NOTICE TO PROPOSERS

RFP#24C12 – Statewide Employee Drug and Alcohol Testing

February 19, 2025

Dear Proposer:

Attached are the responses to the written questions previously submitted and Exceptions to Terms and Conditions and Addendum #2 for RFP #24C12.

Thank you for your interest in this project.

Sincerely,

Georgiann Mock

Georgiann Mock
Contract Management Specialist 1

RFP #24C12
Statewide Employee Drug and Alcohol Testing

Authority Responses to Written Questions
February 19, 2025

On January 10, 2025, the New York State Thruway Authority ("Authority") issued a Request for Proposals (RFP) #24C12 for Statewide Employee Drug and Alcohol Testing. Pursuant to the RFP, all prospective Proposers were given an opportunity to submit written questions concerning this RFP to the Authority by January 27, 2025.

The Authority received the following questions and submits the following responses in accordance with Section 1.4 of the RFP.

1. Who currently holds this contract?

   RESPONSE: Energetix Corporation.

2. Who is the present incumbent?

   RESPONSE: See response to question #1.

3. Can you please release a copy of the current contract, or do I need to file a FOIA request.

   RESPONSE: To view a copy of the current contract, a FOIL (Freedom of Information Law) request can be submitted through the New York State Thruway Authority website.
   Link: https://www.thruway.ny.gov/about/contact/foil.html

4. What is the current positivity rate for specimens submitted.

   RESPONSE: The current estimated positivity rate is 1.3%.

5. For the onsite collection, do you have certified DOT collectors which will observe collections, or do you need a mobile onsite collection performed for drug and alcohol testing?

   RESPONSE: The Contractor will be required to provide certified DOT collectors to meet the requirements of the RFP.

6. Can you provide additional clarification on the scope of services for on-site and off-site drug and alcohol testing as described in Section 2.2?

   RESPONSE: As stated in the RFP, the Contractor will be responsible for on-site and off-site testing in accordance with OTETA and at the required USCG and FMCSA percentages.

7. Are there any limitations or preferences regarding subcontracting arrangements for testing services?

   RESPONSE: Please see RFP Section 6.4 Subcontracting.

8. Are there specific certifications or accreditations required for laboratories or personnel that were not explicitly mentioned in the RFP?

   RESPONSE: Any certification and accreditation requirements are referenced in the RFP.

9. What are the Authority's expectations for managing compliance with changes in OTETA/USCG regulations during the contract period?

   RESPONSE: The Authority expects the Contractor to adhere to and manage any and all OTETA/USCG changes during the term of the Contract.

10. Are there specific formatting requirements for the proposal beyond those mentioned in Section 3.1 (e.g., font size, spacing, or page limits)?

    RESPONSE: No.

11. Will electronic submission suffice for certain sections, or are all materials required to be submitted in hard copy?

    RESPONSE: See Article III – Proposal Requirements, Section 3.2 – Submission of Proposal, The Authority will not accept proposals by telegraph, fax or electronic means. Proposers are required to submit 1 original hard copy original of its proposal and 1 copy on a flash drive in PDF format. RFP Section 3.2 further states "In the event of a discrepancy between the hard copy and any electronic version, the hard copy shall prevail."

12. What weight or importance is placed on each evaluation criterion (e.g., Fee Proposal vs. technical approach)?

    RESPONSE: A Weighting Committee was established for this RFP and was comprised of Authority management level staff. The Committee met to determine the weight for each evaluation criterion. The weights are kept confidential to only the Committee and are not shared as part of the RFP.

13. Are oral presentations or interviews mandatory for all proposers, or will they only be requested for shortlisted candidates?

    RESPONSE: Oral Presentations or interviews are not mandatory but per Section 4.4, the Authority reserves the right to require some or all Proposal to give oral presentations or participate in an interview.

14. Can you provide additional details about the Fee Proposal format and expectations for calculating lump-sum pricing?

    RESPONSE: See Article II – Services Requested, Section 2.3 – Fee Proposal, "The method of calculating costs and pricing for providing drug and alcohol testing is as a lump sum unit price. Lump sum amounts must include all costs associated with providing the service." The Proposer

must provide a lump sum price all-inclusive price for each test listed in RFP Attachment 1 – Cost Calculation Sheet.

15. Should travel and related expenses be itemized separately in the Fee Proposal?

    RESPONSE: No, the Authority will only reimburse for travel expenses when the Contractor is requested to provide Expert Testimony. The Authority will reimburse for travel expenses in accordance with the rates set by the U.S. General Services Administration, please see Article II – Services Requested, Section 2.3 – Fee Proposal.

16. Can you provide examples or further guidance on the expected work plan for transitioning services from the incumbent contractor?

    RESPONSE: The Contractor is expected to advise on their process to transition services to ensure the requirements of the RFP are met.

17. What level of access will the selected proposer have to the Authority's existing database during the transition period?

    RESPONSE: The Authority will provide the required lists of Authority employees subject to drug and alcohol testing. The Contractor will not have direct access to the Authority's database.

18. Are there specific MWBE/SDVOB-certified vendors that the Authority prefers or has worked with in the past?

    RESPONSE: Proposer must identify and solicit to available certified NYS MWBE/SDVOB firms for subcontracting/procurement participation opportunities found on the following directories:

    - NYS MWBE Directory of Certified Firms at: https://ny.newnycontracts.com/
    - Service-Disabled Veteran-Owned Business Directory at: https://sdves.ogs.ny.gov/business-search

    Please see information provided under Article V – Compliance Requirements and Procedures of the RFP.

19. How will compliance with the 30% MWBE and 6% SDVOB goals be monitored throughout the contract period?

    RESPONSE: See Article V – Compliance Requirements and Procedures of the RFP

20. Are there specific security protocols or standards required for the electronic record-keeping system (e.g., encryption standards or server locations)?

    RESPONSE: Requirements for the record-keeping system are outlined in Section 2.2 D of the RFP. Any electronic record keeping system must keep records in accordance with requirements spelled out in OTETA/USCG. Please also see Addendum No. 2, where Attachment E - Cybersecurity Requirements is provided.

21. What format is required for submitting quarterly reports or the MIS Data Collection Forms?

    RESPONSE: The Proposer must provide Reports per Section 2.2 A.11 of the RFP. The Proposer must have a record keeping process in place to ensure testing information is available

for accurate completion of the US Department of Transportation Drug and Alcohol Management Information System (MIS) Data Collection Form (Section 2.2 D.3).

22. Are there any minimum staffing requirements (e.g., specific number of Breath Alcohol Technicians or Medical Review Officers) that the proposer must meet?

    RESPONSE: The Proposer must have sufficient staff to meet the criteria of the RFP, to be in compliance with the requirements of 49 CFR Part 40 (Exhibit 4) and to fulfill the requirements of OTETA/USCG. Please see RFP Section 2.2.A.3.

23. What are the Authority's expectations for handling union inquiries or labor-management concerns related to drug and alcohol testing protocols?

    RESPONSE: The Authority expects the Proposer to provide information to the Authority as requested for use in union inquiries.

24. Are there opportunities to negotiate terms in the final contract, or must the proposer accept all terms outlined in Article VI?

    RESPONSE: Pursuant to RFP Section 1.5 and 1.6, any specific questions need to be raised during the Question and Answer including any additional terms you may want the Authority to consider. There may be opportunities to negotiate minor terms in the final contract.

25. Are there penalties or liquidated damages for failing to meet testing or reporting deadlines?

    RESPONSE: There are no assessed penalties. However, the Authority expects the Proposer to meet the requirements of the RFP, which include testing which meets FMCSA testing percentages.

26. Are there restrictions or requirements regarding the location of off-site collection facilities, particularly in more remote counties?

    RESPONSE: The Proposer must provide sufficient staff to meet the requirements in RFP Section 2.2.A.3.

27. Will there be a pre-award site inspection or visit required for proposed collection and testing sites?

    RESPONSE: No.

28. If we submit a written objection to a specific term, how and when will the Authority respond to the objection?

    RESPONSE: Proposers must submit their exceptions to terms and conditions in accordance with RFP Section 1.6. The Authority responses to such exceptions by the “Issuance of Written Responses” date specified in RFP Section 1.2.

29. Are there any anticipated changes to the timeline or schedule of events listed in Section 1.2?

    RESPONSE: The dates listed in Section 1.2 were revised via Addendum #1 that was issued on January 24, 2025.

30. Please clarify the ask for the record keeping as it relates to MIS.

    RESPONSE: The Proposer must have a record keeping process in place to ensure testing information is available for accurate completion of the US Department of Transportation Drug and Alcohol Management Information System (MIS) Data Collection Form.

31. Section 2.2 – Scope of Services, Letter A Testing Requirements, number 11, Please clarify the ask for the record keeping as it relates to MIS.

    ~~11.~~ 10. Develop a process that will ensure that all drug and alcohol tests will be reported to the appropriate entity (the Authority) and that these results will also be reported to the appropriate drug/alcohol testing pool (FMSCA or USCG) in order to be in compliance with the required Random Testing Rates and for the accurate completion of the US Department of Transportation Drug and Alcohol Testing Management Information System ("MIS") Data Collection Form.

    RESPONSE: The Proposer must have a record keeping process in place to ensure testing information is available for accurate completion of the US Department of Transportation Drug and Alcohol Management Information System (MIS) Data Collection Form.

32. Article VI – Contract Terms and Condition, Section 6.18 – Standard Contract Clauses, Appendices, Exhibits and Supplements, Please clarify which documents listed under Section 6.18 will be part of the final executed agreement between the parties.

    RESPONSE: All Appendices, Exhibits and Supplements will be part of the final agreement.

33. Appendix B does not appear to be applicable within the scope of services "proposer" is providing. Please confirm.

    RESPONSE: Appendix B is a standard attachment on Authority RFP's and Contracts.

34. Article V – Compliance Requirements and Procedures, Section 5.2 – Participation Opportunities For New York State Certified Minority/Women/Service-Disabled Veteran-Owned Business Enterprises. Comment: This is requirement whenever the total bid amount is greater than $1 million, thus not applicable.

    In accordance with Article 15-A of the New York State Executive Law and Article 3 of the Veterans' Services Law, the Thruway Authority is committed to providing meaningful participation in public procurement by certified Minority and Women-Owned Business Enterprises ("MWBEs") and certified Service-Disabled Veteran-Owned Business Enterprises ("SDVOBs"), thereby further integrating such businesses into New York State's economy.

    RESPONSE: Please see RFP Section 5.2 for the MWBE and SDVOB participation goals required for this contract.

EXCEPTIONS TO TERMS AND CONDITIONS:

1. Article II – Background:

> In addition, the collective bargaining agreements covering the employees mentioned above provide prescribed administrative due process procedures which will require best fact-based ~~evidence~~ testimony in disciplinary arbitration hearings by the employees of the Successful Proposer or its subcontractors ~~who either collected, transported, stored, tested and/or analyzed or interpreted the sample~~.

RESPONSE: The requested change will not be made.

2. Section 2.2 – Scope of Services, Letter A, Testing Requirements, number 4

> ~~• Full pre-employment query of the Clearinghouse for current and prospective FMCSA covered employee's drug and alcohol violations.~~
> ~~• Annual limited query, and full query as needed, of the Clearinghouse for each FMCSA covered employee of the Authority.~~

> ~~• Reporting of statutorily/regulatorily mandated drug and alcohol violation information to the Clearinghouse, including drug or alcohol test refusals.~~

RESPONSE: The requested change will not be made.

3. Section 2.2 – Scope of Services, Letter A Testing Requirements, number 10

> ~~10. Develop a procedure for timely communication of positive breath alcohol test results between the Breath Alcohol Technician ("BAT") and the Authority's Program Coordinator in accordance with OTETA/USCG regulations.~~

RESPONSE: The requested change will not be made.

4. Section 2.2 – Scope of Services, Letter A Testing Requirements, number 12

> ~~12. Develop a method and procedures to perform mandated queries and reporting to the Clearinghouse in accordance with the requirements under the OTETA/USCG regulations, including the FMCSA Commercial Driver's License Drug and Alcohol Clearinghouse rules and regulations.~~

RESPONSE: The requested change will not be made.

5. Section 2.2 – Scope of Services, Letter C Administration, number 3

> ~~3. Provide timely notification of all updates/amendments to 33 CFR Part 95, 46 CFR Part 4, 46 CFR Part 5, 46 CFR Part 16, 49 CFR Part 40, and 49 CFR Part 382 and any related laws, rules, and regulations affecting the Authority's drug and alcohol testing programs.~~

RESPONSE: The requested change will not be made.

6. Section 2.2 – Scope of Services, Letter C Administration, number 5

> ~~5.~~4. ~~In accordance with OTETA/USCG requirements, appoint a Substance Abuse Professional ("SAP") to perform the activities as described in OTETA. The SAP must not be affiliated with, have a direct or indirect financial interest in, or receive any type of remuneration from any treatment facility, treatment group or medical specialist to which Authority employees are sent for counseling or treatment by the SAP~~.

RESPONSE: The requested change will not be made.

7. Section 2.2 – Scope of Services, Letter C Administration, number 6

~~6. In conformance with OTETA/USCG requirements, the services of a MRO(s) will be provided. The MRO(s) will be a licensed physician (Doctor of Medicine or Osteopathy) responsible for receiving and reviewing laboratory results generated by the Authority drug testing program who possesses sufficient knowledge of controlled substance abuse disorders and possesses the appropriate medical training to interpret and evaluate an individual's confirmed positive test result, together with the individual's medical history and any other relevant biomedical information.~~

RESPONSE: The requested change will not be made.

8. Section 2.2 – Scope of Services, Letter C Administration, number 7

~~7.~~5. Arrange personal appearances at administrative hearings ~~by individuals who collected, transported, stored, tested and/or analyzed or interpreted the samples for the purpose of providing testimony~~for the purpose of providing fact-based testimony. (As of the date of issuance of this RFP, there has been no need for such individuals to appear at administrative hearings under the current contract.)

RESPONSE: The requested change will not be made.

9. Section 2.2 – Scope of Services, Letter C Administration, number 8

~~8. Arrange appearance of the MRO at administrative hearings for the purpose of providing testimony. The MRO must be available upon 30 days' notice for appearances at Administrative Hearings. (As of the date of the issuance of this RFP, there has been no need for the MRO to appear at administrative hearings under the current contract.)~~

RESPONSE: The requested change will not be made.

10. Section 2.2 – Scope of Services, Letter D Reporting and Record Keeping, number 3 & 4

~~3. Prepare and submit reports that comply with OTETA/USCG requirements, including the Clearinghouse rules and regulations, on a regular schedule and as needed for US Department of Transportation Drug and Alcohol Testing MIS data reporting, on the results of all tests completed during any given period by employee, type of test, location of test, date, laboratory used and results. The proposal must include samples of all reports and forms to be used.~~

~~4. All records, data, information, documentation, and other materials received or prepared by or on behalf of the Successful Proposer in performance of the Agreement, including paper and electronic records/data, will become the property of the Authority. These records will be delivered to the Authority or its designee and purged from the Successful Proposer's system at the direction of the Authority or upon termination or expiration of the Agreement, and the Proposer shall certify the successful completion thereof.~~

RESPONSE: The requested change will not be made.

11. Section 2.3 – Fee Proposal

For ~~expert~~ fact-based witness testimony, the Authority will be responsible for paying an hourly rate for the time the witness is traveling and for the time the witness is providing testimony. The Authority will not reimburse for time during the evening and any other non-productive time. The Authority will reimburse receipted travel expenses incurred while the witness is in travel status, as detailed below.

RESPONSE: The requested change will not be made.

12. Article V – Compliance Requirements and Procedures, Section 5.1 – Compliance Requirements and Procedures, General Provisions, letter b

~~b. These provisions and r~~ Saved to this PC ~~hall be included in all subcontracting contracts so that these requirements and provisions shall be binding upon all subcontractors, performing work under this contract.~~

RESPONSE: The requested change will not be made.

13. Article V – Compliance Requirements and Procedures, Section 5.3 – Equal Employment Opportunity And Removal Of Institutional Policies or Practices That Fail To Address The Harassment And Discrimination Of Individuals, letter b, Availability of Contractor's Records

Subject to Contractor's policies and as mutually agreed upon between the parties, Contractor may ~~will~~ furnish all information and reports as may be reasonably required by the Authority ~~or by rules, regulations and orders incorporated herein by the Authority and will~~ and permit access to its books, records and accounts by the Authority's Compliance Unit for purposes of monitoring and investigating compliance with these requirements of this section 5.3~~and such rules, regulations, orders, procedures and guidelines~~.

RESPONSE: The requested change will not be made.

14. Article V – Compliance Requirements and Procedures, Section 5.3 – Equal Employment Opportunity And Removal Of Institutional Policies or Practices That Fail To Address The Harassment And Discrimination Of Individuals, letter e, Applicability To Subcontract

~~e. Applicability To Subcontract~~

~~As per Section 312 of Executive Law 15 A Contractor will physically include and incorporate this document, Equal Employment Opportunity Requirements, as part of every subcontract or purchase order unless exempted by rules, regulations, or orders of the Director, pursuant to the Executive Order 8, and such requirements shall be binding upon each subcontractor, service provider, or vendor. Contractor will take such action with respect to any subcontract or purchase order as the Authority may direct as a means of enforcing such provisions, including sanctions for noncompliance; provided, however, that in the event Contractor becomes involved in or is threatened with litigation with a subcontractor or vendor as a result of any provision or direction issued pursuant to these requirements or by the Authority, Contractor may request the Authority/State of New York to enter into such litigation or dispute to protect the interests of the State of New York.~~

RESPONSE: The requested change will not be made.

15. Article VI – Contract Terms and Condition, Section 6.4 – Subcontracting

~~Contractor agrees not to subcontract any of its services without the prior written approval of the Authority. Any request for subcontracting should be clearly indicated in the Contractor's proposal/bid. Contractor may arrange for a portion/s of its responsibilities under this Agreement to be subcontracted to qualified, responsible subcontractors, subject to approval of the Authority. If Contractor determines to subcontract a portion of the services, the subcontractors must be clearly identified and the nature and extent of its involvement in and/or proposed performance under the Agreement must be fully explained by Contractor to the Authority. As part of this explanation, the subcontractor must submit to the Authority a completed Vendor Assurance of No Conflict of Interest or Detrimental Effect form, as required to be completed by Contractor prior to execution of this Agreement.~~

Contractor retains ultimate responsibility for all services performed under the Agreement.

~~All subcontracts shall be in writing and shall contain provisions, which are functionally identical to, and consistent with, the provisions of this Agreement including, but not limited to, the body of this Agreement, Appendix A – Standard Clauses for New York State Thruway Authority Contracts and the RFP. Unless waived in writing by the Authority, all subcontracts between Contractor and subcontractors shall expressly name the Authority, as the sole intended third party beneficiary of such subcontract. The Authority reserves the right to review and approve or reject any subcontract, as well as any amendment to said subcontract(s), and this right shall not make the Authority a party to any subcontract or create any right, claim, or interest in the subcontractor or proposed subcontractor against the Authority.~~

~~The Authority reserves the right, at any time during the term of the Agreement, to verify that the written subcontract between Contractor and subcontractors is in compliance with all of the provisions of this Section and any subcontract provisions contained in this Agreement.~~

~~Contractor shall give the Authority immediate notice in writing of the initiation of any legal action or suit which relates in any way to a subcontract with a subcontractor or which may affect the performance of Contractor's duties under the Agreement. Any subcontract shall not relieve Contractor in any way of any responsibility, duty and/or obligation of the Agreement.~~

~~If at any time during performance under this Agreement total compensation to a subcontractor exceeds or is expected to exceed $100,000, that subcontractor shall be required to submit and certify a Vendor Responsibility Questionnaire.~~

RESPONSE: The requested change will not be made.

16. Article VI – Contract Terms and Condition, Section 6.5 – Insurance Conditions, letter E Notice of Cancellation, Nonrenewal or Material Alteration

E. Notice of Cancellation, Nonrenewal or Material Alteration. ~~All policies, by specific Endorsement,~~ Contractor shall provide ~~for~~ written notice to the Authority no less than thirty (30) days prior to the cancellation, nonrenewal, or material alteration of any insurance policies referred to therein. Any such notice shall be sent by e-mail to: Insurancecompliance@thruway.ny.gov, attention Insurance Compliance Supervisor. Only in the event that such written notice cannot be delivered via e-mail,

RESPONSE: This is acceptable, please see Addendum No. 2.

17. Article VI – Contract Terms and Condition, Section 6.5 – Insurance Conditions, letter H Copies of Insurance Documents

H. Copies of Insurance Documents. ~~Contractor shall provide certified copies of all declarations, pages, or of the insurance policies themselves upon request by the Authority, and within twenty (20) days of such request.~~ Contractor shall provide a certificate of insurance for evidence of coverage and applicable endorsements.

RESPONSE: The requested change will not be made.

18. Article VI – Contract Terms and Condition, Section 6.6 – Required Insurance Coverages

▪ ~~Fire~~ Damage to Rented Premises~~Legal Liability:~~	$ ~~100,000~~ 50,000
▪ Medical Expense:	$ ~~5,000~~ 0

CGL Insurance shall cover liability arising from premises, operations, independent contractors, products/completed operations, personal injury, advertising injury, and contractual liability. The Authority and the State of New York shall be listed as primary and non-contributory additional insureds by blanket endorsement on the CGL, and as applicable, on the Business Automobile, and pollution liability policies required under Section 6.6(A), Section 6.6(B), and Section 6.6(D).

RESPONSE: The requested change will not be made.

19. Article VI – Contract Terms and Condition, Section 6.8 – Ethics

Contractor ~~and subcontractors~~ may hire former State agency or Authority employees. However, as a general rule and in accordance with New York Public Officers Law, former employees of the Authority may neither appear nor practice before the Authority, nor receive compensation for services rendered on a matter before the Authority, for a period of two years following their separation from Authority service. In addition, former Authority employees are subject to a "lifetime bar" from appearing before the Authority or receiving compensation for services regarding any transaction in which they personally participated, or which was under their active consideration during their tenure with the Authority.

During the term of the Agreement, Contractor ~~and its subcontractors~~ shall not engage any person who is, or has been at any time, in the employ of the Authority or New York State to perform services under the Agreement in violation of: the provisions of the Public Officers Law ("POL"); the rules, regulations, opinions, guidelines, or policies promulgated or issued by the New York State Commission on Ethics and Lobbying in Government or its predecessors ("COELIG Regulations"); and any other laws applicable to the service of current or former Authority or New York State employees ("Other Laws," and, together with POL and COELIG Regulations, collectively, the "Ethics Provisions"). Contractor certifies that all of its employees ~~and employees of any subcontractor~~ who are former employees of the Authority or New York State and who are assigned to perform services under the Agreement shall be assigned in accordance with all Ethics Provisions. Further, during the term of the Agreement, no person who is employed by Contractor ~~or is subcontractors~~ and who is disqualified from providing services under the Agreement pursuant to any Ethics Provisions may share in any net revenues Contractor ~~or its subcontractors~~ derives from the Agreement.

Contractor shall identify and provide the Authority with notice of those employees of Contractor ~~or its subcontractors~~ who are former employees of the Authority or New York State and who will be assigned to perform services under the Agreement and shall ensure that such employees comply with all applicable laws and prohibitions. The Authority may, request that Contractor provide it with whatever information the Authority deems appropriate about each such person's engagement, work cooperatively with the Authority to solicit advice from the New York State Commission on Ethics and Lobbying in Government, and, if deemed appropriate by the Authority, instruct any such person to seek the opinion of the Commission on Ethics and Lobbying in Government. ~~The Authority shall have the right to withdraw or withhold approval of any subcontractor if utilizing such Subcontractor for any work performed hereunder would be in conflict with any of the Ethics Requirements.~~ The Authority shall have the right to cancel or terminate the Agreement at any time if any work performed under the Agreement is in conflict with any Ethics Provisions.

RESPONSE: The requested change will not be made.

20. Article VI – Contract Terms and Condition, Section 6.9 – Confidentiality and Non-Disclosure, letter D

Contractor shall take all reasonable steps to prevent unauthorized access to, use of, or disclosure of Confidential Information, including without limitation, by protecting its passwords and other log-in information. Contractor shall notify the Authority immediately of any known ~~or~~

~~suspected~~ misuse or misappropriation of Confidential Information and shall use its best efforts to stop said misuse or misappropriation.

RESPONSE: The requested change will not be made.

21. Article VI – Contract Terms and Condition, Section 6. 9 – Confidentiality and Non-Disclosure, letter E

E. Upon written request of the Authority, or upon expiration or termination of the Agreement, Contractor shall, except for copies created pursuant to automatic IT back-up and disaster recovery procedures and retention required due to applicable legal and regulatory requirements, return all Confidential Information to the Authority or upon Authority's written request provide certificatey ~~in writing~~ of destruction that ~~it~~ media containing the Confidential Information has been destroyed ~~and no copies exist~~.

RESPONSE: The requested change will not be made.

22. Article VI – Contract Terms and Condition, Section 6.13 – Conflicts of Interest, letter C

~~C. In conjunction with any subcontract under this Agreement, Contractor shall obtain and deliver to the Authority, prior to entering into a subcontract, a Vendor Assurance of No Conflict of Interest or Detrimental Effect form, signed by an authorized executive or legal representative of the subcontractor. Contractor shall also require in any subcontracting agreement that the subcontractor, in conjunction with any further subcontracting agreement, obtain and deliver to the Authority a signed and completed Vendor Assurance of No Conflict of Interest or Detrimental Effect form for each of its subcontractors prior to entering into a subcontract.~~

RESPONSE: The requested change will not be made.

23. Appendix D, Network Connections Requirements

1) Encrypted Tunnel – The preferred connectivity method is via the Internet to a~~n Authority~~ Virtual Private Network (VPN) device. The Authority may loan Outside Entity the required client software for establishing VPN connections with the Authority. The Authority's perimeter security measures will control access to the internal network.
2) NYeNet/MAN Connection – This can include a VPN.
3) Leased Circuit.
4) Fiber.

C. *Authentication of Network Connection*

Outside Entity must authenticate its Network Connection using ~~Authority~~ authentication systems. All Outside Entity remote access user accounts will have an expiration time consistent with the business justification for the access, which can be renewed at the discretion of the Authority. If the contract term is longer than one year, then Outside Entity must generate a report at least once per year showing which Outside Entity employees have access to the Network Connection and send such report to the Authority for verification and review. Further, any time there is a change in those Outside Entity employees who have access to the Network Connection, Outside Entity shall send the Authority an updated list of those Outside Entity employees who have such access.

G. *Security Incident Notification and Resolution*

Outside Entity is responsible for notifying the Authority upon ~~discovery~~ determination of any security incident that ~~may threaten or~~ compromised the confidentiality, integrity or availability of Authority information or network infrastructure. Outside Entity shall, ~~at a minimum~~to the extent possible, report the following to the Authority: 1) successful ~~or unusually persistent~~ attempts to gain unauthorized information or system access; 2) presence of malicious code that has a widespread impact throughout Outside Entity's network infrastructure; and 3) a known ~~or suspected~~ denial of service attack~~; and 4) scans and probes that precede or are related to a security incident listed above~~.

Once it has resolved the security incident, Outside Entity must also report the following to the Authority: 1) Summary of the incident, IOC ~~attack source details (i.e., IP address, method, vulnerability exploited, etc.); 2) the specific effects (i.e., loss, damage, destruction, modification, disclosure) on systems, accounts or information assets resulting from the threat or compromise;~~ and 3) actions taken to remediate the security incident.

G. *Security Incident Notification and Resolution*

Outside Entity is responsible for notifying the Authority upon ~~discovery~~ determination of any security incident that ~~may threaten or~~ compromised the confidentiality, integrity or availability of Authority information or network infrastructure. Outside Entity shall, ~~at a minimum~~to the extent possible, report the following to the Authority: 1) successful ~~or unusually persistent~~ attempts to gain unauthorized information or system access; 2) presence of malicious code that has a widespread impact throughout Outside Entity's network infrastructure; and 3) a known ~~or suspected~~ denial of service attack~~; and 4) scans and probes that precede or are related to a security incident listed above~~.

Once it has resolved the security incident, Outside Entity must also report the following to the Authority: 1) Summary of the incident, IOC ~~attack source details (i.e., IP address, method, vulnerability exploited, etc.); 2) the specific effects (i.e., loss, damage, destruction, modification, disclosure) on systems, accounts or information assets resulting from the threat or compromise;~~ and 3) actions taken to remediate the security incident.

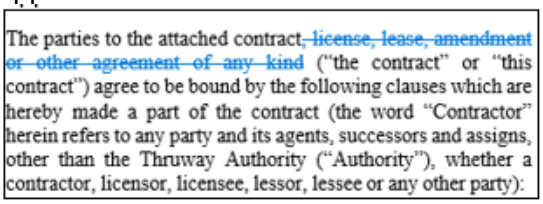
H. *Audit and Review of Outside Entity Network Connections*

The Authority shall have the right at all times to monitor relevant~~all~~ aspects of Network Connections. The Authority will employ automated tools to accomplish monitoring tasks where practicable. The Authority will generate an annual report on its authentication database showing the specific Outside Entity login entries and distribute such reports to appropriate Authority personnel for review. The Authority will periodically audit Network Connections and distribute such audits to appropriate Authority personnel for review.

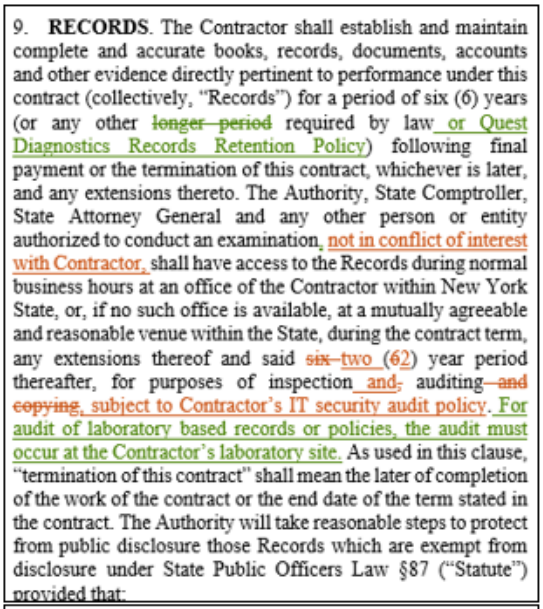
The Authority will review all Network Connections on an annual basis and update or terminate such connections when appropriate.

RESPONSE: The requested change will not be made.

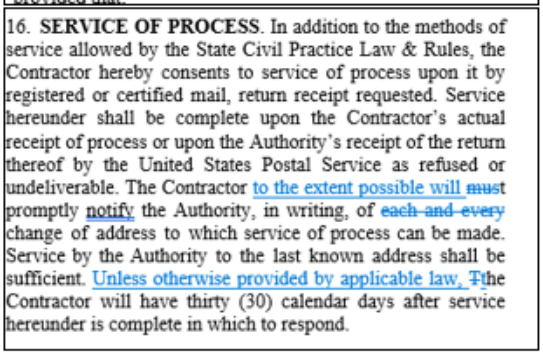
24. Appendix A



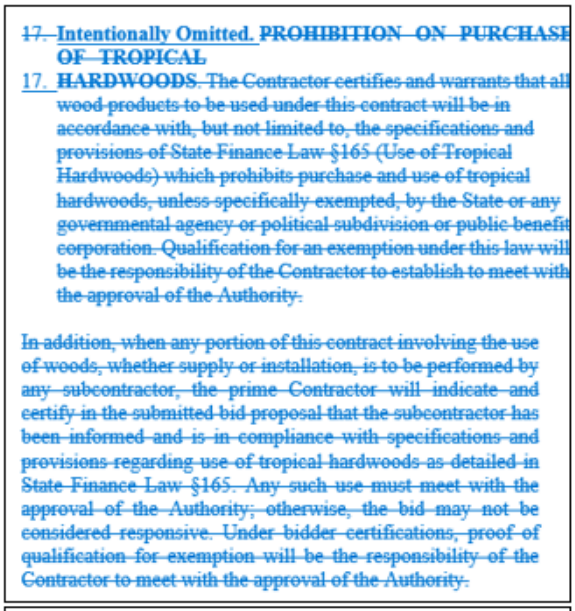
The parties to the attached contract~~, license, lease, amendment or other agreement of any kind~~ ("the contract" or "this contract") agree to be bound by the following clauses which are hereby made a part of the contract (the word "Contractor" herein refers to any party and its agents, successors and assigns, other than the Thruway Authority ("Authority"), whether a contractor, licensor, licensee, lessor, lessee or any other party):



9. **RECORDS**. The Contractor shall establish and maintain complete and accurate books, records, documents, accounts and other evidence directly pertinent to performance under this contract (collectively, "Records") for a period of six (6) years (or any other ~~longer period~~ required by law or Quest Diagnostics Records Retention Policy) following final payment or the termination of this contract, whichever is later, and any extensions thereto. The Authority, State Comptroller, State Attorney General and any other person or entity authorized to conduct an examination, not in conflict of interest with Contractor, shall have access to the Records during normal business hours at an office of the Contractor within New York State, or, if no such office is available, at a mutually agreeable and reasonable venue within the State, during the contract term, any extensions thereof and said ~~six~~ two (62) year period thereafter, for purposes of inspection and~~,~~ auditing~~ and copying~~, subject to Contractor's IT security audit policy. For audit of laboratory based records or policies, the audit must occur at the Contractor's laboratory site. As used in this clause, "termination of this contract" shall mean the later of completion of the work of the contract or the end date of the term stated in the contract. The Authority will take reasonable steps to protect from public disclosure those Records which are exempt from disclosure under State Public Officers Law §87 ("Statute") provided that:



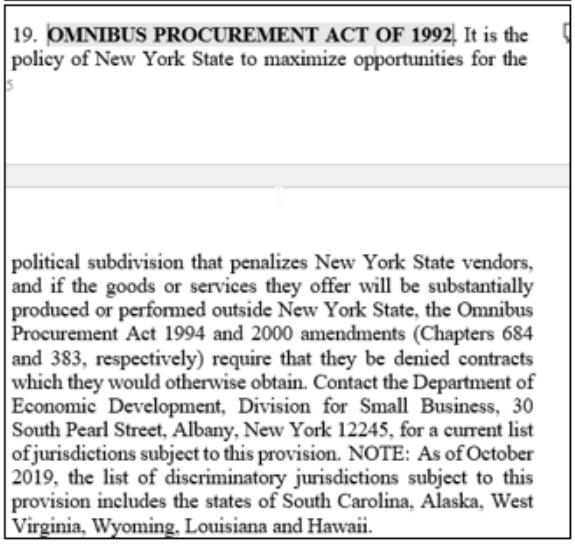
16. **SERVICE OF PROCESS**. In addition to the methods of service allowed by the State Civil Practice Law & Rules, the Contractor hereby consents to service of process upon it by registered or certified mail, return receipt requested. Service hereunder shall be complete upon the Contractor's actual receipt of process or upon the Authority's receipt of the return thereof by the United States Postal Service as refused or undeliverable. The Contractor to the extent possible will ~~must~~ promptly notify the Authority, in writing, of ~~each and every~~ change of address to which service of process can be made. Service by the Authority to the last known address shall be sufficient. Unless otherwise provided by applicable law, ~~T~~the Contractor will have thirty (30) calendar days after service hereunder is complete in which to respond.



~~17. Intentionally Omitted. PROHIBITION ON PURCHASE OF TROPICAL~~

17. **HARDWOODS**. ~~The Contractor certifies and warrants that all wood products to be used under this contract will be in accordance with, but not limited to, the specifications and provisions of State Finance Law §165 (Use of Tropical Hardwoods) which prohibits purchase and use of tropical hardwoods, unless specifically exempted, by the State or any governmental agency or political subdivision or public benefit corporation. Qualification for an exemption under this law will be the responsibility of the Contractor to establish to meet with the approval of the Authority.~~

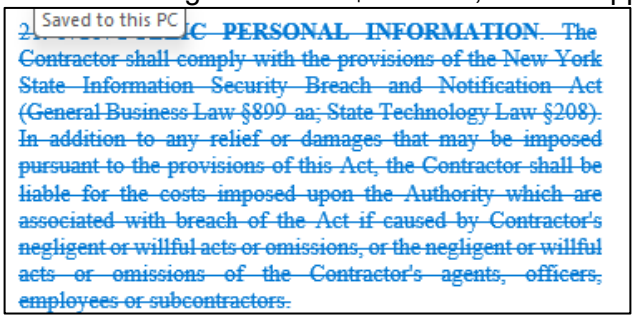
~~In addition, when any portion of this contract involving the use of woods, whether supply or installation, is to be performed by any subcontractor, the prime Contractor will indicate and certify in the submitted bid proposal that the subcontractor has been informed and is in compliance with specifications and provisions regarding use of tropical hardwoods as detailed in State Finance Law §165. Any such use must meet with the approval of the Authority; otherwise, the bid may not be considered responsive. Under bidder certifications, proof of qualification for exemption will be the responsibility of the Contractor to meet with the approval of the Authority.~~



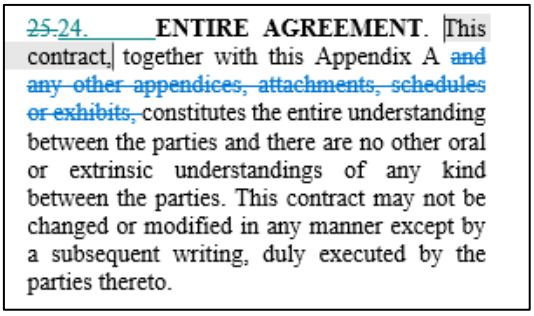
19. **OMNIBUS PROCUREMENT ACT OF 1992**. It is the policy of New York State to maximize opportunities for the

political subdivision that penalizes New York State vendors, and if the goods or services they offer will be substantially produced or performed outside New York State, the Omnibus Procurement Act 1994 and 2000 amendments (Chapters 684 and 383, respectively) require that they be denied contracts which they would otherwise obtain. Contact the Department of Economic Development, Division for Small Business, 30 South Pearl Street, Albany, New York 12245, for a current list of jurisdictions subject to this provision. NOTE: As of October 2019, the list of discriminatory jurisdictions subject to this provision includes the states of South Carolina, Alaska, West Virginia, Wyoming, Louisiana and Hawaii.

Omnibus Procurement Act of 1992 – comment from proposer: This is required whenever the total bid amount is greater than $1 million, this not applicable.



~~21. PUBLIC PERSONAL INFORMATION. The Contractor shall comply with the provisions of the New York State Information Security Breach and Notification Act (General Business Law §899-aa; State Technology Law §208). In addition to any relief or damages that may be imposed pursuant to the provisions of this Act, the Contractor shall be liable for the costs imposed upon the Authority which are associated with breach of the Act if caused by Contractor's negligent or willful acts or omissions, or the negligent or willful acts or omissions of the Contractor's agents, officers, employees or subcontractors.~~



~~25.~~24. **ENTIRE AGREEMENT**. This contract, together with this Appendix A ~~and any other appendices, attachments, schedules or exhibits,~~ constitutes the entire understanding between the parties and there are no other oral or extrinsic understandings of any kind between the parties. This contract may not be changed or modified in any manner except by a subsequent writing, duly executed by the parties thereto.

Please clarify what document is "This Contract"?

RESPONSE: The requested changes to Appendix A will not be made. "This Contract" refers to the contract that will result from this RFP. Please see ARTICLE VI – Contract Terms and Conditions.

RFP #24C12
Statewide Employee Drug and Alcohol Testing

February 19, 2025

ADDENDUM NO. 2

Notice is hereby given that the following Addendum No. 2 shall be made part of RFP #24C12 issued by the Authority on January 10, 2025 (the "RFP").

Each Proposer shall acknowledge receipt of this Addendum No. 2 in the cover letter submitted as part of their Proposal.

Addendum No. 2 consists of the following additions and changes to the RFP.

Change No. 1 – RFP "Section 6.3 – Personnel, Equipment and Supplies" is hereby revised to read as follows. Material to be deleted is in ~~strikethrough~~, material to be added is underscored.

Section 6.3 – Personnel, Equipment and Supplies

Contractor shall provide all resources, personnel, equipment and supplies necessary to perform services pursuant to the Agreement. If in order to provide such services Contractor must make an external connection to the Authority's data communications infrastructure and/or access Authority information systems, Contractor shall in all respects comply with all Authority and/or New York State policies, procedures, and requirements regarding such connections and information systems access, including, but not limited to, Appendix D – Network Connection Requirements and Appendix E – Cybersecurity Requirements, attached hereto, and undertake whatever actions are necessary in the discretion of the Authority to ensure such compliance. New York State Policies are available via the following link: http://its.ny.gov/policies. Contractor shall be responsible for all costs associated with ensuring that its own network security measures comply with all Authority policies, procedures, and requirements regarding external connections.

Change No. 2 – RFP "Section 6.5 – Insurance Conditions, Letter E - Notice of Cancellation, Nonrenewal or Material Alteration" is hereby revised to read as follows. Material to be deleted is in ~~strikethrough~~, material to be added is underscored.

Section 6.5 - Insurance Conditions

E. Notice of Cancellation, Nonrenewal or Material Alteration. ~~All policies, by specific Endorsement~~, Contractor shall provide ~~for~~ written notice to the Authority no less than thirty (30) days prior to the cancellation, nonrenewal, or material alteration of any insurance policies referred to therein. Any such notice shall be sent by e-mail to: Insurancecompliance@thruway.ny.gov, attention Insurance Compliance Supervisor. Only in the event that such written notice cannot be delivered via e-mail, notice shall be sent to: Insurance Compliance Section, Office of Investments and

Asset Management, New York State Thruway Authority, P.O. Box 189, Albany, New York 12201-0189.

Change No. 3 – RFP "Section 6.18 – Standard Contract Clauses, Appendices, Exhibits and Supplements" is hereby revised to read as follows. Material to be added is underscored.

Section 6.18 - Standard Contract Clauses, Appendices, Exhibits and Supplements

The Appendices listed below and attached hereto will be incorporated into and made a part of the Agreement**.** Contractor must complete and submit Exhibit 2 Authority Supplemental Insurance Certificate to the Authority prior to commencement of work under the Agreement. Proposer must complete and submit Supplements 1, 2, 3, 4, and 5 and Attachment 1 with its proposal.

Appendix A Standard Clauses

Appendix B Inventions Policy

Appendix D Network Connection Requirements (TAP-372)

Appendix E Cybersecurity Requirements

Exhibit 1 Thruway Authority Guidelines Regarding Permissible Contacts During a Procurement and the Prohibition of Inappropriate Lobbying Influence

Exhibit 2 Authority Supplemental Insurance Certificate (TA-W51343)

Exhibit 3 49 CFR Part 382 – Controlled Substances and Alcohol Use and Testing

Exhibit 4 49 CFR Part 40 – Procedures for Transportation Workplace Drug and Alcohol Testing Programs

Exhibit 5 Title V – Omnibus Transportation Employee Testing Act

Exhibit 6 Authority's Alcohol and Drug Abuse in the Workplace policy

Exhibit 7 33 CFR Part 95 – Operating a Vessel While Under the Influence of Alcohol or a Dangerous Drug

Exhibit 8 46 CFR Part 4 – Marine Casualties and Investigations

Exhibit 9 46 CFR Part 5 – Marine Investigation Regulations – Personnel Action

Exhibit 10 46 CFR Part 16 – Chemical Testing

Exhibit 11 List of Abbreviations used in the RFP

Exhibit 12 Listing of Authority Worksites

Exhibit 13 Federal Register / Vol. 81, No. 233, Commercial Driver's License Drug and Alcohol Clearinghouse

Exhibit 14 New York State Certified Minority/Women/Service-Disabled Veteran-Owned Business Enterprises Goal Requirements And Procedures For

Participation

Supplement 1 New York State Finance Law §§ 139-j and 139-k Disclosure of Prior Non-Responsibility Determinations

Supplement 2 Certificate of Compliance with the Authority Guidelines Regarding Permissible Contacts During a Procurement and the Prohibition of Inappropriate Lobbying Influence

Supplement 3 Vendor Assurance of No Conflict of Interest or Detrimental Effect

Supplement 4 Conducting Business in Russia Certification

Supplement 5 ST-220-CA New York State Department of Taxation and Finance Contractor Certification

Attachment 1 Cost Calculation Sheet

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APPENDIX E

Cybersecurity Requirements

Appendix E
Cybersecurity Requirements

The Vendor, systems, network, and interfaces shall comply with all Thruway Authority and New York State policies and standards for the applicable security and privacy controls, located at http://www.its.ny.gov/eiso/policies/security.

The Vendor shall comply with all applicable US cybersecurity government regulations, Federal and NYS laws, and best practices. In the event, the system is determined to be out of compliance with applicable security controls, the Vendor shall correct such deficiencies pursuant to a remediation plan approved by the Thruway Authority.

Non-Disclosure and Data Protection:
The Vendor shall not disclose any confidential information obtained by vendor, its agents, subcontractors, officers, distributors, resellers or employees in the course of performing its obligations, including without limitation, security procedures, business operations information, or commercial proprietary information in the possession of the Thruway Authority hereunder or received from another third party, shall not be divulged to any third parties without the prior written consent of the Thruway Authority. The Vendor shall take commercially reasonable steps to inform its agents, Subcontractors, officers, distributors, resellers, or employees of the obligations arising under this clause to ensure such confidentiality.

Notification of Data Breach:
The Vendor shall notify the Project Manager or Thruway Authority's authorized representative and email to CyberSecurityAlert@thruway.ny.gov as well, upon discovery of any security incident that may threaten or compromise the confidentiality, integrity, or availability of information or network infrastructure within 24 hours.

The Vendor shall Comply with applicable laws and cooperate with the Thruway Authority's investigation, including providing relevant records and supporting law enforcement efforts. The Vendor must submit a corrective action plan within 10 days, detailing the cause, measures to address vulnerabilities, and a timeline for resolution. After the incident response, the Vendor shall provide a written final incident analysis report, including details such as the incident's root cause, timeline, scope, impact, corrective actions taken, etc.

Destruction of Data:
All Thruway Authority Data (whether in physical or electronic form, or cloud hosted data), including copies, reproductions, and derived materials must be either returned to the Thruway Authority or irreversibly destroyed by the Vendor and its personnel upon the Thruway Authority's request or when no longer subject to the Vendor's internal retention policies, whichever occurs first. Data destruction can include the following methods as applicable:

- Shredding physical documents.
- Wiping device memory on all equipment, databases, servers, cloud storage, and electronic media.
- Sanitizing storage media, temporary files, and backup files containing Thruway Authority Data.

Upon request, the Vendor must provide certification within 14 days confirming the destruction of all Thruway Authority Data, including backups.

Compliance with Applicable Laws, Security Policies, and Procedures

The Vendor must implement and maintain security measures to prevent unauthorized access to or disclosure of Thruway Authority Data. The Vendor shall comply with Thruway Authority and New York State security policies, standards, and applicable laws and maintain security measures aligning with Exhibit 1 requirements.

The Vendor must Cooperate with annual or incident-triggered cybersecurity reviews. Such reviews will be coordinated by the Thruway Authority's Project Manager, Information Security, Information Technology, or other individual(s) or department as designated by the Thruway Authority.

Data Restrictions – No transmission of Authority data outside of the United States

The Vendor shall not access, transmit, transfer, or store Thruway Authority data, personal information, or any provided information labeled as "confidential" or "sensitive" outside the United States without prior written approval from the Thruway Authority, which may be withheld at its discretion.

Data storage in countries on the OFAC Sanctions List Sanctions Programs and Country Information | Office of Foreign Assets Control or others identified by the Thruway Authority is prohibited.

Cybersecurity Training:

The Vendor must ensure personnel with access to the Thruway Authority system and data complete cybersecurity awareness training upon hire and recertify annually thereafter. The Vendor shall maintain training records and provide confirmation upon request. The Thruway Authority is not responsible for any costs associated with such training.

Software, Hardware, Firmware, and other Technology Components:

For IT products (software, hardware, or firmware) provided under the contract, the Vendor must ensure compliance with secure development lifecycle practices, provide timely updates to address vulnerabilities, disclose known backdoors, and follow Original Equipment Manufacturer (OEM) recommended security controls.

Unless otherwise agreed in writing by the Thruway Authority, the Vendor's software application must function as outlined in the agreed-upon Statement of Work (SoW) and operate within an environment such as operating systems and database platforms that are actively supported and not run on end-of-life (EOL) system components. If the scope of work expands or includes software, hardware, or firmware, the Thruway Authority reserves the right to impose additional cybersecurity requirements to address it.

Conflict:

In the event of a conflict between Cybersecurity requirements, Exhibit 1 requirements, or other contract terms and conditions, the most stringent provisions shall apply.

Exhibit 1

The Vendor shall comply to the following minimum safeguarding requirements and procedures to ensure the confidentiality, integrity, and availability of the Information Systems and the data they process in the development and deployment of the system:

- Limit information system and underlying systems access to authorized users, processes, and devices only. Implement role-based access control (RBAC) to ensure that users can only access data and features necessary for their roles.
- Ensure all implementation services thoroughly address the security hardening of the systems and applications. This hardening must include but is not limited to, turning off unnecessary features based on the Statement of Work (SoW) and implementing a 'least privilege' access model for all users and service accounts.
- Enforce multi-factor authentication for internet-facing and remote access to internal systems and require strong passwords for internal access.
- Ensure encryption methods for data-in-motion and data-at-rest comply with the New York State Office of Information Technology Services Encryption Standard (NYS-S14-007).
- Verify and authenticate all users, processes, and devices accessing the organizational information systems. Limit physical access to information systems, equipment, and operating environments only to authorized personnel.
- Follow a Secure Software Development Lifecycle (SDLC). Ensure third-party libraries, components, and APIs are kept up to date and maintained at their latest stable versions within the released application.
- Protect against malicious code and maintain integrity of data within all information systems. Validate all data inputs to prevent malicious data injection or corruption.
- Identify, and report vulnerabilities or flaws through scans, and third-party penetration testing. Ensure vulnerabilities are remediated promptly.
- Monitor and promptly address any unauthorized access or suspicious activity. Maintain logs of access and system activities to support audits and investigations as required.

NOTICE TO PROPOSERS

RFP#24C12 – Statewide Employee Drug and Alcohol Testing

January 24, 2025

Dear Proposer:

Attached is Addendum #1 for RFP 24C12 – Statewide Employee Drug and Alcohol testing.

Thank you for your interest in this project.

Sincerely,

Georgiann Mock

Georgiann Mock
Contract Management Specialist 1

RFP #24C12
Statewide Employee Drug and Alcohol Testing

January 24, 2025

ADDENDUM NO. 1

Notice is hereby given that the following Addendum No. 1 shall be made part of RFP #24C12 issued by the Authority on January 10, 2025 (the "RFP").

Each Proposer shall acknowledge receipt of this Addendum No. 1 in the cover letter submitted as part of their Proposal.

Addendum No. 1 consists of the following additions and changes to the RFP**.** Material to be deleted is in ~~strikethrough~~, material to be added is underscored.

Change No. 1 – RFP "Section 1.2 – Key Dates" is hereby revised to read as follows.

Section 1.2 - Key Dates

Provided below is a tentative schedule for the milestones in this RFP process, listed in the order of occurrence. The Authority reserves the right to change any or all of these dates as it deems necessary or convenient in its discretion; in the event of such a date change, all parties that have been furnished with this RFP will be duly notified.

Event	**Date**
RFP Issuance	January 10, 2025
Deadline for submitting Written Questions and Exceptions to Terms and Conditions	~~January 27, 2025~~ February 3, 2025
Issuance of Written Responses	~~February 10, 2025~~ February 19, 2025
Proposal Due Date & Time	~~February 26, 2025~~, March 5, 2025, at 1:00p.m.

****

REQUEST FOR PROPOSAL

January 10, 2025

24C12 – Statewide Employee Drug & Alcohol Testing	**Inquiries To:** Georgiann Mock (518) 436-2773 **E-mail:** georgiann.mock@thruway.ny.gov **Fax:** (518) 471-4442
Time and Due Date of Proposal Submission: 1:00 P.M., February 26, 2025	**Time and Date of Pre-proposal Meeting:** N/A
Contract Period: The term shall commence on July 1, 2025, and shall terminate on June 30, 2030.	

INSTRUCTIONS

Attach this form to the front of your proposal.

Indicate whether or not your firm is registered with the NYS Department of Economic Development as a certified Minority and/or Women-Owned Business Enterprise (M/WBE) or with the NYS Office of General Services as a certified Service-Disabled Veteran-owned Business (SDVOB) by circling yes or no.
Circle one: Yes No

Indicate whether or not your firm is proposing a joint venture by circling yes or no.
Circle one: Yes No

Complete all information below, including signature, to acknowledge your understanding and acceptance of the provisions of the Non-Collusive Bidding Certification as indicated at the bottom of this document.

The Signatory to this document must be authorized to bind the proposing firm contractually.

Firm Name _____ Federal Tax ID No. _____

Street Address _____ City/State/Zip _____

Area Code/Telephone (800 if available) _____ Fax _____ E-mail _____

Print Name _____ Title _____

Signature _____ Date _____

NON-COLLUSIVE BIDDING CERTIFICATION

By submission of this bid, each bidder and each person signing on behalf of any bidder certifies, and in the case of joint bid, each party thereto certifies as to its own organization, under penalty of perjury, that to the best of his/her knowledge and belief:

1) The prices of this bid have been arrived at independently, without collusion, consultation, communication, or agreement, for the purposes of restricting competition, as to any matter relating to such prices with any other Bidder or with any competitor; and
2) Unless otherwise required by law, the prices which have been quoted in this bid have not been knowingly disclosed by the Bidder and will not knowingly be disclosed by the Bidder prior to opening, directly or indirectly, to any other Bidder or to any competitor; and
3) No attempt has been made or will be made by the Bidder to induce any other person, partnership or corporation to submit or not to submit a bid for the purpose of restricting competition.

NEW YORK STATE | Thruway Authority

Request for Proposal

STATEWIDE EMPLOYEE DRUG & ALCOHOL TESTING

RFP No: 24C12
Request Issued: January 10, 2025
Proposals Due: February 26, 2025

RFP TABLE OF CONTENTS

ARTICLE I - Background/Administrative Matters

Section 1.1 - Background

The New York State Thruway Authority is seeking proposals from experienced and qualified consulting and/or contracting firms to provide drug and alcohol testing services for employees of the New York State Thruway Authority.

The Thruway Authority is a public corporation organized and existing pursuant to Article 2, Title 9 of the New York State Public Authorities Law for the purpose of financing, constructing, reconstructing, improving, developing, maintaining and operating a highway system known as the Governor Thomas E. Dewey Thruway. The powers of the Thruway Authority are vested in and exercised by a seven-member Board appointed by the Governor with the advice and consent of the State Senate.

The Thruway is a 570-mile superhighway system crossing the State. It is the longest toll superhighway system in the United States. The Thruway route from the New York City line to the Pennsylvania line at Ripley is 496 miles long and includes the 426-mile mainline connecting New York City and Buffalo, the State's two largest cities. Other Thruway sections make direct connections with the Connecticut and Massachusetts Turnpikes, New Jersey Garden State Parkway and other major expressways that lead to New England, Canada, the Midwest and the South. In 1991 the Cross-Westchester Expressway was added to the Thruway system. In all, the Thruway is comprised of 2843 lane miles of roadway, 817 bridges, over 300 buildings, 134 interchanges, 35 tandem areas, 27 service areas, 3 welcome centers, nearly 120 water service facilities, 3 water treatment plants, 16 wastewater treatment plants and 40 motor fueling stations for Authority vehicles and equipment. Operationally, the Authority is segmented into four regional divisions – New York, Albany, Syracuse and Buffalo – with the Administrative Headquarters located in Albany.

For the purposes of this Request for Proposals ("RFP"), the term "Authority" shall mean the New York State Thruway Authority.

Section 1.2 - Key Dates

Provided below is a tentative schedule for the milestones in this RFP process, listed in the order of occurrence. The Authority reserves the right to change any or all of these dates as it deems necessary or convenient in its discretion; in the event of such a date change, all parties that have been furnished with this RFP will be duly notified.

Event	**Date**
RFP Issuance	January 10, 2025
Deadline for submitting Written Questions and Exceptions to Terms and Conditions	January 27, 2025
Issuance of Written Responses	February 10, 2025
Proposal Due Date & Time	February 26, 2025, at 1:00p.m.

Section 1.3 – Permissible Contacts/Contact Person

This procurement is subject to and shall be conducted in accordance with the Thruway Authority Guidelines Regarding Permissible Contacts During a Procurement and the Prohibition of Inappropriate Lobbying Influence (attached hereto as Exhibit 1). All questions concerning this RFP must be addressed to the persons listed below. Proposers and prospective Proposers may not approach any other Authority officer,

employee, contractor or agent or any other State entity relative to this RFP (except as provided in Exhibit 1).

Georgiann Mock
Contract Management Specialist 1
New York State Thruway Authority
200 Southern Boulevard
Albany, New York 12209
georgiann.mock@thruway.ny.gov

Darcy Williams
Assistant Director of Personnel
New York State Thruway Authority
200 Southern Boulevard
Albany, New York 12209

Danielle Adams
Director, Office of Compliance
New York State Thruway Authority
200 Southern Boulevard
Albany, New York 12209

In the event the contact persons listed above are not available, Proposers may direct their questions to Caitlin Cady at Caitlin.cady@thruway.ny.gov or Andrew Trombley at andrew.trombley@thruway.ny.gov.

Section 1.4 – Estimated Quantities

This Contract will be an estimated quantity Contract. The estimated quantities are based on the Authority's records from prior years; however, no specific quantities are represented or guaranteed. The Authority shall pay for the quantities or dollar values actually ordered during the Contract period and the Contractor must furnish all quantities actually ordered at or below the Bid prices.

Section 1.5 – Written Questions & Responses

The Authority will provide official written responses to all written questions that are submitted to the Authority Contract Management Specialist named in Section 1.3 on or before the date set forth in Section 1.2 of this RFP. These official responses will be distributed to all parties that have been furnished with this RFP. Prospective Proposers should rely only on these official written responses. Questions submitted after the due date set forth in Section 1.2 of this RFP may not receive an official answer.

Section 1.6 – Exceptions to Terms and Conditions

The selected Proposer will be required to enter into a contract ("Agreement") with the Authority that includes, but is not limited to, the terms and conditions set forth in Article V and Article VI of this RFP and Appendices A, B, and D attached hereto. If a Proposer objects to any such term or condition, the Proposer must state such objection in writing and submit such objection to the Authority Contract Management Specialist named in Section 1.3 hereof by the deadline for submission of written questions set forth in Section 1.2 herein. Such objections must be stated in detail and, if the Proposer is seeking alternative language for a particular term or condition, accompanied by the Proposer's requested alternative language. The Authority will address such objections in its official responses to questions and/or via addenda to this RFP.

Section 1.7 – RFP Errors or Omissions

If a Proposer believes there is any ambiguity, conflict, discrepancy, omission or other error in this RFP, such Proposer should immediately notify the Authority Contract Management Specialist named in Section 1.3 of such error and request clarification of or modification to this document. Such notice shall be given prior to the final filing date for submission of proposals. Modifications to this RFP, when appropriate, will

be made by addenda hereto and distributed to all parties who have been furnished with this RFP. Clarifications of this RFP, when appropriate, will be made by written notice to all parties who have been furnished with this RFP.

ARTICLE II – Services Requested

Section 2.1 – Background

The Authority is seeking proposals from experienced and qualified firms to provide employee drug and alcohol testing services.

The Authority has approximately 1,100 employees subject to drug and alcohol testing who report to approximately 49 work locations throughout New York State, excluding Long Island and the five boroughs of New York City. Testing services must be available 24 hours per day, 7 days per week, year-round, at the Thruway worksites (hereafter "On-Site") (see Exhibit 12) and non-worksite locations (hereafter "Off-Site").

Collection of urine specimens and administration of breath alcohol testing for random testing will typically be conducted on-site. However, depending on the circumstances, some collections and testing may be conducted off-site. Collection of urine specimens for reasonable suspicion, reasonable cause, post-accident and serious marine incident, pre-employment, follow-up, return to duty testing and tests requiring direct observation will typically be conducted at off-site locations. However, depending on the circumstances, some collection and testing may be conducted at on-site locations. The Authority will evaluate all reasonable collection site network strategies with regard to the efficient accomplishment of required testing with minimal interruption of work activities.

Employees subject to the Omnibus Transportation Employee Testing Act of 1991 ("OTETA") and/or United States Coast Guard ("USCG") Regulations are represented by unions. The contractor selected as a result of this solicitation may be required to respond to union inquiries in the labor management process regarding the testing protocols, procedures and technology.

In addition, the collective bargaining agreements covering the employees mentioned above provide prescribed administrative due process procedures which will require best evidence testimony in disciplinary arbitration hearings by the employees of the Successful Proposer or its subcontractors who either collected, transported, stored, tested and/or analyzed or interpreted the sample.

The Authority's Drug and Alcohol Testing Program Coordinator (hereafter "Authority's Program Coordinator") will work with the Successful Proposer and will be available to answer questions and provide overall direction.

The Authority anticipates making only one (1) award as a result of this solicitation.

Section 2.2 – Scope of Services

The successful Proposer will, in the most efficient and effective manner, provide all drug and alcohol testing services required to fully meet the intent and purpose of OTETA/USCG and to achieve full and effective compliance with all requirements of OTETA/USCG regulations. The successful Proposer shall provide the following services:

A. TESTING REQUIREMENTS

1. Testing must be accomplished in full compliance with the provisions of OTETA and the associated Federal Motor Carrier Safety Regulations, as amended, and as administered under the authority of the United States Department of Transportation by the Federal Motor Carrier Safety Administration ("FMCSA") which is incorporated herein as Exhibits 3, 4, 5 and 13 (See 49 Code of Federal Regulations ("CFR") Part 382 – Controlled Substances and Alcohol Use And Testing; 49 CFR Part 40 – Procedures for Transportation Workplace Drug and Alcohol Testing Programs; Title V – OTETA; and Federal Register / Vol. 81, No. 233, Commercial Driver's License ("CDL") Drug and Alcohol Clearinghouse, respectively) and the Authority's Alcohol and Drug Abuse in the Workplace policy, as may be amended or superseded from time to time, and which is incorporated herein as Exhibit 6.

2. Testing must also be accomplished in full compliance with and under the authority of the United States Department of Homeland Security, USCG in accordance with 33 CFR Part 95 – Operating a Vessel While Under the Influence of Alcohol or a Dangerous Drug; 46 CFR Part 4 – Marine Casualties and Investigations; 46 CFR Part 5 – Marine Investigation Regulations – Personnel Action; 46 CFR Part 16 – Chemical Testing; and 49 CFR Part 40 – Procedures for Transportation Workplace Drug and Alcohol Testing Programs which are incorporated herein as Exhibits 7, 8, 9, 10 and 4. For the purpose of this RFP, the term USCG will refer to all of the applicable USCG regulations governing drug and alcohol testing.

3. The successful Proposer must employ staff in compliance with the requirements of 49 CFR Part 40 (Exhibit 4) and in sufficient numbers and geographic locations to satisfactorily fulfill the requirements of OTETA/USCG in the following counties where the Authority regularly employs individuals who must be tested under OTETA/USCG. Those counties are:

   Albany, Cayuga, Chautauqua, Columbia, Erie, Genesee, Greene, Herkimer, Monroe, Montgomery, Oneida, Onondaga, Ontario, Orange, Rockland, Schenectady, Ulster, and Westchester.

4. The Successful Proposer shall perform program administration, reporting, and annual testing services in full conformance with OTETA/USCG regulations, guidelines, and requirements. In addition, the Successful Proposer shall also be able to perform program administration, reporting, and queries as required by the FMCSA Commercial Driver's License ("CDL") Drug and Alcohol Clearinghouse ("Clearinghouse") rule and regulations. The above Clearinghouse services would be for approximately 1100 required tests and queries per year including:

   - Pre-employment drug tests, including current employees who move into safety sensitive positions.
   - Random drug and alcohol tests.
   - Return to duty drug and alcohol tests.
   - Follow-up drug and alcohol tests required after an employee's positive results and return to duty.
   - Post-accident drug and alcohol OTETA tests, within the time limitations set forth in the relevant regulations.
   - Serious marine incident drug and alcohol tests, within the guidelines set forth in the relevant regulations.
   - Reasonable suspicion/cause drug and alcohol tests.
   - Full pre-employment query of the Clearinghouse for current and prospective FMCSA covered employee's drug and alcohol violations.
   - Annual limited query, and full query as needed, of the Clearinghouse for each FMCSA covered employee of the Authority.

- Reporting of statutorily/regulatorily mandated drug and alcohol violation information to the Clearinghouse, including drug or alcohol test refusals.

5. Develop a method of collecting on-site urine samples for all required tests from employees in full compliance with OTETA/USCG requirements and protocols, while preserving a record of chain of custody.

6. Develop a method of collecting off-site urine and oral fluid samples for all required tests from employees for testing in full compliance with OTETA/USCG requirements and protocols while preserving a record of chain of custody. Off-site locations must be within a 30-mile radius of the proposed worksite or residence of the individual being tested.

7. Develop a procedure for timely transmission of urine and oral fluid samples to the Health and Human Services ("HHS")-certified laboratory designated to perform the analysis for that location. Such transmission must satisfy all requirements to preserve a record of the chain of custody from either an on-site or off-site collection point to the laboratory.

8. Develop a method of alcohol testing using Evidential Breath Testing ("EBT") devices approved by the National Highway Traffic Safety Administration ("NHTSA") and placed on NHTSA's conforming products list ("CPL") for evidential devices. Test procedures must conform to OTETA/USCG requirements and protocols to preserve the accuracy of the test results for employees in the following categories: random, reasonable suspicion/cause, post-accident, serious marine incident, return to duty and follow-up.

9. Develop a procedure for timely communication of results between the HHS-certified laboratory and the Medical Review Officer ("MRO") regarding individual positive results and between the MRO and the Authority's Program Coordinator in accordance with OTETA/USCG regulations.

10. Develop a procedure for timely communication of positive breath alcohol test results between the Breath Alcohol Technician ("BAT") and the Authority's Program Coordinator in accordance with OTETA/USCG regulations.

11. Develop a process that will ensure that all drug and alcohol tests will be reported to the appropriate entity (the Authority) and that these results will also be reported to the appropriate drug/alcohol testing pool (FMSCA or USCG) in order to be in compliance with the required Random Testing Rates and for the accurate completion of the US Department of Transportation Drug and Alcohol Testing Management Information System ("MIS") Data Collection Form.

12. Develop a method and procedures to perform mandated queries and reporting to the Clearinghouse in accordance with the requirements under the OTETA/USCG regulations, including the FMCSA Commercial Driver's License Drug and Alcohol Clearinghouse rules and regulations.

13. Provide reports to the Authority to ensure compliance and the satisfactory completion and submission of the US Department of Transportation Drug and Alcohol Testing MIS Data Collection Forms. These vendor reports will be used to prepare the MIS forms for the Authority to ensure compliance with the reporting requirements for both FMCSA and USCG.

14. Submit invoices to the Authority. Invoices must clearly distinguish charges incurred for the Authority FMCSA and the Authority USCG, as outlined in the Fee Proposal.

B. TRANSITION

1. Prepare and submit a work plan that will explain and set forth the process and procedures for the orderly and successful transition, where applicable, from the current service provider at the commencement of services under the Agreement, as well as for any transition to a subsequent third party service provider upon expiration or termination of the Agreement, while preserving the integrity and quality of the existing, highly functional drug and alcohol testing program without interruption or disruption.

   Prepare and submit a plan to ensure a smooth transition of the current database record keeping system to the new one, ensuring the integrity of the existing records. The Authority's OTETA/USCG employee population is generated from a comma-separated data file from an Oracle database through a PeopleSoft application. This system is used by the present contractor to create and maintain the candidate pool for random testing. The Authority's Program Coordinator will provide the contractor with the Authority's OTETA/USCG Employee Database from which the contractor's system will generate the candidate pool and the random samples. The Authority's Program Coordinator will provide the contractor with an updated OTETA/USCG Employee Database as necessary.

2. If the current system is not used, then any substitute system must be compatible with the Authority's OTETA/USCG Employee Database. The Authority's Employee Database currently includes last name, first name, middle initial, employee ID number, company name, testing pool, Division location, work county, CDL number and State of issuance, and Department ID. (Note: Each employee is assigned a unique 5-digit identification number. The Authority will maintain information about its employees based on the employee's ID number.) All data (either sent or derived) pertaining to the Authority will become the property of the Authority. This data shall be delivered to the Authority or its designee at the direction of the Authority and in the format and manner designated by the Authority, and any remaining data retained or in the custody and control of the Successful Proposer shall be purged from its or its subcontractors systems where lawful, and the destruction thereof shall be certified to the Authority upon termination or expiration of the Agreement.

C. ADMINISTRATION

1. Obtain necessary information and complete the tasks necessary for OTETA/USCG compliance in relation to the mandated drug and alcohol testing program, including but not limited to compliance with the Clearinghouse rules and regulations.

2. Establish ongoing, open communication between the Successful Proposer's Project Director and the Authority's Program Coordinator for the purpose of improving the administration of drug and alcohol testing or the compliance process – by telephone, email or in person, as needed, at the Authority's Administrative Headquarters in Albany, NY. This includes attending meetings with Authority representatives, upon execution of an approved contract, to present proposed work plans and copies of all forms and record keeping systems necessary for satisfaction of all OTETA/USCG requirements and other materials sufficient to satisfactorily demonstrate how the testing, record keeping, queries, and reporting will be accomplished.

3. Provide timely notification of all updates/amendments to 33 CFR Part 95, 46 CFR Part 4, 46 CFR Part 5, 46 CFR Part 16, 49 CFR Part 40, and 49 CFR Part 382 and any related laws, rules, and regulations affecting the Authority's drug and alcohol testing programs.

4. Produce, develop, supply and send forms and supplies necessary for the efficient, orderly and complete administration of the requirements of the Authority's OTETA/USCG drug and alcohol testing program.

5. In accordance with OTETA/USCG requirements, appoint a Substance Abuse Professional ("SAP") to perform the activities as described in OTETA. The SAP must not be affiliated with, have a direct or indirect financial interest in, or receive any type of remuneration from any treatment facility, treatment group or medical specialist to which Authority employees are sent for counseling or treatment by the SAP.

6. In conformance with OTETA/USCG requirements, the services of a MRO(s) will be provided. The MRO(s) will be a licensed physician (Doctor of Medicine or Osteopathy) responsible for receiving and reviewing laboratory results generated by the Authority drug testing program who possesses sufficient knowledge of controlled substance abuse disorders and possesses the appropriate medical training to interpret and evaluate an individual's confirmed positive test result, together with the individual's medical history and any other relevant biomedical information.

7. Arrange personal appearances at administrative hearings by individuals who collected, transported, stored, tested and/or analyzed or interpreted the samples for the purpose of providing testimony. (As of the date of issuance of this RFP, there has been no need for such individuals to appear at administrative hearings under the current contract.)

8. Arrange appearance of the MRO at administrative hearings for the purpose of providing testimony. The MRO must be available upon 30 days' notice for appearances at Administrative Hearings. (As of the date of the issuance of this RFP, there has been no need for the MRO to appear at administrative hearings under the current contract.)

9. Provide and maintain a listing of OTETA/USCG qualified and certified collection sites that will be used for off-site drug and alcohol testing. A work plan must also be submitted stating how the Proposer will maintain a relationship with collection sites in regard to method, means and frequency of training for collection site personnel and qualified breath alcohol technicians.

   If any testing facility loses its certification during the term of the contract, the Proposer must notify the Authority immediately and provide alternate and equal service within the time frames of the regulations.

10. Provide and maintain a listing of OTETA/USCG qualified and certified collection facilities that will collect urine and oral fluid specimens for random drug testing and administer breath alcohol tests for random testing on-site. A work plan must also be submitted stating how the consultant will maintain a relationship with collection facilities in regard to method, means and frequency of training for collection site personnel and qualified breath alcohol technicians.

11. In accordance with OTETA/USCG regulations, laboratories certified by HHS under the National Laboratory Certification Program must be used for all required testing. Laboratories must comply with all requirements of 49 C.F.R. Part 40, as well as applicable requirements of HHS in testing specimens.

    Laboratories used must have quality control programs in place in accordance with OTETA/USCG regulations.

12. Maintain a current roster of all the Authority's employees covered by OTETA/USCG requirements. The Authority will provide an updated roster quarterly.

13. Maintain a system for random selection of employees and coordination of random alcohol and drug testing. Note that testing must be performed on a geographically distributed basis throughout the year, recognizing that the Authority operates 24 hours per day, 7 day per week and that there are also different work shifts depending on the time of year.

D. REPORTING AND RECORD KEEPING

1. Provide written results of all drug and alcohol tests to the Authority's Program Coordinator in accordance with OTETA/USCG regulations.

2. Develop and maintain an electronic record keeping system of all activities conducted in performance of the contract, including but not limited to, creating a candidate pool for random tests and permanent records of test results. Such records must be kept in accordance with the requirements spelled out in OTETA/USCG, including but not limited to any regulatory requirements provided as part of the Clearinghouse rules and regulations amendments.

3. Prepare and submit reports that comply with OTETA/USCG requirements, including the Clearinghouse rules and regulations, on a regular schedule and as needed for US Department of Transportation Drug and Alcohol Testing MIS data reporting, on the results of all tests completed during any given period by employee, type of test, location of test, date, laboratory used and results. The proposal must include samples of all reports and forms to be used.

4. All records, data, information, documentation, and other materials received or prepared by or on behalf of the Successful Proposer in performance of the Agreement, including paper and electronic records/data, will become the property of the Authority. These records will be delivered to the Authority or its designee and purged from the Successful Proposer's system at the direction of the Authority or upon termination or expiration of the Agreement, and the Proposer shall certify the successful completion thereof.

Section 2.3 – Fee Proposal

The Proposer must submit a completed Cost Calculation Sheet (Attachment 1). The Cost Calculation Sheet should be in a separate, identified binder or folder. It is important that the Cost Calculation Sheet be complete, accurate and well documented. The Proposer must fill in all green cells on the Cost Calculation Sheet in order to be evaluated. Failure to do so will cause the Proposal to be found non-responsive, and as a result, the Proposal will not be evaluated.

The electronic fillable form for Attachment 1 – Cost Calculations Sheet can be found at the following link:

https://www.thruway.ny.gov/external/rfp24c12-attachment1-cost-calculation-sheet.zip

Proposers must complete Attachment 1 and submit the hard copy with their proposal.

The method of calculating costs and pricing for providing drug and alcohol testing is as a lump sum unit price. Lump sum amounts must include all costs associated with providing the service. The Authority has provided estimated quantities for the requisite queries and each type of test based on the number of FMCSA covered employees and number of tests conducted over the life of the current contract. These quantities, which are on the Cost Calculation Sheet, are only estimates and are in place to provide the Proposer with an idea of the expected volume of tests and queries to be conducted. However, past practice may not be an exact reflection of actual volume or future demand.

The Cost Calculation Sheet is to be priced out by unit for the first three years and the following two years. The bottom-line grand total will be the final expected cost for the duration of the five-year contract.

General information explaining the fees and additional costs not specifically requested in this RFP may be included. However, additional information or services, which the Authority may or may not elect to use, should be explained by the Proposer. Such costs will not be used in the evaluation.

For expert testimony, the Authority will be responsible for paying an hourly rate for the time the witness is traveling and for the time the witness is providing testimony. The Authority will not reimburse for time during the evening and any other non-productive time. The Authority will reimburse receipted travel expenses incurred while the witness is in travel status, as detailed below.

Unit pricing for drug and alcohol testing and the rates for expert testimony and related travel will be the rates used over the period of the performance of the contract.

The Authority will reimburse the Contractor for necessary travel expenses when engaged directly in Authority work under the Agreement, in accordance with the rates set by the U.S. General Services Administration ("GSA"), which can be found at http://www.gsa.gov/portal/content/104877. All travel must be pre-approved by the Project Manager designated by the Authority. The Contractor shall bear any additional costs that exceed the GSA Rates. Contractor shall promptly advise Project Manager of any cancellations or changes in travel arrangements. The Contractor will not be reimbursed for any avoidable cancellation changes, such as penalties on airfares and "no show" charges for hotels. Pre-approved air and train travel will be reimbursed based upon normal coach fare by the most direct route to and from the destination. Pre-approved ground transportation, such as rental cars, will be reimbursed for an intermediate sized vehicle class or smaller. Any rental car upgrade(s) will not be reimbursed. Travel by private automobile will be reimbursed at the then current rate established by the IRS for mileage reimbursement, plus tolls and reasonable parking fees. Whether any travel expense is reasonable, necessary, or avoidable will be at the sole discretion of the Authority. Unless otherwise approved by the Authority, the Contractor will not be reimbursed for: secretarial or word processing time (normal, temporary, or overtime); or taxis, private cars, or meals except as part of necessary travel expenses.

ARTICLE III – Proposal Requirements

Section 3.1 – Content of Proposal

The following is a list of the information that each Proposer must provide The Authority reserves the right to, in its discretion, disqualify a proposal that does not include all of the information required below.

To expedite the review of submissions, the Authority requests that the proposal be submitted in a binder with the material separated by tabs numbered/lettered to match the specific information requested below; provided, however, that the fee proposal must be submitted in a separate envelope marked "Fee Proposal". Additional information, if any, must be submitted in a separate binder. No information beyond that specifically requested is required, and Proposers should keep their submissions to the shortest length consistent with making a complete presentation, not to exceed 25 pages. Such page limit shall apply to all information that must be submitted except the fee proposal and those materials required by paragraph C(6) and paragraph D of this Section.

A. Cover Letter – A cover letter, which is an integral part of the proposal, must be signed by the individual or individuals authorized to bind the Proposer contractually. The letter must indicate for each signatory that the signer is duly authorized and the title or position the signer holds in the Proposer's organization. The cover letter shall include the following:

    1) The Proposer's name, nature of organization (e.g. corporation, partnership, etc.), location of main office - address, telephone/fax numbers and e-mail address (if applicable) – and

the name, business address, telephone/fax numbers and e-mail address (if applicable) of the person within the organization who will be the Authority's primary contact concerning the proposal.

2) A statement that the proposal is an irrevocable offer for 180 days from the date when proposals are due, or longer by mutual agreement.

3) A statement that the Proposer is ready, willing and able to provide the proposed services in a timely manner upon reasonable notice.

4) The identity of the key management and supervisory personnel who will be assigned to provide the services described to the Authority.

5) Either: A) A statement that if awarded the Agreement, the Proposer's provision of services to the Authority will not create any actual or potential conflict of interest or appearance of impropriety. Indicate what procedures will be followed to detect, notify the Authority of, and resolve any such conflicts.; or B) The identity of any existing or contemplated relationship with any other person or entity, including relationships with any member, shareholders of 5% or more, parent, subsidiary, or affiliated firm, which would constitute an actual or potential conflict of interest or appearance of impropriety, relating to other clients/customers of the Proposer or former officers and employees of the Authority, in connection with rendering services enumerated in the RFP. If a conflict does or might exist, a description of how the Proposer would eliminate or prevent it. Indicate what procedures will be followed to detect, notify the Authority of, and resolve any such conflicts.

6) Either: A) A statement that neither the Proposer, nor any of its members, shareholders of 5% or more, parents, affiliates, or subsidiaries, have been the subject of any investigation or disciplinary action by the New York State Commission on Ethics and Lobbying in Government or its predecessor State entities (collectively, "Commission"); or B) A brief description of any investigation or disciplinary action by the New York State Commission on Ethics and Lobbying in Government or its predecessor State entities (collectively, "Commission") with respect to the Proposer, any of its members, shareholders of 5% or more, parents, affiliates, or subsidiaries, including an indication of how any matter before the Commission was resolved or whether it remains unresolved.

B. Statement of Proposal – each proposal shall contain the following information regarding the services to be provided:

1) Executive Summary – Provide a brief description of the proposed approach and work effort.

2) Narrative Description – Provide a narrative description of the important issues to achieve compliance with OTETA/USCG drug and alcohol testing, including enough substantive discussion to demonstrate an understanding of OTETA/USCG, familiarity with applicable requirements, and an understanding of the Authority's program.

3) Services Requested – Describe the overall approach for providing the specific Services Requested in Article II. Include the overall methodology, addressing the following broad categories of Services Requested as detailed in Article II:

- Transition from the current vendor, including how records and management roles and responsibilities would be transitioned, as well as a plan or description for the transition to the next vendor upon expiration or termination of the Agreement. Include a detailed

schedule for reasonably accomplishing the transition in time for the first Authority Drug and Alcohol random selection in July 2025.

- Administration and management of the program, including a description of the functions of the key administrative staff, MRO; and SAP; how communication would be established and maintained between consultant and Authority staff; the method of providing and monitoring testing facilities and laboratories; and the training provided to staff.

- The drug and alcohol testing procedures including the method of collecting samples and performing breath alcohol tests, the method for transmitting, testing, and evaluating samples, and the timely reporting of results.

- Reporting capability to fulfill both Authority requirements, and OTETA/USCG and the relevant regulations, including the regulatory requirements for the FMCSA Clearinghouse.

The following materials and examples must be included:

- Examples of typical administrative forms used.

- A list of testing facilities used, by county, that meet the requirements of 49 CFR Part 40 including address and days and hours of operation.

- A list of HHS-certified laboratories used including the date of certification, proof of certification, geographic location, and days and hours of operation.

- Description of the quality control program(s) in place at any proposed laboratory or testing facility.

- MRO and SAP certifications and qualifications.

- Examples of typical reports to be provided and their frequency.

- A list of the qualified and certified personnel who will collect urine or oral fluid specimens for random drug testing and administer breath alcohol tests for random testing on-site.

The proposed approaches to providing the Services Requested should, when possible, be based upon practical experience in implementing a program in an organization similar to the Authority, for compliance with OTETA/USCG and the relevant implementing regulations, including the FMCSA Clearinghouse rules and regulations; and should identify problems which may be encountered and proposed solutions.

The proposed approaches should demonstrate an understanding of the overall issues and requirements of a drug and alcohol testing program.

The Proposal should demonstrate an understanding of the need for efficiency in the testing process – and an appreciation for the challenges of administering a testing program over a wide geographic area, while dealing with various round-the-clock work schedules, and minimizing the time employees must be away from their work.

Suggestions for alternative tasks or alternative approaches, based on experience, are encouraged.

4) Management Plan – Provide a management plan which identifies and describes the following items:

   - How the effort will be planned, directed and controlled;
   - Arrangement for, and coordination of, any sub-consultants or teaming arrangement/joint ventures;
   - How personnel, including sub-consultants, will be phased into and used in the effort;
   - The anticipated relationship of Authority management and staff to the Successful Proposer, and responsibilities of each, including an explanation of what Authority staff may be required and utilized, and how overall coordination between the Successful Proposer and the Authority will be achieved.

5) Fee Proposal – Per Section 2.3, Proposers must provide a fee proposal by completing Attachment 1 - Cost Calculation Sheet

C. Statement of Qualifications – each proposal shall contain the following information regarding the Proposer's qualifications to provide such services:

1) A brief history and description of the Proposer's organizational structure including size, scope of services, capability and area(s) of specialization.

2) Detailed documentation of the Proposer's qualifications and experience related to the scope of work required by this RFP.

3) The resumes of key management and supervisory personnel who will be directly assigned to provide the services to the Authority and a description of the specific function each will perform. This information should include each individual's qualifying experience to perform the services assigned and his/her position and length of service with the Proposer.

4) A client list including a detailed description of the size, total dollar value, and specific services provided for each client to which the Proposer provided similar services within the past five (5) years; specify the name, address and telephone number of the individual responsible at the client organization for the supervision of such services.

5) A list of at least three (3) references.

6) Copies of the Proposer's audited financial statements for the past two years. If a Proposer does not have audited financial statements, Proposer should submit any financial statements that it does have (e.g. lines of credit, statements compiled by an outside accounting firm, etc.) and any other information Proposer feels is pertinent in establishing the financial stability of its business/organization. If a Proposer has questions about what evidence of the Proposer's financial stability will be acceptable to the Authority, the Proposer should communicate with the Authority Contract Management Specialist named in Section 1.3.

D. Other Required Materials – each proposal must include the following required materials, completed in their entirety and executed by the individual or individuals who signed the cover letter and are authorized to bind the Proposer contractually:

1) New York State Finance Law §§ 139-j and 139-k Disclosure of Prior Non-Responsibility Determinations (Supplement 1) – New York State Finance Law § 139- k requires that Proposers disclose findings of non-responsibility made within the previous four years by any governmental entity where such prior finding of non-responsibility was due to a violation of New York State Finance Law §139-j or the intentional provision of false or incomplete information to a governmental entity.

2) Certificate of Compliance with the Authority Guidelines Regarding Permissible Contacts During a Procurement and the Prohibition of Inappropriate Lobbying Influence (Supplement 2) – New York State Finance Law § 139- j requires that Proposers certify that they have read, understand and agree to comply with the Authority/Corporation Policy Regarding Permissible Contacts During a Procurement and the Prohibition of Inappropriate Lobbying Influence.

3) Vendor Responsibility Questionnaire – the Authority's Procurement Policy provides that the Authority will award procurement contracts for services to responsive and responsible Proposers on the basis of best value. The Authority uses the information provided by Proposers on this Questionnaire to assist it in making a determination of responsibility of a proposed Contractor.

   The Authority recommends that vendors file the required Vendor Responsibility Questionnaire online via the New York State VendRep System and only provide a copy of the certification page to the Authority. To enroll in and use the New York State VendRep System, see the VendRep System Instructions available at http://www.osc.state.ny.us/vendrep/enroll.htm or go directly to the VendRep System online at: https://onlineservices.osc.state.ny.us/Enrollment/login?0.

   Vendors must provide their New York State Vendor Identification Number when enrolling. To request assignment of a Vendor ID or for VendRep System assistance, contact the Office of the State Comptroller's IT Service Desk at 866-370-4672 or 518-408-4672 or by email at ITServiceDesk@osc.state.ny.us. Vendors opting to complete and submit a paper questionnaire can obtain the appropriate questionnaire from the VendRep website http://www.osc.state.ny.us/vendrep/forms_vendor.htm or may contact the Authority or the Office of the State Comptroller's Help Desk for a copy of the paper form.

4) Vendor Assurance of No Conflict of Interest or Detrimental Effect (Supplement 3)

5) Conducting Business in Russia Certification (Supplement 4)

6) ST-220-CA New York State Department of Taxation and Finance Contractor Certification (Supplement 5) – Section 5-a of the New York State Tax Law, and regulations, bulletins and guidelines promulgated thereunder, require that the Authority collect this information for contracts with a value in excess of $100,000.

Section 3.2 – Submission of Proposal

A Proposer must submit one (1) signed in ink original (marked **ORIGINAL**) copy of its Proposal to the Contract Management Specialist, identified in Section 1.3 hereof, on or before the due date for Proposals set forth in Section 1.2 of this RFP. In addition, Proposers must submit one (1) copy of the Proposal (excluding the Fee Proposal) on a flash drive in a PDF format.

The Proposer's Fee Proposal must be in a separate, sealed envelope with one (1) signed in ink original (marked **ORIGINAL**). Proposers must also submit a copy of the Fee Proposal on a flash drive in PDF

format in the same appropriately marked envelope. All boxes, packages and envelopes containing Fee Proposals shall be clearly labeled with Proposer's name and this RFP title and number (located on the title page of this RFP) and shall additionally be labeled with the notation "Fee Proposal".

In the event of a discrepancy between the hard copy and any electronic version, the hard copy shall prevail.

The Authority is not obligated to accept any proposal received after the proposal due date. A Proposer may withdraw or modify a proposal any time prior to the proposal due date by sending written notification to the Authority Contract Management Specialist named in Section 1.3. A Proposer may thereafter re-submit a previously withdrawn proposal if done so by the proposal due date.

The Authority shall not be liable for any costs incurred by a Proposer in [attending a pre-proposal conference or site visit and/or] the preparation of a proposal. By submitting a proposal, a Proposer accepts that it will not make any claims for or have any right to damages because of any misinterpretation or misunderstanding of the services requested or because of any lack of information.

All proposals submitted in response to this RFP shall become the property of the Authority. A Proposer should mark those sections of its proposal that it believes contain proprietary information. The Authority reserves the right to make its own, independent determination as to whether material so marked is proprietary; the Authority will give proprietary treatment only to that material which it has determined to be proprietary. Further, the Authority's response to third party requests for information contained in a proposal shall be governed by New York State Public Officers Law Articles 6 and 6-A, as applicable. The return of proposals not selected for award shall be in the sole discretion of the Authority.

The Authority will not accept proposals by telegraph, fax or electronic means.

ARTICLE IV – Evaluation of Proposals

Section 4.1 – Overview

An Evaluation Committee comprised of Authority staff will review and evaluate each of the properly submitted written proposals. The purpose of the evaluation process, which will be conducted as set forth in this Article, is twofold: (1) to examine the responses for compliance with this RFP; and (2) to identify the proposals that will provide the best value to the Authority pursuant to the criteria set forth in Section 4.3. The evaluation process may also include, in the Authority's sole discretion, reference checks, any internal knowledge that the Authority may have for past performance under similar or other contracts with the Authority, oral presentations, facility inspections and/or interviews with selected Proposers.

Section 4.2 – Preliminary Review

A. Each proposal will be date and time stamped when received.

B. All proposals will be reviewed to determine if they contain all of the required elements specified in this RFP. The Authority reserves the right to, in its discretion, disqualify without further evaluation a proposal that does not meet all of the RFP requirements.

Section 4.3 – Evaluation/Criteria

The Evaluation Committee will evaluate each proposal using the criteria for selection set forth below, not necessarily in priority order:

A. The Proposer's approach to and work plan for providing the services.

B. Demonstrated record of the Proposer's experience and capability to perform required services.

C. The qualifications, experience and availability of the Proposer's lead person(s) and other staff who would be assigned to provide services to the Authority.

D. Overall completeness, clarity, quality and responsiveness of the proposal to the RFP.

E. Fee Proposal

F. Proposer's status as a NYS certified MWBE as defined in New York State Executive Law § 310 or SDVOB as defined in Veterans' Services Law Article 3**

** In order to be awarded credit pursuant to this factor, the respondent must (1) identify itself as an MWBE or SDVOB in its response and (2) be registered with the NYS Department of State as an entity authorized to conduct business in New York State. Respondents identifying themselves as MWBEs must be listed in the directory of New York State certified MWBEs ("MWBE Directory") as of the closing of the period for responses to this RFP. The MWBE Directory is available at: https://ny.newnycontracts.com/. Respondents identifying themselves as SDVOBs must be listed in the directory of New York State-certified SDVOBs ("SDVOB Directory") as of the closing of the period for responses to this RFP. The SDVOB Directory is available http://www.ogs.ny.gov/Core/SDVOBA.asp.

Criteria E and F will be evaluated by Authority personnel who are non-members of the Evaluation Committee.

Section 4.4 – Oral Presentations/Interviews/Facility Inspections

The Authority reserves the right to require some or all Proposers to give oral presentations regarding their proposals or to appear before the Authority for an interview. The Authority also reserves the right to require a facility inspection at a Proposer's location. The Authority shall not be liable for any costs a Proposer incurs in association with such presentations/interviews/inspections.

The purpose of the oral presentation/interview/facility inspection is to give the Authority an opportunity to pose any questions that may have arisen during the review process and to give the Proposer an opportunity to elaborate on how specific services will be furnished and its ability to deliver those services. In the event the Authority decides to implement this stage of the evaluation process, further information will be provided to affected Proposers.

Section 4.5 – Selection of Proposer(s)

The Authority, as best suits its interests, may at any time enter into contract negotiations with more than one Proposer. The Authority will notify those Proposer(s) so selected for contract negotiations.

The Authority will provide all Proposers with a Notice of Tentative Contract Award which indicates the successful Proposer(s) to which the Authority intends to award a Contract. An unsuccessful Proposer may request a debriefing with Authority staff to discuss the reasons that its proposal was not selected for an award. Such request for a debriefing must be submitted electronically via email to the Contract Management Specialist named in Section 1.3 and must be made within 15 calendar days from the date of the Notice of Tentative Contract Award.

The Authority shall not be bound in any way to a Proposer until a formal written Agreement has been executed by the Authority's Executive Director. Upon execution of the Agreement, public announcements or news releases pertaining to the Agreement shall not be made without the Authority's prior written consent. Proposers are hereby on notice that generally the Authority will not grant permission for public

announcements or news releases and will limit the use of the Authority's name by a Contractor to references only.

Section 4.6 – Additional Procurement Rights

By submission of a proposal, the Proposer acknowledges and agrees that the Authority reserves the right to:

1. Accept or reject any or all proposals received in response to this RFP or withdraw any tentative awards made as a result of this Solicitation.

2. At any time, amend RFP specifications to correct errors or oversights, and to supply additional information as it becomes available. All bidders should monitor the NYS Contract Reporter and/or the Authority website for any amendments, clarifications or additional information issued, if applicable.

3. Change any of the scheduled dates stated herein as noted above in section 1.2.

4. Disqualify proposals that fail to meet mandatory requirements.

5. Request any non-mandatory documents from Proposer.

6. Amend, modify, or withdraw this solicitation at any time and without notice or liability to any Proposer or other parties for expenses incurred in preparations of a proposal.

7. Make an award under the RFP in whole, or in part, to one Proposer or multiple Proposers.

8. Use information obtained through site visits, management interviews and the Authority's investigation of a bidder's qualifications, experience, ability or financial standing, and any material or information submitted by the Proposer in response to the Authority's request for clarifying information in the course of evaluation and/or selection under this RFP.

9. Prior to the opening of the RFP, direct bidders to submit modifications to proposals based on RFP amendments.

10. Clarify RFP requests/components at any time in the best interest of the Authority.

11. Eliminate any mandatory, non-material specifications that cannot be complied with by all of the prospective bidders.

12. Waive any requirements that are not material.

13. Reject any proposal where the Authority finds that the Proposer is non-responsible under State Finance Law §§ 139-j or 139-k or another State agency or authority has found the Proposer non-responsible under State Finance Law §§ 139-j or 139-k within the prior four (4) years.

14. Require clarification at any time during the procurement process and/or require correction of any arithmetic or other apparent errors for the purpose of assuring a full and complete understanding of a Proposer's proposal and/or to determine a Proposer's compliance with the requirements of the RFP.

15. Waive informalities and excuse minor irregularities contained in proposal submissions. This waiver shall in no way modify the RFP or excuse a Proposer that enters into an Agreement with the Authority from full compliance with the RFP.

16. Request that Proposers clarify elements in their proposals and submit revised proposals that incorporate such clarifications, if necessary.

17. Negotiate Agreement terms with the Proposer(s) that best serve the interests of the Authority, consistent with RFP requirements, statutory requirements, and Authority policies and procedures.

18. Conduct contract negotiations with the next responsible bidder, should the Authority be unsuccessful in negotiating with the selected Proposer(s)/tentative awardee(s).

19. Request Best and Final Offers (BAFOs) from all Proposers that are determined to be eligible for Contract award.

20. Utilize any and all ideas submitted in the proposals received.

21. Unless otherwise specified in the solicitation, every offer is firm and irrevocable for a period of 180 days from the bid opening.

22. Contact any clients on the Proposer's client list and/or references furnished as part of the proposal, with the understanding that the Authority will keep such contacts confidential.

23. Utilize any internal knowledge about the Proposer obtained from prior performance under Authority contracts.

Section 4.7 - Grievance Policy

As indicated in Section 1.3, all questions or concerns regarding this RFP must be directed to the Authority Contract Management Specialist named in Section 1.3. If a Proposer believes that a question or concern has not been satisfactorily addressed, Proposer may obtain a copy of the Authority's Vendor Protest Procedure at http://www.thruway.ny.gov/business/purchasing/vendor-protest.html or by contacting the Director of Purchasing at P.O. Box 189, Albany, New York 12201-0189, Attn: Vendor Protest.

ARTICLE V – Compliance Requirements and Procedures

Section 5.1 – Compliance Requirements and Procedures

It is the policy of the New York State Thruway Authority ("Authority") to comply with the provisions of Article 15-A of the New York State Executive Law, which requires that every contract over $25,000 will afford equality of economic opportunities for minority group members and women, the facilitation of participation by Minority and Women-Owned Business Enterprises ("MWBEs"). The Authority shall establish separate goals for participation of MWBEs on all Authority contracts where applicable.

Article 3 of the New York State Veterans' Services Law provides for more meaningful participation in public procurement by certified Service-Disabled Veteran-Owned Business Enterprises ("SDVOBs"); thereby further integrating such businesses into New York State's economy. The Authority recognizes the need to promote the employment of service-disabled veterans and to ensure that certified SDVOBs have opportunities for maximum feasible participation in the performance of Authority contracts.

The Authority is further, committed to providing equal training and employment opportunities to minorities and women to participate in the Authority's contracting and procurement processes, and by ensuring nondiscrimination in accordance with Appendix A-Standard Clauses for New York State Thruway Authority Contracts including Clause 4 – Non-Discrimination Requirements, Clause 11 - Equal Employment

Opportunities for Minorities and Women, Executive Order 177, Training Special Provisions and/or all applicable, federal, State, laws, rules, regulations and Executive Orders.

General Provisions

a. Contractor and/or all subcontractors, shall comply with the applicable laws, rules, regulations and provisions governed by the contract, in addition to any nondiscrimination or diversity practices and provision of the contract at no additional cost to Authority.

b. These provisions and requirements shall be included in all subcontracting contracts so that these requirements and provisions shall be binding upon all subcontractors, performing work under this contract.

c. The Contractor represents and warrants that, as a condition for award, the Contractor will submit a Utilization Plan via the NYS Contract System (NYSCS) if required by Authority, within 10 business days of the notice of tentative contract award which lists all proposed firms the Contractor intends to utilize on this contract to achieve the MWBE/SDVOB Contract Goals as established in the contract documents. The Authority approval of the Utilization Plan only approves a firm for the purpose of the MWBE/SDVOB Utilization Plan.

Section 5.2 – Participation Opportunities For New York State Certified Minority/Women/Service-Disabled Veteran-Owned Business Enterprises

In accordance with Article 15-A of the New York State Executive Law and Article 3 of the Veterans' Services Law, the Thruway Authority is committed to providing meaningful participation in public procurement by certified Minority and Women-Owned Business Enterprises ("MWBEs") and certified Service-Disabled Veteran-Owned Business Enterprises ("SDVOBs"), thereby further integrating such businesses into New York State's economy.

The Authority recognizes the need to promote participation and inclusion of Minority and Women-Owned Business Enterprises and Service-Disabled Veteran-Owned Business Enterprises and to ensure that certified MWBEs and SDVOBs have opportunities for maximum feasible participation in the performance of Authority contracts. For the purposes of this procurement, goal(s) have been established and expressed as a percentage of the total contract/agreement amount as follows:

Minority/Women-Owned Business Enterprise – MWBEs

Minority/Women-Owned Business (MWBE) Overall Goal 30%

Service-Disabled Veteran-Owned Business Enterprise (SDVOB)

Service-Disabled Veteran-Owned Business 6%

Your attention is directed to the attached Exhibit 2 - New York State Certified Minority/Women/Service-Disabled Veteran-Owned Business Enterprises Goal Requirements and Procedures for Participation

Contractors are encouraged to contact the Authority's Compliance Unit at compliance@thruway.ny.gov.

Section 5.3 - Equal Employment Opportunity And Removal Of Institutional Policies or Practices That Fail To Address The Harassment And Discrimination Of Individuals

Contractor agrees to comply with all Compliance Requirements and Procedures, in accordance with the terms and conditions of Appendix A – Standard Clauses for New York State Thruway Authority Contracts

including Clause 4 – Non-Discrimination Requirements and Clause 11 - Equal Employment Opportunities for Minorities and Women.

Equal Employment Opportunities for minority group members and women ("EEO") and related provisions shall be deemed supplementary to, and not in lieu of, the nondiscrimination provisions required by New York State Executive Law Article 15 (the "Human Rights Law") and other applicable federal, state, and local laws.

In the performance of this procurement/contract, Contractor shall demonstrate compliance which the Work Force Diversity Requirements and Procedures Regarding Equal Employment Opportunities for Minority Group Members and Women, pursuant to 5 NYCRR § 143, Executive Order 162, Executive Order 177, and all other applicable federal, state and local laws, rules and regulations.

Contractor will be required to submit its written policies and procedures concerning harassment and discrimination to the Authority's Compliance Unit prior to commencement of work under this Agreement.

During the performance of this contract, Contractor agrees to comply with the Equal Employment Opportunity (EEO) requirements specified herein.

"Minority" includes:

(i) Black (all persons having origins in any of the Black African racial groups not of Hispanic origin);

(ii) Hispanic (a person of Mexican, Puerto Rican, Dominican, Cuban, Central or South American descent of either Indian or Hispanic origin, regardless of race;

(iii) Asian and Pacific Islander (all persons having origins in any of the original peoples of the Far East, Southeast, Asia, the Indian Subcontinent, or the Pacific Islands); and

(iv) American Indian or Alaskan Native (all persons having origins in any of the original peoples of North America and maintaining identifiable tribal affiliations through membership and participation or community identification. Identification may be made by any suitable authority in the community such as an educational institution, religious organization, or a state agency).

a. Non-Discrimination Clause

Contractor will ensure equal employment opportunity by not discriminating against any applicant for employment because of race, color, religion, sex, national origin, age, disability, or marital status, regarding, (among other things) the following: upgrading, demotion, transfer, recruitment, recruitment advertising, layoff, termination, rates of pay or other forms of compensation and selection for training, including apprenticeship.

b. Availability of Contractor's Records

Contractor will furnish all information and reports as may be required by the Authority or by rules, regulations and orders incorporated herein by the Authority and will permit access to its books, records and accounts by the Authority's Compliance Unit for purposes of monitoring and investigating compliance with these requirements and such rules, regulations, orders, procedures and guidelines.

c. Enforcement

In order to determine whether the Contractor has complied with the requirements, the Authority may proceed by order to show cause, compliance conference, hearing or any other lawful procedure upon

due notice in writing to the Contractor. In the event the Authority finds that the Contractor has failed to comply with these requirements, this contract may be canceled, terminated, or suspended in whole or in part or Liquidated Damages may be imposed in accordance with the procedures authorized in Section 312 of Executive Law 15-A, provisions of the contract, relevant laws and statutes as deemed appropriate by the Authority, at no cost or liability to the Authority.

In accordance with EO 177 entitled "Prohibiting State Contracts with Entities that Support Discrimination", provisions of the contract, Contractor may be declared ineligible for further New York State government contract and such other sanctions may be imposed and remedies invoked as deemed appropriate by the Authority by rule, regulation, or order of the Authority, or as otherwise provided by law.

d. Contractor's Responsibility Regarding Collective Bargaining Agreements

Neither the provisions of any collective bargaining agreement, nor the failure by a union with whom Contractor has a collective bargaining agreement to refer either minorities or women shall excuse the Contractor's obligations under these requirements, any rules, regulations, procedures and guidelines promulgated or established pursuant to Executive Order 177.

e. Applicability To Subcontract

As per Section 312 of Executive Law 15-A Contractor will physically include and incorporate this document, Equal Employment Opportunity Requirements, as part of every subcontract or purchase order unless exempted by rules, regulations, or orders of the Director, pursuant to the Executive Order 8, and such requirements shall be binding upon each subcontractor, service provider, or vendor. Contractor will take such action with respect to any subcontract or purchase order as the Authority may direct as a means of enforcing such provisions, including sanctions for noncompliance; provided, however, that in the event Contractor becomes involved in or is threatened with litigation with a subcontractor or vendor as a result of any provision or direction issued pursuant to these requirements or by the Authority, Contractor may request the Authority/State of New York to enter into such litigation or dispute to protect the interests of the State of New York.

f. Equal Employment Opportunity Officer

Contractor will designate and make known to the Compliance Unit who will have the responsibility for and must be capable of effectively administering and promoting an active Proposer program of equal employment opportunity and who must be assigned adequate authority and responsibility to do so.

g. Complaints of Alleged Discrimination/Sexual Harassment

Contractor will promptly investigate all complaints of alleged discrimination/sexual harassment made to Contractor in connection with his/her obligations under this contract, will attempt to resolve such complaints, and will take appropriate corrective action within a reasonable time. If the investigation indicates that the discrimination/sexual harassment may affect persons other that the complainant, such corrective action shall include such other persons. Upon completion of each investigation, Contractor will inform every complainant of all of his or her avenues of appeal, including the New York State Division of Human Rights and Equal Employment Opportunity Commission.

Contractor shall inform the Compliance Unit (within 24 hours) in writing of any formal or informal, complaint, incident or any issue of discrimination/sexual harassment. Results of investigation must be submitted to the Office of Compliance within ten (10) days of the complaint.

h. Required Records

Pursuant to Executive Order 162, if awarded a contract, Proposer shall submit, to the Authority, a Quarterly Workforce Utilization /Gross Wages Reports for their firm and all of their Subcontractors.

The Quarterly EO 162 Workforce Utilization/Gross Wages Reporting are located on the Thruway website at: https://www.thruway.ny.gov/business/dmwbe/eo-162-quarterly-contractors.xls or online via the New York State Contract System "Workforce Audit".

Workforce Utilization/Gross Wages Reports are required to be electronically submitted (Quarterly) to compliance@thruway.ny.gov or online via the NYS Contract System "Workforce Audit".

Questions regarding compliance with Workforce Utilization/Gross Wages Reporting should be directed to the Authority's Compliance Unit at compliance@thruway.ny.gov.

i. Nondiscrimination

Contractor shall comply with the provisions of the Human Rights Law, and all other State and Federal statutory and constitutional non-discrimination provisions. Contractor and its subcontractors shall not discriminate against any employee or applicant for employment because of race, creed (religion), color, sex, national origin, sexual orientation, gender identity or gender expression, military status, age, disability, predisposing genetic characteristic, marital status or domestic violence victim status, and shall also follow the requirements of the Human Rights Law with regard to non-discrimination on the basis of prior criminal conviction and prior arrest.

The Human Rights Law may also require reasonable accommodation for persons with disabilities and who are pregnant or have pregnancy related conditions. A reasonable accommodation is an adjustment to a job or work environment that enables a person with a disability to perform the essential functions of a job in a reasonable manner. The Human Rights Law may also require reasonable accommodation in employment on the basis of Sabbath observance or religious practices.

ARTICLE VI – Contract Terms and Conditions

Selected Proposer(s) will be required to enter into an Agreement with the Authority that includes, but is not limited to, the terms set forth in Article V and this Article VI. No material deviations from these terms will be allowed. Any exceptions to these terms must be submitted as written exceptions pursuant to Section 1.5 of this RFP.

Section 6.1 - Contract Term

The term shall commence on July 1, 2025, and shall terminate on June 30, 2030.

Section 6.2 – Independent Contractor

Contractor is and shall be, in all respects, an independent contractor in performing services pursuant to the Agreement. In accordance with its status as an independent contractor, Contractor shall covenant and agree that neither it nor its agents and/or employees will hold itself or themselves out as or claim to be an officer or employee of the Authority, and that neither Contractor nor its agents and employees shall make any claim, demand or application to or for any right or privilege applicable to an officer or employee of the Authority, including, but not limited to Workers' Compensation coverage, Unemployment Insurance benefits, Social Security coverage or Retirement System membership or credit.

Section 6.3 – Personnel, Equipment and Supplies

Contractor shall provide all resources, personnel, equipment and supplies necessary to perform services pursuant to the Agreement. If in order to provide such services Contractor must make an external connection to the Authority's data communications infrastructure and/or access Authority information systems, Contractor shall in all respects comply with all Authority policies, procedures, and requirements regarding such connections and information systems access, including, but not limited to, Appendix D – Network Connection Requirements, attached hereto, and undertake whatever actions are necessary in the discretion of the Authority to ensure such compliance. Contractor shall be responsible for all costs associated with ensuring that its own network security measures comply with all Authority policies, procedures, and requirements regarding external connections.

Section 6.4 – Subcontracting

Contractor agrees not to subcontract any of its services without the prior written approval of the Authority. Any request for subcontracting should be clearly indicated in the Contractor's proposal/bid. Contractor may arrange for a portion/s of its responsibilities under this Agreement to be subcontracted to qualified, responsible subcontractors, subject to approval of the Authority. If Contractor determines to subcontract a portion of the services, the subcontractors must be clearly identified and the nature and extent of its involvement in and/or proposed performance under the Agreement must be fully explained by Contractor to the Authority. As part of this explanation, the subcontractor must submit to the Authority a completed Vendor Assurance of No Conflict of Interest or Detrimental Effect form, as required to be completed by Contractor prior to execution of this Agreement.

Contractor retains ultimate responsibility for all services performed under the Agreement.

All subcontracts shall be in writing and shall contain provisions, which are functionally identical to, and consistent with, the provisions of this Agreement including, but not limited to, the body of this Agreement, Appendix A – Standard Clauses for New York State Thruway Authority Contracts and the RFP. Unless waived in writing by the Authority, all subcontracts between Contractor and subcontractors shall expressly name the Authority, as the sole intended third party beneficiary of such subcontract. The Authority reserves the right to review and approve or reject any subcontract, as well as any amendment to said subcontract(s), and this right shall not make the Authority a party to any subcontract or create any right, claim, or interest in the subcontractor or proposed subcontractor against the Authority.

The Authority reserves the right, at any time during the term of the Agreement, to verify that the written subcontract between Contractor and subcontractors is in compliance with all of the provisions of this Section and any subcontract provisions contained in this Agreement.

Contractor shall give the Authority immediate notice in writing of the initiation of any legal action or suit which relates in any way to a subcontract with a subcontractor or which may affect the performance of Contractor's duties under the Agreement. Any subcontract shall not relieve Contractor in any way of any responsibility, duty and/or obligation of the Agreement.

If at any time during performance under this Agreement total compensation to a subcontractor exceeds or is expected to exceed $100,000, that subcontractor shall be required to submit and certify a Vendor Responsibility Questionnaire.

Section 6.5 - Insurance Conditions

Contractor shall, and shall require its subcontractors to, procure prior to commencement of work under the Agreement, and maintain until the Agreement is completed and the Authority has accepted all work performed thereunder, insurance of the kinds and in the amounts specified herein, covering all services

and operations under the Agreement, whether performed by Contractor or its subcontractors, in accordance with the following conditions:

A. Contractor Cost and Expense. All insurance required by the Agreement shall be obtained at the sole cost and expense of Contractor.

B. Insurer Qualifications. All insurance required by the Agreement shall be maintained with insurance carriers licensed to do business in New York State, and acceptable to the Authority, with an A.M. Best rating of "A-" or better. The Authority may, at its sole discretion, accept policies of insurance written by a non-authorized carrier or carriers when certificates and/or other policy documentation are accompanied by a completed Excess Lines Association of New York (ELANY) Affidavit. Notwithstanding the foregoing, nothing herein shall be construed to require the Authority to accept insurance placed with a non-authorized carrier under any circumstances.

C. Primary Insurance. All insurance required by the Agreement shall be primary to any Authority insurance policy or Authority self-insurance program, which shall be excess and non-contributory.

D. Certificates and Endorsements. Contractor shall furnish the Authority with certificate(s) of insurance on ACORD Form 25, accompanied by the Authority Supplemental Insurance Certificate (Exhibit 2 – TA-W51343 (11/2017)), for each insurance carrier involved. Such certificate(s) shall be executed by a duly authorized representative of the insurance carrier, certifying such authorization and showing compliance with the Authority's insurance requirements set forth herein. Contractor shall furnish the Authority with a copy of each endorsement required herein. For work to be performed within New York State, proof of Workers' Compensation and Disability Benefits Insurance shall be indicated on the appropriate Workers' Compensation Board forms as listed in Section 6.6 F. below. Contractor shall submit all certificates in .PDF file format via e-mail to: InsuranceCompliance@Thruway.NY.GOV.

E. Notice of Cancellation, Nonrenewal or Material Alteration. All policies, by specific Endorsement, shall provide for written notice to the Authority no less than thirty (30) days prior to the cancellation, nonrenewal, or material alteration of any insurance policies referred to therein. Any such notice shall be sent by e-mail to: Insurancecompliance@thruway.ny.gov, attention Insurance Compliance Supervisor. Only in the event that such written notice cannot be delivered via e-mail, notice shall be sent to: Insurance Compliance Section, Office of Investments and Asset Management, New York State Thruway Authority, P.O. Box 189, Albany, New York 12201-0189.

F. Deductibles and Self-Insured Retentions. If insurance policies utilized for Authority projects contain deductibles or self-insured retentions (SIRs), they must be declared as such with applicable levels on the certificate(s) of Insurance and the Authority Supplemental Insurance Certificate. Insurance policies with Deductibles in excess of $100,000 will require review and approval by the Authority. Additional security or other requirements may be imposed at the sole discretion of the Authority. Any SIR will be subject to Section 6.5(G).

G. Authority Approval of Self-Insured Retentions. Insurance policies with Self-Insured Retentions (SIRs) must receive prior approval by the Authority. All applications for SIR approval must be submitted to the Authority's Office of Investments and Asset Management, indicate whether the program is administered by a third party, and contain a complete description of the program. SIR programs in excess of $100,000 must be administered by a third-party administrator and must also meet additional security requirements. The Authority, at its sole discretion, reserves the right to require Contractor to provide additional collateral, or to reject the use of an SIR by Contractor. Contractor will be solely responsible for all claims, expenses, and loss payments within the retention limit.

H. Copies of Insurance Documents. Contractor shall provide certified copies of all declarations, pages, or of the insurance policies themselves upon request by the Authority, and within twenty (20) days of such request.

I. No Waiver of Contractor's Insurance Obligations. Failure of the Authority to demand such certificates, policies, endorsements, or other evidence of full compliance with the Authority's insurance requirements, or failure of the Authority to identify a deficiency from evidence that is provided, shall not constitute or be construed as a waiver of Contractor's obligation to maintain such insurance.

J. Failure to Maintain or Provide Proof of Coverage. Failure to maintain the required insurance, and failure to provide proof of such coverage to the Authority at its request, may, in the Authority's sole discretion, result in termination of the Agreement, removal of any subcontractor, or in delay or stoppage of payments.

K. Evidence of Renewal or Replacement. At least two weeks prior to the expiration of any policy required by the Agreement, evidence of renewal or replacement policies of insurance with terms at least as favorable to the Authority as the required minimum amounts set forth in Section 6.6. must be submitted to the Authority by email to: Insurancecompliance@thruway.ny.gov, attention Insurance Compliance Supervisor. Only in the event that such certificates cannot be delivered via e-mail, notice shall be sent to: Insurance Compliance Section, Office of Investments and Asset Management, New York State Thruway Authority, P.O. Box 189, Albany, New York 12201-0189.

L. Adequacy of Required Insurance. By requiring insurance, the Authority does not represent that certain coverages and limits will necessarily be adequate to protect Contractor or its subcontractors, and such coverages and limits shall not be deemed a limitation on Contractor's liability under the indemnities granted to the Authority under any provision of the Agreement.

M. Waiver of Rights Against the State and Authority. Contractor shall, and shall require its subcontractors to, waive all rights against the State of New York, the Authority, and their respective agents, officers, directors, and employees, for recovery of damages to the extent these damages are covered by the Commercial General Liability ("CGL") policy, the Business Auto Policy or the Commercial Umbrella Liability policy, as required.

N. Authority Insurance Requirements. Contractor shall, and shall require its subcontractors to, provide a copy of the Authority's Insurance Requirements as set forth in Section 6.5 and Section 6.6 to its insurance producer(s) and insurance carrier(s).

O. Subcontractor Insurance. Contractor shall require that any approved subcontractors carry insurance with the same limits and provisions set forth herein.

Section 6.6 - Required Insurance Coverages

The specific types and amounts of insurance that Contractor must provide pursuant to the Agreement are set forth in this Section 6.6 as follows:

A. Commercial General Liability Insurance - Contractor shall maintain through a combination of Commercial General Liability (CGL) and Commercial Umbrella Liability insurance (see Section 6.6(B)), with no less than the following limits and coverages:

Agreement Value:	Occurrence	General Aggregate
Under $10 Million	$2,000,000	$2,000,000
$10 Million - $25 Million	$5,000,000	$5,000,000

$25 Million - $50 Million	$10,000,000	$10,000,000
Over $50 Million	$25,000,000	$25,000,000

- Products/Completed Operations Aggregate: (Equal to General Aggregate)
- Personal/Advertising Injury Liability: $1,000,000
- Fire Damage Legal Liability: $ 100,000
- Medical Expense: $ 5,000

CGL Insurance shall cover liability arising from premises, operations, independent contractors, products/completed operations, personal injury, advertising injury, and contractual liability. The Authority and the State of New York shall be listed as primary and non-contributory additional insureds on the CGL, and as applicable, on the Business Automobile, and pollution liability policies required under Section 6.6(A), Section 6.6(B), and Section 6.6(D).

B. Commercial Umbrella Liability Insurance - When the limits of the CGL and business automobile liability policies procured are insufficient to meet the limits specified in Section 6.6(A) and Section 6.6(D), Contractor shall procure and maintain commercial umbrella liability insurance and/or excess liability policies with limits in excess of the primary; provided, however that the total amount of insurance coverage is at least equal to the requirements set forth in Section 6.6(A) and Section 6.6(D). Such policies shall be issued on a "follow form" basis of the primary policies.

The Authority and the State of New York shall be included as additional insureds, using ISO Additional Insured Endorsement CG 20 10 04 13 and CG20 37 04 13 or an equivalent, under the CGL and Commercial Umbrella Liability policies, as required.

As noted above, all insurance required by the Agreement shall be primary to any Authority insurance policy or Authority self-insurance program, which shall be excess and non-contributory.

C. Professional Liability or Errors and Omissions Insurance – With regard to the furnishing of any professional services in connection with the Agreement, Contractor shall procure and maintain professional liability or errors and omissions insurance to cover claims, damages, and losses that occur as a result of errors, omissions, malpractice, or breach of professional obligations by Contractor's or its subcontractor's furnishing of or failure to furnish such professional services; and such coverage shall be maintained with no less than the following limits:

Agreement Value:	Limit:
Less than $25 Million	$2,000,000
$25 Million or greater	$5,000,000

The professional liability insurance may be issued on a claims-made policy form provided that, at minimum, Contractor, shall purchase at its sole expense, coverage that provides for (a) reporting circumstances or incidents that may give rise to future claims and (b) tail coverage with an extended reporting period of no less than three (3) years after work is completed to cover events that occurred but were not reported during the term of the policy. If applicable, such professional liability or errors and omissions insurance shall cover any negligent act, error or omission in rendering or failing to render professional services required by the Agreement or in fulfillment of the Agreement arising out of specifications, installation, modification, abatement, replacement or approval of products, materials or processes containing pollutants, and the failure to advise of or detect the existence or

the proportions of pollutants. Such insurance shall apply to professional acts, errors or omissions arising out of the scope of services covered by the Agreement.

D. Business Auto Liability Insurance - In order to cover any liability arising out of Contractor's use of any motor vehicle, whether owned, leased, hired, or non-owned, Contractor shall maintain Business Automobile Liability coverage, with no less than a $1,000,000 combined single limit.

If the Agreement involves the removal of hazardous waste or environmental exposures, pollution liability coverage equivalent to that provided under the ISO Broadened Pollution Liability Coverage for Covered Autos endorsement (CA 9948) shall be provided, and the Motor Carrier Act endorsement (MCS 90) shall be attached.

E. Privacy and Network Security (Cyber Liability) Insurance - the User shall maintain Privacy and Network (Cyber Liability) insurance covering liability arising from (1) hostile action, or a threat of hostile action, with the intent to affect, alter, copy, corrupt, destroy, disrupt, damage, or provide unauthorized access/unauthorized use of a computer system including exposing or publicizing confidential electronic data or causing electronic data to be inaccessible (2) computer viruses, Trojan horses, disabling codes, trap doors, back doors, time bombs drop-dead devices, worms and any other type of malicious or damaging code (3) dishonest, fraudulent, malicious, or criminal use of a computer system by a person, whether identified or not, and whether acting alone or in collusion with other persons, to affect, alter, copy, corrupt, delete, disrupt, or destroy a computer system or obtain financial benefit for any party or to steal or take electronic data (4) denial of service for which the Insured is responsible that results in the degradation of or loss of access to internet or network activities or normal use of a computer system (5) loss of service for which the Insured is responsible that results in the inability of a third party, who is authorized to do so, to gain access to a computer system and conduct normal internet or network activities (6) access to a computer system or computer system resources by an unauthorized person or persons or an authorized person in an unauthorized manner with a limit not less than one million dollars ($1,000,000) per occurrence. This insurance shall provide coverage for personal injury (including emotional distress and mental anguish), and a separate limit of not less than $1,000,000 for credit monitoring services.

F. Workers' Compensation & NYS Disability Benefits Insurance - The Agreement shall be void and of no force and effect unless Contractor shall provide and maintain coverage during the term of the Agreement for the benefit of such employees as are required to be covered by the New York State Workers' Compensation/Disability Benefits Law. If the Agreement involves work on or near a shoreline, a U.S. Longshore and Harborworkers' Compensation Act Endorsement must be provided. The Maritime Coverage Endorsement, on an "if any" basis, shall be attached to the policy. Contractor must provide proof of exemption, certified by the Workers' Compensation Board, to obtain a waiver from the requirements of this provision.

Evidence of Workers' Compensation coverage must be provided on one of the following forms specified by the Commissioner of the Workers' Compensation Board:

1. C-105.2 – Certificate of Workers' Compensation Insurance;
2. U-26.3 – Certificate of Workers' Compensation Insurance from the State Insurance Fund;
3. GSI-105/SI-12 – Certificate of Workers' Compensation Self Insurance; or
4. CE-200 – Certificate of Attestation of Exemption.

Evidence of Disability Benefits coverage must be provided on one of the following forms specified by the Commissioner of the Workers' Compensation Board:

1. DB-120.1 – Certificate of Insurance Coverage under the NYS Disability Benefits Law;

2. DB-155 – Certificate of Disability Self Insurance; or

3. CE-200 – Certificate of Attestation of Exemption.

Disability benefits coverage must also include a rider providing Paid Family Leave insurance in form and substance satisfactory to the Authority. Evidence of coverage shall be provided to the Authority and may be in the form of a Notice of Compliance provided by your insurance carrier stating that you have Paid Family Leave insurance. The Notice will include information about your carrier. If you are self-insured, you can get this notice by contacting the NYS Workers' Compensation Board at certificates@wcb.ny.gov.

Section 6.7 – Liability, Indemnification and Defense

A. Liability

Contractor shall be responsible for the acts and omissions of its agents, employees, and subcontractors, and any other persons furnishing products and services on its behalf under the Agreement.

B. Indemnification and Defense

(1) To the fullest extent permitted by law, Contractor shall indemnify and save harmless, without limitation, the Authority and the State of New York (the "State"), and their respective officers, directors, board members, agents, employees, successors, and assigns ("Authority Indemnitees" and "State Indemnitees," respectively**,** and, collectively, "Collective Indemnitees") as their interests may appear, from any and all claims, suits, actions, damages, liabilities, fines, forfeitures, demands, losses, judgments, and costs of every kind and nature, and every name and description, arising from the products and services provided, or to be provided, under the Agreement ("Claims"). Such defense and indemnity shall not be limited to the insurance coverage herein prescribed.

(2) Contractor shall, at its own expense, defend the Authority Indemnitees, the State Indemnitees, or the Collective Indemnitees in any action or proceeding involving any Claims that may be brought against the Authority Indemnitees, the State Indemnitees, or the Collective Indemnitees. This obligation to defend shall include all attorneys' fees, disbursements, costs, and any other expenses incurred in connection with such Claims. The Authority shall give Contractor: (a) prompt written notice of any action, claim, or suit for which Contractor is required to defend and indemnify the Authority; (b) the opportunity to take over, settle, or defend such action, claim, or suit at Contractor's sole expense; and (c) assistance in the defense of any such action, claim, or suit at the expense of Contractor. Notwithstanding the foregoing, if Contractor defends the Authority Indemnitees, the State Indemnitees or the Collective Indemnitees, the Authority and the State each reserve their respective right to join and/or participate in such action at their own expense.

(3) The Authority may retain and set-off from any amount due to Contractor such monies as may be necessary to satisfy any Claim recovered against the Authority Indemnitees or the Collective Indemnitees. Neither Contractor's obligations nor the Authority's rights under this Section 6.7 shall be deemed waived by the Authority's failure to retain the whole or part of any monies due Contractor, or by the failure to resolve any such Claims, prior to the release of such monies. Further, neither Contractor's obligations under this Section 6.7 nor the

rights of the Authority Indemnitees or the State Indemnitees shall be limited or discharged by the enumeration in the Agreement, or procurement, of any insurance in any amount.

(4) Contractor's indemnification and defense obligations under this Section 6.7 shall include any and all Claims that may arise from any products and services provided, or to be provided, under the Agreement by Contractor's agents, employees, and subcontractors, and by any other party furnishing products and services under the Agreement.

C. Survival

The provisions of this Section 6.7 shall survive the expiration or termination of the Agreement.

Section 6.8 – Ethics

Contractor and subcontractors may hire former State agency or Authority employees. However, as a general rule and in accordance with New York Public Officers Law, former employees of the Authority may neither appear nor practice before the Authority, nor receive compensation for services rendered on a matter before the Authority, for a period of two years following their separation from Authority service. In addition, former Authority employees are subject to a "lifetime bar" from appearing before the Authority or receiving compensation for services regarding any transaction in which they personally participated, or which was under their active consideration during their tenure with the Authority.

During the term of the Agreement, Contractor and its subcontractors shall not engage any person who is, or has been at any time, in the employ of the Authority or New York State to perform services under the Agreement in violation of: the provisions of the Public Officers Law ("POL"); the rules, regulations, opinions, guidelines, or policies promulgated or issued by the New York State Commission on Ethics and Lobbying in Government or its predecessors ("COELIG Regulations"); and any other laws applicable to the service of current or former Authority or New York State employees ("Other Laws," and, together with POL and COELIG Regulations, collectively, the "Ethics Provisions"). Contractor certifies that all of its employees and employees of any subcontractor who are former employees of the Authority or New York State and who are assigned to perform services under the Agreement shall be assigned in accordance with all Ethics Provisions. Further, during the term of the Agreement, no person who is employed by Contractor or is subcontractors and who is disqualified from providing services under the Agreement pursuant to any Ethics Provisions may share in any net revenues Contractor or its subcontractors derives from the Agreement.

Contractor shall identify and provide the Authority with notice of those employees of Contractor or its subcontractors who are former employees of the Authority or New York State and who will be assigned to perform services under the Agreement and shall ensure that such employees comply with all applicable laws and prohibitions. The Authority may, request that Contractor provide it with whatever information the Authority deems appropriate about each such person's engagement, work cooperatively with the Authority to solicit advice from the New York State Commission on Ethics and Lobbying in Government, and, if deemed appropriate by the Authority, instruct any such person to seek the opinion of the Commission on Ethics and Lobbying in Government. The Authority shall have the right to withdraw or withhold approval of any subcontractor if utilizing such Subcontractor for any work performed hereunder would be in conflict with any of the Ethics Requirements. The Authority shall have the right to cancel or terminate the Agreement at any time if any work performed under the Agreement is in conflict with any Ethics Provisions.

Section 6.9 – Confidentiality and Non-Disclosure

A. "Confidential Information" means any information not generally known to the public, or that the Authority claims is confidential, whether oral, written, or electronic, that the Authority discloses, directly or indirectly, through any means of communication, to Contractor. Confidential Information includes, but is not limited to, operational and infrastructure information relating to:

bid documents, plans, drawings, specifications, reports, product information and data; business and security processes and procedures; personnel and organizational data; financial statements; information system IP addresses, passwords, security controls, architectures and designs; and such other data, information and images that the Authority deems confidential.

B. Confidential Information does not include information which, at the time of the Authority's disclosure to Contractor: (1) is already in the public domain or becomes publicly known through no act of Contractor; or (2) is already known by Contractor free of any confidentiality obligations.

   If Contractor wants to disclose Confidential Information, it shall notify the Authority and specify the Confidential Information it wants to disclose. Contractor may only disclose such Confidential Information if the Authority approves such disclosure in writing, subject to such other terms and conditions as the Authority may require. Such approval, if given, shall only apply to the particular request and the specific Confidential Information for which it is given.

   If Contractor is required to disclose or make available, directly or indirectly, Confidential Information pursuant to statute, court or administrative order, subpoena, contractual obligation, or otherwise by law, Contractor shall: (1) notify the Authority that it has received such legal demand as soon as practicable, but in all events prior to any disclosure; (2) permit the Authority to take the steps it deems necessary and appropriate to protect the Confidential Information from disclosure; (3) cooperate to the fullest extent possible under the law with the Authority's efforts to protect the Confidential Information from disclosure; and (4) disclose only such Confidential Information, and only such portions thereof, as is required to satisfy the legal demand, and limit any such disclosure of Confidential Information to the fullest extent permissible under the law.

C. Contractor may use Confidential Information solely for the purposes of providing services to the Authority pursuant to the Agreement. Contractor may make copies of Confidential Information but only to the extent necessary for the disclosures and uses permitted by the Agreement. Contractor will make commercially reasonable efforts to ensure that any copy of Confidential Information that is made is marked to show that it is or contains Confidential Information. Contractor may share Confidential Information with third parties: (i) that are required for Contractor's provision of services to the Authority pursuant to the Agreement (e.g., consultants and subcontractors); and (ii) that agree in writing to be bound by the confidentiality provisions of the Agreement; however, Contractor may share only that Confidential Information that is necessary to the third party's contribution to Contractor's provision of services to the Authority pursuant to the Agreement and Contractor must first obtain the Authority's prior written consent.

   The Authority's disclosure of Confidential Information to Contractor shall not convey to Contractor any right, title, or interest in or to such Confidential Information, and the Agreement does not transfer ownership of Confidential Information or grant a license thereto. The Authority shall retain all right, title, and interest in and to all such Confidential Information at all times.

D. Contractor shall hold Confidential Information confidential to the maximum extent permitted by law. Contractor shall safeguard Confidential Information with at least the same level of care and security that Contractor uses to maintain and protect from disclosure its own confidential information, using all reasonable and necessary security measures, devices, and procedures that Contractor uses to maintain its own confidential information, but in all events with not less than reasonable care.

   Contractor shall take all reasonable steps to prevent unauthorized access to, use of, or disclosure of Confidential Information, including without limitation, by protecting its passwords and other log-in information. Contractor shall notify the Authority immediately of any known or

suspected misuse or misappropriation of Confidential Information and shall use its best efforts to stop said misuse or misappropriation.

E. Upon written request of the Authority, or upon expiration or termination of the Agreement, Contractor shall return all Confidential Information to the Authority or certify in writing that it has been destroyed and no copies exist.

F. Contractor agrees that breach of this Section 6.9 would cause the Authority irreparable injury, for which monetary damages would not provide adequate compensation, and that in addition to any other remedy, the Authority will be entitled to injunctive relief against such breach or threatened breach, without proving actual damages or posting a bond or other security.

G. Without limiting the foregoing, the obligations and assurances involving Confidential Information pursuant to the Agreement shall survive termination or expiration of the Agreement.

Section 6.10 – New York State Finance Law §§ 139-j and 139-k Certification

By execution of the Agreement, Contractor will certify that all information Contractor has provided to the Authority with respect to New York State Finance Law §§ 139-j and 139-k is complete, true and accurate.

Section 6.11 – New York State Finance Law §139-1

By submission of this proposal, each Contractor and each person signing on behalf of any Contractor certifies, and in the case of a joint proposal each party thereto certifies as to its own organization, under penalty of perjury, that Contractor has and has implemented a written policy addressing sexual harassment prevention in the workplace and provides annual sexual harassment prevention training to all of its employees. Such policy shall, at a minimum, meet the requirements of section two hundred one-g of the labor law.

Section 6.12 – New York State Human Rights Law, Article 15 of the Executive Law

The New York State Human Rights Law, Article 15 of the Executive Law, prohibits discrimination and harassment based on age, race, creed, color, national origin, sex, pregnancy or pregnancy-related conditions, sexual orientation, gender identity, disability, marital status, familial status, domestic violence victim status, prior arrest or conviction record, military status or predisposing genetic characteristics.

The Human Rights Law may also require reasonable accommodation for persons with disabilities and pregnancy-related conditions. A reasonable accommodation is an adjustment to a job or work environment that enables a person with a disability to perform the essential functions of a job in a reasonable manner. The Human Rights Law may also require reasonable accommodation in employment on the basis of Sabbath observance or religious practices.

Generally, the Human Rights Law applies to:

- all employers of four or more people, employment agencies, labor organizations and apprenticeship training programs in all instances of discrimination or harassment;
- employers with fewer than four employees in all cases involving sexual harassment; and,
- any employer of domestic workers in cases involving sexual harassment or harassment based on gender, race, religion or national origin.

In accordance with Executive Order No. 177, the Contractor, by signing the Agreement, will certify that it does not have institutional policies or practices that fail to address the harassment and discrimination of

individuals on the basis of their age, race, creed, color, national origin, sex, sexual orientation, gender identity, disability, marital status, military status, or other protected status under the Human Rights Law.

Executive Order No. 177 and the aforementioned certification do not affect institutional policies or practices that are protected by existing law, including but not limited to the First Amendment of the United States Constitution, Article 1, Section 3 of the New York State Constitution, and Section 296(11) of the New York State Human Rights Law.

Section 6.13 – Conflicts of Interest

A. Contractor has provided a form (Vendor Assurance of No Conflict of Interest or Detrimental Effect), signed by an authorized executive or legal representative attesting that Contractor's performance of the services does not and will not create a conflict of interest with, nor position Contractor to breach any other contract currently in force with the State of New York, that Contractor will not act in any manner that is detrimental to any Authority project for which Contractor is rendering services.

B. Contractor hereby reaffirms the attestations made in its proposal and covenants and represents that there is and shall be no actual or potential conflict of interest that could prevent Contractor's satisfactory or ethical performance of duties required to be performed pursuant to the terms of this Agreement. Contractor shall have a continuing affirmative duty to notify the Authority immediately of any actual or potential conflicts of interest.

C. In conjunction with any subcontract under this Agreement, Contractor shall obtain and deliver to the Authority, prior to entering into a subcontract, a Vendor Assurance of No Conflict of Interest or Detrimental Effect form, signed by an authorized executive or legal representative of the subcontractor. Contractor shall also require in any subcontracting agreement that the subcontractor, in conjunction with any further subcontracting agreement, obtain and deliver to the Authority a signed and completed Vendor Assurance of No Conflict of Interest or Detrimental Effect form for each of its subcontractors prior to entering into a subcontract.

D. The Authority and Contractor recognize that conflicts may occur in the future because Contractor may have existing, or establish new, relationships. The Authority will review the nature of any relationships and reserves the right to terminate this Agreement for any reason, or for cause, if, in the judgment of the Authority, a real or potential conflict of interest cannot be cured.

Section 6.14 – Suspension, Abandonment and Termination

The Authority shall have the right, in its sole discretion, to postpone, suspend, abandon, or terminate the Agreement at any time and for any reason, and such action shall in no event be deemed a breach of contract. This includes the Authority's right to terminate the Agreement in the event the Authority finds that the certification made by Contractor in accordance with New York State Finance Law §§ 139-j and 139-k was intentionally false or intentionally incomplete. This also includes the Authority's right to terminate the Agreement at any time in the event the Authority finds that Contractor is non-responsible or has failed to accurately disclose vendor responsibility information. If the Authority exercises its right to terminate on account of a breach of the Agreement, the Authority may complete the contractual requirements in any manner it deems advisable and pursue available legal or equitable remedies for breach.

In the event the Authority exercises its right to postpone, suspend, abandon, or terminate the Agreement, Contractor must within ten (10) days of such postponement, suspension, abandonment, or termination deliver to the Authority all records, documents, and data pertaining to services rendered under the Agreement.

In the event the Authority exercises its right to postpone, suspend, abandon, or terminate the Agreement for convenience, due to no fault of Contractor, the Authority will fix the value of the work performed as of such postponement, suspension, abandonment, or cancellation date, as verified by audit, and compensate Contractor accordingly.

Section 6.15 – General Responsibility Provisions

Contractor shall at all times during the term of the Agreement remain responsible. Contractor agrees if requested by the Authority to present evidence of its/his/her continuing legal authority to do business in New York State and integrity, experience, ability, prior performance, and organizational and financial capacity.

Section 6.16 – Force Majeure

The Contractor and the Authority shall each be excused from the performance of their respective obligations hereunder to the extent each party's failure to perform such obligations is the result of acts of God, riots, insurrections, war, fire, casualty, earthquake, or other events that are beyond the reasonable control of the party seeking to be excused and that are not the fault of such party, including, but not limited to, the failure to exercise reasonable diligence. Further: (i) the party seeking to excuse performance must make good faith and reasonable efforts to meet its obligations hereunder; and (ii) only those services affected by the Force Majeure event shall be excused and only during such time that the Force Majeure event prevents those services from being performed. Notwithstanding anything to the contrary contained herein, and, for clarity, the Authority shall not be obligated to pay the Contractor for a service affected by Force Majeure so long as the Contractor is unable to deliver the affected service. If the Authority has paid in advance for such service, the Contractor shall promptly refund the Authority the amount attributable to service. The occurrence of a pandemic shall not relieve Contractor from its obligations under the Agreement.

Section 6.17 – intentionally omitted

Section 6.18 – Standard Contract Clauses, Appendices, Exhibits and Supplements

The Appendices listed below and attached hereto will be incorporated into and made a part of the Agreement**.** Contractor must complete and submit Exhibit 2 Authority Supplemental Insurance Certificate to the Authority prior to commencement of work under the Agreement. Proposer must complete and submit Supplements 1, 2, 3, 4, and 5 and Attachment 1 with its proposal.

Appendix A	Standard Clauses
Appendix B	Inventions Policy
Appendix D	Network Connection Requirements (TAP-372)
Exhibit 1	Thruway Authority Guidelines Regarding Permissible Contacts During a Procurement and the Prohibition of Inappropriate Lobbying Influence
Exhibit 2	Authority Supplemental Insurance Certificate (TA-W51343)
Exhibit 3	49 CFR Part 382 – Controlled Substances and Alcohol Use and Testing
Exhibit 4	49 CFR Part 40 – Procedures for Transportation Workplace Drug and Alcohol Testing Programs

Exhibit 5	Title V – Omnibus Transportation Employee Testing Act
Exhibit 6	Authority's Alcohol and Drug Abuse in the Workplace policy
Exhibit 7	33 CFR Part 95 – Operating a Vessel While Under the Influence of Alcohol or a Dangerous Drug
Exhibit 8	46 CFR Part 4 – Marine Casualties and Investigations
Exhibit 9	46 CFR Part 5 – Marine Investigation Regulations – Personnel Action
Exhibit 10	46 CFR Part 16 – Chemical Testing
Exhibit 11	List of Abbreviations used in the RFP
Exhibit 12	Listing of Authority Worksites
Exhibit 13	Federal Register / Vol. 81, No. 233, Commercial Driver's License Drug and Alcohol Clearinghouse
Exhibit 14	New York State Certified Minority/Women/Service-Disabled Veteran-Owned Business Enterprises Goal Requirements And Procedures For Participation
Supplement 1	New York State Finance Law §§ 139-j and 139-k Disclosure of Prior Non-Responsibility Determinations
Supplement 2	Certificate of Compliance with the Authority Guidelines Regarding Permissible Contacts During a Procurement and the Prohibition of Inappropriate Lobbying Influence
Supplement 3	Vendor Assurance of No Conflict of Interest or Detrimental Effect
Supplement 4	Conducting Business in Russia Certification
Supplement 5	ST-220-CA New York State Department of Taxation and Finance Contractor Certification
Attachment 1	Cost Calculation Sheet

APPENDIX A

Standard Clauses

APPENDIX A

Standard Clauses For New York State Thruway Authority Contracts

The parties to the attached contract, license, lease, amendment or other agreement of any kind ("the contract" or "this contract") agree to be bound by the following clauses which are hereby made a part of the contract (the word "Contractor" herein refers to any party and its agents, successors and assigns, other than the Thruway Authority ("Authority"), whether a contractor, licensor, licensee, lessor, lessee or any other party):

1. **NON-ASSIGNMENT CLAUSE**. This contract may not be assigned by the Contractor nor may its right, title or interest therein be assigned, transferred, conveyed, subcontracted, sublet or otherwise disposed of without the previous consent, in writing, of the Authority and any attempts to assign the contract without the Authority's written consent are null and void.

2. **COMPTROLLER APPROVAL**. Where required by law, this contract may require approval of the State Comptroller and shall not be valid until it has been approved by the State Comptroller and filed in its office.

3. **WORKERS' COMPENSATION AND DISABILITY BENEFITS**. This contract shall be void and of no force and effect unless the Contractor shall provide and maintain coverage during the life of this contract for the benefit of such employees as are required to be covered by the provisions of the State Workers' Compensation Law. If employees will be working on, near or over navigable waters, a U.S. Longshore and Harbor Workers' Compensation Act endorsement must be included.

4. **NON-DISCRIMINATION REQUIREMENTS**. To the extent required by Article 15 of the State Executive Law (also known as the Human Rights Law) and all other State and Federal statutory and constitutional non-discrimination provisions, the Contractor will not discriminate against any employee or applicant for employment because of race, creed, color, sex (including gender identity or expression), national origin, sexual orientation, military status, age, disability, predisposing genetic characteristics, marital status or domestic violence victim status or because the individual has opposed any practices forbidden under the Human Rights Law or has filed a complaint, testified, or assisted in any proceeding under the Human Rights Law. Furthermore, in accordance with State Labor Law §220-e, if this is a contract for the construction, alteration or repair of any public building or public work or for the manufacture, sale or distribution of materials, equipment or supplies, and to the extent that this contract shall be performed within the State of New York, Contractor agrees that neither it nor its subcontractors shall by reason of race, creed, color, disability, sex or national origin: (a) discriminate in hiring against any New York State citizen who is qualified and available to perform the work; or (b) discriminate against or intimidate any employee hired for the performance of work under this contract. If this is a building service contract as defined in State Labor Law §230, then, in accordance with §239 thereof, the Contractor agrees that neither it nor its subcontractors shall, by reason of race, creed, color, national origin, age, sex or disability: (a) discriminate in hiring against any New York State citizen who is qualified and available to perform the work; or (b) discriminate against or intimidate any employee hired for the performance of work under this contract. The Contractor is subject to fines of $50 per person per day for any violation of State Labor Law §§220-e or 239 as well as possible termination of this contract and forfeiture of all moneys due hereunder for a second or subsequent violation.

5. **WAGE AND HOURS PROVISIONS**. If this is a public work contract covered by Article 8 of the State Labor Law or a building service contract covered by Article 9 thereof, neither the Contractor's employees nor the employees of its subcontractors may be required or permitted to work more than the number of hours or days stated in said statutes, except as otherwise provided in the State Labor Law and as set forth in prevailing wage and supplement schedules issued by the State Labor Department. Furthermore, the Contractor and its subcontractors must pay at least the prevailing wage rate and pay or provide the prevailing supplements, including the premium rates for overtime pay, as determined by the State Labor Department in accordance with the State Labor Law. Additionally, effective April 28, 2008, if this is a public work contract covered by Article 8 of the New York State Labor Law, the Contractor understands and agrees that the filing of payrolls in a manner consistent with subdivision 3-a of §220 of the New York State Labor Law shall be a condition precedent to payment by the Authority of any Authority approved sums due and owing for work done on the project.

6. **NON-COLLUSIVE BIDDING CERTIFICATION**. In accordance with State Public Authorities Law §2878, if this contract was awarded based upon the submission of bids, the Contractor warrants, under penalty of perjury, that its bid was arrived at independently and without collusion aimed at restricting competition. The Contractor further warrants that, at the time the Contractor submitted its bid, an authorized and responsible person executed and delivered to the Authority a non-collusive bidding certification on the Contractor's behalf.

7. **INTERNATIONAL BOYCOTT PROHIBITION**. In accordance with State Labor Law §220-f, if this contract exceeds $5,000, the Contractor agrees, as a material condition of this contract, that neither the Contractor nor any substantially owned or affiliated person, firm, partnership, or corporation has participated, is participating, or shall

participate in an international boycott in violation of the Federal Export Administration Act of 1979 (50 USC App. §§2401 et seq.) or regulations thereunder. If such Contractor, or any of the aforesaid affiliates of the Contractor, is convicted or is otherwise found to have violated said laws or regulations upon the final determination of the United States Commerce Department or any other appropriate agency of the United States subsequent to the contract's execution, such contract, amendment or modification thereto shall be rendered forfeit and void. The Contractor shall so notify the Authority within five (5) business days of such conviction, determination or disposition of appeal.

8. **SET-OFF RIGHTS**. The Authority shall have rights of set-off. These rights shall include, but not be limited to, the Authority's option to withhold for the purposes of set-off any moneys due to the Contractor under this contract up to any amounts due and owing by the Contractor to the Authority with regard to this contract, or any other contract with the Authority, including any contract for a term commencing prior to the term of this contract, plus any amounts due and owing to the Authority for any other reason including, without limitation, monetary penalties, adjustments, fees, or claims for damages by the Authority and third parties in connection therewith.

9. **RECORDS**. The Contractor shall establish and maintain complete and accurate books, records, documents, accounts and other evidence directly pertinent to performance under this contract (collectively, "Records") for a period of six (6) years (or any other longer period required by law) following final payment or the termination of this contract, whichever is later, and any extensions thereto. The Authority, State Comptroller, State Attorney General and any other person or entity authorized to conduct an examination shall have access to the Records during normal business hours at an office of the Contractor within New York State, or, if no such office is available, at a mutually agreeable and reasonable venue within the State, during the contract term, any extensions thereof and said six (6) year period thereafter, for purposes of inspection, auditing and copying. As used in this clause, "termination of this contract" shall mean the later of completion of the work of the contract or the end date of the term stated in the contract. The Authority will take reasonable steps to protect from public disclosure those Records which are exempt from disclosure under State Public Officers Law §87 ("Statute") provided that: (i) the Contractor shall timely inform an appropriate Authority official, in writing, that said records should not be disclosed; (ii) said records shall be sufficiently identified; and (iii) designation of said records as exempt under the Statute is reasonable. Nothing contained herein shall diminish, or in any way adversely affect, the Authority's right to discovery in any pending or future litigation.

10. **IDENTIFYING INFORMATION AND PRIVACY NOTIFICATION**. All invoices or New York State standard vouchers submitted for payment for the sale of goods or services or the lease of real or personal property to the Authority must include the payee's identification number, i.e., the seller's or lessor's identification number. The number is either the payee's Federal employer identification number or Federal social security number, or both such numbers when the payee has both such numbers. Failure to include this number or numbers may delay payment. Where the payee does not have such number or numbers, the payee, on its invoice or New York State standard voucher, must give the reason or reasons why the payee does not have such number or numbers.

The authority to request the above personal information from a seller of goods or services or a lessor of real or personal property, and the authority to maintain such information, is found in State Tax Law §5. Disclosure of this information by the seller or lessor to the Authority is mandatory. The principal purpose for which the information is collected is to enable the State to identify individuals, businesses and others who have been delinquent in filing tax returns or may have understated their tax liabilities and to generally identify persons affected by the taxes administered by the State Commissioner of Taxation and Finance. The information will be used for tax administration purposes and for any other purpose authorized by law.

The above personal information is maintained at the New York State Thruway Authority, Department of Finance and Accounts, P.O. Box 189, Albany, New York 12201.

11. **EQUAL EMPLOYMENT OPPORTUNITIES FOR MINORITIES AND WOMEN**. In accordance with State Executive Law §312, if this contract is: (i) a written agreement or purchase order instrument, providing for a total expenditure in excess of $25,000, whereby the Authority is committed to expend or does expend funds in return for labor, services, supplies, equipment, materials or any combination of the foregoing, to be performed for, or rendered or furnished to the Authority; or (ii) a written agreement in excess of $100,000 whereby the Authority is committed to expend or does expend funds for the acquisition, construction, demolition, replacement, major repair or renovation of real property and improvements thereon; or (iii) a written agreement in excess of $100,000 whereby the owner of a State assisted housing project is committed to expend or does expend funds for the acquisition, construction, demolition, replacement, or major repair or renovation of real property and improvements thereon for such project, then the following shall apply and by signing this contract the Contractor certifies and affirms that it is Contractor's equal employment opportunity policy that:

(a) The Contractor will not discriminate against employees or applicants for employment because of race, creed, color, national origin, sex, age, disability, or marital status, and shall make and document its conscientious and active efforts to employ and utilize minority group members and women in its work force on Authority contracts and will undertake or continue existing programs of affirmative action to ensure that minority group members and women are afforded equal

employment opportunities without discrimination. As used in this clause, "affirmative action" shall mean recruitment, employment, job assignment, promotion, upgrading, demotion, transfer, lay-off or termination, and rates of pay or other forms of compensation.

(b) At the request of the Authority, the Contractor shall request each employment agency, labor union, or authorized representative of workers with which it has a collective bargaining or other agreement or understanding, to furnish a written statement that such employment agency, labor union or representative will not discriminate on the basis of race, creed, color, national origin, sex, age, disability or marital status, and that such union or representative will affirmatively cooperate in the implementation of the Contractor's obligations herein.

(c) The Contractor shall state, in all solicitations or advertisements for employees, that in the performance of this contract all qualified applicants will be afforded equal employment opportunities without discrimination because of race, creed, color, national origin, sex, age, disability or marital status.

The Contractor shall include the provisions of (a), (b) and (c) above in every subcontract over $25,000 for the construction, demolition, replacement, major repair, renovation, planning or design of real property and improvements thereon except where such work is for the beneficial use of the Contractor. Section 312 does not apply to: (i) work, goods or services unrelated to this contract; or (ii) employment outside New York State. The Authority will consider compliance by a Contractor or its subcontractor with the requirements of any Federal law concerning equal employment opportunity which effectuates the purpose of this section. The Authority shall determine whether the imposition of the requirements of the provisions hereof duplicate or conflict with any such Federal law, and if such duplication or conflict exists, the Authority may waive the applicability of §312 of the Executive Law to the extent of such duplication or conflict. The Contractor shall comply with all duly promulgated and lawful rules and regulations of the Department of Economic Development's Division of Minority and Women's Business Development pertaining thereto.

12. **CONFLICTING TERMS**. In the event of a conflict between the terms of the contract (including any and all attachments thereto and amendments thereof) and the terms of this Appendix A, the terms of this Appendix A shall control.

13. **GOVERNING LAW**. This contract shall be governed by the laws of the State of New York except where the Federal supremacy clause requires otherwise.

14. **LATE PAYMENT**. Timeliness of payment and any interest to be paid to the Contractor for late payment shall be governed by State Public Authorities Law §2880 and 21 NYCRR Part 109.

15. **NO ARBITRATION**. Disputes involving this contract, including the breach or alleged breach thereof, may not be submitted to binding arbitration (except where statutorily authorized) but must, instead, be heard in a court of competent jurisdiction of the State of New York.

16. **SERVICE OF PROCESS**. In addition to the methods of service allowed by the State Civil Practice Law & Rules, the Contractor hereby consents to service of process upon it by registered or certified mail, return receipt requested. Service hereunder shall be complete upon the Contractor's actual receipt of process or upon the Authority's receipt of the return thereof by the United States Postal Service as refused or undeliverable. The Contractor must promptly notify the Authority, in writing, of each and every change of address to which service of process can be made. Service by the Authority to the last known address shall be sufficient. The Contractor will have thirty (30) calendar days after service hereunder is complete in which to respond.

17. **PROHIBITION ON PURCHASE OF TROPICAL HARDWOODS**. The Contractor certifies and warrants that all wood products to be used under this contract will be in accordance with, but not limited to, the specifications and provisions of State Finance Law §165 (Use of Tropical Hardwoods) which prohibits purchase and use of tropical hardwoods, unless specifically exempted, by the State or any governmental agency or political subdivision or public benefit corporation. Qualification for an exemption under this law will be the responsibility of the Contractor to establish to meet with the approval of the Authority.

In addition, when any portion of this contract involving the use of woods, whether supply or installation, is to be performed by any subcontractor, the prime Contractor will indicate and certify in the submitted bid proposal that the subcontractor has been informed and is in compliance with specifications and provisions regarding use of tropical hardwoods as detailed in State Finance Law §165. Any such use must meet with the approval of the Authority; otherwise, the bid may not be considered responsive. Under bidder certifications, proof of qualification for exemption will be the responsibility of the Contractor to meet with the approval of the Authority.

18. **MACBRIDE FAIR EMPLOYMENT PRINCIPLES**. In accordance with the MacBride Fair Employment Principles (Chapter 807 of the Laws of 1992), the Contractor hereby stipulates that the Contractor either (a) has no business operations in Northern Ireland, or (b) shall take lawful steps in good faith to conduct any business operations in Northern Ireland in accordance with the MacBride Fair Employment Principles (as described in State Finance Law §165), and shall permit independent monitoring of compliance with such principles.

19. **OMNIBUS PROCUREMENT ACT OF 1992**. It is the policy of New York State to maximize opportunities for the

participation of New York State business enterprises, including minority and women-owned business enterprises as bidders, subcontractors and suppliers on its procurement contracts.

Information on the availability of New York State subcontractors and suppliers is available from:

NYS Department of Economic Development
Division for Small Business
30 South Pearl Street – 7th Floor
Albany, NY 12245
Phone: (518) 292-5220
Fax: (518) 292-5884
http://www.esd.ny.gov

A directory of certified minority and women-owned business enterprises is available from:

NYS Department of Economic Development Minority and Women's Business Development Division
30 South Pearl Street – 2nd Floor
Albany, NY 12245
Phone: (518) 292-5250
Fax: (518) 292-5803
http://www.esd.ny.gov

The Omnibus Procurement Act of 1992 requires that by signing this bid proposal or contract, as applicable, the Contractor certifies that whenever the total bid amount is greater than $1 million:

(a) The Contractor has made reasonable efforts to encourage the participation of New York State Business Enterprises as suppliers and subcontractors, including certified minority and women-owned business enterprises, on this project, and has retained the documentation of these efforts to be provided upon request to the Authority;

(b) The Contractor has complied with the Federal Equal Opportunity Act of 1972 (P.L. 92-261), as amended;

(c) The Contractor agrees to make reasonable efforts to provide notification to New York State residents of employment opportunities on this project through listing any such positions with the Job Service Division of the NYS Department of Labor, or providing such notification in such manner as is consistent with existing collective bargaining contracts or agreements. The Contractor agrees to document these efforts and to provide said documentation to the Authority upon request; and

(d) The Contractor acknowledges notice that the Authority may seek to obtain offset credits from foreign countries as a result of this contract and agrees to cooperate with the Authority in these efforts.

20. **RECIPROCITY AND SANCTIONS PROVISIONS**. Bidders are hereby notified that if their principal place of business is located in a country, nation, province, state or political subdivision that penalizes New York State vendors, and if the goods or services they offer will be substantially produced or performed outside New York State, the Omnibus Procurement Act 1994 and 2000 amendments (Chapters 684 and 383, respectively) require that they be denied contracts which they would otherwise obtain. Contact the Department of Economic Development, Division for Small Business, 30 South Pearl Street, Albany, New York 12245, for a current list of jurisdictions subject to this provision. NOTE: As of October 2019, the list of discriminatory jurisdictions subject to this provision includes the states of South Carolina, Alaska, West Virginia, Wyoming, Louisiana and Hawaii.

21. **NON-PUBLIC PERSONAL INFORMATION**. The Contractor shall comply with the provisions of the New York State Information Security Breach and Notification Act (General Business Law §899-aa; State Technology Law §208). In addition to any relief or damages that may be imposed pursuant to the provisions of this Act, the Contractor shall be liable for the costs imposed upon the Authority which are associated with breach of the Act if caused by Contractor's negligent or willful acts or omissions, or the negligent or willful acts or omissions of the Contractor's agents, officers, employees or subcontractors.

22. **IRAN DIVESTMENT ACT**. In accordance with State Public Authorities Law §2879-c, if this is a contract for work or services performed or to be performed, or goods sold or to be sold, the Contractor subscribes and affirms, under penalty of perjury, that: by signing this contract, each person and each person signing on behalf of any other party certifies, and in the case of a joint bid or partnership each party thereto certifies as to its own organization, under penalty of perjury, that to the best of its knowledge and belief that each person is not on the list created pursuant to paragraph (b) of subdivision 3 of §165-a of the State Finance Law, entitled "Entities Determined to be Non-Responsive Bidders/Offerers pursuant to the New York State Iran Divestment Act of 2012" ("Prohibited Entities List") posted at: https://ogs.ny.gov/list-entities-determined-be-non-responsive-biddersofferers-pursuant-nys-iran-divestment-act-2012.

For the purposes of this clause, the term "person" shall be as defined in subdivision (1)(e) of §165-a of the State Finance Law.

Contractor further certifies that it will not utilize on this contract any subcontractor that is identified on the Prohibited Entities List. Contractor agrees that should it seek to renew or extend this contract, it must provide the same certification at the time the contract is renewed or extended. Contractor also agrees that any proposed Assignee of this contract will be required to certify that it is not on the Prohibited Entities List before the contract assignment will be approved by the Authority.

During the term of the contract, should the Authority receive information that a person (as defined in State Finance Law § 165-a) is in violation of the above-referenced certifications, the Authority will review such information and offer the person an opportunity to respond. If the person fails to demonstrate that it has ceased its engagement in the investment activity which is in violation of the Act within 90 days after the determination of such violation, then the Authority shall take such action as may be appropriate and provided for by law, rule, or contract, including, but not limited to, imposing sanctions, seeking compliance, recovering damages, or declaring the Contractor in default.

23. **OBSERVANCE OF LAWS**. The Contractor agrees to observe all applicable Federal, State and local laws and regulations, and to procure all necessary licenses and permits.

24. **NO WAIVER OF PROVISIONS**. The Authority's failure to exercise or delay in exercising any right or remedy under this contract shall not constitute a waiver of such right or remedy or any other right or remedy set forth therein. No waiver by the Authority of any right or remedy under this contract shall be effective unless made in a writing duly executed by an authorized officer of the Authority, and such waiver shall be limited to the specific instance so written and shall not constitute a waiver of such right or remedy in the future or of any other right or remedy under this contract.

25. **ENTIRE AGREEMENT**. This contract, together with this Appendix A and any other appendices, attachments, schedules or exhibits, constitutes the entire understanding between the parties and there are no other oral or extrinsic understandings of any kind between the parties. This contract may not be changed or modified in any manner except by a subsequent writing, duly executed by the parties thereto.

26. **ADMISSIBILITY OF REPRODUCTION OF CONTRACT.** Notwithstanding the best evidence rule or any other legal principle or rule of evidence to the contrary, the Contractor acknowledges and agrees that it waives any and all objections to the admissibility into evidence at any court proceeding or to the use at any examination before trial of an electronic reproduction of this contract, in the form approved by the State Comptroller, if such approval was required, regardless of whether the original of said contract is in existence.

27. **CERTIFICATION OF REGISTRATION TO COLLECT SALES AND COMPENSATING USE TAX BY CERTAIN STATE CONTRACTORS, AFFILIATES AND SUBCONTRACTORS.** To the extent this agreement is a contract as defined by Tax Law § 5-a, if the Contractor fails to make the certification required by Tax Law § 5-a or if during the term of the contract, the Department of Taxation and Finance or the Authority, as defined by Tax Law § 5-a, discovers that the certification, made under penalty of perjury, is false, then such failure to file or false certification shall be a material breach of this contract and this contract may be terminated, by providing written notification to the Contractor in accordance with the terms of the agreement, if the Authority determines that such action is in the best interest of the Authority.

28. **CONTRACT INVOLVING STEEL PRODUCTS**. Contracts involving steel products are subject to Public Authorities Law § 2603-a, and steel products to be provided or incorporated by Contractor must be produced or made in whole or substantial part in the United States as set forth therein.

APPENDIX B

Inventions Policy

GENERAL POLICY	SECTION TITLE POLICIES – ADMINISTRATIVE	NUMBER 25-1-10
APPROVED **BOARD MEETING NUMBER: 651** **RESOLUTION NUMBER: 5519** **DATE: July 6, 2006**	SUBJECT **INVENTIONS – THRUWAY AUTHORITY**	

GENERAL POLICY

A. PURPOSE

The New York State Thruway Authority ("Authority") recognizes that inventions of value to the public will be made by persons working in its facilities. The purpose of this Policy is to encourage creativity and to take appropriate steps to ensure that the public receives the benefits of inventions conceived or reduced to practice by Authority employees and contractors. Appropriate steps include identifying inventions, securing appropriate patents and copyright registrations, and marketing inventions through licensing and other arrangements. These activities are undertaken in a spirit of cooperation with governmental agencies, private enterprise and staff as part of the Authority's mission and statutory obligations.

B. SCOPE

This Policy shall apply to all of the Authority's employees and contractors, provided that nothing herein shall preclude the contractor from otherwise using the related or underlying general knowledge, skills, ideas, concepts, techniques and experience developed under a project in the course of the contractor's business.

C. POLICY

All inventions, as defined below, shall be the property of the Authority. The inventor, when so instructed by Authority officials, shall make timely application for statutory protection (such as patent, copyright or similar forms of protection) of an invention at the Authority's expense. The inventor shall assign all resulting statutory protection to the Authority. Additionally, the Authority shall have all rights to all inventions conceived or reduced to practice in the course of projects under contract to the Authority.

1. Invention

For the purposes of this Policy, an "invention" shall include products, technical innovations, improvements, inventions, discoveries, devices, methods, computer software, videos, as well as writings and other information in various forms not generally known, whether or not protectable by patent or copyright, when they result from Authority work performed by the inventor, or when they are conceived or reduced to practice by persons using Authority equipment, facilities, time, material, money or personnel.

2. Inventor

An inventor is an employee, former employee, contractor or former contractor of the Authority who conceives of an invention, as defined above, or who reduces such invention to practice. The intent of this Policy is to include former employees and former contractors as inventors with respect to inventions they conceived or reduced to practice while employed by, or under contract to, the Authority.

D. IMPLEMENTING PROVISIONS

1. Disclosure of Invention

Inventions are considered trade secrets of the Authority and are thereby designated as confidential. Inventions must be promptly disclosed to the Authority and shall not be published or disclosed to anyone outside the employ of the Authority without written permission from the Authority.

2. Copyright

The inventor, or author, when so instructed by the Authority or when the inventor, or author, deems it appropriate, shall put a copyright notice on computer software, written procedures, manuals, videos and other information in various forms by including the word "Copyright", the year of first publication and "New York State Thruway Authority" on the material.

3. Ownership of Patents and Copyrights

The inventor shall assign all inventions, applications for patent protection, copyrights and registrations to the Authority and shall execute all other required documents to pursue applications and to vest title in the Authority. The processing costs for obtaining patent or copyright protection shall be the responsibility of the Authority (except see 4 below). When a question is raised regarding ownership of an invention, the matter shall be referred to the Executive Director of the Authority or the Executive Director's designee. The Executive Director or designee shall review the circumstances under which the invention was made. If the Executive Director or designee determines that the invention is not covered by this Policy, the Authority will assert no claim to the invention and will advise the inventor accordingly in writing.

4. Release of Invention to Inventor

The Executive Director or designee will decide whether or not to patent and whether or not to commercialize any invention. The inventor will be notified if it is determined that the Authority will not apply for patent protection for an invention. The inventor may then request in writing that the invention be released. If the request is granted, all of the Authority's rights to the invention shall be released to the inventor, subject to a reservation by the Authority of a nonexclusive, irrevocable, paid-up license to practice or use the invention or to have the invention practiced or used on behalf of the Authority. Such license shall include the right to grant sublicense(s) to other government entities. The inventor may then apply for patent protection at the inventor's own expense.

5. Administration of Policy

The Executive Director may interpret, implement and administer this Policy, including the development of operational and/or administrative procedures necessary to carry out its intent. In addition, the Executive Director or designee shall have the authority to waive the application of all or any portion of this Policy where it is in the Authority's best interests. Any such waiver shall be in writing.

APPENDIX D

Network Connection Requirements

NEW YORK STATE THRUWAY AUTHORITY

NETWORK CONNECTION REQUIREMENTS

A. Permissible Access

The Authority will limit access to a Network Connection to those services and devices (hosts, routers, etc.) needed. Blanket access will not be provided.

The Authority does not allow a Network Connection to be used as Outside Entity's Internet connection.

B. Connectivity Options

The following connectivity options are the standard methods of providing an Outside Entity with an external connection to the Authority's data communications network ("Network Connection"). Anything that deviates from these standard methods must be approved in advance by the Authority.

1) Encrypted Tunnel – The preferred connectivity method is via the Internet to an Authority Virtual Private Network (VPN) device. The Authority may loan Outside Entity the required client software for establishing VPN connections with the Authority. The Authority's perimeter security measures will control access to the internal network.
2) NYeNet/MAN Connection – This can include a VPN.
3) Leased Circuit.
4) Fiber.

C. Authentication of Network Connection

Outside Entity must authenticate its Network Connection using Authority authentication systems. All Outside Entity remote access user accounts will have an expiration time consistent with the business justification for the access, which can be renewed at the discretion of the Authority. If the contract term is longer than one year, then Outside Entity must generate a report at least once per year showing which Outside Entity employees have access to the Network Connection and send such report to the Authority for verification and review. Further, any time there is a change in those Outside Entity employees who have access to the Network Connection, Outside Entity shall send the Authority an updated list of those Outside Entity employees who have such access.

D. Current Software Versions Required

Outside Entity must, for all computers it utilizes for a Network Connection, employ software versions that are currently supported by the software manufacturer. Outside Entity must apply all available security updates and hot fixes for that software in a timely fashion.

All Outside Entity software and firmware utilized for a Network Connection must be kept up to date, especially with patches that fix security vulnerabilities.

E. Virus Protection

Outside Entity must install and enable anti-virus software on all computers utilized for a Network Connection and keep such virus definition files up to date.

F. Protection of Authority Information and Resources

The Authority will implement all security measures it determines appropriate to protect the integrity and confidentiality of Authority confidential information.

The Authority will implement appropriate "Access Control Lists" (ACLs) on the Authority network devices to which the Outside Entity sites are connected. The ACLs will restrict access to pre-defined hosts within the internal Authority network.

In the event the Authority agrees to loan to Outside Entity certain Authority equipment and/or software ("Authority-owned Equipment") to facilitate the Network Connection, the Authority will provide Outside Entity with enable-level access only to those Outside Entity employees necessary to the installation, operation and maintenance of the Network Connection. All other Outside Entity employees will have restricted access/read-only access to the routers at their site and will not be allowed to make configuration changes.

Outside Entity shall be solely responsible for providing the appropriate security measures to ensure protection of its internal network and information. The Authority shall not have any responsibility for ensuring the protection of Outside Entity information.

G. Security Incident Notification and Resolution

Outside Entity is responsible for notifying the Authority upon discovery of any security incident that may threaten or compromise the confidentiality, integrity or availability of Authority information or network infrastructure. Outside Entity shall, at a minimum, report the following to the Authority: 1) successful or unusually persistent attempts to gain unauthorized information or system access; 2) presence of malicious code that has a widespread impact throughout Outside Entity's network infrastructure; 3) a known or suspected denial of service attack; and 4) scans and probes that precede or are related to a security incident listed above.

Once it has resolved the security incident, Outside Entity must also report the following to the Authority: 1) attack source details (i.e., IP address, method, vulnerability exploited, etc.); 2) the specific effects (i.e., loss, damage, destruction, modification, disclosure) on systems, accounts or information assets resulting from the threat or compromise; and 3) actions taken to remediate the security incident.

H. Audit and Review of Outside Entity Network Connections

The Authority shall have the right at all times to monitor all aspects of Network Connections. The Authority will employ automated tools to accomplish monitoring tasks where practicable. The Authority will generate an annual report on its authentication database showing the specific Outside Entity login entries and distribute such reports to appropriate Authority personnel for review. The Authority will periodically audit Network Connections and distribute such audits to appropriate Authority personnel for review.

The Authority will review all Network Connections on an annual basis and update or terminate such connections when appropriate.

EXHIBIT 1

Thruway Authority Guidelines Regarding Permissible Contacts During a Procurement and the Prohibition of Inappropriate Lobbying Influence

TAP-335 (11/2020)

New York State Thruway Authority

Guidelines Regarding Permissible Contacts During a Procurement and the Prohibition of Inappropriate Lobbying Influence

Chapter 1 of the Laws of 2005, as amended (referred to as the "Lobbying Law"), enacted major changes to the Legislative Law and State Finance Law relative to lobbying on government procurements and procurement contracts. The Lobbying Law created two new sections in the State Finance Law: Section 139-j addresses restrictions on "contacts" during the procurement process; and Section 139-k addresses the disclosure of contacts and the responsibility of offerers[1] during the procurement process. In this regard, a procurement contract means a contract or agreement (including an amendment, extension, renewal or change order to an existing contract where such amendment, extension, renewal or change order is not authorized and payable under the terms of the contract) involving an estimated annual expenditure in excess of $15,000 for a commodity, service, technology, public work or construction; purchase, sale, lease or acquisition of real property; or revenue contract.

In conformity with the Lobbying Law, during the restricted period[2] for an Authority procurement, an offerer may only make permissible "contacts" regarding such procurement, which means that the offerer shall contact only the Authority designated contact person(s) for that procurement. In this regard, "contact" means any oral, written or electronic communication with a governmental entity under circumstances where a reasonable person would infer that the communication was intended to influence the governmental entity's conduct or decision regarding the Authority procurement. Exceptions to this rule include:

- submission of a written proposal in response to a Request for Proposals (RFP), Invitation for Bids (IFB) or any other solicitation method;
- submission of written questions as part of an RFP, IFB or other solicitation method where all written questions and written responses will be provided to all offerers;
- participation in a pre-proposal or pre-bid demonstration, conference or other exchange of information open to all bidders scheduled as part of an RFP, IFB or other solicitation process;

[1] An individual or entity, or any employee, agent, consultant or person acting on behalf of such individual or entity, that contacts the Authority about a procurement during the restricted period whether or not the caller has a financial interest in the outcome of the procurement. A governmental agency or its employees that communicates with the Authority regarding a procurement in the exercise of its oversight duties shall not be considered an offerer.

[2] The period of time commencing with the earliest written notice, advertisement or solicitation of a Request for Proposals (RFP), Invitation for Bids (IFB), or solicitation of proposals, or any other method for soliciting responses from offerers intending to result in a procurement contract with the Authority, and ending with the final contract award and approval by the Authority, and, where applicable, the State Comptroller.

- written complaints that the Authority designated contact for a procurement fails to respond in a timely manner to authorized offerer contacts;
- negotiation of procurement contract terms with the Authority following tentative award;
- contacts between designated Authority staff and an offerer to request the review of a procurement contract award;
- communications with the Authority regarding an appeal, protest or other review of a procurement, participation in an administrative or judicial proceeding regarding a procurement and complaints regarding a procurement made to the Attorney General, Inspector General, District Attorney or State Comptroller;
- communications between Authority staff and offerers that solely address the determination of vendor responsibility.
- communications relating to the Authority's procurement made pursuant to State Finance Law Section 162(1) undertaken by (i) the non-profit-making agencies appointed pursuant to Section 162(6)(e) by the Commissioner of the Office of Children and Family Services, the Commission for the Blind or the Commissioner of Education, and (ii) the qualified charitable non-profit-making agencies for the blind, and qualified charitable non-profit-making agencies for other severely disabled persons as identified in Section 162(2); provided, however, that any communications which attempt to influence the issuance or terms of the specifications that serve as the basis or bid documents, RFPs, IFBs, solicitations of proposals, or any other method for soliciting a response from offerers intending to result in a procurement contract with the Authority shall not be exempt;
- complaints by a Minority and Women-owned Business Enterprise (MWBE) entity to the MWBE statewide advocate concerning the Authority's failure to comply with the requirements of Executive Law Section 315; and,
- communications between the MWBE statewide advocate and the Authority in furtherance of the MWBE statewide advocate pursuant to Executive Law Section 312-a.

An offerer shall not, under any circumstance, attempt to influence an Authority procurement in a way that violates or attempts to violate: Public Officers Law Section 73(5), relating to gifts intended to influence; or Public Officers Law Section 74, relating to the code of ethics for employees of state agencies, public authorities and public benefit corporations, members of the New York State Legislature and Legislative employees.

An offerer who contacts the Authority designated contact person for a procurement during the restricted period must be prepared to provide the following information: name, address, telephone number, place of principal employment and occupation of the person or organization making the contact and whether the person/organization making the contact is the offerer or is retained, employed or designated by or on behalf of the offerer to appear before or contact the Authority about the procurement.

An offerer that submits a proposal, bid or other response to an Authority RFP, IFB or other solicitation method must: certify that it understands and agrees to comply with these Guidelines regarding permissible contacts during a procurement and the prohibition of inappropriate lobbying influence; and disclose whether any governmental entity has, within the prior four (4) years, found the offerer non-responsible due to a violation of the Lobbying Law or the intentional provision of false or incomplete information. Further, all Authority procurement contracts will contain: a certification by the offerer that all information provided to the Authority

with respect to the Lobbying Law is complete, true and accurate; and a provision authorizing the Authority to terminate the contract in the event such certification is found to be intentionally false or incomplete.

The Authority will investigate all allegations of violations of the Authority Guidelines regarding permissible contacts during a procurement and the prohibition of inappropriate lobbying influence. A finding that an offerer has knowingly and willfully committed such a violation may result in a determination that the offerer and its subsidiaries are non-responsible and therefore ineligible for award of the procurement contract. A second determination of non-responsibility for such a violation within four (4) years of the first such determination shall render the offerer and its subsidiaries ineligible to submit a bid or proposal or be awarded a procurement contract for four (4) years from the date of the second determination. The Authority will notify the New York State Office of General Services of any determinations of non-responsibility or debarments due to violations of the Lobbying Law.

These Guidelines and related forms are available on the Authority's website, www.thruway.ny.gov, under Doing Business; Purchasing Services - Law, Policies and Procedures. Copies of Sections 73 and 74 of the Public Officer's Law are also available on the Joint Commission on Public Ethics website, www.jcope.ny.gov, under Laws. If you require further guidance on the Lobbying Law, you are encouraged to visit the Advisory Council on Procurement Lobbying website at https://ogs.ny.gov/acpl, where the Lobbying Law and the Guidelines on Procurement Lobbying (Frequently Asked Questions) adopted by the Council are posted.

EXHIBIT 2

Authority Supplemental Insurance Certificate

TA-W51343 (11/2017)

NEW YORK STATE OF OPPORTUNITY. Thruway Authority

SUPPLEMENTAL INSURANCE CERTIFICATE

This form supplements ACORD 25 CERTIFICATE OF LIABILITY INSURANCE documentation as required by the NYSTA. For additional information, please contact the NYSTA's Insurance Compliance Section at (518) 436-2891.

Insured: _____

All Work under NYSTA Project/Agreement/Permit No.: _____
(If NYSTA Permit, leave blank unless Permit No. is known)

Complete/check appropriate boxes:

		Yes	No
I.	**Commercial General Liability (CGL) Insurance - Policy No.** _____		
	a. Does the General Aggregate reflect a per-project aggregate endorsement (CG 25 03 05 09 or equivalent)?	☐	☐
	b. Does the CGL provide coverage for:		
	1. Explosion, Collapse and Underground Hazards (XCU)?	☐	☐
	2. Products & Completed Operations Liability?	☐	☐
	3. Additional Insureds for claims involving injury to employees of the Named Insured or subcontractors?	☐	☐
	4. Is Cross liability in the ISO GL policy (i.e., Insured vs. Insured suits) excluded?	☐	☐
	If "No", is Cross liability in the ISO GL policy restricted?	☐	☐
	5. Property damage to work due to Independent contractor's (subcontractor's) operations?	☐	☐
	c. Is the CGL policy written on ISO form CG 00 01 04 13 or an equivalent form?	☐	☐
II.	**Workers' Compensation - Policy No.** _____		
	a. Does Workers' Comp. apply to federally-regulated employment (i.e., Jones Act, USL&H)?	☐	☐
	b. Is Workers' Comp. from a New York State authorized insurer?	☐	☐
	c. If sole proprietorship, partnership, or corporation with one or two shareholders, is Workers' Comp. coverage provided for owners?	☐	☐
III.	**Environmental Insurance (EI)** (including Asbestos & Lead Abatement) - **Policy No.** _____		
	Professional Liability Insurance (PLI) (including Errors & Omissions) - **Policy No.** _____		
	a. Do EI defense costs reduce liability limits?	☐	☐
	b. If EI is on a claims-made basis, what is the retroactive date? _____		
	c. Do PLI defense costs reduce liability limits?	☐	☐
	d. If PLI is on a claims-made basis, what is the retroactive date? _____		
IV.	**Mandatory Endorsements and Other Provisions** (all policies including auto liability)		
	a. Is the NYSTA listed as an Additional Insured by ISO endorsement CG 20 10 04 13 and CG 20 37 04 13 or an equivalent, under the CGL and Umbrella policies?	☐	☐
	b. Are the Umbrella and/or Excess Liability insurance policies issued on a "stand alone" or "follow form basis" to the primary CGL, Commercial Auto and/or Employer's Liability? Identify for each policy:		

	Stand Alone	Follow Form	No Policy
Umbrella Policy No._____	☐	☐	☐
Excess Policy No. _____	☐	☐	☐

	c. Are all policies endorsed to provide 30 days advance notice to the NYSTA of termination/material change, except for non-payment/cancellation? If "No", identify policies that are not endorsed: _____	☐	☐
	d. Do any of the policies on the attached ACORD 25 contain a Deductible (D) or Self-Insured Retention (SIR)? If "Yes", indicate the specific policy, whether D or SIR, its amount, and whether it is on a per claim, per occurrence or aggregate basis: _____	☐	☐
	e. Is the Automobile Liability policy endorsed to include ***either*** ISO endorsement CA 99 48 03 06 - Pollution Liability - Broadened Coverage for Covered Autos-Business Auto, Motor Carrier and Truckers Coverage Forms ***or*** ISO endorsement CA 00 12 03 06 - Truckers Coverage Forms?	☐	☐

This certificate is issued as a matter of information only. The information provided herein accurately describes the policies listed above; and does not affirmatively or negatively amend, extend or alter the coverage afforded by the policies listed above. The insurance afforded by the policies described herein is subject to all the terms, exclusions and conditions of such policies.

Signed: _____ Date: _____

Print Name: _____

☐ Insurer's Agent

Title: _____

☐ Insurance Broker

Firm Name: _____

Mailing Address: _____ Fax No.: ( ) -

_____ Email: _____

EXHIBIT 3

49 CFR Part 382
Controlled Substances and Alcohol Use and Testing

(1) A scheduled duration of three years or less;

(2) A specific data collection and safety analysis plan that identifies a method of comparing the safety performance for motor carriers, CMVs, and drivers operating under the terms and conditions of the pilot program, with the safety performance of motor carriers, CMVs, and drivers that comply with the regulation;

(3) A reasonable number of participants necessary to yield statistically valid findings;

(4) A monitoring plan to ensure that participants comply with the terms and conditions of participation in the pilot program;

(5) Adequate safeguards to protect the health and safety of study participants and the general public; and

(6) A plan to inform the States and the public about the pilot program and to identify approved participants to enforcement personnel and the general public.

§ 381.510 May the FMCSA end a pilot program before its scheduled completion date?

The FMCSA will immediately terminate a pilot program if there is reason to believe the program is not achieving a level of safety that is at least equivalent to the level of safety that would be achieved by complying with the regulations.

§ 381.515 May the FMCSA remove approved participants from a pilot program?

The Administrator will immediately revoke participation in a pilot program of a motor carrier, CMV, or driver for failure to comply with the terms and conditions of the pilot program, or if continued participation is inconsistent with the goals and objectives of the safety regulations.

§ 381.520 What will the FMCSA do with the results from a pilot program?

At the conclusion of each pilot program, the FMCSA will report to Congress the findings and conclusions of the program and any recommendations it considers appropriate, including suggested amendments to laws and regulations that would enhance motor carrier, CMV, and driver safety and improve compliance with the FMCSRs.

Subpart F—Preemption of State Rules

§ 381.600 Do waivers, exemptions, and pilot programs preempt State laws and regulations?

Yes. During the time period that a waiver, exemption, or pilot program authorized by this part is in effect, no State shall enforce any law or regulation that conflicts with or is inconsistent with the waiver, exemption, or pilot program with respect to a person operating under the waiver or exemption or participating in the pilot program.

PART 382—CONTROLLED SUBSTANCES AND ALCOHOL USE AND TESTING

Subpart A—General

Sec.

Subpart B—Prohibitions

Subpart C—Tests Required

AUTHORITY: 49 U.S.C. 31133, 31136, 31301 *et seq.*, 31502; sec. 32934 of Pub. L. 112–141, 126 Stat. 405, 830; and 49 CFR 1.87.

SOURCE: 66 FR 43103, Aug. 17, 2001, unless otherwise noted.

Subpart A—General

§ 382.101 Purpose.

The purpose of this part is to establish programs designed to help prevent accidents and injuries resulting from the misuse of alcohol or use of controlled substances by drivers of commercial motor vehicles.

§ 382.103 Applicability.

(a) This part applies to service agents and to every person and to all employers of such persons who operate a commercial motor vehicle in commerce in any State and are subject to:

(1) The commercial driver's license requirements of part 383 of this subchapter;

(2) The Licencia Federal de Conductor (Mexico) requirements; or

(3) The commercial drivers license requirements of the Canadian National Safety Code.

(b) An employer who employs himself/herself as a driver must comply with both the requirements in this part that apply to employers and the requirements in this part that apply to drivers. An employer who employs only himself/herself as a driver shall implement a random alcohol and controlled substances testing program of two or more covered employees in the random testing selection pool.

(c) The exceptions contained in §390.3(f) of this subchapter do not apply to this part. The employers and drivers identified in §390.3(f) of this subchapter must comply with the requirements of this part, unless otherwise specifically provided in paragraph (d) of this section.

(d) *Exceptions.* This part shall not apply to employers and their drivers:

(1) Required to comply only with the alcohol and/or controlled substances testing requirements of part 655 of this title (Federal Transit Administration

alcohol and controlled substances testing regulations); or

(2) Who a State must waive from the requirements of part 383 of this subchapter. These individuals include active duty military personnel; members of the reserves; and members of the national guard on active duty, including personnel on full-time national guard duty, personnel on part-time national guard training and national guard military technicians (civilians who are required to wear military uniforms), and active duty U.S. Coast Guard personnel; or

(3) Who a State has, at its discretion, exempted from the requirements of part 383 of this subchapter. These individuals may be:

(i) Operators of a farm vehicle which is:

(A) Controlled and operated by a farmer;

(B) Used to transport either agricultural products, farm machinery, farm supplies, or both to or from a farm;

(C) Not used in the operations of a for-hire motor carrier, except for an exempt motor carrier as defined in § 390.5 of this subchapter; and

(D) Used within 241 kilometers (150 miles) of the farmer's farm.

(ii) Firefighters or other persons who operate commercial motor vehicles which are necessary for the preservation of life or property or the execution of emergency governmental functions, are equipped with audible and visual signals, and are not subject to normal traffic regulation.

(4) Who operate ''covered farm vehicles,'' as defined in 49 CFR 390.5.

[66 FR 43103, Aug. 17, 2001, as amended at 78 FR 16194, Mar. 14, 2013; 81 FR 68346, Oct. 4, 2016; 81 FR 71016, Oct. 14, 2016; 81 FR 87724, Dec. 5, 2016; 86 FR 35639, July 7, 2021]

§ 382.105 Testing procedures.

Each employer shall ensure that all alcohol or controlled substances testing conducted under this part complies with the procedures set forth in part 40 of this title. The provisions of part 40 of this title that address alcohol or controlled substances testing are made applicable to employers by this part.

§ 382.107 Definitions.

Words or phrases used in this part are defined in §§ 386.2 and 390.5 of this subchapter, and § 40.3 of this title, except as provided in this section—

Actual knowledge for the purpose of subpart B of this part, means actual knowledge by an employer that a driver has used alcohol or controlled substances based on the employer's direct observation of the employee, information provided by the driver's previous employer(s), a traffic citation for driving a CMV while under the influence of alcohol or controlled substances or an employee's admission of alcohol or controlled substance use, except as provided in § 382.121. Direct observation as used in this definition means observation of alcohol or controlled substances use and does not include observation of employee behavior or physical characteristics sufficient to warrant reasonable suspicion testing under § 382.307. As used in this section, ''traffic citation'' means a ticket, complaint, or other document charging driving a CMV while under the influence of alcohol or controlled substances.

Alcohol means the intoxicating agent in beverage alcohol, ethyl alcohol, or other low molecular weight alcohols including methyl and isopropyl alcohol.

Alcohol concentration (*or content*) means the alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath as indicated by an evidential breath test under this part.

Alcohol use means the drinking or swallowing of any beverage, liquid mixture or preparation (including any medication), containing alcohol.

Commerce means:

(1) Any trade, traffic or transportation within the jurisdiction of the United States between a place in a State and a place outside of such State, including a place outside of the United States; or

(2) Trade, traffic, and transportation in the United States which affects any trade, traffic, and transportation described in paragraph (1) of this definition.

Commercial Driver's License Drug and Alcohol Clearinghouse (Clearinghouse)

means the FMCSA database that subpart G of this part requires employers and service agents to report information to and to query regarding drivers who are subject to the DOT controlled substance and alcohol testing regulations.

Commercial motor vehicle means a motor vehicle or combination of motor vehicles used in commerce to transport passengers or property if the vehicle

(1) Has a gross combination weight rating or gross combination weight of 11,794 kilograms or more (26,001 pounds or more), whichever is greater, inclusive of a towed unit(s) with a gross vehicle weight rating or gross vehicle weight of more than 4,536 kilograms (10,000 pounds), whichever is greater; or

(2) Has a gross vehicle weight rating or gross vehicle weight of 11,794 or more kilograms (26,001 or more pounds), whichever is greater; or

(3) Is designed to transport 16 or more passengers, including the driver; or

(4) Is of any size and is used in the transportation of materials found to be hazardous for the purposes of the Hazardous Materials Transportation Act (49 U.S.C. 5103(b)) and which require the motor vehicle to be placarded under the Hazardous Materials Regulations (49 CFR part 172, subpart F).

Confirmation (or confirmatory) drug test means a second analytical procedure performed on a urine or oral fluid specimen to identify and quantify the presence of a specific drug or drug metabolite.

Confirmation (or confirmatory) validity test means a second test performed on a urine or oral fluid specimen to further support a validity test result.

Confirmed drug test means a confirmation test result received by an MRO from a laboratory.

Consortium/Third party administrator (C/TPA) means a service agent that provides or coordinates one or more drug and/or alcohol testing services to DOT-regulated employers. C/TPAs typically provide or coordinate the provision of a number of such services and perform administrative tasks concerning the operation of the employers' drug and alcohol testing programs. This term includes, but is not limited to, groups of employers who join together to administer, as a single entity, the DOT drug and alcohol testing programs of its members (*e.g.*, having a combined random testing pool). C/TPAs are not ''employers'' for purposes of this part, except as provided in §382.705(c).

Controlled substances mean those substances identified in §40.82 of this title.

Designated employer representative (DER) is an individual identified by the employer as able to receive communications and test results from service agents and who is authorized to take immediate actions to remove employees from safety-sensitive duties and to make required decisions in the testing and evaluation processes. The individual must be an employee of the company. Service agents cannot serve as DERs.

Disabling damage means damage which precludes departure of a motor vehicle from the scene of the accident in its usual manner in daylight after simple repairs.

(1) *Inclusions.* Damage to motor vehicles that could have been driven, but would have been further damaged if so driven.

(2) *Exclusions.* (i) Damage which can be remedied temporarily at the scene of the accident without special tools or parts.

(ii) Tire disablement without other damage even if no spare tire is available.

(iii) Headlight or taillight damage.

(iv) Damage to turn signals, horn, or windshield wipers which make them inoperative.

DOT Agency means an agency (or ''operating administration'') of the United States Department of Transportation administering regulations requiring alcohol and/or drug testing (14 CFR parts 61, 63, 65, 121, and 135; 49 CFR parts 199, 219, 382, and 655), in accordance with part 40 of this title.

Driver means any person who operates a commercial motor vehicle. This includes, but is not limited to: Full time, regularly employed drivers; casual, intermittent or occasional drivers; leased drivers and independent owner-operator contractors.

Employer means a person or entity employing one or more employees (including an individual who is self-employed) that is subject to DOT agency regulations requiring compliance with this part. The term, as used in this part, means the entity responsible for overall implementation of DOT drug and alcohol program requirements, including individuals employed by the entity who take personnel actions resulting from violations of this part and any applicable DOT agency regulations. Service agents are not employers for the purposes of this part.

Licensed medical practitioner means a person who is licensed, certified, and/or registered, in accordance with applicable Federal, State, local, or foreign laws and regulations, to prescribe controlled substances and other drugs.

Negative return-to-duty test result means a return-to-duty test with a negative drug result and/or an alcohol test with an alcohol concentration of less than 0.02, as described in § 40.305 of this title.

Performing (a safety-sensitive function) means a driver is considered to be performing a safety-sensitive function during any period in which he or she is actually performing, ready to perform, or immediately available to perform any safety-sensitive functions.

Positive rate for random drug testing means the number of verified positive results for random drug tests conducted under this part plus the number of refusals of random drug tests required by this part, divided by the total number of random drug tests results (*i.e.*, positives, negatives, and refusals) under this part.

Refuse to submit (to an alcohol or controlled substances test) means that a driver:

(1) Fail to appear for any test (except a pre-employment test) within a reasonable time, as determined by the employer, consistent with applicable DOT agency regulations, after being directed to do so by the employer. This includes the failure of an employee (including an owner-operator) to appear for a test when called by a C/TPA (see § 40.61(a) of this title);

(2) Fail to remain at the testing site until the testing process is complete. Provided, that an employee who leaves the testing site before the testing process commences (see § 40.63(c) of this title) a pre-employment test is not deemed to have refused to test;

(3) Fail to provide a urine or oral fluid specimen for any drug test required by this part or DOT agency regulations. Provided, that an employee who does not provide a urine or oral fluid specimen because he or she has left the testing site before the testing process commences (see § 40.63(c) of this title) for a pre-employment test is not deemed to have refused to test;

(4) In the case of a directly observed or monitored collection in a drug test, fails to permit the observation or monitoring of the driver's provision of a specimen (see §§ 40.67(l) and 40.69(g) of this title);

(5) Fail to provide a sufficient amount of urine or oral fluid when directed, and it has been determined, through a required medical evaluation, that there was no adequate medical explanation for the failure (see § 40.193(d)(2) of this title);

(6) Fail or declines to take a second test the employer or collector has directed the driver to take;

(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) of this title. 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;

(8) Fail to cooperate with any part of the testing process (e.g., refuse to empty pockets when so directed by the collector, behave in a confrontational way that disrupts the collection process); or

(9) Is reported by the MRO as having a verified adulterated or substituted test result.

Safety-sensitive function means all time from the time a driver begins to work or is required to be in readiness to work until the time he/she is relieved from work and all responsibility for performing work. Safety-sensitive functions shall include:

(1) All time at an employer or shipper plant, terminal, facility, or other property, or on any public property, waiting to be dispatched, unless the driver has been relieved from duty by the employer;

(2) All time inspecting equipment as required by §§ 392.7 and 392.8 of this subchapter or otherwise inspecting, servicing, or conditioning any commercial motor vehicle at any time;

(3) All time spent at the driving controls of a commercial motor vehicle in operation;

(4) All time, other than driving time, in or upon any commercial motor vehicle except time spent resting in a sleeper berth (a berth conforming to the requirements of § 393.76 of this subchapter);

(5) All time loading or unloading a vehicle, supervising, or assisting in the loading or unloading, attending a vehicle being loaded or unloaded, remaining in readiness to operate the vehicle, or in giving or receiving receipts for shipments loaded or unloaded; and

(6) All time repairing, obtaining assistance, or remaining in attendance upon a disabled vehicle.

Screening test (or initial test) means:

(1) In drug testing, a test to eliminate ''negative'' urine or oral fluid specimens from further analysis or to identify a specimen that requires additional testing for the presence of drugs.

(2) In alcohol testing, an analytical procedure to determine whether an employee may have a prohibited concentration of alcohol in a breath or saliva specimen.

Stand-down means the practice of temporarily removing an employee from the performance of safety-sensitive functions based only on a report from a laboratory to the MRO of a confirmed positive test for a drug or drug metabolite, an adulterated test, or a substituted test, before the MRO has completed verification of the test results.

Violation rate for random alcohol testing means the number of 0.04 and above random alcohol confirmation test results conducted under this part plus the number of refusals of random alcohol tests required by this part, divided by the total number of random alcohol screening tests (including refusals) conducted under this part.

[66 FR 43103, Aug. 17, 2001, as amended at 68 FR 75458, Dec. 31, 2003; 77 FR 59825, Oct. 1, 2012; 81 FR 87724, Dec. 5, 2016; 83 FR 48726, Sept. 27, 2018; 84 FR 51432, Sept. 30, 2019; 86 FR 57069, Oct. 14, 2021; 88 FR 27653, May 2, 2023]

§ 382.109 Preemption of State and local laws.

(a) Except as provided in paragraph (b) of this section, this part preempts any State or local law, rule, regulation, or order to the extent that:

(1) Compliance with both the State or local requirement in this part is not possible; or

(2) Compliance with the State or local requirement is an obstacle to the accomplishment and execution of any requirement in this part.

(b) This part shall not be construed to preempt provisions of State criminal law that impose sanctions for reckless conduct leading to actual loss of life, injury, or damage to property, whether the provisions apply specifically to transportation employees, employers, or the general public.

§ 382.111 Other requirements imposed by employers.

Except as expressly provided in this part, nothing in this part shall be construed to affect the authority of employers, or the rights of drivers, with respect to the use of alcohol, or the use of controlled substances, including authority and rights with respect to testing and rehabilitation.

§ 382.113 Requirement for notice.

Before performing each alcohol or controlled substances test under this part, each employer shall notify a driver that the alcohol or controlled substances test is required by this part. No employer shall falsely represent that a test is administered under this part.

§ 382.115 Starting date for testing programs.

(a) All domestic-domiciled employers must implement the requirements of this part on the date the employer begins commercial motor vehicle operations.

(b) All foreign-domiciled employers must implement the requirements of this part on the date the employer begins commercial motor vehicle operations in the United States.

§ 382.117 Public interest exclusion.

No employer shall use the services of a service agent who is subject to public interest exclusion in accordance with 49 CFR part 40, Subpart R.

§ 382.119 Stand-down waiver provision.

(a) Employers are prohibited from standing employees down, except consistent with a waiver from the Federal Motor Carrier Safety Administration as required under this section.

(b) An employer subject to this part who seeks a waiver from the prohibition against standing down an employee before the MRO has completed the verification process shall follow the procedures in 49 CFR 40.21. The employer must send a written request, which includes all of the information required by that section to the Administrator, Federal Motor Carrier Safety Administration, 1200 New Jersey Ave., SE., Washington, DC 20590–0001.

(c) The final decision whether to grant or deny the application for a waiver will be made by the Administrator or the Administrator's designee.

(d) After a decision is signed by the Administrator or the Administrator's designee, the employer will be sent a copy of the decision, which will include the terms and conditions for the waiver or the reason for denying the application for a waiver.

(e) Questions regarding waiver applications should be directed to the Federal Motor Carrier Safety Administration, Office of Safety Programs (MC–SS), 1200 New Jersey Ave., SE., Washington, DC 20590–0001.

[66 FR 43103, Aug. 17, 2001, as amended at 72 FR 55700, Oct. 1, 2007; 87 FR 59035, Sept. 29, 2022]

§ 382.121 Employee admission of alcohol and controlled substances use.

(a) Employees who admit to alcohol misuse or controlled substances use are not subject to the referral, evaluation and treatment requirements of this part and part 40 of this title, provided that:

(1) The admission is in accordance with a written employer-established voluntary self-identification program or policy that meets the requirements of paragraph (b) of this section;

(2) The driver does not self-identify in order to avoid testing under the requirements of this part;

(3) The driver makes the admission of alcohol misuse or controlled substances use prior to performing a safety sensitive function (i.e., prior to reporting for duty); and

(4) The driver does not perform a safety sensitive function until the employer is satisfied that the employee has been evaluated and has successfully completed education or treatment requirements in accordance with the self-identification program guidelines.

(b) A qualified voluntary self-identification program or policy must contain the following elements:

(1) It must prohibit the employer from taking adverse action against an employee making a voluntary admission of alcohol misuse or controlled substances use within the parameters of the program or policy and paragraph (a) of this section;

(2) It must allow the employee sufficient opportunity to seek evaluation, education or treatment to establish control over the employee's drug or alcohol problem;

(3) It must permit the employee to return to safety sensitive duties only upon successful completion of an educational or treatment program, as determined by a drug and alcohol abuse evaluation expert, i.e., employee assistance professional, substance abuse professional, or qualified drug and alcohol counselor;

(4) It must ensure that:

(i) Prior to the employee participating in a safety sensitive function, the employee shall undergo a non-DOT return to duty test with a result indicating an alcohol concentration of less than 0.02; and/or

(ii) Prior to the employee participating in a safety sensitive function, the employee shall undergo a non-DOT return to duty controlled substance

test with a verified negative test result for controlled substances use; and

(5) It may incorporate employee monitoring and include non-DOT follow-up testing.

[66 FR 43103, Aug. 17, 2001, as amended at 86 FR 35639, July 7, 2021]

§ 382.123 Driver identification.

(a) *Identification information on the Alcohol Testing Form (ATF).* For each alcohol test performed under this part, the employer shall provide the driver's commercial driver's license number and State of issuance in Step 1, Section B of the ATF.

(b) *Identification information on the Federal Drug Testing Custody and Control Form (CCF).* For each controlled substance test performed under this part, the employer shall provide the following information, which must be recorded as follows:

(1) The driver's commercial driver's license number and State of issuance in Step 1, section C of the CCF.

(2) The employer's name and other identifying information required in Step 1, section A of the CCF.

[81 FR 87724, Dec. 5, 2016, as amended at 86 FR 35639, July 7, 2021]

Subpart B—Prohibitions

§ 382.201 Alcohol concentration.

No driver shall report for duty or remain on duty requiring the performance of safety-sensitive functions while having an alcohol concentration of 0.04 or greater. No employer having knowledge that a driver has an alcohol concentration of 0.04 or greater shall permit the driver to perform or continue to perform safety-sensitive functions.

[66 FR 43103, Aug. 17, 2001, as amended at 77 FR 4483, Jan. 30, 2012]

§ 382.205 On-duty use.

No driver shall use alcohol while performing safety-sensitive functions. No employer having actual knowledge that a driver is using alcohol while performing safety-sensitive functions shall permit the driver to perform or continue to perform safety-sensitive functions.

§ 382.207 Pre-duty use.

No driver shall perform safety-sensitive functions within four hours after using alcohol. No employer having actual knowledge that a driver has used alcohol within four hours shall permit a driver to perform or continue to perform safety-sensitive functions.

§ 382.209 Use following an accident.

No driver required to take a post-accident alcohol test under § 382.303 shall use alcohol for eight hours following the accident, or until he/she undergoes a post-accident alcohol test, whichever occurs first.

§ 382.211 Refusal to submit to a required alcohol or controlled substances test.

No driver shall refuse to submit to a pre-employment controlled substance test required under § 382.301, a post-accident alcohol or controlled substance test required under § 382.303, a random alcohol or controlled substances test required under § 382.305, a reasonable suspicion alcohol or controlled substance test required under § 382.307, a return-to-duty alcohol or controlled substances test required under § 382.309, or a follow-up alcohol or controlled substance test required under § 382.311. No employer shall permit a driver who refuses to submit to such tests to perform or continue to perform safety-sensitive functions.

[77 FR 4483, Jan. 30, 2012]

§ 382.213 Controlled substance use.

(a) No driver shall report for duty or remain on duty requiring the performance of safety sensitive functions when the driver uses any drug or substance identified in 21 CFR 1308.11 Schedule I.

(b) No driver shall report for duty or remain on duty requiring the performance of safety-sensitive functions when the driver uses any non-Schedule I drug or substance that is identified in the other Schedules in 21 CFR part 1308 except when the use is pursuant to the instructions of a licensed medical practitioner, as defined in § 382.107, who is familiar with the driver's medical history and has advised the driver that the substance will not adversely affect

the driver's ability to safely operate a commercial motor vehicle.

(c) No employer having actual knowledge that a driver has used a controlled substance shall permit the driver to perform or continue to perform a safety-sensitive function.

(d) An employer may require a driver to inform the employer of any therapeutic drug use.

[77 FR 4483, Jan. 30, 2012]

§ 382.215 Controlled substances testing.

No driver shall report for duty, remain on duty or perform a safety-sensitive function, if the driver tests positive or has adulterated or substituted a test specimen for controlled substances. No employer having knowledge that a driver has tested positive or has adulterated or substituted a test specimen for controlled substances shall permit the driver to perform or continue to perform safety-sensitive functions.

[66 FR 43103, Aug. 17, 2001, as amended at 77 FR 4483, Jan. 30, 2012]

§ 382.217 Employer responsibilities.

No employer may allow, require, permit or authorize a driver to operate a commercial motor vehicle during any period in which an employer determines that a driver is not in compliance with the return-to-duty requirements in 49 CFR part 40, subpart O, after the occurrence of any of the following events:

(a) The driver receives a positive, adulterated, or substituted drug test result conducted under part 40 of this title.

(b) The driver receives an alcohol confirmation test result of 0.04 or higher alcohol concentration conducted under part 40 of this title.

(c) The driver refused to submit to a test for drugs or alcohol required under this part.

(d) The driver used alcohol prior to a post-accident alcohol test in violation of § 382.209.

(e) An employer has actual knowledge, as defined at § 382.107, that a driver has:

(1) Used alcohol while performing safety-sensitive functions in violation of § 382.205;

(2) Used alcohol within four hours of performing safety-sensitive functions in violation of § 382.207; or

(3) Used a controlled substance.

[81 FR 87724, Dec. 5, 2016]

Subpart C—Tests Required

§ 382.301 Pre-employment testing.

(a) Prior to the first time a driver performs safety-sensitive functions for an employer, the driver shall undergo testing for controlled substances as a condition prior to being used, unless the employer uses the exception in paragraph (b) of this section. No employer shall allow a driver, who the employer intends to hire or use, to perform safety-sensitive functions unless the employer has received a controlled substances test result from the MRO or C/TPA indicating a verified negative test result for that driver.

(b) An employer is not required to administer a controlled substances test required by paragraph (a) of this section if:

(1) The driver has participated in a controlled substances testing program that meets the requirements of this part within the previous 30 days; and

(2) While participating in that program, either:

(i) Was tested for controlled substances within the past 6 months (from the date of application with the employer), or

(ii) Participated in the random controlled substances testing program for the previous 12 months (from the date of application with the employer); and

(3) The employer ensures that no prior employer of the driver of whom the employer has knowledge has records of a violation of this part or the controlled substances use rule of another DOT agency within the previous six months.

(c)(1) An employer who exercises the exception in paragraph (b) of this section shall contact the controlled substances testing program(s) in which the driver participates or participated and

shall obtain and retain from the testing program(s) the following information:

(i) Name(s) and address(es) of the program(s).

(ii) Verification that the driver participates or participated in the program(s).

(iii) Verification that the program(s) conforms to part 40 of this title.

(iv) Verification that the driver is qualified under the rules of this part, including that the driver has not refused to be tested for controlled substances.

(v) The date the driver was last tested for controlled substances.

(vi) The results of any tests taken within the previous six months and any other violations of subpart B of this part.

(2) An employer who uses, but does not employ a driver more than once a year to operate commercial motor vehicles must obtain the information in paragraph (c)(1) of this section at least once every six months. The records prepared under this paragraph shall be maintained in accordance with § 382.401. If the employer cannot verify that the driver is participating in a controlled substances testing program in accordance with this part and part 40 of this title, the employer shall conduct a pre-employment controlled substances test.

(d) An employer may, but is not required to, conduct pre-employment alcohol testing under this part. If an employer chooses to conduct pre-employment alcohol testing, it must comply with the following requirements:

(1) It must conduct a pre-employment alcohol test before the first performance of safety-sensitive functions by every covered employee (whether a new employee or someone who has transferred to a position involving the performance of safety-sensitive functions).

(2) It must treat all safety-sensitive employees performing safety-sensitive functions the same for the purpose of pre-employment alcohol testing (i.e., it must not test some covered employees and not others).

(3) It must conduct the pre-employment tests after making a contingent offer of employment or transfer, subject to the employee passing the pre-employment alcohol test.

(4) It must conduct all pre-employment alcohol tests using the alcohol testing procedures of 49 CFR part 40 of this title.

(5) It must not allow a covered employee to begin performing safety-sensitive functions unless the result of the employee's test indicates an alcohol concentration of less than 0.04.

§ 382.303 Post-accident testing.

(a) As soon as practicable following an occurrence involving a commercial motor vehicle operating on a public road in commerce, each employer shall test for alcohol for each of its surviving drivers:

(1) Who was performing safety-sensitive functions with respect to the vehicle, if the accident involved the loss of human life; or

(2) Who receives a citation within 8 hours of the occurrence under State or local law for a moving traffic violation arising from the accident, if the accident involved:

(i) Bodily injury to any person who, as a result of the injury, immediately receives medical treatment away from the scene of the accident; or

(ii) One or more motor vehicles incurring disabling damage as a result of the accident, requiring the motor vehicle to be transported away from the scene by a tow truck or other motor vehicle.

(b) As soon as practicable following an occurrence involving a commercial motor vehicle operating on a public road in commerce, each employer shall test for controlled substances for each of its surviving drivers:

(1) Who was performing safety-sensitive functions with respect to the vehicle, if the accident involved the loss of human life; or

(2) Who receives a citation within thirty-two hours of the occurrence under State or local law for a moving traffic violation arising from the accident, if the accident involved:

(i) Bodily injury to any person who, as a result of the injury, immediately receives medical treatment away from the scene of the accident; or

(ii) One or more motor vehicles incurring disabling damage as a result of

the accident, requiring the motor vehicle to be transported away from the scene by a tow truck or other motor vehicle.

(c) The following table notes when a post-accident test is required to be conducted by paragraphs (a)(1), (a)(2), (b)(1), and (b)(2) of this section:

TABLE FOR § 382.303(*a*) AND (*b*)

Type of accident involved	Citation issued to the CMV driver	Test must be performed by employer
i. Human fatality	YES	YES
	NO	YES
ii. Bodily injury with immediate medical treatment away from the scene	YES	YES
	NO	NO
iii. Disabling damage to any motor vehicle requiring tow away	YES	YES
	NO	NO

(d)(1) *Alcohol tests.* If a test required by this section is not administered within two hours following the accident, the employer shall prepare and maintain on file a record stating the reasons the test was not promptly administered. If a test required by this section is not administered within eight hours following the accident, the employer shall cease attempts to administer an alcohol test and shall prepare and maintain the same record. Records shall be submitted to the FMCSA upon request.

(2) *Controlled substance tests.* If a test required by this section is not administered within 32 hours following the accident, the employer shall cease attempts to administer a controlled substances test, and prepare and maintain on file a record stating the reasons the test was not promptly administered. Records shall be submitted to the FMCSA upon request.

(e) A driver who is subject to post-accident testing shall remain readily available for such testing or may be deemed by the employer to have refused to submit to testing. Nothing in this section shall be construed to require the delay of necessary medical attention for injured people following an accident or to prohibit a driver from leaving the scene of an accident for the period necessary to obtain assistance in responding to the accident, or to obtain necessary emergency medical care.

(f) An employer shall provide drivers with necessary post-accident information, procedures and instructions, prior to the driver operating a commercial motor vehicle, so that drivers will be able to comply with the requirements of this section.

(g)(1) The results of a breath or blood test for the use of alcohol, conducted by Federal, State, or local law enforcement or public safety officials having independent authority for the test, shall be considered to meet the requirements of this section, provided such tests conform to the applicable Federal, State or local alcohol testing requirements, and that the results of the tests are obtained by the employer.

(2) The results of a urine test for the use of controlled substances, conducted by Federal, State, or local law enforcement or public safety officials having independent authority for the test, shall be considered to meet the requirements of this section, provided such tests conform to the applicable Federal, State or local controlled substances testing requirements, and that the results of the tests are obtained by the employer.

(h) *Exception.* This section does not apply to:

(1) An occurrence involving only boarding or alighting from a stationary motor vehicle; or

(2) An occurrence involving only the loading or unloading of cargo; or

(3) An occurrence in the course of the operation of a passenger car or a multipurpose passenger vehicle (as defined in § 571.3 of this title) by an employer unless the motor vehicle is transporting passengers for hire or hazardous materials of a type and quantity that require the motor vehicle to

be marked or placarded in accordance with § 177.823 of this title.

[66 FR 43103, Aug. 17, 2001, as amended at 87 FR 59035, Sept. 29, 2022]

§ 382.305 Random testing.

(a) Every employer shall comply with the requirements of this section. Every driver shall submit to random alcohol and controlled substance testing as required in this section.

(b)(1) Except as provided in paragraphs (c) through (e) of this section, the minimum annual percentage rate for random alcohol testing shall be 10 percent of the average number of driver positions.

(2) Except as provided in paragraphs (f) through (h) of this section, the minimum annual percentage rate for random controlled substances testing shall be 50 percent of the average number of driver positions.

(c) The FMCSA Administrator's decision to increase or decrease the minimum annual percentage rate for alcohol testing is based on the reported violation rate for the entire industry. All information used for this determination is drawn from the alcohol management information system reports required by § 382.403. In order to ensure reliability of the data, the FMCSA Administrator considers the quality and completeness of the reported data, may obtain additional information or reports from employers, and may make appropriate modifications in calculating the industry violation rate. In the event of a change in the annual percentage rate, the FMCSA Administrator will publish in the FEDERAL REGISTER the new minimum annual percentage rate for random alcohol testing of drivers. The new minimum annual percentage rate for random alcohol testing will be applicable starting January 1 of the calendar year following publication in the FEDERAL REGISTER.

(d)(1) When the minimum annual percentage rate for random alcohol testing is 25 percent or more, the FMCSA Administrator may lower this rate to 10 percent of all driver positions if the FMCSA Administrator determines that the data received under the reporting requirements of § 382.403 for two consecutive calendar years indicate that the violation rate is less than 0.5 percent.

(2) When the minimum annual percentage rate for random alcohol testing is 50 percent, the FMCSA Administrator may lower this rate to 25 percent of all driver positions if the FMCSA Administrator determines that the data received under the reporting requirements of § 382.403 for two consecutive calendar years indicate that the violation rate is less than 1.0 percent but equal to or greater than 0.5 percent.

(e)(1) When the minimum annual percentage rate for random alcohol testing is 10 percent, and the data received under the reporting requirements of § 382.403 for that calendar year indicate that the violation rate is equal to or greater than 0.5 percent, but less than 1.0 percent, the FMCSA Administrator will increase the minimum annual percentage rate for random alcohol testing to 25 percent for all driver positions.

(2) When the minimum annual percentage rate for random alcohol testing is 25 percent or less, and the data received under the reporting requirements of § 382.403 for that calendar year indicate that the violation rate is equal to or greater than 1.0 percent, the FMCSA Administrator will increase the minimum annual percentage rate for random alcohol testing to 50 percent for all driver positions.

(f) The FMCSA Administrator's decision to increase or decrease the minimum annual percentage rate for controlled substances testing is based on the reported positive rate for the entire industry. All information used for this determination is drawn from the controlled substances management information system reports required by § 382.403. In order to ensure reliability of the data, the FMCSA Administrator considers the quality and completeness of the reported data, may obtain additional information or reports from employers, and may make appropriate modifications in calculating the industry positive rate. In the event of a change in the annual percentage rate, the FMCSA Administrator will publish in the FEDERAL REGISTER the new minimum annual percentage rate for controlled substances testing of drivers.

The new minimum annual percentage rate for random controlled substances testing will be applicable starting January 1 of the calendar year following publication in the FEDERAL REGISTER.

(g) When the minimum annual percentage rate for random controlled substances testing is 50 percent, the FMCSA Administrator may lower this rate to 25 percent of all driver positions if the FMCSA Administrator determines that the data received under the reporting requirements of § 382.403 for two consecutive calendar years indicate that the positive rate is less than 1.0 percent.

(h) When the minimum annual percentage rate for random controlled substances testing is 25 percent, and the data received under the reporting requirements of § 382.403 for any calendar year indicate that the reported positive rate is equal to or greater than 1.0 percent, the FMCSA Administrator will increase the minimum annual percentage rate for random controlled substances testing to 50 percent of all driver positions.

(i)(1) The selection of drivers for random alcohol and controlled substances testing shall be made by a scientifically valid method, such as a random number table or a computer-based random number generator that is matched with drivers' Social Security numbers, payroll identification numbers, or other comparable identifying numbers.

(2) Each driver selected for random alcohol and controlled substances testing under the selection process used, shall have an equal chance of being tested each time selections are made.

(3) Each driver selected for testing shall be tested during the selection period.

(j)(1)To calculate the total number of covered drivers eligible for random testing throughout the year, as an employer, you must add the total number of covered drivers eligible for testing during each random testing period for the year and divide that total by the number of random testing periods. Covered employees, and only covered employees, are to be in an employer's random testing pool, and all covered drivers must be in the random pool. If you are an employer conducting random testing more often than once per month (*e.g.*, daily, weekly, bi-weekly) you do not need to compute this total number of covered drivers rate more than on a once per month basis.

(2) As an employer, you may use a service agent (*e.g.*, a C/TPA) to perform random selections for you, and your covered drivers may be part of a larger random testing pool of covered employees. However, you must ensure that the service agent you use is testing at the appropriate percentage established for your industry and that only covered employees are in the random testing pool.

(k)(1) Each employer shall ensure that random alcohol and controlled substances tests conducted under this part are unannounced.

(2) Each employer shall ensure that the dates for administering random alcohol and controlled substances tests conducted under this part are spread reasonably throughout the calendar year.

(l) Each employer shall require that each driver who is notified of selection for random alcohol and/or controlled substances testing proceeds to the test site immediately; provided, however, that if the driver is performing a safety-sensitive function, other than driving a commercial motor vehicle, at the time of notification, the employer shall instead ensure that the driver ceases to perform the safety-sensitive function and proceeds to the testing site as soon as possible.

(m) A driver shall only be tested for alcohol while the driver is performing safety-sensitive functions, just before the driver is to perform safety-sensitive functions, or just after the driver has ceased performing such functions.

(n) If a given driver is subject to random alcohol or controlled substances testing under the random alcohol or controlled substances testing rules of more than one DOT agency for the same employer, the driver shall be subject to random alcohol and/or controlled substances testing at the annual percentage rate established for the calendar year by the DOT agency regulating more than 50 percent of the driver's function.

(o) If an employer is required to conduct random alcohol or controlled substances testing under the alcohol or

controlled substances testing rules of more than one DOT agency, the employer may—

(1) Establish separate pools for random selection, with each pool containing the DOT-covered employees who are subject to testing at the same required minimum annual percentage rate; or

(2) Randomly select such employees for testing at the highest minimum annual percentage rate established for the calendar year by any DOT agency to which the employer is subject.

[66 FR 43103, Aug. 17, 2001, as amended at 67 FR 61821, Oct. 2, 2002; 68 FR 75459, Dec. 31, 2003; 81 FR 68346, Oct. 4, 2016; 86 FR 57069, Oct. 14, 2021]

§ 382.307 Reasonable suspicion testing.

(a) An employer shall require a driver to submit to an alcohol test when the employer has reasonable suspicion to believe that the driver has violated the prohibitions of subpart B of this part concerning alcohol. The employer's determination that reasonable suspicion exists to require the driver to undergo an alcohol test must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the driver.

(b) An employer shall require a driver to submit to a controlled substances test when the employer has reasonable suspicion to believe that the driver has violated the prohibitions of subpart B of this part concerning controlled substances. The employer's determination that reasonable suspicion exists to require the driver to undergo a controlled substances test must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the driver. The observations may include indications of the chronic and withdrawal effects of controlled substances.

(c) The required observations for alcohol and/or controlled substances reasonable suspicion testing shall be made by a supervisor or company official who is trained in accordance with § 382.603. The person who makes the determination that reasonable suspicion exists to conduct an alcohol test shall not conduct the alcohol test of the driver.

(d) Alcohol testing is authorized by this section only if the observations required by paragraph (a) of this section are made during, just preceding, or just after the period of the work day that the driver is required to be in compliance with this part. A driver may be directed by the employer to only undergo reasonable suspicion testing while the driver is performing safety-sensitive functions, just before the driver is to perform safety-sensitive functions, or just after the driver has ceased performing such functions.

(e)(1) If an alcohol test required by this section is not administered within two hours following the determination under paragraph (a) of this section, the employer shall prepare and maintain on file a record stating the reasons the alcohol test was not promptly administered. If an alcohol test required by this section is not administered within eight hours following the determination under paragraph (a) of this section, the employer shall cease attempts to administer an alcohol test and shall state in the record the reasons for not administering the test.

(2) Notwithstanding the absence of a reasonable suspicion alcohol test under this section, no driver shall report for duty or remain on duty requiring the performance of safety-sensitive functions while the driver is under the influence of or impaired by alcohol, as shown by the behavioral, speech, and performance indicators of alcohol misuse, nor shall an employer permit the driver to perform or continue to perform safety-sensitive functions, until:

(i) An alcohol test is administered and the driver's alcohol concentration measures less than 0.02; or

(ii) Twenty four hours have elapsed following the determination under paragraph (a) of this section that there is reasonable suspicion to believe that the driver has violated the prohibitions in this part concerning the use of alcohol.

(3) Except as provided in paragraph (e)(2) of this section, no employer shall take any action under this part against a driver based solely on the driver's behavior and appearance, with respect to

alcohol use, in the absence of an alcohol test. This does not prohibit an employer with independent authority of this part from taking any action otherwise consistent with law.

(f) A written record shall be made of the observations leading to an alcohol or controlled substances reasonable suspicion test, and signed by the supervisor or company official who made the observations, within 24 hours of the observed behavior or before the results of the alcohol or controlled substances tests are released, whichever is earlier.

§ 382.309 Return-to-duty testing.

The requirements for return-to-duty testing must be performed in accordance with 49 CFR part 40, subpart O.

§ 382.311 Follow-up testing.

The requirements for follow-up testing must be performed in accordance with 49 CFR part 40, subpart O.

Subpart D—Handling of Test Results, Records Retention, and Confidentiality

§ 382.401 Retention of records.

(a) *General requirement*. Each employer shall maintain records of its alcohol misuse and controlled substances use prevention programs as provided in this section. The records shall be maintained in a secure location with controlled access.

(b) *Period of retention*. Each employer shall maintain the records in accordance with the following schedule:

(1) *Five years*. The following records shall be maintained for a minimum of five years:

(i) Records of driver alcohol test results indicating an alcohol concentration of 0.02 or greater,

(ii) Records of driver verified positive controlled substances test results,

(iii) Documentation of refusals to take required alcohol and/or controlled substances tests,

(iv) Driver evaluation and referrals,

(v) Calibration documentation,

(vi) Records related to the administration of the alcohol and controlled substances testing program, including records of all driver violations, and

(vii) A copy of each annual calendar year summary required by § 382.403.

(2) *Two years*. Records related to the alcohol and controlled substances collection process (except calibration of evidential breath testing devices) shall be maintained for a minimum of 2 years.

(3) *One year*. Records of negative and canceled controlled substances test results and MRO reversal of canceled controlled substances test results (as defined in part 40 of this title) and alcohol test results with a concentration of less than 0.02 shall be maintained for a minimum of one year.

(4) *Indefinite period*. Records related to the education and training of breath alcohol technicians, screening test technicians, supervisors, and drivers shall be maintained by the employer while the individual performs the functions which require the training and for two years after ceasing to perform those functions.

(c) *Types of records*. The following specific types of records shall be maintained. ''Documents generated'' are documents that may have to be prepared under a requirement of this part. If the record is required to be prepared, it must be maintained.

(1) Records related to the collection process:

(i) Collection logbooks, if used;

(ii) Documents relating to the random selection process;

(iii) Calibration documentation for evidential breath testing devices;

(iv) Documentation of breath alcohol technician training;

(v) Documents generated in connection with decisions to administer reasonable suspicion alcohol or controlled substances tests;

(vi) Documents generated in connection with decisions on post-accident tests;

(vii) Documents verifying existence of a medical explanation of the inability of a driver to provide adequate breath or to provide a urine or oral fluid specimen for testing; and

(viii) A copy of each annual calendar year summary as required by § 382.403.

(2) Records related to a driver's test results:

(i) The employer's copy of the alcohol test form, including the results of the test;

(ii) The employer's copy of the controlled substances test chain of custody and control form;

(iii) Documents sent by the MRO to the employer, including those required by part 40, subpart G, of this title;

(iv) Documents related to the refusal of any driver to submit to an alcohol or controlled substances test required by this part;

(v) Documents presented by a driver to dispute the result of an alcohol or controlled substances test administered under this part; and

(vi) Documents generated in connection with verifications of prior employers' alcohol or controlled substances test results that the employer:

(A) Must obtain in connection with the exception contained in §382.301, and

(B) Must obtain as required by §382.413.

(3) Records related to other violations of this part.

(4) Records related to evaluations:

(i) Records pertaining to a determination by a substance abuse professional concerning a driver's need for assistance; and

(ii) Records concerning a driver's compliance with recommendations of the substance abuse professional.

(5) Records related to education and training:

(i) Materials on alcohol misuse and controlled substance use awareness, including a copy of the employer's policy on alcohol misuse and controlled substance use;

(ii) Documentation of compliance with the requirements of §382.601, including the driver's signed receipt of education materials;

(iii) Documentation of training provided to supervisors for the purpose of qualifying the supervisors to make a determination concerning the need for alcohol and/or controlled substances testing based on reasonable suspicion;

(iv) Documentation of training for breath alcohol technicians as required by §40.213(g) of this title; and

(v) Certification that any training conducted under this part complies with the requirements for such training.

(6) Administrative records related to alcohol and controlled substances testing:

(i) Agreements with collection site facilities, laboratories, breath alcohol technicians, screening test technicians, medical review officers, consortia, and third party service providers;

(ii) Names and positions of officials and their role in the employer's alcohol and controlled substances testing program(s);

(iii) Semi-annual laboratory statistical summaries of urinalysis required by §40.111(a) of this title; and

(iv) The employer's alcohol and controlled substances testing policy and procedures.

(d) *Location of records.* All records required by this part shall be maintained as required by §390.29 of this subchapter and shall be made available for inspection at the employer's principal place of business within two business days after a request has been made by an authorized representative of the Federal Motor Carrier Safety Administration.

(e) *OMB control number.* (1) The information collection requirements of this part have been reviewed by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and have been assigned OMB control number 2126–0012.

(2) The information collection requirements of this part are found in the following sections: Sections 382.105, 382.113, 382.301, 382.303, 382.305, 382.307, 382.401, 382.403, 382.405, 382.409, 382.411, 382.601, 382.603.

[66 FR 43103, Aug. 17, 2001, as amended at 67 FR 61821, Oct. 2, 2002; 68 FR 75459, Dec. 31, 2003; 78 FR 58479, Sept. 24, 2013; 81 FR 87725, Dec. 5, 2016; 88 FR 27653, May 2, 2023]

§382.403 Reporting of results in a management information system.

(a) An employer shall prepare and maintain a summary of the results of its alcohol and controlled substances testing programs performed under this part during the previous calendar year, when requested by the Secretary of Transportation, any DOT agency, or any State or local officials with regulatory authority over the employer or any of its drivers.

(b) If an employer is notified, during the month of January, of a request by the Federal Motor Carrier Safety Administration to report the employer's

annual calendar year summary information, the employer shall prepare and submit the report to the FMCSA by March 15 of that year. The employer shall ensure that the annual summary report is accurate and received by March 15 at the location that the FMCSA specifies in its request. The employer must use the Management Information System (MIS) form and instructions as required by 49 CFR part 40 (at § 40.26 and appendix J to part 40). The employer may also use the electronic version of the MIS form provided by the DOT. The Administrator may designate means (*e.g.*, electronic program transmitted via the Internet), other than hard-copy, for MIS form submission. For information on the electronic version of the form, see: *http://www.fmcsa.dot.gov/safetyprogs/drugs/engtesting.htm*.

(c) When the report is submitted to the FMCSA by mail or electronic transmission, the information requested shall be typed, except for the signature of the certifying official. Each employer shall ensure the accuracy and timeliness of each report submitted by the employer or a consortium.

(d) If you have a covered employee who performs multi-DOT agency functions (*e.g.*, an employee drives a commercial motor vehicle and performs pipeline maintenance duties for the same employer), count the employee only on the MIS report for the DOT agency under which he or she is randomly tested. Normally, this will be the DOT agency under which the employee performs more than 50% of his or her duties. Employers may have to explain the testing data for these employees in the event of a DOT agency inspection or audit.

(e) A service agent (*e.g.*, *Consortium/Third party administrator* as defined in 49 CFR 382.107) may prepare the MIS report on behalf of an employer. However, a company official (*e.g.*, *Designated employer representative* as defined in § 382.107) must certify the accuracy and completeness of the MIS report, no matter who prepares it.

[66 FR 43103, Aug. 17, 2001, as amended at 68 FR 75459, Dec. 31, 2003; 78 FR 58479, Sept. 24, 2013; 83 FR 22875, May 17, 2018; 88 FR 27653, May 2, 2023]

§ 382.405 Access to facilities and records.

(a) Except as required by law or expressly authorized or required in this section, no employer shall release driver information that is contained in records required to be maintained under § 382.401.

(b) A driver is entitled, upon written request, to obtain copies of any records pertaining to the driver's use of alcohol or controlled substances, including any records pertaining to his or her alcohol or controlled substances tests. The employer shall promptly provide the records requested by the driver. Access to a driver's records shall not be contingent upon payment for records other than those specifically requested.

(c) Each employer shall permit access to all facilities utilized in complying with the requirements of this part to the Secretary of Transportation, any DOT agency, or any State or local officials with regulatory authority over the employer or any of its drivers.

(d) Each employer, and each service agent who maintains records for an employer, must make available copies of all results for DOT alcohol and/or controlled substances testing conducted by the employer under this part and any other information pertaining to the employer's alcohol misuse and/or controlled substances use prevention program when requested by the Secretary of Transportation, any DOT agency, or any State or local officials with regulatory authority over the employer or any of its drivers.

(e) When requested by the National Transportation Safety Board as a part of a crash investigation:

(1) Employers must disclose information related to the employer's administration of a post-accident alcohol and/or a controlled substances test administered following the crash under investigation; and

(2) FMCSA will provide access to information in the Clearinghouse concerning drivers who are involved with the crash under investigation.

(f) Records shall be made available to a subsequent employer upon receipt of

a written request from a driver. Disclosure by the subsequent employer is permitted only as expressly authorized by the terms of the driver's request.

(g) An employer may disclose information required to be maintained under this part pertaining to a driver to the decision maker in a lawsuit, grievance, or administrative proceeding initiated by or on behalf of the individual, and arising from a positive DOT drug or alcohol test or a refusal to test (including, but not limited to, adulterated or substituted test results) of this part (including, but not limited to, a worker's compensation, unemployment compensation, or other proceeding relating to a benefit sought by the driver). Additionally, an employer may disclose information in criminal or civil actions in accordance with § 40.323(a)(2) of this title.

(h) An employer shall release information regarding a driver's records as directed by the specific written consent of the driver authorizing release of the information to an identified person. Release of such information by the person receiving the information is permitted only in accordance with the terms of the employee's specific written consent as outlined in § 40.321(b) of this title.

[66 FR 43103, Aug. 17, 2001, as amended at 81 FR 87725, Dec. 5, 2016]

§ 382.407 Medical review officer notifications to the employer.

Medical review officers shall report the results of controlled substances tests to employers in accordance with the requirements of part 40, Subpart G, of this title.

§ 382.409 Medical review officer or consortium/third party administrator record retention for controlled substances.

(a) A medical review officer or third party administrator shall maintain all dated records and notifications, identified by individual, for a minimum of five years for verified positive controlled substances test results.

(b) A medical review officer or third party administrator shall maintain all dated records and notifications, identified by individual, for a minimum of one year for negative and canceled controlled substances test results and MRO reversal of cancelled controlled substances test results.

(c) No person may obtain the individual controlled substances test results retained by a medical review officer (MRO as defined in § 40.3 of this title) or a consortium/third party administrator (C/TPA as defined in § 382.107), and no MRO or C/TPA may release the individual controlled substances test results of any driver to any person, without first obtaining a specific, written authorization from the tested driver. Nothing in this paragraph (c) shall prohibit a MRO or a C/TPA from releasing to the employer, the Clearinghouse, or to the Secretary of Transportation, any DOT agency, or any State or local officials with regulatory authority over the controlled substances and alcohol testing program under this part, the information delineated in part 40, subpart G, of this title.

[66 FR 43103, Aug. 17, 2001, as amended at 81 FR 87725, Dec. 5, 2016; 88 FR 27653, May 2, 2023]

§ 382.411 Employer notifications.

(a) An employer shall notify a driver of the results of a pre-employment controlled substances test conducted under this part, if the driver requests such results within 60 calendar days of being notified of the disposition of the employment application. An employer shall notify a driver of the results of random, reasonable suspicion and post-accident tests for controlled substances conducted under this part if the test results are verified positive. The employer shall also inform the driver which controlled substance or substances were verified as positive.

(b) The designated employer representative shall make reasonable efforts to contact and request each driver who submitted a specimen under the employer's program, regardless of the driver's employment status, to contact and discuss the results of the controlled substances test with a medical review officer who has been unable to contact the driver.

(c) The designated employer representative shall immediately notify the medical review officer that the

driver has been notified to contact the medical review officer within 72 hours.

§ 382.413 Inquiries for alcohol and controlled substances information from previous employers.

(a) Employers must request alcohol and controlled substances information from previous employers in accordance with the requirements of § 40.25 of this title, except that the employer must request information from all DOT-regulated employers that employed the driver within the previous 3 years and the scope of the information requested must date back 3 years.

(b) As of January 6, 2023, employers must use the Drug and Alcohol Clearinghouse in accordance with § 382.701(a) to comply with the requirements of § 40.25 of this title with respect to FMCSA-regulated employers. Exception: When an employee who is subject to follow-up testing has not successfully completed all follow-up tests, employers must request the employee's follow-up testing plan directly from the previous employer in accordance with § 40.25(b)(5) of this title.

(c) If an applicant was subject to an alcohol and controlled substance testing program under the requirements of a DOT Agency other than FMCSA, the employer must request the alcohol and controlled substances information required under this section and § 40.25 of this title directly from those employers regulated by a DOT Agency other than FMCSA.

[81 FR 87725, Dec. 5, 2016]

§ 382.415 Notification to employers of a controlled substances or alcohol testing program violation.

Each person holding a commercial driver's license and subject to the DOT controlled substances and alcohol testing requirements in this part who has violated the alcohol and controlled substances prohibitions under part 40 of this title or this part without complying with the requirements of part 40, subpart O, must notify in writing all current employers of such violation(s). The driver is not required to provide notification to the employer that administered the test or documented the circumstances that gave rise to the violation. The notification must be made before the end of the business day following the day the employee received notice of the violation, or prior to performing any safety-sensitive function, whichever comes first.

[81 FR 87725, Dec. 5, 2016]

Subpart E—Consequences for Drivers Engaging in Substance Use-Related Conduct

§ 382.501 Removal from safety-sensitive function.

(a) Except as provided in subpart F of this part, no driver shall perform safety-sensitive functions, including driving a commercial motor vehicle, if the driver has engaged in conduct prohibited by subpart B of this part or an alcohol or controlled substances rule of another DOT agency.

(b) No employer shall permit any driver to perform safety-sensitive functions; including driving a commercial motor vehicle, if the employer has determined that the driver has violated this section.

(c) For purposes of this subpart, commercial motor vehicle means a commercial motor vehicle in commerce as defined in § 382.107, and a commercial motor vehicle in interstate commerce as defined in part 390 of this subchapter.

§ 382.503 Required evaluation and testing, reinstatement of commercial driving privilege.

(a) No driver who has engaged in conduct prohibited by subpart B of this part shall perform safety-sensitive functions, including driving a commercial motor vehicle, unless the driver has met the requirements of part 40, subpart O, of this title. No employer shall permit a driver who has engaged in conduct prohibited by subpart B of this part to perform safety-sensitive functions, including driving a commercial motor vehicle, unless the driver has met the requirements of part 40, subpart O, of this title.

(b) No driver whose commercial driving privilege has been removed from the driver's license, pursuant to § 382.501(a), shall drive a commercial motor vehicle until the State Driver

Licensing Agency reinstates the CLP or CDL privilege to the driver's license.

[66 FR 43103, Aug. 17, 2001, as amended at 86 FR 55741, Oct. 7, 2021]

§ 382.505 Other alcohol-related conduct.

(a) No driver tested under the provisions of subpart C of this part who is found to have an alcohol concentration of 0.02 or greater but less than 0.04 shall perform or continue to perform safety-sensitive functions for an employer, including driving a commercial motor vehicle, nor shall an employer permit the driver to perform or continue to perform safety-sensitive functions, until the start of the driver's next regularly scheduled duty period, but not less than 24 hours following administration of the test.

(b) Except as provided in paragraph (a) of this section, no employer shall take any action under this part against a driver based solely on test results showing an alcohol concentration less than 0.04. This does not prohibit an employer with authority independent of this part from taking any action otherwise consistent with law.

§ 382.507 Penalties.

Any employer or driver who violates the requirements of this part shall be subject to the civil and/or criminal penalty provisions of 49 U.S.C. 521(b). In addition, any employer or driver who violates the requirements of 49 CFR part 40 shall be subject to the civil and/or criminal penalty provisions of 49 U.S.C. 521(b).

Subpart F—Alcohol Misuse and Controlled Substances Use Information, Training, and Referral

§ 382.601 Employer obligation to promulgate a policy on the misuse of alcohol and use of controlled substances.

(a) *General requirements.* Each employer shall provide educational materials that explain the requirements of this part and the employer's policies and procedures with respect to meeting these requirements.

(1) The employer shall ensure that a copy of these materials is distributed to each driver prior to the start of alcohol and controlled substances testing under this part and to each driver subsequently hired or transferred into a position requiring driving a commercial motor vehicle.

(2) Each employer shall provide written notice to representatives of employee organizations of the availability of this information.

(b) *Required content.* The materials to be made available to drivers shall include detailed discussion of at least the following:

(1) The identity of the person designated by the employer to answer driver questions about the materials;

(2) The categories of drivers who are subject to the provisions of this part;

(3) Sufficient information about the safety-sensitive functions performed by those drivers to make clear what period of the work day the driver is required to be in compliance with this part;

(4) Specific information concerning driver conduct that is prohibited by this part;

(5) The circumstances under which a driver will be tested for alcohol and/or controlled substances under this part, including post-accident testing under §382.303(d);

(6) The procedures that will be used to test for the presence of alcohol and controlled substances, protect the driver and the integrity of the testing processes, safeguard the validity of the test results, and ensure that those results are attributed to the correct driver, including post-accident information, procedures and instructions required by §382.303(d);

(7) The requirement that a driver submit to alcohol and controlled substances tests administered in accordance with this part;

(8) An explanation of what constitutes a refusal to submit to an alcohol or controlled substances test and the attendant consequences;

(9) The consequences for drivers found to have violated subpart B of this part, including the requirement that the driver be removed immediately from safety-sensitive functions,

and the procedures under part 40, subpart O, of this title;

(10) The consequences for drivers found to have an alcohol concentration of 0.02 or greater but less than 0.04;

(11) Information concerning the effects of alcohol and controlled substances use on an individual's health, work, and personal life; signs and symptoms of an alcohol or a controlled substances problem (the driver's or a co-worker's); and available methods of intervening when an alcohol or a controlled substances problem is suspected, including confrontation, referral to any employee assistance program and/or referral to management; and

(12) The requirement that the following personal information collected and maintained under this part shall be reported to the Clearinghouse:

(i) A verified positive, adulterated, or substituted drug test result;

(ii) An alcohol confirmation test with a concentration of 0.04 or higher;

(iii) A refusal to submit to any test required by subpart C of this part;

(iv) An employer's report of actual knowledge, as defined at § 382.107:

(A) On duty alcohol use pursuant to § 382.205;

(B) Pre-duty alcohol use pursuant to § 382.207;

(C) Alcohol use following an accident pursuant to § 382.209; and

(D) Controlled substance use pursuant to § 382.213;

(v) A substance abuse professional (SAP as defined in § 40.3 of this title) report of the successful completion of the return-to-duty process;

(vi) A negative return-to-duty test; and

(vii) An employer's report of completion of follow-up testing.

(c) *Optional provision.* The materials supplied to drivers may also include information on additional employer policies with respect to the use of alcohol or controlled substances, including any consequences for a driver found to have a specified alcohol or controlled substances level, that are based on the employer's authority independent of this part. Any such additional policies or consequences must be clearly and obviously described as being based on independent authority.

(d) *Certificate of receipt.* Each employer shall ensure that each driver is required to sign a statement certifying that he or she has received a copy of these materials described in this section. Each employer shall maintain the signed certificate and may provide a copy of the certificate to the driver.

[66 FR 43103, Aug. 17, 2001, as amended at 78 FR 58479, Sept. 24, 2013; 81 FR 87725, Dec. 5, 2016; 83 FR 16226, Apr. 16, 2018]

§ 382.603 Training for supervisors.

Each employer shall ensure that all persons designated to supervise drivers receive at least 60 minutes of training on alcohol misuse and receive at least an additional 60 minutes of training on controlled substances use. The training will be used by the supervisors to determine whether reasonable suspicion exists to require a driver to undergo testing under § 382.307. The training shall include the physical, behavioral, speech, and performance indicators of probable alcohol misuse and use of controlled substances. Recurrent training for supervisory personnel is not required.

§ 382.605 Referral, evaluation, and treatment.

The requirements for referral, evaluation, and treatment must be performed in accordance with 49 CFR part 40, Subpart O.

Subpart G—Requirements and Procedures for Implementation of the Commercial Driver's License Drug and Alcohol Clearinghouse

SOURCE: 81 FR 87725, Dec. 5, 2016, unless otherwise noted.

§ 382.701 Drug and Alcohol Clearinghouse.

(a) *Pre-employment query required.* (1) Employers must not employ a driver subject to controlled substances and alcohol testing under this part to perform a safety-sensitive function without first conducting a pre-employment query of the Clearinghouse to obtain information about whether the driver has a verified positive, adulterated, or substituted controlled substances test

result; has an alcohol confirmation test with a concentration of 0.04 or higher; has refused to submit to a test in violation of § 382.211; or that an employer has reported actual knowledge, as defined at § 382.107, that the driver used alcohol on duty in violation of § 382.205, used alcohol before duty in violation of § 382.207, used alcohol following an accident in violation of § 382.209, or used a controlled substance, in violation of § 382.213.

(2) The employer must conduct a full query under this section, which releases information in the Clearinghouse to an employer and requires that the individual driver give specific consent.

(b) *Annual query required.* (1) Employers must conduct a query of the Clearinghouse at least once per year for information for all employees subject to controlled substance and alcohol testing under this part to determine whether information exists in the Clearinghouse about those employees.

(2) In lieu of a full query, as described in paragraph (a)(2) of this section, an employer may obtain the individual driver's consent to conduct a limited query to satisfy the annual query requirement in paragraph (b)(1) of this section. The limited query will tell the employer whether there is information about the individual driver in the Clearinghouse, but will not release that information to the employer. The individual driver may give consent to conduct limited queries that is effective for more than one year.

(3) If the limited query shows that information exists in the Clearinghouse about the individual driver, the employer must conduct a full query, in accordance with paragraph (a)(2) of this section, within 24 hours of conducting the limited query. If the employer fails to conduct a full query within 24 hours, the employer must not allow the driver to continue to perform any safety-sensitive function until the employer conducts the full query and the results confirm that the driver's Clearinghouse record contains no prohibitions as defined in paragraph (d) of this section.

(c) *Employer notification.* If any information described in paragraph (a) of this section is entered into the Clearinghouse about a driver during the 30-day period immediately following an employer conducting a query of that driver's records, FMCSA will notify the employer.

(d) *Prohibition.* No employer may allow a driver the employer employs or intends to hire or use to perform any safety-sensitive function if the results of a Clearinghouse query demonstrate that the driver has a verified positive, adulterated, or substituted controlled substances test result; has an alcohol confirmation test with a concentration of 0.04 or higher; has refused to submit to a test in violation of § 382.211; or that an employer has reported actual knowledge, as defined at § 382.107, that the driver used alcohol on duty in violation of § 382.205, used alcohol before duty in violation of § 382.207, used alcohol following an accident in violation of § 382.209, or used a controlled substance in violation of § 382.213, except where a query of the Clearinghouse demonstrates:

(1) That the driver has successfully completed the SAP evaluation, referral, and education/treatment process set forth in part 40, subpart O, of this title; achieves a negative return-to-duty test result; and completes the follow-up testing plan prescribed by the SAP.

(2) That, if the driver has not completed all follow-up tests as prescribed by the SAP in accordance with § 40.307 of this title and specified in the SAP report required by § 40.311 of this title, the driver has completed the SAP evaluation, referral, and education/treatment process set forth in part 40, subpart O, of this title and achieves a negative return-to-duty test result, and the employer assumes the responsibility for managing the follow-up testing process associated with the testing violation.

(e) *Recordkeeping required.* Employers must retain for 3 years a record of each query and all information received in response to each query made under this section. As of January 6, 2023, an employer who maintains a valid registration fulfills this requirement.

[81 FR 87725, Dec. 5, 2016, as amended at 86 FR 35639, July 7, 2021]

§ 382.703 Driver consent to permit access to information in the Clearinghouse.

(a) No employer may query the Clearinghouse to determine whether a record exists for any particular driver without first obtaining that driver's written or electronic consent. The employer conducting the search must retain the consent for 3 years from the date of the last query.

(b) Before the employer may access information contained in the driver's Clearinghouse record, the driver must submit electronic consent through the Clearinghouse granting the employer access to the following specific records:

(1) A verified positive, adulterated, or substituted controlled substances test result;

(2) An alcohol confirmation test with a concentration of 0.04 or higher;

(3) A refusal to submit to a test in violation of § 382.211;

(4) An employer's report of actual knowledge, as defined at § 382.107, of:

(i) On duty alcohol use pursuant to § 382.205;

(ii) Pre-duty alcohol use pursuant to § 382.207;

(iii) Alcohol use following an accident pursuant to § 382.209; and

(iv) Controlled substance use pursuant to § 382.213;

(5) A SAP report of the successful completion of the return-to-duty process;

(6) A negative return-to-duty test; and

(7) An employer's report of completion of follow-up testing.

(c) No employer may permit a driver to perform a safety-sensitive function if the driver refuses to grant the consent required by paragraph (a) or (b) of this section.

(d) A driver granting consent under this section must provide consent electronically to the Agency through the Clearinghouse prior to release of information to an employer in accordance with § 382.701(a)(2) or (b)(3).

(e) A driver granting consent under this section grants consent for the Agency to release information to an employer in accordance with § 382.701(c).

[81 FR 87725, Dec. 5, 2016, as amended at 86 FR 57069, Oct. 14, 2021]

§ 382.705 Reporting to the Clearinghouse.

(a) *MROs.* (1) Within 2 business days of making a determination or verification, MROs must report the following information about a driver to the Clearinghouse:

(i) Verified positive, adulterated, or substituted controlled substances test results;

(ii) Refusal-to-test determination by the MRO in accordance with 49 CFR 40.191(a)(5), (7), and (11), (b), and (d)(2).

(2) MROs must provide the following information for each controlled substances test result specified in paragraph (a)(1) of this section:

(i) Reason for the test;

(ii) Federal Drug Testing Custody and Control Form specimen ID number;

(iii) Driver's name, date of birth, and CDL number and State of issuance;

(iv) Employer's name, address, and USDOT number, if applicable;

(v) Date of the test;

(vi) Date of the verified result; and

(vii) Test result. The test result must be one of the following:

(A) Positive (including the controlled substance(s) identified);

(B) Refusal to test: Adulterated;

(C) Refusal to test: Substituted; or

(D) Refusal to provide a sufficient specimen after the MRO makes a determination, in accordance with § 40.193 of this title, that the employee does not have a medical condition that has, or with a high degree of probability could have, precluded the employee from providing a sufficient amount of urine or oral fluid. Under this subpart a refusal would also include a refusal to undergo a medical examination or evaluation to substantiate a qualifying medical condition.

(3) Within 1 business day of making any change to the results report in accordance with paragraph (a)(1) of this section, a MRO must report that changed result to the Clearinghouse.

(b) *Employers.* (1) Employers must report the following information about a driver to the Clearinghouse by the close of the third business day following the date on which they obtained that information:

(i) An alcohol confirmation test result with an alcohol concentration of 0.04 or greater;

(ii) A negative return-to-duty test result;

(iii) A refusal to take an alcohol test pursuant to 49 CFR 40.261;

(iv) A refusal to test determination made in accordance with 49 CFR 40.191(a)(1) through (4), (a)(6), (a)(8) through (11), or (d)(1), but in the case of a refusal to test under (a)(11), the employer may report only those admissions made to the specimen collector; and

(v) A report that the driver has successfully completed all follow-up tests as prescribed in the SAP report in accordance with §§ 40.307, 40.309, and 40.311 of this title.

(2) The information required to be reported under paragraph (b)(1) of this section must include, as applicable:

(i) Reason for the test;

(ii) Driver's name, date of birth, and CDL number and State of issuance;

(iii) Employer name, address, and USDOT number;

(iv) Date of the test;

(v) Date the result was reported; and

(vi) Test result. The test result must be one of the following:

(A) Negative (only required for return-to-duty tests administered in accordance with § 382.309);

(B) Positive; or

(C) Refusal to take a test.

(3) For each report of a violation of 49 CFR 40.261(a)(1) or 40.191(a)(1), the employer must report the following information:

(i) Documentation, including, but not limited to, electronic mail or other contemporaneous record of the time and date the driver was notified to appear at a testing site; and the time, date and testing site location at which the employee was directed to appear, or an affidavit providing evidence of such notification;

(ii) Documentation, including, but not limited to, electronic mail or other correspondence, or an affidavit, indicating the date the employee was terminated or resigned (if applicable);

(iii) Documentation, including, but not limited to, electronic mail or other correspondence, or an affidavit, showing that the C/TPA reporting the violation was authorized to act as a service agent for an employer who employs himself/herself as a driver pursuant to paragraph (b)(6) of this section when the reported refusal occurred (if applicable); and

(iv) Documentation, including a certificate of service or other evidence, showing that the employer provided the employee with all documentation reported under paragraph (b)(3) of this section (if applicable).

(4) Employers must report the following violations by the close of the third business day following the date on which the employer obtains actual knowledge, as defined at § 382.107, of:

(i) On-duty alcohol use pursuant to § 382.205;

(ii) Pre-duty alcohol use pursuant to § 382.207;

(iii) Alcohol use following an accident pursuant to § 382.209; and

(iv) Controlled substance use pursuant to § 382.213.

(5) For each violation in paragraph (b)(4) of this section, the employer must report the following information:

(i) Driver's name, date of birth, CDL number and State of issuance;

(ii) Employer name, address, and USDOT number, if applicable;

(iii) Date the employer obtained actual knowledge of the violation;

(iv) Witnesses to the violation, if any, including contact information;

(v) Description of the violation;

(vi) Evidence supporting each fact alleged in the description of the violation required under paragraph (b)(4) of this section, which may include, but is not limited to, affidavits, photographs, video or audio recordings, employee statements (other than admissions pursuant to § 382.121), correspondence, or other documentation; and

(vii) A certificate of service or other evidence showing that the employer provided the employee with all information reported under paragraph (b)(4) of this section (if applicable).

(6) An employer who employs himself/herself as a driver must designate a C/TPA to comply with the employer requirements in paragraph (b) of this section related to his or her own alcohol and controlled substances use.

(c) *C/TPAs.* Any employer may designate a C/TPA to perform the employer requirements in paragraph (b) of this section. Regardless of whether it

uses a C/TPA to perform its requirements, the employer retains ultimate responsibility for compliance with this section. Exception: An employer does not retain responsibility where the C/TPA is designated to comply with employer requirements as described in paragraph (b)(6) of this section.

(d) *SAPs.* (1) SAPs must report to the Clearinghouse for each driver who has completed the return-to-duty process in accordance with 49 CFR part 40, subpart O, the following information:

(i) SAPs name, address, and telephone number;

(ii) Driver's name, date of birth, and CDL number and State of issuance;

(iii) Date of the initial substance-abuse-professional assessment; and

(iv) Date the SAP determined that the driver demonstrated successful compliance as defined in 49 CFR part 40, subpart O, and was eligible for return-to-duty testing under this part.

(2) SAP must report the information required by paragraphs (d)(1)(i) through (iii) of this section by the close of the business day following the date of the initial substance abuse assessment, and must report the information required by paragraph (d)(1)(iv) of this section by the close of the business day following the determination that the driver has completed the return-to-duty process.

(e) *Reporting truthfully and accurately.* Every person or entity with access must report truthfully and accurately to the Clearinghouse and is expressly prohibited from reporting information he or she knows or should know is false or inaccurate.

REPORTING ENTITIES AND CIRCUMSTANCES

Reporting entity	When information will be reported to clearinghouse
Prospective/Current Employer of CDL Driver.	—An alcohol confirmation test with a concentration of 0.04 or higher. —Refusal to test (alcohol) as specified in 49 CFR 40.261. —Refusal to test (drug) not requiring a determination by the MRO as specified in 49 CFR 40.191. —Actual knowledge, as defined in 49 CFR 382.107, that a driver has used alcohol on duty, used alcohol within four hours of coming on duty, used alcohol prior to post-accident testing, or has used a controlled substance. —Negative return-to-duty test results (drug and alcohol testing, as applicable) —Completion of follow-up testing.
Service Agent acting on behalf of Current Employer of CDL Driver.	—An alcohol confirmation test with a concentration of 0.04 or higher. —Refusal to test (alcohol) as specified in 49 CFR 40.261. —Refusal to test (drug) not requiring a determination by the MRO as specified in 49 CFR 40.191. —Actual knowledge, as defined in 49 CFR 382.107, that a driver has used alcohol on duty, used alcohol within four hours of coming on duty, used alcohol prior to post-accident testing, or has used a controlled substance. —Negative return-to-duty test results (drug and alcohol testing, as applicable) —Completion of follow-up testing.
MRO	—Verified positive, adulterated, or substituted drug test result. —Refusal to test (drug) requiring a determination by the MRO as specified in 49 CFR 40.191.
SAP	—Identification of driver and date the initial assessment was initiated. —Successful completion of treatment and/or education and the determination of eligibility for return-to-duty testing.

[81 FR 87725, Dec. 5, 2016, as amended at 86 FR 35639, July 7, 2021; 88 FR 27653, May 2, 2023]

§ 382.707 Notice to drivers of entry, revision, removal, or release of information.

(a) FMCSA must notify a driver when information concerning that driver has been added to, revised, or removed from the Clearinghouse.

(b) FMCSA must notify a driver when information concerning that driver has been released from the Clearinghouse to an employer and specify the reason for the release.

(c) Drivers will be notified by letter sent by U.S. Mail to the address on record with the State Driver Licensing Agency that issued the driver's commercial driver's license. Exception: A driver may provide the Clearinghouse with an alternative means or address for notification, including electronic mail.

§ 382.709 Drivers' access to information in the Clearinghouse.

A driver may review information in the Clearinghouse about himself or herself, except as otherwise restricted by law or regulation. A driver must register with the Clearinghouse before accessing his or her information.

§ 382.711 Clearinghouse registration.

(a) *Clearinghouse registration required.* Each employer and service agent must register with the Clearinghouse before accessing or reporting information in the Clearinghouse.

(b) *Employers.* (1) Employer Clearinghouse registration must include:

(i) Name, address, and telephone number;

(ii) USDOT number, except if the registrant does not have a USDOT Number, it may be requested to provide other information to verify identity; and

(iii) Name of the person(s) the employer authorizes to report information to or obtain information from the Clearinghouse and any additional information FMCSA needs to validate his or her identity.

(2) Employers must verify the names of the person(s) authorized under paragraph (b)(1)(iii) of this section annually.

(3) Identification of the C/TPA or other service agent used to comply with the requirements of this part, if applicable, and authorization for the C/TPA to query or report information to the Clearinghouse. Employers must update any changes to this information within 10 days.

(c) *MROs and SAPs.* Each MRO or SAP must provide the following to apply for Clearinghouse registration:

(1) Name, address, telephone number, and any additional information FMCSA needs to validate the applicant's identity;

(2) A certification that the applicant's access to the Clearinghouse is conditioned on his or her compliance with the applicable qualification and/or training requirements in 49 CFR part 40; and

(3) Evidence of required professional credentials to verify that the applicant currently meets the applicable qualification and/or training requirements in 49 CFR part 40.

(d) *C/TPAs and other service agents.* Each consortium/third party administrator or other service agent must provide the following to apply for Clearinghouse registration:

(1) Name, address, telephone number, and any additional information FMCSA needs to validate the applicant's identity; and

(2) Name, title, and telephone number of the person(s) authorized to report information to and obtain information from the Clearinghouse.

(3) Each C/TPA or other service agent must verify the names of the person(s) authorized under paragraph (d)(2) of this section annually.

§ 382.713 Duration, cancellation, and revocation of access.

(a) *Term.* Clearinghouse registration is valid for 5 years, unless cancelled or revoked.

(b) *Cancellation.* FMCSA will cancel Clearinghouse registrations for anyone who has not queried or reported to the Clearinghouse for 2 years.

(c) *Revocation.* FMCSA has the right to revoke the Clearinghouse registration of anyone who fails to comply with any of the prescribed rights and restrictions on access to the Clearinghouse, including but not limited to, submission of inaccurate or false information and misuse or misappropriation of access rights or protected information from the Clearinghouse and failure to maintain the requisite qualifications, certifications and/or training requirements as set forth in part 40 of this title.

§ 382.715 Authorization to enter information into the Clearinghouse.

(a) *C/TPAs.* No C/TPA or other service agent may enter information into the Clearinghouse on an employer's behalf unless the employer designates the C/TPA or other service agent.

(b) *SAPs.* A driver must designate a SAP before that SAP can enter any information about the driver's return-to-duty process into the Clearinghouse.

§ 382.717 Procedures for correcting certain information in the database.

(a) *Petitions limited to incorrectly reported information.* (1) Under this section, petitioners may request only that administrative errors be corrected (*e.g.*, errors in data entry or a duplicate report of a positive test result); petitioners may not contest the accuracy of test results, test refusals, or other violation information, under this section.

(2) *Exceptions.* (i) Petitioners may request that FMCSA add documentary evidence of a non-conviction to an employer's report of actual knowledge that the driver received a traffic citation for driving a commercial motor vehicle while under the influence of alcohol or controlled substances if the citation did not result in a conviction. For the purposes of this section, conviction has the same meaning as used in 49 CFR part 383.

(ii) Petitioners may request that FMCSA remove from the Clearinghouse an employer's report of actual knowledge (other than as provided for in paragraph (a)(2)(i) of this section) if that report does not comply with the reporting requirements in § 382.705(b)(5).

(iii) Petitioners may request that FMCSA remove from the Clearinghouse an employer's report of a violation under 49 CFR 40.261(a)(1) or 40.191(a)(1) if that report does not comply with the reporting requirements in § 382.705(b)(3).

(b) *Petition.* Any driver or authorized representative of the driver may submit a petition to the FMCSA contesting the accuracy of information in the Clearinghouse. The petition must include:

(1) The petitioner's name, address, telephone number, and CDL number and State of issuance;

(2) Detailed description of the basis for the allegation that the information is not accurate; and

(3) Evidence supporting the allegation that the information is not accurate. Failure to submit evidence is cause for dismissing the petition.

(c) *Submission of petition.* The petitioner may submit his/her petition electronically through the Clearinghouse or in writing to: Federal Motor Carrier Safety Administration, ATTN: Drug and Alcohol Clearinghouse Petition for Review, 1200 New Jersey Avenue SE., Washington, DC 20590.

(d) *Notice of decision.* Within 45 days of receiving a complete petition, FMCSA will inform the driver in writing of its decision to remove, retain, or correct the information in the database and provide the basis for the decision.

(e) *Request for expedited treatment.* (1) A driver may request expedited treatment to correct inaccurate information in his or her Clearinghouse record under paragraph (a)(1) of this section if the inaccuracy is currently preventing him or her from performing safety-sensitive functions, or to remove employer reports under paragraph (a)(2) of this section if such reports are currently preventing him or her from performing safety-sensitive functions. This request may be included in the original petition or as a separate document.

(2) If FMCSA grants expedited treatment, it will subsequently inform the driver of its decision in writing within 14 days of receipt of a complete petition.

(f) *Administrative review.* (1) A driver may request FMCSA to conduct an administrative review if he or she believes that a decision made in accordance with paragraph (d) or (e) of this section was in error.

(2) The request must prominently state at the top of the document: ''Administrative Review of Drug and Alcohol Clearinghouse Decision'' and the driver may submit his/her request electronically through the Clearinghouse or in writing to FMCSA, ATTN: Drug and Alcohol Clearinghouse Administrative Review, Federal Motor Carrier Safety Administration, 1200 New Jersey Ave. SE., Washington, DC 20590.

(3) The driver's request must explain the error he or she believes FMCSA committed and provide information and/or documents to support his or her argument.

(4) FMCSA will complete its administrative review no later than 30 days after receiving the driver's request for review. FMCSA's decision will constitute the final Agency action.

(g) *Subsequent notification to employers.* When information is corrected or

removed in accordance with this section, or in accordance with 49 CFR part 10, FMCSA will notify any employer that accessed the incorrect information that a correction or removal was made.

[81 FR 87725, Dec. 5, 2016, as amended at 86 FR 35640, July 7, 2021; 86 FR 55742, Oct. 7, 2021; 86 FR 57069, Oct. 14, 2021]

§ 382.719 Availability and removal of information.

(a) *Driver information not available.* Information about a driver's drug or alcohol violation will not be available to an employer conducting a query of the Clearinghouse after all of the following conditions relating to the violation are satisfied:

(1) The SAP reports to the Clearinghouse the information required in § 382.705(d);

(2) The employer reports to the Clearinghouse that the driver's return-to-duty test results are negative;

(3) The driver's current employer reports that the driver has successfully completed all follow-up tests as prescribed in the SAP report in accordance with §§ 40.307, 40.309, and 40.311 of this title; and

(4) Five years have passed since the date of the violation determination.

(b) *Driver information remains available.* Information about a particular driver's drug or alcohol violation will remain available to employers conducting a query until all requirements in paragraph (a) of this section have been met.

(c) *Exceptions.* (1) Within 2 business days of granting a request for removal pursuant to § 382.717(a)(2)(i), FMCSA will remove information from the Clearinghouse.

(2) Information about a particular driver's drug or alcohol violation may be removed in accordance with § 382.717(a)(2)(ii) and (iii) or in accordance with 49 CFR part 10.

(d) *Driver information remains available.* Nothing in this part shall prevent FMCSA from using information removed under this section for research, auditing, or enforcement purposes.

§ 382.721 Fees.

FMCSA may collect a reasonable fee from entities required to query the Clearinghouse. Exception: No driver may be required to pay a fee to access his or her own information in the Clearinghouse.

§ 382.723 Unauthorized access or use prohibited.

(a) Except as expressly authorized in this subpart, no person or entity may access the Clearinghouse. No person or entity may share, distribute, publish, or otherwise release any information in the Clearinghouse except as specifically authorized by law. No person may report inaccurate or misleading information to the Clearinghouse.

(b) An employer's use of information received from the Clearinghouse is limited to determining whether a prohibition applies to a driver performing a safety-sensitive function with respect to a commercial motor vehicle. No employer may divulge or permit any other person or entity to divulge any information from the Clearinghouse to any person or entity not directly involved in determining whether a prohibition applies to a driver performing a safety-sensitive function with respect to a commercial motor vehicle.

(c) Violations of this section are subject to civil and criminal penalties in accordance with applicable law, including those set forth at § 382.507.

(d) Nothing in this part shall prohibit FMCSA from accessing information about individual drivers in the Clearinghouse for research, auditing, or enforcement purposes.

§ 382.725 Access by State licensing authorities.

(a)(1) Before November 18, 2024, in order to determine whether a driver is qualified to operate a commercial motor vehicle, the chief commercial driver's licensing official of a State may obtain the driver's record from the Clearinghouse if the driver has applied for a commercial driver's license or commercial learner's permit from that State.

(2) On or after November 18, 2024, in order to determine whether a driver is qualified to operate a commercial motor vehicle, the chief commercial driver's licensing official of a State must obtain the driver's record from

the Clearinghouse if the driver has applied for a commercial driver's license or commercial learner's permit from that State.

(b) By applying for a commercial driver's license or a commercial learner's permit, a driver is deemed to have consented to the release of information from the Clearinghouse in accordance with this section.

(c) The chief commercial driver's licensing official's use of information received from the Clearinghouse is limited to determining an individual's qualifications to operate a commercial motor vehicle. No chief commercial driver's licensing official may divulge or permit any other person or entity to divulge any information from the Clearinghouse to any person or entity not directly involved in determining an individual's qualifications to operate a commercial motor vehicle.

(d) A chief commercial driver's licensing official who does not take appropriate safeguards to protect the privacy and confidentiality of information obtained under this section is subject to revocation of his or her right of access under this section.

[81 FR 87725, Dec. 5, 2016, as amended at 84 FR 68057, Dec. 13, 2019; 86 FR 35640, July 7, 2021; 86 FR 55742, Oct. 7, 2021]

§ 382.727 Penalties.

An employer, employee, MRO, or service agent who violates any provision of this subpart shall be subject to the civil and/or criminal penalty provisions of 49 U.S.C. 521(b)(2)(C).

PART 383—COMMERCIAL DRIVER'S LICENSE STANDARDS; REQUIREMENTS AND PENALTIES

Subpart A—General

Subpart B—Single License Requirement

Subpart C—Notification Requirements and Employer Responsibilities

Subpart D—Driver Disqualifications and Penalties

Subpart E—Testing and Licensing Procedures

Subpart F—Vehicle Groups and Endorsements

Subpart G—Required Knowledge and Skills

Subpart H—Tests

EXHIBIT 4

49 CFR Part 40
Procedures for Transportation Workplace Drug and Alcohol Testing Programs

part 39 from then DOT Departmental Office of Civil Rights and/or DOT Office of General Counsel, 1200 New Jersey Avenue, SE., Washington, DC 20590.

§ 39.109 What enforcement actions may be taken under this Part?

(a) The Department of Transportation investigates complaints and conducts reviews or other inquiries into the compliance with this Part of PVOs that are Title II entities.

(b) As a PVO subject to Title II of the ADA, you must be prepared to provide to the Department of Transportation a written explanation of your action in any situation in which you exclude or restrict an individual with a disability or any mobility or other assistive device used by such an individual with respect to the use of your vessel.

(c) The Department of Transportation investigates complaints conducts compliance reviews or other inquiries into the compliance of this Part of PVOs, whether private or public entities, that receive Federal financial assistance from the Department, under section 504 of the Rehabilitation Act of 1973, as amended.

(d) The Department may refer any matter concerning the compliance of PVOs with this Part to the Department of Justice for enforcement action.

(e) The Department of Justice investigates complaints and conducts reviews or other inquiries into the compliance with this Part of PVOs that are Title III entities.

(f) The Department of Justice may file suit in Federal court against both Title II and Title III PVOs for violations of this part.

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

Subpart A—Administrative Provisions

Sec.

Subpart B—Employer Responsibilities

Subpart C—Urine Collection Personnel

Subpart D—Collection Sites, Forms, Equipment and Supplies Used in DOT Urine and Oral Fluid Collections

Subpart E—Specimen Collections

Subpart F—Drug Testing Laboratories

Subpart G—Medical Review Officers and the Verification Process

Subpart H—Split Specimen Tests

Subpart I—Problems in Drug Tests

Subpart J—Alcohol Testing Personnel

Subpart K—Testing Sites, Forms, Equipment and Supplies Used in Alcohol Testing

Subpart L—Alcohol Screening Tests

Subpart M—Alcohol Confirmation Tests

AUTHORITY: 49 U.S.C. 102, 301, 322, 5331, 20140, 31306, and 54101 *et seq.*

SOURCE: 65 FR 79526, Dec. 19, 2000, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to part 40 appear at 73 FR 33329, June 12, 2008.

Subpart A—Administrative Provisions

§ 40.1 Who does this regulation cover?

(a) This part tells all parties who conduct drug and alcohol tests required by Department of Transportation (DOT) agency regulations how to conduct these tests and what procedures to use.

(b) This part concerns the activities of transportation employers, safety-sensitive transportation employees (including self-employed individuals, contractors and volunteers as covered by DOT agency regulations), and service agents.

(c) Nothing in this part is intended to supersede or conflict with the implementation of the Federal Railroad Administration's post-accident testing program (see 49 CFR 219.200).

§ 40.3 What do the terms used in this part mean?

In this part, the terms listed in this section have the following meanings:

Adulterated specimen. A specimen that has been altered, as evidenced by test results showing either a substance that is not a normal constituent for that type of specimen or showing an abnormal concentration of an endogenous substance.

Affiliate. Persons are affiliates of one another if, directly or indirectly, one controls or has the power to control the other, or a third party controls or has the power to control both. Indicators of control include, but are not limited to: interlocking management or ownership; shared interest among family members; shared facilities or equipment; or common use of employees. Following the issuance of a public interest exclusion, an organization having the same or similar management, ownership, or principal employees as the service agent concerning whom a public interest exclusion is in effect is regarded as an affiliate. This definition is used in connection with the public

interest exclusion procedures of Subpart R of this part.

Air blank. In evidential breath testing devices (EBTs) using gas chromatography technology, a reading of the device's internal standard. In all other EBTs, a reading of ambient air containing no alcohol.

Alcohol. The intoxicating agent in beverage alcohol, ethyl alcohol or other low molecular weight alcohols, including methyl or isopropyl alcohol.

Alcohol concentration. The alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath as indicated by a breath test under this part.

Alcohol confirmation test. A subsequent test using an EBT, following a screening test with a result of 0.02 or greater, that provides quantitative data about the alcohol concentration.

Alcohol screening device (ASD). A breath or saliva device, other than an EBT, that is approved by the National Highway Traffic Safety Administration (NHTSA) and appears on ODAPC's Web page for ''Approved Screening Devices to Measure Alcohol in Bodily Fluids'' because it conforms to the model specifications from NHTSA.

Alcohol screening test. An analytic procedure to determine whether an employee may have a prohibited concentration of alcohol in a breath or saliva specimen.

Alcohol testing site. A place selected by the employer where employees present themselves for the purpose of providing breath or saliva for an alcohol test.

Alcohol use. The drinking or swallowing of any beverage, liquid mixture or preparation (including any medication), containing alcohol.

Aliquot. A fractional part of a specimen used for testing. It is taken as a sample representing the whole specimen.

Alternate specimen. An authorized specimen, other than the type of specimen previously collected or attempted to be collected.

Breath Alcohol Technician (BAT). A person who instructs and assists employees in the alcohol testing process and operates an evidential breath testing device.

Cancelled test. A drug or alcohol test that has a problem identified that cannot be or has not been corrected, or which this part otherwise requires to be cancelled. A cancelled test is neither a positive nor a negative test.

Chain of custody. The procedure used to document the handling of the urine specimen from the time the employee gives the specimen to the collector until the specimen is destroyed. This procedure uses the Federal Drug Testing Custody and Control Form (CCF) as approved by the Office of Management and Budget.

Collection container. A container used to collect a specimen.

Collection site. A place selected by the employer where employees present themselves for the purpose of providing a specimen for a drug test.

Collector. A person who instructs and assists employees at a collection site, who receives and makes an initial inspection of the specimen provided by those employees, and who initiates and completes the CCF.

Commercial Driver's License Drug and Alcohol Clearinghouse (Clearinghouse). A database, administered by the Federal Motor Carrier Safety Administration, containing records of commercial motor vehicle drivers' violations of controlled substances and alcohol testing program requirements, as set forth in part 382 of this title, as well as their return-to-duty status.

Confirmatory drug test. A second analytical procedure performed on a different aliquot of the original specimen to identify and quantify a specific drug or drug metabolite.

Confirmatory validity test. A second test performed on a different aliquot of the original urine specimen to further support a validity test result.

Confirmed drug test. A confirmation test result received by an MRO from a laboratory.

Consortium/Third-party administrator (C/TPA). A service agent that provides or coordinates the provision of a variety of drug and alcohol testing services to employers. C/TPAs typically perform administrative tasks concerning the operation of the employers' drug and alcohol testing programs. This term includes, but is not limited to, groups of employers who join together

to administer, as a single entity, the DOT drug and alcohol testing programs of its members. C/TPAs are not ''employers'' for purposes of this part.

Continuing education. Training for substance abuse professionals (SAPs) who have completed qualification training and are performing SAP functions, designed to keep SAPs current on changes and developments in the DOT drug and alcohol testing program.

Cutoff. The analytical value (*e.g.*, drug or drug metabolite concentration) used as the decision point to determine a result (*e.g.*, negative, positive, adulterated, invalid, or substituted) or the need for further testing.

Designated employer representative (DER). An employee authorized by the employer to take immediate action(s) to remove employees from safety-sensitive duties, or cause employees to be removed from these covered duties, and to make required decisions in the testing and evaluation processes. The DER also receives test results and other communications for the employer, consistent with the requirements of this part. Service agents cannot act as DERs.

Dilute specimen. A urine specimen with creatinine and specific gravity values that are lower than expected for human urine.

DOT, The Department, DOT Agency. These terms encompass all DOT agencies, including, but not limited to, the Federal Aviation Administration (FAA), the Federal Railroad Administration (FRA), the Federal Motor Carrier Safety Administration (FMCSA), the Federal Transit Administration (FTA), the National Highway Traffic Safety Administration (NHTSA), the Pipeline and Hazardous Materials Safety Administration (PHMSA), and the Office of the Secretary (OST). For purposes of this part, the United States Coast Guard (USCG), in the Department of Homeland Security, is considered to be a DOT agency for drug testing purposes only since the USCG regulation does not incorporate Part 40 for its alcohol testing program. These terms include any designee of a DOT agency.

Drugs. The drugs for which tests are required under this part and DOT agency regulations are marijuana, cocaine, amphetamines, phencyclidine (PCP), and opioids.

Employee. Any person who is designated in a DOT agency regulation as subject to drug testing and/or alcohol testing. The term includes individuals currently performing safety-sensitive functions designated in DOT agency regulations and applicants for employment subject to pre-employment testing. For purposes of drug testing under this part, the term employee has the same meaning as the term ''donor'' as found on CCF and related guidance materials produced by the Department of Health and Human Services.

Employer. A person or entity employing one or more employees (including an individual who is self-employed) subject to DOT agency regulations requiring compliance with this part. The term includes an employer's officers, representatives, and management personnel. Service agents are not employers for the purposes of this part.

Error Correction Training. Training provided to BATs, collectors, and screening test technicians (STTs) following an error that resulted in the cancellation of a drug or alcohol test. Error correction training must be provided in person or by a means that provides real-time observation and interaction between the instructor and trainee.

Evidential Breath Testing Device (EBT). A device that is approved by the National Highway Traffic Safety Administration (NHTSA) for the evidential testing of breath at the .02 and .04 alcohol concentrations, and appears on ODAPC's Web page for ''Approved Evidential Breath Measurement Devices'' because it conforms with the model specifications available from NHTSA.

HHS. The Department of Health and Human Services or any designee of the Secretary, Department of Health and Human Services.

Initial drug test. The first test used to differentiate a negative specimen from one that requires further testing for drugs or drug metabolites.

Initial specimen validity test. The first test used to determine if a specimen is adulterated, diluted, substituted, or invalid.

Invalid result. The result reported by an HHS-certified in accordance with

the criteria established by HHS when a positive, negative, adulterated, or substituted result cannot be established for a specific drug or specimen validity test.

Laboratory. Any U.S. laboratory certified by HHS under the National Laboratory Certification Program as meeting the minimum standards set by HHS; or, in the case of foreign laboratories, a laboratory approved for participation by DOT under this part.

Limit of Detection (LOD). The lowest concentration at which the analyte (*e.g.*, drug or drug metabolite) can be identified.

Limit of Quantitation (LOQ). For quantitative assays, the lowest concentration at which the identity and concentration of the analyte (*e.g.*, drug or drug metabolite) can be accurately established.

Medical Review Officer (MRO). A person who is a licensed physician and who is responsible for receiving and reviewing laboratory results generated by an employer's drug testing program and evaluating medical explanations for certain drug test results.

Negative result. The result reported by an HHS-certified laboratory to an MRO when a specimen contains no drug or the concentration of the drug is less than the cutoff concentration for the drug or drug class and the specimen is a valid specimen.

Non-negative specimen. A specimen that is reported as adulterated, substituted, positive (for drug(s) or drug metabolite(s)), or invalid.

Office of Drug and Alcohol Policy and Compliance (ODAPC). The office in the Office of the Secretary, DOT, that is responsible for coordinating drug and alcohol testing program matters within the Department and providing information concerning the implementation of this part.

Oral fluid specimen. A specimen that is collected from an employee's oral cavity and is a combination of physiological fluids produced primarily by the salivary glands. An oral fluid specimen is considered to be a direct observation collection for all purposes of this part.

Oxidizing adulterant. A substance that acts alone or in combination with other substances to oxidize drugs or drug metabolites to prevent the detection of the drug or drug metabolites, or affects the reagents in either the initial or confirmatory drug test.

Primary specimen. In drug testing, the specimen bottle that is opened and tested by a first laboratory to determine whether the employee has a drug or drug metabolite in his or her system; and for the purpose of specimen validity testing. The primary specimen is the portion of the donor's subdivided specimen designated as the primary (''A'') specimen by the collector to distinguish it from the split (''B'') specimen, as defined in this section.

Positive result. The result reported by an HHS-certified laboratory when a specimen contains a drug or drug metabolite equal to or greater than the cutoff concentrations.

Qualification Training. The training required in order for a collector, BAT, MRO, SAP, or STT to be qualified to perform their functions in the DOT drug and alcohol testing program. Qualification training may be provided by any appropriate means (*e.g.*, classroom instruction, internet application, CD-ROM, video).

Reconfirmed. The result reported for a split (Bottle B) specimen when the second HHS-certified laboratory corroborates the original result reported for the primary (Bottle A) specimen.

Refresher Training. The training required periodically for qualified collectors, BATs, and STTs to review basic requirements and provide instruction concerning changes in technology (*e.g.*, new testing methods that may be authorized) and amendments, interpretations, guidance, and issues concerning this part and DOT agency drug and alcohol testing regulations. Refresher training can be provided by any appropriate means (*e.g.*, classroom instruction, internet application, CD-ROM, video).

Rejected for testing. The result reported by an HHS-certified laboratory when no tests are performed for a specimen because of a fatal flaw or a correctable flaw that is not corrected.

Screening Test Technician (STT). A person who instructs and assists employees in the alcohol testing process and operates an ASD.

Secretary. The Secretary of Transportation or the Secretary's designee.

Service agent. Any person or entity, other than an employee of the employer, who provides services to employers and/or employees in connection with DOT drug and alcohol testing requirements. This includes, but is not limited to, collectors, BATs and STTs, laboratories, MROs, substance abuse professionals, and C/TPAs. To act as service agents, persons and organizations must meet DOT qualifications, if applicable. Service agents are not employers for purposes of this part.

Shipping container. A container that is used for transporting and protecting specimen bottles and associated documents from the collection site to the laboratory.

Specimen. Fluid, breath, or other material collected from an employee at the collection site for the purpose of a drug or alcohol test.

Specimen bottle. The bottle that, after being sealed and labeled according to the procedures in this part, is used to hold a primary (''A'') or split (''B'') specimen during transportation to the laboratory. In the context of oral fluid testing, it may be referred to as a ''vial,'' ''tube,'' or ''bottle.''

Split specimen. In drug testing, the specimen that is sent to a first laboratory and stored with its original seal intact, and which is transported to a second laboratory for retesting at the employee's request following MRO verification of the primary specimen as positive, adulterated or substituted.

Split specimen collection. A collection in which the single specimen collected is divided into two separate specimen bottles, the primary specimen (Bottle A) and the split specimen (Bottle B).

SSN or Employee ID No. This number serves as a unique identifier that must be used on the Federal Drug Testing Custody and Control Form (CCF) or Alcohol Testing Form (ATF) for a donor, on the MRO's reports, on SAP reports, or on other documents that are required under this part. For all purposes of this part, this term means: only the Commercial Driver's License (CDL) Number and State of issuance for drivers tested under the authority of the Federal Motor Carrier Safety Administration (FMCSA); and, for all drivers and other safety-sensitive employees tested under the authority of the other DOT agencies, this can be the individual's actual Social Security Number, a unique identifier issued by the employer, a State-issued identification card number, a State-issued driver's license number (including a CDL number) or any other State-issued or federally-issued identification number.

Stand-down. The practice of temporarily removing an employee from the performance of safety-sensitive functions based only on a report from a laboratory to the MRO of a confirmed positive test for a drug or drug metabolite, an adulterated test, or a substituted test, before the MRO has completed verification of the test result.

Substance Abuse Professional (SAP). A person who evaluates employees who have violated a DOT drug and alcohol regulation and makes recommendations concerning education, treatment, follow-up testing, and aftercare.

Substituted specimen. An employee's specimen not consistent with a normal human specimen, as determined by HHS (*e.g.*, a urine specimen, with creatinine and specific gravity values that are so diminished, or so divergent that they are not consistent with normal human urine).

Undiluted (neat) oral fluid. An oral fluid specimen to which no other solid or liquid has been added. For example: A collection device that uses a diluent (or other component, process, or method that modifies the volume of the testable specimen) must collect at least 1 mL of undiluted (neat) oral fluid.

Urine specimen. Urine collected from an employee at the collection site for the purpose of a drug test.

Verified test. A drug test result or validity testing result from an HHS-certified laboratory that has undergone review and final determination by the MRO.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41950, Aug. 9, 2001; 71 FR 49384, Aug. 23, 2006; 71 FR 55347, Sept. 22, 2006; 73 FR 35969, June 25, 2008; 75 FR 49861, Aug. 16, 2010; 76 FR 59577, Sept. 27, 2011; 80 FR 19553, Apr. 13, 2015; 81 FR 52365, Aug. 8, 2016; 82 FR 52243, Nov. 13, 2017; 88 FR 27636, May 2, 2023]

§ 40.5 Who issues authoritative interpretations of this regulation?

ODAPC and the DOT Office of General Counsel (OGC) provide written interpretations of the provisions of this part. These written DOT interpretations are the only official and authoritative interpretations concerning the provisions of this part. DOT agencies may incorporate ODAPC/OGC interpretations in written guidance they issue concerning drug and alcohol testing matters. Only Part 40 interpretations issued after August 1, 2001, are considered valid.

§ 40.7 How can you get an exemption from a requirement in this regulation?

(a) If you want an exemption from any provision of this part, you must request it in writing from the Office of the Secretary of Transportation, under the provisions and standards of 49 CFR part 5. You must send requests for an exemption to the following address: Department of Transportation, Deputy Assistant General Counsel for Regulation and Enforcement, 1200 New Jersey Avenue, SE., Washington, DC 20590.

(b) Under the standards of 49 CFR part 5, we will grant the request only if the request documents special or exceptional circumstances, not likely to be generally applicable and not contemplated in connection with the rulemaking that established this part, that make your compliance with a specific provision of this part impracticable.

(c) If we grant you an exemption, you must agree to take steps we specify to comply with the intent of the provision from which an exemption is granted.

(d) We will issue written responses to all exemption requests.

Subpart B—Employer Responsibilities

§ 40.11 What are the general responsibilities of employers under this regulation?

(a) As an employer, you are responsible for meeting all applicable requirements and procedures of this part.

(b) You are responsible for all actions of your officials, representatives, and agents (including service agents) in carrying out the requirements of the DOT agency regulations.

(c) All agreements and arrangements, written or unwritten, between and among employers and service agents concerning the implementation of DOT drug and alcohol testing requirements are deemed, as a matter of law, to require compliance with all applicable provisions of this part and DOT agency drug and alcohol testing regulations. Compliance with these provisions is a material term of all such agreements and arrangements.

§ 40.13 How do DOT drug and alcohol tests relate to non-DOT tests?

(a) DOT tests must be completely separate from non-DOT tests in all respects.

(b) DOT tests must take priority and must be conducted and completed before a non-DOT test is begun. When conducting a urine DOT drug test, you must discard any excess urine left over from a DOT test and collect a separate urine void for the subsequent non-DOT test.

(c) Except as provided in paragraph (d) of this section, you must not perform any tests on DOT specimens other than those tests specifically authorized by this part or DOT agency regulations. For example, you must not test a DOT specimen for additional drugs. In addition, a laboratory is prohibited from making a DOT specimen available for a DNA test or other types of specimen identity testing.

(d) When a DOT urine drug test collection is conducted as part of a physical examination required by DOT agency regulations, it is permissible to conduct medical tests related to this physical examination (*e.g.*, for glucose) on any specimen remaining in the collection container after the DOT portion has been sealed into the specimen bottles.

(e) A non-DOT drug or alcohol test administered, as part of a physical examination, is not a DOT drug or alcohol test for purposes of this part and/or related DOT agency drug and alcohol testing rules, if that test was performed to determine if an employee is medically qualified for a license or certificate. Consequently, the results of

such a test do not have consequences under this part.

(f) No one is permitted to change or disregard the results of DOT tests based on the results of non-DOT tests. For example, as an employer you must not disregard a verified positive DOT drug test result because the employee presents a negative test result from a blood or urine specimen collected by the employee's physician or a DNA test result purporting to question the identity of the DOT specimen.

(g) As an employer, you must not use the CCF or the ATF in your non-DOT drug and alcohol testing programs. This prohibition includes the use of the DOT forms with references to DOT programs and agencies crossed out. You also must always use the CCF and ATF for all your DOT-mandated drug and alcohol tests.

(h) No one is permitted to conduct a DOT drug or alcohol test on an individual who is not a DOT-regulated employee, as defined by the DOT agency regulations.

[65 FR 79526, Dec. 19, 2000, as amended at 88 FR 27637, May 2, 2023]

§ 40.14 What collection information must employers provide to collectors?

As an employer, or an employer's service agent—for example a C/TPA, you must ensure the collector has the following information when conducting a urine specimen collection for you:

(a) Full name of the employee being tested.

(b) SSN or Employee ID No.

(c) Laboratory name and address (can be pre-printed on the CCF).

(d) Employer name, address, phone number, and fax number (can be pre-printed on the CCF at Step 1–A).

(e) DER information required at § 40.35 of this part.

(f) MRO name, address, phone number, and fax number (can be pre-printed on the CCF at Step 1–B).

(g) The DOT Agency which regulates the employee's safety-sensitive duties (the checkmark can pre-printed in the appropriate box on the CCF at Step 1–D).

(h) Test reason, as appropriate: Pre-employment; Random; Reasonable Suspicion/Reasonable Cause; Post-Accident; Return-to-Duty; and Follow-up.

(i) Whether the test is to be observed or not (see § 40.67 of this part).

(j) (Optional) C/TPA name, address, phone, and fax number (can be pre-printed on the CCF).

(k) Specimen type to be collected (*i.e.*, oral fluid or urine).

[75 FR 59107, Sept. 27, 2010, as amended at 88 FR 27637, May 2, 2023]

§ 40.15 May an employer use a service agent to meet DOT drug and alcohol testing requirements?

(a) As an employer, you may use a service agent to perform the tasks needed to comply with this part and DOT agency drug and alcohol testing regulations, consistent with the requirements of Subpart Q and other applicable provisions of this part.

(b) As an employer, you are responsible for ensuring that the service agents you use meet the qualifications set forth in this part (*e.g.*, § 40.121 for MROs). You may require service agents to show you documentation that they meet the requirements of this part (*e.g.*, documentation of MRO qualifications required by § 40.121(e)).

(c) You remain responsible for compliance with all applicable requirements of this part and other DOT drug and alcohol testing regulations, even when you use a service agent. If you violate this part or other DOT drug and alcohol testing regulations because a service agent has not provided services as our rules require, a DOT agency can subject you to sanctions. Your good faith use of a service agent is not a defense in an enforcement action initiated by a DOT agency in which your alleged noncompliance with this part or a DOT agency drug and alcohol regulation may have resulted from the service agent's conduct.

(d) As an employer, you must not permit a service agent to act as your DER.

§ 40.17 Is an employer responsible for obtaining information from its service agents?

Yes, as an employer, you are responsible for obtaining information required by this part from your service agents. This is true whether or not you

choose to use a C/TPA as an intermediary in transmitting information to you. For example, suppose an applicant for a safety-sensitive job takes a pre-employment drug test, but there is a significant delay in your receipt of the test result from an MRO or C/TPA. You must not assume that ''no news is good news'' and permit the applicant to perform safety-sensitive duties before receiving the result. This is a violation of the Department's regulations.

§ 40.19 [Reserved]

§ 40.21 May an employer stand down an employee before the MRO has completed the verification process?

(a) As an employer, you are prohibited from standing employees down, except consistent with a waiver a DOT agency grants under this section.

(b) You may make a request to the concerned DOT agency for a waiver from the prohibition of paragraph (a) of this section. Such a waiver, if granted, permits you to stand an employee down following the MRO's receipt of a laboratory report of a confirmed positive test for a drug or drug metabolite, an adulterated test, or a substituted test pertaining to the employee.

(1) For this purpose, the concerned DOT agency is the one whose drug and alcohol testing rules apply to the majority of the covered employees in your organization. The concerned DOT agency uses its applicable procedures for considering requests for waivers.

(2) Before taking action on a waiver request, the concerned DOT agency coordinates with other DOT agencies that regulate the employer's other covered employees.

(3) The concerned DOT agency provides a written response to each employer that petitions for a waiver, setting forth the reasons for the agency's decision on the waiver request.

(c) Your request for a waiver must include, as a minimum, the following elements:

(1) Information about your organization:

(i) Your determination that standing employees down is necessary for safety in your organization and a statement of your basis for it, including any data on safety problems or incidents that could have been prevented if a stand-down procedure had been in place;

(ii) Data showing the number of confirmed laboratory positive, adulterated, and substituted test results for your employees over the two calendar years preceding your waiver request, and the number and percentage of those test results that were verified positive, adulterated, or substituted by the MRO;

(iii) Information about the work situation of the employees subject to stand-down, including a description of the size and organization of the unit(s) in which the employees work, the process through which employees will be informed of the stand-down, whether there is an in-house MRO, and whether your organization has a medical disqualification or stand-down policy for employees in situations other than drug and alcohol testing; and

(iv) A statement of which DOT agencies regulate your employees.

(2) Your proposed written company policy concerning stand-down, which must include the following elements:

(i) Your assurance that you will distribute copies of your written policy to all employees that it covers;

(ii) Your means of ensuring that no information about the confirmed positive, adulterated, or substituted test result or the reason for the employee's temporary removal from performance of safety-sensitive functions becomes available, directly or indirectly, to anyone in your organization (or subsequently to another employer) other than the employee, the MRO and the DER;

(iii) Your means of ensuring that all covered employees in a particular job category in your organization are treated the same way with respect to stand-down;

(iv) Your means of ensuring that a covered employee will be subject to stand-down only with respect to the actual performance of safety-sensitive duties;

(v) Your means of ensuring that you will not take any action adversely affecting the employee's pay and benefits pending the completion of the MRO's verification process. This includes continuing to pay the employee during the period of the stand-down in the same

way you would have paid him or her had he or she not been stood down;

(vi) Your means of ensuring that the verification process will commence no later than the time an employee is temporarily removed from the performance of safety-sensitive functions and that the period of stand-down for any employee will not exceed five days, unless you are informed in writing by the MRO that a longer period is needed to complete the verification process; and

(vii) Your means of ensuring that, in the event that the MRO verifies the test negative or cancels it—

(A) You return the employee immediately to the performance of safety-sensitive duties;

(B) The employee suffers no adverse personnel or financial consequences as a result;

(C) For a verified negative result, the employee will not be required to submit an alternate specimen for the same testing action. For a cancelled result, the employee could be required to submit an alternate specimen on a re-collection; and

(D) You maintain no individually identifiable record that the employee had a confirmed laboratory positive, adulterated, or substituted test result (*i.e.*, you maintain a record of the test only as a negative or cancelled test).

(d) The Administrator of the concerned DOT agency, or his or her designee, may grant a waiver request only if he or she determines that, in the context of your organization, there is a high probability that the procedures you propose will effectively enhance safety and protect the interests of employees in fairness and confidentiality.

(1) The Administrator, or his or her designee, may impose any conditions he or she deems appropriate on the grant of a waiver.

(2) The Administrator, or his or her designee, may immediately suspend or revoke the waiver if he or she determines that you have failed to protect effectively the interests of employees in fairness and confidentiality, that you have failed to comply with the requirements of this section, or that you have failed to comply with any other conditions the DOT agency has attached to the waiver.

(e) You must not stand employees down in the absence of a waiver, or inconsistent with the terms of your waiver. If you do, you are in violation of this part and DOT agency drug testing regulations, and you are subject to enforcement action by the DOT agency just as you are for other violations of this part and DOT agency rules.

[65 FR 79526, Dec. 19, 2000, as amended at 88 FR 27637, May 2, 2023]

§ 40.23 What actions do employers take after receiving verified test results?

(a) As an employer who receives a verified positive drug test result, you must immediately remove the employee involved from performing safety-sensitive functions. You must take this action upon receiving the initial report of the verified positive test result. Do not wait to receive the written report or the result of a split specimen test.

(b) As an employer who receives a verified adulterated or substituted drug test result, you must consider this a refusal to test and immediately remove the employee involved from performing safety-sensitive functions. You must take this action on receiving the initial report of the verified adulterated or substituted test result. Do not wait to receive the written report or the result of a split specimen test.

(c) As an employer who receives an alcohol test result of 0.04 or higher, you must immediately remove the employee involved from performing safety-sensitive functions. If you receive an alcohol test result of 0.02–0.039, you must temporarily remove the employee involved from performing safety-sensitive functions, as provided in applicable DOT agency regulations. Do not wait to receive the written report of the result of the test.

(d) As an employer, when an employee has a verified positive, adulterated, or substituted test result, or has otherwise violated a DOT agency drug and alcohol regulation, you must not return the employee to the performance of safety-sensitive functions until or unless the employee successfully completes the return-to-duty process of Subpart O of this part.

(e) As an employer who receives a drug test result indicating that the employee's specimen was dilute, take action as provided in § 40.197.

(f) As an employer who receives a drug test result indicating that the employee's test was cancelled because it was invalid and that a second collection must take place under direct observation—

(1) You must immediately direct the employee to provide a new specimen under direct observation (either an oral fluid specimen or a urine specimen under direct observation).

(2) You must not attach consequences to the finding that the test was invalid other than collecting a new specimen under direct observation.

(3) You must not give any advance notice of this test requirement to the employee.

(4) You must instruct the collector to note on the CCF the same reason (*e.g.*, random test, post-accident test) and DOT Agency (e.g., check DOT and FMCSA) as for the original collection.

(5) You must ensure that the collector conducts the collection under direct observation (either an oral fluid specimen or a urine specimen under direct observation).

(g) As an employer who receives a cancelled test result when a negative result is required (*e.g.*, pre-employment, return-to-duty, or follow-up test), you must direct the employee to provide another specimen immediately.

(h) As an employer, you may also be required to take additional actions required by DOT agency regulations (*e.g.*, FAA rules require some positive drug tests to be reported to the Federal Air Surgeon).

(i) As an employer, you must not alter a drug or alcohol test result transmitted to you by an MRO, BAT, or C/TPA.

[65 FR 79526, Dec. 19, 2000, as amended at 71 FR 49384, Aug. 23, 2006; 73 FR 35970, June 25, 2008; 75 FR 59107, Sept. 27, 2010; 88 FR 27637, May 2, 2023]

§ 40.25 Must an employer check on the drug and alcohol testing record of employees it is intending to use to perform safety-sensitive duties?

(a)(1) Yes, as an employer, you must, after obtaining an employee's written consent, request the information about the employee listed in paragraphs (b) through (j) of this section. This requirement applies only to employees seeking to begin performing safety-sensitive duties for you for the first time (*i.e.*, a new hire, an employee transferring into a safety-sensitive position). If the employee refuses to provide this written consent, you must not permit the employee to perform safety-sensitive functions.

(2) If you are an employer regulated by FMCSA, you must comply with the requirements of this section by using the FMCSA's Drug and Alcohol Clearinghouse in accordance with 49 CFR 382.71(a). In addition, you must continue to comply with the requirements of this § 40.25 when checking an employee's testing history with employers regulated by a DOT operating administration other than FMCSA.

(3) If you are an employer regulated by FMCSA, with a prospective employee subject to drug and alcohol testing with a DOT agency other than FMCSA, you must continue to request the information about the employee listed in paragraphs (b) through (j) of this section. For example, if you are an employer regulated by both FMCSA and PHMSA, and you are hiring an employee to perform functions regulated by both DOT agencies, then you must query FMCSA's Clearinghouse to satisfy FMCSA's requirements and you must request the information listed in paragraphs (b) through (j) of this section to satisfy PHMSA's requirements.

(b) You must request the information listed in this paragraph (b) from DOT-regulated employers who have employed the employee during any period during the two years before the date of the employee's application or transfer:

(1) Alcohol tests with a result of 0.04 or higher alcohol concentration;

(2) Verified positive drug tests;

(3) Refusals to be tested (including verified adulterated or substituted drug test results);

(4) Other violations of DOT agency drug and alcohol testing regulations; and

(5) With respect to any employee who violated a DOT drug and alcohol regulation, documentation of the employee's successful completion of DOT return-to-duty requirements (including follow-up tests). If the previous employer does not have information about the return-do-duty process (*e.g.*, an employer who did not hire an employee who tested positive on a pre-employment test), you must seek to obtain this information from the employee.

(c) The information obtained from a previous employer includes any drug or alcohol test information obtained from previous employers under this section or other applicable DOT agency regulations.

(d) If feasible, you must obtain and review this information before the employee first performs safety-sensitive functions. If this is not feasible, you must obtain and review the information as soon as possible. However, you must not permit the employee to perform safety-sensitive functions after 30 days from the date on which the employee first performed safety-sensitive functions, unless you have obtained or made and documented a good faith effort to obtain this information.

(e) If you obtain information that the employee has violated a DOT agency drug and alcohol regulation, you must not use the employee to perform safety-sensitive functions unless you also obtain information that the employee has subsequently complied with the return-to-duty requirements of Subpart O of this part and DOT agency drug and alcohol regulations.

(f) You must provide to each of the employers from whom you request information under paragraph (b) of this section written consent for the release of the information cited in paragraph (a) of this section.

(g) The release of information under this section must be in any written form (*e.g.*, fax, e-mail, letter) that ensures confidentiality. As the previous employer, you must maintain a written record of the information released, including the date, the party to whom it was released, and a summary of the information provided.

(h) If you are an employer from whom information is requested under paragraph (b) of this section, you must, after reviewing the employee's specific, written consent, immediately release the requested information to the employer making the inquiry.

(i) As the employer requesting the information required under this section, you must maintain a written, confidential record of the information you obtain or of the good faith efforts you made to obtain the information. You must retain this information for three years from the date of the employee's first performance of safety-sensitive duties for you.

(j) As the employer, you must also ask the employee whether he or she has tested positive, or refused to test, on any pre-employment drug or alcohol test administered by an employer to which the employee applied for, but did not obtain, safety-sensitive transportation work covered by DOT agency drug and alcohol testing rules during the past two years. If the employee admits that he or she had a positive test or a refusal to test, you must not use the employee to perform safety-sensitive functions for you, until and unless the employee documents successful completion of the return-to-duty process (see paragraphs (b)(5) and (e) of this section).

[65 FR 79526, Dec. 19, 2000, as amended at 88 FR 27637, May 2, 2023]

§ 40.26 What form must an employer use to report Management Information System (MIS) data to a DOT agency?

As an employer, when you are required to report MIS data to a DOT agency, you must use the U.S. Department of Transportation Drug and Alcohol Testing MIS Data Collection Form to report that data. You must use the form and instructions referenced at appendix J to part 40. You must submit the MIS report in accordance with rule requirements (*e.g.*, dates for submission; selection of companies required to submit, and method of reporting) established by the DOT agency regulating your operation.

[84 FR 16773, Apr. 23, 2019, as amended at 88 FR 27638, May 2, 2023]

§ 40.27 May an employer require an employee to sign a consent or release in connection with the DOT drug and alcohol testing program?

No, as an employer, you must not require an employee to sign a consent, release, waiver of liability, or indemnification agreement with respect to any part of the drug or alcohol testing process covered by this part (including, but not limited to, collections, laboratory testing, MRO and SAP services).

[66 FR 41950, Aug. 9, 2001]

Subpart C—Urine Collection Personnel

§ 40.31 Who may collect specimens for DOT drug testing?

(a) Collectors meeting the requirements of this subpart are the only persons authorized to collect urine specimens for DOT drug testing.

(b) A urine collector must meet training requirements of § 40.33.

(c) An oral fluid collector must meet the training requirements of § 40.35.

(d) To avoid the appearance of a conflict of interest, if you are the immediate supervisor of the employee being tested, you must not act as the collector when that employee is tested, unless no other collector is available and you are permitted to do so under DOT agency drug and alcohol regulations.

(e) You must not act as the collector for the employee being tested if you work for a HHS-certified laboratory (*e.g.*, as a technician or accessioner) and could link the employee with a urine specimen, drug testing result, or laboratory report.

(f) Employees are not permitted to be their own collector.

(1) An employee who is a qualified collector is not permitted to be their own collector; another qualified collector must perform the collection in accordance with this part.

(2) To avoid a potential conflict of interest, a collector must not be related to the employee being tested (*e.g.*, spouse, ex-spouse, relative) or a close personal friend.

[65 FR 79526, Dec. 19, 2000, as amended at 88 FR 27637, May 2, 2023]

§ 40.33 What training requirements must a collector meet for urine collection?

To be permitted to act as a urine collector in the DOT drug testing program, you must meet each of the requirements of this section:

(a) *Basic information.* You must be knowledgeable about this part, the current ''DOT Urine Specimen Collection Procedures Guidelines,'' and DOT agency regulations applicable to the employers for whom you perform collections. DOT agency regulations, the DOT Urine Specimen Collection Procedures Guidelines, and other materials are available from ODAPC (Department of Transportation, 1200 New Jersey Avenue SE., Washington DC, 20590, 202–366–3784, or on the ODAPC Web site (*https://www.transportation.gov/odapc*). You must keep current on any changes to these materials. You must subscribe to the ODAPC list-serve at: *https://www.transportation.gov/odapc/get-odapc-email-updates*.

(b) *Qualification training.* You must receive qualification training meeting the requirements of this paragraph. Qualification training must provide instruction on the following subjects:

(1) All steps necessary to complete a collection correctly and the proper completion and transmission of the CCF;

(2) ''Problem'' collections (*e.g.*, situations like ''shy bladder'' and attempts to tamper with a specimen);

(3) Fatal flaws, correctable flaws, and how to correct problems in collections; and

(4) The collector's responsibility for maintaining the integrity of the collection process, ensuring the privacy of employees being tested, ensuring the security of the specimen, and avoiding conduct or statements that could be viewed as offensive or inappropriate;

(c) *Initial Proficiency Demonstration.* Following your completion of qualification training under paragraph (b) of this section, you must demonstrate proficiency in collections under this part by completing five consecutive error-free mock collections.

(1) The five mock collections must include two uneventful collection scenarios, one insufficient quantity of urine scenario, one temperature out of

range scenario, and one scenario in which the employee refuses to sign the CCF and initial the specimen bottle tamper-evident seal.

(2) Another person must monitor and evaluate your performance, in person or by a means that provides real-time observation and interaction between the instructor and trainee, and attest in writing that the mock collections are ''error-free.'' This person must be a qualified collector who has demonstrated necessary knowledge, skills, and abilities by—

(i) Regularly conducting DOT drug test collections for a period of at least a year;

(ii) Conducting collector training under this part for a year; or

(iii) Successfully completing a ''train the trainer'' course.

(d) You must meet the requirements of paragraphs (b) and (c) of this section before you begin to perform collector functions.

(e) *Refresher training.* No less frequently than every five years from the date on which you satisfactorily complete the requirements of paragraphs (b) and (c) of this section, you must complete refresher training that meets all the requirements of paragraphs (b) and (c) of this section.

(f) *Error correction training.* If you make a mistake in the collection process that causes a test to be cancelled (*i.e.*, a fatal or uncorrected flaw), you must undergo error correction training. This training must occur within 30 days of the date you are notified of the error that led to the need for retraining. Errors that cause cancellation but occur outside the collection process (*e.g.*, when a specimen is crushed or otherwise damaged during the transportation process, or is lost in transit), the cancellation would not be the result of an error by the collector during the collection process and does not require the collector to be retrained.

(1) Error correction training must be provided and your proficiency documented in writing by a person who meets the requirements of paragraph (c)(2) of this section.

(2) Error correction training is required to cover only the subject matter area(s) in which the error that caused the test to be cancelled occurred.

(3) As part of the error correction training, you must demonstrate your proficiency in the collection procedures of this part by completing three consecutive error-free mock collections. The mock collections must include one uneventful scenario and two scenarios related to the area(s) in which your error(s) occurred. The person providing the training must monitor and evaluate your performance and attest in writing that the mock collections were ''error-free.''

(g) *Documentation.* You must maintain documentation showing that you currently meet all requirements of this section. You must provide this documentation on request to DOT agency representatives and to employers and C/TPAs who are using or negotiating to use your services.

[65 FR 79526, Dec. 19, 2000; 66 FR 3885, Jan. 17, 2001, as amended at 66 FR 41950, Aug. 9, 2001; 82 FR 52244, Nov. 13, 2017; 88 FR 27638, May 2, 2023]

§ 40.35 What training requirements must a collector meet for oral fluid collection?

To be permitted to act as an oral fluid collector in the DOT drug testing program, you must meet each of the requirements of this section:

(a) *Basic information.* You must be knowledgeable about this part, the current ''DOT Oral Fluid Specimen Collection Procedures Guidelines,'' and DOT agency regulations applicable to the employers for whom you perform collections. DOT agency regulations, guidelines, and other materials are available from ODAPC (Department of Transportation, 1200 New Jersey Avenue SE, Washington DC, 20590, 202–366–3784, or on the ODAPC website (*https://www.transportation.gov/odapc*). You must keep current on any changes to these materials. You must subscribe to the ODAPC list-serve at: *https://www.transportation.gov/odapc/get-odapc-email-updates*.

(b) *Qualification training.* You must receive qualification training meeting the requirements of this paragraph (b). Qualification training must provide instruction on the following subjects:

(1) Training on the testing procedures of this part;

(2) Training to proficiency in the operation of the particular oral fluid collection device(s) you will be using.

(3) All steps necessary to complete a collection correctly and the proper completion and transmission of the CCF;

(4) ''Problem'' collections (*e.g.*, situations like ''dry mouth'' and attempts to tamper with a specimen);

(5) Fatal flaws, correctable flaws, and how to correct problems in collections; and

(6) The collector's responsibility for maintaining the integrity of the collection process, ensuring the privacy of employees being tested, ensuring the security of the specimen, and avoiding conduct or statements that could be viewed as offensive or inappropriate.

(c) *Initial proficiency demonstration.* Following your completion of qualification training under paragraph (b) of this section, you must demonstrate proficiency in collections under this part by completing five consecutive error-free mock collections for each device you will use.

(1) The five mock collections for each device must include one uneventful collection scenario, one insufficient specimen quantity scenario; one scenario in which the employee has something in their mouth that might interfere with the collection; one scenario in which the employee attempts to tamper with the specimen; and one scenario in which the employee refuses to sign the CCF. For each of the five mock collections, the collector must check the expiration date of the device, show it to the employee, and record the date on the CCF used. The collector must ensure, when applying the labels, they do not cover the expiration dates.

(2) Another person must monitor and evaluate your performance, in person or by a means that provides real-time observation and interaction between you and the qualified collector, who must attest in writing that the mock collections are ''error-free.'' This person must be a qualified collector who has demonstrated necessary knowledge, skills, and abilities by—

(i) Regularly conducting DOT drug test collections for a period of at least one year;

(ii) Conducting collector training under this part for at least one year; or

(iii) Successfully completing a ''train the trainer'' course.

(d) *Schedule for qualification training and initial proficiency demonstration.* You must meet the requirements of paragraphs (b) and (c) of this section before you begin to perform collector functions.

(e) *Refresher training.* No less frequently than every five years from the date on which you satisfactorily complete the requirements of paragraphs (b) and (c) of this section, you must complete refresher training that meets all the requirements of paragraphs (b) and (c).

(f) *Error correction training.* If you make a mistake in the collection process that causes a test to be cancelled (*i.e.*, a fatal or uncorrected flaw), you must undergo error correction training. This training must occur within 30 days of the date you are notified of the error that led to the need for retraining.

(1) Error correction training must be provided and your proficiency documented in writing by a person who meets the requirements of paragraph (c)(2) of this section.

(2) Error correction training is required to cover only the subject matter area(s) in which the error that caused the test to be cancelled occurred.

(3) As part of the error correction training, you must demonstrate your proficiency in the collection procedures of this part by completing three consecutive error-free mock collections. The mock collections must include one uneventful scenario and two scenarios related to the area(s) in which your error(s) occurred. The person providing the training must monitor and evaluate your performance and attest in writing that the mock collections were ''error-free.''

(g) *Documentation.* You must maintain documentation showing that you currently meet all requirements of this section. You must provide this documentation on request to DOT agency representatives and to employers and C/TPAs who are using or negotiating to use your services.

[88 FR 27638, May 2, 2023]

§ 40.36 What information about the DER must employers provide to collectors?

As an employer, you must provide to collectors the name and telephone number of the appropriate DER (and C/TPA, where applicable) to contact about any problems or issues that may arise during the testing process.

[65 FR 79526, Dec. 19, 2000. Redesignated at 88 FR 27639, May 2, 2023]

Subpart D—Collection Sites, Forms, Equipment and Supplies Used in DOT Urine and Oral Fluid Collections

§ 40.40 What form is used to document a DOT collection?

(a) The Federal Drug Testing Custody and Control Form (CCF) must be used to document every collection required by the DOT drug testing program. You may view this form on the Department's website (*https://www.transportation.gov/odapc*) or the HHS website (*https://www.workplace.samhsa.gov*).

(b) You must not use a non-Federal form or an expired CCF to conduct a DOT collection. As a laboratory, C/TPA or other party that provides CCFs to employers, collection sites, or other customers, you must not provide copies of an expired CCF to these participants. You must also affirmatively notify these participants that they must not use an expired CCF.

(c) As a participant in the DOT drug testing program, you are not permitted to modify or revise the CCF except as follows:

(1) You may include, in the area outside the border of the form, other information needed for billing or other purposes necessary to the collection process.

(2) The CCF must include the names, addresses, telephone numbers and any other appropriate contact information (*e.g.*, an email address of the employer and the MRO), including the DER's name and contact information. All of this information must be preprinted, typed, or handwritten. Fax numbers may be included but are not required. The MRO information must include the physician's name and address, as opposed to only a generic clinic, health care organization, company name, or post office box. This information is required, and an employer, collector, service agent or any other party is prohibited from omitting it. In addition, a C/TPA's name, address, telephone and fax numbers, and any other appropriate contact information should be included, but is not required. The employer may use a C/TPA's address in place of its own, but must continue to include its name, telephone and fax numbers, and any other appropriate contact information.

(3) As an employer you may preprint the box in Step 1–D of the CCF for the DOT agency under whose authority the test will occur.

(4) As a collector, you may use a CCF with your name, address, telephone number, and fax number preprinted, but under no circumstances may you sign the form before the collection event. If a collection takes place at a clinic, the actual address of the clinic should be used, not a corporate address of the collection company. If the collection takes place onsite at the employer, the employer's address must be noted as the collection site address. If the collection takes place in a ''mobile unit'' or at an accident site, the collector must enter the actual location address of the collection or as near an approximation as possible. The collector must ensure that the required collector telephone number is the number that the laboratory, MRO, or employer may use to directly contact the individual collector and/or the collector's supervisor during the collection site's business hours. The collector must not provide a number for a call center.

(5) When using an electronic CCF, you must establish adequate confidentiality and security measures to ensure that confidential employee records are not available to unauthorized persons. This includes protecting the physical security of records, access controls, and computer security measures to safeguard confidential data in electronic form.

(d) Under no circumstances may the CCF transmit personal identifying information about an employee (other

than a SSN or Employee ID No.) to a laboratory.

(e) As an employer, you may use an equivalent foreign-language version of the CCF approved by ODAPC. You may use such a non-English language form only in a situation where both the employee and collector understand and can use the form in that language.

(f) An employer who uses an electronic CCF must ensure that the collection site, the primary and split laboratories, and MRO have compatible systems, and that the employee and any other program participants in the testing process will receive a legible copy of the CCF.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41950, Aug. 9, 2001; 75 FR 59107, Sept. 27, 2010; 76 FR 59577, Sept. 27, 2011; 80 FR 19553, Apr. 13, 2015; 82 FR 52244, Nov. 13, 2017. Redesignated and amended at 88 FR 27639, May 2, 2023]

§ 40.41 May employers use the CCF for non-Federal collections or non-Federal forms for DOT collections?

(a) No, as an employer, you are prohibited from using the CCF for non-Federal collections. You are also prohibited from using non-Federal forms for DOT collections. Doing either subjects you to enforcement action under DOT agency regulations.

(b) (1) In the rare case where the collector, either by mistake or as the only means to conduct a test under difficult circumstances (*e.g.*, post-accident or reasonable suspicion test with insufficient time to obtain the CCF), uses a non-Federal form for a DOT collection, the use of a non-Federal form does not present a reason for the laboratory to reject the specimen for testing or for an MRO to cancel the result.

(2) The use of the non-Federal form is a ''correctable flaw.'' As an MRO, to correct the problem you must follow the procedures of § 40.205(b)(2).

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41950, Aug. 9, 2001. Redesignated and amended at 88 FR 27639, June 1, 2023]

§ 40.42 Where does a urine collection for a DOT drug test take place?

(a) A urine collection for a DOT drug test must take place in a collection site meeting the requirements of this section.

(b) If you are operating a collection site, you must ensure that it meets the security requirements of § 40.43.

(c) If you are operating a collection site, you must have all necessary personnel, materials, equipment, facilities and supervision to provide for the collection, temporary storage, and shipping of urine specimens to a laboratory, and a suitable clean surface for writing.

(d) Your collection site must include a facility for urination described in either paragraph (e) or paragraph (f) of this section.

(e) The first, and preferred, type of facility for urination that a collection site may include is a single-toilet room, having a full-length privacy door, within which urination can occur.

(1) No one but the employee may be present in the room during the collection, except for the observer in the event of a directly observed collection.

(2) You must have a source of water for washing hands, that, if practicable, should be external to the closed room where urination occurs. If an external source is not available, you may meet this requirement by securing all sources of water and other substances that could be used for adulteration and substitution (*e.g.*, water faucets, soap dispensers) and providing moist towelettes outside the closed room.

(f) The second type of facility for urination that a collection site may include is a multistall restroom.

(1) Such a site must provide substantial visual privacy (*e.g.*, a toilet stall with a partial-length door) and meet all other applicable requirements of this section.

(2) If you use a multi-stall restroom, you must either—

(i) Secure all sources of water and other substances that could be used for adulteration and substitution (*e.g.*, water faucets, soap dispensers) and place bluing agent in all toilets or secure the toilets to prevent access; or

(ii) Conduct all collections in the facility as monitored collections (see § 40.69 for procedures). This is the only circumstance in which you may conduct a monitored collection.

(3) No one but the employee may be present in the multistall restroom during the collection, except for the monitor in the event of a monitored collection or the observer in the event of a directly observed collection.

(g) A collection site may be in a medical facility, a mobile facility (*e.g.*, a van), a dedicated collection facility, or any other location meeting the requirements of this section.

[65 FR 79526, Dec. 19, 2000. Redesignated at 88 FR 27639, May 2, 2023]

§ 40.43 What steps must operators of collection sites and collectors take to protect the security and integrity of urine collections?

(a) Collectors and operators of collection sites must take the steps listed in this section to prevent unauthorized access that could compromise the integrity of collections.

(b) As a collector, you must do the following before each collection to deter tampering with specimens:

(1) Secure any water sources or otherwise make them unavailable to employees (*e.g.*, turn off water inlet, tape handles to prevent opening faucets);

(2) Ensure that the water in the toilet is blue;

(3) Ensure that no soap, disinfectants, cleaning agents, or other possible adulterants are present;

(4) Inspect the site to ensure that no foreign or unauthorized substances are present;

(5) Tape or otherwise secure shut any movable toilet tank top, or put bluing in the tank;

(6) Ensure that undetected access (*e.g.*, through a door not in your view) is not possible;

(7) Secure areas and items (*e.g.*, ledges, trash receptacles, paper towel holders, under-sink areas) that appear suitable for concealing contaminants; and

(8) Recheck items in paragraphs (b)(1) through (7) of this section following each collection to ensure the site's continued integrity.

(c) If the collection site uses a facility normally used for other purposes, like a public rest room or hospital examining room, you must, as a collector, also ensure before the collection that:

(1) Access to collection materials and specimens is effectively restricted; and

(2) The facility is secured against access during the procedure to ensure privacy to the employee and prevent distraction of the collector. Limited-access signs must be posted.

(d) As a collector, you must take the following additional steps to ensure security during the collection process:

(1) To avoid distraction that could compromise security, you are limited to conducting a collection for only one employee at a time. However, during the time one employee is in the period for drinking fluids in a ''shy bladder'' situation (see § 40.193(b)), you may conduct a collection for another employee.

(2) To the greatest extent you can, keep an employee's collection container within view of both you and the employee between the time the employee has urinated and the specimen is sealed.

(3) Ensure you are the only person in addition to the employee who handles the specimen before it is poured into the bottles and sealed with tamper-evident seals.

(4) In the time between when the employee gives you the specimen and when you seal the specimen, remain within the collection site.

(5) Maintain personal control over each specimen and CCF throughout the collection process.

(e) If you are operating a collection site, you must implement a policy and procedures to prevent unauthorized personnel from entering any part of the site in which urine specimens are collected or stored.

(1) Only employees being tested, collectors and other collection site workers, DERs, employee and employer representatives authorized by the employer (*e.g.*, employer policy, collective bargaining agreement), and DOT agency representatives are authorized persons for purposes of this paragraph (e).

(2) Except for the observer in a directly observed collection or the monitor in the case of a monitored collection, you must not permit anyone to enter the urination facility in which employees provide specimens.

(3) You must ensure that all authorized persons are under the supervision

of a collector at all times when permitted into the site.

(4) You or the collector may remove any person who obstructs, interferes with, or causes a delay in the collection process.

(f) If you are operating a collection site, you must minimize the number of persons handling specimens.

§ 40.44 What materials are used to collect urine specimens?

For each DOT drug test, you must use a collection kit meeting the requirements of Appendix A of this part.

[65 FR 79526, Dec. 19, 2000. Redesignated at 88 FR 27639, May 2, 2023]

§ 40.45 What materials are used to send urine specimens to the laboratory?

(a) Except as provided in paragraph (b) of this section, you must use a shipping container that adequately protects the specimen bottles from shipment damage in the transport of specimens from the collection site to the laboratory.

(b) You are not required to use a shipping container if a laboratory courier hand-delivers the specimens from the collection site to the laboratory.

[65 FR 79526, Dec. 19, 2000. Redesignated at 88 FR 27639, May 2, 2023]

§ 40.47 Where does an oral fluid collection for a DOT drug test take place?

(a) An oral fluid collection for a DOT drug test must take place in a collection site meeting the requirements of this section.

(b) If you are operating an oral fluid collection site:

(1) You must ensure that it meets the security requirements of § 40.48;

(2) The site may be a permanent or temporary facility located either at the work site or at a remote site;

(3) The site may be in a medical facility, a mobile facility (*e.g.*, a van), a dedicated collection facility, or any other location meeting the requirements of this section; and

(4) You must have all necessary personnel, materials, equipment, and facilities that include privacy and supervision to provide for the collection, temporary storage, and shipping of specimens to a laboratory, and a suitable clean surface for writing.

(c) If a collection site is not accessible and there is an immediate requirement to collect an oral fluid specimen (*e.g.*, an accident investigation), another site may be used for the collection, if the collection is performed by a collector who has been trained to collect oral fluid specimens in accordance with this part and the manufacturer's procedures for the collection device.

[88 FR 27640, May 2, 2023]

§ 40.48 What steps must operators of collection sites and collectors take to protect the security and integrity of oral fluid collections?

(a) Collectors and operators of collection sites must take the steps listed in this section to prevent unauthorized access that could compromise the integrity of collections.

(b) As a collector, you must do the following before each collection to deter tampering with specimens:

(1) Ensure that access to collection materials and specimens is effectively restricted;

(2) Ensure that undetected access (*e.g.*, through a door not in your view) is not possible; and

(3) Ensure the security of the facility during the collection process to maintain privacy to the employee and prevent distraction of the collector. Limited-access signs must be posted.

(c) As a collector, you must take the following additional steps to ensure security during the collection process:

(1) To avoid distraction that could compromise security, you are limited to conducting a collection for only one employee at a time. However, during the time one employee is in the period for drinking fluids in a ''dry mouth'' situation (*see* § 40.72(b)(1)), you may conduct a collection for another employee as long as the employee with ''dry mouth'' remains supervised.

(2) To the greatest extent practicable, keep an employee's collection container within view of both you and the employee between the time the employee has provided the oral fluid specimen and the specimen is sealed.

(3) Ensure you are the only person in addition to the employee who handles

the specimen before it is sealed with tamper-evident seals.

(4) In the time between when the employee gives you the specimen and when you seal the specimen, remain within the collection site.

(5) Maintain personal control over each specimen and CCF throughout the collection process.

(d) If you are operating a collection site, you must implement a policy and procedures to prevent unauthorized personnel from entering any part of the site in which oral fluid specimens are collected or stored.

(1) Only employees being tested, collectors and other collection site workers, DERs, employee and employer representatives authorized by the employer (*e.g.*, employer policy, collective bargaining agreement), and DOT agency representatives are authorized persons for purposes of this paragraph (d).

(2) You must ensure that all authorized persons are under the supervision of a collector at all times when permitted into the site.

(3) You or the collector may remove any person who obstructs, interferes with, or causes a delay in the collection process.

(e) If you are operating a collection site, you must minimize the number of persons handling specimens.

[88 FR 27640, May 2, 2023]

§ 40.49 What materials are used to collect oral fluid specimens?

For each DOT drug test, you must use a collection device meeting the requirements of appendix B of this part.

[88 FR 27640, May 2, 2023]

§ 40.51 What materials are used to send oral fluid specimens to the laboratory?

(a) Except as provided in paragraph (b) of this section, you must use a shipping container that adequately protects the specimen bottles from damage in the transport of specimens from the collection site to the laboratory.

(b) You are not required to use a shipping container if a laboratory courier hand-delivers the specimens from the collection site to the laboratory.

[88 FR 27640, May 2, 2023]

Subpart E—Specimen Collections

§ 40.61 What are the preliminary steps in the drug testing collection process?

As the collector, you must take the following steps before actually beginning a collection:

(a) When a specific time for an employee's test has been scheduled, or the collection site is at the employee's work site, and the employee does not appear at the collection site at the scheduled time, contact the DER to determine the appropriate interval within which the DER has determined the employee is authorized to arrive. If the employee's arrival is delayed beyond that time, you must notify the DER that the employee has not reported for testing, the DER must determine whether the employee has refused to test (*see* §§ 40.191(a)(1) and 40.355(i)). In a situation where a C/TPA has notified an owner/operator or other individual employee to report for testing (other than for a pre-employment test) and the employee does not appear, the C/TPA must determine whether the employee has refused to test (*see* §§ 40.191(a)(1) and 40.355(j)).

(b) Ensure that, when the employee enters the collection site, you begin the testing process without undue delay. For example, you must not wait because the employee says he or she is not ready or is unable to urinate or because an authorized employer or employee representative is delayed in arriving.

(1) If the employee is also going to take a DOT alcohol test, you must ensure, to the greatest extent practicable, that the alcohol test is completed before the drug testing collection process begins.

Example to paragraph (b)(1): An employee enters the test site for both a drug and an alcohol test. Normally, the collector would wait until the BAT had completed the alcohol test process before beginning the drug test process. However, there are some situations in which an exception to this normal practice would be reasonable. One such situation might be if several people were waiting for the BAT to conduct alcohol tests, but a drug testing collector in the same facility were free. Someone waiting might be able to complete a drug test without unduly delaying his or her alcohol test. Collectors and

BATs should work together, however, to ensure that post-accident and reasonable suspicion alcohol tests happen as soon as possible (*e.g.*, by moving the employee to the head of the line for alcohol tests).

(2) If the employee needs medical attention (*e.g.*, an injured employee in an emergency medical facility who is required to have a post-accident test), do not delay this treatment to collect a specimen.

(3) You must not collect a specimen from an unconscious employee to conduct a drug test under this part.

(4) You must not catheterize a conscious employee for purposes of a urine test. However, you must inform an employee who normally voids through self-catheterization that the employee is required to provide a specimen in that manner. If an employee normally voids through self-catheterization, but declines to do so for the urine test, the collector should notify the DER of the circumstances, so that the actual employer can determine whether the situation constitutes a refusal to test by the employee.

(c) Require the employee to provide positive identification. You must see a photo ID issued by the employer (other than in the case of an owner-operator or other self-employed individual) or a Federal, state, or local government (*e.g.*, a driver's license). You may not accept faxes or photocopies of identification. Positive identification by an employer representative (not a coworker or another employee being tested) is also acceptable. If the employee cannot produce positive identification, you must contact a DER to verify the identity of the employee.

(d) If the employee asks, provide your identification to the employee. Your identification must include your name and your employer's name, but does not have to include your picture, address, or telephone number.

(e) Explain the basic collection procedure to the employee, and notify the employee that instructions for completing the CCF can be found at the HHS (*https://www.samhsa.gov/workplace*) and DOT (*https://www.transportation.gov/odapc*) websites.

(f) Direct the employee to remove outer clothing (*e.g.*, coveralls, jacket, coat, hat) that could be used to conceal items or substances that could be used to tamper with a specimen. You must also direct the employee to leave these garments and any briefcase, purse, or other personal belongings with you or in a mutually agreeable location. You must advise the employee that failure to comply with your directions constitutes a refusal to test.

(1) If the employee asks for a receipt for any belongings left with you, you must provide one.

(2) You must allow the employee to keep his or her wallet.

(3) You must not ask the employee to remove other clothing (*e.g.*, shirts, pants, dresses, underwear), to remove all clothing, or to change into a hospital or examination gown (unless the urine collection is being accomplished simultaneously with a DOT agency-authorized medical examination).

(4) You must direct the employee to empty his or her pockets and display the items in them to ensure that no items are present which could be used to adulterate the specimen. If nothing is there that can be used to adulterate a specimen, the employee can place the items back into his or her pockets. As the employee, you must allow the collector to make this observation.

(5) If, in your duties under paragraph (f)(4) of this section, you find any material that could be used to tamper with a specimen, you must:

(i) Determine if the material appears to be brought to the collection site with the intent to alter the specimen, and, if it is, either conduct a directly observed urine collection using direct observation procedures (*see* §40.67) or an oral fluid specimen collection, make a note on the CCF and continue with collection process; or

(ii) Determine if the material appears to be inadvertently brought to the collection site (*e.g.*, eye drops), secure and maintain it until the collection process is completed and conduct a normal (*i.e.*, unobserved) collection.

(g) You must instruct the employee not to list medications that he or she is currently taking on the CCF. (The employee may make notes of medications on the back of the employee copy

of the form for his or her own convenience, but these notes must not be transmitted to anyone else.)

[65 FR 79526, Dec. 19, 2000, as amended at 88 FR 27640, May 2, 2023]

§ 40.63 What steps does the collector take in the collection process before the employee provides a urine specimen?

As the collector, you must take the following steps before the employee provides the urine specimen:

(a) Ensure all items under Step 1 of the CCF are complete and accurate (*e.g.*, if Step 1.D is not checked, put a check mark for the ''Specify DOT Agency'' under the authority of which the test will take place; if the address where the collection is actually taking place is not in Step 1.G, update that.)

(b) Instruct the employee to wash and dry his or her hands at this time. You must tell the employee not to wash his or her hands again until after delivering the specimen to you. You must not give the employee any further access to water or other materials that could be used to adulterate or dilute a specimen.

(c) Select, or allow the employee to select, an individually wrapped or sealed collection container from collection kit materials. Either you or the employee, with both of you present, must unwrap or break the seal of the collection container. You must not unwrap or break the seal on any specimen bottle at this time. You must not allow the employee to take anything from the collection kit into the room used for urination except the collection container.

(d) Direct the employee to go into the room used for urination, provide a specimen of at least 45 mL, not flush the toilet, and return to you with the specimen as soon as the employee has completed the void.

(1) Except in the case of an observed or a monitored collection (see §§ 40.67 and 40.69), neither you nor anyone else may go into the room with the employee.

(2) As the collector, you may set a reasonable time limit for voiding.

(e) You must pay careful attention to the employee during the entire collection process to note any conduct that clearly indicates an attempt to tamper with a specimen (*e.g.*, substitute urine in plain view or an attempt to bring into the collection site an adulterant or urine substitute). If you detect such conduct, you must require that a collection take place immediately under direct observation (*see* § 40.67) and complete Step 2 by noting the conduct in the ''Remarks'' line of the CCF and the fact that the collection was observed by checking the ''Observed'' box. You must also, as soon as possible, inform the DER and collection site supervisor that a collection took place under direct observation and the reason for doing so.

[65 FR 79526, Dec. 19, 2000, as amended at 75 FR 59107, Sept. 27, 2010; 88 FR 27641, May 2, 2023]

§ 40.65 What does the collector check for when the employee presents a urine specimen?

As a collector, you must check the following when the employee gives the collection container to you:

(a) *Sufficiency of specimen*. You must check to ensure that the specimen contains at least 45 mL of urine.

(1) If it does not, you must follow ''shy bladder'' procedures (see § 40.193(b)).

(2) When you follow ''shy bladder'' procedures, you must discard the original specimen, unless another problem (*i.e.*, temperature out of range, signs of tampering) also exists.

(3) You are never permitted to combine urine collected from separate voids to create a specimen.

(4) You must discard any excess urine.

(b) *Temperature*. You must check the temperature of the specimen no later than four minutes after the employee has given you the specimen.

(1) The acceptable temperature range is 32–38 °C/90–100 °F.

(2) You must determine the temperature of the specimen by reading the temperature strip attached to the collection container.

(3) If the specimen temperature is within the acceptable range, you must mark the ''Yes'' box on the CCF (Step 2).

(4) If the specimen temperature is outside the acceptable range, you must

mark the ''No'' box and enter in the ''Remarks'' line (Step 2) your findings about the temperature.

(5) If the specimen temperature is outside the acceptable range, you must immediately conduct a new urine collection using direct observation procedures (*see* § 40.67) or an oral fluid collection.

(6) In a case where a specimen is collected under direct observation because of the temperature being out of range, you must process both the original specimen and the specimen collected using direct observation (including oral fluid) and send the two sets of specimens to their respective laboratories. This is true even in a case in which the original specimen has insufficient volume and the temperature is out of range. You must also, as soon as possible, inform the DER and collection site supervisor that a collection took place under direct observation and the reason for doing so.

(7) In a case where the employee refuses to provide another specimen (see § 40.191(a)(3)) or refuses to provide another specimen under direct observation (see § 40.191(a)(4)), you must notify the DER. As soon as you have notified the DER, you must discard any specimen the employee has provided previously during the collection procedure.

(c) *Signs of tampering.* You must inspect the specimen for unusual color, presence of foreign objects or material, or other signs of tampering (*e.g.,* if you notice any unusual odor).

(1) If it is apparent from this inspection that the employee has tampered with the specimen (*e.g.,* blue dye in the specimen, excessive foaming when shaken, or smell of bleach), you must immediately conduct a new urine collection using direct observation procedures (*see* § 40.67) or an oral fluid collection.

(2) In a case where a specimen is collected under direct observation because of showing signs of tampering, you must process both the original specimen and the specimen collected using direct observation and send the two sets of specimens to the laboratory. This is true even in a case in which the original specimen has insufficient volume but it shows signs of tampering. You must also, as soon as possible, inform the DER and collection site supervisor that a collection took place under direct observation and the reason for doing so.

(3) In a case where the employee refuses to provide a specimen under direct observation (see § 40.191(a)(4)), you must discard any specimen the employee provided previously during the collection procedure. Then you must notify the DER as soon as practicable.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41950, Aug. 9, 2001; 88 FR 27641, May 2, 2023]

§ 40.67 When and how is a directly observed urine collection conducted?

(a) As an employer, you must direct an immediate collection under direct observation with no advance notice to the employee, if:

(1) The laboratory reported to the MRO that a specimen is invalid, and the MRO reported to you that there was not an adequate medical explanation for the result;

(2) The MRO reported to you that the original positive, adulterated, or substituted result had to be cancelled because the test of the split specimen could not be performed; or

(3) The laboratory reported to the MRO that the specimen was negative-dilute with a creatinine concentration greater than or equal to 2 mg/dL but less than or equal to 5 mg/dL, and the MRO reported the specimen to you as negative-dilute and that a second collection must take place under direct observation (see § 40.197(b)(1)).

(4) You realize a collection under direct observation was required but was not conducted or the service agent informs you that a direct observation should have been collected but was not (*see* paragraph (n) of this section).

(b) As an employer, you must direct a collection under direct observation of an employee if the drug test is a return-to-duty test or a follow-up test.

(c) As a collector, you must immediately conduct a collection under direct observation if:

(1) You are directed by the DER to do so (see paragraph (a) of this section); or

(2) You observed materials brought to the collection site or the employee's conduct clearly indicates an attempt

to tamper with a specimen (see §§ 40.61(f)(5)(i) and 40.63(e)); or

(3) The temperature on the original specimen was out of range (*see* § 40.65(b)(5));

(4) The original specimen appeared to have been tampered with (*see* § 40.65(c)(1)); or

(5) The test reason is return-to-duty or follow-up.

(d)(1) As the employer, you must explain to the employee the reason for a directly observed collection under paragraph (a) or (b) of this section.

(2) As the collector, you must explain to the employee the reason, if known, under this part for a directly observed collection.

(e) As the collector, you must complete a new CCF for the directly observed collection.

(1) You must mark the ''reason for test'' block (Step 1) the same as for the first collection.

(2) You must check the ''Observed, (Enter Remark)'' box and enter the reason (see paragraphs (c)(2) through (4) of this section) in the ''Remarks'' line (Step 2).

(f) In a case where two sets of specimens are being sent to the laboratory because of suspected tampering with the specimen at the collection site, enter on the ''Remarks'' line of the CCF (Step 2) for each specimen a notation to this effect (*e.g.*, collection 1 of 2, or 2 of 2) and the specimen ID number of the other specimen.

(g) As the collector, you must ensure that the observer is the same gender as the employee.

(1) You must never permit an opposite gender person to act as the observer.

(2) The observer can be a different person from the collector and need not be a qualified collector.

(3) If a same gender collector cannot be found or in circumstances of nonbinary or transgender employees:

(i) If the employer has a standing order to allow oral fluid testing in such situations, the collector will follow that order;

(ii) If there is no standing order from the employer, the collector must contact the DER and either conduct an oral fluid test if the collection site is able to do so, or send the employee to a collection site acceptable to the employer for the oral fluid test.

(h) As the collector, if someone else is to observe the collection (*e.g.*, in order to ensure a same gender observer), you must verbally instruct that person to follow procedures at paragraphs (i) and (j) of this section. If you, the collector, are the observer, you too must follow these procedures.

(i) As the observer, you must request the employee to raise his or her shirt, blouse, or dress/skirt, as appropriate, above the waist; and lower clothing and underpants to show you, by turning around, that they do not have a prosthetic device. After you have determined that the employee does not have such a device, you may permit the employee to return clothing to its proper position for observed urination.

(j) As the observer, you must watch the employee urinate into the collection container. Specifically, you are to watch the urine go from the employee's body into the collection container.

(k) As the observer but not the collector, you must not take the collection container from the employee, but you must observe the specimen as the employee takes it to the collector.

(l) As the collector, when someone else has acted as the observer, you must include the observer's name in the ''Remarks'' line of the CCF (Step 2).

(m) As the employee, if you decline to allow a directly observed collection required or permitted under this section to occur, this is a refusal to test.

(n) As a service agent, when you learn that a directly observed collection should have been collected but was not, you must inform the employer that it must direct the employee to have an immediate recollection under direct observation.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41950, Aug. 9, 2001; 68 FR 31626, May 28, 2003; 69 FR 64867, Nov. 9, 2004; 73 FR 35970, June 25, 2008; 73 FR 50223, Aug. 26, 2008; 73 FR 62910, Oct. 22, 2008; 73 FR 70284, Nov. 20, 2008; 74 FR 37952, July 30, 2009; 82 FR 52244, Nov. 13, 2017; 88 FR 27641, May 2, 2023]

§ 40.69 How is a monitored urine collection conducted?

(a) As stated in § 40.42(f)(2), if you are conducting a urine collection in a

multi-stall restroom and you cannot secure all sources of water and other substances that could be used for adulteration and substitution, you must conduct a monitored collection. This is the only circumstance in which you must conduct a monitored collection.

(b) As the collector, you must secure the room being used for the monitored collection so that no one except the employee and the monitor can enter it until after the collection has been completed.

(c) As the collector, you must ensure that the monitor is the same gender as the employee, unless the monitor is a medical professional (e.g., nurse, doctor, physician's assistant, technologist, or technician licensed or certified to practice in the jurisdiction in which the collection takes place). The monitor can be a different person from the collector and need not be a qualified collector.

(d) As the collector, if someone else is to monitor the collection (e.g., in order to ensure a same-gender monitor), you must verbally instruct that person to follow the procedures of paragraphs (d) and (e) of this section. If you, the collector, are the monitor, you must follow these procedures.

(e) As the monitor, you must not watch the employee urinate into the collection container. If you hear sounds or make other observations indicating an attempt to tamper with a specimen, there must be an additional collection under direct observation. *See* §§ 40.63(e), 40.65(c), and 40.67(c)(2)(3)).

(f) As the monitor, you must ensure that the employee takes the collection container directly to the collector as soon as the employee has exited the enclosure.

(g) As the collector, when someone else has acted as the monitor, you must note that person's name in the ''Remarks'' line of the CCF (Step 2).

(h) As the employee being tested, if you decline to permit a collection authorized under this section to be monitored, it is a refusal to test.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41951, Aug. 9, 2001; 88 FR 27641, May 2, 2023]

§ 40.71 How does the collector prepare the urine specimen?

(a) All collections under DOT agency drug testing regulations must be split specimen collections.

(b) As the collector, you must take the following steps, in order, after the employee brings the urine specimen to you. You must take these steps in the presence of the employee.

(1) After the collection, check the box on the CCF (Step 2) indicating that this was a ''Urine'' and ''Split'' specimen collection.

(2) You, not the employee, must first pour at least 30 mL of urine from the collection container into one specimen bottle, to be used for the primary specimen.

(3) You, not the employee, must then pour at least 15 mL of urine from the collection container into the second specimen bottle to be used for the split specimen.

(4) You, not the employee, must place and secure (*i.e.*, tighten or snap) the lids/caps on the bottles.

(5) You, not the employee, must seal the bottles by placing the tamper-evident bottle seals over the bottle caps/lids and down the sides of the bottles.

(6) You, not the employee, must then write the date on the tamper-evident bottle seals.

(7) You must then ensure that the employee initials the tamper-evident bottle seals for the purpose of certifying that the bottles contain the specimens he or she provided. If the employee fails or refuses to do so, you must note this in the ''Remarks'' line of the CCF (Step 2) and complete the collection process.

(8) You must discard any urine left over in the collection container after both specimen bottles have been appropriately filled and sealed. There is one exception to this requirement: you may use excess urine to conduct clinical tests (e.g., protein, glucose) if the collection was conducted in conjunction with a physical examination required by a DOT agency regulation. Neither you nor anyone else may conduct further testing (such as adulteration testing) on this excess urine and

the employee has no legal right to demand that the excess urine be turned over to the employee.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41951, Aug. 9, 2001; 88 FR 27641, May 2, 2023]

§ 40.72 What steps does the collector take in the collection process before the employee provides an oral fluid specimen?

(a) The collector requests that the employee open the employee's mouth, and the collector inspects the oral cavity to ensure that it is free of any items that could impede or interfere with the collection of an oral fluid specimen (*e.g.*, candy, gum, food, or tobacco) or could be used to adulterate, substitute, or alter the specimen.

(1) If the collector finds indication(s) of anything identified above, the collector will ask the employee to lift their tongue and/or separate their cheek from their gum to permit full inspection. If this occurs, the employee may cleanse his or her hands, but must not decline the collector's request for further inspection.

(2) If the employee claims that he or she has a medical condition that prevents opening his or her mouth for inspection, the collector follows the procedure described in § 40.193(a).

(3) If the collector observes materials brought to the collection site or the employee's conduct clearly indicates an attempt to adulterate, substitute, or alter the specimen, the collector must terminate the collection, note the circumstances in the Remarks section of the CCF, and report the circumstances to the DER, so that the employer can decide whether to deem the situation a refusal in accordance with § 40.191(a).

(b) If an item is present that might impede or interfere with the collection of an oral fluid specimen, the collector must request the employee remove the item.

(1) If the employee removes any item that could impede or interfere with the collection of an oral fluid specimen, the employee has abnormally colored saliva, or the employee claims to have ''dry mouth,'' then the collector must give the employee water, up to 8 ounces, to rinse their mouth. The employee may drink the water. The collector must then wait 10 minutes before beginning the specimen collection.

(2) If the employee refuses to remove the item or rinse, the collector must terminate the collection, note the circumstances in the Remarks section of the CCF, and report the information to the DER to test as described in § 40.191(a)(8) (failure to cooperate), so that the employer can decide whether to deem the situation a refusal.

(c) If there is nothing of concern in the oral cavity and no ''dry mouth'' condition, the collector starts a 10-minute wait period and proceeds with the steps below before beginning the specimen collection as described in § 40.73.

(d) During the 10-minute wait period:

(1) Review with the employee the procedures required for a successful oral fluid specimen collection as stated in the manufacturer's instructions for the specimen collection device.

(2) Complete all items under Step 1 of the CCF, and for clarification:

(i) In Step 1.D of the CCF, the collector must put a check mark for the ''Specify DOT Agency'' under whose authority the test will take place.

(ii) In Step 1.G of the CCF for the ''Collection Site Address'', the collector must provide the address where the collection took place.

(3) The collector will provide, or the employee may select, a specimen collection device that is clean, unused, and wrapped/sealed in original packaging.

(i) The collector will check the expiration date on the device or the package containing the device and show it to the employee.

(ii) The collector must not use the device after its expiration date.

(iii) The collector must open the specimen collection device in view of the employee.

(4) The collector will complete Step 2 of the CCF.

(i) Check ''Oral Fluid'',

(ii) For ''Oral Fluid: Split Type'' check ''Subdivided'', and

(iii) Check ''Each Device Within Expiration Date?'' after ensuring the device is within its expiration date.

(5) The collector will enter the Split Specimen Device Expiration Date in

Step 4 of the CCF. Since the collector will use one oral fluid device that will collect a single specimen, which is then subdivided in the presence of the donor, only one entry in Step 4 is to be made for the device expiration date.

(6) The collector must instruct the employee to use hand sanitizer or wash and dry his or her hands.

(e) To the greatest extent practicable, the collector must keep the employee's unwrapped collection device within view of both the collector and the employee, between the time the employee has provided a specimen and the specimen is sealed.

[88 FR 27642, May 2, 2023]

§ 40.73 How is an oral fluid specimen collected?

(a) The collector must be present and maintain visual contact with the employee during the procedures outlined in this section.

(b) The collector must note any unusual behavior or appearance of the employee on the CCF. If the collector detects any conduct that clearly indicates an attempt to tamper with a specimen (*e.g.*, an attempt to bring into the collection site an adulterant or oral fluid substitute), the collector must terminate the collection and report the information to the DER so that the employer can decide whether to deem the situation a refusal.

(c) The employee and collector must complete the specimen collection in accordance with the manufacturer's instructions for the collection device.

(1) Under the observation of the collector, the employee is responsible for positioning the specimen collection device for collection.

(2) The collector must ensure the collection is performed correctly (*i.e.*, using the oral fluid device in the manner described by its manufacturer), that the collection device is working properly, and that a sufficient specimen volume is collected.

(3) If the employee states that he or she is unable to provide an oral fluid specimen or provides an insufficient specimen during the collection process, the collector must continue to make one attempt to collect, after an insufficient specimen, the collector follows the procedure in § 40.193.

(4) The collector must inspect the specimen for unusual color, presence of foreign objects or material, or other signs of tampering. If it is apparent from this inspection that the employee has tampered with the specimen, the collector must conduct a new collection.

(i) Document any unusual characteristics referenced above in the Remarks section of the CCF.

(ii) Proceed with obtaining the new oral fluid specimen from the donor. Note on the new CCF that this is another collection for the same testing event (*i.e.*, Document in the remarks section that this is Specimen 2 of 2 and include the Specimen ID number of the other specimen). Make the same notation on the CCF of the suspect specimen.

[88 FR 27642, May 2, 2023]

§ 40.74 How does the collector prepare the oral fluid specimens?

(a) The collector follows the manufacturer's instructions to package the split specimen collections.

(b) A volume of at least 1 mL of undiluted (neat) oral fluid is collected for the specimen designated as ''Bottle A'', and a volume of at least 1 mL of undiluted (neat) oral fluid is collected for the specimen designated as ''Bottle B'', or an otherwise sufficient amount of oral fluid is collected to permit an HHS-certified laboratory to analyze the specimen(s).

(c) In the presence of the employee, the collector places a tamper-evident seal from the CCF over the cap of each specimen container, taking care not to obstruct the expiration date on the collection containers. The collector must record the date of the collection on the tamper-evident seals, after they are affixed to the specimen containers.

(d) The collector instructs the employee to initial the tamper-evident seals on each specimen container. If the employee declines to do so, the collector must note this in the ''Remarks'' line of the CCF (Step 2) and complete the collection process.

[88 FR 27642, May 2, 2023]

§§ 40.75–40.78 [Reserved]

§ 40.79 How is the collection process completed?

(a) As the collector, when using the paper CCF, you must do the following things to complete the collection process. You must complete the steps called for in paragraphs (a)(1) through (7) of this section in the employee's presence.

(1) Direct the employee to read and sign the certification statement on Copy 2 of the CCF and provide all information required in Step 5. If the employee declines to sign the CCF or to provide any of the required information, you must note this in the ''Remarks'' line (Step 2) of the CCF and complete the collection. If the employee declines to fill out any information, you must, as a minimum, print the employee's name in the appropriate place.

(2) Complete the chain of custody on the CCF (Step 4) by printing your name (note: you may pre-print your name), recording the time and date of the collection, signing the statement, and entering the name of the delivery service transferring the specimen to the laboratory,

(3) Ensure that all copies of the CCF are legible and complete.

(4) Remove Copy 5 of the CCF and give it to the employee.

(5) Place the specimen bottles and Copy 1 of the CCF in the appropriate pouches of the plastic bag.

(6) Secure both pouches of the plastic bag.

(7) Advise the employee that he or she may leave the collection site.

(8) To prepare the sealed plastic bag containing the specimens and CCF for shipment you must:

(i) Place the sealed plastic bag in a shipping container (*e.g.*, standard courier box) designed to minimize the possibility of damage during shipment. (More than one sealed plastic bag can be placed into a single shipping container if you are doing multiple collections.)

(ii) Seal the container as appropriate.

(iii) If a laboratory courier hand-delivers the specimens from the collection site to the laboratory, prepare the sealed plastic bag for shipment as directed by the courier service.

(9) Send Copy 2 of the CCF to the MRO and Copy 4 to the DER. You must fax or otherwise transmit these copies to the MRO and DER within 24 hours or during the next business day. Keep Copy 3 for at least 30 days, unless otherwise specified by applicable DOT agency regulations.

(b) As a collector, when using other forms of the CCF as approved by the Office of Management and Budget, you must follow the procedures approved for that form.

(c) As a collector or collection site, you must ensure that each specimen you collect is shipped to a laboratory as quickly as possible, but in any case, within 24 hours or during the next business day.

[65 FR 79526, Dec. 19, 2000, as amended at 71 FR 49384, Aug. 23, 2006; 80 FR 19553, Apr. 13, 2015. Redesignated and amended at 88 FR 27641, 27643, May 2, 2023]

Subpart F—Drug Testing Laboratories

§ 40.81 What laboratories may be used for DOT drug testing?

(a) As a drug testing laboratory located in the U.S., you are permitted to participate in DOT drug testing only if you are certified by HHS under the National Laboratory Certification Program (NLCP) for each specimen testing methodology performed required under this part.

(b) As a drug testing laboratory located in Canada or Mexico which is not certified by HHS under the NLCP, you are permitted to participate in DOT drug testing only if:

(1) The DOT, based on a written recommendation from HHS, has approved your laboratory as meeting HHS laboratory certification standards or deemed your laboratory fully equivalent to a laboratory meeting HHS laboratory certification standards for all testing required under this part; or

(2) The DOT, based on a written recommendation from HHS, has recognized a Canadian or Mexican certifying organization as having equivalent laboratory certification standards and procedures to those of HHS, and the

Canadian or Mexican certifying organization has certified your laboratory under those equivalent standards and procedures.

(c) As a laboratory participating in the DOT drug testing program, you must comply with the requirements of this part. You must also comply with all applicable requirements of HHS in testing DOT specimens, whether or not the HHS requirements are explicitly stated in this part.

(d) If DOT determines that you are in noncompliance with this part, you could be subject to PIE proceedings under Subpart R of this part. If the Department issues a PIE with respect to you, you are ineligible to participate in the DOT drug testing program even if you continue to meet the requirements of paragraph (a) or (b) of this section.

[65 FR 79526, Dec. 19, 2000, as amended at 88 FR 27643, May 2, 2023]

§ 40.82 What drugs do laboratories test for?

As a laboratory, you must test for the following five drugs or classes of drugs in a DOT drug test. You must not test ''DOT specimens'' for any other drugs.

(a) Marijuana metabolites.

(b) Cocaine metabolites.

(c) Amphetamines.

(d) Opioids.

(e) Phencyclidine (PCP).

[82 FR 52244, Nov. 13, 2017. Redesignated at 88 FR 27643, May 2, 2023]

§ 40.83 How do laboratories process incoming specimens?

As the laboratory, you must do the following when you receive a DOT specimen:

(a) You are authorized to receive only Copy 1 of the CCF. You are not authorized to receive other copies of the CCF or any copies of the alcohol testing form.

(b) You must comply with applicable provisions of the HHS Guidelines concerning accessioning and processing drug specimens.

(c) You must inspect each specimen and CCF for the following ''fatal flaws'':

(1) There is no CCF;

(2) In cases where a specimen has been collected, there is no specimen submitted with the CCF;

(3) There is no printed collector's name and no collector's signature;

(4) Two separate collections are performed using one CCF;

(5) The specimen ID numbers on the specimen bottle and the CCF do not match;

(6) The specimen bottle seal is broken or shows evidence of tampering, unless a split specimen can be redesignated (see paragraph (h) of this section);

(7) There is an insufficient amount of specimen in the primary bottle for analysis, unless the specimens can be redesignated (see paragraph (h) of this section).

(8) For an oral fluid collection, the collector used an expired device at the time of collection.

(9) For an oral fluid collection, if the collector failed to enter the expiration date in Step 4 of the CCF and the laboratory is unable to determine the expiration date by inspecting Bottles A and B.

(d) When you find a specimen meeting the criteria of paragraph (c) of this section, you must document your findings and stop the testing process. Report the result in accordance with § 40.97(a)(3) .

(e) You must inspect each CCF for the presence of the collector's signature on the certification statement in Step 4 of the CCF. Upon finding that the signature is omitted, document the flaw and continue the testing process.

(1) In such a case, you must retain the specimen for a minimum of 5 business days from the date on which you initiated action to correct the flaw.

(2) You must then attempt to correct the flaw by following the procedures of § 40.205(b)(1).

(3) If the flaw is not corrected, report the result as rejected for testing in accordance with § 40.97(a)(3).

(f) If you determine that the urine specimen temperature was not checked and the ''Remarks'' line did not contain an entry regarding the temperature being outside of range, you must then attempt to correct the problem by following the procedures of § 40.208.

(1) In such a case, you must continue your efforts to correct the problem for

five business days, before you report the result.

(2) When you have obtained the correction, or five business days have elapsed, report the result in accordance with § 40.97(a).

(g) If you determine that a CCF that fails to meet the requirements of § 40.40(a) (e.g., a non-Federal form or an expired Federal form was used for the collection), you must attempt to correct the use of the improper form by following the procedures of § 40.205(b)(2).

(1) In such a case, you must retain the specimen for a minimum of 5 business days from the date on which you initiated action to correct the problem.

(2) If the problem(s) is not corrected, you must reject the test and report the result in accordance with § 40.97(a)(3).

(h) If the CCF is marked indicating that a split specimen collection was collected and if the split specimen does not accompany the primary, has leaked, or is otherwise unavailable for testing, you must still test the primary specimen and follow appropriate procedures outlined in § 40.175(b) regarding the unavailability of the split specimen for testing.

(1) The primary specimen and the split specimen can be redesignated (*i.e.*, Bottle B is redesignated as Bottle A, and vice-versa) if:

(i) The primary specimen appears to have leaked out of its sealed bottle and the laboratory believes a sufficient amount of specimen exists in the split specimen to conduct all appropriate primary laboratory testing; or

(ii) The primary specimen is labeled as Bottle B, and the split specimen as Bottle A; or

(iii) The laboratory opens the split specimen instead of the primary specimen, the primary specimen remains sealed, and the laboratory believes a sufficient amount of specimen exists in the split specimen to conduct all appropriate primary laboratory testing; or

(iv) The primary specimen seal is broken but the split specimen remains sealed and the laboratory believes a sufficient amount of specimen exists in the split specimen to conduct all appropriate primary laboratory testing.

(2) In situations outlined in paragraph (h)(1) of this section, the laboratory shall mark through the ''A'' and write ''B,'' then initial and date the change. A corresponding change shall be made to the other bottle by marking through the ''B'' and writing ''A,'' and initialing and dating the change.

(i) A notation shall be made on Copy 1 of the CCF (Step 5a) and on any laboratory internal chain of custody documents, as appropriate, for any fatal or correctable flaw.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41951, Aug. 9, 2001; 71 FR 49384, Aug. 23, 2006; 73 FR 35970, June 25, 2008; 75 FR 59107, Sept. 27, 2010; 82 FR 52244, Nov 13, 2017; 88 FR 27643, May 2, 2023]

§ 40.84 How long does the laboratory retain specimens after testing?

(a) As a laboratory testing the primary specimen, you must retain a specimen that was reported with positive, adulterated, substituted, or invalid results for a minimum of one year.

(b) You must keep such a specimen in secure, long-term, frozen storage in accordance with HHS requirements.

(c) Within the one-year period, the MRO, the employee, the employer, or a DOT agency may request in writing that you retain a specimen for an additional period of time (*e.g.*, for the purpose of preserving evidence for litigation or a safety investigation). If you receive such a request, you must comply with it. If you do not receive such a request, you may discard the specimen at the end of the year.

(d) If you have not sent the split specimen to another laboratory for testing, you must retain the split specimen for an employee's test for the same period of time that you retain the primary specimen and under the same storage conditions.

(e) As the laboratory testing the split specimen, you must meet the requirements of paragraphs (a) through (d) of this section with respect to the split specimen.

[65 FR 79526, Dec. 19, 2000. Redesignated at 88 FR 27643, May 2, 2023]

§ 40.85 What are the cutoff concentrations for urine drug tests?

(a) As a laboratory, you must use the cutoff concentrations displayed in the following table for initial and confirmatory drug tests. All cutoff concentrations are expressed in nanograms per milliliter (ng/mL). The table follows:

Initial test analyte	Initial test cutoff [1]	Confirmatory test analyte	Confirmatory test cutoff concentration
Marijuana metabolites (THCA) [2]	50 ng/mL [3]	THCA	15 ng/mL.
Cocaine metabolite (Benzoylecgonine).	150 ng/mL [3]	Benzoylecgonine	100 ng/mL.
Codeine/ Morphine	2000 ng/mL	Codeine Morphine	2000 ng/mL. 2000 ng/mL.
Hydrocodone/ Hydromorphone	300 ng/mL	Hydrocodone Hydromorphone	100 ng/mL. 100 ng/mL.
Oxycodone/ Oxymorphone	100 ng/mL	Oxycodone Oxymorphone	100 ng/mL. 100 ng/mL.
6-Acetylmorphine	10 ng/mL	6-Acetylmorphine	10 ng/mL.
Phencyclidine	25 ng/mL	Phencyclidine	25 ng/mL.
Amphetamine/ Methamphetamine	500 ng/mL	Amphetamine Methamphetamine	250 ng/mL. 250 ng/mL.
MDMA [4]/MDA [5]	500 ng/mL	MDMA MDA	250 ng/mL. 250 ng/mL.

[1] For grouped analytes (i.e., two or more analytes that are in the same drug class and have the same initial test cutoff):
Immunoassay: The test must be calibrated with one analyte from the group identified as the target analyte. The cross-reactivity of the immunoassay to the other analyte(s) within the group must be 80 percent or greater; if not, separate immunoassays must be used for the analytes within the group.
Alternate technology: Either one analyte or all analytes from the group must be used for calibration, depending on the technology. At least one analyte within the group must have a concentration equal to or greater than the initial test cutoff or, alternatively, the sum of the analytes present (i.e., equal to or greater than the laboratory's validated limit of quantification) must be equal to or greater than the initial test cutoff.
[2] An immunoassay must be calibrated with a target analyte.
[3] *Alternate technology (THCA and Benzoylecgonine):* When using an alternate technology initial test for the specific target analytes of THCA and Benzoylecgonine, the laboratory must use the same cutoff for the initial and confirmatory tests (i.e., 15 ng/mL for THCA and 100ng/mL for Benzoylecgonine).
[4] Methylenedioxymethamphetamine (MDMA).
[5] Methylenedioxyamphetamine (MDA).

(b) On an initial drug test, you must report a result below the cutoff concentration as negative. If the result is at or above the cutoff concentration, you must conduct a confirmation test.

(c) On a confirmation drug test, you must report a result below the cutoff concentration as negative and a result at or above the cutoff concentration as confirmed positive.

(d) You must report quantitative values for morphine or codeine at 15,000 ng/mL or above.

[65 FR 79526, Dec. 19, 2000, as amended at 75 FR 49862, Aug. 16, 2010; 77 FR 26473, May 4, 2012; 82 FR 52244, Nov. 13, 2017. Redesignated and amended at 88 FR 27643, May 2, 2023]

§ 40.86 What is urine validity testing, and are laboratories required to conduct it?

(a) Specimen validity testing is the evaluation of the specimen to determine if it is consistent with normal human urine. The purpose of validity testing is to determine whether certain adulterants or foreign substances were added to the urine, if the urine was diluted, or if the specimen was substituted.

(b) As a laboratory, you must conduct validity testing.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41951, Aug. 9, 2001; 73 FR 35970, June 25, 2008. Redesignated at 88 FR 27643, May 2, 2023]

§ 40.87 What validity tests must laboratories conduct on primary urine specimens?

As a laboratory, when you conduct validity testing under § 40.86, you must conduct it in accordance with the requirements of this section.

(a) You must determine the creatinine concentration on each primary specimen. You must also determine its specific gravity if you find the creatinine concentration to be less than 20 mg/dL.

(b) You must determine the pH of each primary specimen.

(c) You must perform one or more validity tests for oxidizing adulterants on each primary specimen.

(d) You must perform additional validity tests on the primary specimen when the following conditions are observed:

(1) Abnormal physical characteristics;

(2) Reactions or responses characteristic of an adulterant obtained during initial or confirmatory drug tests (*e.g.*, non-recovery of internal standards, unusual response); or

(3) Possible unidentified interfering substance or adulterant.

(e) If you determine that the specimen is invalid and HHS guidelines direct you to contact the MRO, you must contact the MRO and together decide if testing the primary specimen by another HHS certified laboratory would be useful in being able to report a positive or adulterated test result.

[65 FR 79526, Dec. 19, 2000, as amended at 69 FR 64867, Nov. 9, 2004. Redesignated and amended at 88 FR 27643, May 2, 2023]

§ 40.88 What criteria do laboratories use to establish that a urine specimen is dilute or substituted?

(a) As a laboratory, you must consider the primary specimen to be dilute when:

(1) The creatinine concentration is greater than or equal to 2 mg/dL but less than 20 mg/dL, and

(2) The specific gravity is greater than 1.0010 but less than 1.0030 on a single aliquot.

(b) As a laboratory, you must consider the primary specimen to be substituted when the creatinine concentration is less than 2 mg/dL and the specific gravity is less than or equal to 1.0010 or greater than or equal to 1.0200 on both the initial and confirmatory creatinine tests and on both the initial and confirmatory specific gravity tests on two separate aliquots.

[69 FR 64867, Nov. 9, 2004. Redesignated at 88 FR 27643, May 2, 2023]

§ 40.89 What are the adulterant cutoff concentrations for initial and confirmation urine tests?

(a) As a laboratory, you must use the cutoff concentrations for the initial and confirmation adulterant testing as required by the HHS Mandatory Guidelines and you must use two separate aliquots—one for the initial test and another for the confirmation test.

(b) As a laboratory you must report results at or above the cutoffs (or for pH, at or above or below the values, as appropriate) as adulterated and provide the numerical value that supports the adulterated result.

[73 FR 35970, June 25, 2008. Redesignated at 88 FR 27643, May 2, 2023]

§ 40.90 What criteria do laboratories use to establish that a urine specimen is invalid?

(a) As a laboratory, you must use the invalid test result criteria for the initial and confirmation testing as required by the HHS Mandatory Guidelines, and you must use two separate aliquots—one for the initial test and another for the confirmation test.

(b) As a laboratory, for a specimen having an invalid result for one of the reasons outlined in the HHS Mandatory Guidelines, you must contact the MRO to discuss whether sending the specimen to another HHS certified laboratory for testing would be useful in being able to report a positive or adulterated result.

(c) As a laboratory, you must report invalid results in accordance with the invalid test result criteria as required by the HHS Guidelines and provide the numerical value that supports the invalid result, where appropriate, such as pH.

(d) As a laboratory, you must report the reason a test result is invalid.

[73 FR 35970, June 25, 2008. Redesignated at 88 FR 27643, May 2, 2023]

§ 40.91 What are the cutoff concentrations for oral fluid drug tests?

As a laboratory, you must use the cutoff concentrations displayed in the following table for initial and confirmatory drug tests for oral fluid specimens. All cutoff concentrations are expressed in nanograms per milliliter (ng/mL). The table follows:

TABLE 1 TO § 40.91—ORAL FLUID TESTING CUTOFF CONCENTRATIONS

Initial test analyte	Initial test cutoff [1]	Confirmatory test analyte	Confirmatory test cutoff concentration
Marijuana (THC) [2]	4 ng/mL [3]	THC	2 ng/mL.
Cocaine/Benzoylecgonine	15 ng/mL	Cocaine	8 ng/mL.
		Benzoylecgonine	8 ng/mL.
Codeine/Morphine	30 ng/mL	Codeine	15 ng/mL.
		Morphine	15 ng/mL.
Hydrocodone/Hydromorphone	30 ng/mL	Hydrocodone	15 ng/mL.
		Hydromorphone	15 ng/mL.
Oxycodone/Oxymorphone	30 ng/mL	Oxycodone	15 ng/mL.
		Oxymorphone	15 ng/mL.
6-Acetylmorphine	4 ng/mL [3]	6-Acetylmorphine	2 ng/mL.
Phencyclidine	10 ng/mL	Phencyclidine	10 ng/mL.
Amphetamine/Methamphetamine	50 ng/mL	Amphetamine	25 ng/mL.
		Methamphetamine	25 ng/mL.
MDMA [4]/MDA [5]	50 ng/mL	MDMA	25 ng/mL.
		MDA	25 ng/mL.

[1] For grouped analytes (*i.e.,* two or more analytes that are in the same drug class and have the same initial test cutoff):
Immunoassay: The test must be calibrated with one analyte from the group identified as the target analyte. The cross reactivity of the immunoassay to the other analyte(s) within the group must be 80 percent or greater; if not, separate immunoassays must be used for the analytes within the group.
Alternate technology: Either one analyte or all analytes from the group must be used for calibration, depending on the technology. At least one analyte within the group must have a concentration equal to or greater than the initial test cutoff or, alternatively, the sum of the analytes present (*i.e.,* with concentrations equal to or greater than the laboratory's validated limit of quantification) must be equal to or greater than the initial test cutoff.
[2] An immunoassay must be calibrated with the target analyte.
[3] *Alternate technology (THC and 6-AM):* The confirmatory test cutoff must be used for an alternate technology initial test that is specific for the target analyte (*i.e.,* 2 ng/mL for THC, 2 ng/mL for 6-AM).
[4] Methylenedioxymethamphetamine (MDMA).
[5] Methylenedioxyamphetamine (MDA).

[88 FR 27643, May 2, 2023]

§ 40.92 What is oral fluid validity testing, and are laboratories required to conduct it?

(a) Specimen validity testing is the evaluation of the specimen to determine if it is consistent with normal human oral fluid. The purpose of validity testing is to determine whether certain adulterants or foreign substances were added to the oral fluid, if the oral fluid was altered.

(b) If a specimen exhibits abnormal characteristics (*e.g.*, unusual odor or color), causes reactions or responses characteristic of an adulterant during initial or confirmatory drug tests (*e.g.*, non-recovery of internal standard, unusual response), or contains an unidentified substance that interferes with the confirmatory analysis, then you may conduct validity testing.

(c) If you determine that the specimen is invalid and HHS guidelines direct you to contact the MRO, you must contact the MRO and together decide if testing the primary specimen by another HHS-certified laboratory would be useful in being able to report a positive or adulterated test result.

[88 FR 27643, May 2, 2023]

§ 40.93 What validity tests must laboratories conduct on primary oral fluid specimens?

As a laboratory, if you conduct validity testing under § 40.92, you must conduct it in accordance with the requirements of this section.

(a) You may test for a biomarker such as albumin or immunoglobulin G (IgG) or a test for a specific adulterant.

(b) You must follow the applicable HHS requirements for any additional validity testing.

[88 FR 27643, May 2, 2023]

§ 40.97 What do laboratories report and how do they report it?

(a) As a laboratory, when reporting a result of any kind, you must report the specimen type.

(b) You must also report the results for each primary specimen, which will fall into one of the following three categories. As a laboratory, you must report the actual results (and not the categories):

(1) *Category 1: Negative results.* As a laboratory, when you find a specimen to be negative, you must report the test result as being one of the following, as applicable:

(i) Negative, or

(ii) For urine only, negative-dilute, with numerical values for creatinine and specific gravity.

(2) *Category 2: Non-negative results.* As a laboratory, when you find a specimen to be non-negative, you must report the test result as being one or more of the following, as applicable:

(i) Positive, with drug(s)/metabolite(s) noted, with numerical values for the drug(s) or drug metabolite(s).

(ii) Adulterated, with adulterant(s) noted, with confirmatory test values (when applicable), and with remarks(s);

(iii) For urine only, positive-dilute, with drug(s)/metabolite(s) noted, with numerical values for the drug(s) or drug metabolite(s) and with numerical values for creatinine and specific gravity;

(iv) For urine only, substituted, with confirmatory test values for creatinine and specific gravity; or

(v) For urine only, invalid result, with remark(s). Laboratories will report actual values for pH results.

(vi) For oral fluid only, invalid result, with remark(s). Laboratories must report numerical values of the specimen validity test results that support a specimen reported as invalid.

(3) *Category 3: Rejected for testing.* As a laboratory, when you reject a specimen for testing, you must report the result as being Rejected for Testing, with remark(s).

(c) As a laboratory, you must report laboratory results directly, and only, to the MRO at his or her place of business. You must not report results to or through the DER or a service agent (*e.g.*, a C/TPA).

(1) Negative results: You must fax, courier, mail, or electronically transmit a legible image or copy of the fully completed Copy 1 of the CCF which has been signed by the certifying scientist, or you may provide the laboratory results report electronically (*i.e.*, computer data file).

(i) If you elect to provide the laboratory results report, you must include the following elements, as a minimum, in the report format:

(A) Laboratory name and address;

(B) Employer's name (you may include I.D. or account number);

(C) Medical review officer's name;

(D) Specimen I.D. number;

(E) SSN or Employee ID from Step 1C of the CCF, if provided;

(F) Reason for test, if provided;

(G) Collector's name and telephone number;

(H) Date of the collection;

(I) For oral fluid only, collection device expiration date;

(J) Date received at the laboratory;

(K) Date certifying scientist released the results;

(L) Certifying scientist's name;

(M) Results (*e.g.*, positive, adulterated) as listed in paragraph (a) of this section; and

(N) Remarks section, with an explanation of any situation in which a correctable flaw has been corrected.

(ii) You may release the laboratory results report only after review and approval by the certifying scientist. It must reflect the same test result information as contained on the CCF signed by the certifying scientist. The information contained in the laboratory results report must not contain information that does not appear on the CCF.

(iii) The results report may be transmitted through any means that ensures accuracy and confidentiality. You, as the laboratory, together with the MRO, must ensure that the information is adequately protected from unauthorized access or release, both during transmission and in storage (*e.g.*, *see* §40.351).

(2) Non-negative and Rejected for Testing results: You must fax, courier, mail, or electronically transmit a legible image or copy of the fully completed Copy 1 of the CCF that has been signed by the certifying scientist. In addition, you may provide the electronic laboratory results report following the format and procedures set forth in paragraphs (b)(1)(i) and (ii) of this section.

(d) In transmitting laboratory results to the MRO, you, as the laboratory, together with the MRO, must ensure that the information is adequately protected from unauthorized access or release, both during transmission and in storage. If the results are provided by fax or other electronic means, the electronic communication must be accessible only to authorized individuals.

(e) You must transmit test results to the MRO in a timely manner, preferably the same day that review by the certifying scientist is completed.

(f)(1) You must provide quantitative values for confirmed positive drug test results to the MRO.

(2) You must provide numerical values that support the adulterated (when applicable) or substituted result, without a request from the MRO.

(3) You must also provide the MRO numerical values for creatinine and specific gravity for the negative-dilute urine test result, without a request from the MRO.

(g) You must provide quantitative values for confirmed positive morphine and/or codeine urine results at or below 15,000 ng/mL, and for confirmed positive morphine or codeine oral fluid results at or below 150 ng/mL.

[88 FR 27644, May 2, 2023]

§ 40.101 What relationship may a laboratory have with an MRO?

(a) As a laboratory, you may not enter into any relationship with an MRO that creates a conflict of interest or the appearance of a conflict of interest with the MRO's responsibilities for the employer. You may not derive any financial benefit by having an employer use a specific MRO.

(b) The following are examples of relationships between laboratories and MROs that the Department regards as creating conflicts of interest, or the appearance of such conflicts. This following list of examples is not intended to be exclusive or exhaustive:

(1) The laboratory employs an MRO who reviews test results produced by the laboratory;

(2) The laboratory has a contract or retainer with the MRO for the review of test results produced by the laboratory;

(3) The laboratory designates which MRO the employer is to use, gives the employer a slate of MROs from which to choose, or recommends certain MROs;

(4) The laboratory gives the employer a discount or other incentive to use a particular MRO;

(5) The laboratory has its place of business co-located with that of an MRO or MRO staff who review test results produced by the laboratory; or

(6) The laboratory permits an MRO, or an MRO's organization, to have a financial interest in the laboratory.

§ 40.107 Who may inspect laboratories?

As a laboratory, you must permit an inspection, with or without prior notice, by ODAPC, a DOT agency, or a DOT-regulated employer that contracts with the laboratory for drug testing under the DOT drug testing program, or the designee of such an employer.

§ 40.109 What documentation must the laboratory keep, and for how long?

(a) As a laboratory, you must retain all records pertaining to each employee urine specimen for a minimum of two years.

(b) As a laboratory, you must also keep for two years employer-specific data required in § 40.111.

(c) Within the two-year period, the MRO, the employee, the employer, or a DOT agency may request in writing that you retain the records for an additional period of time (*e.g.*, for the purpose of preserving evidence for litigation or a safety investigation). If you receive such a request, you must comply with it. If you do not receive such a request, you may discard the records at the end of the two-year period.

§ 40.111 When and how must a laboratory disclose statistical summaries and other information it maintains?

(a) As a laboratory, you must transmit an aggregate statistical summary, by employer, of the data listed in appendix D of this part with respect to each specimen type for which you conduct tests to the employer on a semi-annual basis.

(1) The summary must not reveal the identity of any employee.

(2) In order to avoid sending data from which it is likely that information about an employee's test result can be readily inferred, you must not send a summary if the employer has fewer than five aggregate tests results.

(3) The summary must be sent by January 20 of each year for July 1 through December 31 of the prior year.

(4) The summary must also be sent by July 20 of each year for January 1 through June 30 of the current year.

(b) When the employer requests a summary in response to an inspection, audit, or review by a DOT agency, you must provide it unless the employer had fewer than five aggregate test results. In that case, you must send the employer a report indicating that not enough testing was conducted to warrant a summary. You may transmit the summary or report by hard copy, fax, or other electronic means.

(c) You must also release information to appropriate parties as provided in §§ 40.329 and 40.331.

(d) As a laboratory, you must transmit an aggregate statistical summary listed in appendix E of this part for each specimen type for which you conduct testing to DOT on a semi-annual basis. The summary must be sent by January 31 of each year for July 1 through December 31 of the prior year. It must be sent by July 31 of each year for January 1 through June 30 of the current year. If you withdraw or are removed from NLCP's laboratory certification during a reporting period, you must provide the aggregate statistical summary to the DOT-regulated employers and to ODAPC for the last reporting period in which you conducted DOT-regulated testing.

[65 FR 79526, Dec. 19, 2000, as amended at 73 FR 35971, June 25, 2008; 88 FR 27645, May 2, 2023]

§ 40.113 Where is other information concerning laboratories found in this regulation?

You can find more information concerning laboratories in several sections of this part:

§ 40.3—Definition.
§ 40.13—Prohibition on making specimens available for other purposes.
§ 40.31—Conflicts of interest concerning collectors.
§ 40.47—Laboratory rejections of test for improper form.
§ 40.125—Conflicts of interest concerning MROs.
§ 40.175—Role of first laboratory in split specimen tests.
§ 40.177—Role of second laboratory in split specimen tests (drugs).
§ 40.179—Role of second laboratory in split specimen tests (adulterants).
§ 40.181—Role of second laboratory in split specimen tests (substitution).
§§ 40.183–40.185—Transmission of split specimen test results to MRO.
§§ 40.201–40.205—Role in correcting errors.
§ 40.329—Release of information to employees.
§ 40.331—Limits on release of information.
§ 40.355—Role with respect to other service agents.

Subpart G—Medical Review Officers and the Verification Process

§ 40.121 Who is qualified to act as an MRO?

To be qualified to act as an MRO in the DOT drug testing program, you must meet each of the requirements of this section:

(a) *Credentials.* You must be a licensed physician (Doctor of Medicine or Osteopathy). If you are a licensed physician in any U.S., Canadian, or Mexican jurisdiction and meet the other requirements of this section, you are authorized to perform MRO services with respect to all covered employees, wherever they are located. For example, if you are licensed as an M.D. in one state or province in the U.S., Canada, or Mexico, you are not limited to performing MRO functions in that state or province, and you may perform MRO functions for employees in other states or provinces without becoming licensed to practice medicine in the other jurisdictions.

(b) *Basic knowledge.* You must be knowledgeable in the following areas:

(1) You must be knowledgeable about and have clinical experience in controlled substances abuse disorders, including detailed knowledge of alternative medical explanations for laboratory confirmed drug test results.

(2) You must be knowledgeable about issues relating to adulterated and substituted specimens as well as the possible medical causes of specimens having an invalid result.

(3) You must be knowledgeable about this part, the DOT MRO Guidelines, and the DOT agency regulations applicable to the employers for whom you evaluate drug test results, and you must keep current on any changes to these materials. You must subscribe to the ODAPC list-serve at *https://*

www.transportation.gov/odapc/get-odapc-email-updates. DOT agency regulations, DOT MRO Guidelines, and other materials are available from ODAPC (Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590, 202–366–3784), or on the ODAPC Web site (*http://www.transportation.gov/odapc*).

(c) *Qualification training*. You must receive qualification training meeting the requirements of this paragraph (c).

(1) Qualification training must provide instruction on the following subjects:

(i) Collection procedures for specimens;

(ii) Chain of custody, reporting, and recordkeeping;

(iii) Interpretation of drug and validity tests results;

(iv) The role and responsibilities of the MRO in the DOT drug testing program;

(v) The interaction with other participants in the program (*e.g.*, DERs, SAPs); and

(vi) Provisions of this part and DOT agency rules applying to employers for whom you review test results, including changes and updates to this part and DOT agency rules, guidance, interpretations, and policies affecting the performance of MRO functions, as well as issues that MROs confront in carrying out their duties under this part and DOT agency rules.

(2) Following your completion of qualification training under paragraph (c)(1) of this section, you must satisfactorily complete an examination administered by a nationally-recognized MRO certification board or subspecialty board for medical practitioners in the field of medical review of DOT-mandated drug tests. The examination must comprehensively cover all the elements of qualification training listed in paragraph (c)(1) of this section.

(3) You must meet the requirements of paragraphs (a), (b), and (c) of this section before you begin to perform MRO functions.

(d) *Requalification training*. During each five-year period from the date on which you satisfactorily completed the examination under paragraph (c)(2) of this section, you must complete requalification training.

(1) This requalification training must meet the requirements of the qualification training under paragraph (c)(1) of this section.

(2) Following your completion of requalification training, you must satisfactorily complete an examination administered by a nationally-recognized MRO certification board or subspecialty board for medical practitioners in the field of medical review of DOT-mandated drug tests. The examination must comprehensively cover all the elements of qualification training listed in paragraph (c)(1) of this section.

(e) *Documentation*. You must maintain documentation showing that you currently meet all requirements of this section. You must provide this documentation on request to DOT agency representatives and to employers and C/TPAs who are using or negotiating to use your services.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41951, Aug. 9, 2001; 75 FR 49862, Aug. 16, 2010; 82 FR 52245, Nov. 13, 2017; 88 FR 27645, May 2, 2023]

§ 40.123 What are the MRO's responsibilities in the DOT drug testing program?

As an MRO, you have the following basic responsibilities:

(a) Acting as an independent and impartial ''gatekeeper'' and advocate for the accuracy and integrity of the drug testing process.

(b) Providing a quality assurance review of the drug testing process for the specimens under your purview. This includes, but is not limited to:

(1) Ensuring the review of the CCF on all specimen collections for the purposes of determining whether there is a problem that may cause a test to be cancelled (see §§ 40.199–40.203). As an MRO, you are not required to review laboratory internal chain of custody documentation. No one is permitted to cancel a test because you have not reviewed this documentation;

(2) Providing feedback to employers, collection sites and laboratories regarding performance issues where necessary; and

(3) Reporting to and consulting with the ODAPC or a relevant DOT agency

when you wish DOT assistance in resolving any program issue. As an employer or service agent, you are prohibited from limiting or attempting to limit the MRO's access to DOT for this purpose and from retaliating in any way against an MRO for discussing drug testing issues with DOT.

(c) You must determine whether there is a legitimate medical explanation for confirmed positive, adulterated, substituted, and invalid results from the laboratory.

(d) While you provide medical review of employees' test results, this part does not deem that you have established a doctor-patient relationship with the employees whose tests you review.

(e) You must act to investigate and correct problems where possible and notify appropriate parties (*e.g.*, HHS, DOT, employers, service agents) where assistance is needed, (*e.g.*, cancelled or problematic tests, incorrect results).

(f) You must ensure the timely flow of test results and other information to employers.

(g) You must protect the confidentiality of the drug testing information.

(h) You must perform all your functions in compliance with this part and other DOT agency regulations.

[65 FR 79526, Dec. 19, 2000, as amended at 82 FR 52245, Nov. 13, 2017; 88 FR 27645, May 2, 2023]

§ 40.125 What relationship may an MRO have with a laboratory?

As an MRO, you may not enter into any relationship with an employer's laboratory that creates a conflict of interest or the appearance of a conflict of interest with your responsibilities to that employer. You may not derive any financial benefit by having an employer use a specific laboratory. For examples of relationships between laboratories and MROs that the Department views as creating a conflict of interest or the appearance of such a conflict, see § 40.101(b).

§ 40.127 What are the MRO's functions in reviewing negative test results?

As the MRO, you must do the following with respect to negative drug test results you receive from a laboratory, prior to verifying the result and releasing it to the DER:

(a) Review Copy 2 of the CCF to determine if there are any fatal or correctable errors that may require you to initiate corrective action or to cancel the test (see §§ 40.199 and 40.203).

(b) Review the negative laboratory test result and ensure that it is consistent with the information contained on the CCF.

(c) Before you report a negative test result, you must have in your possession the following documents:

(1) Copy 2 of the CCF, a legible copy of it, or any other CCF copy containing the employee's signature; and

(2) A legible copy (fax, photocopy, image) of Copy 1 of the CCF or the electronic laboratory results report that conveys the negative laboratory test result.

(d) If the copy of the documentation provided to you by the collector or laboratory appears unclear, you must request that the collector or laboratory send you a legible copy.

(e) On Copy 2 of the CCF, place a check mark in the ''Negative'' box (Step 6), provide your name, and sign, initial, or stamp and date the verification statement.

(f) Report the result in a confidential manner (see §§ 40.163–40.167).

(g) Staff under your direct, personal supervision may perform the administrative functions of this section for you, but only you can cancel a test. If you cancel a laboratory-confirmed negative result, check the ''Test Cancelled'' box (Step 6) on Copy 2 of the CCF, make appropriate annotation in the ''Remarks'' line, provide your name, and sign, initial or stamp and date the verification statement.

(1) On specimen results that are reviewed by your staff, you are responsible for assuring the quality of their work.

(2) You are required to personally review at least 5 percent of all CCFs reviewed by your staff on a quarterly basis, including all results that required a corrective action. However, you need not review more than 500 negative results of all specimen types combined in any quarter.

(3) Your review must, as a minimum, include the CCF, negative laboratory

test result, any accompanying corrective documents, and the report sent to the employer. You must correct any errors that you discover. You must take action as necessary to ensure compliance by your staff with this part and document your corrective action. You must attest to the quality assurance review by initialing the CCFs that you review.

(4) You must make these CCFs easily identifiable and retrievable by you for review by DOT agencies.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41951, Aug. 9, 2001; 88 FR 27645, May 2, 2023]

§ 40.129 What are the MRO's functions in reviewing laboratory confirmed non-negative drug test results?

(a) As the MRO, you must do the following with respect to confirmed positive, adulterated, substituted, or invalid results you receive from a laboratory, before you verify the result and release it to the DER:

(1) Review Copy 2 of the CCF to determine if there are any fatal or correctable errors that may require you to cancel the test (see §§ 40.199 and 40.203). Staff under your direct, personal supervision may conduct this administrative review for you, but only you may verify or cancel a test.

(2) Review Copy 1 of the CCF and ensure that it is consistent with the information contained on Copy 2, that the test result is legible, and that the certifying scientist signed the form. You are not required to review any other documentation generated by the laboratory during their analysis or handling of the specimen (*e.g.*, the laboratory internal chain of custody).

(3) If the copy of the documentation provided to you by the collector or laboratory appears unclear, you must request that the collector or laboratory send you a legible copy.

(4) Except in the circumstances spelled out in § 40.133 , conduct a verification interview. This interview must include direct contact in person or by telephone between you and the employee. You may initiate the verification process based on the laboratory results report.

(5) Verify the test result, consistent with the requirements of §§ 40.135 through 40.145, 40.159, and 40.160, as:

(i) Negative; or

(ii) Cancelled; or

(iii) Positive, and/or refusal to test because of adulteration or substitution.

(b) Before you report a verified negative, positive, refusal to test because of adulteration or substitution, you must have in your possession the following documents:

(1) Copy 2 of the CCF, a legible copy of it, or any other CCF copy containing the employee's signature; and

(2) A legible copy (fax, photocopy, image) of Copy 1 of the CCF, containing the certifying scientist's signature.

(c) With respect to verified positive test results, place a checkmark in the ''Positive'' box in Step 6 on Copy 2 of the CCF, indicate the drug(s)/metabolite(s) verified positive, and sign and date the verification statement.

(d) If you cancel a laboratory confirmed positive, adulterated, substituted, or invalid result, check the ''test cancelled'' box (Step 6) on Copy 2 of the CCF, make appropriate annotation in the ''Remarks'' line, sign, provide your name, and date the verification statement.

(e) Report the result in a confidential manner (see §§ 40.163–40.167).

(f) With respect to adulteration or substitution test results, check the ''refusal to test because:'' box (Step 6) on Copy 2 of the CCF, check the ''Adulterated'' or ''Substituted'' box, as appropriate, make appropriate annotation in the ''Remarks'' line, sign and date the verification statement.

(g) As the MRO, your actions concerning reporting confirmed positive, adulterated, or substituted results to the employer before you have completed the verification process are also governed by the stand-down provisions of § 40.21 .

(1) If an employer has a stand-down policy that meets the requirements of § 40.21 , you may report to the DER that you have received an employee's laboratory confirmed positive, adulterated, or substituted test result, consistent with the terms of the waiver the employer received. You must not

provide any further details about the test result (*e.g.*, the name of the drug involved).

(2) If the employer does not have a stand-down policy that meets the requirements of § 40.21, you must not inform the employer that you have received an employee's laboratory confirmed positive, adulterated, or substituted test result until you verify the test result. For example, as an MRO employed directly by a company, you must not tell anyone on the company's staff or management that you have received an employee's laboratory confirmed test result.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41952, Aug. 9, 2001; 73 FR 35971, June 25, 2008; 75 FR 59107, Sept. 27, 2010; 88 FR 27645, May 2, 2023]

§ 40.131 How does the MRO or DER notify an employee of the verification process after receiving laboratory confirmed non-negative drug test results?

(a) When, as the MRO, you receive a confirmed positive, adulterated, substituted, or invalid test result from the laboratory, you must contact the employee directly (*i.e.*, actually talk to the employee), on a confidential basis, to determine whether the employee wants to discuss the test result. In making this contact, you must explain to the employee that, if he or she declines to discuss the result, you will verify the test as positive or as a refusal to test because of adulteration or substitution, as applicable.

(b) As the MRO, staff under your personal supervision may conduct this initial contact for you.

(1) This staff contact must be limited to scheduling the discussion between you and the employee and explaining the consequences of the employee's declining to speak with you (*i.e.*, that the MRO will verify the test without input from the employee). If the employee declines to speak with you, the staff person must document the employee's decision, including the date and time.

(2) A staff person must not gather any medical information or information concerning possible explanations for the test result.

(3) A staff person may advise an employee to have medical information (*e.g.*, prescriptions, information forming the basis of a legitimate medical explanation for a confirmed positive test result) ready to present at the interview with the MRO.

(4) Since you are required to speak personally with the employee, face-to-face or on the phone, your staff must not inquire if the employee wishes to speak with you.

(c) As the MRO, you or your staff must make reasonable efforts to reach the employee at the day and evening telephone numbers listed on the CCF. Reasonable efforts include, as a minimum, three attempts, spaced reasonably over a 24-hour period, to reach the employee at the day and evening telephone numbers listed on the CCF. If you or your staff cannot reach the employee directly after making these efforts, you or your staff must take the following steps:

(1) Document the efforts you made to contact the employee, including dates and times. If both phone numbers are incorrect (*e.g.*, disconnected, wrong number), you may take the actions listed in paragraph (c)(2) of this section without waiting the full 24-hour period.

(2) Contact the DER, instructing the DER to contact the employee.

(i) You must simply direct the DER to inform the employee to contact you.

(ii) You must not inform the DER that the employee has a confirmed positive, adulterated, substituted, or invalid test result.

(iii) You must document the dates and times of your attempts to contact the DER, and you must document the name of the DER you contacted and the date and time of the contact.

(d) As the DER, you must attempt to contact the employee immediately, using procedures that protect, as much as possible, the confidentiality of the MRO's request that the employee contact the MRO. If you successfully contact the employee (i.e., actually talk to the employee), you must document the date and time of the contact, and inform the MRO. You must inform the employee that he or she should contact the MRO immediately. You must also inform the employee of the consequences of failing to contact the MRO within the next 72 hours (see § 40.133(a)(2)).

(1) As the DER, you must not inform anyone else working for the employer that you are seeking to contact the employee on behalf of the MRO.

(2) If, as the DER, you have made all reasonable efforts to contact the employee but failed to do so, you may place the employee on temporary medically unqualified status or medical leave. Reasonable efforts include, as a minimum, three attempts, spaced reasonably over a 24-hour period, to reach the employee at the day and evening telephone numbers listed on the CCF.

(i) As the DER, you must document the dates and times of these efforts.

(ii) If, as the DER, you are unable to contact the employee within this 24-hour period, you must leave a message for the employee by any practicable means (*e.g.*, voice mail, e-mail, letter) to contact the MRO and inform the MRO of the date and time of this attempted contact.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41952, Aug. 9, 2001; 68 FR 31626, May 28, 2003; 69 FR 64867, Nov. 9, 2004]

§ 40.133 Without interviewing the employee, under what circumstances may the MRO verify a test result as positive, or as a refusal to test because of adulteration or substitution, or as cancelled because the test was invalid?

(a) As the MRO, you normally may verify a confirmed positive test (for any drug or drug metabolite, including opiates), or as a refusal to test because of adulteration or substitution, only after interviewing the employee as provided in §§ 40.135–40.145 . However, there are three circumstances in which you may verify such a result without an interview:

(1) You may verify a test result as a positive or refusal to test, as applicable, if the employee expressly declines the opportunity to discuss the test with you. You must maintain complete documentation of this occurrence, including notation of informing, or attempting to inform, the employee of the consequences of not exercising the option to speak with the you.

(2) You may verify a test result as a positive or refusal to test, as applicable, if the DER has successfully made and documented a contact with the employee and instructed the employee to contact you and more than 72 hours have passed since the time the DER contacted the employee.

(3) You may verify a test result as a positive or refusal to test, as applicable, if neither you nor the DER, after making and documenting all reasonable efforts, has been able to contact the employee within ten days of the date on which the MRO receives the confirmed test result from the laboratory.

(b) As the MRO, you may verify an invalid test result as cancelled (with instructions to recollect immediately under direct observation) without interviewing the employee, as provided at § 40.159:

(1) If the employee expressly declines the opportunity to discuss the test with you;

(2) If the DER has successfully made and documented a contact with the employee and instructed the employee to contact you and more than 72 hours have passed since the time the DER contacted the employee; or

(3) If neither you nor the DER, after making and documenting all reasonable efforts, has been able to contact the employee within ten days of the date on which you received the confirmed invalid test result from the laboratory.

(c) As the MRO, after you verify a test result as a positive or as a refusal to test under this section, you must document the date and time and reason, following the instructions in § 40.163. For a cancelled test due to an invalid result under this section, you must follow the instructions in § 40.159(a)(5).

(d) As the MRO, after you have verified a test result under this section and reported the result to the DER, you must allow the employee to present information to you within 60 days of the verification to document that serious illness, injury, or other circumstances unavoidably precluded contact with the MRO and/or DER in the times provided. On the basis of such information, you may reopen the verification, allowing the employee to

present information concerning whether there is a legitimate medical explanation of the confirmed test result.

[65 FR 79526, Dec. 19, 2000, as amended at 73 FR 35971, June 25, 2008]

§ 40.135 What does the MRO tell the employee at the beginning of the verification interview?

(a) As the MRO, you must tell the employee that the laboratory has determined that the employee's test result was positive, adulterated, substituted, or invalid, as applicable. You must also tell the employee of the drugs for which his or her specimen tested positive, or the basis for the finding of adulteration or substitution.

(b) You must explain the verification interview process to the employee and inform the employee that your decision will be based on information the employee provides in the interview.

(c) You must explain that, if further medical evaluation is needed for the verification process, the employee must comply with your request for this evaluation and that failure to do so is equivalent of expressly declining to discuss the test result.

(d) As the MRO, you must warn an employee who has a confirmed positive, adulterated, substituted or invalid result that you are required to provide to third parties drug test result information and medical information affecting the performance of safety-sensitive duties that the employee gives you in the verification process without the employee's consent (see § 40.327).

(1) You must give this warning to the employee before obtaining any medical information as part of the verification process.

(2) For purposes of this paragraph (d), medical information includes information on medications or other substances affecting the performance of safety-sensitive duties that the employee reports using or medical conditions the employee reports having.

(3) For purposes of this paragraph (d), the persons to whom this information may be provided include the employer, a SAP evaluating the employee as part of the return to duty process (see § 40.293(g)), DOT, another Federal safety agency (*e.g.*, the NTSB), or any state safety agency as required by state law.

(e) You must also advise the employee that, before informing any third party about any medication the employee is using pursuant to a legally valid prescription consistent with the Controlled Substances Act, you will allow 5 business days from the date you report the verified negative result for the employee to have the prescribing physician contact you to determine if the medication can be changed to one that does not make the employee medically unqualified or does not pose a significant safety risk. If, in your reasonable medical judgment, a medical qualification issue or a significant safety risk remains after you communicate with the employee's prescribing physician or after 5 business days, whichever is shorter, you must follow § 40.327. If, as the MRO, you receive information that eliminates the medical qualification issue or significant safety risk, you must transmit this information to any third party to whom you previously provided information under § 40.327.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41952, Aug. 9, 2001; 82 FR 52245, Nov. 13, 2017; 88 FR 27645, May 2, 2023]

§ 40.137 On what basis does the MRO verify test results involving marijuana, cocaine, amphetamines, semi-synthetic opioids, or PCP?

(a) As the MRO, you must verify a confirmed positive test result for marijuana, cocaine, amphetamines, semi-synthetic opioids (*i.e.*, hydrocodone, hydromorphone, oxycodone, and oxymorphone), and/or PCP unless the employee presents a legitimate medical explanation for the presence of the drug(s)/metabolite(s) in his or her system. In determining whether an employee's legally valid prescription consistent with the Controlled Substances Act for a substance in these categories constitutes a legitimate medical explanation, you must not question whether the prescribing physician should have prescribed the substance.

(b) You must offer the employee an opportunity to present a legitimate medical explanation in all cases.

(c) The employee has the burden of proof that a legitimate medical explanation exists. The employee must present information meeting this burden at the time of the verification interview. As the MRO, you have discretion to extend the time available to the employee for this purpose for up to five days before verifying the test result, if you determine that there is a reasonable basis to believe that the employee will be able to produce relevant evidence concerning a legitimate medical explanation within that time.

(d) If you determine that there is a legitimate medical explanation, you must verify the test result as negative. Otherwise, you must verify the test result as positive.

(e) In determining whether a legitimate medical explanation exists, you may consider the employee's use of a medication from a foreign country. You must exercise your professional judgment consistently with the following principles:

(1) There can be a legitimate medical explanation only with respect to a substance that is obtained legally in a foreign country.

(2) There can be a legitimate medical explanation only with respect to a substance that has a legitimate medical use. Use of a drug of abuse (*e.g.*, heroin, PCP, marijuana) or any other substance (see § 40.151(f) and (g)) that cannot be viewed as having a legitimate medical use can never be the basis for a legitimate medical explanation, even if the substance is obtained legally in a foreign country.

(3) Use of the substance can form the basis of a legitimate medical explanation only if it is used consistently with its proper and intended medical purpose.

(4) Even if you find that there is a legitimate medical explanation under this paragraph (e) and verify a test negative, you may have a responsibility to raise fitness-for-duty considerations with the employer (see § 40.327).

[65 FR 79526, Dec. 19, 2000, as amended at 82 FR 52245, Nov. 13, 2017]

§ 40.139 On what basis does the MRO verify test results involving 6-acetylmorphine, codeine, and morphine?

As the MRO, you must proceed as follows when you receive a laboratory confirmed positive opiate result:

(a) If the laboratory confirms the presence of 6-acetylmorphine (6–AM) in the specimen, you must verify the test result positive.

(b) In the absence of 6–AM, if the laboratory confirms the presence of either morphine or codeine equal to or above 15,000 ng/mL (in urine) or equal to or above 150 ng/mL (in oral fluid), you must verify the test result as positive, unless the employee presents a legitimate medical explanation for the presence of the drug or drug metabolite in his or her system, as in the case of other drugs (see § 40.137). Consumption of food products (*e.g.*, poppy seeds) must not be considered a legitimate medical explanation for the employee having morphine or codeine at these concentrations.

(c) For all other codeine and morphine positive results, you must verify a confirmed positive test result only if you determine that there is clinical evidence, in addition to the test, of unauthorized use of any opium, opiate, or opium derivative (*i.e.*, morphine, codeine, or heroin).

(1) As an MRO, it is your responsibility to use your best professional and ethical judgement and discretion to determine whether there is clinical evidence of unauthorized use of opiates. Examples of information that you may consider in making this judgement include, but are not limited to, the following:

(i) Recent needle tracks;

(ii) Behavioral and psychological signs of acute opiate intoxication or withdrawal;

(iii) Clinical history of unauthorized use recent enough to have produced the laboratory test result;

(iv) Use of a medication from a foreign country. See § 40.137(e) for guidance on how to make this determination.

(2) In order to establish the clinical evidence referenced in paragraphs (c)(1)(i) and (ii) of this section, personal

observation of the employee is essential.

(i) Therefore, you, as the MRO, must conduct, or cause another physician to conduct, a face-to-face examination of the employee.

(ii) No face-to-face examination is needed in establishing the clinical evidence referenced in paragraph (c)(1)(iii) or (iv) of this section.

(3) To be the basis of a verified positive result for codeine or morphine, the clinical evidence you find must concern a drug that the laboratory found in the specimen. (For example, if the test confirmed the presence of codeine, and the employee admits to unauthorized use of hydrocodone, you must not verify the test positive for codeine. The admission must be for the substance that was found through the actual drug test.)

(4) As the MRO, you have the burden of establishing that there is clinical evidence of unauthorized use of opiates referenced in this paragraph (c). If you cannot make this determination (e.g., there is not sufficient clinical evidence or history), you must verify the test as negative. The employee does not need to show you that a legitimate medical explanation exists if no clinical evidence is established.

[77 FR 26473, May 4, 2012, as amended at 82 FR 52245, Nov. 13, 2017; 88 FR 27645, May 2, 2023]

§ 40.141 How does the MRO obtain information for the verification decision?

As the MRO, you must do the following as you make the determinations needed for a verification decision:

(a) You must conduct a medical interview. You must review the employee's medical history and any other relevant biomedical factors presented to you by the employee. You may direct the employee to undergo further medical evaluation by you or another physician.

(b) If the employee asserts that the presence of a drug or drug metabolite in his or her specimen results from taking prescription medication (*i.e.*, a legally valid prescription consistent with the Controlled Substances Act), you must review and take all reasonable and necessary steps to verify the authenticity of all medical records the employee provides.

(1) You may contact the employee's physician or other relevant medical personnel for further information.

(i) If you decide to contact the employee's pharmacy to authenticate whether the prescription offered by the employee was filled by the pharmacy, you or staff under your operational control can contact the pharmacy.

(ii) If you utilize staff to perform the inquiry in paragraph (b)(1)(i) of this section, you must ensure operational control over the hiring, firing, evaluation of the staff and you must oversee the performance of the function of contacting a pharmacy to authenticate specific prescription(s) (*e.g.*, outline or script what the staff will ask the pharmacy; occasionally monitor calls to assure quality control; or other methods to ensure the staff are properly conducting the calls with the pharmacies).

(2) You may request an HHS-certified laboratory with validated protocols (*see* § 40.81(c)) to conduct testing for D,L stereoisomers of amphetamine and methamphetamine or testing for tetrahydrocannabivarin (THC–V) when verifying lab results, as you determine necessary.

[65 FR 79526, Dec. 19, 2000, as amended at 82 FR 52245, Nov. 13, 2017; 88 FR 27645, May 2, 2023]

§ 40.143 [Reserved]

§ 40.145 On what basis does the MRO verify test results involving adulteration or substitution?

(a) As an MRO, when you receive a laboratory report that a specimen is adulterated or substituted, you must treat that report in the same way you treat the laboratory's report of a confirmed positive for a drug or drug metabolite.

(b) You must follow the same procedures used for verification of a confirmed positive test for a drug or drug metabolite (see §§ 40.129–40.135, 40.141, 40.151), except as otherwise provided in this section.

(c) In the verification interview, you must explain the laboratory findings to the employee and address technical questions or issues the employee may raise.

(d) You must offer the employee the opportunity to present a legitimate medical explanation for the laboratory findings with respect to presence of the adulterant in, or the creatinine and specific gravity findings for, the specimen.

(e) The employee has the burden of proof that there is a legitimate medical explanation.

(1) To meet this burden in the case of an adulterated specimen, the employee must demonstrate that the adulterant found by the laboratory entered the specimen through physiological means.

(2) To meet this burden in the case of a substituted specimen, the employee must demonstrate that he or she did produce or could have produced urine through physiological means, meeting the creatinine concentration criterion of less than 2 mg/dL and the specific gravity criteria of less than or equal to 1.0010 or greater than or equal to 1.0200 (see § 40.93(b)).

(3) The employee must present information meeting this burden at the time of the verification interview. As the MRO, you have discretion to extend the time available to the employee for this purpose for up to five days before verifying the specimen, if you determine that there is a reasonable basis to believe that the employee will be able to produce relevant evidence supporting a legitimate medical explanation within that time.

(f) As the MRO or the employer, you are not responsible for arranging, conducting, or paying for any studies, examinations or analyses to determine whether a legitimate medical explanation exists.

(g) As the MRO, you must exercise your best professional judgment in deciding whether the employee has established a legitimate medical explanation.

(1) If you determine that the employee's explanation does not present a reasonable basis for concluding that there may be a legitimate medical explanation, you must report the test to the DER as a verified refusal to test because of adulteration or substitution, as applicable.

(2) If you believe that the employee's explanation may present a reasonable basis for concluding that there is a legitimate medical explanation, you must direct the employee to obtain, within the five-day period set forth in paragraph (e)(3) of this section, a further medical evaluation. This evaluation must be performed by a licensed physician (the ''referral physician''), acceptable to you, with expertise in the medical issues raised by the employee's explanation. (The MRO may perform this evaluation if the MRO has appropriate expertise.)

(i) As the MRO or employer, you are not responsible for finding or paying a referral physician. However, on request of the employee, you must provide reasonable assistance to the employee's efforts to find such a physician. The final choice of the referral physician is the employee's, as long as the physician is acceptable to you.

(ii) As the MRO, you must consult with the referral physician, providing guidance to him or her concerning his or her responsibilities under this section. As part of this consultation, you must provide the following information to the referral physician:

(A) That the employee was required to take a DOT drug test, but the laboratory reported that the specimen was adulterated or substituted, which is treated as a refusal to test;

(B) The consequences of the appropriate DOT agency regulation for refusing to take the required drug test;

(C) That the referral physician must agree to follow the requirements of paragraphs (g)(3) through (g)(4) of this section; and

(D) That the referral physician must provide you with a signed statement of his or her recommendations.

(3) As the referral physician, you must evaluate the employee and consider any evidence the employee presents concerning the employee's medical explanation. You may conduct additional tests to determine whether there is a legitimate medical explanation. Any additional drug tests must be performed in an HHS-certified laboratory.

(4) As the referral physician, you must then make a written recommendation to the MRO about whether the MRO should determine

that there is a legitimate medical explanation. As the MRO, you must seriously consider and assess the referral physician's recommendation in deciding whether there is a legitimate medical explanation.

(5) As the MRO, if you determine that there is a legitimate medical explanation, you must cancel the test and inform ODAPC in writing of the determination and the basis for it (*e.g.*, referral physician's findings, evidence produced by the employee).

(6) As the MRO, if you determine that there is not a legitimate medical explanation, you must report the test to the DER as a verified refusal to test because of adulteration or substitution.

(h) The following are examples of types of evidence an employee could present to support an assertion of a legitimate medical explanation for a substituted urine result.

(1) Medically valid evidence demonstrating that the employee is capable of physiologically producing urine meeting the creatinine and specific gravity criteria of § 40.93(b).

(i) To be regarded as medically valid, the evidence must have been gathered using appropriate methodology and controls to ensure its accuracy and reliability.

(ii) Assertion by the employee that his or her personal characteristics (*e.g.*, with respect to race, gender, weight, diet, working conditions) are responsible for the substituted result does not, in itself, constitute a legitimate medical explanation. To make a case that there is a legitimate medical explanation, the employee must present evidence showing that the cited personal characteristics actually result in the physiological production of urine meeting the creatinine and specific gravity criteria of § 40.93(b).

(2) Information from a medical evaluation under paragraph (g) of this section that the individual has a medical condition that has been demonstrated to cause the employee to physiologically produce urine meeting the creatinine and specific gravity criteria of § 40.93(b).

(i) A finding or diagnosis by the physician that an employee has a medical condition, in itself, does not constitute a legitimate medical explanation.

(ii) To establish there is a legitimate medical explanation, the employee must demonstrate that the cited medical condition actually results in the physiological production of urine meeting the creatinine and specific gravity criteria of § 40.93(b).

[65 FR 79526, Dec. 19, 2000, as amended at 68 FR 31626, May 28, 2003; 69 FR 64867, Nov. 9, 2004; 88 FR 27646, May 2, 2023]

§ 40.147 [Reserved]

§ 40.149 May the MRO change a verified drug test result?

(a) As the MRO, you may change a verified test result only in the following situations:

(1) When you have reopened a verification that was done without an interview with an employee (see § 40.133(d)).

(2) If you receive information, not available to you at the time of the original verification, demonstrating that the laboratory made an error in identifying (*e.g.*, a paperwork mistake) or testing (*e.g.*, a false positive or negative) the employee's primary or split specimen. For example, suppose the laboratory originally reported a positive test result for Employee X and a negative result for Employee Y. You verified the test results as reported to you. Then the laboratory notifies you that it mixed up the two test results, and X was really negative and Y was really positive. You would change X's test result from positive to negative and contact Y to conduct a verification interview.

(3) If, within 60 days of the original verification decision—

(i) You receive information that could not reasonably have been provided to you at the time of the decision demonstrating that there is a legitimate medical explanation for the presence of drug(s)/metabolite(s) in the employee's specimen; or

(ii) You receive credible new or additional evidence that a legitimate medical explanation for an adulterated or substituted result exists.

Example to paragraph (a)(3): If the employee's physician provides you a valid prescription that he or she failed to find at the time

of the original verification, you may change the test result from positive to negative if you conclude that the prescription provides a legitimate medical explanation for the drug(s)/ metabolite(s) in the employee's specimen.

(4) If you receive the information in paragraph (a)(3) of this section after the 60-day period, you must consult with ODAPC prior to changing the result.

(5) When you have made an administrative error and reported an incorrect result.

(b) If you change the result, you must immediately notify the DER in writing, as provided in §§ 40.163–40.165.

(c) You are the only person permitted to change a verified test result, such as a verified positive test result or a determination that an individual has refused to test because of adulteration or substitution. This is because, as the MRO, you have the sole authority under this part to make medical determinations leading to a verified test (e.g., a determination that there was or was not a legitimate medical explanation for a laboratory test result). For example, an arbitrator is not permitted to overturn the medical judgment of the MRO that the employee failed to present a legitimate medical explanation for a positive, adulterated, or substituted test result of his or her specimen.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41952, Aug. 9, 2001; 73 FR 35971, June 25, 2008]

§ 40.151 What are MROs prohibited from doing as part of the verification process?

As an MRO, you are prohibited from doing the following as part of the verification process:

(a) You must not consider any evidence (verbal or written information) from any drug tests that are not collected or tested in accordance with this part. For example, if an employee tells you he went to his own physician, provided a urine specimen, sent it to a laboratory, and received a negative test result, you are required to ignore this test result.

(b) It is not your function to make decisions about factual disputes between the employee and the collector concerning matters occurring at the collection site that are not reflected on the CCF (*e.g.*, concerning allegations that the collector left the area or left open collection containers where other people could access them.)

(c) It is not your function to determine whether the employer should have directed that a test occur. For example, if an employee tells you that the employer misidentified her as the subject of a random test, or directed her to take a reasonable suspicion or post-accident test without proper grounds under a DOT agency drug or alcohol regulation, you must inform the employee that you cannot play a role in deciding these issues.

(d) It is not your function to consider explanations of confirmed positive, adulterated, or substituted test results that would not, even if true, constitute a legitimate medical explanation. For example, an employee may tell you that someone slipped amphetamines into her drink at a party, that she unknowingly ingested a marijuana brownie, or that she traveled in a closed car with several people smoking crack. MROs are unlikely to be able to verify the facts of such passive or unknowing ingestion stories. Even if true, such stories do not present a legitimate medical explanation. Consequently, you must not declare a test as negative based on an explanation of this kind.

(e) You must not verify a test negative based on information that a physician recommended that the employee use a drug listed in Schedule I of the Controlled Substances Act. (*e.g.*, under a state law that purports to authorize such recommendations, such as the ''medical marijuana'' laws that some states have adopted).

(f) You must not accept an assertion of consumption or other use of a hemp or other non-prescription marijuana-related product as a basis for verifying a marijuana test negative. You also must not accept such an explanation related to consumption of coca teas as a basis for verifying a cocaine test result as negative. Consuming or using such a product is not a legitimate medical explanation.

(g) You must not accept an assertion that there is a legitimate medical explanation for the presence of PCP, 6–AM, MDMA, or MDA in a specimen.

(h) You must not accept, as a legitimate medical explanation for an adulterated specimen, an assertion that soap, bleach, or glutaraldehyde entered a specimen through physiological means. There are no physiological means through which these substances can enter a specimen.

(i) You must not accept, as a legitimate medical explanation for a substituted specimen, an assertion that an employee can produce a urine specimen for which the creatinine level is below the laboratory's limit of detection. There are no physiological means through which a person can produce a urine specimen having this characteristic.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41952, Aug. 9, 2001; 75 FR 49863, Aug. 16, 2010; 88 FR 27646, May 2, 2023]

§ 40.153 How does the MRO notify employees of their right to a test of the split specimen?

(a) As the MRO, when you have verified a drug test as positive for a drug or drug metabolite, or as a refusal to test because of adulteration or substitution, you must notify the employee of his or her right to have the split specimen tested. You must also notify the employee of the procedures for requesting a test of the split specimen.

(b) You must inform the employee that he or she has 72 hours from the time you provide this notification to him or her to request a test of the split specimen.

(c) You must tell the employee how to contact you to make this request. You must provide telephone numbers or other information that will allow the employee to make this request. As the MRO, you must have the ability to receive the employee's calls at all times during the 72 hour period (*e.g.*, by use of an answering machine with a ''time stamp'' feature when there is no one in your office to answer the phone).

(d) You must tell the employee that if he or she makes this request within 72 hours, the employer must ensure that the test takes place, and that the employee is not required to pay for the test from his or her own funds before the test takes place. You must also tell the employee that the employer may seek reimbursement for the cost of the test (see § 40.173).

(e) You must tell the employee that additional tests of the specimen *e.g.*, DNA tests) are not authorized.

§ 40.155 What does the MRO do when a negative or positive test result is also dilute?

(a) When the laboratory reports that a specimen is dilute, you must, as the MRO, report to the DER that the specimen, in addition to being negative or positive, is dilute.

(b) You must check the ''dilute'' box (Step 6) on Copy 2 of the CCF.

(c) When you report a dilute specimen to the DER, you must explain to the DER the employer's obligations and choices under § 40.197, to include the requirement for an immediate recollection under direct observation if the creatinine concentration of a negative-dilute specimen was greater than or equal to 2mg/dL but less than or equal to 5mg/dL.

(d) If the employee's recollection under direct observation, in paragraph (c) of this section, results in another negative-dilute, as the MRO, you must:

(1) Review the CCF to ensure that there is documentation that the recollection was directly observed.

(2) If the CCF documentation shows that the recollection was directly observed as required, report this result to the DER as a negative-dilute result.

(3) If CCF documentation indicates that the recollection was not directly observed as required, do not report a result but again explain to the DER that there must be an immediate recollection under direct observation.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41952, Aug. 9, 2001; 68 FR 31626, May 28, 2003; 69 FR 64867, Nov. 9, 2004; 73 FR 35971, June 25, 2008]

§ 40.157 [Reserved]

§ 40.159 What does the MRO do when a drug test result is invalid?

(a) As the MRO, when the laboratory reports that the test result is an invalid result, you must do the following:

(1) Discuss the laboratory results with a certifying scientist to determine if the primary specimen should be tested at another HHS-certified laboratory. If the laboratory did not contact you as required by §§ 40.91(e) and 40.96(b), you must contact the laboratory.

(2) If you and the laboratory have determined that no further testing is necessary, contact the employee and inform the employee that the specimen was invalid. In contacting the employee, use the procedures set forth in § 40.131.

(3) After explaining the limits of disclosure (see §§ 40.135(d) and 40.327), you must determine if the employee has a medical explanation for the invalid result. You must inquire about the medications the employee may have taken.

(4) If the employee gives an explanation that is acceptable, you must:

(i) Place a check mark in the ''Test Cancelled'' box (Step 6) on Copy 2 of the CCF and enter ''Invalid Result'' and ''direct observation collection not required'' on the ''Remarks'' line.

(ii) Report to the DER that the test is cancelled, the reason for cancellation, and that no further action is required unless a negative test result is required (*i.e.*, pre-employment, return-to-duty, or follow-up tests).

(iii) If a negative test result is required and the medical explanation concerns a situation in which the employee has a permanent or long-term medical condition that precludes him or her from providing a valid specimen, as the MRO, you must follow the procedures outlined at § 40.160 for determining if there is clinical evidence that the individual is an illicit drug user.

(5) If the employee is unable to provide an explanation and/or a valid prescription for a medication that interfered with the immunoassay test but denies having adulterated the specimen, you must:

(i) Place a check mark in the ''Test Cancelled'' box (Step 6) on Copy 2 of the CCF and enter ''Invalid Result'' and ''direct observation collection required'' on the ''Remarks'' line.

(ii) Report to the DER that the test is cancelled, the reason for cancellation, and that a second collection must take place immediately under direct observation. Recommend to the employer that an alternate specimen should be collected if practicable (*e.g.*, oral fluid, if the specimen was urine).

(iii) Instruct the employer to ensure that the employee has the minimum possible advance notice that he or she must go to the collection site.

(6) When the test result is invalid because pH is greater than or equal to 9.0 but less than or equal to 9.5 and the employee has no other medical explanation for the pH, you should consider whether there is evidence of elapsed time and increased temperature that could account for the pH value.

(i) You are authorized to consider the temperature conditions that were likely to have existed between the time of collection and transportation of the specimen to the laboratory, and the length of time between the specimen collection and arrival at the laboratory.

(ii) You may talk with the collection site and laboratory to discuss time and temperature issues, including any pertinent information regarding specimen storage.

(iii) If you determine that time and temperature account for the pH value, you must cancel the test and take no further action, as provided at paragraph (a)(4) of this section.

(iv) If you determine that time and temperature fail to account for the pH value, you must cancel the test and direct another collection under direct observation, as provided at paragraph (a)(5) of this section.

(b) You may only report an invalid test result when you are in possession of a legible copy of Copy 1 of the CCF. In addition, you must have Copy 2 of the CCF, a legible copy of it, or any other copy of the CCF containing the employee's signature.

(c) If the employee admits to having adulterated or substituted the specimen, you must, on the same day, write and sign your own statement of what the employee told you. You must then report a refusal to test in accordance with § 40.163 .

(d) If the employee admits to using a drug, you must, on the same day, write and sign your own statement of what the employee told you. You must then report that admission to the DER for

appropriate action under DOT Agency regulations. This test will be reported as cancelled with the reason noted.

(e) If the employee's recollection (required at paragraph (a)(5) of this section) results in another invalid result for the same reason as reported for the first specimen, as the MRO, you must:

(1) Review the CCF to ensure that there is documentation that the recollection was directly observed.

(2) If the CCF review indicates that the recollection was directly observed as required, document that the employee had another specimen with an invalid result for the same reason.

(3) Follow the recording and reporting procedures at (a)(4)(i) and (ii) of this section.

(4) If a negative result is required (i.e., pre-employment, return-to-duty, or follow-up tests), follow the procedures at §40.160 for determining if there is clinical evidence that the individual is an illicit drug user.

(5) If the recollection was not directly observed as required, do not report a result but again explain to the DER that there must be an immediate recollection under direct observation.

(f) If the employee's recollection (required at paragraph (a)(5) of this section) results in another invalid result for a different reason than that reported for the first specimen, as the MRO, you must:

(1) Review the CCF to ensure that there is documentation that the recollection was directly observed.

(2) If the CCF review indicates that the recollection was directly observed as required, document that the employee had another specimen with an invalid result for a different reason.

(3) As the MRO, you should not contact the employee to discuss the result, but rather direct the DER to conduct an immediate recollection under direct observation without prior notification to the employee.

(4) If the CCF documentation indicates that the recollection was not directly observed as required, do not report a result but again explain to the DER that there must be an immediate recollection under direct observation.

(g) If, as the MRO, you receive a laboratory invalid result in conjunction with a positive, adulterated, and/or substituted result and you verify any of those results as being a positive and/or refusal to test, you do not report the invalid result unless the split specimen fails to reconfirm the result(s) of the primary specimen.

[65 FR 79526, Dec. 19, 2000, as amended at 73 FR 35972, June 25, 2008; 75 FR 49863, Aug. 16, 2010; 88 FR 27646, May 2, 2023]

§40.160 What does the MRO do when a valid test result cannot be produced and a negative result is required?

(a) If a valid test result cannot be produced and a negative result is required, (under §40.159 (a)(5)(iii) and (e)(4)), as the MRO, you must determine if there is clinical evidence that the individual is currently an illicit drug user. You must make this determination by personally conducting, or causing to be conducted, a medical evaluation. In addition, if appropriate, you may also consult with the employee's physician to gather information you need to reach this determination.

(b) If you do not personally conduct the medical evaluation, as the MRO, you must ensure that one is conducted by a licensed physician acceptable to you.

(c) For purposes of this section, the MRO or the physician conducting the evaluation may conduct an alternative test (e.g., blood) as part of the medically appropriate procedures in determining clinical evidence of drug use.

(d) If the medical evaluation reveals no clinical evidence of drug use, as the MRO, you must report this to the employer as a negative test result with written notations regarding the medical examination. The report must also state why the medical examination was required (i.e., either the basis for the determination that a permanent or long-term medical condition exists or because the recollection under direct observation resulted in another invalid result for the same reason, as appropriate) and for the determination that no signs and symptoms of drug use exist.

(1) Check ''Negative'' (Step 6) on the CCF.

(2) Sign and date the CCF.

(e) If the medical evaluation reveals clinical evidence of drug use, as the MRO, you must report the result to the

employer as a cancelled test with written notations regarding the results of the medical examination. The report must also state why the medical examination was required (i.e., either the basis for the determination that a permanent or long-term medical condition exists or because the recollection under direct observation resulted in another invalid result for the same reason, as appropriate) and state the reason for the determination that signs and symptoms of drug use exist. Because this is a cancelled test, it does not serve the purpose of an actual negative test result (i.e., the employer is not authorized to allow the employee to begin or resume performing safety-sensitive functions, because a negative test result is needed for that purpose).

[73 FR 35972, June 25, 2008]

§ 40.161 What does the MRO do when a drug test specimen is rejected for testing?

As the MRO, when the laboratory reports that the specimen is rejected for testing (*e.g.*, because of a fatal or uncorrected flaw), you must do the following:

(a) Place a check mark in the ''Test Cancelled'' box (Step 6) on Copy 2 (or a legible copy of Copy 3–5) of the CCF and enter the reason on the ''Remarks'' line. If you do not have Copy 2 (or a legible copy of Copy 3–5), then enter ''Test Cancelled'' and the reason for the cancellation on a report in the format required under § 40.163(c).

(b) Report to the DER that the test is cancelled and the reason for cancellation, and that no further action is required unless a negative test is required (*e.g.*, in the case of a pre-employment, return-to-duty, or follow-up test).

(c) You may only report a test cancelled because of a ''rejected for testing'' laboratory result when you are in possession of a legible copy of Copy 1 of the CCF. In addition, you must have Copy 2 of the CCF, a legible copy of it, or any other copy of the CCF containing the employee's signature. If you do not have Copy 2 (or a legible copy of Copy 3–5), then enter ''Test Cancelled'' and the reason for the cancellation on a report in the format required under § 40.163(c).

[65 FR 79526, Dec. 19, 2000, as amended at 88 FR 27646, May 2, 2023]

§ 40.162 What must MROs do with multiple verified results for the same testing event?

(a) If the testing event is one in which there was one specimen collection with multiple verified non-negative results, as the MRO, you must report them all to the DER. For example, if you verified the specimen as being positive for marijuana and cocaine and as being a refusal to test because the specimen was also adulterated, as the MRO, you should report the positives and the refusal to the DER.

(b) If the testing event was one in which two separate specimen collections (e.g., a specimen out of temperature range and the subsequent observed collection) were sent to the laboratory, as the MRO, you must:

(1) If both specimens were verified negative, report the result as negative.

(2) If either of the specimens was verified negative and the other was verified as one or more non-negative(s), report the non-negative result(s) only. For example, if you verified one specimen as negative and the other as a refusal to test because the second specimen was substituted, as the MRO you should report only the refusal to the DER.

(i) If the first specimen is reported as negative, but the result of the second specimen has not been reported by the laboratory, as the MRO, you should hold—not report—the result of the first specimen until the result of the second specimen is received.

(ii) If the first specimen is reported as non-negative, as the MRO, you should report the result immediately and not wait to receive the result of the second specimen.

(3) If both specimens were verified non-negative, report all of the non-negative results. For example, if you verified one specimen as positive and the other as a refusal to test because the specimen was adulterated, as the MRO, you should report the positive and the refusal results to the DER.

(c) As an exception to paragraphs (a) and (b) of this section, as the MRO, you

must follow procedures at §40.159(g) when any verified non-negative result is also invalid.

[73 FR 35972, June 25, 2008, as amended at 82 FR 52245, Nov. 13, 2017]

§ 40.163 How does the MRO report drug test results?

(a) As the MRO, it is your responsibility to report all drug test results to the employer.

(b) You may use a signed or stamped and dated legible photocopy of Copy 2 of the CCF to report test results.

(c) If you do not report test results using Copy 2 of the CCF for this purpose, you must provide a written report (e.g., a letter) for each test result. This report must, as a minimum, include the following information:

(1) Full name, as indicated on the CCF, of the employee tested;

(2) Specimen ID number from the CCF and the SSN or employee ID No.;

(3) Reason for the test, if indicated on the CCF (e.g., random, post-accident);

(4) Date of the collection;

(5) Date you received Copy 2 of the CCF;

(6) Result of the test (i.e., positive, negative, dilute, refusal to test, test cancelled) and the date the result was verified by the MRO;

(7) For verified positive tests, the drug(s)/metabolite(s) for which the test was positive;

(8) For cancelled tests, the reason for cancellation; and

(9) For refusals to test, the reason for the refusal determination (e.g., in the case of an adulterated test result, the name of the adulterant).

(d) As an exception to the reporting requirements of paragraph (b) and (c) of this section, the MRO may report negative results using an electronic data file.

(1) If you report negatives using an electronic data file, the report must contain, as a minimum, the information specified in paragraph (c) of this section, as applicable for negative test results.

(2) In addition, the report must contain your name, address, and phone number, the name of any person other than you reporting the results, and the date the electronic results report is released.

(e) If you use a written report as provided in paragraph (c) of this section to report results, you must retain a copy of the written report. If you use the electronic data file to report negatives, as provided in paragraph (d) of this section, you must retain a retrievable copy of that report in a format suitable for inspection and audit by a DOT representative. In either case, you must keep the completed Copy 2 of the CCF. When completing Copy 2, either the MRO must sign and date it (for both negatives and non-negatives) or MRO staff must stamp and date it (for negatives only).

(f) You must not use Copy 1 of the CCF to report drug test results.

(g) You must not provide quantitative values to the DER or C/TPA for drug or validity test results. However, you must provide the test information in your possession to a SAP who consults with you (see §40.293(g)).

(h) You must maintain reports and records related to negatives and cancelled results for one year; you must maintain reports and records related to positives and refusals for five years, unless otherwise specified by applicable DOT agency regulations.

[66 FR 41952, Aug. 9, 2001, as amended at 75 FR 49863, Aug. 16, 2010; 75 FR 59107, Sept. 27, 2010; 76 FR 59578, Sept. 27, 2011; 88 FR 27646, May 2, 2023]

§ 40.165 To whom does the MRO transmit reports of drug test results?

(a) As the MRO, you must report all drug test results to the DER, except in the circumstances provided for in §40.345 .

(b) If the employer elects to receive reports of results through a C/TPA, acting as an intermediary as provided in §40.345 , you must report the results through the designated C/TPA.

§ 40.167 How are MRO reports of drug results transmitted to the employer?

As the MRO or C/TPA who transmits drug test results to the employer, you must comply with the following requirements:

(a) You must report the results in a confidential manner.

(b) You must transmit to the DER on the same day the MRO verifies the result or the next business day all verified positive test results, results requiring an immediate collection under direct observation, adulterated or substituted specimen results, and other refusals to test.

(1) Direct telephone contact with the DER is the preferred method of immediate reporting. Follow up your phone call with appropriate documentation (see § 40.163).

(2) You are responsible for identifying yourself to the DER, and the DER must have a means to confirm your identification.

(3) The MRO's report that you transmit to the employer must contain all of the information required by § 40.163 .

(c) You must transmit the MRO's report(s) of verified tests to the DER so that the DER receives it within two days of verification by the MRO.

(1) You must fax, courier, mail, or electronically transmit a legible image or copy of either the signed or stamped and dated Copy 2 or the written report (see § 40.163(b) and (c)).

(2) Negative results reported electronically (i.e., computer data file) do not require an image of Copy 2 or the written report.

(d) In transmitting test results, you or the C/TPA and the employer must ensure the security of the transmission and limit access to any transmission, storage, or retrieval systems.

(e) MRO reports are not subject to modification or change by anyone other than the MRO, as provided in § 40.149(c).

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41953, Aug. 9, 2001]

§ 40.169 Where is other information concerning the role of MROs and the verification process found in this regulation?

You can find more information concerning the role of MROs in several sections of this part:

§ 40.3—Definition.
§§ 40.47–40.49—Correction of form and kit errors.
§ 40.67—Role in direct observation and other atypical test situations.
§ 40.83—Laboratory handling of fatal and correctable flaws.
§ 40.97—Laboratory handling of test results and quantitative values.
§ 40.99—Authorization of longer laboratory retention of specimens.
§ 40.101—Relationship with laboratories; avoidance of conflicts of interest.
§ 40.171—Request for test of split specimen.
§ 40.187—Action concerning split specimen test results.
§ 40.193—Role in ''shy bladder'' situations.
§ 40.195—Role in cancelling tests.
§§ 40.199–40.203—Documenting errors in tests.
§ 40.327—Confidentiality and release of information.
§ 40.347—Transfer of records.
§ 40.353—Relationships with service agents.

[65 FR 79526, Dec. 19, 2000, as amended at 82 FR 52245, Nov. 13, 2017]

Subpart H—Split Specimen Tests

§ 40.171 How does an employee request a test of a split specimen?

(a) As an employee, when the MRO has notified you that you have a verified positive drug test and/or refusal to test because of adulteration or substitution, you have 72 hours from the time of notification to request a test of the split specimen. The request may be verbal or in writing. If you make this request to the MRO within 72 hours, you trigger the requirements of this section for a test of the split specimen. There is no split specimen testing for an invalid result.

(b)(1) If, as an employee, you have not requested a test of the split specimen within 72 hours, you may present to the MRO information documenting that serious injury, illness, lack of actual notice of the verified test result, inability to contact the MRO (e.g., there was no one in the MRO's office and the answering machine was not working), or other circumstances unavoidably prevented you from making a timely request.

(2) As the MRO, if you conclude from the employee's information that there was a legitimate reason for the employee's failure to contact you within 72 hours, you must direct that the test of the split specimen take place, just as you would when there is a timely request.

(c) When the employee makes a timely request for a test of the split specimen under paragraphs (a) and (b) of this section, you must, as the MRO, immediately provide written notice to

the laboratory that tested the primary specimen, directing the laboratory to forward the split specimen to a second HHS-certified laboratory. You must also document the date and time of the employee's request.

[65 FR 79526, Dec. 19, 2000, as amended at 73 FR 35972, June 25, 2008]

§ 40.173 Who is responsible for paying for the test of a split specimen?

(a) As the employer, you are responsible for making sure (e.g., by establishing appropriate accounts with laboratories for testing split specimens) that the MRO, first laboratory, and second laboratory perform the functions noted in §§ 40.175–40.185 in a timely manner, once the employee has made a timely request for a test of the split specimen.

(b) As the employer, you must not condition your compliance with these requirements on the employee's direct payment to the MRO or laboratory or the employee's agreement to reimburse you for the costs of testing. For example, if you ask the employee to pay for some or all of the cost of testing the split specimen, and the employee is unwilling or unable to do so, you must ensure that the test takes place in a timely manner, even though this means that you pay for it.

(c) As the employer, you may seek payment or reimbursement of all or part of the cost of the split specimen from the employee (e.g., through your written company policy or a collective bargaining agreement). This part takes no position on who ultimately pays the cost of the test, so long as the employer ensures that the testing is conducted as required and the results released appropriately.

§ 40.175 What steps does the first laboratory take with a split specimen?

(a) As the laboratory at which the primary and split specimen first arrive, you must check to see whether the split specimen is available for testing.

(b) If the split specimen is unavailable or appears insufficient, you must then do the following:

(1) Continue the testing process for the primary specimen as you would normally. Report the results for the primary specimen without providing the MRO information regarding the unavailable split specimen.

(2) Upon receiving a letter from the MRO instructing you to forward the split specimen to another laboratory for testing, report to the MRO that the split specimen is unavailable for testing. Provide as much information as you can about the cause of the unavailability.

(c) As the laboratory that tested the primary specimen, you are not authorized to open the split specimen under any circumstances (except when the split specimen is redesignated as provided in § 40.83).

(d) When you receive written notice from the MRO instructing you to send the split specimen to another HHS-certified laboratory, you must forward the following items to the second laboratory:

(1) The split specimen in its original specimen bottle, with the seal intact;

(2) A copy of the MRO's written request; and

(3) A copy of Copy 1 of the CCF, which identifies the drug(s)/metabolite(s) or the validity criteria to be tested for.

(e) You must not send to the second laboratory any information about the identity of the employee. Inadvertent disclosure does not, however, cause a fatal flaw.

(f) This subpart does not prescribe who gets to decide which HHS-certified laboratory is used to test the split specimen. That decision is left to the parties involved.

§ 40.177 What does the second laboratory do with the split specimen when it is tested to reconfirm the presence of a drug or drug metabolite?

(a) As the laboratory testing the split specimen, you must test the split specimen for the drug(s)/drug metabolite(s) confirmed in the primary specimen.

(b) You must conduct this test without regard to the cutoff concentrations of § 40.85 or § 40.91, as applicable.

(c) If the test fails to reconfirm the presence of the drug(s)/drug metabolite(s) that were reported in the primary specimen, you must conduct validity tests in an attempt to determine

the reason for being unable to reconfirm the presence of the drug(s)/metabolite(s). You should conduct the same validity tests as you would conduct on a primary specimen set forth in § 40.87 or § 40.93, as applicable.

(d) In addition, if the test fails to reconfirm the presence of the drug(s)/drug metabolite(s) reported in the primary specimen, you may send the specimen or an aliquot of it for testing at another HHS-certified laboratory that has the capability to conduct another reconfirmation test.

[65 FR 79526, Dec. 19, 2000, as amended at 73 FR 35972, June 25, 2008; 88 FR 27646, May 2, 2023]

§ 40.179 What does the second laboratory do with the split specimen when it is tested to reconfirm an adulterated test result?

(a) As the laboratory testing the split specimen, you must test the split specimen for the adulterant detected in the primary specimen, using the confirmatory test for the adulterant and using criteria in § 40.89 or § 40.93, as applicable and confirmatory cutoff levels required by the HHS Mandatory Guidelines.

(b) In addition, if the test fails to reconfirm the adulterant result reported in the primary specimen, you may send the specimen or an aliquot of it for testing at another HHS-certified laboratory that has the capability to conduct another reconfirmation test.

[73 FR 35973, June 25, 2008, as amended at 88 FR 27646, May 2, 2023]

§ 40.181 What does the second laboratory do with the split specimen when it is tested to reconfirm a substituted test result?

As the laboratory testing a urine split specimen, you must test the split specimen using the confirmatory tests for creatinine and specific gravity, using the criteria set forth in § 40.88.

[88 FR 27646, May 2, 2023]

§ 40.183 What information do laboratories report to MROs regarding split specimen results?

(a) As the laboratory responsible for testing the split specimen, you must report split specimen test results by checking the ''Reconfirmed'' box and/or the ''Failed to Reconfirm'' box (Step 5(b)) on Copy 1 of the CCF, as appropriate, and by providing clarifying remarks using current HHS Mandatory Guidelines requirements.

(b) As the laboratory certifying scientist, enter your name, sign, and date the CCF.

[65 FR 79526, Dec. 19, 2000, as amended at 73 FR 35972, June 25, 2008]

§ 40.185 Through what methods and to whom must a laboratory report split specimen results?

(a) As the laboratory testing the split specimen, you must report laboratory results directly, and only, to the MRO at his or her place of business. You must not report results to or through the DER or another service agent (e.g., a C/TPA).

(b) You must fax, courier, mail, or electronically transmit a legible image or copy of the fully-completed Copy 1 of the CCF, which has been signed by the certifying scientist.

(c) You must transmit the laboratory result to the MRO immediately, preferably on the same day or next business day as the result is signed and released.

§ 40.187 What does the MRO do with split specimen laboratory results?

As the MRO, the split specimen laboratory results you receive will fall into five categories. You must take the following action, as appropriate, when a laboratory reports split specimen results to you.

(a) *Category 1:* The laboratory reconfirmed one or more of the primary specimen results. As the MRO, you must report to the DER and the employee the result(s) that was/were reconfirmed.

(1) In the case of a reconfirmed positive test(s) for drug(s) or drug metabolite(s), the positive is the final result.

(2) In the case of a reconfirmed adulterated or substituted result, the refusal to test is the final result.

(3) In the case of a combination positive and refusal to test results, the final result is both positive and refusal to test.

(b) *Category 2:* The laboratory failed to reconfirm all of the primary specimen results because, as appropriate,

drug(s)/drug metabolite(s) were not detected; adulteration criteria were not met; and/or substitution criteria were not met. As the MRO, you must report to the DER and the employee that the test must be cancelled.

(1) As the MRO, you must inform ODAPC of the failure to reconfirm using the format in appendix F to this part.

(2) In a case where the split failed to reconfirm because the substitution criteria were not met and the split specimen creatinine concentration was equal to or greater than 2mg/dL but less than or equal to 5mg/dL, as the MRO, you must, in addition to step (b)(1) of this paragraph, direct the DER to ensure the immediate collection of another specimen from the employee under direct observation, with no notice given to the employee of this collection requirement until immediately before the collection.

(3) In a case where the split failed to reconfirm and the primary specimen's result was also invalid, direct the DER to ensure the immediate collection of another specimen from the employee under direct observation, with no notice given to the employee of this collection requirement until immediately before the collection.

(c) *Category 3:* The laboratory failed to reconfirm all of the primary specimen results, and also reported that the split specimen was invalid, adulterated, and/or substituted.

(1) In the case where the laboratory failed to reconfirm all of the primary specimen results and the split was reported as invalid, as the MRO, you must:

(i) Report to the DER and the employee that the test must be cancelled and the reason for the cancellation.

(ii) Direct the DER to ensure the immediate collection of another specimen from the employee under direct observation, with no notice given to the employee of this collection requirement until immediately before the collection.

(iii) Inform ODAPC of the failure to reconfirm using the format in appendix F to this part.

(2) In the case where the laboratory failed to reconfirm any of the primary specimen results, and the split was reported as adulterated and/or substituted, as the MRO, you must:

(i) Contact the employee and inform the employee that the laboratory has determined that his or her split specimen is adulterated and/or substituted, as appropriate.

(ii) Follow the procedures of § 40.145 to determine if there is a legitimate medical explanation for the laboratory finding of adulteration and/or substitution, as appropriate.

(iii) If you determine that there is a legitimate medical explanation for the adulterated and/or substituted test result, report to the DER and the employee that the test must be cancelled; and inform ODAPC of the failure to reconfirm using the format in appendix F to this part.

(iv) If you determine that there is not a legitimate medical explanation for the adulterated and/or substituted test result, you must take the following steps:

(A) Report the test to the DER and the employee as a verified refusal to test. Inform the employee that he or she has 72 hours to request a test of the primary specimen to determine if the adulterant found in the split specimen is also present in the primary specimen and/or to determine if the primary specimen meets appropriate substitution criteria.

(B) Except when the request is for a test of the primary specimen and is being made to the laboratory that tested the primary specimen, follow the procedures of §§ 40.153, 40.171, 40.173, 40.179, 40.181, and 40.185, as appropriate.

(C) As the laboratory that tests the primary specimen to reconfirm the presence of the adulterant found in the split specimen and/or to determine that the primary specimen meets appropriate substitution criteria, report your result to the MRO on a photocopy (faxed, mailed, scanned, couriered) of Copy 1 of the CCF.

(D) If the test of the primary specimen reconfirms the adulteration and/or substitution finding of the split specimen, as the MRO you must report the result as a refusal to test as provided in paragraph (a)(2) of this section.

(E) If the test of the primary specimen fails to reconfirm the adulteration and/or substitution finding of the split

specimen, as the MRO you must cancel the test, following procedures in paragraph (b) of this section.

(d) *Category 4:* The laboratory failed to reconfirm one or more but not all of the primary specimen results, and also reported that the split specimen was invalid, adulterated, and/or substituted. As the MRO, in the case where the laboratory reconfirmed one or more of the primary specimen result(s), you must follow procedures in paragraph (a) of this section and:

(1) Report that the split was also reported as being invalid, adulterated, and/or substituted (as appropriate).

(2) Inform the DER to take action only on the reconfirmed result(s).

(e) *Category 5:* The split specimen was not available for testing or there was no split laboratory available to test the specimen. As the MRO, you must:

(1) Report to the DER and the employee that the test must be cancelled and the reason for the cancellation;

(2) Direct the DER to ensure the immediate recollection of another specimen from the employee under direct observation, with no notice given to the employee of this collection requirement until immediately before the collection; and

(3) Notify ODAPC of the failure to reconfirm using the format in appendix F to this part.

(f) For all split specimen results, as the MRO you must in Step 7 of Copy 2 of the CCF:

(1) Report split specimen test results by checking the ''Reconfirmed'' box and/or the ''Failed to Reconfirm'' box, or the ''Test Cancelled'' box, as appropriate.

(2), Enter your name, sign, and date.

(3) Send a legible copy of Copy 2 of the CCF (or a signed and dated letter, see §40.163) to the employer and keep a copy for your records. Transmit the document as provided in §40.167.

[73 FR 35973, June 25, 2008, as amended at 75 FR 59108, Sept. 27, 2010; 88 FR 27646, May 2, 2023]

§40.189 Where is other information concerning split specimens found in this regulation?

You can find more information concerning split specimens in several sections of this part:

§40.3—Definition.
§40.65—Quantity of split specimen.
§40.67—Directly observed test when split specimen is unavailable.
§§40.71–40.73—Collection process for split specimens.
§40.83—Laboratory accessioning of split specimens.
§40.99—Laboratory retention of split specimens.
§40.153—MRO notice to employees on tests of split specimen.
§§40.193 and 40.201—MRO actions on insufficient or unavailable split specimens.
APPENDIX D TO PART 40—REPORT FORMAT FOR SPLIT SPECIMEN FAILURE TO RECONFIRM.

[65 FR 79526, Dec. 19, 2000, as amended at 82 FR 52245, Nov. 13, 2017]

Subpart I—Problems in Drug Tests

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

(a) As an employee, you have refused to take a drug test if you:

(1) Fail to appear for any test (except a pre-employment test) within a reasonable time, as determined by the employer, consistent with applicable DOT agency regulations, after being directed to do so by the employer. This includes the failure of an employee (including an owner-operator) to appear for a test when called by a C/TPA (see §40.61(a));

(2) Fail to remain at the testing site until the testing process is complete. Provided that an employee who leaves the collection site before the testing process commences (*see* §40.63(c) or §40.72(e), as applicable) for a pre-employment test is not deemed to have refused to test. The collector is not required to inform an employee that the failure to remain at the collection site is a refusal. If an employee leaves prior to the completion of the testing process, per §40.355(i) the employer must decide whether the employee's actions constitute a refusal;

(3) Fail to provide a specimen for any drug test required by this part or DOT agency regulations. Provided that an employee who does not provide a specimen because he or she has left the testing site before the testing process commences (*see* §40.63(c) or §40.72(e), as applicable) for a pre-employment test is not deemed to have refused to test. The collector is not required to inform an

employee that the failure to remain at the collection site is a refusal. If an employee leaves prior to the completion of the testing process, per § 40.355(i) the employer must decide whether the employee's actions constitute a refusal;

(4) In the case of a directly observed or monitored urine collection in a drug test, fail to permit the observation or monitoring of an employee's provision of a specimen (*see* §§ 40.67(m) and 40.69(g));

(5) Fail to provide a sufficient amount of specimen when directed, and it has been determined, through a required medical evaluation, that there was no adequate medical explanation for the failure (*see* § 40.193(d)(2));

(6) Fail or decline to take an additional drug test the employer or collector has directed you to take (*see*, for instance, § 40.197(b) as applicable);

(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(c). 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;

(8) Fail to cooperate with any part of the testing process (*e.g.*, refuse to empty pockets when directed by the collector, behave in a confrontational way that disrupts the collection process, fail to wash hands after being directed to do so by the collector, fail to remove objects from mouth, fail to permit inspection of the oral cavity, or fail to complete a rinse when requested);

(9) For an observed urine collection, fail to follow the observer's instructions to raise your clothing above the waist, lower clothing and underpants, and to turn around to permit the observer to determine if you have any type of prosthetic or other device that could be used to interfere with the collection process;

(10) Possess or wear a prosthetic or other device that could be used to interfere with the collection process; or

(11) Admit to the collector or MRO that you adulterated or substituted the specimen.

(b) As an employee, if the MRO reports that you have a verified adulterated or substituted test result, you have refused to take a drug test.

(c) As an employee, if you refuse to take a drug test, you incur the consequences specified under DOT agency regulations for a violation of those DOT agency regulations. The consequences specified under DOT agency regulations for a refusal cannot be overturned or set aside by an arbitration, grievance, State court or other non-Federal forum that adjudicates the personnel decisions the employer has taken against the employee.

(d) As a collector or an MRO, when an employee refuses to participate in the part of the testing process in which you are involved, you must terminate the portion of the testing process in which you are involved, document the refusal on the CCF (including, in the case of the collector, printing the employee's name on Copy 2 of the CCF), immediately notify the DER by any means (e.g., telephone or secure fax machine) that ensures that the refusal notification is immediately received. As a referral physician (e.g., physician evaluating a ''shy bladder'' condition or a claim of a legitimate medical explanation in a validity testing situation), you must notify the MRO, who in turn will notify the DER.

(1) As the collector, you must note the actions that may constitute a refusal in the ''Remarks'' line (Step 2), and sign and date the CCF. The collector does not make the final decision about whether the employee's conduct constitutes a refusal to test; the employer has the sole responsibility to decide whether a refusal occurred, as stated in § 40.355(i), the employer has a non-delegable duty to make the decision about whether the employee has refused to test.

(2) As the MRO, you must note the refusal by checking the ''Refusal to Test'' box in Step 6 on Copy 2 of the CCF, checking whether the specimen was adulterated or substituted and, if adulterated, noting the adulterant/reason. If there was another reason for the refusal, check ''Other'' in Step 6 on

Copy 2 of the CCF, and note the reason next to the ''Other'' box and on the ''Remarks'' lines, as needed. You must then sign and date the CCF.

(e) As an employee, when you refuse to take a non-DOT test or to sign a non-DOT form, you have not refused to take a DOT test. There are no consequences under DOT agency regulations for refusing to take a non-DOT test.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41953, Aug. 9, 2001; 68 FR 31626, May 28, 2003; 71 FR 49384, Aug. 23, 2006; 73 FR 35974, June 25, 2008; 75 FR 59108, Sept. 27, 2010; 88 FR 27647, May 2, 2023]

§ 40.193 What happens when an employee does not provide a sufficient amount of specimen for a drug test?

(a) If an employee does not provide a sufficient amount of specimen to permit a drug test (*i.e.*, 45 mL of urine in a single void, or 2mL oral fluid in a single sampling, as applicable) you, as the collector, must provide another opportunity to the employee to do so. In accordance with the employer's instructions, this can be done using the same specimen type as the original collection or this can be done by a collector qualified to use an alternate specimen collection for this purpose.

(1) If you change to an alternate specimen collection at this point (*i.e.*, from urine to oral fluid; or from oral fluid to urine), the next collection begins under § 40.61(e) for urine or § 40.72 for oral fluid collection.

(i) If you proceed with an alternate specimen collection, discard the insufficient specimen and proceed with the next specimen collection.

(ii) If you proceed with an alternate specimen collection, discard the CCF for the insufficient specimen and begin a new CCF for the next specimen collection with a notation in the remarks section of the new CCF.

(b)(1) As the collector, you must do the following when continuing with a urine specimen collection under this section:

(i) Discard the insufficient specimen, except where the insufficient specimen was out of temperature range or showed evidence of adulteration or tampering (*see* § 40.65(b) and (c)).

(ii) Urge the employee to drink up to 40 ounces of fluid, distributed reasonably through a period of up to three hours, or until the individual has provided a sufficient urine specimen, whichever occurs first. It is not a refusal to test if the employee declines to drink. Document on the Remarks line of the CCF (Step 2), and inform the employee of the time at which the three-hour period begins and ends.

(iii) If the employee refuses to make the attempt to provide a new urine specimen or leaves the collection site before the collection process is complete, you must discontinue the collection, note that fact on the ''Remarks'' line of the CCF (Step 2), and immediately notify the DER of the conduct as provided in § 40.191(e)(1); the employer decides whether the situation is deemed to be a refusal.

(iv) If the employee has not provided a sufficient specimen within three hours of the first unsuccessful attempt to provide the specimen, you must discontinue the collection, note the fact on the ''Remarks'' line of the CCF (Step 2), and immediately notify the DER. You must also discard any specimen the employee previously provided, including any specimen that is ''out of temperature range'' or shows signs of tampering. In the remarks section of the CCF that you will distribute to the MRO and DER, note the fact that the employee provided an ''out of temperature range specimen'' or ''specimen that shows signs of tampering'' and that it was discarded because the employee did not provide a second sufficient specimen.

(2) As the collector, you must do the following when continuing with an oral fluid specimen collection under this section:

(i) If the employee demonstrates an inability to provide a specimen after 15 minutes of using the collection device, and if the donor states that he or she could provide a specimen after drinking some fluids, urge the employee to drink (up to 8 ounces) and wait an additional 10 minutes before beginning the next specimen collection (a period of up to one hour must be provided, or until the donor has provided a sufficient oral fluid specimen, whichever occurs first). If the employee simply

needs more time before attempting to provide an oral fluid specimen, the employee is not required to drink any fluids during the one-hour wait time. It is not a refusal to test if the employee declines to drink. The employee must remain at the collection site, in a monitored area designated by the collector, during the wait period.

(ii) If the employee has not provided a sufficient specimen within one hour of the first unsuccessful attempt to provide the specimen, you must discontinue the collection, note the fact on the ''Remarks'' line of the CCF (Step 2), and immediately notify the DER.

(3) Send Copy 2 of the CCF to the MRO and Copy 4 to the DER. You must send or fax these copies to the MRO and DER within 24 hours or the next business day.

(c) As the DER, if the collector informs you that the employee has not provided a sufficient amount of specimen (*see* paragraph (b) of this section), you must, after consulting with the MRO, direct the employee to obtain, within five days, an evaluation from a licensed physician, acceptable to the MRO, who has expertise in the medical issues raised by the employee's failure to provide a urine (*see* paragraph (b)(1) of this section) or oral fluid (*see* paragraph (b)(2) of this section) sufficient specimen, but not both. The evaluation and MRO determination required by this section only applies to the oral fluid or the urine insufficient specimen that was the final methodology at the collection site. (The MRO may perform this evaluation if the MRO has appropriate expertise.)

(1) As the MRO, if another physician will perform the evaluation, you must provide the other physician with the following information and instructions:

(i) That the employee was required to take a DOT drug test, but was unable to provide a sufficient amount of specimen to complete the test;

(ii) The consequences of the appropriate DOT agency regulation for refusing to take the required drug test;

(iii) That the referral physician must agree to follow the requirements of paragraphs (d) through (g) of this section.

(2) [Reserved]

(d) As the referral physician conducting this evaluation, you must recommend that the MRO make one of the following determinations:

(1) A medical condition has, or with a high degree of probability could have, precluded the employee from providing a sufficient amount of specimen. As the MRO, if you accept this recommendation, you must:

(i) Check ''Test Cancelled'' (Step 6) on the CCF; and

(ii) Sign and date the CCF.

(2) There is not an adequate basis for determining that a medical condition has, or with a high degree of probability could have, precluded the employee from providing a sufficient amount of specimen. As the MRO, if you accept this recommendation, you must:

(i) Check the ''Refusal to Test'' box and ''Other'' box in Step 6 on Copy 2 of the CCF and note the reason next to the ''Other'' box and on the ''Remarks'' lines, as needed.

(ii) Sign and date the CCF.

(e) For purposes of this paragraph, a medical condition includes an ascertainable physiological condition (*e.g.*, a urinary system dysfunction in the case of a urine test or autoimmune disorder in the case of an oral fluid test), or a medically documented pre-existing psychological disorder, but does not include unsupported assertions of ''situational anxiety'' or dehydration.

(f) As the referral physician making the evaluation, after completing your evaluation, you must provide a written statement of your recommendations and the basis for them to the MRO. You must not include in this statement detailed information on the employee's medical condition beyond what is necessary to explain your conclusion.

(g) If, as the referral physician making this evaluation in the case of a pre-employment, return-to-duty, or follow-up test, you determine that the employee's medical condition is a serious and permanent or long-term disability that is highly likely to prevent the employee from providing a sufficient amount of specimen for a very long or indefinite period of time, you must set forth your determination and the reasons for it in your written statement to the MRO. As the MRO, upon receiving

such a report, you must follow the requirements of § 40.195, where applicable.

(h) As the MRO, you must seriously consider and assess the referral physician's recommendations in making your determination about whether the employee has a medical condition that has, or with a high degree of probability could have, precluded the employee from providing a sufficient amount of specimen. You must report your determination to the DER in writing as soon as you make it.

(i) As the employer, when you receive a report from the MRO indicating that a test is cancelled as provided in paragraph (d)(1) of this section, you take no further action with respect to the employee. If the test reason was 'random', the employee remains in the random testing pool.

[88 FR 27647, May 2, 2023]

§ 40.195 What happens when an individual is unable to provide a sufficient amount of specimen for a pre-employment, follow-up, or return-to-duty test because of a permanent or long-term medical condition?

(a) This section concerns a situation in which an employee has a medical condition that precludes him or her from providing a sufficient specimen for a pre-employment follow-up or return-to-duty test and the condition involves a permanent or long-term disability. As the MRO in this situation, you must do the following:

(1) You must determine if there is clinical evidence that the individual is an illicit drug user. You must make this determination by personally conducting, or causing to be conducted, a medical evaluation and through consultation with the employee's physician and/or the physician who conducted the evaluation under § 40.193(d).

(2) If you do not personally conduct the medical evaluation, you must ensure that one is conducted by a licensed physician acceptable to you.

(3) For purposes of this section, the MRO or the physician conducting the evaluation may conduct an alternative test (*e.g.*, blood) as part of the medically appropriate procedures in determining clinical evidence of drug use.

(b) If the medical evaluation reveals no clinical evidence of drug use, as the MRO, you must report the result to the employer as a negative test with written notations regarding results of both the evaluation conducted under § 40.193(d) and any further medical examination. This report must state the basis for the determination that a permanent or long-term medical condition exists, making provision of a sufficient urine specimen impossible, and for the determination that no signs and symptoms of drug use exist.

(1) Check ''Negative'' (Step 6) on the CCF.

(2) Sign and date the CCF.

(c) If the medical evaluation reveals clinical evidence of drug use, as the MRO, you must report the result to the employer as a cancelled test with written notations regarding results of both the evaluation conducted under § 40.193(d) and any further medical examination. This report must state that a permanent or long-term medical condition exists, making provision of a sufficient urine specimen impossible, and state the reason for the determination that signs and symptoms of drug use exist. Because this is a cancelled test, it does not serve the purposes of a negative test (*i.e.*, the employer is not authorized to allow the employee to begin or resume performing safety-sensitive functions, because a negative test is needed for that purpose).

(d) For purposes of this section, permanent or long-term medical conditions are those physiological, anatomic, or psychological abnormalities documented as being present prior to the attempted collection, and considered not amenable to correction or cure for an extended period of time, if ever.

(1) Examples would include destruction (any cause) of the glomerular filtration system leading to renal failure; unrepaired traumatic disruption of the urinary tract; or a severe psychiatric disorder focused on genito-urinary matters.

(2) Acute or temporary medical conditions, such as cystitis, urethritis or prostatitis, though they might interfere with collection for a limited period of time, cannot receive the same exceptional consideration as the permanent

or long-term conditions discussed in paragraph (d)(1) of this section.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41953, Aug. 9, 2001]

§ 40.197 What happens when an employer receives a report of a dilute urine specimen?

(a) As the employer, if the MRO informs you that a positive drug test was dilute, you simply treat the test as a verified positive test. You must not direct the employee to take another test based on the fact that the specimen was dilute.

(b) As an employer, if the MRO informs you that a negative test was dilute, take the following action:

(1) If the MRO directs you to conduct a recollection under direct observation (*i.e.*, because the creatinine concentration of the specimen was equal to or greater than 2mg/dL, but less than or equal to 5 mg/dL (*see* §40.155(c)), you must do so immediately.

(2) Otherwise (*i.e.*, if the creatinine concentration of the dilute specimen is greater than 5 mg/dL), you may, but are not required to, direct the employee to take another test immediately.

(i) Such recollections must not be collected under direct observation, unless there is another basis for use of direct observation (see §40.67 (b) and (c)).

(ii) You must treat all employees the same for this purpose. For example, you must not retest some employees and not others. You may, however, establish different policies for different types of tests (*e.g.*, conduct retests in pre-employment situations, but not in random test situations). You must inform your employees in advance of your decisions on these matters.

(c) The following provisions apply to all tests you direct an employee to take under paragraph (b) of this section:

(1) You must ensure that the employee is given the minimum possible advance notice that he or she must go to the collection site;

(2) You must treat the result of the test you directed the employee to take under paragraph (b) of this section—and not a prior test—as the test result of record, on which you rely for purposes of this part;

(3) If the result of the test you directed the employee to take under paragraph (b)(1) of this section is also negative and dilute, you are not permitted to make the employee take an additional test because the result was dilute.

(4) If the result of the test you directed the employee to take under paragraph (b)(2) of this section is also negative and dilute, you are not permitted to make the employee take an additional test because the result was dilute. Provided, however, that if the MRO directs you to conduct a recollection under direct observation under paragraph (b)(1) of this section, you must immediately do so.

(5) If the employee declines to take a test you directed him or her to take under paragraph (b) of this section, the employee has refused the test for purposes of this part and DOT agency regulations.

[68 FR 31626, May 28, 2003, as amended at 69 FR 64867, Nov. 9, 2004; 73 FR 35974, June 25, 2008]

§ 40.199 What problems always cause a drug test to be cancelled?

(a) As the MRO, when the laboratory discovers a ''fatal flaw'' during its processing of incoming specimens (see §40.83), the laboratory will report to you that the specimen has been ''Rejected for Testing'' (with the reason stated). You must always cancel such a test.

(b) The following are ''fatal flaws'':

(1) There is no CCF;

(2) In cases where a specimen has been collected, there is no specimen submitted with the CCF;

(3) There is no printed collector's name and no collector's signature;

(4) Two separate collections are performed using one CCF;

(5) The specimen ID numbers on the specimen bottle and the CCF do not match;

(6) The specimen bottle seal is broken or shows evidence of tampering (and a split specimen cannot be re-designated, see §40.83(h)); or

(7) Because of leakage or other causes, there is an insufficient amount of specimen in the primary specimen bottle for analysis and the specimens cannot be re-designated (*see* §40.83(h)).

(8) For an oral fluid collection, the collector used an expired device at the time of collection.

(9) For an oral fluid collection, the collector failed to enter the expiration date in Step 4 of the CCF and the laboratory confirmed that the device was expired.

(c) You must report the result as provided in § 40.161.

[65 FR 79526, Dec. 19, 2000, as amended at 82 FR 52245, Nov. 13, 2017; 88 FR 27648, May 2, 2023]

§ 40.201 What problems always cause a drug test to be cancelled and may result in a requirement for another collection?

As the MRO, you must cancel a drug test when a laboratory reports that any of the following problems have occurred. You must inform the DER that the test was cancelled. You must also direct the DER to ensure that an additional collection occurs immediately, if required by the applicable procedures specified in paragraphs (a) through (e) of this section.

(a) The laboratory reports an ''Invalid Result.'' You must follow applicable procedures in § 40.159 (recollection under direct observation may be required).

(b) The laboratory reports the result as ''Rejected for Testing.'' You must follow applicable procedures in § 40.161 (a recollection may be required).

(c) The laboratory reports that the split specimen failed to reconfirm all of the primary specimen results because the drug(s)/drug metabolite(s) were not detected; adulteration criteria were not met; and/or substitution criteria were not met. You must follow the applicable procedures in § 40.187(b)—no recollection is required in this case, unless the split specimen creatinine concentration for a substituted primary specimen was greater than or equal to 2mg/dL but less than or equal to 5mg/ dL, or the primary specimen had an invalid result which was not reported to the DER. Both these cases require recollection under direct observation.

(d) The laboratory reports that the split specimen failed to reconfirm all of the primary specimen results, and that the split specimen was invalid. You must follow the procedures in § 40.187(c)(1)—recollection under direct observation is required in this case.

(e) The laboratory reports that the split specimen failed to reconfirm all of the primary specimen results because the split specimen was not available for testing or there was no split laboratory available to test the specimen. You must follow the applicable procedures in § 40.187(e)—recollection under direct observation is required in this case.

(f) The examining physician has determined that there is an acceptable medical explanation of the employee's failure to provide a sufficient amount of specimen. You must follow applicable procedures in § 40.193(d)(1) (no recollection is required in this case).

[65 FR 79526, Dec. 19, 2000, as amended at 73 FR 35974, June 25, 2008; 88 FR 27648, May 2, 2023]

§ 40.203 What problems cause a drug test to be cancelled unless they are corrected?

(a) As the MRO, when a laboratory discovers a ''correctable flaw'' during its processing of incoming specimens (see § 40.83), the laboratory will attempt to correct it. If the laboratory is unsuccessful in this attempt, it will report to you that the specimen has been ''Rejected for Testing'' (with the reason stated).

(b) The following is a ''correctable flaw'' that laboratories must attempt to correct: The collector's signature is omitted on the certification statement on the CCF.

(c) As the MRO, when you discover a ''correctable flaw'' during your review of the CCF, you must cancel the test unless the flaw is corrected.

(d) The following are correctable flaws that you must attempt to correct:

(1) The employee's signature is omitted from the certification statement, unless the employee's failure or refusal to sign is noted on the ''Remarks'' line of the CCF.

(2) The certifying scientist's signature is omitted on Copy 1 of the CCF for a positive, adulterated, substituted, or invalid test result.

(3) The collector uses a non-Federal form or an expired CCF for the test.

This flaw may be corrected through the procedure set forth in § 40.205(b)(2), provided that the collection testing process has been conducted in accordance with the procedures in this part in an HHS-certified laboratory.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41954, Aug. 9, 2001; 75 FR 59108, Sept. 27, 2010; 76 FR 59578, Sept. 27, 2011; 82 FR 52246, Nov. 13, 2017]

§ 40.205 How are drug test problems corrected?

(a) As a collector, you have the responsibility of trying to successfully complete a collection procedure for each employee.

(1) If, during or shortly after the collection process, you become aware of any event that prevents the completion of a valid test or collection (*e.g.,* a procedural or paperwork error), you must try to correct the problem promptly, if doing so is practicable. You may conduct another collection as part of this effort.

(2) If another collection is necessary, you must begin the new collection procedure as soon as possible, using a new CCF and a new collection kit.

(b) If, as a collector, laboratory, MRO, employer, or other person implementing these drug testing regulations, you become aware of a problem that can be corrected (see § 40.203), but which has not already been corrected under paragraph (a) of this section, you must take all practicable action to correct the problem so that the test is not cancelled.

(1) If the problem resulted from the omission of required information, you must, as the person responsible for providing that information, supply in writing the missing information and a statement that it is true and accurate. For example, suppose you are a collector, and you forgot to make a notation on the ''Remarks'' line of the CCF that the employee did not sign the certification. You would, when the problem is called to your attention, supply a signed statement that the employee failed or refused to sign the certification and that your statement is true and accurate. You must supply this information on the same business day on which you are notified of the problem, transmitting it by fax or courier.

(2) If the problem is the use of a non-Federal form or an expired Federal form, you must provide a signed statement (i.e., a memorandum for the record). It must state that the incorrect form contains all the information needed for a valid DOT drug test, and that the incorrect form was used inadvertently or as the only means of conducting a test, in circumstances beyond your control. The statement must also list the steps you have taken to prevent future use of non-Federal forms or expired Federal forms for DOT tests. For this flaw to be corrected, the test of the specimen must have occurred at a HHS-certified laboratory where it was tested consistent with the requirements of this part. You must supply this information on the same business day on which you are notified of the problem, transmitting it by fax or courier.

(3) You must maintain the written documentation of a correction with the CCF.

(4) You must mark the CCF in such a way (*e.g.*, stamp noting correction) as to make it obvious on the face of the CCF that you corrected the flaw.

(c) If the correction does not take place, as the MRO you must cancel the test.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41954, Aug. 9, 2001]

§ 40.207 What is the effect of a cancelled drug test?

(a) A cancelled drug test is neither positive nor negative.

(1) As an employer, you must not attach to a cancelled test the consequences of a positive test or other violation of a DOT drug testing regulation (*e.g.*, removal from a safety-sensitive position).

(2) As an employer, you must not use a cancelled test for the purposes of a negative test to authorize the employee to perform safety-sensitive functions (*i.e.*, in the case of a pre-employment, return-to-duty, or follow-up test).

(3) However, as an employer, you must not direct a recollection for an employee because a test has been cancelled, except in the situations cited in paragraph (a)(2) of this section or other

provisions of this part that require another test to be conducted (*e.g.*, §§ 40.159(a)(5) and 40.187(b)(2), (c)(1), and (e).

(b) A cancelled test does not count toward compliance with DOT requirements (*e.g.*, being applied toward the number of tests needed to meet the employer's minimum random testing rate).

(c) A cancelled DOT test does not provide a valid basis for an employer to conduct a non-DOT test (*i.e.*, a test under company authority).

(d) If a test is cancelled for a correctible flaw (*i.e.*, § 40.203 or § 40.205), only the MRO who cancelled the test can reverse the cancellation and must do so within 60 days of the cancellation. After 60 days, the MRO who cancelled the test cannot reverse the cancellation without the permission of ODAPC. For example, if an MRO cancels a test because the MRO did not receive a copy of the CCF, but later receives a copy of the CCF, the MRO may reverse the decision to cancel the test within 60 days. After 60 days, the MRO must contact ODAPC for permission to reverse the cancellation. An MRO must not reverse the cancellation of a test that the laboratory has reported as rejected for testing, as described in § 40.83(g). A laboratory is not authorized to reverse a cancellation due to a fatal flaw, as described in § 40.199.

[65 FR 79526, Dec. 19, 2000, as amended at 73 FR 35975, June 25, 2008; 88 FR 27648, May 2, 2023]

§ 40.208 What problems require corrective action but do not result in the cancellation of a test?

(a) If, as a laboratory, collector, employer, or other person implementing the DOT drug testing program, you become aware that any of the following omissions listed in paragraphs (a)(1) through (3) of this section occurred, you must take corrective action, including securing a memorandum for the record explaining the problem and taking appropriate action to ensure the problem does not recur:

(1) For a urine collection, the specimen temperature on the CCF was not checked and the ''Remarks'' line did not contain an entry regarding the temperature being out of range; or

(2) For an oral fluid collection, the collector failed to check the box in Step 2 of the CCF that indicates ''Each Device was Within Expiration Date'' but the collector entered the ''Split Specimen Device Expiration Date'' in Step 4 of the CCF.

(3) For an oral fluid collection, the collector erred by entering the expiration date as the ''Primary/Single Specimen Device Expiration Date'' instead of entering the date as the ''Split Specimen Device Expiration Date'' in Step 4 of the CCF.

(b) The errors listed in paragraph (a) of this section do not result in the cancellation of the test.

(c) As an employer or service agent, the errors listed in paragraph (a) of this section, even though not sufficient to cancel a drug test result, may subject you to enforcement action under DOT agency regulations or subpart R of this part.

[88 FR 27649, May 2, 2023]

§ 40.209 What procedural problems do not result in the cancellation of a test and do not require correction?

(a) As a collector, laboratory, MRO, employer or other person administering the drug testing process, you must document any errors in the testing process of which you become aware, even if they are not considered problems that will cause a test to be cancelled as listed in this subpart. Decisions about the ultimate impact of these errors will be determined by other administrative or legal proceedings, subject to the limitations of paragraph (b) of this section.

(b) No person concerned with the testing process may declare a test cancelled based on an error that does not have a significant adverse effect on the right of the employee to have a fair and accurate test. Matters that do not result in the cancellation of a test include, but are not limited to, the following:

(1) A minor administrative mistake (*e.g.*, the omission of the employee's middle initial, a transposition of numbers in the employee's SSN or Employee ID No., the omission of the DOT Agency in Step 1–D of the CCF.)

(2) An error that does not affect employee protections under this part (*e.g.*,

the collector's failure to add bluing agent to the toilet bowl, which adversely affects only the ability of the collector to detect tampering with the specimen by the employee);

(3) The collection of a specimen by a collector who is required to have been trained (*see* § 40.33 or 40.35), but who has not met this requirement;

(4) A delay in the collection process (see § 40.61(a));

(5) Verification of a test result by an MRO who has the basic credentials to be qualified as an MRO (see § 40.121(a) through (b)) but who has not met training and/or documentation requirements (see § 40.121(c) through (e));

(6) The failure to directly observe or monitor a collection that the rule requires or permits to be directly observed or monitored, or the unauthorized use of direct observation or monitoring for a collection;

(7) The fact that a test was conducted in a facility that does not meet the requirements of § 40.42;

(8) If the specific name of the courier on the CCF is omitted or erroneous;

(9) Personal identifying information is inadvertently contained on the CCF (*e.g.*, the employee signs his or her name on Copy 1); or

(10) Claims that the employee was improperly selected for testing.

(11) The failure to use a new CCF for a second collection after an insufficient specimen was conducted under a different methodology (*e.g.*, failing to use a new CCF for an oral fluid test after an insufficient quantity of urine was produced on a urine test.)

(c) As an employer or service agent, these types of errors, even though not sufficient to cancel a drug test result, may subject you to enforcement action under DOT agency regulations or action under Subpart R of this part.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41954, Aug. 9, 2001; 75 FR 59108, Sept. 27, 2010; 88 FR 27649, May 2, 2023]

§ 40.210 What kinds of drug tests are permitted under the regulations?

Both urine and oral fluid specimens are authorized for collection and testing under this part. An employer can use one or the other, but not both at the beginning of the testing event. For example, if an employee is sent for a test, either a urine or oral fluid specimen can be collected, but not both simultaneously. However, if there is a problem in the collection that necessitates a second collection (*e.g.*, insufficient quantity of urine, temperature out of range, or insufficient saliva), then a different specimen type could be chosen by the employer (*i.e.*, through a standing order or a discussion with the collector) or its service agent (*i.e.*, if there is no standing order and the service agent cannot contact the DER) to complete the collection process for the testing event. Only urine and oral fluid specimens screened and confirmed at HHS-certified laboratories (*see* § 40.81) are allowed for drug testing under this part. Point-of-collection (POC) urine, POC oral fluid drug testing, hair testing, or instant tests are not authorized.

[88 FR 27649, May 2, 2023]

Subpart J—Alcohol Testing Personnel

§ 40.211 Who conducts DOT alcohol tests?

(a) Screening test technicians (STTs) and breath alcohol technicians (BATs) meeting their respective requirements of this subpart are the only people authorized to conduct DOT alcohol tests.

(b) An STT can conduct only alcohol screening tests, but a BAT can conduct alcohol screening and confirmation tests.

(c) As a BAT- or STT-qualified immediate supervisor of a particular employee, you may not act as the STT or BAT when that employee is tested, unless no other STT or BAT is available and DOT agency regulations do not prohibit you from doing so.

§ 40.213 What training requirements must STTs and BATs meet?

To be permitted to act as a BAT or STT in the DOT alcohol testing program, you must meet each of the requirements of this section:

(a) You must be knowledgeable about the alcohol testing procedures in this part and the current DOT guidance. Procedures and guidance are available from ODAPC (Department of Transportation, 1200 New Jersey Avenue SE., Washington, DC 20590, 202–366–3784, or

on the ODAPC Web site, *http://www.transportation.gov/odapc*). You must keep current on any changes to these materials. You must subscribe to the ODAPC list-serve at (*https://www.transportation.gov/odapc/get-odapc-email-updates*).

(b) *Qualification training.* You must receive qualification training meeting the requirements of this paragraph (b).

(1) Qualification training must be in accordance with the DOT Model BAT or STT Course, as applicable. The DOT Model Courses are available from ODAPC (Department of Transportation, 1200 New Jersey Avenue, SE., Washington DC, 20590, 202–366–3784, or on the ODAPC web site, *http://www.dot.gov/ost/dapc*). The training can also be provided using a course of instruction equivalent to the DOT Model Courses. On request, ODAPC will review BAT and STT instruction courses for equivalency.

(2) Qualification training must include training to proficiency in using the alcohol testing procedures of this part and in the operation of the particular alcohol testing device(s) (*i.e.*, the ASD(s) or EBT(s)) you will be using.

(3) The training must emphasize that you are responsible for maintaining the integrity of the testing process, ensuring the privacy of employees being tested, and avoiding conduct or statements that could be viewed as offensive or inappropriate.

(4) The instructor must be an individual who has demonstrated necessary knowledge, skills, and abilities by regularly conducting DOT alcohol tests as an STT or BAT, as applicable, for a period of at least a year, who has conducted STT or BAT training, as applicable, under this part for a year, or who has successfully completed a ''train the trainer'' course.

(c) *Initial Proficiency Demonstration.* Following your completion of qualification training under paragraph (b) of this section, you must demonstrate proficiency in alcohol testing under this part by completing seven consecutive error-free mock tests (BATs) or five consecutive error-free tests (STTs).

(1) Another person must monitor and evaluate your performance, in person or by a means that provides real-time observation and interaction between the instructor and trainee, and attest in writing that the mock collections are ''error-free.'' This person must be an individual who meets the requirements of paragraph (b)(4) of this section.

(2) These tests must use the alcohol testing devices (*e.g.*, EBT(s) or ASD(s)) that you will use as a BAT or STT.

(3) If you are an STT who will be using an ASD that indicates readings by changes, contrasts, or other readings in color, you must demonstrate as part of the mock test that you are able to discern changes, contrasts, or readings correctly.

(d) You must meet the requirements of paragraphs (b) and (c) of this section before you begin to perform STT or BAT functions.

(e) *Refresher training.* No less frequently than every five years from the date on which you satisfactorily complete the requirements of paragraphs (b) and (c) of this section, you must complete refresher training that meets all the requirements of paragraphs (b) and (c) of this section.

(f) *Error Correction Training.* If you make a mistake in the alcohol testing process that causes a test to be cancelled (*i.e.*, a fatal or uncorrected flaw), you must undergo error correction training. This training must occur within 30 days of the date you are notified of the error that led to the need for retraining.

(1) Error correction training must be provided and your proficiency documented in writing by a person who meets the requirements of paragraph (b)(4) of this section.

(2) Error correction training is required to cover only the subject matter area(s) in which the error that caused the test to be cancelled occurred.

(3) As part of the error correction training, you must demonstrate your proficiency in the alcohol testing procedures of this part by completing three consecutive error-free mock tests. The mock tests must include one uneventful scenario and two scenarios related to the area(s) in which your error(s) occurred. The person providing the training must monitor and evaluate your performance and attest in

writing that the mock tests were error-free.

(g) *Documentation.* You must maintain documentation showing that you currently meet all requirements of this section. You must provide this documentation on request to DOT agency representatives and to employers and C/TPAs who are negotiating to use your services.

(h) *Other persons who may serve as BATs or STTs.* (1) Anyone meeting the requirements of this section to be a BAT may act as an STT, provided that the individual has demonstrated initial proficiency in the operation of the ASD that he or she is using, as provided in paragraph (c) of this section.

(2) Law enforcement officers who have been certified by state or local governments to conduct breath alcohol testing are deemed to be qualified as BATs. They are not required to also complete the training requirements of this section in order to act as BATs. In order for a test conducted by such an officer to be accepted under DOT alcohol testing requirements, the officer must have been certified by a state or local government to use the EBT or ASD that was used for the test.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41954, Aug. 9, 2001; 75 FR 5244, Feb. 2, 2010; 82 FR 52246, Nov. 13, 2017]

§ 40.215 What information about the DER do employers have to provide to BATs and STTs?

As an employer, you must provide to the STTs and BATs the name and telephone number of the appropriate DER (and C/TPA, where applicable) to contact about any problems or issues that may arise during the testing process.

§ 40.217 Where is other information on the role of STTs and BATs found in this regulation?

You can find other information on the role and functions of STTs and BATs in the following sections of this part:

§ 40.3—Definitions.
§ 40.223—Responsibility for supervising employees being tested.
§§ 40.225–40.227—Use of the alcohol testing form.
§§ 40.241–40.245—Screening test procedures with ASDs and EBTs.
§§ 40.251–40.255—Confirmation test procedures.
§ 40.261—Refusals to test.
§§ 40.263–40.265—Insufficient saliva or breath.
§ 40.267—Problems requiring cancellation of tests.
§§ 40.269–40.271—Correcting problems in tests.

Subpart K—Testing Sites, Forms, Equipment and Supplies Used in Alcohol Testing

§ 40.221 Where does an alcohol test take place?

(a) A DOT alcohol test must take place at an alcohol testing site meeting the requirements of this section.

(b) If you are operating an alcohol testing site, you must ensure that it meets the security requirements of § 40.223.

(c) If you are operating an alcohol testing site, you must ensure that it provides visual and aural privacy to the employee being tested, sufficient to prevent unauthorized persons from seeing or hearing test results.

(d) If you are operating an alcohol testing site, you must ensure that it has all needed personnel, materials, equipment, and facilities to provide for the collection and analysis of breath and/or saliva samples, and a suitable clean surface for writing.

(e) If an alcohol testing site fully meeting all the visual and aural privacy requirements of paragraph (c) is not readily available, this part allows a reasonable suspicion or post-accident test to be conducted at a site that partially meets these requirements. In this case, the site must afford visual and aural privacy to the employee to the greatest extent practicable.

(f) An alcohol testing site can be in a medical facility, a mobile facility (*e.g.*, a van), a dedicated collection facility, or any other location meeting the requirements of this section.

§ 40.223 What steps must be taken to protect the security of alcohol testing sites?

(a) If you are a BAT, STT, or other person operating an alcohol testing site, you must prevent unauthorized personnel from entering the testing site.

(1) The only people you are to treat as authorized persons are employees

being tested, BATs, STTs, and other alcohol testing site workers, DERs, employee representatives authorized by the employer (*e.g.*, on the basis of employer policy or labor-management agreement), and DOT agency representatives.

(2) You must ensure that all persons are under the supervision of a BAT or STT at all times when permitted into the site.

(3) You may remove any person who obstructs, interferes with, or causes unnecessary delay in the testing process.

(b) As the BAT or STT, you must not allow any person other than you, the employee, or a DOT agency representative to actually witness the testing process (see §§ 40.241–40.255).

(c) If you are operating an alcohol testing site, you must ensure that when an EBT or ASD is not being used for testing, you store it in a secure place.

(d) If you are operating an alcohol testing site, you must ensure that no one other than BATs or other employees of the site have access to the site when an EBT is unsecured.

(e) As a BAT or STT, to avoid distraction that could compromise security, you are limited to conducting an alcohol test for only one employee at a time.

(1) When an EBT screening test on an employee indicates an alcohol concentration of 0.02 or higher, and the same EBT will be used for the confirmation test, you are not allowed to use the EBT for a test on another employee before completing the confirmation test on the first employee.

(2) As a BAT who will conduct both the screening and the confirmation test, you are to complete the entire screening and confirmation process on one employee before starting the screening process on another employee.

(3) You are not allowed to leave the alcohol testing site while the testing process for a given employee is in progress, except to notify a supervisor or contact a DER for assistance in the case an employee or other person who obstructs, interferes with, or unnecessarily delays the testing process.

§ 40.225 What form is used for an alcohol test?

(a) The DOT Alcohol Testing Form (ATF) must be used for every DOT alcohol test. The ATF must be a three-part carbonless manifold form. The ATF is found in appendix I to this part. You may view this form on the ODAPC web site (*http://www.transportation.gov/odapc*).

(b) As an employer in the DOT alcohol testing program, you are not permitted to modify or revise the ATF except as follows:

(1) You may include other information needed for billing purposes, outside the boundaries of the form.

(2) You may use a ATF directly generated by an EBT which omits the space for affixing a separate printed result to the ATF, provided the EBT prints the result directly on the ATF.

(3) You may use an ATF that has the employer's name, address, and telephone number preprinted. In addition, a C/TPA's name, address, and telephone number may be included, to assist with negative results.

(4) You may use an ATF in which all pages are printed on white paper. You may modify the ATF by using colored paper, or have clearly discernable borders or designation statements on Copy 2 and Copy 3. When colors are used, they must be green for Copy 2 and blue for Copy 3.

(5) As a BAT or STT, you may add, on the ''Remarks'' line of the ATF, the name of the DOT agency under whose authority the test occurred.

(6) As a BAT or STT, you may use a ATF that has your name, address, and telephone number preprinted, but under no circumstances can your signature be preprinted.

(c) As an employer, you may use an equivalent foreign-language version of the ATF approved by ODAPC. You may use such a non-English language form only in a situation where both the employee and BAT/STT understand and can use the form in that language.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41954, Aug. 9, 2001; 75 FR 8529, Feb. 25, 2010; 75 FR 13009, Mar. 18, 2010; 82 FR 52246, Nov. 13, 2017; 88 FR 27649, May 2, 2023]

§ 40.227 May employers use the ATF for non-DOT tests, or non-DOT forms for DOT tests?

(a) No, as an employer, BAT, or STT, you are prohibited from using the ATF for non-DOT alcohol tests. You are also prohibited from using non-DOT forms for DOT alcohol tests. Doing either subjects you to enforcement action under DOT agency regulations.

(b) If the STT or BAT, either by mistake, or as the only means to conduct a test under difficult circumstances (*e.g.*, post-accident test with insufficient time to obtain the ATF), uses a non-DOT form for a DOT test, the use of a non-DOT form does not, in and of itself, require the employer or service agent to cancel the test. However, in order for the test to be considered valid, a signed statement must be obtained from the STT or BAT in accordance with § 40.271(b) .

§ 40.229 What devices are used to conduct alcohol screening tests?

ASDs listed on ODAPC's Web page for ''Approved Screening Devices to Measure Alcohol in Bodily Fluids'' and EBTs listed on ODAPC's Web page for ''Approved Evidential Breath Measurement Devices'' are the only devices you are allowed to use to conduct alcohol screening tests under this part. You may use an ASD for DOT alcohol tests only if there are instructions for its use in this part. An ASD can be used only for screening tests for alcohol, and must not be used for confirmation tests.

[82 FR 52246, Nov. 13, 2017]

§ 40.231 What devices are used to conduct alcohol confirmation tests?

(a) EBTs on ODAPC's Web page for ''Approved Evidential Breath Measurement Devices'' that meet the requirements of paragraph (b) of this section are the only devices you may use to conduct alcohol confirmation tests under this part.

(b) To conduct a confirmation test, you must use an EBT that has the following capabilities:

(1) Provides a printed triplicate result (or three consecutive identical copies of a result) of each breath test;

(2) Assigns a unique number to each completed test, which the BAT and employee can read before each test and which is printed on each copy of the result;

(3) Prints, on each copy of the result, the manufacturer's name for the device, its serial number, and the time of the test;

(4) Distinguishes alcohol from acetone at the 0.02 alcohol concentration level;

(5) Tests an air blank; and

(6) Performs an external calibration check.

[65 FR 79526, Dec. 19, 2000, as amended at 82 FR 52246, Nov. 13, 2017]

§ 40.233 What are the requirements for proper use and care of EBTs?

(a) As an EBT manufacturer, you must submit, for NHTSA approval, a quality assurance plan (QAP) for your EBT before ODAPC places the EBT on its Web page for ''Approved Evidential Breath Measurement Devices.''

(1) Your QAP must specify the methods used to perform external calibration checks on the EBT, the tolerances within which the EBT is regarded as being in proper calibration, and the intervals at which these checks must be performed. In designating these intervals, your QAP must take into account factors like frequency of use, environmental conditions (*e.g.*, temperature, humidity, altitude) and type of operation (*e.g.*, stationary or mobile).

(2) Your QAP must also specify the inspection, maintenance, and calibration requirements and intervals for the EBT.

(b) As the manufacturer, you must include, with each EBT, instructions for its use and care consistent with the QAP.

(c) As the user of the EBT (*e.g.*, employer, service agent), you must do the following:

(1) You must follow the manufacturer's instructions (see paragraph (b) of this section), including performance of external calibration checks at the intervals the instructions specify.

(2) In conducting external calibration checks, you must use only calibration devices appearing on NHTSA's CPL for ''Calibrating Units for Breath Alcohol Tests.''

(3) If an EBT fails an external check of calibration, you must take the EBT

out of service. You may not use the EBT again for DOT alcohol testing until it is repaired and passes an external calibration check.

(4) You must maintain records of the inspection, maintenance, and calibration of EBTs as provided in § 40.333(a)(3).

(5) You must ensure that inspection, maintenance, and calibration of the EBT are performed by its manufacturer or a maintenance representative certified either by the manufacturer or by a state health agency or other appropriate state agency.

[65 FR 79526, Dec. 19, 2000, as amended at 82 FR 52246, Nov. 13, 2017]

§ 40.235 What are the requirements for proper use and care of ASDs?

(a) As an ASD manufacturer, you must submit, for NHTSA approval, a QAP for your ASD before NHTSA approves it and ODAPC places the device on its Web page for ''Approved Screening Devices to Measure Alcohol in Bodily Fluids''. Your QAP must specify the methods used for quality control checks, temperatures at which the ASD must be stored and used, the shelf life of the device, and environmental conditions (*e.g.*, temperature, altitude, humidity) that may affect the ASD's performance.

(b) As a manufacturer, you must include with each ASD instructions for its use and care consistent with the QAP. The instructions must include directions on the proper use of the ASD, and, where applicable the time within which the device must be read, and the manner in which the reading is made.

(c) As the user of the ADS (*e.g.*, employer, STT), you must follow the QAP instructions.

(d) You are not permitted to use an ASD that does not pass the specified quality control checks or that has passed its expiration date.

(e) As an employer, with respect to breath ASDs, you must also follow the device use and care requirements of § 40.233 .

[65 FR 79526, Dec. 19, 2000, as amended at 82 FR 52246, Nov. 13, 2017]

Subpart L—Alcohol Screening Tests

§ 40.241 What are the first steps in any alcohol screening test?

As the BAT or STT you will take the following steps to begin all alcohol screening tests, regardless of the type of testing device you are using:

(a) When a specific time for an employee's test has been scheduled, or the collection site is at the employee's worksite, and the employee does not appear at the collection site at the scheduled time, contact the DER to determine the appropriate interval within which the DER has determined the employee is authorized to arrive. If the employee's arrival is delayed beyond that time, you must notify the DER that the employee has not reported for testing. In a situation where a C/TPA has notified an owner/operator or other individual employee to report for testing and the employee does not appear, the C/TPA must notify the employee that he or she has refused to test.

(b) Ensure that, when the employee enters the alcohol testing site, you begin the alcohol testing process without undue delay. For example, you must not wait because the employee says he or she is not ready or because an authorized employer or employee representative is delayed in arriving.

(1) If the employee is also going to take a DOT drug test, you must, to the greatest extent practicable, ensure that the alcohol test is completed before the urine collection process begins.

(2) If the employee needs medical attention (*e.g.*, an injured employee in an emergency medical facility who is required to have a post-accident test), do not delay this treatment to conduct a test.

(c) Require the employee to provide positive identification. You must see a photo ID issued by the employer (other than in the case of an owner-operator or other self-employer individual) or a Federal, state, or local government (*e.g.*, a driver's license). You may not accept faxes or photocopies of identification. Positive identification by an employer representative (not a coworker or another employee being tested) is also acceptable. If the employee

cannot produce positive identification, you must contact a DER to verify the identity of the employee.

(d) If the employee asks, provide your identification to the employee. Your identification must include your name and your employer's name but is not required to include your picture, address, or telephone number.

(e) Explain the testing procedure to the employee, including showing the employee the instructions on the back of the ATF.

(f) Complete Step 1 of the ATF.

(g) Direct the employee to complete Step 2 on the ATF and sign the certification. If the employee refuses to sign this certification, you must document this refusal on the ''Remarks'' line of the ATF and immediately notify the DER. This is a refusal to test.

§ 40.243 What is the procedure for an alcohol screening test using an EBT or non-evidential breath ASD?

As the BAT or STT, you must take the following steps:

(a) Select, or allow the employee to select, an individually wrapped or sealed mouthpiece from the testing materials.

(b) Open the individually wrapped or sealed mouthpiece in view of the employee and insert it into the device in accordance with the manufacturer's instructions.

(c) Instruct the employee to blow steadily and forcefully into the mouthpiece for at least six seconds or until the device indicates that an adequate amount of breath has been obtained.

(d) Show the employee the displayed test result.

(e) If the device is one that prints the test number, testing device name and serial number, time, and result directly onto the ATF, you must check to ensure that the information has been printed correctly onto the ATF.

(f) If the device is one that prints the test number, testing device name and serial number, time and result, but on a separate printout rather than directly onto the ATF, you must affix the printout of the information to the designated space on the ATF with tamper-evident tape or use a self-adhesive label that is tamper-evident.

(g) If the device is one that does not print the test number, testing device name and serial number, time, and result, or it is a device not being used with a printer, you must record this information in Step 3 of the ATF.

§ 40.245 What is the procedure for an alcohol screening test using a saliva ASD or a breath tube ASD?

(a) As the STT or BAT, you must take the following steps when using the saliva ASD:

(1) Check the expiration date on the device or on the package containing the device and show it to the employee. You may not use the device after its expiration date.

(2) Open an individually wrapped or sealed package containing the device in the presence of the employee.

(3) Offer the employee the opportunity to use the device. If the employee uses it, you must instruct the employee to insert it into his or her mouth and use it in a manner described by the device's manufacturer.

(4) If the employee chooses not to use the device, or in all cases in which a new test is necessary because the device did not activate (see paragraph (a)(7) of this section), you must insert the device into the employee's mouth and gather saliva in the manner described by the device's manufacturer. You must wear single-use examination or similar gloves while doing so and change them following each test.

(5) When the device is removed from the employee's mouth, you must follow the manufacturer's instructions regarding necessary next steps in ensuring that the device has activated.

(6)(i) If you were unable to successfully follow the procedures of paragraphs (a)(3) through (a)(5) of this section (*e.g.*, the device breaks, you drop the device on the floor), you must discard the device and conduct a new test using a new device.

(ii) The new device you use must be one that has been under your control or that of the employee before the test.

(iii) You must note on the ''Remarks'' line of the ATF the reason for the new test. (Note: You may continue using the same ATF with which you began the test.)

(iv) You must offer the employee the choice of using the device or having you use it unless the employee, in the opinion of the STT or BAT, was responsible (*e.g.*, the employee dropped the device) for the new test needing to be conducted.

(v) If you are unable to successfully follow the procedures of paragraphs (a)(3) through (a)(5) of this section on the new test, you must end the collection and put an explanation on the ''Remarks'' line of the ATF.

(vi) You must then direct the employee to take a new test immediately, using an EBT for the screening test.

(7) If you are able to successfully follow the procedures of paragraphs (a)(3)–(a)(5) of this section, but the device does not activate, you must discard the device and conduct a new test, in the same manner as provided in paragraph (a)(6) of this section. In this case, you must place the device into the employee's mouth to collect saliva for the new test.

(8) You must read the result displayed on the device no sooner than the device's manufacturer instructs. In all cases the result displayed must be read within 15 minutes of the test. You must then show the device and it's reading to the employee and enter the result on the ATF.

(9) You must never re-use devices, swabs, gloves or other materials used in saliva testing.

(10) You must note the fact that you used a saliva ASD in Step 3 of the ATF.

(b) As the STT or BAT, you must take the following steps when using the breath tube ASD:

(1) Check the expiration date on the detector device and the electronic analyzer or on the package containing the device and the analyzer and show it to the employee. You must not use the device or the analyzer after their expiration date. You must not use an analyzer which is not specifically pre-calibrated for the device being used in the collection.

(2) Remove the device from the package and secure an inflation bag onto the appropriate end of the device, as directed by the manufacturer on the device's instructions.

(3) Break the tube's ampoule in the presence of the employee.

(4) Offer the employee the opportunity to use the device. If the employee chooses to use (*e.g.* hold) the device, instruct the employee to blow forcefully and steadily into the blowing end of device until the inflation bag fills with air (approximately 12 seconds).

(5) If the employee chooses not to hold the device, you must hold it and provide the use instructions in paragraph (b)(4) of this section.

(6) When the employee completes the breath process, take the device from the employee (or if you were holding it, remove it from the employee's mouth), remove the inflation bag, and prepare the device to be read by the analyzer in accordance with the manufacturer's directions.

(7)(i) If you were unable to successfully follow the procedures of paragraphs (b)(4) through (b)(6) of this section (*e.g.*, the device breaks apart, the employee did not fill the inflation bag), you must discard the device and conduct a new test using a new one.

(ii) The new device you use must be one that has been under your control or that of the employer before the test.

(iii) You must note on the ''Remarks'' line of the ATF the reason for the new test. (Note: You may continue using the same ATF with which you began the test.)

(iv) You must offer the employee the choice of holding the device or having you hold it unless the employee, in the your opinion, was responsible (*e.g.*, the employee failed to fill the inflation bag) for the new test needing to be conducted.

(v) If you are unable to successfully follow the procedures of paragraphs (b)(4) through (b)(6) of this section on the new test, you must end the collection and put an explanation on the ''Remarks'' line of the ATF.

(vi) You must then direct the employee to take a new test immediately, using another type of ASD (*e.g.*, saliva device) or an EBT.

(8) If you were able to successfully follow the procedures of paragraphs (b)(4) through (b)(6) of this section and after having waited the required amount of time directed by the manufacturer for the detector device to incubate, you must place the device in

the analyzer in accordance with the manufacturer's directions. The result must be read from the analyzer no earlier then the required incubation time of the device. In all cases, the result must be read within 15 minutes of the test.

(9) You must follow the manufacturer's instructions for determining the result of the test. You must show the analyzer result to the employee and record the result on Step 3 of the ATF.

(10) You must never re-use detector devices or any gloves used in breath tube testing. The inflation bag must be voided of air following removal from a device. Inflation bags and electronic analyzers may be re-used but only in accordance with the manufacturer's directions.

(11) You must note the fact that you used a breath tube device in Step 3 of the ATF.

[67 FR 61522, Oct. 1, 2002, as amended at 72 FR 1299, Jan. 11, 2007]

§ 40.247 What procedures does the BAT or STT follow after a screening test result?

(a) If the test result is an alcohol concentration of less than 0.02, as the BAT or STT, you must do the following:

(1) Sign and date Step 3 of the ATF; and

(2) Transmit the result to the DER in a confidential manner, as provided in § 40.255 .

(b) If the test result is an alcohol concentration of 0.02 or higher, as the BAT or STT, you must direct the employee to take a confirmation test.

(1) If you are the BAT who will conduct the confirmation test, you must then conduct the test using the procedures beginning at § 40.251 .

(2) If you are not the BAT who will conduct the confirmation test, direct the employee to take a confirmation test, sign and date Step 3 of the ATF, and give the employee Copy 2 of the ATF.

(3) If the confirmation test will be performed at a different site from the screening test, you must take the following additional steps:

(i) Advise the employee not to eat, drink, put anything (*e.g.*, cigarette, chewing gum) into his or her mouth, or belch;

(ii) Tell the employee the reason for the waiting period required by § 40.251(a) (*i.e.*, to prevent an accumulation of mouth alcohol from leading to an artificially high reading);

(iii) Explain that following your instructions concerning the waiting period is to the employee's benefit;

(iv) Explain that the confirmation test will be conducted at the end of the waiting period, even if the instructions have not been followed;

(v) Note on the ''Remarks'' line of the ATF that the waiting period instructions were provided;

(vi) Instruct the person accompanying the employee to carry a copy of the ATF to the BAT who will perform the confirmation test; and

(vii) Ensure that you or another BAT, STT, or employer representative observe the employee as he or she is transported to the confirmation testing site. You must direct the employee not to attempt to drive a motor vehicle to the confirmation testing site.

(c) If the screening test is invalid, you must, as the BAT or STT, tell the employee the test is cancelled and note the problem on the ''Remarks'' line of the ATF. If practicable, repeat the testing process (see § 40.271).

Subpart M—Alcohol Confirmation Tests

§ 40.251 What are the first steps in an alcohol confirmation test?

As the BAT for an alcohol confirmation test, you must follow these steps to begin the confirmation test process:

(a) You must carry out a requirement for a waiting period before the confirmation test, by taking the following steps:

(1) You must ensure that the waiting period lasts at least 15 minutes, starting with the completion of the screening test. After the waiting period has elapsed, you should begin the confirmation test as soon as possible, but not more than 30 minutes after the completion of the screening test.

(i) If the confirmation test is taking place at a different location from the screening test (see § 40.247(b)(3)) the

time of transit between sites counts toward the waiting period if the STT or BAT who conducted the screening test provided the waiting period instructions.

(ii) If you cannot verify, through review of the ATF, that waiting period instructions were provided, then you must carry out the waiting period requirement.

(iii) You or another BAT or STT, or an employer representative, must observe the employee during the waiting period.

(2) Concerning the waiting period, you must tell the employee:

(i) Not to eat, drink, put anything (*e.g.*, cigarette, chewing gum) into his or her mouth, or belch;

(ii) The reason for the waiting period (*i.e.*, to prevent an accumulation of mouth alcohol from leading to an artificially high reading);

(iii) That following your instructions concerning the waiting period is to the employee's benefit; and

(iv) That the confirmation test will be conducted at the end of the waiting period, even if the instructions have not been followed.

(3) If you become aware that the employee has not followed the instructions, you must note this on the ''Remarks'' line of the ATF.

(b) If you did not conduct the screening test for the employee, you must require positive identification of the employee, explain the confirmation procedures, and use a new ATF. You must note on the ''Remarks'' line of the ATF that a different BAT or STT conducted the screening test.

(c) Complete Step 1 of the ATF.

(d) Direct the employee to complete Step 2 on the ATF and sign the certification. If the employee refuses to sign this certification, you must document this refusal on the ''Remarks'' line of the ATF and immediately notify the DER. This is a refusal to test.

(e) Even if more than 30 minutes have passed since the screening test result was obtained, you must begin the confirmation test procedures in §40.253, not another screening test.

(f) You must note on the ''Remarks'' line of the ATF the time that elapsed between the two events, and if the confirmation test could not begin within 30 minutes of the screening test, the reason why.

(g) Beginning the confirmation test procedures after the 30 minutes have elapsed does not invalidate the screening or confirmation tests, but it may constitute a regulatory violation subject to DOT agency sanction.

§ 40.253 What are the procedures for conducting an alcohol confirmation test?

As the BAT conducting an alcohol confirmation test, you must follow these steps in order to complete the confirmation test process:

(a) In the presence of the employee, you must conduct an air blank on the EBT you are using before beginning the confirmation test and show the reading to the employee.

(1) If the reading is 0.00, the test may proceed. If the reading is greater than 0.00, you must conduct another air blank.

(2) If the reading on the second air blank is 0.00, the test may proceed. If the reading is greater than 0.00, you must take the EBT out of service.

(3) If you take an EBT out of service for this reason, no one may use it for testing until the EBT is found to be within tolerance limits on an external check of calibration.

(4) You must proceed with the test of the employee using another EBT, if one is available.

(b) You must open a new individually wrapped or sealed mouthpiece in view of the employee and insert it into the device in accordance with the manufacturer's instructions.

(c) You must ensure that you and the employee read the unique test number displayed on the EBT.

(d) You must instruct the employee to blow steadily and forcefully into the mouthpiece for at least six seconds or until the device indicates that an adequate amount of breath has been obtained.

(e) You must show the employee the result displayed on the EBT.

(f) You must show the employee the result and unique test number that the EBT prints out either directly onto the ATF or onto a separate printout.

(g) If the EBT provides a separate printout of the result, you must attach

the printout to the designated space on the ATF with tamper-evident tape, or use a self-adhesive label that is tamper-evident.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41954, Aug. 9, 2001]

§ 40.255 What happens next after the alcohol confirmation test result?

(a) After the EBT has printed the result of an alcohol confirmation test, you must, as the BAT, take the following additional steps:

(1) Sign and date Step 3 of the ATF.

(2) If the alcohol confirmation test result is lower than 0.02, nothing further is required of the employee. As the BAT, you must sign and date Step 3 of the ATF.

(3) If the alcohol confirmation test result is 0.02 or higher, direct the employee to sign and date Step 4 of the ATF. If the employee does not do so, you must note this on the ''Remarks'' line of the ATF. However, this is not considered a refusal to test.

(4) If the test is invalid, tell the employee the test is cancelled and note the problem on the ''Remarks'' line of the ATF. If practicable, conduct a retest. (see § 40.271).

(5) Immediately transmit the result directly to the DER in a confidential manner.

(i) You may transmit the results using Copy 1 of the ATF, in person, by telephone, or by electronic means. In any case, you must immediately notify the DER of any result of 0.02 or greater by any means (*e.g.*, telephone or secure fax machine) that ensures the result is immediately received by the DER. You must not transmit these results through C/TPAs or other service agents.

(ii) If you do not make the initial transmission in writing, you must follow up the initial transmission with Copy 1 of the ATF.

(b) As an employer, you must take the following steps with respect to the receipt and storage of alcohol test result information:

(1) If you receive any test results that are not in writing (*e.g.*, by telephone or electronic means), you must establish a mechanism to establish the identity of the BAT sending you the results.

(2) You must store all test result information in a way that protects confidentiality.

Subpart N—Problems in Alcohol Testing

§ 40.261 What is a refusal to take an alcohol test, and what are the consequences?

(a) As an employee, you are considered to have refused to take an alcohol test if you:

(1) Fail to appear for any test (except a pre-employment test) within a reasonable time, as determined by the employer, consistent with applicable DOT agency regulations, after being directed to do so by the employer. This includes the failure of an employee (including an owner-operator) to appear for a test when called by a C/TPA (see § 40.241(a));

(2) Fail to remain at the testing site until the testing process is complete. Provided that an employee who leaves the collection site before the testing process commences (*see* § 40.243(a)) for a pre-employment test is not deemed to have refused to test. The BAT or STT is not required to inform an employee that the failure to remain at the collection site is a refusal. If an employee leaves prior to the completion of the testing process, per § 40.355(i) the employer must decide whether the employee's actions constitute a refusal;

(3) Fail to provide an adequate amount of saliva or breath for any alcohol test required by this part or DOT agency regulations; *Provided* that an employee who does not provide an adequate amount of breath or saliva because he or she has left the testing site before the testing process commences (*see* § 40.243(a)) for a pre-employment test is not deemed to have refused to test. The BAT or STT is not required to inform an employee that the failure to remain at the collection site is a refusal. If an employee leaves prior to the completion of the testing process, per § 40.355(i) the employer must decide whether the employee's actions constitute a refusal;

(4) Fail to provide a sufficient breath specimen, and the physician has determined, through a required medical evaluation, that there was no adequate

medical explanation for the failure (see § 40.265(c));

(5) Fail to undergo a medical examination or evaluation, as directed by the employer as part of the insufficient breath procedures outlined at § 40.265(c);

(6) Fail to sign the certification at Step 2 of the ATF (see §§ 40.241(g) and 40.251(d)); or

(7) Fail to cooperate with any part of the testing process.

(b) As an employee, if you refuse to take an alcohol test, you incur the same consequences specified under DOT agency regulations for a violation of those DOT agency regulations. The consequences specified under DOT agency regulations for a refusal cannot be overturned or set aside by an arbitration, grievance, State court or other non-Federal forum that adjudicates the personnel decisions the employer has taken against the employee.

(c)(1) As a BAT or an STT, or as the physician evaluating a ''shy lung'' situation, when an employee refuses to test as provided in paragraph (a) of this section, you must terminate the portion of the testing process in which you are involved, document the refusal on the ATF (or in a separate document which you cause to be attached to the form), immediately notify the DER by any means (*e.g.*, telephone or secure fax machine) that ensures the refusal notification is immediately received. You must make this notification directly to the DER (not using a C/TPA as an intermediary).

(2) As the BAT or STT, you must note the actions that may constitute a refusal in the ''Remarks'' line (Step 3), and sign and date the ATF. The BAT or STT does not make the final decision about whether the employee's conduct constitutes a refusal to test; the employer has the sole responsibility to decide whether a refusal occurred, as stated in § 40.355(i), the employer has a non-delegable duty to make the decision about whether the employee has refused to test.

(d) As an employee, when you refuse to take a non-DOT test or to sign a non-DOT form, you have not refused to take a DOT test. There are no consequences under DOT agency regulations for such a refusal.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41954, Aug. 9, 2001; 88 FR 27649, May 2, 2023]

§ 40.263 What happens when an employee is unable to provide a sufficient amount of saliva for an alcohol screening test?

(a) As the STT, you must take the following steps if an employee is unable to provide sufficient saliva to complete a test on a saliva screening device (*e.g.*, the employee does not provide sufficient saliva to activate the device).

(1) You must conduct a new screening test using a new screening device.

(2) If the employee refuses to make the attempt to complete the new test, you must discontinue testing, note the fact on the ''Remarks'' line of the ATF, and immediately notify the DER. This is a refusal to test.

(3) If the employee has not provided a sufficient amount of saliva to complete the new test, you must note the fact on the ''Remarks'' line of the ATF and immediately notify the DER.

(b) As the DER, when the STT informs you that the employee has not provided a sufficient amount of saliva (see paragraph (a)(3) of this section), you must immediately arrange to administer an alcohol test to the employee using an EBT or other breath testing device.

§ 40.265 What happens when an employee is unable to provide a sufficient amount of breath for an alcohol test?

(a) If an employee does not provide a sufficient amount of breath to permit a valid breath test, you must take the steps listed in this section.

(b) As the BAT or STT, you must instruct the employee to attempt again to provide a sufficient amount of breath and about the proper way to do so.

(1) If the employee refuses to make the attempt, you must discontinue the test, note the fact on the ''Remarks'' line of the ATF, and immediately notify the DER. This is a refusal to test.

(2) If the employee again attempts and fails to provide a sufficient amount

of breath, you may provide another opportunity to the employee to do so if you believe that there is a strong likelihood that it could result in providing a sufficient amount of breath.

(3) When the employee's attempts under paragraph (b)(2) of this section have failed to produce a sufficient amount of breath, you must note the fact on the ''Remarks'' line of the ATF and immediately notify the DER.

(4) If you are using an EBT that has the capability of operating manually, you may attempt to conduct the test in manual mode.

(5) If you are qualified to use a saliva ASD and you are in the screening test stage, you may change to a saliva ASD only to complete the screening test.

(c) As the employer, when the BAT or STT informs you that the employee has not provided a sufficient amount of breath, you must direct the employee to obtain, within five days, an evaluation from a licensed physician who is acceptable to you and who has expertise in the medical issues raised by the employee's failure to provide a sufficient specimen.

(1) You are required to provide the physician who will conduct the evaluation with the following information and instructions:

(i) That the employee was required to take a DOT breath alcohol test, but was unable to provide a sufficient amount of breath to complete the test;

(ii) The consequences of the appropriate DOT agency regulation for refusing to take the required alcohol test;

(iii) That the physician must provide you with a signed statement of his or her conclusions; and

(iv) That the physician, in his or her reasonable medical judgment, must base those conclusions on one of the following determinations:

(A) A medical condition has, or with a high degree of probability could have, precluded the employee from providing a sufficient amount of breath. The physician must not include in the signed statement detailed information on the employee's medical condition. In this case, the test is cancelled.

(B) There is not an adequate basis for determining that a medical condition has, or with a high degree of probability could have, precluded the employee from providing a sufficient amount of breath. This constitutes a refusal to test.

(C) For purposes of paragraphs (c)(1)(iv)(A) and (B) of this section, a medical condition includes an ascertainable physiological condition (*e.g.*, a respiratory system dysfunction) or a medically documented pre-existing psychological disorder, but does not include unsupported assertions of ''situational anxiety'' or hyperventilation.

(2) As the physician making the evaluation, after making your determination, you must provide a written statement of your conclusions and the basis for them to the DER directly (and not through a C/TPA acting as an itermediary). You must not include in this statement detailed information on the employee's medical condition beyond what is necessary to explain your conclusion.

(3) Upon receipt of the report from the examining physician, as the DER you must immediately inform the employee and take appropriate action based upon your DOT agency regulations.

§ 40.267 What problems always cause an alcohol test to be cancelled?

As an employer, a BAT, or an STT, you must cancel an alcohol test if any of the following problems occur. These are ''fatal flaws.'' You must inform the DER that the test was cancelled and must be treated as if the test never occurred. These problems are:

(a) In the case of a screening test conducted on a saliva ASD or a breath tube ASD:

(1) The STT or BAT reads the result either sooner than or later than the time allotted by the manufacturer and this Part (see § 40.245(a)(8) for the saliva ASD and § 40.245(b)(8) for the breath tube ASD).

(2) The saliva ASD does not activate (*see* § 40.245(a)(7); or

(3) The device is used for a test after the expiration date printed on the device or on its package (see § 40.245(a)(1) for the saliva ASD and § 40.245(b)(1) for the breath tube ASD).

(4) The breath tube ASD is tested with an analyzer which has not been pre-calibrated for that device's specific lot (see § 40.245(b)(1)).

(b) In the case of a screening or confirmation test conducted on an EBT, the sequential test number or alcohol concentration displayed on the EBT is not the same as the sequential test number or alcohol concentration on the printed result (see § 40.253(c), (e) and (f)).

(c) In the case of a confirmation test:

(1) The BAT conducts the confirmation test before the end of the minimum 15-minute waiting period (see § 40.251(a)(1));

(2) The BAT does not conduct an air blank before the confirmation test (see § 40.253(a));

(3) There is not a 0.00 result on the air blank conducted before the confirmation test (see § 40.253(a)(1) and (2));

(4) The EBT does not print the result (see § 40.253(f)); or

(5) The next external calibration check of the EBT produces a result that differs by more than the tolerance stated in the QAP from the known value of the test standard. In this case, every result of 0.02 or above obtained on the EBT since the last valid external calibration check is cancelled (see § 40.233(a)(1) and (c)(3)).

[65 FR 79526, Dec. 19, 2000, as amended at 67 FR 61522, Oct. 1, 2002; 71 FR 49384, Aug. 23, 2006; 72 FR 1299, Jan. 11, 2007]

§ 40.269 What problems cause an alcohol test to be cancelled unless they are corrected?

As a BAT or STT, or employer, you must cancel an alcohol test if any of the following problems occur, unless they are corrected. These are ''correctable flaws.'' These problems are:

(a) The BAT or STT does not sign the ATF (see §§ 40.247(a)(1) and 40.255(a)(1)).

(b) The BAT or STT fails to note on the ''Remarks'' line of the ATF that the employee has not signed the ATF after the result is obtained (see § 40.255(a)(3)).

(c) The BAT or STT uses a non-DOT form for the test (see § 40.225(a)).

[65 FR 79526, Dec. 19, 2000, as amended at 71 FR 49384, Aug. 23, 2006]

§ 40.271 How are alcohol testing problems corrected?

(a) As a BAT or STT, you have the responsibility of trying to complete successfully an alcohol test for each employee.

(1) If, during or shortly after the testing process, you become aware of any event that will cause the test to be cancelled (see § 40.267), you must try to correct the problem promptly, if practicable. You may repeat the testing process as part of this effort.

(2) If repeating the testing process is necessary, you must begin a new test as soon as possible. You must use a new ATF, a new sequential test number, and, if needed, a new ASD and/or a new EBT. It is permissible to use additional technical capabilities of the EBT (*e.g.*, manual operation) if you have been trained to do so in accordance with § 40.213(c) .

(3) If repeating the testing process is necessary, you are not limited in the number of attempts to complete the test, provided that the employee is making a good faith effort to comply with the testing process.

(4) If another testing device is not available for the new test at the testing site, you must immediately notify the DER and advise the DER that the test could not be completed. As the DER who receives this information, you must make all reasonable efforts to ensure that the test is conducted at another testing site as soon as possible.

(b) If, as an STT, BAT, employer or other service agent administering the testing process, you become aware of a ''correctable flaw'' (see § 40.269) that has not already been corrected, you must take all practicable action to correct the problem so that the test is not cancelled.

(1) If the problem resulted from the omission of required information, you must, as the person responsible for providing that information, supply in writing the missing information and a signed statement that it is true and accurate. For example, suppose you are a BAT and you forgot to make a notation on the ''Remarks'' line of the ATF that the employee did not sign the certification. You would, when the problem is called to your attention, supply a signed statement that the employee failed or refused to sign the certification after the result was obtained, and that your signed statement is true and accurate.

(2) If the problem is the use of a non-DOT form, you must, as the person responsible for the use of the incorrect form, certify in writing that the incorrect form contains all the information needed for a valid DOT alcohol test. You must also provide a signed statement that the incorrect form was used inadvertently or as the only means of conducting a test, in circumstances beyond your control, and the steps you have taken to prevent future use of non-DOT forms for DOT tests. You must supply this information on the same business day on which you are notified of the problem, transmitting it by fax or courier.

(c) If you cannot correct the problem, you must cancel the test.

§ 40.273 What is the effect of a cancelled alcohol test?

(a) A cancelled alcohol test is neither positive nor negative.

(1) As an employer, you must not attach to a cancelled test the consequences of a test result that is 0.02 or greater (*e.g.*, removal from a safety-sensitive position).

(2) As an employer, you must not use a cancelled test in a situation where an employee needs a test result that is below 0.02 (*e.g.*, in the case of a return-to-duty or follow-up test to authorize the employee to perform safety-sensitive functions).

(3) As an employer, you must not direct a recollection for an employee because a test has been cancelled, except in the situations cited in paragraph (a)(2) of this section or other provisions of this part.

(b) A cancelled test does not count toward compliance with DOT requirements, such as a minimum random testing rate.

(c) When a test must be cancelled, if you are the BAT, STT, or other person who determines that the cancellation is necessary, you must inform the affected DER within 48 hours of the cancellation.

(d) A cancelled DOT test does not provide a valid basis for an employer to conduct a non-DOT test (*i.e.*, a test under company authority).

§ 40.275 What is the effect of procedural problems that are not sufficient to cancel an alcohol test?

(a) As an STT, BAT, employer, or a service agent administering the testing process, you must document any errors in the testing process of which you become aware, even if they are not ''fatal flaws'' or ''correctable flaws'' listed in this subpart. Decisions about the ultimate impact of these errors will be determined by administrative or legal proceedings, subject to the limitation of paragraph (b) of this section.

(b) No person concerned with the testing process may declare a test cancelled based on a mistake in the process that does not have a significant adverse effect on the right of the employee to a fair and accurate test. For example, it is inconsistent with this part to cancel a test based on a minor administrative mistake (*e.g.*, the omission of the employee's middle initial) or an error that does not affect employee protections under this part. Nor does the failure of an employee to sign in Step 4 of the ATF result in the cancellation of the test. Nor is a test to be cancelled on the basis of a claim by an employee that he or she was improperly selected for testing.

(c) As an employer, these errors, even though not sufficient to cancel an alcohol test result, may subject you to enforcement action under DOT agency regulations.

§ 40.277 Are alcohol tests other than saliva or breath permitted under these regulations?

No, other types of alcohol tests (*e,g.*, blood and urine) are not authorized for testing done under this part. Only saliva or breath for screening tests and breath for confirmation tests using approved devices are permitted.

Subpart O—Substance Abuse Professionals and the Return-to-Duty Process

§ 40.281 Who is qualified to act as a SAP?

To be permitted to act as a SAP in the DOT drug and alcohol testing program, you must meet each of the requirements of this section:

(a) *Credentials.* You must have one of the following credentials:

(1) You are a licensed physician (Doctor of Medicine or Osteopathy);

(2) You are a licensed or certified social worker;

(3) You are a licensed or certified psychologist;

(4) You are a licensed or certified employee assistance professional;

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

(6) You are a drug and alcohol counselor certified by an organization listed at *https://www.transportation.gov/odapc/sap*.

(b) *Basic knowledge.* You must be knowledgeable in the following areas:

(1) You must be knowledgeable about and have clinical experience in the diagnosis and treatment of alcohol and controlled substances-related disorders.

(2) You must be knowledgeable about the SAP function as it relates to employer interests in safety-sensitive duties.

(3) You must be knowledgeable about this part, the DOT agency regulations applicable to the employers for whom you evaluate employees, and the DOT SAP Guidelines. You must keep current on any changes to these materials. You must subscribe to the ODAPC listserve at *https://www.transportation.gov/odapc/get-odapc-email-updates*. DOT agency regulations, DOT SAP Guidelines, and other materials are available from ODAPC (Department of Transportation, 1200 New Jersey Avenue SE., Washington DC, 20590 (202–366–3784), or on the ODAPC Web site (*http://www.transportation.gov/odapc*).

(c) *Qualification training.* You must receive qualification training meeting the requirements of this paragraph (c).

(1) Qualification training must provide instruction on the following subjects:

(i) Background, rationale, and coverage of the Department's drug and alcohol testing program;

(ii) 49 CFR Part 40 and DOT agency drug and alcohol testing rules;

(iii) Key DOT drug testing requirements, including collections, laboratory testing, MRO review, and problems in drug testing;

(iv) Key DOT alcohol testing requirements, including the testing process, the role of BATs and STTs, and problems in alcohol tests;

(v) SAP qualifications and prohibitions;

(vi) The role of the SAP in the return-to-duty process, including the initial employee evaluation, referrals for education and/or treatment, the follow-up evaluation, continuing treatment recommendations, and the follow-up testing plan;

(vii) SAP consultation and communication with employers, MROs, and treatment providers;

(viii) Reporting and recordkeeping requirements;

(ix) Issues that SAPs confront in carrying out their duties under the program.

(2) Following your completion of qualification training under paragraph (c)(1) of this section, you must satisfactorily complete an examination administered by a nationally-recognized professional or training organization. The examination must comprehensively cover all the elements of qualification training listed in paragraph (c)(1) of this section.

(3) You must meet the requirements of paragraphs (a), (b), and (c) of this section before you begin to perform SAP functions.

(d) *Continuing education.* During each three-year period from the date on which you satisfactorily complete the examination under paragraph (c)(2) of this section, you must complete continuing education consisting of at least 12 professional development hours (*e.g.*, CEUs) relevant to performing SAP functions.

(1) This continuing education must include material concerning new technologies, interpretations, recent guidance, rule changes, and other information about developments in SAP practice, pertaining to the DOT program, since the time you met the qualification training requirements of this section.

(2) Your continuing education activities must include documentable assessment tools to assist you in determining whether you have adequately learned the material.

(e) *Documentation.* You must maintain documentation showing that you currently meet all requirements of this section. You must provide this documentation on request to DOT agency representatives and to employers and C/TPAs who are using or contemplating using your services.

(f) *Limitation.* If you are an otherwise qualified SAP under this part, you must abide by the geographic limitations applicable to your credential when performing remote evaluations. You must not conduct an evaluation that exceeds your geographic limitations.

[65 FR 79526, Dec. 19, 2000, as amended at 69 FR 3022, Jan. 22, 2004; 71 FR 49384; Aug. 23, 2006; 71 FR 55347, Sept. 22, 2006; 82 FR 52246, Nov. 13, 2017; 88 FR 27649, May 2, 2023]

§ 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.

(b) You must obtain the National Commission for Certifying Agencies (NCCA) accreditation before DOT will act on your petition.

(c) You must also meet the minimum requirements of appendix G to this part before DOT will act on your petition.

[65 FR 79526, Dec. 19, 2000, as amended at 71 FR 49384, Aug. 23, 2006; 88 FR 27650, May 2, 2023]

§ 40.285 When is a SAP evaluation required?

(a) As an employee, when you have violated DOT drug and alcohol regulations, you cannot again perform any DOT safety-sensitive duties for any employer until and unless you complete the SAP evaluation, referral, and education/treatment process set forth in this subpart and in applicable DOT agency regulations. The first step in this process is a SAP evaluation.

(b) For purposes of this subpart, a verified positive DOT drug test result, a DOT alcohol test with a result indicating an alcohol concentration of 0.04 or greater, a refusal to test (including by adulterating or substituting a specimen) or any other violation of the prohibition on the use of alcohol or drugs under a DOT agency regulation constitutes a DOT drug and alcohol regulation violation.

[65 FR 79526, Dec. 19, 2000, as amended at 88 FR 27650, May 2, 2023]

§ 40.287 What information is an employer required to provide concerning SAP services to an employee who has a DOT drug and alcohol regulation violation?

As an employer, you must provide to each employee (including an applicant or new employee) who violates a DOT drug and alcohol regulation a listing of SAPs readily available to the employee and acceptable to you, with names, addresses, and telephone numbers. You cannot charge the employee any fee for compiling or providing this list. You may provide this list yourself or through a C/TPA or other service agent.

§ 40.289 Are employers required to provide SAP and treatment services to employees?

(a) As an employer, you are not required to provide a SAP evaluation or any subsequent recommended education or treatment for an employee who has violated a DOT drug and alcohol regulation.

(b) However, if you offer that employee an opportunity to return to a DOT safety-sensitive duty following a violation, you must, before the employee again performs that duty, ensure that the employee receives an evaluation by a SAP meeting the requirements of § 40.281 and that the employee successfully complies with the SAP's evaluation recommendations.

(c) Payment for SAP evaluations and services is left for employers and employees to decide and may be governed by existing management-labor agreements and health care benefits.

§ 40.291 What is the role of the SAP in the evaluation, referral, and treatment process of an employee who has violated DOT agency drug and alcohol testing regulations?

(a) As a SAP, you are charged with:

(1) Making a clinical assessment and evaluation to determine what assistance is needed by the employee to resolve problems associated with alcohol and/or drug use. At the SAP's discretion, this assessment or evaluation may be performed face-to-face in-person or remotely. If a SAP is not prohibited from using technology within the parameters of the SAP's State-issued license or other credential(s), a remote evaluation must be must be conducted in accordance with the following criteria:

(i) The technology must permit real-time audio and visual interaction between the SAP and the employee; and

(ii) The quality of the technology (*e.g.*, speed of the internet connection and clarity of the video display) must be sufficient to allow the SAP to gather all the visual and audible information the SAP would otherwise gather in an in-person face-to-face interaction, while providing security to protect the confidentiality of the communications at the level expected by industry standards for remote substance abuse evaluations.

(2) Referring the employee to an appropriate education and/or treatment program;

(3) Conducting a follow-up evaluation to determine if the employee has actively participated in the education and/or treatment program and has demonstrated successful compliance with the initial assessment and evaluation recommendations. This assessment or evaluation may be performed face-to-face in-person or remotely. A face-to-face remote evaluation must meet the criteria in paragraphs (a)(1)(i) and (ii) of this section.

(4) Providing the DER with a follow-up drug and/or alcohol testing plan for the employee; and

(5) Providing the employee and employer with recommendations for continuing education and/or treatment.

(b) As a SAP, you are not an advocate for the employer or employee. Your function is to protect the public interest in safety by professionally evaluating the employee and recommending appropriate education/treatment, follow-up tests, and aftercare.

[65 FR 79526, Dec. 19, 2000, as amended at 88 FR 27650, May 2, 2023]

§ 40.293 What is the SAP's function in conducting the initial evaluation of an employee?

As a SAP, for every employee who comes to you following a DOT drug and alcohol regulation violation, you must accomplish the following:

(a) Provide a comprehensive assessment and clinical evaluation meeting the requirements of § 40.291(a)(1).

(b) Recommend a course of education and/or treatment with which the employee must demonstrate successful compliance prior to returning to DOT safety-sensitive duty.

(1) You must make such a recommendation for every individual who has violated a DOT drug and alcohol regulation.

(2) You must make a recommendation for education and/or treatment that will, to the greatest extent possible, protect public safety in the event that the employee returns to the performance of safety-sensitive functions.

(c) Appropriate education may include, but is not limited to, self-help groups (*e.g.*, Alcoholics Anonymous) and community lectures, where attendance can be independently verified, and bona fide drug and alcohol education courses.

(d) Appropriate treatment may include, but is not limited to, in-patient hospitalization, partial in-patient treatment, out-patient counseling programs, and aftercare.

(e) You must assess and clinically evaluate each employee on an individual basis and use your professional judgment to determine education and/or treatment, as well as a follow-up testing plan unique to the needs of the individual employee. For example, do not require the same and/or substantially similar education, treatment, and/or follow-up testing plan for most of the employees you assess.

(f) You must provide a written report directly to the DER highlighting your specific recommendations for assistance (see § 40.311(c)).

(g) For purposes of your role in the evaluation process, you must assume that a verified positive test result has conclusively established that the employee committed a DOT drug and alcohol regulation violation. You must not take into consideration in any

way, as a factor in determining what your recommendation will be, any of the following:

(1) A claim by the employee that the test was unjustified or inaccurate;

(2) Statements by the employee that attempt to mitigate the seriousness of a violation of a DOT drug or alcohol regulation (*e.g.*, related to assertions of use of hemp oil, ''medical marijuana'' use, ''contact positives,'' poppy seed ingestion, job stress); or

(3) Personal opinions you may have about the justification or rationale for drug and alcohol testing.

(h) In the course of gathering information for purposes of your evaluation in the case of a drug-related violation, you may consult with the MRO. As the MRO, you are required to cooperate with the SAP and provide available information the SAP requests. It is not necessary to obtain the consent of the employee to provide this information.

[65 FR 79526, Dec. 19, 2000, as amended at 88 FR 27650, May 2, 2023]

§ 40.295 May employees or employers seek a second SAP evaluation if they disagree with the first SAP's recommendations?

(a) As an employee with a DOT drug and alcohol regulation violation, when you have been evaluated by a SAP, you must not seek a second SAP's evaluation in order to obtain another recommendation.

(b) As an employer, you must not seek a second SAP's evaluation if the employee has already been evaluated by a qualified SAP. If the employee, contrary to paragraph (a) of this section, has obtained a second SAP evaluation, as an employer you may not rely on it for any purpose under this part.

§ 40.297 Does anyone have the authority to change a SAP's initial evaluation?

(a) Except as provided in paragraph (b) of this section, no one (*e.g.*, an employer, employee, a managed-care provider, any service agent) may change in any way the SAP's evaluation or recommendations for assistance. For example, a third party is not permitted to make more or less stringent a SAP's recommendation by changing the SAP's evaluation or seeking another SAP's evaluation.

(b) The SAP who made the initial evaluation may modify his or her initial evaluation and recommendations based on new or additional information (*e.g.*, from an education or treatment program).

(c) The SAP, who is otherwise fully qualified under this subpart, must not perform evaluations outside the geographic jurisdiction for their credential(s). If the SAP who made the evaluation exceeds their geographic jurisdiction, the employee will not be required to seek the evaluation of a second SAP.

[65 FR 79526, Dec. 19, 2000, as amended at 88 FR 27650, May 2, 2023]

§ 40.299 What is the SAP's role and what are the limits on a SAP's discretion in referring employees for education and treatment?

(a) As a SAP, upon your determination of the best recommendation for assistance, you will serve as a referral source to assist the employee's entry into an education and/or treatment program.

(b) To prevent the appearance of a conflict of interest, you must not refer an employee requiring assistance to your private practice or to a person or organization from which you receive payment or to a person or organization in which you have a financial interest. You are precluded from making referrals to entities with which you are financially associated.

(c) There are four exceptions to the prohibitions contained in paragraph (b) of this section. You may refer an employee to any of the following providers of assistance, regardless of your relationship with them:

(1) A public agency (*e.g.*, treatment facility) operated by a state, county, or municipality;

(2) The employer or a person or organization under contract to the employer to provide alcohol or drug treatment and/or education services (*e.g.*, the employer's contracted treatment provider);

(3) The sole source of therapeutically appropriate treatment under the employee's health insurance program

(*e.g.*, the single substance abuse in-patient treatment program made available by the employee's insurance coverage plan); or

(4) The sole source of therapeutically appropriate treatment reasonably available to the employee (*e.g.*, the only treatment facility or education program reasonably located within the general commuting area).

§ 40.301 What is the SAP's function in the follow-up evaluation of an employee?

(a) As a SAP, after you have prescribed assistance under § 40.293, you must re-evaluate the employee to determine if the employee has successfully carried out your education and/or treatment recommendations.

(1) This is your way to gauge for the employer the employee's ability to demonstrate successful compliance with the education and/or treatment plan.

(2) Your evaluation may serve as one of the reasons the employer decides to return the employee to safety-sensitive duty.

(b) As the SAP making the follow-up evaluation determination, you must:

(1) Confer with or obtain appropriate documentation from the appropriate education and/or treatment program professionals where the employee was referred; and

(2) Conduct a clinical interview meeting the requirements of § 40.291(a)(1) with the employee to determine if the employee demonstrates successful compliance with your initial evaluation recommendations.

(c) (1) If the employee has demonstrated successful compliance, you must provide a written report directly to the DER highlighting your clinical determination that the employee has done so with your initial evaluation recommendation (see § 40.311(d)).

(2) You may determine that an employee has successfully demonstrated compliance even though the employee has not yet completed the full regimen of education and/or treatment you recommended or needs additional assistance. For example, if the employee has successfully completed the 30-day inpatient program you prescribed, you may make a ''successful compliance'' determination even though you conclude that the employee has not yet completed the out-patient counseling you recommended or should continue in an aftercare program.

(d)(1) As the SAP, if you believe, as a result of the follow-up evaluation, that the employee has not demonstrated successful compliance with your recommendations, you must provide written notice directly to the DER (see § 40.311(e)).

(2) As an employer who receives the SAP's written notice that the employee has not successfully complied with the SAP's recommendations, you must not return the employee to the performance of safety-sensitive duties.

(3) As the SAP, you may conduct additional follow-up evaluation(s) if the employer determines that doing so is consistent with the employee's progress as you have reported it and with the employer's policy and/or labor-management agreements.

(4) As the employer, following a SAP report that the employee has not demonstrated successful compliance, you may take personnel action consistent with your policy and/or labor-management agreements.

[65 FR 79526, Dec. 19, 2000, as amended at 88 FR 27650, May 2, 2023]

§ 40.303 What happens if the SAP believes the employee needs additional treatment, aftercare, or support group services even after the employee returns to safety-sensitive duties?

(a) As a SAP, if you believe that ongoing services (in addition to follow-up tests) are needed to assist an employee to maintain sobriety or abstinence from drug use after the employee resumes the performance of safety-sensitive duties, you must provide recommendations for these services in your follow-up evaluation report (see § 40.311(d)(10)).

(b) As an employer receiving a recommendation for these services from a SAP, you may, as part of a return-to-duty agreement with the employee, require the employee to participate in the recommended services. You may monitor and document the employee's participation in the recommended services. You may also make use of SAP

and employee assistance program (EAP) services in assisting and monitoring employees' compliance with SAP recommendations. Nothing in this section permits an employer to fail to carry out its obligations with respect to follow-up testing (see § 40.309).

(c) As an employee, you are obligated to comply with the SAP's recommendations for these services. If you fail or refuse to do so, you may be subject to disciplinary action by your employer.

§ 40.305 How does the return-to-duty process conclude?

(a) As the employer, if you decide that you want to permit the employee to return to the performance of safety-sensitive functions, you must ensure that the employee takes a return-to-duty test. This test cannot occur until after the SAP has determined that the employee has successfully complied with prescribed education and/or treatment. The employee must have a negative drug test result and/or an alcohol test with an alcohol concentration of less than 0.02 before resuming performance of safety-sensitive duties.

(b) As an employer, you must not return an employee to safety-sensitive duties until the employee meets the conditions of paragraph (a) of this section. However, you are not required to return an employee to safety-sensitive duties because the employee has met these conditions. That is a personnel decision that you have the discretion to make, subject to collective bargaining agreements or other legal requirements.

(c) As a SAP or MRO, you must not make a ''fitness for duty'' determination as part of this re-evaluation unless required to do so under an applicable DOT agency regulation. It is the employer, rather than you, who must decide whether to put the employee back to work in a safety-sensitive position.

(d) As the employer, if a SAP who is otherwise fully qualified under this subpart performed a remote evaluation of the employee outside the geographic jurisdiction for their credential(s), the employee who they evaluated will not be required to seek the evaluation of a second SAP. If you decide that you want to permit the employee to return to the performance of safety-sensitive functions, you will proceed with the requirements of paragraph (a) of this section.

[65 FR 79526, Dec. 19, 2000, as amended at 88 FR 27650, May 2, 2023]

§ 40.307 What is the SAP's function in prescribing the employee's follow-up tests?

(a) As a SAP, for each employee who has committed a DOT drug or alcohol regulation violation, and who seeks to resume the performance of safety-sensitive functions, you must establish a written follow-up testing plan. You do not establish this plan until after you determine that the employee has successfully complied with your recommendations for education and/or treatment.

(b) You must present a copy of this plan directly to the DER (see § 40.311(d)(9)).

(c) You are the sole determiner of the number and frequency of follow-up tests and whether these tests will be for drugs, alcohol, or both, unless otherwise directed by the appropriate DOT agency regulation. For example, if the employee had a positive drug test, but your evaluation or the treatment program professionals determined that the employee had an alcohol problem as well, you should require that the employee have follow-up tests for both drugs and alcohol.

(d) However, you must, at a minimum, direct that the employee be subject to six unannounced follow-up tests in the first 12 months of safety-sensitive duty following the employee's return to safety-sensitive functions.

(1) You may require a greater number of follow-up tests during the first 12-month period of safety-sensitive duty (*e.g.*, you may require one test a month during the 12-month period; you may require two tests per month during the first 6-month period and one test per month during the final 6-month period).

(2) You may also require follow-up tests during the 48 months of safety-sensitive duty following this first 12-month period.

(3) You are not to establish the actual dates for the follow-up tests you

prescribe. The decision on specific dates to test is the employer's.

(4) As the employer, you must not impose additional testing requirements (*e.g.*, under company authority) on the employee that go beyond the SAP's follow-up testing plan.

(e) The requirements of the SAP's follow-up testing plan ''follow the employee'' to subsequent employers or through breaks in service.

Example 1 to paragraph (e): The employee returns to duty with Employer A. Two months afterward, after completing the first two of six follow-up tests required by the SAP's plan, the employee quits his job with Employer A and begins to work in a similar position for Employer B. The employee remains obligated to complete the four additional tests during the next 10 months of safety-sensitive duty, and Employer B is responsible for ensuring that the employee does so. Employer B learns of this obligation through the inquiry it makes under § 40.25.

Example 2 to paragraph (e): The employee returns to duty with Employer A. Three months later, after the employee completes the first two of six follow-up tests required by the SAP's plan, Employer A lays the employee off for economic or seasonal employment reasons. Four months later, Employer A recalls the employee. Employer A must ensure that the employee completes the remaining four follow-up tests during the next nine months.

(f) As the SAP, you may modify the determinations you have made concerning follow-up tests. For example, even if you recommended follow-up testing beyond the first 12-months, you can terminate the testing requirement at any time after the first year of testing. You must not, however, modify the requirement that the employee take at least six follow-up tests within the first 12 months after returning to the performance of safety-sensitive functions.

(g) As the employer, SAP, or other service agent, you must not provide to the employee a copy of their drug and/or alcohol follow-up testing schedule prescribed by the SAP. No employer, SAP, or other service agent will indicate to the employee what the frequency or duration of the employee's follow-up testing schedule will be. The SAP can require follow-up testing for either or both drugs and alcohol for a drug-related or an alcohol-related violation.

[65 FR 79526, Dec. 19, 2000, as amended at 88 FR 27650, May 2, 2023]

§ 40.309 What are the employer's responsibilities with respect to the SAP's directions for follow-up tests?

(a) As the employer, you must carry out the SAP's follow-up testing requirements. You may not allow the employee to continue to perform safety-sensitive functions unless follow-up testing is conducted as directed by the SAP.

(b) You should schedule follow-up tests on dates of your own choosing, but you must ensure that the tests are unannounced with no discernable pattern as to their timing, and that the employee is given no advance notice.

(c) You cannot substitute any other tests (*e.g.*, those carried out under the random testing program) conducted on the employee for this follow-up testing requirement.

(d) You cannot count a follow-up test that has been cancelled as a completed test. A cancelled follow-up test must be recollected.

§ 40.311 What are the requirements concerning SAP reports?

(a) As the SAP conducting the required evaluations, you must send the written reports required by this section in writing directly to the DER and not to a third party or entity for forwarding to the DER (except as provided in § 40.355(e)). You may, however, forward the document simultaneously to the DER and to a C/TPA.

(b) As an employer, you must ensure that you receive SAP written reports directly from the SAP performing the evaluation and that no third party or entity changed the SAP's report in any way.

(c) The SAP's written report, following an initial evaluation that determines what level of assistance is needed to address the employee's drug and/or alcohol problems, must be on the SAP's own letterhead (and not the letterhead of another service agent) signed and dated by the SAP, and must contain the following delineated items:

(1) Employee's name and SSN or employee ID No.;

(2) Employer's name and address;
(3) Reason for the assessment (specific violation of DOT regulations and violation date);
(4) Date(s) and format (*i.e.*, face-to-face or remote) of the assessment;
(5) SAP's education and/or treatment recommendation; and
(6) SAP's telephone number.
(d) The SAP's written report concerning a follow-up evaluation that determines the employee has demonstrated successful compliance must be on the SAP's own letterhead (and not the letterhead of another service agent), signed by the SAP and dated, and must contain the following items:
(1) Employee's name and SSN or employee ID No.;
(2) Employer's name and address;
(3) Reason for the initial assessment (specific violation of DOT regulations and violation date);
(4) Date(s) and format (*i.e.*, face-to-face or remote) of the initial assessment and synopsis of the treatment plan;
(5) Name of practice(s) or service(s) providing the recommended education and/or treatment;
(6) Inclusive dates of employee's program participation;
(7) Clinical characterization of employee's program participation;
(8) SAP's clinical determination as to whether the employee has demonstrated successful compliance;
(9) Follow-up testing plan;
(10) Employee's continuing care needs with specific treatment, aftercare, and/or support group services recommendations; and
(11) SAP's telephone number.
(e) The SAP's written report concerning a follow-up evaluation that determines the employee has not demonstrated successful compliance must be on the SAP's own letterhead (and not the letterhead of another service agent), signed by the SAP and dated, and must contain the following items:
(1) Employee's name and SSN or employee ID No.;
(2) Employer's name and address;
(3) Reason for the initial assessment (specific DOT violation and date);
(4) Date(s) and format (*i.e.*, face-to-face or remote) of initial assessment and synopsis of treatment plan;
(5) Name of practice(s) or service(s) providing the recommended education and/or treatment;
(6) Inclusive dates of employee's program participation;
(7) Clinical characterization of employee's program participation;
(8) Date(s) of the first follow-up evaluation;
(9) Date(s) of any further follow-up evaluation the SAP has scheduled;
(10) SAP's clinical reasons for determining that the employee has not demonstrated successful compliance; and
(11) SAP's telephone number.
(f) As a SAP, you must also provide these written reports directly to the employee if the employee has no current employer and to the gaining DOT regulated employer in the event the employee obtains another transportation industry safety-sensitive position.
(g) As a SAP, you are to maintain copies of your reports to employers for 5 years, and your employee clinical records in accordance with Federal, state, and local laws regarding record maintenance, confidentiality, and release of information. You must make these records available, on request, to DOT agency representatives (*e.g.*, inspectors conducting an audit or safety investigation) and representatives of the NTSB in an accident investigation.
(h) As an employer, you must maintain your reports from SAPs for 5 years from the date you received them.

[65 FR 79526, Dec. 19, 2000, as amended at 88 FR 27650, May 2, 2023]

§ 40.313 Where is other information on SAP functions and the return-to-duty process found in this regulation?

You can find other information on the role and functions of SAPs in the following sections of this part:

§ 40.3—Definition.
§ 40.347—Service agent assistance with SAP-required follow-up testing.
§ 40.355—Transmission of SAP reports.
§ 40.329(c)—Making SAP reports available to employees on request.
APPENDIX E TO PART 40—SAP EQUIVALENCY REQUIREMENTS FOR CERTIFICATION ORGANIZATIONS.

Subpart P—Confidentiality and Release of Information

§ 40.321 What is the general confidentiality rule for drug and alcohol test information?

Except as otherwise provided in this subpart, as a service agent or employer participating in the DOT drug or alcohol testing process, you are prohibited from releasing individual test results or medical information about an employee to third parties without the employee's specific written consent.

(a) A ''third party'' is any person or organization to whom other subparts of this regulation do not explicitly authorize or require the transmission of information in the course of the drug or alcohol testing process.

(b) ''Specific written consent'' means a statement signed by the employee that he or she agrees to the release of a particular piece of information to a particular, explicitly identified, person or organization at a particular time. ''Blanket releases,'' in which an employee agrees to a release of a category of information (*e.g.*, all test results) or to release information to a category of parties (*e.g.*, other employers who are members of a C/TPA, companies to which the employee may apply for employment), are prohibited under this part.

§ 40.323 May program participants release drug or alcohol test information in connection with legal proceedings?

(a) As an employer, you may release information pertaining to an employee's drug or alcohol test without the employee's consent in certain legal proceedings.

(1) These proceedings include a lawsuit (*e.g.*, a wrongful discharge action), grievance (*e.g.*, an arbitration concerning disciplinary action taken by the employer), or administrative proceeding (*e.g.*, an unemployment compensation hearing) brought by, or on behalf of, an employee and resulting from a positive DOT drug or alcohol test or a refusal to test (including, but not limited to, adulterated or substituted test results).

(2) These proceedings also include a criminal or civil action resulting from an employee's performance of safety-sensitive duties, in which a court of competent jurisdiction determines that the drug or alcohol test information sought is relevant to the case and issues an order directing the employer to produce the information. For example, in personal injury litigation following a truck or bus collision, the court could determine that a post-accident drug test result of an employee is relevant to determining whether the driver or the driver's employer was negligent. The employer is authorized to respond to the court's order to produce the records.

(b) In such a proceeding, you may release the information to the decisionmaker in the proceeding (*e.g.*, the court in a lawsuit). You may release the information only with a binding stipulation that the decisionmaker to whom it is released will make it available only to parties to the proceeding.

(c) If you are a service agent, and the employer requests its employee's drug or alcohol testing information from you to use in a legal proceeding as authorized in paragraph (a) of this section (*e.g.*, the laboratory's data package), you must provide the requested information to the employer.

(d) As an employer or service agent, you must immediately notify the employee in writing of any information you release under this section.

§ 40.325 [Reserved]

§ 40.327 When must the MRO report medical information gathered in the verification process?

(a) As the MRO, you must, except as provided in paragraph (d) of this section, report drug test results and medical information you learned as part of the verification process to third parties without the employee's consent if you determine, in your reasonable medical judgment, that:

(1) The information is likely to result in the employee being determined to be medically unqualified under an applicable DOT agency regulation; or

(2) The information indicates that continued performance by the employee of his or her safety-sensitive function is likely to pose a significant safety risk.

(b) The third parties to whom you are authorized to provide information by this section include the employer, a physician or other health care provider responsible for determining the medical qualifications of the employee under an applicable DOT agency safety regulation, a SAP evaluating the employee as part of the return to duty process (see § 40.293(g)), a DOT agency, or the National Transportation Safety Board in the course of an accident investigation.

(c) The MRO must not report such medical information using the CCF. Instead, the MRO must provide the information in a separate written communication (*e.g.*, letter, secure email). The information must state the specific nature of the MRO's safety concern (*e.g.*, the effects of a medication the employee is taking, the employee's underlying medical condition that the employee disclosed to the MRO).

(d) If the law of a foreign country (*e.g.*, Canada) prohibits you from providing medical information to the employer, you may comply with that prohibition.

[65 FR 79526, Dec. 19, 2000, as amended at 88 FR 27650, May 2, 2023]

§ 40.329 What information must laboratories, MROs, and other service agents release to employees?

(a) As an MRO or service agent you must provide, within 10 business days of receiving a written request from an employee, copies of any records pertaining to the employee's use of alcohol and/or drugs, including records of the employee's DOT-mandated drug and/or alcohol tests. You may charge no more than the cost of preparation and reproduction for copies of these records.

(b) As a laboratory, you must provide, within 10 business days of receiving a written request from an employee, and made through the MRO, the records relating to the results of the employee's drug test (*i.e.*, laboratory report and data package). You may charge no more than the cost of preparation and reproduction for copies of these records.

(c) As a SAP, you must make available to an employee, on request, a copy of all SAP reports (see § 40.311). However, you must redact follow-up testing information from the report before providing it to the employee.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41954, Aug. 9, 2001]

§ 40.331 To what additional parties must employers and service agents release information?

As an employer or service agent you must release information under the following circumstances:

(a) If you receive a specific, written consent from an employee authorizing the release of information about that employee's drug or alcohol tests to an identified person, you must provide the information to the identified person. For example, as an employer, when you receive a written request from a former employee to provide information to a subsequent employer, you must do so. In providing the information, you must comply with the terms of the employee's consent.

(b) If you are an employer, you must, upon request of DOT agency representatives, provide the following:

(1) Access to your facilities used for this part and DOT agency drug and alcohol program functions.

(2) All written, printed, and computer-based drug and alcohol program records and reports (including copies of name-specific records or reports), files, materials, data, documents/documentation, agreements, contracts, policies, and statements that are required by this part and DOT agency regulations. You must provide this information at your principal place of business in the time required by the DOT agency.

(3) All items in paragraph (b)(2) of this section must be easily accessible, legible, and provided in an organized manner. If electronic records do not meet these standards, they must be converted to printed documentation that meets these standards.

(c) If you are a service agent, you must, upon request of DOT agency representatives, provide the following:

(1) Access to your facilities used for this part and DOT agency drug and alcohol program functions.

(2) All written, printed, and computer-based drug and alcohol program records and reports (including copies of name-specific records or reports), files,

materials, data, documents/documentation, agreements, contracts, policies, and statements that are required by this part and DOT agency regulations. You must provide this information at your principal place of business in the time required by the DOT agency.

(3) All items in paragraph (c)(2) of this section must be easily accessible, legible, and provided in an organized manner. If electronic records do not meet these standards, they must be converted to printed documentation that meets these standards.

(d) If requested by the National Transportation Safety Board as part of an accident investigation, you must provide information concerning post-accident tests administered after the accident.

(e) If requested by a Federal, state or local safety agency with regulatory authority over you or the employee, you must provide drug and alcohol test records concerning the employee.

(f) Except as otherwise provided in this part, as a laboratory you must not release or provide a specimen or a part of a specimen to a requesting party, without first obtaining written consent from ODAPC. DNA testing and other types of identity testing are not authorized and ODAPC will not give permission for such testing. If a party seeks a court order directing you to release a specimen or part of a specimen contrary to any provision of this part, you must take necessary legal steps to contest the issuance of the order (*e.g.*, seek to quash a subpoena, citing the requirements of §40.13). This part does not require you to disobey a court order, however.

(g) Notwithstanding any other provision of this Part, as an employer of Commercial Motor Vehicle (CMV) drivers holding commercial driving licenses (CDLs) or as a third party administrator for owner-operator CMV drivers with CDLs, you are authorized to comply with State laws requiring you to provide to State CDL licensing authorities information about all violations of DOT drug and alcohol testing rules (including positive tests and refusals) by any CMV driver holding a CDL.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41955, Aug. 9, 2001; 73 FR 33737, June 13, 2008; 82 FR 52247, Nov. 13, 2017]

§40.333 What records must employers keep?

(a) As an employer, you must keep the following records for the following periods of time:

(1) You must keep the following records for five years:

(i) Records of alcohol test results indicating an alcohol concentration of 0.02 or greater;

(ii) Records of verified positive drug test results;

(iii) Documentation of refusals to take required alcohol and/or drug tests (including substituted or adulterated drug test results);

(iv) SAP reports; and

(v) All follow-up tests and schedules for follow-up tests.

(2) You must keep records for three years of information obtained from previous employers under §40.25 concerning drug and alcohol test results of employees.

(3) You must keep records of the inspection, maintenance, and calibration of EBTs, for two years.

(4) You must keep records of negative and cancelled drug test results and alcohol test results with a concentration of less than 0.02 for one year.

(b) You do not have to keep records related to a program requirement that does not apply to you (*e.g.*, a maritime employer who does not have a DOT-mandated random alcohol testing program need not maintain random alcohol testing records).

(c) You must maintain the records in a location with controlled access.

(d) A service agent may maintain these records for you. However, you must ensure that you can produce these records at your principal place of business in the time required by the DOT agency. For example, as a motor carrier, when an FMCSA inspector requests your records, you must ensure that you can provide them within two business days.

(e) If you store records electronically, where permitted by this part, you must ensure that the records are

easily accessible, legible, and formatted and stored in an organized manner. If electronic records do not meet these criteria, you must convert them to printed documentation in a rapid and readily auditable manner, at the request of DOT agency personnel.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41955, Aug. 9, 2001]

Subpart Q—Roles and Responsibilities of Service Agents

§ 40.341 Must service agents comply with DOT drug and alcohol testing requirements?

(a) As a service agent, the services you provide to transportation employers must meet the requirements of this part and the DOT agency drug and alcohol testing regulations.

(b) If you do not comply, DOT may take action under the Public Interest Exclusions procedures of this part (see Subpart R of this part) or applicable provisions of other DOT agency regulations.

§ 40.343 What tasks may a service agent perform for an employer?

As a service agent, you may perform for employers the tasks needed to comply with DOT agency drug and alcohol testing regulations, subject to the requirements and limitations of this part.

§ 40.345 In what circumstances may a C/TPA act as an intermediary in the transmission of drug and alcohol testing information to employers?

(a) As a C/TPA or other service agent, you may act as an intermediary in the transmission of drug and alcohol testing information in the circumstances specified in this section only if the employer chooses to have you do so. Each employer makes the decision about whether to receive some or all of this information from you, acting as an intermediary, rather than directly from the service agent who originates the information (*e.g.*, an MRO or BAT).

(b) The specific provisions of this part concerning which you may act as an intermediary are listed in appendix H to this part. These are the only situations in which you may act as an intermediary. You are prohibited from doing so in all other situations.

(c) In every case, you must ensure that, in transmitting information to employers, you meet all requirements (*e.g.*, concerning confidentiality and timing) that would apply if the service agent originating the information (*e.g.*, an MRO or collector) sent the information directly to the employer. For example, if you transmit drug testing results from MROs to DERs, you must transmit each drug test result to the DER in compliance with the MRO requirements set forth in § 40.167.

[65 FR 79526, Dec. 19, 2000, as amended at 88 FR 27650, May 2, 2023]

§ 40.347 What functions may C/TPAs perform with respect to administering testing?

As a C/TPA, except as otherwise specified in this part, you may perform the following functions for employers concerning random selection and other selections for testing.

(a) You may operate random testing programs for employers and may assist (*i.e.*, through contracting with laboratories or collection sites, conducting collections) employers with other types of testing (*e.g.*, pre-employment, post-accident, reasonable suspicion, return-to-duty, and follow-up).

(b) You may combine employees from more than one employer or one transportation industry in a random pool if permitted by all the DOT agency drug and alcohol testing regulations involved.

(1) If you combine employees from more than one transportation industry, you must ensure that the random testing rate is at least equal to the highest rate required by each DOT agency.

(2) Employees not covered by DOT agency regulations may not be part of the same random pool with DOT covered employees.

(c) You may assist employers in ensuring that follow-up testing is conducted in accordance with the plan established by the SAP. However, neither you nor the employer are permitted to randomly select employees from a ''follow-up pool'' for follow-up testing.

§ 40.349 What records may a service agent receive and maintain?

(a) Except where otherwise specified in this part, as a service agent you may receive and maintain all records concerning DOT drug and alcohol testing programs, including positive, negative, and refusal to test individual test results. You do not need the employee's consent to receive and maintain these records.

(b) You may maintain all information needed for operating a drug/alcohol program (*e.g.*, CCFs, ATFs, names of employees in random pools, random selection lists, copies of notices to employers of selected employees) on behalf of an employer.

(c) If a service agent originating drug or alcohol testing information, such as an MRO or BAT, sends the information directly to the DER, he or she may also provide the information simultaneously to you, as a C/TPA or other service agent who maintains this information for the employer.

(d) If you are serving as an intermediary in transmitting information that is required to be provided to the employer, you must ensure that it reaches the employer in the same time periods required elsewhere in this part.

(e) You must ensure that you can make available to the employer within two business days any information the employer is asked to produce by a DOT agency representative.

(f) On request of an employer, you must, at any time on the request of an employer, transfer immediately all records pertaining to the employer and its employees to the employer or to any other service agent the employer designates. You must carry out this transfer as soon as the employer requests it. You are not required to obtain employee consent for this transfer. You must not charge more than your reasonable administrative costs for conducting this transfer. You may not charge a fee for the release of these records.

(g) If you are planning to go out of business or your organization will be bought by or merged with another organization, you must immediately notify all employers and offer to transfer all records pertaining to the employer and its employees to the employer or to any other service agent the employer designates. You must carry out this transfer as soon as the employer requests it. You are not required to obtain employee consent for this transfer. You must not charge more than your reasonable administrative costs for conducting this transfer. You may not charge a fee for the release of these records.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41955, Aug. 9, 2001]

§ 40.351 What confidentiality requirements apply to service agents?

Except where otherwise specified in this part, as a service agent the following confidentiality requirements apply to you:

(a) When you receive or maintain confidential information about employees (*e.g.*, individual test results), you must follow the same confidentiality regulations as the employer with respect to the use and release of this information.

(b) You must follow all confidentiality and records retention requirements applicable to employers.

(c) You may not provide individual test results or other confidential information to another employer without a specific, written consent from the employee. For example, suppose you are a C/TPA that has employers X and Y as clients. Employee Jones works for X, and you maintain Jones' drug and alcohol test for X. Jones wants to change jobs and work for Y. You may not inform Y of the result of a test conducted for X without having a specific, written consent from Jones. Likewise, you may not provide this information to employer Z, who is not a C/TPA member, without this consent.

(d) You must not use blanket consent forms authorizing the release of employee testing information.

(e) You must establish adequate confidentiality and security measures to ensure that confidential employee records are not available to unauthorized persons. This includes protecting the physical security of records, access controls, and computer security measures to safeguard confidential data in electronic data bases.

§ 40.353 What principles govern the interaction between MROs and other service agents?

As a service agent other than an MRO (*e.g.*, a C/TPA), the following principles govern your interaction with MROs:

(a) You may provide MRO services to employers, directly or through contract, if you meet all applicable provisions of this part.

(b) If you employ or contract for an MRO, the MRO must perform duties independently and confidentially. When you have a relationship with an MRO, you must structure the relationship to ensure that this independence and confidentiality are not compromised. Specific means (including both physical and operational measures, as appropriate) to separate MRO functions and other service agent functions are essential.

(c) Only your staff who are actually under the day-to-day supervision and control of an MRO with respect to MRO functions may perform these functions. This does not mean that those staff may not perform other functions at other times. However, the designation of your staff to perform MRO functions under MRO supervision must be limited and not used as a subterfuge to circumvent confidentiality and other requirements of this part and DOT agency regulations. You must ensure that MRO staff operate under controls sufficient to ensure that the independence and confidentiality of the MRO process are not compromised.

(d) Like other MROs, an MRO you employ or contract with must personally conduct verification interviews with employees and must personally make all verification decisions. Consequently, your staff cannot perform these functions.

§ 40.355 What limitations apply to the activities of service agents?

As a service agent, you are subject to the following limitations concerning your activities in the DOT drug and alcohol testing program.

(a) You must not require an employee to sign a consent, release, waiver of liability, or indemnification agreement with respect to any part of the drug or alcohol testing process covered by this part (including, but not limited to, collections, laboratory testing, MRO, and SAP services). No one may do so on behalf of a service agent.

(b) You must not act as an intermediary in the transmission of drug test results from the laboratory to the MRO. That is, the laboratory may not send results to you, with you in turn sending them to the MRO for verification. For example, a practice in which the laboratory transmits results to your computer system, and you then assign the results to a particular MRO, is not permitted.

(c) You must not transmit drug test results directly from the laboratory to the employer (by electronic or other means) or to a service agent who forwards them to the employer. All confirmed laboratory results must be processed by the MRO before they are released to any other party.

(d) You must not act as an intermediary in the transmission of alcohol test results of 0.02 or higher from the STT or BAT to the DER.

(e) Except as provided in paragraph (f) of this section, you must not act as an intermediary in the transmission of individual SAP reports to the actual employer. That is, the SAP may not send such reports to you, with you in turn sending them to the actual employer. However, you may maintain individual SAP summary reports and follow-up testing plans after they are sent to the DER, and the SAP may transmit such reports to you simultaneously with sending them to the DER.

(f) As an exception to paragraph (e) of this section, you may act as an intermediary in the transmission of SAP report from the SAP to an owner-operator or other self-employed individual.

(g) Except as provided in paragraph (h) of this section, you must not make decisions to test an employee based upon reasonable suspicion, post-accident, return-to-duty, and follow-up determination criteria. These are duties the actual employer cannot delegate to a C/TPA. You may, however, provide advice and information to employers regarding these testing issues and how the employer should schedule required testing.

(h) As an exception to paragraph (g) of this section, you may make decisions to test an employee based upon reasonable suspicion, post-accident, return-to-duty, and follow-up determination criteria with respect to an owner-operator or other self-employed individual.

(i) Except as provided in paragraph (j) of this section, you must not make a determination that an employee has refused a drug or alcohol test. This is a non-delegable duty of the actual employer. You may, however, provide advice and information to employers regarding refusal-to-test issues.

(j) As an exception to paragraph (i) of this section, you may make a determination that an employee has refused a drug or alcohol test, if:

(1) You schedule a required test for an owner-operator or other self-employed individual, and the individual fails to appear for the test without a legitimate reason; or

(2) As an MRO, you determine that an individual has refused to test on the basis of adulteration or substitution.

(k) You must not act as a DER. For example, while you may be responsible for transmitting information to the employer about test results, you must not act on behalf of the employer in actions to remove employees from safety-sensitive duties.

(l) In transmitting documents to laboratories, you must ensure that you send to the laboratory that conducts testing only Copy 1 of the CCF. You must not transmit other copies of the CCF or any ATFs to the laboratory.

(m) You must not impose conditions or requirements on employers that DOT regulations do not authorize. For example, as a C/TPA serving employers in the pipeline or motor carrier industry, you must not require employers to have provisions in their DOT plans that PHMSA or FMCSA regulations do not require.

(n) You must not intentionally delay the transmission of drug or alcohol testing-related documents concerning actions you have performed, because of a payment dispute or other reasons.

Example 1 to paragraph (n): A laboratory that has tested a specimen must not delay transmitting the documentation of the test result to an MRO because of a billing or payment dispute with the MRO or a C/TPA.

Example 2 to paragraph (n): An MRO or SAP who has interviewed an employee must not delay sending a verified test result or SAP report to the employer because of such a dispute with the employer or employee.

Example 3 to paragraph (n): A collector who has performed a specimen collection must not delay sending the drug specimen and CCF to the laboratory because of a payment or other dispute with the laboratory or a C/TPA.

Example 4 to paragraph (n): A BAT who has conducted an alcohol test must not delay sending test result information to an employer or C/TPA because of a payment or other dispute with the employer or C/TPA.

(o) While you must follow the DOT agency regulations, the actual employer remains accountable to DOT for compliance, and your failure to implement any aspect of the program as required in this part and other applicable DOT agency regulations makes the employer subject to enforcement action by the Department.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41955, Aug. 9, 2001; 71 FR 49384, Aug. 23, 2006; 75 FR 59108, Sept. 27, 2010; 88 FR 27650, May 2, 2023]

Subpart R—Public Interest Exclusions

§ 40.361 What is the purpose of a public interest exclusion (PIE)?

(a) To protect the public interest, including protecting transportation employers and employees from serious noncompliance with DOT drug and alcohol testing rules, the Department's policy is to ensure that employers conduct business only with responsible service agents.

(b) The Department therefore uses PIEs to exclude from participation in DOT's drug and alcohol testing program any service agent who, by serious noncompliance with this part or other DOT agency drug and alcohol testing regulations, has shown that it is not currently acting in a responsible manner.

(c) A PIE is a serious action that the Department takes only to protect the public interest. We intend to use PIEs only to remedy situations of serious noncompliance. PIEs are not used for the purpose of punishment.

(d) Nothing in this subpart precludes a DOT agency or the Inspector General from taking other action authorized by its regulations with respect to service agents or employers that violate its regulations.

§ 40.363 On what basis may the Department issue a PIE?

(a) If you are a service agent, the Department may issue a PIE concerning you if we determine that you have failed or refused to provide drug or alcohol testing services consistent with the requirements of this part or a DOT agency drug and alcohol regulation.

(b) The Department also may issue a PIE if you have failed to cooperate with DOT agency representatives concerning inspections, complaint investigations, compliance and enforcement reviews, or requests for documents and other information about compliance with this part or DOT agency drug and alcohol regulations.

§ 40.365 What is the Department's policy concerning starting a PIE proceeding?

(a) It is the Department's policy to start a PIE proceeding only in cases of serious, uncorrected noncompliance with the provisions of this part, affecting such matters as safety, the outcomes of test results, privacy and confidentiality, due process and fairness for employees, the honesty and integrity of the testing program, and cooperation with or provision of information to DOT agency representatives.

(b) The following are examples of the kinds of serious noncompliance that, as a matter of policy, the Department views as appropriate grounds for starting a PIE proceeding. These examples are not intended to be an exhaustive or exclusive list of the grounds for starting a PIE proceeding. We intend them to illustrate the level of seriousness that the Department believes supports starting a PIE proceeding. The examples follow:

(1) For an MRO, verifying tests positive without interviewing the employees as required by this part or providing MRO services without meeting the qualifications for an MRO required by this part;

(2) For a laboratory, refusing to provide information to the Department, an employer, or an employee as required by this part; failing or refusing to conduct a validity testing program when required by this part; or a pattern or practice of testing errors that result in the cancellation of tests. (As a general matter of policy, the Department does not intend to initiate a PIE proceeding concerning a laboratory with respect to matters on which HHS initiates certification actions under its laboratory guidelines.);

(3) For a collector, a pattern or practice of directly observing collections when doing so is unauthorized, or failing or refusing to directly observe collections when doing so is mandatory;

(4) For collectors, BATs, or STTs, a pattern or practice of using forms, testing equipment, or collection kits that do not meet the standards in this part;

(5) For a collector, BAT, or STT, a pattern or practice of ''fatal flaws'' or other significant uncorrected errors in the collection process;

(6) For a laboratory, MRO or C/TPA, failing or refusing to report tests results as required by this part or DOT agency regulations;

(7) For a laboratory, falsifying, concealing, or destroying documentation concerning any part of the drug testing process, including, but not limited to, documents in a ''litigation package'';

(8) For SAPs, providing SAP services while not meeting SAP qualifications required by this part or performing evaluations without interviews meeting the requirements of § 40.291(a)(1);

(9) For any service agent, maintaining a relationship with another party that constitutes a conflict of interest under this part (*e.g.*, a laboratory that derives a financial benefit from having an employer use a specific MRO);

(10) For any service agent, falsely representing that the service agent or its activities is approved or certified by the Department or a DOT agency (such representation includes, but is not limited to, the use of a Department or DOT agency logo, title, or emblem).

(11) For any service agent, disclosing an employee's test result information to any party this part or a DOT agency

regulation does not authorize, including by obtaining a ''blanket'' consent from employees or by creating a data base from which employers or others can retrieve an employee's DOT test results without the specific consent of the employee;

(12) For any service agent, interfering or attempting to interfere with the ability of an MRO to communicate with the Department, or retaliating against an MRO for communicating with the Department;

(13) For any service agent, directing or recommending that an employer fail or refuse to implement any provision of this part; or

(14) With respect to noncompliance with a DOT agency regulation, conduct that affects important provisions of Department-wide concern (*e.g.,* failure to properly conduct the selection process for random testing).

[65 FR 79526, Dec. 19, 2000, as amended at 82 FR 52247, Nov. 13, 2017; 88 FR 27650, May 2, 2023]

§ 40.367 Who initiates a PIE proceeding?

The following DOT officials may initiate a PIE proceeding:

(a) The drug and alcohol program manager of a DOT agency;

(b) An official of ODAPC, other than the Director; or

(c) The designee of any of these officials.

§ 40.369 What is the discretion of an initiating official in starting a PIE proceeding?

(a) Initiating officials have broad discretion in deciding whether to start a PIE proceeding.

(b) In exercising this discretion, the initiating official must consider the Department's policy regarding the seriousness of the service agent's conduct (see § 40.365) and all information he or she has obtained to this point concerning the facts of the case. The initiating official may also consider the availability of the resources needed to pursue a PIE proceeding.

(c) A decision not to initiate a PIE proceeding does not necessarily mean that the Department regards a service agent as being in compliance or that the Department may not use other applicable remedies in a situation of noncompliance.

§ 40.371 On what information does an initiating official rely in deciding whether to start a PIE proceeding?

(a) An initiating official may rely on credible information from any source as the basis for starting a PIE proceeding.

(b) Before sending a correction notice (see § 40.373), the initiating official informally contacts the service agent to determine if there is any information that may affect the initiating official's determination about whether it is necessary to send a correction notice. The initiating official may take any information resulting from this contact into account in determining whether to proceed under this subpart.

§ 40.373 Before starting a PIE proceeding, does the initiating official give the service agent an opportunity to correct problems?

(a) If you are a service agent, the initiating official must send you a correction notice before starting a PIE proceeding.

(b) The correction notice identifies the specific areas in which you must come into compliance in order to avoid being subject to a PIE proceeding.

(c) If you make and document changes needed to come into compliance in the areas listed in the correction notice to the satisfaction of the initiating official within 60 days of the date you receive the notice, the initiating official does not start a PIE proceeding. The initiating official may conduct appropriate fact finding to verify that you have made and maintained satisfactory corrections. When he or she is satisfied that you are in compliance, the initiating official sends you a notice that the matter is concluded.

§ 40.375 How does the initiating official start a PIE proceeding?

(a) As a service agent, if your compliance matter is not correctable (see § 40.373(a)), or if have not resolved compliance matters as provided in § 40.373(c), the initiating official starts a PIE proceeding by sending you a notice of proposed exclusion (NOPE). The NOPE contains the initiating official's

recommendations concerning the issuance of a PIE, but it is not a decision by the Department to issue a PIE.

(b) The NOPE includes the following information:

(1) A statement that the initiating official is recommending that the Department issue a PIE concerning you;

(2) The factual basis for the initiating official's belief that you are not providing drug and/or alcohol testing services to DOT-regulated employers consistent with the requirements of this part or are in serious noncompliance with a DOT agency drug and alcohol regulation;

(3) The factual basis for the initiating official's belief that your noncompliance has not been or cannot be corrected;

(4) The initiating official's recommendation for the scope of the PIE;

(5) The initiating official's recommendation for the duration of the PIE; and

(6) A statement that you may contest the issuance of the proposed PIE, as provided in § 40.379.

(c) The initiating official sends a copy of the NOPE to the ODAPC Director at the same time he or she sends the NOPE to you.

§ 40.377 Who decides whether to issue a PIE?

(a) The ODAPC Director, or his or her designee, decides whether to issue a PIE. If a designee is acting as the decisionmaker, all references in this subpart to the Director refer to the designee.

(b) To ensure his or her impartiality, the Director plays no role in the initiating official's determination about whether to start a PIE proceeding.

(c) There is a ''firewall'' between the initiating official and the Director. This means that the initiating official and the Director are prohibited from having any discussion, contact, or exchange of information with one another about the matter, except for documents and discussions that are part of the record of the proceeding.

§ 40.379 How do you contest the issuance of a PIE?

(a) If you receive a NOPE, you may contest the issuance of the PIE.

(b) If you want to contest the proposed PIE, you must provide the Director information and argument in opposition to the proposed PIE in writing, in person, and/or through a representative. To contest the proposed PIE, you must take one or more of the steps listed in this paragraph (b) within 30 days after you receive the NOPE.

(1) You may request that the Director dismiss the proposed PIE without further proceedings, on the basis that it does not concern serious noncompliance with this part or DOT agency regulations, consistent with the Department's policy as stated in § 40.365.

(2) You may present written information and arguments, consistent with the provisions of § 40.381, contesting the proposed PIE.

(3) You may arrange with the Director for an informal meeting to present your information and arguments.

(c) If you do not take any of the actions listed in paragraph (b) of this section within 30 days after you receive the NOPE, the matter proceeds as an uncontested case. In this event, the Director makes his or her decision based on the record provided by the initiating official (*i.e.*, the NOPE and any supporting information or testimony) and any additional information the Director obtains.

§ 40.381 What information do you present to contest the proposed issuance of a PIE?

(a) As a service agent who wants to contest a proposed PIE, you must present at least the following information to the Director:

(1) Specific facts that contradict the statements contained in the NOPE (see § 40.375(b)(2) and (3)). A general denial is insufficient to raise a genuine dispute over facts material to the issuance of a PIE;

(2) Identification of any existing, proposed or prior PIE; and

(3) Identification of your affiliates, if any.

(b) You may provide any information and arguments you wish concerning the proposed issuance, scope and duration of the PIE (see § 40.375(b)(4) and (5)).

(c) You may provide any additional relevant information or arguments

concerning any of the issues in the matter.

§ 40.383 What procedures apply if you contest the issuance of a PIE?

(a) DOT conducts PIE proceedings in a fair and informal manner. The Director may use flexible procedures to allow you to present matters in opposition. The Director is not required to follow formal rules of evidence or procedure in creating the record of the proceeding.

(b) The Director will consider any information or argument he or she determines to be relevant to the decision on the matter.

(c) You may submit any documentary evidence you want the Director to consider. In addition, if you have arranged an informal meeting with the Director, you may present witnesses and confront any person the initiating official presents as a witness against you.

(d) In cases where there are material factual issues in dispute, the Director or his or her designee may conduct additional fact-finding.

(e) If you have arranged a meeting with the Director, the Director will make a transcribed record of the meeting available to you on your request. You must pay the cost of transcribing and copying the meeting record.

§ 40.385 Who bears the burden of proof in a PIE proceeding?

(a) As the proponent of issuing a PIE, the initiating official bears the burden of proof.

(b) This burden is to demonstrate, by a preponderance of the evidence, that the service agent was in serious noncompliance with the requirements of this part for drug and/or alcohol testing-related services or with the requirements of another DOT agency drug and alcohol testing regulation.

§ 40.387 What matters does the Director decide concerning a proposed PIE?

(a) Following the service agent's response (see § 40.379(b)) or, if no response is received, after 30 days have passed from the date on which the service agent received the NOPE, the Director may take one of the following steps:

(1) In response to a request from the service agent (see § 40.379(b)(1)) or on his or her own motion, the Director may dismiss a PIE proceeding if he or she determines that it does not concern serious noncompliance with this part or DOT agency regulations, consistent with the Department's policy as stated in § 40.365.

(i) If the Director dismisses a proposed PIE under this paragraph (a), the action is closed with respect to the noncompliance alleged in the NOPE.

(ii) The Department may initiate a new PIE proceeding against you on the basis of different or subsequent conduct that is in noncompliance with this part or other DOT drug and alcohol testing rules.

(2) If the Director determines that the initiating official's submission does not have complete information needed for a decision, the Director may remand the matter to the initiating official. The initiating official may resubmit the matter to the Director when the needed information is complete. If the basis for the proposed PIE has changed, the initiating official must send an amended NOPE to the service agent.

(b) The Director makes determinations concerning the following matters in any PIE proceeding that he or she decides on the merits:

(1) Any material facts that are in dispute;

(2) Whether the facts support issuing a PIE;

(3) The scope of any PIE that is issued; and

(4) The duration of any PIE that is issued.

§ 40.389 What factors may the Director consider?

This section lists examples of the kind of mitigating and aggravating factors that the Director may consider in determining whether to issue a PIE concerning you, as well as the scope and duration of a PIE. This list is not exhaustive or exclusive. The Director may consider other factors if appropriate in the circumstances of a particular case. The list of examples follows:

(a) The actual or potential harm that results or may result from your noncompliance;

(b) The frequency of incidents and/or duration of the noncompliance;

(c) Whether there is a pattern or prior history of noncompliance;

(d) Whether the noncompliance was pervasive within your organization, including such factors as the following:

(1) Whether and to what extent your organization planned, initiated, or carried out the noncompliance;

(2) The positions held by individuals involved in the noncompliance, and whether your principals tolerated their noncompliance; and

(3) Whether you had effective standards of conduct and control systems (both with respect to your own organization and any contractors or affiliates) at the time the noncompliance occurred;

(e) Whether you have demonstrated an appropriate compliance disposition, including such factors as the following:

(1) Whether you have accepted responsibility for the noncompliance and recognize the seriousness of the conduct that led to the cause for issuance of the PIE;

(2) Whether you have cooperated fully with the Department during the investigation. The Director may consider when the cooperation began and whether you disclosed all pertinent information known to you;

(3) Whether you have fully investigated the circumstances of the noncompliance forming the basis for the PIE and, if so, have made the result of the investigation available to the Director;

(4) Whether you have taken appropriate disciplinary action against the individuals responsible for the activity that constitutes the grounds for issuance of the PIE; and

(5) Whether your organization has taken appropriate corrective actions or remedial measures, including implementing actions to prevent recurrence;

(f) With respect to noncompliance with a DOT agency regulation, the degree to which the noncompliance affects matters common to the DOT drug and alcohol testing program;

(g) Other factors appropriate to the circumstances of the case.

§ 40.391 What is the scope of a PIE?

(a) The scope of a PIE is the Department's determination about the divisions, organizational elements, types of services, affiliates, and/or individuals (including direct employees of a service agent and its contractors) to which a PIE applies.

(b) If, as a service agent, the Department issues a PIE concerning you, the PIE applies to all your divisions, organizational elements, and types of services that are involved with or affected by the noncompliance that forms the factual basis for issuing the PIE.

(c) In the NOPE (see § 40.375(b)(4)), the initiating official sets forth his or her recommendation for the scope of the PIE. The proposed scope of the PIE is one of the elements of the proceeding that the service agent may contest (see § 40.381(b)) and about which the Director makes a decision (see § 40.387(b)(3)).

(d) In recommending and deciding the scope of the PIE, the initiating official and Director, respectively, must take into account the provisions of paragraphs (e) through (j) of this section.

(e) The pervasiveness of the noncompliance within a service agent's organization (see § 40.389(d)) is an important consideration in determining the scope of a PIE. The appropriate scope of a PIE grows broader as the pervasiveness of the noncompliance increases.

(f) The application of a PIE is not limited to the specific location or employer at which the conduct that forms the factual basis for issuing the PIE was discovered.

(g) A PIE applies to your affiliates, if the affiliate is involved with or affected by the conduct that forms the factual basis for issuing the PIE.

(h) A PIE applies to individuals who are officers, employees, directors, shareholders, partners, or other individuals associated with your organization in the following circumstances:

(1) Conduct forming any part of the factual basis of the PIE occurred in connection with the individual's performance of duties by or on behalf of your organization; or

(2) The individual knew of, had reason to know of, approved, or acquiesced

in such conduct. The individual's acceptance of benefits derived from such conduct is evidence of such knowledge, acquiescence, or approval.

(i) If a contractor to your organization is solely responsible for the conduct that forms the factual basis for a PIE, the PIE does not apply to the service agent itself unless the service agent knew or should have known about the conduct and did not take action to correct it.

(j) PIEs do not apply to drug and alcohol testing that DOT does not regulate.

(k) The following examples illustrate how the Department intends the provisions of this section to work:

Example 1 to § 40.391. Service Agent P provides a variety of drug testing services. P's SAP services are involved in a serious violation of this Part 40. However, P's other services fully comply with this part, and P's overall management did not plan or concur in the noncompliance, which in fact was contrary to P's articulated standards. Because the noncompliance was isolated in one area of the organization's activities, and did not pervade the entire organization, the scope of the PIE could be limited to SAP services.

Example 2 to § 40.391. Service Agent Q provides a similar variety of services. The conduct forming the factual basis for a PIE concerns collections for a transit authority. As in Example 1, the noncompliance is not pervasive throughout Q's organization. The PIE would apply to collections at all locations served by Q, not just the particular transit authority or not just in the state in which the transit authority is located.

Example 3 to § 40.391. Service Agent R provides a similar array of services. One or more of the following problems exists: R's activities in several areas—collections, MROs, SAPs, protecting the confidentiality of information—are involved in serious noncompliance; DOT determines that R's management knew or should have known about serious noncompliance in one or more areas, but management did not take timely corrective action; or, in response to an inquiry from DOT personnel, R's management refuses to provide information about its operations. In each of these three cases, the scope of the PIE would include all aspects of R's services.

Example 4 to § 40.391. Service Agent W provides only one kind of service (*e.g.*, laboratory or MRO services). The Department issues a PIE concerning these services. Because W only provides this one kind of service, the PIE necessarily applies to all its operations.

Example 5 to § 40.391. Service Agent X, by exercising reasonably prudent oversight of its collection contractor, should have known that the contractor was making numerous ''fatal flaws'' in tests. Alternatively, X received a correction notice pointing out these problems in its contractor's collections. In neither case did X take action to correct the problem. X, as well as the contractor, would be subject to a PIE with respect to collections.

Example 6 to § 40.391. Service Agent Y could not reasonably have known that one of its MROs was regularly failing to interview employees before verifying tests positive. When it received a correction notice, Y immediately dismissed the erring MRO. In this case, the MRO would be subject to a PIE but Y would not.

Example 7 to § 40.391. The Department issues a PIE with respect to Service Agent Z. Z provides services for DOT-regulated transportation employers, a Federal agency under the HHS-regulated Federal employee testing program, and various private businesses and public agencies that DOT does not regulate. The PIE applies only to the DOT-regulated transportation employers with respect to their DOT-mandated testing, not to the Federal agency or the other public agencies and private businesses. The PIE does not prevent the non-DOT regulated entities from continuing to use Z's services.

§ 40.393 How long does a PIE stay in effect?

(a) In the NOPE (see § 40.375(b)(5)), the initiating official proposes the duration of the PIE. The duration of the PIE is one of the elements of the proceeding that the service agent may contest (see § 40.381(b)) and about which the Director makes a decision (see § 40.387(b)(4)).

(b) In deciding upon the duration of the PIE, the Director considers the seriousness of the conduct on which the PIE is based and the continued need to protect employers and employees from the service agent's noncompliance. The Director considers factors such as those listed in § 40.389 in making this decision.

(c) The duration of a PIE will be between one and five years, unless the Director reduces its duration under § 40.407.

§ 40.395 Can you settle a PIE proceeding?

At any time before the Director's decision, you and the initiating official

can, with the Director's concurrence, settle a PIE proceeding.

§ 40.397 When does the Director make a PIE decision?

The Director makes his or her decision within 60 days of the date when the record of a PIE proceeding is complete (including any meeting with the Director and any additional fact-finding that is necessary). The Director may extend this period for good cause for additional periods of up to 30 days.

§ 40.399 How does the Department notify service agents of its decision?

If you are a service agent involved in a PIE proceeding, the Director provides you written notice as soon as he or she makes a PIE decision. The notice includes the following elements:

(a) If the decision is not to issue a PIE, a statement of the reasons for the decision, including findings of fact with respect to any material factual issues that were in dispute.

(b) If the decision is to issue a PIE—

(1) A reference to the NOPE;

(2) A statement of the reasons for the decision, including findings of fact with respect to any material factual issues that were in dispute;

(3) A statement of the scope of the PIE; and

(4) A statement of the duration of the PIE.

§ 40.401 How does the Department notify employers and the public about a PIE?

(a) The Department maintains a document called the ''List of Excluded Drug and Alcohol Service Agents.'' This document may be found on the Department's web site (*http://www.transportation.gov/odapc*) . You may also request a copy of the document from ODAPC.

(b) When the Director issues a PIE, he or she adds to the List the name and address of the service agent, and any other persons or organizations, to whom the PIE applies and information about the scope and duration of the PIE.

(c) When a service agent ceases to be subject to a PIE, the Director removes this information from the List.

(d) The Department also publishes a FEDERAL REGISTER notice to inform the public on any occasion on which a service agent is added to or taken off the List.

[65 FR 79526, Dec. 19, 2000, as amended at 82 FR 52247, Nov. 13, 2017]

§ 40.403 Must a service agent notify its clients when the Department issues a PIE?

(a) As a service agent, if the Department issues a PIE concerning you, you must notify each of your DOT-regulated employer clients, in writing, about the issuance, scope, duration, and effect of the PIE. You may meet this requirement by sending a copy of the Director's PIE decision or by a separate notice. You must send this notice to each client within three business days of receiving from the Department the notice provided for in § 40.399(b).

(b) As part of the notice you send under paragraph (a) of this section, you must offer to transfer immediately all records pertaining to the employer and its employees to the employer or to any other service agent the employer designates. You must carry out this transfer as soon as the employer requests it.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41955, Aug. 9, 2001]

§ 40.405 May the Federal courts review PIE decisions?

The Director's decision is a final administrative action of the Department. Like all final administrative actions of Federal agencies, the Director's decision is subject to judicial review under the Administrative Procedure Act (5 U.S.C. 551 *et. seq*).

§ 40.407 May a service agent ask to have a PIE reduced or terminated?

(a) Yes, as a service agent concerning whom the Department has issued a PIE, you may request that the Director terminate a PIE or reduce its duration and/or scope. This process is limited to the issues of duration and scope. It is not an appeal or reconsideration of the decision to issue the PIE.

(b) Your request must be in writing and supported with documentation.

(c) You must wait at least nine months from the date on which the Director issued the PIE to make this request.

(d) The initiating official who was the proponent of the PIE may provide information and arguments concerning your request to the Director.

(e) If the Director verifies that the sources of your noncompliance have been eliminated and that all drug or alcohol testing-related services you would provide to DOT-regulated employers will be consistent with the requirements of this part, the Director may issue a notice terminating or reducing the PIE.

§ 40.409 What does the issuance of a PIE mean to transportation employers?

(a) As an employer, you are deemed to have notice of the issuance of a PIE when it appears on the List mentioned in § 40.401(a) or the notice of the PIE appears in the FEDERAL REGISTER as provided in § 40.401(d). You should check this List to ensure that any service agents you are using or planning to use are not subject to a PIE.

(b) As an employer who is using a service agent concerning whom a PIE is issued, you must stop using the services of the service agent no later than 90 days after the Department has published the decision in the FEDERAL REGISTER or posted it on its web site. You may apply to the ODAPC Director for an extension of 30 days if you demonstrate that you cannot find a substitute service agent within 90 days.

(c) Except during the period provided in paragraph (b) of this section, you must not, as an employer, use the services of a service agent that are covered by a PIE that the Director has issued under this subpart. If you do so, you are in violation of the Department's regulations and subject to applicable DOT agency sanctions (*e.g.*, civil penalties, withholding of Federal financial assistance).

(d) You also must not obtain drug or alcohol testing services through a contractor or affiliate of the service agent to whom the PIE applies.

Example to paragraph (d): Service Agent R was subject to a PIE with respect to SAP services. As an employer, not only must you not use R's own SAP services, but you also must not use SAP services you arrange through R, such as services provided by a subcontractor or affiliate of R or a person or organization that receives financial gain from its relationship with R.

(e) This section's prohibition on using the services of a service agent concerning which the Director has issued a PIE applies to employers in all industries subject to DOT drug and alcohol testing regulations.

Example to paragraph (e): The initiating official for a PIE was the FAA drug and alcohol program manager, and the conduct forming the basis of the PIE pertained to the aviation industry. As a motor carrier, transit authority, pipeline, railroad, or maritime employer, you are also prohibited from using the services of the service agent involved in connection with the DOT drug and alcohol testing program.

(f) The issuance of a PIE does not result in the cancellation of drug or alcohol tests conducted using the service agent involved before the issuance of the Director's decision or up to 90 days following its publication in the FEDERAL REGISTER or posting on the Department's web site, unless otherwise specified in the Director's PIE decision or the Director grants an extension as provided in paragraph (b) of this section.

Example to paragraph (f): The Department issues a PIE concerning Service Agent N on September 1. All tests conducted using N's services before September 1, and through November 30, are valid for all purposes under DOT drug and alcohol testing regulations, assuming they meet all other regulatory requirements.

§ 40.411 What is the role of the DOT Inspector General's office?

(a) Any person may bring concerns about waste, fraud, or abuse on the part of a service agent to the attention of the DOT Office of Inspector General.

(b) In appropriate cases, the Office of Inspector General may pursue criminal or civil remedies against a service agent.

(c) The Office of Inspector General may provide factual information to other DOT officials for use in a PIE proceeding.

§ 40.413 How are notices sent to service agents?

(a) If you are a service agent, DOT sends notices to you, including correction notices, notices of proposed exclusion, decision notices, and other notices, in any of the ways mentioned in paragraph (b) or (c) of this section.

(b) DOT may send a notice to you, your identified counsel, your agent for service of process, or any of your partners, officers, directors, owners, or joint venturers to the last known street address, fax number, or e-mail address. DOT deems the notice to have been received by you if sent to any of these persons.

(c) DOT considers notices to be received by you—

(1) When delivered, if DOT mails the notice to the last known street address, or five days after we send it if the letter is undeliverable;

(2) When sent, if DOT sends the notice by fax or five days after we send it if the fax is undeliverable; or

(3) When delivered, if DOT sends the notice by e-mail or five days after DOT sends it if the e-mail is undeliverable.

APPENDIX A TO PART 40—DOT STANDARDS FOR URINE COLLECTION KITS

The Collection Kit Contents

1. *Collection Container*

a. Single-use container, made of plastic, large enough to easily catch and hold at least 55 mL of urine voided from the body.

b. Must have graduated volume markings clearly noting levels of 45 mL and above.

c. Must have a temperature strip providing graduated temperature readings 32–38 °C/90–100 °F, that is affixed or can be affixed at a proper level on the outside of the collection container. Other methodologies (*e.g.*, temperature device built into the wall of the container) are acceptable provided the temperature measurement is accurate and such that there is no potential for contamination of the specimen.

d. Must be individually wrapped in a sealed plastic bag or shrink wrapping; or must have a peelable, sealed lid or other easily visible tamper-evident system.

e. May be made available separately at collection sites to address shy bladder situations when several voids may be required to complete the testing process.

2. *Plastic Specimen Bottles*

a. Each bottle must be large enough to hold at least 35 mL; or alternatively, they may be two distinct sizes of specimen bottles provided that the bottle designed to hold the primary specimen holds at least 35 mL of urine and the bottle designed to hold the split specimen holds at least 20 mL.

b. Must have screw-on or snap-on caps that prevent seepage of the urine from the bottles during shipment.

c. Must have markings clearly indicating the appropriate levels (30 mL for the primary specimen and 15 mL for the split) of urine that must be poured into the bottles.

d. Must be designed so that the required tamper-evident bottle seals made available on the CCF fit with no damage to the seal when the employee initials it nor with the chance that the seal overlap would conceal printed information.

e. Must be wrapped (with caps) together in a sealed plastic bag or shrink wrapping separate from the collection container; or must be wrapped (with cap) individually in sealed plastic bags or shrink wrapping; or must have peelable, sealed lid or other easily visible tamper-evident system.

f. Plastic material must be leach resistant.

3. *Leak-Resistant Plastic Bag*

a. Must have two sealable compartments or pouches which are leak-resistant; one large enough to hold two specimen bottles and the other large enough to hold the CCF paperwork.

b. The sealing methodology must be such that once the compartments are sealed, any tampering or attempts to open either compartment will be evident.

4. *Absorbent material*

Each kit must contain enough absorbent material to absorb the entire contents of both specimen bottles. Absorbent material must be designed to fit inside the leak-resistant plastic bag pouch into which the specimen bottles are placed.

5. *Shipping Container*

a. Must be designed to adequately protect the specimen bottles from shipment damage in the transport of specimens from the collection site to the laboratory (*e.g.*, standard courier box, small cardboard box, plastic container).

b. May be made available separately at collection sites rather than being part of an actual kit sent to collection sites.

c. A shipping container is not necessary if a laboratory courier hand-delivers the specimen bottles in the plastic leak-proof bags from the collection site to the laboratory.

APPENDIX B TO PART 40—ORAL FLUID COLLECTION KIT CONTENTS

1. Oral Fluid Collection Device

a. A single device, which can be subdivided in the employee's presence into an ''A'' specimen and a ''B'' split specimen bottle sufficient for laboratory testing, that is either of the following:

(1) An oral fluid collection device made to collect a sufficient amount of oral fluid to permit an HHS-certified laboratory to analyze the specimen(s). For example, a device that directs the oral fluid into two separate collection bottles.

(2) A device that uses buffering solution that collects a specimen using a single pad or dual pads joined for insertion together into the same region of the mouth, which can be subdivided into two separate collection bottles. Such a buffered device may use a diluent (or other component, process, or method that modifies the volume of the testable specimen). The volume specifications for the device must be consistent with those set by HHS.

b. Must have unit markings or other indicators that demonstrate the adequacy of the volume of oral fluid specimen collected.

c. Must be sufficiently transparent to permit a visual assessment of the contents without opening the specimen bottle.

d. Must be individually packaged in an easily visible tamper-evident system.

e. Must have the device's expiration date on the specimen bottles sent to the laboratory (*i.e.*, the shortest expiration date of any component).

f. Must not have components that substantially affect the composition of drugs and/or drug metabolites in the oral fluid specimen and/or interfere with an accurate analysis of the specimen.

g. Must maintain the integrity of the specimen during storage and transport so the specimen can be tested in an HHS-certified laboratory.

h. Must be designed so that the required tamper-evident bottle seals made available on the CCF fit without concealing the expiration date on the bottles, without damage to the seal when the collector dates and the employee initials it.

i. Must be approved by HHS for use by the specific HHS-certified laboratory that will test the specimen gathered by this device.

2. Instructions

Must include the manufacturer's instructions within the device's packaging. The instructions must provide sufficient detail to allow for an error-free collection when the instructions are followed.

3. Leak-Resistant Plastic Bag

a. Must have two sealable compartments or pouches that are leak-resistant; one large enough to hold two specimen bottles and the other large enough to hold the CCF paperwork, as applicable.

b. The sealing methodology must be such that once the compartments are sealed, any tampering or attempts to open either compartment will be evident.

4. Absorbent Material

Each kit must contain enough absorbent material to absorb the entire contents of both specimen bottles. Absorbent material must be designed to fit inside the leak-resistant plastic bag pouch into which the specimen bottles are placed.

5. Shipping Container

a. Must be designed to adequately protect the specimen bottles from damage during shipment of the specimens from the collection site to the laboratory (*e.g.*, standard courier box, small cardboard box, plastic container).

b. May be made available separately at collection sites rather than being part of an actual collection device sent to collection sites.

c. A shipping container is not necessary if a laboratory courier hand-delivers the specimen bottles in the leak-resistant plastic bags from the collection site to the laboratory.

[88 FR 27651, May 2, 2023]

APPENDIX C TO PART 40 [RESERVED]

APPENDIX D TO PART 40—DOT DRUG TESTING SEMI-ANNUAL LABORATORY REPORT TO EMPLOYERS

The following items are required on each laboratory report:

Reporting Period: (inclusive dates)
Laboratory Identification: (name and address)
Employer Identification: (name; may include Billing Code or ID code)
C/TPA Identification: (where applicable; name and address)

A. URINE SPECIMENS

1. Urine Specimen Results Reported (Total Number) By Test Reason

(a) Pre-employment (number)
(b) Post-Accident (number)
(c) Random (number)
(d) Reasonable Suspicion/Cause (number)
(e) Return-to-Duty (number)
(f) Follow-up (number)
(g) Type of Test Not Noted on CCF (number)

2. Urine Specimens Reported

(a) Negative (number)
(b) Negative and Dilute (number)

3. Urine Specimens Reported as Rejected for Testing (Total Number) by Reason

(a) Fatal flaw (number)
(b) Uncorrected Flaw (number)

4. Urine Specimens Reported as Positive (Total Number) by Drug

(a) Marijuana Metabolite (number)
(b) Cocaine Metabolite (number)
(c) Opioids (number)
(1) Codeine (number)
(2) Morphine (number)
(3) 6–AM (number)
(4) Hydrocodone (number)
(5) Hydromorphone (number)
(6) Oxycodone (number)
(7) Oxymorphone (number)
(d) Phencyclidine (number)
(e) Amphetamines (number)
(1) Amphetamine (number)
(2) Methamphetamine (number)
(3) MDMA (number)
(4) MDA (number)

5. Urine Adulterated (Number)

6. Urine Substituted (Number)

7. Urine Invalid Result (Number)

B. ORAL FLUID SPECIMENS

1. Oral Fluid Specimen Results Reported (Total Number) by Test Reason

(a) Pre-employment (number)
(b) Post-Accident (number)
(c) Random (number)
(d) Reasonable Suspicion/Cause (number)
(e) Return-to-Duty (number)
(f) Follow-up (number)
(g) Type of Test Not Noted on CCF (number)

2. Oral Fluid Specimens Reported

(a) Negative (number)
(b) Negative and Dilute (number)

3. Oral Fluid Specimens Reported as Rejected for Testing (Total Number) by Reason

(a) Fatal flaw (number)
(b) Uncorrected Flaw (number)

4. Oral Fluid Specimens Reported as Positive (Total Number) by Drug

(a) Marijuana (number)
(b) Cocaine and/or Cocaine Metabolite (number)
(c) Opioids (number)
(1) Codeine (number)
(2) Morphine (number)
(3) 6–AM (number)
(4) Hydrocodone (number)
(5) Hydromorphone (number)
(6) Oxycodone (number)
(7) Oxymorphone (number)
(d) Phencyclidine (number)
(e) Amphetamines (number)
(1) Amphetamine (number)
(2) Methamphetamine (number)
(3) MDMA (number)
(4) MDA (number)

5. Oral Fluid Adulterated (Number)

6. Oral Fluid Substituted (Number)

7. Oral Fluid Invalid Result (Number)

[88 FR 27651, May 2, 2023]

APPENDIX E TO PART 40—DRUG TESTING SEMI-ANNUAL LABORATORY REPORT TO DOT

Mail, fax or email to: U.S. Department of Transportation, Office of Drug and Alcohol Policy and Compliance, 1200 New Jersey Avenue SE, Washington, DC 20590.

Fax: (202) 366–3897.

Email: ODAPCWebMail@dot.gov.

The following items are required on each report:

Reporting Period: (inclusive dates)
Laboratory Identification: (name and address)
1. Specimen Type:
—oral fluid or urine
2. DOT agency
—FMCSA, FAA, FRA, FTA, PHMSA, or USCG
3. Test Reason
—Pre-Employment, Random, Reasonable Suspicion/Cause, Post-Accident, Return-to-Duty, Other, and Follow-up
A. DOT Specimen Results Reported (total number)
B. Negative Results Reported (total number)
1. Negative (number)
2. Negative-Dilute (number)
C. Rejected for Testing Results Reported (total number) By Reason
1. Fatal flaw (number)
2. Uncorrected Flaw (number)
D. Positive Results Reported (total number) By Drug
1. Marijuana or Marijuana Metabolite (number)
2. Cocaine and/or Cocaine Metabolite (number)
3. Opioids (number)
a. Codeine (number)
b. Morphine (number)
c. 6–AM (number)
d. Hydrocodone (number)
e. Hydromorphone (number)
f. Oxycodone (number)
g. Oxymorphone (number)
4. Phencyclidine (number)
5. Amphetamines (number)
a. Amphetamine (number)
b. Methamphetamine (number)

c. MDMA (number)
d. MDA (number)
E. Adulterated Results Reported (total number) By Reason (number)
F. Substituted Results Reported (total number)
G. Invalid Results Reported (total number) By Reason (number)

[88 FR 27652, May 2, 2023]

APPENDIX F TO PART 40—REPORT FORMAT: SPLIT SPECIMEN FAILURE TO RECONFIRM

Mail, fax, or submit electronically to: U.S. Department of Transportation, Office of Drug and Alcohol Policy and Compliance, 1200 New Jersey Avenue SE, Washington, DC 20590.

Fax: (202) 366–3897.

Submit Electronically: https://www.transportation.gov/odapc/mro-split-specimen-cancellation-notification.

The following items are required on each report:

1. MRO name, address, phone number, and fax number.
2. Collection site name, address, and phone number.
3. Date of collection.
4. Specimen I.D. number.
5. Specimen type.
6. Laboratory accession number.
7. Primary specimen laboratory name, address, and phone number.
8. Date result reported or certified by primary laboratory.
9. Split specimen laboratory name, address, and phone number.
10. Date split specimen result reported or certified by split specimen laboratory.
11. Primary specimen results (*e.g.*, name of drug, adulterant) in the primary specimen.
12. Reason for split specimen failure-to-reconfirm result (*e.g.*, drug or adulterant not present, specimen invalid, split not collected, insufficient volume).
13. Actions taken by the MRO (*e.g.*, notified employer of failure to reconfirm and requirement for re-collection).
14. Additional information explaining the reason for cancellation.
15. Name of individual submitting the report (if not the MRO).

[88 FR 27652, May 2, 2023]

APPENDIX G TO PART 40—SAP EQUIVALENCY REQUIREMENTS FOR CERTIFICATION ORGANIZATIONS

1. *Experience:* Minimum requirements are for three years of full-time supervised experience or 6,000 hours of supervised experience as an alcoholism and/or drug abuse counselor. The supervision must be provided by a licensed or certified practitioner. Supervised experience is important if the individual is to be considered a professional in the field of alcohol and drug abuse evaluation and counseling.

2. *Education:* There exists a requirement of 270 contact hours of education and training in alcoholism and/or drug abuse or related training. These hours can take the form of formal education, in-service training, and professional development courses. Part of any professional counselor's development is participation in formal and non-formal education opportunities within the field.

3. *Continuing Education:* The certified counselor must receive at least 40–60 hours of continuing education units (CEU) during each two year period. These CEUs are important to the counselor's keeping abreast of changes and improvements in the field.

4. *Testing:* A passing score on a national test is a requirement. The test must accurately measure the application of the knowledge, skills, and abilities possessed by the counselor. The test establishes a national standard that must be met to practice.

5. *Testing Validity:* The certification examination must be reviewed by an independent authority for validity (examination reliability and relationship to the knowledge, skills, and abilities required by the counseling field). The reliability of the exam is paramount if counselor attributes are to be accurately measured. The examination passing score point must be placed at an appropriate minimal level score as gauged by statistically reliable methodology.

6. *Measurable Knowledge Base:* The certification process must be based upon measurable knowledge possessed by the applicant and verified through collateral data and testing. That level of knowledge must be of sufficient quantity to ensure a high quality of SAP evaluation and referral services.

7. *Measurable Skills Base:* The certification process must be based upon measurable skills possessed by the applicant and verified through collateral data and testing. That level of skills must be of sufficient quality to ensure a high quality of SAP evaluation and referral services.

8. *Quality Assurance Plan:* The certification agency must ensure that a means exists to determine that applicant records are verified as being true by the certification staff. This is an important check to ensure that true information is being accepted by the certifying agency.

9. *Code of Ethics:* Certified counselors must pledge to adhere to an ethical standard for practice. It must be understood that code violations could result in de-certification. These standards are vital in maintaining the integrity of practitioners. High ethical standards are required to ensure quality of client care and confidentiality of client information as well as to guard against inappropriate referral practices.

10. *Re-certification Program:* Certification is not just a one-time event. It is a continuing privilege with continuing requirements. Among these are continuing education, continuing state certification, and concomitant adherence to the code of ethics. Re-certification serves as a protector of client interests by removing poor performers from the certified practice.

11. *Fifty State Coverage:* Certification must be available to qualified counselors in all 50 states and, therefore, the test must be available to qualified applicants in all 50 states. Because many companies are multi-state operators, consistency in SAP evaluation quality and opportunities is paramount. The test need not be given in all 50 states but should be accessible to candidates from all states.

12. *National Commission for Certifying Agencies (NCCA) Accreditation:* Having NCCA accreditation is a means of demonstrating to the Department of Transportation that your certification has been reviewed by a panel of impartial experts that have determined that your examination(s) has met stringent and appropriate testing standards.

[65 FR 79526, Dec. 19, 2000. Redesignated at 88 FR 27651, May 2, 2023]

APPENDIX H TO PART 40—DRUG AND ALCOHOL TESTING INFORMATION THAT C/TPAS MAY TRANSMIT TO EMPLOYERS

1. If you are a C/TPA, you may, acting as an intermediary, transmit the information in the following sections of this part to the DER for an employer, if the employer chooses to have you do so. These are the only items that you are permitted to transmit to the employer as an intermediary. The use of C/TPA intermediaries is prohibited in all other cases, such as transmission of laboratory drug test results to MROs, the transmission of medical information from MROs to employers, the transmission of SAP reports to employers, the transmission of positive alcohol test results, and the transmission of medical information from MROs to employers.

2. In every case, you must ensure that, in transmitting the information, you meet all requirements (*e.g.,* concerning confidentiality and timing) that would apply if the party originating the information (*e.g.,* an MRO or collector) sent the information directly to the employer. For example, if you transmit MROs' drug testing results to DERs, you must transmit each drug test result to the DER in compliance with the requirements for MROs set forth in §40.167.

DRUG TESTING INFORMATION

§40.25: Previous two years' test results

§40.35: Notice to collectors of contact information for DER

§40.61(a): Notification to DER that an employee is a ''no show'' for a drug test

§40.63(e): Notification to DER of a collection under direct observation

§40.65(b)(6) and (7) and (c)(2) and (3): Notification to DER of a refusal to provide a specimen or an insufficient specimen

§40.73(a)(9): Transmission of CCF copies to DER (However, MRO copy of CCF must be sent by collector directly to the MRO, not through the C/TPA.)

§40.111(a): Transmission of laboratory statistical report to employer

§40.127(f): Report of test results to DER

§§40.127(g), 40.129(d), 40.159(a)(4)(ii); 40.161(b): Reports to DER that test is cancelled

§40.129(e): Report of test results to DER

§40.129(g)(1): Report to DER of confirmed positive test in stand-down situation

§§40.149(b): Report to DER of changed test result

§40.155(a): Report to DER of dilute specimen

§40.167(b) and (c): Reports of test results to DER

§40.187(a)–(e) Reports to DER concerning the reconfirmation of tests

§40.191(d): Notice to DER concerning refusals to test

§40.193(b)(3): Notification to DER of refusal in shy bladder situation

§40.193(b)(4): Notification to DER of insufficient specimen

§40.193(b)(5): Transmission of CCF copies to DER (not to MRO)

§40.199: Report to DER of cancelled test and direction to DER for additional collection

§40.201: Report to DER of cancelled test

ALCOHOL TESTING INFORMATION

§40.215: Notice to BATs and STTs of contact information for DER

§40.241(b)(1): Notification to DER that an employee is a ''no show'' for an alcohol test

§40.247(a)(2): Transmission of alcohol screening test results only when the test result is less than 0.02

§40.255(a)(4): Transmission of alcohol confirmation test results only when the test result is less than 0.02

§40.263(a)(3) and 263(b)(3): Notification of insufficient saliva and failure to provide sufficient amount of breath

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41955, Aug. 9, 2001; 73 FR 35975, June 25, 2008. Redesignated and amended at 88 FR 27651, 27652, May 2, 2023]

APPENDIX I TO PART 40—ALCOHOL TESTING FORM

The following form is the alcohol testing form required for use in the DOT alcohol testing program beginning January 1, 2011. Employers are authorized to use the form effective February 25, 2010.

U.S. Department of Transportation (DOT)
Alcohol Testing Form

(The instructions for completing this form are on the back of Copy 3)

Print Screening Results Here or Affix with Tamper Evident Tape

Step 1: TO BE COMPLETED BY ALCOHOL TECHNICIAN

A: Employee Name _____
(Print) (First, M.I., Last)

B: SSN or Employee ID No. _____

C: Employer Name _____
Street _____
City, Sate, Zip _____

_____

DER Name and Telephone No. _____ (____) _____
DER Name DER Phone Number

D: Reason for Test: ☐ Random ☐ Reasonable Susp ☐ Post-Accident ☐ Return to Duty ☐ Follow-up ☐ Pre-employment

STEP 2: TO BE COMPLETED BY EMPLOYEE

I certify that I am about to submit to alcohol testing required by US Department of Transportation regulations and that the identifying information provided on the form is true and correct.

_____ ____/____/____
Signature of Employee Date Month Day Year

Print Confirmation Results Here or Affix with Tamper Evident Tape

STEP 3: TO BE COMPLETED BY ALCOHOL TECHNICIAN

(If the technician conducting the screening test is not the same technician who will be conducting the confirmation test, each technician must complete their own form.) I certify that I have conducted alcohol testing on the above named individual in accordance with the procedures established in the US Department of Transportation regulation, 49 CFR Part 40, that I am qualified to operate the testing device(s) identified, and that the results are as recorded.

TECHNICIAN: ☐ BAT ☐ STT DEVICE: ☐ SALIVA ☐ BREATH* 15-Minute Wait: ☐ Yes ☐ No

SCREENING TEST: *(For BREATH DEVICE* write in the space below only if the testing device is not designed to print.)*

Test #	Testing Device Name	Device Serial # OR Lot # & Exp Date	Activation Time	Reading Time	Result

CONFIRMATION TEST: *Results MUST be affixed to each copy of this form or printed directly onto the form.*

REMARKS:

Print Additional Results Here or Affix With Tamper Evident Tape

_____ _____
Alcohol Technician's Company Company Street Address

_____ _____ (____) _____
(PRINT) Alcohol Technician's Name (First, M.I., Last) Company City, State, Zip Phone Number

_____ ____/____/____
Signature of Alcohol Technician Date Month Day Year

STEP 4: TO BE COMPLETED BY EMPLOYEE IF TEST RESULT IS 0.02 OR HIGHER

I certify that I have submitted to the alcohol test, the results of which are accurately recorded on this form. I understand that I must not drive, perform safety-sensitive duties, or operate heavy equipment because the results are 0.02 or greater.

_____ ____/____/____
Signature of Employee Date Month Day Year

Form DOT F 1380 (Rev. 5/2008) OMB No. 2105-0529

COPY 1 – ORIGINAL – FORWARD TO THE EMPLOYER

U.S. Department of Transportation (DOT)
Alcohol Testing Form

(The instructions for completing this form are on the back of Copy 3)

Step 1: TO BE COMPLETED BY ALCOHOL TECHNICIAN

A: Employee Name _____
(Print) (First, M.I., Last)

B: SSN or Employee ID No. _____

C: Employer Name _____
Street _____
City, State, Zip _____

_____

DER Name and Telephone No. _____ (____) _____
DER Name DER Phone Number

D: Reason for Test: ☐ Random ☐ Reasonable Susp ☐ Post-Accident ☐ Return to Duty ☐ Follow-up ☐ Pre-employment

Print Screening Results Here or Affix with Tamper Evident Tape

STEP 2: TO BE COMPLETED BY EMPLOYEE

I certify that I am about to submit to alcohol testing required by US Department of Transportation regulations and that the identifying information provided on the form is true and correct.

_____ _____/____/_____
Signature of Employee Date Month Day Year

STEP 3: TO BE COMPLETED BY ALCOHOL TECHNICIAN

(If the technician conducting the screening test is not the same technician who will be conducting the confirmation test, each technician must complete their own form.) I certify that I have conducted alcohol testing on the above named individual in accordance with the procedures established in the US Department of Transportation regulation, 49 CFR Part 40, that I am qualified to operate the testing device(s) identified, and that the results are as recorded.

TECHNICIAN: ☐ BAT ☐ STT DEVICE: ☐ SALIVA ☐ BREATH* 15-Minute Wait: ☐ Yes ☐ No

SCREENING TEST: *(For BREATH DEVICE* write in the space below only if the testing device is not designed to print.)*

Test #	Testing Device Name	Device Serial # OR Lot # & Exp Date	Activation Time	Reading Time	Result

CONFIRMATION TEST: *Results MUST be affixed to each copy of this form or printed directly onto the form.*

Print Confirmation Results Here or Affix with Tamper Evident Tape

REMARKS:

_____
_____
_____

_____ _____
Alcohol Technician's Company Company Street Address

_____ _____ (____) _____
(PRINT) Alcohol Technician's Name (First, M.I., Last) Company City, State, Zip Phone Number

_____ _____/____/_____
Signature of Alcohol Technician Date Month Day Year

Print Additional Results Here or Affix With Tamper Evident Tape

STEP 4: TO BE COMPLETED BY EMPLOYEE IF TEST RESULT IS 0.02 OR HIGHER

I certify that I have submitted to the alcohol test, the results of which are accurately recorded on this form. I understand that I must not drive, perform safety-sensitive duties, or operate heavy equipment because the results are 0.02 or greater.

_____ _____/____/_____
Signature of Employee Date Month Day Year

Form DOT F 1380 (Rev. 5/2008) OMB No. 2105-0529

COPY 2 – EMPLOYEE RETAINS

U.S. Department of Transportation (DOT)
Alcohol Testing Form

(The instructions for completing this form are on the back of Copy 3)

Print Screening Results Here or Affix with Tamper Evident Tape

Step 1: TO BE COMPLETED BY ALCOHOL TECHNICIAN

A: Employee Name _____
(Print) (First, M.I., Last)

B: SSN or Employee ID No. _____

C: Employer Name _____
Street _____
City, State, Zip _____

_____

DER Name and Telephone No. _____ (____) _____
DER Name DER Phone Number

D: Reason for Test: ☐ Random ☐ Reasonable Susp ☐ Post-Accident ☐ Return to Duty ☐ Follow-up ☐ Pre-employment

STEP 2: TO BE COMPLETED BY EMPLOYEE

I certify that I am about to submit to alcohol testing required by US Department of Transportation regulations and that the identifying information provided on the form is true and correct.

_____ ____/____/____
Signature of Employee Date Month Day Year

Print Confirmation Results Here or Affix with Tamper Evident Tape

STEP 3: TO BE COMPLETED BY ALCOHOL TECHNICIAN

(If the technician conducting the screening test is not the same technician who will be conducting the confirmation test, each technician must complete their own form.) I certify that I have conducted alcohol testing on the above named individual in accordance with the procedures established in the US Department of Transportation regulation, 49 CFR Part 40, that I am qualified to operate the testing device(s) identified, and that the results are as recorded.

TECHNICIAN: ☐ BAT ☐ STT DEVICE: ☐ SALIVA ☐ BREATH* 15-Minute Wait: ☐ Yes ☐ No

SCREENING TEST: *(For BREATH DEVICE* write in the space below only if the testing device is not designed to print.)*

Test #	Testing Device Name	Device Serial # OR Lot # & Exp Date	Activation Time	Reading Time	Result

CONFIRMATION TEST: *Results MUST be affixed to each copy of this form or printed directly onto the form.*

REMARKS:

Print Additional Results Here or Affix With Tamper Evident Tape

_____ _____
Alcohol Technician's Company Company Street Address

_____ _____ (____) _____
(PRINT) Alcohol Technician's Name (First, M.I., Last) Company City, State, Zip Phone Number

_____ ____/____/____
Signature of Alcohol Technician Date Month Day Year

STEP 4: TO BE COMPLETED BY EMPLOYEE IF TEST RESULT IS 0.02 OR HIGHER

I certify that I have submitted to the alcohol test, the results of which are accurately recorded on this form. I understand that I must not drive, perform safety-sensitive duties, or operate heavy equipment because the results are 0.02 or greater.

_____ ____/____/____
Signature of Employee Date Month Day Year

Form DOT F 1380 (Rev. 5/2008) OMB No. 2105-0529

COPY 3 – ALCOHOL TECHNICIAN RETAINS

PAPERWORK REDUCTION ACT NOTICE (as required by 5 CFR 1320.21)

A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. The OMB Control Number for this information collection is 2105-0529. Public reporting for this collection of information is estimated to be approximately 8 minutes per response, including the time for reviewing instructions, completing and reviewing the collection of information. All responses to this collection of information are mandatory. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to: Information Collection Clearance Officer, U.S. Department of Transportation, Office of Drug and Alcohol Policy and Compliance, 1200 New Jersey Avenue, SE, Suite W62-300, Washington, D.C. 20590.

BACK OF PAGES 1 and 2

INSTRUCTIONS FOR COMPLETING THE U.S. DEPARTMENT OF TRANSPORTATION ALCOHOL TESTING FORM

NOTE: Use a ballpoint pen, press hard, and check all copies for legibility.

STEP 1 The Breath Alcohol Technician (BAT) or Screening Test Technician (STT) completes the information required in this step. Be sure to print the employee's name and check the box identifying the reason for the test.

NOTE: If the employee refuses to provide SSN or I.D. number, be sure to indicate this in the remarks section in STEP 3. Proceed with STEP 2.

STEP 2 Instruct the employee to read, sign, and date the employee certification statement in STEP 2.

NOTE: If the employee refuses to sign the certification statement, do not proceed with the alcohol test. Contact the designated employer representative.

STEP 3 The BAT or STT completes the information required in this step and checks the type of device (saliva or breath) being used. After conducting the alcohol screening test, do the following (as appropriate):

Enter the information for the screening test (test number, testing device name, testing device serial number or lot number and expiration date, time of test with any device-dependent activation times, and the results), on the front of the AFT. For a breath testing device capable of printing, the information may be part of the printed record.

NOTE: Be sure to enter the result of the test exactly as it is indicated on the breath testing device, e.g., 0.00, 0.02, 0.04, etc.

Affix the printed information to the front of the form in the space provided, or to the back of the form, in a tamper-evident manner (e.g., tape) such that it does not obscure the original printed information, or the device may print the results directly on the ATF. If the results of the screening test are less than 0.02, print, sign your name, and enter today's date in the space provided. The test process is complete.

If the results of the screening test are 0.02 or greater, a confirmation test must be administered in accordance with DOT regulations. An EVIDENTIAL BREATH TESTING device that is capable of printing confirmation test information must be used in conducting this test.

Ensure that a waiting period of at least 15 minutes occurs before the confirmation test begins. Check the box indicating that the waiting period lasted at least 15 minutes.

After conducting the alcohol confirmation test, affix the printed information to the front of the form in the space provided, or to the back of the form, in a tamper-evident manner (e.g., tape) such that it does not obscure the original information, or the device may print the results directly on the ATF. Print, sign your name, and enter the date in the space provided. Go to STEP 4.

STEP 4 If the employee has a breath alcohol confirmation test result of 0.02 or higher, instruct the employee to read, sign, and date the employee certification statement in STEP 4.

NOTE: If the employee refuses to sign the certification statement in STEP 4, be sure to indicate this in the remarks line in STEP 3.

Immediately notify the DER if the employee has a breath alcohol confirmation test result of 0.02 or higher.

Forward **Copy 1** to the employer. Give **Copy 2** to the employee. Retain **Copy 3** for BAT/STT records.

BACK OF PAGE 3

[75 FR 8529, Feb. 25, 2010, as amended at 75 FR 13009, Mar. 18, 2010; 75 FR 38423, July 2, 2010. Redesignated at 88 FR 27651, May 2, 2023]

APPENDIX J TO PART 40—DOT DRUG AND ALCOHOL TESTING MANAGEMENT INFORMATION SYSTEM (MIS) DATA COLLECTION FORM

The following form is the MIS Data Collection form required for use to report calendar year MIS data. The instructions for this form are found at *https://www.transportation.gov/odapc*.

U.S. DEPARTMENT OF TRANSPORTATION DRUG AND ALCOHOL TESTING MIS DATA COLLECTION FORM

Calendar Year Covered by this Report: _____ OMB No. 2105-0529

Form DOT F 1385 (Rev. 4/2019)

I. Employer:

Company Name: _____

Doing Business As (DBA) Name (if applicable): _____

Address: _____ E-mail: _____

Name of Certifying Official: _____ Signature: _____

Telephone: (____) _____ Date Certified: _____

Prepared by (if different): _____ Telephone: (____) _____

C/TPA Name and Telephone (if applicable): _____ (____) _____

Check the DOT agency for which you are reporting MIS data; and complete the information on that same line as appropriate:

___ FMCSA – Motor Carrier: DOT #: _____ Owner-operator: (circle one) YES or NO Exempt (Circle One) YES or NO

___ FAA – Aviation: Certificate # (if applicable): _____ Plan / Registration # (if applicable): _____

___ PHMSA – Pipeline: (Check) Gas Gathering__ Gas Transmission__ Gas Distribution__ Transport Hazardous Liquids__ Transport Carbon Dioxide__

___ FRA – Railroad: Total Number of observed/documented Part 219 "Rule G" Observations for covered employees: _____

___ USCG – Maritime: Vessel ID # (USCG- or State-Issued): _____ (If more than one vessel, list separately.)

___ FTA – Transit

II. Covered Employees: **(A) Enter Total Number Safety-Sensitive Employees In All Employee Categories:** _____

(B) Enter Total Number of Employee Categories: _____

(C)

Employee Category	Total Number of Employees in this Category

If you have multiple employee categories, complete Sections I and II (A) & (B). Take that filled-in form and make one copy for each employee category and complete Sections II (C), III, and IV for each separate employee category.

III. Drug Testing Data:

	1	2	3	4	5	6	7	8	9	10	11	12	13
									Refusal Results				
Type of Test	Total Number Of Test Results [Should equal the sum of Columns 2, 3, 9, 10, 11, and 12]	Verified Negative Results	Verified Positive Results – For One Or More Drugs	Positive For Marijuana	Positive For Cocaine	Positive For PCP	Positive For Opioids	Positive For Amphetamines	Adulterated	Substituted	"Shy Bladder" – With No Medical Explanation	Other Refusals To Submit To Testing	Cancelled Results
Pre-Employment													
Random													
Post-Accident													
Reasonable Susp./Cause													
Return-to-Duty													
Follow-Up													
TOTAL													

IV. Alcohol Testing Data:

	1	2	3	4	5	6	7	8	9
							Refusal Results		
Type of Test	Total Number Of Screening Test Results [Should equal the sum of Columns 2, 3, 7, and 8]	Screening Tests With Results Below 0.02	Screening Tests With Results 0.02 Or Greater	Number Of Confirmation Tests Results	Confirmation Tests With Results 0.02 Through 0.039	Confirmation Tests With Results 0.04 Or Greater	"Shy Lung" – With No Medical Explanation	Other Refusals To Submit To Testing	Cancelled Results
Pre-Employment									
Random									
Post-Accident									
Reasonable Susp./Cause									
Return-to-Duty									
Follow-Up									
TOTAL									

PAPERWORK REDUCTION ACT NOTICE (as required by 5 CFR 1320.21)

A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. The OMB Control Number for this information collection is 2105-0529. Public reporting for this collection of information is estimated to be approximately 90 minutes per response, including the time for reviewing instructions, completing and reviewing the collection of information. All responses to this collection of information are mandatory. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to: Information Collection Clearance Officer, U.S. Department of Transportation, Office of Drug and Alcohol Policy and Compliance, 1200 New Jersey Avenue, SE, Suite W62-300, Washington, D.C. 20590.

Title 18, USC Section 1001, makes it a criminal offense subject to a maximum fine of $10,000, or imprisonment for not more than 5 years, or both, to knowingly and willfully make or cause to be made any false or fraudulent statements of representations in any matter within the jurisdiction of any agency of the United States.

[84 FR 16773, Apr. 23, 2019. Redesignated at 88 FR 27651, May 2, 2023]

PART 41—SEISMIC SAFETY

Sec.

AUTHORITY: 42 U.S.C. 7701 *et seq.*; 49 U.S.C. 322; E.O. 12699, 3 CFR, 1990 Comp., p. 269.

SOURCE: 58 FR 32871, June 14, 1993, unless otherwise noted.

§ 41.100 Purpose and applicability.

(a) This part implements the provisions of 49 U.S.C. 7701 *et seq.* and Executive Order (E.O.) 12699, ''Seismic Safety of Federal and Federally-Assisted or Regulated New Building Construction'' (3 CFR, 1990 Comp., p. 269). Under the Executive Order the DOT is given the responsibility for developing and implementing its own mission-appropriate and cost-effective regulations governing seismic safety.

(b) This part applies to new DOT owned buildings and to new DOT leased, assisted and regulated buildings. The purpose of this part is to reduce risk to lives of the building occupants, improve the capabilities of essential buildings to function during or after an earthquake, and to reduce earthquake losses of public buildings and investments.

(c) This part may be further implemented by the DOT Operating Administrations.

§ 41.105 Definitions.

As used in this part—

Operating Administration includes the Office of the Secretary.

DOT means the U.S. Department of Transportation.

§ 41.110 New DOT owned buildings and additions to buildings.

(a) DOT Operating Administrations responsible for the design and construction of new DOT Federally owned buildings will ensure that each building is designed and constructed in accord with the seismic design and construction standards set out in § 41.120 of this part.

(b) This section pertains to all building projects for which development of detailed plans and specifications was initiated after January 5, 1990. It applies to additions to existing buildings as well as to new buildings. It applies worldwide.

(c) For DOT Federally owned buildings, a certification of compliance with the seismic design and construction requirements of this part is required

EXHIBIT 5

Title V – Omnibus Transportation Employee Testing Act

Public Law 102-143
102d Congress

An Act

Making appropriations for the Department of Transportation and related agencies for the fiscal year ending September 30, 1992, and for other purposes.

Oct. 28, 1991
[H.R. 2942]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Department of Transportation and related agencies for the fiscal year ending September 30, 1992, and for other purposes, namely:

Department of Transportation and Related Agencies Appropriations Act, 1992.

TITLE I—DEPARTMENT OF TRANSPORTATION

OFFICE OF THE SECRETARY

Immediate Office of the Secretary

For necessary expenses of the Immediate Office of the Secretary, $1,435,000.

Immediate Office of the Deputy Secretary

For necessary expenses of the Immediate Office of the Deputy Secretary, $550,000.

Office of the General Counsel

For necessary expenses of the Office of the General Counsel, $7,000,000.

Office of the Assistant Secretary for Policy and International Affairs

For necessary expenses of the Office of the Assistant Secretary for Policy and International Affairs, $8,733,000.

Office of the Assistant Secretary for Budget and Programs

For necessary expenses of the Office of the Assistant Secretary for Budget and Programs, $2,726,000, including not to exceed $40,000 for allocation within the Department of official reception and representation expenses as the Secretary may determine.

Office of the Assistant Secretary for Governmental Affairs

For necessary expenses of the Office of the Assistant Secretary for Governmental Affairs, $2,320,000.

59-139 O - 91 (143)

Omnibus Transportation Employee Testing Act of 1991.
Drugs and drug abuse.
Safety.
49 USC app. 1301 note.
49 USC app. 1434 note.

TITLE V—OMNIBUS TRANSPORTATION EMPLOYEE TESTING

SHORT TITLE

SEC. 1. This title may be cited as the "Omnibus Transportation Employee Testing Act of 1991".

FINDINGS

SEC. 2. The Congress finds that—

(1) alcohol abuse and illegal drug use pose significant dangers to the safety and welfare of the Nation;

(2) millions of the Nation's citizens utilize transportation by aircraft, railroads, trucks, and buses, and depend on the operators of aircraft, trains, trucks, and buses to perform in a safe and responsible manner;

(3) the greatest efforts must be expended to eliminate the abuse of alcohol and use of illegal drugs, whether on duty or off duty, by those individuals who are involved in the operation of aircraft, trains, trucks, and buses;

(4) the use of alcohol and illegal drugs has been demonstrated to affect significantly the performance of individuals, and has been proven to have been a critical factor in transportation accidents;

(5) the testing of uniformed personnel of the Armed Forces has shown that the most effective deterrent to abuse of alcohol and use of illegal drugs is increased testing, including random testing;

(6) adequate safeguards can be implemented to ensure that testing for abuse of alcohol or use of illegal drugs is performed in a manner which protects an individual's right of privacy, ensures that no individual is harassed by being treated differently from other individuals, and ensures that no individual's reputation or career development is unduly threatened or harmed; and

(7) rehabilitation is a critical component of any testing program for abuse of alcohol or use of illegal drugs, and should be made available to individuals, as appropriate.

TESTING TO ENHANCE AVIATION SAFETY

SEC. 3. (a) Title VI of the Federal Aviation Act of 1958 (49 App. U.S.C. 1421 et seq.) is amended by adding at the end thereof the following:

"SEC. 614. ALCOHOL AND CONTROLLED SUBSTANCES TESTING. 49 USC app. 1434.

"(a) TESTING PROGRAM.—

"(1) PROGRAM FOR EMPLOYEES OF CARRIERS.—The Administrator shall, in the interest of aviation safety, prescribe regulations within 12 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. Regulations.

"(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 programs 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 ON 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.—

Regulations.

"(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 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 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.".

(b) That portion of the table of contents of the Federal Aviation Act of 1958 relating to title VI is amended by adding at the end thereof the following:

"Sec. 614. Alcohol and controlled substances testing.
"(a) Testing program.
"(b) Prohibition on service.
"(c) Program for rehabilitation.

"(d) Procedures.
"(e) Effect on other laws and regulations.
"(f) Definition.".

TESTING TO ENHANCE RAILROAD SAFETY

SEC. 4. Section 202 of the Federal Railroad Safety Act of 1970 (45 U.S.C. 431) is amended by adding at the end thereof the following:

"(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— Regulations.

"(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 3 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.

Regulations.

"(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.".

TESTING TO ENHANCE MOTOR CARRIER SAFETY

SEC. 5. (a)(1) The Commercial Motor Vehicle Safety Act of 1986 (49 App. U.S.C. 2701 et seq.) is amended by adding at the end the following new section:

"SEC. 12020. ALCOHOL AND CONTROLLED SUBSTANCES TESTING. 49 USC app. 2717.

"(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 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. Regulations.

"(d) PROCEDURES FOR TESTING.—In establishing the program required under subsection (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 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 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.".

(2) The table of contents of the Commercial Motor Vehicle Safety Act of 1986 (Public Law 99-570; 100 Stat. 5223) is amended by adding at the end thereof the following:

"Sec. 12020. Alcohol and controlled substances testing.".

49 USC app. 2717 note.

(b)(1) The Secretary of Transportation shall design within nine months after the date of enactment of this Act, and implement within fifteen months after the date of enactment of this Act, a pilot test program for the purpose of testing the operators of commercial motor vehicles on a random basis to determine whether an operator has used, in violation of law or Federal regulation, alcohol or a controlled substance. The pilot test program shall be administered as part of the Motor Carrier Safety Assistance Program.

(2) The Secretary shall solicit the participation of States which are interested in participating in such program and shall select four States to participate in the program.

(3) The Secretary shall ensure that the States selected pursuant to this subsection are representative of varying geographical and population characteristics of the Nation and that the selection takes into consideration the historical geographical incidence of commercial motor vehicle accidents involving loss of human life.

(4) The pilot program authorized by this subsection shall continue for a period of one year. The Secretary shall consider alternative methodologies for implementing a system of random testing of operators of commercial motor vehicles.

Reports.

(5) Not later than thirty months after the date of enactment of this Act, the Secretary shall prepare and submit to the Congress a comprehensive report setting forth the results of the pilot program conducted under this subsection. Such report shall include any recommendations of the Secretary concerning the desirability and

implementation of a system for the random testing of operators of commercial motor vehicles.

(6) For purposes of carrying out this subsection, there shall be available to the Secretary $5,000,000 from funds made available to carry out section 404 of the Surface Transportation Assistance Act of 1982 (49 App. U.S.C. 2304) for fiscal year 1992.

(7) For purposes of this subsection, the term "commercial motor vehicle" shall have the meaning given to such term in section 12019(6) of the Commercial Motor Vehicle Safety Act of 1986 (49 App. U.S.C. 2716(6)).

TESTING TO ENHANCE MASS TRANSPORTATION SAFETY

49 USC app. 1618a.

SEC. 6. (a) As used in this section, the term—

(1) "controlled substance" means any substance under section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)) whose use the Secretary has determined has a risk to transportation safety;

(2) "person" includes 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 of any foreign country;

(3) "Secretary" means the Secretary of Transportation; and

(4) "mass transportation" means 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 (45 U.S.C. 431 et seq.) or the Commercial Motor Vehicle Safety Act of 1986 (49 App. U.S.C. 2701 et seq.).

Regulations.

(b)(1) The Secretary shall, in the interest of mass transportation safety, issue regulations within twelve months after the date of enactment of this Act. Such regulations shall establish a program which requires mass transportation operations which are recipients of Federal financial assistance under section 3, 9, or 18 of the Urban Mass Transportation Act of 1964 (49 App. U.S.C. 1602, 1607a, or 1614) or section 103(e)(4) of title 23, United States Code, to conduct preemployment, 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 may also issue regulations, as the Secretary 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) In issuing such regulations, the Secretary shall require that post-accident testing of such a mass transportation employee be conducted in the case of any accident involving mass transportation in which occurs loss of human life, or, as determined by the Secretary, other serious accidents involving bodily injury or significant property damage.

Regulations.

(c) The Secretary shall issue regulations setting forth requirements for rehabilitation programs which provide for the identification and opportunity for treatment of mass transportation employees referred to in subsection (b)(1) 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 employees shall be required to partici-

pate in such program. Nothing in this subsection shall preclude a mass transportation operation from establishing a program under this section in cooperation with any other such operation.

(d) In establishing the program required under subsection (b), 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 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 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)(1) 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 mass transportation employees, or to the general public.

(2) 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 mass transportation employees issued before the date of enactment of this Act.

(3) 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)(1) As the Secretary considers appropriate, the Secretary shall require—

(A) disqualification for an established period of time or dismissal of any employee referred to in subsection (b)(1) who is determined to have used or to have been impaired by alcohol while on duty; and

(B) disqualification for an established period of time or dismissal of any such 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 regulations.

(2) Nothing in this section shall be construed to supersede any penalty applicable to a mass transportation employee under any other provision of law.

(g) A person shall not be eligible for Federal financial assistance under section 3, 9, or 18 of the Urban Mass Transportation Act of 1964 (49 App. U.S.C. 1602, 1607a, or 1614) or section 103(e)(4) of title 23, United States Code, if such person—

(1) is required, under regulations prescribed by the Secretary under this section, to establish a program of alcohol and controlled substances testing; and

(2) fails to establish such a program in accordance with such regulations.

This Act may be cited as the "Department of Transportation and Related Agencies Appropriations Act, 1992".

Approved October 28, 1991.

LEGISLATIVE HISTORY—H.R. 2942:

HOUSE REPORTS: Nos. 102-156 (Comm. on Appropriations) and 102-243 (Comm. of Conference).
SENATE REPORTS: No. 102-148 (Comm. on Appropriations).
CONGRESSIONAL RECORD, Vol. 137 (1991):
July 24, considered and passed House.
Sept. 17, considered and passed Senate, amended.
Oct. 9, House agreed to conference report; receded and concurred in certain Senate amendments, in others with amendments.
Oct. 16, Senate agreed to conference report; concurred in House amendments.
WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 27 (1991):
Oct. 28, Presidential statement.

EXHIBIT 6

Authority’s Alcohol and Drug Abuse in the Workplace Policy

EXECUTIVE INSTRUCTION

FROM:

Jen M Carmichael — 4/13/15

INTERIM DEPUTY EXECUTIVE DIRECTOR — DATE

NUMBER: 2015-6

SUBJECT:

DRUG AND ALCOHOL ABUSE IN THE WORKPLACE

DISTRIBUTION:

All Employees

THIS INSTRUCTION SUPERSEDES EXECUTIVE INSTRUCTION 2008-5 AND EXECUTIVE BULLETIN 87-15

It is the policy of the New York State Thruway Authority and New York State Canal Corporation (Authority/Corporation) to ensure that its employees are fit for duty (i.e., not under the influence of drugs or alcohol) and are provided a safe and healthful workplace in which to conduct business.

In keeping with this policy, employees are prohibited from reporting to and/or remaining at work when they are unfit for duty as a result of the use of alcohol, illegal drugs, prescription drugs, over-the-counter drugs or any other substance. Employees who test positive for alcohol or a controlled substance (drug) are considered unfit for duty. The possession or consumption of alcoholic beverages or the use, distribution, sale, attempted sale, purchase, or illegal possession or abuse of controlled substances by Authority/Corporation employees while at the workplace or while performing in a work-related capacity is prohibited.

Employees who perform safety-sensitive or safety-related functions consistent with the Omnibus Transportation Employee Testing Act (OTETA) and United States Coast Guard (USCG) Regulations are required to comply with the applicable federal drug and alcohol testing guidelines as outlined by the Administrative Services Bulletins entitled POST ACCIDENT DRUG AND ALCOHOL TESTING PROCEDURE and UNITED STATES COAST GUARD TESTING PROGRAM – DRUG AND ALCOHOL REASONABLE CAUSE OBSERVATION RECORD (TA-31408-9).

Prescription and Over-the-Counter Drugs

Prescription and over-the-counter drugs are not prohibited in the workplace when taken in standard dosage and/or according to a physician's prescription. However, employees taking prescribed or over-the-counter medications are responsible for consulting their prescribing physician and/or pharmacist to ascertain if the medication may interfere with the safe performance of their job. If the use of a medication could compromise the safety of the employee, fellow employees or the public, it is the employee's responsibility to request to use appropriate leave credits, request a temporary change of duty, or notify their Supervisor or the Employee Health Services Nurse to avoid unsafe workplace practices.

Reasonable Suspicion

All Supervisors should be aware of the possibility of drug or alcohol use by employees within their jurisdiction and should remain alert at all times for signs of such use. In cases where the

Supervisor has a reasonable suspicion that an employee is not able to perform his or her duties as a result of a disability which may be caused by alcohol or a controlled substance, the Supervisor may, under the provisions of Section 72 of Civil Service Law, request that the employee undergo a medical examination to determine the cause of the disability.

A "reasonable suspicion" must be based upon specific, reliable observation that the Supervisor can articulate concerning the appearance, behavior, speech or body odor of the employee. Indicators of drug or alcohol use may include:

- an unsteady gait;
- odor of alcohol on the breath;
- thick or slurring speech;
- aggressive or abusive language or behavior; and/or
- disorientation and lethargy.

The New York State Employee Health Service (EHS) form entitled Supervisor's Observation Checklist should be used to document the indicators observed.

The Supervisor may also consider the following behavioral patterns when determining whether an employee is suffering from a drug or alcohol related disability:

- time and attendance patterns, such as absences around weekends or paydays;
- excessive use of sick time;
- excessive lateness and unauthorized absences;
- on-the-job accidents;
- difficulty in recalling instructions or conversations;
- poor relationships with co-workers and supervisors; and
- other variations in productivity.

Fitness for Duty Exams for Employees Suspected of Drug or Alcohol Use (Non-OTETA and Non-USCG)

In order to have an employee tested for drugs or alcohol impairment, they must undergo a fitness for duty exam pursuant to Section 72 of Civil Service Law. Once it has been determined that there is reasonable cause for ordering drug and alcohol testing, the procedure described below must be followed:

1. The Supervisor should contact the Bureau of Labor Relations and Employee Safety, who will review the reasonable cause and determine whether a medical examination is warranted.

2. If a medical examination is justified, the Supervisor will be asked to provide detailed observations and other necessary information to the Benefits Unit in the Bureau of Personnel, who will complete the Agency Request for Medical Examination (EHS-707) and arrange to have the employee evaluated by EHS.

Note: An EHS physician will review the Request for Medical Examination, especially the basis for reasonable suspicion. If, in the reviewing physician's opinion, the appointing authority fails to establish reasonable suspicion, EHS will not schedule the testing.

3. After the examination is scheduled, the Supervisor will be notified and asked to make arrangements to transport the employee to the testing site. In some instances, the drug or alcohol testing will be scheduled immediately, followed by a complete medical examination at another date. The Supervisor or a fellow employee may be needed to identify the employee before testing begins. Prior to testing, the employee must sign completed Authorization for Drug/Alcohol Testing and Release of Medical Information (EHS-752) and Authorization for Release and Disclosure of Medical Information to a State Agency (EHS-742.4) forms authorizing the tests to be performed and authorizing EHS to release the results to Authority/Corporation personnel. Refusal by the employee to either sign these forms or to cooperate with the testing process may be considered insubordination and the employee may be subject to disciplinary action.

Upon receipt of the test and evaluation results from EHS, the Authority/Corporation may choose to: 1) pursue disability leave procedures, 2) discipline the employee and/or 3) refer the employee to the Employee Assistance Program.

Employee Assistance Program

The Authority/Corporation remains deeply committed to the individual health and safety of all its employees. Recognizing that drug and alcohol dependencies cause serious problems, the Authority/Corporation has programs in place to address these devastating social issues.

The Authority/Corporation actively supports the Employee Assistance Program (EAP). Employees in need of assistance in coping with any personal problems, including drug and/or alcohol dependency, are encouraged to contact the Employee Assistance Coordinator in their Division and/or Headquarters. All contacts with EAP are held in the strictest confidence.

Drug Addiction and Alcoholism Under the Human Rights Law and Regulations

An individual who is currently using drugs illegally is not protected under the disability provisions of the Human Rights Law. The law protects individuals who are recovered or recovering drug addicts or alcoholics and may protect alcoholics if the alcoholism does not interfere with job performance.

If an individual is protected by the Human Rights Law, reasonable accommodation may be sought provided the individual is able to reasonably perform the essential functions of the job, including predictable and regular attendance. For information regarding reasonable accommodation, contact the Equal Opportunity Unit.

Additional Information

The Authority/Corporation provides training to assist Supervisors in recognizing and acting upon the work-related problems of employees who have drug and/or alcohol dependencies.

All publications and forms related to the testing of employees covered by Civil Service Law, OTETA and USCG are available on the Human Resources page of the Intranet under the "Supervisor's Corner" section.

Questions concerning the Authority/Corporation's policy on the drug and alcohol testing program may be referred to the Benefits Unit at (518) 436-2722.

EXHIBIT 7

33 CFR Part 95
Operating a Vessel While Under the Influence of Alcohol or a Dangerous Drug

SUBCHAPTER F—VESSEL OPERATING REGULATIONS

PART 95—OPERATING A VESSEL WHILE UNDER THE INFLUENCE OF ALCOHOL OR A DANGEROUS DRUG

AUTHORITY: 33 U.S.C. 2071; 46 U.S.C. 2302; Department of Homeland Security Delegation No. 0170.1.

SOURCE: CGD 84–099, 52 FR 47532, Dec. 14, 1987, unless otherwise noted.

§ 95.001 Purpose.

(a) The purpose of this part is to establish under the influence of alcohol or a dangerous drug standards under 46 U.S.C. 2302 and to prescribe restrictions and responsibilities for personnel on vessels inspected, or subject to inspection, under Chapter 33 of Title 46 United States Code. This part does not pre-empt enforcement by a State of its applicable laws and regulations concerning operating a recreational vessel while under the influence of alcohol or a dangerous drug.

(b) Nothing in this part shall be construed as limiting the authority of a vessel's marine employer to limit or prohibit the use or possession of alcohol on board a vessel.

[CGD 84–099, 52 FR 47532, Dec. 14, 1987, as amended by USCG–1998–4593, 66 FR 1862, Jan. 10, 2001]

§ 95.005 Applicability.

(a) This part is applicable to a vessel (except those excluded by 46 U.S.C. 2109) operated on waters subject to the jurisdiction of the United States, and to a vessel owned in the United States on the high seas. This includes a foreign vessel operated on waters subject to the jurisdiction of the United States.

(b) This part is also applicable at all times to vessels inspected, or subject to inspection, under Chapter 33 of Title 46 United States Code.

[CGD 84–099, 52 FR 47532, Dec. 14, 1987; CGD 84–009, 53 FR 13117, Apr. 21, 1988]

§ 95.010 Definition of terms as used in this part.

Alcohol means any form or derivative of ethyl alcohol (ethanol).

Alcohol concentration means either grams of alcohol per 100 milliliters of blood, or grams of alcohol per 210 liters of breath.

Blood alcohol concentration level means a certain percentage of alcohol in the blood.

Chemical test means a test which analyzes an individual's breath, blood, urine, saliva and/or other bodily fluids or tissues for evidence of drug or alcohol use.

Controlled substance has the same meaning assigned by 21 U.S.C. 802 and includes all substances listed on Schedules I through V as they may be revised from time to time (21 CFR Part 1308).

Drug means any substance (other than alcohol) that has known mind or function-altering effects on a person, specifically including any psychoactive substance, and including, but not limited to, controlled substances.

Intoxicant means any form of alcohol, drug or combination thereof.

Law enforcement officer means a Coast Guard commissioned, warrant, or petty officer; or any other law enforcement officer authorized to obtain a chemical test under Federal, State, or local law.

Marine employer means the owner, managing operator, charterer, agent, master, or person in charge of a vessel other than a recreational vessel.

Recreational vessel means a vessel meeting the definition in 46 U.S.C. 2101(25) that is then being used only for pleasure.

State means a State or Territory of the United States of America including but not limited to a State of the United States, American Samoa, the Commonwealth of the Northern Marianas Islands, District of Columbia, Guam, Puerto Rico, and the United States Virgin Islands.

Under the influence means impaired or intoxicated by a drug or alcohol as a matter of law.

Underway means that a vessel is not at anchor, or made fast to the shore, or aground.

Vessel includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

Vessel owned in the United States means any vessel documented or numbered under the laws of the United States; and, any vessel owned by a citizen of the United States that is not documented or numbered by any nation.

Waters subject to the jurisdiction of the United States means those waters described in § 2.38 of this chapter.

[CGD 84–099, 52 FR 47532, Dec. 14, 1987; CGD 84–099, 53 FR 13117, Apr. 21, 1988, as amended by USCG–1998–4593, 66 FR 1862, Jan. 10, 2001; USCG–2001–9044, 68 FR 42601, July 18, 2003]

§ 95.015 Operating a vessel.

For purposes of this part, an individual is considered to be operating a vessel when:

(a) The individual has an essential role in the operation of a recreational vessel underway, including but not limited to navigation of the vessel or control of the vessel's propulsion system.

(b) The individual is a crewmember (including an officer), pilot, or watchstander not a regular member of the crew, of a vessel other than a recreational vessel.

[CGD 84–099, 52 FR 47532, Dec. 14, 1987, as amended at USCG–2006–24371, 74 FR 11211, Mar. 16, 2009]

§ 95.020 Standard for under the influence of alcohol or a dangerous drug.

An individual is under the influence of alcohol or a dangerous drug when:

(a) The individual is operating a recreational vessel and has a Blood Alcohol Concentration (BAC) level of .08 percent or more, by weight, in their blood;

(b) The individual is operating a vessel other than a recreational vessel and has an alcohol concentration of .04 percent by weight or more in their blood; or,

(c) The individual is operating any vessel and the effect of the intoxicant(s) consumed by the individual on the person's manner, disposition, speech, muscular movement, general appearance or behavior is apparent by observation.

[CGD 84–099, 52 FR 47532, Dec. 14, 1987; CGD 84–099, 53 FR 13117, Apr. 21, 1988, as amended by USCG–1998–4593, 66 FR 1862, Jan. 10, 2001]

§ 95.025 Adoption of State blood alcohol concentration levels.

(a) This section applies to operators of recreational vessels on waters within the geographical boundaries of any State that has established by statute a blood alcohol concentration level for purposes of determining whether a person is operating a vessel under the influence of alcohol.

(b) If the applicable State statute establishes a blood alcohol concentration level at which a person is considered or presumed to be under the influence of alcohol, then that level applies within the geographical boundaries of that State instead of the level provided in § 95.020(a) of this part.

(c) For the purposes of this part, a standard established by State statute and adopted under this section is applicable to the operation of any recreational vessel on waters within the geographical boundaries of the State.

[CGD 84–099, 52 FR 47532, Dec. 14, 1987, as amended by USCG–1998–4593, 66 FR 1862, Jan. 10, 2001]

§ 95.030 Evidence of under the influence of alcohol or a dangerous drug.

Acceptable evidence of when a vessel operator is under the influence of alcohol or a dangerous drug includes, but is not limited to:

(a) Personal observation of an individual's manner, disposition, speech, muscular movement, general appearance, or behavior; or,

(b) A chemical test.

[CGD 84–099, 53 FR 13117, Apr. 21, 1988; CGD 84–009, 53 FR 13117, Apr. 21, 1988, as amended by USCG–1998–4593, 66 FR 1862, Jan. 10, 2001]

§ 95.035 Reasonable cause for directing a chemical test.

(a) Only a law enforcement officer or a marine employer may direct an individual operating a vessel to undergo a chemical test when reasonable cause exists. Reasonable cause exists when:

(1) The individual was directly involved in the occurrence of a marine casualty as defined in Chapter 61 of Title 46, United States Code, or

(2) The individual is suspected of being in violation of the standards in §§ 95.020 or 95.025.

(b) When an individual is directed to undergo a chemical test, the individual to be tested must be informed of that fact and directed to undergo a test as soon as is practicable.

(c) When practicable, a marine employer should base a determination of the existence of reasonable cause, under paragraph (a)(2) of this section, on observation by two persons.

[CGD 84–099, 52 FR 47532, Dec. 14, 1987; CGD 84–099, 53 FR 13117, Apr. 1, 1988]

§ 95.040 Refusal to submit to testing.

(a) If an individual refuses to submit to or cooperate in the administration of a timely chemical test when directed by a law enforcement officer based on reasonable cause, evidence of the refusal is admissible in evidence in any administrative proceeding and the individual will be presumed to be under the influence of alcohol or a dangerous drug.

(b) If an individual refuses to submit to or cooperate in the administration of a timely chemical test when directed by the marine employer based on reasonable cause, evidence of the refusal is admissible in evidence in any administrative proceeding.

[CGD 84–099, 52 FR 47532, Dec. 14, 1987, as amended by USCG–1998–4593, 66 FR 1862, Jan. 10, 2001]

§ 95.045 General operating rules for vessels inspected, or subject to inspection, under Chapter 33 of Title 46 United States Code.

While on board a vessel inspected, or subject to inspection, under Chapter 33 of Title 46 United States Code, a crewmember (including an officer), pilot, or watchstander not a regular member of the crew:

(a) Shall not perform or attempt to perform any scheduled duties within four hours of consuming any alcohol;

(b) Shall not be intoxicated at any time;

(c) Shall not consume any intoxicant while on watch or duty; and

(d) May consume a legal non-prescription or prescription drug provided the drug does not cause the individual to be intoxicated.

[CGD 84–099, 52 FR 47532, Dec. 14, 1987, as amended at USCG–2006–24371, 74 FR 11211, Mar. 16, 2009]

§ 95.050 Responsibility for compliance.

(a) The marine employer shall exercise due diligence to assure compliance with the applicable provisions of this part.

(b) If the marine employer has reason to believe that an individual is intoxicated, the marine employer shall not allow that individual to stand watch or perform other duties.

PART 96—RULES FOR THE SAFE OPERATION OF VESSELS AND SAFETY MANAGEMENT SYSTEMS

Subpart A—General

Sec.

Subpart B—Company and Vessel Safety Management Systems

EXHIBIT 8

46 CFR Part 4
Marine Casualties and Investigations

§ 3.10–10 Right of appeal.

Any person directly affected by a decision or action taken under this part, by or on behalf of the Coast Guard, may appeal therefrom in accordance with subpart 1.03 of this chapter.

[CGD 88–033, 54 FR 50379, Dec. 6, 1989]

PART 4—MARINE CASUALTIES AND INVESTIGATIONS

Subpart 4.01—Authority and Scope of Regulations

Sec.

Subpart 4.03—Definitions

Subpart 4.04—Notice of Potential Vessel Casualty

Subpart 4.05—Notice of Marine Casualty and Voyage Records

Subpart 4.06—Mandatory Chemical Testing Following Serious Marine Incidents Involving Vessels in Commercial Service

Subpart 4.07—Investigations

Subpart 4.09—Marine Board of Investigation

Subpart 4.11—Witnesses and Witness Fees

AUTHORITY: 14 U.S.C. 102; 43 U.S.C. 1333; 46 U.S.C. 2103, 2303A, 2306, 6101, 6301, 6305, 70034; 50 U.S.C. 198; DHS Delegation 00170.1, Revision No. 01.2. Subpart 4.40 issued under 49 U.S.C. 1131(a)(1)(E).

SOURCE: CGD 74–119, 39 FR 33317, Sept. 17, 1974, unless otherwise noted.

Subpart 4.01—Authority and Scope of Regulations

§ 4.01–1 Scope of regulation.

The regulations in this part govern the reporting of marine casualties, the investigation of marine casualties and the submittal of reports designed to increase the likelihood of timely assistance to vessels in distress.

[CGD 85–015, 51 FR 19341, May 29, 1986]

§ 4.01–3 Reporting exclusion.

(a) Vessels subject to 33 CFR 173.51 are excluded from the requirements of subpart 4.05.

(b) Vessels which report diving accidents under 46 CFR 197.484 regarding deaths, or injuries which cause incapacitation for greater than 72 hours, are not required to give notice under § 4.05–1(a)(5) or § 4.05–1(a)(6).

(c) Vessels are excluded from the requirements of § 4.05–1(a)(5) and (a)(6) with respect to the death or injury of shipyard or harbor workers when such accidents are not the result of either a vessel casualty (e.g., collision) or a vessel equipment casualty (e.g., cargo boom failure) and are subject to the reporting requirements of Occupational Safety and Health Administration (OSHA) under 29 CFR 1904.

(d) Except as provided in subpart 4.40, public vessels are excluded from the requirements of this part.

[CGD 76–170, 45 FR 77441, Nov. 24, 1980; 46 FR 19235, Mar. 30, 1981, as amended by CGD 76–170, 47 FR 39684, Sept. 9, 1982; CGD 95–028, 62 FR 51195, Sept. 30, 1997; USCG–2000–7790, 65 FR 58458, Sept. 29, 2000]

Subpart 4.03—Definitions

§ 4.03–1 Marine casualty or accident.

Marine casualty or accident means—

(a) Any casualty or accident involving any vessel other than a public vessel that—

(1) Occurs upon the navigable waters of the United States, its territories or possessions;

(2) Involves any United States vessel wherever such casualty or accident occurs; or

(3) With respect to a foreign tank vessel operating in waters subject to the jurisdiction of the United States, including the Exclusive Economic Zone (EEZ), involves significant harm to the environment or material damage affecting the seaworthiness or efficiency of the vessel.

(b) The term ''marine casualty or accident'' applies to events caused by or

involving a vessel and includes, but is not limited to, the following:

(1) Any fall overboard, injury, or loss of life of any person.

(2) Any occurrence involving a vessel that results in—

(i) Grounding;
(ii) Stranding;
(iii) Foundering;
(iv) Flooding;
(v) Collision;
(vi) Allision;
(vii) Explosion;
(viii) Fire;
(ix) Reduction or loss of a vessel's electrical power, propulsion, or steering capabilities;
(x) Failures or occurrences, regardless of cause, which impair any aspect of a vessel's operation, components, or cargo;
(xi) Any other circumstance that might affect or impair a vessel's seaworthiness, efficiency, or fitness for service or route; or
(xii) Any incident involving significant harm to the environment.

(3) Any occurrences of injury or loss of life to any person while diving from a vessel and using underwater breathing apparatus.

(4) Any incident described in § 4.05–1(a).

[USCG–2000–6927, 70 FR 74675, Dec. 16, 2005]

§ 4.03–2 Serious marine incident.

The term *serious marine incident* includes the following events involving a vessel in commercial service:

(a) Any marine casualty or accident as defined in § 4.03–1 which is required by § 4.05–1 to be reported to the Coast Guard and which results in any of the following:

(1) One or more deaths;

(2) An injury to a crewmember, passenger, or other person which requires professional medical treatment beyond first aid, and, in the case of a person employed on board a vessel in commercial service, which renders the individual unfit to perform routine vessel duties;

(3) Damage to property, as defined in § 4.05–1(a)(7) of this part, in excess of $200,000;

(4) Actual or constructive total loss of any vessel subject to inspection under 46 U.S.C. 3301; or

(5) Actual or constructive total loss of any self-propelled vessel, not subject to inspection under 46 U.S.C. 3301, of 100 gross tons or more.

(b) A discharge of oil of 10,000 gallons or more into the navigable waters of the United States, as defined in 33 U.S.C. 1321, whether or not resulting from a marine casualty.

(c) A discharge of a reportable quantity of a hazardous substance into the navigable waters of the United States, or a release of a reportable quantity of a hazardous substance into the environment of the United States, whether or not resulting from a marine casualty.

[CGD 86–067, 53 FR 47077, Nov. 21, 1988, as amended by CGD 97–057, 62 FR 51041, Sept. 30, 1997; USCG–2016–0748, 83 FR 11902, Mar. 19, 2018]

§ 4.03–4 Individual directly involved in a serious marine incident.

The term *individual directly involved in a serious marine incident* is an individual whose order, action or failure to act is determined to be, or cannot be ruled out as, a causative factor in the events leading to or causing a serious marine incident.

[CGD 86–067, 53 FR 47077, Nov. 21, 1988]

§ 4.03–5 Medical facility.

The term *medical facility* means an American hospital, clinic, physician's office, or laboratory, where blood and urine specimens can be collected according to recognized professional standards.

[CGD 86–067, 53 FR 47077, Nov. 21, 1988]

§ 4.03–6 Qualified medical personnel.

The term *qualified medical personnel* means a physician, physician's assistant, nurse, emergency medical technician, or other person authorized under State or Federal law or regulation to collect blood and urine specimens.

[CGD 86–067, 53 FR 47077, Nov. 21, 1988]

§ 4.03–7 Chemical test.

The term *chemical test* means a scientifically recognized test which analyzes an individual's breath, blood, urine, saliva, bodily fluids, or tissues

for evidence of dangerous drug or alcohol use.

[CGD 86–067, 53 FR 47077, Nov. 21, 1988]

§ 4.03–10 Party in interest.

The term *party in interest* shall mean any person whom the Marine Board of Investigation or the investigating officer shall find to have a direct interest in the investigation conducted by it and shall include an owner, a charterer, or the agent of such owner or charterer of the vessel or vessels involved in the marine casualty or accident, and all licensed or certificated personnel whose conduct, whether or not involved in a marine casualty or accident is under investigation by the Board or investigating officer.

§ 4.03–15 Commandant.

The Commandant, U.S. Coast Guard, is that officer who acts as chief of the Coast Guard and is charged with the administration of the Coast Guard.

§ 4.03–20 Coast Guard district.

A Coast Guard district is one of the geographical areas whose boundaries are described in 33 CFR part 3.

§ 4.03–25 District Commander.

The District Commander is the chief of a Coast Guard district and is charged with the administration of all Coast Guard responsibilities and activities within his respective district, except those functions of administrative law judges under the Administrative Procedure Act (60 Stat. 237, 5 U.S.C. 1001 *et seq.*) and activities of independent units of the Coast Guard, such as the Coast Guard Yard and the Coast Guard Academy.

§ 4.03–30 Investigating officer.

An investigating officer is an officer or employee of the Coast Guard designated by the Commandant, District Commander or the Officer in Charge, Marine Inspection, for the purpose of making investigations of marine casualties and accidents or other matters pertaining to the conduct of seamen. An Officer in Charge, Marine Inspection, is an investigating officer without further designation.

§ 4.03–35 Nuclear vessel.

The term *nuclear vessel* means any vessel in which power for propulsion, or for any other purpose, is derived from nuclear energy; or any vessel handling or processing substantial amounts of radioactive material other than as cargo.

[CGD 84–099, 52 FR 47534, Dec. 14, 1987]

§ 4.03–40 Public vessels.

Public vessel means a vessel that—

(a) Is owned, or demise chartered, and operated by the U.S. Government or a government of a foreign country, except a vessel owned or operated by the Department of Transportation or any corporation organized or controlled by the Department (except a vessel operated by the Coast Guard or Saint Lawrence Seaway Development Corporation); and

(b) Is not engaged in commercial service.

[CGD 95–028, 62 FR 51195, Sept. 30, 1997]

§ 4.03–45 Marine employer.

Marine employer means the owner, managing operator, charterer, agent, master, or person in charge of a vessel other than a recreational vessel.

[CGD 84–099, 52 FR 47534, Dec. 14, 1987]

§ 4.03–50 Recreational vessel.

Recreational vessel means a vessel meeting the definition in 46 U.S.C. 2101(25) that is then being used only for pleasure.

[CGD 84–099, 52 FR 47534, Dec. 14, 1987]

§ 4.03–55 Law enforcement officer.

Law enforcement officer means a Coast Guard commissioned, warrant or petty officer; or any other law enforcement officer authorized to obtain a chemical test under Federal, State, or local law.

[CGD 84–099, 52 FR 47534, Dec. 14, 1987]

§ 4.03–60 Noxious liquid substance (NLS).

Noxious liquid substance (NLS) means—

(a) Each substance listed in 33 CFR 151.47 or 151.49;

(b) Each substance having an ''A,'' ''B,'' ''C,'' or ''D'' beside its name in

the column headed ''IMO Annex II pollution category'' in table 1 of part 153 of this chapter; and

(c) Each substance that is identified as an NLS in a written permission issued under § 153.900(d) of this chapter.

[USCG–2000–6927, 70 FR 74676, Dec. 16, 2005]

§ 4.03–65 Significant harm to the environment.

Significant harm to the environment means—

(a) In the navigable waters of the United States, a discharge of oil as set forth in 40 CFR 110.3 or a discharge of hazardous substances in quantities equal to or exceeding, in any 24-hour period, the reportable quantity determined in 40 CFR part 117;

(b) In other waters subject to the jurisdiction of the United States, including the EEZ—

(1) A discharge of oil in excess of the quantities or instantaneous rate permitted in 33 CFR 151.10 or 151.13 during operation of the ship; or

(2) A discharge of noxious liquid substances in bulk in violation of §§ 153.1126 or 153.1128 of this chapter during the operation of the ship; and

(c) In waters subject to the jurisdiction of the United States, including the EEZ, a probable discharge of oil, hazardous substances, marine pollutants, or noxious liquid substances. The factors you must consider to determine whether a discharge is probable include, but are not limited to—

(1) Ship location and proximity to land or other navigational hazards;

(2) Weather;

(3) Tide current;

(4) Sea state;

(5) Traffic density;

(6) The nature of damage to the vessel; and

(7) Failure or breakdown aboard the vessel, its machinery, or equipment.

[USCG–2000–6927, 70 FR 74676, Dec. 16, 2005]

§ 4.03–70 Tank vessel.

Tank vessel means a vessel that is constructed or adapted to carry, or that carries, oil, hazardous substances, marine pollutants, or noxious liquid substances, in bulk as cargo or cargo residue.

[USCG–2000–6927, 70 FR 74676, Dec. 16, 2005]

§ 4.03–75 Merchant mariner credential and credential.

The following definitions apply to this part:

Credential means any or all of the following:

(1) Merchant mariner's document.

(2) Merchant mariner's license.

(3) STCW endorsement.

(4) Certificate of registry.

(5) Merchant mariner credential.

Merchant mariner credential or MMC means the credential issued by the Coast Guard under 46 CFR part 10. It combines the individual merchant mariner's document, license, and certificate of registry enumerated in 46 U.S.C. subtitle II part E as well as the STCW endorsement into a single credential that serves as the mariner's qualification document, certificate of identification, and certificate of service.

[USCG–2006–24371, 74 FR 11214, Mar. 16, 2009]

Subpart 4.04—Notice of Potential Vessel Casualty

SOURCE: CGD 85–015, 51 FR 19341, May 29, 1986, unless otherwise noted.

§ 4.04–1 Reports of potential vessel casualty.

A vessel owner, charterer, managing operator or agent shall immediately notify either of the following Coast Guard officers if there is reason to believe a vessel is lost or imperiled.

(a) The Coast Guard district rescue coordination center (RCC) cognizant over the area the vessel was last operating in; or

(b) The Coast Guard search and rescue authority nearest to where the vessel was last operating.

Reasons for belief that a vessel is in distress include, but are not limited to, lack of communication with or nonappearance of the vessel.

§ 4.04–3 Reports of lack of vessel communication.

The owner, charterer, managing operator or agent of a vessel that is required to report to the United States flag Merchant Vessel Location Filing System under the authority of section 212(A) of the Merchant Marine Act, 1936

(46 App. U.S.C. 1122a), shall immediately notify the Coast Guard if more than 48 hours have passed since receiving communication from the vessel. This notification shall be given to the Coast Guard district RCC cognizant over the area the vessel was last operating in.

(Information collection requirements approved by the Office of Management and Budget under control number 1625–0048)

[CGD 85–015, 51 FR 19341, May 29, 1986, as amended by USCG–2006–25697, 71 FR 55745, Sept. 25, 2006]

§ 4.04–5 Substance of reports.

The owner, charterer, managing operator or agent, notifying the Coast Guard under § 4.04–1 or § 4.04–3, shall:

(a) Provided the name and identification number of the vessel, the names of the individuals on board, and other information that may be requested by the Coast Guard (when providing the names of the individuals on board for a passenger vessel, the list of passengers need only meet the requirements of 46 U.S.C. 3502); and

(b) Submit written confirmation of that notice to the Coast Guard facility that the notice was given to within 24 hours.

(Information collection requirements approved by the Office of Management and Budget under control number 1625–0048)

[CGD 85–015, 51 FR 19341, May 29, 1986, as amended by USCG–2006–25697, 71 FR 55745, Sept. 25, 2006]

Subpart 4.05—Notice of Marine Casualty and Voyage Records

§ 4.05–1 Notice of marine casualty.

(a) Immediately after the addressing of resultant safety concerns, the owner, agent, master, operator, or person in charge, shall notify the nearest Sector Office, Marine Inspection Office or Coast Guard Group Office whenever a vessel is involved in a marine casualty consisting in—

(1) An unintended grounding, or an unintended strike of (allision with) a bridge;

(2) An intended grounding, or an intended strike of a bridge, that creates a hazard to navigation, the environment, or the safety of a vessel, or that meets any criterion of paragraphs (a)(3) through (8);

(3) A loss of main propulsion, primary steering, or any associated component or control system that reduces the maneuverability of the vessel;

(4) An occurrence materially and adversely affecting the vessel's seaworthiness or fitness for service or route, including but not limited to fire, flooding, or failure of or damage to fixed fire-extinguishing systems, lifesaving equipment, auxiliary power-generating equipment, or bilge-pumping systems;

(5) A loss of life;

(6) An injury that requires professional medical treatment (treatment beyond first aid) and, if the person is engaged or employed on board a vessel in commercial service, that renders the individual unfit to perform his or her routine duties; or

(7) An occurrence causing property-damage in excess of $75,000, this damage including the cost of labor and material to restore the property to its condition before the occurrence, but not including the cost of salvage, cleaning, gas-freeing, drydocking, or demurrage.

(8) An occurrence involving significant harm to the environment as defined in § 4.03–65.

(b) Notice given as required by 33 CFR 160.215 satisfies the requirement of this section if the marine casualty involves a hazardous condition as defined by 33 CFR 160.202.

(c) Except as otherwise required under this subpart, if the marine casualty exclusively involves an occurrence or occurrences described by paragraph (a)(8) of this section, a report made pursuant to 33 CFR 153.203, 40 CFR 117.21, or 40 CFR 302.6 satisfies the immediate notification requirement of this section.

[CGD 94–030, 59 FR 39471, Aug. 3, 1994, as amended by USCG–2000–6927, 70 FR 74676, Dec. 16, 2005; USCG–2006–25556, 72 FR 36330, July 2, 2007; USCG–2011–0618, 76 FR 60754, Sept. 30, 2011; USCG–2014–0688, 79 FR 58275, Sept. 29, 2014; USCG–2005–21869, 80 FR 5336, Jan. 30, 2015; USCG–2016–0748, 83 FR 11902, Mar. 19, 2018]

§ 4.05–2 Incidents involving foreign tank vessels.

(a) *Within the navigable waters of the United States, its territories, or possessions.* The marine casualty reporting and investigation criteria of this part apply to foreign tank vessels operating on the navigable waters of the United States, its territories, or possessions. A written marine casualty report must be submitted under § 4.05–10 of this chapter.

(b) *Outside the U.S. navigable waters and within the Exclusive Economic Zone (EEZ).* The owner, agent, master, operator, or person in charge of a foreign tank vessel involved in a marine casualty must report under procedures detailed in 33 CFR 151.15, immediately after addressing resultant safety concerns, whenever the marine casualty involves, or results in—

(1) Material damage affecting the seaworthiness or efficiency of the vessel; or

(2) An occurrence involving significant harm to the environment as a result of a discharge, or probable discharge, resulting from damage to the vessel or its equipment. The factors you must consider to determine whether a discharge is probable include, but are not limited to—

(i) Ship location and proximity to land or other navigational hazards;

(ii) Weather;

(iii) Tide current;

(iv) Sea state;

(v) Traffic density;

(vi) The nature of damage to the vessel; and

(vii) Failure or breakdown aboard the vessel, its machinery, or equipment.

[USCG–2000–6927, 70 FR 74676, Dec. 16, 2005]

§ 4.05–5 Substance of marine casualty notice.

The notice required in § 4.05–1 must include the name and official number of the vessel involved, the name of the vessel's owner or agent, the nature and circumstances of the casualty, the locality in which it occurred, the nature and extent of injury to persons, and the damage to property.

[CGD 76–170, 45 FR 77441, Nov. 24, 1980]

§ 4.05–10 Written report of marine casualty.

(a) The owner, agent, master, operator, or person in charge must, within 5 days, file a written report of any marine casualty required to be reported under § 4.05–1. This written report is in addition to the immediate notice required by § 4.05–1. This written report must be delivered to a Coast Guard Sector Office or Marine Inspection Office. It must be provided on Form CG–2692 (Report of Marine Casualty, Commercial Diving Casualty, or OCS-Related Casualty), and supplemented as necessary by appended Forms CG–2692A (Barge Addendum), CG–2692B (Report of Mandatory Chemical Testing Following a Serious Marine Incident Involving Vessels in Commercial Service), CG–2692C (Personnel Casualty Addendum), and/or CG–2692D (Involved Persons and Witnesses Addendum).

(b) If filed without delay after the occurrence of the marine casualty, the report required by paragraph (a) of this section suffices as the notice required by § 4.05–1(a).

[CGD 94–030, 63 FR 19192, Apr. 17, 1998, as amended by USCG–2006–25556, 72 FR 36330, July 2, 2007; USCG–2016–0748, 83 FR 11902, Mar. 19, 2018]

§ 4.05–12 Alcohol or drug use by individuals directly involved in casualties.

(a) For each marine casualty required to be reported by § 4.05–10, the marine employer shall determine whether there is any evidence of alcohol or drug use by individuals directly involved in the casualty.

(b) In the written report (Forms CG–2692 and CG–2692B) submitted for the casualty, the marine employer must include information that—

(1) Identifies those individuals for whom evidence of drug or alcohol use, or evidence of intoxication, has been obtained; and,

(2) Specifies the method used to obtain such evidence, such as personal observation of the individual, or by chemical testing of the individual.

(c) An entry shall be made in the official log book, if carried, pertaining to those individuals for whom evidence of intoxication is obtained. The individual must be informed of this entry

and the entry must be witnessed by a second person.

(d) If an individual directly involved in a casualty refuses to submit to, or cooperate in, the administration of a timely chemical test, when directed by a law enforcement officer or by the marine employer, this fact must be noted in the official log book, if carried, and in the written report (Forms CG–2692 and CG–2692B), and shall be admissible as evidence in any administrative proceeding.

[CGD 84–099, 52 FR 47534, Dec. 14, 1987, as amended by USCG–2016–0748, 83 FR 11902, Mar. 19, 2018]

§ 4.05–15 Voyage records, retention of.

(a) The owner, agent, master, or person in charge of any vessel involved in a marine casualty shall retain such voyage records as are maintained by the vessel, such as both rough and smooth deck and engine room logs, bell books, navigation charts, navigation work books, compass deviation cards, gyro records, stowage plans, records of draft, aids to mariners, night order books, radiograms sent and received, radio logs, crew and passenger lists, articles of shipment, official logs and other material which might be of assistance in investigating and determining the cause of the casualty. The owner, agent, master, other officer or person responsible for the custody thereof, shall make these records available upon request, to a duly authorized investigating officer, administrative law judge, officer or employee of the Coast Guard.

(b) The investigating officer may substitute photostatic copies of the voyage records referred to in paragraph (a) of this section when they have served their purpose and return the original records to the owner or owners thereof.

§ 4.05–20 Report of accident to aid to navigation.

Whenever a vessel collides with a buoy, or other aid to navigation under the jurisdiction of the Coast Guard, or is connected with any such collision, it shall be the duty of the person in charge of such vessel to report the accident to the nearest Officer in Charge, Marine Inspection. No report on Form CG-2692 is required unless one or more of the results listed in § 4.05–1 occur.

[CGD 74–119, 39 FR 33317, Sept. 17, 1974, as amended by CGD 88–070, 53 FR 34533, Sept. 7, 1988]

§ 4.05–25 Reports when state of war exists.

During the period when a state of war exists between the United States and any foreign nation, communications in regard to casualties or accidents shall be handled with caution and the reports shall not be made by radio or by telegram.

§ 4.05–30 Incidents involving hazardous materials.

When a casualty occurs involving hazardous materials, notification and a written report to the Department of Transportation may be required. See 49 CFR 171.15 and 171.16.

[CGD 76–170, 45 FR 77441, Nov. 24, 1980]

§ 4.05–35 Incidents involving nuclear vessels.

The master of any nuclear vessel shall immediately inform the Commandant in the event of any accident or casualty to the nuclear vessel which may lead to an environmental hazard. The master shall also immediately inform the competent governmental authority of the country in whose waters the vessel may be or whose waters the vessel approaches in a damaged condition.

[CGD 84–099, 52 FR 47534, Dec. 14, 1987]

§ 4.05–40 Alternate electronic means of reporting.

The Commandant may approve alternate electronic means of submitting notices and reports required under this subpart.

[USCG–1999–6216, 64 FR 53223, Oct. 1, 1999]

Subpart 4.06—Mandatory Chemical Testing Following Serious Marine Incidents Involving Vessels in Commercial Service

SOURCE: CGD 86–067, 53 FR 47078, Nov. 21, 1988, unless otherwise noted.

§ 4.06–1 Responsibilities of the marine employer.

(a) At the time of occurrence of a marine casualty, a discharge of oil into the navigable waters of the United States, a discharge of a hazardous substance into the navigable waters of the United States, or a release of a hazardous substance into the environment of the United States, the marine employer shall make a timely, good faith determination as to whether the occurrence currently is, or is likely to become, a serious marine incident.

(b) When a marine employer determines that a casualty or incident is, or is likely to become, a serious marine incident, the marine employer shall take all practicable steps to have each individual engaged or employed on board the vessel who is directly involved in the incident chemically tested for evidence of drug and alcohol use as required in this part.

(c) The marine employer determines which individuals are directly involved in a serious marine incident (SMI). A law enforcement officer may determine that additional individuals are directly involved in the SMI. In these cases, the marine employer must take all practical steps to have these additional individuals tested according to this part.

(d) The requirements of this subpart do not prevent personnel who are required to be tested from performing duties in the aftermath of an SMI when their performance is necessary to respond to safety concerns directly related to the incident.

(e) The marine employer shall ensure that all individuals engaged or employed on board a vessel are fully indoctrinated in the requirements of this subpart, and that appropriate vessel personnel are trained as necessary in the practical applications of these requirements.

[CGD 86–067, 53 FR 47078, Nov. 21, 1988, as amended by USCG–2000–7759, 66 FR 42967, Aug. 16, 2001; USCG–2001–8773, 70 FR 75960, Dec. 22, 2005]

§ 4.06–3 Requirements for alcohol and drug testing following a serious marine incident.

When a marine employer determines that a casualty or incident is, or is likely to become, an SMI, the marine employer must ensure that the following alcohol and drug testing is conducted:

(a) *Alcohol testing.* (1) Alcohol testing must be conducted on each individual engaged or employed on board the vessel who is directly involved in the SMI.

(i) The alcohol testing of each individual must be conducted within 2 hours of when the SMI occurred, unless precluded by safety concerns directly related to the incident.

(ii) If safety concerns directly related to the SMI prevent the alcohol testing from being conducted within 2 hours of the occurrence of the incident, then alcohol testing must be completed as soon as the safety concerns are addressed.

(iii) Alcohol testing is not required to be conducted more than 8 hours after the occurrence of the SMI.

(2) Alcohol-testing devices must be used according to the procedures specified by the manufacturer of the testing device and by this part.

(3) If the alcohol testing required in paragraphs (a)(1)(i) and (a)(1)(ii) of this section is not conducted, the marine employer must document on Forms CG–2692 and CG–2692B the reason why the testing was not conducted.

(4) The marine employer may use alcohol-testing results from tests conducted by Coast Guard or local law enforcement personnel to satisfy the alcohol testing requirements of this part only if the alcohol testing meets all of the requirements of this part.

(b) *Drug testing.* (1) Drug testing must be conducted on each individual engaged or employed on board the vessel who is directly involved in the SMI.

(i) The collection of drug-test specimens of each individual must be conducted within 32 hours of when the SMI occurred, unless precluded by safety concerns directly related to the incident.

(ii) If safety concerns directly related to the SMI prevent the collection of drug-test specimens from being conducted within 32 hours of the occurrence of the incident, then the collection of drug-test specimens must be conducted as soon as the safety concerns are addressed.

(2) If the drug-test specimens required in paragraphs (b)(1)(i) and

(b)(1)(ii) of this section were not collected, the marine employer must document on Forms CG–2692 and CG–2692B the reason why the specimens were not collected.

[USCG–2001–8773, 70 FR 75960, Dec. 22, 2005, as amended by USCG–2016–0748, 83 FR 11902, Mar. 19, 2018]

§ 4.06–5 Responsibility of individuals directly involved in serious marine incidents.

(a) Any individual engaged or employed on board a vessel who is determined to be directly involved in an SMI must provide a blood, breath, saliva, or urine specimen for chemical testing when directed to do so by the marine employer or a law enforcement officer.

(b) If the individual refuses to provide a blood, breath, saliva, or urine specimen, this refusal must be noted on Forms CG–2692 and CG–2692B and in the vessel's official log book, if a log book is required. The marine employer must remove the individual as soon as practical from duties that directly affect the safe operation of the vessel.

(c) Individuals subject to alcohol testing after an SMI are prohibited from consuming alcohol beverages for 8 hours following the occurrence of the SMI or until after the alcohol testing required by this part is completed.

(d) No individual may be compelled to provide specimens for alcohol and drug testing required by this part. However, refusal to provide specimens is a violation of this subpart and may subject the individual to suspension and revocation proceedings under part 5 of this chapter, a civil penalty, or both.

[USCG–2001–8773, 70 FR 75961, Dec. 22, 2005, as amended by USCG–2016–0748, 83 FR 11902, Mar. 19, 2018]

§ 4.06–15 Accessibility of chemical testing devices.

(a) *Alcohol testing.* (1) The marine employer must have a sufficient number of alcohol testing devices readily accessible on board the vessel to determine the presence of alcohol in the system of each individual who was directly involved in the SMI.

(2) All alcohol testing devices used to meet the requirements of this part must be currently listed on either the Conforming Products List (CPL) titled ''Modal Specifications for Devices To Measure Breath Alcohol'' or ''Conforming Products List of Screening Devices To Measure Alcohol in Bodily Fluids,'' which are published periodically in the FEDERAL REGISTER by National Highway Traffic Safety Administration (NHTSA).

(3) The alcohol testing devices need not be carried on board each vessel if obtaining the devices and conducting the required alcohol tests can be accomplished within 2 hours from the time of occurrence of the SMI.

(b) *Drug testing.* (1) The marine employer must have a sufficient number of urine-specimen collection and shipping kits meeting the requirements of 49 CFR part 40 that are readily accessible for use following SMIs.

(2) The specimen collection and shipping kits need not be carried on board each vessel if obtaining the kits and collecting the specimen can be completed within 32 hours from the time of the occurrence of the SMI.

[USCG–2001–8773, 70 FR 75961, Dec. 22, 2005]

§ 4.06–20 Specimen collection requirements.

(a) *Alcohol testing.* (1) When conducting alcohol testing required in § 4.06–3(a), an individual determined under this part to be directly involved in the SMI must provide a specimen of their breath, blood, or saliva to the marine employer as required in this subpart.

(2) Collection of an individual's blood to comply with § 4.06–3(a) must be taken only by qualified medical personnel.

(3) Collection of an individual's saliva or breath to comply with § 4.06–3(a) must be taken only by personnel trained to operate the alcohol-testing device in use and must be conducted according to this subpart.

(b) *Drug testing.* (1) When conducting drug testing required in § 4.06–3(b), an individual determined under this part to be directly involved in the SMI must provide a specimen of their urine according to 46 CFR part 16 and 49 CFR part 40.

(2) Specimen collection and shipping kits used to conduct drug testing must be used according to 49 CFR part 40.

[USCG–2001–8773, 70 FR 75961, Dec. 22, 2005]

§ 4.06–30 Specimen collection in incidents involving fatalities.

(a) When an individual engaged or employed on board a vessel dies as a result of a serious marine incident, blood and urine specimens must be obtained from the remains of the individual for chemical testing, if practicable to do so. The marine employer shall notify the appropriate local authority, such as the coroner or medical examiner, as soon as possible, of the fatality and of the requirements of this subpart. The marine employer shall provide the specimen collection and shipping kit and request that the local authority assist in obtaining the necessary specimens. When the custodian of the remains is a person other than the local authority, the marine employer shall request the custodian to cooperate in obtaining the specimens required under this part.

(b) If the local authority or custodian of the remains declines to cooperate in obtaining the necessary specimens, the marine employer shall provide an explanation of the circumstances on Form CG-2692B (Report of Mandatory Chemical Testing Following a Serious Marine Incident Involving Vessels in Commercial Service).

[CGD 86–067, 53 FR 47078, Nov. 21, 1988, as amended by USCG–2016–0748, 83 FR 11902, Mar. 19, 2018]

§ 4.06–40 Specimen handling and shipping.

(a) The marine employer shall ensure that blood specimens collected in accordance with §§ 4.06–20 and 4.06–30 are promptly shipped to a testing laboratory qualified to conduct tests on such specimens. A proper chain of custody must be maintained for each specimen from the time of collection through the authorized disposition of the specimen. Blood specimens must be shipped to the laboratory in a cooled condition by any means adequate to ensure delivery within twenty-four (24) hours of receipt by the carrier.

(b) The marine employer shall ensure that the urine specimen collection procedures of § 16.113 of this chapter and the chain of custody requirements of 49 CFR part 40, subpart D, are complied with. The marine employer shall ensure that urine specimens required by §§ 4.06–20 and 4. 06–30 are promptly shipped to a laboratory complying with the requirements of 49 CFR part 40. Urine specimens must be shipped by an expeditious means, but need not be shipped in a cooled condition for overnight delivery.

[CGD 86–067, 53 FR 47078, Nov. 21, 1988, as amended by USCG–2000–7759, 66 FR 42967, Aug. 16, 2001]

§ 4.06–50 Specimen analysis and follow-up procedures.

(a) Each laboratory will provide prompt analysis of specimens collected under this subpart, consistent with the need to develop all relevant information and to produce a complete analysis report.

(b) Reports shall be sent to the Medical Review Officer meeting the requirements of 49 CFR 40.121, as designated by the marine employer submitting the specimen for testing. Wherever a urinalysis report indicates the presence of a dangerous drug or drug metabolite, the Medical Review Officer shall review the report as required by 49 CFR part 40, subpart G, and submit his or her findings to the marine employer. Blood test reports indicating the presence of alcohol shall be similarly reviewed to determine if there is a legitimate medical explanation.

(c) Analysis results which indicate the presence of alcohol, dangerous drugs, or drug metabolites shall not be construed by themselves as constituting a finding that use of drugs or alcohol was the probable cause of a serious marine incident.

[CGD 86–067, 53 FR 47078, Nov. 21, 1988, as amended by CGD 90–053, 58 FR 31107, May 28, 1993; USCG–2000–7759, 66 FR 42967, Aug. 16, 2001]

§ 4.06–60 Submission of reports and test results.

(a) Whenever an individual engaged or employed on a vessel is identified as being directly involved in a serious marine incident, the marine employer shall complete Form CG-2692B (Report

of Mandatory Chemical Testing Following a Serious Marine Incident Involving Vessels in Commercial Service).

(b) When the serious marine incident requires the submission of Form CG-2692 (Report of Marine Casualty, Commercial Diving Casualty, or OCS-Related Casualty) to the Coast Guard in accordance with § 4.05–10, the report required by paragraph (a) of this section shall be appended to Form CG-2692.

(c) In incidents involving discharges of oil or hazardous substances as described in § 4.03–2 (b) and (c) of this part, when Form CG-2692 is not required to be submitted, the report required by paragraph (a) of this section shall be submitted to the Coast Guard Officer in Charge, Marine Inspection, having jurisdiction over the location where the discharge occurred or nearest the port of first arrival following the discharge.

(d) Upon receipt of the report of chemical test results, the marine employer shall submit a copy of the test results for each person listed on the CG-2692B to the Coast Guard Officer in Charge, Marine Inspection to whom the CG-2692B was submitted.

(e) The Commandant may approve alternate electronic means of submitting reports and test results as required under paragraphs (a) through (d) of this section.

[CGD 86–067, 53 FR 47078, Nov. 21, 1988, as amended by CGD 97–057, 62 FR 51041, Sept. 30, 1997; USCG–1999–6216, 64 FR 53223, Oct. 1, 1999; USCG–2016–0748, 83 FR 11902, Mar. 19, 2018]

§ 4.06–70 Penalties.

Violation of this part is subject to the civil penalties set forth in 46 U.S.C. 2115.

[USCG–2001–8773, 70 FR 75961, Dec. 22, 2005]

Subpart 4.07—Investigations

§ 4.07–1 Commandant or District Commander to order investigation.

(a) The Commandant or District Commander upon receipt of information of a marine casualty or accident, will immediately cause such investigation as may be necessary in accordance with the regulations in this part.

(b) The investigations of marine casualties and accidents and the determinations made are for the purpose of taking appropriate measures for promoting safety of life and property at sea, and are not intended to fix civil or criminal responsibility.

(c) The investigation will determine as closely as possible:

(1) The cause of the accident;

(2) Whether there is evidence that any failure of material (either physical or design) was involved or contributed to the casualty, so that proper recommendations for the prevention of the recurrence of similar casualties may be made;

(3) Whether there is evidence that any act of misconduct, inattention to duty, negligence or willful violation of the law on the part of any person holding a Coast Guard credential contributed to the casualty, so that appropriate proceedings against the credential of such person may be recommended and taken under 46 U.S.C. 6301;

(4) Whether there is evidence that any Coast Guard personnel or any representative or employee of any other government agency or any other person caused or contributed to the cause of the casualty; or,

(5) Whether the accident shall be further investigated by a Marine Board of Investigation in accordance with regulations in subpart 4.09.

[CGD 74–119, 39 FR 33317, Sept. 17, 1974, as amended by CGD 97–057, 62 FR 51041, Sept. 30, 1997; USCG–2006–24371, 74 FR 11214, Mar. 16, 2009]

§ 4.07–5 Investigating officers, powers of.

(a) An investigating officer investigates each marine casualty or accident reported under §§ 4.05–1 and 4.05–10.

(b) Such investigating officer shall have the power to administer oaths, subpoena witnesses, require persons having knowledge of the subject matter of the investigation to answer questionnaires and require the production of relevant books, papers, documents and other records.

(c) Attendance of witnesses or the production of books, papers, documents

or any other evidence shall be compelled by a similar process as in the United States District Court.

[CGFR 65–50, 30 FR 17099, Dec. 30, 1965, as amended by CGD 72–104R, 37 FR 14234, July 18, 1972]

§ 4.07–7 Opening statement.

The investigating officer or the Chairman of a Marine Board of Investigation shall open the investigation by announcing the statutory authority for the proceeding and he shall advise parties in interest concerning their rights to be represented by counsel, to examine and cross-examine witnesses, and to call witnesses in their own behalf.

§ 4.07–10 Report of investigation.

(a) At the conclusion of the investigation the investigating officer shall submit to the Commandant via the Officer in Charge, Marine Inspection, and the District Commander, a full and complete report of the facts as determined by his investigation, together with his opinions and recommendations in the premises. The Officer in Charge, Marine Inspection, and the District Commander shall forward the investigating officer's report to the Commandant with an endorsement stating:

(1) Approval or otherwise of the findings of fact, conclusions and recommendations;

(2) Any action taken with respect to the recommendations;

(3) Whether or not any action has been or will be taken under part 5 of this subchapter to suspend or revoke credentials; and,

(4) Whether or not violations of laws or regulations relating to vessels have been reported.

(b) At the conclusion of the investigation, the investigating officer shall submit the report described in paragraph (a) of this section, to the Commandant via the Merchant Marine Detail Officer or the Officer in Charge, Marine Inspection, and the Commander, Coast Guard MIO Europe for a European port or Commander, Fourteenth Coast Guard for an Asian or Pacific port. The Merchant Marine Detail Officer or the Officer in Charge, Marine Inspection, and Commander, Coast Guard MIO Europe or Commander, Fourteenth Coast Guard District shall forward the investigating officer's report to the Commandant with the endorsement described in paragraphs (a)(1) through (4) of this section.

[CGD 74–119, 39 FR 33317, Sept. 17, 1974, as amended by CGD 75–196, 41 FR 18655, May 6, 1976; CGD 97–057, 62 FR 51042, Sept. 30, 1997; USCG–2006–24371, 74 FR 11214, Mar. 16, 2009; USCG–2016–0498, 82 FR 35089, July 28, 2017]

§ 4.07–15 Recommendations, action on.

Where the recommendations of an investigating officer are such that their accomplishment is within the authority of the District Commander or any of the personnel under his command, immediate steps shall be taken to put them into effect and his forwarding endorsement shall so indicate.

§ 4.07–20 Transfer of jurisdiction.

When it appears to the District Commander that it is more advantageous to conduct an investigation in a district other than in the district where the casualty was first reported, that officer shall transfer the case to the other district together with any information or material relative to the casualty he may have.

§ 4.07–25 Testimony of witnesses in other districts, depositions.

When witnesses are available in a district other than the district in which the investigation is being made, testimony or statements shall be taken from witnesses in the other districts by an investigating officer and promptly transmitted to the investigating officer conducting the investigation. Depositions may be taken in the manner prescribed by regulations in subpart 4.12.

§ 4.07–30 Testimony of witnesses under oath.

(a) Witnesses to marine casualties or accidents appearing before an investigating officer may be placed under oath and their testimony may be reduced to writing.

(b) Written statements and reports submitted as evidence by witnesses shall be sworn to before an officer authorized to administer oaths and such

statements and/or reports shall be signed.

§ 4.07–35 Counsel for witnesses and parties in interest.

(a) All parties in interest shall be allowed to be represented by counsel, to examine and cross-examine witnesses and to call witnesses in their own behalf.

(b) Witnesses who are not parties in interest may be assisted by counsel for the purpose of advising such witnesses concerning their rights; however, such counsel will not be permitted to examine or cross-examine other witnesses or otherwise participate in the investigation.

§ 4.07–45 Foreign units of Coast Guard, investigation by.

Investigations of marine casualties conducted by foreign units of the Coast Guard shall be in accordance with the regulations in this part and all actions taken in connection with the investigations of such marine casualties entered in the official log(s) of the vessel(s) concerned.

§ 4.07–55 Information to be furnished Marine Board of Investigation.

When a Marine Board of Investigation is convened in accordance with § 4.09–1, the investigating officer shall immediately furnish the board with all testimony, statements, reports, documents, papers, a list of witnesses including those whom he has examined, other material which he may have gathered, and a statement of any findings of fact which he may have determined. The preliminary investigation shall cease forthwith and the aforementioned material shall become a part of the Marine Board of Investigation's record.

Subpart 4.09—Marine Board of Investigation

§ 4.09–1 Commandant to designate.

If it appears that it would tend to promote safety of life and property at sea or would be in the public interest, the Commandant may designate a Marine Board of Investigation to conduct an investigation.

[CGD 76–170, 45 FR 77441, Nov. 24, 1980]

§ 4.09–5 Powers of Marine Board of Investigation.

Any Marine Board of Investigation so designated shall have the power to administer oaths, summon witnesses, require persons having knowledge of the subject matter of the investigation to answer questionnaires, and to require the production of relevant books, papers, documents or any other evidence. Attendance of witnesses or the production of books, papers, documents or any other evidence shall be compelled by a similar process as in the United States District Court. The chairman shall administer all necessary oaths to any witnesses summoned before said Board.

§ 4.09–10 Witnesses, payment of.

Any witness subpoenaed under § 4.09–5 shall be paid such fees for his travel and attendance as shall be certified by the chairman of a Marine Board of Investigation or an investigating officer, in accordance with § 4.11–10.

§ 4.09–15 Time and place of investigation, notice of; rights of witnesses, etc.

Reasonable notice of the time and place of the investigation shall be given to any person whose conduct is or may be under investigation and to any other party in interest. All parties in interest shall be allowed to be represented by counsel, to cross-examine witnesses, and to call witnesses in their own behalf.

§ 4.09–17 Sessions to be public.

(a) All sessions of a Marine Board of Investigation for the purpose of obtaining evidence shall normally be open to the public, subject to the provision that the conduct of any person present shall not be allowed to interfere with the proper and orderly functioning of the Board. Sessions will not be open to the public when evidence of a classified nature or affecting national security is to be received.

§ 4.09–20 Record of proceedings.

The testimony of witnesses shall be transcribed and a complete record of the proceedings of a Marine Board of Investigation shall be kept. At the conclusion of the investigation a written report shall be made containing findings of fact, opinions, and recommendations to the Commandant for his consideration.

§ 4.09–25 U.S. Attorney to be notified.

The recorder of a Marine Board of Investigation shall notify the United States Attorney for the District in which the Marine Board of Investigation is being conducted of the nature of the casualty under investigation and time and place the investigation will be made.

§ 4.09–30 Action on report.

Upon approval of the report of a Marine Board of Investigation the Commandant will require to be placed into effect such recommendations as he may deem necessary for the better improvement and safety of life and property at sea.

§ 4.09–35 Preferment of charges.

(a) If in the course of an investigation by a Marine Board there appears probable cause for the preferment of charges against any licensed or certificated personnel, the Marine Board shall, either during or immediately following the investigation and before the witnesses have dispersed, apprise the District Commander of such evidence for possible action in accordance with part 5 of this subchapter, without waiting for the approval of the report by the Commandant. Such action or proceedings shall be independent and apart from any other action which may be later ordered by the Commandant or taken by other authorities.

Subpart 4.11—Witnesses and Witness Fees

§ 4.11–1 Employees of vessels controlled by Army or Navy as witnesses.

No officer, seaman, or other employee of any public vessel controlled by the Army or Navy (not including the Coast Guard) of the United States, shall be summoned or otherwise required to appear as a witness in connection with any investigation or other proceeding without the consent of the Government agency concerned.

§ 4.11–5 Coercion of witnesses.

Any attempt to coerce any witness or to induce him to testify falsely in connection with a shipping casualty, or to induce any witness to leave the jurisdiction of the United States, is punishable by a fine of $5,000.00 or imprisonment for one year, or both such fine and imprisonment.

§ 4.11–10 Witness fees and allowances.

Witness fees and allowances are paid in accordance with 46 CFR 5.401.

[CGD 79–080, 45 FR 2046, Jan. 10, 1980, as amended by CGD 96–041, 61 FR 50726, Sept. 27, 1996]

Subpart 4.12—Testimony by Interrogatories and Depositions

§ 4.12–1 Application, procedure, and admissibility.

(a) Witnesses shall be examined orally, except that for good cause shown, testimony may be taken by deposition upon application of any party in interest or upon the initiative of the investigating officer or Marine Board of Investigation.

(b) Applications to take depositions shall be in writing setting forth the reasons why such deposition should be taken, the name and address of the witness, the matters concerning which it is expected the witness will testify, and the time and place proposed for the taking of the deposition. Such application shall be made to an investigating officer or the Marine Board of Investigation prior to or during the course of the proceedings.

(c) The investigating officer or Marine Board of Investigation, shall, upon receipt of the application, if good cause is shown, make and serve upon the parties an order which will specify the name of the witness whose deposition is to be taken, the name and place of the taking of such deposition and shall contain a designation of the officer before whom the witness is to testify.

Such deposition may be taken before any officer authorized to administer oaths by the laws of the United States.

(d) The party desiring the deposition may submit a list of interrogatories to be propounded to the absent witness; then the opposite party after he has been allowed a reasonable time for this purpose, may submit a list of cross-interrogatories. If either party objects to any question of the adversary party, the matter shall be presented to the investigating officer or Marine Board of Investigation for a ruling. Upon agreement of the parties on a list of interrogatories and cross-interrogatories (if any) the investigating officer or Marine Board of Investigation may propound such additional questions as may be necessary to clarify the testimony given by the witness.

(e) The subpoena referred to in subpart F of this subchapter together with the list of interrogatories and cross-interrogatories (if any) shall be forwarded to the officer designated to take such deposition. This officer will cause the subpoena to be served personally on the witness. After service the subpoena shall be endorsed and returned to the investigating officer or Marine Board of Investigation.

(f) When the deposition has been duly executed it shall be returned to the investigating officer or Marine Board of Investigation. As soon as practicable after the receipt of the deposition the investigating officer or Marine Board of Investigation shall present it to the parties for their examination. The investigating officer or Marine Board of Investigation shall rule on the admissibility of the deposition or any part thereof and of any objection offered by either party thereto.

[CGD 74–119, 39 FR 33317, Sept. 17, 1974, as amended by CGD 96–041, 61 FR 50726, Sept. 27, 1996]

Subpart 4.13—Availability of Records

§ 4.13–1 Public availability of records.

Coast Guard records are made available to the public in accordance with 49 CFR part 7.

[CGD 73–43R, 40 FR 13501, Mar. 27, 1975]

Subpart 4.19—Construction of Regulations and Rules of Evidence

§ 4.19–1 Construction of regulations.

The regulations in this part shall be liberally construed to insure just, speedy, and inexpensive determination of the issues presented.

§ 4.19–5 Adherence to rules of evidence.

As hearings under this part are administrative in character, strict adherence to the formal rules of evidence is not imperative. However, in the interest of orderly presentation of the facts of a case, the rules of evidence should be observed as closely as possible.

Subpart 4.21—Computation of Time

§ 4.21–1 Computation of time.

The time, within which any act, provided by the regulation in this subchapter, or an order of the Marine Board of Investigation is to be done, shall be computed by excluding the first day and including the last unless the last day is Sunday or a legal holiday, in which case the time shall extend to and include the next succeeding day that is not a Sunday or legal holiday: *Provided*, *however*, That where the time fixed by the regulations in this subchapter or an order of the Board is five days or less all intervening Sundays or legal holidays, other than Saturdays, shall be excluded.

Subpart 4.23—Evidence of Criminal Liability

§ 4.23–1 Evidence of criminal liability.

If, as a result of any investigation or other proceeding conducted hereunder, evidence of criminal liability on the part of any licensed officer or certificated person or any other person is found, such evidence shall be referred to the U.S. Attorney General.

[CGD 74–119, 39 FR 33317, Sept. 17, 1974, as amended by USCG–2004–18884, 69 FR 58341, Sept. 30, 2004]

Subpart 4.40—Coast Guard—National Transportation Safety Board Marine Casualty Investigations

SOURCE: CGD 76–149, 42 FR 61200, Dec. 1, 1977, unless otherwise noted.

§ 4.40–1 Purpose.

This subpart prescribes the joint regulations of the National Transportation Safety Board and the Coast Guard for the investigation of marine casualties.

[CGD 82–034, 47 FR 45882, Oct. 14, 1982]

§ 4.40–3 Relationship to Coast Guard marine investigation regulations and procedures.

(a) The Coast Guard's responsibility to investigate marine casualties is not eliminated nor diminished by the regulations in this subpart.

(b) In those instances where the National Transportation Safety Board conducts an investigation in which the Coast Guard also has responsibility under 46 U.S.C. Chapter 63, the proceedings are conducted independently but so as to avoid duplication as much as possible.

[CGD 76–149, 42 FR 61200, Dec. 1, 1977, as amended by CGD 95–028, 62 FR 51195, Sept. 30, 1997]

§ 4.40–5 Definitions.

As used in this subpart:

(a) *Act* means title III of Public Law 93–633, the Independent Safety Board Act of 1974, (49 U.S.C. 1131).

(b) *Board* means the National Transportation Safety Board.

(c) *Chairman* means the Chairman of the National Transportation Safety Board.

(d) *Major marine casualty* means a casualty involving a vessel, other than a public vessel, that results in:

(1) The loss of six or more lives:

(2) The loss of a mechanically propelled vessel of 100 or more gross tons;

(3) Property damage initially estimated at $500,000 or more; or

(4) Serious threat, as determined by the Commandant and concurred in by the Chairman, to life, property, or the environment by hazardous materials.

(e) *Public vessel* means a vessel owned by the United States, except a vessel to which the Act of October 25, 1919, c.82, (41 Stat. 305, 46 U.S.C. 363) applies.

(f) *Vessel of the United States* means a vessel:

(1) Documented or required to be documented under the laws of the United States;

(2) Owned in the United States; or

(3) Owned by a citizen or resident of the United States and not registered under a foreign flag.

[CGD 76–149, 42 FR 61200, Dec. 1, 1977, as amended by CGD 95–028, 62 FR 51195, Sept. 30, 1997; USCG–2021–0348, 87 FR 3223, Jan. 21, 2022; 87 FR 35901, June 14, 2022]

§ 4.40–10 Preliminary investigation by the Coast Guard.

(a) The Coast Guard conducts the preliminary investigation of marine casualties.

(b) The Commandant determines from the preliminary investigation whether:

(1) The casualty is a major marine casualty; or

(2) The casualty involves a public and a non-public vessel and at least one fatality or $75,000 in property damage; or

(3) The casualty involves a Coast Guard and a non-public vessel and at least one fatality or $75,000 in property damage; or

(4) The casualty is a major marine casualty which involves significant safety issues relating to Coast Guard safety functions, e.g., search and rescue, aids to navigation, vessel traffic systems, commercial vessel safety, etc.

(c) The Commandant notifies the Board of a casualty described in paragraph (b) of this section.

[CGD 76–149, 42 FR 61200, Dec. 1, 1977, as amended by CGD 82–034, 47 FR 45882, Oct. 14, 1982]

§ 4.40–15 Marine casualty investigation by the Board.

(a) The Board may conduct an investigation under the Act of any major marine casualty or any casualty involving public and non-public vessels. Where the Board determines it will convene a hearing in connection with such an investigation, the Board's

rules of practice for transportation accident hearings in 49 CFR part 845 shall apply.

(b) The Board shall conduct an investigation under the Act when:

(1) The casualty involves a Coast Guard and a non-public vessel and at least one fatality or $75,000 in property damage; or

(2) The Commandant and the Board agree that the Board shall conduct the investigation, and the casualty involves a public and a non-public vessel and at least one fatality or $75,000 in property damage; or

(3) The Commandant and the Board agree that the Board shall conduct the investigation, and the casualty is a major marine casualty which involves significant safety issues relating to Coast Guard safety functions.

[CGD 82–034, 47 FR 45882, Oct. 14, 1982]

§ 4.40–20 Cause or probable cause determinations from Board investigation.

After an investigation conducted by the Board under § 4.40–15, the Board determines cause or probable cause and issues a report of that determination.

§ 4.40–25 Coast Guard marine casualty investigation for the Board.

(a) If the Board does not conduct an investigation under § 4.40–15 (a), (b) (2) or (3), the Coast Guard, at the request of the Board, may conduct an investigation under the Act unless there is an allegation of Federal Government misfeasance or nonfeasance.

(b) The Board will request the Coast Guard to conduct an investigation under paragraph (a) of this section within 48 hours of receiving notice under § 4.40–10(c).

(c) The Coast Guard will advise the Board within 24 hours of receipt of a request under paragraph (b) of this section whether the Coast Guard will conduct an investigation under the Act.

[CGD 82–034, 47 FR 45882, Oct. 14, 1982]

§ 4.40–30 Procedures for Coast Guard investigation.

(a) The Coast Guard conducts an investigation under § 4.40–25 using the procedures in 46 CFR 4.01–1 through 4.23–1.

(b) The Board may designate a person or persons to participate in every phase of an investigation, including an on scene investigation, that is conducted under the provisions of subpart 4.40–25 of this part.

(c) Consistent with Coast Guard responsibility to direct the course of the investigation, the person or persons designated by the Board under paragraph (b) of this section may:

(1) Make recommendations about the scope of the investigations.

(2) Call and examine witnesses.

(3) Submit or request additional evidence.

(d) The Commandant provides a record of the proceedings to the Board of an investigation of a major marine casualty under paragraph (a) of this section.

(e) The Board, under the Act, makes its determination of the facts, conditions, circumstances, and the cause or probable cause of a major marine casualty using the record of the proceedings provided by the Commandant under paragraph (d) of this section, and any additional evidence the Board may acquire under its own authority.

(f) An investigation by the Coast Guard under this section is both an investigation under the Act and under 46 U.S.C. Chapter 63.

[CGD 76–149, 42 FR 61200, Dec. 1, 1977, as amended by CGD 95–028, 62 FR 51195, Sept. 30, 1997; USCG–2004–18884, 69 FR 58341, Sept. 30, 2004]

§ 4.40–35 Records of the Coast Guard and the Board.

(a) Records of the Coast Guard made under § 4.40–30 are available to the public under 49 CFR part 7.

(b) Records of the Board made under §§ 4.40–20 and 4.40–30 are available to the public under 49 CFR part 801.

PART 5—MARINE INVESTIGATION REGULATIONS—PERSONNEL ACTION

Subpart A—Purpose

Sec.

EXHIBIT 9

46 CFR Part 5
Marine Investigations Regulations – Personnel Action

rules of practice for transportation accident hearings in 49 CFR part 845 shall apply.

(b) The Board shall conduct an investigation under the Act when:

(1) The casualty involves a Coast Guard and a non-public vessel and at least one fatality or $75,000 in property damage; or

(2) The Commandant and the Board agree that the Board shall conduct the investigation, and the casualty involves a public and a non-public vessel and at least one fatality or $75,000 in property damage; or

(3) The Commandant and the Board agree that the Board shall conduct the investigation, and the casualty is a major marine casualty which involves significant safety issues relating to Coast Guard safety functions.

[CGD 82–034, 47 FR 45882, Oct. 14, 1982]

§ 4.40–20 Cause or probable cause determinations from Board investigation.

After an investigation conducted by the Board under § 4.40–15, the Board determines cause or probable cause and issues a report of that determination.

§ 4.40–25 Coast Guard marine casualty investigation for the Board.

(a) If the Board does not conduct an investigation under § 4.40–15 (a), (b) (2) or (3), the Coast Guard, at the request of the Board, may conduct an investigation under the Act unless there is an allegation of Federal Government misfeasance or nonfeasance.

(b) The Board will request the Coast Guard to conduct an investigation under paragraph (a) of this section within 48 hours of receiving notice under § 4.40–10(c).

(c) The Coast Guard will advise the Board within 24 hours of receipt of a request under paragraph (b) of this section whether the Coast Guard will conduct an investigation under the Act.

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(b) The Board may designate a person or persons to participate in every phase of an investigation, including an on scene investigation, that is conducted under the provisions of subpart 4.40–25 of this part.

(c) Consistent with Coast Guard responsibility to direct the course of the investigation, the person or persons designated by the Board under paragraph (b) of this section may:

(1) Make recommendations about the scope of the investigations.

(2) Call and examine witnesses.

(3) Submit or request additional evidence.

(d) The Commandant provides a record of the proceedings to the Board of an investigation of a major marine casualty under paragraph (a) of this section.

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(f) An investigation by the Coast Guard under this section is both an investigation under the Act and under 46 U.S.C. Chapter 63.

[CGD 76–149, 42 FR 61200, Dec. 1, 1977, as amended by CGD 95–028, 62 FR 51195, Sept. 30, 1997; USCG–2004–18884, 69 FR 58341, Sept. 30, 2004]

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PART 5—MARINE INVESTIGATION REGULATIONS—PERSONNEL ACTION

Subpart A—Purpose

Sec.

AUTHORITY: 46 U.S.C. 2103, 7101, 7301, 7701; DHS Delegation 00170.1, Revision No. 01.2.

SOURCE: CGD 82–002, 50 FR 32184, Aug. 9, 1985, unless otherwise noted.

Subpart A—Purpose

§ 5.3 Purpose of regulations.

The regulations in this part establish policies for administrative actions against mariners' credentials or endorsements issued by the Coast Guard.

[CGD 82–002, 50 FR 32184, Aug. 9, 1985, as amended by USCG–1998–3472, 64 FR 28075, May 24, 1999; USCG–2006–24371, 74 FR 11214, Mar. 16, 2009]

§ 5.5 Purpose of administrative actions.

The administrative actions against a license, certificate, merchant mariner credential, endorsement, or document are remedial and not penal in nature. These actions are intended to help maintain standards for competence and

conduct essential to the promotion of safety at sea.

[CGD 82–002, 50 FR 32184, Aug. 9, 1985, as amended by USCG–2006–24371, 74 FR 11214, Mar. 16, 2009]

Subpart B—Definitions

§ 5.11 Officer in Charge, Marine Inspection.

Officer in Charge, Marine Inspection (OCMI) for the purposes of part 5 means the officer or individual so designated at one of the Regional Examination Centers, or any person so designated by the Commandant.

[USCG–2006–25535, 71 FR 48482, Aug. 21, 2006]

§ 5.15 Investigating Officer.

An *investigating officer* is a Coast Guard official designated by the Commandant, a District Commander, or the Officer in Charge, Marine Inspection, for the purpose of conducting investigations of marine casualties or matters pertaining to the conduct of persons applying for or holding merchant mariner's documents, licenses, certificates or credentials issued by the Coast Guard. An Officer in Charge, Marine Inspection is an investigating officer without further designation.

[USCG–2006–25535, 71 FR 48482, Aug. 21, 2006]

§ 5.19 Administrative Law Judge.

(a) An *Administrative Law Judge* shall mean any person designated by the Commandant pursuant to the Administrative Procedure Act (5 U.S.C. 556(b) for the purpose of conducting hearings arising under 46 U.S.C. 7703 or 7704.

(b) The Commandant has delegated to Administrative Law Judges the authority to admonish, suspend, with or without probation, or revoke a credential or endorsement issued to a person by the Coast Guard under any navigation or shipping law.

[CGD 82–002, 50 FR 32184, Aug. 9, 1985, as amended by USCG–2004–18884, 69 FR 58341, Sept. 30, 2004; USCG–2006–24371, 74 FR 11214, Mar. 16, 2009]

§ 5.27 Misconduct.

Misconduct is human behavior which violates some formal, duly established rule. Such rules are found in, among other places, statutes, regulations, the common law, the general maritime law, a ship's regulation or order, or shipping articles and similar sources. It is an act which is forbidden or a failure to do that which is required.

§ 5.29 Negligence.

Negligence is the commission of an act which a reasonable and prudent person of the same station, under the same circumstances, would not commit, or the failure to perform an act which a reasonable and prudent person of the same station, under the same circumstances, would not fail to perform.

§ 5.31 Incompetence.

Incompetence is the inability on the part of a person to perform required duties, whether due to professional deficiencies, physical disability, mental incapacity, or any combination thereof.

§ 5.33 Violation of law or regulation.

Where the proceeding is based exclusively on that part of title 46 U.S.C. section 7703, which provides as a basis for suspension or revocation, a violation or failure to comply with 46 U.S.C. subtitle II, a regulation prescribed under that subtitle, or any other law or regulation intended to promote marine safety or protect navigable waters, the complaint must state the specific statute or regulation by title and section number, and the particular manner in which it was allegedly violated.

[CGD 82–002, 50 FR 32184, Aug. 9, 1985, as amended by USCG–1998–3472, 64 FR 28075, May 24, 1999; USCG–2004–18884, 69 FR 58342, Sept. 30, 2004]

§ 5.35 Conviction for a dangerous drug law violation, use of, or addiction to the use of dangerous drugs.

Where the proceeding is based exclusively on the provisions of title 46, U.S.C. 7704, the complaint will allege *conviction for a dangerous drug law violation* or *use of dangerous drugs* or *addiction to the use of dangerous drugs,* depending upon the circumstances and will allege jurisdiction by stating the elements as required by title 46, U.S.C.

7704, and the approximate time and place of the offense.

[CGD 82–002, 50 FR 32184, Aug. 9, 1985, as amended by USCG–1998–3472, 64 FR 28075, May 24, 1999]

§ 5.40 Credential and merchant mariner credential.

Credential means any or all of the following:

(1) Merchant mariner's document.

(2) Merchant mariner's license.

(3) STCW endorsement.

(4) Certificate of registry.

(5) Merchant mariner credential.

Merchant mariner credential or MMC means the credential issued by the Coast Guard under 46 CFR part 10. It combines the individual merchant mariner's document, license, and certificate of registry enumerated in 46 U.S.C. subtitle II part E as well as the STCW endorsement into a single credential that serves as the mariner's qualification document, certificate of identification, and certificate of service.

[USCG–2006–24371, 74 FR 11214, Mar. 16, 2009]

Subpart C—Statement of Policy and Interpretation

§ 5.51 Construction of regulations.

The regulations in this part shall be construed so as to obtain a just, speedy, and economical determination of the issues presented.

§ 5.55 Time limitations for service of a complaint.

(a) The time limitations for service of a complaint upon the holder of a credential are as follows:

(1) When based exclusively on 46 U.S.C. 7704, service shall be within 10 years after the date of conviction, or at anytime if the person charged is a user of or addicted to the use of a dangerous drug.

(2) For one of the misconduct offenses specified in § 5.59(a) or § 5.61(a), service shall be within five years after commission of the offense alleged therein.

(3) For an act or offense not otherwise provided for, the service shall be within three years after the commission of the act or offense alleged therein.

(b) When computing the period of time specified in paragraphs (a) (2) and (3) of this section there shall be excluded any period or periods of time when the respondent could not attend a hearing or be served charges by reason of being outside of the United States or by reason of being in prison or hospitalized.

[CGD 82–002, 50 FR 32184, Aug. 9, 1985, as amended by USCG–1998–3472, 64 FR 28075, May 24, 1999; USCG–2006–24371, 74 FR 11214, Mar. 16, 2009]

§ 5.57 Acting under authority of Coast Guard credential or endorsement.

(a) A person employed in the service of a vessel is considered to be acting under the authority of a credential or endorsement when the holding of such credential or endorsement is:

(1) Required by law or regulation; or

(2) Required by an employer as a condition for employment.

(b) A person is considered to be acting under the authority of the credential or endorsement while engaged in official matters regarding the credential or endorsement. This includes, but is not limited to, such acts as applying for renewal, taking examinations for raises of grade, requesting duplicate or replacement credentials, or when appearing at a hearing under this part.

(c) A person does not cease to act under the authority of a credential or endorsement while on authorized or unauthorized shore leave from the vessel.

[CGD 82–002, 50 FR 32184, Aug. 9, 1985, as amended by USCG–2006–24371, 74 FR 11214, Mar. 16, 2009]

§ 5.59 Offenses for which revocation of credentials or endorsements is mandatory.

An Administrative Law Judge enters an order revoking a respondent's credential or endorsement when—

(a) A charge of misconduct for wrongful possession, use, sale, or association with dangerous drugs is found proved. In those cases involving marijuana, the Administrative Law Judge may enter

an order less than revocation when satisfied that the use, possession or association, was the result of experimentation by the respondent and that the respondent has submitted satisfactory evidence that he or she is cured of such use and that the possession or association will not recur.

(b) The respondent has been a user of, or addicted to the use of, a dangerous drug, or has been convicted for a violation of the dangerous drug laws, whether or not further court action is pending, and such charge is found proved. A conviction becomes final when no issue of law or fact determinative of the respondent's guilt remains to be decided.

[CGD 82–002, 50 FR 32184, Aug. 9, 1985, as amended by USCG–2006–24371, 74 FR 11215, Mar. 16, 2009]

§ 5.61 Acts or offenses for which revocation of credentials is sought.

(a) An investigating officer seeks revocation of a respondent's credential or endorsements when one of the following acts or offenses is found proved:

(1) Assault with a dangerous weapon.

(2) Misconduct resulting in loss of life or serious injury.

(3) Rape or sexual molestation.

(4) Murder or attempted murder.

(5) Mutiny.

(6) Perversion.

(7) Sabotage.

(8) Smuggling of aliens.

(9) Incompetence.

(10) Interference with master, ship's officers, or government officials in performance of official duties.

(11) Wrongful destruction of ship's property.

(b) An investigating officer may seek revocation of a respondent's credential or endorsements when the circumstances of an act or offense found proved or consideration of the respondent's prior record indicates that permitting such person to serve under the credential or endorsements would be clearly a threat to the safety of life or property, or detrimental to good discipline.

[CGD 82–002, 50 FR 32184, Aug. 9, 1985, as amended by USCG–2006–24371, 74 FR 11215, Mar. 16, 2009]

§ 5.65 Commandant's decisions in appeal or review cases.

The decisions of the Commandant in cases of appeal or review of decisions of Administrative Law Judges are officially noticed and the principles and policies enunciated therein are binding upon all Administrative Law Judges, unless they are modified or rejected by competent authority.

§ 5.67 Physician-patient privilege.

For the purpose of these proceedings, the physician-patient privilege does not exist between a physician and a respondent.

§ 5.69 Evidence of criminal liability.

Evidence of criminal liability discovered during an investigation or hearing conducted pursuant to this part will be referred to the Attorney General's local representative or other appropriate law enforcement authority having jurisdiction over the matter.

§ 5.71 Maritime labor disputes.

Under no circumstances will the Coast Guard exercise its authority for the purpose of favoring any party to a maritime labor controversy. However, if the situation affecting the safety of the vessel or persons on board is presented, the matter shall be thoroughly investigated and when a violation of existing statutes or regulations is indicated, appropriate action will be taken.

Subpart D—Investigations

§ 5.101 Conduct of investigations.

(a) Investigations may be initiated in any case in which it appears that there are reasonable grounds to believe that the holder of a credential or endorsement issued by the Coast Guard may have:

(1) Committed an act of incompetency, misconduct, or negligence while acting under the authority of a credential or endorsement;

(2) Violated or failed to comply with subtitle II of title 46, U.S.C., a regulation prescribed under this subtitle, or any other law or regulations intended to promote marine safety or to protect the navigable waters, while acting

under the authority of a credential or endorsement;

(3) Been convicted of a dangerous drug law violation, or has been a user of, or addicted to the use of, a dangerous drug, so as to be subject to the provisions of 46 U.S.C. 7704.

(b) In order to promote full disclosure and facilitate determinations as to the cause of marine casualties, no admission made by a person during an investigation under this part or part 4 of this title may be used against that person in a proceeding under this part, except for impeachment.

[CGD 82–002, 50 FR 32184, Aug. 9, 1985, as amended by USCG–2006–24371, 74 FR 11215, Mar. 16, 2009]

§ 5.103 Powers of investigating officer.

During an investigation, the investigating officer may administer oaths, issue subpoenas in accordance with subpart F of this title, and require persons having knowledge of the subject matter of the investigation to answer questions.

§ 5.105 Course of action available.

During an investigation, the investigating officer may take appropriate action as follows:

(a) Issue complaint.

(b) Accept voluntary surrender of a credential or endorsement.

(c) Accept voluntary deposit of a credential or endorsement.

(d) Refer the case to others for further action. The investigating officer may refer the case to the Commandant or to an Officer in Charge, Marine Inspection, at any port for completion of administrative action if an adequate basis for action is found and the person under investigation and/or witnesses are not locally available.

(e) Give a written warning. The investigating officer may give a warning to any person holding a credential or endorsement. Refusal to accept the written warning will normally result in a withdrawal of the warning and the preferral of charges. An unrejected warning will become a part of the person's record.

(f) Close the case.

[CGD 82–002, 50 FR 32184, Aug. 9, 1985, as amended by USCG–1998–3472, 64 FR 28075, May 24, 1999; USCG–2006–24371, 74 FR 11215, Mar. 16, 2009]

§ 5.107 Service of complaints.

(a) When the investigating officer determines that an S&R proceeding is appropriate, he or she shall prepare and serve a complaint in accordance with 33 CFR part 20.

(b) When the investigating officer serves the complaint, he or she shall also advise the respondent—

(1) Of the nature of S&R proceedings and their possible results;

(2) Of the right to be represented at the hearing by another person, who may, but need not, be a lawyer;

(3) Of the right to obtain witnesses, records, and other evidence by subpoena; and

(4) That failure or refusal to answer the complaint or to appear at the time, date, and place specified for the hearing may result in a finding of default, which will constitute an admission of the facts alleged in the complaint and the waiver of his or her right to a hearing.

[USCG–1998–3472, 64 FR 28075, May 24, 1999]

Subpart E—Deposit or Surrender of Coast Guard Credential or Endorsement

§ 5.201 Voluntary deposits in event of mental or physical incompetence.

(a) A holder may deposit a credential or endorsement with the Coast Guard in any case where there is evidence of mental or physical incompetence. A voluntary deposit is accepted on the basis of a written agreement, the original of which will be given to the holder, which specifies the conditions upon which the Coast Guard will return the credential or endorsement to the holder.

(b) Where the mental or physical incompetence of a holder of a credential or endorsement is caused by use of or addiction to dangerous drugs, a voluntary deposit will only be accepted contingent on the following circumstances:

(1) The holder is enrolled in a bona fide drug abuse rehabilitation program;

(2) The holder's incompetence did not cause or contribute to a marine casualty,

(3) The incompetence was reported to the Coast Guard by the individual or any other person and was not discovered as a result of a Federal, State or local government investigation; and

(4) The holder has not voluntarily deposited or surrendered a credential or endorsement, or had a credential or endorsement revoked for a drug related offense on a prior occasion.

(c) Where the mental or physical incompetence of a holder of a credential or endorsement is caused by use or addiction to alcohol, a voluntary deposit will only be accepted contingent on the following circumstances:

(1) The holder is enrolled in a bona fide alcohol abuse rehabilitation program;

(2) The holder's incompetence did not cause or contribute to a marine casualty; and

(3) The incompetence was reported to the Coast Guard by the individual or any other person and was not discovered as a result of a Federal, State, or local government investigation.

(d) Where the conditions of paragraphs (b) and (c) of this section are not met, the holder may only surrender such credential or endorsement in accordance with § 5.203.

[CGD 84–099, 52 FR 47535, Dec. 14, 1987, as amended by USCG–2006–24371, 74 FR 11215, Mar. 16, 2009]

§ 5.203 Voluntary surrender to avoid hearing.

(a) Any holder may surrender a credential or endorsement to the Coast Guard in preference to appearing at a hearing.

(b) A holder voluntarily surrendering a credential or endorsement shall sign a written statement containing the stipulations that:

(1) The surrender is made voluntarily in preference to appearing at a hearing;

(2) All rights to the credential or endorsement surrendered are permanently relinquished; and,

(3) Any rights with respect to a hearing are waived.

(c) A voluntary surrender of a credential or endorsement to an investigating officer in preference to appearing at a hearing is not to be accepted by an investigating officer unless the investigating officer is convinced that the holder fully realizes the effect of such surrender.

[CGD 82–002, 50 FR 32184, Aug. 9, 1985, as amended by USCG–2006–24371, 74 FR 11215, Mar. 16, 2009]

§ 5.205 Return or issuance of a credential or endorsement.

(a) A person may request the return of a voluntarily deposited credential or endorsement at any time, provided he or she can demonstrate a satisfactory rehabilitation or cure of the condition which caused the incompetence; has complied with any other conditions of the written agreement executed at the time of deposit; and complies with the physical and professional requirements for issuance of a credential or endorsement.

(b) Where the voluntary deposit is based on incompetence due to drug abuse, the deposit agreement shall provide that the credential or endorsement will not be returned until the person:

(1) Successfully completes a bona fide drug abuse rehabilitation program;

(2) Demonstrates complete non-association with dangerous drugs for a minimum of six months after completion of the rehabilitation program; and

(3) Is actively participating in a bona fide drug abuse monitoring program.

(c) Where the voluntary deposit is based on incompetence due to alcohol abuse, the deposit agreement shall provide that the credential or endorsement will not be returned until the person:

(1) Successfully completes a bona fide alcohol abuse rehabilitation program; and

(2) Is actively participating in a bona fide alcohol abuse monitoring program.

(d) The voluntary surrender of a credential or endorsement is the equivalent of revocation of such papers. A holder who voluntarily surrenders a credential or endorsement must comply with provisions of §§ 5.901 and 5.903

when applying for the issuance of a new credential or endorsement.

[CGD 84–099, 52 FR 47535, Dec. 14, 1987, as amended by USCG–2006–24371, 74 FR 11215, Mar. 16, 2009]

Subpart F—Subpoenas

§ 5.301 Issuance of subpoenas.

(a) Every subpoena shall command the person to whom it is directed to appear at a specified time and place to give testimony or to produce books, papers, documents, or any other evidence, which shall be described with such particularity as necessary to identify what is desired.

(b) The investigating officer may issue subpoenas for the attendance of witnesses or for the production of books, papers, documents, or any other relevant evidence needed by the investigating officer or by the respondent.

(c) After charges have been served upon the respondent the Administrative Law Judge may, either on the Administrative Law Judge's own motion or the motion of the investigating officer or respondent, issue subpoenas for the attendance and the giving of testimony by witnesses or for the production of books, papers, documents, or any other relevant evidence.

§ 5.303 Service of subpoenas on behalf of the respondent.

Service of subpoenas issued on behalf of the respondent is the responsibility of the respondent. However, if the Administrative Law Judge finds that the respondent or respondent's counsel is physically unable to effect the service, despite diligent and bona fide attempts to do so, and if the Administrative Law Judge further finds that the existing impediment to the service of the subpoena is peculiarly within the authority of the Coast Guard to overcome, the Administrative Law Judge will have the subpoena delivered to an investigating officer participating in the case for the purpose of effecting service.

§ 5.305 Quashing a subpoena.

Any person subpoenaed to appear to produce evidence at a hearing may request that the subpoena be quashed or modified using the procedures in 33 CFR 20.609.

[USCG–1998–3472, 64 FR 28075, May 24, 1999]

§ 5.307 Enforcement.

Upon application and for good cause shown, or upon its own initiative, the Coast Guard will seek judicial enforcement of subpoenas issued by investigating officers or Administrative Law Judges. This is done by making application to the United States District Court, through the office of the appropriate U.S. Attorney, to issue an order compelling the attendance of, and/or giving of testimony by, witnesses, or for the production of books, papers, documents, or any other relevant evidence.

§ 5.309 Proof of service.

(a) The person serving a subpoena shall make a written statement setting forth the date, time and manner of service and shall return such report with or on a copy of the subpoena to the investigating officer or Administrative Law Judge who issued it. In case of failure to make service of a subpoena, the person assigned to serve such subpoena shall make a written statement setting forth the reasons the subpoena was not served. The statement should be placed on the subpoena or attached to it and returned to the investigating office or Administrative Law Judge who issued the subpoena.

(b) When service of a subpoena is made by certified mail with return receipt to be signed by the addressee only, the person mailing the subpoena shall make a written statement on a copy of the subpoena or attached to it, setting forth the date, time and location of the post office where mailed, the post office number assigned thereto. If delivered, the receipt requested shall be returned, by the person receiving the receipt, to the investigating officer or Administrative Law Judge who issued the subpoena. In case the subpoena is not delivered, any information reported by the post office regarding non-delivery shall be given to the investigating officer or Administrative Law Judge who issued the subpoena.

Subpart G—Witness Fees

§ 5.401 Payment of witness fees and allowances.

(a) Duly subpoenaed witnesses, other than Federal government employees, may apply for payment of their attendance as witnesses at an investigation or hearing conducted pursuant to this part by submitting a request for payment (Standard Form 1157) accompanied by any necessary receipts.

(b) Fees and allowances will be paid as provided by 28 U.S.C. 1821, except that a person called to testify as an expert witness may be paid a higher fee to be fixed by the District Commander.

[CGD 82–002, 50 FR 32184, Aug. 9, 1985; 50 FR 35228, Aug. 30, 1985]

Subpart H—Hearings

§ 5.501 General.

A hearing concerning the suspension or revocation of a merchant mariner's credential or endorsement is a formal adjudication under the Administrative Procedure Act (APA) (5 U.S.C. 551, *et seq.*). It is presided over by, and conducted under the exclusive control of, an ALJ in accordance with applicable requirements in the APA, the rules in this part, and the rules of administrative practice at 33 CFR part 20. The ALJ shall regulate and conduct the hearing so as to bring out all the relevant and material facts and to ensure a fair and impartial hearing.

[USCG–1998–3472, 64 FR 28075, May 24, 1999, as amended by USCG–2006–24371, 74 FR 11215, Mar. 16, 2009]

§ 5.521 Verification of credential or endorsement.

(a) The Administrative Law Judge shall require the respondent to produce and present at the opening of the hearing, and on each day the hearing is in session thereafter, all valid credentials issued by the Coast Guard to the respondent. In the event that the respondent alleges that credential has been lost, misplaced, stolen, destroyed, or is otherwise beyond his ability to produce, the respondent shall execute a lost document affidavit (Form CG-4363). The Administrative Law Judge shall warn the respondent that a willful misstatement of any material item in such affidavit is punishable as a violation of a Federal criminal statute. (See 18 U.S.C. 1001).

(b) When a hearing is continued or delayed, the Administrative Law Judge returns the credential to the respondent: unless a prima facie case has been established that the respondent committed an act or offense which shows that the respondent's service on a vessel would constitute a definite danger to public health, interest or safety at sea.

[CGD 82–002, 50 FR 32184, Aug. 9, 1985, as amended by CGD 97–057, 62 FR 51042, Sept. 30, 1997; USCG–2006–24371, 74 FR 11215, Mar. 16, 2009]

§ 5.567 Order.

(a) The Administrative Law Judge enters an order which recites the disposition of the case. When the finding is *not proved,* the Administrative Law Judge issues an order *dismissing* the proceeding with or without prejudice to refile. When the finding is *proved,* the Administrative Law Judge may order an *admonition, suspension* with or without probation, or *revocation.*

(b) The order is directed against all credentials or endorsements, except that in cases of negligence or professional incompetence, the order is made applicable to specific credentials or endorsements. If the Administrative Law Judge determines that the respondent is professionally incompetent in the grade of the license, certificate or document held, but is considered competent in a lower grade, the credential or endorsement may be revoked and the issuance of one of a lower grade ordered.

(c) An order must specify whether the credential or endorsement affected is:

(1) Revoked;

(2) Suspended outright for a specified period after surrender;

(3) Suspended for a specified period, but placed on probation for a specific period; or

(4) Suspended outright for a specified period, followed by a specified period of suspension on probation.

(d) The order will normally state, *that the credential or endorsement is to be*

surrendered to the Coast Guard immediately, if the order is one of revocation or includes a period of outright suspension. In cases involving special circumstances, the order may provide for surrender on a certain date.

(e) The time of any period of outright suspension ordered does not commence until the credential or endorsement is surrendered to the Coast Guard. The time of any period of suspension on probation begins at the end of any period of outright suspension or the effective date of the order if there is no outright suspension.

[CGD 82–002, 50 FR 32184, Aug. 9, 1985, as amended by USCG–1998–3472, 64 FR 28075, May 24, 1999; USCG–2006–24371, 74 FR 11215, Mar. 16, 2009]

§ 5.569 Selection of an appropriate order.

(a) This section addresses orders in a general manner. The selection of an appropriate order is the responsibility of the Administrative Law Judge, subject to appeal and review. The investigating officer and the respondent may suggest an order and present argument in support of this suggestion during the presentation of aggravating or mitigating evidence.

(b) Except for acts or offenses for which revocation is mandatory, factors which may affect the order include:

(1) Remedial actions which have been undertaken independently by the respondent;

(2) Prior record of the respondent, considering the period of time between prior acts and the act or offense for which presently charged is relevant; and

(3) Evidence of mitigation or aggravation.

(c) After an order of revocation is entered, the respondent will be given an opportunity to present relevant material on the record for subsequent consideration by the special board convened in the event an application is filed in accordance with subpart L of this part.

(d) Table 5.569 is for the information and guidance of Administrative Law Judges and is intended to promote uniformity in orders rendered. This table should not affect the fair and impartial adjudication of each case on its individual facts and merits. The orders are expressed by a range, in months of outright suspension, considered appropriate for the particular act or offense prior to considering matters in mitigation or aggravation. For instance, without considering other factors, a period of two to four months outright suspension is considered appropriate for *failure to obey a master's written instructions*. An order within the range would not be considered excessive. Mitigating or aggravating factors may make an order greater or less than the given range appropriate. Orders for repeat offenders will ordinarily be greater than those specified.

TABLE 5.569—SUGGESTED RANGE OF AN APPROPRIATE ORDER

Type of offense	Range of order (in months)
Misconduct:	
Failure to obey master's/ship officer's order.	1–3.
Failure to comply with U.S. law or regulations.	1–3.
Possession of intoxicating liquor.	1–4.
Failure to obey master's written instruction.	2–4.
Improper performance of duties related to vessel safety.	2–5.
Failure to join vessel (required crew member).	2–6.
Violent acts against other persons (without injury).	2–6.
Failure to perform duties related to vessel safety.	3–6.
Theft	3–6.
Violent acts against other persons (injury).	4-Revocation.
Use, possession, or sale of dangerous drugs.	Revocation (Note: see § 5.59).
Negligence:	
Negligently performing duties related to vessel navigation.	2–6.
Negligently performing non-navigational duties related to vessel safety.	1–3.
Neglect of vessel navigation duties.	3–6.
Neglect of non-navigational safety related duties.	2–4.
Incompetence	The only proper order for a charge of incompetence found proved is revocation.
Violation of Regulation:	
Refusal to take chemical drug test.	12–24
Refusal to take required alcohol test.	12–24

TABLE 5.569—SUGGESTED RANGE OF AN APPROPRIATE ORDER—Continued

Type of offense	Range of order (in months)
Dangerous drugs (46 U.S.C. 7704).	The only proper order for a charge under 46 U.S.C. 7704 found proved is revocation.

[CGD 82–002, 50 FR 32184, Aug. 9, 1985, as amended by CGD 86–067, 53 FR 47079, Nov. 21, 1989; USCG–2000–7759, 66 FR 42967, Aug. 16, 2001]

Subpart I [Reserved]

Subpart J—Appeals

§ 5.701 Appeals in general.

A party may appeal the decision of an ALJ under the procedures in subpart J of 33 CFR part 20. A party may appeal only the following issues:

(a) Whether each finding of fact rests on substantial evidence.

(b) Whether each conclusion of law accords with applicable law, precedent, and public policy.

(c) Whether the ALJ committed any abuses of discretion.

(d) The ALJ's denial of a motion for his or her disqualification.

[USCG–1998–3472, 64 FR 28075, May 24, 1999]

§ 5.707 Stay of effect of decision and order of Administrative Law Judge on appeal to the Commandant; temporary credential or endorsement.

(a) A person who has appealed from a decision suspending outright or revoking a credential or endorsement, except for revocation resulting from an offense enumerated in § 5.59, may file a written request for a temporary credential or endorsement. This request must be submitted to the Administrative Law Judge who presided over the case, or to any Officer in Charge, Marine Inspection for forwarding to the Administrative Law Judge.

(b) Action on the request is taken by the ALJ unless the hearing transcript has been forwarded to the Commandant, in which case, the Commandant will make the final action.

(c) A determination as to the request will take into consideration whether the service of the individual is compatible with the requirements for safety at sea and consistent with applicable laws. If one of the offenses enumerated in § 5.61(a) has been found proved, the continued service of the appellant will be presumed not compatible with safety at sea, subject to rebuttal by the appellant. A temporary credential or endorsement may be denied for that reason alone.

(d) All temporary credentials or endorsements will provide that they expire not more than six months after issuance or upon service of the Commandant's decision on appeal, whichever occurs first. If a temporary credential or endorsement expires before the Commandant's decision is rendered, it may be renewed, if authorized by the Commandant.

(e) If the request for a temporary credential or endorsement is denied by the Administrative Law Judge, the individual may appeal the denial, in writing, to the Commandant within 30 days after notification of such denial. Any decision by the Commandant to deny is the final agency action.

(f) Copies of the temporary credential issued become a part of the record on appeal.

[CGD 82–002, 50 FR 32184, Aug. 9, 1985, as amended by USCG–2004–18884, 69 FR 58342, Sept. 30, 2004; USCG–2006–24371, 74 FR 11215, Mar. 16, 2009]

§ 5.713 Appeals to the National Transportation Safety Board.

(a) The rules of procedure for appeals to the National Transportation Safety Board from decisions of the Commandant, U.S. Coast Guard, affirming orders of suspension or revocation of credentials or endorsements are in 49 CFR part 825. These rules give the party adversely affected by the Commandant's decision 10 days after service upon him or his attorney of the Commandant's decision to file a notice of appeal with the Board.

(b) In all cases under this part which are appealed to the National Transportation Safety Board under 49 CFR part 825, the Chief Counsel of the Coast Guard is designated as the representative of the Commandant for service of notices and appearances. Communications should be addressed to Suspension and Revocation National Center of

Expertise (S&R NCOE): by mail to U.S. Coast Guard National Maritime Center, S&R National Center of Expertise, 100 Forbes Drive, Martinsburg, WV 25404–7213 or electronically to *SR-NCOE@uscg.mil*.

(c) In cases before the National Transportation Safety Board the Chief Counsel of the Coast Guard may be represented by others designated *of counsel*.

[CGD 82–002, 50 FR 32184, Aug. 9, 1985, as amended by USCG–2006–24371, 74 FR 11215, Mar. 16, 2009; USCG–2009–0702, 74 FR 49224, Sept. 25, 2009; USCG–2013–0671, 78 FR 60144, Sept. 30, 2013; USCG–2021–0348, 87 FR 3223, Jan. 21, 2022]

§ 5.715 Stay of effect of Decision of the Commandant on Appeal: Temporary credential and/or endorsement pending appeal to National Transportation Safety Board.

(a) A Decision of the Commandant on Appeal affirming an order of revocation, except a revocation resulting from an offense enumerated under § 5.59 or suspension that is not placed entirely on probation, which is appealed to the National Transportation Safety Board, may be stayed if, in the Commandant's opinion, the service of the appellant on board a vessel at that time or for the indefinite future would be compatible with the requirements of safety at sea and consistent with applicable laws. If one of the offenses enumerated in § 5.61(a) has been found proved, the continued service of the appellant will be presumed not compatible with safety at sea, subject to rebuttal by the appellant; in cases of offenses under § 5.61(a), a temporary credential and/or endorsement may be denied for that reason alone.

(b) A stay of the effect of the Decision of the Commandant on Appeal may be granted by the Commandant upon application by the respondent filed with the notice served on the Commandant under 49 CFR 825.5(b).

(c) An Officer in Charge, Marine Inspection, on presentation of an original stay order, issues a temporary credential and/or endorsement as specified in the stay order. This credential and/or endorsement is effective for not more than six months, renewable until such time as the National Transportation Safety Board has completed its review.

[CGD 82–002, 50 FR 32184, Aug. 9, 1985, as amended by USCG–2006–24371, 74 FR 11215, Mar. 16, 2009]

Subpart K—Review of Administrative Law Judge's Decisions in Cases Where Charges Have Been Found Proved

§ 5.801 Commandant's review.

Any decision of an Administrative Law Judge, in which there has been a finding of *proved*, may be called up for review by the Commandant without procedural formality.

§ 5.803 Record for decision on review.

The transcript of the hearing, together with all papers and exhibits filed, shall constitute the record for consideration and review.

[CGD 82–002, 50 FR 32184, Aug. 9, 1985, as amended by USCG–2004–18884, 69 FR 58342, Sept. 30, 2004]

§ 5.805 Action on review.

(a) The Commandant may adopt, in whole or in part, the findings, conclusions, and basis therefor stated by the Administrative Law Judge, may make entirely new findings on the record, or may remand the case to the Administrative Law Judge for further proceedings.

(b) In no case will the review by the Commandant be followed by any order increasing the severity of the Administrative Law Judge's original order.

(c) The Decision of the Commandant on Review, shall be the final agency action in the absence of a remand.

[CGD 82–002, 50 FR 32184, Aug. 9, 1985, as amended by USCG–2004–18884, 69 FR 58342, Sept. 30, 2004]

§ 5.807 Commandant's Decision on Review.

The Commandant's Decisions on Review are available for reading purposes at Coast Guard Headquarters, at Offices of District Commanders, Sector

Offices and Marine Inspection Offices. (See 33 CFR subpart 1.10.)

[CGD 82–002, 50 FR 32184, Aug. 9, 1985, as amended by USCG–2006–25556, 72 FR 36330, July 2, 2007]

Subpart L—Issuance of New Credential or Endorsement After Revocation or Surrender

§ 5.901 Time limitations.

(a) Any person whose credential or endorsement has been revoked or surrendered for one or more of the offenses described in § 5.59 and § 5.61(a) may, three years after compliance with the Administrative Law Judge's decision and order or the date of voluntary surrender, apply for the issuance of a new credential or endorsement.

(b) The three year time period may be waived by the Commandant upon a showing by the individual that, since the occurrence upon which the revocation or surrender was based, the individual has demonstrated his good character in the community for a period exceeding three years.

(c) Any person whose credential or endorsement has been revoked or surrendered for one or more offenses which are not specifically described in §§ 5.59 or 5.61(a) may, after one year, apply for the issuance of a new credential or endorsement.

(d) For a person whose credential or endorsement has been revoked or surrendered for the wrongful simple possession or use of dangerous drugs, the three year time period may be waived by the Commandant upon a showing that the individual:

(1) Has successfully completed a bona fide drug abuse rehabilitation program;

(2) Has demonstrated complete nonassociation with dangerous drugs for a minimum of one year following completion of the rehabilitation program and;

(3) Is actively participating in a bona fide drug abuse monitoring program.

(e) For a person whose credential or endorsement has been revoked or surrendered for offenses related to alcohol abuse, the waiting period may be waived by the Commandant upon a showing that the individual has successfully completed a bona fide alcohol abuse rehabilitation program and is actively participating in a bona fide alcohol abuse monitoring program.

(f) The waivers specified under subparagraphs (d) or (e) of this section may only be granted once to each person.

[CGD 82–002, 50 FR 32184, Aug. 9, 1985, as amended by CGD 84–099, 52 FR 47535, Dec. 14, 1987; USCG–2006–24371, 74 FR 11215, Mar. 16, 2009]

§ 5.903 Application procedures.

(a) An application form for a new credential or endorsement may be obtained from any Officer in Charge, Marine Inspection.

(b) The completed application and letter must be addressed to the U.S. Coast Guard Office of Investigations and Analysis, Commandant (CG–INV–1), U.S. Coast Guard Stop 7501, 2703 Martin Luther King Jr. Avenue SE., Washington, DC 20593–7501, and must be delivered in person to the nearest Officer in Charge, Marine Inspection.

(c) The letter is an informal request for the issuance of a new credential or endorsement and should include the following:

(1) A letter from each employer during the last three years attesting to the individual's work record;

(2) Information supportive of rehabilitation or cure when the credential or endorsement was revoked because of incompetency or association with dangerous drugs; and

(3) Any other information which may be helpful in arriving at a determination in the matter.

(d) The Officer in Charge, Marine Inspection, forwards the letter and application, together with an evaluation and recommendation, to the Commandant.

[CGD 82–002, 50 FR 32184, Aug. 9, 1985, as amended by USCG–2006–24371, 74 FR 11215, Mar. 16, 2009; USCG–2009–0702, 74 FR 49224, Sept. 25, 2009; USCG–2013–0671, 78 FR 60144, Sept. 30, 2013; USCG–2015–0867, 80 FR 62469, Oct. 16, 2015]

§ 5.905 Commandant's decision on application.

(a) The applicant's letter and application form, as well as the evaluation and recommendation, are referred to a

special board appointed by the Commandant. The board examines all the material submitted with the application and such other information as may, in the judgment of the board, be considered appropriate. The board shall submit its findings and recommendation to the Commandant.

(b) The Commandant shall determine whether or not a new credential or endorsement will be issued. The applicant will be notified by letter of such determination.

[CGD 82–002, 50 FR 32184, Aug. 9, 1985, as amended by USCG–2006–24371, 74 FR 11215, Mar. 16, 2009]

PART 6—WAIVERS OF NAVIGATION AND VESSEL INSPECTION LAWS AND REGULATIONS [1]

Sec.

AUTHORITY: Act Dec. 27, 1950, Ch. 1155, secs. 1, 2, 64 Stat. 1120 (*see* 46 U.S.C. App. note prec. 1); Department of Homeland Security Delegation No. 0170.1.

§ 6.01 Procedures for effecting individual waivers of navigation and vessel inspection laws and regulations.

(a) It is hereby found necessary in the interest of national defense to waive compliance with the navigation and vessel inspection laws administered by the Coast Guard, as well as the regulations issued thereunder and published in 33 CFR chapter I or in this chapter, to the extent and in the manner and upon the terms and conditions as set forth in this section.

(b) An application requesting that a waiver be made effective, with respect to a particular vessel, may be made by any authorized representative of an agency of the United States Government or any other interested person (including the master, agent, or owner of the vessel involved). Except as provided in paragraph (d) of this section, the application shall be in writing. The application shall be delivered to the Coast Guard District Commander or to his designated representative at the port or place where the vessel is located. In the case of a vessel in any foreign port or place, the application shall be made to the designated representative of the Commandant at such port or place, or if the Coast Guard has not established facilities in such port or place, to the nearest designated representative of the Commandant at a port or place where such facilities have been established. Every application shall contain a statement of the particular provisions of law with respect to which waiver of compliance is requested, a certification that the waiver of compliance with such laws with respect to the vessel involved is necessary in the interest of national defense and, an outline of the facts upon which such certification is based. The Coast Guard District Commander (or his designated representative or the designated representative of the Commandant, as the case may be) shall promptly examine every application for the purpose of determining whether the necessity for prompt action is such as to require that the waiver be made effective by him without reference to the Commandant. In any case in which it appears to the Coast Guard officer concerned that reference of the application to the Commandant for action would not delay the sailing of the vessel or otherwise be contrary to the interest of national defense, the application shall be so referred. In all other cases, such Coast Guard officer shall give immediate consideration to the application and if he reaches the conclusion that the urgency of the situation outweighs the marine hazard involved, then such waiver shall be made effective in regard to such vessel to the extent and under the circumstances specified by him.

(c) The Coast Guard officer making such a waiver effective pursuant to paragraph (b) of this section shall immediately prepare, in triplicate, an order setting forth the name of the vessel involved, the laws (also regulations, if any) with respect to which the waiver is effective, the extent to which

[1] This is also codified in 33 CFR part 19.

EXHIBIT 10

46 CFR Part 16
Chemical Testing

(3) Exceptions to paragraph (a)(2) of this section are not allowed for more than two consecutive weeks, and the intervals between two periods of exceptions to paragraph (a)(2) must not be less than twice the duration of the longer exception.

§ 15.1113 Security personnel.

(a) Onboard a seagoing vessel of 500 GT or more to which the International Ship and Port Facility Security (ISPS) Code applies, all persons performing duties as Vessel Security Officer (VSO) must hold a valid endorsement as VSO.

(b) Persons who hold an endorsement as VSO will be deemed to satisfy the requirements for vessel personnel with designated security duties in paragraph (c) of this section.

(c) After March 24, 2014, onboard a seagoing vessel of 500 GT or more to which the ISPS Code applies, all personnel with designated security duties must hold a valid endorsement as vessel personnel with designated security duties, or a certificate of course completion or documentary evidence of onboard training from an appropriate Coast Guard-accepted or Coast Guard-approved course meeting the requirements of 33 CFR 104.220.

(d) Persons who hold an endorsement as vessel personnel with designated security duties, or a certificate of course completion or documentary evidence of onboard training from an appropriate Coast Guard-accepted or Coast Guard-approved course for vessel personnel with designated security duties, will be deemed to satisfy the requirements for all other vessel personnel in paragraph (e) of this section.

(e) After March 24, 2014, onboard a seagoing vessel of 500 GT or more to which the ISPS Code applies, all other vessel personnel must hold a valid endorsement in security awareness, or a certificate of course completion from an appropriate Coast Guard-accepted or Coast Guard-approved course, or documentary evidence of onboard training meeting the requirements of 33 CFR 104.225.

(f) After March 24, 2014, onboard a seagoing vessel of 500 GT or more to which the ISPS Code applies, all contractors, whether part-time, full-time, temporary, or permanent, must have knowledge of the requirements in 33 CFR 104.225, through training or equivalent job experience. Vessel owners and operators must maintain records documenting this requirement and produce those records to the Coast Guard upon request.

PART 16—CHEMICAL TESTING

Subpart A—General

Sec.

Subpart B—Required Chemical Testing

Subpart C [Reserved]

Subpart D—Employee Assistance Programs

Subpart E—Management Information System

AUTHORITY: 46 U.S.C. 2103, 3306, 7101, 7301, and 7701; Department of Homeland Security Delegation No. 0170.1.

SOURCE: CGD 86–067, 53 FR 47079, Nov. 21, 1988, unless otherwise noted.

Subpart A—General

§ 16.101 Purpose of regulations.

(a) The regulations in this part provide a means to minimize the use of intoxicants by merchant marine personnel and to promote a drug free and safe work environment.

(b) These regulations prescribe the minimum standards, procedures, and means to be used to test for the use of dangerous drugs.

(c) As part of a reasonable cause drug testing program established pursuant to this part, employers may test for drugs in addition to those specified in this part only with approval granted by the Coast Guard under 49 CFR part 40 and for substances for which the Department of Health and Human Services has established an approved testing protocol and positive threshold.

§ 16.105 Definitions of terms used in this part.

Chemical test means a scientifically recognized test which analyzes an individual's breath, blood, urine, saliva, bodily fluids, or tissues for evidence of dangerous drug or alcohol use.

Consortium/Third party administrator (C/TPA) means a service agent who provides or coordinates the provision of a variety of drug and alcohol testing services to employers. C/TPAs typically perform administrative tasks concerning the operation of the employers' drug and alcohol testing programs. This term includes, but is not limited to, groups of employers who join together to administer, as a single entity, the DOT drug and alcohol testing programs of its members.

Credential is a term used to refer to any or all of the following:

(1) Merchant mariner's document.

(2) Merchant mariner's license.

(3) STCW endorsement.

(4) Certificate of registry.

(5) Merchant mariner credential.

Crewmember means an individual who is:

(1) Onboard a vessel acting under the authority of a credential issued under this subchapter, whether or not the individual is a member of the vessel's crew; or

(2) Engaged or employed onboard a vessel owned in the United States that is required by law or regulation to engage, employ, or be operated by an individual holding a credential issued under this subchapter, except for the following:

(i) Individuals on fish processing vessels who are primarily employed in the preparation of fish or fish products, or in a support position, and who have no duties that directly affect the safe operation of the vessel;

(ii) Scientific personnel on an oceanographic research vessel;

(iii) Individuals on industrial vessels who are industrial personnel, as defined in this chapter; and

(iv) Individuals not required under part 15 of this subchapter who have no duties that directly affect the safe operation of the vessel.

Dangerous drug means a narcotic drug, a controlled substance, or a controlled-substance analog (as defined in section 102 of the Comprehensive Drug Abuse and Control Act of 1970 (21 U.S.C. 802)).

Drug test means a chemical test of an individual's urine for evidence of dangerous drug use.

Employer means a marine employer or sponsoring organization.

Fails a chemical test for dangerous drugs means that the result of a chemical test conducted in accordance with 49 CFR 40 was reported as ''positive'' by a Medical Review Officer because the chemical test indicated the presence of a dangerous drug at a level equal to or exceeding the levels established in 49 CFR part 40.

Marine employer means the owner, managing operator, charterer, agent, master, or person in charge of a vessel, other than a recreational vessel.

Medical Review Officer (MRO) means a person who is a licensed physician and who is responsible for receiving and reviewing laboratory results generated by an employer's drug testing program and evaluating medical explanations for certain drug test results.

Operation means to navigate, steer, direct, manage, or sail a vessel, or to control, monitor, or maintain the vessel's main or auxiliary equipment or systems. Operation includes:

(a) Determining the vessel's position, piloting, directing the vessel along a desired trackline, keeping account of the vessel's progress through the water, ordering or executing changes in course, rudder position, or speed, and maintaining a lookout;

(b) Controlling, operating, monitoring, maintaining, or testing: the vessel's propulsion and steering systems; electric power generators; bilge,

ballast, fire, and cargo pumps; deck machinery including winches, windlasses, and lifting equipment; lifesaving equipment and appliances; firefighting systems and equipment; and navigation and communication equipment; and

(c) Mooring, anchoring, and line handling; loading or discharging of cargo or fuel; assembling or disassembling of tows; and maintaining the vessel's stability and watertight integrity.

Passes a chemical test for dangerous drugs means the result of a chemical test conducted in accordance with 49 CFR part 40 is reported as ''negative'' by a Medical Review Officer in accordance with that part.

Positive rate for random drug testing means the number of verified positive results for random drug tests conducted under this part plus the number of refusals of random drug tests required by this part, divided by the total number of random drug test results (*i.e.*, positives, negatives, and refusals) under this part.

Refuse to submit means you refused to take a drug test as set out in 49 CFR 40.191.

Serious marine incident means an event defined in 46 CFR 4.03–2.

Service agent means any person or entity that provides services specified under this part or 49 CFR part 40 to employers and/or crewmembers in connection with DOT drug and alcohol testing requirements. This includes, but is not limited to, collectors, BATs and STTs, laboratories, MROs, substance abuse professionals, and C/TPAs. To act as service agents, persons and organizations must meet the qualifications set forth in applicable sections of 49 CFR part 40. Service agents are not employers for purposes of this part.

Sponsoring organization is any company, consortium, corporation, association, union, or other organization with which individuals serving in the marine industry, or their employers, are associated.

Stand-down means the practice of temporarily removing a crewmember from the performance of safety-sensitive functions based only on a report from a laboratory to the MRO of a confirmed positive test for a drug or drug metabolite, an adulterated test, or a substituted test, before the MRO has completed verification of the test result.

Substance Abuse Professional (SAP) means a person who evaluates employees who have violated a DOT drug and alcohol regulation and makes recommendations concerning education, treatment, follow-up testing, and aftercare.

Vessel owned in the United States means any vessel documented or numbered under the laws of the United States; and any vessel owned by a citizen of the United States that is not documented or numbered by any nation.

[CGD 86–067, 53 FR 47079, Nov. 21, 1988; 53 FR 48367, Nov. 30, 1988, as amended by CGD 90–014, 56 FR 31033, July 8, 1991; CGD 90–053, 58 FR 31107, May 28, 1993; CGD 93–051, 59 FR 28792, June 3, 1994; 59 FR 62226, Dec. 2, 1994; CGD 91–223, 60 FR 4525, Jan. 23, 1995; USCG–2000–7759, 66 FR 42967, Aug. 16, 2001; USCG–2003–16414, 69 FR 6577, Feb. 11, 2004; USCG–2006–24371, 74 FR 11263, Mar. 16, 2009]

§ 16.107 Waivers.

(a) To obtain a waiver from 49 CFR 40.21 or from this part you must send your request for a waiver to the Commandant (CG–INV).

(b) Employers for whom compliance with this part would violate the domestic laws or policies of another country may request an exemption from the drug testing requirements of this part by submitting a written request to Commandant (CG–INV), at the address listed in §16.500(a).

(c) An employer may request a waiver from the Coast Guard in order to stand-down a crewmember following the Medical Review Officer's receipt of a laboratory report of a confirmed positive test for a drug or drug metabolite, an adulterated test, or a substituted test pertaining to the crewmember. Consistent with 49 CFR 40.21, the request for a waiver must include as a minimum: Information about the organization and the proposed written company policy concerning stand-down.

Specific elements required in the written waiver request are contained in 49 CFR 40.21(c).

[USCG–2000–7759, 66 FR 42967, Aug. 16, 2001, as amended by USCG–2009–0702, 74 FR 49225, Sept. 25, 2009]

§ 16.109 Public Interest Exclusion (PIE).

Service agents are subject to Public Interest Exclusion (PIE) actions in accordance with 49 CFR Part 40, subpart R. The PIE is an action which excludes from participation in DOT's drug and alcohol testing program any service agent who, by serious noncompliance with this part or with 49 CFR part 40, has shown that it is not currently acting in a responsible manner.

[USCG–2000–7759, 66 FR 42968, Aug. 16, 2001]

§ 16.113 Chemical drug testing.

(a) Drug testing programs required by this part must be conducted in accordance with 49 CFR part 40, Procedures for Transportation Workplace Testing Programs. This subpart summarizes the responsibilities of credentialed mariners, marine employers, MRO, SAP and other chemical testing service providers in 49 CFR part 40. The regulations in 49 CFR part 40 should be consulted to determine the specific procedures which must be established and utilized. Drug testing programs required by this part must use only drug testing laboratories certified by the Department of Health and Human Services (DHHS).

(b) Each specimen collected in accordance with this part will be tested, as provided in 49 CFR 40.85, for the following:

(1) Marijuana;
(2) Cocaine;
(3) Opiates;
(4) Phencyclidine (PCP); and
(5) Amphetamines.

[USCG–2000–7759, 66 FR 42968, Aug. 16, 2001, as amended by USCG–2006–24371, 74 FR 11264, Mar. 16, 2009]

§ 16.115 Penalties.

Violation of this part is subject to the civil penalties set forth in 46 U.S.C. 2115. Any person who fails to implement or conduct, or who otherwise fails to comply with the requirements for chemical testing for dangerous drugs as prescribed under this part, is liable to the United States Government for a civil penalty of not more than $5,000 for each violation. Each day of a continuing violation will constitute a separate violation.

[USCG–2000–7759, 66 FR 42968, Aug. 16, 2001]

Subpart B—Required Chemical Testing

§ 16.201 Application.

(a) Chemical testing of personnel must be conducted as required by this subpart and in accordance with the procedures detailed in 49 CFR part 40.

(b) If an individual fails a chemical test for dangerous drugs under this part, the individual will be presumed to be a user of dangerous drugs.

(c) If an individual holding a credential fails a chemical test for dangerous drugs, the individual's employer, prospective employer, or sponsoring organization must report the test results in writing to the nearest Coast Guard Officer in Charge, Marine Inspection (OCMI). The individual must be denied employment as a crewmember or must be removed from duties which directly affect the safe operation of the vessel as soon as practicable and is subject to suspension and revocation proceedings against his or her credential under 46 CFR part 5.

(d) If an individual who does not hold a credential fails a chemical test for dangerous drugs, the individual shall be denied employment as a crewmember or removed from duties which directly affect the safe operation of the vessel as soon as possible.

(e) An individual who has failed a required chemical test for dangerous drugs may not be re-employed aboard a vessel until the requirements of paragraph (f) of this section and 46 CFR Part 5, if applicable, have been satisfied.

(f) Before an individual who has failed a required chemical test for dangerous drugs may return to work aboard a vessel, the MRO must determine that the individual is drug-free and the risk of subsequent use of dangerous drugs by that person is sufficiently low to justify his or her return

to work. In addition, the individual must agree to be subject to increased unannounced testing—

(1) For a minimum of six (6) tests in the first year after the individual returns to work as required in 49 CFR part 40; and

(2) For any additional period as determined by the MRO up to a total of 60 months.

[CGD 86–607, 53 FR 47049, Nov. 11, 1988, as amended by CGD 90–014, 56 FR 31034, July 8, 1991; USCG–2000–7759, 66 FR 42968, Aug. 16, 2001; USCG–2006–24371, 74 FR 11264, Mar. 16, 2009]

§ 16.203 Employer, MRO, and SAP responsibilities.

(a) *Employers.* (1) Employers must ensure that they and their crewmembers meet the requirements of this part.

(2) Employers are responsible for all the actions of their officials, representatives, and agents in carrying out the requirements of this part.

(3) All agreements and arrangements, written or unwritten, between and among employers and service agents concerning the implementation of DOT drug testing requirements are deemed, as a matter of law, to require compliance with all applicable provisions of this part and DOT agency drug testing regulations. Compliance with these provisions is a material term of all such agreements and arrangements.

(b) *Medical Review Officer (MRO).* (1) Individuals performing MRO functions must meet the training requirements and follow the procedures in 49 CFR Part 40.

(2) MROs may report chemical drug test results to the Coast Guard for unemployed, self-employed, or individual mariners.

(c) *Substance Abuse Professional (SAP).* Individuals performing SAP functions must meet the training requirements and follow the procedures in 49 CFR Part 40.

[USCG–2000–7759, 66 FR 42968, Aug. 16, 2001]

§ 16.205 Implementation of chemical testing programs.

(a) When a vessel owned in the United States is operating in waters that are not subject to the jurisdiction of the United States, the testing requirements of §§ 16.210 and 16.230 do not apply to a citizen of a foreign country engaged or employed as pilot in accordance with the laws or customs of that foreign country.

(b) Upon written request of an employer, Commandant (CG–INV) will review the employer's chemical testing program to determine compliance with the provisions of this part.

[CGD 90–014, 56 FR 60930, Nov. 29, 1991, as amended by 59 FR 62226, Dec. 2, 1994; CGD 95–072, 60 FR 50461, Sept. 29, 1995; CGD 96–041, 61 FR 50726, Sept. 27, 1996; CGD 95–028, 62 FR 51196, Sept. 30, 1997; USCG–2009–0702, 74 FR 49225, Sept. 25, 2009]

§ 16.210 Pre-employment testing requirements.

(a) No marine employer shall engage or employ any individual to serve as a crewmember unless the individual passes a chemical test for dangerous drugs for that employer.

(b) An employer may waive a pre-employment test required for a job applicant by paragraph (a) of this section if the individual provides satisfactory evidence that he or she has:

(1) Passed a chemical test for dangerous drugs, required by this part, within the previous six months with no subsequent positive drug tests during the remainder of the six-month period; or

(2) During the previous 185 days been subject to a random testing program required by § 16.230 for at least 60 days and did not fail or refuse to participate in a chemical test for dangerous drugs required by this part.

[CGD 90–053, 58 FR 31107, May 28, 1993, as amended by CGD 93–051, 59 FR 28792, June 3, 1994]

§ 16.220 Periodic testing requirements.

(a) Except as provided by paragraph (c) of this section and § 10.227(g) of this chapter, an applicant must pass a chemical test for dangerous drugs for—

(1) An original issuance of a license, COR, MMD, or MMC;

(2) The first issuance, raise of grade, or renewal of an officer endorsement on a merchant mariner credential;

(3) A raise of grade of a license or COR;

(4) The first endorsement as an able seaman, lifeboatman, qualified member

of the engine department, or tankerman; or

(5) A reissuance of a credential with a new expiration date. The applicant must provide the results of the test to the Coast Guard Regional Examination Center (REC) at the time of submitting an application. The test results must be completed and dated not more than 185 days before submission of the application.

(b) Unless excepted under paragraph (c) of this section, each pilot required by this subchapter to receive an annual physical examination must pass a chemical test for dangerous drugs as a part of that examination, and provide the results to the Coast Guard. Applicants need not submit additional copies of their annual chemical test for dangerous drugs pursuant to paragraph (a) of this section if the applicant submitted passing results of a chemical test for dangerous drugs to the Coast Guard within 12 months of the date of application.

(c) An applicant need not submit evidence of passing a chemical test for dangerous drugs required by paragraph (a) or (b) of this section if he or she provides satisfactory evidence that he or she has—

(1) Passed a chemical test for dangerous drugs required by this part within the previous six months with no subsequent positive chemical tests during the remainder of the 6-month period; or

(2) During the previous 185 days been subject to a random testing program required by §16.230 for at least 60 days and did not fail or refuse to participate in a chemical test for dangerous drugs required by this part.

(d) Except as provided by paragraph (b) of this section, an applicant is required to provide the results of only one chemical test for dangerous drugs when multiple transactions are covered by or requested in a single application.

[CGD 91–223, 60 FR 4525, Jan. 23, 1995, as amended by USCG–2006–24371, 74 FR 11264, Mar. 16, 2009; USCG–2018–0874, 84 FR 30883, June 28, 2019]

§16.230 Random testing requirements.

(a) Marine employers shall establish programs for the chemical testing for dangerous drugs on a random basis of crewmembers on inspected vessels who:

(1) Occupy a position, or perform the duties and functions of a position, required by the vessel's Certificate of Inspection;

(2) Perform the duties and functions of patrolmen or watchmen required by this chapter; or,

(3) Are specifically assigned the duties of warning, mustering, assembling, assisting, or controlling the movement of passengers during emergencies.

(b) Marine employers shall establish programs for the chemical testing for dangerous drugs on a random basis of crewmembers on uninspected vessels who:

(1) Are required by law or regulation to hold a license issued by the Coast Guard in order to perform their duties on the vessel;

(2) Perform duties and functions directly related to the safe operation of the vessel;

(3) Perform the duties and functions of patrolmen or watchmen required by this chapter; or,

(4) Are specifically assigned the duties of warning, mustering, assembling, assisting, or controlling the movement of passengers during emergencies.

(c) The selection of crewmembers for random drug testing shall be made by a scientifically valid method, such as a random number table or a computer-based random number generator that is matched with crewmembers' Social Security numbers, payroll identification numbers, or other comparable identifying numbers. Under the testing frequency and selection process used, each covered crewmember shall have an equal chance of being tested each time selections are made and an employee's chance of selection shall continue to exist throughout his or her employment. As an alternative, random selection may be accomplished by periodically selecting one or more vessels and testing all crewmembers covered by this section, provided that each vessel subject to the marine employer's test program remains equally subject to selection.

(d) Marine employers may form or otherwise use sponsoring organizations, or may use contractors, to conduct the random chemical testing programs required by this part.

(e) Except as provided in paragraph (f) of this section, the minimum annual percentage rate for random drug testing shall be 50 percent of covered crewmembers.

(f) The annual rate for random drug testing may be adjusted in accordance with this paragraph.

(1) The Commandant's decision to increase or decrease the minimum annual percentage rate for random drug testing is based on the reported random positive rate for the entire industry. All information used for this determination is drawn from the drug MIS reports required by this part. In order to ensure reliability of the data, the Commandant considers the quality and completeness of the reported data, may obtain additional information or reports from marine employers, and may make appropriate modifications in calculating the industry random positive rate. Each year, the Commandant will publish in the FEDERAL REGISTER the minimum annual percentage rate for random drug testing of covered crewmembers. The new minimum annual percentage rate for random drug testing will be applicable starting January 1 of the calendar year following publication.

(2) When the minimum annual percentage rate for random drug testing is 50 percent, the Commandant may lower this rate to 25 percent of all covered crewmembers if the Commandant determines that the data received under the reporting requirements of 46 CFR 16.500 for two consecutive calendar years indicate that the positive rate is less than 1.0 percent.

(3) When the minimum annual percentage rate for random drug testing is 25 percent, and the data received under the reporting requirements of 46 CFR 16.500 for any calendar year indicate that the positive rate is equal to or greater than 1.0 percent, the Commandant will increase the minimum annual percentage rate for random drug testing to 50 percent of all covered crewmembers.

(g) Marine employers shall randomly select a sufficient number of covered crewmembers for testing during each calendar year to equal an annual rate not less than the minimum annual percentage rate for random drug testing determined by the Commandant. If the marine employer conducts random drug testing through a consortium, the number of crewmembers to be tested may be calculated for each individual marine employer or may be based on the total number of covered crewmembers covered by the consortium who are subject to random drug testing at the same minimum annual percentage rate under this part or any DOT drug testing rule.

(h) Each marine employer shall ensure that random drug tests conducted under this part are unannounced and that the dates for administering random tests are spread reasonably throughout the calendar year.

(i) If a given covered crewmember is subject to random drug testing under the drug testing rules of more than one DOT agency for the same marine employer, the crewmember shall be subject to random drug testing at the percentage rate established for the calendar year by the DOT agency regulating more than 50 percent of the crewmember's function.

(j) If a marine employer is required to conduct random drug testing under the drug testing rules of more than one DOT agency, the marine employer may—

(1) Establish separate pools for random selection, with each pool containing the covered crewmembers who are subject to testing at the same required rate; or

(2) Randomly select such crewmembers for testing at the highest percentage rate established for the calendar year by any DOT agency to which the marine employer is subject.

(k) An individual may not be engaged or employed, including self-employment, on a vessel in a position as master, operator, or person in charge for which a credential is required by law or regulation unless all crewmembers covered by this section are subject to the

random testing requirements of this section.

[CGD 90–014, 56 FR 31034, July 8, 1991, as amended by 59 FR 62227, Dec. 2, 1994; USCG–2006–24371, 74 FR 11264, Mar. 16, 2009]

§ 16.240 Serious marine incident testing requirements.

The marine employer shall ensure that all persons directly involved in a serious marine incident are chemically tested for evidence of dangerous drugs and alcohol in accordance with the requirements of 46 CFR 4.06.

§ 16.250 Reasonable cause testing requirements.

(a) The marine employer shall require any crewmember engaged or employed on board a vessel owned in the United States that is required by law or regulation to engage, employ or be operated by an individual holding a credential issued under this subchapter, who is reasonably suspected of using a dangerous drug to be chemically tested for dangerous drugs.

(b) The marine employer's decision to test must be based on a reasonable and articulable belief that the individual has used a dangerous drug based on direct observation of specific, contemporaneous physical, behavioral, or performance indicators of probable use. Where practicable, this belief should be based on the observation of the individual by two persons in supervisory positions.

(c) When the marine employer requires testing of an individual under the provisions of this section, the individual must be informed of that fact and directed to provide a urine specimen as soon as practicable. This fact shall be entered in the vessel's official log book, if one is required.

(d) If an individual refuses to provide a urine specimen when directed to do so by the employer under the provisions of this section, this fact shall be entered in the vessel's official log book, if one is required.

[CGD 86–067, 53 FR 47079, Nov. 21, 1988, as amended by USCG–2006–24371, 74 FR 11264, Mar. 16, 2009]

§ 16.260 Records.

(a) Employers must maintain records of chemical tests as provided in 49 CFR 40.333 and must make these records available to Coast Guard officials upon request.

(b) The records shall be sufficient to:

(1) Satisfy the requirements of §§ 16.210(b) and 16.220(c) of this part.

(2) Identify the total number of individuals chemically tested annually for dangerous drugs in each of the categories of testing required by this part including the annual number of individuals failing chemical tests and the number and types of drugs for which individuals tested positive.

[CGD 86–067, 53 FR 47079, Nov. 21, 1988, as amended by CGD 91–223, 60 FR 4526, Jan. 23, 1995; USCG–2000–7759, 66 FR 42968, Aug. 16, 2001]

Subpart C [Reserved]

Subpart D—Employee Assistance Programs

§ 16.401 Employee Assistance Program (EAP).

The employer shall provide an Employee Assistance Program (EAP) for all crewmembers. The employer may establish the EAP as a part of its internal personnel services or the employer may contract with an entity that will provide EAP services to a crewmember. Each EAP must include education and training on drug use for crewmembers and the employer's supervisory personnel as provided below:

(a) *EAP education program:* Each EAP education program must include at least the following elements: display and distribution of informational material; display and distribution of a community service hot-line telephone number for crewmember assistance, and display and distribution of the employer's policy regarding drug and alcohol use in the workplace.

(b) *EAP training program:* An EAP training program must be conducted for the employer's crewmembers and supervisory personnel. The training program must include at least the following elements: the effects and consequences of drug and alcohol use on personal health, safety, and work environment; the manifestations and behavioral cues that may indicate drug

and alcohol use and abuse; and documentation of training given to crewmembers and the employer's supervisory personnel. Supervisory personnel must receive at least 60 minutes of training.

Subpart E—Management Information System

§ 16.500 Management Information System requirements.

(a) *Data collection.* (1) All marine employers must submit drug testing program data required by 49 CFR 40.26 and appendix H to 49 CFR part 40.

(2) The provisions in 49 CFR part 40 for alcohol testing do not apply to the Coast Guard or to marine employers, and alcohol testing data is not required or permitted to be submitted by this section.

(b) *Data reporting.* (1) By March 15 of the year following the collection of the data in paragraph (a) of this section, marine employers must submit the data on the form titled U.S. Department of Transportation Drug and Alcohol Testing MIS Data Collection Form (OMB Number: 2105–0529) by mail to Commandant (CG–INV), Attn: Office of Investigations and Casualty Analysis, U.S. Coast Guard Stop 7501, 2703 Martin Luther King Jr. Avenue SE., Washington, DC 20593–7501 or by Internet at *https://www.dco.uscg.mil/Our-Organization/Assistant-Commandant-for-Prevention-Policy-CG-5P/Inspections-Compliance-CG-5PC-/Office-of-Investigations-Casualty-Analysis/DAPI-Program-Main-Page/*.

(2) The DOT Drug and Alcohol Testing MIS form can be downloaded and printed from *https://www.dco.uscg.mil/Our-Organization/Assistant-Commandant-for-Prevention-Policy-CG-5P/Inspections-Compliance-CG-5PC-/Office-of-Investigations-Casualty-Analysis/DAPI-Program-Main-Page/* or may be obtained from any Sector Office.

(3) A consortium or other employer representative may submit data for a marine employer. Reports may contain data for more than one marine employer. Each report, however, must list the marine employers included in the report.

(4) Marine employers must ensure that data submitted by a consortium or other employer representative under paragraph (b)(3) of this section is correct.

(c) After filing 3 consecutive annual MIS reports since January 1, 1996, required by paragraph (b) of this section, marine employers with 10 or fewer covered employees may stop filing the annual report each succeeding year during which they have no more than 10 covered employees.

[USCG–1998–4469, 64 FR 22559, Apr. 27, 1999; 64 FR 31989, June 15, 1999, as amended by USCG–2003–16414, 69 FR 6578, Feb. 11, 2004; USCG–2006–25556, 72 FR 36330, July 2, 2007; USCG–2009–0702, 74 FR 49225, Sept. 25, 2009; USCG–2013–0671, 78 FR 60145, Sept. 30, 2013; USCG–2020–0304, 85 FR 58281, Sept. 18, 2020]

APPENDIX A TO PART 16 [RESERVED]

EXHIBIT 11

List of Abbreviations used in the RFP

Exhibit 11

List of Abbreviations used in Request for Proposal

BAT	Breath Alcohol Technician
CDL	Commercial Driver's License
CFR	Code of Federal Regulations
CPL	Conforming Products List
EBT	Evidential Breath Testing Device
FMCSA	Federal Motor Carrier Safety Administration
HHS	Health and Human Services
MIS	Management Information System
MRO	Medical Review Officer
NHTSA	National Highway Traffic Safety Administration
NYS	New York State
OTETA	Omnibus Transportation Employee Testing Act of 1991
RFP	Request for Proposal
SAP	Substance Abuse Professional
USCG	United States Coast Guard Regulations
Authority	New York State Thruway Authority
Clearinghouse	Drug and Alcohol Clearinghouse

EXHIBIT 12

Listing of Authority Worksites

Exhibit 12

New York State Thruway Authority
Work Units

The New York State Thruway Authority employees work at various locations along the NYSTA. A brief explanation of the types of work units is provided below:

SECTION – This is a work crew stationed about every 30 miles along the NYSTA. The crew is responsible for snow and ice control during winter months and right of way maintenance and light road maintenance and construction activities during the remainder of the year. During the winter months there is round the clock staffing. In summer, staffing is generally during the day. However, in Erie County work is performed from 10:00 p.m. through 6:30 a.m., Monday – Friday, April – November. In Larchmont Maintenance which is in Westchester County work is performed 10:00pm - 6:30am Monday - Friday, April - November. Nyack Maintenance which is in Rockland County work is performed 10:00pm - 6:30am Monday - Friday April - November.

DIVISION HIGHWAY/BRIDGE – This unit provides certain maintenance activities for several sections and engage in significant repair activities to hundreds of bridges along the NYSTA corridor. The unit contains special equipment not available at each section. Work may include heavier maintenance duties, sign installation and paint striping and snow and ice support to the sections during the winter months. Staffing is generally during the day. However, in Erie County, during the winter months there is staffing from 6 a.m. to 10 p.m. daily.

GOVERNOR MARIO M. CUOMO BRIDGE – The function of this crew is to provide maintenance and operations needs to the Governor Mario M. Cuomo Bridge. Work may include bridge deck repairs and repairs made from the river below, as well as traffic control. Work may be performed 7:00am - 3:30pm and 8:30pm - 4:30am year-round.

FACILITIES – Employees in these work units provide maintenance, repair, operation, construction and reconstruction of buildings and equipment at all facilities, including the electrical, mechanical, heating, ventilating, air conditioning, and water and wastewater treatment systems. Staffing is generally during the day.

GARAGE – The Authority has five (5) garages which provide for the majority of the maintenance and repair work on Authority vehicles. Staffing is generally during the day.

NEW YORK STATE THRUWAY AUTHORITY
DRUG & ALCOHOL TESTING SITES

New York Division

Westchester County – Approx. number of employees subject to testing - 90	
Work Unit	Street Address
New England Section New England/Tarrytown Bridge Crew	629 5th Avenue Larchmont, NY
Cross Westchester Section	565 Westchester Avenue Purchase, NY
Governor Mario M. Cuomo Bridge	333 South Broadway Tarrytown, NY
Rockland County – Approx. number of employees subject to testing - 110	
Work Unit	Street Address
Nyack Section, Nyack Garage, Nyack Division Highway, Nyack Facilities	201 North Route 303 West Nyack, NY
Ramapo/Sloatsburg Service Areas	Mileposts 33S and 33N NYS Thruway
New York Division Headquarters	4 Executive Blvd. Suffern, NY
Orange County – Approx. number of employees subject to testing – 95	
Work Unit	Street Address
Harriman Section	Thruway Exit 16 Harriman, NY
Plattekill & Modena Service Areas	Mileposts 65N & 66S NYS Thruway
Newburgh Section, Newburgh Facilities, Newburgh Division Garage	1309 Route 300 Newburgh, NY

Administrative Headquarters & Albany Division

Ulster County – Approx. number of employees subject to testing – 35	
Work Unit	Street Address
Kingston Section, Kingston Bridge	Route 28 Kingston, NY
Ulster Service Area	Milepost 96 S NYS Thruway
Malden Service Area	Milepost 103N NYS Thruway
Columbia County – Approx. number of employees subject to testing – 30	
Work Unit	Street Address
Berkshire Section, Berkshire Bridge	Thruway Exit B2 Chatham, NY

Albany County – Approx. number of employees subject to testing – 90	
Work Unit	Street Address
Administrative Headquarters	200 Southern Blvd. Albany, NY
Albany Garage, Albany Section, Albany Bridge, Albany Division Bridge, Albany Division Highway	Route 9W Thruway Exit 23 Albany, NY
Selkirk Equipment Maintenance, Albany Facilities	Exit 22 NYS Thruway
Montgomery County – Approx. number of employees subject to testing – 30	
Work Unit	Street Address
Amsterdam Section, Amsterdam Bridge	Route 30 S Amsterdam, NY
Schenectady County – Approx. number of employees subject to testing – 10	
Work Unit	Street Address
Pattersonville & Mohawk Svc Area	Mileposts 168W & 172E NYS Thruway
Guilderland Service Area	Milepost 153E NYS Thruway
Greene County – Approx. number of employees subject to testing – 30	
Work Unit	Street Address
Catskill Section	Route 23 Leeds, NY
New Baltimore Service Area	Milepost 127N/S NYS Thruway

Buffalo Division

Monroe County – Approx. number of employees subject to testing - 30	
Work Unit	Street Address
West Henrietta Section	5200 West Henrietta Rd. West Henrietta, NY
Genesee County – Approx. number of employees subject to testing – 40	
Work Unit	Street Address
Batavia Section	210 Oak Street Batavia, NY
Pembroke Service Area (Buffalo Facilities Satellite)	Milepost 397E NYS Thruway
Erie County – Approx. number of employees subject to testing – 160	
Work Unit	Street Address
Buffalo Garage, Buffalo Section	1870 Walden Ave. Cheektowaga, NY
Division Highway	175 Dingens Street Buffalo, NY
Niagara Section	265 Grand Island Blvd. Tonawanda, NY

Facilities 51	3331 Paul Kurdy's Way Cheektowaga, NY
Angola Service Area (Buffalo Facilities Satellite)	Milepost 447 E/W NYS Thruway
Chautauqua County – Approx. number of employees subject to testing – 60	
Work Unit	Street Address
Silver Creek Section	Route 5 & 20 Silver Creek, NY
Westfield Section	7712 North Portage Rd. Westfield, NY

Syracuse Division

Herkimer County – Approx. number of employees subject to testing – 30	
Work Unit	Street Address
Herkimer Section	Thruway Exit 30 799 Mohawk Street Herkimer, NY
Oneida County – Approx. number of employees subject to testing – 40	
Work Unit	Street Address
Verona Section	Thruway Exit 33 5322 State Rd., Route 365 Verona, NY
Utica Facilities	Thruway Exit 31 308 N. Genesee St. Utica, NY
Onondaga County – Approx. number of employees subject to testing – 80	
Work Unit	Street Address
Syracuse Section, Syracuse Garage, Syracuse Division Highway	Thruway Exit 35 6150 Tarbell Road East Syracuse, NY
Cayuga County – Approx. number of employees subject to testing – 30	
Work Unit	Street Address
Weedsport Section	Thruway Exit 40 9191 State Route 34 Weedsport, NY
Ontario County – Approx. number of employees subject to testing - 40	
Work Unit	Street Address
Manchester Section	Thruway Exit 43 3401 State Route 21 Manchester, NY
Junius Ponds Facilities	3180 NYS Thruway Nine Foot Road Phelps, NY

EXHIBIT 13

Federal Register / Vol. 81, No. 233, Commercial Driver's License Drug and Alcohol Clearinghouse

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Parts 382, 383, 384 and 391

[Docket No. FMCSA–2011–0031]

RIN 2126–AB18

Commercial Driver's License Drug and Alcohol Clearinghouse

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Final rule.

SUMMARY: FMCSA amends the Federal Motor Carrier Safety Regulations to establish requirements for the Commercial Driver's License Drug and Alcohol Clearinghouse (Clearinghouse), a database under the Agency's administration that will contain information about violations of FMCSA's drug and alcohol testing program for the holders of commercial driver's licenses (CDLs). This rule is mandated by the Moving Ahead for Progress in the 21st Century Act (MAP–21). It will improve roadway safety by identifying commercial motor vehicle (CMV) drivers who have committed drug and alcohol violations that render them ineligible to operate a CMV.

DATES: *Effective Date:* January 4, 2017. *Compliance Date:* January 6, 2020.

FOR FURTHER INFORMATION CONTACT: Mr. Juan Jose Moya, Compliance Division, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE., Washington, DC 20590–0001, by telephone at (202) 366–4844 or via email at *fmcsadrugandalcohol@dot.gov*. FMCSA office hours are from 9 a.m. to 5 p.m., Monday through Friday, except Federal holidays. If you have questions on viewing or submitting material to the docket, contact Docket Services, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

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I. Executive Summary

A. Purpose and Summary of the Major Provisions of the Clearinghouse

The purpose of the Clearinghouse, as mandated by section 32402 of MAP–21, is to maintain records of all drug and alcohol program violations in a central repository and require that employers query the system to determine whether current and prospective employees have incurred a drug or alcohol violation that would prohibit them from performing safety-sensitive functions covered by the FMCSA and U.S. Department of Transportation (DOT) drug and alcohol testing regulations. This will provide FMCSA and employers the necessary tools to identify drivers who are prohibited from operating a CMV and ensure that such drivers receive the required evaluation and treatment before resuming safety-sensitive functions. Specifically, information maintained in the Clearinghouse will ensure that drivers who commit a drug or alcohol violation while working for another employer, or who attempt to find work with another employer, do not perform safety-sensitive functions until completing the return-to-duty process. The Clearinghouse thus addresses the situation in which drivers can conceal their drug and alcohol violations merely by moving on to the next job or the next jurisdiction. As explained below, drug and alcohol violation records maintained in the Clearinghouse will ''follow'' the driver regardless of how many times he or she changes employers, seeks employment or applies for a CDL in a different State. The Clearinghouse will be administered and maintained in strict compliance with applicable Federal security standards. The Agency will comply with the consent requirements of the Privacy Act prior to releasing any driver's Clearinghouse record to an employer.

Employers and medical review officers (MROs), or their designated representatives, are required to report information about positive drug test results, alcohol test results greater than 0.04 blood alcohol content, refusals to test and other non-test violations of FMCSA's drug and alcohol regulations. In addition, Substance Abuse Professionals (SAPs) are required to report information about drivers undergoing the return-to-duty drug and alcohol rehabilitation process. Employers must search the Clearinghouse for information during the pre-employment process for prospective employees and at least once a year for current employees to determine whether anyone has incurred a drug or alcohol violation with a different employer that would prohibit him or her from performing safety-sensitive functions.

B. Benefits and Costs

In the Initial Regulatory Analysis, the Agency estimated the annual benefit of the proposed rule at $187 million and the annual cost at $186 million. The present value of the proposed rule was $8 million at a 7 percent discount rate. The Final Regulatory Impact Analysis estimates the annual benefit of the final rule at $196 million and the annual cost at $154 million. Net present value benefit is estimated at $316 million at a 7 percent discount rate.

The principal factor causing the reduction in costs is the analytical change necessary to account for the program change concerning the testing rate for annual random drug tests. Effective January 1, 2016, the random drug testing rate is now 25 percent of drivers employed by a carrier, as opposed to 50 percent. This change was made pursuant to 49 CFR 382.305, and is unrelated to the Clearinghouse or the final rule. The industry has only been in operation for less than a year at the lower testing rate. Therefore, no drug survey data available that indicates that the random positive drug test rate has, or will, materially diverge from the three-year average of positive test rates used to estimate the number of positive random drug tests for the forecast period. This change reduces the estimate of the number of annual random positive drug tests from 28,000 in the Initial Regulatory Impact Analysis to 10,000 in the Final Regulatory Impact Analysis. The principal effect of this change is a reduction in return-to-duty costs from the $101 million estimated in the Initial Regulatory Impact Analysis to $56 million in the Final Regulatory Impact Analysis. In addition, FMCSA estimated drivers' opportunity cost for the personal income they would forgo for the hours in which they are in substance abuse education or treatment programs. This opportunity cost is included in the estimate of total return-to-duty costs. In the Final RIA, FMCSA estimated employers' opportunity cost as the monetized value of on-duty time lost for the entire period of time drivers, with drug and alcohol violations are detected as a result of the final rule, are prohibited from performing safety-sensitive functions.

The Agency estimates about $196 million in annual benefits from crash

reductions resulting from the rule. The benefits consist of $55 million in safety benefits from the annual queries and $141 million in safety benefits from the pre-employment queries. FMCSA estimates that the rule would result in $154 million in total annual costs, which include:

- $29 million that is the estimated monetized value of employees' time to prepare annual employer queries;
- $11 million that is the estimated monetized value of employees' time to prepare pre-employment queries;
- $3 million for employers to designate service agents, and $1 million for SAPs to report initiation of the return-to-duty Initial Assessment;
- $5 million incurred by various reporting entities to register with the Clearinghouse, verify authorization, and become familiar with the rule, plus an additional $700,000 for these entities to report positive tests;
- $35 million of fees and consent and verification costs consisting of $24 million in Clearinghouse access fees incurred by employers for pre-employment queries, limited annual queries and full annual queries, plus $11 million of the monetized value of drivers' time to provide consents to employers and verification to FMCSA to allow employers access to drivers' records;
- $2.2 million for development of the Clearinghouse and management of records;
- $56 million incurred by drivers to go through the return-to-duty process, including $7 million of opportunity costs in the form of income forgone for those hours spent in substance abuse education and treatment programs in lieu of hours that could be spent in non-safety-sensitive in positions; and
- $11.5 million of opportunity costs incurred by employers due to lost on-duty hours and profits associated with drivers suspended from safety-sensitive functions until successful completion of the return-duty-process.

Total net benefits of the rule are $42 million annually ($196 million–$154 million). The 10-year projection of net benefits is $316 million when discounted at 7 percent and $369 million when discounted at 3 percent. The annualized net benefit of the final rule is $42 million at the 7 percent and 3 percent discount rates. The estimated benefits include only those associated with reductions in CMV crashes.

TOTAL NET BENEFIT PROJECTION OVER A 10-YEAR PERIOD

Total	Annual	10-year	10-year
Discount rate		7%	3%
Total Benefits	$196,000,000	$1,472,985,521	$1,722,077,349
Total Costs	154,000,000	1,157,345,766	1,353,060,774
Total Net Benefits	42,000,000	315,639,754	369,016,575

II. Abbreviations

AAMVA American Association of Motor Vehicle Administrators
ABA American Bus Association
AMRO American Medical Review Officers, LLC
ATA American Trucking Associations
ATF Alcohol Testing Form
BLS Bureau of Labor Statistics
Boeing The Boeing Company
CAA Clean Air Act
Cahill-Swift Cahill Swift LLC
CCF Federal Drug Testing Custody and Control Form
CCTA California Construction Trucking Association
CDL Commercial Driver's License
CDLIS Commercial Driver's License Information System
Clearinghouse FMCSA's Commercial Driver's License Drug and Alcohol Clearinghouse
CLP Commercial Learner's Permit
CMV Commercial Motor Vehicle
C/TPA Consortia/Third Party Administrator
CVTA Commercial Vehicle Training Association
DOT U.S. Department of Transportation
Driver Check Driver Check Medical Testing and Assessment
DrugPak DrugPak LLC
DUI Driving a Commercial Motor Vehicle While Under the Influence of Alcohol or Drugs
eCCF Electronic Custody and Control Form
EIN Employer Identification Number
E-MAIL Electronic Mail
FCRA Fair Credit Reporting Act
FE FirstEnergy Corporation
FMCSA Federal Motor Carrier Safety Administration
FMCSRs Federal Motor Carrier Safety Regulations
Foley Foley Carrier Services
GAO Government Accountability Office
Greyhound Greyhound Lines, Inc.
HHS Health and Human Services
HIPAA Health Insurance Portability and Accountability Act of 1996
IBT International Brotherhood of Teamsters
IT Information Technology
J.B. Hunt J.B. Hunt Transport, Inc.
MAP–21 Moving Ahead for Progress in the 21st Century Act
MRO Medical Review Officer
MROCC Medical Review Officer Certification Council
NCSL National Conference of State Legislators
NGA National Governors Association
NPRM Notice of Proposed Rulemaking
NPTC National Private Truck Council
NTSB National Transportation Safety Board
NYAPT New York Association for Pupil Transportation
OMB Office of Management and Budget
OOIDA Owner-Operator Independent Drivers Association, Inc.
OTETA Omnibus Transportation Employee Testing Act of 1991
PII Personally Identifiable Information
PSP Pre-Employment Screening Program
PTC Pipeline Testing Consortium, Inc.
Quest Diagnostics Quest Diagnostics Incorporated
RIA Regulatory Impact Analysis
SAMHSA Substance Abuse and Mental Health Services Administration
SAP Substance Abuse Professional
SAPAA Substance Abuse Program Administrators Association
Schneider Schneider National, Inc.
SDLA State Driver Licensing Agency
TTD Transportation Trades Department, AFL–CIO
UMRA Unfunded Mandates Reform Act of 1995
WPCI Western Pathology Consultants, Inc.

III. Legal Basis for the Rulemaking

Section 32402 of the Moving Ahead for Progress in the 21st Century Act (MAP–21) (Pub. L. 112–141, 126 Stat. 405), codified at 49 U.S.C. 31306a, directs the Secretary of Transportation (Secretary) to establish a national Clearinghouse containing CMV operators' violations of FMCSA's drug and alcohol testing program. This rule implements that mandate.

In addition, FMCSA has general authority to promulgate safety standards, including those governing drivers' use of drugs or alcohol while operating a CMV. The Motor Carrier Safety Act of 1984 (the 1984 Act), codified at 49 U.S.C. 31136(a), provides concurrent authority to regulate drivers, motor carriers, and vehicle equipment. The 1984 Act requires the Secretary to prescribe safety standards for CMVs which, at a minimum, shall ensure that: (1) CMVs are maintained, equipped, loaded, and operated safely; (2) the responsibilities imposed on CMV operators do not impair their ability to

operate the vehicles safely; (3) the physical condition of CMV operators is adequate to enable them to operate the vehicles safely; (4) CMV operation does not have a deleterious effect on the physical condition of the operators; and (5) CMV drivers are not coerced by a motor carrier, shipper, receiver, or transportation intermediary to operate a CMV in violation of regulations promulgated under 49 U.S.C. 31136 or 49 U.S.C. chapters 51 or 313 (49 U.S.C. 31136(a)). Section 211 of the 1984 Act also grants the Secretary broad power, in carrying out motor carrier safety statutes and regulations, to ''prescribe recordkeeping and reporting requirements'' and to ''perform other acts the Secretary considers appropriate'' (49 U.S.C. 31133(a)(8) and (10)).

The FMCSA Administrator has been delegated authority under 49 CFR 1.87(e) and (f) to carry out the functions vested in the Secretary by 49 U.S.C. chapter 313 and 49 U.S.C. chapter 311, subchapters I and III, relating to CMV programs and safety regulation. This rule will implement, in part, the Agency's delegated authority under 49 U.S.C. 31136(a)(1) to ensure that CMVs are ''operated safely,'' and, under section 31136(a)(3), to ensure that ''the physical condition of operators of commercial motor vehicles is adequate to enable them to operate the vehicles safely.'' The final rule does not directly address the operational responsibilities imposed on CMV drivers (section 31136(a)(2)) or possible physical effects caused by driving a CMV (section 31136(a)(4)). FMCSA prohibits employers from submitting false reports of drug or alcohol violations to the Clearinghouse, which could be used to exercise coercive influence over drivers (49 U.S.C. 31136(a)(5)). FMCSA also exercises the broad recordkeeping and implementation authority under 49 U.S.C. 31133(a)(8) and (10).

The Omnibus Transportation Employee Testing Act of 1991 (OTETA) (Pub. L. 102–143, Title V, 105 Stat. 917, at 952, October 28, 1991, codified at 49 U.S.C. 31306), mandated the alcohol and controlled substances (drug) testing program for DOT. OTETA affirmed the existing regulations for drug testing and required the Secretary to promulgate regulations for alcohol testing for persons in safety-sensitive positions in four modes of transportation—motor carrier, airline, railroad, and mass transit. Those regulations, including subsequent amendments, are codified at 49 CFR part 40, ''Procedures for Transportation Workplace Drug and Alcohol Testing Programs.'' Part 40 establishes requirements for all DOT-regulated parties, including employers of drivers with CDLs subject to FMCSA testing requirements, for conducting drug and alcohol tests. Part 40 also defines the roles and responsibilities of service agents, including MROs, SAPs, and consortia/third party administrators (C/TPAs), who perform critical functions under DOT-wide drug and alcohol testing program requirements.

In 1994, FMCSA's predecessor agency, the Federal Highway Administration (FHWA), published a final rule addressing the OTETA and amending regulations, including penalties, codified in 49 CFR part 382, ''Controlled Substances and Alcohol Use and Testing.'' In 2001, FMCSA revised its regulations in 49 CFR part 382 to make FMCSA's drug and alcohol testing procedures consistent with and non-duplicative of the revised regulations at 49 CFR part 40.

This rule incorporates many of the findings and recommendations contained in FMCSA's March 2004 report to Congress, which was required under section 226 of the Motor Carrier Safety Improvement Act of 1999 (Pub. L. 106–159, 113 Stat. 1748, 1771, December 9, 1999).[1]

IV. Background on FMCSA's Drug and Alcohol Testing Program

Agency regulations at 49 CFR part 382 apply to persons and employers of such persons who operate CMVs in commerce in the United States and who are subject to the CDL requirements in 49 CFR part 383 or the equivalent CDL requirements for Canadian and Mexican drivers (49 CFR 382.103(a)). Part 382 requires that employers conduct pre-employment drug testing, post-accident testing, random drug and alcohol testing, and reasonable suspicion testing, as well as return-to-duty testing and follow-up testing for those drivers who test positive or otherwise violate DOT drug and alcohol program requirements.

Motor carrier employers are prohibited from allowing an employee to perform safety-sensitive functions, which include operating a CMV, if the employee tests positive on a DOT drug or alcohol test, refuses to take a required test, or otherwise violates the DOT or FMCSA drug and alcohol testing regulations. The prohibition on performing safety-sensitive functions continues until the employee satisfies all of the requirements of the return-to-duty process prescribed in 49 CFR part 40, subpart O. Additionally, part 382 provides that an employer may not allow a covered employee to perform safety-sensitive functions when the employer has actual knowledge that a driver has engaged in on-duty or pre-duty alcohol use, used alcohol prior to post-accident testing, or used a controlled substance. An employer has ''actual knowledge'' of a driver's drug or alcohol use while performing safety-sensitive functions based upon the employer's direct observation of employee drug or alcohol use, an admission by the employee of drug or alcohol use, information provided by a previous employer, or if the employee receives a traffic citation for driving a CMV while under the influence of drugs or alcohol. An employer may not use a driver under these circumstances until the driver has completed the return-to-duty process prescribed in 49 CFR part 40, subpart O. Although not required to do so, the employer may, at its discretion, fire the employee without giving the opportunity to complete the return-to-duty process. FMCSA does not regulate an employer's decision to terminate or the conditions under which an employer chooses to keep a driver on after a drug or alcohol violation.

The Federal Motor Carrier Safety Regulations (FMCSRs) require that a motor carrier employer obtain information from a job applicant that includes the names and addresses of the applicant's employers for the past 3 years, and whether or not the applicant was subject to the FMCSRs and to the drug and alcohol testing requirements under 49 CFR part 40 (49 CFR 391.21(b)). Interstate motor carrier employers are then required to investigate the applicant's history under the DOT drug and alcohol testing program by contacting any named DOT-regulated employers to determine whether the applicant has, within the past 3 years, violated the drug and alcohol prohibitions under part 382 or the testing requirements under part 40 (49 CFR 391.23(e)). A similar background check requirement exists in part 40. *See* 49 CFR 40.25 (DOT-regulated employers must contact all of the applicant's employers for the 2 years prior to the employee application date and obtain drug and alcohol test information, including information that these employers obtained from previous employers).

Part 40 defines an ''employee'' as ''any person who is designated in a DOT agency regulation as subject to drug testing and/or alcohol testing'' including ''applicants for employment subject to

[1] ''A Report to Congress On the Feasibility and Merits of Reporting Verified Positive Federal Controlled Substance Test Results to the States and Requiring FMCSA-Regulated Employers to Query the State Databases Before Hiring a Commercial Drivers License (CDL) Holder,'' Federal Motor Carrier Safety Administration, March 2004, Pg. 2.

pre-employment testing'' (49 CFR 40.3). Pursuant to this definition, an individual is an employee of any DOT-regulated employer for whom the individual takes a pre-employment drug test, regardless of whether the individual is subsequently hired by the employer. As a result, an individual must list that prospective employer, when applying for a new covered position (*see* 49 CFR 40.25).

FMCSA published the Notice of Proposed Rulemaking (NPRM) for the Drug and Alcohol Clearinghouse on April 22, 2014 (79 FR 9703). Changes to the published proposal are discussed in detail below.

V. Discussion of Comments Received on the Proposed Rule

The Agency received 165 comments. FMCSA's responses to those comments follow.

General Support/Opposition to the Clearinghouse

Comment. Ninety-seven commenters expressed general support for the proposal to establish the Clearinghouse. These commenters included 26 trade associations, 23 service agents, 13 employers, 3 safety advocacy organizations, 2 trade unions, the NTSB, a U.S. Congressman, a transportation consultant, and 27 individuals. Common reasons cited for general support of the proposal include that it will improve safety, deter drivers from job-hopping to evade the drug and alcohol violations, and provide employers with easy access to the information they need to hire safe, qualified drivers. Ten commenters expressed opposition to establishing the Clearinghouse. The majority of the commenters registering opposition were drivers who were concerned with overlapping reporting responsibilities and the lack of sufficient time for reporting information.

Compliance Date

Comment. SAPAA, NYAPT, First Advantage, WPCI and Quest Diagnostics requested that FMCSA give stakeholders enough time to restructure processes and systems before compliance is required. SAPAA requested at least a 1-year delay from the date of publication. First Advantage suggested that the compliance date coincide with the release of the HHS eCCF. National Ready Mixed Concrete Association and FE suggested a 2-year compliance period, while another commenter suggested a 3-year period.

Response. FMCSA notes that we did not propose a compliance date in the NPRM. This final rule includes a 3-year compliance period. FMCSA believes 3 years is necessary to provide the Agency time to design and implement the information technology (IT) systems needed to facilitate the reporting of results and violations of the drug and alcohol testing rules and the responses to queries from employers and prospective employers. Also, this period of time will ensure that stakeholders have sufficient time to prepare for this rule.

Applicability—Canadian and Mexican Employees, Employers, and Service Agents

Comment. Driver Check, Schneider, OOIDA and other commenters requested that the Agency clarify whether the proposed requirements apply to Canadian and Mexican commercial drivers, employers, C/TPAs, MROs, SAPs, and certified laboratories that are subject to the FMCSA testing regulations. Some of these commenters expressed concern that the proposal does not explain how the rule will be implemented and enforced against regulated entities in Canada and Mexico. One expressed concern that some of the proposed provisions would present privacy issues for Canadians because of a recent case involving an employer in the Province of Alberta. Driver Check asked whether the Clearinghouse data entry fields would be able to accommodate Canadian addresses and CDL numbers. The same commenter asked if the Clearinghouse would accommodate French, which is one of Canada's official languages.

Response. The Clearinghouse is designed to create an overlay onto FMCSA's drug and alcohol testing program to enhance compliance. As a result, all Clearinghouse requirements in this rule apply to employees, employers, and service agents that are otherwise subject to DOT and FMCSA drug and alcohol testing requirements as codified in 49 CFR parts 40 and 382. Therefore, all Mexican or Canadian employees, employers, or service agents that are currently required to comply with DOT and FMCSA drug and alcohol testing requirements must comply with this rule.

Canadian and Mexican motor carriers will follow the same procedures as U.S.-based motor carriers to query and report to the Clearinghouse. All Canadian and Mexican motor carriers engaged in cross-border trucking are required to obtain a USDOT number and maintain active registration. They will use those credentials to register with the Clearinghouse just as any U.S.-based carrier would. Similarly, FMCSA will enforce Clearinghouse requirements using the same tools it currently uses to enforce DOT and FMCSA drug and alcohol testing requirements against Canadian and Mexican motor carriers: Investigations, roadside inspections, and other enforcement mechanisms.

Currently, FMCSA is able to access information about Canadian CDL holders through the CDLIS pointer system. As a result, FMCSA does not anticipate having trouble accessing or accommodating Canadian information as a part of the Clearinghouse design. To the extent that issues arise that may affect the ability of Canadian carriers to comply with the requirements of this rule due to differences between Canadian and U.S. privacy laws and regulations, the Agency will work with Canadian authorities to resolve those issues. FMCSA intends to provide access to the Clearinghouse only in English, although parties will be able to enter French or Spanish words and names in the various data entry fields. Users with limited English proficiency may seek assistance with the Clearinghouse by contacting FMCSA's Office of Civil Rights at (202) 366–8810 to request a language accommodation.

Comment. Several commenters expressed concern that FMCSA's requirement that motor carriers implement a random drug testing program violates Canadian law. Specifically, they cite to *Communications, Energy and Paperworkers Union of Canada, Local 30* v. *Irving Paper & Pulp, Ltd.,* [2013] 2 S.C.R. 458, and a grievance arbitration between Uniform Local 707A and Suncor Energy, Inc. that set limitations on an employer's ability to require random alcohol testing for employees working under a collective bargaining agreement.

Response. The decisions in the referenced proceedings do not address the issue of Canadian motor carriers' compliance with FMCSA's random drug and alcohol testing requirements. Although this rule would require employers to report the results of positive or refused random tests to the Clearinghouse, it does not in and of itself establish the requirement that foreign motor carriers implement random testing programs. To the contrary, 20 years ago, FMCSA's predecessor made clear that the Agency's drug and alcohol requirements apply equally to foreign drivers. *See* ''Controlled Substances and Alcohol Use and Testing; Foreign-based Motor Carriers and Drivers,'' 60 FR 49322, Sept. 22, 1995. Moreover, in accordance with bilateral agreements between the United States and Canada, Canadian drivers are—and have been—subject to

all U.S. regulations when operating CMVs in the United States. Canadian motor carriers concerned about the effect of these recent cases on their cross-border transportation operations should consult with local legal counsel.

Applicability—Motor Carriers Operating Non-CDL CMVs

Comment. A number of commenters including J. B. Hunt Transport, Inc. and several trade associations requested that FMCSA also require motor carriers that operate non-CDL CMVs to query the Clearinghouse. Several commented that if this rule is implemented as proposed, CDL drivers with a drug or alcohol violation would seek employment with non-CDL motor carriers because the proposed rule does not require them to query the Clearinghouse. J.B. Hunt posited that ''many drivers who fail a test and can't 'job-hop' due to the Clearinghouse will downgrade to an operator's license and migrate to carriers not required to conduct testing or check for past test failures.'' Other commenters were also concerned that the rule, as proposed, would push unsafe drivers into the non-CDL segment of the motor carrier industry. Another commenter observed that 49 CFR 382.501(c) prohibits a driver with a drug or alcohol violation from operating CMVs that do not require a CDL, but under the proposed rule, non-CDL CMV employers would not know whether a driver is subject to this prohibition.

Response. The MAP–21 mandate underlying this rule applies only to individuals who hold a valid CDL and who are subject to drug and alcohol testing under Title 49 of the Code of Federal Regulations (including part 382) and to those who employ such individuals (49 U.S.C. 31306a(m)(4)(A)). The drug and alcohol testing and reporting requirements of part 382 apply to CDL holders who operate CMVs with GVWRs of 26,001 pounds or more, a vehicle that is designed to transport 16 or more passengers, including the driver, or a vehicle of any size used in the transport of hazardous materials, and to employers of such persons (§§ 382.103(a) and 383.5). The NPRM did not propose to change any underlying requirement of part 382.

FMCSA acknowledges, as one commenter noted, that § 382.501prohibits any driver from performing safety-sensitive functions, including operating CMVs that do not require a CDL, if the driver has violated part 382. We note, however, that the provision applies only to CDL holders. FHWA, in adopting § 382.501(c) in 1994, explained its intent: ''. . . a driver removed from performing safety-sensitive functions because of a rule violation occurring in a 26,001 pound or greater vehicle in inter- or intrastate commerce, also is prohibited from driving a 10,001 pound or greater vehicle in interstate commerce, until complying [with return-to-duty requirements].'' (59 FR 7484, 7501, February 15, 1994). Further, § 382.501(c) does not subject CDL holders operating CMVs with GVWRs between 10,001 and 26,000 pounds, or their employers, to the requirements of part 382.

FMCSA therefore concludes that, at this time, it would not be appropriate to require that motor carriers who employ individuals (either non-CDL holders or CDL holders) to operate CMVs with GVWRs between 10,001 and 26,000 pounds, to query the Clearinghouse. Such a requirement would expand the reach of this rulemaking to employers and drivers who are not required to participate in FMCSA's drug and alcohol testing program. Because those parties are not subject to part 382 requirements, they did not have sufficient notice that Clearinghouse requirements could become applicable to them and, accordingly, have not had a fair opportunity to participate in this proceeding. Should FMCSA, on the basis of demonstrable need, subsequently exercise its discretion under the 1984 Act (49 U.S.C. 31136(1) and (3)) to require that these employers query the Clearinghouse, we will provide notice and an opportunity for comment.

The Agency notes, however, that. ''non-CDL'' employers operating in interstate commerce remain subject to the investigation and inquiry requirements of § 391.23. Employers obtaining records related to an applicant's driving and safety performance history under § 391.23(a) would, for example, be able to discern whether the applicant had voluntarily downgraded a CDL to a motor vehicle operator's license and thus have a basis on which to question the applicant concerning the reason for the downgrade. ''Non-CDL'' employers must also request drug and alcohol testing information from ''all previous DOT regulated employers that employed the driver within the previous three years . . . in a safety-sensitive function that required alcohol and controlled substance testing specified by 49 CFR part 40'' (§ 391.23(e)). Section 391.23(f) requires that prospective employers provide previous employers with the driver's written consent, as required by § 40.321(b), to allow for the release of this privacy-protected information. Use of FMCSA's Pre-employment Screening Program (PSP) will also assist motor carrier employers in finding disqualifying drug and alcohol offenses and identifying prior DOT-regulated employers. The availability of this information will enable prospective employers to determine whether applicants who are CDL holders are subject to § 382.501.

Additionally, subject to applicable State requirements, ''non-CDL'' employers may conduct pre-employment and/or random non-DOT drug and alcohol testing (though the results of such tests would not be reportable to the Clearinghouse, as explained below).

Applicability—Non-DOT Tests

Comment. Cahill-Swift, Driver IQ/CARCO, J.B. Hunt, Schneider, C.R. England and the ATA requested that FMCSA permit employers to report non-DOT tests to the Clearinghouse. OOIDA opposed including non-DOT tests in the Clearinghouse.

Response. Congress did not grant FMCSA the authority to require employers to report non-DOT tests to the Clearinghouse. Congress directed the Agency to establish the Clearinghouse as a repository of DOT drug and alcohol testing program violations. *See* 49 U.S.C. 31306a(a). This is consistent with the rules applicable to FMCSA's drug and alcohol testing program: All FMCSA-required tests must be conducted in accordance with DOT rules. *See* 49 U.S.C. 31306(c); 49 CFR 382.105. Although employers may conduct testing beyond that required by FMCSA and DOT rules, positive results for these non-DOT tests must be kept completely separate from DOT test results and do not constitute violations of FMCSA or DOT rules. *See* 49 CFR 382.105; 49 CFR 40.13. Accordingly, FMCSA will not expand the scope of the Clearinghouse to include non-DOT tests.

Applicability—Municipalities

Comment. A commenter asked whether this final rule would apply to municipalities.

Response. Generally speaking, municipalities are subject to FMCSA's drug and alcohol testing program to the extent they employ drivers who are required to hold a CDL to operate a CMV. *See* 49 U.S.C. 31301, 31306; 49 CFR 382.103. Because this rule applies to all employers and employees subject to FMCSA's drug and alcohol testing rules, it would also apply to any municipality subject to those rules.

Applicability—Fair Credit Reporting Act (FCRA)

Comment. Foley and C.R. England asked whether the information in the

Clearinghouse would be subject to the FCRA when it is used for pre-employment background checks. C.R. England asked that FMCSA issue guidance stating whether a prospective employer would be required to submit an adverse employment action letter to a prospective employee if he or she were not hired as a result of information disseminated from the Clearinghouse. OOIDA stated that FMCSA must comply with the FCRA.

Response. FMCSA will comply with applicable FCRA requirements; however, not all provisions in the FCRA apply to the Agency's administration of the Clearinghouse. Information that a prospective employer receives from the Clearinghouse during a pre-employment check is not subject to requirements on the use of ''consumer reports'' under the FCRA. While still subject to some FCRA requirements, as noted below, this type of ''pre-employment'' information on a prospective employee, solely considered for employment purposes and required by Federal regulation and law, qualifies as an ''excluded communication'' under 15 U.S.C. 1681a(d)(2)(D), 1681a(o), and 1681a(y) of the FCRA.

FMCSA, as the government agency communicating this information, is subject to disclosure requirements under section 1681a(o)(5)(C). FMCSA meets these disclosure requirements through the provisions of this final rule on driver notification and access to the Clearinghouse in 49 CFR 382.707 and 382.709. Under § 382.707, FMCSA must notify a driver when information concerning that driver has been added to, revised, or removed from the Clearinghouse. When information concerning that driver has been released from the Clearinghouse to an employer, the Agency must specify the reason for the release. Such notice will inform the driver how to access his or her information in the Clearinghouse and will comply with the disclosure requirements in section 1681a(o)(5)(C).

An employer that takes adverse action based in whole or in part on a communication from the Clearinghouse, whether that information indicates a current disqualification or a resolved violation, would be subject to the FCRA's ''subsequent disclosure'' requirement. This requirement provides that the employer shall disclose ''a summary containing the nature and substance of the communication upon which the adverse action is based.'' 15 U.S.C. 1681a(y)(2). Employers should consult with their own experts for more information on how to comply with the FCRA.

Federalism

Comment. Several commenters said that the Clearinghouse rule would have implications for Federalism under Executive Order (E.O.) 13132. A rule has implications for Federalism if it has a substantial direct effect on State or local governments. NPTC, Cahill-Swift and First Advantage observed that some States have their own reporting requirements for drug and alcohol violations and requested guidance on how those reporting requirements would be affected. First Advantage asked if the Clearinghouse could send notice directly to the SDLA, to eliminate double reporting. NYAPT said that pending legislation in New York would require an MRO or C/TPA to report positive results of a school bus driver's random drug or alcohol test to the New York Department of Motor Vehicles.

Response. Nothing in this final rule will change or otherwise affect State or local drug and alcohol violation reporting requirements so long as they are compatible with this final rule. *See* 49 U.S.C. 31306a(l). Incompatible State or local requirements are subject to preemption. Each State will have to evaluate its own requirements to determine whether they are compatible with this final rule.

With respect to the Clearinghouse reporting to States, at this time FMCSA is considering the most efficient way to share information with the SDLAs. There is a more complete discussion below of Agency efforts to coordinate information sharing with SDLAs.

Privacy Considerations

Comment. A commenter stated that the Clearinghouse would violate the requirements of HIPAA.

Response. The Drug and Alcohol Clearinghouse established in this final rule is not subject to HIPPA requirements. HIPAA, which governs the dissemination of protected health information, applies to all records generated or received by ''covered entities.'' 45 CFR 160.103; 45 CFR 164.104(a). HIPAA defines a covered entity as: ''(1) A health plan; (2) A health care clearinghouse; or (3) A health care provider that transmits any health information in electronic form.'' *Id.* The Drug and Alcohol Clearinghouse does not fall into any of these categories. Even if drug and alcohol testing is viewed as protected under HIPAA, where DOT requires the use or disclosure of such information, its release is mandated by Federal law, and would not violate the requirements of HIPAA. Further information on this topic is available at *www.transportation.gov/odapc/hipaa-statement.*

Comment. The Association of American Railroads and the American Short Line and Regional Railroad Association asked whether releasing information to the Clearinghouse would violate the Federal Railroad Administration's (FRA) drug and alcohol regulations.

Response. FMCSA consulted with FRA's drug and alcohol testing program, which concluded that the Clearinghouse would not create a conflict with FRA's regulations. Any CDL driver who is subject to and violates part 382, even if that driver is working in a different DOT agency's industry, would be reported to the Clearinghouse.

Motor Carrier Registration

Comment. OOIDA suggested that FMCSA query the Clearinghouse as a part of the motor carrier registration process to determine whether any company principals have unresolved drug or alcohol violations.

Response. Company principals who do not currently serve in a safety-sensitive function (*e.g.,* they do not operate CMVs), or have never served in a safety-sensitive function are not a focus of this rulemaking. OOIDA's comment relates to registration requirements and is beyond the scope of this rulemaking. FMCSA will, however, take this comment under advisement as it moves forward with implementation of the Unified Registration System, *see* ''Unified Registration System,'' 78 FR 52608, August 23, 2013, and, as appropriate, when further developing the registration processes in an NPRM concerning ''MAP–21 Enhancements and Other Updates to the Unified Registration System''. That said, nothing in this rule would prohibit FMCSA from querying the Clearinghouse during the registration process, as a part of its audit and enforcement functions.

Definition of Positive Alcohol Test (§ 382.107)

Comment. The American College of Occupational and Environmental Medicine, Cahill-Swift, and C.R. England suggested that FMCSA remove the proposed definition of ''positive alcohol test.'' Some of these commenters stated that the definition is confusing because it has not been used previously and does not appear in 49 CFR part 40. Others said it would create confusion between the different prohibitions that apply when a driver has a blood alcohol level of between 0.02–0.039 or 0.04 and higher. Conversely, SAPAA and NYAPT supported the proposed definition of ''positive alcohol test.''

Response. The FMCSRs prohibit a driver with a blood alcohol level of 0.02–0.039 from driving a CMV. But being on duty with this blood alcohol level does not constitute a violation and does not require a driver to complete the return-to-duty process before resuming safety-sensitive functions. 49 CFR 382.505(a). A driver who is on duty with a blood alcohol level of 0.04 or higher, however, is in violation of FMCSA's rules and must complete the return-to-duty process. 49 CFR 382.201.

FMCSA proposed to define a positive alcohol test to make it easier to differentiate between the consequences of results showing a blood alcohol level of 0.02–0.039 and 0.04 or higher. We understand, however, that this definition could be confusing given that it would be a violation of FMCSA's rules for a driver to operate a CMV with a blood alcohol level of either 0.02 or 0.04, but that different consequences would apply. As a result, we have removed the definition of positive alcohol test from the rule along with all references to it in the regulatory text. The final rule uses the term ''an alcohol confirmation test with a concentration of 0.04 or higher'' in all places where ''positive alcohol test result'' appeared in the proposal.

Definition of Owner-Operator

Comment. Foley suggested that FMCSA define the term ''owner-operator'' because it was not clear whether the term refers to one-person companies or includes companies owned by a driver.

Response. It is not necessary to define ''owner-operator'' because that term does not appear anywhere in the regulatory text of this final rule. That said, § 382.103(b) explains that part 382, which includes this final rule, is applicable to all driver-owned firms without differentiating between one-person companies and companies owned by drivers. The only differences are that § 382.103(b) also requires that one-person company owner-operators join a testing pool with at least one other person and new § 382.705(b)(6) requires that an employer who employs himself/herself as a driver must designate a C/TPA to comply with the employer reporting requirements in this rule.

Definition of Service Agent

Comment. A commenter requested that FMCSA define the term ''service agent.''

Response. Prior to the enactment of MAP–21, part 382 incorporated the definition of ''service agent'' set forth in 49 CFR 40.3, which applied to service agents providing services only in connection with the DOT-wide drug and alcohol testing requirements in part 40. MAP–21 included an expanded definition of ''service agent'' which, while functionally equivalent to the definition of ''service agent'' in § 40.3, applied the term to the Clearinghouse requirements. Accordingly, the NPRM proposed a definition of ''service agent'' consistent with that change. However, following publication of the NPRM, DOT amended its definition of ''service agent'' in § 40.3 to conform to MAP–21 so that it is clear the definition is not limited to those persons providing services only in connection with part 40 requirements (81 FR 52364, August 8, 2016). The revised definition in § 40.3 now encompasses service agents who provide services in connection with drug and alcohol testing requirements, including the Clearinghouse requirements. Consequently, no new definition of ''service agent'' is necessary in the final rule.

Driver Identification (§ 382.123)

Social Security Numbers

Comment. FMCSA proposed that drivers be identified by their CDL number and State of licensure rather than Social Security Number or other Employee ID Number on the alcohol testing form (ATF) and Federal Drug Testing Custody and Control Form (CCF). A number of commenters opposed this change. Driver Check, Driver IQ/CARCO, Schneider and an individual commenter objected to using CDL numbers in lieu of Social Security Numbers because they believed that when a driver moves to a new State his or her license number would change, complicating the Clearinghouse's ability to track the driver. NYAPT, MROCC, CVTA and an individual commenter supported using CDL numbers. Driver IQ/CARCO and CCTA suggested that FMCSA should use CDLIS to track a driver's previous CDLs in other States. First Advantage and another commenter interpreted FMCSA's proposal to require a change to the ATF and CCF. These commenters stated that FMCSA did not have the authority to propose a change to these forms, which come under the authority of HHS. The IBT stated that use of the CDL number and State of issuance in lieu of a Social Security Number would reduce the risk of identity theft in the event the Clearinghouse suffered a security breach. SAPAA, Foley and Quest Diagnostics asked what would happen if a collection site mistakenly used a Social Security Number or EIN on the ATF or CCF. First Advantage also asked how the system would track foreign CDL numbers.

Response. After careful consideration of the comments and evaluation of FMCSA's information technology systems, the Agency concluded that the most accurate and secure method to identify a driver in the Clearinghouse is by using his or her CDL number and State of issuance. This is consistent with Federal and DOT policies which strongly encourage agencies to avoid using Social Security Numbers as an identifier whenever possible. Moreover, by interfacing with the CDLIS driver record system, the Clearinghouse will be able to identify drivers quickly and easily using the driver's CDL number and State of issuance, including foreign drivers. Contrary to the concerns some commenters raised, the Clearinghouse will be able to identify both domestic and foreign drivers and track their drug and alcohol violation records regardless of the number of times the driver moves to a new State and obtains a new CDL.

Using a driver's CDL number and State of issuance to track drug and alcohol violations does not require a change to the CCF or ATF. These forms specifically permit the use of either the Social Security number or an employee identification number. Under this final rule, the person completing the form is required to use the driver's CDL number and State of issuance as the employee identification number.

Once laboratories are approved to use HHS's eCCF, the likelihood of a collection site mistakenly using an identification number other than the CDL number and State of issuance will drop significantly. But in those cases in which the CDL number and State of issuance is not entered, the parties will have an opportunity to input the correct number later in the process.

Driving Schools

Comment. C.R. England and CVTA wanted to know how this rule would be applied to driving school students and prospective employees taking pre-employment drug tests prior to obtaining a CDL. CVTA asked FMCSA to clarify that the rule would not require the reporting of non-CDL holder testing results.

Response. MAP–21 requires that certain records related to drug and alcohol testing of ''commercial motor vehicle operators'' be reported to the Clearinghouse. MAP–21 defines ''commercial motor vehicle operator'' as ''an individual who (A) possesses a valid commercial driver's license issued in accordance with section 31308; and (B) is subject to controlled substances and alcohol testing under [49 CFR part

382]'' (49 U.S.C. 31306a(m)(4)). The Agency believes that, in accordance with that definition, the drug and alcohol records for CLP holders are required to be reported to the Clearinghouse because the CLP is a valid commercial driver's license and CLP holders are subject to drug and alcohol testing. Non-CDL holders—that is, persons who hold neither a CLP nor a CDL—are not subject to the Clearinghouse reporting requirements. While employers may conduct non-DOT drug and alcohol tests on employees who do not hold CDLs or CLPs, those tests are not considered DOT tests under parts 40 and 382 and cannot be reported to the Clearinghouse.

USDOT Numbers

Comment. FMCSA proposed to require employers to provide their USDOT number or their Internal Revenue Service-issued EIN on the CCF. First Advantage and Quest Diagnostics said that laboratories currently use account numbers to identify clients and that they would have to create new data fields to record USDOT numbers or EINs. MROCC, AMRO and PTC stated that, in many States, intrastate employers do not need to have USDOT numbers and that obtaining EINs would be burdensome. Two commenters also observed that the CCF does not include information to remind the collection site to record the USDOT number.

Response. As discussed below, FMCSA decided to eliminate the requirement that laboratories submit annual summaries of employer testing data. As a result, there is no longer a need to include USDOT numbers or EINs on the CCF. Accordingly, FMCSA removed this requirement from § 382.123(b)(1).

Definition of ''Reasonable Time'' and ''Refuse to Submit''

Comment. OOIDA requested that FMCSA clarify that a driver has not refused to submit to a drug or alcohol test under § 40.191 or § 40.261 when certain circumstances cause a driver to be delayed in reaching a testing facility. OOIDA requested that FMCSA make this clarification through guidance or by creating definitions of the terms ''reasonable time'' and ''refuse to submit.''

Response. FMCSA cannot make this change as a part of this final rule. The comments are related to DOT-wide drug and alcohol testing program requirements that are beyond both the scope of the Agency's authority and the scope of the final rule.

Electronic Forms

Comment. One commenter wanted to know whether entities involved in drug testing could continue to use paper forms. The commenter stated that in some circumstances computer facilities are unavailable to complete electronic forms. SAPAA, Driver IQ/CARCO, National Association of Professional Background Screeners and ATA supported the use of electronic forms and stated that FMCSA should allow parties to use electronic signatures for required authorizations and consents.

Response. It is beyond the scope of this rulemaking to change how entities involved in drug testing exchange information that is not submitted to FMCSA. The SAMHSA, which administers the CCF, has issued guidance on the use of paper and electronic CCFs. You can access that guidance at *www.samhsa.gov/sites/default/files/guidance-2014-ccf.pdf.* Changes to the electronic CCF are beyond the scope of FMCSA's authority—and this rulemaking. Questions on that issue should be directed to SAMHSA. You may access more information on SAMHSA at *www.samhsa.gov.*

Under certain circumstances, electronic documents and signatures can be used to satisfy part 382 requirements. We note, as discussed below, that this rule permits drivers to provide electronic consent for limited queries. Consent related to full queries must be provided electronically through the Clearinghouse. The Agency's previously published guidance on electronic signatures and documents can be found at *https://www.gpo.gov/fdsys/pkg/FR-2011-01-04/pdf/2010-33238.pdf* (''Regulatory Guidance Concerning Electronic Signatures and Documents,'' 76 FR 411 (Jan. 4, 2011)).

It is important to be aware, however, that FMCSA's guidance applies only to those requirements that appear in 49 CFR parts 300–399. Except for use in the eCCF, the DOT Office of Drug and Alcohol Policy and Compliance (ODAPC) has not approved the use of electronic signatures or documents to satisfy the requirements of the DOT-wide drug and alcohol regulations, which are found at 49 CFR part 40.[2] Any questions about part 40 regulations should be directed to ODAPC. You can find ODAPC contact information at *https://www.transportation.gov/odapc.*

Further, we note that electronic documents and signatures fall within the scope of a separate NPRM that FMCSA published on April 28, 2014 (79 FR 23306), in which the Agency proposes to amend its regulations to allow the use of electronic records and signatures to satisfy its regulatory requirements. In addition, under section 5203 of the Fixing America's Surface Transportation (FAST) Act (Pub. L. 114–94, 129 Stat. 1312, Dec. 4, 2015), FMCSA is required to take certain steps in addressing the Agency's Regulatory Guidance Program. Therefore, changes to regulatory guidance regarding electronic documents and signatures may also occur under this initiative.

Employer Responsibilities (§ 382.217)

Comment. FMCSA proposed a new section that would prohibit employers from allowing a driver to operate a CMV if the driver does not comply with the return-to-duty process after a refusal, a positive drug test, an alcohol confirmation test with a concentration of 0.04 or higher, or if the employer has actual knowledge that the driver has used alcohol or controlled substances as defined in § 382.107. NYAPT expressed support for this provision. FE suggested that a driver should be able to resume operating a CMV after being cleared by the SAP and passing a return-to-duty drug test regardless of whether the appropriate documentation had been updated in the Clearinghouse.

SAPAA and FE wanted to know whether § 382.217(d) requires employers to report actual knowledge of drug or alcohol use to the Clearinghouse when a driver voluntarily self-reports such use under § 382.121. SAPAA suggested that § 382.217 should include each violation under which a driver is not allowed to engage in a safety-sensitive function prior to complying with the return-to-duty process.

Response. The purpose of § 382.217 is to prohibit employers from allowing a driver to operate a CMV if that driver is subject to the prohibitions in 49 CFR part 382, subpart B, and has not completed the return-to-duty process as required by 49 CFR part 382. This section does not impose reporting obligations; those obligations are in part 382, subpart G. Nor does this section limit the types of actual knowledge violations that give rise to employer prohibitions.

After consideration of the above comments and further review of the proposed regulatory text, we conclude that, although this purpose was expressed in the preamble, the regulatory text does not clearly convey the intended result. Accordingly, this final rule revises the regulatory text to clarify that no employer may allow a driver to operate a CMV if he or she is

[2] See ''Use of Electronic Chain of Custody and Control Form in DOT-Regulated Drug Testing Programs,'' 80 FR 19551 (April 13, 2015).

subject to *any* of the prohibitions in 49 CFR part 382, subpart B. Among other things, these prohibitions specifically include drivers for whom the employer has actual knowledge (as defined in § 382.107) that the driver used controlled substances, engaged in on-duty or pre-duty alcohol use, or used alcohol prior to taking a post-accident test. *See* §§ 382.205, 382.207, 382.209, and 382.213.

Retention of Records (Section 382.401)

Comment. This section requires that employers retain documents related to the administration of employers' drug and alcohol testing programs for a minimum of 5 years. FMCSA proposed changes to clarify that this requirement includes records establishing that an employer has actual knowledge of a driver's traffic citation for driving a CMV while under the influence of alcohol or drugs. NYAPT stated that it was unnecessary to retain records of traffic citations. Towing and Recovery Association of America and Conference of Northeastern Towing Association stated that an employer's C/TPA should be able to maintain these records. SAPAA stated that employers keep records of citations in their safety department, not with their drug and alcohol program records. Similarly, FE said that records of citations are not maintained in drug and alcohol program records and it should not be the responsibility of employers to keep records of those citations.

Response. We believe that the commenters may have misunderstood the effect of the proposed change. Existing FMCSA regulations already require that employers maintain all records related to their drug and alcohol testing programs for at least 5 years. The purpose of the proposed change was to clarify that an employer must retain a DUI traffic citation only when it uses that citation as the basis for establishing that it had actual knowledge of a driver's use of drugs or alcohol in violation of FMCSA's drug and alcohol testing program. The proposed change was not intended to require employers to maintain copies of all traffic citations. In addition, it is left to the employer's discretion whether to use a C/TPA to administer and maintain records related to the employer's drug and alcohol program. Nothing in this proposed change would have affected that.

Regardless, it appears that the proposed change created more confusion than clarity. As a result, the final rule clarifies that employers must maintain drug and alcohol program records, including records of all part 382 drug and alcohol violations, for a minimum of 5 years.

Laboratories' Duty To Report Controlled Substances Test Results (§ 382.404)

Comment. FMCSA proposed to require each laboratory to report a summary of test results for each motor carrier using the laboratory to conduct controlled substances testing under FMCSA's requirements. A C/TPA commented that many owner-operators do not have independent accounts at laboratories; instead, their C/TPAs are the contact point with the laboratory. SAPAA and Quest Diagnostics said that the semi-annual statistical summary information laboratories provide to ODAPC is not required to be electronic and that creating an electronic format would be burdensome. First Advantage said that laboratories do not currently collect USDOT numbers and would have to create a new field in their IT systems to collect this information. Cahill-Swift commented that laboratories often indicate that a test is an FMCSA test when an employer has testing responsibilities for more than one mode and that it would be difficult for laboratories to separate them out. Several commenters said that the reporting requirement was duplicative and that FMCSA should use the information that is reported to ODAPC and Drug and Alcohol Management Information System (DAMIS). Along the same lines, a commenter suggested that if the laboratories are reporting this information, carriers should not have to submit summaries. On the other hand, commenters such as Schneider, IBT and an individual supported the proposed requirement.

Response. After considering the comments on this proposal, FMCSA decided to eliminate proposed § 382.404. The overwhelming majority of commenters indicated that the proposed laboratory reporting requirement would require changes to existing laboratory IT systems' information collection procedures and that the summaries would result in redundant reporting. In light of the burden on the industry and the fact that other less burdensome means of obtaining this information exist, FMCSA will not require laboratories to submit annual summary reports.

Access to Facilities and Records (§ 382.405)

Comment. FMCSA previously required employers to make records of their DOT drug and alcohol testing programs available to certain officials with regulatory authority over the employers. FMCSA proposed to extend that requirement to service agents as well. FMCSA also proposed to provide the NTSB access to a driver's record in the Clearinghouse when that driver is involved in a crash under investigation. One commenter misinterpreted this section to mean that FMCSA would disclose Clearinghouse information to officials with regulatory authority over employers and requested that FMCSA narrow the purposes for which these officials could request information. SAPAA said that C/TPAs were better able to comply with record requests than employers, as long as the employers provide C/TPAs with all of the relevant information. The NTSB requested that it be granted access to all information in the Clearinghouse that ''may be pertinent to its investigative mission.''

Response. Under 49 CFR 40.331(c), service agents are obligated to make drug and alcohol testing program records available to certain DOT officials as well as other officials with regulatory authority over employers. This final rule extends a requirement in § 382.405 that was previously limited to employers and now will include service agents as well. This change applies to records under the service agents' control and does not apply to information in the Clearinghouse. This change makes § 382.405 consistent with part 40.

Congress authorized FMCSA to grant the NTSB access to an individual's Clearinghouse record ''if the individual is involved in an accident that is under investigation by the National Transportation Safety Board.'' 49 U.S.C. 31306a(i). Based on this statutory language, FMCSA believes that Congress intended to limit the NTSB's access to individual records to instances when that particular individual is involved in an accident under NTSB investigation. Accordingly, § 382.405 remains as proposed.

Medical Review Officer or C/TPA Record Retention for Controlled Substances (§ 382.409)

Comment. FMCSA proposed to amend § 382.409(c) to add the Clearinghouse to the list of entities to which an MRO or C/TPA may release a driver's drug test results. SAPAA and NYAPT stated their support for this change. SAPAA also suggested that the MRO be required to tell the driver that the MRO must report violations to the Clearinghouse and that the MRO be required to notify the driver's employer when a verified result is entered into the Clearinghouse. Driver IQ/CARCO and DOT Right Hunters suggested adding SAPs, the NTSB, and consumer reporting agencies to the list of entities

to which MROs are permitted to release drug tests. One commenter stated that § 382.409(c) is confusing and could be in conflict with §§ 40.163(g) and 40.293(g), which permit the release of test information to SAPs.

Response. In this final rule, in accordance with § 382.601, employers must notify drivers that drug and alcohol testing program violations will be reported to the Clearinghouse. As a result, it is not necessary for MROs also to provide this notification. In addition, MROs have been and will continue to be required to notify employers of violations, in accordance with § 382.407. Since the employer will be made aware of the violation directly by the MRO, there is no reason for the MRO to provide additional notification when the result is entered in the Clearinghouse.

The purpose of the changes to § 382.409(c) in this final rule is to include the Clearinghouse in the category of entities to which MROs and C/TPAs may report test results. FMCSA did not intend, and did not propose, to expand the list of entities that are entitled to obtain drug test results beyond the Clearinghouse. Moreover, § 382.409(c), as proposed, is consistent with the parallel provisions authorizing the release of drug and alcohol information under the DOT-wide drug and alcohol testing program. *See* 49 CFR 40.331. FMCSA is not aware that the substantive language of § 382.409 has caused any confusion over an MRO's authorization to provide drug and alcohol test information to SAPs.

Further, it is unnecessary to add any language to allow for release of information to SAPs. The DOT-wide program expressly authorizes MROs to release drug-related violation information about a driver to the driver's SAP without additional consent. 49 CFR 40.163(g); 40.327(b); 40.293(g).

Finally, no statutory or regulatory authority permits the release of information to a consumer reporting agency without the driver's consent. To the contrary, such a release would be inconsistent with the fundamental privacy protections that parts 40 and 382 afford.

Notification to Employers of a Controlled Substances or Alcohol Testing Program Violation (§ 382.415)

Comment. FMCSA proposed to require drivers to notify all employers if they violate FMCSA's drug and alcohol testing regulations in 49 CFR part 40 or 382. Several commenters expressed general support for this provision. The Florida Trucking Association, SAPAA, MROCC, AMRO and PTC asked how FMCSA would enforce this requirement. Commenters also asked about the time frame in which the driver would have to report this information to employers. A commenter requested additional information about how notification would be delivered and what would happen if an employer claimed not to have received notification. IBT said that a driver with only one employer should not have to report the violation to that employer.

Response. The purpose of this provision is to require a driver to notify his or her employers if he or she has a drug or alcohol violation while working for a different employer or in connection with pre-employment testing with a new prospective employer. The text of the regulation specifically states that this notification must be made in writing before the end of the business day following the day the employee received notice of the violation or prior to performing any safety-sensitive function, whichever comes first. FMCSA recognizes that there is some confusion about whether drivers with only one employer must provide this notification and whether drivers with multiple employers must notify the employer that administered the test. To clarify this requirement, FMCSA has amended this provision to state expressly that drivers are not required to notify the employer who administered the test. Drivers who violate this provision are subject to the civil penalties authorized by 49 U.S.C. 521(b)(2)(C), and criminal penalties authorized by section 521(b)(6), with civil penalties adjusted for inflation as provided in § 382.507. FMCSA may enforce this provision against drivers in connection with any type of enforcement activity that it is currently authorized to conduct, including roadside inspections and compliance reviews.

Comment. SAPAA stated that it is possible for a C/TPA to represent several employers all of which employ the same driver. The commenter asked whether, when the driver has a violation with one employer, a C/TPA could notify the other employers it also represents.

Response. A service agent is prohibited from releasing information about a driver's violations to other employers that the C/TPA represents without the driver's specific consent. *See* 49 CFR 40.351(c). For purposes of FMCSA's drug and alcohol program, specific consent means a statement signed by the employee that he or she agrees to the release of a particular piece of information to an explicitly identified person or organization at a particular time. *Id.* The employee may not grant a ''blanket release,'' in which he or she agrees to a release of a category of information (*e.g.,* all test results) or to release information to a category of parties (*e.g.,* other employers who are members of a C/TPA or companies to which the employee may apply for employment).

Comment. One commenter observed that the NPRM stated that each employer must separately follow the return-to-duty requirements and asked whether a driver with multiple employers is required to have multiple SAP evaluations and follow-up testing plans.

Response. FMCSA apologizes for any confusion it may have caused in the NPRM. A driver with a drug or alcohol violation must complete the return-to-duty process. Each employer must be sure that the driver has completed those requirements before it allows the driver to resume safety-sensitive functions. But the driver need not complete multiple evaluations and testing plans simply because he or she has multiple employers.

Employer Obligation To Promulgate a Policy on the Misuse of Alcohol and Use of Controlled Substance (§ 382.601)

Comment. Existing regulations require employers to provide employees with educational materials about the FMCSA's drug and alcohol testing program requirements and the employer's policies for implementing those requirements. *See* § 382.601. FMCSA proposed to require that employers include notice in the educational materials that violations of FMCSA's drug and alcohol testing program would be reported to the Clearinghouse. A commenter suggested requiring employers to reference § 382.405, which governs access to driver records, in the employer's educational materials. The American Bus Association (ABA) objected to the burden it places on small and large passenger carriers to provide additional educational materials. The IBT suggested that employers be required to provide information to employees about virtually all aspects of how employers and employees can use the Clearinghouse. The commenter also suggested that employers make clear that a driver's self-report of the need for assistance with substance abuse in accordance with § 382.121 would not be reported to the Clearinghouse.

Response. The purpose of this change is to require employers, as a part of their educational materials, to notify drivers that drug and alcohol test information

will be reported to the Clearinghouse. As a part of implementing this rule, FMCSA will conduct driver outreach to help drivers understand their rights and responsibilities. Because FMCSA is cognizant of the burdens changes to mandated materials place on employers, the changes to § 382.601 in this final rule are limited to updating the requirements in that section to include the Clearinghouse. Sections 382.121 and 382.405 have been in existence for a number of years; we are unaware of any problem associated with employer-provided educational materials that requires additional regulatory intervention at this time.

Drug and Alcohol Clearinghouse (§ 382.701)

FMCSA proposed to require employers to conduct pre-employment and annual queries of the Clearinghouse.

Pre-Employment Investigations Under §§ 40.25, 382.413, and 391.23

Comment. ATA, Cahill-Swift, Driver IQ/CARCO, C.R. England, Boeing, NPTC, MROCC, AMRO, PTC, J.B. Hunt, and an individual commenter asked whether employers would have to do a background investigation on prospective employees' drug and alcohol testing history in accordance with §§ 40.25, 382.413, and 391.23 if the employer conducted a pre-employment query of the Clearinghouse. Many of these commenters observed that it would be redundant to complete a background investigation and *also* query the Clearinghouse. Accordingly, they suggested that FMCSA either eliminate the background investigation requirement or, alternatively, provide an exemption.

Response. FMCSA agrees that it would be redundant for employers to request information on an employee's drug and alcohol testing history *and* query the Clearinghouse. Under current regulations, employers are required to determine whether a prospective employee violated FMCSA's drug and alcohol testing program during the preceding 3 years and, if so, whether he or she has completed the return-to-duty process. In this final rule, FMCSA eliminates the requirement that employers both query the Clearinghouse and conduct a drug and alcohol history background investigation, with limited exceptions as discussed below.

Employers will be required to query the Clearinghouse and request drug and alcohol testing histories from previous employers until the Clearinghouse has been in operation for at least 3 years. After 3 years, employers subject to part 382 will no longer be required to request drug and alcohol testing histories from previous employers, except in the following situations. When an employer relies on the § 382.301(b) exception to the pre-employment testing requirement, the employer must meet all of the requirements, including verifying that the driver participated in the controlled substances testing specified in § 382.301(b)(2)(i) and (ii) and had no recorded violations of another DOT agency's controlled substances use rule within the previous 6 months.

In addition, for drivers subject to follow-up testing, an employer must request the follow-up testing plan from the previous employer if the driver's Clearinghouse record does not indicate that he/she successfully completed follow-up testing. Employers are required to obtain an employee's ongoing follow-up testing plan pursuant to § 40.25(b)(5). As discussed below, the duration of the follow-up testing and the number and type of follow-up tests prescribed by the SAP will not be reported to the Clearinghouse. Therefore employers will continue to be required to request this information directly from the previous employer. The need to request the follow-up testing plan will be apparent when the driver's Clearinghouse record indicates that he/she successfully completed the return-to-duty process, but there is no report, required under § 382.705(b)(1)(v), that the driver completed all follow-up tests as prescribed by the SAP. In cases where a driver who is subject to follow-up testing is not currently employed, the gaining employer may obtain the driver's follow-up testing plan from the SAP, whose contact information will be available in the Clearinghouse.

Finally, if a prospective employee was subject to drug and alcohol testing with a DOT mode other than FMCSA, employers must continue to request background information from those DOT-regulated employers, who are not subject to the Clearinghouse reporting requirements. The Clearinghouse therefore will not contain any non-FMCSA drug and alcohol information. FMCSA revised §§ 382.413 and 391.23 to implement these changes. These revisions will make clear that an employer that queries the Clearinghouse has satisfied the background investigation requirements of § 40.25(b), subject to the exceptions described above.

Frequency of Queries Permitted

Comment. ATA, FE, Cahill-Swift, J.B. Hunt, and Driver IQ/CARCO asked whether employers would be limited to just one query per employee per year and suggested that they should be able to query the database more frequently.

Response. Nothing in the rule prohibits employers from conducting queries on drivers more than once per year. The annual query requirement, which can be met by conducting either a full or limited query, merely sets the minimum frequency for conducting queries. FMCSA made minor changes to § 382.701(b) to make this clear.

Employers may conduct more frequent queries so long as they obtain employee consent in accordance with § 382.703. FMCSA envisions that employers would obtain one general consent to conduct a limited query (or queries) from drivers at the time they are hired. Employers should ensure that the general consent to query does not restrict them to one query per year if they intend to conduct limited queries on a more frequent basis.

Burden of Annual Queries

Comment. Boeing, ABA, and a number of other commenters said that the annual query requirement is unnecessary and burdensome. Boeing added that the time and resources associated with the annual query would be burdensome, especially for large employers.

Response. FMCSA disagrees that the annual query requirement is unnecessary or overly burdensome. The number of commenters interested in conducting queries more often than once a year points to the opposite conclusion: That employers believe Clearinghouse queries will be a useful tool for identifying problem employees. The purpose of this requirement is to ensure that drivers who commit a drug or alcohol violation while working for another employer or attempting to find work with another employer do not continue performing safety-sensitive functions without complying with the return-to-duty process. Without the annual query, employers have no way of knowing about violations with other employers that render a driver ineligible to drive. FMCSA envisions that employers would obtain one general consent to query from drivers at the time they are hired in order to conduct these annual or more frequent limited queries, reducing the burden on employers to obtain such consent on a yearly basis. As noted above, employers also have the option of conducting a full query in order to satisfy the annual query requirement; in such cases, specific consent must first be obtained from the driver.

Employer Alert of Positive Test Result

Comment. FMCSA proposed that an employer would be notified if new information about a driver is entered into the Clearinghouse within 7 days of an employer conducting a query. One commenter stated that the 7-day time period is too short. SAPAA, MROCC, AMRO and PTC, and several trucking associations requested that FMCSA extend the time from 7 days to 30 days to take into account hiring delays and the time it takes to process pre-employment drug tests.

Response. FMCSA believes that these comments have merit and, as a result, includes a 30-day notification period in this final rule. FMCSA interprets the statutory mandate that the Agency provide notification to an employer within 7 days as a minimum, not a maximum time period. This interpretation is consistent with the purposes of the Clearinghouse: To improve compliance and enhance safety. *See* 49 U.S.C. 31306a(a)(2). As the commenters observe, it could take more than 7 days after a drug test for a violation to be processed, verified, and entered into the Clearinghouse. This means that a driver submitting applications to more than one employer could have a positive pre-employment drug test without other employers' knowledge. By extending the notification period, employers are more likely to get the necessary information to determine whether a driver is in compliance with FMCSA's drug and alcohol testing program. Accordingly, FMCSA extends the notification period for employers to 30 days.

Full Query in Lieu of Limited Query

Comment. FMCSA proposed that the annual query requirement would be satisfied by conducting a limited query to determine whether any information about a particular driver existed in the Clearinghouse. If the limited query shows that information exists, the employer would be required to obtain consent to conduct a full query to gain access to the information. Schneider, the CCTA, and another commenter objected to conducting a limited query in advance of a full query and requested that the regulation provide for only full queries.

Response. An employer that conducts a limited query will receive a response that says that information either exists or does not exist in the Clearinghouse. If the response indicates that there is information, the employer must obtain specific consent from the driver to conduct a full query that releases the content of that information. Nothing prevents an employer from obtaining specific consent to conduct a full query each year. But to ease the burden associated with obtaining annual consent, FMCSA offers employers the option of doing a limited query, which may be conducted with a multi-year consent to query.

Comment. A commenter asked what kind of information would trigger a full query.

Response. If a limited query returns a response indicating that any information about that driver exists in the Clearinghouse, the employer must conduct a full query to find out whether the information shows that the driver is eligible to perform safety-sensitive functions.

Annual Queries—Miscellaneous

Comment. One commenter expressed support for the annual query requirement. Two commenters asked whether they would be able to conduct annual queries of all employees in a batch.

Response. Nothing in this rule would foreclose the possibility of batch-processing annual queries. Details on Clearinghouse functionality will be addressed during the design and development process. FMCSA will provide information to stakeholders on that functionality closer to the Clearinghouse compliance date.

Comment. A commenter asked whether the annual query could be conducted at the same time as other required annual checks.

Response. Nothing in the rule mandates when the annual checks be conducted except that they occur at least once per year. Employers are free to choose the time of year that best suits their operational needs. FMCSA anticipates that many employers will choose to conduct Clearinghouse queries at the same time they conduct other required annual verifications, but that decision is left entirely to the employer.

Comment. An individual wanted to know, in the event of multiple employers, which employer would be responsible for querying the Clearinghouse. CCTA asked if owner-operators are required to query themselves.

Response. Anyone who employs a driver, regardless of whether that driver has other employers, must query the Clearinghouse in accordance with § 382.701. This includes owner-operators who, as both employers and employees, are subject to *all* provisions of FMCSA's drug and alcohol regulations. *See* 49 CFR 382.103(b). A driver who owns a company, regardless of whether it has one or many drivers, must comply with all employer and employee Clearinghouse requirements.

Comment. Another commenter asked what FMCSA hopes to achieve through the annual query. The same commenter wanted to know what an employer is supposed to do if an annual query returns results showing that a driver violated FMCSA's drug and alcohol testing program with another employer.

Response. The goal of the annual query, which is mandated by Congress (*see* 49 U.S.C. 31306a(f)(4)), is to make employers aware of drug and alcohol violations a driver may have incurred while working for another employer or in connection with pre-employment testing with a prospective employer. If the annual search shows a drug or alcohol violation, the employer would be prohibited from allowing a driver to perform safety-sensitive functions until the driver complied with the return-to-duty requirements.

Comment. MROCC, AMRO and PTC asked about the time frame for an employer to conduct a full query after a limited query indicates that there is information about a particular driver in the Clearinghouse.

Response. When a limited query shows that there is information in the Clearinghouse about a particular driver, the employer making the query (or service agent making it on the employer's behalf) must conduct a full query within 24 hours. If the full query is not conducted within 24 hours, the driver in question is prohibited from performing safety-sensitive functions. The driver may resume safety-sensitive functions once a full query is conducted so long as it shows that the driver is not prohibited from performing those functions. FMCSA amended § 382.701(b) to make this requirement clear.

Driver Consent To Permit Access to Information in the Clearinghouse (§ 382.703)

FMCSA proposed that employers may not query the Clearinghouse without the affected driver's consent.

Consent Required

Comment. Several commenters suggested that FMCSA allow employers to query the Clearinghouse at will without driver consent.

Response. In authorizing FMCSA to establish the Clearinghouse, Congress specifically required that a driver grant consent before the Clearinghouse releases information in a driver's Clearinghouse record. 49 U.S.C. 31306a(h)(1). The Agency therefore has no discretion to permit employers to

query the Clearinghouse without the driver's consent and accordingly, § 382.703, prohibits employers from conducting either limited or full queries without obtaining the driver's consent. The issue of driver consent is addressed more fully below.

Electronic Consent

Comment. Schneider, WPCI, C.R. England, ATA and DrugPak, LLC (DrugPak) recommended that FMCSA allow the use of electronic signatures for driver consent.

Response. FMCSA anticipates that, for the full query, drivers will provide electronic consent through the Clearinghouse, as noted below. The Agency intends to include this functionality in the design of the Clearinghouse system. For limited queries, drivers and employers will have the option of using either paper or electronic methods to create and maintain documentation of driver consent. You may access FMCSA's guidance on how to create and maintain electronic signatures at ''Regulatory Guidance Concerning Electronic Signatures and Documents,'' 76 FR 411 (Jan. 4, 2011).

''Blanket'' Consent Forms

Comment. Several commenters suggested that employers should obtain driver consent to query the Clearinghouse as a part of the driver's employment application. Cahill-Swift, Driver IQ/CARCO, J.B. Hunt, ABA and Schneider recommended blanket consents for both full and limited queries for as long as the driver is employed with that employer. Foley, C.R. England, MRROC, AMRO and PTC also expressed support for blanket consents for limited queries. Commenters suggested that limited consent be combined with the driver employment application or pre-employment screening program (PSP) consent, while another suggested that it should be solicited during the driver's annual review. SAPAA suggested that consent forms be valid for 3 years.

Response. Under existing regulations, employees may not grant blanket consent to release drug and alcohol testing program information. 49 CFR 40.321. Accordingly, FMCSA does not permit employees to grant blanket consent to conduct annual Clearinghouse queries. But nothing in this final rule prevents an employer from obtaining general consent for limited queries because limited queries do not release driver information. Employers and employees are free to work out the details for obtaining general consent for limited queries, such as when the consent is originally obtained, for how long it is effective, and whether is it is combined with other consent forms.

Standard Consent Form

Comment. One commenter suggested that FMCSA establish a standard consent form so that employees know what information they are consenting to release with each type of query. OOIDA suggested that FMCSA prescribe the exact language for the consent form, including details about the type of consent given and the driver's rights under Clearinghouse rules. OOIDA also suggested that consent forms have time limits, the full and limited query consent forms should be separate, and drivers should receive a copy of each form he or she signs.

Response. To preserve the maximum flexibility for employers and employees, FMCSA does not provide a standard consent form in this final rule. However, we will provide a sample consent form on the Clearinghouse Web site that employers may use or adapt. With respect to limited queries, employers and employees are free to structure the consent in the way that permits the most efficient use of their resources. For example, it may be combined with other documents and consents or it could be a stand-alone document. It could be subject to renewal each year, or be effective for the duration of employment. It could be limited to one query per year, or permit an unlimited number of queries. Employers are required to keep records of this consent for a minimum of 3 years after the last query and compliance with this requirement is subject to audit. Nothing prohibits employers from providing employees a copy of their consent.

FMCSA will not, however, compel employers to include detailed information about the Clearinghouse or an individual's rights on the consent form.

The Agency intends that consent for full queries will be managed electronically through the Clearinghouse. FMCSA envisions that an employer will make an electronic request for records through the Clearinghouse and, once FMCSA receives electronic confirmation of consent from the driver, records, if they exist, would be released to the requesting employer. Employers would not be required to obtain or keep any other written forms of consent for full queries. The Clearinghouse will provide notice to the driver each time his or her information is released in connection with a full query. In addition, a driver will be given the option to receive electronic notification each time someone conducts a limited query on that driver. The driver will be given the opportunity to provide electronic contact information when he or she registers with the Clearinghouse.

Consent for Service Agents To Query the Clearinghouse

Comment. First Advantage and CCTA suggested that service agents should be able to query the Clearinghouse on behalf of an employer.

Response. Employers may designate service agents to query the Clearinghouse on their behalf. Service agents accessing the Clearinghouse must be authorized by the employer and registered in accordance with § 382.711.

FMCSA Verification of Employee Consent

Comment. Two commenters wanted to know how FMCSA would verify driver consent for a full query.

Response. The driver would log into the Clearinghouse and authorize the release of his or her records to a particular employer. The driver would have to establish log-in credentials when registering with the Clearinghouse in order to verify his or her identity.

Reporting to the Clearinghouse (§ 382.705)

FMCSA proposed to require employers, MROs, and SAPs to report information about violations of FMCSA's drug and alcohol testing program to the Clearinghouse. Section 382.705 identified and assigned responsibility for these reporting requirements.

Harassment or Coercion

Comment. OOIDA stated that it was concerned that a motor carrier could misuse its role in the reporting process to coerce, harass, or retaliate against drivers.

Response. In response to concerns about employers submitting false allegations to the Clearinghouse in order to coerce, harass, or retaliate against drivers, FMCSA has established new requirements for reports of violations based on an employer's actual knowledge or on a driver's failure to appear for a test. These new requirements, codified in new § 382.705(b)(3) and (5), call for the employer to document the violation contemporaneously and/or to submit supporting information, under penalty of perjury, about the violation to the Clearinghouse. For more information on these procedures and the consequences for false reporting, see the discussion of § 382.705(b)(3) and (5) below. In

addition, drivers who believe that inaccurate information about them has been entered into the Clearinghouse may request correction of their record in accordance with § 382.717 or DOT's Privacy Act procedures (49 CFR part 10, subpart E) (*See also* discussion of the Privacy Act elsewhere in this preamble.)

Inaccurate Reporting

Comment. A number of commenters were concerned about how the reporting of inaccurate information to the Clearinghouse would affect drivers. OOIDA urged that every requirement be carefully considered to maximize accuracy and eliminate room for error. Another commenter recommended that no SAP reports or return-to-duty information should be reported to the Clearinghouse because there is a risk of inaccurate reporting.

Response. Minimizing the risk for error was an important consideration for the Agency while developing this rule. Entries to the Clearinghouse will be made electronically using pre-defined data fields to minimize incorrect entries. Anyone reporting information will not be able to make an entry without including all required information. In addition, each time an entry is made to a driver's record, that driver will be notified in accordance with § 382.707. In the event of an incorrect entry, drivers will be able to request corrections in accordance with the procedures in § 382.717.

Cancelled or Changed Tests

Comment. SAPAA asked what happens when a test is cancelled. Two commenters recommended that cancelled tests should be deleted and not kept for any purposes. Cahill-Swift asked whether a record is immediately expunged from the Clearinghouse when an MRO changes a reported positive or refusal.

Response. In accordance with part 40, a cancelled test may not be considered positive or used as a basis for prohibiting a driver from performing safety-sensitive functions or requiring the driver to complete the return-to-duty process. 49 CFR 40.207, 40.267. Accordingly, no cancelled test should be reported to the Clearinghouse. In the event an MRO cancels a test that he or she previously reported to the Clearinghouse, that MRO must report that change to the Clearinghouse within 1 business day (§ 382.705(a)(3)). FMCSA would then remove that test from the Clearinghouse. FMCSA would not, however, remove the information from its archives. Although this information would not be accessible to employers, it is important that FMCSA retain a record of all cancelled tests for auditing and enforcement purposes. If an MRO fails to report the cancelled test within the required time frame, the employee can submit a request for removal through the Clearinghouse data correction procedures in § 382.717.

Redundant Reporting Responsibilities

Comment. C.R. England, Greyhound Lines Inc. (Greyhound), OOIDA, CCTA and other commenters said that the proposed reporting requirements were redundant because different entities—for example, employers and MROs—were responsible for reporting the same information. These commenters requested less duplicative and burdensome requirements. One of the commenters suggested using chain of custody or other numbers to track specimens and prevent duplicate reporting of positive test results from different sources.

Response. FMCSA did not intend to include any redundant reporting requirements in the proposed rule. We believe that several commenters were confused because § 382.705 requires both employers and MROs to report refusals. FMCSA intended, however, for MROs to report only those refusals related to the portion of the testing process in which they are involved, as identified in § 40.191. Similarly, FMCSA intended for employers to report all other refusals identified in § 40.191. In other words, § 382.705 requires employers and MROs to report different kinds of refusals with no overlapping responsibilities.

To clarify that MROs and employers have mutually exclusive reporting requirements, this final rule distinguishes between those paragraphs of 49 CFR 40.191 that implicate MRO reporting and those that implicate employer reporting. The final rule now states that employers are required to report refusals to take drug tests pursuant to § 40.191(a)(1)–(4), (a)(6), (a)(8)–(10), or (d)(1) and to report situations in which the employee admits to the collector that he or she adulterated or substituted the specimen in accordance with § 40.191(a)(11). MROs, on the other hand, are required to report refusals that are determined pursuant to § 40.191(a)(5), (a)(7), (b), and (d)(2). MROs are also required to report refusals when the employee admits to the MRO that he or she adulterated or substituted the specimen in accordance with § 40.191(a)(11).

Additionally, we note that MROs and employers do not have overlapping reporting responsibilities related to positive test results. Consequently, duplicate reporting, in which the same test result is reported to the Clearinghouse by different sources, will not occur. However, to the extent that duplicate test results are inadvertently reported to the Clearinghouse by the same source as a result of administrative error, drivers may request that duplicate reports be removed through the data correction procedures established under § 382.717.

Who Should Report Information

Comment. Several commenters said that only employers should enter information to alleviate burdens on service agents and to promote accuracy. OOIDA suggested alternative regulatory text that would make employers responsible for reporting all refusals to test. Several commenters supported having MROs, not employers, report positive test information to eliminate opportunities for employers to report inaccurate information, both inadvertently and intentionally. One commenter supported having SAPs enter SAP information to ensure accurate data is entered. Commenters also suggested having blood alcohol technicians or screening test technicians instead of employers enter alcohol test results, also to improve accuracy. Other commenters stated that employers, MROs, and SAPs should be able to allow third parties or assistants to enter information into the Clearinghouse to alleviate their reporting burdens. Greyhound and another commenter supported having each party enter information related to their immediate firsthand knowledge as a way of ensuring checks and balances in the reporting process. Two commenters supported having MROs report positive test results because they believe some employers would choose not to report the positive tests so that their employees could continue driving. A number of commenters suggested that SDLAs report information on citations for DUI while driving a CMV. Other commenters expressed concern about the conflict of interest owner-operators have in self-reporting their own drug and alcohol violations.

Response. FMCSA considered permitting only employers to input information into the Clearinghouse and determined that the better option is to have service agents enter their own information. This minimizes the risk of error by preventing the information from passing through multiple hands before reporting and holds each actor responsible for the integrity of his or her own reportable information. Furthermore, consolidating reporting authority into the hands of employers could make it easier for unscrupulous

employers to misuse their reporting role either to coerce drivers or help them evade the consequences of receiving a positive test.

Nothing in the final rule prohibits an MRO or SAP from allowing authorized staff to enter information into the Clearinghouse. The MRO or SAP remains responsible, however, for the accuracy of any information entered by staff on their behalf.

The rule does not require SDLAs to report DUI citations to the Clearinghouse. FMCSA believes that some of the commenters misunderstood the requirement to report that an individual was cited for a DUI while driving a CMV. The rule proposed that it would be the employer's responsibility to report a violation of §§ 382.205, 382.207, or 382.213 that is based on the employer's actual knowledge of a citation for DUI while driving a CMV. The Clearinghouse was never intended to be a repository for all citations for DUI while driving a CMV. In accordance with § 382.107, it will only contain those citations that an employer uses to substantiate actual knowledge that an employee violated FMCSA's drug and alcohol program.

In this final rule, FMCSA will require employers to report and substantiate all violations of § 382.205, § 382.207, or § 382.213 based on the employer's actual knowledge of the circumstances. We discuss these provisions in more detail below.

In addition, this final rule mandates that any owner-operator, regardless of whether he or she operates solo or has other driver-employees, must use a C/TPA to comply with the employer reporting requirements established in this rule. FMCSA implements this requirement in response to commenters' concerns about the conflict of interest owner-operators have in self-reporting their own drug and alcohol violations. The Agency does not believe that this will cause any increased costs or burdens on owner-operators. In the case of owner-operators who employ only themselves, they are already required to participate in a testing pool managed by a C/TPA. *See* § 382.103(b). Similarly, FMCSA's experience has shown that most owner-operators with other employees tend to be very small motor carriers that find it more convenient to use C/TPAs to manage their drug and alcohol programs. Accordingly, adding the reporting function to the C/TPA's duties should not create new burdens; to the contrary, consolidating all reporting into the C/TPA's hands should achieve efficiencies.

Employers and Drivers Regulated by More Than One Mode

Comment. Two commenters stated that some drivers work for companies that are regulated by more than one mode and suggested that results of a test conducted under the authority of another mode be reported to the Clearinghouse.

Response. In accordance with Congress's mandate in MAP–21, this final rule applies to part 382 drug and alcohol violations only. *See* 49 U.S.C. 31306a(a)(3). FMCSA does not have the authority to require employers to report other modes' drug and alcohol violations to the Clearinghouse.

Reporting Truthfully and Accurately

Comment. FMCSA proposed that every person or entity with access to the Clearinghouse be required to report truthfully and accurately, and expressly prohibited them from knowingly reporting false or inaccurate information. OOIDA suggested that FMCSA remove the term ''knowingly'' from this requirement.

Response. FMCSA proposed using the term ''knowingly'' because the Agency does not intend to impose sanctions on inadvertent errors. That said, the Agency recognizes the serious consequences drivers could face as a result of parties who report inaccurate information. Accordingly, the Agency expanded the prohibition to provide sanctions when a person reports information he or she knows *or should know* is false or inaccurate. This holds those reporting information to the Clearinghouse to a higher standard of accountability.

Reporting Follow-Up Tests

Comment. Driver Check asked whether employers are required to report negative as well as positive follow-up tests. OOIDA suggested that the number of follow-up tests be reported to the Clearinghouse. SAPAA suggested that employers report aftercare information during the follow-up period.

Response. Although employers must report negative return-to-duty tests, they are not required to report negative follow-up tests. The reason for the distinction between the two is because reporting a negative return-to-duty test changes a driver's status from prohibited to eligible to perform safety-sensitive functions. A negative follow-up test does not cause a change in the driver's status until the employer reports successful completion of all follow-up tests. Employers and MROs must, however, report positive return-to-duty and follow-up tests just as they would for any other positive test. In addition, employers will report to the Clearinghouse that a driver has completed the return-to-duty process when he or she has successfully completed all required follow-up tests.

FMCSA does not believe that reporting aftercare information is appropriate at this time. The purpose of the Clearinghouse is to be a tool for employers to use to determine whether an employee or prospective employee is prohibited from performing a safety-sensitive function. While the details of aftercare are relevant to the driver's return-to-duty process, they do not, in and of themselves, indicate whether a driver is prohibited from driving.

Time Allowed for Reporting

Comment. FMCSA proposed to require MROs, employers, C/TPAs, and SAPs to report to the Clearinghouse within 1 day of the event triggering a reporting requirement. Many commenters said that this did not allow enough time. DrugPak said that this requirement was not consistent with FMCSA's statutory authority, which simply required ''timely'' reporting. WPCI said that the rule should have a more specific time frame such as 24 hours. Yet another commenter requested that the reporting period be extended to 2 days. A commenter said that there are no time limits applicable to C/TPAs and requested that FMCSA change the rule to include them. Several commenters suggested that SAPs have up to 72 hours to report information. A different commenter suggested that SAPs have 5 days to report information.

Response. After consideration of these comments, FMCSA changed the proposed provisions so that this final rule requires MROs to report within 2 days of verifying a drug test. FMCSA makes this change to allow MROs a little more time to comply with their reporting requirements. The 2-day time frame is consistent with current MRO requirements for transmitting a report of a verified test to the employer within 2 days of verification. *See* 49 CFR 40.167(c).

There is no comparable reporting period in part 40 for employers or SAPs, however. FMCSA appreciates the commenters' concerns about the short period of time required for reporting, but must also balance this requirement against the public safety interest in timely reporting and the driver's interest in returning to work as soon as he or she is eligible. Accordingly, this final rule requires SAPs to complete their reporting requirements by the close of

the business day after the event that triggered their reporting responsibility.

For employers, the reporting period has been extended to the end of the third business day following the event triggering the violation. This change was made to reflect the fact that, in the case of a violation substantiated by an employer's actual knowledge of drug or alcohol use, or in the case of an employer's report of a driver's failure to appear for a test, new reporting requirements apply. The final rule affords more time for employers to report violations because employers are now required to generate or gather documents in order to substantiate these types of reports. These reporting requirements are discussed in further detail below. In order to maintain a uniform reporting period applicable to employer reports, the reporting period in this rule applies to all reports made by employers, not just those requiring additional documentation.

We also note these reporting periods establish the maximum amount of time in which MROs, SAPs and employers can submit their reports to the Clearinghouse. Nothing in this rule prohibits the submission of reports at an earlier point within the reporting window.

C/TPAs who report information to the Clearinghouse stand in the shoes of the employer, when they are designated to take on that responsibility. Accordingly, any time frame applicable to an employer is equally applicable to the C/TPA acting on the employer's behalf.

Reporting Actual Knowledge of Drug or Alcohol Use

Comment. FMCSA's proposal to require employers to report violations based on their actual knowledge of an employee's drug or alcohol use *only* when substantiated by a citation for DUI in a CMV is narrower than the scope of actual knowledge violations defined in § 382.107. Twenty-three commenters objected to this limitation and recommended that FMCSA require employers to report all violations based on actual knowledge, as defined in § 382.107. They stated that limited reporting would leave the Clearinghouse incomplete and would be inconsistent with Congress's mandate in MAP–21 that *all* violations of the Agency's drug and alcohol program be reported to the Clearinghouse. Commenters also said that FMCSA's concerns about inadequate documentation for violations based on actual knowledge were inconsistent with existing regulations that require employers to report these types of violations in accordance with pre-employment background investigations.

Several commenters supported the proposal and said that reports to the Clearinghouse should not be based on undocumented information that could be used to coerce drivers. One of these commenters, OOIDA, said that employers should order a reasonable suspicion test when they have actual knowledge of a violation, but opposed permitting ''unverified'' actual knowledge violations to be reported to the Clearinghouse.

One commenter stated that no DUI information should be available.

Response. After considering the comments on this issue, FMCSA agrees that it is appropriate to include all actual knowledge violations of part 382 in the Clearinghouse. By including such violations, employers will be able to query the Clearinghouse to obtain a complete picture of a driver's drug and alcohol violations history. This change also allows employers to use a Clearinghouse query to satisfy the drug and alcohol background investigation requirements in §§ 382.413 and 391.23, as discussed above. We note that neither DOT nor non-DOT tests are included in the scope of reportable actual knowledge violations.

Any violation based on an employer's actual knowledge of a driver's drug or alcohol use requires detailed, contemporaneous documentation in the Clearinghouse. Employers are required to report the details of the violation and upload evidence documenting the violation by the end of the third business day following the triggering event. Employers must report the date of the violation, a detailed description of the event, including the approximate time the violation occurred, and the names and contact information for any corroborating witness. Employers must also provide evidence to support each fact alleged in its description of the violation. In the absence of any tangible written, video, or audio evidence, the employer must attest to each fact alleged in an affidavit. Finally, the employer must verify that it provided all of the evidence supporting the violation to the employee.

The Agency intends, during the implementation phase, to build technology into the Clearinghouse that allows an employer to report an actual knowledge violation *only* if the employer attests that the report contains the required evidentiary support, as described above, and that the employer has provided a copy of the report to the employee. In the event that an employer falsely certifies that either of those requirements for submission of the report have been met, the employee may request that the information be removed from the Clearinghouse under new § 382.717(a)(2)(ii). Additionally, the employer would be subject to criminal and civil penalties as discussed below.

Reporting an actual knowledge violation to the Clearinghouse will have the effect of prohibiting a driver from engaging in his or her occupation; however, it typically is not accompanied by the type of paperwork or documentation that accompanies a test result. Given the severity of the consequences for the employee, we do not believe that an employer should be able to report an actual knowledge violation without evidence substantiating each allegation. Accordingly, these requirements create objective standards for documenting actual knowledge violations and hold employers accountable for what they report to the Clearinghouse.

In addition, as a part of the system design and implementation process, FMCSA intends to build functionality into the Clearinghouse that requires the person submitting information to state that it is true and correct and that will warn the user that the submission of false or misleading information is subject to civil and criminal penalties under § 382.507. These requirements are implemented to address concerns about coercion and harassment. They are designed to ensure that no employer reports any violation based on actual knowledge without providing evidence to support the violation. Moreover, no employer will be able to report any violation based on actual knowledge after the window for reporting has closed, eliminating the possibility for after-the-fact harassment or coercion.

Although a full query will alert an employer or prospective employer when a driver has a prohibition based on an employer's actual knowledge, the Clearinghouse will not release the details of that violation to anyone other than the driver. The circumstances of the violation have no bearing on whether the employee is eligible to perform safety-sensitive functions. All that is relevant is whether the driver is prohibited from performing safety-sensitive functions.

The Agency believes that this reporting requirement does not impose an additional cost burden on employers because a prudent employer would compile such documentation to support the termination or transfer of an employee to a non-safety-sensitive function, pending the driver's completion of the return-to-duty process.

Reporting Refusals To Test

Comment. OOIDA expressed concern regarding a situation that exists under the current drug and alcohol testing program, in which a false allegation of a driver's refusal to test may be made by the motor carrier as a means of harassing, coercing, or retaliating against the driver. OOIDA cited a specific example in which an employer reported a test refusal for a driver who was no longer in the motor carrier's employ at the time of the alleged refusal. Among other things, OOIDA recommended that FMCSA require the employer to provide supporting documents to prevent the motor carrier's submission of false or inaccurate reports of driver refusals, and to provide for the timely removal of such reports if they do occur.

Response. The Agency understands the serious consequences to a driver whenever any violation is reported to the Clearinghouse. Consequently, it is incumbent upon FMCSA to ensure, to the extent feasible, that employers do not report violations to the Clearinghouse that are false or inaccurate, and that employers who do so will be subject to appropriate sanctions. FMCSA notes, however, that we have no basis on which to anticipate that widespread fraud by employers subject to the Clearinghouse reporting requirements will occur. On the other hand, we acknowledge that unscrupulous employers could, as the commenter described, attempt to use the Clearinghouse for purposes of coercion or harassment when reporting a test refusal.

Accordingly, we are adding new documentation requirements related to the reporting, by an employer, or a C/TPA acting as the employer's service agent, of a driver's failure to appear for an alcohol or drug test. Under 49 CFR 40.261(a)(1) and 49 CFR 40.191(a)(1), failure to appear at a testing site after being directed to do so by an employer constitutes a refusal. In submitting such reports to the Clearinghouse under § 382.705(b)(3), an employer must provide documentation, such as a contemporaneous record or an affidavit, of the time and date that the driver was notified to appear at a testing site, as well as the time and date the driver was directed to appear; documentation, such as electronic mail or an affidavit, of the date the employee was terminated or resigned (*if applicable*); and documentation, such as a certificate of service or other evidence, showing the employer provided the driver with all the information reported under this paragraph. C/TPAs who report ''failure to appear'' refusals by self-employed drivers pursuant to § 382.705(b)(6) would be required to document, by affidavit or other means, that they were designated as the service agent for that employer at the time the ''failure to appear'' refusal occurred. The Agency envisions that employers, or C/TPAs acting as their service agents, could rely on a single affidavit to fulfill these documentation requirements, as long as all the required information is included. Further, we presume that the documentation of test notifications, a driver's employment status, or the existence of a valid business relationship between self-employed drivers and C/TPAs, are records reasonably kept in the ordinary course of business and would not need to be created solely to comply with these reporting requirements.

The NPRM proposed, under § 382.705(b)(1), that employers report test refusals to the Clearinghouse by the close of the business day following the date on which they obtained the information. In recognition of the fact that additional time may be needed to comply with these new documentation requirements for ''failure to appear'' refusals, in this rule we extend the reporting period for all test refusals to the close of the third business day following the date on which the violation information was obtained. Further, we note that the 3-year implementation period for this rule will afford employers ample opportunity to make any necessary adjustments to their record keeping systems in order to comply with these requirements.

Similar to the reporting requirements for actual knowledge violations, FMCSA intends that the Clearinghouse functionality will allow ''failure to appear'' refusals to be reported only if the employer certifies that the report contains the required documentation, as described above, and a copy of the documentation has been provided to the employee. As noted above, FMCSA also intends that the Clearinghouse functionality will require the person submitting information to state that it is true and correct and will warn the user that the submission of false or misleading information is subject to civil and criminal penalties under § 382.507. These requirements are implemented to address concerns about coercion and harassment.

Finally, in the event that an employer falsely certifies either that the required documentation has been provided, or that the employee has received a copy of the documentation, the employee may request that FMCSA remove the report from the Clearinghouse pursuant to new § 382.717(a)(2)(iii).

Reporting Return-to-Duty Test Eligibility

Comment. FMCSA proposed to require SAPs to report the date they determined that a driver successfully completed the education and/or treatment process as defined in 49 CFR part 40, subpart O, and was eligible for return-to-duty testing under part 382. A commenter said that the language referencing eligibility for testing was unnecessary and that employers could confuse it with a statement of fitness-for-duty determination. The commenter suggested limiting the SAP's determination to successful compliance with the SAP's recommendation.

Response. Section 382.705(d)(1)(iv), as proposed, accurately reflects the state of the law: Once a SAP determines that a driver has successfully completed the education and/or treatment process as defined in subpart O, the driver is eligible to take a return-to-duty test. *See* 49 CFR 40.305. FMCSA is unaware that employers have been confusing eligibility to take the return-to-duty test with a fitness-for-duty determination. Accordingly, FMCSA does not see any reason to change the language in this section.

Notice to Drivers and Employers of Entry, Revision, Removal or Release of Information (§ 382.707)

Comment. FMCSA proposed to notify a driver when information about that driver is entered, changed, removed, or released. Everyone commenting on this issue supported driver notification. OOIDA requested that drivers be able to obtain information identifying the person to whom records are released. SAPAA and TTD requested that FMCSA establish a time frame in which the driver would be notified about activity in the Clearinghouse. Driver Check asked how drivers licensed outside of the United States would be notified of Clearinghouse activity. SAPAA asked whether C/TPAs could receive notification on behalf of owner-operators. A commenter disagreed with the proposal to send notification of Clearinghouse activity via U.S. Mail and suggested that the rule provide for electronic notification.

Response. FMCSA understands that commenters have many questions about how the Clearinghouse will operate. Many of the operational details will be developed during the implementation phase, and thus are not appropriate for codification in FMCSA's rules. That said, it is FMCSA's intention that drivers will have access to their

Clearinghouse records, including information on who submits information and to whom information is released. With respect to timing, as soon as there is activity in a driver's Clearinghouse record, FMCSA will initiate notification. If a driver takes no action to designate an address or method of notification, the default method is to send notification via U.S. Mail to the current address on file with the driver's State of licensure. All drivers will have the option to provide an alternate electronic method of notification when they register with the Clearinghouse. The time it takes the driver to receive the notification would vary depending on which notification method is selected.

Drivers' Access to Information in the Clearinghouse (§ 382.709)

Comment. FMCSA proposed to grant drivers access to any information in their Clearinghouse record, except as restricted by law. Two commenters recommended that FMCSA prohibit drivers from having access to their own follow-up testing plans and prohibit employers from sharing that information with drivers. One of those commenters said that many employers believe that they are not prohibited from sharing follow-up testing plans with drivers. Boeing was concerned that owner-operators would have access to their follow-up plans. Finally, a driver requested clarification about how often he would be required to check his own records in the Clearinghouse.

Response. Section 382.705(d)(1)(v) of the NPRM proposed that SAPs report to the Clearinghouse the frequency, number, and type of follow-up tests as well as the duration of the follow-up testing plan. Section 40.329 currently requires that SAPs redact the follow-up testing information from any reports provided to employees so that they will not be aware of either the number or type of follow-up tests or the duration of the testing period. When DOT adopted this requirement in 2001, it noted the concern that providing employees with access to their follow-up plans ''could lessen the deterrent effect of follow-up tests'' (66 FR 41949 (August 2001)). However, the Privacy Act generally requires that an employee be permitted, upon request, access to information about him/her in their Clearinghouse record that is retrievable by that employee's name or other identifying particular. Accordingly, in order to ensure compliance with current part 40 requirements, in this rule FMCSA removes the proposed requirement in § 382.705 that SAPs report the follow-up testing plan to the Clearinghouse. SAPs will thus continue to provide that information directly to the employer as part of the follow-up evaluation report required by § 40.311(d). Therefore, follow-up testing plans will not be included in a driver's Clearinghouse record. Subsequent employers will be required to obtain the follow-up testing plan from the previous employer, if the driver's Clearinghouse record does not indicate that follow-up testing has been completed. In cases where a driver who is subject to follow-up testing is not currently employed, the gaining employer may obtain the driver's follow-up testing plan from the SAP, whose contact information will be available in the Clearinghouse. (*See,* also, discussion of this issue under ''Pre-Employment Investigations Under §§ 40.25, 382.413 and 391.23'', above.) Finally, nothing in this rule requires drivers to query the Clearinghouse. Drivers are, however, free to query their own records at any time and as often as they choose.

Clearinghouse Registration (Section 382.711)

FMCSA proposed that each employer and designated service agent register with the Clearinghouse before accessing or reporting information to the Clearinghouse.

Consumer Reporting and Background Screening Agencies

Comment. Many commenters, including Cahill-Swift, Driver IQ/CARCO, J.B. Hunt, Foley, NPTC, ABA, Schneider, C.R. England and several trucking associations, supported allowing consumer reporting and background screening agencies to access the Clearinghouse. A number of these commenters suggested that FMCSA expand the definition of ''service agent'' to include these third party service providers. OOIDA opposed third party service provider access to the Clearinghouse unless the service provider was acting specifically on behalf of an employer with a right to access the Clearinghouse. That commenter urged tight controls on Clearinghouse access.

Response. As noted previously, the final rule does not include a new definition of ''service agent,'' as proposed in the NPRM, because DOT recently expanded the definition of that term in 49 CFR 40.3 to apply to those persons who provide services in connection with the Clearinghouse. Accordingly, a consumer reporting or background screening agency acting on behalf of an employer in connection with fulfilling that employer's obligations under parts 40 and 382 may register to access the Clearinghouse, but those entities' use of the accessed information is limited. No third party service agent may disseminate, or make any other use of the information in the Clearinghouse except to communicate it directly to the specific employer that authorized the provider to query the Clearinghouse on its behalf. No third party service agent may publish or consolidate Clearinghouse information for commercial or other purposes.

SAP and MRO Access to Information in the Clearinghouse

Comment. SAPAA, American Substance Abuse Professionals, First Advantage and other commenters requested that SAPs and MROs have access to information in the Clearinghouse to help them assess return-to-duty treatment and education requirements.

Response. In FMCSA's judgment, Congress did not intend for anyone other than employers (or an employer's designated agent), SDLAs, the NTSB, and individual drivers to access the information in the Clearinghouse. (*See* 49 U.S.C. 31306a(h)–(j).) The statute limits employer use of the information to determine whether a driver has a drug or alcohol prohibition, while SDLAs may not use the information for any purpose other than determining the qualifications of a CDL applicant. The NTSB can use the information only in connection with a crash investigation. The statute does not contemplate using the information for MRO verifications and SAP assessment determinations. Moreover, we note that the DOT-wide drug and alcohol rules do not provide for MROs to use historical drug and alcohol information as a part of the verification process. Certainly, if a driver wishes to provide that information, he or she may. But it is not currently required as a part of the MRO's function. The Agency agrees that historical information may be relevant to the SAP's role in the return-to-duty process, and notes that nothing in this final rule prohibits SAPs from obtaining this information directly from the drivers under their care as a condition of providing an assessment.

Designation of Service Agents and Employees and Credentials Required for Registration

Comment. FMCSA proposed that employers must specifically designate those employees and service agents who are authorized to access the Clearinghouse on their behalf. FMCSA also proposed that MROs and SAPs must certify compliance with part 40 and provide evidence of the

professional credentials required by part 40. A commenter asked when the employer would designate its MRO and how it would make a change of designation. The same commenter said that some MROs are contracted with C/TPAs rather than individual employers. Several commenters asked what kind of evidence MROs and SAPs must provide concerning their professional credentials. First Advantage said that providing evidence of certification and licensing would be time consuming and expensive. An individual expressed concern about how FMCSA would verify or authenticate these credentials.

Several commenters asked whether an MRO working for several different organizations would need multiple registrations and whether different MROs working for one organization would need individual registrations. Finally, Driver IQ/CARCO suggested that employers and service agents should not have to verify their designated employees on an annual basis.

Response. An employer is not required to designate which MRO or MROs may report information to the Clearinghouse for that employer's employees. Furthermore, in an effort to eliminate the potential opportunity for employers to conceal violations of their own employees, FMCSA requires MROs, rather than employers, to report verified drug test results to the Clearinghouse. Requiring that MROs report verified drug test results independently will help preserve their impartiality while eliminating any potential for employers to exert pressure on the MRO during the verification process.

To register with the Clearinghouse, MROs and SAPs must upload documentation showing that they are qualified, in accordance with the requirements of 49 CFR 40.121 and 40.281, to act as an MRO or SAP. The type of documentation will vary depending on the individual MRO or SAP's professional qualifications. FMCSA does not consider this process to be time consuming. Under current rules, MROs and SAPs are otherwise required to maintain this documentation and provide it upon request to DOT agency representatives. (*See* 49 CFR 40.121(e) and 40.281(e).) Providing this information to the Clearinghouse as a condition of access is no different than responding to an agency request to produce the same information.

An MRO's registration will be personal to that individual and will depend on his or her credentials and other qualifications. Accordingly, each MRO must have his or her own personal registration regardless of the type of organization with which he or she is affiliated.

FMCSA did not make any changes to the requirement that employers annually verify the identity of employees who are authorized to access the Clearinghouse on their employer's behalf. All employers are obligated to keep their verifications updated, but in the event that an employer fails to do so, the annual verification procedure will ensure that unauthorized employees do not retain access to the Clearinghouse indefinitely.

Duration, Cancellation, and Revocation of Access (§ 382.713)

Comment. FMCSA proposed to make Clearinghouse registration effective for 5 years, cancel inactive registrations after 2 years, and revoke registration for failure to comply with applicable rules. Cahill-Swift asked whether non-payment of fees would result in revocation. OOIDA and another commenter stated that a registrant's access must be revoked if it fails to comply with the rules. OOIDA requested that a registrant's failure to comply with Clearinghouse rules be considered a pattern or practice of noncompliance under part 385, subpart K. Another commenter suggested that the Agency reconsider its proposal that FMCSA staff process Clearinghouse requests for motor carriers that have had their registrations revoked.

Response. While the details of payment options will be determined during the contract bidding process, FMCSA anticipates that payment would be made prior to an employer conducting a search or gaining access to information. Under this scenario, non-payment would simply result in the employer being unable to conduct a search.

In this final rule, FMCSA retains the right to revoke Clearinghouse registration for anyone who fails to comply with the applicable rules. However, an employer that had its registration revoked for failure to comply with the Clearinghouse rules would nonetheless have to ensure that its employees were not subject to prohibitions related to drug or alcohol violations. We anticipate that, in order to query or report violations, such employers would need to contact FMCSA's drug and alcohol program directly, so that program staff could conduct queries or enter violations into the Clearinghouse in a timely manner. The Agency recognizes that these alternative means of querying and reporting are not nearly as efficient as using the Clearinghouse directly and expects that revocation of an employer's access would occur only when an employer has egregiously violated the Clearinghouse's rules of use.

During the implementation phase, we will continue to explore more efficient means of querying and reporting for employers whose access has been revoked. We expect, however, that the civil and criminal penalties associated with an employer's failure to lawfully use the Clearinghouse (§§ 382.723(c) and 382.727) will provide, in most instances, an adequate deterrent to its misuse.

FMCSA's regulations governing patterns or practices of safety violations by motor carrier management are specifically limited to violations of safety regulations arising under 49 U.S.C. chapter 311, subchapter III. Authority for the Clearinghouse arises under 49 U.S.C. 31306a, which does not fall within chapter 311, subchapter III. Accordingly, instances of non-compliance with this final rule will not be considered for the purposes of establishing a pattern or practice of safety violations under part 385, subpart K.

Authorization To Enter Information Into the Clearinghouse (§ 382.715)

Comment. FMCSA proposed to require an employer to designate a C/TPA in the Clearinghouse before the C/TPA could enter information on the employer's behalf. A commenter asked whether this provision also applied to SAPs. Several commenters were confused by the section of the NPRM that proposed to require employers to designate SAPs for employees and requested that FMCSA clarify that employees, not employers, designate SAPs.

Response. As proposed, § 382.715 applied only to employer designations of C/TPAs. In the NPRM, FMCSA inadvertently stated that employers must designate SAPs in the Clearinghouse; that was not correct. In accordance with long-standing rules governing the selection of SAPs, the employer must provide the employee with the list of DOT-qualified SAPs and each employee is free to choose his or her own DOT-qualified SAP. (*See* 49 CFR 40.287, 40.289.) Accordingly, in this final rule, FMCSA amended § 382.715 to make clear that *employees* must designate SAPs to enter information about their own return-to-duty process. FMCSA makes this change to ensure that only the employee's selected SAP can report information to the Clearinghouse. FMCSA also made conforming changes to § 382.711 to make clear that service agents may

submit information on behalf of either an employer or an employee.

Procedures for Correcting Information in the Database (§ 382.717)

FMCSA proposed administrative procedures for correcting errors in a driver's Clearinghouse record.

FMCSA Review of Petitions for Correction

Comment. TTD, OOIDA and IBT stated that under the proposed process, it would take too long to resolve errors. TTD requested alternative ways to expedite the decision-making process. OOIDA requested that FMCSA respond to a petition within 14–21 days, depending on the nature of the correction. Yet another commenter requested a 5-day resolution period. CCTA stated that, if resolution of petitions were delayed, employers, MROs, and C/TPAs could face litigation. Another commenter recommended a simple appeals process, but did not include any specifics. An individual asked if it is the responsibility of the driver to update the Clearinghouse when a citation for a DUI in a CMV does not result in a conviction. Another seemed to have misunderstood this section, believing that drivers had only 30 days to submit a petition.

Response. In response to these comments, FMCSA decided to amend its proposal. This rule provides for a 14-day resolution period when a request for expedited treatment is granted in accordance with § 382.717(e). To be considered for expedited treatment, an inaccurate record, or a record not reported to the Clearinghouse in compliance with this section, must be preventing the petitioner from performing safety-sensitive functions. In addition, the petitioner must provide a complete petition including all documentation supporting his or her request. Failure to include all relevant information will impede the Agency's ability to resolve the petitioner's request in a timely manner.

The Agency also removed the proposed requirement in § 382.717(a) that petitions for review be submitted within 18 months of the date the allegedly erroneous information was reported to the Clearinghouse. Upon further consideration, we determined that drivers should have the option to request that inaccurate information be corrected for as long as the allegedly erroneous record is retained in the Clearinghouse. Finally, as further discussed below, FMCSA reduced the time in which it will resolve petitions for administrative review and notify the driver of its decision from 90 days, as proposed, to 45 days following the Agency's receipt of a complete petition. We also reduced the time in which we will complete an administrative review under § 382.717(f) from 60 days, as proposed, to 30 days.

Where an employer has reported a citation for DUI in a CMV to the Clearinghouse and that citation did not result in a conviction, the driver is responsible for submitting a request for removal under § 382.717(a)(2)(i).

Administrative Protections for Drivers

Comment. A commenter requested that the Clearinghouse contain contact information for those reporting information to the Clearinghouse. C.R. England, Foley, and other commenters requested complete, clear procedures for removing erroneous information. Some of those commenters also requested that FMCSA hold those who report erroneous information accountable. Other commenters were concerned with how FMCSA would handle false positives and identity theft. TTD stated that the credibility of the Clearinghouse depends on a fair and expeditious process for correcting errors. C.R. England wanted to ensure that the Clearinghouse would not prevent qualified drivers from working. IBT emphasized the need for accurate, up-to-date information.

Response. FMCSA believes that holding people who report to the Clearinghouse accountable for the accuracy of their submission is critical to the integrity of the Clearinghouse. When registering to access the Clearinghouse, all parties who have reporting obligations to the Clearinghouse will be required to provide identifying information, including name, address, telephone number and any other information needed to verify the registrant's identity (§ 382.711).

With respect to removing erroneous information, all procedures in part 40 continue to apply to the processing of drug and alcohol tests. A positive test that is reported but subsequently cancelled would not be a prohibition on driving and therefore would be removed from the Clearinghouse. If a positive test is incorrectly associated with a particular driver, regardless of whether the error results from identity theft, mistake, or administrative error, the affected driver would submit a petition under § 382.717 to correct the erroneously reported information. Additional remedies related to the correction or removal of violation reports submitted to the Clearinghouse are discussed below.

Privacy Act

Comment. OOIDA and another commenter requested that FMCSA include Privacy Act procedures in part 382, and one of those commenters requested FCRA procedures allowing an individual to submit a statement disputing or explaining their record. OOIDA stated that the Clearinghouse's authorizing statute requires FMCSA to comply with certain requirements for the release of information under the Privacy Act and the FCRA.

Response. MAP–21 requires that a ''release of information'' from the Clearinghouse comply with the applicable provisions of the Privacy Act and the FCRA (49 U.S.C. 31306a (d)(1) and (2)). The final rule complies with the ''release of information'' requirements of the Privacy Act, as defined in 5 U.S.C. 552(a)(b), which generally prohibit the disclosure of records ''except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains.'' As noted above, an employer may not request access to an employee's Clearinghouse record without prior electronic consent of the driver, and the Agency must receive electronic consent from the driver before releasing a Clearinghouse record to the employer (§ 382.703(b) and (d)). Other Privacy Act procedures to which commenters refer are currently set forth in 49 CFR part 10, ''Maintenance Of and Access to Records Pertaining to Individuals,'' the DOT-wide rules implementing the Privacy Act. The part 10 regulations include, for example, procedures for individuals to request that their records be corrected (49 CFR 10.41) and to file a concise written statement of disagreement with an agency's refusal to amend that individual's record (49 CFR 10.45). Further, we note that the System of Records Notice (SORN), to be issued for public comment following publication of this final rule, will describe the specific means by which the Agency intends to implement the Privacy Act requirements as they pertain to the Clearinghouse, including how individuals can exercise their rights under the Privacy Act.

As discussed above, information disseminated through the Clearinghouse is considered ''excluded'' communications for the purposes of the FCRA. Accordingly, no FCRA procedures are necessary.

Challenges to Clearinghouse Data

Comment. Under proposed § 382.717(c), petitioners were limited to contesting the accuracy of information

reported to the Clearinghouse and could not challenge the accuracy of positive test results or refusals. CCTA said that FMCSA should permit challenges to the accuracy and correctness of Clearinghouse reports, including refusals. The same commenter requested that FMCSA create a clear dispute resolution process, clarifying what can be challenged through the process. C.R. England requested that FMCSA clearly define the rights of drivers with respect to correcting errors on their records, including placing the burden of proof on the reporting party. Finally, two commenters objected to removing a report of a citation for DUI in a CMV, even if that citation did not result in a conviction.

Response. Nothing in this final rule creates a new right under part 40 to challenge the substantive outcome of a drug or alcohol test or the accuracy of a driver's refusal to test at a collection site or a refusal to test when notified by an employer to submit to testing. Individuals wishing to challenge the accuracy of information in their Clearinghouse record that is not otherwise addressed under § 382.717 may follow the Privacy Act procedures set forth in 49 CFR part 10, subpart E (Correction of Records).

Section 382.717 does, however, contain data correction procedures to ensure accuracy in reporting. For example, a driver may use the procedures set forth in this rule to challenge an incorrect name or CDL number, or to remove duplicate test results (that is, a single test result reported more than once to the Clearinghouse), but may not challenge the outcome of a test. To make it clearer that the procedures in § 382.717 pertain primarily to the correction of data that is erroneously reported in the Clearinghouse record (except as otherwise provided in § 382.717(a)(2)) and not for substantive challenges to drug and alcohol violation determinations, we re-designated paragraph (c) as paragraph (a) in this section. FMCSA will consider each correction request on a case-by-case basis and assess the validity of information presented in determining whether correction is warranted.

FMCSA notes the importance of the difference between a citation for DUI in a CMV and a conviction. Although a driver must immediately discontinue safety-sensitive functions after being cited for a DUI in a CMV, he or she may resume safety-sensitive functions without completing the return-to-duty process if that citation does not result in a conviction. Prohibiting a driver from performing safety-sensitive functions when a citation does not result in a conviction contravenes fundamental principles of fairness. Using the expedited procedures in § 382.717, the driver is responsible for requesting that FMCSA remove from the Clearinghouse an employer's report related to a citation that did not result in a conviction.

Comment. OOIDA recommended that if a driver submits a ''substantive'' request for correction with complete supporting documentation, the challenged information should not be released in response to an employer query until a decision has been made on the request for correction.

Response. As explained above, resolution of a challenge to the substance of a drug or alcohol violation—as opposed to simple data correction or the employer's failure to comply with reporting requirements under § 382.705(b)(3) and (5)—is outside the scope of this rule. Accordingly, FMCSA will not process such a request under § 382.717. We note that the withholding of violation reports pending resolution of a request to challenge the substance of a violation would be inconsistent with DOT-wide drug and alcohol compliance rules. Section 40.331 of those rules requires an employer to release information with proper consent and does not provide an exception for information that a driver is challenging as inaccurate. That rule is applicable DOT-wide and FMCSA does not have the authority to change that provision.

Moreover, it would not be in the interest of safety to withhold violation reports during the review period. FMCSA believes that to do so would encourage drivers to file frivolous or baseless challenges to accurate reports solely for the purpose of extending their ability to continue performing safety-sensitive functions. Adopting the commenter's suggestion would thus delay necessary rehabilitation and keep drug and alcohol abusers on the road. Neither of these outcomes serves the best interests of the driver or the motoring public.

Notification to Employers of Corrections

Comment. One commenter suggested that, after correcting errors, FMCSA should require individuals to alert employers that queried the driver's record that inaccurate data has been corrected.

Response. FMCSA agrees that alerting employers that they have viewed inaccurate information about a driver significantly contributes to the accuracy and fairness of the Clearinghouse. Accordingly, this final rule includes new § 382.717(g), requiring that the Clearinghouse update employers when they have viewed information that was subsequently corrected or removed under § 382.717(a)(2) or in accordance with the Privacy Act.

Availability and Removal of Information (§ 382.719)

Comment. FMCSA proposed that information about a violation would remain available to employers for a term of either 3 or 5 years, or until the driver completed the return-to-duty process, whichever is longer. Many commenters were in favor of a 5-year term. Some of these commenters recommended 5 years because they were concerned that the record would otherwise be removed before the driver completed all follow-up tests. Others favored 5 years because it aligns with part 382 record keeping requirements. The Institute of Makers of Explosives stated that it would support an even longer retention period. Another commenter supported a 10-year retention period.

On the other hand, a number of individual commenters were in favor of a 3-year term. Yet others were in favor of removing information as soon as the driver completed the return-to-duty process. Some commenters suggested that information be retained for 3 years from the driver's completion of the return-to-duty process. Another commenter suggested that information be made available for at least 5 years after the driver's return-to-duty date.

Response. After carefully considering FMCSA's statutory authority and the safety implications of this proposed requirement, the Agency concluded that 5 years is the appropriate document retention period. We explain the rationale for our interpretation below.

The basis for a 3-year retention period was 49 U.S.C. 31306a(f)(3), which requires prospective employers to use the Clearinghouse to determine whether any employment prohibitions exist on new hires and prohibits employers from hiring anyone to drive a CMV if that person has had a drug or alcohol violation during the preceding 3 years. This requirement mirrors current FMCSA regulations that also direct employers to investigate prospective hires' compliance with DOT drug and alcohol programs during the preceding 3 years. (*See* 49 CFR 391.23(e); *see also* 49 CFR 40.25, 382.413.) FMCSA interprets section 31306a(f)(3) to codify the investigation requirement in § 391.23(e) and to mandate that employers use the Clearinghouse to conduct the investigation. We implement that statutory requirement by amending § 391.23(e) to state explicitly that conducting a pre-employment

search of the Clearinghouse, as required by § 382.701, satisfies the employer's obligation to investigate a prospective employee's drug and alcohol compliance history (with limited exceptions as previously noted). We do not interpret anything in section 31306a(f)(3) to require FMCSA to retire these records after 3 years. Nor do we interpret that provision to prohibit FMCSA from releasing information after 3 years have passed. In fact, nothing in this section directs FMCSA to take any action with respect to records retention. To the contrary, this section simply places an obligation on employers to conduct the background investigation already required in § 391.23 using the Clearinghouse.

Moreover, nothing in either FMCSA's existing regulations or section 31306a(f)(3) prohibits employers from requesting or obtaining drug and alcohol compliance histories going back more than 3 years. In FMCSA's judgment, the 3-year pre-employment look—back is intended to be the regulatory (and now statutory) *minimum.* Employers have an interest in obtaining information going back more than 3 years because a driver's drug or alcohol violation does not necessarily expire after 3 years; that violation continues to prohibit that driver from performing safety-sensitive functions until he or she completes the return-to-duty process. As long as the driver's consent to release records is not limited to a 3-year look back, employers can request and obtain information about drug and alcohol compliance going back at least 5 years because, under § 382.401, employers are required to keep records of drivers' drug and alcohol violations for a minimum of 5 years. Whether and to what extent employers seek records going back further than 3 years is a decision that individual employers make based on their particular business needs. For example, a company's safety or risk management policies may dictate a more extensive background investigation than the regulatory minimum. How an employer chooses to balance its hiring needs, risk management, and safety policies is a matter for private decision making. Nothing in this final rule would change this practice.

The basis for the 5-year retention period is section 31306a(g)(6), titled ''retention of records,'' which directs the Agency to hold records of driver violations in the Clearinghouse for 5 years, except where a driver has failed to complete the return-to-duty process. Assuming a driver completes the return-to-duty process within 5 years, the statute directs the Agency to archive the records in a separate location. We interpret this section to require the Agency to make all records of driver violations available to authorized employers for 5 years or until the driver completes the return-to-duty process, whichever is longer. After that, the Agency must move them to the archives.

There are fundamental differences between the 3-year and 5-year look—back provisions in section 31306a that direct us to require a 5-year retention period in this final rule. For example, while the 3-year look back in section 31306a(f)(3) focuses on the scope of an *employer's* pre-employment background investigation, the 5-year look back in section 31306a(g)(6) focuses on the *Agency's* recordkeeping requirements. As discussed above, FMCSA interprets section 31306a(f)(3) to codify the existing drug and alcohol investigation requirements and to direct employers to conduct those investigations using the Clearinghouse. We interpret section 31306a(g)(6), on the other hand, to be focused exclusively on the matter of how long FMCSA should make records available to employers and what to do with those records after they should no longer be made available.

Comparing the text of sections 31306a(f)(3) and (g)(6) provides additional support for this interpretation. Section 31306a(f)(3) provides no recordkeeping guidance at all; it does not address what happens if a prospective hire has an unresolved drug or alcohol violation dating back more than 3 years, or what should happen to the records after the time for release has expired. Nor does it make any mention of the look-back period for annual queries; it is focused exclusively on how an employer should conduct a pre-employment background investigation. Section 31306a(g)(6), on the other hand, addresses all of these other contingencies and is, in fact, titled ''retention of records.'' Based on all of the considerations discussed above, we interpret MAP–21 to mandate a 5-year record retention period.

But, even in the face of statutory ambiguity, we believe that safety interests dictate that the 5-year retention period is appropriate. Overwhelmingly, employers who submitted comments to the docket requested that they have access to 5 years' worth of drug and alcohol compliance histories so that they could make informed decisions about the risk they assume when they hire drivers. Moreover, FMCSA believes the fact that a driver's compliance history will follow him or her for a minimum of 5 years will act as a significant deterrent to illegal drug and alcohol use. As we continue to raise the severity of the consequences for unsafe conduct behind the wheel, drivers who wish to be productive participants in the industry should modify their behavior accordingly.

Comment. FMCSA proposed that information on a citation for a DUI in a CMV would be removed within 2 days of FMCSA granting a request for a determination that the citation did not result in a conviction. A commenter requested that this be shortened to 1 day.

Response. FMCSA believes that 2 days are required to verify the accuracy of the documentation supporting the request. Accordingly, this provision remains as proposed.

Comment. Cahill-Swift requested that the date FMCSA uses to determine whether sufficient time has passed to remove a violation from the Clearinghouse be the date the test was administered instead of the date of the violation determination. The commenter stated that, generally, part 40 uses the test date as the point of reference for future action and requested that FMCSA modify proposed § 382.719(a)(4) to conform.

Response. FMCSA concluded that the date a record is submitted to the Clearinghouse is the violation determination date, which will be used to calculate the date information will be removed from the Clearinghouse. This approach is consistent with MAP–21 requirements.

Fees (§ 382.721)

Comment. FMCSA proposed to collect a reasonable fee from employers querying the Clearinghouse, but to grant drivers access to their own records without assessing a fee. Most commenters were concerned about keeping the fees low or eliminating them altogether. At least one commenter asked the Agency to identify what the actual fees will be. Commenters such as First Advantage, ABA, C.R. England, ATA and several others requested that FMCSA establish subscription-based fees. ATA, Florida Trucking Association and other commenters stated that FMCSA had previously expressed preference for a subscription-based fee structure. SAPAA requested that there be only a one-time registration fee. NTPC, Ohio Trucking Association, Cahill-Swift, Driver IQ/CARCO, J.B. Hunt, and American Moving and Storage Association requested that FMCSA permit employers to choose between subscription- and transaction-based fees. One commenter suggested that FMCSA use the PSP program as a model. ATA suggested that it not be used as a model, stating that the

contractor would earn excessive and unreasonable profits based on the PSP fee structure. ATA and others stated that they did not want the fees to greatly exceed the contractor's costs to manage the Clearinghouse. Minnesota Trucking Association suggested that subscription-based fees should be limited to $10–$20 per employer. SAPAA asked for details regarding the procedure for paying the fees. OOIDA requested that the cost for the limited query be much lower than the cost for the full query. An individual requested that the fees be set at a more ''reasonable'' level.

Response. FMCSA proposed § 382.721 to establish its authority to collect fees from entities required to query the Clearinghouse; however, FMCSA does not set the specific dollar amounts for user fees as a part of this rulemaking. We note, however, that under § 382.721 no driver will be required to pay a fee to access his or her own records in the Clearinghouse.

FMCSA will contract with a third-party to operate and maintain the Clearinghouse. Accordingly, Clearinghouse user fees will be determined through that competitive bidding process. One of the criteria for selecting a contractor to design and operate the Clearinghouse will be the ability to provide reliable, accurate, and cost-effective service to stakeholders. In its request for proposal FMCSA will require batch processing of data, subscription fees and pre-population of recurring data. This should minimize transaction costs relative to the time per test, per driver and per entity costing methodology used to estimate the costs of queries.

The Regulatory Impact Analysis (RIA) acknowledges that annual queries to the Clearinghouse impose costs on employers not present under the current regulations. The annual query is a statutory requirement pursuant to 49 U.S.C. 31306a(f)(4). The RIA demonstrates that the rule produces net benefits based on a conservative estimate of the incremental cost of annual queries calculated on a per transaction basis (*e.g.,* cost per test, cost per driver, etc.). For purpose of the RIA, the Agency conceptualized fees for limited and full queries and pre-employment queries based on its experience with Pre-employment Screening Program (PSP) Database. The fee for requesting a driver's record through PSP is $10.[3] Employers' use of the PSP to screen prospective employees is voluntary. The Clearinghouse is a mandatory program with an expected number of transactions well in excess of the number of PSP voluntary transactions. As a result, FMCSA believes Clearinghouse fixed costs will be spread over a larger volume of transactions than the volume of PSP transactions. These costs include, but are not limited to, hardware, software, labor costs for systems analysts and contractor staff available to assist Clearinghouse users.

Unauthorized Access or Use Prohibited (Section 382.723)

Comment. FMCSA proposed rules that would prohibit unauthorized access to or misuse of information obtained from the Clearinghouse. One commenter was generally concerned that employers would misuse Clearinghouse information. TTD was concerned that prospective employers would query the Clearinghouse for information about a driver even if that driver were not applying for a position that mandated a Clearinghouse check. The same commenter requested that FMCSA include safeguards to ensure that people requesting information are legitimate employers and that the information goes to them directly. Another commenter recommended that FMCSA anonymize information before using it for research purposes.

Response. FMCSA takes its mandate to secure sensitive information and protect driver privacy very seriously. Accordingly, this final rule includes provisions that prohibit the release of information without affirmative driver consent and audit functions to verify compliance with these rules. Anyone who violates those provisions is subject to civil and criminal penalties. FMCSA appreciates all public comments on how to address driver privacy protections and will take all of them into consideration as it moves into the implementation process.

Access by State Licensing Authorities (§ 382.725)

Comment. FMCSA proposed to grant each SDLA access to the Clearinghouse to determine whether an applicant for a CDL is qualified to operate a CMV. ATA, J.B. Hunt and other commenters suggested that SDLAs be required to check the Clearinghouse before issuing a CDL. ATA suggested that SDLAs be required to check the Clearinghouse annually. ATA and the Florida Trucking Association recommended that SDLAs be required to revoke a CDL when violations are reported to the Clearinghouse. Another commenter pointed out that one provision of MAP–21 makes SDLA access to the Clearinghouse mandatory while another provision makes it permissive and asked FMCSA to reconcile this inconsistency. The same commenter also requested guidance on what an SDLA is supposed to do with Clearinghouse information. A number of commenters recommended that the Clearinghouse automatically notify SDLAs when there are changes to a driver's record. Schneider suggested that law enforcement have access to the Clearinghouse. A commenter suggested that FMCSA enter into agreements to obtain DUI information from SDLAs. Driver Check asked whether Canadian licensing agencies would have access to the Clearinghouse.

Response. After careful consideration of these comments, FMCSA decided to require that SDLAs access Clearinghouse information prior to issuing CDLs. While 49 U.S.C. 31306a(h)(2) requires that FMCSA only provide SDLAs with Clearinghouse access, section 31311(a)(24) requires that SDLAs use that access prior to issuing or renewing a CDL. Accordingly, FMCSA amended proposed § 382.725(a) to *require* SDLAs to access a driver's information in the Clearinghouse in order to determine whether the driver is qualified to operate a CMV prior to issuing, renewing, upgrading, or transferring a CDL. FMCSA also made conforming changes in existing § 383.73 to implement section 31311(a)(24) and make clear that Clearinghouse access is mandatory prior to the SDLA taking action on a CDL. To ease the burden on States, FMCSA intends to integrate this function into the CDLIS pointer system, which connects the records of CDL holders in all 50 States and the District of Columbia. FMCSA will work closely with AAMVA, which administers CDLIS, to provide for the most efficient and least burdensome method of granting SDLAs access to the Clearinghouse.

The information in the Clearinghouse may have a direct impact on the ability of the individual to hold or obtain a CDL. If information available to an SDLA shows that a CDL applicant is not qualified to operate a CMV, that driver should not be issued a CDL. FMCSA will provide more detailed guidance on this subject in conjunction with its implementation of SDLA access to the Clearinghouse.

At this time, FMCSA will not pursue agreements with law enforcement agencies to obtain information on DUI convictions. That information is currently available from other sources and need not be duplicated in the Clearinghouse. Further, because the Clearinghouse is limited to drug and alcohol violations under parts 40 and 382, inclusion of other disqualifying

[3] *https://www.psp.fmcsa.dot.gov/psp/default.aspx.*

offenses under part 383 is not appropriate.

Finally, Canadian and Mexican licensing agencies will not have access to the Clearinghouse because Congress authorized access for only the SDLAs in the 50 States and the District of Columbia (49 U.S.C. 31306a(h)(2)). However, in accordance with its authority under section 31306a(b)(5), FMCSA intends to explore alternative ways in which information about drug and alcohol violations for CMV drivers licensed in Canada and Mexico can be made available to their respective licensing authorities and to U.S. law enforcement, including using the Foreign Convictions and Withdrawal Database under § 384.209(a)(2).

Penalties (§ 382.727)

Comment. FMCSA proposed that employers, employees, and service agents be subject to penalties for violating new part 382, subpart G. An individual commenter asked how MROs would be held accountable for reporting positive tests. Another commenter said this provision should be worded the same as § 382.507, with the addition of the word ''alleged.'' Southern Company said that alleged violators should be issued a notice of claim or violation allowing the alleged violator to contest the charge. That commenter also requested that penalties be reserved for egregious violations. WPCI asked what the penalty would be for an employer that does not comply with the requirements.

Response. Any employer, employee, or service agent, including an MRO, that does not comply with his or her responsibilities under part 382, subpart G, is subject to civil or criminal penalties under 49 U.S.C. 521(b)(2)(C). The employer, employee, or service agent may be issued a notice of claim or violation and afforded the opportunity to contest those charges in accordance with existing procedures in 49 CFR part 386. The type and severity of the penalty would depend on the specific circumstances surrounding the violation.

Regulatory Impact Analysis

Comment. In the RIA, FMCSA provided an explanation of the costs and benefits associated with the proposed rule. A number of commenters expressed concern about the cost to employers and the burden those costs would place on the motor carrier industry. Two commenters noted that the additional costs incurred by laboratories, MROs and CTPAs will be passed on to the employer, thereby further increasing the cost to employers.

Response. FMCSA recognizes that various entities interacting with the Clearinghouse will incur new or incremental costs of conducting business under the rule. FMCSA estimates these costs for the first entity that incurs the cost, as opposed to the entity that is ultimately responsible for paying for the cost. The RIA estimates the societal benefits, not the distributional benefits resulting from the avoidance of crashes.

Motor carriers will benefit from this rule in a variety of ways. For example, the Clearinghouse will automate the pre-employment drug and alcohol background investigation process, which will save motor carriers time and conserve resources. In addition, closing the loopholes that allow job-hoppers to evade the consequences of drug and alcohol violations will increase employers' confidence in the pre-employment screening process, allowing them to more easily identify drivers who are not eligible to drive. While these are not the only benefits that will accrue to employers, they are some of the more tangible immediate benefits that will offset the costs of compliance.

Comment. One commenter also noted that many benefits discussed in the RIA are only speculative while the costs are real and extremely burdensome for the passenger motor carrier industry, which is largely made up of small businesses.

Response. The Agency disagrees that the benefits discussed in the RIA are speculative. As discussed above, motor carriers will see real benefits in terms of fewer resources being required to conduct investigations related to drivers' drug and alcohol violations, an increase in the quality of drivers hired, and a reduction in the liability costs associated with unsafe drivers.

Comment. A commenter said that the costs associated with this proposal, combined with the costs associated with a recent NPRM concerning vehicle leasing regulations, impose significant administrative costs on passenger motor carriers, and requests the Agency consider less burdensome alternatives.

Response. FMCSA is sensitive to the cumulative costs of industry compliance with the Agency's regulations. In responding to comments received in response to the NPRM, FMCSA considered the burden placed on stakeholders and made changes to alleviate those burdens where possible. But the Clearinghouse and many of its individual components are mandated by statute; the Agency's ability to find less burdensome alternatives is constrained by these limitations.

Comment. Two commenters said that FMCSA's cost estimate did not include the cost of training for service agents. A commenter estimated that implementing program changes for service agents may require up to 800 hours over a 3 to 5 month period, and a minimum of a year may be required for the effective implementation of the final program data requirements to allow for advanced planning and budgeting.

Response. FMCSA included the cost of training for service agents in the Final RIA Section 6.6, titled ''Registration, Rule Familiarization, and Verification'', which identifies costs associated with familiarizing service agents with use of the Clearinghouse. As discussed above, there will be a 3-year compliance period, which we believe will give stakeholders adequate time to conduct necessary training and otherwise prepare for implementation of this final rule.

Comment. A commenter said that the Agency also did not consider the full impact of entering data and creating a new laboratory report and the commenter estimated that the additional data entry would require an additional 15 seconds per specimen keyed. Some commenters also noted that implementing a new CCF containing the additional information that would be required under this proposal could result in significant cost to laboratories and those responsible for manufacturing and shipping forms. These commenters estimated that system modifications would require 750–910 hours per DHHS-certified laboratory conducting testing for FMCSA regulated employers, and at least 8 to 10 months for development, testing, implementation, and training.

Response. FMCSA removed the laboratory reporting requirement from the final rule; accordingly, there are no longer any costs associated with this provision.

Comment. A commenter challenged FMCSA's estimate of 20 minutes for registration and rule familiarization, asserting that first-time registration alone will take more than 10 minutes. Further, the commenter asserted the Agency did not account for the annual costs of verifying information entered in the database.

Response. The Agency does not agree that 20 minutes underestimates the time required for registration and rule familiarization. Much of the registration process will be automated and only a minimum amount of information is required to complete registration. All the information necessary for registration—name, address, phone number, authorized employees, USDOT

Number, and professional qualifications—is otherwise required under FMCSA or DOT rules and should, therefore, be readily available. Moreover, FMCSA intends that the Clearinghouse will be designed to be interactive and user-friendly to maximize efficiencies. Finally, the cost of annual verification of authorized users was accounted for in the regulatory analysis.

Comment. A commenter said that FMCSA underestimated the number of drivers subject to the rule by 1 million and provided an estimate of 5,240,740 drivers (based on commenter's own data and available data from other sources, such as laboratory reports submitted to DOT).

Response. The commenter estimated the number of FMCSA drivers as the difference between the total number of tests reported by all modes, including FMCSA,[4] to DOT in 2012, pursuant to part 40, Appendix C and the commenters' estimates of number random and pre-employment tests at a 25 percent testing rate applied to each mode's (other than FMCSA) estimate of the total number of safety-sensitive employees. The number of blind tests and ''all other tests'' are assumed to be 1 percent and 2 percent of safety-sensitive employees, respectively are also subtracted from the total number of tests. There are a number of flaws in this methodology. The commenter equates the number of employees to the number of tests. This is an apple to oranges comparison. The commenter ignores that drivers may change employers during the year, or are ''multiple-employer drivers'' as defined in 49 CFR 390.5 and as a result may be tested multiple times per year. The analysis estimates pre-employment tests as if they are random, by applying a 25 percent random testing rate to each modes total number of safety-sensitive employees.

FMCSA relies on the statistics it publishes to determine the number of drivers affected by this rule.[5] Although the number of drivers in operation at any given time is subject to change due to a variety of reasons, FMCSA believes this is the best estimate of the number of drivers currently subject to FMCSA's drug and alcohol regulations. In the Regulatory Impact Analysis (RIA), FMCSA used its estimate of the number of CDL-holder to the cost of annual queries. All other costs and benefits are estimated using the results of FMCSA's Annual Drug and Alcohol Surveys.

Comment. Several commenters stated that the cost of the proposed rule was overstated in the RIA. Commenters said that costs associated with completing the return-to-duty process should not be attributed to the Clearinghouse, claiming that they are attributed to the return-to-duty process under 49 CFR part 40, not part 382.

Response. The Agency made the best estimate of costs based on available data, but concluded that it was better to err on the side of over-estimating rather than under-estimating costs. That said, we disagree that the return-to-duty costs should not be included in the total cost of the rule. Although the return-to-duty requirement arises out of the DOT-wide drug and alcohol regulations in 49 CFR part 40, the costs of completing the process are attributable to each DOT mode's individual drug and alcohol program. One effect of the Clearinghouse is that drivers will improve their compliance with the return-to-duty requirements. Instead of job-hopping, we expect that drivers with violations will either complete the return-to-duty process or exit the industry. Accordingly, we take into account the increased costs—and benefits—of this improved compliance.

Comment. One commenter suggested the estimated cost of $2.50 for limited annual queries is too high.

Response. FMCSA agrees that the query cost estimates in the RIA were conservatively high. As discussed above, the dollar amount for the fees will ultimately be determined in connection with a competitive bidding process. The Agency expects that the per-transaction cost, whether structured on a per query or subscription basis, will be significantly lower than estimated in the RIA. In the absence of reliable data, we chose to base our estimate on the only comparable information available: The PSP user fees. We recognize, as commenters have stated, that the volume of Clearinghouse transactions will greatly exceed the number of PSP transactions, creating efficiencies that should result in significantly lower user costs.

Comment. Another commenter questioned why a query would take 10 minutes, and suggested the Agency could reduce the burden by allowing large carriers to submit a batch list of drivers.

Response. We agree that there is the potential for further cost savings through batch processing of queries. Among the options the Agency plans to explore is providing employers the opportunity to conduct annual queries in batches. Nothing in the rule would foreclose that possibility. FMCSA will provide information to stakeholders on Clearinghouse functionality closer to the rule's compliance date.

Comment. A commenter stated that the labor rate and fringe rates used in Table 15 and subsequent tables in the RIA are not appropriate. According to the commenter, more than 80 percent of carriers have one to five power units. These carriers do not have office staff; a driver's wage should be used for these carriers. The commenter questioned whether the assumption in the RIA that larger carriers will assign a sensitive task to a very low level staff person is reasonable. In addition, a commenter contended that the fringe rate used in the RIA is too high because the Bureau of Labor Statistics (BLS) fringe rate includes costs (leave, overtime, etc.) that BLS also includes in its wage rates, which are based on gross pay. The commenter alleged that combining the two results in double counting, and many drivers do not receive many of the fringe benefits.

Response. We disagree that the labor rates are inappropriate for carriers operating five or fewer power units. In the Agency's experience, many small motor carriers use C/TPAs, which employ office staff to administer drug and alcohol testing programs. We anticipate that C/TPAs will continue to administer the programs, including Clearinghouse requirements.

In addition, we believe that the appropriate wage rates were used for developing query and test reporting transaction costs. The wage rate used to calculate the cost incurred by SAPs to report to the Clearinghouse results of return-to-duty progress is the BLS estimate of the hourly wage for Occupational and Safety Workers. The BLS hourly wage for heavy truck drivers was used to estimate driver consent costs. These rates are directly applicable to the individuals responsible for performing these tasks. The remaining cost estimates for registration, familiarization with the rule, pre-employment queries, designation of C/TPAs, and reporting of test results are based on the BLS wage rate for Bookkeeping, Accounting and Audit Clerks.

The Agency has no information indicating that administrative functions performed by employees of C/TPAs, MROs, SAPs, and other service agents require a higher level sensitivity for personal information. Medical service and health care providers performing similar functions in other industries

[4] The other modes are Pipeline and Hazardous Materials and Safety Administration, Federal Railroad Administration, Federal Transit Administration, Federal Aviation Administration and the U.S. Coast Guard.

[5] *http://ntl.bts.gov/lib/54000/54800/54841/2015 Pocket-Guide-March-30-2015-ForWebPublishing-508c.pdf.*

have recordkeeping and reporting requirements comparable to the testing and reporting requirements of this rule. The commenter did not offer any information in support of the proposition that individuals responsible for administrative tasks associated with the rule fall under a BLS occupation other than for Bookkeeping, Accounting and Audit Clerks. Nevertheless, in the final Regulatory Impact Analysis, a wage rate of $33.27 per hour was used to estimate the cost for SAPs to report driver information to the Clearinghouse following an initial assessment. It is the median wage rate estimated by the BLS for Occupational Health and Safety Specialists.[6] This occupational description is more closely related to health care professionals whose responsibilities include reporting highly sensitive personal medical information.

Finally, the hourly wage rate and fringe benefits rate do not result in double counting of employment costs. Fringe benefits include paid leave, supplemental pay, insurance (health and life), retirement and savings, and legally required benefits (*i.e.,* Social Security and Medicare).

Comment. A commenter said the estimated benefits of the proposed rule were understated in the RIA. While the RIA mentioned benefits to drivers such as ''improved health, quality of life and increased life expectancy,'' these benefits were not included in the estimate. The commenter noted other benefits resulting from the rulemaking were not mentioned, including decreased drug and alcohol abuse by drivers, increased compliance with the regulations by employers, and the overall program benefits associated with improved drug and alcohol testing data. The commenter suggested expanding the discussion of non-quantifiable benefits.

Response. We agree with the commenter that there are residual benefits from the proposed rule. However, they are not ''direct'' primary benefits, but rather secondary or tertiary ones. Furthermore, since they are largely unquantifiable, such benefits are mentioned, but do not warrant extensive analysis in the RIA.

Changes From the Notice of Proposed Rulemaking

This final rule makes the following changes to the NPRM in response to comments.

In § 382.107, we removed the proposed definition of ''positive alcohol test.'' We eliminated proposed § 382.404, which would have required laboratories to report summary statistics on drug tests. As a result of that change, we will not collect employers' USDOT Numbers on the ATF and CCF and, accordingly, removed those proposed requirements from § 382.123. Section 382.705 now requires that employers report all violations of FMCSA's drug and alcohol testing program that are identified in part 382, subpart B, including violations based on any type of actual knowledge. We updated the text in other sections of the final rule to reflect these changes.

In § 382.413, we extended the drug and alcohol background investigation requirement to cover the previous 3 years, consistent with the requirement in § 391.23. In both §§ 382.413 and 391.23, we added provisions that require employers to query the Clearinghouse in lieu of conducting the background investigations required under §§ 40.25 and 391.23, as the query satisfies these requirements for employers subject to § 382.701(a), with specified exceptions. We added language to § 382.415 to make it clear that a driver need not report a violation to the employer that administered the test.

In § 382.701(a) and (b), we added language to make it more clear which type of query, full or limited, an employer is required to conduct, as well as a clearer explanation of the difference between full and limited queries. In paragraph (c) of that section we extended the employer notification period from 7 to 30 days after a Clearinghouse query. In paragraph (e), we clarified that, 3 years after the compliance date of this final rule, an employer who maintains a valid registration on the Clearinghouse system meets the recordkeeping requirement.

In § 382.705(a), we changed an MRO's reporting period to 2 business days. In paragraph (b), we changed the employer's reporting period to the close of the third business day. We added language distinguishing between the types of refusals employers and MROs must report. We also added the requirement that employers report all drug and alcohol violations based on an employer's actual knowledge and established evidentiary requirements for those reports. New paragraph (b)(3) identifies documentation requirements for the reporting of ''failure to appear'' test refusals. New paragraph (b)(6) requires owner-operators who employ themselves as drivers to designate a C/TPA to comply with all employer related reporting requirements with respect to the individual's drug and alcohol use. We provided new language for paragraph (c) that makes clear that C/TPAs are subject to the reporting requirements of the employers on whose behalf they report. Paragraph (c) also makes clear that the employer remains responsible for compliance regardless of whether it uses a C/TPA. We simplified the language in the introductory paragraph of paragraph (d) and amended paragraph (d)(2) to make clear that a SAP has until the close of the following business day to report his or her required information to the Clearinghouse. In paragraph (e), we expanded the responsibility for reporting information to the Clearinghouse truthfully and accurately by prohibiting anyone from reporting information he or she should know is false or inaccurate.

In § 382.711(b), we added the requirement that an employer update its service agent designation within 10 days of making a change. In paragraph (d), we extended the rules governing C/TPA registration to all service agents. We updated the text throughout the final rule to conform to this change.

In § 382.715, we updated the language to make clear that an employer must authorize a C/TPA or other service agent before they can enter any information into the Clearinghouse on the employer's behalf. In response to comments, FMCSA added paragraph (b) to make clear that it is the employee, not the employer, who designates a SAP to enter information about the employee.

We made changes to the procedures in § 382.717 for correcting information in the Clearinghouse. Any request for correction must be addressed to FMCSA's Drug and Alcohol Program Manager and must include the words ''Administrative Review of Drug and Alcohol Clearinghouse Decision.'' We shortened FMCSA's period for expedited treatment of a request for data correction from 30 days to 14 days and added a provision that requires the Agency to notify employers that previously accessed information was subsequently corrected or removed. We re-ordered the paragraphs, so that paragraph (a) clearly states that this section may only be used for data correction, with three exceptions related to a DUI citation that did not result in a conviction and reporting violations based on an employer's actual knowledge and a driver's refusal to appear for a test.

In § 382.725, we clarified that an SDLA's access to the Clearinghouse is solely for the purpose of determining whether the driver is qualified to operate a CMV. Finally, we amended part 383 to implement the statutory

[6] Bureau of Labor Statistics, ''Occupational Employment and Wages,'' May 2014, *http://www.bls.gov/oes/current/oes299011.htm#ind.*

requirement that SDLAs query the Clearinghouse in connection with the issuance, upgrade, transfer, or renewal of a CDL.

In § 383.73, we made changes to reflect the new requirement that SDLAs check the Clearinghouse before issuing, renewing, transferring or upgrading a CDL.

In § 391.23, we made changes to require employers subject to § 382.701(a) to use the Clearinghouse to conduct drug and alcohol background investigations.

VI. Section-by-Section Explanation of Changes From the Notice of Proposed Rulemaking

FMCSA amends parts 382, 383, 384, and 391 in the following ways.

A. Part 382

Section 382.103

In § 382.103, ''Applicability,'' this final rule makes clear that the requirements of part 382 apply to service agents; otherwise this section remains as proposed.

Section 382.107

In § 382.107, this final rule includes definitions of ''Clearinghouse'' and ''Negative return-to-duty test,'' which remain as proposed. ''Clearinghouse'' means the database implemented by this final rule that contains records of drug and alcohol program violations. A ''negative return-to-duty test'' is a negative drug test or an alcohol test showing an alcohol concentration of less than 0.02.

In response to comments, FMCSA removed the definition of ''positive alcohol test'' for the reasons explained in this final rule's response to comments.

Section 382.123

The Agency proposed to amend this section to require anyone filling out an ATF or CCF to record the employee's CDL number and State of issuance on the form. That requirement remains as proposed. FMCSA also proposed to require that the person filling out the form record the USDOT Number or EIN of the employer requesting the test. FMCSA requested that information so that laboratories could produce annual reports summarizing drug testing activity for specific employers. As discussed in the response to comments on this matter, the Agency eliminated the annual summary requirement. Without the annual summary requirement, it is not necessary to record USDOT Numbers or EINs on the ATF or CCF.

Section 382.217

FMCSA proposed a new § 382.217 that would prohibit an employer from allowing a driver to operate a CMV if the Clearinghouse has a record that shows that the driver has not successfully completed the return-to-duty process required by 49 CFR 40.305. The core function of this section remains as proposed, with several changes to conform to updates in other sections of the rule. The first change removes reference to a ''positive alcohol test'' and replaces it with the specific alcohol test result that constitutes a violation (0.04 BAC or higher). The remaining several changes update § 382.217 to prohibit an employer from allowing a driver to operate a CMV if the Clearinghouse shows any violation of part 382, subpart B, including violations based on actual knowledge of drug or alcohol use. This conforms to changes in § 382.701, discussed in the relevant response to comments section of this rule.

Section 382.401

Section 382.401, as proposed, was intended to require employers to keep records of all reportable drug and alcohol violations for a minimum of 5 years. As discussed in the response to comments on this issue, the proposed changes caused some confusion. Accordingly, this final rule makes clear that employers are required to keep records of all employee drug and alcohol violations for a minimum of 5 years.

Section 382.405

The changes to § 382.405 remain as proposed. Section 382.405(d) requires service agents who maintain records for an employer to make copies of all DOT drug and alcohol test results available to the Secretary, any DOT agency, or any State or local officials with regulatory authority over the employer. Paragraph (e) authorizes FMCSA to provide the NTSB access to a CDL driver's records in the Clearinghouse when that driver is involved in a crash under investigation by the NTSB and requires employers to disclose information related to the administration of post-accident testing following the crash under investigation.

Section 382.409

The changes to § 382.409 remain as proposed. The changes add the Clearinghouse to the list of entities to which an MRO or C/TPA is authorized to release a driver's drug test results. They also amend the title of § 382.409 to add the words ''or consortium/third party administrator'' so that it reads ''Medical review officer or consortium/third party administrator record retention for controlled substances'' to reflect more accurately the contents of the section.

Section 382.413

In response to comments, this final rule includes changes to § 382.413. That section previously required employers to request drug and alcohol testing information from an employee's employers during the preceding 2 years. First, we changed the scope of § 382.413 to cover drug and alcohol testing information during the preceding 3 years. This change reconciles § 382.413 with § 391.23(e), which currently requires employers to gather information going back 3 years. Second, § 382.413 now provides that an employer who queries the Clearinghouse does not have to make an additional request to previous FMCSA-regulated employers for this information once the Clearinghouse has been in effect for 3 years. In other words, querying the Clearinghouse will satisfy the § 382.413 background investigation requirement—but only with respect to FMCSA-regulated employers. Employers must continue to request information from previous employers if the employee was subject to drug and alcohol testing under an employer regulated by one of the other DOT modes.

For example, an FMCSA-regulated employer would have to request drug and alcohol information about employees who were subject to testing under Federal Railroad Administration, Federal Aviation Administration, or other modes' regulations. If an employee violates the drug or alcohol testing program with an employer regulated by another mode, that person may not perform safety-sensitive functions for motor carrier employers until he or she successfully complies with the part 40 return-to-duty process. Because records of violations with non-FMCSA-regulated employers will not be reported to the Clearinghouse, employers must continue to request those records directly from the previous employers.

In addition, we added an exception pertaining to drivers who are subject to follow-up testing who have not completed their follow-up testing plan. In such cases, the gaining employer is required to request that information from the previous employer since the number, type, and duration of follow-up tests will not be reported to the Clearinghouse.

Section 382.415

Section 382.415 remains largely as proposed. That section requires an employee to notify all current employers when he or she violates the drug and alcohol rules in part 382. FMCSA intends that employees notify all current employers, aside from the employer that administered the test. The purpose of this section is to place an obligation on an employee with multiple employers to notify all other employers when he or she has a drug or alcohol violation with one of them. As discussed above, there was some confusion about how this section should work. Accordingly, the Agency amended the proposal to make clear that the employee need not notify the employer that ordered the test or documented the violation.

Section 382.601

Section 382.601 remains largely as proposed. That section requires an employer to promulgate a policy on the misuse of drugs and alcohol and to provide educational materials on the subject to its new and current employees. This rule requires that materials required under this section put employees on notice that information on drug and alcohol violations will be reported to the Clearinghouse. FMCSA made several changes to the proposal to conform to other changes in this final rule. The first change removes reference to a ''positive alcohol test'' and replaces it with the specific result that constitutes a violation (0.04 BAC or higher). The remaining changes update the type of violations reportable to the Clearinghouse to include all violations in part 382, subpart B, including those based on actual knowledge of drug or alcohol use.

B. Part 382, Subpart G (§§ 382.701 Through 382.727)

Section 382.701

This section sets out the basic requirements for querying the Clearinghouse. Paragraph (a) requires employers to conduct a pre-employment query on all prospective drivers to determine if they have drug or alcohol program violations. We made two organizational changes to paragraph (a). First, we added a paragraph title, ''Pre-employment query required'' to alert the reader to the subject of the paragraph. Second, to provide better organization for the reader, we separated paragraph (a) into two subparagraphs. In paragraph (a)(1), we establish the employer's requirement to conduct a pre-employment query and identify the different types of drug and alcohol violations that will be searched in the query. We updated the language in that paragraph to remove reference to a positive alcohol test, as discussed above. Also as discussed above, we updated the language in this section to include all of the prohibitions in part 382, subpart B, that constitute violations of FMCSA's drug and alcohol program, including all violations based on an employer's actual knowledge, as defined at § 382.107.

In paragraph (a)(2), we added new language to state explicitly that an employer must have a prospective employee's specific consent for a full release of information before it can conduct a pre-employment query. We refer to this type of query as a full query, meaning that the consent obtained grants the employer access to information about that driver. This is distinguished from a limited query, described in § 382.701(b)(2), which tells the employer whether there is any information in the Clearinghouse about that driver, but does not provide access to the information without further consent.

For paragraph (b), we added a title, ''Annual query required,'' and separated the paragraph into three subparagraphs for organizational reasons. Paragraph (b)(1) requires employers to conduct a Clearinghouse query for all employees at least once a year to find out whether there is any information in the Clearinghouse about those employees. Paragraph (b)(2) explains that an employer may, but is not required, to conduct a full query. The employer may choose, instead, to conduct a limited query, which alerts the employer to whether information exists in the Clearinghouse about a particular employee, but does not release the substance of the information without additional specific consent from the employee. Paragraph (b)(3) tells the employer that if it conducts a limited query and the Clearinghouse reports back that it contains information about a particular employee, the employer must conduct a full query within 24 hours to determine whether that information shows that the employee is prohibited from performing safety-sensitive functions. Once 24 hours pass, the employer may not allow the employee to perform safety-sensitive functions until it has completed the full query and the results show that the driver does not have any violations prohibiting him or her from performing safety-sensitive functions. We added language making this last point more clear.

As proposed, paragraph (c) provided that the Clearinghouse would notify employers if new information appeared in the Clearinghouse within 7 days of conducting a query. We include two changes to this paragraph in this final rule. First, similar to changes made to paragraphs (a) and (b), FMCSA added the following title for organizational purposes: ''Employer notification.'' Second, as discussed in the response to comments on this matter, FMCSA extended the new information notification period to 30 days.

Paragraph (d) prohibits an employer from allowing an employee to drive if its Clearinghouse query shows that the employee has committed one of the part 382, subpart B, drug and alcohol violations without completing the return-to-duty process. We made two changes to this paragraph as a part of this final rule. First, like changes we made in the preceding paragraphs, we added a title for organizational purposes: ''Prohibition.'' Second, we updated the language in this section to include all of the prohibitions in part 382, subpart B, that constitute violations of FMCSA's drug and alcohol program, including those based on an employer's actual knowledge.

Paragraph (e) remains substantively as proposed. It requires employers to maintain records of all Clearinghouse queries. FMCSA amended this section to clarify that the employer can maintain those records on the Clearinghouse system so long as its Clearinghouse registration is valid. Regardless, nothing prohibits an employer from maintaining the records as a part of its own recordkeeping system. FMCSA made only one change to proposed paragraph (e): It now includes a title, ''Recordkeeping required,'' for organizational purposes.

Section 382.703

Section 382.703 remains largely as proposed. This section provides that no employer may obtain information about an individual from the Clearinghouse without that individual's express consent. It also provides that an employee cannot perform safety-sensitive functions if he or she refuses to give this consent. We updated the language in this section to make clear that the employee grants consent for the employer to view information about all of the driver's part 382, subpart B drug and alcohol violations, including those based on the employer's actual knowledge, as well as return-to-duty information. We also make clear, in new paragraph (d), that the driver must provide electronic consent to FMCSA before the Agency releases

Clearinghouse records to the employer. Paragraph (d), as it appeared in the NPRM, pertained to a driver's consent for FMCSA to release information under § 382.701(c). The text of that paragraph is unchanged and is now new paragraph (e).

Section 382.705

Section 382.705 describes who is responsible for reporting information to the Clearinghouse. This paragraph contains several key changes and additions. Paragraph (a) lays out MRO reporting responsibilities, which include reporting verified positive, adulterated, or substituted test results and those results the MRO determines to be a refusal. This paragraph explains what information the MRO will report, including information identifying the driver and test results. The MRO is required to report this information within 2 business days of reaching a determination. But if the MRO subsequently makes a change to its determination, it must report that change by the close of the next business day.

In response to comments, the Agency changed the initial MRO reporting period from 1 day to 2 days. Second, FMCSA simplified the instructions for recording a driver's CDL number and State of issuance. Finally, the Agency eliminated the requirement that MROs report the requesting employer's USDOT Number or EIN. As discussed above, FMCSA will no longer be collecting USDOT Numbers or EINs.

Paragraph (b) lays out employer responsibilities for reporting an alcohol confirmation test with a concentration of 0.04 or higher, alcohol refusals, drug refusals that do not involve an MRO determination, negative return-to-duty tests, and successful completion of follow-up tests. The NPRM required the employer to report this information by the close of business the day after having received notice of the determination. In order to accommodate the employer's need to comply with new documentation requirements for reporting certain violations, described below, we changed the reporting period to the end of the third business day following the date on which the employer obtained the violation information.

When an employer has actual knowledge, as defined at § 382.107, that an employee has used alcohol on duty, before duty, or prior to taking a post-accident test, or that an employee used drugs in violation of FMCSA's drug and alcohol regulations, the employer must report that use to the Clearinghouse. The employer must report *all* instances of actual knowledge of prohibited drug or alcohol use by the close of the third business day following the day the employer became aware of the use. As discussed in the response to comments, paragraph (b) requires the employer to report detailed information on its knowledge of the drug or alcohol use and further requires the employer to provide evidence to substantiate the employee's violation, and to demonstrate that this evidence was provided to the employee. No employer may report actual knowledge of drug or alcohol use after the close of the third business day following the day the employer became aware of the use.

Paragraph (b)(3) also identifies employer responsibilities for reporting ''failure to appear'' test refusals to the Clearinghouse. As explained in the response to comments, paragraph (b) identifies the types of documentation that employers, and the C/TPAs' designated as their service agents, must submit each time they report a ''failure to appear'' refusal and requires the employer to demonstrate that the documentation was provided to the employee.

New paragraph (b)(6) requires owner-operators who employ themselves as drivers to designate a C/TPA to comply with all employer-related reporting requirements with respect to the individual's drug and alcohol use.

Paragraph (c) lays out a C/TPA's Clearinghouse reporting responsibilities. In the NPRM, we provided a detailed list of all of the information an employer could ask a C/TPA to report. The comments we received indicated, however, that this approach caused confusion about how a C/TPA reports to the Clearinghouse. To eliminate this confusion, this final rule simply states that when a C/TPA acts on behalf of an employer, that C/TPA stands in the shoes of the employer with respect to all of the rights and responsibilities the employer delegated to it. Accordingly, a properly authorized C/TPA can fulfill any of an employer's responsibilities under paragraph (b). That said, an employer does not discharge its responsibilities under paragraph (b) when it delegates compliance to a C/TPA; the employer remains responsible for compliance with paragraph (b) regardless of whom it assigns to interact with the Clearinghouse on its behalf.

Paragraph (d) requires a SAP to report to the Clearinghouse when he or she conducts an initial assessment of an employee and when an employee completes the return-to-duty process. The NPRM proposed that the SAP make these reports within 1 business day following the day of the event or determination that triggered the reporting obligation. After consideration of comments, we changed the reporting period to require SAPs to complete their reporting requirements by the close of the business day after the event that triggered their reporting responsibility. In addition, as discussed above in the response to comments, we no longer require that the SAP report the follow-up testing plan to the Clearinghouse. SAPs will continue to provide that information directly to employers in accordance with 49 CFR 40.311.

Paragraph (e) obligates anyone reporting to the Clearinghouse to do so truthfully and accurately. As discussed in the Response to Comments section, we changed this final rule to prohibit anyone from reporting anything he or she knows or *should know* to be untruthful or inaccurate.

Section 382.707

Section 382.707 remains as proposed. This section requires FMCSA to notify a driver when information about that driver is entered in, revised, or removed from the Clearinghouse. It also requires FMCSA to notify a driver when information from the Clearinghouse is released to an employer and to state the reason for the release. The Agency will send a letter by U.S. Mail to the address on record with the SDLA that issued the driver's CDL unless drivers provide an alternate address or method of communication, such as electronic mail (email).

Section 382.709

Section 382.709 remains essentially as proposed. This section grants a driver the right to review information in the Clearinghouse about himself or herself. This section now makes clear that, in order to access such information, a driver must register with the Clearinghouse.

Section 382.711

Under § 382.711(a), all users must register with the Clearinghouse before querying or reporting any information. In the proposal, this paragraph stated that only employers and their service agents had to register. This language inadvertently excluded service agents that work for employees, *i.e.* SAPs, who also must register. We corrected this oversight by changing the language in this section to provide that each employer and each service agent must register with the Clearinghouse.

Paragraph (b) explains what an employer must do to register with the Clearinghouse. The employer must provide contact information, USDOT

Number, names of authorized users, and authorizations for service agents, if the employer uses them. The employer must keep its list of authorized users current, but at a minimum, will be required to re-authorize them annually. With respect to service agents, FMCSA added the requirement that employers must update their designations within 10 days of a change.

Paragraph (b) is different from the proposal in three ways. First, with respect to the contact information an employer must provide, we removed reference to the EIN. FMCSA will not allow a motor carrier to use an EIN in lieu of a USDOT Number for identification purposes. All motor carriers must use their USDOT Numbers to register. If an employer does not have a USDOT Number, it will leave this field blank. Second, we updated the language in paragraph (b)(3) to include service agents (other than C/TPAs) as entities that can act on an employer's behalf for querying and reporting to the Clearinghouse. Finally, to eliminate any confusion about an employer's obligation to update service agent designations, we included the 10-day period for reporting a change in service agent designation.

Paragraph (c) is the same as was proposed in the NPRM. It explains what MROs and SAPs must do to register with the Clearinghouse. MROs and SAPs must provide contact information, certification that the MRO or SAP meets the minimum requirements in part 40 for MROs or SAPs, and documentation that shows that the MRO or SAP meets those minimum qualifications or training requirements. For example, an MRO would be required to provide documentation showing that he or she is a licensed physician, as required by § 40.121(a), and has completed the required training or re-training requirements in § 40.121(c). He or she would also be required to certify that he or she has the basic knowledge and experience related to drug testing and DOT regulations, as required by § 40.121(b). A SAP would be required to provide documentation showing that he or she is licensed or certified to provide substance abuse counseling in accordance with the requirements of § 40.281(a), has completed the qualification training in § 40.281(c), and has completed the continuing education requirements in § 40.281(d). He or she would also be required to certify that he or she has the basic knowledge and experience related to substance abuse diagnosis and treatment, SAP functions, and DOT drug and alcohol testing regulations required by § 40.281(b).

Paragraph (d) remains largely as proposed. It explains what C/TPAs and other service agents must do to register with the Clearinghouse. They must provide contact information and names of authorized users. Similar to employer requirements in paragraph (b), C/TPAs and other service agents must verify their authorized users annually. The Agency made some changes to the text to make clear that these registration requirements apply to C/TPAs as well as other service agents acting on an employer's behalf.

Section 382.713

Section 382.713 remains as proposed. It explains the terms under which Clearinghouse registrations remain active, or are revoked or cancelled. The initial Clearinghouse registration term is 5 years unless the Agency takes action to revoke or cancel it. The Agency will cancel any registrant that does not use the Clearinghouse for 2 years. The Agency also has the authority to revoke the Clearinghouse registration of anyone who does not comply with Clearinghouse regulations.

Section 382.715

Section 382.715(a) requires employers to authorize C/TPAs or other service agents to access the Clearinghouse on their behalf before the C/TPA or other service agent can enter information on their behalf into the Clearinghouse. Similarly, paragraph (b) requires employees to authorize a SAP before the SAP can enter information about the employee's return-to-duty process.

The final rule differs from the proposal in several respects. Originally, this section had only one paragraph that required employers to designate C/TPAs acting on their behalf. Changes implemented in this final rule require employers to designate any other service agents authorized to enter information on the employer's behalf as well. That original paragraph is now paragraph (a). In response to comments, FMCSA added paragraph (b) to make clear that it is the employee, not the employer, who designates a SAP to enter information about the employee.

Section 382.717

Section 382.717 explains the procedures for a driver to request that FMCSA change information reported incorrectly to the Clearinghouse. We reordered the paragraphs in the final rule to highlight that the procedures in this section may be used primarily to request data correction. Accordingly, paragraph (a), which was proposed as paragraph (c), explains that no driver may use the procedures in § 382.717 to challenge a particular test result. The procedures are for challenging information that was not accurately reported. Paragraph (a) contains two exceptions related to reporting violations based on an employer's actual knowledge of drug or alcohol use and one exception related to reporting a driver's failure to appear for a test. The first remains as proposed: A driver may petition the Agency to remove a violation when it is based on the driver receiving a citation for DUI in a CMV and the citation does not result in a conviction. The second is new: A driver may petition the Agency to remove a report of a violation that does not meet the minimum reporting requirements, including evidentiary requirements, provided in § 382.705(b)(5). The third exception is also new: A driver may petition for removal of a report of a ''failure to appear'' refusal that does not meet the reporting requirements in new § 382.705(b)(3).

Paragraph (b), which was proposed as paragraph (a), provides that the petition must include information identifying the driver and the information he or she wants to be corrected, the reasons he or she believes the information is inaccurate, and evidence supporting his or her challenge. As noted above, we removed the proposed requirement that petitions be submitted within 18 months of the date the allegedly incorrect information was reported to the Clearinghouse.

The address for submitting the petition is in paragraph (c), which was originally proposed as paragraph (b). FMCSA added ''Attention: Drug and Alcohol Program Manager'' to the address as a part of this final rule. In addition, we added the option for electronic submission of petitions through the Clearinghouse system; the precise means by which electronic submission is accomplished will be addressed during the implementation process. In order to reflect the addition of an electronic submittal option, we changed the title of the paragraph from ''Address'' to ''Submission of Petition''.

Paragraph (d) provides that FMCSA will inform the driver of its decision to remove, retain, or correct the driver's information in the Clearinghouse and will explain the basis for its decision. The Agency reduced, from 90 days (as proposed) to 45 days, the time in which it will respond to petitions submitted under this section. We believe that the electronic submission of petitions will allow us to process those requests more efficiently.

Paragraph (e) provides an option for drivers to request expedited treatment. A driver may request expedited

treatment only if the driver is prohibited from performing safety-sensitive functions because of the information incorrectly reported under paragraph (a)(1) or (2). If the request is granted, FMCSA will subsequently issue a decision within 14 days of receiving a complete petition. Submission of a petition for correction does not authorize a driver to resume safety-sensitive functions or otherwise stay the effective date of the driver's prohibition on performing safety-sensitive functions. Paragraph (e) remains as proposed with one exception. This final rule shortens the time for FMCSA to consider an expedited request from 30 to 14 days. The reasons for this change are discussed in the response to comments discussion.

Paragraph (f) explains that a driver may seek administrative review if FMCSA does not grant his or her petition for correction. The driver must submit a request, with the words ''Administrative Review of Drug and Alcohol Clearinghouse Decision'' conspicuously noted at the top of the document, to FMCSA's Associate Administrator for Enforcement. The request must explain the basis for administrative review and provide all supporting explanations and documents. FMCSA will issue a decision within 30 days and that decision will constitute the final agency order on the matter. Paragraph (f) remains largely as proposed, except that this final rule added the requirement for prominent display of ''Administrative Review of Drug and Alcohol Clearinghouse Decision'' at the top of the request and the option to submit the request electronically through the Clearinghouse. We reduced the time in which the Agency will complete its administrative review from 60 days (as proposed) to 30 days because we believe the electronic submission of requests for review will allow for a speedier resolution. The 30-day time frame is also consistent with the administrative review provisions of the Privacy Act.

In response to comments, we added a new paragraph (g). That paragraph explains that after FMCSA corrects or removes information in response to a petition, it will notify any employer that viewed the incorrect information that a correction has been made.

Section 382.719

Under § 382.719, the Clearinghouse will stop releasing information about a driver's drug and alcohol violations under the following conditions: (1) The SAP reports all of the required information about the initial assessment and driver completion of the return-to-duty process; (2) the employer reports that the driver had a negative return-to-duty test; (3) the employer reports that the driver completed all of the prescribed follow-up tests; and (4) 5 years have passed since the date of the violation determination, which is the date the violation was submitted to the Clearinghouse. Unless all of these conditions are satisfied, information in the Clearinghouse will remain available to employers with authorized access. As previously noted, exceptions apply to records otherwise removed from the Clearinghouse, such as a DUI citation not resulting in a conviction or records removed in accordance with § 382.717. Once these conditions are satisfied and the information is removed, FMCSA will maintain an archived record of this information—not available to employers—for internal use such as research into the effectiveness of the drug and alcohol program, auditing for compliance with this rule, and identifying non-compliant employers or employees for enforcement action.

This final rule differs from the proposal in one critical aspect: How long the Clearinghouse will make records available to employers before moving them to the archives. In the NPRM, FMCSA announced a dual proposal concerning the searchable records retention period. Based on the language of MAP–21, the Agency concluded that there was a basis for making the minimum period for which employers could search records either 3 or 5 years. After considering comments, we conclude that the statutory provisions in MAP–21, as well as over-arching safety considerations, compel the Agency to implement the 5-year retention period. A full discussion of the Agency's analysis is in the response to comments.

Section 382.721

Section 382.721 remains as proposed. It authorizes FMCSA to collect fees from entities that are required to query the Clearinghouse. The Agency is prohibited, however, from collecting fees from drivers accessing their own records.

Section 382.723

Section 382.723 remains as proposed. It prohibits unauthorized access to the Clearinghouse, inaccurate or misleading reporting to the Clearinghouse, and unauthorized disclosure of information obtained from the Clearinghouse. Employers are limited to using information from the Clearinghouse for determining whether a driver is prohibited from operating a CMV. And employers may not divulge any information to anyone not directly involved in that determination. Anyone who violates the requirements of this section is subject to the civil and criminal penalties in § 382.507. This section would not prohibit FMCSA from accessing information in the Clearinghouse for research, auditing, or enforcement purposes. For example, FMCSA could use the information in the database to identify trends in testing data that could help the Agency focus its oversight activities.

Section 382.725

Section 382.725 requires each State chief commercial driver's license official to obtain information in the Clearinghouse about an applicant for a CDL for the purpose of determining whether that applicant is qualified to operate a CMV. The applicant is not required to grant prior consent; an applicant is deemed to have granted consent by virtue of applying for a CDL. The chief commercial driver's license officials are required to protect the privacy and confidentiality of the information they receive. Failure to comply will result in the official losing his or her right of access.

As proposed, this section authorized, but did not require, States to access the Clearinghouse. As discussed in the response to comments, section 31306a(h)(2) makes access permissive, but MAP–21 amendments to section 31311(a) make it mandatory. To implement the amendments to section 31311(a), this final rule will require that States query the Clearinghouse to determine whether an applicant is qualified under FMCSA's regulations to operate a CMV.

FMCSA is aware that some States have licensing standards that prohibit applicants from obtaining CDLs if they failed or refused a drug or alcohol test, or have other drug and alcohol program violations. This rule also will permit those States to use the information in the driver's record, obtained from the Clearinghouse, to determine whether the individual is qualified to operate a commercial motor vehicle in accordance with applicable State laws and regulations. This implements the permissive access requirements of section 31306a(h)(2) and reconciles the two different types of access referenced in that section and the amendments to section 31311(a).

Section 382.727

Section 382.727 remains as proposed. It explains that there are civil and criminal penalties for violations of the Clearinghouse regulations. As stated above, 49 CFR 382.507 already

establishes civil and criminal liability for employers and drivers who violate any provision of 49 CFR part 382; however, § 382.727 extends civil and criminal liability to all employees, medical review officers, and service agents for violations of 49 CFR part 382, subpart G.

C. Part 383

Section 383.73

This final rule includes changes to the CDL standards in part 383 that were not proposed in the NPRM. As discussed above and in the response to comments, these changes implement the statutory requirement that SDLAs obtain driver information from the Clearinghouse before issuing a CDL. Accordingly, new paragraphs (b)(10), (c)(10), (d)(9), and (e)(8) require the States to query the Clearinghouse before issuing a new, renewed, upgraded, or transferred CDL. FMCSA will work with the States to provide for an automatic, electronic query system to minimize costs and maximize efficiencies.

D. Part 384

Section 384.235

This final rule includes a conforming change to part 384. FMCSA recognizes the need to hold States accountable to request information from the Clearinghouse in accordance with the new changes to § 383.73.

E. Part 391

Section 391.23

This final rule includes changes to § 391.23(e) and (f) that were not proposed in the NPRM. Section 391.23(e) requires employers to investigate a prospective employee's drug and alcohol compliance history during the preceding 3 years. Section 391.23(f) prohibits employers from allowing a driver to operate a CMV if he or she refuses to grant consent for the release of his or her information. As discussed above and in the response to comments, section 31306a(f)(3) requires employers to use the Clearinghouse to conduct this background investigation. Once the Clearinghouse has been in operation for 3 years, any pre-employment query will provide the employee's 3-year compliance history. To implement the requirement in section 31306a(f)(3) and to avoid redundant searches and investigations, the Agency amended § 391.23(e) to state that an employer subject to § 382.701(a) must query the Clearinghouse, after it has been in operation for 3 years, to satisfy the drug and alcohol background investigation requirement. Similarly, the Agency amended § 391.23(f) to prohibit an employer from allowing a driver to operate a CMV if he or she refuses to grant consent for the query.

As explained in § 382.413, however, employers must continue to request information from previous employers if the employee was subject to drug and alcohol testing under an employer regulated by one of the other DOT modes. For employees subject to follow-up testing who have not completed their follow-up testing plan prescribed by the SAP, gaining employers must continue to request the follow-up plan from the previous employer because that information will not be reported to the Clearinghouse.

VII. Regulatory Analyses and Notices

Executive Order (E.O.) 12866 (Regulatory Planning and Review and DOT Regulatory Policies and Procedures as Supplemented by E.O. 13563 (Improving Regulation and Regulatory Review)

FMCSA has determined that this rulemaking is an economically significant regulatory action under section 3(f) of Executive Order (E.O.) 12866, Regulatory Planning and Review, as supplemented by E.O. 13563 (76 FR 3821, January 21, 2011). It also is significant under Department of Transportation regulatory policies and procedures because the economic costs and benefits of the rule exceed the $100 million annual threshold and because of the substantial congressional and public interest concerning the crash risks associated with CMV drivers operating while under the influence of drugs or alcohol. FMCSA has prepared a Regulatory Impact Assessment (RIA) of the benefits and costs of the rule. The summary of the RIA follows.

RIA Estimates of Benefits and Costs

In the Initial RIA, the Agency estimated the annual benefit of the proposed rule at $187 million and the annual cost at $186 million. The present value of the proposed rule was $9 million at a 7 percent discount rate. The Final RIA estimates the annual benefit of the final rule at $196 million and the annual cost at $154 million. The present value of the final rule is estimated at $42 million at a 7 percent discount rate.

The principal factor causing the reduction in costs is the analytical change necessary to account for the recent program concerning the testing rate for annual random drug tests. Effective January 1, 2016, the random drug testing rate is now 25 percent of drivers employed by a carrier, as opposed to 50 percent. This change was made pursuant to 49 CFR 382.305, and is unrelated to the Clearinghouse or the final rule. The industry has been in operation for less than a year at the lower testing rate. Therefore, no drug survey data is available that indicates that the random positive drug test rate has, or will, materially diverge from the three-year average of positive test rates used to estimate the number of positive random drug tests for the forecast period. This change reduces the estimate of the number of annual random positive drug tests from 28,000 in the Initial Regulatory Impact Analysis to 10,000 in the Final Regulatory Impact Analysis. The principal effect of this change is a reduction in return-to-duty costs from the $101 million estimated in the Initial Regulatory Impact Analysis to $56 million. The final analysis also includes updates of drug and alcohol survey data through 2013 and crash statistic. These changes had a modest impact on estimated benefits and estimated costs other than return-to-duty costs.

All employers subject to the drug and alcohol testing regulations are required to query the Clearinghouse (1) on an annual basis to determine whether their employees have drug or alcohol violations that would prohibit them from performing safety-sensitive function and (2) as part of a prospective driver's pre-employment screening process.

Given the established, sizeable success of mandatory testing programs on crash reduction,[7] concrete improvements in the process of disseminating positive-test results and making them accessible to employers are expected to bring substantial benefits.

The Agency estimates about $196 million in annual crash reduction benefits from the rule, which consists of $55 million from the annual queries and $141 million from the pre-employment queries. FMCSA estimates about $154 million in total annual costs, which include costs for:

- $29 million that is the estimated monetized value of employees' time to prepare annual employer queries;
- $11 million that is the estimated monetized value of employees' time to prepare pre-employment queries;

[7] Jacobson, Mireille, ''Drug Testing in the Trucking Industry: The Effect on Highway Safety,'' The Journal of Law and Economics, April 2003, Vol. 46, pp.130–156.

Brady, Joanne E., Susan P. Baker, Charles DiMaggio, Melissa McCarthy, George W. Rebok, and Guohua Li, ''Effectiveness of Mandatory Alcohol Testing Programs in Reducing Alcohol Involvement in Fatal Motor Carrier Crashes,'' American Journal of Epidemiology, Vol. 170, No. 6, pp.775–782 (Advance Access Publication 19-August-2009).

• $3 million for employers to designate service agents, and $1 million for SAPs to report initiation of the return-to-duty Initial Assessment;
• $5 million incurred by various reporting entities to register with the Clearinghouse, verify authorization, and become familiar with the rule, plus an additional $700,000 for these entities to report positive tests;
• $35 million of fees and consent and verification costs consisting of $24 million in Clearinghouse access fees incurred by employers for pre-employment queries, limited annual queries and full annual queries, plus $11 million of the monetized value of drivers' time to provide consents to employers and verification to FMCSA to allow employers access to drivers' records.;
• $2.2 million for development of the Clearinghouse and management of records;
• $56 million incurred by drivers to go through the return-to-duty process, including $7 million of opportunity costs incurred by drivers for those hours in which they are in substance abuse education and treatment programs; and
• $11.5 million of opportunity costs incurred by employers due to lost on-duty hours of drivers suspended from safety-sensitive functions until successful completion of the return-duty-process.

The annual net benefit of the rule is $42 million. The 10-year projection of net benefits is $316 million when discounted at 7 percent and $369 million when discounted at 3 percent. Estimated benefits include only those associated with reductions in CMV crashes.

FMCSA could not precisely quantify improved health, quality-of-life improvements, and increased life expectancy for CMV drivers. The Agency believes these non-quantified benefits are significant, and, if they were included in the benefits estimates, would clearly result in net benefits in excess of the estimated $38 million annual benefit. The net benefit of the final rule is summarized in the table below.

TOTAL NET BENEFIT PROJECTION OVER A 10-YEAR PERIOD

Total	Annual	10-year	10-year
Discount rate		7%	3%
Total Benefits	$196,000,000	$1,472,985,521	$1,722,077,349
Total Costs	154,000,000	1,157,345,7665	1,353,060,774
Total Net Benefits	42,000,000	315,639,0754	369,016,575

Benefit Analysis

The benefits of the rule derive from reductions in crashes due to the additional information on employee-failed and -refused drug and alcohol tests disseminated through the annual and pre-employment queries. The rationale is that drivers who fail or refuse drug and alcohol tests are assumed to be more crash-prone than drivers who take and pass these tests. Further, queries of the Clearinghouse provide the information on positive tests that prevents these identified drivers from operating until they successfully complete the return-to-duty process. Given this, the benefits of the rule are the reduction in crashes by drivers kept off the road by queries of the Clearinghouse. The Clearinghouse makes available information that employers would not otherwise obtain or be able to act on.

A major study on the effectiveness of mandatory *alcohol-testing* programs in reducing alcohol involvement in fatal motor carrier crashes was published in 2009.[8] The research analyzed data [9] on about 69,000 motor carrier drivers (and about 83,000 non-motor carrier drivers) involved in about 66,000 fatal multi-vehicle crashes over the 25 years from 1982 through 2006. Given that mandatory alcohol testing programs for motor carrier drivers began in 1995, this provides 13 years of data before the program was implemented and 12 years of data after implementation, which allows for a robust examination of the effectiveness of the program. The authors also controlled for age, gender, recent-past driving-while intoxicated (DWI) convictions, whether or not the driver survived, and other characteristics. These controls allowed for the specific isolation of whether (1995–2006) or not (1982–1994) the existence of a mandatory alcohol-testing program affected whether or not the fatal crash involved alcohol.

The authors performed multivariate logistic-regression analyses that estimated the effects of the above-listed factors on whether or not alcohol was involved in the fatal crash. Whether or not alcohol was involved in the crash was defined by a blood-alcohol-level (BAC) greater than or equal to 0.01 grams per deciliter (g/DL) for the driver involved in the fatal crash. With the controls for driver age, gender, history of driving while intoxicated, and survival status, ''implementation of the mandatory alcohol testing programs was found to be associated with a *23 percent reduced risk* of alcohol involvement in fatal crashes by motor-carrier drivers.'' [10] The authors concluded that the ''results from this study indicate that mandatory alcohol-testing programs may have contributed to a significant reduction in alcohol involvement in fatal motor carrier crashes.'' [11] Given the authors' estimate that the program reduces the risk by 23 percent, the Agency applies this percentage reduction to fatal crashes involving drivers for whom post-crash alcohol tests are positive.

A major study on the effectiveness of *drug-testing* programs in reducing fatal motor carrier crashes was published in 2003.[12] The research analyzed data [13] from all States (except Hawaii) for the 16 years from 1983 through 1998, generating 784 annual observations of fatal crashes (784 years = 49 States × 16 years per State). Federal drug-testing legislation passed in 1990, and 13 states passed drug-testing legislation between 1987–89,[14] so this provides many years of data both before and after the program implementation, allowing for a robust analysis of the effectiveness of

[8] Brady, JE, Baker SP, DiMaggio C, McCarthy ML, Rebok GW, Li G, ''Effectiveness of Mandatory Alcohol Testing Programs in Reducing Alcohol Involvement in Fatal Motor Carrier Crashes.'' *American Journal of Epidemiology*. 2009; 170(6): 775–783.

[9] From the Fatality Analysis Reporting System (FARS).

[10] Brady, et al., page 775.

[11] Ibid.

[12] Jacobson, Mireille, ''Drug Testing in the Trucking Industry: The Effect on Highway Safety,'' The Journal of Law and Economics, April 2003, Vol. 46, pp.130–156.

[13] Data is from the Fatality Analysis Reporting System (FARS).

[14] Connecticut, Iowa, Louisiana, Minnesota, Montana, Rhode Island, and Vermont in 1987, Utah, Nebraska, Kansas, Tennessee in 1988, and Florida and Maine in 1989.

the drug-testing program. The authors controlled for mandatory seat belt laws, speed-limit laws, the unemployment rate, miles driven and other factors. These controls allowed for the specific isolation of whether the fact that a State had standing drug-testing legislation or not (all States did after 1990) affected the number of traffic fatalities in the State.

The authors employed a negative binomial model that estimated the effects of the above-listed factors on the number of fatalities in a given State in a given year. With controls for seat-belt laws, speed-limit laws, and other factors, drug-testing legislation is estimated to have led to about a *9–10 percent reduction* in truck-accident fatalities.[15] Given this estimation, the Agency applies this percentage reduction to fatal crashes involving drivers testing positive for drugs.

The current drug-testing program is estimated to generate $152 million in annual crash-reduction benefits from 29,590 annual positive tests, which averages to approximately $5,100 per positive drug test ($152 million/29,590 positive tests, rounded to the nearest hundred). The *mandatory annual query* in the final rule would result in 6,100 instances of employer alerts to positive drug tests of their drivers that current employers would not otherwise have known about.[16] A requirement that disseminates additional information on 6,100 other positive testing drivers can be estimated to generate the same proportion of benefits that the 29,590 from the current program generates. If 29,950 positive tests and consequent alerts generate $152 million in benefits, then 6,100 additional alerts would generate *$31 million of benefits* (($152 million/29,520) = ($31.1 million/6,100), rounded to the nearest million).

The current alcohol testing program is estimated to generate $95 million in annual crash-reduction benefits from 3,135 annual positive alcohol tests, which averages to approximately $30,300 per positive alcohol test ($95 million/3,135 positive tests, rounded to nearest hundred). The *mandatory annual query* in the final rule would result in 800 instances of employer alerts to positive tests of their drivers that current employers would not otherwise have known about. A requirement that disseminates additional information on 800 other positive testing drivers can be estimated to generate the same proportion of benefits that the 3,135 from the current program generates. If 3,135 positive tests and consequent alerts generate $95 million in benefits, then 800 additional alerts would generate about *$24 million of benefits* (($95 million/3,135) = ($24.2 million/800), rounded to the nearest million).

The annual drug and alcohol queries required by the rule are estimated to generate $55 million in benefits. Annual drug testing is estimated to produce benefits totaling $31 million. Annual alcohol testing is estimated to produce benefits totaling $24 million. The *mandatory pre-employment query* required by the final rule results in 15,100 instances of employer alerts to positive drug tests that prospective employers would not otherwise have known about. A requirement that disseminates additional information on 15,100 other positive drug testing drivers can be estimated to generate the same proportion of benefits that the 29,590 from the current program generates. If 29,590 positive tests and consequent alerts generate $152 million in benefits, then 15,100 additional alerts would generate $77 million in benefits (($152 million/29,590) = ($77.0 million/15,100)), rounded to the nearest million.

The *mandatory pre-employment query* results in 2,100 instances where employers are alerted to positive alcohol tests of their drivers. Prospective employers of these drivers would not otherwise have known about these test results, in the absence of this rule. A requirement that disseminates additional information on 2,100 other positive testing drivers can be estimated to generate the same proportion of benefits that the 3,135 from the current program generates. If 3,135 positive tests and consequent alerts generate $95 million in benefits, then 2,100 additional alerts would generate $64 million in benefits (($95 million/3,135) = ($63.6 million/2,100), rounded to the nearest million).

With annual benefits to the drug-testing side of the pre-employment queries estimated at $77 million and the alcohol-testing side at $64 million, total annual benefits realized from pre-employment queries are estimated at $141 million ($77 million + $64 million).

Given the $55 million in annual benefits from the information on positive drug and alcohol tests disseminated because of the mandatory annual queries ($31 million drug and $24 million alcohol) and the $141 million in annual benefits from the information on positive tests disseminated because of the mandatory pre-employment queries ($77 million drug and $64 million alcohol), the total annual benefits of rule are *$196 million annually.* The table below presents these benefit totals.

TOTAL ANNUAL BENEFITS OF THE RULE

Queries	Drug	Alcohol	Total
Annual	$31,000,000	$24,000,000	$55,000,000
Pre-Employment	77,000,000	64,000,000	141,000,000
Total	108,000,000	88,000,000	196,000,000

Based on the annual benefits of $196 million, the *10-year benefit projection* is $1.472 billion when discounted at 7 percent and $1,722 billion when discounted at 3 percent.

By reducing drug and alcohol abuse by drivers, this rule could also lead to improved health, quality-of-life improvements, and increased life expectancy for drivers beyond those associated with reductions in vehicle crashes.

Cost Analysis

FMCSA estimates that the total annual cost of this action comes in at $154 million, which can be separated into several categories. The rule defines a number of entities with specific roles related to reporting to, or making queries of, the Clearinghouse. Therefore, the annual costs of the rule are organized by categories consistent with the role of each entity.

[15] Jacobson, M., p. 131.

[16] The Agency estimates that 6,100 drivers with multiple employers are job-hoppers that have multiple employers as defined in 49 CFR 391.63 and 49 CFR 391.65. That is, 30 percent of the sum of positive random survey tests (4,500), reasonable suspicion tests (405) and pre-employment tests (14,440) [6100 = ((4,500 + 405 + 14,440) × 30 percent).].

- $29 million that is the estimated monetized value of employees' time to prepare annual employer queries;
- $11 million that is the estimated monetized value of employees' time to prepare pre-employment queries;
- $3 million for employers to designate service agents, and $1 million for SAPs to report initiation of the return-to-duty Initial Assessment;
- $5 million incurred by various reporting entities to register with the Clearinghouse, verify authorization, and become familiar with the rule, plus an additional $700,000 for these entities to report positive tests;
- $35 million of fees and consent and verification costs consisting of $24 million in Clearinghouse access fees incurred by employers for pre-employment queries, limited annual queries and full annual queries, plus $11 million of the monetized value of drivers' time to provide consents to employers and verification to FMCSA to allow employers access to drivers' records.;
- $2.2 million for development of the Clearinghouse and management of records;
- $56 million incurred by drivers to go through the return-to-duty process, including $7 million of opportunity cost associates with the hours spent in substance abuse education and treatment programs in lieu of hours that could be spent in non-safety-sensitive in positions; and
- $11 million of opportunity costs incurred by employers due to lost on-duty hours associated with drivers suspended from safety-sensitive functions until successful completion of the return-duty-process.

Annual costs by cost category are summarized in the table below.

SUMMARY OF THE TOTAL ANNUAL COSTS OF THE RULE

Cost category	Entity	Annual cost
Annual Queries	Employers	$29,000,000
Pre-Employment Queries	Employers	11,000,000
Designate Service Agents/Report Driver Info	Employers	4,000,000
Report Positive Tests	Various	700,000
Register, Rule Familiarize, Verify Authorization	Various	5,000,000
Access Fees to Employers and Drivers' Cost to Provide Consent and Verification to FMCSA	Employers/Drivers	35,000,000
Clearinghouse IT Costs	FMCSA	2.2000,000
Return-to-Duty Process	Drivers	56,000,000
Employers Opportunity Cost Due to Return-to-Duty	Employer	11,490,000
New-CDL and CDL-Renewal Queries	SDLAs	0
Grand Total		154,000,000

Based on the annual cost of $154 million, the 10-year cost projection is $1,157 billion when discounted at 7 percent and $1.353 billion when discounted at 3 percent.

Regulatory Flexibility Act and Small Business Regulatory Enforcement Fairness Act

The Regulatory Flexibility Act of 1980 (Pub. L. 96–354, 94 Stat. 1164 (codified at 5 U.S.C. 601)) requires Federal agencies to ''. . . endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation.'' The Act requires Federal agencies to consider the effects of the regulatory action on small business and other small entities and to minimize any significant economic impact. The term ''small entities'' comprises small businesses and not-for-profit organizations that are independently owned and operated and are not dominant in their fields and governmental jurisdictions with populations of less than 50,000. Accordingly, DOT policy requires an analysis of the impact of all regulations (or proposals) on small entities, and mandates that agencies shall strive to lessen any adverse effects on these businesses.

A Final Regulatory Flexibility Analysis (RFA) must address the following topics:

(1) A statement of the reasons why action by the Agency is being considered;

FMCSA is issuing this final rule pursuant to a statutory mandate and recommendations of the National Transportation Safety Board (NTSB) and the General Accountability Office (GAO).

Section 32402 of the Moving Ahead for Progress in the 21st Century Act (MAP–21) (Pub. L. 112–141, 126 Stat. 405), codified at 49 U.S.C. 31306a, directs the Secretary of Transportation (Secretary) to establish a national clearinghouse containing commercial motor vehicle operators' violations of FMCSA's drug and alcohol testing program. In addition, FMCSA has general authority to promulgate safety standards, including those governing drivers' use of drugs or alcohol while operating a CMV. The Motor Carrier Safety Act of 1984 (Pub. L. 98–554, Title II, 98 Stat. 2832, October 30, 1984) (the 1984 Act), as amended, provides authority to regulate drivers, motor carriers, and vehicle equipment and requires the Secretary to prescribe minimum safety standards for CMVs. FMCSA has been delegated authority under 49 CFR 1.87(e) and (f) to carry out the functions vested in the Secretary by 49 U.S.C. chapter 313 and 49 U.S.C. chapter 311, subchapters I and III, relating to CMV programs and safety regulation.

The NTSB recommendation arose from its investigation of 1999 bus crash in New Orleans resulted in 22 passenger fatalities. The driver of the motor-coach had failed pre-employment drug testing when applying for previous positions. He had also failed to disclose on his employment application that a previous employer had fired him after he tested positive for a controlled substance. Therefore, his employer at the time of the crash was unaware of the driver's history of positive tests because of his failure to provide a complete employment history. Without that history, his employer was unable to contact prior employers to obtain his drug and alcohol test history.[17]

The NTSB made recommendations to the Agency pertaining to the reporting of CMV driver drug and alcohol testing results. Specifically, the NTSB recommended that FMCSA ''develop a system that records all positive drug and

[17] ''Motor-coach Run-off-the-Road in New Orleans, Louisiana-May 9, 1999,'' National Transportation Safety Board, HAR 01/01, August 28, 2001, p. 66.

alcohol test results and refusal determinations that are conducted under the DOT testing requirements, require prospective employers to query the system before making a hiring decision, and require certifying authorities to query the system before making a certification decision.'' [18] This final rule addresses the NTSB's recommendation.

The GAO issued two reports discussing its observations of drivers ''job-hopping'' under FMCSA's current regulations. When CDL holders fail, or refuse to submit to, a drug or alcohol test, some quit that job and—after a brief delay to ensure that drugs or alcohol are no longer detectable—pass the pre-employment test at another carrier and resume driving without having a completed the return-to-duty process. Obviously, job-hopping defeats the purpose of the drug and alcohol testing program. The GAO identified and verified 43 cases (based on insider information supplied by a third party to a Congressman).[19] The GAO recommended that Congress provide FMCSA the authority to establish a national database for reporting positive test results and that FMCSA undertake this rulemaking to create a national database of positive and refusal-to-test drug and alcohol test results to prevent CDL holders from job-hopping.[20]

(2) A statement of the significant issues raised by the public comments in response to the initial RFA, a statement of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;

In response to the NPRM and Initial RFA, public comments were submitted by 165 individuals including national trucking and motor coach industry associations, regional trucking associations, trade unions, SDLA's and the NTSB.[21] There were no comments specific to the Initial RFA.

The final rule revises 49 CFR part 382, Controlled Substances and Alcohol Use and Testing, to establish a database, identified as the ''Commercial Driver's License Drug and Alcohol Clearinghouse,'' for reporting of drug and alcohol violations. Upon implementation, the final rule also requires employers to query the Clearinghouse for drug and alcohol test result information on employees and prospective employees. This rule is intended to increase compliance with FMCSA's drug and alcohol testing program.

(3) The response of the agency to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments;

The Chief Counsel for Advocacy of the Small Business Administration (SBA) did not submit comments in response to the NPRM.

(4) Description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;

Because FMCSA does not have direct revenue figures for all carriers, power units serve as a proxy to determine the carrier size that will qualify as a small business given the SBA's revenue threshold. In order to produce this estimate, it is necessary to determine the average revenue generated by a power unit.

With regard to truck power units, the Agency has estimated that a power unit produces about $189,000 in revenue annually (in 2014 dollars).[22] According to the SBA, motor carriers with annual revenue of $27.5 million [23] are considered small businesses.[24] This equates to 146 power units (145.503 = $27,500,000/$189,000). Thus, FMCSA considers motor carriers of property with 146 PUs or fewer to be small businesses for purposes of this analysis. The Agency then looked at the number and percentage of property carriers with recent activity that will fall under that definition (of having 146 power units or fewer). The results show that over 99 percent of all interstate property carriers with recent activity have 146 power units or fewer.

This amounts to 515,000 carriers (514,800 = 99 percent × 520,000 active motor carriers, rounded to the nearest thousand). Therefore, an overwhelming majority of interstate carriers of property are small entities.

(5) A description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;

The final rule requires additional reporting, recordkeeping and compliance requirements beyond what is required by FMCSA's current drug and alcohol testing regulations. The entities required to report to, or make queries of, the Clearinghouse are employers, MROs, C/TPAs and SAPs.

There are an estimated 58,500 annual positive drug and alcohol tests consisting of 52,000 positive drug tests and 6,500 positive alcohol tests at full participation (including refusals). Each positive drug test will be reported to the Clearinghouse by an MRO. Each positive alcohol test will be reported by an employer or a C/TPA. Each driver's subsequent return-to-duty process for positive test results and test refusals will be reported by an SAP. Ninety-nine percent of motor carriers, MROs, C/TPAs, and SAPs are most likely small entities. With regard to SAPs submitting driver information, FMCSA estimates that drivers, bookkeepers, audit clerks accounting clerks, and occupational health and safety specialists, will perform reporting functions under the final rule.

(6) A description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected;

The Agency did not identify any significant alternatives to the rule that could lessen the burden on small entities without compromising its goals or the Agency's statutory mandate to implement the Clearinghouse. Because small businesses are such a large part of the demographic the Agency regulates, providing alternatives to small business to permit noncompliance with FMCSA

[18] Ibid., p. 74.

[19] Government Accountability Office, ''Examples of Job-hopping by Commercial Drivers after Failing Drug Tests,'' GAO 08–829R, (Washington, DC, June 30, 2008, p. 3.

[20] Government Accountability Office, ''Motor Carrier Safety: Improvements to Drug Testing Programs Could Better Identify Illegal Drug Users and Keep Them off the Road,'' GAO–08–600 (Washington, DC: May 15, 2008), pp. 44–45.

[21] See Regulation.gov at *http://www.regulations.gov/#!searchResults;rpp=25;po=0;s=FMCSA-2011-0031;dct=O%252BPS.*

[22] ''The 2000 TTS Blue Book of Trucking Companies,'' number adjusted to 2014 dollars for inflation. $172,000 estimate in 2008 indexed for inflation to 2014 dollars: (236.736/215.303) × $172,000 = $189,000, rounded to nearest thousand) using the annual CPI. See *http://www.bls.gov/data/inflation_calculator.htm.* Accessed December 22, 2015.

[23] Subsector 484 on page 26 of SBA guidelines (July 14, 2014) See *http://www.sba.gov/sites/default/files/Size_Standards_Table.pdf.* Accessed December 22, 2015.

[24] U.S. Small Business Administration Table of Small Business Size Standards matched to North American Industry Classification (NAIC) System codes, effective August 22, 2008. See NAIC subsector 484, Truck Transportation.

regulations is neither feasible nor consistent with sound public policy.

(7) A description of the steps taken by the covered agency to minimize any additional cost of credit for small entities.

FMCSA is not a covered agency as defined in 5 U.S.C. 609(d)(2) of the Regulatory Flexibility Act. Therefore, it is not required to take steps to minimize any additional cost of credit for small entities.

Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (UMRA) requires Federal agencies to assess the effect of their discretionary regulatory actions (2 U.S.C. 1531–1538). An assessment under UMRA is not required for regulations that incorporate requirements specifically set forth in law (2 U.S.C. 1531). Because MAP–21 mandated that DOT establish, operate, and maintain a clearinghouse for records related to alcohol and drug testing of CMV operators, an assessment was not prepared.

Federalism (E.O. 13132)

A rule has implications for Federalism under E.O. 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. FMCSA recognized that, as a practical matter, this rule may have an impact on the States. Accordingly, by letters sent March 28, 2011, the Agency sought advice from the National Governors Association (NGA), National Conference of State Legislators (NCSL), and the AAMVA on the topic of developing a database that the Agency believed would increase the effectiveness of its drug and alcohol testing program. (Copies of the letters are available in the docket for this rulemaking.) FMCSA offered NGA, NCSL, and AAMVA officials the opportunity to meet and discuss issues of concern to the States. FMCSA did not receive any responses to this letter. Nevertheless, during the public comment period several commenters indicated that the Clearinghouse rule would have implications for Federalism under this executive order.

At this time, section 32402 of MAP–21 preempts State and local laws inconsistent with the Clearinghouse. Preemption specifically applies to the reporting of drug and alcohol tests, refusals, and any other violation of FMCSA's drug and alcohol testing program. MAP–21 does not preempt State laws related to a driver's CDL or driving record. Each State must review its current requirements to determine whether they are compatible with this final rule.

Civil Justice Reform (E.O. 12988)

This action meets applicable standards in sections 3(a) and 3(b)(2) of E.O. 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children (E.O. 13045)

FMCSA has analyzed this action under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. FMCSA determined that this final rule will not create an environmental risk to health or safety that may disproportionately affect children.

Taking of Private Property (E.O. 12630)

FMCSA reviewed this action in accordance with Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, and has determined it would not effect a taking of private property or otherwise have taking implications.

Privacy Impact Assessment

FMCSA conducted a privacy impact assessment of this action as required by section 522(a)(5) of division H of the FY 2005 Omnibus Appropriations Act, Pub. L. 108–447, 118 Stat. 3268 (Dec. 8, 2004) [set out as a note to 5 U.S.C. 552a]. The assessment considers any impacts of the final rule on the privacy of information in an identifiable form and related matters. FMCSA has determined that this action would impact the handling of personally identifiable information (PII). FMCSA has also determined the risks and effects the rulemaking might have on collecting, storing, and sharing PII and has examined and evaluated protections and alternative information handling processes in developing the rule in order to mitigate potential privacy risks. The Privacy Impact Assessment for the Clearinghouse is available for review in the docket for this rulemaking.

Intergovernmental Review (E.O. 12372)

The regulations implementing E.O. 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this rule.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), a Federal agency must obtain approval from OMB for each collection of information it conducts, sponsors, or requires through regulations. FMCSA analyzed this action and preliminarily determined that its implementation would create a new information collection burden on CDL holders, motor carriers, and entities that provide services as part of FMCSA's mandatory alcohol and controlled substances testing process under 49 CFR part 382. FMCSA will seek approval of the information collection requirements in a new information collection entitled ''Commercial Driver's License Drug and Alcohol Clearinghouse.''

The collected information encompasses information that is generated, maintained, retained, disclosed, and provided to, or for, the Agency for a database that will be entitled the ''Commercial Driver's License Drug and Alcohol Clearinghouse'' or Clearinghouse.

DOT currently has approval for two information collections for its alcohol and controlled substances testing programs: (1) The Federal Chain of Custody and Control Form, OMB control number 0930–0158, and (2) the U.S. Department of Transportation Alcohol and Controlled Substances Testing Program, OMB control number 2105–0529. Although the Clearinghouse obtains information from the forms covered by the two information collections, this action does not create any revisions or additional burden under those collections.

This rule will create a new information collection to cover the requirements set forth in the amendments to 49 CFR part 382. These amendments will create new requirements for CDL drivers, employers of CDL drivers, MROs, SAPs, and C/TPAs to register with the new database, which will be created and administered by FMCSA. Clearinghouse registration will be a prerequisite to both placing information in the database and obtaining information from the database. Access to information in the database will be strictly limited and controlled, and available only with the consent of the CDL holders about whom information is sought.

Prospective employers of CDL drivers are required to query the Clearinghouse to determine if job applicants have controlled substance or alcohol testing violations that preclude them, under existing FMCSA regulations in part 382, from carrying out safety-sensitive functions. Employers will also be required to query the database once annually for information about drivers whom they currently employ. Employers, C/TPAs that perform testing and other services for carriers, MROs, and SAPs will place information into the database about alcohol and controlled substances testing violations.

This final rule contains procedures for correcting information in the database and specifies that most interactions with the database will be carried out using electronic media.

The total burden to respondents for queries, designations, registration, familiarization, reporting, and recordkeeping to the Clearinghouse is estimated at about 1.86 million hours annually. The hours attributed to each activity are presented in the table below.

TOTAL ANNUAL NUMBER OF BURDEN HOURS

Submissions	Responsible	Performed by	Instances	Minutes	Total hours
Annual Queries	Employer	Bookkeeping Clerk	5,200,000	10	867,000
Pre-Employment Queries	Employer	Bookkeeping Clerk	1,996,328	10	333,000
Designate C/TPAs	Employer	Bookkeeping Clerk	520,000	10	87,000
SAPs Report Driver Information Following Initial Assessment.	SAPs	Occupational Health Specialist.	55,580	10	9,000
Report/Notify Positive Tests	Various	Bookkeeping Clerk	117,000	10	20,000
Register/Familiarize/Verify	Various	Bookkeeping Clerk	793,000	20; 10	155,000
Driver Consent and Verifications	Drivers	Drivers	2,357,328	10	393,000
New-CDL and CDL-Renewal Queries	SDLAs	SDLAs	0	0	0
Total Instances/Hours			11,039,655		1,864,000

FMCSA prepared an information collection request and supporting statement that was submitted to the Office of Management and Budget and that is available for viewing pursuant to a notice to be published in the **Federal Register**.

National Environmental Policy Act and Clean Air Act

When FMCSA drafted the NPRM, the Agency prepared a draft environmental assessment (EA) under the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*). The EA evaluated a range of proposed alternatives considered by FMCSA and determined that, if the NPRM reduces CMV crashes as estimated, there would be a small net benefit to the environment. The benefits include: Lives saved and injuries prevented from reducing CMV crashes, the reduction of fuel consumed and prevention of greenhouse gas and criteria pollutant emissions from traffic congestion caused by a CMV crash, the reduction of solid waste generated in CMV crashes from damaged vehicles, infrastructure and goods, and hazardous materials spilled during a CMV crash. (See section 3.2.1 of the draft EA for details.)

However, after reviewing FMCSA's NEPA Implementing Procedures and Policy for Considering Environmental Impacts, Order 5610.1 (FMCSA Order), March 1, 2004 (69 FR 9680), FMCSA determined that this final rule is excluded from further environmental review and documentation because it falls under a categorical exclusion (CE). The CE in paragraph 6(r) applies to regulations implementing employer controlled substances and alcohol use and testing procedures. As FMCSA received no comments on the draft EA, and does not expect the environmental impacts listed above to be considered significant under NEPA, the Agency has prepared a statement of Categorical Exclusion Determination for this final rule and does not find it necessary to issue a final EA or prepare an Environmental Impact Statement.

FMCSA also analyzed this rule under the Clean Air Act, as amended (CAA), section 176(c) (42 U.S.C. 7401 *et seq.*), and general conformity regulations (40 CFR part 51, subpart W, and part 93, subpart B) promulgated by the Environmental Protection Agency. Approval of this action is exempt from the CAA's general conformity requirement since it does not affect direct or indirect emissions of criteria pollutants.

Environmental Justice (E.O. 12898)

FMCSA evaluated the environmental effects of this final rule in accordance with E.O. 12898 and determined that there are no environmental justice issues associated with its provisions nor any collective environmental impact resulting from its promulgation. Environmental justice issues would be raised if there were ''disproportionate'' and ''high and adverse impact'' on minority or low-income populations.

Energy Supply, Distribution, or Use (E.O. 13211)

FMCSA has analyzed this rule under E.O. 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. While FMCSA's analysis shows a small reduction in fuel used due to eliminating traffic idling caused by CMV crashes, we have determined that it would not be a ''significant energy action'' under that Executive Order because it would not be likely to have a significant adverse effect on the supply, distribution, or use of energy.

Indian Tribal Governments (E.O. 13175)

This rule does not have tribal implications under E.O. 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

National Technology Transfer and Advancement Act (Technical Standards)

The National Technology Transfer and Advancement Act (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through OMB, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards (*e.g.,* specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) are standards that are developed or adopted by voluntary consensus standards bodies. This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

FAST Act Waiver of Advance Notice of Proposed Rulemaking/Negotiated Rulemaking

FMCSA is aware of the regulatory reform requirements imposed by the FAST Act concerning public participation in rulemaking (49 U.S.C.

31136(g)). In the Agency's judgment, these requirements, which pertain to certain major rules, are not applicable to this final rule. In any event, the Agency finds that, for the reasons stated below, publication of an advance notice of proposed rulemaking under 49 U.S.C. 31136(g)(1)(A), or a negotiated rulemaking under 49 U.S.C. 31136(g)(1)(B), is unnecessary and contrary to the public interest in accordance with the waiver provision in 49 U.S.C. 31136(g)(3).

This final rule implements the MAP–21 mandate that DOT establish and maintain a national clearinghouse for records related to alcohol and controlled substances testing. The public had ample opportunity to comment on the Agency's February 20, 2014 NPRM proposing the establishment of the Clearinghouse (79 FR 9703). The Agency received 165 comments to the 2014 NPRM and made significant changes, reflected in this rule, in response to the commentary. Further, the final rule is the product of years of study and deliberation concerning an important public safety issue. As previously noted, this rule implements the NTSB's recommendation, included in its August 2001 report on the 1999 New Orleans bus crash resulting in multiple fatalities, that FMCSA establish a system to record positive DOT drug and alcohol test results and require prospective employers to query the system before hiring a driver. The rule also incorporates many of the findings and recommendations contained in FMCSA's March 2004 report to Congress, ''A Report to Congress on the Feasibility and Merits of Reporting Verified Positive Federal Controlled Substance Test Results to the States and Requiring FMCSA-Regulated Employers to Query the State Databases Before Hiring a Commercial Drivers License (CDL) Holder''. In addition, this rule implements a key recommendation of the GAO's May 2008 Report to Congress, ''Improvements to Drug Testing Programs Could Better Identify Illegal Drug Users and Keep Them off the Road'' (GAO–08–600) and responds to concerns identified in GAO's June 2008 report to Congress, ''Examples of Job-hopping by Commercial Drivers after Failing Drug Tests'' (GAO–08–0829R). In view of the extensive record of public input, study and oversight that informs this final rule, any further public participation measures would be unnecessary. Because the Agency strongly believes that establishment of the Clearinghouse will improve highway safety, the public interest is best served by the publication of this rule.

List of Subjects

49 CFR Part 382

Administrative practice and procedure, Alcohol abuse, Drug abuse, Drug testing, Highway safety, Motor carriers, Penalties, Safety, Transportation.

49 CFR Part 383

Administrative practice and procedure, Commercial driver's license, Highway safety, Motor carriers.

49 CFR Part 384

Administrative practice and procedure, Alcohol abuse, Drug abuse, Highway safety, Motor carriers.

49 CFR Part 391

Driver qualification, Highway safety, Motor carriers, Reporting and recordkeeping requirements, Safety, Transportation.

For the reasons discussed in the preamble, the Federal Motor Carrier Safety Administration amends 49 CFR parts 382, 383, 384, and 391 as follows:

PART 382—CONTROLLED SUBSTANCES AND ALCOHOL USE AND TESTING

■ 1. The authority citation for part 382 continues to read as follows:

Authority: 49 U.S.C. 31133, 31136, 31301 *et seq.,* 31502; sec. 32934 of Pub. L. 112–141, 126 Stat. 405, 830; and 49 CFR 1.87.

■ 2. Amend § 382.103 by revising the introductory text of paragraph (a) to read as follows:

§ 382.103 Applicability.

(a) This part applies to service agents and to every person and to all employers of such persons who operate a commercial motor vehicle in commerce in any State and are subject to:

* * * * *

■ 3. Amend § 382.107 by adding the definitions ''Commercial Driver's License Drug and Alcohol Clearinghouse'' and ''Negative return-to-duty test result'' in alphabetical order to read as follows:

§ 382.107 Definitions.

* * * * *

Commercial Driver's License Drug and Alcohol Clearinghouse (Clearinghouse) means the FMCSA database that subpart G of this part requires employers and service agents to report information to and to query regarding drivers who are subject to the DOT controlled substance and alcohol testing regulations.

* * * * *

Negative return-to-duty test result means a return-to-duty test with a negative drug result and/or an alcohol test with an alcohol concentration of less than 0.02, as described in § 40.305 of this title.

* * * * *

■ 4. Add § 382.123 to read as follows:

§ 382.123 Driver identification.

(a) *Identification information on the Alcohol Testing Form (ATF).* For each alcohol test performed under this part, the employer shall provide the driver's commercial driver's license number and State of issuance in Step 1, Section B of the ATF.

(b) *Identification information on the Federal Drug Testing Custody and Control Form (CCF).* For each controlled substance test performed under this part, the employer shall provide the following information, which must be recorded as follows:

(1) The driver's commercial driver's license number and State of issuance in Step 1, section C of the CCF.

(2) The employer's name and other identifying information required in Step 1, section A of the ATF.

■ 5. Add § 382.217 to read as follows:

§ 382.217 Employer responsibilities.

No employer may allow, require, permit or authorize a driver to operate a commercial motor vehicle during any period in which an employer determines that a driver is not in compliance with the return-to-duty requirements in 49 CFR part 40, subpart O, after the occurrence of any of the following events:

(a) The driver receives a positive, adulterated, or substituted drug test result conducted under part 40 of this title.

(b) The driver receives an alcohol confirmation test result of 0.04 or higher alcohol concentration conducted under part 40 of this title.

(c) The driver refused to submit to a test for drugs or alcohol required under this part.

(d) The driver used alcohol prior to a post-accident alcohol test in violation of § 382.209.

(e) An employer has actual knowledge, as defined at § 382.107, that a driver has:

(1) Used alcohol while performing safety-sensitive functions in violation of § 382.205;

(2) Used alcohol within four hours of performing safety-sensitive functions in violation of § 382.207; or

(3) Used a controlled substance.

■ 6. Amend § 382.401 by revising paragraph (b)(1)(vi) to read as follows:

§ 382.401 Retention of records.

* * * * *

(b) * * *

(1) * * *

(vi) Records related to the administration of the alcohol and controlled substances testing program, including records of all driver violations, and

* * * * *

■ 7. Amend § 382.405 by revising paragraphs (d) and (e) to read as follows:

§ 382.405 Access to facilities and records.

* * * * *

(d) Each employer, and each service agent who maintains records for an employer, must make available copies of all results for DOT alcohol and/or controlled substances testing conducted by the employer under this part and any other information pertaining to the employer's alcohol misuse and/or controlled substances use prevention program when requested by the Secretary of Transportation, any DOT agency, or any State or local officials with regulatory authority over the employer or any of its drivers.

(e) When requested by the National Transportation Safety Board as a part of a crash investigation:

(1) Employers must disclose information related to the employer's administration of a post-accident alcohol and/or a controlled substances test administered following the crash under investigation; and

(2) FMCSA will provide access to information in the Clearinghouse concerning drivers who are involved with the crash under investigation.

* * * * *

■ 8. Amend § 382.409 by revising the section heading and paragraph (c) to read as follows:

§ 382.409 Medical review officer or consortium/third party administrator record retention for controlled substances.

* * * * *

(c) No person may obtain the individual controlled substances test results retained by a medical review officer (MRO as defined in § 40.3 of this title) or a consortium/third party administrator (C/TPA as defined in § 382.107), and no MRO or C/TPA may release the individual controlled substances test results of any driver to any person, without first obtaining a specific, written authorization from the tested driver. Nothing in this paragraph (c) shall prohibit a MRO or a C/TPA from releasing to the employer, the Clearinghouse, or to the Secretary of Transportation, any DOT agency, or any State or local officials with regulatory authority over the controlled substances and alcohol testing program under this part, the information delineated in part 40, subpart G, of this title.

■ 9. Revise § 382.413 to read as follows:

§ 382.413 Inquiries for alcohol and controlled substances information from previous employers.

(a) Employers must request alcohol and controlled substances information from previous employers in accordance with the requirements of § 40.25 of this title, except that the employer must request information from all DOT-regulated employers that employed the driver within the previous 3 years and the scope of the information requested must date back 3 years.

(b) As of January 6, 2023, employers must use the Drug and Alcohol Clearinghouse in accordance with § 382.701(a) to comply with the requirements of § 40.25 of this title with respect to FMCSA-regulated employers. Exception: When an employee who is subject to follow-up testing has not successfully completed all follow-up tests, employers must request the employee's follow-up testing plan directly from the previous employer in accordance with § 40.25(b)(5) of this title.

(c) If an applicant was subject to an alcohol and controlled substance testing program under the requirements of a DOT Agency other than FMCSA, the employer must request the alcohol and controlled substances information required under this section and § 40.25 of this title directly from those employers regulated by a DOT Agency other than FMCSA.

■ 10. Add § 382.415 to read as follows:

§ 382.415 Notification to employers of a controlled substances or alcohol testing program violation.

Each person holding a commercial driver's license and subject to the DOT controlled substances and alcohol testing requirements in this part who has violated the alcohol and controlled substances prohibitions under part 40 of this title or this part without complying with the requirements of part 40, subpart O, must notify in writing all current employers of such violation(s). The driver is not required to provide notification to the employer that administered the test or documented the circumstances that gave rise to the violation. The notification must be made before the end of the business day following the day the employee received notice of the violation, or prior to performing any safety-sensitive function, whichever comes first.

■ 11. Amend § 382.601 by:

■ a. Removing the period at the end of paragraph (b)(11) and adding ''; and'' in its place; and

■ b. Adding paragraph (b)(12).

The addition reads as follows:

§ 382.601 Employer obligation to promulgate a policy on the misuse of alcohol and use of controlled substances.

* * * * *

(b) * * *

(12) The requirement that the following personal information collected and maintained under this part shall be reported to the Clearinghouse:

(i) A verified positive, adulterated, or substituted drug test result;

(ii) An alcohol confirmation test with a concentration of 0.04 or higher;

(iii) A refusal to submit to any test required by subpart C of this part;

(iv) An employer's report of actual knowledge, as defined at § 382.107:

(A) On duty alcohol use pursuant to § 382.205;

(B) Pre-duty alcohol use pursuant to § 382.207;

(C) Alcohol use following an accident pursuant to § 382.209; and

(D) Controlled substance use pursuant to § 382.213;

(v) A substance abuse professional (SAP as defined in § 40.3 of this title) report of the successful completion of the return-to-duty process;

(vi) A negative return-to-duty test; and

(vii) An employer's report of completion of follow-up testing.

* * * * *

■ 12. Add subpart G to part 382 to read as follows:

Subpart G—Requirements and Procedures for Implementation of the Commercial Driver's License Drug and Alcohol Clearinghouse

Sec.

Subpart G—Requirements and Procedures for Implementation of the Commercial Driver's License Drug and Alcohol Clearinghouse

§ 382.701 Drug and Alcohol Clearinghouse.

(a) *Pre-employment query required.* (1) Employers must not employ a driver subject to controlled substances and alcohol testing under this part to perform a safety-sensitive function without first conducting a pre-employment query of the Clearinghouse to obtain information about whether the driver has a verified positive, adulterated, or substituted controlled substances test result; has an alcohol confirmation test with a concentration of 0.04 or higher; has refused to submit to a test in violation of § 382.211; or that an employer has reported actual knowledge, as defined at § 382.107, that the driver used alcohol on duty in violation of § 382.205, used alcohol before duty in violation of § 382.207, used alcohol following an accident in violation of § 382.209, or used a controlled substance, in violation of § 382.213.

(2) The employer must conduct a full query under this section, which releases information in the Clearinghouse to an employer and requires that the individual driver give specific consent.

(b) *Annual query required.* (1) Employers must conduct a query of the Clearinghouse at least once per year for information for all employees subject to controlled substance and alcohol testing under this part to determine whether information exists in the Clearinghouse about those employees.

(2) In lieu of a full query, as described in paragraph (a)(2) of this section, an employer may obtain the individual driver's consent to conduct a limited query to satisfy the annual query requirement in paragraph (b)(1) of this section. The limited query will tell the employer whether there is information about the individual driver in the Clearinghouse, but will not release that information to the employer. The individual driver may give consent to conduct limited queries that is effective for more than one year.

(3) If the limited query shows that information exists in the Clearinghouse about the individual driver, the employer must conduct a full query, in accordance with paragraph (a)(2) of this section, within 24 hours of conducting the limited query. If the employer fails to conduct a full query within 24 hours, the employer must not allow the driver to continue to perform any safety-sensitive function until the employer conducts the full query and the results confirm that the driver's Clearinghouse record contains no prohibitions as defined in paragraph (d) of this section.

(c) *Employer notification.* If any information described in paragraph (a) of this section is entered into the Clearinghouse about a driver during the 30-day period immediately following an employer conducting a query of that driver's records, FMCSA will notify the employer.

(d) *Prohibition.* No employer may allow a driver to perform any safety-sensitive function if the results of a Clearinghouse query demonstrate that the driver has a verified positive, adulterated, or substituted controlled substances test result; has an alcohol confirmation test with a concentration of 0.04 or higher; has refused to submit to a test in violation of § 382.211; or that an employer has reported actual knowledge, as defined at § 382.107, that the driver used alcohol on duty in violation of § 382.205, used alcohol before duty in violation of § 382.207, used alcohol following an accident in violation of § 382.209, or used a controlled substance in violation of § 382.213, except where a query of the Clearinghouse demonstrates:

(1) That the driver has successfully completed the SAP evaluation, referral, and education/treatment process set forth in part 40, subpart O, of this title; achieves a negative return-to-duty test result; and completes the follow-up testing plan prescribed by the SAP.

(2) That, if the driver has not completed all follow-up tests as prescribed by the SAP in accordance with § 40.307 of this title and specified in the SAP report required by § 40.311 of this title, the driver has completed the SAP evaluation, referral, and education/treatment process set forth in part 40, subpart O, of this title and achieves a negative return-to-duty test result, and the employer assumes the responsibility for managing the follow-up testing process associated with the testing violation.

(e) *Recordkeeping required.* Employers must retain for 3 years a record of each query and all information received in response to each query made under this section. As of January 6, 2023, an employer who maintains a valid registration fulfills this requirement.

§ 382.703 Driver consent to permit access to information in the Clearinghouse.

(a) No employer may query the Clearinghouse to determine whether a record exists for any particular driver without first obtaining that driver's written or electronic consent. The employer conducting the search must retain the consent for 3 years from the date of the last query.

(b) Before the employer may access information contained in the driver's Clearinghouse record, the driver must submit electronic consent through the Clearinghouse granting the employer access to the following specific records:

(1) A verified positive, adulterated, or substituted controlled substances test result;

(2) An alcohol confirmation test with a concentration of 0.04 or higher;

(3) A refusal to submit to a test in violation of § 382.211;

(4) An employer's report of actual knowledge, as defined at § 382.107, of:

(i) On duty alcohol use pursuant to § 382.205;

(ii) Pre-duty alcohol use pursuant to § 382.207;

(iii) Alcohol use following an accident pursuant to § 382.209; and

(iv) Controlled substance use pursuant to § 382.213;

(5) A SAP report of the successful completion of the return-to-duty process;

(6) A negative return-to-duty test; and

(7) An employer's report of completion of follow-up testing.

(c) No employer may permit a driver to perform a safety-sensitive function if the driver refuses to grant the consent required by paragraphs (a) and (b) of this section.

(d) A driver granting consent under this section must provide consent electronically to the Agency through the Clearinghouse prior to release of information to an employer in accordance with § 382.701(a)(2) or (b)(3).

(e) A driver granting consent under this section grants consent for the Agency to release information to an employer in accordance with § 382.701(c).

§ 382.705 Reporting to the Clearinghouse.

(a) *MROs.* (1) Within 2 business days of making a determination or verification, MROs must report the following information about a driver to the Clearinghouse:

(i) Verified positive, adulterated, or substituted controlled substances test results;

(ii) Refusal-to-test determination by the MRO in accordance with 49 CFR 40.191(a)(5), (7), and (11), (b), and (d)(2).

(2) MROs must provide the following information for each controlled substances test result specified in paragraph (a)(1) of this section:

(i) Reason for the test;

(ii) Federal Drug Testing Custody and Control Form specimen ID number;

(iii) Driver's name, date of birth, and CDL number and State of issuance;

(iv) Employer's name, address, and USDOT number, if applicable;

(v) Date of the test;

(vi) Date of the verified result; and

(vii) Test result. The test result must be one of the following:

(A) Positive (including the controlled substance(s) identified);

(B) Refusal to test: Adulterated;

(C) Refusal to test: Substituted; or

(D) Refusal to provide a sufficient specimen after the MRO makes a determination, in accordance with § 40.193 of this title, that the employee does not have a medical condition that has, or with a high degree of probability could have, precluded the employee from providing a sufficient amount of urine. Under this subpart a refusal would also include a refusal to undergo a medical examination or evaluation to substantiate a qualifying medical condition.

(3) Within 1 business day of making any change to the results report in accordance with paragraph (a)(1) of this section, a MRO must report that changed result to the Clearinghouse.

(b) *Employers.* (1) Employers must report the following information about a driver to the Clearinghouse by the close of the third business day following the date on which they obtained that information:

(i) An alcohol confirmation test result with an alcohol concentration of 0.04 or greater;

(ii) A negative return-to-duty test result;

(iii) A refusal to take an alcohol test pursuant to 49 CFR 40.261;

(iv) A refusal to test determination made in accordance with 49 CFR 40.191(a)(1) through (4), (a)(6), (a)(8) through (11), or (d)(1), but in the case of a refusal to test under (a)(11), the employer may report only those admissions made to the specimen collector; and

(v) A report that the driver has successfully completed all follow-up tests as prescribed in the SAP report in accordance with §§ 40.307, 40.309, and 40.311 of this title.

(2) The information required to be reported under paragraph (b)(1) of this section must include, as applicable:

(i) Reason for the test;

(ii) Driver's name, date of birth, and CDL number and State of issuance;

(iii) Employer name, address, and USDOT number;

(iv) Date of the test;

(v) Date the result was reported; and

(vi) Test result. The test result must be one of the following:

(A) Negative (only required for return-to-duty tests administered in accordance with § 382.309);

(B) Positive; or

(C) Refusal to take a test.

(3) For each report of a violation of 49 CFR 40.261(a)(1) or 40.191(a)(1), the employer must report the following information:

(i) Documentation, including, but not limited to, electronic mail or other contemporaneous record of the time and date the driver was notified to appear at a testing site; and the time, date and testing site location at which the employee was directed to appear, or an affidavit providing evidence of such notification;

(ii) Documentation, including, but not limited to, electronic mail or other correspondence, or an affidavit, indicating the date the employee was terminated or resigned (if applicable);

(iii) Documentation, including, but not limited to, electronic mail or other correspondence, or an affidavit, showing that the C/TPA reporting the violation was designated as a service agent for an employer who employs himself/herself as a driver pursuant to paragraph (b)(6) of this section when the reported refusal occurred (if applicable); and

(iv) Documentation, including a certificate of service or other evidence, showing that the employer provided the employee with all documentation reported under paragraph (b)(3) of this section.

(4) Employers must report the following violations by the close of the third business day following the date on which the employer obtains actual knowledge, as defined at § 382.107, of:

(i) On-duty alcohol use pursuant to § 382.205;

(ii) Pre-duty alcohol use pursuant to § 382.207;

(iii) Alcohol use following an accident pursuant to § 382.209; and

(iv) Controlled substance use pursuant to § 382.213.

(5) For each violation in paragraph (b)(4) of this section, the employer must report the following information:

(i) Driver's name, date of birth, CDL number and State of issuance;

(ii) Employer name, address, and USDOT number, if applicable;

(iii) Date the employer obtained actual knowledge of the violation;

(iv) Witnesses to the violation, if any, including contact information;

(v) Description of the violation;

(vi) Evidence supporting each fact alleged in the description of the violation required under paragraph (b)(4) of this section, which may include, but is not limited to, affidavits, photographs, video or audio recordings, employee statements (other than admissions pursuant to § 382.121), correspondence, or other documentation; and

(vii) A certificate of service or other evidence showing that the employer provided the employee with all information reported under paragraph (b)(4) of this section.

(6) An employer who employs himself/herself as a driver must designate a C/TPA to comply with the employer requirements in paragraph (b) of this section related to his or her own alcohol and controlled substances use.

(c) *C/TPAs.* Any employer may designate a C/TPA to perform the employer requirements in paragraph (b) of this section. Regardless of whether it uses a C/TPA to perform its requirements, the employer retains ultimate responsibility for compliance with this section. Exception: An employer does not retain responsibility where the C/TPA is designated to comply with employer requirements as described in paragraph (b)(6) of this section.

(d) *SAPs.* (1) SAPs must report to the Clearinghouse for each driver who has completed the return-to-duty process in accordance with 49 CFR part 40, subpart O, the following information:

(i) SAPs name, address, and telephone number;

(ii) Driver's name, date of birth, and CDL number and State of issuance;

(iii) Date of the initial substance-abuse-professional assessment; and

(iv) Date the SAP determined that the driver demonstrated successful compliance as defined in 49 CFR part 40, subpart O, and was eligible for return-to-duty testing under this part.

(2) SAP must report the information required by paragraphs (d)(1)(i) through (iii) of this section by the close of the business day following the date of the initial substance abuse assessment, and must report the information required by paragraph (d)(1)(iv) of this section by the close of the business day following the determination that the driver has completed the return-to-duty process.

(e) *Reporting truthfully and accurately.* Every person or entity with access must report truthfully and accurately to the Clearinghouse and is expressly prohibited from reporting information he or she knows or should know is false or inaccurate.

REPORTING ENTITIES AND CIRCUMSTANCES

Reporting entity	When information will be reported to clearinghouse
Prospective/Current Employer of CDL Driver.	—An alcohol confirmation test with a concentration of 0.04 or higher. —Refusal to test (alcohol) as specified in 49 CFR 40.261. —Refusal to test (drug) not requiring a determination by the MRO as specified in 49 CFR 40.191. —Actual knowledge, as defined in 49 CFR 382.107, that a driver has used alcohol on duty, used alcohol within four hours of coming on duty, used alcohol prior to post-accident testing, or has used a controlled substance. —Negative return-to-duty test results (drug and alcohol testing, as applicable) —Completion of follow-up testing.
Service Agent acting on behalf of Current Employer of CDL Driver.	—An alcohol confirmation test with a concentration of 0.04 or higher. —Refusal to test (alcohol) as specified in 49 CFR 40.261. —Refusal to test (drug) not requiring a determination by the MRO as specified in 49 CFR 40.191. —Actual knowledge, as defined in 49 CFR 382.107, that a driver has used alcohol on duty, used alcohol within four hours of coming on duty, used alcohol prior to post-accident testing, or has used a controlled substance. —Negative return-to-duty test results (drug and alcohol testing, as applicable) —Completion of follow-up testing.
MRO	—Verified positive, adulterated, or substituted drug test result. —Refusal to test (drug) requiring a determination by the MRO as specified in 49 CFR 40.191.
SAP	—Identification of driver and date the initial assessment was initiated. —Successful completion of treatment and/or education and the determination of eligibility for return-to-duty testing.

§ 382.707 Notice to drivers of entry, revision, removal, or release of information.

(a) FMCSA must notify a driver when information concerning that driver has been added to, revised, or removed from the Clearinghouse.

(b) FMCSA must notify a driver when information concerning that driver has been released from the Clearinghouse to an employer and specify the reason for the release.

(c) Drivers will be notified by letter sent by U.S. Mail to the address on record with the State Driver Licensing Agency that issued the driver's commercial driver's license. Exception: A driver may provide the Clearinghouse with an alternative means or address for notification, including electronic mail.

§ 382.709 Drivers' access to information in the Clearinghouse.

A driver may review information in the Clearinghouse about himself or herself, except as otherwise restricted by law or regulation. A driver must register with the Clearinghouse before accessing his or her information.

§ 382.711 Clearinghouse registration.

(a) *Clearinghouse registration required.* Each employer and service agent must register with the Clearinghouse before accessing or reporting information in the Clearinghouse.

(b) *Employers.* (1) Employer Clearinghouse registration must include:

(i) Name, address, and telephone number;

(ii) USDOT number, except if the registrant does not have a USDOT Number, it may be requested to provide other information to verify identity; and

(iii) Name of the person(s) the employer authorizes to report information to or obtain information from the Clearinghouse and any additional information FMCSA needs to validate his or her identity.

(2) Employers must verify the names of the person(s) authorized under paragraph (b)(1)(iii) of this section annually.

(3) Identification of the C/TPA or other service agent used to comply with the requirements of this part, if applicable, and authorization for the C/TPA to query or report information to the Clearinghouse. Employers must update any changes to this information within 10 days.

(c) *MROs and SAPs.* Each MRO or SAP must provide the following to apply for Clearinghouse registration:

(1) Name, address, telephone number, and any additional information FMCSA needs to validate the applicant's identity;

(2) A certification that the applicant's access to the Clearinghouse is conditioned on his or her compliance with the applicable qualification and/or training requirements in 49 CFR part 40; and

(3) Evidence of required professional credentials to verify that the applicant currently meets the applicable qualification and/or training requirements in 49 CFR part 40.

(d) *C/TPAs and other service agents.* Each consortium/third party administrator or other service agent must provide the following to apply for Clearinghouse registration:

(1) Name, address, telephone number, and any additional information FMCSA needs to validate the applicant's identity; and

(2) Name, title, and telephone number of the person(s) authorized to report information to and obtain information from the Clearinghouse.

(3) Each C/TPA or other service agent must verify the names of the person(s) authorized under paragraph (d)(2) of this section annually.

§ 382.713 Duration, cancellation, and revocation of access.

(a) *Term.* Clearinghouse registration is valid for 5 years, unless cancelled or revoked.

(b) *Cancellation.* FMCSA will cancel Clearinghouse registrations for anyone who has not queried or reported to the Clearinghouse for 2 years.

(c) *Revocation.* FMCSA has the right to revoke the Clearinghouse registration of anyone who fails to comply with any of the prescribed rights and restrictions on access to the Clearinghouse, including but not limited to, submission of inaccurate or false information and misuse or misappropriation of access rights or protected information from the Clearinghouse and failure to maintain the requisite qualifications, certifications and/or training requirements as set forth in part 40 of this title.

§ 382.715 Authorization to enter information into the Clearinghouse.

(a) *C/TPAs.* No C/TPA or other service agent may enter information into the Clearinghouse on an employer's behalf unless the employer designates the C/TPA or other service agent.

(b) *SAPs.* A driver must designate a SAP before that SAP can enter any

information about the driver's return-to-duty process into the Clearinghouse.

§ 382.717 Procedures for correcting information in the database.

(a) *Petitions limited to inaccurately reported information.* (1) Under this section, petitioners may challenge only the accuracy of information reporting, not the accuracy of test results or refusals.

(2) *Exceptions.* (i) Petitioners may request that FMCSA remove from the Clearinghouse an employer's report of actual knowledge that the driver received a traffic citation for driving a commercial motor vehicle while under the influence of alcohol or controlled substances if the citation did not result in a conviction. For the purposes of this section, conviction has the same meaning as used in 49 CFR part 383.

(ii) Petitioners may request that FMCSA remove from the Clearinghouse an employer's report of actual knowledge (other than as provided for in paragraph (a)(2)(i) of this section) if that report does not comply with the reporting requirements in § 382.705(b)(5).

(iii) Petitioners may request that FMCSA remove from the Clearinghouse an employer's report of a violation under 49 CFR 40.261(a)(1) or 40.191(a)(1) if that report does not comply with the reporting requirements in § 382.705(b)(3).

(b) *Petition.* Any driver or authorized representative of the driver may submit a petition to the FMCSA contesting the accuracy of information in the Clearinghouse. The petition must include:

(1) The petitioner's name, address, telephone number, and CDL number and State of issuance;

(2) Detailed description of the basis for the allegation that the information is not accurate; and

(3) Evidence supporting the allegation that the information is not accurate. Failure to submit evidence is cause for dismissing the petition.

(c) *Submission of petition.* The petitioner may submit his/her petition electronically through the Clearinghouse or in writing to: Federal Motor Carrier Safety Administration, Office of Enforcement and Compliance, Attention: Drug and Alcohol Program Manager, 1200 New Jersey Avenue SE., Washington, DC 20590.

(d) *Notice of decision.* Within 45 days of receiving a complete petition, FMCSA will inform the driver in writing of its decision to remove, retain, or correct the information in the database and provide the basis for the decision.

(e) *Request for expedited treatment.* (1) A driver may request expedited treatment to correct inaccurate information in his or her Clearinghouse record under paragraph (a)(1) of this section if the inaccuracy is currently preventing him or her from performing safety-sensitive functions, or to remove employer reports under paragraph (a)(2) of this section if such reports are currently preventing him or her from performing safety-sensitive functions. This request may be included in the original petition or as a separate document.

(2) If FMCSA grants expedited treatment, it will subsequently inform the driver of its decision in writing within 14 days of receipt of a complete petition.

(f) *Administrative review.* (1) A driver may request FMCSA to conduct an administrative review if he or she believes that a decision made in accordance with paragraph (d) or (e) of this section was in error.

(2) The request must prominently state at the top of the document: ''Administrative Review of Drug and Alcohol Clearinghouse Decision'' and the driver may submit his/her request electronically through the Clearinghouse or in writing to the Associate Administrator for Enforcement (MC–E), Federal Motor Carrier Safety Administration, 1200 New Jersey Ave. SE., Washington, DC 20590.

(3) The driver's request must explain the error he or she believes FMCSA committed and provide information and/or documents to support his or her argument.

(4) FMCSA will complete its administrative review no later than 30 days after receiving the driver's request for review. The Associate Administrator's decision will constitute the final Agency action.

(g) *Subsequent notification to employers.* When information is corrected or removed in accordance with this section, or in accordance with 49 CFR part 10, FMCSA will notify any employer that accessed the incorrect information that a correction or removal was made.

§ 382.719 Availability and removal of information.

(a) *Driver information not available.* Information about a driver's drug or alcohol violation will not be available to an employer conducting a query of the Clearinghouse after all of the following conditions relating to the violation are satisfied:

(1) The SAP reports to the Clearinghouse the information required in § 382.705(d);

(2) The employer reports to the Clearinghouse that the driver's return-to-duty test results are negative;

(3) The driver's current employer reports that the driver has successfully completed all follow-up tests as prescribed in the SAP report in accordance with §§ 40.307, 40.309, and 40.311 of this title; and

(4) Five years have passed since the date of the violation determination.

(b) *Driver information remains available.* Information about a particular driver's drug or alcohol violation will remain available to employers conducting a query until all requirements in paragraph (a) of this section have been met.

(c) *Exceptions.* (1) Within 2 business days of granting a request for removal pursuant to § 382.717(a)(2)(i), FMCSA will remove information from the Clearinghouse.

(2) Information about a particular driver's drug or alcohol violation may be removed in accordance with § 382.717(a)(2)(ii) and (iii) or in accordance with 49 CFR part 10.

(d) *Driver information remains available.* Nothing in this part shall prevent FMCSA from using information removed under this section for research, auditing, or enforcement purposes.

§ 382.721 Fees.

FMCSA may collect a reasonable fee from entities required to query the Clearinghouse. Exception: No driver may be required to pay a fee to access his or her own information in the Clearinghouse.

§ 382.723 Unauthorized access or use prohibited.

(a) Except as expressly authorized in this subpart, no person or entity may access the Clearinghouse. No person or entity may share, distribute, publish, or otherwise release any information in the Clearinghouse except as specifically authorized by law. No person may report inaccurate or misleading information to the Clearinghouse.

(b) An employer's use of information received from the Clearinghouse is limited to determining whether a prohibition applies to a driver performing a safety-sensitive function with respect to a commercial motor vehicle. No employer may divulge or permit any other person or entity to divulge any information from the Clearinghouse to any person or entity not directly involved in determining whether a prohibition applies to a driver performing a safety-sensitive function

with respect to a commercial motor vehicle.

(c) Violations of this section are subject to civil and criminal penalties in accordance with applicable law, including those set forth at § 382.507.

(d) Nothing in this part shall prohibit FMCSA from accessing information about individual drivers in the Clearinghouse for research, auditing, or enforcement purposes.

§ 382.725 Access by State licensing authorities.

(a) In order to determine whether a driver is qualified to operate a commercial motor vehicle, the chief commercial driver's licensing official of a State must obtain the driver's record from the Clearinghouse if the driver has applied for a commercial driver's license from that State.

(b) By applying for a commercial driver's license, a driver is deemed to have consented to the release of information from the Clearinghouse in accordance with this section.

(c) The chief commercial driver's licensing official's use of information received from the Clearinghouse is limited to determining an individual's qualifications to operate a commercial motor vehicle. No chief driver's licensing official may divulge or permit any other person or entity to divulge any information from the Clearinghouse to any person or entity not directly involved in determining an individual's qualifications to operate a commercial motor vehicle.

(d) A chief commercial driver's licensing official who does not take appropriate safeguards to protect the privacy and confidentiality of information obtained under this section is subject to revocation of his or her right of access under this section.

§ 382.727 Penalties.

An employer, employee, MRO, or service agent who violates any provision of this subpart shall be subject to the civil and/or criminal penalty provisions of 49 U.S.C. 521(b)(2)(C).

PART 383—COMMERCIAL DRIVER'S LICENSE STANDARDS; REQUIREMENTS AND PENALTIES

■ 13. The authority citation for part 383 is revised to read as follows:

Authority: 49 U.S.C. 521, 31136, 31301 *et seq.,* and 31502; secs. 214 and 215 of Pub. L. 106–159, 113 Stat. 1748, 1766, 1767; sec. 1012(b) of Pub. L. 107–56, 115 Stat. 272, 297; sec. 4140 of Pub. L. 109–59, 119 Stat. 1144, 1746; sec. 32934 of Pub. L. 112–141, 126 Stat. 405, 830; sec. 7208 of Pub. L. 114–94, 129 Stat. 1312, 1593; and 49 CFR 1.87.

■ 14. Amend § 383.73 by:

■ a. Removing the word ''and'' at the end of paragraph (b)(8);

■ b. Removing the period at the end of paragraph (b)(9) and adding ''; and'' in its place;

■ c. Adding paragraph (b)(10);

■ d. Removing ''and:'' at the end of paragraph (c)(8) and adding a semicolon in its place;

■ e. Removing the period at the end of paragraph (c)(9) and adding ''; and'' in its place;

■ f. Adding paragraph (c)(10);

■ g. Removing the word ''and'' at the end of paragraph (d)(7);

■ h. Removing the period at the end of paragraph (d)(8) and adding ''; and'' in its place;

■ i. Adding paragraph (d)(9);

■ j. Removing ''and:'' at the end of paragraph (e)(6) and adding a semicolon in its place;

■ k. Removing the period at the end of paragraph (e)(7) and adding ''; and'' in its place;

■ l. Adding paragraphs (e)(8) and (f)(4).

The additions read as follows:

§ 383.73 State procedures.

* * * * *

(b) * * *

(10) Beginning January 6, 2020, request information from the Drug and Alcohol Clearinghouse in accordance with § 382.725 of this chapter.

(c) * * *

(10) Beginning January 6, 2020, request information from the Drug and Alcohol Clearinghouse in accordance with § 382.725 of this chapter.

(d) * * *

(9) Beginning January 6, 2020, request information from the Drug and Alcohol Clearinghouse in accordance with § 382.725 of this chapter.

(e) * * *

(8) Beginning January 6, 2020, request information from the Drug and Alcohol Clearinghouse in accordance with § 382.725 of this chapter.

(f) * * *

(4) Beginning January 6, 2020, for drivers seeking issuance, renewal, upgrade or transfer of a non-domiciled CDL, request information from the Drug and Alcohol Clearinghouse in accordance with § 382.725 of this chapter.

* * * * *

PART 384—STATE COMPLIANCE WITH COMMERCIAL DRIVER'S LICENSE PROGRAM

■ 15. The authority citation for this part is revised to read as follows:

Authority: 49 U.S.C. 31136, 31301, *et seq.,* and 31502; secs. 103 and 215 of Pub. L. 106–59, 113 Stat. 1753, 1767; sec. 32934 of Pub. L. 112–141, 126 Stat. 405, 830; sec. 5524 of Pub. L. 114–94, 129 Stat. 1312, 1560; and 49 CFR 1.87.

■ 16. Add § 384.235 to read as follows:

§ 384.235 Commercial driver's license Drug and Alcohol Clearinghouse.

Beginning January 6, 2020, the State must request information from the Clearinghouse in accordance with § 383.73 of this chapter.

PART 391—QUALIFICATIONS OF DRIVERS AND LONGER COMBINATION VEHICLE (LCV) DRIVER INSTRUCTORS

■ 17. The authority citation for part 391 continues to read as follows:

Authority: 49 U.S.C. 504, 508, 31133, 31136, 31149, and 31502; sec. 4007(b) of Pub. L. 102–240, 105 Stat. 1914, 2152; sec. 114 of Pub. L. 103–311, 108 Stat. 1673, 1677; sec. 215 of Pub. L. 106–159, 113 Stat. 1748, 1767; sec. 32934 of Pub. L. 112–141, 126 Stat. 405, 830; and 49 CFR 1.87.

■ 18. Amend § 391.23 by adding paragraph (e)(4) and revising paragraph (f) to read as follows:

§ 391.23 Investigation and inquiries.

* * * * *

(e) * * *

(4) As of January 6, 2023, employers subject to § 382.701(a) of this chapter must use the Drug and Alcohol Clearinghouse to comply with the requirements of this section with respect to FMCSA-regulated employers.

(i) *Exceptions.* (A) If an applicant who is subject to follow-up testing has not successfully completed all follow-up tests, the employer must request the applicant's follow-up testing plan directly from the previous employer in accordance with § 40.25(b)(5) of this title.

(B) If an applicant was subject to an alcohol and controlled substance testing program under the requirements of a DOT mode other than FMCSA, the employer must request alcohol and controlled substances information required under this section directly from those employers regulated by a DOT mode other than FMCSA.

(ii) [Reserved]

(f)(1) A prospective motor carrier employer must provide to the previous employer the driver's consent meeting the requirements of § 40.321(b) of this title for the release of the information in paragraph (e) of this section. If the driver refuses to provide this consent, the prospective motor carrier employer must not permit the driver to operate a commercial motor vehicle for that motor carrier.

(2) If a driver refuses to grant consent for the prospective motor carrier

employer to query the Drug and Alcohol Clearinghouse in accordance with paragraph (e)(4) of this section, the prospective motor carrier employer must not permit the driver to operate a commercial motor vehicle.

* * * * *

Issued under the authority delegated in 49 CFR 1.87 on: November 8, 2016.

T.F. Scott Darling, III,

Administrator.

[FR Doc. 2016–27398 Filed 12–2–16; 8:45 am]

BILLING CODE 4910–EX–P

EXHIBIT 14

New York State Certified Minority/Women/Service Disabled Veteran-Owned Business Enterprises Goal Requirements And Procedures For Participation

EXHIBIT 14

NEW YORK STATE CERTIFIED MINORITY/WOMEN/SERVICE DISABLED VETERAN-OWNED BUSINESS ENTERPRISES GOAL REQUIREMENTS AND PROCEDURES FOR PARTICIPATION

I. MINORITY/WOMEN-OWNED BUSINESS ENTERPRISES ("MWBE")

In accordance with Article 15-A of the Executive Law, including regulations promulgated thereunder, the Authority has established Minority-Owned Business Enterprise ("MBE") and/or Women-Owned Business Enterprise ("WBE") participation goals for this Agreement. Contractor shall facilitate MWBE participation for the scope of work to be performed under this Agreement, to satisfy the participation goals, or document good faith efforts taken to fulfill the goals in a manner prescribed by the Authority in accordance with the requirements described herein.

The Agreement's MWBE goals are applicable to the total amount payable under the Agreement any changes made to the Agreement.

1. The Authority establishes MWBE goals for all applicable procurements. The MWBE goals for this Agreement are located in Section 6.3 of the Agreement, and under the Section of the RFP entitled "Participation Opportunities For New York State Certified Minority/Women/Service Disabled Veteran-Owned Business Enterprises".

2. For purposes of providing meaningful participation to certified MWBEs on this Agreement and in an effort to attain the MWBE goals identified for this Agreement, Contractor should reference the directory of MWBEs at the following internet address: ny.newnycontracts.com.

3. Contractor understands that only sums paid to MWBEs for the performance of a Commercially Useful Function, as that term is defined in 5 NYCRR § 140.1, may be applied towards the achievement of the applicable MWBE participation goal.

4. Contractor agrees to provide, upon request by the Authority, documentation and/or evidence of actions taken to demonstrate "Good Faith Efforts," in accordance with 5 NYCRR § 142.8, to provide meaningful participation by MWBEs as subcontractors and suppliers in the performance of the contract.

II. MWBE UTILIZATION REQUIREMENTS

This Agreement's MWBE goals have been established by the Authority based on certified MWBE availability, job assignments, services to be performed and/or type of work to be performed under the Agreement.

In the performance of this contract, 60% of the total participation value shall be deemed to represent the Commercially Useful Function of the MWBE serving as a supplier and

the mark up and/or broker's fee shall represent the Commercially Useful Function of the MWBE serving as broker.

A. A complete and accurate TA-W3239 Utilization Plan (Contractor) shall be submitted to MWBEProcurement@thruway.ny.gov within ten (10) business days of the notice of tentative contract award. Contractor shall certify that the TA-W3239 Utilization Plan (Contractor) identifies all subcontractors to be used in the performance of the Agreement.

B. Contractor agrees to adhere to the approved TA-W3239 Utilization Plan (Contactor) in the performance of the Agreement.

C. Contractor further agrees that failure to submit and/or adhere to such TA-W3239 Utilization Plan (Contractor) shall constitute a material breach of the terms of this Agreement. Upon the occurrence of such a material breach, the Authority shall be entitled to any remedy provided herein, including but not limited to, a finding that Contractor is non-responsive or non-responsible.

III. REPORTING

Contractor is required to submit the TA-W3240 Payments (Contractor) report on or before the 10th of each month, following the month being reported. Monthly reports must be submitted via email, to MWBEProcurement@thruway.ny.gov, however, during the term of the contract, Contractor may arrange to provide such report via a non-electronic method to the Authority by the 10th day following the end of each month during the term of the Agreement.

IV. COMPLIANCE

Contractor will comply with any procedures and guidelines established by the Director of the Division of Minority and Women-Owned Business Enterprise (hereinafter the Director) under the authority of New York State Executive Order 8, issued August 3, 1983 (hereinafter Executive Order 8) and will comply with any rules, regulations and orders of the Director as may be promulgated pursuant to or under the authority of Executive Order 8, or other applicable law or order.

V. MWBE WAIVERS

A. Prior to submission of a request for a partial or total waiver, Contractor shall speak to the designated contacts at the Authority for guidance.

B. In accordance with 5 NYCRR § 142.7, if Contractor is able to document good faith efforts to meet the goal requirements, as set forth herein, Contractor may submit a request for a partial or total waiver on Form TA-W3243 Contractor Waiver Request, accompanied by supporting documentation. Contractor may submit the request for waiver at the same time it submits its TA-W3239 Utilization Plan (Contractor).

Supporting documentation of good faith efforts shall include, but not limited

to:

1. Evidence of targeted and specific outreach to MWBEs;

2. Logs, written correspondence, records of telephone contacts and other information to document responses from MWBEs to Contractor outreach;

3. Copies of advertisements for participation by MWBEs in appropriate general circulation, trade, and minority or women-oriented publications;

4. The dates of attendance at any pre-bid, pre-award, or other meetings, if any, scheduled by the Authority with MWBEs; and,

5. Information describing specific steps undertaken by Contractor to reasonably structure the Agreement's scope of work to maximize opportunities for MWBE participation.

C. If a request for waiver is submitted with the TA-W3239 Utilization Plan (Contractor) and is not approved by the Authority at that time, the provisions of clauses (D - H) will apply. If the documentation included with Contractor's waiver request is complete, the Authority shall evaluate the request and issue a written notice of acceptance or denial within twenty (20) days of receipt.

D. Contractor shall attempt to utilize, in good faith, certified MWBEs, during the performance of the Agreement. Requests for a partial or total waiver of established goal requirements may be made to the Authority, at time of bid submission, subsequent to award of the Agreement or at any time during the term of the Agreement, but must be made no later than prior to the submission of a request for final payment on the Agreement.

E. If the Authority, upon review of the TA-W3239 Utilization Plan (Contractor) and Monthly TA-W3240 Payments (Contractor) to MWBEs, determines that Contractor is failing or refusing to comply with the Agreement's MWBE goals and no waiver has been granted in regards to such non-compliance, the Authority may issue a notice of deficiency to Contractor.

F. Contractor must respond to the notice of deficiency within seven (7) business days of receipt. Such response may include a request for partial or total waiver of the Agreement's MWBE goals.

G. If Contractor, after making good faith efforts, is unable to achieve the MWBE goals stated herein, Contractor may submit a request for a waiver to the Bureau of Purchasing. Such waiver request must be supported by evidence of the good faith efforts by Contractor to achieve the maximum feasible MWBE participation towards the applicable MWBE goals. If the documentation included with the waiver request is complete, the Authority shall evaluate the request and issue a written notice of approval or denial within twenty (20) business days of receipt.

H. If the Authority, upon review of TA-W3239 Utilization Plan (Contractor) and the TA-W3240 Payments (Contractor) reports as described in Section II and III, or any other relevant information, determines that Contractor is non-compliant, deficient or failing to document the good faith efforts to meet the Agreement's MWBE goals or requirements and no waiver has been issued in regards to such non-compliance, the Authority may issue a notice of deficiency to Contractor. Contractor must respond to the notice of deficiency letter within seven (7) business days of receipt. Such response may include a request for partial or total waiver of the contract MWBE goals.

Waiver requests shall be sent to the Authority's Bureau of Purchasing at MWBEProcurement@thruway.ny.gov.

Forms are located at: www.thruway.ny.gov/business/purchasing/index.html

Questions regarding compliance with MWBE participation goal, requirements and provisions should be directed to the Authority's Office of Compliance at (518) 471-5830.

VI. NON-COMPLIANCE

A. Where the Authority determines that Contractor is not in compliance with the requirements of this Exhibit 2 and/or other Agreement requirements, refuses to comply with such requirements, or if Contractor is found to have willfully and intentionally failed to comply with the MWBE participation goals, Contractor may be found in breach of the Agreement, which may result in withholding of any payment, a delay in award of the contract, and/or the Authority may impose liquidated damages.

B. Such liquidated damages shall be calculated as an amount equaling the difference between:

    1. All sums identified for payment to MWBEs had Contractor achieved the contractual MWBE goals; and

    2. All sums actually paid to MWBEs for work performed or materials supplied under the contract.

C. In the event a determination has been made by the Authority after Contractor has been afforded the process that it is due, which requires the payment of liquidated damages, Contractor shall pay such liquidated damages to the Authority within sixty (60) days after such determination or the Authority shall have the ability to withhold such amount from Contractor unless prior to the expiration of such sixtieth day, the Contractor has filed a complaint with the Director of the Division of Minority and Women's Business Development pursuant to 5 NYCRR § 142.12, in which event the liquidated damages shall be payable or withheld from Contractor only in the event of a determination adverse to Contractor following the complaint process.

VII. SERVICE-DISABLED VETERAN-OWNED BUSINESS ENTERPRISES (SDVOBs)

Article 17-B of the New York State Executive Law provides for meaningful participation in public procurement by certified Service-Disabled Veteran-Owned Business Enterprises ("SDVOB"), thereby further integrating such businesses into New York State's economy. The Authority recognizes the need to ensure that certified SDVOBs have opportunities for maximum feasible participation in the performance of Authority contracts. In recognition of the service and sacrifices made by service-disabled veterans and in recognition of their economic activity in doing business in New York State, Contractor is required to foster participation of SDVOBs in the fulfillment of the requirements of the Agreement.

In accordance with Article 17-B of the Executive Law, including regulations promulgated thereunder, the Authority has established SDVOB participation goals for this Agreement. Contractor shall facilitate SDVOB participation for the scopes of work to be performed under this Agreement, and/or document good faith efforts taken to achieve the goals in a manner prescribed by the Authority in accordance with the requirements described herein.

VIII. SDVOB GOALS

The Agreement's SDVOB goals are applicable to the total amount payable under the Agreement and any changes made to the Agreement.

1. The Authority establishes SDVOB goals for all applicable contracts. The SDVOB goals for this Agreement are located in Section 6.3 of the Agreement, and under the Section of the RFP entitled "Participation Opportunities For New York State Certified Minority/Women/Service Disabled Veteran-Owned Business Enterprises".

2. For purposes of providing meaningful participation to certified SDVOBs on this Agreement and in an effort to attain the certified SDVOB goals for this Agreement, the Contractor should reference the directory of SDVOBs at the following internet address: online.ogs.ny.gov/SDVOB/search .

3. Contractor must document "good faith efforts" to provide meaningful participation by SDVOBs as subcontractors or suppliers in the performance of the Agreement (see clause XI below).

IX. SDVOB UTILIZATION PLANS

A. In accordance with 9 NYCRR § 252.2(i), Contractor is required to submit a completed TA-W3239 Utilization Plan (Contractor). A complete and accurate TA-W3239 Utilization Plan (Contractor) shall be submitted to MWBEProcurement@thruway.ny.gov within ten (10) business days of the notice of tentative contract award.

B. The TA-W3239 Utilization Plan (Contractor) shall list the certified SDVOBs that Contractor intends to use to perform the Agreement, a description of the work that

Contractor intends the SDVOB to perform to meet the goals on the Agreement, the estimated dollar amounts to be paid to a certified SDVOB, or, if not known, an estimate of the percentage of contract work the SDVOB will perform. By signing the TA-W3239 Utilization Plan (Contractor), Contractor acknowledges that making false representations or providing information that shows a lack of good faith as part of, or in conjunction with, the submission of a TA-W3239 Utilization Plan is prohibited by law and may result in penalties including, but not limited to, termination of the Agreement for cause, loss of eligibility to submit future bids and/or withholding of payments. Any modifications or changes to the agreed participation by SDVOBs after the award of the Agreement and during the term of the Agreement must be reported on a revised TA-W3239 Utilization Plan (Contractor) and submitted to the Authority's Office of Compliance for approval.

C. The Authority will review the submitted TA-W3239 Utilization Plan (Contractor) and advise Contractor of the Authority's acceptance or issue a notice of deficiency within twenty (20) days of receipt.

D. If a notice of deficiency is issued, Contractor agrees that it shall respond to the notice of deficiency, within seven (7) business days of receipt, by submitting to the Authority a written remedy in response to the notice of deficiency. If the written remedy that is submitted is not timely or is found by the Authority to be inadequate, the Authority shall notify Contractor and direct Contractor to submit, within five (5) business days of notification by the Authority, a request for a partial or total waiver of SDVOB participation goals on TA-W3243 Contractor Waiver Request. Failure to file the waiver request form in a timely manner may be grounds for disqualification of the proposal.

E. The Authority may find Contractor to be non-responsive under the following circumstances:

(a) If Contractor fails to submit a TA-W3239 Utilization Plan (Contractor);
(b) If Contractor fails to submit a written remedy to a notice of deficiency;
(c) If Contractor fails to submit a TA-W3243 Contractor Waiver Request; or
(d) If the Authority determines that Contractor has failed to document good faith efforts.

F. Contractor certifies that it will follow the submitted TA-W3239 Utilization Plan (Contractor) for the performance of SDVOBs on the Agreement in accordance with the prescribed SDVOB compliance requirements and procedures for the SDVOB goals of the Agreement.

G. Contractor further agrees that failure to use SDVOBs as agreed in the TA-W3239 Utilization Plan (Contractor) shall constitute a material breach of the terms of the Agreement. Upon the occurrence of such a material breach, the Authority shall be entitled to any remedy provided herein, including but not limited to, a finding that Contractor is non-responsive or non-responsible.

X. SDVOB WAIVER

A. Prior to submission of a request for a partial or total waiver, Contractor shall speak to the designated contacts at the Authority for guidance.

B. In accordance with 9 NYCRR § 252.2(m), if Contractor is able to document good faith efforts to meet the goal requirements, as set forth herein, Contractor may submit a request for a partial or total waiver on Form TA-W3243 Contractor Waiver Request, accompanied by supporting documentation. Contractor may submit the TA-W3243 Contractor Waiver Request at the same time it submits its TA-W3239 Utilization Plan (Contractor).

If a TA-W3243 Contractor Waiver Request is submitted with the TA-W3239 Utilization Plan (Contractor) and is not approved by the Authority at that time, the provisions of Section IX D-E will apply. If the documentation included with the Contractor's waiver request is complete, the Authority shall evaluate the request and issue a written notice of acceptance or denial within twenty (20) days of receipt.

C. Contractor shall attempt to utilize, in good faith, certified SDVOBs, during the performance of the Agreement. Requests for a partial or total waiver of established goal requirements may be made to the Authority, at time of proposal submission, subsequent to award of the Agreement or at any time during the term of the Agreement, but must be made no later than prior to the submission of a request for final payment on the Agreement.

D. If the Authority, upon review of the TA-W3239 Utilization Plan (Contractor) and Monthly TA-W3240 Payments (Contractor) determines that Contractor is failing or refusing to comply with the Agreement's goals and no waiver has been granted for such non-compliance, the Authority may issue a notice of deficiency to Contractor.

Contractor must respond to the notice of deficiency within seven (7) business days of receipt. Such response may include a request for partial or total waiver of the contract SDVOB goals.

Waiver requests shall be sent to the Authority's Office of Compliance at Compliance@thruway.ny.gov.

XI. GOOD FAITH EFFORTS

In accordance with 9 NYCRR § 252.2(n), Contractor must document its good faith efforts toward utilizing SDVOBs on the Agreement. Evidence of required good faith efforts shall include, but not be limited to, the following:

(1) Copies of solicitations to SDVOBs and any responses thereto.
(2) Explanation of the specific reasons each SDVOB that responded to Contractor's solicitation was not selected.
(3) Dates of any pre-bid, pre-award or other meetings attended by Contractor if any, scheduled by the Authority with certified SDVOBs which the Authority determined

were capable of fulfilling the SDVOB goals set in the contract.

(4) Information describing the specific steps undertaken to reasonably structure the Agreement's scope of work for the purpose of subcontracting with, or obtaining supplies from, certified SDVOBs.

(5) Other information deemed relevant to the waiver request.

XII. MONTHLY SDVOB CONTRACTOR COMPLIANCE REPORT

In accordance with 9 NYCRR § 252.2(q), Contractor is required to report Monthly SDVOB Contractor Compliance to the Authority during the term of the Agreement for the preceding month's activity, documenting progress made towards achieving the Agreement's SDVOB goals.

This information must be submitted by Contractor, using form TA-W3240 Payments (Contractor) available on the Authority's website, reflecting the preceding month's activities. Timely, complete and accurate forms must be submitted to MWBEProcurement@thruway.ny.gov, by the 10th day of each month.

XIII. BREACH OF CONTRACT AND DAMAGES

In accordance with 9 NYCRR § 252.2(s), if Contractor is found to have willfully and intentionally failed to comply with the SDVOB participation goals set forth in the Agreement, Contractor shall be found to have breached the Agreement and Contractor shall pay damages equivalent to the Authority's expenses for personnel, supplies and overhead related to establishing, monitoring, and reviewing certified Service-Disabled Veteran-Owned Business Enterprise programmatic goals for the Agreement.

Questions regarding compliance with SDVOB participation goals should be directed to the Authority's Office of Compliance at 518-436-5830.

All forms are available at: For Commodities/Non-Engineering Personal Services: http://www.thruway.ny.gov/business/purchasing/index.html

SUPPLEMENT 1

New York State Finance Law Sections §§ 139-j and 139-k
Disclosure of Prior
Non-Responsibility Determinations

TA-W3053 (04/2019)

NEW YORK STATE OF OPPORTUNITY. Thruway Authority

200 Southern Blvd.
Albany, NY 12209

New York State Finance Law Sections 139-j and 139-k

Disclosure of Prior Non-Responsibility Determinations

Contract/Project/Transaction Description:

_____

_____

Contract # (if applicable): _____ Date: _____

Name of Offerer/Applicant: _____

Address: _____

Name and Title of Person Submitting this Form
(if different from above): _____

Has any governmental entity* made a finding of non-responsibility regarding the Offerer/Applicant in the previous four years where:

the basis for the finding of the Offerer/Applicant's non-responsibility was due to a violation of State Finance Law Section 139-j? ☐ No ☐ Yes

the basis for the finding of the Offerer/Applicant's non-responsibility was due to the intentional provision of false or incomplete information to a governmental entity? ☐ No ☐ Yes

If yes, please provide details regarding the finding of non-responsibility below.

Governmental Entity: _____

Date of Finding of Non-responsibility: _____

Basis of Finding of Non-responsibility (attach additional sheets if necessary):

_____

_____

_____

_____

_____

_____

Offerer certifies that all information provided to the Governmental Entity with respect to State Finance Law Section 139-k is complete, true and accurate.

By: _____
Signature

_____
Date

_____
Name (please print)

( ) -
Telephone No.

_____
Title

* A "governmental entity" is: (1) any department, board, bureau, commission, division, office, council, committee or officer of New York State, whether permanent or temporary; (2) each house of the New York State Legislature; (3) the unified court system; (4) any public authority, public benefit corporation or commission created by or existing pursuant to the Public Authorities Law; (5) any public authority or public benefit corporation, at least one of whose members is appointed by the Governor or who serves as a member by virtue of holding a civil office of the State; (6) a municipal agency, as that term is defined in paragraph (ii) of subdivision (s) of section one-c of the Legislative Law; or (7) a subsidiary or affiliate of such a public authority.

For engineering agreements and construction contracts, submit this form to the Department of Engineering, 200 Southern Blvd., Albany, 12209. All other form submissions should be forwarded to the address listed on the solicitation material or application.

If you have any questions, please call the contact person listed on the solicitation material or application.

SUPPLEMENT 2

Certificate of Compliance with the Authority Guidelines Regarding Permissible Contacts During a Procurement and the Prohibition of Inappropriate Lobbying Influence

TA-W2111 (04/2019)

NEW YORK STATE OF OPPORTUNITY. Thruway Authority

200 Southern Blvd.
Albany, NY 12209

CERTIFICATE OF COMPLIANCE WITH THE AUTHORITY GUIDELINES REGARDING PERMISSIBLE CONTACTS DURING A PROCUREMENT AND THE PROHIBITION OF INAPPROPRIATE LOBBYING INFLUENCE

To protect the integrity and fairness of the procurement process and maintain public confidence in the Thruway Authority's (Authority) stewardship role, all Authority procurement decisions must be based on the merits of proposals, free of any inappropriate lobbying influence. Toward that end, the Authority has adopted Guidelines Regarding Permissible Contacts During a Procurement and the Prohibition of Inappropriate Lobbying Influence (TAP-335), Guidelines with which all vendors/firms/proposers must comply. A copy of these Guidelines is available in the Purchasing Services section of the Authority's website at www.thruway.ny.gov. Further, Authority funds may not be used to reimburse a vendor/firm for its outside lobbying expenses. Authority payments made under a contract cannot be used to pay outside lobbying costs and a vendor/firm is prohibited from seeking reimbursement of such costs.

Certification

The undersigned certifies that the vendor/firm/proposer has read, understands and agrees to comply with the Authority Guidelines Regarding Permissible Contacts During a Procurement and the Prohibition of Inappropriate Lobbying Influence (TAP-335). Further, the undersigned certifies that the vendor/firm/proposer will not utilize Authority payments made under a contract or agreement, including an amendment, extension, renewal or change order to an existing contract, to pay outside lobbying expenses and will not seek reimbursement of such costs. The undersigned also certifies that he or she is authorized to bind the vendor/firm/proposer contractually.

Contract No.	Description
Vendor/Firm Name	Telephone No.
Print Name	Title
Signature	Date

SUPPLEMENT 3

Vendor Assurance of No Conflict of Interest or Detrimental Effect

Vendor Assurance of No Conflict of Interest or Detrimental Effect

The undersigned entity ("Firm"), offering to provide services pursuant to this RFP, as a contractor, joint venture contractor, subcontractor, or consultant, attests that its performance of the services outlined in this RFP does not and will not create any actual or potential conflict of interest or appearance of impropriety, nor position the Firm to breach any other contract currently in force, with the New York State Thruway Authority ("Authority").

Furthermore, the Firm attests that it will not act in any manner that is detrimental to any Authority project on which the Firm is rendering services. Specifically, the Firm attests and certifies that:

1. The fulfillment of obligations by the Firm, as proposed in the response, does not and will not violate any existing contracts or agreements between the Firm and the Authority;

2. The fulfillment of obligations by the Firm, as proposed in the response, does not and will not create any appearance of impropriety or actual or potential conflict of interest, or any perception thereof, with any current role or responsibility that the Firm has with regard to any existing contracts or agreements between the Firm and the Authority;

3. The fulfillment of obligations by the Firm, as proposed in the response, does not and will not compromise the Firm's ability to carry out its obligations under any existing contracts between the Firm and the Authority;

4. The fulfillment of any other contractual obligations that the Firm has with the Authority will not affect or influence its ability to perform under any contract with the Authority resulting from this RFP;

5. During the negotiation and execution of any contract resulting from this RFP, the Firm will not knowingly take any action or make any decision which creates a potential for conflict of interest or might cause a detrimental impact to the Authority as a whole including, but not limited to, any action or decision to divert resources from one Authority project to another;

6. In fulfilling obligations under each of its Authority contracts, including any contract which results from this RFP, the Firm will act in accordance with the terms of each of its Authority contracts and will not knowingly take any action or make any decision which might cause a detrimental impact to the Authority as a whole including, but not limited to, any action or decision to divert resources from one Authority project to another;

7. No former officer or employee of the Authority or the State of New York ("State") who is now employed by the Firm, nor any former officer or employee of the Firm who is now employed by the Authority or the State, has played a role with regard to the

administration of this contract procurement in a manner that may violate section 73(8)(a) of the New York State Public Officers Law; and

8. The Firm has not and shall not offer to any employee, member or director of the Authority any gift, whether in the form of money, service, loan, travel, entertainment, hospitality, thing or promise, or in any other form, under circumstances in which it could reasonably be inferred that the gift was intended to influence said employee, member or director, or could reasonably be expected to influence said employee, member or director, in the performance of the official duty of said employee, member or director, or was intended as a reward for any official action on the part of said employee, member or director.

The Firm expressly understands, acknowledges, and agrees that the Authority recognizes that conflicts may occur in the future because the Firm may have existing or new relationships. The Firm hereby expressly acknowledges and agrees it shall have a continuing affirmative duty and obligation to notify the Authority immediately of any actual or potential conflicts of interest or the perception thereof, and that failure to promptly provide such notice and information may serve as a basis for termination by the Authority of any Agreement resulting from this RFP. The Authority will review the nature of any such new relationship and reserves the right to reject the Firm's proposal in response to the RFP, or to terminate any contract resulting from this RFP for any reason, including for cause if, in its judgment, a real or potential conflict of interest cannot be cured.

This form must be signed by an authorized executive or legal representative with the authority to bind its organization.

_____
Name of Firm

_____
Name of Signatory

_____
Title of Signatory:

_____
Signature:

_____
Date:

SUPPLEMENT 4

Certification Under Executive Order No. 16
Prohibiting State Agencies and Authorities from Contracting with Businesses Conducting Business in Russia

Certification Under Executive Order No. 16
Prohibiting State Agencies and Authorities from Contracting with Businesses Conducting Business in Russia

Executive Order No. 16 provides that "all Affected State Entities are directed to refrain from entering into any new contract or renewing any existing contract with an entity conducting business operations in Russia." The complete text of Executive Order No. 16 can be found here.

The Executive Order remains in effect while sanctions imposed by the federal government are in effect. Accordingly, vendors who may be excluded from award because of current business operations in Russia are nevertheless encouraged to respond to solicitations to preserve their contracting opportunities in case the sanctions are lifted during a solicitation or even after award in the case of some solicitations.

As defined in Executive Order No. 16, an "entity conducting business operations in Russia" means an institution or company, wherever located, conducting any commercial activity in Russia or transacting business with the Russian Government or with commercial entities headquartered in Russia or with their principal place of business in Russia in the form of contracting, sales, purchasing, investment, or any business partnership.

Is Vendor an entity conducting business operations in Russia, as defined above? Please answer by checking one of the following boxes:

☐ 1. No, Vendor does not conduct business operations in Russia within the meaning of Executive Order No. 16.

☐ 2.a. Yes, Vendor conducts business operations in Russia within the meaning of Executive Order No. 16 but has taken steps to wind down business operations in Russia or is in the process of winding down business operations in Russia. (Please provide a detailed description of the wind down process and a schedule for completion.)

☐ 2.b. Yes, Vendor conducts business operations in Russia within the meaning of Executive Order No. 16 but only to the extent necessary to provide vital health and safety services within Russia or to comply with federal law, regulations, executive orders, or directives. (Please provide a detailed description of the services being provided or the relevant laws, regulations, etc.)

☐ 3. Yes, Vendor conducts business operations in Russia within the meaning of Executive Order No. 16.

The undersigned certifies under penalties of perjury that they are knowledgeable about the Vendor's business and operations and that the answer provided herein is true to the best of their knowledge and belief.

Vendor Name: (legal entity) _____

By: (signature) _____

Name: _____

Title: _____

Date: _____

SUPPLEMENT 5

ST-220-CA New York State Department of Taxation and Finance Contractor Certification

New York State Department of Taxation and Finance

Contractor Certification to Covered Agency

(Pursuant to Section 5-a of the Tax Law, as amended, effective April 26, 2006)

ST-220-CA
(12/11)

For information, consult Publication 223, *Questions and Answers Concerning Tax Law Section 5-a* (see *Need Help?* on back).

Contractor name				*For covered agency use only* *Contract number or description*
Contractor's principal place of business	City	State	ZIP code	
Contractor's mailing address *(if different than above)*				*Estimated contract value over the full term of contract (but not including renewals)* $
Contractor's federal employer identification number (EIN)	Contractor's sales tax ID number (if different from contractor's EIN)			
Contractor's telephone number	Covered agency name			
Covered agency address				*Covered agency telephone number*

I, _____ , hereby affirm, under penalty of perjury, that I am _____
(name) *(title)*

of the above-named contractor, that I am authorized to make this certification on behalf of such contractor, and I further certify that:

(Mark an **X** *in only one box)*

☐ The contractor has filed Form ST-220-TD with the Department of Taxation and Finance in connection with this contract and, to the best of contractor's knowledge, the information provided on the Form ST-220-TD, is correct and complete.

☐ The contractor has previously filed Form ST-220-TD with the Tax Department in connection with _____
(insert contract number or description)

and, to the best of the contractor's knowledge, the information provided on that previously filed Form ST-220-TD, is correct and complete as of the current date, and thus the contractor is not required to file a new Form ST-220-TD at this time.

Sworn to this ___ day of _____, 20 ____

_____ _____
(sign before a notary public) *(title)*

Instructions

General information

Tax Law section 5-a was amended, effective April 26, 2006. On or after that date, in all cases where a contract is subject to Tax Law section 5-a, a contractor must file (1) Form ST-220-CA, *Contractor Certification to Covered Agency,* with a covered agency, and (2) Form ST-220-TD with the Tax Department before a contract may take effect. The circumstances when a contract is subject to section 5-a are listed in Publication 223, Q&A 3. See *Need help?* for more information on how to obtain this publication. In addition, a contractor must file a new Form ST-220-CA with a covered agency before an existing contract with such agency may be renewed.

Note: Form ST-220-CA must be signed by a person authorized to make the certification on behalf of the contractor, and the acknowledgement on page 2 of this form must be completed before a notary public.

When to complete this form

As set forth in Publication 223, a contract is subject to section 5-a, and you must make the required certification(s), if:

i. The procuring entity is a *covered agency* within the meaning of the statute (see Publication 223, Q&A 5);

ii. The contractor is a *contractor* within the meaning of the statute (see Publication 223, Q&A 6); and

iii. The contract is a *contract* within the meaning of the statute. This is the case when it (a) has a value in excess of $100,000 and (b) is a contract for *commodities* or *services*, as such terms are defined for purposes of the statute (see Publication 223, Q&A 8 and 9).

Furthermore, the procuring entity must have begun the solicitation to purchase on or after January 1, 2005, and the resulting contract must have been awarded, amended, extended, renewed, or assigned *on or after April 26, 2006* (the effective date of the section 5-a amendments).

Individual, Corporation, Partnership, or LLC Acknowledgment

STATE OF }
: SS.:
COUNTY OF }

On the ___ day of _____ in the year 20__ , before me personally appeared _____ ,

known to me to be the person who executed the foregoing instrument, who, being duly sworn by me did depose and say that

_he resides at _____ ,

Town of _____ ,

County of _____ ,

State of _____; and further that:

[Mark an ***X*** in the appropriate box and complete the accompanying statement.]

☐ (If an individual): _he executed the foregoing instrument in his/her name and on his/her own behalf.

☐ (If a corporation): _he is the _____

of _____ , the corporation described in said instrument; that, by authority of the Board of Directors of said corporation, _he is authorized to execute the foregoing instrument on behalf of the corporation for purposes set forth therein; and that, pursuant to that authority, _he executed the foregoing instrument in the name of and on behalf of said corporation as the act and deed of said corporation.

☐ (If a partnership): _he is a _____

of _____ , the partnership described in said instrument; that, by the terms of said partnership, _he is authorized to execute the foregoing instrument on behalf of the partnership for purposes set forth therein; and that, pursuant to that authority, _he executed the foregoing instrument in the name of and on behalf of said partnership as the act and deed of said partnership.

☐ (If a limited liability company): _he is a duly authorized member of _____ , LLC, the limited liability company described in said instrument; that _he is authorized to execute the foregoing instrument on behalf of the limited liability company for purposes set forth therein; and that, pursuant to that authority, _he executed the foregoing instrument in the name of and on behalf of said limited liability company as the act and deed of said limited liability company.

_____
Notary Public

Registration No. _____

Privacy notification

The Commissioner of Taxation and Finance may collect and maintain personal information pursuant to the New York State Tax Law, including but not limited to, sections 5-a, 171, 171-a, 287, 308, 429, 475, 505, 697, 1096, 1142, and 1415 of that Law; and may require disclosure of social security numbers pursuant to 42 USC 405(c)(2)(C)(i).

This information will be used to determine and administer tax liabilities and, when authorized by law, for certain tax offset and exchange of tax information programs as well as for any other lawful purpose.

Information concerning quarterly wages paid to employees is provided to certain state agencies for purposes of fraud prevention, support enforcement, evaluation of the effectiveness of certain employment and training programs and other purposes authorized by law.

Failure to provide the required information may subject you to civil or criminal penalties, or both, under the Tax Law.

This information is maintained by the Manager of Document Management, NYS Tax Department, W A Harriman Campus, Albany NY 12227; telephone (518) 457-5181.

Need help?

Visit our Web site at ***www.tax.ny.gov***
- get information and manage your taxes online
- check for new online services and features

Telephone assistance

Sales Tax Information Center: (518) 485-2889

To order forms and publications: (518) 457-5431

Text Telephone (TTY) Hotline (for persons with hearing and speech disabilities using a TTY): (518) 485-5082

Persons with disabilities: In compliance with the Americans with Disabilities Act, we will ensure that our lobbies, offices, meeting rooms, and other facilities are accessible to persons with disabilities. If you have questions about special accommodations for persons with disabilities, call the information center.

ATTACHMENT 1

Cost Calculation Sheet

ATTACHMENT 1
COST CALCULATION SHEET

Proposer name:

Proposers must complete all green cells in the tables below. Failure to do so will cause the proposal to be found non-responsive and it will not be evaluated. It is permissible to include additional sheets for additional services the Authority may elect to use. The costs for the additional services will not be used in the evaluation. Please note that the calculations in the tables below are to be provided for the first three years of the contract, the last two years and the final expected cost for the duration of the five-year contract. Proposer must not alter the spreadsheet other than entering the Unit Pricing and Hourly Rates. The cells that require input by the Proposer are highlighted in green. The fields containing calulation formulas are highlighted in blue.

Item to be expensed - TESTING	Estimated number of tests (first three years of contract)* [2]	Unit Price per test (first three years of contract)*	Estimated number of tests (last 2 years of contract)** [2]	Unit Price per test for last 2 years of contract**	TOTAL cost for 5 years (life of contract)
Off-site testing					
Drug test - Lump sum unit price, per employee, conducted at an **off-site** location.[1]	600		400		
Alcohol test - Lump sum unit price, per employee, conducted at an **off-site** location.[1]	150		100		
Direct Observation- Lump sum unit price, per employee, conducted at an **off-site** location. [1]	250		150		
On-site testing between 6:00 a.m. and 4:00 p.m.					
Drug test - Lump sum unit price, per employee, conducted at an **on-site** location.[1]	1,300		900		
Alcohol test - Lump sum unit price, per employee, conducted at an **on-site** location.[1]	300		200		
On-site testing (off hours) between 4:00 p.m. and 6:00 a.m.					
Drug test - Lump sum unit price, per employee, conducted at an **on-site** location.[1]	700		475		
Alcohol test - Lump sum unit price, per employee, conducted at an **on-site** location.[1]	200		150		
A lump sum unit price, per employee, for testing a split specimen after a positive drug test result. NOTE: Should an employee request such test, the cost will be borne by the employee.	15		10		
A rate for case management by the Substance Abuse Professional (SAP), per employee. NOTE: All costs for SAP services will be borne by the employee.	20		15		
			SUBTOTAL FOR TESTING:		

Item to be expensed - HOURLY RATES	Estimated hours (first three years of contract)*	Hourly rate for first 3 years of contract*	Estimated hours (last 2 years of contract)**	Hourly rate for last 2 years of contract**	TOTAL cost for 5 years (life of contract)
Expert Testimony – inclusive of all direct and indirect costs, fees and profit, for the period the witness is traveling and for the workday hours when the witness must be available to testify. (Travel expenses, including meals and lodging, will be reimbursed in accordance with Exhibit B, Travel and Expense Bulletin.)					
Hourly rate for expert testimony provided by the MRO. NOTE: The Authority has required the testimony of an MRO only once.	60		40		
Hourly rate for expert testimony provided by individuals who either collected, transported, stored, tested and/or analyzed or interpreted the sample. NOTE: The Authority has not, to date, required testimony of these employees.	60		40		
		SUBTOTAL FOR HOURLY RATES:			

[1] See Employee Drug & Alcohol Testing RFP, Section 2.1 – Background.

[2] Quantities are estimates only. The estimated quantities are not a guarantee of volume.

* First three years of contract are 7/1/25 – 6/30/28.

** Last two years of contract are 7/1/28 – 6/30/30.

GRAND TOTAL:	

(Subtotal for Testing + Subtotal for Hourly Rates)