

working toward being able to create such a database. However, it has not yet been established. Meanwhile, we believe it is useful to remove an obstacle to the implementation of State laws that do exist now. We simply recognize that the States are also stepping up to play a role in suspending CDLs based on Part 40 results and we do not want to discourage such actions where appropriate. We do not want Part 40 to pose an impediment to employers in their efforts to comply with their own respective State's legal requirements.

Some of the commenters who favored the IFR, as well as some of those who opposed it, suggested that we require the States to tailor their laws to include certain provisions, protections and limitations. Some of the commenters wanted us to order the States to have certain service agents report the results. Others wanted us to require that the individual driver's record be cleared of the violation after 2 years (which is not consistent with FMCSA requirements of 3 years tracking and would not provide a window into follow-up testing). Others asked that we order the States to notify drivers when the information is reported to the State and to provide the drivers with privacy rights, due process, and the right to correct their records in the State databases. Some commenters wanted assurance that the States would purge records regarding violations once the CDL holder completed the return-to-duty process under Part 40. Many of the commenters felt that, if DOT set standards for the States to meet within the scope of the respective legislation, this would address the concerns about inconsistent State laws.

The purpose of the IFR was simply to avoid a conflict between State and Federal law with respect to State laws that direct employers and TPAs for owner-operators to report violation information to State agencies. Going beyond this limited purpose and imposing additional requirements on States, even where such additional requirements would arguably be good policy, would exceed the scope of the IFR and require an additional notice of proposed rulemaking and comment period. We do not believe that taking such additional rulemaking steps is justified at this time.

Some of those who opposed the IFR appeared to suggest that, if we did not finalize this IFR, they would not need to comply with their State reporting laws. On a related, but slightly different note, some commenters assumed that this IFR was requiring compliance with State laws—and that the DOT Agencies would find employers and service agents out-of-compliance with Part 40

and the Federal Agency regulations, if these parties failed to properly comply with the State law requirements. These are not correct assumptions.

This IFR is intended to permit but not require employers and TPAs for owner-operator CMV drivers with CDLs to comply with State laws without running afoul of Part 40. We have not created compliance responsibilities under State law. That is within the jurisdiction of the States. It is up to the States to ensure compliance with their laws. Since we are not creating responsibilities, we also disagree with the commenter who believed that this IFR would impose significant costs resulting from new compliance requirements to conform to State laws. This IFR does not impose duties. It merely relieves a potential enforcement problem for certain employers and TPAs for owner-operator CMV drivers with CDLs.

Finally, there were some comments outside the scope of this rulemaking. One commenter suggested that the DOT rely on an industry association to point out who may be violating Part 40. Others referenced new Federal requirements that should be imposed upon the States, including a recommendation that Part 40 require notification to States that individual CDL holders have been identified as no longer qualified to drive after a Part 40 violation. Some commenters suggested higher fines levied by FMCSA for violations of § 40.25 and other provisions of Part 40. Others wanted this IFR to bring forward the FMCSA centralized database. All of these comments, and any others outside the scope of this rulemaking, have not resulted in changes to the IFR.

There were no comments which provided substantive information to warrant changing the procedures in the IFR, the Department will adopt the IFR as final with no changes to the procedures.

#### Regulatory Analyses and Notices

The statutory authority for this rule derives from the Omnibus Transportation Employee Testing Act of 1991 (49 U.S.C. 102, 301, 5331, 20140, 31306, and 54101 *et seq.*) and the Department of Transportation Act (49 U.S.C. 322).

This final rule is not significant for purposes of Executive Order 12866 or the DOT's regulatory policies and procedures. It represents a minor modification to our regulation to ensure that employers and TPAs for owner-operators are not held out-of-compliance with our regulation for providing information required by the State. The rule does not increase costs

on regulated parties. In fact, it will reduce the chance of civil penalty action and increase safety for employers and TPAs for owner-operators.

Consequently, the Department certifies under the Regulatory Flexibility Act that this final rule does not have a significant economic impact on a substantial number of small entities. To the extent that there is any such impact, it is expected to be negligible.

Issued at Washington DC, this 10th day of February 2010.

**Ray LaHood,**

*Secretary of Transportation.*

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

Accordingly, the Interim Final Rule amending 49 CFR Part 40 which was published at 73 FR 33735 on June 13, 2008 is adopted as a final rule without change.

[FR Doc. 2010-3729 Filed 2-24-10; 8:45 am]

**BILLING CODE 4910-9X-P**

#### **DEPARTMENT OF TRANSPORTATION**

##### **Office of the Secretary**

##### **49 CFR Part 40**

[Docket OST-2007-26828]

RIN 2105-AD64

##### **Procedures for Transportation Workplace Drug and Alcohol Testing Programs**

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

**ACTION:** Final rule.

**SUMMARY:** This final rule responds to the comments received regarding the interim final rule (IFR) procedures for the use of a new alcohol screening device (ASD) which is qualified for use in DOT Agency regulated alcohol testing. The Department did not receive any comments which were germane to the rulemaking. As such, the Department will adopt the rule as final without change.

**DATES:** This rule is effective February 25, 2010.

**FOR FURTHER INFORMATION CONTACT:** Bohdan Baczara, U.S. Department of Transportation, Office of Drug and Alcohol Policy and Compliance, 1200 New Jersey Avenue, SE., Washington, DC 20590; 202-366-3784 (voice), 202-366-3897 (fax), or [bohdan.baczara@dot.gov](mailto:bohdan.baczara@dot.gov) (e-mail).

**SUPPLEMENTARY INFORMATION:**

## Purpose

Department regulations require that in order for an employer to utilize a specific ASD to conduct required DOT alcohol tests, the device must (a) have been approved by the National Highway Traffic Safety Administration (NHTSA) as meeting required model specifications, (b) be published by NHTSA in the **Federal Register** on their most current ASD CPL, and (c) have Department-approved procedures in part 40 for its use. By publishing the IFR, the Department ensured that procedures were in place so that when NHTSA published its ASD CPL in the **Federal Register**, the breath tube ASD was immediately available for use by DOT regulated employers.

## Background and Purpose

When it originally published its alcohol testing rules on February 15, 1994 [54 FR 7302 *et seq.*], the Department established breath testing using evidential breath testing devices (EBTs) as the required method. However, in response to comments requesting additional flexibility in testing methods, the Department said that NHTSA would develop model specifications for non-evidential alcohol screening devices, evaluate additional screening devices against those specifications, and periodically publish a conforming products list of screening devices that met the model specifications. The Department noted, too, that the Department would also have to undertake separate rulemaking proceedings to establish part 40 procedures for use by DOT-regulated industries of any devices approved by NHTSA.

On April 20, 1995 [60 FR 19675], the Department published procedures for use of both breath and saliva ASDs. At that time, the Department did not anticipate that additional breath and saliva screening devices would be developed that would necessitate new procedures for their use. As a result, the revised part 40 published December 19, 2000 [65 FR 79462] stated, in part, that ASDs on the NHTSA CPL could be used for part 40 alcohol screening tests. Because NHTSA added an ASD to their CPL and the Department had no procedures for its use, we were forced to amend that rule. On August 9, 2001 [65 FR 41944], part 40 was amended to read, "You may use an ASD that is on the NHTSA CPL for DOT alcohol tests only if there are instructions for its use in this part."

On October 1, 2002 [67 FR 61521], the Department published procedures for the use of a breath tube ASD that had

been approved by NHTSA and added to their May 4, 2001 CPL [66 FR 22639]. By 2005, that device was no longer being manufactured, and was removed from the CPL effective September 19, 2005 [70 FR 54972]. Subsequently, NHTSA approved a new breath tube ASD but had not yet added it to its ASD CPL which was one of three critical criteria to permitting DOT regulated employers to use the device.

Although DOT regulated employers could still not use the ASD, the Department realized that the breath tube procedures currently in our regulation were not consistent with instructions for use of the newly approved ASD. As a result, on January 11, 2007 the Department published an IFR [72 FR 1298] where it amended part 40 by eliminating procedures specific for the breath tube ASD which is no longer being manufactured and added procedures for use of the newly approved device.

The IFR provided instructions for use of the new ASD which were generally similar to those for the previously approved breath tube device. The principal difference was in how the alcohol result is read by the technician. Instead of comparing the color of the crystals in the ASD with the colored crystals in a manufacturer-produced control tube, the new ASD used an electronic analyzer to provide the technician and the employee with an automated visual result of negative (a flashing green light) or positive (a flashing red light) at 0.02. The Department also retained the requirement to read the result within 15 minutes of the test to ensure a confirmation test, when necessary, was conducted in a timely manner. Finally, because of the manufacturer's requirement to only use the detector device with a pre-calibrated electronic analyzer, the IFR also added a fatal flaw to the current list of fatal flaws. Specifically, the alcohol screening test was to be cancelled if an electronic analyzer was not used with a specified lot of detector devices.

## Discussion of Comments to the Docket

There were two comments to the docket which were not germane to the interim final rule and, therefore, the Department will not address them. Because there were no comments which provided substantive information to warrant changing the procedures in the IFR, the Department will adopt the text in the IFR as final.

## Regulatory Analyses and Notices

The statutory authority for this rule derives from the Omnibus

Transportation Employee Testing Act of 1991 (49 U.S.C. 102, 301, 322, 5331, 20140, 31306, and 54101 *et seq.*) and the Department of Transportation Act (49 U.S.C. 322).

This final rule is not significant for purposes of Executive Order 12866 or the DOT's regulatory policies and procedures. It finalizes minor modifications, already in effect, to our procedures that do not increase costs on regulated parties. In fact, it facilitates the use of an alcohol screening device that may increase flexibility and lower costs for employers who choose to use them over more expensive options previously approved by the Department. The rule will impose no burdens on any parties, and NHTSA has already determined that the device is technically acceptable for use in the DOT alcohol testing program. While small entities are among those who may use the device, the Department consequently certifies, under the Regulatory Flexibility Act, that this rule does not have a significant economic impact on a substantial number of small entities.

We issued the IFR on this subject to ensure that employers could use the ASD when it is placed on NHTSA's CPL as a qualified device (meeting DOT specifications for accuracy and precision). We determined, at that time, under section 553 of the Administrative Procedure Act, that prior notice and an opportunity for public comment were unnecessary, impracticable, or contrary to the public interest. Given the absence of any comment on the IFR, and the fact that this rule simply finalizes a rule already in effect, the Department finds good cause under 553 to make this rule effective immediately.

## List of Subjects in 49 CFR Part 40

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

Issued at Washington DC, this 9th day of February 2010.

**Ray LaHood,**

*Secretary of Transportation.*

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

■ Accordingly, the Interim Final Rule amending 49 CFR part 40 which was published at 72 FR 1298 on January 11,

2007 is adopted as a final rule without change.

[FR Doc. 2010-3730 Filed 2-24-10; 8:45 am]

BILLING CODE 4910-9X-P

## DEPARTMENT OF TRANSPORTATION

### Office of the Secretary

#### 49 CFR Part 40

[Docket DOT-OST-2008-0088]

RIN OST 2105-AD84

### Procedures for Transportation Workplace Drug and Alcohol Testing Programs

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

**ACTION:** Final rule.

**SUMMARY:** The Department of Transportation is making technical amendments to its drug and alcohol testing procedures to authorize employers to begin using the updated U.S. DOT Alcohol Testing Form (ATF) and the Management Information System (MIS) Data Collection Form. The Department updated the information collection notice on the forms to conform to requirements under the Paperwork Reduction Act.

**DATES:** The rule is effective February 25, 2010.

**FOR FURTHER INFORMATION CONTACT:** For program issues, Bohdan Baczara, Office of Drug and Alcohol Policy and Compliance, 1200 New Jersey Avenue, SE., Washington, DC 20590; (202) 366-3784 (voice), (202) 366-3897 (fax), or [bohdan.baczara@dot.gov](mailto:bohdan.baczara@dot.gov) (e-mail).

#### SUPPLEMENTARY INFORMATION:

##### Background and Purpose

In compliance with the Paperwork Reduction Act of 1995, Public Law 104-13, (44 U.S.C. 3501 *et seq.*) the Department submitted a request to the Office of Management and Budget (OMB) for the extension of the currently approved Procedures for the Transportation Drug and Alcohol Testing Program. OMB approved the submission which included a revised U.S. DOT Alcohol Testing Form (ATF) and the Management Information System (MIS) Data Collection Form.

As part of the approval process, the Department asked for public comment on ways to enhance the quality, utility, and clarity of the information being collected on the Alcohol Testing Form (ATF) and Management Information System (MIS) form **Federal Register** [73 FR 14300] and [73 FR 33140]. There was one response, which contained several comments. As a result of the comments

and other input from OMB and DOT agencies, both forms were updated. Specifically, the ATF and MIS were updated to include an updated Paperwork Reduction Act Burden Statement, the current address of the Department, new DOT form numbers. We provided additional instructions on the reverse side of Page 3 of the ATF that tamper evident tape must not obscure the printed information. Also, the legends in the test result boxes on the front of the ATF were adjusted and printed in a smaller font so they don't obscure test results printed directly on the ATF. Other than these changes, the content and format of ATF from the previous versions remain the same.

The Department recognizes that employers and alcohol testing technicians may currently have a large supply of old ATFs. To avoid unnecessarily wasting these forms, the Department will permit the use of the old ATF until supplies are exhausted, but the old ATF must not be used beyond August 1, 2010. Employers are authorized to begin using the updated ATF immediately.

In 2006, the Department published a **Federal Register** notice [71 FR 49383] to update the MIS form and its accompanying instructions to change the name the Research and Special Programs Administration (RSPA) to the Pipeline and Hazardous Materials Safety Administration (PHMSA). This change reflects a February 2005 reorganization and renaming of that DOT agency. Since the change did not appear in the **Federal Register** notice, we are publishing the form with its accompanying instructions sheet again.

The MIS form is a single-page form, and the information reported on the MIS data form can be submitted electronically via the Internet at <http://damis.dot.gov>. As a result, it is less likely any employer would have a large number of MIS forms. Thus, employers required to report MIS data must begin using the revised MIS form in 2011 to report calendar year 2010 MIS data.

Both revised forms can be found on our Web site at <http://www.dot.gov/ost/dapc/documents.html>.

##### Regulatory Analyses and Notices

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

This rule is a non-significant rule both for purposes of Executive Order 12886 and the Department of Transportation's Regulatory Policies and Procedures. The

Department certifies that it will not have a significant economic effect on a substantial number of small entities, for purposes of the Regulatory Flexibility Act. The Department makes these statements on the basis that, as a series of technical amendments that correct or clarify existing regulatory provisions, this rule will not impose any significant costs on anyone. The costs of the underlying Part 40 final rule were analyzed in connection with its issuance in December 2000. Therefore, it has not been necessary for the Department to conduct a regulatory evaluation or Regulatory Flexibility Analysis for this final rule. The forms comply with the Paperwork Reduction Act. It has no Federalism impacts that would warrant a Federalism assessment. The amendments made in this rule are technical and corrective, to an existing rule that went through an extensive public notice and comment process.

The amendments are purely technical, do not make significant changes to Part 40, and we would not anticipate the receipt of meaningful comments on them. Consequently, the Department has determined, for purposes of section 553 of the Administrative Procedure Act, that prior notice and comment are unnecessary, impracticable, or contrary to the public interest. For the same reasons, and because it will be very useful to program participants to be authorized to use the revised forms immediately, we have determined, under section 553, that there is good cause to make the rule effective immediately upon publication.

##### List of Subjects in 49 CFR Part 40

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

Issued this 9th day of February 2010, at Washington, DC.

**Ray LaHood,**

*Secretary of Transportation.*

■ For reasons discussed in the preamble, the Department of Transportation is amending 49 CFR part 40, Code of Federal Regulations, as follows:

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

■ 1. The authority citation for 49 CFR part 40 continues to read as follows:

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