

**SUPPLEMENTARY INFORMATION:** EPA has explained the reasons for this action in the preamble to the direct final rule. For additional information, see the direct final rule published in the “Rules and Regulations” section of this issue of the **Federal Register**.

**Authority:** This proposed rule is issued under the authority of sections 2002(a), 7004(b), and 9004 of the Solid Waste Disposal Act, as amended, 42 U.S.C. 6912, 6991c, 6991d, and 6991e.

Dated: November 22, 2024.

**Meghan A. McCollister,**

*Regional Administrator, EPA Region 7.*

[FR Doc. 2024–28139 Filed 12–6–24; 8:45 am]

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## DEPARTMENT OF TRANSPORTATION

### Office of the Secretary

#### 49 CFR Part 40

[Docket DOT–OST–2021–0093]

RIN 2105–AF28

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

**AGENCY:** Office of the Secretary, Department of Transportation (DOT).

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The U.S. Department of Transportation (DOT) proposes to revise its drug testing procedures rule, which became effective on June 1, 2023, to provide interim provisions to require the conduct of directly observed urine tests in situations where oral fluid tests are currently required, but oral fluid testing is not yet available.

**DATES:** Comments must be received on or before January 8, 2025.

**ADDRESSES:** Submit your comments, identified by Docket ID No. DOT–OST–2021–0093, at <https://www.regulations.gov/>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. DOT may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. For additional submission methods and general guidance on making effective comments, please visit <https://www.transportation.gov/regulations/rulemaking-process>.

**FOR FURTHER INFORMATION CONTACT:**

Bohdan Baczara, Deputy Director, Office

of Drug and Alcohol Policy and Compliance, 1200 New Jersey Avenue SE, Washington, DC 20590; telephone number 202–366–3784; [ODAPCwebmail@dot.gov](mailto:ODAPCwebmail@dot.gov).

**SUPPLEMENTARY INFORMATION:**

#### I. Why is DOT proposing this rule?

DOT proposes to revise its drug testing regulation, Procedures for Transportation Workplace Drug and Alcohol Testing Programs (49 CFR part 40), to address unforeseen circumstances rendering it impossible to comply with requirements in the final rule.

#### II. General Information

DOT published a final rule amending the procedures for its drug testing program (49 CFR part 40) on May 2, 2023 (88 FR 27596) (May 2023 Final Rule). The May 2023 Final Rule went into effect on June 1, 2023. The May 2023 Final Rule authorized oral fluid drug testing as an additional methodology for employers to use as a means of achieving the safety goals of the program. In the May 2023 Final Rule, we required an oral fluid test to be conducted in certain circumstances where an observed collection is required. However, because oral fluid testing is not yet available, DOT proposes to amend DOT’s regulations to require the conduct of directly observed urine collections in those circumstances for an interim period. This rulemaking would correct the inadvertent factual impossibility created by the May 2023 Final Rule.

*Section 40.67 When and how is a directly observed urine collection conducted?*

DOT regulations at § 40.67 require that a collection be directly observed in certain circumstances, e.g., if the original sample was invalid without adequate medical explanation or the test is for a return to duty. In the May 2023 Final Rule, DOT codified a procedure requiring the directly observed collection to be an oral fluid test rather than a urine test in certain situations. However, oral fluid testing cannot be implemented until the Department of Health and Human Services (HHS) certifies at least two laboratories, one to serve as a primary laboratory, and a second to serve as a split specimen laboratory. Because no oral fluid laboratories have been certified, it is not yet possible to comply with this provision.

In the interim, it is necessary to ensure that directly observed collections can still be conducted when required. DOT proposes to require directly

observed urine collections in the situations specified in § 40.67(g)(3) if an oral fluid collection is not yet available. We emphasize that the responsibility of ensuring the collection takes place has always been a requirement the employer must satisfy. If a directly observed urine collection is required, the burden—as is currently the case—remains on the employer to provide an observer as specified in § 40.67(g) if the collection site cannot do so.

We intend this provision to require directly observed urine tests in situations where an oral fluid collection is required, but is not yet available, to be a temporary, short-term solution because there are currently no certified oral fluid laboratories. This provision will sunset one year after HHS publishes a **Federal Register** notice that it certified the second oral fluid drug testing laboratory. So that all are aware of the date when this provision will sunset, we will publish a **Federal Register** document specifying the date the second oral fluid laboratory is certified by HHS. If, during the interim period, a collection site is able to conduct an oral fluid collection (HHS has certified at least two oral fluid drug testing laboratories, and both a qualified oral fluid collector and a conforming oral fluid collection device are available at the collection site), an oral fluid collection would be required to be conducted.

In the May 2023 Final Rule, we added § 40.67(g)(3) to address situations where an observer who meets the regulatory requirements cannot be found at the collection site, but mistakenly used the term “collector” instead of “observer” in the regulatory text of that section. In this rule, we propose to correct the error.

#### III. Regulatory Notices and Analyses

*Executive Orders 12866, 13563, and 14094*

This proposed rule is a non-significant rule for purposes of Executive Order (E.O.) 12866, as supplemented by E.O. 13563 and amended by E.O. 14094, and will not impose any significant costs or have any significant impacts. Given the uncertainty of testing costs and lack of data on other aspects of testing, DOT did not estimate cost savings or other benefits for the May 2023 Final Rule that permitted oral fluid testing as an alternative to urine testing in most scenarios. In the regulatory analyses for the May 2023 Final Rule, DOT stated that “Oral fluid testing is optional in all but very rare cases . . .” However, and because oral fluid testing is not yet

available, this proposed rule requires that a directly observed urine collection be conducted in those “very rare cases” where an oral fluid test is required but is not available. As an amendment to establish a temporary requirement to conduct directly observed urine collections in situations where oral fluid collections are required but oral fluid testing is not yet available, which was the requirement in existence before issuance of the May 2023 Final Rule, this proposed rule will not affect a significant number of drug tests, and as such, will not impose any significant costs or have any significant impacts on the DOT testing program.

*Regulatory Flexibility Act and Small Business Regulatory Enforcement Fairness Act (SBREFA)*

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) requires Federal agencies to consider the effects of their regulatory actions on small businesses and other small entities and 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 a population of less than 50,000. For this rulemaking, potentially affected small entities include drug testing companies (U.S. Small Business Administration (SBA) North American Industry Classification System (NAICS) Sector 54 (Professional, Scientific and Technical Services), Code 541380 (Testing Laboratories and Services)) as well as DOT-regulated entities (SBA NAICS Sectors 48–49 (Transportation and Warehousing)).

The Department does not expect that the proposed rule would have a significant economic impact on a substantial number of small entities. The proposed rule, if adopted, would establish a temporary requirement to conduct directly observed urine collections in situations where oral fluid collections are required but oral fluid testing is not yet available. Urine testing was the requirement in existence before issuance of the May 2023 Final Rule, and regulated entities are therefore familiar with the procedure for directly observed urine tests. Because oral fluid testing is not yet available for use in DOT’s drug testing programs, regulated entities also likely still have the collection devices and other equipment necessary to conduct urine testing. In addition, the temporary procedures proposed in this rulemaking would be used only in the specific circumstances in § 40.67(g) where urine testing is

currently required and would thus not affect a significant number of drug tests. As a result, the temporary amendments would not, if adopted, impose significant costs. For these reasons, I certify that the proposed rule would not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act. DOT requests comment on its certification and the expected economic impacts of the proposed rule.

*Unfunded Mandates*

The Secretary has examined the impact of this proposed rule under the Unfunded Mandates Reform Act (UMRA) of 1995 (Pub. L. 104–4). This proposed rule does not trigger the requirement for a written statement under sec. 202(a) of the UMRA because this rulemaking does not impose a mandate that results in an expenditure of \$200 million or more by either State, local, and Tribal governments in the aggregate or by the private sector in any one year.

*Environmental Impact*

The DOT has analyzed the environmental impacts of this action pursuant to the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*) and has determined that it is categorically excluded pursuant to DOT Order 5610.1C, “Procedures for Considering Environmental Impacts” (44 FR 56420, October 1, 1979). Categorical exclusions are actions identified in an agency’s NEPA implementing procedures that do not normally have a significant impact on the environment and therefore do not require either an environmental assessment (EA) or environmental impact statement (EIS). This proposed rule would amend the transportation industry drug testing program procedures regulation to establish a temporary requirement to conduct directly observed urine collections in situations where oral fluid collections are required but oral fluid testing is not yet available. This action is covered by the categorical exclusion listed at 23 CFR 771.118(c)(4), “[p]lanning and administrative activities that do not involve or lead directly to construction, such as: . . . promulgation of rules, regulations, directives . . .” The Department does not anticipate any environmental impacts, and there are no extraordinary circumstances present in connection with this rulemaking.

*Executive Order 13132: Federalism*

The Secretary has analyzed the proposed rule in accordance with Executive Order 13132: Federalism.

Executive Order 13132 requires Federal agencies to carefully examine actions to determine if they contain policies that have federalism implications or that preempt State law. As defined in the order, “policies that have federalism implications” refer to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government.

Most of the regulated parties under the Department’s drug testing program are private entities. Some regulated entities are public entities (*e.g.*, transit authorities and public works departments); however, the Secretary has determined that the proposed rule, which would provide temporary procedures to require the conduct of directly observed urine testing where oral fluid testing is not available, does not contain policies that have federalism implications.

*Executive Order 13175: Consultation and Coordination With Indian Tribal Governments*

Executive Order 13175 (65 FR 67249, November 6, 2000) requires Federal agencies to develop an accountable process to ensure “meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.” “Policies that have tribal implications” as defined in the Executive order, include regulations that have “substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.” This proposed rule does not have Tribal implications. The proposed rule will also not have substantial direct effects on Tribal governments, 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, as specified in Executive Order 13175.

*Paperwork Reduction Act*

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) (PRA) requires that DOT consider the impact of paperwork and other information collection burdens imposed on the public. This proposed rule would not require any new collection of information under the PRA. Notwithstanding any other provision of

law, no person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a currently valid Office of Management and Budget (OMB) control number.

#### *Privacy Act*

Anyone is able to search the electronic form of all comments received in any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). For information on DOT's compliance with the Privacy Act, please visit <https://www.transportation.gov/privacy>.

#### *Rule Summary*

As required by 5 U.S.C. 553(b)(4), a summary of this proposed rule can be found at [regulations.gov](https://www.regulations.gov), Docket DOT-OST-2021-0093, in the **SUMMARY** section of this document.

#### *Pay-As-You-Go Act of 2023*

In accordance with Compliance with Pay-As-You-Go Act of 2023 (Fiscal Responsibility Act of 2023, Pub. L. 118-5, div. B, title III) and OMB

Memorandum (M-23-21) dated September 1, 2023, the Department has determined that this proposed rule is not subject to the Pay-As-You-Go Act of 2023 because it will not increase direct spending beyond specified thresholds.

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

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

For the reasons stated in the preamble, DOT proposes to amend 49 CFR part 40 as follows:

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

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

**Authority:** 49 U.S.C. 102, 301, 322, 5331, 20140, 31306, and 54101 *et seq.*

■ 2. In § 40.67:

■ a. In paragraph (g)(3) introductory text, remove the word “collector” and add in its place “observer”; and

■ b. Add paragraph (g)(4).

The addition reads as follows:

#### **§ 40.67 When and how is a directly observed urine collection conducted?**

\* \* \* \* \*

(g) \* \* \*

(4) Notwithstanding paragraphs (g)(3)(i) and (ii) of this section, until otherwise specified (one year after HHS publishes a **Federal Register** notification of the second certified oral fluid drug testing laboratory), you must conduct an oral fluid collection if possible (*i.e.*, HHS has certified at least two oral fluid drug testing laboratories, and both a qualified oral fluid collector and a conforming oral fluid collection device are available at the collection site). Otherwise, you must conduct a directly observed urine collection as required in this section.

\* \* \* \* \*

Signed pursuant to authority delegated at 49 CFR 1.27(c) in Washington, DC.

**Subash Iyer,**

*Acting General Counsel.*

[FR Doc. 2024-28561 Filed 12-6-24; 8:45 am]

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