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115TH CONGRESS }
2d Session }

SENATE

{ REPORT
115-286 }

FIGHTING OPIOID ABUSE IN
TRANSPORTATION ACT

R E P O R T

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND
TRANSPORTATION

ON

S. 2848



JUNE 27, 2018.—Ordered to be printed

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SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

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FIGHTING OPIOID ABUSE IN TRANSPORTATION ACT

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Mr. THUNE, from the Committee on Commerce, Science, and
Transportation, submitted the following

R E P O R T

[To accompany S. 2848]

[Including cost estimate of the Congressional Budget Office]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 2848) to improve Department of Transportation controlled substances and alcohol testing, and for other purposes, having considered the same, reports favorably thereon with an amendment (in the nature of a substitute) and recommends that the bill (as amended) do pass.

PURPOSE OF THE BILL

The purpose of S. 2848 is to improve drug and alcohol testing requirements for transportation workers by doing the following: extending testing requirements to rail mechanical employees and yardmasters; setting a deadline for the issuance of oral fluid testing guidelines; increasing the transparency of drug and alcohol testing data; promoting accountability for the issuance of regulatory actions required by prior statutes; and requiring mandatory testing guidelines to include fentanyl on the drug testing panel if justified.

BACKGROUND AND NEEDS

Opioid abuse has surged in recent years, with more than 42,000 opioid overdose deaths in 2016 alone.¹ Opioid abuse negatively affects transportation safety; recent post-accident test data show sig-

¹National Institute on Drug Abuse. Nearly half of opioid-related overdose deaths involve fentanyl. 2018. (<https://www.drugabuse.gov/news-events/news-releases/2018/05/nearly-half-opioid-related-overdose-deaths-involve-fentanyl>)

nificant increases in the number of operators or drivers impaired by opioids and involved in accidents.² In addition, lab-reported Department of Transportation (DOT) drug testing data for safety-sensitive transportation workers from 2011 to 2015 show increases in positive drug tests across a range of substances, including opiates and amphetamines.³ DOT, through its Office of Drug and Alcohol Policy and Compliance (ODAPC) and modal administrations, currently requires drug and alcohol testing for more than 12 million transportation workers in the aviation, trucking, railroad, mass transit, pipeline, and other transportation industries.⁴

Pursuant to the Omnibus Transportation Employee Testing Act of 1991 (P.L. 102–143), DOT follows the Department of Health and Human Services (HHS) Mandatory Guidelines for Federal Workplace Drug Testing Programs (HHS Mandatory Guidelines) to determine the types of drugs for which DOT requires testing.⁵ DOT, however, has discretion regarding many aspects of the regulations covering regulated modal administration programs, and ODAPC primarily advises DOT on such issues, publishing drug and alcohol testing regulations for the transportation industry and issuing official interpretations of those regulations.

On January 23, 2017, HHS revised its HHS Mandatory Guidelines to include synthetic opioids—specifically oxycodone, oxymorphone, hydrocodone, and hydromorphone—on the panel of controlled substances for which Federal agencies can test.⁶ Following revision of the HHS Mandatory Guidelines, on November 13, 2017, DOT published a final rule including these synthetic opioids on its drug testing panel used for transportation workers subject to DOT drug and alcohol testing regulations.⁷ Notably, fentanyl, a synthetic opioid responsible for approximately 19,000, or 46 percent, of the opioid overdose deaths in 2016, was not included on the panel.⁸

Like many transportation workers across modes, railroad employees defined as performing safety-sensitive functions—including engineers, conductors, brakemen, dispatching employees, and signal employees, among other types of employees—are subject to mandatory drug and alcohol testing.⁹ The goal of this testing is to serve as a deterrent for drug and alcohol use, reducing on-the-job impairment and therefore increasing safety. However, rail mechanical employees and yardmasters, who do not perform a dual role that otherwise would require testing, are currently not subject to mandatory drug and alcohol testing, despite the nexus between

² Governors' Highway Safety Association. Drug-Impaired Driving: Marijuana and Opioids Raise Critical Issues for States. 2018. (<https://www.ghsa.org/resources/DUID18>)

³ Federal Railroad Administration. MOW Final Rule Presentation; Drug & Alcohol Regulations, Incidents, and Trends. September 15, 2016. (<https://rsac.fra.dot.gov/meetings/20160915.php>)

⁴ DOT. Office of Drug and Alcohol Policy and Compliance. Employees—What are the drug & alcohol testing rules and where do I find them? 2018. (<https://www.transportation.gov/odapc/employee>). Note that this number includes employees subject to regulations of the United States Coast Guard, which is part of the Department of Homeland Security.

⁵ See Omnibus Transportation Employee Testing Act of 1991 (P.L. 102–143).

⁶ SAMHSA. Mandatory Guidelines for Federal Workplace Drug Testing Programs. 2017. (https://www.samhsa.gov/sites/default/files/workplace/frn_vol_82_7920.pdf)

⁷ DOT. Addition of Certain Schedule II Drugs to the Department of Transportation's Drug-Testing Panel and Certain Minor Amendments. 2017. (<https://www.federalregister.gov/documents/2017/11/13/2017-24397/procedures-for-transportation-workplace-drug-and-alcohol-testing-programs-addition-of-certain>)

⁸ Ibid. National Institute on Drug Abuse. 2018.

⁹ Federal Railroad Administration. Drug and Alcohol. 2018. (<https://www.fra.dot.gov/Page/P0345>)

their work and safety. Moreover, because transit and aviation mechanical employees are generally subject to mandatory drug and alcohol testing requirements, extending requirements to rail mechanical employees and yardmasters would increase uniformity in the types of employees tested across modes of transportation.

While urine, oral fluid, and hair can also be used to test for concentrations of controlled substances, urine testing currently is the only form of drug testing authorized for use under the HHS Mandatory Guidelines. Hair and oral fluid testing may offer advantages in comparison to urine testing, including more expedient and less invasive testing procedures, and hair testing may offer greater visibility on use patterns. The Fixing America's Surface Transportation (FAST) Act (P.L. 114–94) required HHS to issue, not later than 1 year after the date of enactment, guidelines for hair testing as a method of detecting use of a controlled substance.¹⁰ However, HHS to date has only issued a request for information on hair testing, released in May 2015, before the enactment of the FAST Act.¹¹ HHS also issued a notice of mandatory guidelines for oral fluid testing in May 2015, but it has yet to finalize these guidelines.¹²

Given the number of tests conducted across the transportation industry, about 6 million tests annually, better data collection and analysis in relation to drug and alcohol testing provides valuable insight regarding changes in the types of substances used and magnitude of positive test rates.¹³ However, DOT currently does not have a consolidated, publicly accessible database to display drug and alcohol testing across modes of transportation and by drug type, among other variables. Moreover, DOT does not have a national database for regulators and employers to track drug and alcohol violations and ensure that such drivers are identified before operating commercial motor vehicles on public roads. To that end, in 2012, Congress, in the Moving Ahead for Progress in the 21st Century Act (MAP–21; P.L. 112–141), directs the Secretary of Transportation to establish a national clearinghouse containing commercial motor vehicle operators' violations of the Federal Motor Carrier Safety Administration's (FMCSA) drug and alcohol testing program.¹⁴ On December 5, 2016, FMCSA published the final rule pursuant to the MAP–21 mandate and set a compliance date for January 6, 2020.¹⁵

SUMMARY OF PROVISIONS

If enacted, S. 2848 would do the following:

- Close a safety gap in railroad drug and alcohol testing regulations by expanding testing requirements to both rail mechanical employees and yardmasters.

¹⁰ FAST Act Section 5402 (codified at 49 U.S.C. § 31306 note).

¹¹ SAMHSA. Request for Information Regarding Specific Issues Related to the Use of the Hair Specimen for Drug Testing. 2015. (<https://www.gpo.gov/fdsys/pkg/FR-2015-05-29/pdf/2015-12743.pdf>)

¹² SAMHSA. Mandatory Guidelines for Federal Workplace Drug Testing Programs. 2015. (<https://www.gpo.gov/fdsys/pkg/FR-2015-05-15/pdf/2015-11523.pdf>)

¹³ Information Provided by the Office of Drug and Alcohol Policy and Compliance.

¹⁴ P.L. 112–141.

¹⁵ Federal Motor Carrier Safety Administration. Commercial Driver's License Drug and Alcohol Clearinghouse. 2016. (<https://www.gpo.gov/fdsys/pkg/FR-2016-12-05/pdf/2016-27398.pdf>)

- Address a major on-going drug abuse issue by requiring that HHS and DOT include fentanyl in the drug-testing panel, subject to findings on available testing.
- Advance a more expedient and less invasive testing method by setting a deadline for HHS to issue mandatory guidelines on oral fluid testing.
- Increase transparency by requiring DOT to create a publicly available database of drug and alcohol testing data and requiring the Government Accountability Office (GAO) to review DOT's collection, use, and availability of drug and alcohol testing data.
- Promote accountability by requiring FMCSA to provide status reports on its implementation of the Commercial Driver's License Drug and Alcohol Clearinghouse and HHS to provide status reports on its hair testing guideline.

LEGISLATIVE HISTORY

S. 2848 was introduced by Senator Thune on May 15, 2018. On May 22, 2018, in an open Executive Session, the Committee, by voice vote, ordered the bill to be reported favorably with an amendment (in the nature of a substitute). Senator Thune offered an amendment (in the nature of a substitute) to improve the bill. The Committee accepted the bill and amendment en bloc by voice vote.

ESTIMATED COSTS

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

S. 2848—Fighting Opioid Abuse in Transportation Act

The Department of Transportation (DOT) issues regulations concerning drug and alcohol testing of workers in the transportation industry. The Department of Health and Human Services (HHS) issues guidelines concerning drug testing in federal workplaces.

S. 2848 would require DOT and HHS to issue and revise regulations regarding who is subject to drug and alcohol testing and to report to the Congress regarding the implementation of previous regulations. The bill also would require DOT to establish a public database on drug and alcohol testing of employees in the transportation industry and to require the Governmental Accountability Office to complete a report.

Under current law, DOT collects information from employers about the drug and alcohol testing of employees. S. 2848 also would require DOT to revise current rules about which categories of railroad employees are subject to drug and alcohol testing. CBO expects that to expand that information into a publicly available database, the agency would have to hire up to two employees over a three-year period (at an average annual cost of \$125,000 per employee) to develop the database and to complete the required rule-making and reports.

HHS establishes the scientific and technical guidelines for federal drug-testing programs in the workplace. Current guidelines address testing for certain opioid drugs, but do not include testing for the synthetic opioid fentanyl. The bill would require HHS to up-

date its drug testing guidelines to include fentanyl or to issue a report to the Congress that explains its decision not to do so. Based on feedback from HHS, CBO estimates that carrying out those activities would require the equivalent of about two employees for two years (at an average cost of about \$125,000 per employee) and additional work from an outside contractor if HHS updated the current guidelines.

As a result, CBO estimates that implementing the bill would cost about \$1 million over the 2019–2023 period; such spending would be subject to the availability of appropriated amounts.

Enacting S. 2848 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

CBO estimates that enacting S. 2848 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2029.

S. 2848 would impose intergovernmental and private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) by requiring railroads regulated by DOT to expand drug testing to include mechanical employees and yardmasters. Because of the relatively small number of these employees and the fact that many railroads already test them, CBO expects that the costs of the mandate would be small.

In addition, the bill would impose a mandate on public and private employers across various transportation sectors regulated by DOT if HHS determines that drug testing guidelines should be updated to include fentanyl. In that scenario, the costs of the mandate would be the additional costs employers would incur to test their employees for use of fentanyl. According to DOT, approximately 5 million employees—including about 4 million employees who have been issued commercial driver's licenses—would be subject to testing. Under the current testing system, only a fraction are randomly tested in any given year. The costs of the mandate would vary depending on how many variants of fentanyl HHS chooses to include in its guidelines, and also would vary depending on the size of each employer. Using information from DOT and transportation industry sources, CBO estimates that the costs of the mandate could be significant, but would not exceed the annual thresholds for intergovernmental and private-sector mandates established in UMRA (\$80 million and \$160 million in 2018, respectively, adjusted annually for inflation).

The CBO staff contact for this estimate are Sarah Puro (for DOT programs), Andrea Noda (for HHS programs) and Jon Sperl (for mandates). The estimate was reviewed by Theresa Gullo, Assistant Director for Budget Analysis.

REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation, as reported:

NUMBER OF PERSONS COVERED

Sections 2 and 3 of S. 2848, as reported, would expand to both rail mechanical employees and yardmasters the drug testing requirements applicable to other types of rail employees that have

safety responsibilities. The Bureau of Labor Statistics (BLS) estimates that approximately 39,000 yardmasters and conductors and approximately 35,000 rail installation, repair, and maintenance workers are employed in the United States.¹⁶ The majority of employees included in these BLS estimates—including conductors and rail signal employees—are already covered under existing DOT drug testing requirements, meaning the number of additional persons covered would likely be a small fraction of those 64,000 employees.

Section 6 of S. 2848 also would require HHS and DOT to include fentanyl in the drug testing panel if justified, and section 7 would set a deadline for HHS to issue mandatory guidelines on oral fluid testing. The promulgation of these guidelines by HHS and subsequent adoption by DOT through rulemaking would affect the approximately 12 million workers performing safety-sensitive transportation occupations in the United States.¹⁷ However, the changes made are not expected to substantially increase burden on affected employees, given that they are already subject to drug testing using the existing panel. In fact, both oral fluid and hair testing methods are considered to be less invasive and more expedient than urine testing. If hair and oral fluid samples become widely used in drug testing as a result of HHS's issuance, cumulative burden on transportation employees could foreseeably be reduced.

ECONOMIC IMPACT

S. 2848, as reported, is not expected to have a negative impact on the Nation's economy.

PRIVACY

S. 2848, as reported, is expected to have an impact on the personal privacy of a small number of individuals, since the bill would subject rail mechanical employees and yardmasters—currently not covered under drug testing requirements unless they perform a dual role that otherwise would require testing—to mandatory drug testing. With respect to the oral testing provision in section 7, in addition to increasing the expediency of testing, this provision is intended to quicken the adoption of an oral sampling method for drug testing, which would advance the same objective as urine testing with a smaller impact on the privacy of individuals.

PAPERWORK

S. 2848, as reported, would reduce paperwork requirements for regulated entities. Section 9 of the bill would require HHS to approve all certified laboratories requesting use of paperless electronic chain of custody forms used in the course of drug testing. As major laboratories responsible for the majority of drug testing in the United States transition to completely paperless electronic chain of custody systems, the paperwork burden on employers, col-

¹⁶ Bureau of Labor Statistics. National Industry-Specific Occupational Employment and Wage Estimates 482100—Rail Transportation. May 2017. (https://www.bls.gov/oes/current/naics4_482100.htm#00-0000)

¹⁷ DOT. Office of Drug and Alcohol Policy and Compliance. Employees—What are the drug & alcohol testing rules and where do I find them?. 2018 (<https://www.transportation.gov/odapc/employee>). Note that this number includes employees subject to regulations of the United States Coast Guard, which is part of the Department of Homeland Security.

lectors, and laboratories would significantly decrease. In addition, section 10 would require FMCSA to provide status reports on its implementation of the Commercial Driver's License Drug and Alcohol Clearinghouse, and section 8 would require HHS to provide status reports on its hair testing guidelines. These two reporting requirements are expected to result in a very small increase in paperwork for those agencies, as necessary for the status reports, up until the date of full implementation or compliance with the underlying statutory requirements.

CONGRESSIONALLY DIRECTED SPENDING

In compliance with paragraph 4(b) of rule XLIV of the Standing Rules of the Senate, the Committee provides that no provisions contained in the bill, as reported, meet the definition of congressionally directed spending items under the rule.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title.

This section would provide that the bill may be cited as the "Fighting Opioid Abuse in Transportation Act."

Section 2. Rail mechanical employee controlled substances and alcohol testing.

This section would require the Secretary of Transportation to publish a final rule to designate rail mechanical employees as employees responsible for safety-sensitive functions for the purposes of railroad drug and alcohol testing requirements. In effect, this section would make such requirements applicable to rail mechanical employees, similar to other types of railroad employees with safety responsibilities, such as engineers or conductors. The section would require the Secretary of Transportation to define the term "rail mechanical employee" by regulation.

Section 3. Rail yardmaster controlled substances and alcohol testing.

This section would require the Secretary of Transportation to publish a final rule to designate yardmasters as employees responsible for safety-sensitive functions for the purpose of railroad drug and alcohol testing requirements. In effect, this section would make such requirements applicable to yardmasters, similar to other types of railroad employees with safety responsibilities, such as engineers or conductors. The section would require the Secretary of Transportation to define the term "yardmaster" by regulation.

Section 4. Department of Transportation public drug and alcohol testing database.

This section would require the Secretary of Transportation to establish and make publicly available on its website a database of drug and alcohol testing data reported by employers for each mode of transportation and to update the database annually. This section would require the database to include, for each mode of transportation, the following: the number of tests by substance tested; results of the tests by substance; the reasons for the tests; and the number of individuals who refused testing. This database is in-

tended to provide greater transparency of drug and alcohol testing data by making it available in a more consolidated and easily accessible format. This section would include protections for commercially sensitive data and for ensuring individual employers and employees are not identified.

Section 5. GAO report on department of transportation's collection and use of drug testing data.

This section would require GAO to review DOT's Drug and Alcohol Testing Information Management System and to submit a report on the review to relevant congressional committees. The report would include a description of data collection processes, an assessment of data use, and an assessment of the public database, along with potential recommendations for how the management of drug and alcohol testing data could be improved.

Section 6. Transportation workplace drug and alcohol testing program; addition of fentanyl.

This section would require the Secretary of Health and Human Services to determine, within 6 months, whether the inclusion of fentanyl on the panel of drugs authorized for testing is justified, based on the reliability and cost-effectiveness of available testing. If the Secretary does find that the inclusion of fentanyl is justified, the agency would be required to issue a revision to the mandatory guidelines to include fentanyl on the panel within 18 months of the date of the determination. If the Secretary finds that the inclusion of fentanyl is not justified, the agency would be required to submit a report to Congress explaining, in detail, the reasons for its determination.

Within 18 months of the Secretary of Health and Human Services publishing the final notice to revise the mandatory guidelines to include fentanyl, pursuant to this section, the Secretary of Transportation would be required to publish a final rule adding fentanyl to DOT's drug testing panel.

Section 7. Status reports on hair testing guidelines.

This section would require the Secretary of Health and Human Services to report to Congress on the status of the final notice for the statutorily-required scientific and technical guidelines for hair testing, within 30 days of enactment of this bill and every 6 months thereafter, until the agency publishes a final notice of guidelines for hair testing. The section would require the report to include the following: an explanation of why the guidelines have not been issued; a schedule, including benchmarks, for the completion of the guidelines; and an estimated date of completion for the guidelines. The section would include a provision to address positive test results, of the individual being tested, caused solely by the drug use of others and not caused by the drug use of the individual being tested.

In addition, the Committee directs HHS to conduct, every 60 days starting from the date of enactment of this bill and until the issuance of the final notice of guidelines for hair testing, staff-level briefings with the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives. The briefings should

include an explanation of why the guidelines have not been issued; a schedule, including benchmarks, for the completion of the guidelines; and an estimated date of completion for the guidelines.

Section 8. Mandatory guidelines for Federal workplace drug testing programs using oral fluid.

This section would require the Secretary of Health and Human Services to publish a final notice of mandatory guidelines for oral fluid testing not later than December 31, 2018, based on the notice of proposed mandatory guidelines published in 2015. The section would include a provision to address positive test results, of the individual being tested, caused solely by the drug use of others and not caused by the drug use of the individual being tested.

Section 9. Electronic recordkeeping.

This section would require the Secretary of Health and Human Services, not later than 1 year from the date of enactment of this bill, to ensure each certified laboratory that requests the use of paperless electronic chain of custody forms receives approval. This section also would require the Secretary of Transportation, not later than 30 months from the date of enactment of this bill, to issue a final rule authorizing the use of electronic signatures for all paperless chain of custody forms under part 40 of title 49, Code of Federal Regulations.

Section 10. Status reports on Commercial Driver's License Drug and Alcohol Clearinghouse.

This section would require FMCSA to submit a report to Congress biannually on the implementation of the final rule for the Commercial Driver's Drug and Alcohol Clearinghouse, until such rule is fully implemented. The report would include an updated schedule for implementation of the rule as soon as practicable and a description of actions taken by FMCSA to implement the rule before the compliance date of January 6, 2020.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the Committee states that the bill as reported would make no change to existing law.