

the procurement of the printing of Standard Form 149, U.S. Government National Credit Card.

3. Section 101-26.408-4(c) is redesignated § 101-26.503 and revised to read as follows:

§ 101-26.503 Multiple award schedule purchases made by GSA supply distribution facilities.

GSA supply distribution facilities are responsible for quickly and economically providing customers with frequently needed common-use items. Stocking a variety of commercial, high-demand items purchased from FSS multiple award schedules is an important way in which GSA supply distribution facilities meet this responsibility.

4. The heading for Subpart 101-26.4 is revised and the text is removed and reserved to read as follows:

Subpart 101-26.4—Federal Supply Schedules—[Reserved]

5. Section 101-26.507 is revised to read as follows:

§ 101-26.507 Security equipment.

Federal agencies and other activities authorized to purchase security equipment through GSA sources shall do so in accordance with the provisions of this § 101-26.507. Under section 201 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 481), the Administrator of GSA has determined that fixed-price contractors and lower tier subcontractors who are required to protect and maintain custody of security classified records and information may purchase security equipment from GSA sources. Delivery orders for security equipment submitted by such contractors and lower tier subcontractors shall contain a statement that the security equipment is needed for housing Government security classified information and that the purchase of such equipment is required to comply with the security provision of a Government contract. In the event of any inconsistency between the terms and conditions of the delivery order and those of the Federal Supply Schedule contract, the latter shall govern. Security equipment shall be used as prescribed by the cognizant security office.

6. Section 101-26.507-3 is revised to read as follows:

§ 101-26.507-3 Purchase of security equipment from Federal Supply Schedules.

To ensure that a readily available source exists to meet the unforeseen demands for security equipment, Federal Supply Schedule contracts have

been established to satisfy requirements that are not appropriate for consolidated procurement and do not exceed the maximum order limitations.

Dated: March 17, 1995.

Julia M. Stasch,

Acting Administrator of General Services.

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DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 40

[Docket 50018]

RIN 2105-AC20

Procedures for Transportation Workplace Drug and Alcohol Testing Programs; Procedures for Non-Evidential Alcohol Screening Devices

AGENCY: Office of the Secretary, DOT.

ACTION: Final rule; request for comments.

SUMMARY: When the Department of Transportation published its final alcohol testing rules in February 1994, it said that if non-evidential screening devices were approved, the devices could be used for screening tests in DOT-mandated alcohol testing programs. Several such devices have now been determined by the National Highway Traffic Safety Administration to be capable of detecting the presence of alcohol at the 0.02 or greater level of alcohol concentration. This rule establishes procedures for the use of these devices.

DATES: This rule is effective May 22, 1995. Comments on amendments to §§ 40.59(c), 40.63(d)(1), and 40.63(e)(2) should be received by June 5, 1995. Late-filed comments will be considered to the extent practicable.

FOR FURTHER INFORMATION CONTACT: Albert Alvarez, Director, Department of Transportation, Office of Drug Enforcement and Program Compliance, 400 7th Street SW., Washington, DC 20590, Room 9404A, 202-366-3784; or Robert C. Ashby, Deputy Assistant General Counsel for Regulation and Enforcement, 400 7th Street SW., Room 10424, Washington, DC 20590; 202-366-9306.

SUPPLEMENTARY INFORMATION:

Background

When the Department published its final alcohol testing rules on February 15, 1994 (59 FR 7302 *et seq.*), the Department established breath testing, using evidential breath testing devices

(EBTs), as the method to be used. However, in response to comments requesting additional flexibility in testing methods, the Department said that—

NHTSA [the National Highway Traffic Safety Administration] will develop model specifications (using precision and accuracy criteria), evaluate additional screening devices against them, and periodically publish a conforming products list of those additional screening devices (not exclusively breath testing devices) that meet the model specifications. * * * Please note that the Department will also have to undertake separate rulemaking proceedings to establish procedures for the use of any devices after they are approved. (Id. at 7316.)

NHTSA published model specifications, tested several screening devices and, on December 2, 1994, published a conforming products list (CPL) including four non-evidential breath testing devices and one saliva testing device. As noted in the February 15 common preamble cited above, before these devices can be used in DOT alcohol testing programs, this procedural rule has to be issued. When this rule becomes effective, employers may begin using the approved non-evidential screening devices.

We emphasize that these devices may be used only for alcohol *screening* tests. Confirmation tests must be performed on EBTs. To the greatest extent feasible, we have drafted these procedures to incorporate the same basic requirements as the existing alcohol testing procedures. This makes the procedures simple and achieves the flexibility that is the goal of using non-evidential devices.

Comments and Responses

As of the close of the comment period, the Department received 23 comments on the January 17, 1995, notice of proposed rulemaking (NPRM) for this rule (60 FR 3371). Ten of these comments were from employers or employer associations, another 10 were from manufacturers or distributors of breath testing equipment, and three were from other testing industry participants. The comments focused on several issues.

Interval Between Screening and Confirmation Tests

In the NPRM leading to the February 15, 1994, final rule on alcohol testing procedures (57 FR 59416; December 15, 1992), the Department proposed a 15-minute waiting period before the confirmation test. The purpose of this waiting period was to ensure that residual mouth alcohol did not artificially raise the confirmation test result. The Department had considered,

and asked for comment on, the idea of requiring such a waiting period before all screening tests, but we decided against proposing such a requirement because it would waste employers' and employees' time in the great majority of screening tests that we expect to be negative. Because the Department believed, and notable forensic experts in the alcohol testing field agreed, that the confirmation test should follow the screening test as immediately as possible, the Department proposed a maximum of 20 minutes (i.e., no more than 5 minutes beyond the 15-minute waiting period) between the two tests. The NPRM said that—

The purpose of establishing a maximum limit for the waiting period is to prevent the manipulation of confirmation results by affording time for the metabolism of alcohol so that results will be lower than first recorded on the initial test. Should there be greater flexibility in the timing of confirmation tests? (Id.)

In the final rule (59 FR 7351; February 15, 1994), the Department retained the 15–20-minute interval between the screening and confirmation tests. The preamble discussion of this issue was as follows:

There were 29 comments concerning the waiting period before the confirmation test, fifteen of which supported the 15-minute minimum time proposed in the NPRM. Four comments wanted a shorter interval (e.g., two or five minutes) and four supported a longer interval (e.g., 20 or 30 minutes). Two comments opposed any requirement concerning an interval. Six comments either wanted no maximum waiting time or preferred to rely on the employer's or EBT manufacturer's discretion.

The waiting period is important. It is intended to give the employee the opportunity to ensure that any residual mouth alcohol does not influence the result of the confirmation test. According to the Department's information, fifteen minutes is the minimum period after which one can be confident that any residual mouth alcohol has disappeared. A shorter interval is not feasible for this reason. At the same time, waiting a long period between tests can be costly in terms of lost employee time and could influence the outcome of the confirmation test. In order to guard against lengthy delays in the performance of confirmation tests, which can allow alcohol concentration levels to fall, the final rule

retains the 20-minute maximum. It should be pointed out that failing to observe the minimum 15-minute period is a "fatal flaw" (see § 40.79(a)), automatically invalidating a test. This is because the Department believes it is important to prevent artificially high readings due to mouth alcohol residue. However, taking longer than 20 minutes between tests is not a "fatal flaw." The Department is aware that circumstances may sometimes result in stretching the time between tests for a few additional minutes. (Id.)

In establishing the 15–20-minute interval, then, the Department considered and decided the issue based on a specific request for and review of comments.

In the NPRM leading to this final rule, the Department again addressed this issue.

Confirmation tests must be performed on EBTs, within 20 minutes of the screening test, as provided in existing 49 CFR 40.65(b). The Department is aware that increasing this interval for situations in which non-evidential devices are used could provide additional flexibility to employers, by increasing the distance that a non-evidential screening test could be conducted away from a confirmation EBT. However, as noted in the preamble to the February 15, 1994, final Part 40 rule, conducting the confirmation test within a brief time from the screening test is important to prevent metabolism of alcohol over time from negating what would otherwise be "positive" test results. This is no less true in a case where the screening test is conducted on a non-evidential device than where the screening test is conducted on an EBT. For this reason, the Department is not proposing to increase this interval, though we seek comment on the degree to which an increased interval between screening and confirmation tests could increase the utility of non-evidential devices, without concomitant loss of otherwise positive tests. (60 FR 3371; January 17, 1995.)

The Department received 11 comments on this issue. Four of these comments, all from breath testing equipment manufacturers or distributors, recommended retaining the 15–20-minute timeframe for completing tests. One commented that even a brief increase (e.g., five minutes) in the interval could result in losing otherwise positive results. Seven comments (5 employers or employer associations and 2 testing service providers)

recommended increasing the interval. The longer intervals they suggested included 30 minutes, one hour, and two hours. Their basic rationale was that if employers had to get an employee from a field site where a non-evidential device was used for a screening test to a site where an EBT was available within 20 minutes, it would deter the use of non-evidential screening devices and limit the cost savings and increased flexibility that would result from using such devices. Two of the comments said that the loss of otherwise positive tests could be a small one.

The Department established consequences for employees testing at the .02 and .04 alcohol concentration levels because even these low levels of alcohol concentration can adversely affect the performance of safety-sensitive functions by transportation employees. If, because long periods of time intervene between screening and confirmation tests, significant numbers of individuals with such alcohol concentrations are able to avoid the consequences of their conduct, the deterrent effects and safety benefits of the alcohol testing rules will be reduced. Consequently, to help determine its response to the comments on this issue, the Department obtained further information about the effects of lengthier delays on tested alcohol concentration.

According to this information, most people (male and female) appear to eliminate alcohol in a range between 0.01 and 0.02 percent per hour. This is the range most forensically accepted and commonly cited. Individual employees' results will, of course, have individual differences based on such factors as gender, body weight, acquired tolerance for alcohol, etc. The following chart displays this data. The chart starts with a screening test alcohol concentration, at the moment the screening test result is obtained. It then shows what the predicted range of confirmation tests results would be after a 30–120 minute interval, assuming (as is very likely to be the case in most instances) that the individual's alcohol concentration is in the declining phase at the time of the screening test.

SCREENING TEST ALCOHOL CONCENTRATION

Interval	.06	.05	.04	.03
20 minutes .....	.053–.056	.043–.046	.033–.036	.023–.026
30 minutes .....	.050–.055	.040–.045	.030–.035	.020–.025
40 minutes .....	.046–.053	.036–.043	.026–.033	<.02–.023
60 minutes .....	.040–.050	.030–.040	.020–.030	<.02–.020
120 minutes .....	.020–.040	<.02–.030	<.02–.020	<.02

The chart shows that at any of the alcohol concentration levels shown, the longer intervals (e.g., 1–2 hours) suggested by some commenters would often result in loss of what would otherwise be valid “positive” tests, or even the loss of the ability to remove individuals from safety-sensitive functions for eight hours (24 hours in the case of the motor carrier industry). The Department does not have data that allow us to predict the distribution of various levels of screen positives among tested employees (e.g., what percentage of employees would screen at .02, .04, .08, 1.0, etc.). Consequently, we do not know what overall percentage of screen positives would be lost as the result of longer intervals. Nevertheless, it is clear that the effect of longer intervals would be to effectively immunize persons with alcohol concentrations in the .03–.06 range from the consequences stated in the regulations. Procedural flexibility of this magnitude would nullify the intended substantive impact of the rules.

The Department does not believe that it is appropriate to establish a provision which it knows, in advance, would make it more likely that someone who had violated the Department’s regulations could avoid accountability for his or her actions. Nor would it be appropriate to increase significantly the opportunities for violators to manipulate the system to their advantage. Based on three years of rulemaking, participants had reason to know that the Department has consistently expected confirmation tests to follow screening tests as soon as possible. For these reasons, the Department is not going to increase the interval to the extent some commenters requested.

However, the data show that an individual whose alcohol concentration at the time of the screening test was .05–.06 would still, on average, test at .04 or above after a 30-minute interval. An individual whose alcohol concentration at the time of the screening test was .04 would test, on average, below .04 after a 30-minute interval, but this individual would also test below .04 after the present 20-minute interval. Consequently, increasing the interval from 20 to 30 minutes is unlikely to have a marked adverse effect on achieving the regulation’s objectives. Such an increase would permit employers some additional degree of flexibility. Because the Department’s regulatory policy is to provide appropriate flexibility to regulated parties, where doing so does not adversely affect the safety objectives of a rule, the Department has decided to

increase the interval between the tests from 20 to 30 minutes. This change, to § 40.65(b), also affects the interval between EBT screening and confirmation tests.

One question that some comments raised is what the consequences are if a confirmation test is not conducted within 30 minutes of the screening test. First, the Department reemphasizes that a test conducted more than 30 minutes later than the screening test is not fatally flawed. For example, if an individual’s confirmation test result is .04 or above, the test is valid and its consequences apply even though the confirmation test was conducted more than 30 minutes after the screening test. Second, an employer that conducts confirmation tests more than 30 minutes after screening tests—particularly if the employer has a pattern or practice of doing so—is subject to being found in violation of an operating administration’s regulation. This has similar consequences to any other finding by an operating administration that an employer is failing to implement the regulation properly. To allow operating administrations to determine whether employers are meeting this requirement, the Department is adding a sentence to § 40.65(b) instructing the BAT conducting the confirmation test to note, in the remarks section of the form, any occasion on which the confirmation test is late and the reason for the delay.

Observation During Transit

The use of non-evidential screening devices would often occur at a site removed from the site of the EBT confirmation test. In this situation, the NPRM proposed that the employee would have to be observed by the saliva testing technician (STT) or an employer representative while traveling between the two sites. Two breath testing equipment manufacturers agreed with this proposal, while one employer association opposed it, saying it was unnecessary. The Department will retain this provision. Clearly, it is not appropriate for someone who has just tested at .02 or above to drive himself or herself to the next testing site. Someone else will necessarily be responsible for the employee’s transportation. That someone else should be an individual with a stake in the success of the testing process (i.e., an STT or an employer representative), who can ensure that the employee arrives at the confirmation testing site safely and in a timely manner and reduce the probability that the employee could engage in behavior that might result in a refused or invalid test. This person should also be responsible for

monitoring the employee with respect to observing the 15-minute deprivation period between the initial and confirmation tests. (The Department’s view is that the time the employee spends in transit between tests, if the employee is under observation as provided in this section, counts toward the mandatory 15-minute deprivation period.) The final rule applies this same requirement to the situation in which an EBT without printing capability is used for the screening test and the employee is taken to a confirmation EBT for the confirmation test.

Procedures for Screening Tests

One commenter noted that the NPRM failed to require (as existing Part 40 requires for breath tests) that the STT inform the employee about the procedures to be followed in the test. The final rule adds this requirement.

The NPRM provided that the STT would take the reading from the saliva device in the time frame specified by the manufacturer. This led to comments that the testing process could be unnecessarily delayed, since the manufacturer’s instructions on the only saliva device now approved by NHTSA appeared to call for a 2–15 minute period for reading the device. The Department discussed this matter with the manufacturer, which said that the device may always be read after two minutes. After 15 minutes, the result begins to degrade. Consistent with this understanding of the device, the final rule requires STTs to take a reading two minutes after inserting the swab into the device. The fatal flaws section now provides that a test is invalid if the reading is taken less than two or more than 15 minutes after insertion of the swab into the device.

One of the issues addressed in the NPRM was what the STT should do when a saliva test fails (e.g. the device indicates that a sample is unacceptable, the swab falls on the floor). The NPRM proposed that, in this case, the STT would first administer another saliva test, using a new saliva device. There were no comments on this provision, which the Department will retain. The Department will add one safeguard to this provision. The Department understands that, at least in some cases, companies may pre-place saliva packages in workplaces (e.g., in the glove compartment of a truck). Such a device might be used for the initial saliva test. If that test is not successfully completed, the final rule provides that the STT must use a new device that has been in the STT’s (or employer’s) possession prior to the test, rather than under the control of the employee. This

safeguard will help to preclude questions about whether environmental degradation or tampering could have affected the result of the screening test.

The NPRM proposed that if there were two consecutive failures of saliva tests, the employee would be referred for a breath test. The NPRM sought comment on whether this breath test should be on an EBT. Two breath testing equipment manufacturers favored using an EBT under these circumstances; two employer groups and a consortium thought doing so was unnecessary (i.e., that another non-evidential test was adequate). The Department has concluded that it makes the most sense to resort to an EBT in these circumstances. As noted in the NPRM preamble, going, after two saliva tests, to another non-evidential breath testing device, and then having to go to an EBT for confirmation, would unnecessarily lengthen the procedure and could result in the loss of what would otherwise be a positive test. The Department believes that keeping the procedure compact is most consistent with the objectives of the program.

There were several miscellaneous comments about testing procedures. One asked for more specificity about the type of gloves an STT should use if the STT is swabbing an employee's mouth. The Department believes that reference to a surgical glove—the kind that doctors and dentists use in examining patients—is adequate, though we have made the requirement more specific by deleting the NPRM's reference to other types of hand protection. Comments from two breath testing equipment manufacturers suggested that there should be serial numbers for each saliva device on the package and on the device itself, which if mismatched would result in a fatal flaw. Given that the procedures call for the STT to open the package in the presence of the employee, matching serial numbers seems superfluous and a likely source of unnecessary problems in the collection process. Another commenter suggested allowing the employee to select his or her own saliva device from among several that the STT would offer. The Department has no objection to this practice, but it seems unnecessary to require STTs to proceed in this fashion.

The NPRM called for the STT to use a logbook in connection with a non-evidential breath testing device. This proposed requirement paralleled the existing Part 40 requirement for situations in which an EBT without printing and sequential numbering capability is used for a screening test. The proposal did not apply to saliva devices, since a logbook traveling with

the device makes no sense in the context of a disposable device.

In reexamining this requirement in the context of this rulemaking, the Department has determined that the paperwork burden involved is not justified by the utility of the requirement to the program. It essentially duplicated material required to be entered on the form. For this reason, the Department will not make the proposed requirement final with respect to non-evidential breath testing devices. The same logic applies to the existing requirement for using a logbook in connection with EBTs that do not have printout and sequential numbering capabilities. Consequently, the Department is withdrawing this requirement as well. The amendments to § 40.59, 40.63(d)(1), and 40.63(e)(3) remove references to this requirement. One of the amendments to § 40.63(e) corrects a codification error in this section resulting from the Department's August 19, 1994, amendment to part 40 (see 59 FR 43001). This action redesignates the presently codified paragraph (e)(3) as (e)(4), and adds the proper (e)(3)—modified to delete the reference to the logbook—back into the section. There is also an editorial correction to delete a substantively duplicative reference to the “quantitative result.” The section already requires entry of the “displayed result.” Because the Department did not propose to do so in the NPRM, we will seek comments on these amendments, which reduce paperwork burdens, for 45 days.

Forms

The NPRM suggested that STTs conducting non-evidential breath tests would use the existing breath testing form, while STTs conducting saliva tests would use a modified form. Four commenters suggested having one form for all tests rather than having separate forms. One of these commenters provided a suggested modification of the existing alcohol testing form that included boxes to check for what sort of test was involved. Three other commenters approved the idea of a separate form for saliva testing. One of these suggested adding blocks in which the starting and ending times of screening and confirmation tests would be noted, and also suggested adding other information to the form, such as initials by the observer who traveled to the confirmation site with the employee, the serial number of the saliva device, and the expiration date of the saliva device.

The Department is persuaded that for the sake of simplicity and avoiding

confusion in the program, it is preferable to have only one form used in DOT alcohol testing. The Department believes that some of the suggestions commenters made—particularly including boxes to check off indicating the testing method and the inclusion of starting and ending times of tests—have merit. The Department is also aware, however, that it is important to issue this rule as soon as possible so that those employers who choose to do so can begin using non-evidential devices. Redesigning a form, securing Office of Management and Budget approval for it, and printing it all take a good deal of time. Consequently, the Department is making an interim solution part of this final rule. For now, employers will continue to use the existing alcohol form. The rule will direct STTs to note in the remarks section of the form that a non-evidential breath or saliva device, as applicable, was used for the screening test.

Subsequently, the Department intends to revise the alcohol testing form, incorporating some of the ideas proposed in the NPRM and in the comments responding to it. After the revised form is published, we anticipate permitting employers to exhaust stocks of existing forms before being required to use it.

STT Training

One employer and nine breath testing equipment manufacturers or distributors commented on the NPRM's proposal to require training for STTs, using a modified version of the Department's BAT training course. The employer wanted to be sure that STTs would be trained in how to operate the non-evidential devices they would use. The NPRM and final rule both provide that this must be the case. Of the remaining commenters, six favored the NPRM's concept of using a modified, shorter version of the BAT course for training of STTs, while the other three appeared to favor a closer integration of BAT and STT training.

The Department is aware that, while many people who have trained as BATs will also operate as STTs, there may also be many situations in which, in order to gain flexibility and reduce costs, employers may wish to use people who will only administer non-evidential screening tests. For this reason, we believe it is reasonable to establish training requirements for individuals who will be STTs only, and who will not train as BATs. The Department has prepared an STT training course, which will be the basis for training STTs. This will be made available to the public at a modest

charge from the Government Printing Office. Training for STTs (as well as for BATs who will conduct non-evidential screening tests) must include hands-on training in the use of the specific non-evidential devices they will use. If the screening device used is a disposable, single-use device that requires the STT to evaluate a color change, some criteria for correct judgments should be included in the training.

Quality Assurance Plans (QAPs)

One commenter, a manufacturer of standards for calibrating alcohol testing devices, suggested that there be QAPs for calibration devices. There is a NHTSA conforming products list for such devices, and the Department is not convinced that additional requirements are needed now. Another commenter asked who is responsible for compliance with the QAP. The manufacturer is responsible for creating the QAP and getting NHTSA approval for it, and the employer or its agent is responsible for operating the equipment in conformity with it. A breath testing manufacturer recommended that saliva device QAPs call for periodic testing of each lot of devices. The commenter said that environmental conditions (e.g., storage conditions) could affect the accuracy of the devices, perhaps leading to an unacceptable number of false negatives. The Department is concerned that periodic testing of large numbers of disposable devices may not be feasible and could be overly costly and burdensome. Employers are required to comply with manufacturers' QAPs, which will provide for appropriate storage conditions. While the Department will not impose such a requirement as part of this final rule, the Department can revisit this issue if experience suggests that false negatives with a particular type of device become a serious problem.

One of the requirements of a QAP for disposable devices is that they include the shelf life of the devices. With the QAP, the Department wishes manufacturers to submit the data on which the shelf life determination for the device is based (e.g., tests over time of devices drawn from manufacturers' lots).

Regulatory Analyses and Notices

This is not a significant rule under Executive Order 12866 or under the Department's Regulatory Policies and Procedures. It does not impose costs on regulated parties. It facilitates the use of devices that may increase flexibility, and decrease costs, for employers who choose to use them. There are not sufficient Federalism implications to

warrant the preparation of a Federalism Assessment. The Department certifies that this rule will 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 a small favorable impact, since some small entities may be able to conduct screening tests at a lower cost.

List of Subjects in 49 CFR Part 40

Drug testing, Alcohol testing, laboratories, Reporting and recordkeeping requirements, Safety, Transportation.

Issued this 5th day of April, 1995, at Washington, DC.

Federico Peña,

Secretary of Transportation.

For the reasons set forth in the preamble, 49 CFR Part 40 is amended as follows:

PART 40—[AMENDED]

1. The authority citation for Part 40 continues to read as follows:

Authority: 49 U.S.C. 102,301,322; 49 U.S.C. app. 1301nt., app. 1434nt., app. 2717, app. 1618a.

§ 40.51 [Amended]

2. Section 40.51(c) is amended by adding the words "or non-evidential alcohol screening device" after the word "EBT".

§ 40.59 [Amended]

3. The heading of § 40.59 is revised to read "The breath alcohol testing form".

4. Section 40.59(c) is removed.

5. Section 40.63(d)(1) is revised to read as follows:

§ 40.63 Procedures for screening tests.

* * * * *

(d)(1) If the EBT does not meet the requirements of § 40.53(b) (1) through (3), the BAT shall ensure, before a screening test is administered to each employee, that he or she and the employee read the sequential test number displayed on the EBT. The BAT shall record the displayed result, test number, testing device, serial number of the testing device, and time in Step # of the form.

* * * * *

6. In § 40.63, paragraph (e)(4) is removed, paragraph (e)(3) is redesignated as paragraph (e)(4), and a new paragraph (e)(3) is added, to read as follows:

§ 40.63 Procedures for screening tests.

* * * * *

(e) * * *

(3) If the employee does not sign the certification in Step 4 of the form for a

test, it shall not be considered a refusal to be tested. In this event, the BAT shall note the employee's failure to sign in the "Remarks" section of the form.

* * * * *

7. A new § 40.63(h) is added, to read as follows:

§ 40.63 Procedures for screening tests.

* * * * *

(h) If the confirmation test will be conducted at a different site from the screening test, the employer or its agent shall ensure that—

(1) The employee is advised against taking any of the actions mentioned in the first sentence of § 40.65(b) of this Part;

(2) The employee is advised that he or she must not drive, perform safety-sensitive duties, or operate heavy equipment, as noted in Block 4 of the alcohol testing form; and

(3) The employee is under observation of a BAT, STT, or other employer personnel while in transit from the screening test site to the confirmation test site.

8. In § 40.65(b), the third sentence is revised to read: "The confirmation test shall be conducted within 30 minutes of the completion of the screening test."

§ 40.65 [Amended]

9. In § 40.65, paragraph (b) is amended by adding, at the end thereof, to read: "If the BAT conducts the confirmation test more than 30 minutes after the result of the screening test has been obtained, the BAT shall note in the "Remarks" section of the form the time that elapsed between the screening and confirmation tests and the reason why the confirmation test could not be conducted within 30 minutes of the screening test."

10. A new Subpart D of Part 40 is added, to read as follows:

Subpart D—Non-Evidential Alcohol Screening Tests

40.91—Authorization for use of non-

evidential alcohol screening devices

40.93—The screening test technician

40.95—Quality assurance plans for non-evidential screening devices

40.97—Locations for non-evidential alcohol screening tests

40.99—Testing forms

40.101—Screening test procedure

40.103—Refusals to test and uncompleted tests

40.105—Inability to provide an adequate amount of breath or saliva

40.107—Invalid tests

40.109—Availability and disclosure of alcohol testing information about individual employees

40.111—Maintenance and disclosure of records concerning non-evidential testing devices and STTs.

Subpart D—Non-Evidential Alcohol Screening Devices

§ 40.91 Authorization for use of non-evidential alcohol screening devices.

Non-evidential alcohol screening tests, performed using screening devices included by the National Highway Traffic Safety Administration on its conforming products list for non-evidential screening devices, may be used in lieu of EBTs to perform screening tests required by operating administrations' alcohol testing regulations. Non-evidential screening devices may not be used for confirmation alcohol tests, which must be conducted using EBTs as provided in Subpart C of this Part.

§ 40.93 The screening test technician.

(a) Anyone meeting the requirements of this Part to be a BAT may act as a screening test technician (STT), provided that the individual has demonstrated proficiency in the operation of the non-evidential screening device he or she is using.

(b) Any other individual may act as an STT if he or she successfully completes a course of instruction concerning the procedures required by this Part for conducting alcohol screening tests. Only the Department of Transportation model course, or a course of instruction determined by the Department of Transportation's Office of Drug Enforcement and Program Compliance to be equivalent to it, may be used for this purpose.

(c) With respect to any non-evidential screening device involving changes, contrasts, or other readings that are indicated on the device in terms of color, STTs shall, in order to be regarded as proficient, be able to discern correctly these changes, contrasts or readings.

(d) The STT shall receive additional training, as needed, to ensure proficiency, concerning new or additional devices or changes in technology that he or she will use.

(e) The employer or its agent shall document the training and proficiency of each STT it uses to test employees and maintain the documentation as provided in § 40.83.

(f) The provisions of § 40.51(b) and (c); § 40.57; § 40.59; § 40.61; § 40.63 (e)(1)–(2), (f), (g), and (h); § 40.69; and § 40.81; and other provisions, as applicable, of this Part apply to STTs as well as to BATs.

§ 40.95 Quality assurance plans for non-evidential screening devices.

(a) In order to be used for alcohol screening tests subject to this part, a

non-evidential screening device shall have an approved quality assurance plan (QAP) developed by the manufacturer and approved by the National Highway Traffic Safety Administration (NHTSA).

(1) The plan shall designate the method or methods to be used to perform quality control checks; the temperatures at which the non-evidential screening device shall be stored and used, as well as other environmental conditions (e.g., altitude, humidity) that may affect the performance of the device; and, where relevant, the shelf life of the device.

(2) The QAP shall prohibit the use of any device that does not pass the specified quality control checks or that has passed its expiration date.

(b) The manufacturers' instructions on or included in the package for each saliva testing device shall include directions on the proper use of the device, the time frame within which the device must be read and the manner in which the reading is made.

(c) The employer and its agents shall comply with the QAP and manufacturer's instructions for each non-evidential screening device it uses for alcohol screening tests subject to this Part.

§ 40.97 Locations for non-evidential alcohol screening tests.

(a) Locations for non-evidential alcohol screening tests shall meet the same requirements set forth for breath alcohol testing in § 40.57 of this Part.

(b) The STT shall supervise only one employee's use of a non-evidential screening device at a time. The STT shall not leave the alcohol testing location while the screening test procedure for a given employee is in progress.

§ 40.99 Testing forms.

STTs conducting tests using a non-evidential screening device shall use the alcohol testing form as provided in § 40.59 and Appendix B of this Part for the screening test.

§ 40.101 Screening test procedure.

(a) The steps for preparation for testing shall be the same as provided for breath alcohol testing in § 40.61 of this Part.

(b) The STT shall complete Step 1 on the form required by § 40.99. The employee shall then complete Step 2 on the form, signing the certification. Refusal by the employee to sign this certification shall be regarded as a refusal to take the test.

(c) If the employer is using a non-evidential breath testing device, the STT

shall follow the same steps outlined for screening tests using EBTs in § 40.63.

(d) If the employer is using a saliva testing device, the STT shall take the following steps:

(1) The STT shall explain the testing procedure to the employee.

(2) The STT shall check the expiration date of the saliva testing device, show the date to the employee, and shall not use a device at any time subsequent to the expiration date.

(3) The STT shall open an individually sealed package containing the device in the presence of the employee.

(4) The STT shall offer the employee the opportunity to use the swab. If the employee chooses to use the swab, the STT shall instruct the employee to insert the absorbent end of the swab into the employee's mouth, moving it actively throughout the mouth for a sufficient time to ensure that it is completely saturated, as provided in the manufacturer's instructions for the device.

(5) If the employee chooses not to use the swab, or in all cases in which a new test is necessary because the device did not activate (see paragraph (d)(8) of this section), the STT shall insert the absorbent end of the swab into the employee's mouth, moving it actively throughout the mouth for a sufficient time to ensure that it is completely saturated, as provided in the manufacturer's instructions for the device. The STT shall wear a surgical grade glove while doing so.

(6) The STT shall place the device on a flat surface or otherwise in a position in which the swab can be firmly placed into the opening provided in the device for this purpose. The STT shall insert the swab into this opening and maintain firm pressure on the device until the device indicates that it is activated.

(7) If the procedures of paragraph (d)(3)–(d)(5) of this section are not followed successfully (e.g., the swab breaks, the STT drops the swab on the floor or another surface, the swab is removed or falls from the device before the device is activated), the STT shall discard the device and swab and conduct a new test using a new device. The new device shall be one that has been under the control of the employer or STT prior to the test. The STT shall note in the remarks section of the form the reason for the new test. In this case, the STT shall offer the employee the choice of using the swab himself or herself or having the STT use the swab. If the procedures of paragraph (d)(3)–(d)(5) of this section are not followed successfully on the new test, the collection shall be terminated and an

explanation provided in the remarks section of the form. A new test shall then be conducted, using an EBT for both the screening and confirmation tests.

(8) If the procedures of paragraph (d)(3)–(d)(5) of this section are followed successfully, but the device is not activated, the STT shall discard the device and swab and conduct a new test, in the same manner as provided in paragraph (d)(7) of this section. In this case, the STT shall place the swab into the employee's mouth to collect saliva for the new test.

(9) The STT shall read the result displayed on the device two minutes after inserting the swab into the device. The STT shall show the device and its reading to the employee and enter the result on the form.

(10) Devices, swabs, gloves and other materials used in saliva testing shall not be reused, and shall be disposed of in a sanitary manner following their use, consistent with applicable requirements.

(e) In the case of any screening test performed under this section, the STT, after determining the alcohol concentration result, shall follow the applicable provisions of § 40.63 (e)(1)–(2), (f), (g), and (h). The STT shall also enter, in the "Remarks" section of the form, a notation that the screening test was performed using a non-evidential breath testing device or a saliva device, as applicable. Following completion of the screening test, the STT shall date the form and sign the certification in Step 3 of the form.

§ 40.103 Refusals to test and uncompleted tests.

(a) Refusal by an employee to complete and sign the alcohol testing form required by § 40.99 (Step 2), to provide a breath or saliva sample, to provide an adequate amount of breath, or otherwise to cooperate in a way that prevents the completion of the testing process, shall be noted by the STT in the remarks section of the form. This constitutes a refusal to test. The testing process shall be terminated and the STT shall immediately notify the employer.

(b) If the screening test cannot be completed, for reasons other than a refusal by the employee, or if an event occurs that would invalidate the test, the STT shall, if practicable, immediately begin a new screening test, using a new testing form and, in the case of a test using a saliva screening device, a new device.

§ 40.105 Inability to provide an adequate amount of breath or saliva.

(a) If an employee is unable to provide sufficient breath to complete a test on a non-evidential breath testing device, the procedures of § 40.69 apply.

(b) 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), the STT, as provided in § 40.101 of this Part, shall conduct a new test using a new device. If the employee refuses to complete the new test, the STT shall terminate testing and immediately inform the employer. This constitutes a refusal to test.

(c) If the new test is completed, but there is an insufficient amount of saliva to activate the device, STT shall immediately inform the employer, which shall immediately cause an alcohol test to be administered to the employee using an EBT.

§ 40.107 Invalid tests.

An alcohol test using a non-evidential screening device shall be invalid under the following circumstances:

(a) With respect to a test conducted on a saliva device—

(1) The result is read before two minutes or after 15 minutes from the time the swab is inserted into the device;

(2) The device does not activate;

(3) The device is used for a test after the expiration date printed on its package; or

(4) The STT fails to note in the remarks section of the form that the screening test was conducted using a saliva device;

(b) With respect to a test conducted on any non-evidential alcohol testing device, the STT has failed to note on the remarks section of the form that the employee has failed or refused to sign the form following the recording on the form of the test result.

§ 40.109 Availability and disclosure of alcohol testing information about individual employees.

The provisions of § 40.81 apply to records of non-evidential alcohol screening tests.

§ 40.111 Maintenance and disclosure of records concerning non-evidential testing devices and STTs.

Records concerning STTs and non-evidential testing devices shall be maintained and disclosed following the same requirements applicable to BATs and EBTs under § 40.81 of this Part.

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National Highway Traffic Safety Administration

49 CFR Part 571

[Docket No. 94–104; Notice 2]

RIN 2127–AF45

Federal Motor Vehicle Safety Standards; Lamps, Reflective Devices and Associated Equipment

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Final rule.

SUMMARY: This notice amends the Federal motor vehicle safety standard on lighting to allow the photometric conformance of rear center highmounted stop lamps to be determined by a grouping of test points. This action is consistent with the agency's requirements for other lamps and will lessen the testing burden for manufacturers.

DATES: The effective date of the final rule is May 22, 1995.

FOR FURTHER INFORMATION CONTACT: Richard Van Iderstine, Office of Rulemaking, NHTSA (202–366–5280).

SUPPLEMENTARY INFORMATION: Dennis Moore of Livermore, California, petitioned for rulemaking to amend Standard No. 108 to allow "a 'Zonal' approach * * * for Compliance Photometric Testing of 3rd Brake Lights which has already been adopted for Tail Lights, Regular Brake Lights and Turn Signals." Under S5.1.1.6 of Standard No. 108, taillamps and parking lamps need not meet the minimum photometric values specified for each of the test points of the relevant SAE Standards incorporated by reference, provided that the sum of the minimum candlepower measured at the test points is not less than that specified for each group listed in Figure 1c. In addition, the more recent SAE Standards for stop lamps and turn signal lamps that have been incorporated into Standard No. 108 no longer specify values for individual test points (though including them as photometric design guidelines). Instead, they specify required values for "zones" only.

In contrast, the applicable photometric values for center highmounted stop lamps (CHMSLs) are those of Figure 10 of Standard No. 108 and are for individual test points. Moore viewed this as an anomaly. He believes that laboratory test results vary so greatly that CHMSLs must be overdesigned to ensure compliance at each test point. As a result, they draw more power and have a shorter life expectancy. He argued that because