(c) As a SAP, you must make available to an employee, on request, a copy of all SAP reports (see § 40.311). However, you must redact follow-up testing information from the report before providing it to the employee.

38. Amend § 40.331 by revising paragraphs (b)(2) and (c)(2), and adding new paragraphs (b)(3) and (c)(3), to read as follows:

§ 40.331 To what additional parties must employers and service agents release information?

* * * * *

(b) * * *

(2) All written, printed, and computer-based drug and alcohol program records and reports (including copies of name-specific records or reports), files, materials, data, documents/documentation, agreements, contracts, policies, and statements that are required by this part and DOT agency regulations. You must provide this information at your principal place of business in the time required by the DOT agency.

(3) All items in paragraph (b)(2) of this section must be easily accessible, legible, and provided in an organized manner. If electronic records do not meet these standards, they must be converted to printed documentation that meets these standards.

(c) * * *

(2) All written, printed, and computer-based drug and alcohol program records and reports (including copies of name-specific records or reports), files, materials, data, documents/documentation, agreements, contracts, policies, and statements that are required by this part and DOT agency regulations. You must provide this information at your principal place of business in the time required by the DOT agency.

(3) All items in paragraph (c)(2) of this section must be easily accessible, legible, and provided in an organized manner. If electronic records do not meet these standards, they must be converted to printed documentation that meets these standards.

* * * * *

39. Amend § 40.333 as follows:

a. In paragraphs (a)(1)(i) and (a)(1)(ii), remove the word ''employee''.

b. In paragraph (d), remove the word ''working'' and add in its place the word ''business''.

c. Add a new paragraph (e), to read as follows:

§ 40.333 What records must employers keep?

* * * * *

(e) If you store records electronically, where permitted by this part, you must ensure that the records are easily accessible, legible, and formatted and stored in an organized manner. If electronic records do not meet these criteria, you must convert them to printed documentation in a rapid and readily auditable manner, at the request of DOT agency personnel.

§ 40.349 [Amended]

40. Amend § 40.349(e) by adding the word ''business'' after the word ''two''.

41. Amend § 40.355 as follows:

a. Add a sentence at the end of paragraph (a).

b. In paragraph (j)(1), remove the words ''You are authorized by a DOT agency regulation to do so, you'' and add the word ''You'' in their place.

The addition reads as follows:

§ 40.355 What limitations apply to the activities of service agents?

* * * * *

(a) * * * No one may do so on behalf of a service agent.

* * * * *

§ 40.403 [Amended]

42. Amend § 40.403(a) by removing the word ''working'' and adding in its place the word ''business''.

43. Amend Appendix F to Part 40 by revising the list entitled ''Drug Testing Information, to read as follows:

Appendix F to Part 40—Drug and Alcohol Testing Information That C/TPAs May Transmit to Employers

* * * * *

Drug Testing Information

§ 40.25: Previous two years' test results
§ 40.35: Notice to collectors of contact information for DER
§ 40.61(a): Notification to DER that an employee is a ''no show'' for a drug test
§ 40.63(e): Notification to DER of a collection under direct observation
§ 40.65(b)(6) and (7) and (c)(2) and (3): Notification to DER of a refusal to provide a specimen or an insufficient specimen
§ 40.73(a)(9): Transmission of CCF copies to DER (However, MRO copy of CCF must be sent by collector directly to the MRO, not through the C/TPA.)
§ 40.111(a): Transmission of laboratory statistical report to employer
§ 40.127(f): Report of test results to DER
§§ 40.127(g), 40.129(d), 40.159(a)(4)(ii); 40.161(b): Reports to DER that test is cancelled
§ 40.129 (d): Report of test results to DER
§ 40.129(g)(1): Report to DER of confirmed positive test in stand-down situation
§§ 40.149(b): Report to DER of changed test result
§ 40.155(a): Report to DER of dilute specimen
§ 40.167(b) and (c): Reports of test results to DER
§ 40.187(a)–(f) Reports to DER concerning the reconfirmation of tests
§ 40.191(d): Notice to DER concerning refusals to test
§ 40.193(b)(3): Notification to DER of refusal in shy bladder situation
§ 40.193(b)(4): Notification to DER of insufficient specimen
§ 40.193(b)(5): Transmission of CCF copies to DER (not to MRO)
§ 40.199: Report to DER of cancelled test and direction to DER for additional collection
§ 40.201: Report to DER of cancelled test

* * * * *

[FR Doc. 01–19232 Filed 8–2–01; 4:41 p.m.]

BILLING CODE 4910–62–U

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 40

Federal Aviation Administration

14 CFR Part 121

Coast Guard

46 CFR Parts 4, 5, and 16

Research and Special Programs Administration

49 CFR Part 199

Federal Railroad Administration

49 CFR Part 219

Federal Motor Carrier Safety Administration

49 CFR Part 382

Federal Transit Administration

49 CFR Parts 653, 654, and 655

[Docket OST–99–6578]

RIN 2105–AD02, 2120–AH15, 2115–AG00, 2137–AD55, 2130–AB43, 2126–AA58, 2132–AA71

Transportation Workplace Drug and Alcohol Testing Programs: Response to Comments on Pre-Employment Inquiry Requirement; Common Preamble for DOT Agency Conforming Rules

AGENCY: Office of the Secretary, DOT.

SUMMARY: This document does two things. First, it responds to comments by maritime industry groups and others concerning the pre-employment inquiry provision of the Department-wide

regulations on transportation workplace drug and alcohol testing procedures (Part 40 rule). The Department recently opened a 30-day comment period on that issue. Second, this document serves as a ''common preamble'' discussing issues raised with respect to the Part 40 rule in comments to DOT agency proposals to amend their drug and alcohol testing rules to conform to the Part 40 rule.

ADDRESSES: The public may also review the docketed material referred to in this document electronically. The following web address provides instructions and access to the DOT electronic docket: *http://dms.dot.gov/search/.*

FOR FURTHER INFORMATION CONTACT: Kenneth C. Edgell, Acting Director, Office of Drug and Alcohol Policy and Compliance (ODAPC), 400 7th Street, SW., Room 10403, Washington, DC 20590, 202–366–3784 (voice), 202–366–3897 (fax), or *kenneth.edgell@ost.dot.gov* (e-mail); or Robert C. Ashby, Deputy Assistant General Counsel for Regulation and Enforcement, 400 7th Street, SW., Room 10424, Washington, DC 20590, 202–366–9306 (voice), 202–366–9313 (fax), or *bob.ashby@ost.dot.gov* (e-mail).

SUPPLEMENTARY INFORMATION:

Comments on § 40.25

The Department included a provision (§ 40.25) in the final 49 CFR Part 40 rule that requires employers in all covered industries to seek information about the DOT-mandated drug and alcohol testing history of applicants for safety-sensitive work. We did so because it is very important, as a matter of safety, for employers to know whether new employees they are hiring have complied with drug and alcohol testing requirements, especially return-to-duty requirements (see 65 FR 79486; December 19, 2000). In the absence of this information, employers cannot know whether an individual is eligible, under DOT rules, to perform safety-sensitive functions. Employers cannot know whether they have an obligation to perform additional follow-up tests.

In industries that often have high employee turnover, such as some parts of the motor carrier and maritime industries, having this information is particularly important. If an employee tests positive for Employer A, quits or is fired, and then applies for work with Employer B, without having completed the mandatory return-to-duty process, Employer B could unknowingly allow the employee to perform safety-sensitive functions despite being prohibited from doing so by DOT rules. This is a situation in which ignorance, far from being bliss, becomes a threat to transportation safety. It also places Employer B in noncompliance with DOT rules.

Several months after the publication of the final rule, in June 2001, the Department received a letter from several maritime industry organizations objecting to the application of this requirement to the maritime industry. Because the text of § 40.25 had not been part of the December 1999 notice of proposed rulemaking for Part 40, the organizations requested a comment period on the section. While the Department believes that the adoption of this provision met all rulemaking process requirements, we decided, in the interest of responsiveness to the concerns of the maritime industry organizations, to open a 30-day comment period on the issue (66 FR 32248; June 14, 2001). By the July 16, 2001, comment closing date, we had received 48 comments on the section. This includes a number of comments to the Coast Guard's proposed conforming rule that also mentioned this issue, which we have added to this docket. All but four of these letters were from employers and other organizations in the maritime industry.

Generally, maritime industry commenters opposed the provision because, in their view, it created too heavy an administrative and cost burden for them. They said that the requirement was incompatible with the circumstances under which small maritime businesses operate. In particular, commenters said, their businesses have high employee turnover, and must often replace employees on very short notice. Commenters expressed the concern that the rule would delay hiring of workers while pre-employment inquiries were being made, resulting in vessels being shorthanded. In addition, some comments mentioned that they get employees through union hiring halls. If the hiring halls were unable to have performed the pre-employment inquiries on behalf of the employers, this would also lead to untenable delays in bringing new employees on board.

Fortunately, the Department's rule, as presently written, accommodates both these concerns. Section 40.25(c) provides that ''if feasible,'' the employer must obtain the information before the employee begins performance of safety-sensitive functions. If this is not feasible—as it may well not be in the rapid replacement scenario mentioned in comments—then the employer may use the employee for 30 days in safety-sensitive functions before obtaining either the information concerning the employee or documenting the employer's good faith effort to obtain it. This requirement does not, in any way, delay bringing new employees on board when needed, even in a situation where the employee must be used quickly.

One comment suggested that, even given this 30-day window, the provision could be troublesome if a company found out, 30 days after bringing an employee on board a vessel, that the individual was out of compliance and had to replace him or her. We suggest that it would be even more troublesome for the employer to learn this information and not replace such an individual. Deliberately avoiding steps that could bring this information to the attention of the employer would be irresponsible from a safety point of view.

The commenters' concerns about the role of hiring halls and other third parties involved in the drug and alcohol testing program (e.g., consortia and third party administrators (C/TPAs)) are also answered by the existing rule. Under the final Part 40 rule, C/TPAs are already permitted to perform the pre-employment inquiry function (see Appendix F). In the maritime and motor carrier industries, hiring halls already perform a number of drug and alcohol testing functions for employers (e.g., pre-employment testing). In the Department's view, hiring halls that perform drug and alcohol testing functions are properly viewed as C/TPAs. Consequently, if a hiring hall or other C/TPA has an arrangement that will ensure compliance with § 40.25, then it is consistent with Part 40 for the C/TPA or hiring hall to perform this function on behalf of the individual employers. In such a situation, the third party could make the inquiries and maintain the needed documentation, on which employers could rely when they obtain employees covered by the third party's § 40.25 program.

With respect to costs and administrative burdens, some comments asserted that the Department had failed to analyze the cost or paperwork burdens of the pre-employment inquiry requirement. This assertion is incorrect. The Department's Paperwork Reduction Act analysis of the December 2000 final rule, which the Office of Management and Budget approved and which we have placed in the docket for the public's information, specifically considered the costs and paperwork provisions of applying this provision to all covered transportation industries. (Previously, this requirement had applied only in the motor carrier industry.) The cost and burden information pertaining to the maritime

industry is the following: An estimated 69,600 new employees each year would be subject to the pre-employment inquiry requirement. This figure is derived from Coast Guard data about the employment practices of the maritime industry, and includes both licensed and unlicensed personnel. Given this number of employees that would be subject in a year, the Department calculated that the combined paperwork burden for new employers and previous employers in the maritime industry would be 12,821 annual burden hours. Using guidelines developed by the Association of Records Managers and Administrators and employee compensation hourly costs developed by the Department of Labor's Bureau of Labor Statistics, this would lead to an added annual cost of $256,430 to the maritime industry.

These costs and burdens are not, in the Department's view, unreasonably high. Even if the cost of implementing the provision were a number of times higher than this estimate, it would still be within reasonable bounds. The motor carrier industry, like the maritime industry, has many small businesses and high employee turnover, and it has implemented this provision for a number of years without suffering the dire consequences envisioned in some maritime industry comments.

Many comments made general assertions that the costs and burdens of carrying out § 40.25 would be too high. For the most part, however, commenters did not provide data from which either they or the Department could quantify this asserted burden. Two comments made high estimates of the costs of the provision based on numbers apparently reflecting costs of background checks performed by professional background check companies. Section 40.25 requires neither ''background checks'' nor the services of such companies. It simply requires employers to seek information about previous DOT drug and alcohol test results.

Two comments asserted that the provision should not be adopted because the motor carrier industry has not fully complied with the similar FMCSA provision. In the large, diverse industries that the Department regulates for safety, there is doubtless less than perfect compliance with this and other regulatory requirements. That is why FMCSA, the Coast Guard, and other DOT agencies have inspectors who check to see if employers are meeting their obligations. The potential for some noncompliance does not invalidate the rationale for a requirement, however.

Commenters also suggested that the Coast Guard could develop a system for responding to inquiries about previous positive tests, based on test result information required to be submitted to the Coast Guard. The decision on whether it would be feasible to develop such a system rests with the Coast Guard. However, the Department does not regard it as essential for the Coast Guard to have such a system now, or in the future, in order for § 40.25 to apply to the maritime industry.

Some industry comments argued that the pre-employment inquiries requirement is illegal, a violation of the Americans with Disabilities Act (ADA), unconstitutional, discriminatory (because it seeks information only abut prior DOT-mandated drug and alcohol tests), or a draconian invasion of privacy. We would point out that inquiries under this provision are made only on the basis of the employee's written consent, which goes far to obviate privacy concerns. Obtaining employees' consent to gather information about whether employees have complied with DOT safety rules in no way violates the ADA. In its comment, the Equal Employment Opportunity Commission, the Federal agency charged with implementing the ADA in employment matters, agrees that the provision is consistent with the ADA.

Only DOT drug and alcohol tests have consequences for regulated employers (such as the required completion of the return-to-duty process before further performance of safety-sensitive functions); it is, therefore, rational to request only information concerning these tests. To the best of the Department's knowledge, this provision has never been legally challenged in the several years it has applied to the motor carrier industry, including on the ground that the consequence of an employee's decision to decline to provide consent to the inquiry is the employer's inability to use the employee for safety-sensitive functions.

One commenter said that it should be sufficient to have a new hire pass a pre-employment test and expressed doubt about the value of the return-to-duty process. The Department is convinced of the safety necessity of a strong return-to-duty process, including evaluation by a substance abuse professional (SAP), education or treatment, reevaluation by the SAP, a return-to-duty test, and follow-up tests. Permitting an employee to test positive one day, ignore return-to-duty requirements, apply for a job with another company the next day, and pass a pre-employment test the day after and start work in a safety-sensitive position, undermines not only the Department's drug testing program but, more importantly, transportation safety. It is for these safety reasons—and not, as some comments asserted, a mere desire for uniformity among transportation industries—that the Department views the pre-employment inquiry requirement as vital.

For these reasons, the Department concludes that the comments on this provision do not justify any change in § 40.25, which will go into effect as scheduled for all the transportation industries. We would also point out that we received a few comments from non-maritime industry sources that supported the provision and suggested that the cost impacts were minimal.

''Common Preamble'': Comments to DOT Agency Conforming Rules

At the time the Department's agencies published their proposals to make their rules consistent with the new Part 40, the Department published a common preamble discussing certain common issues (66 FR 21492, April 30, 2001). For the most part, the individual DOT agency preambles to their final ''conforming rules'' address the issues mentioned in this common preamble. However, comments to operating administration dockets raised some issues that cut across DOT agency lines or are otherwise pertinent to Part 40 itself. The Department is responding to these comments in this portion of the preamble.

The Department had hoped to publish the six conforming rules together, on or before August 1, 2001. However, some of the operating administration rules remain in the final stages of coordination. We expect to publish them very shortly. However, with respect to any of DOT agencies whose rules have not been published by this date, the Department intends that new Part 40 control in the event of any inconsistency between Part 40 and the unmodified DOT agency rules during the brief time between August 1 and the effective dates of the amended DOT agency rules.

One testing industry association requested that each of the six DOT agency regulations authorize service agents to make refusal determinations when owner-operators fail to appear for a test (see § 40.355(j)(1)). The Department believes it is reasonable for service agents to make refusal determinations in this instance. For simplicity's sake, we are amending Part 40 to make this change, rather than amending six modal regulations. The amendment (published with the Department's technical amendments to Part 40) will remove the language making authorization by a DOT agency

regulation a prerequisite to a service agent's refusal determination in this case. This means that § 40.355(j)(1) will authorize service agents to make refusal determinations with respect to owner-operators and other self-employed individuals when the service agent has scheduled the test and the individual fails to appear for it without a legitimate reason.

This commenter also asked that all DOT agencies require violations of DOT agency drug and alcohol testing rules to be reported to the DOT agency in question. While this may be feasible for some modes (e.g., the Coast Guard, which has adopted such a provision), it may be more difficult for others (e.g., FMCSA, given the very large size of the industry and work force involved). The Department is not adopting an across-the-board response to this comment, but individual operating administrations will continue to consider if and when it is appropriate to adopt such a requirement.

This commenter also suggested that where the same individual acts as both an medical review officer (MRO) and substance abuse professional (SAP), he or she meet the training requirements for both professions. This is, indeed, the effect of the training requirements in the revised Part 40, and no regulatory change is needed on this point.

The same commenter also recommended that all DOT agency rules require proof of having met pre-employment testing requirements before an individual is enrolled in a random testing program. The mandate of DOT rules is that someone meet applicable pre-employment testing requirements before he or she begins performing safety-sensitive functions. As long as employers meet this requirement, the Department's safety objectives for pre-employment testing have been met. An employer does not violate our rules if an employee is part of a random testing pool without proof of having complied with pre-employment requirements, as long as the employee does not perform safety-sensitive functions without having complied. Of course, employers must be able to document that employees whom they use for safety-sensitive functions in fact have met applicable pre-employment testing requirements. We do not believe that any further across-the-board action is needed in this area at this time.

Many of the same maritime industry commenters who objected to § 40.25 in their comments to the Coast Guard NPRM also objected to the collector training requirements of § 40.33. As noted, these comments have been placed in the Department's Part 40 docket. Generally, they said that the requirements were too burdensome and costly for the maritime industry, especially small employers. Unlike § 40.25, however, these training requirements of Part 40 were not the subject of a comment period at this time. Many commenters did speak to these provisions in response to the Department's December 1999 Part 40 NPRM, and the Department responded to these comments in the December 2000 final rule. The Department is not considering further changes to § 40.33 at present. Indeed, we believe that, in the maritime industry, as elsewhere, well-trained collectors are essential for the operation of a fair and accurate drug testing program, which in turn is a key part of the Department's safety efforts.

Old Part 40 required that a laboratory must have qualified personnel available to testify in an administrative or disciplinary proceeding based on a positive test of the employee's specimen [see former § 40.29(n)(6)]. The Department never interpreted this provision as permitting a party to a proceeding to require the personal attendance at a hearing of one or more laboratory personnel or that the laboratory or employer must pay for the time or transportation of laboratory personnel involved in proceedings.

When the Department revised Part 40, we deleted this provision, in the belief that the discovery process in administrative and judicial proceedings was sufficient to obtain all needed relevant testimony. One comment from a union docket raised the issue of this deletion, advocating that the deleted language should be put back into the rule and that laboratories and employers should have to produce and pay for laboratory witnesses in proceedings. A comment from another union raised a broader, but related, issue. It said that, based on experience gained in litigation concerning errors in the validity testing process at one laboratory, it believed that employees should always have access to all relevant documentation about laboratory procedures. According to the comment,

> Such relevant evidence includes but is not limited to: Laboratory quality control records, laboratory performance records on proficiency testing, results of laboratory inspections and critiques, all laboratory internal and external quality control data, instrument maintenance and corrective action documentation, instrument and software instruction manuals, as well as laboratory Standard Operating Procedures.

The commenter stressed that this information should be available to all employees subject to testing under DOT regulations, regardless of whether the employee had access to specific administrative adjudication proceedings (e.g., grievance procedures, certificate actions). The commenter believes that at least some of this information should be made available to unions as organizations, as distinct from individual employees.

As noted above, many employees have access to discovery proceedings, through which they can gain access to a wide variety of information. As the union making the comment noted, it had conducted extensive discovery in one prominent substitution case. Nothing in the Department's rules protects laboratory data from such discovery. Even where administrative proceedings like FAA certificate actions or FRA locomotive engineer proceedings are not involved in a case, individuals who file cases in state or Federal court also have access to discovery. However, where an employee may not have ready access to discovery rules, access to potentially relevant laboratory data does potentially raise issues of fairness.

Compiling and copying the often voluminous information involved (which in some cases can run into thousands of pages) can be a significant cost and administrative burden. It could also be burdensome for laboratory personnel to be compelled to give testimony in a wide variety of proceedings. Who should bear these costs and burdens (e.g., the requester, as is common in Federal freedom of information actions)? Laboratories may regard some of this information as proprietary business information (e.g., portions of Standard Operating Procedures). In the absence of a court or administrative decisionmaker (as is involved in a discovery proceeding), who determines the scope of relevance for the requested information or testimony, and by what standards?

The Department would have to consider these and other matters before deciding on the shape of a regulatory requirement of the kind the commenters requested. We believe that, if we propose provisions of the kind requested by the commenter, they would properly reside in Part 40, rather than in the DOT agency regulations. In the near future, we anticipate publishing a document requesting further comment on these issues.

Issued this 24th day of July, 2001, at Washington, DC.

Norman Y. Mineta,

Secretary of Transportation.

[FR Doc. 01–19230 Filed 8–2–01; 4:41 pm]

BILLING CODE 4910–62–U