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DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 40

[Docket OST–2007–26828]

RIN 2105–AD64

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

AGENCY: Office of the Secretary, DOT.

ACTION: Interim final rule.

SUMMARY: The National Highway Transportation Safety Administration (NHTSA) has recently approved a new breath tube alcohol screening device (ASD) which will qualify for use in DOT Agency regulated testing once it appears on NHTSA's conforming products list (CPL). This interim final rule (IFR) will provide procedures for use of the new device and remove procedures for a previously approved breath tube ASD which is no longer being manufactured.

DATES: This rule is effective January 11, 2007. Comments to the interim final rule should be submitted by February 12, 2007. Late-filed comments will be considered to the extent practicable.

ADDRESSES: *Written Comments:* Submit written comments to the Docket Management System, U.S. Department of Transportation, Room PL–401, 400 Seventh Street, SW., Washington, DC 20590–0001. You may submit comments identified by the docket number (OST–2007–26828) by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the online instructions for submitting comments.

- *Web site:* <http://dms.dot.gov>. Follow the instructions for submitting comments on the DOT electronic docket site.

- *Fax:* 1–202–493–2478.

- *Mail:* Docket Management System; U.S. Department of Transportation, 400

Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–0001.

- *Hand Delivery:* To the Docket Management System; Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Instructions: All submissions must include the agency name and docket number or Regulatory Identification Number (RIN) for this notice. Note that all comments received will be posted without change to <http://dms.dot.gov> including any personal information provided.

FOR FURTHER INFORMATION CONTACT:

George Ellis or Bohdan Baczara, Office of Drug and Alcohol Policy and Compliance, Room 10403, 400 Seventh Street, SW., Washington, DC 20590; 202–366–3784 (voice), 202–366–3897 (fax), or bohdan.baczara@dot.gov (e-mail).

SUPPLEMENTARY INFORMATION:

Purpose

Department regulations require that in order for an employer to utilize a specific ASD to conduct required DOT alcohol tests, the device must (a) Have been approved by NHTSA as meeting required model specifications, (b) be published by NHTSA in the **Federal Register** on their most current ASD CPL, and (c) have Department-approved procedures in part 40 for its use. The procedures in this IFR will ensure that the NHTSA-approved breath tube ASD will be immediately available for use by employers upon publication of NHTSA's ASD CPL in the **Federal Register**.

Background

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

industries of any devices approved by NHTSA.

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

On October 1, 2002 (67 FR 61521), the Department published procedures for the use of a breath tube ASD that had been approved by NHTSA and added to their May 4, 2001 CPL (66 FR 22639). By 2005, that device was no longer being manufactured, and was removed from the CPL effective September 19, 2005 (70 FR 54972).

NHTSA has recently approved a new breath tube ASD and anticipates adding it to their CPL in late January 2007. However, the breath tube procedures currently in our regulation are not consistent with instructions for use of the newly approved ASD. In this IFR, we have amended part 40 by eliminating procedures specific for the breath tube ASD which is no longer being manufactured and adding procedures for use of the newly approved device.

Instructions for use of the new ASD are generally similar to those for the previously approved breath tube device. The principal difference is in how the alcohol result is read by the technician. Instead of comparing the color of the crystals in the ASD with the colored crystals in a manufacturer-produced control tube, the new ASD uses an electronic analyzer to provide the technician and the employee with an automated visual result of negative (a flashing green light) or positive (a flashing red light) at 0.02. The Department will retain the requirement to read the result within 15 minutes of the test to ensure a confirmation test, when necessary, is conducted in a timely manner.

The addition of an electronic analyzer with this type of breath tube ASD will also add an entry to the list of fatal flaws which would require the alcohol screening test to be cancelled.

According to the manufacturer, each electronic analyzer is pre-calibrated for use with a specific lot of detector devices. Use of an electronic analyzer not pre-calibrated for that lot will result in a fatal flaw.

Please note that employers participating in the DOT alcohol testing program are not authorized to use the new alcohol screening device until it appears on the NHTSA ASD CPL.

Regulatory Analyses and Notices

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

This IFR is not significant for purposes of Executive Order 12866 or the DOT's regulatory policies and procedures. It represents minor modifications to our procedures which do not increase costs on regulated parties. In fact, it would facilitate the use of an alcohol screening device that may increase flexibility and lower costs for employers who choose to use them over more expensive options already approved by the Department. Consequently, the Department certifies under the Regulatory Flexibility Act that this interim 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 negligible.

Under the criteria of section 553 of the Administrative Procedure Act (APA), an agency may determine that prior notice and public comment are impractical, unnecessary, or contrary to the public interest. The Department believes that this interim change meets this requirement. The rule will impose no burdens on any parties, and NHTSA has already determined that the device is technically acceptable for use in the DOT alcohol testing program. We have concluded that it is necessary to make this procedural amendment without prior notice and comment in order to ensure that employers can use the ASD when it is placed on NHTSA's CPL as a qualified device (meeting DOT specifications for accuracy and

precision). These same reasons provide good cause under the APA to make this rule effective immediately. The Department will, however, consider any comments concerning the procedures for use of the ASD.

List of Subjects in 49 CFR Part 40

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

49 CFR Subtitle A

Authority and Issuance

Issued in Washington DC this 4th day of January, 2007.

Mary E. Peters,
Secretary of Transportation.

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

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

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

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

■ 2. Revise § 40.245(b)(1), (2), (3), (6), (8), (9), and (10) to read as follows:

§ 40.245 What is the procedure for an alcohol screening test using a saliva ASD or a breath tube ASD?

* * * * *

(b) * * *

(1) Check the expiration date on the detector device and the electronic analyzer or on the package containing the device and the analyzer and show it to the employee. You must not use the device or the analyzer after their expiration date. You must not use an analyzer which is not specifically pre-calibrated for the device being used in the collection.

(2) Remove the device from the package and secure an inflation bag onto the appropriate end of the device, as

directed by the manufacturer on the device's instructions.

(3) Break the tube's ampoule in the presence of the employee.

* * * * *

(6) When the employee completes the breath process, take the device from the employee (or if you were holding it, remove it from the employee's mouth), remove the inflation bag, and prepare the device to be read by the analyzer in accordance with the manufacturer's directions.

* * * * *

(8) If you were able to successfully follow the procedures of paragraphs (b)(4) through (b)(6) of this section and after having waited the required amount of time directed by the manufacturer for the detector device to incubate, you must place the device in the analyzer in accordance with the manufacturer's directions. The result must be read from the analyzer no earlier than the required incubation time of the device. In all cases, the result must be read within 15 minutes of the test.

(9) You must follow the manufacturer's instructions for determining the result of the test. You must show the analyzer result to the employee and record the result on Step 3 of the ATF.

(10) You must never re-use detector devices or any gloves used in breath tube testing. The inflation bag must be voided of air following removal from a device. Inflation bags and electronic analyzers may be re-used but only in accordance with the manufacturer's directions.

* * * * *

■ 3. Amend § 40.267 by adding a new paragraph (a)(4) to read as follows:

§ 40.267 What problems always cause an alcohol test to be cancelled?

(a) * * *

(4) The breath tube ASD is tested with an analyzer which has not been pre-calibrated for that device's specific lot (see § 40.245(b)(1)).

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