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To: Regulatory.Review

Subject:Regulatory Burden RFI

Hello:

I offer the following comments and suggestions for your consideration regarding the Request for Information (RFI) that was published in the Federal Register on May 10, 2016 (81 FR 28736).

1. Consolidate the Drug and Alcohol (D&A) Regulations of 10 CFR 707 and 712 and Increase Harmonization with 49 CFR 40

To the maximum extent possible, merge the D&A regulations of 10 CFR 707 and 712.

10 CFR 712.15(c)(1) invokes 49 CFR part 40, subparts J through N for alcohol testing. Consider likewise invoking subparts C through I for drug testing.

49 CFR 40 serves as an excellent benchmark for cross-reference, because it is the most time-tested and thorough implementation of the U.S. Department of Health and Human Services (HHS) Mandatory Guidelines (MG) known to exist in the Code of Federal Regulations.

2. Make Random Testing Truly Random

10 CFR 712.11(a)(8) requires that each individual applying for (or in) a Human Reliability Program (HRP) position be subject to random drug tests for the use of illegal drugs at least once each 12 months. It is somewhat of a non sequitur to refer to such a program as a random program. A truly random program generally means each employee in the test pool has an equal chance of being tested each time selections are made throughout the year. Making each

employee be tested at least once annually is not a truly random program and forces contractors to contrive some sort of system that emulates a random program (in terms of being unannounced) but is not truly random. In other words, such a program forces the implementation of some sort of algorithm or selection logic that progressively increases an employee's probability of being selected in direct proportion to how long that employee has gone through a given year without being selected for testing. Consider implementing a truly random program. A good analogy for parameters, annual test rates, etc. is 49 CFR 382. In a truly random program, DOE would be free to set any test rate it wishes, but it would be an annual percentage of covered positions, not specific employees.

As a side note, it appears the reference to DOE O 3792.3, Drug-Free Federal Workplace Testing Implementation Program has become obsolete, as the directive has been replaced with DOE O 343.1, Federal Substance Abuse Testing Program.

3. Allow Alcohol Screening Devices (i.e., Don't Limit to Evidential Devices)

Despite the fact that 10 CFR 712 invokes 49 CFR part 40, subparts J through N (which encompass Subpart L for alcohol screening tests involving non-evidential screening devices), 10 CFR 712.11(a)(9) is currently written to restrict alcohol testing to the use of only evidential breath testing devices (EBTs). This restriction is inconsistent with the 49 CFR 40 subpart range being invoked and deprives the regulated community of some possible efficiencies available through the use of non-evidential screening devices.

Consideration should be given to allowing the use of alcohol screening devices (ASDs) to measure alcohol in bodily fluids in the same manner that DOT does. DOT defines an ASD as a "breath or saliva device, other than an EBT, that is approved by the National Highway Traffic Safety Administration (NHTSA) and placed on a conforming products list (CPL) for such devices" (49 CFR 40.3). The latest ASD CPL was published in the Federal Register on June 14, 2012 (77 FR 35745). NHTSA model specifications for ASDs were published on March 31, 2008

(73 FR 16956). Devices meeting those specifications are capable of reliably detecting the presence of 0.020 or more blood alcohol concentration (BAC), and there are well-established DOT procedures for the use of ASDs. It should also be noted that a screening test result of 0.02 or higher (whether using an evidential or non-evidential device) leads to a confirmation test that can only be conducted on an evidential device, which means evidential documentation is generated in cases where the tested person tested positive on the screening test.

4. Improve Report Times for Random Testing

Whereas the two-hour report time generally causes no problems for drug tests, it allows a person who has consumed alcohol a full two hours for alcohol to metabolize out of their system and potentially test negative when they might have tested positive had they been required to reporting immediately upon notification (consistent with the safe cessation of safety-sensitive functions and travel time to the test site).

In the spirit of 49 CFR 382.305(l), and based on the aforementioned alcohol-related concern, consider setting the random alcohol testing reporting time as follows: Employees notified of selection for random testing proceed to the test site immediately, consistent with the safe cessation of duties and travel time to the test site, but in no case later than two hours from the time of notification.

If approved, supervisors should be involved in helping monitor and enforce this approach, and of course, alcohol testing should be conducted prior to urine collection for drug testing (again because of the time-sensitive nature of alcohol consumption).

5. Update Terminology and Decrease Inconsistencies

There are areas where definitions could be better aligned and perhaps more efficiently referenced between 10 CFR 707.4 and 49 CFR 40.3 or the MG. For example, 10 CFR 707.4 provides a

definition for a “confirmed positive test” which is used later in the context of denying an employee unescorted access [e.g., 707.7(c)]. This is problematic, because a test result is not normally considered “positive” from the standpoint of being actionable (to impose restrictions upon or take action against an employee) until a medical review officer (MRO) verifies it as such [e.g., MG Sec. 13.3(c)(4), 13.8(a); 49 CFR 40.167(b), etc.]. This is referred to as a “verified positive” test—a concept that even appears in Step 6 of the Federal Drug Testing Custody and Control Form (CCF) where it states “. . . my verification is . . .” for the MRO.
A confirmed positive denotes a test that has been found positive by the laboratory but not yet verified positive by an MRO; therefore, a positive test upon which action against an employee is based should be referred to as a verified positive test.

Drug testing has evolved to look for more than the presence of drugs. With the inception of laboratory testing for adulteration and substitution, which can lead to a determination of a refusal to test, the term “positive test” has been displaced by the term “non-negative test” in many contexts. This fact should also be considered in the context of taking action against employees.

Unless there is a procedural reason to restate MG or DOT definitions, it may be possible that such definitions could simply be invoked by reference, thereby reducing the size of the regulation and the potential for inconsistency.

10 CFR 707 discusses drug testing procedures in a manner that could be considered vague or silent on some topics (e.g., instrumented initial test facilities, blind samples, shy lung, shy bladder, etc.) while unnecessarily repeating (or even conflicting with) other topics (e.g., chain of custody form). For example, 10 CFR 707.16(e) unnecessarily attempts to define the Federal CCF which is an Office of Management and Budget (OMB) approved form (OMB No. 0930-0158) that is already sufficiently invoked/described in the HHS MG. It is for reasons such as these that it is considered advisable to simply defer to the MG (and 49 CFR 40) to the extent possible and where appropriate.

For what it's worth, it is noted that use of the Federal CCF denotes a Federally-required test, not a Federal employee test. In other words, the Federal CCF is applicable to both Federal employees and Federally-regulated contractors who are subject to drug testing via Federal regulations. For example, over 1.6 million commercial motor vehicle drivers who are not Federal employees are tested under 49 CFR 40 using the Federal CCF. There has been some confusion among regulators and the regulated community in the past regarding this subject.

6. Look for Opportunities to Align with DOT's Modal Rules

DOT's modal regulations (e.g., 49 CFR 382 for commercial motor vehicle [CMV] drivers) contain several prohibitions, standards, or triggers that are echoed (but modified) in DOE regulations. It would be helpful if DOE would compare and contrast these regulations and determine if, in DOE's experience, those differences remain justified or if it might be more efficient to increase alignment between DOT and DOE regulations. The significance of this issue is driven by the fact that some DOE contractor employees (subject to 10 CFR regulations) also happen to be CMV drivers (subject to 49 CFR 382). Some of the known modal differences include positive drug test thresholds (0.02 versus 0.04), reasonable suspicion (one-person determination versus two-person concurrence), etc.

Other topics for which there may be opportunities for harmonization include the following:

* Designated employer representative (DER) functions
* Qualification and training of urine collection personnel
* Collection sites, forms, equipment and supplies used in DOT urine collections
* Urine specimen collection processes
* Use of drug testing laboratories
* MROs and the verification process
* Handling of split specimen tests
* Handling of problems in drug tests

* Substance abuse professionals and the return-to-duty process
* Roles and responsibilities of service agents

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