

DEPARTMENT OF TRANSPORTATION**Office of the Secretary****49 CFR Part 40****[OST Docket OST-96-1295] [Notice 96-13]****RIN: 2105-AC49****Update of Drug and Alcohol Procedural Rules****AGENCY:** Office of the Secretary, DOT.**ACTION:** Advance Notice of Proposed Rulemaking.

SUMMARY: The Department of Transportation is reviewing its procedural rules for drug and alcohol testing. This review is intended to lead to a notice of proposed rulemaking to update and clarify provisions of the rules. This advance notice of proposed rulemaking seeks suggestions for possible changes to the regulation.

DATES: Comments should be received July 29, 1996. Late-filed comments will be considered to the extent practicable.

ADDRESSES: Comments should be sent to the Docket Clerk, Docket No. OST-96-1295, Department of Transportation, 400 7th Street, S.W., Washington, D.C., Room PL 401, Washington, D.C., 20590. We request that, in order to minimize burdens on the docket clerk's staff, commenters send three copies of their comments to the docket. Commenters wishing to have their submissions acknowledged should include a stamped, self-addressed postcard with their comments. The docket clerk will date stamp the postcard and return it to the commenter. Comments will be available for inspection at the above address from 9 a.m. to 5:30 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Robert C. Ashby, Deputy Assistant General Counsel for Regulation and Enforcement, 400 7th Street, S.W., Room 10424, Washington, D.C., 20590. (202) 366-9306.

SUPPLEMENTARY INFORMATION: Six of the Department's operating administrations (the Federal Aviation Administration (FAA), Federal Highway Administration (FHWA), Federal Transit Administration (FTA), Federal Railroad Administration (FRA), U.S. Coast Guard (USCG), and Research and Special Programs Administration (RSPA)) have modal-specific drug and/or alcohol testing rules. These rules apply to about 8 million transportation employees who work in safety-sensitive positions (e.g., truck drivers, airline pilots, and railroad engineers). The operating administration rules impose substantive requirements concerning the testing

program, on subjects such as which employers must conduct tests, which employees are subject to testing, what kinds of tests are required, when the tests must be administered, the consequences of positive tests and other rule violations, how an employee who has violated the rule can return to duty, and what recordkeeping and reporting requirements apply to employers. These modal rules are not being revisited as part of this rulemaking initiative.

The Office of the Secretary (OST) procedural rule (49 CFR Part 40) that is the subject of this advance notice of proposed rulemaking (ANPRM) applies to regulated parties through each of the operating administration's rules. Part 40 describes, in detail, *how* the required tests must be conducted.

The drug testing portion of Part 40 closely follows the Mandatory Guidelines for Federal Workplace Drug Testing Programs of the Department of Health and Human Services (DHHS). With respect to the four operating administrations covered by the Omnibus Transportation Employee Testing Act of 1991 (FAA, FRA, FHWA, and FTA), the Department is required by statute to have procedures consistent with the DHHS Guidelines. We are committed, as a matter of policy, to consistency with the DHHS Guidelines with respect to the RSPA and Coast Guard drug testing programs as well. Consequently, the Department is not, in this ANPRM, entertaining comments that would require substantive departures from the DHHS Guidelines. Nor is the Department seeking comments on significant substantive issues that have, in recent years, been the subject of completed or pending rulemaking actions (e.g., review of negative drug test results by medical review officers, blood testing for alcohol, "shy bladder" procedures).

The Department conceives this ANPRM, then, not as an occasion for suggesting major substantive changes to how we test for drugs and alcohol, but rather as an opportunity to clarify the myriad details of Part 40. We want to make the rule as easy to understand and apply as we can, reduce burdens where feasible, take "lessons learned" during the several years of operating the program under Part 40 into account, correct problems that have been identified, clarify areas of uncertainty or ambiguity, and incorporate, where appropriate, the Department's interpretations of Part 40 into the regulatory text. We also anticipate reordering provisions of the rule so that the material flows more smoothly and is easier for readers to follow.

While we are soliciting comments on both the drug and alcohol portions of the regulation, we anticipate that the main focus of this effort will be on drug testing procedures, which are both more complex and older than the alcohol testing procedures. We seek the ideas of everyone involved with the program—employers, employees, consortia and third-party administrators, laboratories, substance abuse professionals, medical review officers, collectors, breath alcohol technicians, and other interested persons—to assist us in this process.

The Department is contemplating hosting one or more public meetings or other forums during which interested persons can discuss potential Part 40 changes with DOT officials and staff. We will issue a notice announcing such events when plans are in place.

Regulatory Analyses and Notices

This ANPRM, which simply requests public input concerning potential changes to the Department's drug and alcohol testing procedures, is not significant for purposes of Executive Order 12866 or Department of Transportation Rulemaking Policies and Procedures.

Issued this 22nd day of April 1996, at Washington, D.C.

Federico Peña,

Secretary of Transportation.

[FR Doc. 96-10522 Filed 4-26-96; 8:45 am]

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Federal Highway Administration**49 CFR Parts 383 and 391****[FHWA Docket No. MC-93-23]****RIN 2125-AD20****Commercial Driver Physical Qualifications As Part of the Commercial Driver's License Process****AGENCY:** Federal Highway Administration (FHWA), DOT.**ACTION:** Notice of intent to form a Negotiated Rulemaking Committee on Commercial Driver's License (CDL) and Physical Qualifications Requirements.

SUMMARY: The FHWA proposes to establish a negotiated rulemaking advisory committee (the Committee) under the Federal Advisory Committee Act and the Negotiated Rulemaking Act to consider the relevant issues and attempt to reach a consensus in developing regulations governing the proposed merger of the State-administered commercial driver's license procedures and the driver

physical qualifications requirements of 49 CFR Part 391. The Committee would be composed of people who represent the interests that would be substantially affected by the rule.

The FHWA invites interested parties to comment on the proposal to establish the Committee and on the proposed membership of the Committee, and to submit applications or nominations for membership on the Committee.

DATES: Interested parties may file comments and nominations for committee membership on or before May 29, 1996.

ADDRESSES: Comments and/or nominations should be sent to FHWA Docket No. MC-93-23, Room 4232, HCC-10, Office of Chief Counsel, Federal Highway Administration, 400 Seventh Street, SW., Washington, D.C. 20590. All comments received will be available for examination at the above address from 8:30 a.m. to 3:30 p.m. e.t., Monday through Friday, except Federal holidays. Those desiring notification of receipt of comments must include a self-addressed, stamped postcard/envelope.

FOR FURTHER INFORMATION CONTACT: Ms. Teresa Doggett, Office of Motor Carrier Research and Standards, (202) 366-4001, or Ms. Grace Reidy, Office of Chief Counsel, (202) 366-0834, Federal Highway Administration, 400 Seventh Street, SW., Washington, D.C. 20590. Office hours are from 7:45 a.m. to 4:15 p.m. e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

The Secretary of Transportation has authority to establish standards for physical qualifications that must be met by drivers in interstate commerce. 49 U.S.C. 31502 and 49 U.S.C. 31136. This authority is delegated to the Federal Highway Administrator. 49 CFR 1.48. The Federal Motor Carrier Safety Regulations (FMCSRs) set forth the qualifications of drivers who operate commercial motor vehicles (CMV) in interstate commerce. 49 CFR 391.11. The Commercial Motor Vehicle Safety Act of 1986 (CMVSA) provides, in section 12005(a)(8) (49 U.S.C. 31305(a)(8)), that Federal standards *may* be promulgated to require issuance of a certification of fitness to operate a CMV to each person who passes a CDL test and may require such person to have a copy of such certification in his or her possession whenever operating a CMV.

In September 1990, the FHWA explored options for giving responsibility for medical qualification determinations to the State licensing agencies as part of the CDL process. Six

States—Alabama, Utah, Arizona, North Carolina, Indiana and Missouri—began pilot programs seeking efficient ways to assure that commercial motor vehicle drivers meet the Federal physical qualifications requirements before they are issued a license. The pilots were developed by the FHWA and its contractors, the Association for the Advancement of Automotive Medicine and the American Association of Motor Vehicle Administrators, in conjunction with a committee of State government licensing officials.

The pilot projects were completed on January 31, 1995, and a final report was submitted to the agency. The report revealed that the State driver licensing agencies demonstrated the potential to assume responsibility for commercial motor vehicle driver medical qualification determinations as part of the CDL process. However, some States indicated they would require enabling legislation and additional funding to administer the process.

Currently, the FMCSRs require that CMV drivers be medically examined and certified as physically qualified once every two years in order to operate in interstate commerce. If the driver meets the Federal physical qualifications requirements, a medical examiner then issues a medical certificate which indicates that the driver is qualified to drive. Drivers must carry this certificate while driving and employers must maintain a copy in the drivers' qualification files. 49 CFR 391.41(a), 391.43, 391.45 and 391.51(b)(1). Enforcement of these requirements is performed primarily through roadside inspections of vehicles and drivers or through Federal or State safety compliance reviews of motor carriers.

In addition, 49 CFR 383.71(a) requires that during the CDL application process a person who operates or expects to operate in interstate or foreign commerce, or is otherwise subject to 49 CFR Part 391, shall certify that he or she meets the qualification requirements contained in 49 CFR Part 391. In practice, some States rely solely on the drivers' certifications while other States also require drivers who certify that they meet the qualification requirements of Part 391 to produce the required medical certificate in order to be issued a CDL. Before issuing the CDL, a few States also review the medical "long form" that the medical examiner completes to assure that the regulatory requirements are met.

The FHWA issued an advance notice of proposed rulemaking (ANPRM) (copy enclosed in Docket File) on July 15, 1994, requesting comments on merging

the CDL and physical qualifications programs. 59 FR 36338. The FHWA stated in the ANPRM that merging the systems would allow the States to make the physical qualification determinations prior to issuing a CDL. Under such an approach, the CDL would then be the sole document a commercial driver would have to carry and would be evidence that a driver is medically qualified to operate the CMV.

The proposal to merge the medical fitness determination into the CDL process has several very strong potential benefits. Drivers would be relieved of the responsibility to carry a medical fitness card, thus eliminating the potential for such cards to be inadvertently lost, damaged or destroyed. Enforcement personnel would also have immediate notice of the medical fitness status of a driver, without the time-consuming need to refer to and authenticate a separate document. Carriers would no longer need to maintain driver medical qualification certificates, as the license document itself would confirm the fitness of the driver.

In addition, States would be better able to identify unqualified drivers that currently operate without medical cards or with forged medical cards. Where questions exist regarding a license applicant, the driver licensing agency could refer the applicant and the medical fitness form to the State medical advisory board for further review. Medical advisory boards are currently in place in many States and are used to review medical qualifications of passenger car drivers and for intrastate CMV operators. The agency understands that forty-seven States currently have either a medical advisory board or some kind of medical review process for the above-described driver licensing determinations. In this rulemaking, the FHWA proposes to include medical determinations involving interstate CMV drivers in existing State medical review infrastructure programs by taking advantage of established working practices that are prevalent within State licensing agencies.

The results of the six-State pilot program provide support for the benefits of this proposal. The final report found that drivers who did not meet current medical standards could be readily detected and could be restricted from driving CMVs entirely or within parameters set by the driver licensing agency and its medical advisory board. Medical examiners would be able to contact the driver licensing agency medical unit or medical advisory board if questions arose during a physical. The

review of the fitness qualifications as part of the licensing process streamlines the procedure and creates a single record for each driver. The pilot found that fraudulent or expired medical certifications and the lack of required medical certifications of drivers did not exist in the six participating States.

In the ANPRM, the FHWA asked interested parties to comment on specific issues including the feasibility of the "merger" concept; how best to achieve such a system; how to reconcile the differences between the States' four-year CDL renewal cycle with the FHWA's two-year medical certificate cycle; whether medical examiners should be certified to perform examinations; the degree of flexibility States should have in determining how to implement any new, merged standard; and the types of resources required by States to implement a new, merged standard. Seventy-six parties responded to the notice, including State agencies, for-hire motor carriers, private carriers, safety advocates, and medical groups.

The responses received from commenters to the ANPRM generally involved one of five general issues. Because the parties likely to be interested in this proposed regulation (i.e., State licensing agencies, carriers, drivers, medical professionals) are fairly well defined, and the issues identified through the ANPRM are also well defined, the agency believed that this proposed rulemaking would be a good candidate for negotiated rulemaking. The range of interested parties and issues to be addressed are not the only reasons for the decision to initiate a negotiated rulemaking. The agency is enthusiastic about the opportunity to work cooperatively with partners in the motor carrier community at large to discuss this issue and approaches to resolving it in an open exchange of ideas. The opportunity to engage in face-to-face discussion of concerns and benefits will hopefully allow for a creative, cooperative approach to addressing the merger of medical fitness and licensing decisions.

As referenced earlier, the five general issues identified by the respondents to the ANPRM were: (1) whether States would have statutory authority to verify the physical qualifications of a driver; (2) whether there will be adequate staff available to verify drivers' compliance with physical qualifications requirements at the time a license is issued; (3) the feasibility of merging the two-year medical certificate with the States' four-year licensing cycle; (4) the motor carrier's role in assuring physical qualifications of the driver; and (5) the

cost of training licensing examiners and/or staffing medical review boards on the administration of the process.

Comments on the ANPRM included questions on the potential costs to States of assuming responsibility for verifying medical fitness as part of CDL issuance or renewal. Some carriers expressed concern that licensing agencies would be unable to adequately confirm information on the medical form and suggested that the current carrier responsibility for driver fitness be maintained. The agency believes that the results of the six-State pilot program indicate a strong likelihood that States can assume responsibility for the medical fitness determination process. This rulemaking will form the basis for addressing the questions raised by respondents to the ANPRM, as well as other issues that may be identified as this process continues.

Pursuant to the Negotiated Rulemaking Act, 5 U.S.C. 561–570, the agency has decided to form a negotiated rulemaking committee. As discussed earlier, the agency believes that this approach is most likely to lead to an efficient and successful transfer of responsibility for medical fitness determinations to State licensing agencies. Unlike traditional, informal notice and comment rulemaking, this process will allow for the open exchange of ideas and information among and between parties with an interest in the outcome of this issue. The agency believes that in adopting this approach, the process will lead to creative, innovative approaches to resolving issues that might not emerge through the individual efforts of commenters to a docket. The process will still result in the promulgation of a notice of proposed rulemaking. This will provide an opportunity for comment by other interested parties and the general public, but the initial proposal that will be published for comment will reflect the exchange of ideas and differing proposals that occur in negotiations. One result of the negotiations will be a better informed commercial motor vehicle safety community with a fuller understanding of the benefits and potential problem areas associated with State verification of medical fitness determinations. This knowledge should help all parties, including the agency, to develop a more practical, effective means of dealing with these medical fitness determinations.

Negotiated Rulemaking Process

Conveners

As provided for in 5 U.S.C. 563(b), a convener assists the agency in identifying the persons or interests that would be significantly affected by the proposed rule. The convener conducts discussions with representatives of such interests to identify the issues of concern to them and to ascertain the feasibility of establishing a negotiated rulemaking committee.

The FHWA retained the services of a contractor to act as a convener and provide advice on the feasibility of using a negotiated rulemaking process for this rule. The convening team met with FHWA officials to review background information on the issues, including the responses to the ANPRM, potential interested parties, and objectives of the agency. Prior to conducting interviews with prospective participants, the convening team analyzed the views of the various respondents to the ANPRM and the level of controversy generated by the issues as outlined in the ANPRM.

The conveners attempted to develop the range of interests that would be affected by the rule and identify individuals who would be able to represent or articulate those interests. The conveners then sought to interview those individuals to determine their views on the issues involved and whether they would be interested in participating in the negotiated rulemaking. The convening team sought to determine whether the negotiated rulemaking process would be effective in developing the rule. Each party was also asked if there were other individuals or groups which should be contacted and these additional parties were also interviewed. Based upon these interviews, the conveners submitted a convening report (copy enclosed in Docket File) in December 1995 to the FHWA, recommending that the agency proceed with the negotiated rulemaking process.

Determination of Need for Negotiated Rulemaking Committee

The purpose of a negotiated rulemaking committee is to develop consensus on a proposed rule. "Consensus" means the unanimous concurrence among the interests represented on the negotiated rulemaking committee unless the committee explicitly adopts some other definition. This requirement also means that the agency itself participates in the negotiations in a manner similar to that of any other party.

Before establishing such a negotiated rulemaking committee, the Negotiated Rulemaking Act (5 U.S.C. 563(a)) directs the head of an agency to consider whether:

1. There is a need for the rule;
2. There are a limited number of identifiable interests that will be significantly affected by the rule;
3. There is a reasonable likelihood that a committee can be convened with a balanced representation of persons who can adequately represent those interests and are willing to negotiate in good faith to reach a consensus on a proposed rule;
4. There is a reasonable likelihood that a committee will reach consensus on the proposed rule within a fixed period of time;
5. The negotiated rulemaking will not unreasonably delay the issuance of the notice of proposed rulemaking and the final rule;
6. The agency has adequate resources and is willing to commit such resources, including technical assistance, to the committee; and
7. The agency, to the maximum extent possible, consistent with its statutory authority and legal obligations, will use the consensus of the committee as the basis for the rule proposed by the agency for notice and comment.

The FHWA believes that all of the requisite negotiated rulemaking factors are satisfied with regard to the proposal to merge the medical qualification determination and the CDL processes and that the negotiating process could provide significant advantages over conventional informal rulemaking. This determination is based on the review of the comments to the ANPRM and the convener's report submitted by the contractor. There is broad consensus among the parties contacted by the conveners that there are weaknesses in the current medical qualifications system that can be improved. The potentially affected interests are limited in number; there are clearly fewer than 25 distinct interests that would be affected by the rule. A balanced committee representing the various interests at stake in this matter can be empaneled. The parties contacted by the conveners have expressed their interests in discussing the issues and believe that there is a strong likelihood of reaching consensus on the issues within a reasonable period of time. The FHWA believes that these negotiations will not delay, but will expedite the rulemaking process since the negotiations will enable the agency to benefit from the committee members' practical first-hand insights and knowledge into the operation of the physical qualifications

determinations and the benefits and costs of integrating those determinations into the licensing process. Gaining those insights and resolving the controversies surrounding the identified issues would otherwise take the agency considerably longer to resolve by using traditional rulemaking. The agency is committed to facilitating the negotiated rulemaking process and will devote the necessary resources, including technical assistance, to the Committee. The member or members of the Committee representing the agency shall participate in the deliberations and activities of the Committee with the same rights and responsibilities as other members of the Committee, and shall be authorized to fully represent the agency in discussions and negotiations of the Committee. The agency, to the maximum extent possible, consistent with its statutory authority and legal obligations, will use the consensus of the Committee as the basis for the rule proposed by the agency for notice and comment.

Therefore, based on this analysis of the seven factors mentioned above, the agency has concluded that the use of the negotiated rulemaking procedure in this case is in the public interest.

Potential Topics for the Negotiated Rulemaking Process

Based on the interviews conducted with potential committee members and the report provided by the convener, the FHWA proposes that the following issues would be considered in the negotiated rulemaking process.

1. Whether the physical qualifications guidelines currently used by the agency should be modified to more effectively implement the current medical standards.
2. The scope of any medical qualifications tracking system which might be used by law enforcement officials, as well as by carriers interested in medical information that is not currently available.
3. What is the status of the various federally-funded State Prototype Medical Review pilot programs which explored the merger of the medical qualifications and licensing processes, and what useful information can be utilized from these efforts in drafting a rule on merging CDL and physical qualifications requirements?
4. How much control should various parties have over the medical review process and should the current commonly-used procedure, in which a company directs its drivers to physicians it selects, be replaced entirely or could it simply be modified? For example, should the agency require

drivers to submit a medical long form to employers and the appropriate State licensing agency instead of replacing the current system?

5. How can the current physical examination requirements used by medical providers be clarified? How can these requirements and guidelines be more effectively communicated to the medical provider community?

6. Is there a way to allow merger of the separate requirements without burdening the small operator who moves to another State? In this case, although the driver's medical certification would still be valid, he or she might still be required to be recertified in the new State, thus potentially requiring a new certificate and a corresponding fee (e.g. medical reciprocity of old certificate to new States).

Once the negotiated rulemaking process begins, Committee members may raise other issues necessary for successful completion of the rulemaking.

Potential Participants Who Were Interviewed By Conveners

The following entities were identified as interested parties that should be included in the negotiated rulemaking process either directly as members of the Committee or as a part of a broader caucus of similar or related interests:

Enforcement Groups

Commercial Vehicle Safety Alliance
International Association of Chiefs of Police

State Licensing Agencies

American Association of Motor Vehicle Administrators

Carriers

American Trucking Associations
National Private Truck Council
National School Transportation Association
United Bus Motor Coach Association
American Bus Association
Terra International (Agricultural)
Farmland Industries (Agricultural)

Drivers

Owner-Operators Independent Drivers Association
Independent Truckers and Driver Association
Independent Truck Owner Operator Association
International Brotherhood of Teamsters

Public Interest

Advocates for Highway and Auto Safety
American Automobile Association

Medical

American College of Occupational and Environmental Medicine
 Association for the Advancement of Automotive Medicine
 American Association of Occupational Health Nurses

Insurance

Lancer Insurance (Busing Interests)
 AI Transportation—AIG (Busing and Trucking)
 Insurance Institute for Highway Safety
 Proposed Agenda and Schedule

The FHWA anticipates that the negotiated rulemaking committee will hold six two-day meetings, approximately once a month. The first committee meeting will focus on such matters as: determining if there are additional interests that should be represented on the Committee; identifying issues to be considered; and setting ground rules, a schedule, and an agenda for future Committee meetings.

Administrative Support

The FHWA's Office of Motor Carrier Research and Standards will supply logistical, technical, and administrative support to the Committee. The meetings will be held at the FHWA headquarters in Washington, D.C. Washington, D.C. is where a majority of the prospective Committee members are located. In general, Committee members will be responsible for their own expenses, but the FHWA will consider requests for compensation in accordance with 5 U.S.C. 568(c).

Applications for Membership on Committee

The FHWA is soliciting comments on this proposal to establish a negotiated rulemaking advisory committee and on the proposed membership of the Committee. Persons may apply or nominate another person for membership on the Committee in accordance with the following procedures:

Persons who will be significantly affected by the proposed rule and who believe that their interests will not be adequately represented by any person on the previously discussed list of potential participants may apply for, or nominate another person for, membership on the negotiated rulemaking committee. Each application or nomination shall include:

1. the name of the applicant or nominee and a description of the interests such person shall represent;
2. evidence that the applicant or nominee is authorized to represent parties related to the interests the person proposes to represent;
3. a written commitment that the applicant or nominee shall actively participate in good faith in the development of the rule under consideration; and
4. the reasons that the persons specified in this notice do not adequately represent the interests of the person submitting the application or nomination.

Announcement of FHWA Public Meeting

In order to identify and select organizations or interests to be

represented on the Committee, the FHWA will hold a public meeting on May 14, 1996. The meeting will be held at the Nassif Building, 400 7th Street, SW, Room 9230, Washington, D.C., at 8:30 a.m. e.t. All parties interested in this rulemaking, including the potential participants listed above and parties submitting applications or nominations for membership, are encouraged to attend this meeting. The convener/facilitator will also attend this organizational meeting.

As a general rule, the Federal Advisory Committee Act provides that no advisory committee may meet or take any action until an approved charter has been filed with the appropriate House and Senate committees with jurisdiction over the agency using the committee. Only upon the Secretary of Transportation's approval of the charter and the list of organizations or interests to be represented on the Committee and the filing of the charter will the FHWA form the Committee and begin negotiations.

After review of the comments received in response to this notice and any additional comments received at the organizational meeting, the FHWA will issue a final notice announcing the Committee members and the date of the first Committee meeting.

Authority: [5 U.S.C. 561–570].

Issued on: April 23, 1996.

Rodney E. Slater,

Federal Highway Administrator.

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