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U.S. Department of Transportation

Office of the Secretary of Transportation

400 Seventh St., S.W.
Washington, D.C. 20590

March 9, 2000

OST - 99 - 6578 - 37

Mr. Robert C. Schoening
Co-Chair, Governmental and Legislative
Affairs Committee
Substance Abuse Program Administrators
Association
Drug Testing Consultants, Inc.
P.O. Box 706
Fairfax, VA 22030-0706

DO MAR 15 PM 7:47
DEPT. OF TRANSPORTATION

Dear Mr. Schoening:

I am writing in response to your letter concerning the Department's proposal to ensure that service agents are accountable for serious noncompliance with the Department's drug and alcohol testing procedures. You ask that we "sever" (i.e., withdraw) this proposal from the Department of Transportation's pending notice of proposed rulemaking (NPRM) to revise 49 CFR Part 40. You propose that the Department begin a new and separate proceeding on "the service agent question," to be conducted through negotiated rulemaking.

We acknowledge SAPAA's legitimate interest in the NPRM's accountability proposals. Employers, employees, service agents not represented by SAPAA (or who are members of SAPAA and do not share the views expressed in your letter), and the public have an equally legitimate interest in these proposals. To allow all these interested parties adequate time to prepare carefully considered comments on this technical and complex rulemaking, we established a 120-day comment period. By the time we received your letter, approximately three fourths of this comment period had elapsed. I see nothing to be gained from withdrawing the accountability proposals from the NPRM at this late date. As a matter of public policy and of fairness to all interested parties, it is far better to permit everyone to continue to comment on proposals in the NPRM and to make their suggestions for modifications or alternatives.

The course of action you propose would significantly postpone the adoption of rules concerning service agent accountability. I can assure you that, as I mentioned to you in response to SAPAA's previous letter seeking to delay the entire rulemaking, the project to revise Part 40 is a very high priority for the Department. Secretary of Transportation Rodney Slater and I strongly wish to complete it as soon as possible. Prompt completion of this rulemaking will have important benefits for employers, employees, service agents, and the Department alike. The Department would choose to delay the completion of the rulemaking process, for the rulemaking as a whole or for an important component of it, only for the most compelling of reasons.

Your rationale for delaying the accountability provisions appears to be based on a number of faulty premises. Your letter says that the Department has concluded that proposed public interest exclusion (PIE) provision of the **NPRM** “is the only viable solution” to service agent accountability. This ignores the Department’s request for **comment** on three specific **alternatives** and general solicitation of comment on all other means of addressing the issue (see 64 FR at 69086; December 9, 1999).

Your letter says that the **NPRM** was “the first time” that the proposed accountability mechanism “was first discussed by **OST**.” This is simply incorrect. I and other members of the **OST** staff have personally discussed the concept of an accountability mechanism at industry forums and other public sessions during the years that preceded the issuance of the **NPRM**, including **SAPAA** national and regional **conferences**. At the “First **SAPAA** Invitational Industry Conversation” last year, which you mention in your letter and which took place before we issued the **NPRM**, DOT officials specifically mentioned and discussed our accountability proposal. I realize that you did not personally attend this session, and I urge you to review the transcript of the meeting, which confirms the lengthy discussion we had on this matter.

I would also point out that the Department’s discretion in **determining** what to propose in an **NPRM** is in **no** way limited by what matters the Department chose to discuss in a an advance notice of proposed rulemaking (**ANPRM**) issued, in this case, almost four years ago. Indeed, there is no requirement to issue an **ANPRM** at all.

Your letter says that “**OST** has publicly attempted to downplay the role and the **frequency** at which the PIE will be used,” but that **SAPAA**’s constituents “cannot afford to take comfort in DOT’s informal and non-binding assurances.” We disagree with your characterization of DOT officials’ comments as “downplaying” the role of the proposed accountability mechanism. To the contrary, we have consistently emphasized its importance. DOT’s intent for the PIE provisions is clearly stated in the preamble to the **NPRM**. A decision to **begin a** PIE proceeding would be “made in view of the seriousness of the problem” and the Department “**contemplate[s]** use of this process only in cases having considerable significance, not for minor mistakes.” In addition, the preamble relates, “DOT offices would resort to this process only after having unsuccessfully tried other means of resolving the problem” (Id.)

Your letter questions “DOT’s jurisdiction over service agents in general,” but does so without mentioning the discussion of this very issue in the preamble to the **NPRM** (Id., beginning last paragraph, center column). As this and other points mentioned in this letter show, the Department’s **NPRM** includes regulatory text or preamble language on many of the points about which you express concern. In particular, I would direct your attention to the many due process provisions of the PIE proposal. These provisions are well designed to prevent the arbitrary or unfair treatment of service agents.

With respect to your recommendation concerning the use of negotiated **rulemaking**, I would point out that the Department of Transportation was a pioneer in conducting negotiated rulemakings, and the Department remains a strong supporter of this approach. However, we do not believe that that negotiated rulemaking is necessary or appropriate in this case.

First, we believe that comments we receive during the **120-day** comment period for the **NPRM** should produce sufficient information to allow us to craft an accountability provision in the final rule that is sound as a matter of law and policy. We do not anticipate needing an additional process, or additional time, to obtain this information. For example, the only two specific issues your letter cites (concerning the opportunity for service agents to confront their “accuser” and the criteria for the length of a public interest exclusion) are exactly the kind of issues that the Department can consider readily based on presentations at the upcoming listening sessions and written comments to the docket.

Second, there are a number of factors agencies consider in deciding whether to use negotiated **rulemaking**. Among the factors we consider are that a negotiated rulemaking is most likely to be successful when it begins before the issuance of an **NPRM**, involves multiple parties, and concerns multiple issues, permitting the Department to facilitate the parties’ work toward a compromise solution. These factors do not favor the use of negotiated rulemaking in this case. Finally, **even** if a given issue may arguably meet certain statutory criteria for use of negotiated rulemaking, an agency is never required to use this approach. The agency always has the discretion to determine whether a given topic is appropriate for negotiated rulemaking.

For these reasons, the Department will neither sever the accountability proposals from the Part **40 NPRM** nor convene a negotiated **rulemaking** on this subject. The Department is heartened to learn that **SAPAA** and other parties have an interest in discussing and refining the **NPRM’s accountability** proposals, and we invite your participation in the PIE roundtable discussion we are planning as part of the Washington, DC, listening session scheduled for March **20-21**. This roundtable discussion will take place from **10:30 a.m. – 1:30 p.m.** on the second day of the listening session. The record of this discussion will become part of the docket. I have enclosed a copy of our notice **describing** the agenda for the Washington meeting. We will hold additional roundtable discussions in conjunction with our Los Angeles and Dallas listening sessions as time permits.

Sincerely,



Mary Bernstein

Enclosure

cc: Members, **SAPAA** Board of Directors

4910-62U

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 40

[Docket **OST-99-6578**]

RIN 2105-AC49]

Procedures for Transportation **Workplace** Drug and Alcohol Testing Programs

AGENCY: Office of the Secretary, DOT

ACTION: Notice of agenda for public meeting.

SUMMARY: The U.S. Department of Transportation (**DOT**) scheduled three public listening sessions on its notice of proposed rulemaking (**NPRM**) to revise the Department's drug and alcohol testing procedures, published in the Federal Register on December 9, 1999 (64 FR 69076). In the meeting notice, published in the Federal Register on January 18, 2000 (65 FR 2573), the Department included tentative agendas for the meetings to be held in Los Angeles, California, and Dallas, Texas. However, the Department did not include such an agenda for the meeting to be held in Washington DC. This notice provides the agenda for the Washington DC meeting, which will include a roundtable discussion on the proposed public interest exclusion (PIE) provisions of the **NPRM**.

DATES AND ADDRESSES: The public meetings will be held on March 20 and 21, 2000, at the Ronald Reagan Building and International Trade Center, 1300 Pennsylvania Avenue, NW, Washington, DC 20004; on March 28, 2000, at the Hilton Los Angeles Airport, 5711 West Century Boulevard, Los Angeles, CA 90045, telephone number (310)

410-4000, fax (310) 410-6177; and on March 30, 2000, at the **Crowne** Plaza, Dallas Market Center, **7050 Stemmons** Freeway, Dallas, TX **75247**, telephone number (214) 630-8500, fax (214) 630-0037.

FOR FURTHER INFORMATION CONTACT: For general meeting information and to register for one of the meetings, contact the DOT contractor, **Marti Bludworth**, Transportation Safety Institute (**TSI**), **Special Programs** Division, **DTI-100, 4400** Will Rogers Parkway, Suite **205**, Oklahoma City, OK **73108-2057**, telephone number **(800) 862-4832**, extension **323**, fax number **(405) 946-4268**, or e-mail **marti_bludworth@tsi.jccbi.gov**.

SUPPLEMENTAL INFORMATION:

A. Purpose

The purpose of the meetings is to provide all segments of the transportation industry and the general public with an opportunity to make statements, which have not already been made previously, to the docket. These meetings would also give DOT the opportunity to ask questions and ensure that the public comments are clearly understood by **the** Department. It may also give the Department the opportunity to clarify issues related to comments that had already **been** submitted to the docket during the early days of the formal comment period. Questions by **commenters** and other attendees to the DOT will be permitted as time allows. Registration and meeting procedures were specified in the January **18, 2000**, notice.

B. Agenda for the Washington DC meeting.

The meeting in Washington, DC will be held for a day and a half to provide ample opportunity for attendees to make comments and for DOT to have additional time, if needed, to ask follow up questions. This geographic location will **also** provide added opportunity for additional DOT staff and industry representatives **from** the Capital area to attend the meeting.

The following is a tentative agenda that may be modified as needed to accommodate the needs of **commenters** and to ensure adequate coverage of the subject matter. We call your attention particularly to the "Roundtable Discussion" on the second day of the meeting concerning the service agent accountability provisions of the proposed rules, known as the public interest

exclusion (PIE) proposal. This proposal has generated considerable interest among interested parties, and we believe that it could be useful to schedule an open, interactive discussion among attendees about it. This discussion will be in addition to the opportunity for speakers to address this proposal in their regular statements. As time permits, the Department intends to hold similar discussions as part of the Los Angeles and Dallas meetings as well.

**Agenda
DOT Public Meeting
Ronald Reagan and International Trade Center
Atrium Ballroom A
March 20 - 21, 2000 Washington, DC**

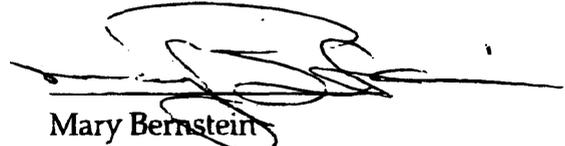
Monday, March **20, 2000**

09:00 - 09:15 Introduction and Administrative Items
09:15 - 09:55 Overview of the Notice of Proposed **Rulemaking**
10:00 - 11:10 Collection Issues
11:15 - 11:30 Laboratory Issues
11:30 - 12:00 Q&A and Public Comments
01:00 - 01:50 Labor/Employer/Employee Issues
02:00 - 03:45 Medical Review **Officer** Issues
03:50 - 04:10 Substance Abuse Professional Issues
04:10 - 05:00 Questions and **Answers** and Additional Public Comments

Tuesday, March **21, 2000**

09:00 - 10:10 Service Agents/ Public Interest Exclusion
10:30 - 01:30 Public Interest Exclusion Round Table Discussion

ISSUED **THIS** 7th DAY OF March 2000, AT WASHINGTON, DC



Mary Bernstein
Director, Office of Drug and Alcohol
Policy and Compliance
Department of Transportation