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As counsel to Pipeline Testing Consortium, Inc. ("PTC"), an administrator of federally mandated drug testing programs throughout the nation, we appreciate the opportunity to comment upon the Department of Transportation's Notice of Proposed Rulemaking, Docket OST-99-6578 (the "NPRM"). Under the proposed regulations PTC would be considered a "service agent."

As a service agent, PTC would be directly affected by various parts of the proposed regulations, but its most serious reservations relate to NPRM §40.35 l(e) and §§40.361 et seq. The former purports to prohibit service agents from acting as intermediaries in the transmission of individual drug test results from the MRO to the actual employer. The latter relates to and explicates the procedures associated with Public Interest Exclusions (PIEs).

Section 40.35 l(e) provides:

You [a service agent] may not act as an intermediary in the transmission of negative and verified positive test results from the MRO to the actual employer. That is, the MRO may not send these results to you, with you in turn sending them to the actual employer. However, you may maintain individual test results after they are sent to the DER [the Designated Employer Representative], and the MRO may transmit such results to you simultaneously with sending them to the DER.

You request comment regarding the relative advantages and disadvantage of direct reporting by MRO's to employers. In discussing the rationale for the PIE proposals, the regulations note that "... employers — especially the many small businesses involved — do not have the expertise or resources to determine whether the service agents are providing services in a way that meets Part 40 requirements." That observation is relevant in the context of direct reporting of test results to employers. In PTC's considerable experience, employers in many instances are neither equipped nor inclined to receive, assimilate, interpret and appropriately

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disseminate test results from the MRO. Third party administrators are retained in large measure because of the disinclination of companies, large and small, to become enmeshed in the minutiae of drug testing administration.

As justification for the requirement that test results be reported directly to employers without use of a service agent intermediary, the NPRM recites that "[u]se of intermediaries has the potential to delay the transmission of results and increase the likelihood of administrative error." Though it would be difficult to dispute the proposition that there exists the potential for delay or erroneous reporting, we are unaware of any empirical data that supports the conclusion that delay or administrative errors are sufficiently widespread to justify the increased burden to be borne by employers who receive the MRO data and by medical review officers who will in most instances be required to report in duplicate. Absent such evidence, the direct reporting requirement seems incongruous with the goals and specific mandate of Executive Order 12866 which provides in Section One:

a. The Regulator-v Philosophy. Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people.

b. The Principles of Regulation.

7. Each agency shall base its decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation.

11. Each agency shall tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations.

Unquestionably the objective of insuring the safety of the public and coworkers from those who would work while impaired by drugs or alcohol is of paramount importance. But the

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NPRM fails to cogently articulate the rationale for the rule. Moreover, it is difficult to discern how the laudable goal of eliminating delay and administrative error in reporting test results is furthered by a regulation that imposes additional burdens on employers and MRO's who in many instances are ill-equipped to comply.

All Americans want the benefits of effective regulation: clean water, safe workplaces, wholesome food, sound financial institutions. But too often the rules are drafted with such detailed lists of **dos** and **don'ts** that the objectives they seek to achieve are undermined. Clear goals and cooperation would work better. Too often, businesses, especially small ones, face a profusion of overlapping and sometimes conflicting rules. *White House Memorandum for Heads of Departments and Agencies Regarding Regulatory Reinvention Initiative*, March 4, 1995.

Standard industry data suggests that positive test results comprise significantly less than five per cent of all drug testing. If the goal of direct reporting of test results to employers is to insure that those employees who test positive for illicit substances are removed from safety-sensitive positions, and to the extent D.O.T. is convinced that reporting through intermediaries is a problem in need of regulation, the goal is achievable by modification of the proposed regulation to require that only positive test results must be transmitted directly to the employer.

In the preamble to Executive Order 12866, the President stated that:

The American people deserve a regulatory system that works for them, not against them: a regulatory system that protects and improves their health, safety, environment, and well-being and improves the performance of the economy without imposing unacceptable or unreasonable costs on society; regulatory policies that recognize that the private sector and private markets are the best engine for economic growth; regulatory approaches that respect the role of State, local, and tribal governments; and regulations that are effective, consistent, sensible, and understandable.

By adopting a rule that requires that only positive test results be directly reported to employers if the employer has contracted with a service agent to provide drug-testing services, the regulations will protect the public's health and safety while allowing the free market to deal with service agents who fail in their legal or contractual responsibilities.

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We have extensively reviewed and considered the Subpart R-Public Interest Exclusions. PTC largely concurs in the petition for severance and expedited initiation of a negotiated rulemaking filed by the Substance Abuse Program Administrators Association ("SAPAA"). In its petition SAPAA notes its concerns regarding due process issues and the lack of objective criteria that would govern D.O.T.'s decision-making process when imposing a PIE.

To SAPAA's observations PTC would add that the Clinton Administration's regulatory philosophy as expressed in Executive Order 12866 clearly favors one or more of the alternatives set forth in the NPRM. PTC believes that either alternative proposal 1<sup>1</sup> or 3<sup>2</sup> would be an equally effective and less draconian approach to the problem apparently perceived by the Agency.

Thank you for the opportunity to comment upon the NPRM. PTC management would be available to discuss the substance of the company's views at any time with Agency staff.

Sincerely,



CHARLES D. LEE

Partner

cc: Vergi Geurian

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<sup>1</sup> "The process would work as described above, but instead of issuing a PIE, the Department would issue an advisory notice to employers telling them that the service agent was not providing services as required by part 40, placing employers using the agent at peril of enforcement action."

<sup>2</sup> "A contract provision in all agreements between service agents and regulated employers (see §40.11(d)) would bind service agents to providing services in compliance with Part 40. Noncompliance would breach this provision, leading to termination of the contract."