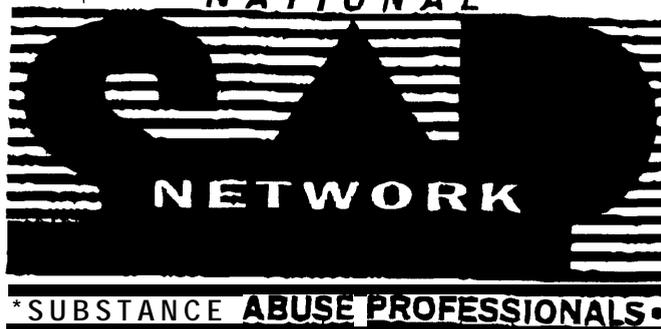


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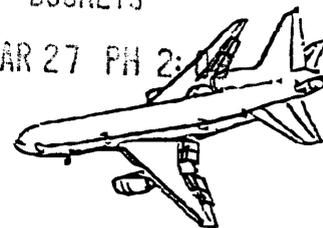
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DOCKETS

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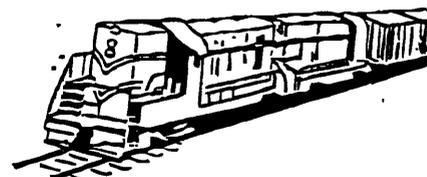


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NUMBER OF PAGES 9 (Including cover sheet)

SUBJECT:

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ON THE SAP SERVICE AGENT RATE, OPEN FOR
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Docket OST-99-6578
 Department of Transportation
 400 7th Street, SW., Room PL401
 Washington, DC 20590

DEPT. OF TRANSPORTATION
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00 MAR 27 PM 2:09

RE: 49 CFR Part 40, Procedures for Transportation Workplace Drug and Alcohol Testing Programs [64 FED. REG. 69076]

Subpart B--Participant responsibilities and Subpart O--Return to duty process and roles of Substance Abuse Professionals

Compliance with 49 CFR Part 40/Prohibition of Waivers of Liability

Subpart B, Sec. 40.11 and Subpart O, Sec. 40.291

Issue: Service agents in implementing the SAP process should not be held in writing as the only responsible party or entity for DOT program compliance. Part 40 places the contractual agreement for program compliance in Sec. 40.11 with one party, the service agent who is the only entity responsible in writing; in addition, Part 40 nullifies all contractual indemnification in Sec. 40.291, placing all service agents performing SAP functions at a heightened liability risk for "all" functions and tasks performed in the SAP process regardless of what entity was responsible under contract or otherwise for performing the SAP functions or tasks. Sec. 40.291 nullifies indemnification between service agents administering the SAP process.

Recommendation: Part 40 should permit mutual indemnifications in contractual arrangements for the differing service agents administering the various functions and tasks in the SAP process--viewing contractual arrangements as private business matters between private parties. In addition, the employee and the employer need to demonstrate in writing their responsibilities for DOT program compliance with the service agent(s).

Supportive View of Recommendation: Throughout NPRM's Part 40, there is no direct statement that explicitly states that employers must sign a contract nor employees must sign off on their commitment in terms of actions and choices to become program compliant. Yes, responsibilities and instructions are listed clearly for employers regarding their obligations as part of program compliance, for example, in Subpart O [Questions 40.285, 40.287, 40.295, 40.303, 40.305, 40.309, 40.311(h)] and Subpart B (Question 40.11), but neither Subpart O nor Subpart B state that the employer must also sign an agreement or sign a statement of program compliance as in paragraph d, directed to employers, with the service agent. As stated in Subpart B concerning the employer's role, question 40.11 page 69099, (e) "If there is not a written agreement, you must ensure that the statement in paragraph (d) of this section is stipulated to in writing and signed by their service agent. . . (f) The statement in paragraph (d) of this section shall be signed by the

service agent.” In fact, **paragraph (d)** only targets the service agent whose actions require program compliance, stating:

[Name of service agent] agrees to provide **all** services concerning **drug and/or alcohol** tests required by Department of Transportation regulations in **full** compliance with the provisions of **49 CFR Part 40**. Compliance with Part 40 is a **mandatory term** of this agreement. If the Department of Transportation **determines** that [Name of the service agent] is in noncompliance with **Part 40** with respect to DOT regulated **drug and alcohol** programs, this **agreement** will be terminated for **cause** by the **employer** unless the noncompliance is corrected.

Inherent in NPRM Part 40 is a narrow **focus** that **program** compliance relies on the actions of the service agents-- with the presumption that employers in Sec. **40.11 (c), (d)** are seeking **agreements** with **service agents** and must be signing off on such agreements. **In reality, the SAP** service agent is the one, for the most part, initiating **service agreements**-- not the **other** way around. Further, under the new regulations **most employers** will **find** that implementing the SAP **process** is “**risk-free**” because DOT clearly mandates in writing that their **service** agents make them program compliant, and this fact is adhered to by the **service** agent in writing. In the **interest** of maintaining a **free** marketplace and one **free** of **presumed** guilt, it is important to bring **this** to the attention of DOT; DOT is **interfering** with **private contractual arrangements** with **employers** and establishing the perception that **service** agents, rather than employers or **employees**, **could** be the only entity at fault in the SAP process. **In a** free society the expectation is that contractual business arrangements will be the **primary concern operating** between private business entities--who, in turn, usually indemnify each other **from** the other’s distinct responsibilities given each parties **sphere** of control in the **nature** of the transaction, process, product or **service delivery, etc.** The **understanding** since the conception of **Part 40** is that the goal of all **entities**-- **employee, employer, and service** agent(s)--involved in the **SAP** process has been “program compliance” with the mandates of **49 CFR Part 40**.

Of particular concern is NPRM’s Sec. **40.291** (page **69126**) that the SAP “must not ask or require an employee or employer to **waive** liability with regard to negligence and/or **malpractice** related to a valuation, **referral**, treatment, and follow-up evaluation **processes**” and further states “**nor indemnify any person or group for the negligence of others in the SAP process.**” In fact, **given** that the SAP process involves multiple **service agents** in the performance of functions and **supportive tasks**, this statement nullifies all contractual arrangements for **indemnification** between **service** agents as well. To the vast majority of **professionals** in the SAP process, a waiver of liability, waiving a professional from having to perform good **service**, is not a **viable** implementation mechanism due to the practical fact that a professional has never been upheld in any U.S. court of law for bad **practice**. The term “**negligence**” is an open-ended concept suggesting unlimited interpretation due to the NPRM’s stated inclusion of **negligence** occurring for any entity or person in the “SAP process.” This section broadly implies that **all and** any **service** agents involved in the

SAP process are culpable in the **employee and** the employer failing to **maintain** DOT compliance. It is **understandable** that *no* professional should be allowed to waive **the** quality of his or her **work**; if this is the DOT **intent** it needs to **be clearly** stated in Part 40 as such. **In all fairness**, what about **the service** agent asking or requiring the **employee and the employer** to maintain conditions as **responsibilities** for program **compliance** in their **implementation of the SAP process**? Within the SAP process, the SAP service **agent(s)** should be **allowed** in a **free** society to **indemnify itself** against the organizational actions of **the employer** in conducting the SAP process, to be protected against the **employee's** choices and actions made during **the SAP process** and be **permitted** to establish **indemnification** for actions of other service agents performing functions and **supportive** tasks in the SAP process.

Without **the quality control assurance of indemnification and** given the precondition **now** that **only service** agents need to sign an "agreement" or "statement" attesting to the **commitment of program compliance**, the outcome for service agents becomes **one of serious concern**. With the **NPRM Part 40**, employers, as well as employees, do not have to **commit in writing to any responsibilities** under Part 40 regarding the **SAP process**. In **the real world**, who **does DOT believe** will be held accountable for employee and **employer** actions when there is no explicit direction for the employee or the employer to **commit in writing to appropriate** actions? **The NPRM** places the service agent with the only enforceable accountability for program compliance.

Subpart O--Return to duty Process and Role of Substance Abuse Professionals Sec. 40.291

Issue: The term "malpractice" denotes that **any** irregularities or mistakes in the SAP **process** regardless of the **source**, the content or its extent cannot be **waived** and that they have **been** prejudged by Part 40 as a source of litigation because they are **viewed as malpractice**.

Recommendation: The term "malpractice" should be **removed** from Part 40 and the term "negligence" can be retained only if it can **be defined** in specific **terms**, rather than leaving a vague, **open-ended interpretation where** any irregularity **in the SAP process** can be **deemed negligent** on the part of **one** entity, the service agent, when program noncompliance happens to occur.

Supportive View of Recommendation: **The** following identifies a few instances of concern when **the** employer and the employee are not responsible parties **for** program compliance, and **negligence** is **only** an issue of service agent accountability, What about **the employee** lying or distorting facts **during** initial evaluation about the incident and **the** substance abuse **issues** and **then** being inappropriately placed in assistance on the basis of this lie or **distortion**? What about **the** employee placing blame on the service agent for how **his/her** employer **enacted** organizational policy concerning the SAP process? **What** about **the**

employer who chooses to keep on the job an employee who has a verified positive alcohol and/or drug test results and refuses to remove the employee from the safety-sensitive functions? What about the employer who terminates all employees after testing positive and never talks to service agents regarding any SAP referrals and refuses to sign any type of agreement, even Sec. 40.11(d); is this negligent for service agents to implement such SAP referrals? What about the employer who receives SAP documentation in a timely manner but creates no internal system by which the SAP documentation is retained for audit? What about the employer who tries to establish the conditions and the outcome of the SAP process and actually subverts the objective, appropriate implementation of the SAP process? What about the employee who intimidates and behaves in an abusive manner toward service agents while they are administering the SAP process? What about the employer who chooses not to sign any type of an agreement with a service agent, but then turns around and uses that service agent as its primary SAP referral service for an employee who requires SAP service assistance? What about the employer who does not incorporate SAP recommendations into the return-to-work agreement or who does not implement return-to-work agreements in any form as a matter of collective bargaining? The above only mentions a few of the irregularities occurring in the SAP process, who would be negligent in each of these situations if program noncompliance was the outcome for the employee or the employer? Clearly, under the broad term of "negligence" the service agent(s) providing SAP services could be held liable for the misconduct, misunderstandings and the overall lack of knowledge of either party in the SAP process. DOT will find it hard pressed to find any SAP service agents willing to take on liability for employer and employee misconduct, misunderstandings, and lack of knowledge. The NPRM Part 40 should clearly define "negligence" in specific terms or omit it entirely as in the usage of the term "malpractice." The term "malpractice" prejudices all actions set forth in the SAP process as a matter of litigation and should, without a doubt, be removed, while the term "negligence" can be defined in specific terms (in Sec. 40.3) such that a clear understanding of its contextual meaning and intent are understood through Part 40. Otherwise, all irregularities will be assigned fault under professional liability and will be presumed and acknowledged in the realm of service agents regardless of who instigated the problem or performed the action or the behavior,

Subpart O--Return-to-Duty Process and Role of Substance Abuse Professionals (SAPs)

Sec. 40.293 (b,3), Sec.40.301 (b,3), Sec.40.311 (a)

Subpart Q--Roles and Responsibilities of Service Agents

Sec. 40.353 (b)

Issue: As part of a legal contractual arrangement, the employer should be allowed to delegate DER functions, except for those akin to internal business practices like hiring, firing, returning employees to duties or removing an employee from them, etc. such that a third party can be delegated intermediary SAP duties as transmitting accurate SAP records in a timely manner to the employer.

Recommendation: The word “directly” should be eliminated from Sec. 40.293(b,3), Sec., 40.301(b,3), Sec. 40.311 (a) and new language should be generated to allow for either the service agent to act in the place of the DER by agreement or for the service agent to facilitate the timely return of the SAP’s written reports as a matter of quality control assurance to the employer as a matter of contractual arrangements.

Supportive View of Recommendation: Most of the SAP professional community understands that this NPRM stipulation derives from a previous interpretation made by DOT concerning the fact that the employer must receive SAP reports directly from the SAP. However, much of the work in the SAP process is monitored and coordinated by third party administrators which maintain program compliance and continuity throughout the implementation of each function of the SAP process through a contractual arrangement. This stipulation has proven to be problematic for many third party administrators--on the one-hand, the service agent is responsible to the employer for legible, accurate, and timely reporting by SAPs, and on the other-hand, the service agent cannot provide the valuable quality controls (the check and balance on the delivery of services) on facilitating SAP documentation to the employer. In this particular instance, third parties have all the responsibility under the agreement but no control over the delivery of the end-product.

It appears that this previous interpretation originated with the DOT belief that third party entities were changing SAP recommendations. At that particular time as a historical accounting, most of the third parties believed they were contractually the SAP of record, and many were misunderstanding their roles in the process. Given that years have past since this interpretation, most third party administrators with an ounce of common sense know they are third parties and are not the SAP of record. At that particular point in time, the interpretation helped greatly to establish roles and dispel misunderstandings. However, DOT seems to forget that the misunderstandings were well-intended, for the most part, at that time; third parties trying to enhance public safety and do what they thought was an appropriate job for their employers had not distinguished themselves contractually from the SAP of record. Clearly, the NPRM Part 40 states “no one” (Question 40.297) has the authority to change or modify SAP reports; so why does DOT continue to prohibit the intermediary role of the third party in facilitating the timely transmission of accurate SAP reports to employers? Most, if not all, third party administrators only seek to facilitate the SAP process for employers under contract rather than to subvert it.

With the service agent not being able to indemnify against actions of others and being the only party responsible in writing under the regulations, the NPRM prohibits formally third party entities from facilitating the transmission of SAP documentation to the employer--one more instance where negligence could be found by the employer or the employee if the service agent cannot exert any quality control over this aspect of the SAP process.

Regulatory Analyses and Notices

Page 69093--Additional Training Requirements

Issue: Understanding for SAPs is that they can **self-certify** through self-instruction or attend a training class every two years in order to **certify** that they reviewed DOT Part 40, updated Modal regulations for each Agency, and SAP procedural guidelines. It is **understood** that SAPs demonstrate they are qualified SAPs through their renewal of licensure or certification through the **expectations** of their group membership as part of the SAP definition (Sec. 40.281 (a-e)). As such, **there** is an ongoing **need** for a **coherent**, organized computer web-site for SAPs to obtain accurate updates on Part 40/Modal regulations and SAP procedural guidelines.

Recommendation: Request for a centralized, DOT web-site for SAPs to obtain easily the content package of self-instruction for the purpose of **self-certification**.

Supportive View of Recommendation: The proposed training requirements for SAPs as well as MROs seem fair and consistent across the board. The self-administered training concept allows for the retention of SAP's in the field and treats them as professionals. **Hopefully, this self-certification** concept will serve the two-fold purpose of maintaining competent professionals serving the DOT purpose without diminishing the availability of qualified SAP's. **However**, the content of the SAP training for **self-certification** is supposed to include a working knowledge of the current Part 40, the 'Substance Abuse Professional Procedure Guidelines', and the DOT agency regulations applicable to the employers for which the SAP evaluates employees (Subpart O, question 40.281, b). The easy access and availability to this training information should be a direct concern of DOT. A strong suggestion is made that the DOT needs to arrange for one training web-site where SAP clinicians and other service agents can easily obtain copies of the updated, current materials that are required for self-review. An updating of the "date of modification" of such training materials requires DOT attention, as well, so that service agents are not subject to buying or obtaining "out-of-date" materials. For example, agency rules have been updated or modified more frequently than that of Part 40; having agency rules be part of this training web-site allows for professionals to receive the current materials they are expected to review. Without such a centralized web-site for obtaining training materials, the DOT is setting up another expense for clinicians and other service agents to have to purchase public information and may, in turn, be establishing one more reason for the employee and the employer to charge negligence on the part of the SAP or other service agents, if materials reviewed are not current.

**Subpart O--Return-to-duty process and role of Substance Abuse Professionals
Sec. 40.297**

Issue: Does 'no one' include **or** exclude **the** original SAP who conducted **the** initial assessment?

Recommendation: Given the liability for program noncompliance, the desire is that **the** original SAP learning of newly identified needs (**while** the employee is in **treatment** and failing at that level of care) would be able to increase the initial assessment in order to facilitate the **employee** in successfully completing a program.

Supportive View of Recommendation: One area for clarification is requested **from** DOT regarding the **SAP's initial assessment** recommendations. To the question **40.297** (page 69127), asking whether or not if anyone has the authority to change a SAP's initial assessment recommending assistance, the **DOT needs to specify** whether or not **the original SAP evaluating** a case can modify the initial assessment recommendation. Under inquiry is the **language** in Part **40** of "**no one . . . has the authority...**" which is seemingly **excluding** everyone involved in the **SAP process**. **Realizing** that public **safety** is the **primary** objective, can **the** SAP learning of newly identified **client needs** from the **treatment provider** increase the **initial assessment** recommendation? To **provide** a context, **the client** has **clarified new** information of substance usage and needs to **the treatment** provider **and/or the client** is demonstrating during program implementation (i.e. failing a clinical drug test) **that** a higher **level** of care would be required for program **compliance**; the **following** is to be **determined**: **1)** Should the **SAY** allow the client to fail the initial assessment recommendations **regardless** of **newly** identified needs during **treatment** and become program noncompliant? "**or**" **2)** Should the **SAP assess the new information** and specify a **modification** to the initial **assessment expectation** for the client? Simply, is **Part 40** **excluding** or including **the** original SAP in the terminology of "**no one**?"

**Subpart O--Return-to-duty Process and Role of Substance Abuse Professionals
Sec. 40.299 ©**

Issue: There are four **exceptions** listed **to** the conflict of **interest** prohibition against **making** referrals to entities with which a SAP is financially associated. **Sec. 40.299 (c,4)** seems to allude to **the** previous understanding about rural, **remote** areas where an **exception** could be made **concerning** this conflict of interest.

Recommendation: The exception for rural, remote areas **needs** to be clarified in specific terms **under** **Sec. 40.299**, for example where **the** only qualified SAP for many miles works for the **only treatment** provider in the **area**. **The** term "**rural**" **needs** to be defined in **terms** of **accessibility** and availability to SAP services.

**Subpart O--Return-to-duty Process and Role of Substance Abuse Profession&
Sec. 40.283 (I), 40.301 (b,3)**

Issue: All operating administrations do not follow SAP procedures as described in Sec. 40.283 or Sec. 40.299, USCG does not subscribe to the SAP process, and NRC, if reciprocity given, does not recognize the full SAP process. Continuity and consistency of expectations for service agents are unclear.

Recommendation: Amend Subpart O to state the operating administrations which adhere to these regulations and those which have been given exceptions to the regulations, detailing those exceptions in the SAP process for those agencies.

**Subpart O--Return-to-Duty Process and Role of Substance Abuse Professionals (SAPs)
Sec. 40.281**

Issue: There is a developing controversy about NCCA accreditation for professional groups currently included in the definition for qualified SAPs.

Recommendation: A clarification is needed to demonstrate that all professional groups currently included in the SAP definition are not required to have NCCA accreditation which is true of NAADAC and ICRC.

Supportive View of Recommendation: Based on input from the SAP community, there is some confusion in the reading of Part 40 around the inclusion of the ANPRM (June 3, 1999) in Part 40, page 69084 (first paragraph in section entitled "Substance Abuse Professionals"). Question 40.281 on page 69126 details who is a qualified SAP by listing all groups included in the definition. What is not clearly understood is whether all groups designated in the existing SAP definition in question 40.281 are given the same distinction made for NAADAC and ICRC that they do not need NCCA accreditation- It would seem from a thorough reading of Part 40 that all groups in the existing SAP definition do not need NCCA accreditation, but this is never stated in Part 40 and may need to be stated to resolve this issue.

**Proposed Rules-- Page 69084
Solicited Comment (Column 3)**

Issue: To the question on Page 69084, "would it be better if there were a minimum requirement of twelve follow-up tests during the year?"

Recommendation: The recommendation is made that the current minimum of six tests over one year should be increased to twelve follow-up tests over one year for all employees who are involved in prohibited behavior in the workplace under DOT and for all agencies whether or not employees require SAP required assistance.