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Comments on 49 CFR part 40
Procedures for Transportation Workplace Drug and Alcohol Testing Programs;
Proposed Rules
DEPARTMENT OF TRANSPORTATION
Office of the Secretary
**[Docket OST-99-6578]** -49
**RIN 2105-AC49**
**NPRM**

*Submitted by DRZ Management Associates, Inc.*
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DRZ Management Associates, Inc. is a third party administrator/FAA Approved Antidrug Consortium and has been in business since 1990. DRZ provides drug and alcohol testing services, program development and regulatory guidance to companies from airlines and trucking to aircraft and aircraft engine manufacturing.

It is both a pleasure and a concern to see the Department of Transportation attempt to clarify the requirements of the transportation workplace drug and alcohol testing program. The DRZ client base is primarily comprising companies testing under the FAA regulatory program. DRZ will attempt to briefly address some of the items included in the NPRM that will have an impact on the FAA transportation industry and their "service agents/third party administrators."

Since the elimination of the Aviation Drug/Alcohol Abatement *UPDATE,* there has been no vehicle for education on and interpretation of the regulatory requirement of the aviation portion of the testing program. The addition of the FAA website has provided a library of the historical information prepared by the FAA, but since the elimination of the *UPDATE* publication, interpretations come only when the private sector writes to the individual Department of Transportation agency. DOT still needs to address the individual company concerns and questions, however, responding to the individual company prevents the general public from the benefit of the interpretation.

If there is one thing that has become clear to DRZ Management in ten years of service it is that even the most willing, compliant companies need periodic refreshing. DRZ holds to the theory that companies covered by these regulations need resources. The tenor of the NPRM is somewhat negative in its approach to offer this understanding.

The following are some of the points that DRZ has chosen to offer comments:

**Sec. 40.5** *The question of who issues regulatory interpretations is spelled out, but the vehicle for obtaining this interpretation is not. Consortia and companies need to know how to obtain answers and interpretations in a time&fashion.*

**Sec. 40.11** *The contract language proposed regarding the responsibilities of the employer and contractual obligations of the service agent seem inappropriate. The intent of the regulations and the inspection process imposed under the current testing program are in place to ensure that companies and their service providers are acting in*

*accordance with the regulations. It is the business of the private sector and their own attorneys to construct the guiding terms of their operating contracts.*

**Sec. 40.17** *The DOT NPRM reflects heightened concern regarding how to place "responsibility for compliance," and "sanctions "for noncompliance upon the employer and the service agents. The preoccupation on the part of the DOT seems unfounded since current regulations already spell out the requirements for adhering to the testing rule. Currently, any approved FAA plan holder, which includes third party administrators and individual companies, can have their plan revoked if they are out of compliance. Any lab that is not conducting its operations under defined guidelines will lose their lab certification. MROs and their standards of performance are reflected clearly under the inspection of records in any FAA inspection of either the company or the MRO. Collection sites and their handling of the necessary custody and controlforms and urine specimen collection packaging, etc. are monitored via the lab upon their receipt of the individual specimen. In all of these areas the responsibility for compliance is properly placed on the individual service agents.*

*While the intent of the NPRM may be to narrow down the point of responsibility to one single body, the employer, it is the individual service agent* ***"and/or"*** *the employer who will receive possible sanctions. How does this change the current question of liability from our current regulations.?*

**Sec. 40.35** *At any given time, DRZ Management works with approximately one hundred medical facilities for use in urine specimen collection services and breath alcohol testing. The requirement that an organization employing collectors obtain and keep on file "signed statements "from collectors and their trainers stating that the collector has received training/retraining and has demonstrated proficiency as required . . . is simply a paperwork nightmare and an unnecessary burden.*

*Rather than requesting a piece of paper stating that all collectors and their supervisors have received training, from all the collection sites currently used by DRZ clients, DRZ conducts ongoing oversight of the collection site by reviewing monthly error reports prepared by our lab so that collector errors can be discussed with the collection site and/or collector/supervisor involved. DRZ also has all requestsfor affidavits routedfrom the lab to DRZ, to the collectorfor signature and back to DRZ, and then DRZ forwards the affidavit to our lab. This measure enables DRZ to discuss a collection site error and to ensure that the affidavit is signed and properly filed with the lab so that the test can be processed according to regulations. This process offers an ongoing ability to monitor the collection process where filing forms that say that the collectors have received training hardly ensures that the collection will be performed correctly.*

*Sec.* **40.103** *DRZ has never had apositive test result on a blind test submission. Unless ODAPC has adequate data to reflect that a significant number of errors are being detected under the current blind testing requirement, it would appear that blind test submissions are not serving the intended goal of cracking down on inadequate labs.*

*Sec.* **40.215** *The requirements of this section pose the same problems regarding breath alcohol technicians' and supervisors' training records as those outlined in Sec. 40.35 for drug testing and collection procedures. Under current inspection guidelines, collection sites, labs, MROs, TPAs, and individual employers are open to review by the appropriate governing agency of the Department of Transportation. Under the current inspection rules, when any one of those individual concerns is out of compliance, it is the joint obligation of the connected parties to ensure that the necessary corrective action is taken. Analogous to the training record requirement would be if the FCC wanted to hold all users of Cable Company X liable due to the faulty wiring installed by unlicenced electricians employed by Company X and used by those individuals. Should the consumer have to ask that all electricians of Company X submit copies of their licences prior to allowing those electricians to work on the cable system or is the consumer logical to belief that Company X has the responsibility for training and licensing their electricians?*

*Following the additional of the alcohol testing provisions of this program and the deletion of the preemployment breath alcohol test, many collection sites stopped performing DOT collection services. DRZ was told on more than one occasion that the breath alcohol testing equipment, training and record keeping that the new alcohol testing provision would require simply was not worth the ten percent covered population that would be tested Add to these concerns another requirement for training and record keeping may make it even more difficult to fine the necessary collection sites.*

**Subpart R** *PUBLIC INTEREST EXCLUSIONS, intended to be the better business bureau of the Department of Transportation, could certainly serve as a means of exposing and eliminating "service agents" that are charging for but not providing the proper services outlined under the requirements. The exclusion and its possible nine months to five year duration is extreme, and the NPRM falls short in defining what conduct warrants a PIE.*

*The equity involved in the detection process is unclear. The universal inspection and certification or decertification of laboratories covers all labs, however, it seems that the Department of Transportation will only place a PIE on a service agent if they find the company. The current inspection process is set up to evaluate and require the changes needed to get service agents into compliance. If the service agent fails to do so, there are already penalty measures in place.*

> *It seems that the ultimate goal of the Department of Transportation is the intention of ensuring that all of the businesses involved in the drug and alcohol testing community provide the highest quality service, not develop ways of putting businesses out of business.*

In concluding I would like to report that DRZ Management has been inspected by FAA and remains in good standing. Many of the service agent/TPAs that were present attempted to place the blame for any of the existing program problems on smaller TPAs. In the area of substance abuse program management, I strongly believe that the only effective outside program management is one in which the TPA has the time to address the ongoing concerns of the regulated employer. A larger TPA is no more competent than a small TPA in accomplishing this goal. Larger is not always better!

Some of the remarks that were made from the open comment portion of the hearing regarding the fees charged by service agent/TPAs were entirely self serving. There is no business that operates without compensation. The discussion of fee for service should not have been an item for consideration in a hearing about a NPRM that does not address such information. While it is impossible to have a truly candid forum for the consideration of the NPRM, DOT's challenge is the process of culling through the myriad of ideas and reactions contributed by the industry at large.

Thank you for allowing DRZ Management to express views on a few of the topics covered in the NPRM. We look forward to an equitable and uncomplicated advance in the direction of better program management. DRZ welcomes questions from DOT regarding these comments on the proposed rule.