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Docket Management System  
U.S. Department of Transportation  
Room Plaza 401  
400 7<sup>th</sup> Street, SW  
Washington, DC 20590  
FAA-2000-8431

This is to submit comments in reference to the April 30, 2001 Notice of Proposed Rulemakings of each of the six Department of Transportation Modes.

DATIA is a 1,100 member national trade association representing the full spectrum of drug and alcohol testing service agents including laboratories, collection sites, C/TPAs, BATs, MROs, SAPs, and on-site testing device manufacturers. Since our members manage testing and compliance services in all six of the Modes, we are submitting this document to each Mode under separate covers.

The information and input contained in our comment to the docket is from the following sources:

1. Instructors, authors, and attendees at the DATIA full day course on management of C/TPAs, which has been held in 12 cities with over 600 total attendees over the past two years. This course has given us a unique opportunity to identify key issues needing clarification, along with problematic areas and subjects of confusion. In the course of the day long training course and with questionnaires following the course, we receive feedback on regulations and service provider issues.
2. Program working papers and written requirements of the Nationally Accredited for Administration of Drug and Alcohol Testing Programs (NAADATP) program, including a comprehensive list of standards that address potential problems, an exam and required attendance at the course. We surveyed over 1,000 members in developing these C/TPA requirements and are aware of their issues.
3. Instructors, authors, and attendees at DATIA's Certified Professional Collector Trainer (CPCT) course that DATIA has taught in 22 cities over the past 4 years, with 1132 total attendees. MROs, C/TPAs, BATs, and SAPs have attended this full day course in addition to specimen collectors. In addition, the collector certification program, which now certifies 1800 individuals, features an exam, a requirement of experience, and a demonstration of proficiency.

DATIA's comments are as follows:

The most important issue for DATIA members relating to this rulemaking is to ensure an effective and practical working relationship between the employer, the Modal agency, and the various service agents in carrying out the drug and alcohol testing rules. While the DOT rules apply to employers first and foremost, most DOT employers are small employers, and they have a strong need to utilize service agents to handle most of the administrative burden in managing a drug and alcohol testing program. Our experience is that a majority of DOT regulated employers utilize C/TPAs to manage their programs, and with some Modes, such as Federal Motor Carrier Safety Administration (FMCSA) and United States Coast Guard (USCG), over 70 percent of the employers utilize C/TPAs. All employers use labs, MROs and collection sites. So making the working relationship work effectively with both the Modal and general DOT rules is not just DATIA's concern, it is key to transportation safety.

### **1. Pre-employment Testing Issues**

Our members' experience reflects pre-employment testing as one of the most crucial elements of the drug and alcohol testing regulation. It turns many drug users away before even applying to a safety sensitive job, and detects and removes applicants before they assume a position. The DOT published pre-employment testing positive rates are higher than the random rates, proving its worth as a deterrence and detection tool. However, since most employers want their safety sensitive employees to start their position immediately and wish to avoid any lost time and expense, the area of pre-employment testing is perhaps the one most usually ignored or not followed correctly, often intentionally by the employer.

In the proposed rulemaking, The FMCSA has done an exceptionally good job at addressing the pre-employment testing requirements (Subpart C, Section 382.301, page 21544) as they apply to employers. FMCSA would require the employer to obtain written proof, check with prior employers, verify the validity of a prior program, etc.

Unfortunately, many employers utilize C/TPAs as a "middleman" to further ignore or dodge the pre-employment requirements, to enroll people in a random testing pool without proper written proof. At the DATIA C/TPA courses, we have found that only a handful of C/TPAs required written proof of pre-employment test status before enrollment in the random pool. Most C/TPAs begin the membership/client relationship and quietly enroll the safety sensitive employee in the pool in order to get the new client, saying it was the "responsibility of the employer" – which certainly is ultimately true. (Economists refer to this as a "market failure", and it is a widespread problem according to our members). We have prohibited this practice among firms in our C/TPA accreditation program, NAADATP, but the overall problem is likely to only increase given the removal of any role by the C/TPA in the employer definition -- which used to give the C/TPA some leverage with the actual employer.

Obviously, this non-compliance and blame has a very negative effect on safety, because if a safety sensitive employee is an active drug user, and "skips" the pre-employment test, he or she can go up to two years (and possibly longer) without being detected by the random testing process.

The solution to this problem is relatively simple. *DATIA recommends that all the Modes adopt the FMCSA language relating to pre-employment testing, but add a provision to require managers of random testing pools, including C/TPAs and MROs, to receive written proof of a pre-employment test, or written proof of an exemption, before that person can be enrolled in the random testing pool.* Some of our members who are C/TPAs have been doing this for years, and this practice has proven most effective at ensuring that the requirement be met. In addition, we have information that some of the Modes have informally or “unofficially” enforced requiring C/TPAs to get this paperwork from the employers, and neither the C/TPA nor the employer has complained, even though it was not specifically addressed by the current regulations. Finally, it has been part of the C/TPA course taught by DATIA for the past two years, as a required practice.

## **2. Refusal to Test Determinations by C/TPAs**

DATIA supports the new 49 CFR 40 requirement (in 40.355j(1)) that C/TPAs be allowed to make refusal determinations for owner operators, when the owner/operator refuses to take a test as directed by the C/TPA. Owner/operators and small employers failing to report for a test is an ongoing and widespread problem and we support DOT addressing the subject in this manner. *DATIA recommends that all six Modes include regulatory text allowing C/TPAs to make refusal determinations, with the possible exception of FRA and FTA, which do not have owner operators.* This is also a frequent topic of discussion at our C/TPA courses, because there is currently no recourse available to the C/TPA (or DOT) when an owner-operator or small firm decides not to take a test, whether it is because he is a current substance abuser or not. Allowing C/TPAs to make these determinations is crucial to bringing accountability to the testing process for small firms; therefore, DATIA believes all Modes should incorporate this provision.

It should also be added that the “no show” is not only a problem limited to owner-operators, but also can occur with any firm having a contact person subject to random testing no matter what the size. That is, even a company of 10 drivers could be likely to refuse a test notification from a C/TPA if the notification was for a key driver, the owner, or someone who is “needed” for a shift.

As to any concern that giving this authority to the program manager (C/TPA) has risks, there is no foundation for that belief in our view. Should there be a valid excuse or reason by the owner-operator why he/she did not report for that test, the administrative proceedings by the Mode offers the opportunity for the owner-operator to correct the record. Therefore, the potential for abuse does not really exist. The Modes will need to schedule time and resources to look into these cases, to ensure that all parties are treated fairly.

## **3. Notification of Positive Tests**

An issue addressed by only one Mode in its NPRM, and an issue of omission of the others is the issue of when a small employer or owner-operator tests positive for drugs or alcohol. DATIA wishes to illustrate the problem through a few questions as follows: How does the

Mode or DOT find out about a positive test on an owner-operator in order to take appropriate action? Can owner-operators be expected to voluntarily report him/herself (or a key employee) to surrender his/her license in case of a confirmed positive test result sent to him or her from the MRO or C/TPA? Would "self-reporting" require that he be a "witness against himself" (as may be arguably prohibited by Amendment V of the Constitution), or at a minimum defy the expected pattern of behavior of a substance abuser? How are subsequent employers to know that the applicant just failed a pre-employment or random test, if the DOT is never notified?

Clearly, this is a potential major loophole, and must be addressed in this rulemaking.

On this issue, the Coast Guard has taken the lead in identifying and addressing the problem. The Coast Guard's proposal is: "to require a sponsoring organization, like employers and prospective employers, to report a mariner's positive chemical drug test to the nearest Coast Guard Officer in Charge Marine Inspection." This not only makes basic sense, but also is a key part of the DATIA C/TPA course and requirements for accreditation as a NAADATP C/TPA.

Therefore, DATIA's recommendation is that all six Modes adopt language along the lines of: *"in the event of a confirmed positive drug or alcohol test, the MRO, C/TPA or other service provider must immediately report the positive result to the closest office of the [Transportation Mode] to ensure removal of that employee from safety sensitive duty. Whenever a positive test result is reported to the employer by the C/TPA or the MRO, it must also be concurrently reported to the Mode in writing."*

#### **4. Notification of Changes in Modal Random Testing Rates**

The FMCSA has made a proposal to discontinue the annual publishing of random testing rates, in favor of publishing the rates only when they change. The intended effect may be to lower the total number of regulatory announcements. However, in actuality the burden for employers and service agents would go up under the FMCSA proposal for the following reasons: 1) because employers would have to constantly monitor the Federal Register for announcements that could come at any time, where currently there is only one annual announcement per year; 2) The likelihood of missing a future rate announcement would be greater, because there would not be an "official rate" published for that year, i.e. 2002 rate, if it was published in 2000, and the 2000 rate would never "expire" as it does now.

Under the FMCSA proposal therefore, while the burden might decrease slightly for the modal regulators in not publishing the random rates on an annual basis (thus saving some taxpayer money), the burden for regulated employers and their agents would go up in a more significant manner. So the cost benefit analysis on this proposal would fail.

There is a need to change the current process, however. A significant problem with the current process of a yearly announcement is that there is much confusion when one Mode announces its rates, and others do not announce their rates until days, or many weeks later.

This creates six different announcements and the associated burden with following in the Federal Register which Mode announced what when. That is not a smooth flow of information.

Instead, a more significant way of lowering the burden on regulated employers would be for all the Modes to publish their rates at the *same time on an annual basis*, as they did for regulatory changes with this NPRM. Moving to one annual, expected, concrete announcement would be a very good public policy and a simple regulatory process.

## **5. Removal of FAA Consortium Approval**

As comprehensive regulations concerning C/TPA operations have been included in DOT's CFR 49 Part 40, DATIA supports the removal of the FAA approval process from the FAA regulations. By doing so, it is stressed that C/TPA operations are regulated for all Modes by the CFR 49 Part 40 regulations. In addition, for C/TPAs that provide services for employers whose employees fall under numerous modal regulations, this will allow for greater continuity of services by the C/TPA.

## **6. CG Dual MRO/SAP Training Requirements**

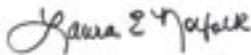
The CG requested comment on whether a service provider acting as both an MRO and a SAP needs to meet the training requirements for both. DATIA feels that where training requirements are outlined in CFR 49 Part 40, the person performing those services must meet all applicable requirements. Therefore, in the CQ regulations, we support the requirement that an MRO who also performs SAP functions should meet the required training and proficiency demonstration for both the MRO and SAP. This is no different than a person who performs both alcohol testing and specimen collections needing to meet both the collector training and proficiency demonstrations and the BAT training and proficiency demonstrations.

In summary, we make the following recommendations for incorporation in each Modal requirement:

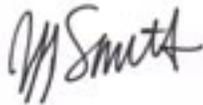
1. All the Modes adopt the FMCSA language relating to pre-employment testing, but add a provision to require managers of random testing pools, including C/TPAs and MRO, to receive written proof of a pre-employment test, or written proof of an exemption, before that person can be enrolled in the random testing pool.
2. All six Modes should allow C/TPAs to make refusal determinations, with the possible exception of FRA and FTA, which do not have owner operators.
3. All the Modes should adopt language similar to the Coast Guard to ensure that positive tests are reported in cases where they might otherwise not be. Suggested

- languages is: “in the event of a confirmed positive drug or alcohol test, the MRO, C/TPA or other service provider immediately report the positive result to the closest office of the [Transportation Mode] to ensure removal of that employee from safety sensitive duty. Whenever a positive test result is reported to the employer by the C/TPA or the MRO, it must also be concurrently reported to the Mode in writing.”
4. To have all the Modes publish their random testing rates in one announcement, on an annual basis. FMCSA has proposed to publish the rates only when needed, and DATIA opposes that proposal, as it would increase the burden of compliance. DATIA’s proposal for a group annual modal notice would significantly lower the compliance cost for regulated employers and their agents.
  5. To eliminate individual modal regulations concerning C/TPA approval.
  6. To require service providers to meet all applicable training requirements as outlined in CFR 49 Part 40.

Sincerely,



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Executive Director



Jeffrey C. Smith  
Managing Director