

Research and Special Programs Administration, Federal Highway Administration, Federal Railroad Administration, Federal Transit Administration, DOT.

**ACTION:** Final rule.

**SUMMARY:** Each of the Department's alcohol testing rules include a definition of a substance abuse professional. By this action, the Department is consolidating these definitions into its Department-wide testing procedures rule and adding to the definition substance abuse professionals certified by the International Certification Reciprocity Consortium.

**EFFECTIVE DATE:** This rule is effective July 17, 1996.

**FOR FURTHER INFORMATION CONTACT:** Jim Swart, Program Analyst, Office of Drug Enforcement and Program Compliance, Room 10317 (202-366-3784); or Robert C. Ashby, Deputy Assistant General Counsel for Regulation and Enforcement, Room 10424, (202-366-9306); 400 7th Street, SW., Washington, DC 20590.

**SUPPLEMENTARY INFORMATION:**

**Background**

The Omnibus Transportation Employees Testing Act of 1991 required that an opportunity for treatment be made available to covered employees. To implement this requirement in its alcohol and drug testing rules issued in February 1994, the Department of Transportation established the role of the "substance abuse professional" (SAP). The DOT rules require an employer to advise a covered employee, who engages in conduct prohibited under these rules, of the resources available for evaluation and treatment of substance abuse problems, including the names, addresses, and telephone numbers of SAPs and counseling and treatment programs. The rules also provide for SAP evaluation to identify the assistance needed by employees with substance abuse problems. In many cases (e.g., the Federal Highway Administration and Federal Transit Administration rules), this process and the role of the SAP apply to drug testing as well as alcohol testing.

The primary safety objective of the DOT rules is to prevent, through deterrence and detection, alcohol and controlled substance users from performing transportation safety-sensitive functions. The SAP is responsible for several duties important to the evaluation, referral, and treatment of employees identified through breath and urinalysis testing as being positive for alcohol and/or controlled substance

use, or who refuse to be tested, or who have violated other provisions of the DOT rules.

The SAP's fundamental responsibility is to provide a comprehensive face-to-face assessment and clinical evaluation to determine if the employee needs assistance resolving problems associated with alcohol use or prohibited drug use. If the employee is found to need assistance as a result of this evaluation, the SAP recommends a course of treatment with which the employee must demonstrate successful compliance prior to returning to DOT safety-sensitive duty. Assistance recommendations can include, but are not limited to: In-patient treatment, partial in-patient treatment, out-patient treatment, education programs, and aftercare. Upon the determination of the best recommendation for assistance, the SAP will serve as a referral source to assist the employee's entry into an acceptable treatment or education program.

In general, the DOT rules prohibit a covered employee who has engaged in conduct prohibited by the rules from performing any safety-sensitive functions until meeting the conditions for returning to work, which include a SAP evaluation, demonstration of successful compliance with any required assistance program, and a successful return-to-duty test result (below 0.02 for alcohol test and/or a negative drug test). Therefore, the SAP follow-up evaluation is needed to determine if the employee demonstrates successful compliance with the original treatment recommendation. In addition, the SAP directs the employee's follow-up testing program.

The DOT rules define the SAP to be a licensed physician (Medical Doctor or Doctor of Osteopathy), a licensed or certified psychologist, a licensed or certified social worker, or a licensed or certified employee assistance professional. In addition, alcohol and drug abuse counselors certified by the National Association of Alcoholism and Drug Abuse Counselors (NAADAC) Certification Commission, a national organization that imposes qualification standards for treatment of alcohol and drug related disorders, are included in the SAP definition. All must have knowledge of and clinical experience in the diagnosis and treatment of substance abuse-related disorders (the degrees and certificates alone do not confer this knowledge). The rules do not authorize individuals to be SAPs who meet only state certification criteria because qualifications vary greatly by state. In some states, certified counselors do not have the experience or training deemed

**DEPARTMENT OF TRANSPORTATION**

Office of the Secretary of Transportation

49 CFR Part 40

Federal Aviation Administration

14 CFR Part 121

Research and Special Programs Administration

49 CFR Part 199

Federal Railroad Administration

49 CFR Part 219

Federal Highway Administration

49 CFR Part 382

Federal Transit Administration

49 CFR Parts 653 and 654

[OST Docket No. OST-96-1533]

RIN 2105-AC33

Amendment to Definition of "Substance Abuse Professional"

AGENCIES: Office of the Secretary, Federal Aviation Administration,

necessary to implement the objectives of the rules. State-certified addiction counselors could have, of course, taken the NAADAC competency examination to receive certification.

The issue of who should be regarded as qualified to be a SAP was one of the most commented-upon issues in the rulemaking leading to the February 1994 rules (see 59 FR 7334-36; February 15, 1994). In the time since these rules were issued, various parties have continued to request that they be included within the definition of SAPs. In evaluating how to respond to such requests, the Department has taken the view that any expansion of the definition of SAPs should ensure that the qualifications of persons playing this important role not be diluted.

The International Certification Reciprocity Consortium (ICRC)/Alcohol & Other Drug Abuse (Suite 213, 3725 National Drive, Raleigh, North Carolina 27612), petitioned the DOT for inclusion of its certified counselors in the SAP definition. Upon receipt of the petition, the DOT began a thorough evaluation of the ICRC proposal, including information from ICRC related to counselor eligibility criteria, quality assurance procedures, codes of ethics, and certification and testing parameters. We also reviewed ICRC information on testing procedures, examination availability, and psychometrician standards.

The results of our evaluation supported the conclusion that ICRC has rigorous standards in place and that their counselors warrant inclusion in the Department's SAP definition. Their program requirements for professional counselors and their testing and certification procedures (as well as test availability) are consistent with those of other groups already defined as qualified for participation. After careful review and evaluation of the ICRC petition, supporting documentation, and testing methodology the DOT proposed including ICRC certified counselors in its SAP definition. ICRC-certified counselors must meet examination, experience, and other standards comparable to NAADAC-certified counselors, who are included in the existing SAP definition.

At the same time, the Department proposed consolidating SAP-related matters into Part 40, its Department-wide procedural regulation. Under the NPRM, the Department proposed to place the revised definition of SAP—including ICRC-certified counselors—in part 40, while removing the SAP definitions in each of the operating administration rules.

#### Comments and DOT Responses

Twenty-eight comments addressed the inclusion of ICRC-certified counselors in the SAP definition. No one opposed the proposed amendment. For the reasons noted above, the Department will include ICRC counselors in the definition.

Three comments suggested that additional professions or certifications be recognized in the SAP definition. Further additions to the definition are beyond the scope of this rulemaking. However, representatives of any group or profession seeking inclusion may contact the individuals listed above in "For Further Information Contact" to discuss the process for considering such requests.

One comment asked for further clarification of the operational role of the SAP, with respect to such matters as referral for treatment, the return to duty process, and follow-up testing. The Department has issued guidance in these areas and, if needed, can issue additional guidance in the future. In our view, further elaboration of the regulatory text in these areas is not necessary.

One comment, from a trade association, suggested that the definition of SAP remain in the regulation for the operating administration that regulates its members, rather than being consolidated in 49 CFR part 40. The rationale for this suggestion appears to be that employers would prefer to find all relevant terms in one rule—the operating administration rule—rather than needing to be familiar with both the operating administration rule and part 40.

This rationale is unpersuasive. Part 40 already applies to all employers covered by all the operating administration drug and alcohol testing rules. Each operating administration rule already incorporates by reference and applies Part 40 with respect to all tests conducted by covered employers. Employers must already be familiar with and refer to part 40 in order to conduct tests properly. Having a DOT-wide, common definition of SAP in part 40 is no more remarkable or difficult for employers to grasp than having the existing common definitions of Medical Review Officer or Breath Alcohol Technician in part 40. The ease of reference to common terms affecting the drug and alcohol testing process found in a single place, particularly for the many multi-modal employers covered by the Department's rules, is a significant reason for adopting the proposed consolidation. Moreover, it is much quicker to amend one rule than to

amend six, an important consideration when the SAP definition is potentially subject to additional amendments if additional professions or certifications are included. The Department is adopting the proposed consolidation.

#### Regulatory Process Matters

The final rule is considered to be a nonsignificant rulemaking under DOT Regulatory Policies and Procedures, 44 FR 11034. It also is a nonsignificant rule for purposes of Executive Order 12866. The Department certifies, under the Regulatory Flexibility Act, that the NPRM, if adopted, would not have a significant economic effect on a substantial number of small entities. The NPRM would not impose any costs or burdens on regulated entities, serving merely to broaden the definition of service providers under the rule. The rule has also been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that it does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

The Department finds good cause to make this final rule effective immediately. There are a substantial number of ICRC-certified counselors who are ready and waiting to participate as SAPs in the DOT drug and alcohol testing program, and there is no opposition to their beginning to participate. The interest of the DOT program, the counselors themselves, and the employers who will be able to make use of them is served by making this rule change effective as soon as possible. In addition, this rule can be viewed as relieving a restriction on the participation of ICRC-counselors in the program.

#### Office of the Secretary

##### List of Subjects in 49 CFR Part 40

Drug testing, Alcohol testing, Reporting and recordkeeping requirements, Safety, Transportation.

For the reasons set forth in the preamble, 49 CFR part 40 is amended as follows:

#### PART 40—[AMENDED]

1. The authority citation for part 40 continues to read as follows:

**Authority:** 49 U.S.C. 102, 301, 322; 49 U.S.C. app. 1301nt., app. 1434nt., app. 2717, app. 1618a.

2. In § 40.3, after the definition of "specimen bottle," a definition of "substance abuse professional" is added, to read as follows:

**§ 40.3 Definitions.**

*Substance abuse professional.* A licensed physician (Medical Doctor or Doctor of Osteopathy); or a licensed or certified psychologist, social worker, or employee assistance professional; or an addiction counselor (certified by the National Association of Alcoholism and Drug Abuse Counselors Certification Commission or by the International Certification Reciprocity Consortium/Alcohol & Other Drug Abuse). All must have knowledge of and clinical experience in the diagnosis and treatment of alcohol and controlled substances-related disorders.

Issued this 9th day of July, 1996, at Washington, DC.

**Federico Peña,**  
*Secretary of Transportation.*

**Federal Aviation Administration****List of Subjects in 14 CFR Part 121**

Air carriers, Aircraft, Aircraft pilots, Airmen, Airplanes, Air transportation, Aviation safety, Drug abuse, Drugs, Narcotics, Pilots, Safety, Transportation.

For the reasons set out in the preamble, the Federal Aviation Administration amends 14 CFR part 121, as follows:

**PART 121—OPERATING REQUIREMENTS: DOMESTIC, FLAG, AND SUPPLEMENTAL OPERATIONS**

1. The authority citation for part 121 continues to read as follows:

**Authority:** 49 U.S.C. 106(g), 40113, 40119, 44101, 44701–44702, 44705, 44709–44711, 44713, 44716–44717, 44722, 44901, 44903–44904, 44912, 46105.

**Appendix I [Amended]**

2. In Appendix I, Sec. II, the definition of "Substance abuse professional" is removed.

**Appendix J [Amended]**

3. In Appendix J, Sec. I, subsection C, the definition of "Substance abuse professional" is removed.

Issued in Washington, DC on May 13, 1996.

**David R. Hinson,**  
*Administrator, Federal Aviation Administration.*

**Research and Special Programs Administration****List of Subjects in 49 CFR Part 199**

Alcohol testing, Drug testing, Pipeline safety, Recordkeeping and reporting.

For the reasons stated in the preamble, RSPA amends 49 CFR part 199 as follows:

**PART 199—DRUG AND ALCOHOL TESTING**

1. The authority for Part 199 continues to read as follows:

**Authority:** 49 U.S.C. 5103, 60102, 60103, 60104, and 60108; 49 CFR 1.53.

**§ 199.205 [Amended]**

2. In 49 CFR 199.205, the definition of "Substance abuse professional" is removed.

Issued in Washington, DC on June 11, 1996.

**D.K. Sharma,**  
*Administrator, Research and Special Programs Administration.*

**Federal Railroad Administration****List of Subjects in 49 CFR Part 219**

Alcohol and drug abuse, Railroad safety, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, FRA amends 49 CFR part 219, as follows:

**PART 219—CONTROL OF ALCOHOL AND DRUG USE**

1. The authority for part 219 continues to read as follows:

**Authority:** 49 U.S.C. 20103, 20107, 20111, 20112, 20113, 20140, 21301, 21304; Pub. L. 103–272 (July 5, 1994); and 49 CFR 1.49(m).

**§ 219.5 [Amended]**

2. In § 219.5, the definition of "Substance abuse professional" is removed.

Issued in Washington, DC on July 9, 1996.

**Donald M. Itzkoff,**  
*Deputy Administrator, Federal Railroad Administration.*

**Federal Highway Administration****List of Subjects in 49 CFR Part 382**

Alcohol and drug abuse, Highway safety, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, the FHWA amends 49 CFR part 382, as follows:

**PART 382—CONTROLLED SUBSTANCES AND ALCOHOL USE AND TESTING**

1. The authority for part 382 continues to read as follows:

**Authority:** 49 U.S.C. 31133, 31136, 31301 *et seq.*, 31502; and 49 CFR 1.48.

2. In § 382.107, the definition of "Substance abuse professional" is removed.

Issued in Washington, DC on July 9, 1996.

**Rodney E. Slater,**  
*Administrator, Federal Highway Administration.*

**Federal Transit Administration****List of Subjects****49 CFR Part 653**

Drug testing, Grant programs—transportation, Mass transportation, Reporting and recordkeeping requirements, Safety, Transportation.

**49 CFR Part 654**

Alcohol testing, Grant programs—transportation, Mass transportation, Reporting and recordkeeping requirements, Safety, Transportation.

For the reasons set out in the preamble, the Federal Transit Administration amends 49 CFR parts 653 and 654, as follows:

**PART 653—PREVENTION OF PROHIBITED DRUG USE IN TRANSIT OPERATIONS**

1. The authority for part 653 continues to read as follows:

**Authority:** 49 U.S.C. 5331; 49 CFR 1.51.

**§ 653.7 [Amended]**

2. In § 653.7, the definition of "Substance abuse professional" is removed.

**PART 654—PREVENTION OF ALCOHOL MISUSE IN TRANSIT OPERATIONS**

1. The authority for part 654 continues to read as follows:

**Authority:** 49 U.S.C. 5331; 49 CFR 1.51.

**§ 654.7 [Amended]**

2. In § 654.7, the definition of "Substance abuse professional" is removed.

Issued in Washington, DC on July 9, 1996.

**Gordon J. Linton,**  
*Administrator, Federal Transit Administration.*

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