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DRUG AND ALCOHOL TESTING OF COMMERCIAL MOTOR VEHICLE DRIVERS

(110–86)

HEARING

BEFORE THE

SUBCOMMITTEE ON
HIGHWAYS AND TRANSIT

OF THE

COMMITTEE ON
TRANSPORTATION AND
INFRASTRUCTURE
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

NOVEMBER 1, 2007

Printed for the use of the
Committee on Transportation and Infrastructure

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October 30, 2007

SUMMARY OF SUBJECT MATTER

TO: Members of the Subcommittee on Highways and Transit

FROM: Subcommittee on Highways and Transit, and Oversight and Investigations Staff

SUBJECT: Hearing on "Drug and Alcohol Testing of Commercial Motor Vehicle Drivers"

PURPOSE OF THE HEARING

The Subcommittee on Highways and Transit will meet on Thursday, November 1, 2007 at 10:00 a.m., in 2167 Rayburn House Office Building, to receive testimony regarding vulnerabilities in the Drug and Alcohol Testing (DAT) programs administered by motor carriers. The Oversight and Investigations staff has conducted an in-depth review of conditions at facilities that perform urine collections for drug tests regulated by the Department of Transportation (DOT). The hearing will examine weaknesses in the collection process that could allow drug-using commercial drivers to disguise their drug use. We will identify the extent to which those products manufactured and sold specifically to beat drug tests affect the integrity of the drug testing process. Finally, the hearing will explore factors that enable drug-using drivers to continue to operate commercial motor vehicles and potential solutions to the identified weaknesses.

BACKGROUND

The DOT rules include procedures for urine drug testing and breath-alcohol testing. DOT Part 40 Drug and Alcohol Testing Rules were finalized in December of 2000, after which all of the transportation modes incorporated Part 40 requirements into their own regulations. In August of 2001, the Federal Motor Carriers Safety Administration (FMCSA) published motor-carrier specific rules in 49 CFR Part 382 (Part 382).

FMCSA rules apply to safety-sensitive employees who operate commercial motor vehicles requiring a CDL. These include anyone who owns or leases commercial motor vehicles, for-hire motor carriers, private motor carriers, bus operators, and civic organizations (for example, Boy Scouts, churches, etc.).

The Committee chose to focus on DAT oversight in the motor carrier industry because of differences in that industry in terms of size and geographic diversity. However, vulnerabilities found in the collection process for motor carriers potentially affect all DOT-regulated industries that rely upon privately-owned and operated collection facilities to perform specimen collections.

FOX News Report Precipitates Committee Investigation

On February 19, 2007, Fox News in Minneapolis, MN aired the results of their investigation of five local businesses that collect urine for DOT-mandated drug tests. In four out of five collection facilities, they found conditions that afforded employees opportunities to cheat. Contrary to DOT's collection facility requirements, the reporters found restrooms with running water (potential dilution); discovered use of shared public bathrooms (another individual could provide the specimen); the test administrator failed to require reporters to take off jackets or empty their pockets (an adulterant or clean urine sample could be brought in). After the story aired, the Committee requested that the General Accountability Office (GAO) investigate the practices of collection facilities that service commercial drivers. In addition, we requested that they evaluate FMCSA's oversight of the DAT program requirements and assess potential ways to improve the program.

OVERVIEW OF DOT'S DRUG AND ALCOHOL TESTING PROGRAM

DOT requires DAT under several conditions: pre-employment, reasonable suspicion, post-accident, random, return-to-duty, and follow-up.[1] The Part 40 DAT rules require a urine drug screen that tests for five drugs: marijuana, opiates, cocaine, amphetamines, and PCP. DOT requires employers of commercial drivers to randomly test 50 percent of their safety-sensitive employees each year.[2]

Collection facilities are privately owned and operated centers that collect urine from drivers in accordance with DOT requirements. The Part 40 rules prescribe the physical and procedural requirements of the collection facility; including configuration of the restrooms, accessibility to running water, supervision and monitoring of the test, how the specimen should be prepared and sealed, and the appropriate forms to be filled out and signed prior to being transmitted to the laboratory for testing. Employers are responsible for ensuring that collection facilities meet the Federal regulatory requirements.

Employers collect urine specimens for drug testing at facilities in their workplaces, mobile or on-call services, physician's offices, out-patient clinics, or hospitals. While these collection facilities are required to meet Federal regulations governing personnel training and collection procedures, they are not inspected, certified, or regulated by the Department of Health and Human Services (HHS) or DOT. The collection facilities are not certified, but analysis of the urine specimens must be conducted in a laboratory that is certified and monitored by HHS. The list of HHS-approved laboratories is published monthly in the Federal Register.

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[1] Return-to-duty and follow-up tests are done after an employee tests positive, rehabilitates, and begins the process to reinstate his operating eligibility.

[2] DOT obtains year-end data on positive drug tests from a non-random sample of employers in all DOT-regulated industries through an electronic management information system. Based on the industry positive test rate, DOT determines the level of risk presented by each industry and establishes a random testing rate accordingly. In 2005, the motor carrier industry positive rate was 1.7 percent; upon which DOT imposed a 50-percent random test rate.

All drug test results are reviewed and interpreted by a physician who serves as the Medical Review Officer (MRO). If the laboratory reports a positive result, the MRO consults with the employee to determine if there is an alternative medical explanation for the drugs found in the specimen. If the MRO determines that it is legitimate medical use of the prohibited drug, the drug test result is reported as negative to the employer. If the MRO determines that the test is positive for controlled substances, the MRO reports the result to the employer who must remove the employee must from safety-sensitive duty until he or she completes a return-to-duty process.

Of the 711,000 carriers with operating authority in the United States, more than one-half are single truck owner-operators. These operators are still responsible for implementing a DAT program, which they do primarily through a third-party administrator or consortium.

VULNERABILITIES IN COLLECTION FACILITIES ENABLE SOME DRUG USERS TO EVADE DETECTION

The Substance Abuse Program Administrators' Association (SAPAA) estimates that there are between 8,500 and 10,000 facilities that provide urine specimen collection for DOT-regulated industries. While the Committee's review focused on issues affecting the motor carrier industry, other modes that rely upon privately-owned and operated collection facilities likely experience similar difficulties with the collection process and are similarly vulnerable to employee specimen-tampering.

The Committee will hear from GAO investigators that 75 percent of the collection facilities they tested in an undercover operation failed to secure the facility from substances that could be used to adulterate or dilute the specimen. They found facilities with cleaning fluids stored in the restrooms, restrooms with running water, and collectors that allowed investigators to leave the facility and return later to complete their drug tests—all violations of the Federal requirements.

One of the most challenging collection issues is maintaining a qualified workforce. Turnover is as high as 150 percent in specimen collection facilities, and it is difficult to keep the ever-changing staff current on required training. Collectors must receive qualification training that includes: all steps necessary to complete a collection; how to handle "problem" collections, including suspected attempts to tamper with a specimen; and five supervised "mock" collections to demonstrate proficiency.

Facilities present another challenge. For the vast majority of collection facilities, drug testing is not their "core service offering." These facilities can range from an insurance agent's office to an emergency room; and because the facilities are multi-purpose, they are often not configured optimally to discourage or prevent specimen tampering. For example, DOT requires that no one but the employee be present in the room during the collection. This would either require a single-stall restroom or a monitor to ensure that nobody but the employee enters a multi-stall restroom while the test is being conducted.

When collectors do not follow required protocols and facilities are not in compliance with DOT regulations, an opportunity exists for drug users to evade detection. As the Substance Abuse and Mental Health Services Administration's (SAMHSA) Center for Substance Abuse Prevention noted in 2005, "a drug user, who is part of a workplace drug testing program, will most likely try to

defeat the drug test if given the opportunity.[3]" As the following section illustrates, there is no shortage of tools available for that purpose.

PRODUCTS INTENDED TO DEFRAUD A DRUG TEST HAVE PROLIFERATED

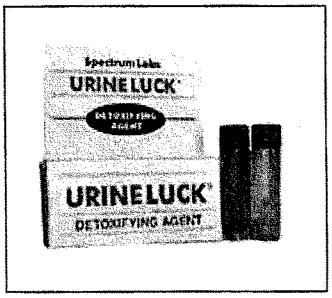
The widespread implementation of workplace drug testing has created a niche market for products designed to beat a drug test so that illicit drug users can continue their drug use and keep their jobs (or get new ones). In 2005, GAO testified before Congress that approximately 400 different products were available to adulterate samples. GAO found that, "the sheer number of these products, and the ease with which they are marketed and distributed through the Internet, present formidable obstacles to the integrity of the drug testing process."[4] There are no other uses for these products. Their sole and explicit purpose is to enable a drug user to defraud a drug test.

The websites where these products are sold make clear their intent. For example:

http://www.howtopassyourdrugtest.com
http://www.urineluck.com
http://www.testclear.com
http://gonumber1.com
http://www.perfecturine.com

The products can be classified by how they work.

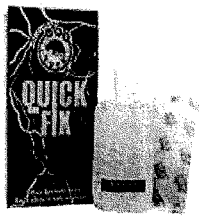
"Dilution" products reduce the concentration of drug in the urine below the testing cut-off level. Special "detoxifying" drinks taken with water cause frequent urination which dilutes the level of toxins. This method is marketed for "light" users; 1-4 times per week. Some products are marketed by individual's size. "Absolute De-Tox XXL," pictured right, is marketed to persons weighing more than 200 pounds.



"Adulterants" are chemicals that are added to urine to mask the presence of toxins. These chemicals are purposely sold in small vials and tubes so they can be easily concealed. Some of these products are extremely successful as the labs can't keep up with the constantly evolving formulas. For example, "UrineLuck," pictured right, is now on version 6.8. As its manufacturers advise, "Don't let your job go up in smoke!"

[3] Substance Abuse and Mental Health Services Administration; Center for Substance Abuse Prevention; Division of Workplace Programs; "Preventing Employees from Cheating on a Urine Drug Test." (March 2005)
[4] "DRUG TESTS: Products to Defraud Drug Use Screening Tests Are Widely Available: GAO-05-653T

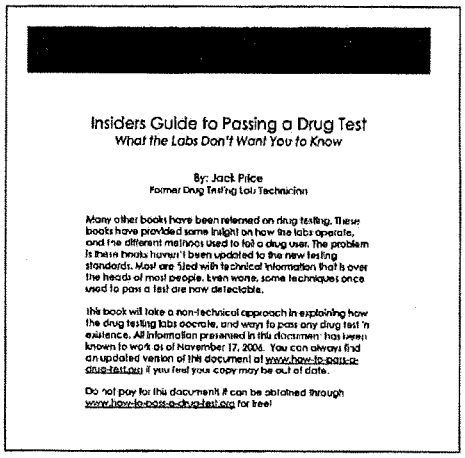
"Substitution" involves providing a clean urine specimen—either real or synthetic—in place of the donor's dirty urine. Synthetic urine can come in several forms: concentrated, powdered, or pre-mixed. "Quick Fix," pictured right, is advertised as, "Complete 100% Fake/Synthetic Urine." It is also available bulk for frequent users: sold in 3-packs or 6-packs.



Patent Pending

While substitution can be done effectively by concealing a vial of urine in a pocket or sock, some entrepreneurial individuals have gone a step further. Puck Technologies has manufactured a belt-like anatomically correct prosthetic device containing a heated receptacle which can store clean human urine or synthetic urine. The device comes in five skin tones and is especially effective in defeating an observed drug test. (In the interest of taste, this product can be viewed at www.whizzinator.com.)

These products can be found in drug stores, general nutrition shops, the backs of magazines like "High Times," and most ubiquitously, on the Internet.
During the course of this investigation, Committee staff found a posting on Washington, DC's "Craig's List" from an individual selling, "Clean urine for drug testing!!!!!-$35." Staff also found a link from a DOT Drug Testing Clinic's website to a site advertising the, "Insider's Guide to Passing a Drug Test, --*What the Labs Don't Want You to Know.*" Numerous products, such as "UrineLuck" were widely available on eBay.



Insiders Guide to Passing a Drug Test
What the Labs Don't Want You to Know

By: Jack Price
Former Drug Testing Lab Technician

Many other books have been released on drug testing. These books have provided some insight on how the labs operate, and the different methods used to fool a drug user. The problem is these books haven't been updated to the new testing standards. Most are filled with technical information that is over the heads of most people. Even worse, some techniques once used to pass a test are now detectable.

This book will take a non-technical approach in explaining how the drug testing labs operate, and ways to pass any drug test in existence. All information presented in this document has been known to work as of November 17, 2004. You can always find an updated version of this document at www.how-to-pass-a-drug-test.com if you feel your copy may be out of date.

Do not pay for this document! It can be obtained through www.how-to-pass-a-drug-test.org for free!

SAMHSA, which oversees the laboratories where the urine specimens are tested, has seen a marked increase in the number of specimens that have been either adulterated or substituted—so many that SAMHSA issued guidance in 2005[5] to help collectors minimize the opportunity for a donor to cheat:

(1) Ensure that the employee does not have access to anything at the collection site that could be used to adulterate or substitute a urine specimen; and

(2) Request the employee to remove and display any items he or she may have concealed in pockets, coats, hat, etc.

But SAPAA does not believe that theses precautions have any effect. "Securing the collection site, having specimen donors remove outer clothing and empty their pockets in view of

[5] See earlier footnote; reference SAMHSA.

the collector, disabling sources of water, and checking the temperature [...] can only prevent or detect the most rudimentary of attempts to defraud the test." GAO investigators also found how easy it is to defraud even a monitored test. At one collection facility, even though the collector told the investigator to leave the restroom door open, he was still able to substitute a vial of synthetic urine for his own specimen.

PRODUCTS ARE EFFECTIVE IN DEFRAUDING DRUG TESTS

All of the websites that sell products intended to defraud a drug test claim their products are 100 percent effective. For example, the manufacturers of Magnum Synthetic Urine have so much faith in their product that they offer a 400% money-back guarantee.

Manufacturers can make these offers because their products work. In April 2004, a new requirement was instituted that every Federal job applicant or employee urine specimen be tested not only for illicit drugs, but also to determine if the specimen provided is a valid one – i.e., consistent with normal human physiology.[6] However, the product manufacturers have succeeded in formulating new versions of the adulterants so that they are not detected by the specimen validity tests. HHS is required to publish the list of adulterants and the tests developed for them in the Federal Register,[7] and the manufacturers are able to change the formulas to prevent detection. As soon as HHS is able to reverse-engineer the active adulterant compounds, the manufacturers have already changed the formula to include different—and, as yet, undetectable—compounds.

An example is the chemical oxidant potassium nitrite, an active ingredient in many adulterants. As soon as the Federal drug testing program established (and published) methods to detect potassium nitrite and thresholds beyond which to report it in specimens, new formulations of adulterants were released that had lower concentrations of that compound and increased levels of acids – not yet detectable, but every bit as effective.

RESOURCE CONSTRAINTS LIMIT EFFECTIVENESS OF FMCSA'S DAT ENFORCEMENT

Representatives of labs, collection facilities, third party administrators, and DAT workplace programs believe that FMCSA is under-staffed and under-funded to accomplish meaningful audits and inspections of motor carrier employers.

In 2006, Federal and State inspectors, combined, conducted 15,177 compliance reviews, representing about 2 percent of all carriers. The limited number of reviews is largely a function of the size of the industry and the very limited size of the investigator workforce. With 711,000 carriers and 29,000 new entrants every year, the 258 FMCSA investigators are stretched thin. With just the

[6] The rule applied to tests performed on the Federal workforce, but was not adopted by DOT. The tests are authorized; however, and are currently performed on approximately 98 percent of all DOT tests.
[7] Public Law 100.71; Section 503 (July 11, 1987)

current number of motor carriers, the ratio of investigators to carriers is 1:2,577. In contrast, the Federal Aviation Administration—which has a force of 40 inspectors dedicated *exclusively* to DAT reviews—has a ratio of 1:175.

When FMCSA's investigators conduct compliance reviews, DAT is only one component of the review. Inspectors are also looking for maintenance, insurance, and hours of service compliance violations. And within the DAT component, collection facility conditions receive relatively little scrutiny. It is not feasible for FMCSA to inspect all collection facilities used by a carrier, especially if that carrier uses drivers in different geographic locations.

Auditing and inspection of collection facilities is an essential component of enforcement and compliance and has been significantly lacking in FMCSA's efforts to evaluate, assess and enforce compliance with the DOT drug and alcohol testing regulations. A "paper audit" is inadequate and auditors and inspectors need to physically go to collection sites to interview collection personnel and observe collection processes.

OWNER-OPERATOR BUSINESS MODEL COMPLICATES DAT PROGRAM IMPLEMENTATION

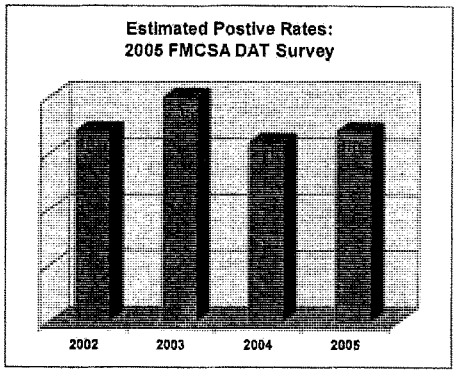
Of the 711,000 carriers with operating authority in the United States, more than one-half are single truck owner-operators. These operators are still responsible for implementing a DAT program, which they do primarily through a third-party administrator or consortium. The consortium operates as a sort of a "super-employer" for multiple small motor carriers and owner-operators. The consortium performs the same functions as a large employer, including randomly testing 50 percent of the consortium members each year (per regulation), and assuming the role of the MRO to confirm lab test results.

While the consortium can perform a number of functions, it has no authority to enforce the regulatory requirements if a driver tests positive. According to the National Transportation Safety Board (NTSB), owner-operators are, "in the precarious position of overseeing their own substance abuse program."[8] The consortium must inform the employer of a positive test, but the employer is responsible for taking the driver out of service until the return-to-duty process is completed. According to NTSB, "such an arrangement requires owner-operators who are abusing controlled substances to remove themselves from driving if they test positive." NTSB concludes that it seems unlikely that s will comply with those sections of the drug testing regulations if they are already choosing to not comply with other regulations that require employers to maintain a drug-free workplace. The Board concluded that, "the current Federal drug-testing regulations cannot adequately identify owner-operators who abuse controlled substances."

[8] Carol J. Carmody, Acting Chairman. Safety Recommendation. National Transportation Safety Board. September 10, 2001. <http://www.ntsb.gov/recs/letters/2001/H01_17_25.pdf>.

QUANTIFYING THE PROBLEM: CONTRADICTORY STATISTICS ON DRUG USE AMONG COMMERCIAL DRIVERS

DOT found that 1.7 percent of commercial drivers tested positive for drugs in 2005; the Oregon State Police report use at around 10 percent, and heavy truck drivers self-report rates of 7.4 percent. Many believe that the true number is somewhere in-between. But because employees are able to defraud drug tests—through products designed to defeat a drug test or other means—it is impossible to quantify the true extent of the problem.



In 2005, FMCSA reported an estimated drug-positive rate of 1.7 percent; this is consistent with prior year levels which ranged from 1.6 to 2.0 percent. This rate has remained relatively unchanged since 1997. While the rate itself is low, the absolute number of drivers testing positive would approach 170,000. Even assuming that one-half of the population of CDL-holders are not active and subject to DAT screening, the absolute number of drug-using drivers would exceed 80,000.

Oregon's Anonymous Testing of Truck Drivers Suggest Higher Levels of Drug Use

In April 2007, the Oregon State Police (OSP) conducted a 72-hour exercise ("Operation Trucker Check") at the Woodburn, OR inspection facility on I-5, the busiest North-South commercial truck route on the west coast. OSP collected nearly 500 anonymous urine samples from commercial drivers; the majority of which were driving heavy trucks or tractor-trailers. In total, 9.65 percent of the drivers tested positive for illegal drugs and prescription narcotics. A similar exercise conducted in September 2007 on a major East-West truck route in Oregon (Cascade Locks), produced similar results—8.97 percent of truck drivers tested positive for illicit drugs or controlled narcotics.

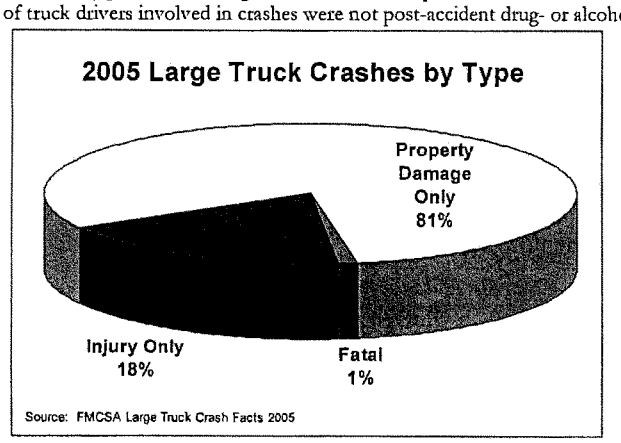
Because both tests were anonymous, it was impossible to follow up with an MRO to determine whether there were alternative explanations for the positive results, such as a positive-opiate reading from prescription OxyContin®. Because it is likely that some of the tests were false positives, the rate of drug use reported is likely overstated. In addition, the drugs tested for by the States included some drugs not required to be tested for in the DOT drug tests and in some cases, were tested at a lower threshold than the DOT tests. These factors could also explain the higher number of positives.

Large Truck Drivers Self-Report a Higher Level of Illicit Drug and Heavy Alcohol Use

In June 2007, SAMHSA issued its annual report on occupational drug use, "Worker Substance Use and Workplace Policies and Programs."[9] The report reflects a 3-year survey of drug and alcohol use by workers across a range of industries. In the most recent report, 7.4 percent of Heavy Truck and Tractor-Trailer Drivers[10] reported illicit drug use in the prior month. The most prevalent drug used was marijuana, reported by 5.2 percent of drivers. Of the same sample, 11.2 percent reported heavy alcohol use in the prior month. In the prior year, 2.6 percent of truck drivers admitted drug dependence or abuse, and 11.6 percent reported alcohol dependence or abuse.

The Contribution of Illegal Drugs to Crashes

According to FMCSA's "Large Truck Crash Facts 2005," 1.2 percent of large truck crash *fatalities* in 2005 were attributed to illegal drug use. This statistic only takes into account the one percent of crashes that involve fatalities. There are no good statistics for the remaining 99 percent of crashes that result in injuries and/or property damage. Part 382 regulations require drivers to be drug and alcohol-tested following all crashes that result in a fatality. Drivers are only required to be tested in other crashes if they are issued a traffic citation. According to NHTSA's Large-Truck Crash Causation Study published in August 2006, between April 1, 2001 and December 31, 2003, two-thirds of truck drivers involved in crashes were not post-accident drug- or alcohol-tested.



Opportunities Exist for Drivers Who Have Failed a Drug Test to Circumvent FMCSA Requirements Regarding Return-to-Duty Process

On May 9, 1999, a charter motor coach carrying 43 passengers was en route from La Place, Louisiana, to a casino in Bay St. Louis, Mississippi. As the bus approached milepost 1.6 in New

[9] "Worker Substance Use and Workplace Policies and Programs"; Department of Health and Human Services; Substance Abuse and Mental Health Services Administration, Office of Applied Studies. June 2007.

Orleans, it departed the right side of the highway, crossed the shoulder, and went onto the grassy side slope alongside the shoulder. The bus continued on the side slope, struck the terminal end of a guardrail, traveled through a chain-link fence, vaulted over a paved golf cart path, collided with the far side of a dirt embankment, and then bounced and slid forward upright to its final resting position. Twenty-two passengers were killed, the bus driver and 15 passengers received serious injuries, and 6 passengers received minor injuries. The NTSB attributed the crash, in part, to the driver's use of marijuana and a sedating antihistamine.

The driver had tested positive for drugs on four previous occasions, twice as an employee of The Regional Transit Authority, once as an employee of Westside Bus Service, and once when applying for a job with Greyhound. When the New Orleans driver applied at Custom (his employer at the time of the accident) he listed his former positions with Hertz Car Rental and Turner Bus Service but did not mention the positions held with the Regional Transit Authority and with Westside Bus Service, where he had been fired following his positive tests.

According to SAPAA, "conservative estimates" are that less than one half of CDL holders who test positive or refuse to test actually complete the return to duty process necessary to reinstate their driving status. Yet it is possible for drivers who have failed a drug test to continue driving by moving from job to job. Title 49 CFR 391.21 requires drivers to provide carriers with the names and addresses of employers from their previous 3 years of employment. But job applicants are able to avoid negative scrutiny from new employers by omitting jobs where a drug test came back positive or by failing to disclose prior failed pre-employment tests. In NTSB's accident report on the New Orleans crash, the Board stated that it, "does not believe this self-reporting method will effectively identify problem drivers because drivers are unlikely to provide information that may limit their employment opportunities." In addition, the NTSB noted that although Custom obtained the driver's permission to investigate his prior employment, it did not receive a response from any of the former employers it contacted. The extent to which employers do not provide information on former employee drug tests is not quantified, but the NTSB advises that non-responsiveness is a problem and that, "no enforcement mechanism or incentive exists to compel previous employers to comply with information requests."

PROPOSALS TO FIX WEAKNESSES IN THE DRUG AND ALCOHOL TESTING PROGRAM

National Ban on Adulterants and Products Designed to Defraud Drug Tests

On March 8, 2006, Representatives Whitfield and Engel introduced H.R. 4910, the "National Drug Testing Integrity Act." The bill required the Consumer Product Safety Commission to promulgate a rule declaring any, "instrument, tool, substance, or device designed or intended to falsify, alter, or defraud any lawfully administered drug test designed to detect the presence of chemical substances or controlled substances in the body," a product to be banned as a "hazardous product." The bill was referred to the Energy and Commerce Committee but was not considered.

State Bans on Adulterants and Products Designed to Defraud Drug Tests

Four states (NE, TX, IL and SC) have enacted laws that criminalize both the sale and use of products intended to defraud a drug test. The legislative language in the three states are similar and

make it illegal to, "manufacture, sell, or market synthetic or human substances with the *intent to defraud* a drug test," and also make it illegal to, "substitute a sample or adulterate synthetic human substances with the *intent to defraud* a drug test."

While some of the product manufacturers indicate that they will not sell or ship products to residents of those states, others have attempted to circumvent the law by adding disclaimers that the products being sold are not intended to pass a drug test. For example, products sold by www.ureasample.com come with the following disclaimers:

> This equipment and specimen may only serve as a control sample when conducting private home tests. Any reference to "passing drug tests or screens" on this site refers solely to private home tests.
>
> UreaSample.com no longer markets this URINE TEST substitution kit for use in drug testing in these states (TX, NE, IL and SC). If you order from one of these states, you will receive our novelty kits. These are fully functioning copies of our original kits. In all cases the sample included has been pre-tested to the highest possible standards.

Manufacturers also capitalize on the fact that only a few states have laws. UreaSample.com's shipping instructions state, "Kits are not available to residents of New Jersey and Illinois. If you are from one of the aforementioned states...you may have it shipped to a friend or family member in a neighboring state."[11]

Provide FMCSA Resources to Create a Dedicated DAT Inspector Workforce

FAA has established a dedicated staff of about 70 inspectors and auditors whose mission is to exclusively enforce DAT program requirements at the (approximately) 7000 FAA-regulated air carriers. These inspectors ensure that FAA-regulated carriers are complying with all Part 40 DAT requirements, including the specimen collection process. FAA's force of inspectors conducts about 1,000 DAT audits each year, equating to about 15 percent of all carriers; although the largest carriers are audited every 12-18 months. FMCSA would need to determine, based upon its own industry needs, whether a dedicated inspection staff would be desirable, what its duties would encompass, and what size the workforce should be.

National Clearinghouse for Positive Drug and Alcohol Results

One of the gaps in available authority in FMCSA's Drug and Alcohol Testing program is the ability for drivers to "job-hop" from one trucking company to another without their drug history following them. The NTSB identified this as a significant problem in its investigation of the 1999 New Orleans bus accident. In the accident report, the NTSB recommended that FMCSA:

> Develop a system that records all positive drug and alcohol test results and refusal determinations that are conducted under the U.S. Department of Transportation testing requirements, require prospective employers to query the system before making a hiring decision, and require certifying authorities to query the system before making a certification decision.

[11] http://www.ureasample.com/buy-drug-test-solutions/store/whizzinator.htm

In recent years, support has grown within the trucking industry and government for such a clearinghouse. The Motor Carrier Safety Improvement Act of 1999 directed the FMCSA to evaluate the feasibility and merits of requiring MROs and/or employers to report all verified positive controlled substance test results on drivers tested under Part 382 to the States who issued the driver's Commercial Driver License. The study, published in 2004, concluded that, "the most cost effective and logical organization would be to mandate a single Federal database covering the entire country, sponsored or operated by FMCSA." The study further concluded that the database requirement should be authorized by Congress through legislation (rather than regulation), and that the legislation should, "prohibit the establishment of any competing commercial or trade association-sponsored databases."

The American Trucking Associations (ATA) has developed a proposal to create a centralized, national clearinghouse to collect positive drug and alcohol tests results of Commercial Driver's License holders. In addition to reporting positive results, this proposal would require reports of an employee's refusal to provide a specimen for testing. Organizations representing commercial drivers have expressed concern over this proposal based on privacy issues, the need to ensure due process in any clearinghouse, and how access to the data will be controlled.

State Clearinghouse for Positive Drug and Alcohol Results

Seven States have enacted legislation that requires commercial drivers' positive drug and alcohol tests to be reported to State licensing officials. The laws vary in the degree to which this information is used in the licensing process and who has access to that data. The following table summarizes and highlights the differences in the seven States' reporting laws.

State	Drugs	Alcohol	Refusals	Employee Sanctions	Available to Other Employers
AR	x	x	X	None	Employee Consent
CA	x		X	Revoke license 3 years	No
NC	x	x		DQ until Return to Duty process complete	No
NM	x			None	No
OR	x			None	Employee Consent
TX	x	x	X	None	Employee Consent
WA	x	x	X	DQ until Return to Duty process complete	No

U.S. House of Representatives
Committee on Transportation and Infrastructure

James L. Oberstar
Chairman

David Heymsfeld, Chief of Staff
Ward W. McCarragher, Chief Counsel

Washington, DC 20515

John L. Mica
Ranking Republican Member

James W. Coon II, Republican Chief of Staff

AGENDA

Subcommittee on Highways and Transit
Oversight and Investigations Hearing

Thursday, November 1, 2007
10:00 a.m.
2167 Rayburn House Office Building

"Drug and Alcohol Testing of Commercial Motor Vehicle Drivers"

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WITNESSES

PANEL I

Mr. Gregory D. Kutz
Managing Director
Forensic Audits and Special Investigations
U.S. Government Accountability Office
Washington, DC

Ms. Katherine A. Siggerud
Director, Physical Infrastructure Team
U.S. Government Accountability Office
Washington, DC

Dr. Donna R. Smith, Ed.D.
Regulatory Affairs and Program Development Officer, FirstLab, Inc.
Substance Abuse Program Administrators' Association
North Wales, PA

PANEL II

Mr. John Wilburn Williamson
Assistant Director for Driver and Vehicle Services
North Carolina Division of Motor Vehicles
Raleigh, NC

Sgt. Alan Hageman
Patrol Division Support/Logistics
Oregon State Police
Salem, OR

Mr. Greer Woodruff
Senior Vice President of Corporate Safety & Security
J.B. Hunt Transport Inc.
American Trucking Associations
Arlington, VA

Mr. Rick Craig
Director of Regulatory Affairs
Owner-Operator Independent Drivers Association
Grain Valley, MO

Mr. Fred McLuckie
Legislative Director
International Brotherhood of Teamsters
Washington, DC

PANEL III

The Honorable John Hill
Administrator
Federal Motor Carrier Safety Administration
Washington, DC

Accompanied by

Mr. Jim L. Swart
Acting Director
Office of Drug and Alcohol Policy and Compliance
U.S. Department of Transportation

Mr. Robert L. Stephenson II, M.P.H.
Director, Division of Workplace Programs
Substance Abuse and Mental Health Services Administration
Department of Health and Human Services
Washington, DC

HEARING ON DRUG AND ALCOHOL ABUSE TESTING OF COMMERCIAL MOTOR VEHICLE DRIVERS

Thursday, November 1, 2007

HOUSE OF REPRESENTATIVES,
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE,
SUBCOMMITTEE ON HIGHWAYS AND TRANSIT,
Washington, DC.

The Subcommittee met, pursuant to call, at 10:04 a.m., in Room 2167, Rayburn House Office Building, the Honorable Peter A. DeFazio [Chairman of the Subcommittee] presiding.

Mr. DEFAZIO. Sometimes around here, you have to tear up the script and that is what we are going to do today. Not being previously aware of the breadth and depth of the problems that are about to be revealed here today, I am changing the order of the witnesses because I want the principals who are involved in shaping Federal policy or implementing Federal policy in these areas to hear the testimony which is going to be absolutely devastating.

I have been very critical of Mexican trucks coming across the border and raised a host of safety issues. Among the issues I have raised is the lack of certified drug testing facilities in Mexico. Well, it turns out here in the United States of America, we have no meaningful program of drug testing for commercial truck drivers, none. We are going to hear that today.

The collection facilities are easily penetrated with false licenses. The facilities themselves, you could easily smuggle in devices that are readily available on the internet which we will hear about a little later today.

The FMCSA has been aware of this. They, in fact, say in their testimony, in response to GAO, no, they weren't shocked at all to learn that these testing facilities were loophole-ridden and providing tests for which results were easily modified and made meaningless, but they have sent out posters.

We are going to hear testimony that there is a 2004 report about the problem with job-hopping.

So even when this faulty system works, which we don't know how many people are out there abusing substances. The most conservative estimate, 1.7 percent, everybody agrees on that, at least 1.7 percent. That is 170,000 truck drivers driving 80,000 pound trucks, abusing drugs.

In Oregon, with the random test, it seems like maybe the number is five times higher. We don't know. There is no meaningful system, none. This is shocking. This is incredibly shocking stuff.

We are going to proceed in a little different manner today. So we are going to have people listen to the people who are doing the investigations and a person representing an organization that has been critical of the system, and then we will have the other witnesses. Then I will hope for meaningful responses from the Administrator and the person representing SAMHSA because this cries for out action.

If you lack legal authority to implement the program that your 2004 report said you needed to do to take care of job-hopping, tell us, but you don't say it in your testimony. You are just saying, well, yes, we got that report in 2004. We are still thinking about how we might have a national database.

So that when you have a drug-abusing truck driver who doesn't complete treatment and goes to another trucking company and starts driving again, we have no idea except in the State of North Carolina and a few other places who have taken steps that we could take nationally to prevent that from happening, prevent people from being killed because there are drug-abusing truck drivers out there.

Mr. Duncan.

Mr. DUNCAN. Well, thank you, Mr. Chairman.

This is a very appropriate subject about which to hold a hearing, and I thank you for calling this hearing today. The safety of truck and bus drivers on our Nation's highways is a major concern for this Committee and Subcommittee.

We know that a driver's health can significantly affect his ability to drive safely while on the road with other trucks, buses, passenger cars and pedestrians. Recent news reports have called truck and bus driving safety into question, particularly with respect to driving while under the influence of drugs.

In response, this Committee has exercised his oversight responsibility to review policies regarding drug testing of truck drivers. We want to know if there is actually a problem with drug use and drug testing in the trucking industry. Only when we get an accurate picture of this issue and its severity can we determine effective measures to address it.

The DOT study of the causes of truck crashes found that brake problems, speeding and driver fatigue are the most common factors cited as causes. Illegal drug usage was cited as being an associated factor in 2 percent of drug crashes.

There are 711,000 commercial motor carriers registered by the Federal Motor Carrier Administration. This translates to more than four million individuals who have been issued a commercial driver's license.

FMCSA is charged with regulating the safety of all commercial motor vehicles engaging in interstate commerce. The Agency must focus its attention on policies and actions that will reap the greatest safety benefit. Looking to other Department of Transportation agencies like FAA, FTA or FRA for a drug and alcohol testing program structure really is probably not going to work. The trucking industry needs a safety oversight and enforcement program that fits the unique needs and size of the industry it regulates.

We have to keep our eye on the main objective, protecting our citizens from unsafe drivers and vehicles. Our policy and funding

decisions should be focused on the activities that will do this the most effectively.

Thank you again, Mr. Chairman, for calling this hearing, and I look forward to hearing the testimony.

Mr. DEFAZIO. I thank the gentleman.

I turn to Mr. Oberstar, the Chair of the Full Committee.

Mr. OBERSTAR. Mr. DeFazio, Chairman, I share your anger, your frustration and your fury at the state of drug and alcohol testing in the United States, especially in the light of the efforts this Committee has made on Mexican trucks and drivers and drug testing and the inadequacy of their program, but to find that ours falls so grossly short is, as you put it, shocking and makes one angry.

This Committee played a significant role in the 1980s in shaping the drug and alcohol testing rules that were put in place in the late eighties, but there hasn't been any oversight over whether those rules are working and how they are working and who is being caught and how the tests are being avoided.

The number of commercial drivers using drugs by official record has gone down, but the rules aren't working. They aren't working as well as they should. We know that drivers are still using drugs but getting away with it. That is the serious problem.

Now this is not a hearing about morality of drug use. It is not about the character of the people who are using the drugs. It is about breaking the law, avoiding the law, skillfully using the internet to get around the law. It is about safety, about lives on the highways.

Commercial motor carriers account for 13 percent of highway deaths a year. Illegal drugs, so far as is known, account for a small percentage of those crashes. But, as Mr. DeFazio said, even at 1 percent, that is 110 plus thousand, maybe as many as 200,000, deaths. I mean incidents of drivers.

We know what the effects of cocaine, marijuana and speed use are on driving. They impair the driver's ability to conduct that vehicle. It is one thing to go to a pop concert and use those drugs, but it is something else to use them and get behind the wheel of a 80,000 pound vehicle. This Committee takes that seriously.

The FOX News outlet in Minneapolis in February of this year conducted an investigation of drug testing facilities on some tips that they received, sites where urine is collected, where what they found shocked them about the integrity of the tests.

The FOX reporter wasn't required to empty his pockets. He was sent to a public restroom that other building tenants had access to. The restroom wasn't searched first to make sure that nothing had been hidden there to help him mask the tests.

Collectors who are not following protocols, facilities that don't meet Federal requirements create an opportunity, an opening for drug users to escape detection, and they will jump on the opportunity in athletics as well as in driving.

The Health and Human Services Department in 2005 issued a guidance to collectors to try to deal with the cheating problem. They said a drug user who is part of a workplace drug testing program will most likely to defeat the drug test if given the opportunity. Well, that is human nature.

What FOX News found, what GAO is going to tell us today is that there is plenty of opportunity, and there are products out there to make it possible to cheat, over 400 products, gadgets to help a drug user beat the drug test, products that can be added to a urine sample to mask the drug, to dilute the urine sample.

Even synthetic urine, I was stunned to find out, virtually indistinguishable from human urine, with products like Whizzies, UrineLuck, a play on words, a play on the sound of words, and Stealth. They are sold on web sites called PassYourDrugTest.com, OneHourDetox.com, Whizzinator.com.

Committee investigators from our Committee found human urine for sale on craigslist, adulterants available on eBay, adulterants available on Amazon. I thought you could only buy books from Amazon.

These products are sold with the specific intent of defeating a drug test. There is no other use, no other beneficial use for those products. They ought to be banned, and I hope one of the outcomes of this hearing will be legislation to do exactly that.

Health and Human Services admits that their tests don't pick up these products. When they do, guess what, the manufacturer simply changes the formula. It is a cat and mouse game, the manufacturer staying one step ahead of the labs. Because the products fool the labs, there is no way of knowing how widespread the cheating is.

That is one of the revealing, shocking messages of and findings of the GAO report. Because they don't know how many drivers are cheating, the regulatory agencies can't tell how many drivers are using drugs.

The Motor Carrier Safety Administration estimates 2 percent of drivers test positive, but there are other studies that suggest a much higher number. In Oregon, State police conducted two operations last spring and this fall where they anonymously tested 400 drivers. They found illegal drugs in nearly 10 percent of truck drivers.

Health and Human Services published their occupational drug use survey finding that 7.4 percent of heavy truck drivers reported they had used illegal drugs in the prior month. At 2 percent, that is 200,000 drivers. If only half of those were using, there is still 100,000 drivers on the roads—indefensible, unacceptable.

Then there is another loophole. Drivers who have been caught using drugs can keep on driving without going through the rehab process.

In May, 1999, a bus taking 43 passengers crashed in New Orleans, killing 22 passengers, and the driver tested positive for marijuana. The tragedy was it could have been prevented. When the company hired the driver, they didn't know the driver had failed four prior drug tests, two for which he was fired.

Getting a job applicant's prior drug history relies on self-reporting. That is not good enough. There are no alternative sources from which employers can get that history, and there are drug-using drivers that are able to jump from job to job, leaving their drug use history behind.

Now the Tour de France last year was widely criticized for drug use by cyclists, but they were all caught. There is a rigorous pro-

gram of testing bicyclists by the World Anti-Doping Agency and the U.S. Anti-Doping Agency. They follow the cyclists into the testing place, into the bathroom. They stand there while the urine sample is delivered. They take blood tests.

Now we have all these privacy laws that say you can't do that sort of thing. Well, there are other ways to deal with it, and we are going to explore those in the course of this hearing and we are not going to just leave it there. We are going to follow up with action by this Committee under the vigorous leadership of Chairman DeFazio.

Thank you.

Mr. DEFAZIO. Thank you, Mr. Chairman.

Mr. Chairman, just on one remark you made, it is not just that the manufacturers get ahead of the tests—and I will be asking about the rationale for this because it is unfathomable to me—but Health and Human Services is apparently required to publish the list of adulterants and the tests developed for them in the Federal Register so that the manufacturers are able to change their formulas and prevent detection. That one is way beyond me, so that will be another topic I hope we cover.

With that, we will turn to our first panel of witnesses. As I say, we have gotten off the script here because this is so extraordinary. I do want and hope that when the Administrator testifies later, and the Acting Director of the Office of Drug and Alcohol Policy and Compliance is with him and the person representing the Substance Abuse and Mental Health Services Administration, I would urge you to take notes and depart from your prepared testimony because you are going to need to.

So, with that, I will turn first to Mr. Gregory D. Kutz, Managing Director, Forensic Audits and Special Investigations, U.S. GAO.

Mr. Kutz.

TESTIMONY OF GREGORY D. KUTZ, MANAGING DIRECTOR, FORENSIC AUDITS AND SPECIAL INVESTIGATIONS, U.S. GOVERNMENT ACCOUNTABILITY OFFICE; KATHERINE A. SIGGERUD, DIRECTOR, PHYSICAL INFRASTRUCTURE TEAM, U.S. GOVERNMENT ACCOUNTABILITY OFFICE; DONNA R. SMITH, ED.D., REGULATORY AFFAIRS AND PROGRAM DEVELOPMENT OFFICER, FIRSTLAB, INC., SUBSTANCE ABUSE PROGRAM ADMINISTRATORS' ASSOCIATION

Mr. KUTZ. Mr. Chairman and Members of the Subcommittee, thank you for the opportunity to discuss drug testing for commercial truck drivers.

Recent reports of drivers operating with controlled substances in their system raise serious questions about the safety of our Nation's highways. Today's testimony highlights our covert testing of the DOT drug testing program. My testimony has two parts. First, I will discuss what we did and, second, I will discuss what we found.

First, we created two fictitious companies and selected 24 publicly advertised urine collection sites that followed DOT protocols. These sites are located in Los Angeles, Dallas-Fort Worth, New York, New Jersey and the Washington, D.C. areas. We also produced 24 bogus commercial driver's licenses for 24 fictitious indi-

viduals from the States of Washington, Georgia, West Virginia and Delaware.

Using bogus licenses, we visited these 24 sites, posing as drivers selected by our fictitious companies to take a drug test. At these sites, we tested 16 key DOT protocols designed to prevent an employee from beating a drug test. We also purchased synthetic urine and adulterants on the internet and used these products for eight of our tests.

Moving on to the results of our work, we found breakdowns in all phases of the drug testing program. I have in my hand one of the 24 bogus driver's licenses that we used for this test. We produced this West Virginia driver's license, using commercially available hardware, software and materials.

We used licenses just like this one to gain access to all 24 sites to take our drug tests. This clearly shows that a drug user could send someone else in their place to take a drug test.

With respect to protocols, 22 of the 24 sites that we visited failed at least 2 of the 16 DOT protocols that we tested. For example, 75 percent of the sites failed to secure the facility from substances that could be used to adulterate or dilute the specimen.

The first posterboard and the pictures on the monitor on both sides of me show pictures we took at one of the collection sites with our cell phone cameras. Notice in the first picture the potential adulterants such as Lysol outside of the collection area. The second picture shows the same Lysol container which our investigator took into the collection area and could have easily used to adulterate his urine.

We also found that products designed to be a drug test are widely available for sale on the internet. The next posterboard shows some of the marketing pitches that are used to sell these products. As you can see, these products are represented to be safe, undetectable and guaranteed to beat a DOT or other drug test.

We were able to easily bring these products into all eight of the sites that we tested for them. For example, I have in my hand one of the bottles and heating pads that we used to carry synthetic urine into the collection area. We also used vials like the one I have in my hand to carry adulterants into the collection area.

None of the eight synthetic or adulterated urine samples that we provided were detected by the labs.

Mr. OBERSTAR. Mr. Kutz, I want to interrupt you at that point.

Mr. KUTZ. Sure.

Mr. OBERSTAR. Are you able to identify the authors of those comments?

Mr. KUTZ. On the posterboard there?

Mr. OBERSTAR. Yes.

Mr. KUTZ. I don't have that with me, but there were lots of sites.

Mr. OBERSTAR. You do have that information?

Mr. KUTZ. We could get that for you if you are interested.

Mr. OBERSTAR. Submit that for the record, please.

Mr. KUTZ. Certainly.

Mr. DEFAZIO. Mr. Chairman, we do have some slides that I was going to have the staff put up later which actually show some of these web sites and the advertisements.

Mr. OBERSTAR. We do have that, but I wonder about these particular comments.

Mr. KUTZ. We could submit that for you, yes, sir.

In conclusion, our covert testing clearly shows that a drug user could easily beat the DOT drug tests. Even if the collection sites followed all of the DOT protocols, our work shows that the tests can be beaten using counterfeit documents, synthetic urine or adulterants.

Addressing the vulnerabilities that I have just discussed will require substantial improvements in all phases of the drug testing program.

Mr. Chairman, that ends my statement. I look forward to your questions.

Mr. DEFAZIO. Thank you.

With that, I turn to Katherine Siggerud, Director of the Physical Infrastructure Team of U.S. GAO.

Ms. Siggerud.

Ms. SIGGERUD. Chairman Oberstar, Chairman DeFazio, Ranking Member Duncan and Members of the Subcommittee, we appreciate your invitation to appear at this hearing on drug testing of drivers employed in safety-sensitive positions in the motor carrier industry.

My colleague, Mr. Kutz, has described the significant problems existing at collection sites that are an important component of FMCSA's drug testing program. Our ongoing work for this Subcommittee and the Chairman of the Full Committee raises issues about compliance, accountability and design of additional aspects of the drug testing program.

My statement presents these preliminary results today and will focus on challenges in, first, overseeing and enforcing compliance with drug testing regulations and, second, ensuring the integrity of the drug tests and the processes for keeping drivers with identified problems off the roads. Before getting to these results, it is useful to provide some background of the program itself.

As shown in this slide and in the packets you have in front of you, drug testing is a multi-step process that includes many players. Employers must, of course, design and implement a program or hire a third party to do it for them. In addition, FMCSA provides regulation and oversight.

Collection sites obtain the specimens. Laboratories test the specimens under the oversight of the Department of Health and Human Services. Medical review officers review and verify lab results and report them to employers, and substance abuse professionals design programs for employees that wish to return to driving after a positive test.

With regard to FMCSA's efforts to ensure that commercial motor carriers have drug testing programs in place, we found that noncompliance appears to be widespread. According to FMCSA data, more than 70 percent of compliance reviews conducted since 2001 and more than 40 percent of safety audits conducted since 2003 found violations of drug testing regulations including finding the carrier has no drug testing program at all.

As shown here, the most frequently cited drug testing violations in compliance reviews are carriers having employed drivers without

a pre-employment drug test or not testing them at all. About 1 percent of compliance reviews find that carriers allow drivers with a positive drug test to continue to drive. Non-compliance appears to be particularly high among small carriers and owner-operators.

In addition, FMCSA's oversight is limited. While new entrant safety audits are designed to reach all new entrants, compliance reviews only reach about 2 percent of carriers each year due to the size of the industry and resources devoted to these activities.

In particular, oversight activities do not address compliance by agencies and by carriers to implement drug testing programs such as collection sites because of limited resources and the lack of enforcement authority. FMCSA will investigate service agents such as collection sites as a result of a specific complaint but can only act to disqualify them from DOT's testing programs rather than using the fines that can be applied to motor carriers.

Even when there is good compliance with regulations, drivers who use drugs may still be driving commercial motor vehicles. First, as Mr. Kutz explained, subversion of the drug test is still possible. The regulations do not require employees to directly observe collection nor do they require a thorough search for hidden subversion products.

The extent to which subversion is occurring is unknown and is impossible to determine because when specimens are successfully adulterated or substituted, there is no record which would allow us to judge this extent.

Second, there are limitations to the test itself. Drivers who use illegal substances other than the five the DOT tests for, those are amphetamines, cocaine, opiates, marijuana and PCP, or who use certain prescription medications may not be identified.

Also, the urine test does not provide indications of drug use history because it can only detect the presence of drugs taken within the previous several days.

Finally, lack of disclosure of past positive drug tests is a problem. DOT regulations require that an employer, in addition to testing a job applicant, inquire about that applicant's drug test history and contact the driver's recent employers.

Representatives from several motor carriers told us it is easy for drivers to simply omit any previous employer for whom they tested positive or any such pre-employment drug test. Such drivers can remain drug-free for a period of time leading up to their next pre-employment test, get a negative result and get hired without their new employer knowing about any past positive tests.

In our ongoing work, we are analyzing options for addressing some of these problems including their costs, advantages and disadvantages. These include publicizing information and successful practices regarding drug testing requirements to carriers, service agents and drivers, improving and expanding FMCSA oversight and enforcement, adopting Federal legislation prohibiting the sale, manufacture or use of adulterants or substitutes, testing for more and different drugs, testing alternative specimens, and developing a national reporting requirement for past positive drug test results.

We will be issuing our report to the Committee in May.

I will take any questions when the Committee is ready. Thank you.

Mr. DEFAZIO. Thank you.

We would now turn to Dr. Smith. Go ahead.

Ms. SMITH. My name is Dr. Donna Smith. I represent today, before you, the Substance Abuse Administrators' Association which is a non-profit professional group that has as its members, DOT regulated employers and service agents who assist them and support them in implementing and conducting workplace drug and alcohol testing programs.

In preparation for my being here today, the organization did conduct a survey, a very thorough survey of its membership to explore the problems that the Committee is addressing. We also held a recent conference where this particular topic was discussed and where more data were provided.

So, as a summary of that, I would like to present that there are probably three main things that I believe and that the association believes are roadblocks to being able to effectively implement the Department of Transportation's drug and alcohol testing program and to achieve its objectives of deterrence and detection of illegal drug use among safety-sensitive workers. Those three things, my colleagues have already mentioned.

One is obviously that there are opportunities to cheat on the drug test and very, very little opportunity to detect that cheating.

Secondly is that the when the rules have been successful in identifying an individual who tests positive or who refuses to test through an adulterated or substituted drug test, by our best estimates, only 40 percent of those go through any kind of rehabilitation, intervention or return to duty efforts.

Now other people would say, well, that is a good thing; it is working; they aren't working in transportation any more or they aren't driving a truck any more. I am not at all convinced that that is true.

The third thing that I think is the greatest impediment to the success of the Department of Transportation's drug and alcohol testing regulations is a real difficulty in implementing effective compliance monitoring, and that is particularly true in the commercial motor carrier industry.

I would to take just a couple of more minutes to explain in some depth what some of the things that I think are critical.

Having to do with collection sites, when I worked for five years at the U.S. Department of Transportation at the time that the Omnibus Act was being implemented and the regulations were being promulgated, we always said then that we knew that the collection of the specimen was going to be the weakest link in the process.

We had a lot of tools to address the analytical issues in the laboratories. We had a lot of ways that we could address issues in terms of the training and the expertise of the physicians who would review and interpret test results.

The mere scope of specimen collection for potentially hundreds of thousands of employers is mind-boggling. Our estimate in our association is that there are probably at least 10,000 collection sites that service DOT-regulated employers across the U.S. These are laboratories, patient service centers. These are urgent care centers. They are doctors' offices. They are chiropractors' offices. They are whatever.

In almost all cases, collecting a forensic urine drug sample is not their core business and, in almost all cases, this task is entrusted to the lowest paid, least trained member of that staff. So I think just getting our hands around that is difficult.

In terms of the return to duty process and people that circumvent that—and I think it may be as high as 50,000 people that we have caught on the drug test but who do not go through the return to duty process—I think that we need to look seriously at the opportunity for a national database.

The U.S. Coast Guard, the Federal Aviation Administration and, to some extent, the Federal Railroad Administration have been much more successful because they are able to rescind or revoke licenses or documents, and people therefore cannot work in that industry again until they have been able to satisfy the return to duty requirements.

So, in short, the recommendations to the Committee from SAPAA are as follows:

That the Congress support and pass some form of the Drug Testing Integrity Act to try to get a handle on the proliferation of the adulterants and the other products so readily available.

That they would follow what six States have tried to do. Of course, the purveyors of these products simply get around that by having the ads on their web site: We can't ship to you in North Carolina, but we can ship it to a friend or family member in any of the neighboring States.

So I think we need a national piece of legislation, Mr. Chairman.

I think that we also need to increase funding and resource for the Federal Motor Carrier Safety Administration. The ratio of auditor or inspector to carrier is abysmal. But we have to make those more than paper audits, more than an auditor or an inspector going in and saying: Let me see our statistical report for the year. Let me see your written policy.

The inspectors must be trained and they must be held to go out into the field to do the kind of collections that Mr. Kutz's organization did in terms of seeing what is going on.

I also believe that the development somehow of a national database is essential to stop the job-hopping. You have an industry where turnover rate, where availability of drivers really drives and encourages the process of being able to walk out of one trucking company or motor carrier and go down the road to the next.

Finally, I think that the Department of Transportation needs to more effectively wield a club and a tool that it already has in place in the regulations which is the Public Interest Exclusionary Process so that when collection sites or when third party administrators or when medical review officers flagrantly disregard the requirements that are already there in the rule, that they are in fact posted as this service agent cannot do business with a DOT-regulated employer.

Thank you for your time and your attention.

Mr. DEFAZIO. Thank you.

We would now go for a round of questions.

First, a couple of questions from web sites, if I could see the slide that says, this one claims Government endorsement. Could the GAO comment on that?

It says we carry FDA-approved drug test detoxification programs for passing serious drug tests. All of our products are manufactured in the U.S. I, of course, supported manufactured in the U.S., but——

[Laughter.]

Mr. DEFAZIO. Located DHS and DEA certified facilities. Can you comment? Do you have any comment or insight into that claim?

Mr. KUTZ. I don't certainly.

Ms. SIGGERUD. I don't either.

Mr. DEFAZIO. Okay. How about then the favorite links from a DAT testing facility web site slide? No, not the Whizzinator. Yes, here we go, the last one.

This is from a lab called, I think it is blacked out. They are in California. Some of the specifics are blacked out. I don't know why. I would love to publish their name right now, but I will get it later.

It is something health care clinic, Commerce, California, and they administer commercial truck driver medical exams and drug testing. They have their favorite links. We all like our favorite links.

Their favorite link is to—could we have the next slide please—Insider's Guide to Passing a Drug Test: What the Labs Don't Want You to Know. This is on the web site of a company that is certified to do commercial truck driver medical exams and drug testing.

Ms. SIGGERUD. Well, I think, Chairman DeFazio, clearly that is a problem, and we have all made the case today here that these adulterants and substitutes are not regulated except by a few States and that there is an issue with oversight of these collection facilities. It is not surprising, therefore, to see a collection facility web site that would have, shall we say, questionable information on it.

Mr. DEFAZIO. I think, Dr. Smith, this might go to your comment about the exclusionary process or the disqualification process. Maybe a company that is doing medical exams and drug testing that has a favorite link on how to beat the test, do you think they ought to be doing these tests?

Ms. SMITH. No, sir, and I think that is the point. It is just like what I think we have been through as a Country in terms of how did we get OSHA compliance. There has to be—there has to be some kind of threat, a risk assessment that every employer, every company is going to go through in terms of what may happen if I don't comply, and I think that it has been difficult.

I think one of the fears, Mr. Chairman—and I know this was true when I was at the Department of Transportation—is if we rode these people too hard, then they will simply say: Okay, I am not going to do drug testing anymore, all right, DOT drug testing. It is not a big part of my revenue anyway and, you know what, I don't even care if I do the DOT physicals. I am going getting 25 or 35 bucks for those. So that is okay.

The concern was all right, then we are simply going to make it harder for a commercial motor carrier to comply because they are not going to have very many places that they can send this driver for that random test when he is between Moose Breath and wherever.

Mr. DEFAZIO. Okay, thank you.

In the testimony by Mr. Kutz, on page 20, you say here: Corrective Action Briefing, we briefed the DOT on the results of our investigation on October 1st, 2007. DOT officials agreed with our findings and indicated they were not surprised by the results of our work, stating that they have performed similar tests themselves in prior years with similar results.

Do you stand by that? They actually said that?

Mr. KUTZ. Yes. We do corrective action briefings all the time. Our protocols are first to brief your staff, and then we go to the agencies affected and brief them. We document what we say to us, and that is correct.

Mr. DEFAZIO. Then it says there their response was they developed posters?

Mr. KUTZ. That is what it says, yes.

Mr. DEFAZIO. Are the posters required to be posted in these facilities?

Mr. KUTZ. I don't believe they are required. We did see one of the best practices was one of the places that followed all the protocols actually did have posters up there. So that certainly was one of the better things we did see, and we didn't see many good things.

Mr. DEFAZIO. Then they also said that the REAL ID Act could close a vulnerability identified, using fake driver's licenses.

My recollection, and you could help me out with this, on the REAL ID Act is I believe State compliance is required in 2009 or 2010 and then States are not required until a person's license is reissued to provide a REAL ID-capable license, which could be in some States as long as 10 years. So we could be looking at 2020.

Mr. KUTZ. That is a long term, clearly.

Mr. DEFAZIO. Right, right.

Mr. KUTZ. I agree.

Mr. DEFAZIO. They didn't seem disturbed by the fact you were able to successfully penetrate all these facilities with fake driver's licenses today?

Mr. KUTZ. I think they were, but they didn't really offer a short term solution. I think that is something we can talk about at the hearing today, are there short term solutions to that issue.

Mr. DEFAZIO. What would those be?

Mr. KUTZ. Well, we talked about two possibilities, either the employer faxing a copy of identification to the test sites of the person coming to take the test or actually the test site making copies of the credentials that were given to them for the person taking the test and making sure that those go back to the employer, so the employer makes sure that the person who took the test is in fact their person. That could be a short term, low cost alternative.

Mr. DEFAZIO. Okay, we will be asking the Administrator if he would like to do that.

I have a question about part of the problem with the drug testing is it is obviously ephemeral, and there is some discussion about hair and other things. Is hair testing accurate for historic drug use which might then give us probable cause to target more testing on that person?

Can anybody comment on that?

Ms. SMITH. I can comment on that simply by the involvement that I have had with clients that utilize hair testing. Does it give a longer window of detection for illegal drug use depending on the length of hair sample? The answer to that question is yes.

Is it reliable? I think again the science is divided on that. It certainly is analytically reliable.

I think you have questions about whether or not single time or recreational use is as easily detected in terms of absorption into the hair as you do people who are chronic or frequent users. I think you also have some of the issues with regard to the availability of sample depending on where on the body you can get sufficient hair, so from a reliability, et cetera.

I think, though, the thing that would address some of the issues that we are having here is, and I am sure Mr. Stephenson and Dr. Bush from SAMHSA will back me up, since hair testing has begun to proliferate more in the non-regulated drug testing world—that is employers doing drug tests not under Federal authority of any kind—we have seen the products, the ads and whatever increase over 300 percent for shampoos, for hair preparations that you would put on your hair to pass your hair test if your employer has gone to that.

I have had collectors, who have been trained how to snip the hair and package the hair, contact me because people are showing up with weaves and with human hair wigs and all kinds of things. So I don't want you to think that by changing specimens, you can necessarily——

Mr. DEFAZIO. That is not exactly where I was going. Where I was going was that the hair test, since it is not real time and there is potential dispute, could be used as an indicator to give us probable cause to target that individual for more frequent urinalysis or something along those lines.

Not necessarily a disqualification but say: Well, we notice the test shows you have been using drugs in the past. That means you are going to be subjected to more frequent random testing.

Ms. SMITH. And I can tell you that I have seen that used in other programs that I have been involved with particularly in the area of monitoring healthcare professionals who have had their licenses rescinded for substance abuse.

Mr. DEFAZIO. Then one other, yes.

Ms. SIGGERUD. Chairman DeFazio, we will be looking at these alternative specimens in our work, in our report that will be issued in May.

Let me just mention a couple things to keep in mind about them. I think part of it is we need to decide what it is we are trying to accomplish. Are we looking for long term use or are we looking for recent use? The urine is useful for recent use; the hair is useful for longer term use.

We have talked with motor carriers who are using hair testing as part of a pre-employment test for that very reason and then also using urine testing.

The other issue to keep in mind is, of course, what Dr. Smith brought up. In deciding to go a different direction in this area, we need to look at the potential to address the two problems that Mr. Kutz found, and that is the ability to substitute or to adulterate

and whether the industry that assists with that will sort of ramp up and be responsive to a new testing.

Mr. DEFAZIO. That goes to that requirement. Are you familiar with this requirement that DHHS publish a road map on how to beat the system and can you tell me what the possible rationale for that is?

Ms. SIGGERUD. DHHS does, in fact, publish in the Federal Register, protocols for testing and ranges within which testing will be done. My understanding is that is a Federal requirement. Dr. Smith may have some more to say about that.

Ms. SMITH. I would defer that, I think, for when Mr. Stephenson is here. He can tell you exactly the circumstance under which that has to be published.

Mr. DEFAZIO. Okay, we may want to.

Then, finally, on the job-hopping which was raised and the issue of a Federal registry, we had a report in 2004 and from reviewing the FMCSA testimony, it seems like they are thinking about it. Is that sort of the extent of where we are at here? They are kind of thinking about it?

This is an identified problem. Did you have any discussions with FMCSA about the national database and the need for one and the job-hopping problem.

Ms. SIGGERUD. Yes, we have had discussions with FMCSA and, in our ongoing work, we also do plan to go to the States that have a registry already. There are a number of them across the Country and two States that actually not only require reporting but connect that then to the provision of the CDL.

There are a number of issues to be addressed there. Clearly, the registry would address two problems. One would be the job-hopping issue. The other would be helping employers to comply with the requirement that they do check the previous drug history. The registry addresses both of those.

Clearly, in setting it up, there are a number of things to think about, the resources that would need to be devoted to the registry to make sure that it is timely and accurate and then another question of whether, at the Federal level, you want to make the connection to the CDL the way a few of the States are doing.

Mr. DEFAZIO. Okay, we will look forward to your further thoughts on that.

I do have the full name now. It is the Ross Healthcare Clinic in Commerce, California, great citizens. We might want to have FMCSA consider whether they want these people to still continue to be eligible to apply to do medical exams and drug testing given their advocacy for beating the drug test, and that isn't an advertisement for this company.

Thank you. I turn now to the Ranking Member, Mr. Duncan.

Mr. DUNCAN. Well, thank you, Mr. Chairman.

Ms. Siggerud, you say in your statement that DOT estimates that approximately 4.2 million people including truck and bus drivers work in such positions, in other words, commercial driving, and that commercial motor carriers account for less than 5 percent of all highway crashes, but these crashes result in about 13 percent of all highway deaths or about 5,500 of the approximately 43,000 annual highway fatalities.

A DOT study on the factors associated with large truck crashes finds that vehicle factors such as brake problems and behavioral factors such as speeding and driver fatigue are some of the most frequently cited factors involved in large truck crashes while illegal drug usage is not among the most frequently cited factors, appearing as an associated factor in only 2 percent of the crashes, which everybody would agree is 2 percent too many.

I just wonder, do you have faith in that DOT study or, in your investigation of this, do you have any reason to question that?

Do you think that 2 percent figure is accurate? I am just trying to learn the extent of the problem here.

Ms. SIGGERUD. Yes, there are a lot of different ways to think about that, Mr. Duncan, but let me just make a few points. It certainly is true that the study, and this is the Large Truck Crash Causation Study. It is an ongoing study that was done to investigate crashes post hoc, and it is very comprehensive.

Mr. DUNCAN. You say it is a long term study?

Ms. SIGGERUD. It is called the Large Truck Crash Causation Study.

Mr. DUNCAN. How long has it been going on?

Ms. SIGGERUD. I would have to get that to you for the record, Mr. Duncan.

Mr. DUNCAN. Anyway, it has been several years?

Ms. SIGGERUD. Yes, it has. The idea of it is it goes out to crashes and investigates a number of factors related to them after the crash. It does, of course, identify that equipment failure and behavior problems are very significant causes of crashes. Of course, this Committee has looked at those issues in other hearings.

With regard to the amount of illegal drug use going on, though, and its contribution to crashes, we really don't know very well what the actual percentage is of drivers that are using drugs. The bottom number is certainly the 2 percent that FMCSA identifies. The upper bound may be somewhere around the 10 percent that hair testing and other testing has shown. So it is fairly difficult to know exactly what the causes are.

Another part of that Large Truck Crash Causation Study did say, however, that there is no doubt that illegal drug use does increase the likelihood and the risk of a crash occurring.

Mr. DUNCAN. I am told by staff that of these four million truck and bus drivers that approximately half are tested every year. Is that fairly accurate?

Ms. SIGGERUD. The Federal requirement is that 50 percent of workers be tested in a given year, yes.

Mr. DUNCAN. So I am not sure I understood what you just said. Roughly, two million are being tested each year, is that correct?

Ms. SIGGERUD. That is certainly what the requirement is. We have some concerns based on our work.

Mr. DUNCAN. Well, it may be what the requirement is. What I am trying to get at is how many do you think are being tested.

Ms. SIGGERUD. My guess is when it comes to motor carriers, it is probably less than 50 percent. We did find in our work, and FMCSA has told us this, that when they go out and do these safety audits of new companies that are just getting a DOT number and

entering into the motor carrier business, that they find that 30 percent of those companies have no drug testing program at all.

So my guess is less than 50 percent of motor carriers' drivers are being tested in any given year.

Mr. DUNCAN. I am also told that roughly 2 percent of the total number of drivers test positive.

Ms. SIGGERUD. Of those that are tested and where, in fact, the test is able to either find a positive test or an adulterated test, as Mr. Kutz has said and as we have found, we think that there is a higher number that were actually successfully substituting or adulterating and not getting caught.

Mr. DUNCAN. Is it accurate then that 40 percent of those who have tested positive go through the return to duty process?

Ms. SIGGERUD. I don't have those numbers in front of me, Mr. Duncan, but I have no reason to doubt what Dr. Smith said.

Mr. DUNCAN. All right.

Mr. Kutz, what is involved in the return to duty process? In your investigation of all of this, do you think that the return to duty process is sufficient in most instances?

Mr. KUTZ. We stopped. We actually did the test and stopped.

Mr. DUNCAN. You didn't look into that?

Mr. KUTZ. No, we didn't look at that. Once we got our negative results back, we were done.

Ms. SIGGERUD. Mr. Duncan, I can comment on that if you would like me to.

Mr. DUNCAN. Yes, go right ahead.

Ms. SIGGERUD. Once a positive test is reported to an employer, what is supposed to happen is the driver is supposed to be removed from that safety-sensitive position and then be allowed to go through this process which would typically involve education, treatment and a series of drug tests before being allowed to return to duty.

Mr. DUNCAN. Well, is the main problem here not so much in the number of drivers being tested, but it is in the fact that it is so easy falsify or manipulate these tests? Is that the main problem?

Ms. SIGGERUD. I would say there are two problems. That is one of them. The other is that there is a fair amount of non-compliance within the motor carrier community itself in terms of actually getting drivers to enroll in this drug testing program at all.

Mr. DUNCAN. Dr. Smith, do you feel that the States are being harsh enough on the drivers that have these accidents in which drugs are involved?

Secondly, do you question this return to duty process and your association, has it been trying to encourage or do something to see that the States do get a little tougher in enforcement?

In other words, in our system, the Federal Government can't do everything. The State and local people have to do some things as well.

Ms. SMITH. Two things, I think that are of note: In the six States, and I only have data on three of them, there is a requirement that either the medical review officer or the employer report DOT violations such as a positive drug test or refusal to test where the specimen is adulterated or substituted and that that information is then put onto that driver's CDL.

The substance abuse professionals that I have spoken to that operate in those States have seen higher compliance with going through the return to duty process because the driver in the State of Oregon, for example, okay, knows that positive test is on his CDL record.

In order for him to work in transportation again, unless he leaves the State and is able to get a CDL elsewhere, is contingent upon him completing the return to duty process that Ms. Siggerud just mentioned with regard to a substance abuse professional evaluation, completion of education or rehabilitation and having passed a return to duty and then being subject to increased, intensified monitoring through follow-up testing in addition to taking his or her chances in the random pool.

So I think that, yes, where States have taken the lead, I think that there is an effect. It is only two States I can judge it on. I don't have a lot of data, Mr. Duncan.

Mr. DUNCAN. All right.

One last question, Mr. Kutz, what do you think is the best way to stop or discourage this cheating or this manipulation of these tests that seems to be going on at this point?

Mr. KUTZ. Well, if you don't address the actual collection process and move towards more of a direct observation, you really have to attack these products because these products are so widespread.

It is interesting that 1 or 2 percent of the people fail. I would like to meet those people because it would hard to imagine someone not being able to beat at test if they were fairly skilled and actually bring in synthetic urine. They don't check your socks, for example. So if you put synthetic urine in your sock, you potentially could beat this test 100 percent of the time.

Mr. DUNCAN. Well, when you say address the collection process or get to the products, how do you think we should go about that? That is the question.

How can we stop this cheating, do you think?

Mr. KUTZ. Well, certainly, with respect to the current process, better adherence to the current protocol would help. We found an average of four to five out of the sixteen tests we looked at or of the protocols we looked were not followed by the sites. So, right there, you have a problem with adherence to DOT protocols.

With respect to improving that process, again, and I am not saying this is the right answer but a direct observation is one certain way to know that you are getting the person's urine. There is still potential ways to beat that, but direct observation is certainly a stronger test.

Then again, the products at the end of the process, just it is a proliferation of those products. Again, since there is not a real search of the person going into the site to take the test, it is very easy to hide an adulterant or synthetic urine to get in.

So it is really there is no silver bullet. I think there are a lot of pieces of this that need to be looked at.

Mr. DUNCAN. All right, thank you very much.

Mr. DEFAZIO. I thank the Ranking Member.

I turn now to the Chairman.

Mr. OBERSTAR. Thank you, Mr. Chairman.

I want to thank this panel for your very thoughtful and in-depth review and shocking information that you have provided for us.

Mr. Kutz, when you got deeply into this investigation and you found these products—Whizzies, UrineLuck, Stealth—and guidance on how to pass a drug test, and found those products on Craig's List and eBay and Amazon, what was your gut reaction?

Mr. KUTZ. Well, I wasn't surprised they were out there, but the number of hits you get when you put in, for example, beat drug test and pass drug test, it is hundreds of thousands or millions of hits out there. So it is just amazing the number of entities that are out there that are marketing these products.

Mr. OBERSTAR. Hundreds of thousands and millions of hits telling the subscriber, the person checking in on the internet, this is how you can beat the DOT, flat-out telling them how to operate illegally, right?

Mr. KUTZ. It is the DOT and any other drug test. I mean it is much broader than that, but DOT is specified in many of the web sites. We will help you beat the DOT test, guaranteed, 200 percent money back return, all those kinds of guarantees.

Mr. OBERSTAR. And FDA-approved, as Mr. DeFazio pointed out there.

Mr. KUTZ. I saw that representation. Whether that is true or not.

Mr. OBERSTAR. Wild claim, whether it is true or not, it gets your attention right away.

Mr. KUTZ. Many claims like that, yes.

Mr. OBERSTAR. But others, than drivers, would be subscribing to those list, wouldn't they?

Mr. KUTZ. That is correct.

Mr. OBERSTAR. Dr. Smith, you touched on but didn't get deeply into the issue of making the products, the masking products illegal. Has your organization pursued this matter in any depth?

Ms. SMITH. Yes, we have, in fact.

Mr. OBERSTAR. You did suggest a Drug Test Integrity act.

Ms. SMITH. Yes, that was last introduced as, I believe, H.R. 4910, and SAPAA did present testimony in a hearing on that particular bill. My understanding is it went to Committee and was not acted upon or did not go any further.

Mr. OBERSTAR. That was in the last Congress.

Ms. SMITH. Yes, sir.

Mr. OBERSTAR. That was in the Committee on Energy and Commerce.

Ms. SMITH. That is correct.

Mr. OBERSTAR. We have that bill. Staff has looked at the Drug Testing Integrity Act. I have just made a cursory review of it. We need to look at that in greater depth, and we welcome your suggestions as to how we can make it more effective.

Ms. SMITH. We would be happy to provide that because I think it is very essential that we are as comprehensive as possible in the language. If you have something like, for example, if you have language that any product that is solely produced or distributed or sold to defraud a drug test, you will find that suddenly those labels will say a product suitable for cleaning your fine jewelry, okay, for making precision instruments operate cleanly and for detoxifying body fluids. So now it simply comes.

Now, of course, the product's name may have something clever like Mary Jane Super Clean, wink wink, okay, Mary Jane, of course, the code name for marijuana. So I think it is important that there be a lot of thought placed into putting together a piece of legislation that can have some effect.

I might also add that I think there are 15 States now that have some degree of legislation in this regard. Some of the most successful ones have been ones where it also makes it a criminal offense, albeit there are a lot of different levels from misdemeanor to whatever, for the person who is caught using a product. So it is really trying to get at the end user as well as the manufacturer, distributor, et cetera.

I would think that that should be something the Committee or whoever would sponsor such a bill should take into account.

Mr. OBERSTAR. I am glad you elaborated on it because you touched on all the follow-up points I was going to raise. You are very good.

Once you say, okay, this is illegal because it has no other valid societal beneficial use, then some other application like it is a good pesticide can be tacked onto it.

Ms. SMITH. And FDA-approved.

Mr. OBERSTAR. This anti-drug effort has to be a multilayered issue just like security. Security has to be multilayered. You cannot do just one thing. You have to have many applications, many aspects.

Just as in safety in aviation, we don't do just one thing. We don't build one practice into an aircraft. We build many backups, redundancies.

So there have to be backups and redundancies in this drug testing, and one of those is to go the origin. Make the product illegal so at least there is a way to catch someone doing it and potentially shut them down.

Then the testing, the process of testing and then the user and then the company that is hiring the people. One of the later testimonies we will see is a suggestion for a national clearinghouse. You suggested a national database, something that I have advocated.

We also have the National Driver Register which catches over 350,000, 400,000 drivers a year who lose their license in one State and are still able to get a license or try to get a license in another State. The NDR has cut those people, prevented them from getting licenses. I know a little something about that because I authored that legislation 25 years ago, and aviation uses the NDR now.

Something of this nature and maybe expanding the information available through the National Driver Registry would be beneficial as well.

Ms. SMITH. The only response that I have there is, and I am not an attorney but having dealt for many years with this with my former colleague from the Department of Transportation, Robert Ashby, there is a difference or what would have to be adopted, a difference from DOT drug tests which are administrative employer, et cetera, as opposed to something that has been adjudicated through the criminal justice system such as a driving under the influence or a driving while intoxicated.

So, I would agree. Certainly, the NDR has been extremely effective in my opinion with how FAA has used it to identify pilots and others who have DWI convictions and that is an indicator of substance abuse or an issue that needs to be dealt with.

I really do think that it is possible. I know that it will be a cumbersome system because there has to be some type of avenue for correction to records that are incorrect. There has to be some way to document effectively for the driver who has gone through the return to duty process and has successfully completed rehabilitation and therefore should be eligible. All of those things are necessary.

Mr. OBERSTAR. Thank you.

Mr. Duncan asked, I think, a key question in this process that we are engaged in, that is, is the problem that the tests are easy to bypass? We don't need to rehash the answer because it was a very good answer and complete answer. But how do we deal with that?

Mr. Kutz, I know your investigation was aimed at finding the issues that you raised, the problems that you have reported on, but in the process you and Ms. Siggerud surely have some ideas how testing can be made more effective.

Mr. KUTZ. Well, I would say again you have mentioned that you have to look at all the phases of this program.

Mr. OBERSTAR. Yes.

Mr. KUTZ. From our perspective, with the covert testing we did, from the moment you walked in the door until the point in time when the lab actually tested the urine, there were issues with all phases of that.

I can look at it as three phases: You walked in the door with the counterfeit ID. You were able to get in.

You were able to do through the protocols. They didn't follow a lot of protocols and, even if they did, you could substitute the urine or adulterate the urine.

Then when you sent it to the laboratories, the lab was unable to detect in the eight cases we did the adulterants or the synthetic urine. So you have issues even with the laboratories and what kind of testing they are doing and how effective that is. We haven't discussed that yet even.

Mr. OBERSTAR. The driver ID was again shocking, but that is an issue that the Department of Homeland Security is dealing with for a secure identification card for transportation workers. We need to engage them in this process of accelerating their development of the TWIC and coordinating with other agencies of Federal and State Government. We have to engage the States in this process as well.

Then the next is the protocols. What are your thoughts about the presence of an observer in the delivery of a sample?

Mr. KUTZ. Well, again, it gets into the tradeoff between privacy and other issues and having an effective drug test. Certainly, direct observation is going to be a lot harder to beat than actually going into a room and closing the door.

We did have one instance where the individual actually made our agent leave the door open, and we still were able to substitute synthetic urine into the collection cup and beat the test. So it is very

difficult without a direct observation to actually catch someone trying to cheat.

Ms. SIGGERUD. Mr. Oberstar, if I could add to that.

Mr. OBERSTAR. Yes, Ms. Siggerud.

Ms. SIGGERUD. I think the thing to keep in mind in expanding in that direction, which would be much more labor-intensive than the current approach, of course, is that not only are we talking about motor carriers but transit workers, rail workers, aviation workers, et cetera, the vast majority of whom are not using drugs. Having a directly observed observation for people who are likely not criminals, I think, would be a very big step to take.

Mr. OBERSTAR. And could be very hugely labor-intensive, no question about it. I know that.

Look, in bridge testing, we had testimony just last week in Mr. DeFazio's hearing on legislation and we reported yesterday on a bridge safety program, that the State of Minnesota has only 77 inspectors for 14,000 bridges. They don't have enough people to do that job. Imagine trying to deal with seven million drivers in this Country.

Well, we need to think this through.

What about the lab test? Wouldn't that be something more amenable to management, that Federal and State Governments could actually exercise control over the labs that are doing the testing?

Mr. KUTZ. I think HHS does exercise some oversight of the labs, certainly. Again, getting into the issue of whether the labs are actually testing for synthetic urine or dilutants, right now for this test, the DOT test we did, we don't know whether they were checking for the synthetic urine or the adulterants. They are authorized but not required to, and so that is another thing, certainly.

Mr. OBERSTAR. We need to close that loophole then.

Mr. KUTZ. That could be a loophole in addition to what Chairman DeFazio said with respect to the advertising for these people out there, what actually they are testing for and what kind of things are out there. That is something that needs to be looked at. That could be a simple fix so that these people who are out there, devising products to beat the system, don't know everything they need to know.

Mr. OBERSTAR. We absolutely have to crack down, I think, on that advertising on the internet how to beat the DOT. That is something within our ability to do. If we have the chip for parents to prevent their kids from being exposed to bad TV, we ought to be able to do something like this.

All right, I have gone on way too long, but I am exercised about this.

Mr. DEFAZIO. Thank you, Mr. Chairman.

Just one very quick point, I believe a lot of the airlines—I have heard complaints from the employees—do direct observation because you mentioned, Ms. Siggerud, FAA, but I think they do.

No? You are shaking your head. No, okay.

Ms. SMITH. Under Federal authority, any employer in transportation, whether it is an airline or whether it is a motor carrier, is limited to just six very specific circumstances where they can do direct observation. Those, under the regulatory scheme, have been

identified as instances where the employee or the candidate has a lowered expectation of privacy.

For example, a flight attendant who has a positive test and now must undergo follow-up testing, the airline can do every single one of those follow-up tests under direct observation.

Mr. DEFAZIO. All right, so it is sort of a probable cause thing. Okay, thank you.

Mr. Boustany will go ahead with his questions.

Mr. BOUSTANY. Thank you, Mr. Chairman.

Mr. OBERSTAR. Mr. Chairman, we have a doctor here now. Maybe he can help us get to the bottom of this.

Mr. BOUSTANY. Human ingenuity is truly amazing especially when used for devious purposes. With that having been said, it leads me to doubt whether we can actually truly regulate and eliminate the use of adulterants. That is going to be a difficult problem.

In looking at this, I sort of broke it down into test integrity, looking at the collection process and looking at the lab accuracy and reporting. Then there are lab compliance and certification issues, what is the role of the State versus the Federal DOT in laying out those kinds of guidelines.

Reporting, a database, then what you mentioned, a Federal database or should there be State databases with sharing of information.

Then the effectiveness of the return to duty process. I guess I have so many questions, it is going to be impossible to ask them all, but I will start off with the return to duty process. How really effective is it right now?

Ms. SMITH. It is my opinion from being in this industry for a number of years that it is minimally effective. I think that the problem that we have of under the Department of Transportation regulations a motor carrier nor any other employer is required to give a person an opportunity for rehabilitation, hold their job open and then monitor their after-care.

It is my experience that in particularly the motor carrier industry, the majority of trucking companies where a driver is positive, they terminate them. They fire them on the spot.

They are required by the DOT rules to hand them with their pink slip in one hand, in the other hand, by the way, here is the name and address of a qualified substance abuse professional. Go and get thee help.

Mr. BOUSTANY. But we don't know what happens to them afterwards.

Ms. SMITH. Our information shows that clearly less than 40 percent of those ever follow through with that substance abuse professional referral.

Mr. BOUSTANY. So, they leave. Some of them can leave the State, go get a CDL in another State by just not revealing information, and so we have major loopholes in that system or that issue alone.

Another question, I am a physician but I am not an expert on laboratory science. Is there some general agreement on standards used to detect drug use and abuse, combinations of random testing with scheduled testing?

Is there some general agreement that give you 90 percent confidence, 95 percent confidence or so on?

Ms. SMITH. The best data that are probably available on that comes from the years of the U.S. Military's drug testing program in terms of at what percentage, for example.

Ms. Siggerud mentioned that the current percentage in the motor carrier industry is 50 percent random annually.

In terms of looking at a population that you make some assumption of, what percentage random testing gives you the optimal deterrence, for example?

What are the odds, if you will, that a person will be found, will be identified on a pre-employment drug test when they have had two or three days notice to clean up and not use drugs and knowing the detection level, et cetera? Those kinds of data are available.

I can tell you in terms of trying to estimate the scope of the problem, a formula that has long been in place is if your random testing positive rate is, let's say, 1 percent, using urine drug testing with the detection windows available, given the statistical manipulation, your best estimate is that the actual prevalence of current use is 3 and a half times that percentage. There are limited studies available, sir, but that is the best that we have been able to do.

Mr. BOUSTANY. Thank you.

In terms of looking at laboratories and trying to make sure that laboratories are doing all that is necessary with regard to collection standards, accuracy reporting and so forth, what is the role of the State and State DOT versus Federal in that?

Typically, labs and the practice of medicine is sort of a State-regulated issue. Could you comment on that interface?

Ms. SIGGERUD. Mr. Boustany, this is a Federal program that we are talking about. So the collection sites are expected to follow standards and training established by the Federal Government. The medical review officers are again following standards established by the Federal Government.

Mr. BOUSTANY. Federal guidelines.

Ms. SIGGERUD. The laboratories that test the specimens are regulated by the Department of Health and Human Services.

Mr. BOUSTANY. Okay, because clearly there is going to be a need to try to tighten all that up or do you feel that the standards are appropriate and it is just that the laboratories are not following the standards?

Ms. SIGGERUD. I want to make a distinction here between collection sites and laboratories.

Mr. BOUSTANY. Right.

Ms. SIGGERUD. A lot of the issues we have talked about today have been more on the collection site side and whether those protocols are being followed and whether even when they are whether they can be subverted.

The laboratories then are, of course, regulated by the Department of Health and Human Services, and we have not focused as much on whether there are particular issues there. We have a later witness on that, of course, but Mr. Kutz did find the laboratories were unable to identify some of the adulterated specimens that his investigators submitted.

Mr. KUTZ. Right, of the eight specimens we submitted, four of them were synthetic urine and four were adulterated. The urine we adulterated was clean urine. So we don't know whether an adulterant would have actually worked for a drug user, but the synthetic urine also produced a negative test result.

We didn't know whether the labs would be able to catch it or not. We weren't certain of that.

Mr. BOUSTANY. Okay. I mean we need to focus on both sides of it, the collection side and the laboratory accuracy piece.

Mr. KUTZ. Yes.

Mr. BOUSTANY. Thank you. That is all I have, Mr. Chairman.

Mr. DEFAZIO. Thank you.

We have only seven minutes until the vote. Do you want to do your five minutes now, Grace?

Okay, go ahead, Mrs. Napolitano.

Mrs. NAPOLITANO. Very quickly because I know we have to get out, the test integrity itself is questionable, of course. Some of it is done not in labs, right? Am I correct? So their validity is in question.

What about employees of the labs?

My reading of the staff memo indicates that there is a high turnover. Is there a question? Have you validated the integrity of the employees themselves in the labs?

Ms. SMITH. I think again, if I can respond to that, that comment was intended for the collection sites, these 10,000 doctors' offices, clinics, patient service centers.

There are only approximately 57 laboratories that actually do the analysis of the specimens, that are certified by the Department of Health and Human Services, but there are all of these other collection sites where the process begins.

Mrs. NAPOLITANO. There are no penalties for the employee who is found with dirty urine, am I correct?

In other words, they can just be referred and hopefully they will go. Like you say, 40 percent might go. What happens? Is there a way to be able to make it mandatory referral or a penalty if they do not to be able to keep this employee from not revealing a prior dismissal based on dirty urine and then go and find another job and put people in jeopardy?

My concern has been because I live in an area where the Alameda Corridor has thousands of trucks a day. Many of them come through my district. My concern is the safety of the people and how are those truck drivers able to maintain if they are on amphetamines, and I don't see anything here related to alcohol, just drugs.

Ms. SIGGERUD. Mrs. Napolitano, there is an alcohol program. We have just really focused our statements today on the drug testing program. It may be that there are witnesses who can talk more about that, but our focus is on the drug testing.

I do want to be clear that for employees that have a positive test, their employers are required to immediately move them from a safety-sensitive position. So, in other words, they are not allowed to keep driving. Then there is this referral to this rehabilitation and treatment process.

Mrs. NAPOLITANO. I know, but it is not mandatory; it is voluntary.

Ms. SIGGERUD. The treatment process is voluntary, that is right.

Mrs. NAPOLITANO. Then they go and find another job and not refer to their prior employment.

Ms. SIGGERUD. In fact, that appears to be quite common in that they may go and apply for another job and not ever reveal that they worked at the employer where they had the positive drug test.

Mrs. NAPOLITANO. Well, Mr. Chair, I will stop now so that we can get to the vote, but I would like to be able to have a second round. Thank you very much.

Mr. DEFAZIO. I thank the gentlelady. I thank her for using her time so efficiently.

We will now recess the hearing. There are three votes. We should hopefully be back in about 20 minutes.

[Recess.]

Mr. DEFAZIO. Let's get organized here.

I would recognize the gentleman from Texas, Mr. Poe.

Mr. POE. Thank you, Mr. Chairman.

I am impressed with the GAO's ability to get to the truth, and I appreciate all three of you, your candor in testimony instead of double-talk which we seem to hear a lot of down here.

I have three questions. You have described, I think, and very detailed the total, in my opinion, lack of the ability to test people who are driving these 18 wheelers throughout the Country.

In spite of the fact this Committee and the sense of the House is that the Administration should not move forward with bringing in Mexican trucks, of course, we got the assurance from the Transportation Department that all these truck drivers coming in from south of the border are going to be tested, drug tested.

Do you have any comments at all on the ability of Mexico to test its truck drivers that are coming into the United States? Do you know anything about their labs, their sampling, their process, if it exists?

Ms. SIGGERUD. We have not looked at that in our ongoing work in GAO.

Mr. POE. I am not sure you would be able to find any of those labs down there in Mexico. But if at some point the GAO needs another project, maybe that would be a good one to find out what is happening because now we are bringing in thousands of more truckers into the United States, and we have no control over that testing procedure. It disturbs me a great deal.

When I was on the bench in Texas for forever, we had the same problem of drug testing. We found that hair samples was one of the best ways to find out if people continued to use drugs. I say that to get to the second question.

What is your opinion about you can call it a national database or registry system?

A truck driver goes to business one. He flunks for whatever reason, whether he is using methamphetamines, amphetamines or anything else, cocaine.

So he waits it out and then he goes to the second business, another trucking company. Am I correct that the second business has no record that he flunked the test with the first business? Is that a correct statement?

Ms. SIGGERUD. Mr. Poe, that is a correct statement as long as he did not reveal that on his job application.

Mr. POE. Well, you know some of them might even tell them but probably not.

What is your opinion of having a system where a person flunks at trucking business number one and trucking business number one puts the driver's license, the social security number, something into a registry that is monitored, supervised by the Federal Government, not paid for by the taxpayers but supervised by the Federal Government, where the trucking industry itself is able to pull up individuals to find out if they flunked with one business or another?

Do you have an opinion on something like that?

Ms. SIGGERUD. Mr. Poe, we are looking at that in our ongoing work. It is important to know that there are a couple of States that are doing that. So we plan to look at those to see how those models are working in terms of getting the information out, in terms of accuracy, timeliness and the extent to which then motor carriers are able to act on that information.

The Motor Carriers Administration did do a study on this concept a few years ago. It was largely a positive study, feeling that it would deal with really two problems. One being the one you mentioned of moving from job to job without revealing a past drug test. The other being that motor carriers are expected to comply with Federal requirements to actually do an inquiry in this area, and it is difficult for them to do so if they don't have the information that they need.

So we will be looking into that as a concept to address several of the problems that we have outlined in our statement today.

Mr. POE. With the States that are doing this, is it paid for by the trucking industry?

Ms. SIGGERUD. I do not have that information, Mr. Poe.

Mr. POE. It would seem to me that it would be advantageous for the trucking industry to finance that some way because as a trial lawyer, if a guy flunked one place and he goes some place else and he is in a wreck, I would be suing that company because they didn't have due diligence about the first situation. So it seems like it would be to their interest, plus highway safety, to have such a system.

Lastly, do you think the system is feasible by having the trucking industry support the system?

Ms. SIGGERUD. I really don't have a comment on that, Mr. Poe.

Mr. POE. Okay. Thank you, Mr. Chairman.

Mr. DEFAZIO. Thank you, Mr. Poe.

At this point, I think we are going to move on to the next panel.

I do have just one question since he raised the issue of Mexican trucks. I was at the border 10 days ago with the Secretary, and they are doing inspecting the trucks at the border, but my understanding is that the drug testing is being done within the commercial zone but not at the border. So it is being done through collection facilities within the commercial zone.

Do we have any inclination or information that those are operating in a different way than the problems we have identified here with collection facilities?

Ms. SIGGERUD. In our discussions with FMCSA staff, they had told us that they have sent additional personnel into those zones to pay more attention to those collection sites than they typically do in other parts of the Country.

Mr. DEFAZIO. Okay, so they will be inspecting more than 2 percent of them on an annual basis.

Ms. SIGGERUD. That is my understanding.

Mr. DEFAZIO. Right, but of course even if they are following the standards, as Dr. Smith has said, basically only an imbecile could not figure out how to beat the test following the standards.

Ms. SIGGERUD. I mean, as we said in our statement, that even if you have full compliance with all aspects of the drug testing program, there are still ways that drivers that use drugs can continue to drive a motor vehicle.

Mr. DEFAZIO. Right, okay. Thank you.

I am sorry. Mr. Boozman came in.

John.

Mr. BOOZMAN. Thank you very much.

Very quickly, Mr. Chairman, do we have the same problem across the board with physicians when they go, when they are being monitored, airplane pilots, people that work on trains, things like that?

We are really talking about two things. We are talking about the problems of the industry as a whole and the drug testing industry and then the other thing specifically as it occurs with the truck drivers. Do we see the same thing, Dr. Smith?

Ms. SMITH. We do not see the same thing particularly in the aviation industry or in the railroad industry.

Mr. BOOZMAN. How do they do it differently?

Ms. SMITH. They are different I think because, for example, in the rail industry, it is our experience that the vast majority of those specimen collections are actually done on railroad property with very well trained and dedicated teams who come in and collect the specimens. There is almost always a supervisor present from the railroad as an example.

Aviation, the vast majority of random tests, et cetera, on aviation safety-sensitive personnel are also similarly conducted at airport property or aviation company property, frequently again using personnel that are trained, that do that month after month in comparison to others.

Mr. BOOZMAN. So we have a much looser process with the trucking industry.

Ms. SMITH. Well, certainly, because the driver that works for an over the road hauler, for example, might have a random test done in any of 48 States near any truck stop or near wherever, and so it is extraordinarily difficult for the motor carrier to control that.

Mr. BOOZMAN. Right.

Mr. Kutz, under the things that you all found, under current law, was there anything that was considered criminal, the violations that you saw?

Mr. KUTZ. No, not necessarily. No.

Mr. BOOZMAN. Has there been any criminal prosecution of the industry for any of these things that any of you all are aware of?

Ms. SIGGERUD. Mr. Boozman, let me take a step back and answer that a couple of different ways. I mentioned in my statement that there is still a fair amount of non-compliance found with FMCSA does compliance reviews of motor carriers themselves in terms of having a program that meets the Federal standards. In those cases, FMCSA does have the ability to use fines and compliance orders, for example, to try to get that motor carrier to get its drug testing program up to snuff.

With regard to the collection site issue that we have been talking about, FMCSA does not have that same enforcement authority. What it can do is take steps to remove that particular collection site or set of collection sites from the DOT drug testing program.

Mr. BOOZMAN. So have they ever done that? Have they removed sites?

Ms. SIGGERUD. There have been a number. It is called a public interest exclusion. There have been a number of these efforts started. To my knowledge, in most cases, either the collection site has dropped out of the program or come into compliance.

Mr. BOOZMAN. But they really haven't kicked anybody out?

Ms. SIGGERUD. Not that I know of.

Mr. BOOZMAN. I guess the only thing I would say is it doesn't really matter what we do if there is no enforcement mechanism. It just doesn't work. See what I am saying?

Ms. SIGGERUD. The enforcement issue with regard to collection sites is one that I think both the Motor Carrier Safety Administration and this Committee should be considering.

Mr. BOOZMAN. Okay. Thank you, Mr. Chairman.

Mr. DEFAZIO. I thank the gentleman.

Mr. Duncan.

Mr. DUNCAN. Just very briefly, Mr. Chairman, obviously we can't really know or we don't really know at this point how many of these two million tests each year are bad or illegitimate or cheated on or whatever, but the implication or the gist of your testimony is that cheating or falsifying these tests is pretty widespread and rampant primarily because of all the goods that are being advertised over the internet and for other reasons.

What I am getting at it this: Law enforcement, they know they stop just a very tiny percentage of the speeders each year. They catch a much higher percentage of the more serious crimes, but even thousands of murders go unsolved each year.

What I am wondering about is this: Instead of doing two million tests that we regard as joke tests or questionable tests, would we be better off to go on the deterrence theory of most law enforcement?

Most law enforcement is based on the fact that while we know we are not going to solve even a tiny fraction of these crimes, at least there is a deterrence value out there that they think stops many other people from committing the crime. So would we be better off with some much lesser number of tests but tests that would be clearly legitimate, that would be random, that would be personally observed and tests that would be thorough and authentic, 50,000 or 100,000 of those?

Would we better off with something like that or are we better to stay with the system that we have?

Mr. KUTZ. I would just comment on that. I think everything should be on the table here. I mean everybody is looking same thing, an improved process. I don't think anybody is happy with the results of what we have had today, and certainly I wouldn't be happy with respect to us going in 24 out of 24 times and potentially beating this test.

Something different has to be done, and that could be an option that should be on the table. I mean I wouldn't dismiss it necessarily.

Mr. DUNCAN. All right. Anybody else want to comment?

Ms. SMITH. I honestly believe that the Department of Transportation's drug and alcohol testing program and policy is well founded and well crafted. I think that it can be effective and, despite its shortcomings that we have talked about here today, I think there are some statistics that show that it has been effective from a deterrence perspective in terms of reducing the prevalence of illicit drug use by workers in the transportation industries over the past 10 years.

If we can but fine-tune the program that we have in the areas that we have talked about today, I am convinced that it can be and is an effective Federal program for the deterrence and detection of illegal drug use.

I am talking about national databases to prevent going from State to State or job to job. I am talking about making mandatory specimen validity testing and giving the laboratories and HHS more bulk to be able to go after the people that produce these substances. I am talking about being able, again, to utilize the PIE and other processes to weed those providers that are not committed to following the procedures and upholding the integrity of the process.

I don't think the system, in terms of the rules, the program, is broken. I think the execution in terms of its enforcement is where our problems lie.

Mr. DUNCAN. All right. Thank you very much.

Mr. DEFAZIO. I thank the gentleman. He provoked one last question from me, and then we will move on.

You said in the last 10 years, we have seen a big improvement, but since 1997 we have the 1.6 to 2.0 percent reported problem. Oregon has the 9 percent. We have self-reporting at 7.4. Since we have had that consistency in the most conservative number over those 10 years, I don't know how we can say that we have made big progress.

Ms. SMITH. You are right in terms of looking if you only look at drug test positive numbers, but I would suggest that there are other barometers for measuring the effectiveness of this program as a deterrent.

If you look, for example, to the Department of Health and Human Services household survey data, which admittedly is self-report but nonetheless has had a standardized series of questions over the years, you can see that those individuals when polled anonymously who work in transportation industries today, who say they are current users of illicit drugs, is less than those who responded to that same question, workers in transportation industries, 10 years ago.

You have not seen the same significant decrease in the general population at large. You have seen some decrease.

I think that is but one measure, sir. Granted, it doesn't necessarily prove my point.

Mr. DEFAZIO. Sure, I appreciate that.

Okay, I thank this panel for their excellent testimony.

Here is the way I would hope to proceed. I appreciate the indulgence of time that John Hill, the Administrator, and Robert Stephenson from SAMHSA have shown.

What I would like to do is I won't put you last, but I think it would be instructive to hear from North Carolina and Oregon because I think it raises, first, we have a State that has addressed a lot of problems that have been laid out here today as far as I can tell from their testimony and then we have the question of is there a bigger problem from Oregon. So if you can possibly hang in, I would like to do it that way. Thank you.

We would now have Mr. John Wilburn Williamson and Sergeant Alan Hageman. We will start with Mr. Williamson.

I have read your testimony. You are not bound by it. If you want to read it, that is fine. If you want to depart from it given the preceding panel, we would be happy with that too.

Go right ahead. You have five minutes.

TESTIMONY OF JOHN WILBURN WILLIAMSON, ASSISTANT DIRECTOR FOR DRIVER AND VEHICLE SERVICES, NORTH CAROLINA DIVISION OF MOTOR VEHICLES; SERGEANT ALAN HAGEMAN, PATROL DIVISION SUPPORT/LOGISTICS, OREGON STATE POLICE

Mr. WILLIAMSON. First of all, I would like to take the opportunity, Mr. Chairman and Members of the Committee to let you know how honored we are to be here today, representing the great State of North Carolina, Governor Mike Easley and the Department of Transportation and our Division of Motor Vehicles.

In late 2004, we were approached by the North Carolina Public Transportation Association with a problem they had with transit drivers testing positive for drugs and alcohol, being dismissed from employment and a few weeks later, when the driver felt comfortable, he or she would test negative for pre-employment testing, be hired by another transit company and driving a passenger bus the next day.

The Association and Division worked jointly on legislation which would address this problem. This joint effort resulted in the Positive Drug Test Reporting Law. That bill was signed by Governor Mike Easley and became effective on December 1 of 2005.

The law states that an employer who has an employee, who tests positive for drugs or alcohol per the Federal regulation, must report the positive to the Division within five days of receiving notification from a lab that the driver had tested positive. Once the Division receives notification of the positive results, we send the driver a letter.

This letter gives the effective date of the disqualification, which is 20 days from the date of the letter, and informs the driver that a preliminary hearing is allowed. If the driver requests a hearing,

he or she must do so within 20 days. The hearing may only address the testing protocol and procedures used by the lab.

Once the driver is disqualified, the motor vehicle record will show the date of the disqualification followed by the general statute number. The motor vehicle record will not indicate directly the reason for the CDL disqualification.

For a driver to end the disqualification, the Division must receive verification from a substance abuse professional that the employee driver has successful completed a substance abuse assessment program. The disqualification will end on the date the completion is received by the Division of Motor Vehicles. The disqualification history remains on the motor vehicle report for a period of two years.

The statistics which I am about to give you are from the positive tests reported to us from February, 2006, when we received our first positive, through October 17th of this year or about 20 months. During that time, we have received 544 positive tests that have been reported to us, 357 of which remain currently active disqualifications.

One hundred and fifty of the drivers who tested positive have completed the substance abuse assessment program. We have 20 current pending disqualifications sitting there in that 20 day window. Seventeen reported positives were not disqualified due to the completion of the substance abuse assessment program prior to the disqualification going onto the record or going into effect.

North Carolina has had 62 hearings requested and only 49 actually conducted. There were 13 that were canceled or the driver did not appear.

North Carolina has had no official media campaign, and the motor carrier or the employers are learning from the new law by contact with the North Carolina Highway Patrol Motor Carrier section which conducts motor carrier audits. The North Carolina Trucking Association web site has information about our program.

The North Carolina Federal Motor Carrier Safety Administration, the motor carrier auditors who go out and audit these motor carriers as well and the North Carolina Division of Motor Vehicles Commercial Driver's License compliance officers as well are out there doing audits.

With over 325,000 CDL holders and approximately 23,000 interstate carriers in North Carolina, unfortunately, we firmly believe we have only scratched the surface to a problem that exists statewide.

Some key program benefits are North Carolina disqualifies the driver from driving legally until he or she has completed the substance abuse assessment program. WE provide an incentive to the drivers with a substance abuse problem who, for the first time, are given an incentive to receive treatment and address their problem.

Equally as important, by placing the disqualification on the motor vehicle record, the Division is collecting data as it pertains to the positive tests. This helps the trucking industry identify problem drivers and protects the motoring public.

An example of this is of the 544 positives, 53 have been reported from the school bus driver population. Of the 53 positives, we know that 27 tested positive for marijuana, 23 for cocaine, 1 for amphet-

amines, 1 for alcohol and 1 just flat-out refused to take the test which is also reportable as a positive.

The ability to collect such data is benefit alone for North Carolina to justify the cost to the taxpayers and more than enough to justify our time and efforts with this highway safety initiative.

In closing and on a personal note, I have learned a valuable lesson while working on this program. We in the highway safety field must keep an open ear to all private sector groups who have an interest in highway safety. The North Carolina Public Transportation Association had a problem. We learned the problem not only affected them but affected the segments of the entire commercial industry.

North Carolina Division of Motor Vehicles Commissioner Bill Gore, Jr., and Deputy Commissioner, Wayne Hurder would like to publicly thank the North Carolina Public Transportation Association, the North Carolina Trucking Association and its president, Charlie Diehl, for all their support and the North Carolina Administrator for FMCSA, Chris Hartley, and his staff for their assistance.

The North Carolina Division of Motor Vehicles web site has instructions and information on our law, Positive Drug Testing Reporting, and you may go there at www.ncdot.org/dmv/forms.

Thank you for giving me the honor to be here and speak with you today.

Mr. DEFAZIO. Thank you, Mr. Williamson.

Sergeant.

Mr. HAGEMAN. Thank you. Chairman DeFazio and distinguished Members of the Subcommittee, I first thank you for the honor of speaking before you today.

I am Alan Hageman. I am a sergeant with the Oregon State Police assigned to the Patrol Division at general headquarters, and I am here today to briefly summarize Oregon's finding in drug testing of our truck driving population and to make a single recommendation which I believe will improve our performance in reducing the number of impaired motor vehicle drivers on our highways.

Just a brief summary of what we have found as we have been conducting these what we call trucker checks since the fall of 1998. It was the division of now retired Captain Chuck Hayes.

Basically, what these trucker checks involve is 72 hours straight of operation at any of our seven ports of entry where these trucks come in. They are randomly chosen for enforcement of the Federal Motor Carrier regulations of both drivers and their equipment. We also have an emphasis of looking at drivers for impairment of either alcohol, drugs or fatigue.

One of the things that Captain Hayes wanted to introduce in the first trucker check, which he did, was urine testing. To maximize the participation, he asked that it be voluntary and anonymous so there would be no inhibition about giving urine. He had very high compliance in that. He repeated it again in the fall of 1999.

The first time we did this, we were surprised. We got results back that about 9.5 percent of the urine samples tested positive for one or more of the drug categories that were tested.

Again, we repeated this in 1999, and the results were up around 15 percent due to an increase in amphetamines. I have no explanation for what that spike is in amphetamines and we haven't seen it since.

In any case, now under the leadership of Captain Gerry Gregg, there was an interest in revalidating this study. So last April, we did another trucker check, this time in Woodburn, and we did the same tests. We conducted the whole trucker check under the same template as we did under the original ones, and we again received results of about 9.5 percent.

Backing up a little bit in my testimony, our Oregon legislature in 1999 did take some legislative action to address what was being discovered then which was designed to exceed the U.S. DOT testing requirements found in Part 40. Unfortunately, the language is crated in such a way that it doesn't have a lot of teeth. So, as I speak to you right now, the Oregon DOT is developing another legislative concept that will enhance the existing statutory language.

Currently, the only two States that I could locate that have good legislation in this area are Washington and North Carolina.

Oregon can become very proactive in drug testing. However, the interstate nature of trucking severely limits the effectiveness of Oregon's effort unless there is interstate uniformity. That is why I am here to ask you to consider that we have some type of a nationwide clearinghouse which would report all positive tests including refusals. The interstate motor carriers should be required to contact this clearinghouse before employing any driver.

It has been a privilege to speak before you today, and I hope what I share with you has some value in improving our safety of our Nation's highways. I am honored to answer any of your questions.

Mr. DEFAZIO. Thank you.

Mr. Williamson, the programs, I like what you said in terms of it certainly would give an incentive to someone who has to make a living driving, that they need to get their record cleared up. Who established the criteria for the programs to make certain that the person goes through a real treatment program? Does the State monitor those programs?

Mr. WILLIAMSON. Yes. Well, actually, that list comes from the Federal Motor Carriers. We also send a list of substance abuse assessment professionals who can handle that treatment when we send that letter out of notification of disqualification. Yes, sir.

Mr. DEFAZIO. Then on the issue of your database, who can access that, under what conditions?

Mr. WILLIAMSON. Currently, that is strictly an in-house thing. Our adjudication branch, we have two hearing officers who have access to that system. The facility or the room where we keep these records that has its own fax machine, its own phone line and everything comes in there and stays in that area. So there is an area. We do consider that a private type situation.

Mr. DEFAZIO. Your hook is you have taken their State license, but we have been talking about a different clearinghouse concept in the first panel where a prospective employer could get a hit, yes or no. You don't allow that because you are figuring since you have

taken the person's license, no one would need to contact you. You don't need to provide access to prospective employers.

Mr. WILLIAMSON. Well, actually, what occurs when we receive notification and the person does not request a hearing, that disqualification goes on that individual's motor vehicle record. It shows CDL disqualification. It gives the general statute number and being on his motor vehicle record, it is record to just that. Whomever, by the Driver Privacy Protection Act, who would have access legally to that motor vehicle record would see that on there.

Mr. DEFAZIO. Which would be a prospective employer with a release could access that. Does it require a release?

Mr. WILLIAMSON. That is correct, sir.

Mr. DEFAZIO. Yes, okay. You feel that the process that you have put in place with the 20 days for the hearing and that because we had concerns earlier about someone having recourse if they felt the test wasn't properly administered or whatever.

You haven't had people go on and appeal and then subsequently litigate and claim that you didn't give them a fair hearing and the system wasn't adequate to clear their name and they are unjustly accused. Have you had any litigation like that?

Mr. WILLIAMSON. No, sir, we have not had any challenges as of this point. Just they would come to the hearing, and that is about it.

Mr. DEFAZIO. Sergeant, someone mentioned Oregon earlier, saying what do we do in terms of what record. When someone is found to have a positive drug test, what are we doing in Oregon?

Mr. HAGEMAN. The medical review officers are required to report that to Oregon DOT, more specifically, DMV.

The problem is kind of lingers in a database that no one is required to access and no one is required to disclose. It only includes positives. It doesn't include refusals. So there is this database that basically is, for all intents and purposes, meaningless.

Mr. DEFAZIO. Right, and that is something the legislature or policymakers are looking at to make that more useful and more inclusive?

Mr. HAGEMAN. Yes, Chair DeFazio, I think we are looking at North Carolina as sort of a template on that and do the same as disqualifying the driver until steps are taken to correct it.

Mr. DEFAZIO. All right.

Mr. Duncan.

Mr. DUNCAN. No questions, Mr. Chairman.

Mr. DEFAZIO. Okay. Well, I thank you. I think you contributed to the dialogue here and now you might hang around and hear what the Administrator's response is. Thank you very much. We appreciate your testimony.

With that, again, I thank Administrator Hill for his very generous allocation of time and also—I lost track of my agenda here—he is accompanied by Mr. Jim Swart, Acting Director, Office of Drug and Alcohol Policy and Compliance, and then Mr. Robert L. Stephenson, Director, Division of Workplace Programs, Substance Abuse and Mental Health Services Administration.

We would start with Administrator Hill. I have read your testimony, but you are free to do with your five minutes as you wish. I realize there are sometimes constraints put upon officials by their

higher-ups in terms of what you can do or depart from, but go ahead.

TESTIMONY OF THE HONORABLE JOHN HILL, ADMINISTRATOR, FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION; ACCOMPANIED BY JIM L. SWART, ACTING DIRECTOR, OFFICE OF DRUG AND ALCOHOL POLICY AND COMPLIANCE, U.S. DEPARTMENT OF TRANSPORTATION; ROBERT L. STEPHENSON, II, M.P.H., DIRECTOR, DIVISION OF WORKPLACE PROGRAMS, SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, DEPARTMENT OF HEALTH AND HUMAN SERVICES

Mr. HILL. Thank you, Mr. Chairman and Ranking Member Duncan. I appreciate the opportunity to give the FMCSA side to this issue in your interest in highway safety.

We are responsible for regulating about 4.2 million employees and 600,000 employers. FMCSA has an aggressive program to examine compliance with the drug and alcohol regulations through roadside inspections, safety audits, and compliance reviews.

The Agency also takes every opportunity to educate the industry regarding the drug and alcohol testing regulations, and data indicates that CMV operators are among the safest transportation workers in the U.S.

NHTSA's Fatality Analysis Reporting System, otherwise known as FARS, from 1997 to 2006 showed alcohol intoxication averaged 1 percent in crashes each year. It should also be noted that the alcohol intoxication level for a commercial vehicle operator is at .04 percent blood alcohol compared to the higher .08 percent for passenger vehicle operators.

During use in the same FARS report, the same 10 year period, drug use in that period of time for commercial vehicle operators was 1 percent. Our last survey, as has been mentioned today, is at 1.7 and doesn't show too much differentiation over the last 10 years.

Now while these data are positive, we acknowledge that any commercial vehicle that has a driver behind the wheel with controlled substances is too many. I pledge to work with the GAO and this Committee to take proactive initiatives that will deal with this problem. I want to also tell you that we have already taken some of those initiatives, and I want to explain some of those to you.

We have applied limited resources for a very large carrier population, using a risk-based approach in addressing safety priorities that has produced some significant results. Last year, we reviewed compliance of more than 55,000 drug and alcohol testing programs during our compliance reviews and new entrant audits.

We also see State and local roadside enforcement playing a crucial role in detecting illegal drug usage One such example was in Maryland earlier this year when a semi tractor-trailer driver was stopped for running well over the speed limit. Cocaine was found in the vehicle. The trooper revealed through this process that not only did he possess cocaine but he was under the influence at the time he was driving.

We, as the Agency, used our authority and declared him an imminent hazard and had him disqualified. Fortunately, the State of Florida worked with us to have that CDL revoked.

We have also begun to use data in which the driver tested positive for drugs and has not completed the return to duty process, which you have heard about today. We are following this process. We are removing drivers from the highways.

I will be glad to talk more about it in the question and answer period and expound on it, but we also believe that the strategy that you just heard from North Carolina about licensing and disqualifying drivers is a positive step, and we look forward to working with other States in that regard.

Our Comprehensive Safety Analysis 2010, CSA 2010, recognizes the need to collect more comprehensive data regarding drug and alcohol compliance. Therefore, our staff is currently developing strategies for requiring collection of drug and alcohol testing information to ensure that our new compliance model is able to identify drivers and carriers that do not comply with drug and alcohol regulations and to prevent their continued operation. You will be seeing more about that in a proposed rulemaking next year.

As a former law enforcement official, I have seen firsthand the consequences of impaired driving behind CMVs and passenger vehicles. Some States have taken steps to criminalize products that circumvent the drug testing process, and I certainly support these efforts including Federal legislation to prohibit their manufacture and distribution.

Most carriers use service agents to collect drug testing programs is what we heard about today. We reviewed compliance at these entities during our compliance review process and have found 22,000 violations in the past 7 years.

DOT has worked with the drug testing and transportation industries to give special emphasis to collection site integrity. We have also asked our inspectors and auditors to increase their scrutiny of collection sites.

We will continue to find new ways to ensure comprehensive programs aimed at identifying non-compliant drivers and carriers with the alcohol and controlled substance regulations. I do look forward to working with you, Mr. Chairman, and GAO and our State partners to improve compliance in this area.

Thank you, and I will answer your questions.

Mr. DEFAZIO. Thank you.

Mr. Stephenson.

Mr. STEPHENSON. Mr. Chairman, Members of the Subcommittee, I am Robert Stephenson, Director of Division of workplace Programs in the Center for Substance Abuse Prevention within the Substance Abuse and Mental Health Services Administration, SAMHSA, of the United States Department of Health and Human Services. On behalf of our Administrator, Terry Cline, we thank you for holding this important hearing too.

Following the lead of your earlier comments, I look around and see that most of the issues and concerns we had originally come prepared to testify about have already been put out on the table. So we have withdrawn our normal oral testimony, and I am going to try to respond in this limited time to some of those issues that

have been raised and tell you a little bit more about who we are and what it is we do and try to anticipate some of the questions you might ask, but I know I won't be totally successful.

Mr. DEFAZIO. Excellent, go right ahead.

Mr. STEPHENSON. First of all, the HHS roles, we are responsible for the administrative and technical standards and procedures for Executive Branch Federal employees. That is our authority and that is our responsibility.

This was initially established by executive order back in 1986, and we established mandatory guidelines for testing and programs that needed to be set up by Executive Branch agencies back in 1988. We have been in business ever since then.

A lot of the capacity that we have is to test other agencies under their own separate authority, but they use our standards by their decision and by their incorporation under their rules and processes.

Currently, we certify 46 laboratories in the United States and Canada. We have 114 inspectors who perform two inspections per year in each one of those laboratories, where they physically go into the places and spend at least a day and, in some cases, several days.

One of the questions that was asked was: Why publish a playbook in the Federal Register with what it is about the adulterants? Well, the bottom line is that I am equally frustrated by that process too, but it is required under the Administrative Procedures Act.

We need to propose things through notice and comments, and there was a fairly important case decision that kind of cemented the need to do what we are doing. That is putting out any modifications to testing protocols, procedures, cutoff levels and so forth that are instructions to the labs that are to be performed on specimens collected for Federal agency employees and, by extension, the DOT-regulated industry.

We have to put those into a Federal Register notice beforehand. We have to receive comments on them, and then we have to publish it.

That puts the lead time way out in advance for anybody who wants to willfully manipulate their products to change it. So we could do this time and time again, and it will result in a blatant behavior of changing products and ignoring. There is no fairness in it. They have all the ground advantages in the process.

Why can't you test and detect these adulterants? Well, when we had a process where we aggressively used the insight of our laboratories to look for anomalies in the specimens being tested and then they identified a new adulterant. Then we learned from our experience in a couple of important court cases that were, by the way, DOT cases, that we needed to publish these processes up front.

What we found out was that you needed a second lab to be able to respond to a legal challenge that would be raised when one of the adulterant issues was brought up in a specific court case. In most situations, that worked well in the early years, but it came about that the only other lab that had the kind of corporate mentality and will to do this dissolved or became an asset of another laboratory corporation, and so we lost the capacity to have a second lab do this.

We explored opportunities with the Department of Transportation of using perhaps a resource that they had under the FAA, an aerospace medical laboratory, to do some of this kind of superlab retesting and so forth, but that has not produced any result.

As a result of that, what we had chosen to do and it was at the request of DOT is we truncated the process whenever we saw anything funky in a particular specimen being tested and as quickly as possible turned the results around, showing that it was an invalid test for testing.

It was an invalid specimen and we could not do laboratory testing on it. For a variety of reasons, it just wouldn't go through the process well. We didn't identify a specific adulterant in it, but we knew there was something wrong.

So the best we could do was turn the specimen result around very quickly and get it back and in the hands of the MRO who, in turn, would then suggest we need to do a direct observation recollection, maybe in a couple of days rather than chasing after an illusive adulterant that you might or might not find for four or five days. By then, a person has had enough time to clean their system out. They had enough lead warning. So that was the best we could do of that process.

I would totally agree I would love to see a process where we didn't have to put that playbook out in advance, but I don't know how to get around that under administrative procedures rules.

The last real thing was: What about alternative specimens? We published proposed rules for Federal agency employees to be used by Federal agencies back in April of 2004. During the internal review process, there were issues raised by other Federal agencies and departments about some of the issues around fairness, hair color bias and legal concerns that have not allowed those to go forward to a final process, but we did move forward with the urine portion of it to address issues around collection site concerns, certification of MROs.

We separately published the adulterant instructions in 2004 as a final, and it went into effect in November of 2004 because we were concerned about what was going on. By 2005, we had provided testimony the first time about the problems that were going on in the industry that we were seeing adulterant products and substitute specimens.

The last one was: What about testing for more and different drugs? Well, one of the issues raised, I think, in the Oregon experience was that they were doing screening tests on some of the drivers and they were finding what could have been prescription drugs. The comment in the testimony, I think, the oral testimony was illicit drugs or illegal drugs. Well, we don't really know that.

What we know is that when you come up with a prescription drug test result, you then need to determine whether or not the person has a prescription for that and whether they are using it in accordance with that prescription.

If we test for more drugs, the issue is going to be resurfacing of a problem that we have had in the past where we test for a number of different drugs like benzodiazepines or the other opiates for chronic pain issues. If a person taking that drug has a prescription

and medical review officer reviews that, they would say that it is a negative drug test for the purposes of the program.

But I would raise an issue, a concern about the safety about using some of these drugs in a work environment where that kind of sedation or other issues could be a concern. That is an issue to think about when you think about expanding a panel to add other drugs.

At this time, I would just like to indicate our written testimony talks more about what we do as a Federal agency, as HHS and about our role with the Federal agency programs. I am prepared to answer any questions I can.

Mr. DEFAZIO. Thank you.

Mr. Hill, on page three of your prepared testimony, talking about dealing with the idea of a national database or registry, the study concluded it is feasible to establish a national database for positive drug results. If a database were established, the report recommends that it be operated by the Federal Government to ensure consistency and uniformity. FMCSA is moving forward to address this problem.

The report was in 2004. Can you tell me what you are doing to move forward and what kind of time line we have for a Federal database?

Mr. HILL. Mr. Chairman, one of the frustrations that I have had in dealing with this, coming from a State in law enforcement as I have been aware of this problem for some time, as these gentlemen indicated earlier on the panel. So I began to ask questions in the Agency, and I was repeatedly told that the privacy concerns outweigh the ability of the Department to move forward in this regard.

We have been working despite that. We are going to work through the Comprehensive Safety Analysis, CSA 2010. We are developing the structure right now and plan to publish a notice of proposed rulemaking in early 2008 that will deal with a requirement to have medical review officers submit positive drug tests to us so that we can create some kind of a database that will allow us to know what the performance of carriers is actually happening.

Now I haven't got the rule ready for prime time, but we are far along in this process. This isn't an idea. This isn't a thought process. This is something that we actually worked with our attorneys on.

What we plan to do at this point is to use, as you indicated earlier in response to the North Carolina gentleman, a waiver by the employee that if they are going to have a safety-sensitive position, they are going to have to make agreement to allow this information to be used by those people who regulate and, if they do not, they will not be allowed to continue in the process.

Now I really think, as you have seen with hours of service and other kinds of high priority issues in this Country involving commercial vehicles, there are a lot of different moving parts, and I think there will be litigation. I think, legislatively, if there was support for creating this database, it would make it an easier process to go through.

But we are prepared to roll up our sleeves with your staff and move forward on this. In fact, we are already moving forward and

are going to go forward with it because I believe it is so critical to public safety.

Mr. DEFAZIO. I think you heard the Chairman earlier. I believe that he and—I can speak for myself—I would like to move forward with legislative support for this process. I think it is essential.

In terms of the privacy concerns, we have a database to determine a person's eligibility to legally acquire a firearm. We don't reveal any sensitive information about the person. It is just a yes or a no.

It could be a similar system which is no, you have a problem here and you better go contact the FMCSA if you think that is in error. They have an appeals process, and you can get your record cleaned up or whatever or if you haven't completed your rehab program, you will have to go do it or whatever.

It seems to me that the privacy issues have been dealt with in other databases, and we could certainly deal with them here. I appreciate your support for that, and I think we will try and give you legislative support.

What about the whole issue of the integrity of the testing process? You certainly heard some very devastating testimony regarding that. I mean 100 percent failure rate, and I read earlier some comments that had been submitted to GAO in response to that.

The future REAL ID licenses in the second decade of the 21st Century will help ameliorate the fake ID problem, but then it was suggested there was an interim to deal with that. I would be curious about your comments on that.

Then, secondly, we have that and then we also have the process itself and the identified problems when it wasn't dependent on the fake ID but actually the adulterants and the other issues.

The fact that I believe GAO made a point that they felt you had too few people to monitor compliance, not just for drug testing but generally as I took their comment, which is something we have talked about previously. I know you are constrained by your OMB masters, but they pointed also to a high failure rate even with that small number of compliance reviews. In the drug testing area, I believe they said 40 percent and it doesn't seem to have a consequence.

So if you could comment on those two issues.

Mr. HILL. Sure. Well, first of all, I don't believe that we should wait on the REAL ID to start dealing with credentialing issues in this process. One of our frustrations as an agency is that we don't have the ability to levy fines against these collection sites.

We have to go through this process of a public interest exclusion called a PIE, and before we ever get to the PIE we have to give them a notice of a PIE. Before that, we obviously go out and gather the facts from the individuals and, during that process, they are aware that there is somebody looking into their behavior. So they either clean it up or they go out of business and recreate themselves.

We have done this repeatedly, and the inference was we aren't really using the PIE process. Well, the PIE process is designed to give advance notice. They get the advance notice, and they don't really clean up their act. They just go out of business. So I think that is one of the frustrations.

I think if we had the ability to levy a fine or some kind of penalty, it would deal with what Congressman Duncan indicated in his comments earlier, that there would be a sanction. There would be an enforcement provision to this process.

Now the second thing, I really would like to say to you that we have ready-made solution for this problem. It is complex, and it is going to be difficult. I think during the next reauthorization, we are going to have to talk about how do we build in, with existing resources, whether at the State level or at the Federal level, to give the kind of monitoring that we need to do with this.

I will tell you that we have found the States to be very agreeable to involving themselves in controlled substance and alcohol enforcement, and I believe that we can do a better job of giving them guidance and helping them with things like the Oregon trucker check program. But it is very labor-intensive, and there are going to be issues that we are going to have to deal with having officers.

For example, a large contingent of the workforce in this Country doing commercial vehicle safety is not a law enforcement officer. They are a limited civilian employee who doesn't have the authority to engage in law enforcement-related practices. So that is something that we are going to have to keep in mind, but we can work around that.

That is just going to be something we have to deal with. Whether we do it in the forms of grants or an expanded Federal workforce, we are going to have to have resources to address this problem in the next reauthorization. I am convinced of that.

Because, as you indicated, to really deal with fraud at the site, you are going to have to get somebody in there to observe that, and that is going to take covert monitoring. It is going to be labor-intensive. We do that now with CDL monitoring. It is very labor-intensive. It is going to be a decision, a policy call of whether that is the way we want to use our resources.

Finally, I would just say in managing the risk of the commercial vehicle safety program, I can tell you that I would like to look at this Committee and say let's save 300 lives next year by getting every trucker in this Country to wear a safety belt because we lose 300 a year because they don't wear a safety belt. We are losing 1 percent due to some kind of controlled substance or alcohol abuse in commercial vehicle crashes, which is too much and I am certainly not saying we tolerate it, but in terms of addressing risk, we need to apply our resources where we get the most reward.

I believe that is what we are trying to do through addressing more driver focus in our programs. We have seen a 9 percent increase in the number of driver-related inspections in this Country. That is because we are changing the focus away from vehicle-related activities to driver inspections.

The story that I told about Maryland is something that we are seeing readily. Troopers along the road are stopping vehicles with CMV operators, noticing some kind of paraphernalia or drug abuse, and then we are following up to disqualify those people using imminent hazard. We were not doing that previously, and it is something we have started using more readily in this past 12 to 15 months.

Mr. DEFAZIO. Well, thanks. I would just reflect and certainly we would want to be doing what we can to encourage that drivers use their safety belts, but that ultimately is a self-inflicted injury or death as opposed to a driver under the influence who takes out a swath of passenger cars who are totally innocent victims. So I would just make that little distinction there in terms of why.

The issue of your response on the labs, I mean if you had a fining authority, if that were more highly valued. Ultimately, I think what you are going to find is we are going to end up somehow probably with fewer labs. It is probably going to be more highly valued product, so we are going to charge the employers more.

Also, I would like to see a regime that you can monitor and fine them, and that would provide some potential revenue for the people to actually monitor the process. That seems to me to be a way you could begin to clean that up.

SAMHSA now looks at the labs. I think you said there were 44 certified labs, and you have 144 people to monitor those labs.

Mr. STEPHENSON. Forty-six labs, 114 inspectors, they look at them onsite 2 times a year, each lab, every year.

Mr. DEFAZIO. Do you have any thoughts on how we could clean up the problems at the collection sites given your experience in monitoring the labs?

Mr. STEPHENSON. There are multiple groups that are advocates and specialties, professional staff that work in associations. That is certainly one way.

Both internal self-policing as well as national standards, best practices, more aggressive understanding by the employers who hire these commercial services as to what their roles and responsibilities are under contract law to make sure that the work they are getting meets the standards and expectations.

When you have a failed collection, it costs that employer not only the cost of the missed test and the time that the person was there. This isn't all about pre-employment testing. This is existing random testing. A person being out of service while they go to this collection site to get a test that doesn't work is certainly an expensive area.

I would think that those are certainly things that could be done better.

We spend a lot of our time on the laboratory side, training physicians as medical review officers and specialty groups within the American Medical Association to perform their task knowledgeably and understand what a drug test does and what it doesn't do and what their roles and responsibilities are. We do that for the Federal agencies, and very similar programs are also established under the Department of Transportation and they participate too.

But professional education for the people who have to do these things is certainly one major piece that I think we ought to bank on.

Mr. DEFAZIO. Thank you.

Mr. Duncan.

Mr. DUNCAN. Thank you, Mr. Chairman.

You know everybody, no matter what their job or position or occupation is, should always be trying to do more and do better and

to improve, but let me see if I can summarize what I have learned from this hearing.

Administrator Hill, you say that the truck drivers overall are the safest drivers in the Country, and we have been given statistics saying that drugs and alcohol are involved in only about 2 percent of the accidents and I think a similar percentage on the number of commercial drivers involved in the wrecks that are occurring.

Truck companies have pressure and incentive from a monetary standpoint to make sure that they don't hire drivers who are addicted to drugs because the trial lawyers are going to help a lot on that. I mean they are going to be sued if they hire drug addict truck drivers who are going to be in wrecks, in frequent wrecks. In addition to lawsuits for injuring other people, drug-addicted drivers are going to cost their employers a lot of money by damaging their trucks and so forth. So there is a lot of pressure that way that is very effective, I think.

In addition, I don't think we should give the impression that not much is being done because I noticed in your testimony you said that your inspectors are inspecting three million trucks a year, is that correct, and they look for drugs and alcohol at that time.

Mr. HILL. It is three million nationwide and predominantly by the States, but our people also do a small percentage of those, yes, in controlled substances and alcohol.

Mr. DUNCAN. Okay, three million. Then the people who are enforcing the traffic laws, the State troopers and even the local law enforcement people, are stopping some trucks at times. So there are checks that way in addition to these three million drug tests.

Now a lot of them, apparently they could get around pretty easily or some of them are not legitimate, but I would assume also that a lot of these three million drug tests are legitimate tests because truck company owners would have pressures and incentives to make sure that those tests were legitimate. Would you agree with that?

Plus, you said in your testimony also that your Agency is doing a lot of work with truck companies to make sure that their testing is legitimate. Is that correct?

Mr. HILL. Yes, Congressman Duncan, we are doing two primary focus areas at this point in addition to the random roadside inspection process.

The first one is through the safety audit. This Committee required us an agency to do new entrant audits of anyone coming into the business for the first time, and within 18 months we are required to do a safety audit.

Now what we found, basically, during that safety audit process is that a lot of these companies are passing the safety audit even though they don't have compliance with some of these issues. The program, the way it was set up initially, was primarily designed to be an educational outreach.

We, as an Agency, said, look, this is not the direction we need to go. We need to refine this.

So we put out a notice of proposed rulemaking in 2006 to change the new entrant program to make it more enforcement-based and to stop entry if you have certain violations that are occurring. One of those is drug and alcohol.

That notice of proposed rulemaking is presently we have finalized the analysis of the comments. We are preparing the final rule, and that rule will be out hopefully in 2008 as well.

What that will do is it will say if you have employees that you are using, that are testing positive for drugs, you are not going to be allowed to continue. We are going to revoke their operating authority and put them out of business.

The second we will do is if they don't have a drug and alcohol testing program, out of service. Until you get it fixed, you will not be allowed to operate. So those are major changes that we are making in the new entrant process to fix that.

Mr. DUNCAN. All right. Then you have these major associations, the American Trucking Association and the Owner-Operator Independent Drivers Association, and both of them are making efforts to help on this problem as well. Is that correct?

Mr. HILL. Well, they both commented to the rule, and we are taking their suggestion as we move forward with this process, yes.

Mr. DUNCAN. I believe there has been a suggestion or recommendation about a national clearinghouse. Are you familiar with that?

Mr. HILL. I am aware of ATA's proposal to do that, yes, sir.

Mr. DUNCAN. Now a lot is being done is really the point here, and we are making great strides here on this problem, but you do need some better enforcement mechanisms for these facilities when you find that their drug testing programs are inadequate. Is that correct?

Mr. HILL. Yes. We have the ability to cite them, but then we put them through an administrative process to revoke their ability to be involved in that in the future. I really think that money, fines and penalties work effectively, and that is one of the things we have used in the motor carrier industry to deal with people who don't want to comply with the regulations. So I think that would benefit us in dealing with the collection site issue.

Mr. DUNCAN. Well, now let me ask you this one last question. We have been given statistics that drugs and alcohol are involved in only 2 percent of these commercial vehicle accidents and that only about 2 percent of these drug tests turn out positive.

But we heard from the North Carolina official, and then have been given these statistics from the Oregon tests that were done April 10th through the 12th for 491 drivers, 487 samples. They found drugs in 9.7 percent of their tests.

Now they said if you remove the opiates in half the situations because some of this could be medicine, it would move down to 8 percent. Then if you eliminate the opiates entirely, it would be 6.4 percent.

Based on their findings in North Carolina and Oregon, do you think this problem is more widespread than these 2 percent figures that we have been given?

Mr. HILL. I wish that I had a good answer for you because I would think that if we were killing more people related to controlled substance, it would show up in the crash report data that we have.

I investigated hundreds, thousands of crashes when I was involved as a State policeman over 29 years. We had a lot of tools

and resources to find out. In every fatal crash, you draw a blood sample. You find out if there is alcohol or drugs in that system.

If you have people who are seriously injured, you pull a blood sample or you do some kind of analysis for reasonable suspicion or post-accident testing. So I think that we would find that there was more involvement in crashes if this were more of a widespread problem.

Now I commend the Oregon State Police for doing this program.

Mr. DUNCAN. From your 29 years in Indiana, do you think in all those accidents that you personally dealt with, was it roughly 2 percent, do you think or do you have any wild guess?

Mr. HILL. I just know that we were able to identify people involved in fatal crashes that were contributing because of controlled substance because the blood test, and I would say it was a very low percentage when I was doing it, but I can't give you empirical data from my experience.

Mr. DUNCAN. All right, thank you very much.

Mr. DEFAZIO. I thank the gentleman.

There was the self-reporting figure which I believe was 7.4 percent, and I don't know that many people who would self-report they were abusing a substance if they weren't, but maybe they wanted to make something up.

Mrs. Napolitano.

Mrs. NAPOLITANO. Thank you, Mr. Chair.

Mr. Hill, I am very interested in much of what is being discussed as it relates to the safety of people generally. In speaking, I wasn't here for a lot of the questioning, unfortunately, because I was detained elsewhere, but you indicate that your Agency has begun a compliance initiative to identify the drivers to comply with the return to duty process.

Does that initiative look at drivers who may have drug content in their urine that is due to medication and how does that medication impede them or is it affecting their ability to drive competently?

Mr. HILL. Congresswoman Napolitano, I would say to you that the reason why we started this initiative is that there are some very concerned members in the industry that have been witnessing firsthand the movement, what we call job-hoppers, truck drivers testing positive and going to different carriers. They have been very frustrated with the fact that the driver just doesn't have to self-report, and therefore they can leave their employment with that particular carrier and then move to another one and infect that carrier with the same drug habit or drug problem.

We have sat with them and said, look, we have to figure out a way to begin to address this. So we asked our investigators. We formed a team to go into these MROs and look at people who are testing positive for drugs.

Mrs. NAPOLITANO. Any drug?

Mr. HILL. Well, the five that are required to be tested through the HHS process that Mr. Stephenson alluded to in his opening comments.

The people who test positive for one of those five drugs, we then have reconfigured our IT systems that allows us to track drivers as opposed to just carriers. Historically, we have looked at carrier

databases. Now we are refining that so that we can see where a driver is moving to work for different carriers.

If we have a name of a driver who has tested positive through one of these facilities, been unemployed or terminated from that one carrier and then shows up working for a different carrier subsequent to that test, we go out and we investigate the new carrier. Did they do the pre-employment testing? Did they have the procedures in place? Are they doing random testing?

Fourth, we go after that driver, and we file a driver case against him or her. Then we use our imminent hazard authority and say, look, this driver is an imminent hazard. You need to get out of the interstate commerce industry.

Mrs. NAPOLITANO. I understand, sir. My question deals more with any individual who is driving who may be under a doctor's orders to take certain medication whether it is for schizophrenia or diabetes or anything else. I am not sure what drugs might have a detrimental effect on the driving ability of that individual. That is more what I am referring to.

Have you looked at anything that might be posing a problem in those particular medically prescribed drugs? That is my question.

Mr. HILL. We have been working diligently through our medical review board to establish a new set of regulations that govern medical qualifications for commercial vehicle drivers. This is something we have been working to address and the NTSB's Most Wanted Recommendations in which they think that the medical regulations need to be updated. So we have been in the process of doing that.

In our medical review board, a panel of experts in the medical field have been addressing this particular problem, and they have actually given us some recommendations that we are going to be considering as we move ahead and we do our regulations. So we are doing that.

Mrs. NAPOLITANO. Thank you. That was what I was trying to get to.

I understand that the independent drivers do not necessarily self-report, that they are required to go to a base entity to be able to do self-reporting. If they are found, they may or may not go back to retest or be able to be cleared for driving. They may not report that particular job and skip and be able to go and obtain another job.

That is a big question from me on independent drivers.

Mr. HILL. It is true with independent drivers, but it is also true with other carriers as well. I wouldn't just relegate it to the owner independent drivers. That is why we started this process that I told you about in these independent investigations to track these people.

But I want to tell you it is very labor-intensive. It takes time. We are committed to doing it, but it is not something we just do thousands in a day. It is something that takes a little time to track them and do the investigative steps, but we are committed to doing it.

Mrs. NAPOLITANO. What would help you then identify the amount of investment, if you will, to set up such a tracking mechanism to be able to tie in the States if they go from one State to

another, so they would be able then to identify those drivers who are at risk?

Then further, do we have a mechanism to be able to go after the damage caused? I know most of it falls upon insurance companies, but certainly somebody has to have liability for being able to not only hire but also drive a vehicle while being impaired.

Mr. HILL. I would just say to you that this response that I gave to the Chairman earlier about our CSA 2010 rulemaking that we are developing is designed to help us track where these people are. That is one of our problems right now. We have to literally go out and find people who tested positively, and then we have to track them to where they go in the carriers.

This reporting mechanism that we referred to earlier will allow us to have that information readily available and eliminate a lot of the investigate footwork that we have to do now to go and find them.

Mrs. NAPOLITANO. If you had a crystal ball, what would that take in funding? What would be able to help you expedite your ability to be able to put that in place?

Mr. HILL. That is a question I am going to have to get back with the record.

Mrs. NAPOLITANO. I would appreciate it, sir.

Mr. HILL. I am not prepared to answer that here today, but it is a valid question. We would like to get back with you on that.

Mrs. NAPOLITANO. I appreciate it because the lives of a lot of people could be at stake.

Thank you, Mr. Chair.

Mr. DEFAZIO. Thank you.

Mr. Platts.

Mr. PLATTS. Thank you, Mr. Chairman. I appreciate yours and the Ranking Member's efforts on the issue as well as our witnesses here today on all the panels.

Mr. Hill, I wanted to follow up on your comments regarding new entries, and I apologize with trying to be at four places at once. If I cover something you have already address, I do apologize in advance.

In your comments and in your written testimony, you talked about the new entrant rule for 2008. You and I have spoken before about the regulations being proposed and working with you. Are we referencing the same issue here, the same set of regulations, or is this something different?

Mr. HILL. I believe that there are two issues that you and I have discussed. One is the training of new drivers into the marketplace.

Mr. PLATTS. Correct.

Mr. HILL. Then the specific new entrant is specifically about the new carrier itself and how the carrier complies with the regulations and how we monitor that process.

Mr. PLATTS. Okay, so they are related but two separate issues then.

Mr. HILL. And two separate rulemakings, yes, sir.

Mr. PLATTS. On the one we have talked about before, my understanding is that is at OMB with the requirements for new drivers as far as behind the wheel training and things.

Mr. HILL. Yes.

Mr. PLATTS. Is there any new estimate? I know it is somewhat out of your hands because it is at OMB, but have you given any estimate from OMB?

Given that this is something that started back in 2004 and with that 2005 court decision and now in 2007, are they giving you any time frame?

Mr. HILL. They have a minimum of 90 days to review it. We are dialoguing with them about that, so I can assure you that we are expressing our interest in moving this rule along. We know that the court is interested as well. So we have a vital interest in making sure this notice of proposed rulemaking gets out.

Mr. PLATTS. Do you think that will happen before the end of the year?

Mr. HILL. It is our plan.

Mr. PLATTS. Okay. On the other regs with the new entrant rule, in your written testimony, you talk about as part of your testimony that of the 40,000 new entrants that you reviewed, 42 percent of those programs were counseled for deficiencies and that the proposed new entry rule will help address this. Could you, one, highlight what the most common type of deficiency you found and how the new rule will likely address that and similar deficiencies?

Mr. HILL. Sure. At the top of the list is that the carrier doesn't have a policy in place about dealing with drugs and alcohol which usually implies that they don't have a drug and alcohol testing program. Closest right after not having a policy is they don't do drug and alcohol testing. So they aren't doing pre-employment, random testing, post-accident or reasonable suspicion.

What I tried to say in my comments there was that we recognized this back in 2003 and said, look, you can't allow people to come into the business and just educate them and hope it gets better. You have to take some action, and that is why we put into place a notice of proposed rulemaking to tighten that up.

Now what it is going to do is it is going to front-end load the work. Instead of catching these people after they have been in commerce and then do compliance reviews, we are hoping to deal with it on the front end.

Not having a drug and alcohol program or using a driver that has tested positively will preclude you from continuing on in interstate commerce. That is going to be the key, and it is going to get people's attention. They are either going to comply or they are going to be out of business.

Mr. PLATTS. So today, without that new rule adopted, not having a program in place, not having the testing done doesn't prohibit you from being out there?

Mr. HILL. That is correct. Now we can do a compliance review, and we can go back in which we do in several cases. But in terms of the strict mechanism to preclude them from continuing on, that is not in place and we needed regulatory authority to do that.

Mr. PLATTS. Because the way it is now it is almost like something has to happen that you are likely to do that compliance review and catch them as opposed to being an across the board requirement and they would be, in essence, certified to have that program in place?

Mr. HILL. Yes, Congressman Platts, that is correct.

Mr. PLATTS. Again, it is proactive rather than reactive.

Mr. HILL. That is right. That is right.

Mr. PLATTS. I think that is a very necessary and appropriate approach. I commend the Department and the Agency for promulgating that regulation, and hopefully we will get it through the process quickly along with the other one regarding the training requirements.

Mr. HILL. Thank you, sir.

Mr. PLATTS. Thank you.

Thank you, Mr. Chairman.

Mr. DEFAZIO. Thank you, Mr. Platts.

Three quick questions follow up on that: As I understand, so you are going to have a new authority to deal with new entrants who don't have programs, to prohibit them from continuing to operate.

Mr. HILL. Yes, sir.

Mr. DEFAZIO. What about the 70 percent of existing firms who are found to have violations of drug testing, who are ongoing? Do you have the authority to put them out of service too and has that ever been done?

Mr. HILL. In the past seven years, six years, we have done about 31,000 enforcement cases. So we bring an enforcement case against them, give them a penalty, but we don't stop them from operating.

Under the CSA 2010 initiative that I referred to earlier, what we plan to do, as we say, is there are certain things that are so fundamental to a carrier's operation that you cannot be safe and not do them.

Mr. DEFAZIO. Okay, so it won't just be new entrants. It will be ongoing problems with compliance.

Mr. HILL. But they are two separate rulemaking processes, and I want you to understand that.

Mr. DEFAZIO. All right.

Mr. HILL. But that is the plan, that we will actually go in and declare them unfit if they are a carrier involved in not having a drug and alcohol program or they are using a driver that tests positively.

Mr. DEFAZIO. In the 70 percent of the compliance reviews since 2001, where you found violations of drug testing programs, have you gone back and verified that those 70 percent have corrected those deficiencies?

Mr. HILL. Normally, Mr. Chairman, as part of our process, we engage into not just giving them a notice of claim and then they pay their penalty, but we actually engage in settlement agreements. Our goal is to get compliance. So as a part of that settlement agreement, they have to verify with us that they have instituted a program and that we have verified that they are using a consortium with third party testing.

Mr. DEFAZIO. But right now you don't have a big club over them. You are going to have the big club in the future with the out of service.

Mr. HILL. It will be bigger, larger, but right now we do have a club because if they are in that settlement agreement and they don't comply, we can come back and hit them pretty hard. I wouldn't discount that, but it will be much stronger with the unfit rating in the future.

Mr. DEFAZIO. Okay, thank you.

Then just quickly for entertainment value, Mr. Stephenson, since PassYourDrugTest.com says they carry FDA-approved drug test detoxification programs for passing serious drug tests, are you aware if there are any FDA-approved drug test detoxification programs for passing tests? I can imagine there are detoxification drugs for people trying to kick a habit, but did you ever hear of such a thing?

Mr. STEPHENSON. Absolutely not. It is a wild claim that is on the internet, and I would love to have someone show me to the contrary because I would be like a pit bull. I would be more than glad to follow up on it.

Mr. DEFAZIO. We would love to have you do that. That would be good.

Then, Mr. Administrator, just given the other site we mentioned here with the Ross Healthcare clinic which apparently does driver medical exams and drug testing, which refers people to a favorite link on a site on how to beat the test. Is there some action you could take regarding their status since they are doing commercial truck driver medical exams and drug testing?

Mr. HILL. If the information that you have is accurate, someone will be knocking at their door very shortly. I will take the appropriate action commensurate with my authority to deal with that problem, and I will get back with the Committee on the results.

Mr. DEFAZIO. Excellent, thank you.

Mr. HILL. You are welcome.

Mr. DEFAZIO. No further questions.

Again, I realize this was an unusual procedure, but I thought the GAO and the other information was so startling that it was necessary for you to hear it. I appreciate your indulgence of time. Thank you very much.

Mr. HILL. You are welcome, sir.

Mr. DEFAZIO. Acronyms are flying like snow. There will be QFRs, questions for the record.

If we could now, we will call the final witnesses. I have a group of parliamentarians from Britain here. I have to step out. Mrs. Napolitano will take the Chair. Thank you.

Mrs. NAPOLITANO. [Presiding.] Good afternoon, gentlemen, and welcome. I believe we will start the questioning of the third panel with Mr. Woodruff. Sorry, I didn't give you a chance to clear.

TESTIMONY OF GREER WOODRUFF, SENIOR VICE PRESIDENT OF CORPORATE SAFETY AND SECURITY, J.B. HUNT TRANSPORT, INC., AMERICAN TRUCKING ASSOCIATIONS; RICK CRAIG, DIRECTOR OF REGULATORY AFFAIRS, OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION; FRED MCLUCKIE, LEGISLATIVE DIRECTOR, INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Mr. WOODRUFF. Thank you. Chairman DeFazio, Ranking Member Duncan and other Members of the Subcommittee, thank you for the opportunity to communicate ATA's recommendations on drug and alcohol testing.

I am Greer Woodruff, Senior Vice President of Corporate Safety and Security for J.B. Hunt Transport and active member of ATA.

J.B. Hunt is a large motor carrier operating in the contiguous 48 States and Canada. We have approximately 11,700 power units, 56,000 trailers and containers and employ over 13,500 truck drivers. In the last year, J.B. Hunt has performed more than 39,000 DOT drug tests, more than 1,700 DOT alcohol tests and over 14,000 non-DOT tests using hair specimens.

ATA has long been a proponent of alcohol and drug testing for truck drivers and actively supported the Omnibus Transportation Employee Testing Act of 1991.

My comments are aimed at improving drug and alcohol testing in the trucking industry, and I will cover two of the five recommendations provided in written testimony: number one, the need for a national clearinghouse for positive drug and alcohol test results and, secondly, the industry's desire to use alternative specimen testing methods such as hair testing.

Concerning the national clearinghouse, this recommendation is aimed at closing a serious loophole in the Federal drug and alcohol testing regulations which is being exploited by too many drug-abusing drivers.

The loophole is as follows: A driver applies for a job at a trucking company and tests positive for drugs on the DOT-required pre-employment drug test. As a result of testing positive, the driver is not hired. In many cases, the driver simply waits a short amount of time to cleanse his system, a few days or perhaps a few weeks, and applies for a job at a different trucking company and passes the DOT-required pre-employment test.

The driver does not self-report the previous positive test result on the employment application, and therefore the second trucking company is not aware of the driver's previous positive test result.

This loophole exists because a driver is supposed to self-report since there is no current method of centrally capturing positive test results. ATA made Congress aware of this loophole in the late 1990s when it first began advocating for a national clearinghouse.

FMCSA studied this issue and submitted a report to Congress in May of 2004. This report found that a centralized clearinghouse for positive results to be queried by motor carriers during the hiring process was feasible, cost effective and, more importantly, could improve safety.

Currently, five States have positive drug test results reporting laws. However, drug and alcohol testing in trucking is done in compliance with Federal regulations, and it is a national program. In order to close the loophole I described, ATA urges Congress to pass legislation to authorize and fund a centralized national clearinghouse for positive drug and alcohol test results.

The final issue I will address is the need for alternative specimen testing. ATA seeks Congressional support to encourage the Substance Abuse and Mental health Services Administration and the U.S. Department of Transportation to move forward with rulemaking that will allow the use of alternative specimen testing methods such as hair. These alternative methods have shown great promise in applied situations to detect lifestyle drug users and those that seek to evade the current urine collection method of controlled substance testing.

Information from ATA's membership indicates that the typical chronic user is more likely to show a positive drug test result when a hair specimen is employed. ATA is eager to work with Congress and DOT to allow for the addition of specimen options beyond urine such as hair.

In summary, Mr. Chairman, ATA urges Congress to enhance drug and alcohol testing in the trucking industry by establishing a national clearinghouse for drug and alcohol test results, directing SAMHSA and DOT to complete rulemaking to allow alternative specimen testing methods, banning the sale of adulterant and substitution devices and providing for enforcement and penalties for their use, encouraging the DOT to better focus their random testing rate requirements and, finally, ensuring good practices are followed by drug and alcohol collection sites.

Thank you for the opportunity for ATA to offer its recommendations. I will be happy to answer questions at the appropriate time.

Mrs. NAPOLITANO. Thank you, Mr. Woodruff. That kind of tickles the imagination about other ways of providing material for the testing. Thank you.

Mr. WOODRUFF. Thank you.

Mrs. NAPOLITANO. Mr. Craig.

Mr. CRAIG. Congresswoman Napolitano, Ranking Member Duncan, thank you for inviting me to testify this afternoon on behalf of our Nation's small business trucking professionals.

My name is Rick Craig. I currently serve as Director of Regulatory Affairs for OOIDA.

The members of OOIDA believe that drug and alcohol testing for commercial vehicle operators has played an important role in raising the level of safety on our national highways. However, there are problems with existing regulations, procedures and enforcement that should be addressed to ensure that testing programs are effectively employed while also mindful of the significant harm that may be caused to a trucker's life and livelihood by errant administration.

The sheer volume and complexity of State and Federal drug and alcohol testing regulations make it extremely difficult for motor carriers to run their own testing programs. Thus, nearly all carriers rely on service agents to administer various aspects of their programs.

Of the benefit programs and services offered to our members, OOIDA administers a drug and alcohol testing consortium and third party administrator program or C/TPA. Our C/TPA provides a full range of services to keep its motor carrier clients and their commercial drivers in compliance with Federal drug and alcohol testing requirements including dissemination of extensive educational information related to testing and reporting requirements. I have provided copies of these materials to the Committee.

OOIDA C/TPA has experienced a multitude of problems with existing drug and alcohol testing regulations and procedures. Most problems are relatively minor and correctable but nonetheless may serve to illustrate the various reasons why certain carriers and drivers fail to comply. Certain other problems are much more serious and may substantially impact or even destroy a trucker's driving career.

Examples of problems commonly encountered by OOIDA are outlined in my written testimony. Many of these same problems have been echoed by other witnesses.

One area I would like to highlight is the collection process has always been and remains to be the weakest link in the DOT testing program. The findings of the GAO are indeed alarming. We absolutely agree that problems identified by the GAO and this Committee must be addressed as soon as possible.

However, speaking on behalf of the vast majority of men and women who operate trucks and who do not abuse drugs or misuse alcohol, I ask that the Committee be careful not to draw the assumption that problems with specimen collection and testing procedures equate to our Nation's highways being filled by drug-crazed truckers. That scenario is certainly not reality.

At the core of OOIDA's membership are owner-operators. These small business trucking professionals commonly lease their equipment and their driving services to motor carriers that operate multiple trucks within their fleet.

Any carrier that leases an owner-operator assumes the responsibility for compliance for all safety regulations no differently than their employee drivers. In fact, the Federal Motor Carrier safety regulations specifically include independent contractors or owner-operators in the definition of an employee.

Motor carriers primarily contract with service agents to administer drug and alcohol testing programs. However, carriers are ultimately responsible for ensuring that service agents meet the qualifications set forth in the rules. While a service agent may provide educational materials to the carrier, it is the responsibility of the carrier to provide the materials to its drivers that explain the rules as well as the carrier's policies and procedures.

More and more owner-operators are obtaining operating authority while continuing to perform driver duties. A one truck-one driver motor carrier must comply with both the requirements that apply to employers and the requirements that apply to drivers.

Since the driver and carrier management are one in the same and the carrier must establish the testing program and carrier policies, it is likely that as the driver this individual has a greater awareness of drug and alcohol testing requirements than many others in the industry.

All carriers, regardless of size, are required to remove a driver from performing safety-sensitive functions in the event of a positive or equivalent test result. Each carrier must assign a designated employer representative to oversee this function and various other aspects of the carrier's testing program. Reliance upon a single employee carrier to remove him or herself from duty is little different than simply accepting that any other designated employer representative will remove a much needed employee from safety-sensitive duty.

I am about to run out of time. I think I will skip ahead just a little bit. I would like to take a moment to comment on ATA's national clearinghouse proposal.

While OOIDA fully supports the goal of striving to make the trucking industry free of drug and alcohol abuse, we remain unconvinced of the need for a national clearinghouse for positive drug

and alcohol testing results. The national database, as described in ATA's proposal, does not ensure that a carrier removes a violating driver from performing safety-sensitive functions nor does it otherwise enhance the existing drug testing requirements.

I have outlined several questions and concerns raised by the clearinghouse proposal in my written testimony. Until privacy, operational security and logistical oversight complications have been adequately addressed, the proposal has the real potential to negatively impact drivers far beyond the scope of those who abuse drugs and misuse alcohol.

Thank you. I will be happy to answer any questions.

Mrs. NAPOLITANO. Thank you, Mr. Craig. I do have the greatest respect for the truck drivers. The job they have is very critical to the Nation's economy. I worked in the industry for quite a while, so I understand a lot of the issues that they have.

We also have some that do not follow the rules and, because of them, we continue to implement laws to protect the whole Country.

Mr. CRAIG. I agree, Congresswoman.

Mrs. NAPOLITANO. Thank you.

Mr. McLuckie, welcome.

Mr. MCLUCKIE. Thank you, Congresswoman Napolitano and Ranking Member Duncan. Thank you for the opportunity to testify here today on drug and alcohol testing for drivers.

Testimony this morning was quite shocking, but I do not think that drug and alcohol abuse in the trucking industry is rampant. I hope that conclusion is not reached by the Committee. Most of our members are hardworking, law-abiding citizens who perform a very difficult task every day.

The Teamsters Union has a long history of being proactive in deterring the abuse of controlled substances and alcohol in the trucking industry. For well over two decades, we have negotiated drug and alcohol testing programs with virtually all of our larger trucking employers. The language in our collective bargaining agreements ensures that the testing programs comply with both provisions of the agreements and FMCSA regulations.

The agreements outline the process that must followed to allow workers who have substance abuse issues the opportunity to obtain treatment and rehabilitation prior to returning to work in safety-sensitive functions. Almost all of those members testing positive take advantage of treatment and rehabilitation and return to duty. We have a once in a lifetime second chance that most of our members take advantage of.

The results of the recent Oregon State Police roadside testing were potentially skewed. The almost 10 percent positive rate could be attributed to several issues. The OSP included three additional drugs, all of which are not included in the FMCSA five-panel drug screen for which analyses were conducted that contributed to the higher overall rate of positive test results.

For example, commercial motor vehicle operators are not prohibited from using propoxyphene, provided that such use is monitored and approved by the driver's physician. These opiates and synthetic opiates accounted for 19 of the 47 tests for which a controlled substance was identified.

Also, drug testing results not validated by a medical review officer leave open the strong possibility that some of the positives were due to legitimate medical explanation. For example, the driver had a valid prescription from his physician.

Occupational injury data provided by the U.S. Bureau of Labor Statistics shows that truck drivers are among the group of workers who experience the most work-related injuries and illnesses with days away from work. Therefore, it is not unusual that these workers would use painkillers, some of which may contain opiates to mitigate discomfort resulting from work-related injuries. Many drivers have legitimate prescriptions for these painkillers and consequently may be allowed in some instances to operate commercial motor vehicles without violating FMCSA regulations.

Because there was no positive test result validation process incorporated in the OSP study, the assumption is that all positive opiate test results were due to illegal or improper use of controlled substances which may be an erroneous assumption.

There are also cases where drivers have legal prescriptions for amphetamines and may drive while using the controlled substance. For example, the use of the prescription drug Adderall, which is often times used to control attention deficit hyperactivity or treatment-resistant depression, can cause a positive test result. However, a driver who has been properly prescribed the drug is not automatically disqualified from operating a commercial motor vehicle.

Further validation of even lower positive drug testing rates for drivers can be found in unionized large, less than truckload carriers. The IBT reviewed the random drug testing results for large LTL carriers for the period 2003 to 2006.

During this period, the union LTL companies conducted 64,477 random drug trusts of which 395 were validated by medical review officers as being positive, for a positive test rate of 0.6 percent. That is six tenths of 1 percent, much lower than the FMCSA survey rate of around 2 percent.

This lower rate may be attributable to an older workforce with low turnover rate. I am told also that in those 64,000 plus drug tests, only 5 cases were found to use adulterated substances.

We have significant concerns about the creation of a national clearinghouse for positive testing results especially with respect to issues related to driver privacy. However, when we consider the fact that certain States such as North Carolina have moved forward in collecting this data, we are of the opinion that a national clearinghouse operated by the Federal Government may be preferable to these data being collected on a State by State basis.

The IBT could support the implementation of a centralized reporting and inquiry system and believes such a system could have positive safety benefits provided, however, that such requirements should only be imposed if and when the FMCSA is able to devise a system that would adequately protect the driver's confidentiality, provide a reasonable mechanism for drivers to learn of and report reporting errors and devise a uniform, and fair method for expunging the records of drivers that have undergone treatment and are rehabilitated.

Finally, I would be remiss if I did not reiterate our concern about drug and alcohol testing procedures for Mexican drivers. Still, after more than a decade of negotiations, there is no lab in Mexico to certify samples. Random drug testing is non-existent with drivers knowing that they will be tested at the border because collection procedures and chain of custody practices are questionable and there appears to be little, if any, enforcement against the use of drugs and alcohol by drivers on the Mexican side of the border.

This concludes my testimony, and I am happy to answer any questions you may have.

Mrs. NAPOLITANO. Thank you, Mr. McLuckie, and I am lucky I get all three of you.

I have a very, very open mind about the issues because I did work in my prior life in the transportation department and I did have an opportunity to ask a lot of questions of the State transportation, California Transportation Commission.

We have heard a lot of the issues continually being brought up. In working through some of these things, and I understand, Mr. McLuckie, the issue. That is why I brought up the medical concept of it because there are some things that will affect the analysis, the final analysis of the urine as regards drugs that they have to take to continue being able to work, whether it is back problem, whether it is schizophrenia, whatever it is.

My concern is that we are not balancing them to be able to allow that employee the opportunity to continue making a living and operating safely. Do you want to address that?

Mr. MCLUCKIE. Well, I think it is very important that the employee have the opportunity to have any positive result reviewed by the medical review officer in the instance especially where he is on a prescription drug. As you say, in the trucking industry, the rate of injury and illness is very high, and these drivers take these drugs to stay on the road and to be able to make a living. So we encourage the continued examination of that issue.

Mrs. NAPOLITANO. Especially for long haul.

Mr. MCLUCKIE. Yes.

Mrs. NAPOLITANO. Mr. Woodruff, the current drug and alcohol regulations require new employers to contact former employers regarding the job's application, especially for drug history. How responsive have former employers been to the requests and what enforcement actions, if any, or penalties for those employers who are non-responsive and, if there are not, should there be?

Mr. WOODRUFF. A very good question; in October of 2004, FMCSA implemented a safety performance history regulation and, following implementation of that particular regulation, the responsiveness of former motor carrier employers has greatly improved.

I cannot speak for the whole ATA membership population, but for J.B. Hunt, we would encounter perhaps one to two employers per month. We hire five to six hundred drivers a month, and only one to two employers that would not supply the information that they are required to supply under the regulations. We do report those to the associate administrator of FMCSA when they fail to meet their regulatory obligation to provide drug and alcohol data.

We often find ourselves in a role of educating the other motor carriers as to what their regulatory responsibilities are. So we work through that. We normally get those.

Really, a bigger issue that I believe we encounter with regards to having the information that we need to have available and the regulations require us to obtain is with carriers that go out of business, that are bankrupt or no longer able to be contacted. In 2004, 2005 and 2006, those three years total, there were over 4,700 trucking company bankruptcies of carriers with more than 10 trucks.

So the number is even more significant when you consider the number of bankruptcies or closures of companies with less than 10 trucks. But in that three year period, 4,700 motor carriers with more than 10 trucks whose drug and alcohol data is not available to future motor carriers that need that data.

With regards to J.B. Hunt, we experience about 20 percent of the driver applicants have one more driving jobs in the past three years that we are unable to verify because that employer is no longer available for us to talk to. So we believe through having a central repository, that that data would be in the repository and whether or not the company closes business or moves or changes their phone number, that that data would still be available for future motor carriers to access.

Mrs. NAPOLITANO. The ATA is recommending the national clearinghouse be set up for positive and refused drug and alcohol tests. Why does this have to be on a national level and can that be something that will be helpful to identify those repeat offender who should not be driving?

Mr. WOODRUFF. That is another very good question. The drug and alcohol regulations that the trucking industry must comply with is a national program, and it becomes very problematic for the industry when they have to begin to start to comply with potentially 50 different State rules and regulations.

As we have heard in the testimony, there is somewhere between five and seven different States that have positive results reporting requirements, and many of those are different. So that becomes very complicated for a motor carrier doing business throughout the United States to identify how to comply with a varied set of regulatory requirements, where a national clearinghouse would have one standard for us to comply with.

Mrs. NAPOLITANO. Gentlemen?

Mr. CRAIG. Yes, if I may. You know, certainly, we see that there are obviously some drug users out there that slip through the cracks, and I was rather surprised by some of the comments I heard today as well.

With this national clearinghouse, we do have some real concerns. Obviously, privacy is very obvious.

Mrs. NAPOLITANO. Sir, how would you address the privacy issue?

Mr. CRAIG. Well certainly, and I have read the draft language of the legislation that came from ATA, and they talk about the privacy issues. It is certainly difficult to deal with that, but one thing that would have to certainly be done is that the system be very secure, that the access to the system be limited to only those who have authorization, a real right to know.

Of course, one of the problems you get into there is how do you know that these individuals really have authorization, really have the right to know over time and then who is going to catch these folks that violate the system and enter the system when they don't really have authorization. Then we also question who is going to enforce against anyone who violates the requirements.

Mrs. NAPOLITANO. That would go back to, I guess, a funded mandate for the States to be able to establish such a network with the clearinghouse and be able to do it with the trucking companies to be able to ensure that their drivers were complying. Am I not correct?

Mr. CRAIG. Well, certainly, and if I might also add, as I started to say earlier, we also see some other problems with the process. We certainly agree that collection sites are by far the weakest link in the whole system.

We have had some experiences with the collection sites that have given the drivers, who came in to test, erroneous information. A good example of that and a repeated example of that is a driver who goes in and for whatever reason cannot provide an adequate amount of specimen the first try. They are supposed to be required and instructed to drink water and stay there for at least three hours and attempt again.

Many times, we have heard of instances where the collection site personnel simply say, oh, it is okay. Come back tomorrow.

The problem is once that driver leaves, that is determined a refusal which, as you know, is equivalent to a positive result. That is a very big issue.

Also, another problem that we have is even with MROs, and they haven't really been addressed. That is the medical review officers. They really are the last word in this whole process. If there is an MRO, and we have experienced a couple of cases at least of MROs who have made wrong judgments on whether or not a test result should be confirmed as positive and entered that as positive. There is very, very little recourse for drivers to clear their names after that has happened.

Mrs. NAPOLITANO. Shouldn't it be then part of what they should be looking at is how the drivers may be able to clear their record if they can prove or through further testing be able to clarify?

Mr. CRAIG. Absolutely. Possibly there could be, as anyone would do when they get a medical opinion, get a second opinion. Maybe they should be able to dispute the first MRO's determination of a confirmed positive.

Another thing is we have had several members who were very adamant that, to their knowledge, they could not possibly have tested positive for drugs. The MRO confirms that it is positive, and they have been very adamant and wanted to have these samples, DNA tested.

Well, we have to tell them, you can go to that trouble and expense if you like. The problem is it will do no good because it is not allowed under the rules.

Mrs. NAPOLITANO. Mr. McLuckie?

Mr. MCLUCKIE. Two points, Congresswoman: One is we would prefer a national system with national standards, uniform stand-

ards versus 50 State systems that all might have different criteria and different requirements.

Secondly, we would be concerned about devising a method for expunging the records of drivers who have undergone treatment and rehabilitation. Employers and medical review officers only keep records for a certain period of time. We would have to look at how long a person might be on this register if they have gone through a rehab process and would it be fair to keep them on this, keep their violation on that list forever.

Mrs. NAPOLITANO. What would you consider adequate?

Mr. MCLUCKIE. I would say somewhere in the period of three to five years.

Mrs. NAPOLITANO. If they had no further violations?

Mr. MCLUCKIE. Right, correct.

Mrs. NAPOLITANO. Very interesting, there is a lot of substance in that.

Mr. Craig, the NTSB has said that the owner-operators are in the precarious position of overseeing their own substance abuse program. The protections are in place to ensure that all of the drug and alcohol program requirements are enforced including those that mean putting a driver out of service after a positive test. How do you feel on that?

Mr. CRAIG. Well, certainly, as I have mentioned earlier, we do have a consortium that OOIDA runs, and we have seen that as being a problem.

Really, under the rules as they are right now, if someone refuses to test, there are certain exceptions where the C/TPA, in an instance where you have a one truck-one driver motor carrier, will enter that information as a refusal in the system, but the rules allow us to go no further. It takes the designated employer representative to order that driver out of service for safety-sensitive duties and go through the SAP process. Under those rules, the consortium has no method of doing that.

Mrs. NAPOLITANO. But in the reality of things, not all the independent truck drivers belong to the association.

Mr. CRAIG. No, the don't. Basically, for a one truck-one driver motor carrier, though, they would have to participate in a random selection pool of two or more drivers. Obviously, as a single one, you can't do a random selection. So that is how the vast majority.

I don't know of anyone who could not participate with a consortium or a third party administrator or some sort so they could participate within their drug testing pool.

Mrs. NAPOLITANO. Thank you.

Mr. Boozman.

Mr. BOOZMAN. Thank you, Madam Chair.

Mr. Woodruff, would you describe how hair testing, how that method sometimes is more advantageous over the urine test?

Mr. WOODRUFF. Yes, Congressman Boozman. J.B. Hunt has been conducting hair testing of drivers for about a year now, and we are conducting hair testing along with urine testing. We have to do urine testing to comply with the Federal regulations.

We do hair testing under a company policy test. We test for the same five-panel drugs that the DOT urine test requires. We also use a medical review officer review of those results as well, involv-

ing the interview of any drivers who have a positive result. So we are trying to follow the best that we can a similar protocol as DOT in terms of the drugs we test for, the cutoff levels and the process.

We are finding a higher rate of positive drug use when we use a hair specimen. Hair specimens are very difficult to adulterate and to substitute, so we would like to see that as an alternative specimen for complying with the Federal requirements.

Mr. BOOZMAN. I guess the follow-up would be what steps should be taken by Congress and Government agencies to encourage the use of alternative specimen testing? Do you have any?

Mr. WOODRUFF. We would like to see Congress direct SAMHSA and DOT to finalize rules that would permit alternative specimens to be used by motor carriers if they so choose.

Mr. BOOZMAN. Thank you very much.

Mr. WOODRUFF. Thank you.

Mr. BOOZMAN. Let me ask all of you. I am going to start with Mr. Woodruff.

The current legislation authorizing transportation drug and alcohol testing has been in existence for several years. If Congress was to advocate a study of the effectiveness of the Government-mandated drug and alcohol programs, what are some of the areas that you all feel like should be examined?

Mr. WOODRUFF. I will begin and say that we have heard a lot of numbers here today as to what the real positive rate is for drug use, illegal drug use among truck drivers. Probably the low end is 2 percent which is the positive random rate that FMCSA reports, and then we have heard numbers as high as maybe 10 percent and some others in between. The reality is that the positive rate for drivers is probably somewhere in the middle there.

In terms of studying effectiveness, I think it would be a good idea that we do look at these alternative specimens to determine whether or not they could provide us a better result and a more accurate result. So that would be where I would start.

Then, of course, we feel like the national repository would give the motor carriers the tools that they need to help be part of the solution to this as opposed to putting this data into an FMCSA database that only enforcement people have access to.

This is currently a requirement of the driver to disclose, the motor carrier to inquire with other prior motor carriers and a requirement for other former motor carriers to provide that data, but we should be making rules that make it easier for us to do what the regulations require of us.

Mr. BOOZMAN. Mr. Craig?

Mr. CRAIG. Yes, thank you, Congressman Boozman. One thing, obviously, the rules are designed all across the board to prevent accidents and injuries and fatalities certainly. What we would like to see is take a closer look at how the testing rates really correlate with accidents.

We have heard some statistics thrown around there, but I don't know if the Agency has really been taking, FMCSA has really been taking a close enough look at that. I don't know just how much. I guess you could take a look at post-accident, obviously, statistics and see how they compare with the random selection rate.

Obviously, another area too is the collection sites. As I mentioned, we see problems on one side and on the other, and they definitely need to be cleaned up.

There is one other thing too that we have considered that might work quite well, that would have a dual effect. The vast majority of truckers or commercial drivers in general do not use drugs. However, they are painted with the same brush and must participate in the same program, the same random selection rate and everything. Currently, the selection rate for random drug testing is at 50 percent.

What we would kind of like to see is a system whereby those individuals who have passed a certain number of tests with negative results, pick a number, four or five, and have proven themselves to be non-drug users, to be placed into a lower random selection pool, a lower percentage selection rate of, say, 25 percent. That would reward the non-drug users and, at the same time, it would help out because they wouldn't be diluting the 50 percent testing pool.

We think that that would have a very good effect on the random selection process in the future.

Mr. BOOZMAN. Thank you.

I know we have to go, Madam Chair. We have a vote on.

Do you have anything in one minute that you would like to add?

Mr. MCLUCKIE. Certainly, Congressman. I think the testimony today supports collection facility oversight, the possible licensing of laboratory personnel, and getting these adulterating products off the market.

We would certainly look at the use of alternative specimens. It might relieve some of the privacy issues related to urine samples, and we would certainly be receptive to looking at those kinds of things.

Mr. BOOZMAN. Thank you very much.

Thank you, Madam Chair.

Mrs. NAPOLITANO. Thank you to the panel. I think we do have to go and vote, and I don't think you want to sit here until next week because we are leaving after that.

I appreciate your testimony. There will be some questions sent to you. We would appreciate a prompt reply. The record will remain open for 10 work days for additional input from the panel, Members and anybody who has an interest in this matter.

With that, this hearing is adjourned. Thank you, gentlemen.

[Whereupon, at 2:05 p.m., the Subcommittee was adjourned.]

Subcommittee on Highways & Transit

Hearing on "Drug and Alcohol Testing of Commercial Motor Vehicle Drivers"
Thursday, November 1, 2007

Statement – Congressman Jason Altmire (PA-04)

Thank you, Mr. Chairman, for holding this hearing today on the drug and alcohol testing policies in place for commercial motor vehicle drivers. Welcome to today's witnesses. Thank you for your time and willingness to provide us with your views and expertise on this issue.

As I understand it, the committee staff has reviewed the conditions of facilities that perform urine collections for drug tests regulated by the Department of Transportation. The review exposed some potential vulnerabilities in the testing process that could allow drug-using commercial drivers to hide their drug use. I share the Chairman's concern about this issue and the safety consequences that this could have on our nation's highways. I look forward to today's testimony to see how we can improve current drug and alcohol testing.

Thank you again Mr. Chairman. I yield back the balance of my time.

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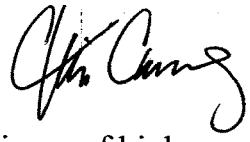

Good Morning Mr. Chairman, the issue of highway safety, in general, is an extremely serious issue that we have examined in several different hearings this year. Adequately addressing the problem of illicit drug use by commercial drivers certainly is an important component of ensuring the safety of the motoring pubic. Mr. Chairman, I want to thank you for holding this hearing today and I hope to learn more about the current inadequacies of commercial drug testing programs and potential remedies.

Ensuring the safe operation of motor carriers trucks and buses is a complicated task that involves many partners, including federal and state agencies, truck and bus companies, as well as the average motorist.

During 2005, more Americans were killed by accidents involving large trucks and buses than were killed on 9/11. And during that same time, nearly 114,000 Americans were injured. This is unacceptable. The solution to this tragedy is going to take the concerted effort of all involved. Congress has the responsibility to ensure

that the Federal Motor Carrier Safety Administration is properly focused on the problem and that they have all the necessary tools at their disposal to ensure the public's safety on our highways.

Again Mr. Chairman, I thank you for holding this hearing today and I look forward to the testimony of the witnesses you've assembled before us.

STATEMENT OF
THE HONORABLE PETER A. DEFAZIO, CHAIRMAN
SUBCOMMITTEE ON HIGHWAYS AND TRANSIT

OVERSIGHT AND INVESTIGATIONS HEARING ON
"DRUG AND ALCOHOL TESTING OF COMMERCIAL MOTOR VEHICLE DRIVERS"
NOVEMBER 1, 2007

I want to thank all the panelists who have agreed to testify today on this very important topic. I especially want to thank Sgt. Alan Hageman who has traveled all the way from my home state of Oregon to provide details on Operation Trucker Check.

No one wants drugged or drunk commercial drivers operating on our nation's highways. The industry has come a long way in reducing the incidence of drug use by commercial drivers, but it hasn't come far enough. Loopholes exist in the form of loose oversight of the testing process--and drivers on drugs may be taking advantage of these loopholes to evade detection. These gaps must be closed and I look forward to hearing from FMCSA today on how it intends to make this happen.

In addition to loopholes in FMCSA's oversight, during the course of this investigation a number of other problems with the motor carrier industry's drug testing programs have emerged. As we will hear today, GAO found multiple opportunities to cheat on a drug test at nearly every collection facility they

investigated. In some cases products like bleach and Lysol were stored in the restroom where the investigator was sent to provide a specimen. In others, collectors failed to comply with regulations by not having the investigator empty his pockets. Drivers that are using drugs can take advantage of these lapses in protocol to cheat on their drug tests. For example, the driver could add bleach to his specimen or dilute the sample. At the very least, the lab will report the result as an "invalid" sample, meaning inconsistent with the properties of human urine. The driver will be asked to provide a new specimen, but will have had enough time to dry out and the drugs to clear his system.

Beyond products that may be available at the collection facility, employees have been very successful at sneaking in products manufactured specifically to beat a drug test. As we will learn today, synthetic urine and chemical adulterants are both very effective at evading lab detection and are as easy to purchase as doing a "Google" search on the Internet.

Oversight by FMCSA is too lax – last year compliance reviews were done on only 2 percent of the entire motor carrier industry. And those reviews raised serious red flags about how carriers are managing their drug and alcohol testing programs.

Drivers are able to hop from job-to-job without their past drug-use history hopping along with them. They simply don't list jobs where they failed a drug test on their employment history. And background checks on these drivers are often pointless as former employers are notoriously unresponsive to requests for prior drug-use history.

More than one-half of the motor carrier industry is comprised of owner-operators. Just like other carriers, owner-operators are required to comply with Federal requirements for drug and alcohol testing. Owner-operators are thus in the precarious position of overseeing their own substance abuse program. The rules require an employer to take a driver who has failed a drug test out of service until he or she completes the return-to-duty process. This arrangement requires owner-operators who are using drugs to remove themselves from driving; an unlikely scenario as they have already shown disregard for the rules by using drugs in the first place.

Our highways are no place for commercial drivers who abuse drugs or alcohol. When drugged drivers are behind the wheel, the lives and welfare of the traveling public are at risk. I hope today's hearing will bring us closer to closing the loopholes that allow drugged commercial drivers to slip through the cracks.

Doris O. Matsui

Statement by Congresswoman Doris O. Matsui
Hearing on "Drug and Alcohol Testing of Commercial Motor Vehicle Drivers"
November 1, 2007

Thank you Chairman DeFazio for calling this important hearing.

I am proud that safety is a top priority of the Committee and the Chairman. I share this commitment to safety.

Safety is not just about the soundness of the physical infrastructure. Although we have witnessed how the collapse of the I-35 bridge can devastate a community and a nation.

Broadly speaking, safety on our nation's transportation infrastructure is only as secure as the people who use and operate it----and the judgment they exhibit.

It is vitally important that we have training programs in place, inspection standards and procedures and sound technology to improve our physical infrastructure.

I am very interested in hearing from today's witnesses. Commercial motor vehicle drivers are playing an increasingly important---and visible---- role within our communities. More and more these drivers are transporting our children, grandchildren, friends and family on our nation's highways.

We need the most qualified and safest drivers behind the wheel.

Having said that, safety is just an empty word, if federal agencies and companies alike do not have the commitment and follow through to oversee and fully implement the safety programs this committee has authorized.

We all have a stake in the safety on our highways. I look forward hearing from today's witnesses. Thank you. Mr. Chairman.

Statement of Rep. Harry Mitchell
House Transportation and Infrastructure Committee
Subcommittee on Highways and Transit
11/1/07

--Thank you Mr. Chairman.

--Earlier this year, our committee examined risks associated with a controversial Department of Transportation pilot program to give Mexican trucks full access to our nation's highway system.

--At the time we expressed concern about the safety standards associated with the program.

--In particular, we worried about degree to which drug tests for commercial truck drivers in Mexico failed to meet American standards.

--We were reminded of a 2005 audit by the Department of Transportation Office of Inspector General that found Mexico having problems developing an adequate system to test commercial drivers for drug and alcohol use.

--We were reminded that the same audit found Mexico-domiciled motor carriers had submitted

inaccurate or incomplete data on both vehicles and drivers.

--Even more alarming, we heard reports of Mexican truckers driving 16-20 hours in a single day, using methamphetamine, cocaine and other stimulants to maintain awareness.

--We were so concerned that, in May, we passed H.R. 1773, the Safe American Roads Act, to require the DOT to ensure that Mexican trucks participating in the new pilot program meet United States safety standards.

--I was proud to cosponsor that bill, and vote for it.

--But based on what we are learning today about the state of U.S. drug testing for commercial truck drivers, frankly, I'm worried U.S. safety standards may not be enough.

--The Government Accountability Office (GAO) is sharing with us today the results of its undercover investigation of collection facilities for drug tests of commercial truck drivers, and Mr. Chairman, these results are disturbing.

Fully 75 percent of these facilities tested failed to adequately block access to substances that could be used to adulterate or dilute specimens.

--This is clearly unacceptable.

--Drug use by commercial drivers places the driving public at risk. We need to keep our roads safe.

--I want to thank the GAO for conducting this investigation, and to this committee for helping bring these important findings to light.

--I look forward to hearing from our witnesses.

-- I yield back.

STATEMENT OF
THE HONORABLE JAMES L. OBERSTAR, CHAIRMAN
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE

SUBCOMMITTEE ON HIGHWAYS AND TRANSIT
OVERSIGHT AND INVESTIGATIONS HEARING ON
"DRUG AND ALCOHOL TESTING OF COMMERCIAL MOTOR VEHICLE DRIVERS"
NOVEMBER 1, 2007

Good morning. I want to thank all of the witnesses who have agreed to appear before the Subcommittee this morning. Our Committee has a long-standing interest in DOT's Drug and Alcohol Testing Rules. In fact, we were instrumental in creating those rules in the late 1980's. Today we are here to talk about whether these rules are working. And we know that they are – the number of commercial drivers using drugs has certainly gone down since those rules were passed. But they're not working well enough. We know that some drivers are still using drugs.

First, let me say that this hearing is not about morality. It is not about character. It is not even about breaking the law. It is about safety.

Crashes involving commercial motor carriers account for 13 percent of all highway deaths each year. Illegal drugs account for a small percentage of those crashes, but it is well documented how severely drugs such as cocaine, marijuana, and speed impair driving ability. If drivers are able to use these drugs and get behind the

wheel of an 80,000 vehicle, then something isn't working. And this Committee takes that very, very seriously.

In February 2007, Fox News in Minneapolis conducted an investigation of drug testing facilities – the sites where urine is collected for testing. What they found at those facilities raised questions about the integrity of the tests. The Fox reporter wasn't required to empty his pockets, he was sent to a public restroom that other building tenants had access to, and the restroom wasn't searched first to make sure nothing had been hidden there. When collectors do not follow protocols or facilities do not meet Federal requirements, an opportunity exists for drug users to escape detection. And drug users will jump on that opportunity.

In 2005, HHS issued guidance to collectors to help stem the cheating problem. They said, quote, "A drug user, who is part of a workplace drug testing program, will most likely try to defeat the drug test if given the opportunity."

And what Fox News found, and what GAO is going to tell us today, is that there is plenty of opportunity. And there are plenty of products out there that make it easy to take advantage of that opportunity.

GAO estimates that there are more than 400 products and gadgets readily available to help a drug user beat a drug test. These are products to add to a urine sample to mask drugs, or to water down a urine sample to reduce the toxicity level below detection. There is even synthetic urine which is virtually indistinguishable from human urine. These products have names like "Whizzies," "UrineLuck," and "Stealth." They are sold on websites called, "pass-your-drug-test.com," "1-Hour-Detox.com," and "Whizzinator.com." Committee investigators even found human urine for sale on "Craigslist," and adulterants on eBay and Amazon. These products are sold with the specific intent of helping someone defraud a drug test. There is simply no other use for these products!

HHS admits that their tests can't pick up many of these products. And once they do, the manufacturers just change the formula. It's a cat and mouse game, with the manufacturers always staying just one step ahead of the labs. Because these products fool the labs, there is no way of telling how widespread the cheating is. As HHS says, quote, "we don't know what we don't know."

Because we don't know how many drivers are cheating, we can't tell how many drivers are using drugs. By FMCSA estimates, about 2 percent of drivers test positive for drugs each year in motor carrier testing programs. But there are two other studies that suggest a much higher number. The Oregon State Police conducted two

operations – one last spring, and one this fall – where they anonymously tested about 400 drivers. They found evidence of illicit drugs in nearly 10 percent of truck drivers. In addition, HHS published its occupational drug use survey this past June. In that survey, 7.4 percent of heavy truck drivers reported that they had used illicit drugs in the prior month.

Even using the most conservative estimate – the 2 percent rate that FMCSA reports -- this still equates to 200,000 drivers. Even if only one-half of those CDL holders are currently operating in a commercial capacity and subject to the federal drug and alcohol testing rules, that is still 100,000 drug-using drivers on the roads. That statistic is indefensible.

Another loophole exists that enables drivers who *have* been caught using drugs to keep on driving without going through the rehabilitation process. In May 1999, a motorcoach transporting 43 passengers crashed in New Orleans, Louisiana, killing 22 passengers. The driver tested positive for marijuana. The tragedy was that this could have been prevented. When the company hired the driver, it did not know that the driver had failed four prior drug tests, including two for which he was fired. The driver simply omitted those employers from his employment history. Obtaining a job applicant's prior drug history relies heavily on driver self-reporting. Because there are no reliable alternative sources from which employers can obtain this history, drug-

using drivers are able to hop from job to job, while leaving their drug-use histories behind.

It is clear we've come a long way to making our roads safer by reducing the number of drivers operating under the influence of drugs and alcohol. But we need to go farther. It is clear that there are still ways for drivers to use illicit drugs and continue to drive. We have witnesses from across the industry today who all have ideas for how to first, define and measure the problem; and second, identify and implement solutions. I look forward to hearing this discussion.

Testimony of

RICK CRAIG
DIRECTOR, REGULATORY AFFAIRS
OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION

Before the

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
SUBCOMMITTEE ON HIGHWAYS AND TRANSIT

Regarding

DRUG & ALCOHOL TESTING OF
COMMERCIAL MOTOR VEHICLE DRIVERS

NOVEMBER 1, 2007

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Submitted by

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Good morning Chairman Defazio, Ranking Member Duncan and members of the Subcommittee. Thank you for inviting me to testify this morning on a subject that is of great significance to the men and women who the United States depends upon to move our goods and commodities as well as to keep our nation's economy healthy and vibrant.

My name is Rick Craig. I have been involved with the trucking industry for more than 33 years, first as a truck owner-operator; and then as a representative for our nation's small-business trucking professionals and professional truck drivers. I currently serve as the Director of Regulatory Affairs for the Owner-Operator Independent Drivers Association (OOIDA).

OOIDA is a not-for-profit corporation established in 1973, with its principal place of business in Grain Valley, Missouri. OOIDA is the national trade association representing the interests of independent owner-operators and professional drivers on all issues that affect small-business truckers. The more than 157,000 members of OOIDA are small-business men and women and professional truck drivers located in all 50 states who collectively own and operate more than 240,000 individual heavy-duty trucks. Small businesses dominate the trucking industry in the United States. One-truck motor carriers represent nearly half the total number of active motor carriers operating our country while approximately 96 percent of U.S. motor carriers operate 20 or fewer trucks.

OOIDA believes that drug and alcohol testing for commercial motor vehicle operators has played an important role in raising the level of safety on our nation's highways. However, there are problems with existing regulations, procedures and enforcement that should be addressed to ensure that testing programs are effectively employed while also mindful of the significant harm that may be caused to a trucker's life and livelihood by errant administration.

Information, Education and Training

Drug and alcohol testing regulations that pertain to commercial motor vehicle operators are contained in two separate parts of Title 49 of the Code of Federal Regulations. The provisions of Part 40 cover all parties who conduct drug and alcohol tests required by the U.S. Department of Transportation (DOT) including transportation employers, safety-sensitive transportation employees and service agents. Part 382 is specific to commercial motor vehicle drivers, their motor carrier employers and service agents that fall under the authority of the Federal Motor Carrier Safety Administration (FMCSA). The sheer volume and complexity of the regulations make it extremely difficult for motor carriers to run their own testing programs. Thus, nearly all carriers rely on service agents to administer various aspects of their programs.

Of the many benefit programs and services offered to its membership, OOIDA administers a drug and alcohol testing consortium/third party administrator program (C/TPA). OOIDA's C/TPA provides a full range of services to keep its motor carrier clients and their commercial drivers in compliance with federal drug and alcohol testing requirements, including the dissemination of educational information related to testing and reporting requirements. OOIDA's C/TPA provides all of its members with required educational and training

information including a driver handbook, motor carrier testing policy and a compact disk containing motor carrier supervisor training (*copies of those materials are included with this testimony*). Also, C/TPA personnel and other appropriate association staff are available during extended business hours to answer questions and assist in solving any problems related to the testing rules.

Additionally, OOIDA publishes an instructional booklet for members who are considering obtaining federal motor carrier operating authority that describes the requirements for establishing and maintaining a compliant testing program. The OOIDA Foundation also conducts business seminars that include sessions on drug and alcohol regulations as a part of the standard curriculum.

Problems with Drug and Alcohol Testing

Since its inception in 1990, OOIDA's C/TPA has experienced a multitude of problems with the federal drug and alcohol testing regulations. Most problems are relatively minor and correctable, but nonetheless may serve to illustrate the various reasons why certain carriers and drivers fail to comply. Certain other problems are much more serious and may substantially impact or even destroy a driver's ability to continue to pursue trucking as a career. As I previously mentioned, the sheer volume and complexity as well as the language of the regulations often cause confusion among carriers, drivers, collection site personnel, Medical Review Officers (MROs), Substance Abuse Professionals (SAPs), and federal and state investigators that may result in violations of the rules. Problems that OOIDA's C/TPA has encountered include:

- Carriers. Oftentimes, carriers do not follow through with their obligations and responsibilities, which include (i) providing the required education and training to their drivers and supervisors, (ii) adequately instructing drivers in the carriers' policies and procedures including what to do in the event a test is required, (iii) providing the required referral information, and (iv) responding to other carriers when requesting driver testing history for possible employment.

- Drivers. Many drivers do not understand the educational materials, think the regulations do not apply to them, or simply ignore the obligation to test.

- Specimen Collection. It is often not recognized that collection site personnel can, and sometimes do, make mistakes in the collection process. Personnel have been known to improperly complete the Custody and Control Form (CCF) and provide false instructions to drivers.

- Improper Training for Officials. Currently, there is no certification process for MRO training and knowledge or for SAP training and knowledge.

- Lack of Uniformity. Some federal and state investigators demand records that are not required by the regulations.

The collection process has always been, and remains to be the weakest link in the DOT testing program. While the Department of Health and Human Services (HHS) must certify laboratories that conduct specimen testing, there are no certification requirements for collection sites or collection site personnel. The rules provide for nothing more than a "faith based" approach to available site facilities as well as training and qualification of collection site personnel. Site management itself is trusted to follow the multitude of requirements with little or no oversight. The only real checks and balances in place involve a review upon receipt by laboratory personnel of the CCF to catch obvious paperwork mistakes or omissions as well as to check for any obvious problems with a specimen.

To meet the criteria for a collection facility in the DOT drug and alcohol testing program, collection facilities need only comply with the requirements of the Federal Motor Carrier Safety Regulations (FMCSR), 49 CFR §40.41. There is little to no oversight of those who are "qualified" to act as a specimen collector in the DOT testing program. To act as a specimen collector an individual needs only to meet the training requirements for collectors in the DOT testing program (§40.33). When a collector makes an error during the collection process that results in the cancellation of a test, that collector must undergo error correction training that must take place within 30 days of the date that collector was notified by an MRO of the need to undergo such training. If this training does not take place by the end of that 30 day window, the collector is no longer qualified to conduct DOT specimen collections. DOT regulations also require specimen collectors to undergo refresher training no less frequently than every 5 years from the date the collector originally satisfied the requirements to conduct DOT collections. Employing facilities are required to maintain documentation to demonstrate that their collectors currently meet all DOT requirements. However, it is unclear if any federal agency audits collection facilities to ensure that they and their employees are compliant with DOT regulations. It is also unclear how many specimen collectors are performing DOT collections, but are no longer qualified to do so.

The use of masking agents and specimen adulterant products by individuals hoping to alter or invalidate the outcome of drug and alcohol tests has long been a problem. While the availability of products that are used to subvert drug tests seem to be more prevalent in the internet age, drug tests are increasingly more effective at detecting masking agents and adulterants. These substances can be and are often tested for in specimens along with illegal drugs. Due to the expanded use of such products the FMCSA revised §40.91 and §40.93 to combat their expanded use. If the validity testing procedures set forth by FMCSA are not going far enough to reject specimens that contain such products, the agency should initiate a rulemaking process to modify existing regulations to provide for more effective countermeasures.

Another problem with existing testing regulations and procedures that is of significant concern to OOIDA is the limited opportunities for recourse provided for drivers who test positive and wish to challenge the test result. The only recourse currently available is to have a test completed on a split specimen, which is simply half of the original specimen. This by no means ensures a valid outcome. For example, if a collection facility incorrectly matches a specimen with the wrong donor and the specimen tests positive, a split specimen test will just result in another positive. If a driver is confident that they have not taken any prohibited

substances, it is unclear why the DOT does not accept DNA testing to either prove or disprove that the specimen belongs to the correct donor.

Owner-Operators

Owner-operators commonly lease their equipment and their driving services to motor carriers that operate multiple trucks within their fleet. It is rare for any one owner-operator to be leased to more than one carrier at any given time. Any carrier that leases an owner-operator assumes the responsibility for compliance with all safety regulations, no differently than with their employed drivers. In fact, the FMCSRs specifically include independent contractors, or owner-operators, in the definition of an employee. In a case where an owner-operator leases to more than one carrier at the same time, each carrier is responsible for compliance with the testing rules and the driver must be in each carrier's random selection pool, increasing the odds that the owner-operator will be selected for testing.

Motor carriers are allowed to, and primarily do, contract with service agents to administer, to the extent allowed, their drug and alcohol testing programs. However, carriers are ultimately responsible for ensuring that service agents meet the qualifications set forth in the rules. While a service agent may provide educational materials to the carrier, it is the responsibility of the carrier to provide the materials to its drivers that explain the rules as well as the carrier's policies and procedures. More and more owner-operators are obtaining operating authority and becoming a motor carrier while continuing to perform driving duties. A one truck, one driver motor carrier must comply with both the requirements that apply to employers and the requirements that apply to drivers. Since the driver and carrier management are one in the same, and the carrier must establish the testing program and carrier policies, it is likely that as the driver this individual has a greater awareness of drug and alcohol testing requirements than many others in the trucking industry.

A single-employee carrier must participate in a random drug and alcohol testing program of two or more covered employees in a random testing selection pool. This is accomplished by contracting with a C/TPA to administer the testing program where that carrier participates in the C/TPA's random pool. While service agents are prohibited from performing certain functions required of a motor carrier, there are exceptions where a C/TPA can and does perform certain single-employee carrier duties to ensure the integrity of the carrier's testing program. All agreements between carriers and service agents are deemed, as a matter of law, to require compliance with the drug and alcohol testing regulations.

All carriers, regardless of size, are required to remove a driver from performing safety sensitive functions in the event of a refusal to test, an alcohol test result of 0.04 or higher, a positive drug test result, or a verified or adulterated drug test result. Each carrier must assign a Designated Employer Representative (DER) to oversee this function and various other aspects of the carrier's testing program. Reliance upon a single employee carrier to remove him or herself from duty is little different than simply accepting that any other DER will remove a driver employee from safety sensitive duty.

Oregon's Operation Trucker Check

The state of Oregon reported that voluntary, anonymous urine specimens collected from commercial drivers during "Operation Trucker Check" conducted in both April and September of 2007 returned positive test results for certain types of drugs in nearly 1 out of 10 specimens tested. The tests were reportedly performed by the Oregon State Police Forensic Services Division (FSD). A nearly 10 percent positive testing rate far exceeds the positive rate of less than 2 percent historically reported under the DOT controlled substances testing program. OOIDA has been unable to obtain a comprehensive report that describes the methodology Oregon used to collect and test the specimens. However, there are viable explanations as to why the presence of drugs found in the Oregon efforts exceeds the positive results found under the DOT program.

There are numerous safeguards built into the DOT testing criteria. One such safeguard provides for specific cutoff concentrations for certain drugs or drug metabolites for which testing is required. These cutoff levels are consistent with the standard levels of numerous other national programs. The cutoff levels are employed to minimize the incidence of false positive tests that may result from "innocent" activities such as the ingestion of certain legal substances. A test result may indicate some presence of one or more drugs or drug metabolites, however, under the DOT requirements if the result falls below a cutoff concentration, the test result is considered negative. It is OOIDA's understanding that FSD used no cutoff concentration criteria to guard against false positive test results.

The DOT regulations provide another safeguard by requiring that a confirmation test be performed on all specimens that return a positive result for drugs or drug metabolites at or above the cutoff concentrations discovered during an initial test. The confirmation test involves a more precise analysis of the specimen. It is OOIDA's understanding that FSD performed no confirmation tests on the positive specimens to validate the test results.

The DOT rules also require that a Medical Review Officer (MRO) evaluate test results and determine the accuracy and integrity of the entire collection and testing process. An important part of the MRO's duties involves making contact with a driver for which a positive test result is confirmed to inquire about any medications the driver may have used, or determine whether there is any other legitimate medical explanation. Again, there are many substances that can cause a false positive that could be ruled out during the MRO interview process. These include legally prescribed substances that a doctor has specifically noted to a driver will not hinder their ability to operate a commercial motor vehicle. Under an anonymous collection and testing regime such as Oregon describes there can be no such follow up to determine whether the result is a false positive.

Proposal for a National Clearinghouse

OOIDA fully supports the goal of striving to make the trucking industry free of drug and alcohol abuse. However, OOIDA remains unconvinced of the need for a national clearinghouse for positive drug and alcohol testing results. Not only are we concerned about the effectiveness of such a clearinghouse in actually combating existing drug and alcohol

abuse problems, OOIDA is also concerned about the serious privacy implications of this proposal. Unless the serious operational, security and logistical oversight complications are adequately addressed the proposal has the real potential to negatively impact drivers far beyond the scope of just those who abuse drugs and alcohol.

As previously noted, OOIDA is concerned about the effectiveness of reducing drug and alcohol abuse. The only obvious effect of this proposal is to require that names be compiled in a central database controlled by either the federal government or some private entity. It does not ensure that a carrier removes a violating driver from performing safety functions, nor does it otherwise enhance the existing drug testing requirements. The only thing that this proposal appears to accomplish is to lift a burden from motor carriers' shoulders and reduce carriers' liability with regard to their often inadequate hiring practices. Furthermore, it should be noted that the drug and alcohol abuse rate of the trucking industry is far lower than that of many other industries, yet this proposal would create a costly system with numerous operational and logistical complications.

This proposal raises considerable privacy, operational, security, and oversight concerns. Conducting unreasonable searches and seizures, including those inside the human body, are considered unconstitutional and only when certain public safety considerations are present may the government conduct or require such searches be conducted. OOIDA does not dispute the fact that there is a legitimate governmental interest in ensuring that those who drive large vehicles are drug and alcohol free and capable of operating such vehicles. However, compiling positive test results in a clearinghouse raises the sort of the privacy implications for drivers that the Constitution is designed to protect. How exactly will this information be used? Who will have access to this clearing house? Who will ensure that the system is accessed only by those with authority to do so? How will the government secure the clearinghouse from "hackers" who wish to gain access and view such personal information? Who ensures the accuracy of the reported results? What is to prevent a carrier with a personal vendetta against a driver from falsely reporting a violation of the alcohol testing rules? Once a false positive enters the system how will it be contested and removed? How will the federal system interact with other, state reporting requirements? How will enforcement action be taken? These are but a few questions that must first be answered before OOIDA can support such a system.

The ATA proposal casts a wide net without any assurances that necessary privacy precautions can be accomplished. It is not difficult to envision a number of innocent drivers falling victim to such a system that, on its face, will do nothing to reduce the rate of alcohol and drug use among drivers. This proposal simply shifts the burden of responsibility from the motor carriers to the federal government. After careful review of the proposal, as it now stands, OOIDA believes that any benefits that may result from this proposal may very well be far outweighed by grave and looming detriments and for that reason can not support this endeavor.

Other Issues

FMCSA regulations currently require employers to subject at least 50 percent of the average number of commercial motor vehicle drivers to random drug testing on an annual basis. The regulations also allow the FMCSA Administrator to lower the minimum random drug testing rate for all drivers to 25 percent if, and only if, the industry-wide random positive rate is less than 1 percent for two consecutive calendar years while testing at the 50 percent rate. While the reported positive rate, as derived by FMCSA from aggregate test results provided by a sample of employers, has declined since 1994, the reported rate has never dropped below 1 percent. Further, the reported positive test rate seems to have reached a plateau.

These drug test results under the current regulatory scheme show that the use of a uniform industry-wide level of testing plus the totally random nature of the test selection process – which subjects some drivers to repeated testing while others are rarely or never tested – has allowed some drug users to escape detection. At the same time, the current system subjects the vast majority of drivers, who are not drug users, to a costly and burdensome testing program that does not offer them any direct reward for their continued drug-free status. Nor is there any reward for employers whose exemplary driver hiring and training programs result in a drug-free group of drivers.

OOIDA believes that improved drug test results may be realized if the random drug testing program is modified to focus more directly on detecting the small group of drug users while at the same time rewarding drug-free drivers and their employers with an incentive for continued good performance. This could be accomplished by allowing drivers who have repeatedly tested negative on random drug tests and have never had a positive DOT drug test result of any kind to be removed from the pool of drivers subject to the annual 50 percent random drug testing requirement and be placed in a separate pool that is subject to an annual 25 percent random testing rate. All other drivers – those who have not proven themselves to be drug free – should still be subject to the 50 percent testing requirement.

Conclusion

As I explained in my introduction, OOIDA is an association of the hardworking men and women who are the owner operators and/or the professional drivers of this country. In other words, we are the men and women who are on the roads daily, bringing goods to stores and homes all over North America. We are the men and women behind the wheel and no one knows better than the members of our association the need for drug and alcohol testing as a critical factor in keeping America's highways safe, because after all, unsafe highways put our members directly in harm's way.

I have illustrated for you today some of the many problems that are present in the current drug and alcohol testing system. Such problems include, ensuring the carrier's are fulfilling their responsibilities, educating drivers about their obligations, inadequacies in collecting specimens, improper training for officials, and the lack of uniformity in conflicting systems. If our government works hard to help correct these problems, then we may be able to better strive toward our common goal of keeping the trucking industry free of drug and alcohol abuse. However, in our pursuit of this common goal, we must not lose sight of the basic

liberties and protections to which all people of this land are entitled. As I previously noted, by establishing a federal database to keep the names of those who test positive for drugs and alcohol we will not be combating the problem at hand, but rather creating new obstacles and confusion while jeopardizing the privacy of many hardworking men and women who do not abuse drugs and alcohol. Finally, OOIDA believes that those men and women who have proven themselves free of drugs should be rewarded by being placed in a lower random testing pool.

Chairman DeFazio, Ranking Member Duncan and members of the Subcommittee, thank you for providing me with this opportunity to testify on behalf of the members of OOIDA.

I would be pleased to answer any questions that you may have.

Questions from Chairman Peter A. DeFazio
SUBCOMMITTEE ON HIGHWAYS AND TRANSIT
OVERSIGHT AND INVESTIGATIONS HEARING ON
"DRUG AND ALCOHOL TESTING OF COMMERCIAL MOTOR VEHICLE DRIVERS"
NOVEMBER 1, 2007

The vast majority of "owner-operators" enter into long-term lease agreements with separate and distinct motor carrier entities that oversee the owner-operator's compliance with the federal drug and alcohol testing regulations. OOIDA responds to the following questions in the context that the term owner-operator takes on a different definition, meaning an individual that is both the driver and motor carrier employer.

1. NTSB has said that "owner-operators are in the precarious position of overseeing their own substance abuse program." That is sort of like the "fox watching the henhouse." What protections are in place to ensure that *all* of the Drug and Alcohol program requirements are enforced, including those that mean putting a driver out of service after a positive test?

   Answer:
   The protections in place to ensure enforcement of drug and alcohol testing compliance are the same for a motor carrier of any size. Generally, non-compliance would be discovered during a Compliance Review (CR) and, as a motor carrier, an owner-operator is subject to audit no different than a larger carrier. All motor carriers must comply equally with the record retention requirements so that auditors may verify compliance with the testing regulations. If a violation is discovered, an owner-operator is exposed to the same civil and criminal penalties that would apply to any motor carrier employer as well as penalties for violating the regulations as the driver.

   Ultimately, enforcement rests with the FMCSA, but the agency is able to conduct CRs on only a very small percentage of carriers annually. Any motor carrier of any size may risk beating the odds of being audited and ignore the requirement to remove a much needed driver with a positive test result from safety sensitive duty.

2. If an owner-operator participates in a consortium or third-party administrator, and he or she tests positive, what does the consortium do? Can the consortium report the driver to the State licensing agency or FMCSA?

   Answer:
   OOIDA's Consortium/Third-party administrator (C/TPA) notifies the Designated Employer Representative (DER) of a positive test result. The owner-operator may be the DER. The DER is advised of the employer's responsibility with regard to violations of the drug and alcohol prohibitions and the consequences fo r non-compliance, and is offered a list of qualified Substance Abuse Professionals. From there, it is up to the DER to follow the regulations.

Currently, there is no regulation prohibiting a C/TPA from reporting a positive test result to a state licensing agency or the FMCSA. C/TPAs do report drug and alcohol testing results when the information has been requested by such an agency as required by §40.331(e).

3. Does a consortium have any authority to take a driver who tests positive out of service or ensure that they complete the return-to-duty process before operating a commercial vehicle?

   Answer:
   No. It is the responsibility of the DER who has been authorized by the employer to take immediate action to remove an employee from safety sensitive duty. The regulations specifically prohibit an employer from allowing a C/TPA to act as their DER (§40.15(d)), and also prohibit a C/TPA from acting as a DER (§40.355(k)).

   A consortium may assist a driver, but it is ultimately that driver's responsibility to complete the return-to-duty process and it is the responsibility of an employer to verify that the driver has completed the process.

4. GAO has testified that there is a lot of confusion regarding who plays what role in a relationship between an owner-operator and a part-time employer. Whose responsibility is it to make sure that driver is tested in accordance with the regulations? Who maintains the records?

   Answer:
   An employer that uses any driver on a part-time basis is responsible for ensuring that driver is participating in a random drug and alcohol testing program that complies with the requirements. When an owner-operator is occasionally used by another employer, the employer may choose to use the results from the owner-operator's program. In this case, however, the employer must make the owner-operator's program, by contract or other agreement, the employer's own program. The employer would be held responsible for the compliance of the owner-operator's program, having the required records forwarded to the employer's principle place of business and acting upon positive test results.

5. North Carolina has instituted a law that requires employers to report positive test results (and refusals) to the state licensing agency. Only an employer can make that report.

   a. Are your owner-operator members required to report themselves?

      Answer:
      As a motor carrier, any owner-operator with a North Carolina Commercial Driver's License must within five business days after receipt of a confirmed positive test result submit a report of such result in writing to the North Carolina Division of Motor Vehicles. This would include OOIDA member owner-operators.

b. Have they?

Answer:
OOIDA is unaware of any member owner-operator licensed in North Carolina that has tested positive.

c. Have there been any difficulties with the NC law?

Answer:
OOIDA has received no complaints from members and is unaware of any difficulties with the North Carolina reporting process.

6. One of the criticisms of the current drug and alcohol program is that it relies heavily on self-reporting of past drug history. If a driver doesn't disclose a job where he tested positive, then the new employer can't know that the driver ever worked for that employer and will not seek information on past drug use. Is this happening and if so, how do we fix it?

Answer:
OOIDA is aware that during the application process some drivers do omit a previous employer with which the driver has tested positive. Even drivers that have successfully completed the return-to-duty process may elect not to disclose the previous employer for fear that the prospective employer will refuse to hire any driver with a previous positive result regardless of whether the driver is in compliance with the rules.

OOIDA believes prospective employers must be diligent in their hiring practices that must include recognizing suspicious gaps in drivers' work histories and requiring drivers to provide legitimate, verifiable reasons for those gaps. An employer must take seriously any unexplained or questionable employment gaps and refuse to hire those driver s. Many motor carriers are desperate to recruit and hire drivers and, consequently, become lax in scrutinizing driver applicants. Motor carrier employers are responsible for the safety performance of their employees and FMCSA is responsible for monitoring and correcting unsafe carrier performance. FMCSA must remedy the deficiencies with the federal motor carrier reporting and rating system, and hold accountable those carriers that demonstrate a pattern of employing unsafe drivers.

7. When a driver applies for a job with a new employer, the employer is required to contact former employers regarding drug and alcohol testing results. Some motor carriers have complained that there is a great deal of non-responsiveness from those former employers in reporting drug histories. Is that true and if so, how do we encourage better compliance?

Answer:
OOIDA is aware that a large number of carriers do not respond to consent requests from prospective employers for release of drug and alcohol testing information. This is due in part to motor carriers that have gone out of business. Other employers do not respond to

such requests due to many factors including, a general lack of knowledge of the requirement to respond, fear of being sued by the driver, or simply view responding as too much trouble.

Non-responsiveness on the part of employers is likely as responsible as driver nondisclosure on employment applications for allowing drivers who have violated the drug and alcohol prohibitions to continue operating without completing the return-to-duty process. The regulations should require, and provide a mechanism for, reporting of non-responsive previous employers and stringently enforce the requirement for previous employers to respond to consent requests.

8. ATA has proposed the creation of a national database of positive and refused alcohol and drug tests. Do you believe such a database is necessary? What would be the alternatives to making sure that driver drug use history is available to employers?

   Answer:
   OOIDA believes a national database of verified positive results and refusals may resolve certain problems with the drug and alcohol testing rules. However, the regulations must be amended to provide effective due process protections for drivers to contest false positives, and collection site, laboratory and Medical Review Officer errors.

9. If FMCSA were to proceed with this clearinghouse idea, do you support this concept? Do you have concerns about it? Is there an alternative?

   Answer:
   OOIDA does not support the concept of a clearinghouse as proposed by ATA. There are numerous concerns related to the operation of such a system as well as accuracy and protection of driver data.

   FMCSA is planning to launch a field test of its Comprehensive Safety Analysis 2010 (CSA 2010) operational model beginning in January 2008. CSA 2010 will collect data related to carrier management and performance as well as multiple driver data elements including use and possession of controlled substances and alcohol while operating a commercial vehicle. OOIDA believes CSA 2010 will provide a more practical system for also tracking positive test results that will eliminate the need to establish a separate and costly clearinghouse. The carrier and driver data are linked throughout the period of time a driver is employed by a particular carrier, eliminating any doubt about who employs a driver and when.

10. There has been some interest in allowing companies to use hair testing in place of urine testing for DOT drug tests. Do you have any concerns about hair testing?

    Answer:
    OOIDA has many concerns with using hair testing. While hair testing has the ability to test a much larger detection window, in some cases it is not as reliable and there is no uniform accepted collection, preparation or testing method for hair specimens. Also,

there are no scientifically valid cut-off concentrations established to determine if the presence of drugs can be attributed to actual use, or linked to environmental contamination or other factors. Not everyone has hair on their scalp, so that raises the question of what part of the body is acceptable for specimen collection. Furthermore, studies have shown that hair color may affect the amount of drug metabolite that a hair specimen will retain. Darker colored hair specimens seem to retain a higher level of drug metabolite than lighter colored hair, which could bias the test result. Until the testing of hair is standardized, cut-off levels are established through scientific research, the type of hair that may be collected as a specimen is agreed upon and there are answers to the issue of hair color, hair testing should not be accepted as an alternative to urine based drug testing.

Statement of Alan Hageman

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STATEMENT FOR THE RECORD TO
Highways and Transit Subcommittee of the
Committee on Transportation and Infrastructure

United States House of Representatives

The Honorable Peter DeFazio, Chairman
The Honorable John Duncan, Jr., Ranking Member
Hearing on Drug and Alcohol Testing of Commercial Motor Vehicle Drivers

November 1, 2007

Chairman DeFazio and distinguished members of the subcommittee, first, thank you for the honor of speaking before you this morning on the topic of commercial motor vehicle drug testing. For the record, my name is Alan Hageman and I am a Sergeant with the Oregon State Police assigned to the Patrol Services Division at our General Headquarters. I am here today to briefly summarize Oregon's findings in drug testing of our truck driving population and make a single recommendation which I believe will improve our performance in reducing the number of impaired commercial motor vehicle drivers on our highways.

In summary, in the fall or 1998, now retired Captain Chuck Hayes initiated the first trucker check (OTC-1) in Oregon at the Ashland Port of Entry which is on Interstate 5 northbound near our border with California. We have now conducted 13 trucker checks at our various ports of entry.

The overall goal of the trucker checks has been to enhance transportation safety through enforcement of state and federal laws specific to commercial vehicle operations. All of the trucker checks involve randomly selecting trucks for driver and equipment inspections with an emphasis on looking for driver qualifications, hours of service compliance, and equipment safety violations. Additionally, specially trained drug recognition evaluators conduct a cursory examination of the drivers for signs of fatigue and impairment. Each trucker check runs for 72 consecutive hours.

Captain Hayes devoted his career to enhancing transportation safety through reducing impaired driving, and the Oregon State Police continue to build on his vision. Captain Hayes employed different strategies ranging from traditional enforcement to introducing the latest training methods to legislative changes at the state level. In order to have a better understanding of the extent of drug usage in the trucking population, Captain Hayes added as an element to OCT-1 of asking all drivers to provide a voluntary and anonymous urine sample; compliance was very high. The analysis of the urine collected revealed a 9.4 percent of the samples were positive for some kind of drug (alcohol was not tested) with cannabinoid (marijuana) being the predominant drug followed by amphetamines and opiates.

A year later, Captain Hayes conducted OCT-2 on Interstate 84 eastbound about 40 miles east of Portland near the Washington border. Urine testing at OTC-2 revealed 15.2% of the samples were positive as a result of a spike in amphetamines. We do not have an explanation for this amphetamine spike.

OTC-2 was the last trucker check where we collected urine until OTC-12 on I-5 southbound near Portland last April. Captain Gerry Gregg recognized that the latest testing was over seven years old and he wanted to refresh previous studies. OCT-12 revealed a 9.65% positive rate which was strikingly similar to what we found in OCT-1, over eight years earlier. In September, we held OTC-13 in the same location as OTC-2 and saw only a slight downturn from previous trucker checks with 8.9% of samples showing positive.

The primary difference between the drugs detected from the last decade to the present is an increase in marijuana and opiates and a decrease in cocaine. Other than the OTC-2 amphetamine spike, this drug category has been relatively static. In any case, the overall rate of positive urine samples has not decreased significantly during the eight and one-half between OTC-1 and OTC-13.

One of the steps that the Oregon Legislature took in 1999 to address the drug issue was to create a statute (ORS 825.410) which was intended to exceed US Department of Transportation drug testing requirements found in the US Code,

Title 49, Part 40 but there are some weaknesses in the statutory language which keep this statute from achieving its intended results.

As I speak, the Oregon Department of Transportation is developing a legislative concept to modify this statute which it hopes to get introduced in our next general legislative assembly which will do two things: first, it will treat employment urine test refusals as a positive (currently, refusals are invisible). Second, Oregon DMV will disqualify commercial drivers for positive results. Presently, Washington and North Carolina are the only two states known to do this.

Oregon can seek to become very proactive in drug testing. However, the interstate nature of trucking severely limits the effectiveness of Oregon's efforts unless there is interstate uniformity. Therefore, I am urging you to consider establishing a nation-wide clearing house which will report all positive (refusals included) drug tests and require inquiry into this clearinghouse for driver pre-employment by any interstate trucking company.

Conclusion

Thank you again for the privilege of speaking before you today. I hope that what I have shared with you is of some value in improving the safety of our nation's highways. I will be honored to answer any of your questions.

Operation Trucker Check – 13

Cascade Locks

September 18-20, 2007

477 drivers were requested to provide urine samples. 9 drivers (1.9%) declined to participate. Following are the analysis results of the 468 urine samples obtained:

- 9 (1.92%) drivers tested positive for the presence of amphetamines.
- 2 (0.43%) tested positive for benzodiazepines.
- 1 (0.21%) tested positive for cocaine.
- 19 (4.06%) tested positive for the presence of cannabinoid (marijuana).
- 14 (2.99%) tested positive for opiates (e.g., oxycodone).
- 3 (0.64%) tested positive for propoxyphene (synthetic opiates).
- 5 (1.07%) were positive for more than one drug category.
- Overall, 42 (8.97%) of 468 drivers that provided urine tested positive in at least one drug category.

It should be noted that the samples were also tested for the presence of Barbiturates and Methadone, although none tested positives for these drugs.

Drug Usage Comparison

Drug Type	Ashland 10/1998	Cascade Locks 9/1999	Woodburn 4/2007	Cascade Locks 9/2007
Amphetamines	8	23	8	9
Barbiturates	0	1	0	0
Benzodiazepines	1	1	0	2
Cocaine	4	2	0	1
Cannabinoid	11	8	18	19
Methadone	0	0	2	0
Opiates	8	4	16	14
Propoxyphene	1	0	3	3
Total samples requested (trucker's contacted)	n/a	n/a	491	477
Number of refusals	n/a	n/a	4	9

Total samples provided	361	255	487	468
Total positive samples	34*	39*	41	42
Percentage of positive samples**	9.4%	15.2%	9.65%	8.97%

*Actual data not available. Assumption made that percentages were based on each positive sample counting as one, regardless if the sample tested positive for multiple drugs.

**Some samples tested positive for multiple drugs. A sample that tested positive for multiple drugs was only counted as one positive sample.

MEMORANDUM
OREGON STATE POLICE

DATE: April 27, 2007

TO: Lieutenant Glenn Chastain
General Headquarters – Patrol Services Division

FROM: Alan A. Hageman, Sergeant
General Headquarters – Patrol Services Division

SUBJECT: **AFTER ACTION REPORT – OPERATION TRUCKER CHECK-12 WOODBURN PORT OF ENTRY APRIL 10-12, 2007**

REFER: To the State Police Motor Carrier Enforcement spreadsheet.
To the Washington State Patrol "Traffic Safety Emphasis" spreadsheet.
To the Urine Analysis spreadsheet and graphs.
To the Oregon State Police InfoFlash dated April 11, 2007.
To the Oregon State Police News Release dated April 18, 2007.

From 12:01 a.m. on Tuesday, April 10 through 11:59 p.m. on Thursday, April 12, 2007, the Oregon State Police, in cooperation with law enforcement partners and the Oregon Department of Transportation – Motor Carrier Transportation Division (MCTD) conducted the 12th Operation Trucker Check (OTC-12). OTC-12 was held at the Woodburn Port of Entry, I-5, milepost 274 southbound.

The goal of OTC-12 was enhancing transportation safety through thorough truck inspections and the detection of impaired drivers with four primary objectives:

1. The first objective of OTC-12 was to identify commercial vehicle driver and equipment safety violations and to place out-of-service drivers and vehicles discovered to be in violation of the North American Standard out-of-service criteria.

2. Another objective of OTC-12 was to discover alcohol or other substance impairment and driver fatigue.

3. A third objective is to discover any kind of criminal activity that may be occurring in conjunction with commercial motor vehicle operations.

4. The fourth objective was to determine the extent of substance use in the commercial motor carrier driver population through the anonymous and voluntary collection of urine samples from CMV drivers and the comparisons of these results with earlier studies.

The first objective of identifying safety related commercial motor vehicle and driver violations included Level II and Level III safety inspections by Oregon State Police Troopers and the Gresham Police Department. MCTD personnel conducted Level I, II, and III safety inspections. Trucks were selected randomly for inspection based on a "next to cross" the scales. Following is a brief summary of our truck inspection efforts:

- 505 commercial motor vehicles were inspected.
- 54 vehicles (11%) were placed out-of-service for safety related violations of the North American Standard out-of-service criteria.
- 85 drivers (17%) were placed out-of-service for North American Standard out-of-service violations. Most of the violations were for exceeding their maximum driving hours or for record keeping deficiencies.

Senior Trooper Dan De Haven, The Dalles, conducting a Level II Safety Inspection

Senior Trooper Dede Hansell, Portland, obtaining a driver's documents.

A Drug Recognition Expert talks to a truck driver

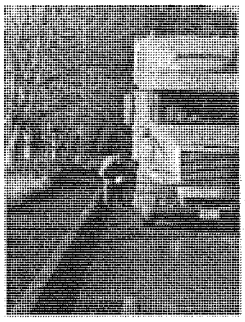
Certified drug recognition experts (DRE) from the State Police, Gresham Police Department, Gladstone Police Department, Portland Police Bureau, the Clackamas County Sheriff's Office, and the Marion County Sheriff's Office contacted 491 drivers and conducted initial screening for alcohol or drug impairment and fatigue. Drivers who exhibited signs of impairment were given further field sobriety tests. Below are results from the DRE efforts.

- Three (3) drivers were found to be suffering from fatigue.
- Three (3) drivers were found to have been driving while under the influence of intoxicants – methamphetamine (suspected). All three drivers were arrested for DUII and placed out-of-service.

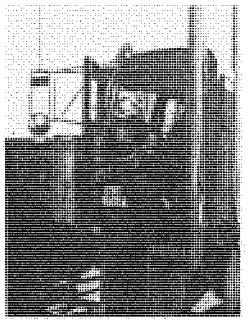
- One (1) driver exhibited signs of impairment and was unable to pass standard field sobriety tests. Further examination established the driver was suffering from severe hyperglycemia. Medical aid was summoned. Investigation revealed a driver history of not adequately controlling blood glucose levels; he was placed out-of-service for his medical condition.

Two canine teams were on site between 6:00 a.m. until 2:00 a.m. each day to assist with the third objective of identifying criminal activity. No arrest warrants were served or suspended drivers cited/arrested. No criminal activity was detected other than the contraband seizures noted below:

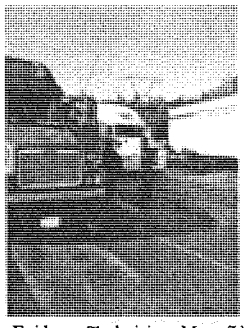
- Two (2) methamphetamine possession criminal cases were made.
- One (1) personal amount of marijuana was seized.
- Seven (7) drivers were found to be unlawfully in possession of alcohol.



Trooper Tom Hunt, Springfield, and canine "Hemi" searching a bulk load



Senior Trooper Peter Arnautov, Capitol Mall, contacting a driver



Evidence Technicians Mary (L) Ward and Kristen Ramsey

The fourth objective was to determine the extent of undetected substance use among truck drivers. This was done by requesting voluntary and anonymous urine samples. This process was conducted at OTC-1 and OTC-2. In that the last testing was done in 1999, there was interest in revalidating the previous studies. State Police evidence technicians staffed OTC-12 during its operation. In summary, 491 drivers were requested to provide urine samples. 4 drivers (less than one percent) declined to participate. Following are the analysis results of the 487 urine samples obtained:

- 8 (1.64%) drivers tested positive for the presence of amphetamines.
- 18 (3.70%) tested positive for the presence of cannabinoid (marijuana).
- 2 (0.41%) tested positive for the presence of methadone.
- 16 (3.29%) tested positive for opiates (e.g., oxycodone).
- 3 (0.62%) tested positive for propoxyphene (synthetic opiates).
- 5 (1.03%) were positive for more than one drug category).

- Overall, 41 (9.65%) 487 drivers provided urine which tested positive in at least one drug category.

Anonymous urine samples have been collected at three OTC operations since the initial operation in 1998. The first collection was taken during the Ashland/Klamath Falls OTC operation in October 1998. The second collection was taken during the Cascade Locks OTC operation in September of 1999. The third and most recent operation was held at the Woodburn POE in April 2007.

During the Ashland/Klamath Falls operation 361 samples were tested with a total drug usage of 9.4%. The Cascade Locks operation collected 255 samples with a total drug usage of 15.2%. The Woodburn operation collected 487 samples with a total drug usage of 9.65%.

Drug Usage comparison

Drug Type	Ashland/Klamath Falls 10/1998	Cascade Locks 9/1999	Woodburn 4/2007
Amphetamines	8	23	8
Barbiturates	0	1	0
Benzodiazepines	1	1	0
Cocaine	4	2	0
Cannabinoid	11	8	18
Methadone	0	0	2
Opiates	8	4	16
Propoxyphene	1	0	3
Percentage of total use	. 9.4%	15.2%	9.65%

The evidence technicians also assisted with evidence processing in DUII and controlled substance cases. This was the first trucker check participation for all of the evidence technicians and all of them performed very well and their organization, participation, motivation, and expertise was appreciated.

OTHER INFORMATION

Trucker checks generally produce anecdotal reports of by-pass truck traffic around the scales and an inordinate amount of trucks "waiting it out" in rest areas and truck stops prior to the trucker check location. During OTC-12, reports were received of heavy truck traffic on SR 99E which is east of and parallel to I-5 and Butteville Road, a county road just west of and parallel to I-5. During OTC-12, an officer in an unmarked car patrolled SR 99E and after stopping six trucks noticed a significant decrease in truck traffic on SR 99E.

Washington State Patrol was advised in advance of OTC-12. WSP motor carrier officers and troopers conducted a traffic safety emphasis on SR 14 eastbound. They inspected 34 trucks of which they placed 11 out-of-service. WSP did not report anything remarkable during their emphasis nor did they see an apparent increase in truck traffic or parking in Clark County.

State Police public information officer, Lieutenant Gregg Hastings, posted an "InfoFlash" on the second morning of OTC-12. All three Portland news networks and the Statesman Journal (Salem) made news reports from OTC-12. On April 18th, Lieutenant Hastings posted an OTC-12 news release containing preliminary statistics. Media developed reports on this with news radio showing a particular interest in the results. Overall, OTC-12 generated strong media interest.

SUMMARY AND CONCLUSION:

Captain Chuck Hayes (retired), Training Division Director and Oregon Drug Evaluation and Classification Program Coordinator, initiated the first Oregon Trucker Check at the Ashland and Klamath Falls Ports of Entry in the fall of 1998. The trucker check template that we use is virtually unchanged since 1998. An analysis of the urine collected at all three trucker checks does not demonstrate a significant difference in the presence of controlled substances among the commercial motor carrier driver population. This suggests that the trucking industry, state and federal regulatory agencies, the insurance industry, law enforcement community, and other safety advocates can do more to improve our performance in this area. That nearly one in ten commercial motor vehicle drivers have controlled substances in their system while operating 80,000 pound vehicle combinations on our highways is not acceptable.

AAH/aah

cc: Captain Gregg – GHQ/PSD
Region Commanders
Lieutenant Hastings - PIO
Lieutenant MacManiman, LaGrande Area Command
Sergeant Essman – Washington State Patrol
Mr. Chuck Hayes – NHSTA
FMCSA
Gregg Dal Ponte – ODOT/MCTD
David McKane – ODOT/MCTD
Bonnie Pierovich – ODOT/MCTD
OTC-12 Participants (see schedule)

Attachment (5)

otc 12 after action 042607.mem

MEMORANDUM
OREGON STATE POLICE

DATE: October 30, 2007

TO: Gerry Gregg, Captain
Patrol Services Division

FROM: David MacKenzie, Sergeant
East Region Headquarters

SUBJECT: **AFTER ACTION REPORT**

REFER: **OPERATION TRUCKER CHECK 13**
Cascade Locks Port of Entry – September 18-20, 2007

SUMMARY:

The Operation Plan was implemented September 18-20, 2007 by Oregon State Police members from the Motor Carrier Enforcement Team, Patrol division, DRE program, K-9 program, and Evidence Technician program. Partnering agencies included ODOT, DPSST, Washington Co. Sheriff's Office, and Portland Police Bureau.

The goal of OTC13 was to enhance transportation safety by conducting thorough Level I, II, and III truck inspections and the detection of impaired operators of commercial motor vehicles.

The primary objectives of OTC13 were:

- identifying commercial motor vehicle driver and vehicle violations, with emphasis on out-of-service violations;
- detecting operator impairment by alcohol and/or substance abuse;
- detecting operator impairment by fatigue;
- to detect any criminal activity occurring in conjunction with commercial motor vehicle operations; and,
- to determine the extent of substance use in the commercial motor vehicle operator's community through the voluntary collection of urine samples of all operators contacted.

All inspections were based on a next-to-cross criteria to ensure a representative cross-section of the commercial trucking industry.

Results of the voluntary urinalysis showed that 477 drivers were requested to provide urine samples. Of those, nine drivers (1.9%) declined to participate.

Following are the analysis results of the 468 urine samples obtained:

- 9 (1.92%) drivers tested positive for the presence of amphetamines.
- 2 (0.43%) tested positive for benzodiazepines.
- 1 (0.21%) tested positive for cocaine.
- 19 (4.06%) tested positive for the presence of cannabinoid (marijuana).
- 14 (2.99%) tested positive for opiates (e.g., oxycodone).

- 3 (0.64%) tested positive for propoxyphene (synthetic opiates).
- 5 (1.07%) were positive for more than one drug category.
- Overall, 42 (8.97%) of 468 drivers that provided urine tested positive in at least one drug category.

It should be noted that the samples were also tested for the presence of Barbiturates and Methadone, although none tested positives for these drugs.

The chart listed below compares the results of three similar operations conducted by OSP with the current operation's findings.

Drug Usage Comparison

Drug Type	Ashland/ Klamath Falls 10/1998	Cascade Locks 9/1999	Woodburn 4/2007	Cascade Locks 9/2007
Amphetamines	8	23	8	9
Barbiturates	0	1	0	0
Benzodiazepines	1	1	0	2
Cocaine	4	2	0	1
Cannabinoid	11	8	18	19
Methadone	0	0	2	0
Opiates	8	4	16	14
Propoxyphene	1	0	3	3
Percentage of total use	9.4%	15.2%	9.65%	8.97%

The chart listed below displays the statistics gathered, per shift, over the duration of OTC13.

ACTIVITY	GRAVEYARD	DAY	SWING	TOTAL
Equipment Cite	0	0	1	1
Equipment Warn	36	150	88	274
Log Book Cite	1	2	12	15
Log Book Warn	63	87	90	240
Misc FMCSR Cite	1	0	2	3
Misc FMCSR Warn	54	52	18	124
Level 1 Inspection	14	35	37	86
Level 2 Inspection	98	163	125	386
Level 3 Inspection	28	1	11	40
Total Inspections	140	199	173	512
Vehicles Out of Service	15	19	21	55
Drivers Out of Service	30	32	37	99
Consent Search	17	95	69	181
UPCS – Meth	1	0	1	2
UPCS- Marijuana	0	0	1	1
Alcohol Seized	1	5	1	7

SFST's Conducted	0	0	3	3
Full DRE Eval.	0	2	4	6
Other Drug Seized	1	0	0	1
Driving While Suspended	0	0	1	1
Fatigued Driver	1	0	2	3
DUII – Alcohol	0	0	0	0
DUII – Drugs	0	0	0	0
DRE Contacts	93	183	137	413
DRE SFST's	0	0	2	2
DRE Evaluation	0	2	2	4
Drug Dog-Free Air Sniff	0	0	0	0
Drug Dog – Reasonable Susp.	0	0	1	1
Drug Dog – Probable Cause	0	0	0	0

Of the 512 inspections conducted, 55 (10.74%) resulted in vehicles being placed out of service and 99 (19.34%) resulted in drivers being placed out of service.

November 16, 2007

Honorable Peter A. DeFazio, Chairman
U.S. House of Representatives
Committee on Transportation and Infrastructure
Subcommittee on Highways and Transit
Washington, DC 20515

Re: Your Letter Dated November 14, 2007 Requesting Additional Information

Thank you for the opportunity to testify before the Committee on Transportation and Infrastructure regarding "Drug and Alcohol Testing of Commercial Motor Vehicle Drivers." I was honored to represent the Oregon State Police on this important topic.

Following my signature line are your questions followed by my responses. If I may be of any clarification or further assistance on this topic, please feel free to contact me at (503) 934-0268 or E-mail alan.hageman@state.or.us.

Sincerely,

Alan A. Hageman, Sergeant
Patrol Services Division

AAH/aah

cc: Lt. Glenn Chastain – GHQ/PSD
File

Response to Representative Peter DeFazio
November 16, 2007

1. *How did the panel of drugs you tested for compare with the 5 panel DOT test? What drugs do you test for that DOT does not?*[1]

   The US DOT and Oregon State Police (OSP) both screen for Amphetamines, Cocaine, Cannabinoid, and Opiates. US DOT includes Phencyclidine (PCP) in their screening panel whereas OSP did not for the trucker check screenings. OSP additionally screens for Barbiturates, Benzodiazepines, Methadone, and Propoxyphene. OSP has a lower threshold for positive results (available on request). You may note that these additional drug categories account for only a small total of our positive results from all four of our trucker checks where we conducted urine screening.

2. *Why do you test for these other drugs?*

   OSP tests for the above controlled substances, ultimately, because they have demonstrated a historical potential to impair driving. All of these controlled substances have demonstrated potential for abuse. These are the most common controlled substances that we find routinely during urine testing or otherwise see being abused either through impaired driving or unlawful possession.

3. *Some of the drivers you tested came back positive for opiates that are difficult to distinguish between illegal and prescription drugs. What is the difference in the two? Would the prescription drugs have a different impact on driver impairment than illegal drugs?*

   OSP does differentiate between some subgroups of opiates. For example, we can distinguish between heroin and other prescription opiates although we did not do this for the anonymous trucker check urine screening.

   Prescription drugs, particularly if they are being abused, will not present differently than illegal opiates with respect to impaired driving. However, a driver may be using prescription drugs of an opiate category appropriately under a physician's direction and not present any signs of impairment while still producing a positive urine sample.

[1] Response to the first three questions were written by Sergeants Tim Plummer and Alan Hageman and Forensic Scientist Jennifer Bray.

4. *Oregon has a law that requires positive tests to be reported by the Medical Review Officer to the state licensing agency. What does the licensing agency do with this information.*[2]

   The Oregon Driver and Motor Vehicle Division (DMV) of ODOT place this information into its database. Employers and/or prospective employers may obtain a DMV report reflecting these positive tests by submitting the appropriate DMV form which includes a signed driver's release. ODOT investigators also have access to this database.

825.410 Drug and alcohol testing program; report of positive test. (1) Every motor carrier must:

(a) Have an in-house drug and alcohol testing program that meets the federal requirements of 49 C.F.R. part 382; or

(b) Be a member of a consortium, as defined in 49 C.F.R. 382.107, that provides testing that meets the federal requirements.

(2) At the time of registration or renewal of registration of a commercial vehicle or a commercial motor vehicle under any provision of ORS chapter 803 or 826, a motor carrier must certify to the Department of Transportation that the carrier is in compliance with subsection (1) of this section and, if the carrier belongs to a consortium, must provide the department with the names of persons who operate the consortium.

(3) When a medical review officer of a motor carrier's testing program or of the consortium the carrier belongs to determines that a positive test result is valid, the officer must report the finding to the department. [1999 c.1099 §2]

5. *Are the positive test results available to employers when conducting pre-employment background checks?*

   Yes, provided the above process is followed.

6. *How do you enforce compliance with the reporting requirements? If an MRO is located in another state, are they still required to comply with Oregon law? Is that enforceable?*

   The Oregon Department of Transportation does not have enforcement authority.

   MRO's in other states are required to comply with Oregon law but enforcement remains as stated above.

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[2] In Oregon, the state's Department of Transportation, Motor Carrier Transportation Division (MCTD), is responsible for compliance review of motor carriers. Howard "Russ" H. Russell, MCTD, answered questions four through seven.

7. *ATA and others support the development of a national clearinghouse of positive tests and refusals. Do you support this? What are the pros and cons of having the state administer the database vs a federal database?*

   Oregon strongly supports a national clearinghouse, especially if employers are mandated to use it. A federal database will provide employers with one simple, rapid method of determining a driver's controlled substances history. Employers would not experience delays in the hiring process waiting for responses from various sources (i.e., past employers and state licensing agencies) which may or may not respond in the mandatory 30 day period.

   Employers are more likely to conduct background checks if the process is streamlined and eliminates the burden of contacting numerous states and employers. Further, drivers could not hide positive tests by simply omitting from the job application previous employment in which positive tests occurred.

STATEMENT OF JOHN HILL
ADMINISTRATOR
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION
BEFORE THE HOUSE COMMITTEE ON TRANSPORTATION AND INFRASTUCTURE
SUBCOMMITTEE ON HIGHWAYS AND TRANSIT
NOVEMBER 1, 2007

Chairman DeFazio, Ranking Member Duncan, and Members of the Subcommittee, thank you for inviting me today to describe how the Federal Motor Carrier Safety Administration (FMCSA) is working to improve oversight of drug and alcohol testing of commercial motor vehicle (CMV) drivers. I am pleased that the Subcommittee has provided this forum for our partners and stakeholders to discuss how they believe the existing program may be improved. Joining me this morning is Mr. Jim Swart, Acting Director of the Department's Office of Drug and Alcohol Policy Compliance (ODAPC).

The FMCSA is responsible for regulating approximately 4.2 million employees and the vast majority of the regulated employers (approximately 600,000 companies). Utilizing our inspectors in the field, FMCSA has implemented an aggressive program to examine compliance with the drug and alcohol regulations during roadside inspections, safety audits, and compliance reviews (CRs) to deter impaired driving. The Agency takes every opportunity to educate the industry regarding the drug and alcohol testing regulations. I am happy to report today that the data indicates that commercial vehicle operators are among the safest transportation workers in the United States. FMCSA's most comprehensive commercial vehicle crash study, the 2006 Large Truck Crash Causation Study (LTCCS), found very little illegal drug use or alcohol abuse among the CMV drivers, just 2.3 percent for illegal drug use and .8 percent for alcohol use for all large trucks involved in the LTCCS crashes. The last completed annual survey of drug and alcohol testing results revealed that fewer than two percent of CDL drivers are testing positive for controlled substances and that fewer than one percent are testing positive for alcohol, based on random testing performed by motor carriers. The fact of the matter is that while some transportation workers use illicit drugs, the overwhelming majority does not.

While these data are positive, FMCSA continues to look for ways to improve our programs to further deter drug and alcohol use by commercial vehicle drivers. Challenges continue to exist with regard to "job-hoppers," those who move to other companies after testing positive for drugs or alcohol, oversight of owner-operators, and the increased sophistication of adulterants that can mask "positive" drug tests.

To meet these challenges, our Agency works to continually improve our strategies to increase the knowledge of our regulated employers, service agents, and employees about regulatory compliance. FMCSA is increasing the effectiveness and efficiency of our compliance and enforcement activities to ensure that identified problems are addressed swiftly. We enjoy the support of our safety partners and the regulated industry in our

common effort to deter alcohol abuse and illegal drug use by CMV drivers. These initiatives give us hope for our program's continued success.

TARGETING HIGH RISK CARRIERS AND DRIVERS

FMCSA, with our State partners, focuses on drug and alcohol compliance during all compliance activities, which include roadside inspections, safety audits, and CRs. The Agency uses an aggressive risk-based approach in addressing safety priorities with our compliance and enforcement resources. This strategy has produced significant safety results and has increased the regulated industry's awareness of areas to improve. In 2006, FMCSA and the States reviewed the compliance of more than 15,000 drug and alcohol programs during CRs of high risk motor carriers. Nearly 64 percent identified implementation deficiencies. All of these carriers received regulatory guidance and technical assistance to correct the problems; 2,775 of them were fined for serious noncompliance. Additionally, since the program's inception in 2003, 147,815 new entrant safety audits have been completed. Last year, we reviewed the drug and alcohol testing programs of more than 40,000 new entrants to the motor carrier industry through our safety audit activities and counseled more than 42 percent of them about deficiencies in their drug and alcohol programs. Our revised New Entrant Rule will only enhance this issue with motor carriers when published in 2008.

In addition to reviewing the effectiveness of drug and alcohol testing programs during CRs and new entrant safety audits, FMCSA and our State partners conducted over 3 million roadside inspections last year. During each of these inspections, drivers were evaluated for signs of drug or alcohol use and, if use was discovered, they were removed from the roadway. In 2006, 5,466 drivers, or 2 tenths of a percent, were discovered under the influence or in possession of drugs or alcohol during roadside inspections and were removed immediately from the highways. Once convicted, these drivers are subject to disqualification of their Commercial Driver's License (CDL) and, consequently, their privileges to operate a CMV. FMCSA has worked with the States to strengthen the CDL program to ensure that CMV drivers convicted of driving under the influence, as well as many other convictions, lose their driving privileges. The Agency has implemented the CDL provisions of the Motor Carrier Safety Improvement Act of 1999 (MCSIA) as part of our continuing efforts to improve the safety of trucks and buses.

FMCSA also performs significant outreach to the motor carrier industry about drug and alcohol testing regulations. As members of a regulated industry, motor carriers are responsible for being aware of their obligations to comply with FMCSA safety regulations, including those concerning drug testing. In cooperation with ODAPC and the other DOT operating Administrations, we have developed a number of implementation guides that simplify the requirements and illustrate what employers, drivers, collectors, and medical review officers (MROs) must do in order to make the testing process effective. We have produced and distributed thousands of brochures, books, and posters, and continually make presentations to industry associations and other

groups to help clarify the drug and alcohol testing requirements and to promote awareness and quality implementation.

DRUG AND ALCOHOL TESTING REGULATORY CHALLENGES

Using our dual and complementary strategies of education and enforcement, FMCSA and our State partners have been able to minimize impaired driving in the commercial motor vehicle industry. While we are pleased with these results, we seek better information sources regarding drug and alcohol noncompliance and ways to better educate the industry about the requirements. Additionally, FMCSA identifies and addresses challenges not met through the oversight scheme I discussed previously.

Job Hoppers

One of the greatest challenges facing FMCSA and the industry as we try to eliminate alcohol abusers and drug users from the CMV driver population is the "job hopper." A job hopper is the driver who tests positive for drug and/or alcohol use and is discharged by one carrier, only to be hired by another carrier in a week or two after the driver has cleansed all illicit substances from his or her body. Generally, the "positive driver" fails to reveal the identity of the previous employer with whom he or she had tested positive. Thus, the subsequent employer has no way of knowing about the positive test. Such a driver could continue to use illegal drugs or abuse alcohol until being caught again, at which time the driver could repeat the process with the next carrier.

The job-hopping driver is not a new regulatory challenge. Section 226 of MCSIA required a study of the feasibility and merits of requiring MROs and employers to report positive test results to State CDL licensing agencies. The study was done and the findings and recommendations were reported to Congress with a copy to this Subcommittee. The study concluded that it is feasible to establish a national database of positive drug test results. If a database were established, the report recommends that it be operated by the Federal government to ensure consistency and uniformity. FMCSA is moving forward to address this problem.

A number of strategies are being evaluated. FMCSA has begun a compliance initiative to identify drivers who fail to comply with the return-to-duty process – the process of being evaluated by a substance abuse professional (SAP) and undergoing the counseling or follow-up testing the SAP prescribes. We have been successful in identifying a number of drivers that have avoided the required return-to-duty process and have removed them from the highways by having the State rescind the CDL. While the process effectively identifies noncompliant drivers and removes them quickly from the roadway, it is labor-intensive. Currently, our efforts have not provided the broad-based results necessary to discourage drivers from job-hopping but modifications are being developed to streamline and improve the effectiveness of the process.

Another strategy being assessed is one initiated by a number of States. Some States require the reporting of positive drug test results to the State licensing agency, usually the Department of Motor Vehicles (DMV). Two States, North Carolina and Washington, take action to revoke or suspend the driver's CDL until the driver proves he is in compliance with the return-to-duty requirements. Other States merely gather the information and may list the positive test result on the driver's record or they may use it for "statistical purposes." Unfortunately, these programs impact drivers only with licenses from the State in which they are tested and the State enforcement authority may be limited regarding employers who fail to report the positive test. Nevertheless, FMCSA is exploring the possibility of this becoming an effective tool if all States were to participate.

Along a similar line, FMCSA's reform of our compliance and enforcement efforts – known as the Comprehensive Safety Analysis 2010 (CSA 2010) – recognizes the need to collect more comprehensive data regarding drug and alcohol compliance. Compliance with drug and alcohol regulations is one of seven performance-based Behavioral Safety Analysis Improvement Categories (BASICS) that FMCSA plans to use in the future to target motor carriers and drivers for compliance. CSA 2010 is examining strategies for collecting drug and alcohol testing information to ensure our new compliance model is able to identify drivers and carriers that do not comply with our drug and alcohol regulations.

Many people have mentioned, over the years, that it would be desirable to create a national data base of drivers who have violated the Department's drug testing rules. Employers could query such a data base to determine if an applicant was out of compliance with our rules. As with any large database containing personally sensitive information, we would have to ensure that: only the minimum information necessary to perform our safety function is collected; the information is used only for safety-sensitive purposes; the information is secure; the information is reported and updated promptly; and there is an adequate mechanism to ensure that individuals can get erroneous information corrected or eliminated from the system.

Owner-Operators

Another challenge to the effectiveness of FMCSA's Drug and Alcohol Testing Program is the "owner-operator," often a one-person trucking company that generally has its own operating authority and does not work regularly for any one motor carrier. Currently, owner-operators are required to join a consortium to administer their random drug testing but if the owner-operator tests positive for drugs or alcohol or refuses to test, the consortium may report the positive result or refusal to the owner-operator only, and not to the State or FMCSA.

Unfortunately, there exists very little data about owner-operators. Recent statistics indicate that there are nearly 143,000 owner-operators. We suspect that many of these are leased to other larger motor carriers but continue to maintain their own operating authority. We have not determined the answer to the owner-operator problem but believe

that a reporting requirement similar to that discussed previously for job-hoppers would improve the situation.

Cheating

As we work to deter safety-sensitive workers from using illegal drugs, we are aware of the problem of cheating. Cheating is a serious matter because it diminishes the deterrent effect of our program if employees believe they can get away with using drugs. As a former law enforcement official, I saw first-hand the awful consequences to impaired drivers –both CMV and passenger vehicles.

As a Federal program, FMCSA's rules must maintain a proper balance between our compelling interest in safety and the legitimate privacy expectations of employees. The Supreme Court and other Federal court cases have approved or upheld the DOT testing program because it maintains this balance.

For this reason, Part 40 requires that all testing take place in Department of Health and Human Services (DHHS) – certified laboratories, using stringent protocols to ensure that the tests are scientifically sound. Manufacturers of alternative testing methods, involving the testing of hair, saliva, and sweat, frequently market their products as the answer to cheating. To date, only urine testing meets the Part 40 requirement.

Perhaps the most obvious way of countering the use of adulterants and substituted specimens would be to make all tests observed directly. I think most people would agree that, in the civilian context, directly observing all employees for all tests would make the testing process vastly more intrusive, as well as more costly. It is likely that such a change to the program would require additional legislative authority. Even with this authority, the Department is concerned that the Courts may reasonably conclude that such a change would adversely affect the balance between the safety purposes of the program and employees' privacy interests.

Laboratories already use "specimen validity testing" (SVT) methods to detect many adulterants and substituted specimens. According to from the laboratory community, approximately 98 percent of DOT tests are estimated to undergo SVT at the present time. When SVT cannot specifically identify an adulterant, the employee who provided a compromised specimen will undergo an additional test, this time under direct observation. A number of States have enacted criminal laws regarding products used to circumvent drug testing and DOT has supported these efforts, as well as Federal legislation.

Collection Facility Oversight

Most motor carriers use service agents to perform the testing program functions. These are people or organizations such as collection sites, third party administrators, MROs, and substance abuse professionals. FMCSA reviews the compliance of these entities during the CR process and has found more than 22,000 violations in the past 7 years.

Employers are responsible for meeting the requirements of our drug testing rules, including the procedural rules of Part 40, whether they perform the functions themselves or contract them out. If a service agent fails to meet a Part 40 requirement, it is the motor carrier that is accountable to FMCSA.

Part 40 gives us an additional tool to address serious problems that we discover in the performance of service agents. This is the Public Interest Exclusion (PIE) process, based on the Federal government's suspension and debarment rules. After appropriate administrative due process, a service agent who is failing to comply in significant ways with Part 40 can be prohibited from working in the drug testing program for DOT-regulated employers for up to five years. ODAPC has not yet had to issue a PIE and barred someone from working in our program because, when we encounter serious misconduct by a service agent, we inform the agent that a PIE may be considered. This has caused the service agent to correct the identified problem or to stop serving DOT-regulated employers. The deterrent presence of the PIE provision can be effective in addressing program deficiencies.

FMCSA's perception is that collection sites generally comply with most of the key portions of the rules, but may not fully comply with all the rules all the time. This is generally consistent with what GAO found in its review. The Department has taken important steps to ensure that the collection process does comply with our rules. In 2000, Part 40 started requiring initial and refresher training for collectors. DOT has worked with the drug testing and transportation industries to give special emphasis to collection site integrity. We have also asked for our inspectors and auditors to pay close attention to collection site issues. They have done so.

On the ODAPC web site and in personal emails to a number of drug and alcohol testing administrators and laboratories, we have reminded program participants to ensure that collectors whose services they use or manage pay special attention to collection site procedures. ODAPC also provided English and Spanish versions of the reminders. In all, 14 major organizations reported that they notified nearly 43,000 service centers, clients, collection sites, and collectors.

OADPC developed the "DOT's 10 Steps to Collection Site Security" and provided 16" x 20" posters to nearly 25,000 collection sites throughout the U.S. The Department will continue to emphasize collection site integrity during inspections and audits, our numerous training activities, and speaking engagements.

FUTURE PLANS

As we move forward, FMCSA, in cooperation with ODAPC and the other operating administrations, continues to look for ways to make our highways safer by ensuring that no commercial vehicle driver is driving while impaired. We continue to refine our drug and alcohol enforcement strategies, including more effectively and efficiently identifying job-hoppers, overseeing collection sites, and pursuing PIEs where appropriate. We have

asked our investigators and State partners to focus on carrier compliance with regulations requiring employers to check with previous employers regarding drug or alcohol use and owner-operator drug and alcohol regulatory compliance. FMCSA is also exploring the possibilities of using laboratory data as a targeting mechanism for problem drivers and motor carriers.

The FMCSA is in the process of bolstering our drug and alcohol testing compliance program by increasing the training provided to State and Federal enforcement staff. From the program's inception, we have had a group of investigators with additional training and expertise in the drug and alcohol testing regulations. These investigators make up FMCSA's Drug & Alcohol Technical Assistance Group (TAG). The TAG members are available to assist any investigation. Additionally, FMCSA is upgrading the knowledge of drug and alcohol testing procedures among our entire field staff, incorporating a module on drug and alcohol testing procedures into the investigator and auditor training academies, and will soon offer additional training for all current investigators. We also plan to develop a new Drug and Alcohol Testing Enforcement Course and develop web-based in-service training for State and Federal enforcement staff.

Using the Drug and Alcohol TAG, FMCSA is in the process of improving the information on the FMCSA website regarding Drug and Alcohol Testing requirements. We are working to make the site more user-friendly for the primary target audiences – motor carriers, drivers, and service agents. The website will be loaded with user guides on how to implement a DOT drug and alcohol program and a series of outreach brochures, posters, etc., for drivers and employers to improve the awareness of program implementation and to increase their knowledge of the consequences of a refusal or positive test.

Looking to the future, FMCSA will increase the focus on our CSA 2010 initiative. This will place additional emphasis on drug and alcohol testing compliance and targeted enforcement for those drivers and carriers that choose not to comply.

Finally, FMCSA has close relationships with our DOT, State, and industry partners on drug and alcohol testing issues and continues to develop and enhance these partnerships. This is critical because our success is dependent on our ability to leverage the available safety resources.

CONCLUSION

Thank you for the opportunity to allow me to discuss the FMCSA Drug and Alcohol Program and what steps we are taking to ensure that commercial vehicle drivers do not drive while impaired. Removing impaired drivers from our roadways has been a focus of my career during my 29 years with the Indiana State Police and my four years with FMCSA. Given the size and scope of our responsibilities, FMCSA will continue to find

new ways to ensure a comprehensive enforcement program aimed at identifying noncompliant drivers and carriers.

I look forward to working with you to achieve our common goals. I would be happy to respond to any questions you may have.

Questions from Chairman Peter A. DeFazio
SUBCOMMITTEE ON HIGHWAYS AND TRANSIT
OVERSIGHT AND INVESTIGATIONS HEARING ON
DRUG AND ALCOHOL TESTING OF COMMERCIAL MOTOR VEHICLE DRIVERS
THURSDAY, NOVEMBER 1, 2007

QUESTION 1: Since 1988 the U.S. trucking industry has conducted in excess of 100 million drug tests under your regulations. Do you have any data to show the effectiveness of this program?

ANSWER: Drug testing data collected in annual motor carrier surveys since 1995 indicates there has been a significant drop in illegal drug usage by commercial motor vehicle (CMV) drivers. The positive rate for CMV drivers in 1995 was 2.8 percent, while the most recent positive rate for 2006 is 1.3 percent. These employer-reported testing results are supported by FMCSA's most comprehensive commercial vehicle crash study, the "2006 Large Truck Crash Causation Study (LTCCS)", which found just 2.3 percent for illegal drug use for all large trucks involved in the LTCCS crashes. Simply stated, while some transportation workers may use illicit drugs, the overwhelming majority does not.

QUESTION 2: During the last 19 years have accidents and injuries resulting from illegal drug use increased, decreased, or stayed about the same?

ANSWER: Since 1993, the percentage of fatal crashes in the Fatality Analysis Reporting System (FARS) involving illicit drug usage on the part of the driver has been increasing for both truck drivers and passenger vehicle drivers. It is unclear why this is happening. It could be because more people are actually using drugs or it could be because more drug testing information is getting recorded into the FARS over time (i.e., the database is becoming more complete over time).

Nevertheless, if you compare truck drivers to passenger vehicle drivers between 1993 and 2006, you will notice that the percentage of passenger vehicle drivers recorded in FARS as having used an illegal drug (a narcotic, hallucinogen, cannabinol, or PCP) increased much faster than it did for truck drivers.

Specifically, for passenger vehicle drivers, the percentage of these drivers that are recorded in FARS as having used an illegal drug increased by 223 percent between 1993 and 2006 (1.3 percent of passenger vehicle drivers involved in fatal crashes in 1993 tested positive compared to 4.2 percent in 2006). On the other hand, in the case of large truck drivers, the percentage increased by a lesser amount -- 0.63 percent of large truck drivers involved in fatal crashes in 1993 tested positive for illicit drugs, compared to 1.28 percent in 2006).

QUESTION 3: A decline in positive drug tests is not necessarily a good measure. It could mean drug use has gone down or that test evasion has increased. How do you distinguish between the two?

ANSWER: It should be pointed-out that if and when successful test evasion occurs, the agency will have no way of knowing it, since these individuals would be considered to have a negative drug test result. It should also be noted that, based on the agency's annual Drug and Alcohol Testing Survey, the percentage of drivers caught trying to evade testing (based on adulterated and substituted test data) has remained fairly constant over the years. Approximately two hundredths of one percent of the drug tests evaluated in our annual survey shows an adulterated or substituted test result.

QUESTION 4: Why doesn't FMCSA organize a national study of commercial driver drug use based upon the Oregon model? This would ensure that each state is testing for the same drugs at the same thresholds as the DOT test. Is this a feasible idea?

ANSWER: This idea is currently being considered within FMCSA. Much depends on the number of additional States having the scope of authority to conduct roadside urine collections; and the level of funding available to conduct such a study.

QUESTION 5: You indicate that FMCSA has begun a compliance initiative to identify drivers who fail to comply with the return-to-duty process.

a. Can you describe this initiative and its methodology?
b. How many drivers have you identified?
c. You mention that the process is labor intensive and that modifications are being developed to streamline the process and make it more effective. What are these modifications?

ANSWER: The FMCSA "Controlled Substances Subpart O Enforcement Initiative" began in February 2007 to address the problem of drivers testing positive for illegal drugs, then "job-hopping" to another motor carrier without complying with the return-to-duty (RTD) requirements of 49 CFR Part 40 Subpart O.

a. The initiative consists of identifying drivers who test "positive" and then "negative" within a 15 to 20 day period, then matching the driver name against FMCSA databases to identify the motor carrier for which the driver is currently employed. An investigation is initiated and, if it is discovered the driver has failed to complete the RTD process, FMCSA will disqualify and fine the driver.
b. By the end of October 2007, there were nine drivers successfully disqualified and fined through the enforcement process. There were another 12 drivers suspected of being in violation, awaiting investigation. No motor carriers were found to be in noncompliance.
c. In an effort to reduce the costs and increase the enforcement results, FMCSA is streamlining the investigative process, expanding the data analysis, simplifying the policy guidance, and decentralizing the investigations to local areas. We are confident that these measures will improve enforcement results against both drivers and motor carriers that support job-hopping.

QUESTION 6: Mr. Swart, NTSB has recommended and ATA has proposed the creation of a national database — a clearinghouse — of positive and refused drug and alcohol tests for drivers. Would do you think about a DOT wide database that would include this information for all DOT-regulated industries? Is there an argument for keeping it at the modal level?

ANSWER: The Department's Office of Drug and Alcohol Policy Compliance (ODAPC) continues to support the creation of an FMCSA-wide clearinghouse for all CDL-holder drug and alcohol positive and refusal results. This could help prevent job-hopping within, by far, the largest of the DOT-regulated transportation industries.

The Department also believes a national database system will require a considerable investment of resources in order to establish, maintain, and sustain the system that would require specific appropriation. When FMCSA's clearinghouse is up and running and all privacy and tracking issues are resolved, further considerations could be given to include other DOT Agencies in the system.

The DOT drug and alcohol testing program is a nationwide, multi-industry safety effort. Therefore, in addition to supporting the national FMCSA database for positives and refusals, ODAPC has taken many steps on its own and in coordination with many of the DOT Agencies / United States Coast Guard (USCG) regulating drug and alcohol testing to address the collection site issues and thereby to ensure the effectiveness of our safety regulations. Also, ODAPC has continued to take a leading role to inform the public.

For example, ODAPC put onto its website a new employer page with easy-to-follow program guidance and details about setting up successful employer programs. ODAPC developed the "DOT's 10 Steps to Collection Site Security and Integrity" poster and provided widest dissemination possible through our website, listserve, and the DOT Agencies / USCG. We are continuing mail-outs of posters to over 20,000 collection sites throughout the U.S. We have translated ODAPC publications into Spanish language documents. In addition, ODAPC and the DOT Agencies / USCG provided a number of formal conference presentations to a large number of regulated industry and drug and alcohol testing industry representatives throughout the U.S. At each and every one of these industry conferences, we have fully emphasized collection site integrity and security issues.

After the news story broke about collection site irregularities in Minnesota, ODAPC contacted the DOT Agencies / USCG about these important safety concerns. The Federal Aviation Administration (FAA) promptly sent a team to inspect several Minnesota collection sites. With Federal Transit Administration (FTA) assistance, ODAPC supported "clandestine" inspections of the Minnesota collection sites identified in the news story; and more recently, clandestine inspections of those sites identified in the GAO investigation as being the most problematic – this effort continues. ODAPC supports clandestine collection site inspections by all DOT agencies / USCG and will provide training in setting them up.

The FAA, the Federal Railroad Administration, the FTA, the Pipeline and Hazardous Materials Safety Administration, and the U.S. Coast Guard have also stepped-up their collection site

inspections and audits. They are reporting inspection details to ODAPC for entry into a collection site database and have agreed to work together to develop a risk assessment system.

QUESTION 7: ATA is recommending that FMCSA establish a *carrier-based* random testing requirement. For carriers with lower positive rates, the random test rate would be lower. Is this a reasonable idea? Would this be a manageable program? What would it require of FMCSA?

ANSWER: The American Trucking Associations (ATA) proposal to lower the random sampling testing rates for carriers with low positive drug testing rates would be beneficial to the industry. Obtaining accurate information on as many as 700,000 motor carriers and using it to set individualized testing rates would create, at a minimum, a large logistical problem that the agency could not manage and could indeed result in a misdirection of enforcement resources toward carriers who falsely certify to low positive random rates.

The idea may have significant merit if a national database is developed that includes motor carrier specific drug testing information. Until such a development occurs, the additional effort required to monitor the self-reported low positive rate will only redirect resources away from activities that could be considered more "safety-productive."

QUESTION 8: How would a third party administrator/consortium be affected if FMCSA switched to a carrier-based random testing requirement? Would the random test rate apply to all member-carriers based on the TPA's performance? Or would each company within the TPA have its own rate?

ANSWER: As indicated in the previous response, setting up a carrier-based random testing requirement is not considered to be feasible at this time. If the agency does implement such a proposal in the future, questions such as those posed would have to be resolved through analysis of the industry and the notice and comment rulemaking process.

QUESTION 9: Owner-operators are in a unique position in that they must take themselves out of service if they test positive on a drug test. What regulatory changes would he necessary to enforce that requirement?

ANSWER: True owner-operators are unique as indicated when it comes to DOT drug testing. One way to assure that an owner-operator will remove himself from driving after testing positive is to require the consortium to report the positive drug test result to a State CDL licensing agency, and have the State CDL agency suspend or revoke his license until he complies with the return-to-duty requirements. This could also be accomplished by reporting positive test results to FMCSA and having the agency make information about the qualifications (or lack of qualifications) of commercial drivers available to law enforcement. This information could be checked during roadside inspections or traffic enforcement.

QUESTION 10: If a clearinghouse were created with positive tests, would an owner-operator also be required to report him or herself to that clearinghouse?

ANSWER: FMCSA would likely require the consortium that tested the owner-operator to report the positive finding to the national clearinghouse or State CDL licensing agency.

QUESTION 11: Since 2001, more than 70 percent of compliance reviews found violations of drug-testing programs. Have you verified that those violations have been fixed?

ANSWER: The range of drug and alcohol testing violations discovered during compliance reviews ranged from serious violations such as failing to have a drug and alcohol testing program, using a positive tested driver, to minor paperwork violations. In cases of serious noncompliance, follow-up activities (including enforcement) are initiated. In noncompliance of a lesser nature the violations are weighted and combined in an algorithm to identify motor carriers that present the greatest risk to highway safety. These high risk carriers generally receive compliance reviews and may be subjected to enforcement action if appropriate. This method of handling noncompliance is consistent throughout the motor carrier safety program.

QUESTION 12: Mr. Hill, I find DOT's response to GAO's undercover investigations work stunning. Page 20 of Mr. Kutz's written testimony indicates that "DOT officials... indicated they were not surprised by the results of our work, stating that they have performed similar tests themselves in prior years with similar results." The statement goes on to say that DOT has already taken steps to improve collection facility performance by developing posters. What else have you done to take action? Do you really believe that is a legitimate response based on the magnitude of the problem GAO has outlined?

ANSWER: No FMCSA headquarters staff met with Mr. Kutz. FMCSA has provided training to key staff regarding how to review a collection site and has begun reviewing collection sites in selected locations and as determined necessary based on information received during compliance reviews or through complaints. FMCSA is also committed to developing a technical training course for the remainder of the FMCSA field staff. FMCSA will continue to work with the Office of Drug and Alcohol Policy Compliance (ODAPC) in assessing the extent of the problem, and developing countermeasure strategies to improve the industry compliance.

ODAPC was surprised at the GAO's characterization of DOT's response to this issue. At no time during our "Corrective Action briefing" with the GAO did any DOT representative make the statement that GAO attributed to us. In fact, ODAPC spoke with GAO's Mr. Kutz about this incorrect statement and requested that GAO revise it. DOT has not conducted "similar tests themselves in prior years" as GAO asserted.

The GAO testimony's characterization of DOT's action being limited to developing a poster is inaccurate. During the course of GAO's work, DOT set out all of the actions that were underway to address this issue. GAO offered particularly favorable feedback about having collection protocols on the wall of sampling areas, such as by using the poster. During our corrective action briefing, GAO noted that having this information available on the posters was a best practice, which was significantly different than portrayed at the hearing.

ODAPC and the DOT modal agencies ensured that training of program inspectors and auditors is accomplished. We continue to support DOT Agency efforts to increase collection site inspections including civil penalty authority over collection sites and their parent organizations – not just over their regulated employers.

ODAPC will continue to develop and will maintain a centralized database for DOT Agency / USCG collection site inspections. It is teaming with others at DOT to develop on-line and CD training for inspectors and auditors; and to develop on line and CD training for collectors, their parent organizations, and employers. We will continue to strengthen our outreach efforts by continuing to team with the DOT Agencies/ USCG, the drug testing industry, and the regulated transportation industries to publicize and inform them of appropriate collection site standards and procedures.

Regarding attempts to adulterate and substitute specimens, ODAPC promulgated a Notice of Proposed Rulemaking to make specimen validity testing mandatory throughout the transportation industries. The Final Rule is in final coordination within the Department.

ODAPC would support Congressional legislation to:

a. Fund a national database(s) to prevent "job hoppers."

b. Criminalize manufacture and sale products designed to beat the tests.

c. Authorize DOT Agency civil-penalty authority against poor performing collection sites and other service agents.

QUESTION 13: Please explain how you determine the appropriate random testing rate. Are all carriers required to report testing rates or is it a sample? If a sample, how is that sample determined and what percentage of the industry does this represent? If a company fails to provide its positive testing rate, what does ODAPC do to follow-up? Is there any penalty for a company not responding? If yes, please provide a history of enforcement actions taken against companies for failing to provide required data.

ANSWER: The appropriate random drug testing rate is determined by regulation, 49 CFR §382.305, which requires that motor carriers test at a 50 percent rate until the industry reduces its positive testing rate below 1.0 percent for two consecutive years. Additionally, 49 CFR §382.403 requires selected motor carriers to report drug and alcohol testing results in accordance with 49 CFR § 40.26 using the form and guidance provided in Appendix H.

All carriers are not currently required to submit drug and alcohol testing information. Only a sample of randomly selected (with a few exceptions) motor carriers is included in the annual "Drug and Alcohol Testing Survey". For 2006, there were 3,272 survey forms mailed which produced 1,364 usable survey forms for the drug and alcohol assessment (the remaining selected

carriers were either exempt from testing, out-of-business, belonged to consortia that did not select them for testing, did not have testing programs, or did not respond to the survey) . The sample is stratified by carrier size, and determined to be representative of the industry as a whole. The sample represented about 1 percent of the number of carriers of record. The data from the survey are used to estimate the drug and alcohol usage rates in the motor carrier industry for CDL drivers.

Selected carriers that fail to respond to the annual survey are the responsibility of FMCSA. Penalty provisions are provided for but there is no history of extensive enforcement in this area. The strategy for 2007's Drug and Alcohol Management Information System survey has been improved to include a contractor to follow-up on nonrespondents. This activity will expedite the collection process and give the survey more credibility by incorporating a broader sense of enforcement. ODAPC has helped to shape the FMCSA survey and has been primarily responsible for uniformly consolidating 21 individual modal reports into a single Department-wide survey report.

United States Government Accountability Office

GAO

Testimony

Before the Subcommittee on Highways and Transit, Committee on Transportation and Infrastructure, House of Representatives

For Release on Delivery
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DRUG TESTING

Undercover Tests Reveal Significant Vulnerabilities in DOT's Drug Testing Program

Statement of Gregory D. Kutz, Managing Director
Forensic Audits and Special Investigations

GAO-08-225T

November 1, 2007

GAO

Highlights

Highlights of GAO-08-127, a testimony before the Subcommittee on Highways and Transit, Committee on Transportation and Infrastructure, House of Representatives

Why GAO Did This Study

To help prevent accidents resulting from drug use by individuals in safety-sensitive positions, the Department of Transportation (DOT) requires many employers to conduct drug testing of their employees. These drug tests, besides collecting a urine specimen from employees, to ensure the integrity of the urine specimen and the collection process, DOT regulations provide numerous protocols that outline collection procedures and identify controls to prevent employees from defeating a drug test.

Recent media accounts indicate that urine sites performing DOT drug test collections may not be adhering to the collection protocols. Moreover, given the different techniques a drug user may employ in an attempt to defeat a drug test, it is possible that a commercial truck driver could defeat a drug test by cheating, adulterating, or substituting a urine specimen in order to obtain a passing result. GAO was asked to perform an undercover operation to determine whether (1) urine collection followed DOT protocols at selected collection sites and (2) commercially available products could be used to defeat drug tests.

To perform this undercover operation, GAO created two fictitious trucking companies and produced bogus driver's licenses. GAO investigators then posed as truck drivers to test 24 collection sites throughout the United States. GAO briefed DOT officials on the results and they agreed with the findings.

To view the full product, including the scope and methodology, click on GAO-08-127. For more information, contact Gregory D. Kutz at (202) 512-6722 or kutzg@gao.gov.

DRUG TESTING

Undercover Tests Reveal Significant Vulnerabilities in DOT's Drug Testing Program

What GAO Found

DOT's drug testing program is vulnerable to manipulation by drug users, especially given the wide availability of products designed to defeat drug tests. While all urine collection sites followed DOT protocols by asking GAO undercover investigators to provide identification, investigators successfully used bogus driver's licenses to gain access to all 24 sites—demonstrating that a drug user could send someone to take a drug test in their place using fake identification. In addition, 22 of the 24 selected urine collection sites did not adequately follow the remaining protocols GAO tested. For example, 75 percent of the urine collection sites GAO tested failed to restrict access to items that could be used to adulterate or dilute the specimen, meaning that running water, soap, or air freshener was available in the bathroom during the test. The table below provides information about the high failure of selected protocols for the 24 collection sites tested.

Failure Rates for Selected DOT Protocols GAO Tested

Selected DOT urine specimen collection protocol	Percentage of the 24 collection sites that failed
Secure the facility from all substances that could be used to adulterate or dilute the specimen	75
Secure all sources of water in the restroom	67
Ask the employee to empty his/her pockets and display items to ensure no items are present that could be used to adulterate the specimen	42
Check the temperature of the specimen	19
Place a bluing agent in the toilet or secure it with tape	17

Source: GAO.

GAO also found that drug masking products such as adulterants, dilutants, and substitutes were widely available on the Internet. After purchasing drug masking products from Web sites, GAO investigators used adulterants at four of the collection sites and substitute synthetic urine at another four sites without being caught by site collectors—demonstrating that these products could easily be brought into a collection site and used during a test. Even in one case where a collection site followed all DOT collection protocols regarding administration of the test, investigators were still able to substitute synthetic urine for their sample. Every drug masking product went undetected by the drug screening labs. Provided the adulterant GAO used would be able to mask drug use as advertised, a drug user would likely be able to use the substances GAO tested to obtain a passing result on his or her test. According to officials GAO interviewed at the Substance Abuse and Mental Health Services Administration (SAMHSA), companies that make drug-masking products are aware of government test standards and devise products that prevent laboratories from detecting them. SAMHSA is required to provide information to laboratories on how to test the validity of the urine specimens, publicly providing detailed information on lab testing procedures on its Web site.

Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to discuss our undercover operation to test Department of Transportation (DOT) drug testing regulations as they relate to commercial truck drivers. According to DOT, its regulations implement the world's largest drug and alcohol testing program covering six DOT operating administrations and over 12.1 million employees in the United States, including school bus drivers, commercial truck drivers transporting hazardous materials, and airline pilots. We focused our efforts on the DOT drug testing program for commercial truck drivers, which DOT considers to be a safety-sensitive transportation position. If an employee in a safety-sensitive transportation position were using controlled substances such as marijuana, cocaine, or phencydidine (PCP), a clear public safety risk would exist.

To help prevent accidents resulting from drug use by individuals holding safety-sensitive positions, federal law requires motor carriers to drug test their employees.[1] Motor carriers in the United States are responsible for conducting the drug testing of their employees and can use third-party administrators to help them coordinate the drug tests. Drug tests involve collecting a urine specimen from the employee at a collection site. As long as the collection site meets the requirements of DOT's regulations, urine collection can be performed at sites across the nation, in addition to being performed onsite at an employer's facilities. DOT regulations contain numerous control measures intended to ensure the integrity of the urine specimen and the collection process during these tests. However, a drug using employee may attempt to defeat a drug test using techniques commonly known as substitution, dilution, and adulteration. To prevent an employee from defeating the drug test, DOT regulations mandate that collection sites follow certain protocols, for instance:

- DOT protocols require collectors to validate that an employee is carrying photo identification before the test. This is designed to prevent an employee from having somebody else take the test for him or her, which is one form of *substitution*.

- DOT protocols require collectors at drug testing sites to ensure that no clear water source is available in the collection area, among other measures, to prevent an employee from using water in the bathroom to *dilute* their urine specimen.

[1] 49 U.S.C. § 31306.

- DOT protocols specify that employees should not be able to access soap, air freshener, or other chemicals to prevent them from using these products to *adulterate* a urine specimen. Other DOT protocols designed to prevent adulteration require employees to empty their pockets and wash their hands before providing the specimen.

Recent media accounts indicate that some private sector collection sites performing DOT drug test collections may not be adhering to established collection protocols. Moreover, given the different techniques a drug user may employ in an attempt to defeat a drug test, it is possible that a commercial truck driver could defeat a drug test by diluting, substituting, or adulterating a urine specimen in order to obtain a passing result. You asked us to perform an undercover operation to determine whether (1) urine collectors followed DOT protocols at selected collection sites and (2) commercially available products could be used to defeat drug tests.

To determine whether urine collectors followed DOT protocols at selected publicly advertised urine collection sites, we created two fictitious trucking companies. Since our focus was on commercial truck drivers, we produced bogus commercial driver's licenses using computer software and hardware available to the public. Our investigators then posed as commercial truck drivers employed at the fictitious companies. We also used the fictitious company names to hire third-party administrators (TPA) to help us coordinate the drug tests by recommending collection sites and processing the required paperwork. Our undercover investigators then reported to urine collection sites pretending they had been selected by their company to receive a drug test and submitted urine specimens. The specimens were sent to the drug testing laboratories by the collection sites, and through our TPA we were able to access the laboratory results of our drug tests. We selected 24 publicly advertised urine collection sites to test four major geographic areas throughout the United States, including 6 urine collection sites in the Washington, D.C., metropolitan area and 6 in each of the following three areas—Los Angeles, New York/Northern New Jersey, and Dallas/Fort Worth. We chose the Washington, D.C., area because of its size and for reasons of convenience and economy, and the other three areas due to the large number of truck drivers residing within each area.[2] At each urine collection site we tested 16 specific DOT protocols which we determined, based on our research, to be the most critical in preventing an employee from defeating a drug test.

[2]According to the U.S. Department of Labor, Bureau of Labor Statistics.

Investigators brought mobile phones with photographic capability into the collection sites to photograph any breaches of protocol they observed.

To determine whether commercially available products could be used to defeat drug tests, we researched products available to mask drug use by conducting Internet searches, reviewing prior GAO reports, and interviewing knowledgeable government officials.[3] We then purchased adulterants and substitute synthetic urine over the Internet and used them in an attempt to defeat 8 out of the 24 drug tests. We did not test any commercially available dilutants or use dilutants we found in the collection area (e.g., tap water). While synthetic urine requires complete substitution, adulterants were mixed with the urine specimen our investigators provided. It is therefore important to note that since our investigators' urine specimens did not contain traces of drug use, we cannot report on whether the adulterants we used were able to mask drug use—only on whether the laboratories could detect the presence of the adulterant. We assumed that a drug user could receive a passing result as long as the laboratories did not detect the presence of the synthetic urine. It is not possible to generalize the results of our undercover testing to apply to all collection sites or to all drug-masking products.

We conducted this investigation from May to September 2007 in accordance with standards prescribed by the President's Council on Integrity and Efficiency.

Summary

While all urine collection sites followed DOT protocols by asking our undercover investigators to provide identification, we successfully used bogus driver's licenses to gain access to all 24 sites—demonstrating that a drug user could send someone to take a drug test in their place using fake identification. In addition, 22 of the 24 selected urine collection sites did not adequately follow the remaining protocols we tested. For example, 75 percent of the 24 urine collection sites we tested failed to restrict access to items that could be used to adulterate or dilute the specimen, meaning that running water, soap, or air freshener was available in the bathroom during the test. Table 1 provides information about the high failure of selected protocols for the 24 collection sites tested.

[3]GAO, *Products to Defeat Drug Use Screening Tests Are Widely Available,* GAO-05-653T (Washington, D.C.: May 17, 2005).

Table 1: Failure Rates for Selected DOT Protocols GAO Tested

Selected DOT collection protocol	Percentage of the 24 collection sites that failed
Secure the facility from all substances that could be used to adulterate or dilute the specimen	75
Secure all sources of water in the restroom	67
Ask the employee to empty his/her pockets and display items to ensure no items are present that could be used to adulterate the specimen	42
Check the temperature of the specimen	19
Place a bluing agent in the toilet or secure it with tape	17

Source: GAO.

We also determined that drug-masking products, such as adulterants, dilutants, and substitutes, were widely available on the Internet. After purchasing drug-masking products from Web sites, we used adulterants at four of the collection sites and substitute synthetic urine at another four sites without being caught by site collectors—demonstrating that these products could easily be brought into a collection site and used during a test. Even in one case where a collection site followed all DOT collection protocols regarding administration of the test, we were still able to substitute synthetic urine for our specimen. Every drug-masking product went undetected by the drug screening labs. Provided the adulterant we used would be able to mask drug use as advertised, a drug user would likely be able to use the substances we tested to obtain a passing result on his or her test. According to officials we interviewed at the Substance Abuse and Mental Health Services Administration (SAMHSA), companies that make drug-masking products are aware of government test standards and devise products that prevent laboratories from detecting them.

We briefed DOT officials on the results of our work and they agreed with our findings. We will provide DOT with a referral letter that specifies the geographic areas and collection site names for those sites that we determined had failures in protocols.

Background

Six operating administrations under DOT have issued regulations requiring antidrug programs in the aviation, highway, railroad, mass transit, pipeline, and maritime industries. Antidrug programs for commercial truck drivers are regulated by the Federal Motor Carrier Safety Administration (FMCSA), which is the operating administration responsible for enforcing FMCSA regulations and establishing who is tested and when they are

tested.[4] FMCSA antidrug regulations require that employers of commercial motor carriers, including those who are owner-operators, conduct drug testing according to the DOT "Procedures for Transportation Workplace Drug Testing Programs."[5] These DOT regulations mandate that motor carriers must conduct pre-employment, reasonable suspicion, random, and post-accident drug testing on their employees. While these scenarios are all different, DOT requires collectors and collection sites to follow uniform collection protocols regardless of the reason for the test. Collection sites are privately run facilities, where the collectors at the sites do not have to be certified by DOT, but must meet DOT regulations by completing the required training and following DOT protocols. Because collection sites are spread throughout the nation, it is easy for an employee in any of the drug testing scenarios, from pre-employment to post-accident drug testing, to get to a collection site within the given time frame.[6] According to DOT regulations, collection sites must promote privacy, incorporate the scientific and technical guidelines of the Department of Health and Human Services (HHS), utilize a scientifically recognized testing method, and require that specimens be labeled and secured in the presence of the tested employee to prevent tampering. To help collection sites comply with these regulations, DOT's Office of Drug and Alcohol Policy and Compliance issued revised protocols in December 2006.[7] The protocols indicate that the collector has a major role in the success of the DOT drug testing program because he or she is the one individual in the testing process with which all employees have direct, face-to-face contact. The protocols also state that the test may lose validity if the collector does not ensure the integrity of the specimen and collection process.

DOT protocols have specific requirements that collection sites must meet, including procedures to (1) prevent unauthorized access to the urine collection site; (2) prevent the tested employee or anyone else from gaining unauthorized access to the collection materials/supplies;

[4]These regulations apply to those who operate commercial motor vehicles in any state and are subject to commercial drivers' license requirements under 49 CFR 382, Licencia Federal de Conductor (Mexico) requirements, or the requirements of Canadian National Safety Code.

[5]49 CFR Part 40.

[6]Post-accident drug tests must be conducted as soon as practicable, but within 32 hours of the crash, while employees required to take a random drug test must report immediately once he or she is notified.

[7]*Urine Specimen Collection Guidelines for the U.S. Department of Transportation Workplace.*

(3) ensure that the tested employee does not have access to items that could be used to adulterate or dilute the specimen such as soap, disinfectants, cleaning supplies, and water; and (4) ensure that the tested employee is under the supervision of a collector or appropriate site personnel at all times when permitted into the site.

To document the collection of the specimen, DOT requires that urine collection sites correctly complete the Federal Drug Testing Custody and Control Form (CCF) for every collection under the DOT drug testing program. This form is also used to document the transfer of the specimen to the HHS-approved, private sector laboratories, where the urine specimen is sent to be tested for marijuana, cocaine, amphetamines, opiates, and phencydidine (PCP) as identified by HHS regulations. It is important to note that the laboratories that test the specimen are separate entities than the urine collection sites. The collection sites must follow DOT protocols and their role is to collect the urine specimen, while the laboratories must be certified by HHS and their role is to perform the drug testing of the specimen. The laboratories are authorized to also conduct validity testing to determine if the specimen is consistent with normal human urine, whether adulterants or foreign substances are present, or if the specimen was diluted or substituted. The HHS organization, Substance Abuse and Mental Health Services Administration (SAMHSA), administers the Federal Workplace Drug Testing Program and revised the guidelines in 2004 to require that specimen validity tests be conducted on all urine specimens of federal employees due to the increase in the number of chemical adulterants that were marketed on the Internet and in certain magazines. DOT did not adopt this update in their regulations—so currently drug testing laboratories are only authorized, not required, to perform validity testing for all DOT required commercial motor carrier drug tests.

As an additional quality control check, DOT requires that a Medical Review Officer (MRO) serve as an independent, impartial authority to verify the lab results. After the results are verified, the MRO, who is a licensed physician, informs the designated company official whether the employee passed or failed the drug test. The MRO may also designate test results as *cancelled* in the case of an invalid test. An invalid test results when a drug screening lab identifies an unidentified adulterant, substitute, or abnormal physical characteristic in the specimen that prevents the lab from obtaining a valid test result. In the case of a cancelled test, the MRO conducts an interview with the employee to determine if there is a legitimate medical reason for the result. If the MRO determines there is a

legitimate medical reason, no further action is required.[8] However, if the MRO determines there is no legitimate medical reason, the employee is required to take another drug test under direct observation—effectively getting another opportunity to take the test, but without the privacy afforded previously.[9] In the case of a positive result, which is defined as a failed drug test, a supervisor or company official is required to immediately remove the employee from the job. Employees who test positive and continue to perform safety-sensitive functions and employers who permit them to do so are both subject to criminal and civil fines.

Most Collection Sites Failed to Comply with All DOT Protocols

In our tests of the selected 24 urine collection sites in four major geographic areas throughout the United States, we determined that 22 of the 24 sites showed varying degrees of failure in complying with the protocols that we tested. While all urine collection sites followed DOT protocols by asking our undercover investigators to provide identification, we successfully used bogus driver's licenses to gain access to all 24 sites—demonstrating that a drug user could send someone else to take a drug test in their place. This fact in and of itself shows that in 100 percent of our tests we successfully used a form of substitution. However, we did not count these instances as a failure of protocol because the collectors are not required to validate the identity of the employee—they are only required to ensure that an employee presents identification.

Twenty-two of the 24 tested collection sites failed to comply with many of the remaining DOT protocols we tested. In table 2, we provide a summary of the results of our testing of the 16 protocols by geographic area in the order that we tested them. The table identifies the number of protocols with which each site failed to comply.

[8]In the case of pre-employment, return-to-duty, or follow-up tests, a negative result is required.

[9]A directly observed collection procedure is the same as a routine collection with the additional requirement that an observer physically watch the employee urinate into the collection container.

Table 2: Results of Testing the 16 Protocols by Geographic Area

	Number of protocols failed					
Geographic area	**Site 1**	**Site 2**	**Site 3**	**Site 4**	**Site 5**	**Site 6**
Washington, D.C.	2	2	0	2	12	2
Los Angeles	8	5	6	2	2	3
New York/Northern New Jersey	6	4	5	3	6	5
Dallas/Fort Worth	2	5	2	4	0	2

Source: GAO.

For a summary of the protocols we tested and their rationale, see figure 1.

Figure 1: Key Collection Protocols Tested by GAO Undercover Investigators

Requirement	Rationale
☐ 1. **Did the collector require the employee to provide appropriate identification?**	To validate the identity of the employee
☐ 2. **Did the collector ask the employee to empty his/her pockets and display items to ensure no items are present that could be used to defeat the test?**	To ensure no items are present that could be used to defeat the test
☐ 3. **Did the collector instruct the employee to wash his/her hands under the collector's supervision?**	To ensure that the employee does not have items that he or she could use to adulterate, substitute or dilute the specimen
☐ 4. **Did the collector direct the employee to provide a specimen of at least 45 ml?**	To ensure the specimen contains a sufficient amount of urine—a minimum of 45mL for DOT collections
☐ 5. **Did the collector direct the employee to not flush the toilet?**	When the employee flushes the toilet, he or she can use the clear (un-blued) water to potentially dilute the specimen
☐ 6. **Did the collector direct the employee to return with the specimen as soon as possible after voiding?**	The time from urination to temperature measurement is critical and in no case shall exceed 4 minutes
☐ 7. **Were all sources of water in the restroom secured?**	The employee can use clear (un-blued) water to potentially dilute the specimen
☐ 8. **Was bluing agent placed in the toilet or was it secured with tape?**	The employee can use the clear (un-blued) water to potentially dilute the specimen
☐ 9. **Did the collector check the temperature of the specimen?**	If the temperature of the specimen is outside the acceptable range, it gives reason to believe that the donor may have altered or substituted the specimen
☐ 10. **Was the employee allowed to place the tamper-evident seals from the Federal Drug Testing Custody and Control Form (CCF) onto the specimen bottles?**	The collector, not the employee, is supposed to place the tamper-evident label/seal on the specimen bottle
☐ 11. **Did the collector seal and date the specimen?**	The tamper-evident seal is used to deter tampering of the specimen during transit and the specimen is dated to ensure that the urine specimen is correctly documented
☐ 12. **Did the collector have the employee initial the specimen bottle seals after placing them on the bottles?**	To certify that it is the specimen collected from the employee
☐ 13. **Did unauthorized people have access to the collection site?**	To ensure secure access and authorization of the collection site
☐ 14. **Did the employee have access to the collection materials or supplies?**	To avoid unauthorized access to items that could be used to adulterate or substitute the specimen
☐ 15. **Did the employee have access to items that could be used to adulterate or dilute the specimen?**	To avoid unauthorized access to items that could be used to adulterate or substitute the specimen
☐ 16. **Was the employee under the supervision of the collector or appropriate site personnel at all times?**	To ensure that all employees authorized are under the supervision of a collector or appropriate site personnel at all times when permitted into the collection site

Source: GAO.

Note: We selected these protocols from 49 CFR Part 40, "Procedures for Transportation Workplace Drug Testing Programs."

Some of the criteria above relate to preventing the employee from having access to items at the collection site, such as water or cleaning products, which could be used to adulterate or dilute the specimen. These types of products might be detected by drug testing laboratories, however, we did not test this. We provide detail on our findings of the tested urine collection sites by area in the order of our testing below.

Washington, D.C., Metropolitan Area

In our testing of the Washington, D.C., metropolitan area we determined that, in five of the six sites tested, there were varying degrees of failure in complying with the 16 protocols. Most of the sites failed only two protocols, while site 3 did not fail any of the protocols and site 5 performed poorly by failing 12 protocols—75 percent of the protocols tested. In the case of site 5, we determined that although this collection site failed to comply with most of the protocols, the drug screening lab identified errors and cancelled the test due to the inappropriate collection process. We provide additional detail below on our experiences at three of the Washington, D.C., metropolitan area collection sites.

- **Washington D.C., Area, Site 3**: This collection site did not fail any of the protocols that we tested. However, our investigator used substitute synthetic urine he brought with him to contaminate the urine specimen during the test and the laboratory did not detect the presence of the synthetic urine.

- **Washington D.C., Area, Site 4:** At this collection site, the investigator had access to water which could be used to dilute a specimen. In addition, the investigator brought in and used an adulterant at this site and the laboratory did not detect the presence of the adulterant.

- **Washington D.C., Area, Site 5:** This site failed to comply with 12 of the 16 protocols that we tested. Although it was not one of the protocols we tested at other facilities, one of our investigators exhibited a "shy bladder" at this site and could not provide a full urine specimen of 45 mL. The collector permitted our investigator to provide half of the specimen, leave the facility, and return approximately 1 hour later—a violation of DOT protocols, which state that the employee should not be allowed to leave the collection site and should be monitored during the waiting time. When completing the collection process, the collector used half of the specimen from the original collection and half from what the investigator provided later. The drug screening lab identified this error and cancelled the test due to the inappropriate collection process.

See appendix I for a site-specific breakdown, by protocol, of the results of our testing in the Washington, D.C., metro area.

Los Angeles Area

In our testing of the Los Angeles area we determined that, of the six sites tested, there were varying degrees of failure in complying with the 16 protocols—including one site that failed 8 of the 16 protocols. Other selected sites in the Los Angeles area failed up to 5 and 6 protocols while the remaining sites failed 3 protocols or less. We provide additional detail below on our experiences at four of the Los Angeles area collection sites.

- **Los Angeles, Site 1:** The investigator was not instructed to wash his hands before providing the specimen. This could have allowed a tested employee to hide a drug-masking product in his hand when taking the test. In addition, there was no bluing agent in the toilet. That means a tested employee could have used the clear water in the toilet to dilute his or her specimen. The collector did not perform the split specimen correctly by only filling one specimen bottle.[10] The results were still valid despite the incorrect split specimen because the lab result was passing for the first specimen bottle, so according to DOT protocols a second bottle is not needed to validate a passing result.

- **Los Angeles, Site 3**: The collector did not tell our investigator that the toilet should not be flushed, allowing the employee to potentially use the clear un-blued water in the flushed toilet to dilute the specimen. In addition, the collector did not instruct the investigator to return with the specimen as soon as possible after voiding—the temperature of the specimen needs to be taken within 4 minutes in an attempt to determine whether the specimen was substituted, diluted, or adulterated. Our investigator used synthetic urine in this drug test and the laboratory was not able to detect the presence of the synthetic urine.

- **Los Angeles, Site 4:** The collector at this site asked our investigator to empty his pockets. However, he did not have to empty all of his pockets—this enabled our investigator to bring an adulterant into the collection area by hiding it in his back pocket. The laboratory did not detect the presence of the adulterant.

[10]DOT regulations require a split specimen, which entails splitting the urine specimen into two vials. The collector pours the primary specimen of at least 30 mL of urine in the first vial, and then pours at least 15 mL in the second vial. The second vial is not tested unless there is a positive result and it is needed to confirm the positive result.

- **Los Angeles, Site 6:** The collector failed to instruct our investigator to empty his pockets before providing a specimen at this site. In addition, our investigator had access to running water in the sink—this could potentially be used to dilute the specimen. The collector did not perform the split specimen correctly and only filled one specimen bottle. The results were still valid despite the incorrect split specimen because the lab result was passing for the first specimen bottle, so according to DOT protocols a second bottle is not needed to validate a passing result.

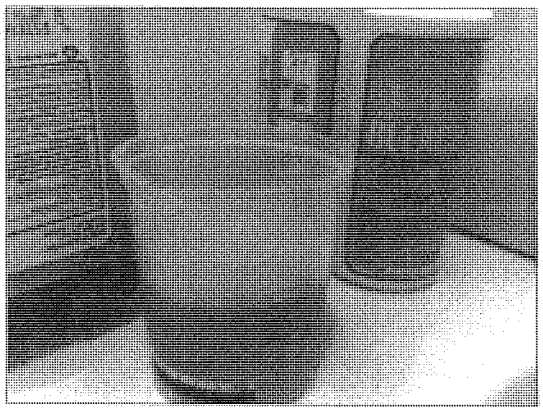
See appendix I for site-specific breakdown, by protocol, of the results of our testing in the Los Angeles area.

New York/Northern New Jersey Area

In our testing of the New York/Northern New Jersey area we determined that, of the six sites tested, collection sites failed to comply with a large number of the 16 protocols—sites 1 and 5 failed to comply with six protocols, sites 3 and 6 failed to comply with five protocols, and sites 2 and 4 failed to comply with four and three protocols, respectively. We provide additional detail below on our experiences at five of the New York/Northern New Jersey area collection sites, including photographs of the collection areas taken with mobile phone cameras.

- **New York/Northern New Jersey, Site 1:** In addition to failing to comply with five other protocols, this collection site had an adulterant (bleach) located on top of the toilet (see fig. 2).

Figure 2: Bleach Located in Collection Area in Violation of DOT Protocols



Source: GAO.

- **New York/Northern New Jersey, Site 2**: The collector failed to instruct our investigator to empty his pockets before providing a specimen at this site, making it easy for our investigator to bring an adulterant into the collection room. Moreover, the collector did not watch our investigator to see whether he washed his hands before providing the specimen. The bathroom had liquid soap and liquid cleaning products available in the collection area. Our investigator used an adulterant he brought with him to contaminate the urine specimen during the test. The laboratory did not detect the presence of the adulterant.

- **New York/Northern New Jersey, Site 4:** The collector failed to instruct our investigator to empty his pockets before providing a specimen at this site, making it easy for our investigator to bring synthetic urine into the collection room. In addition, the bathroom had water and disinfectant spray available in the collection area. The laboratory did not detect the presence of the synthetic urine.

- **New York/Northern New Jersey, Site 5:** The collector did not supervise our investigator in the collection site. While the collector remained in one room, he told our investigator to use a bathroom

located down an adjoining hallway. According to DOT protocols, a tested employee should be supervised at all times during the collection process.

- **New York/Northern New Jersey, Site 6:** Our investigator was unsupervised at the collection site, allowing him to identify cleaning products outside the collection room that could be used as adulterants, pick up a large can of disinfectant, and bring it with him into the collection room. Our investigator took pictures of this violation using a mobile phone camera. Figure 3 shows the disinfectant spray and other adulterants outside the collection room.

Figure 3: Adulterants Located Outside a Collection Room in Violation of DOT Protocols

Source: GAO.

In figure 4, the investigator has brought the disinfectant with him into the collection room and placed it next to his urine specimen on the toilet.

Figure 4: Adulterant Moved into Collection Room

Source: GAO.

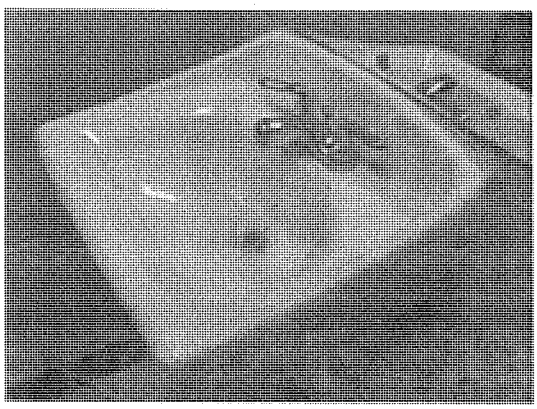
See appendix I for a site-specific breakdown, by protocol, of the results of our testing in the New York/Northern New Jersey area.

Dallas/Fort Worth Area

In our testing of the Dallas/Fort Worth area we determined that, in five of the six sites tested, there were varying degrees of failure in complying with the 16 protocols. Many of the sites failed 2 protocols, while site 2 failed 5, site 4 failed 4, and site 5 did not fail any of the protocols. We provide additional detail below on our experiences at five of the Dallas/Fort Worth area collection sites, including photographs of the collection areas taken with mobile phone cameras.

- **Dallas/Fort Worth, Site 2:** Our investigator was able to bring an adulterant into the collection site and used it to adulterate his urine specimen. While in the collection area, the investigator noticed that running water was available—in violation of DOT protocols. See figure 5.

Figure 5: Running Water in the Collection Room in Violation of DOT Protocols



Source: GAO.

After providing his urine specimen to the collector, the investigator observed that the collector only filled one specimen bottle rather than the two required under DOT's split specimen protocols. The collector threw out the remaining specimen. The laboratory did not detect the presence of the adulterant. The results were still valid despite the incorrect split specimen because the lab result was passing on the first specimen bottle, so according to DOT protocols a second bottle is not needed to validate a passing result.

- **Dallas/Fort Worth, Site 4:** The collector failed to instruct our investigator to empty his pockets before providing a specimen at this site, making it easy for our investigator to bring synthetic urine into the collection room. Once he was in the collection room, the collector instructed our investigator to leave the door completely open while providing the specimen. The collector waited outside the collection room and did not directly observe the collection; nevertheless, our investigator was able to pour synthetic urine into the provided specimen cup. The laboratory did not detect the synthetic urine.

- **Dallas/Fort Worth, Site 5**: This collection site performed well in meeting all of the DOT protocols. This site had a 15-item checklist

outlining DOT protocols hanging on the wall. Our investigator observed the technician using the checklist while conducting the collection of the urine specimen.

- **Dallas/Fort Worth, Site 6**: This collection site allowed the employee access to water by not securing the toilet lid in the collection room leaving the employee an opportunity to use the clear un-blued water to potentially dilute the specimen. Also in the collection room was an automatic spray disinfectant on the wall. A tested employee could have used this spray to dilute or adulterate his or her specimen.

See appendix I for a site-specific breakdown, by protocol, of the results of our testing in the New York/Northern New Jersey area.

Commercially Available Products Can Defeat Drug Tests at Selected Sites

We determined that drug-masking products were widely available for purchase over the Internet and used this method to purchase adulterants and synthetic urine for our tests. As discussed above, we submitted specimens containing adulterants at four of the collection sites and at another four sites we used synthetic urine without being caught by site collectors, demonstrating that these products could easily be brought in and used during a test. In every case that investigators used adulterants or substitutes during the drug test, the drug-masking products went undetected during lab testing, lab validation, and MRO review of the labs' results. We also determined that publicly available regulations provide details on how drug testing labs test and validate urine specimens. Companies that sell drug-masking products can access this information and update their products to prevent them from being detected by the laboratory.

Products to Defeat Drug Tests Are Widely Available

In performing Internet searches, we found drug-masking products that the public can easily obtain and that are marketed as products that can be used to pass urine drug tests. A simple Internet search using a phrase such as "pass drug test" resulted in over 2 million Web site hits. We determined that these types of Web sites contained various adulterants and urine substitutes available for purchase, including accessories that would allow an employee to conceal the product on their body when taking a test. We used these types of Web sites to purchase drug-masking products for our testing of selected urine collection sites. SAMHSA is aware of these products and revised the Mandatory Guidelines for Federal Workplace Drug Testing Programs in 2004 to require that specimen validity tests be conducted on all urine specimens, noting that there was a recent increase in the number of chemical adulterants that are marketed on the Internet

and in certain magazines. DOT did not adopt this update in their regulations—so currently drug testing laboratories are only authorized, not required, to perform validity testing for all DOT required commercial motor carrier drug tests. According to SAMHSA, approximately 400 different products are available to defeat urine drug tests.

Adulterants and Synthetic Urine Used at 8 of 24 Collection Sites

We were able to easily bring drug-masking products into a collection room at every one of the eight collection sites we tested with these products. Even in cases where the collector followed DOT protocol and asked our investigator to empty his pockets, our investigators simply hid these products in their pockets and elsewhere in their clothing. At one Dallas/Fort Worth collection site discussed above, the collector instructed our investigator to leave the bathroom door completely open when providing the specimen. The collector waited outside the bathroom; nevertheless, the investigator was able to pour synthetic urine into the specimen cup undetected. Investigators determined that there is information on the Internet about concealing drug-masking products. For example, one Web site noted that "although most testing sites will require you to remove items from your pockets, it is still possible to sneak in another specimen." Even a knowledgeable government official with SAMHSA stated that, because collection protocols do not allow collectors to directly observe urination unless they are suspicious, the opportunity to substitute or adulterate a urine specimen exists.

Adulterants and Substitutes Were Not Detected by Laboratories

SAMHSA officials stated that validity tests are intended to produce accurate, reliable, and correctly interpreted test results and to decrease or eliminate opportunities to defeat drug tests. We found that none of the adulterants or synthetic urine we used were identified by the laboratories, however, we cannot confirm if the laboratories performed validity testing because under DOT regulations they are only authorized, not required, to do so. SAMHSA is required to provide information to laboratories on how to test the validity of the urine specimen and publicly provide detailed information on lab testing procedures.[11] According to a SAMHSA official with whom we spoke, companies that market masking substances periodically offer new formulations of their products to avoid detection. In fact, one Web site we located appeared to verify this claim by advertising that its product was "continuously updated and adjusted to keep up with changing technologies." Despite their sophistication and ease of use, there is no regulation prohibiting the sale of these products. Under 21 U.S.C.

[11]Under P.L. 100-71, Section 503 (July 11, 1987).

Section 863 it may be illegal to sell drug-masking products if the products are determined to be "drug paraphernalia." However, we have not found any reported federal cases in which an individual has been prosecuted for selling drug-masking products under this statute.

Corrective Action Briefing

We briefed DOT on the results of our investigation on October 1, 2007. DOT officials agreed with our findings and indicated that they were not surprised by the results of our work, stating that they have performed similar tests themselves in prior years with similar results. We agreed with DOT that we would provide a referral letter that specifies the areas and collection site names for those sites that we determined had failures in protocols. DOT added that it has already taken steps to improve the collection facilities' performance in the drug testing program. For example, officials said they have developed posters with 10 key DOT protocols to be distributed at urine collection sites. These posters are intended to help collectors follow the appropriate protocols while conducting drug tests under the DOT drug screening program.[12] DOT officials also stated that the Real ID Act could close the vulnerability we identified of using fake drivers' licenses to take the drug tests, but that, because implementation of this act is years away, there should be an interim solution.[13] Finally, regarding drug-masking products, DOT officials stated that they have continually supported legislation to ban the sale and marketing of drug-masking products.

Conclusion

Our work shows that a drug user could easily pass a DOT drug test and continue to work in his or her safety-sensitive commercial transportation job—driving children to school or transporting hazardous materials, for example. To fully address the vulnerabilities we identified, improvements will need to be made in both the design of the entire process and the ability of collection site employees to adhere to current protocols. In ongoing work, expected to be complete in May 2008, GAO is examining options to deal with these and related drug testing issues.[14]

[12] 49 CFR Part 40.

[13] Real ID Act of 2005, P.L. No. 109-13, div. B (May 11, 2005).

[14] GAO, *Preliminary Information on Challenges to Ensure the Integrity of Drug Testing Programs*, GAO-08-220T (Washington, D.C.: Nov. 1, 2007)

Mr. Chairman and Members of the Subcommittee, this concludes my statement. I would be pleased to answer any questions that you may have at this time.

Contacts and Acknowledgments

For further information about this testimony, please contact Gregory D. Kutz at (202) 512-6722 or kutzg@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this testimony. In addition to the individual named above, the individuals who made major contributions to this testimony were John Ryan Assistant, Director; Verginie Amirkhanian; Shafee Carnegie; Paul Desaulniers; Matthew Harris; Jason Kelly; Jeffrey McDermott; and Andrew McIntosh.

Appendix I: Results of Undercover Testing in Four Metropolitan Areas of the United States

The following four tables present a site-specific breakdown, by protocol, of our undercover test results. We provide these tables in the order of our testing. Our investigators used a data collection instrument to track the compliance of collectors at each site. An "unknown" result means that investigators could not determine whether the collection site failed to comply with the particular protocol because it was not observed.

Washington, D.C., Metropolitan Area

Table 3 provides our findings for the Washington, D.C., metropolitan area, which is the first area where we tested the 16 key collection protocols.

Table 3: Washington, D.C., Undercover Test Results

Protocol	Site 1	Site 2	Site 3	Site 4	Site 5	Site 6
Did the collector require the employee to provide appropriate identification?	✓	✓	✓	✓	✓	✓
Did the collector ask the employee to empty his/her pockets and display items to ensure no items are present that could be used to defeat the test?	✓	✓	✓	✓	**Fail**	✓
Did the collector instruct the employee to wash his/her hands under the collector's supervision?	✓	✓	✓	✓	**Fail**	✓
Did the collector direct the employee to provide a specimen of at least 45 mL?	✓	✓	✓	✓	✓	✓
Did the collector direct the employee to not flush the toilet?	✓	✓	✓	✓	**Fail**	✓
Did the collector direct the employee to return with the specimen as soon as possible after voiding?	✓	✓	✓	✓	**Fail**	✓
Were all sources of water in the restroom secured?	**Fail**	**Fail**	✓	**Fail**	**Fail**	**Fail**
Was bluing agent placed in the toilet or was it secured with tape?	✓	✓	✓	✓	**Fail**	✓
Did the collector check the temperature of the specimen?	**Unknown**	**Unknown**	✓	✓	**Fail**	**Unknown**
Was the employee allowed to place the tamper-evident seals from the CCF onto the specimen bottles?	✓	✓	✓	✓	✓	✓
Did the collector seal and date the specimen?	✓	✓	✓	✓	**Fail**	**Fail**
Did the collector have the employee initial the specimen bottle seals after placing them on the bottles?	✓	✓	✓	✓	**Fail**	✓
Did unauthorized people have access to the collection site?	✓	✓	✓	✓	✓	✓
Did the employee have access to the collection materials or supplies?	✓	✓	✓	✓	**Fail**	✓
Did the employee have access to items that could be used to adulterate or dilute the specimen?	**Fail**	**Fail**	✓	**Fail**	**Fail**	✓
Was the employee under the supervision of the collector or appropriate site personnel at all times?	✓	✓	✓	✓	**Fail**	✓
Number of protocols failed	**2**	**2**	**0**	**2**	**12**	**2**

Source: GAO.

Los Angeles Metropolitan Area

Table 4 provides our findings for the Los Angeles metropolitan area, which is the second area where we tested the 16 key collection protocols.

Table 4: Los Angeles Undercover Test Results

Requirement	Site 1	Site 2	Site 3	Site 4	Site 5	Site 6
Did the collector require the employee to provide eppropriate identification?	✓	✓	✓	✓	✓	✓
Did the collector ask the employee to empty his/her pockets and display items to ensure no items are present that could be used to defeat the test?	**Fail**	✓	✓	✓	✓	**Fail**
Did the collector instruct the employee to wash his/her hands under the collector's supervision?	**Fail**	**Fail**	**Fail**	**Fail**	**Fail**	✓
Did the collector direct the employee to provide a specimen of at least 45 mL?	✓	✓	✓	✓	✓	✓
Did the collector direct the employee to not flush the toilet?	**Fail**	✓	**Fail**	✓	✓	✓
Did the collector direct the employee to return with the specimen as soon as possible after voiding?	**Fail**	**Fail**	**Fail**	✓	✓	✓
Were all sources of water in the restroom secured?	**Fail**	**Fail**	✓	✓	✓	**Fail**
Was bluing agent placed in the toilet or was it secured with tape?	**Fail**	**Fail**	**Fail**	✓	✓	✓
Did the collector check the temperature of the specimen?	✓	✓	✓	✓	**Fail**	✓
Was the employee allowed to place the tamper-evident seals from the CCF onto the specimen bottles?	✓	✓	✓	✓	✓	✓
Did the collector seal and date the specimen?	✓	✓	✓	✓	✓	✓
Did the collector have the employee initial the specimen bottle seals after placing them on the bottles?	**Fail**	✓	**Fail**	**Fail**	✓	✓
Did unauthorized people have access to the collection site?	✓	✓	✓	✓	✓	✓
Did the employee have access to the collection materials or supplies?	✓	✓	✓	✓	✓	✓
Did the employee have access to items that could be used to adulterate or dilute the specimen?	**Fail**	**Fail**	**Fail**	✓	✓	**Fail**
Was the employee under the supervision of the collector or appropriate site personnel at all times?	✓	✓	✓	✓	✓	✓
Number of protocols failed	**8**	**5**	**6**	**2**	**2**	**3**

Source: GAO.

New York/Northern New Jersey Metropolitan Area

Table 5 provides our findings for the New York/Northern New Jersey metropolitan area, which is the third area where we tested the 16 key collection protocols.

Table 5: New York/Northern New Jersey Undercover Test Results

Requirement	Site 1	Site 2	Site 3	Site 4	Site 5	Site 6
Did the collector require the employee to provide appropriate identification?	✓	✓	✓	✓	✓	✓
Did the collector ask the employee to empty his/her pockets and display items to ensure no items are present that could be used to defeat the test?	**Fail**	**Fail**	**Fail**	**Fail**	**Fail**	**Fail**
Did the collector instruct the employee to wash his/her hands under the collector's supervision?	**Fail**	**Fail**	**Fail**	✓	✓	✓
Did the collector direct the employee to provide a specimen of at least 45 mL?	✓	✓	**Fail**	✓	✓	✓
Did the collector direct the employee to not flush the toilet?	✓	✓	✓	✓	✓	✓
Did the collector direct the employee to return with the specimen as soon as possible after voiding?	✓	✓	**Fail**	✓	**Fail**	**Fail**
Were all sources of water in the restroom secured?	**Fail**	**Fail**	✓	**Fail**	✓	✓
Was bluing agent placed in the toilet or was it secured with tape?	✓	✓	✓	✓	✓	✓
Did the collector check the temperature of the specimen?	**Fail**	✓	**Unknown**	✓	**Unknown**	✓
Was the employee allowed to place the tamper-evident seals from the CCF onto the specimen bottles?	**Unknown**	✓	✓	✓	✓	✓
Did the collector seal and date the specimen?	✓	✓	✓	✓	✓	✓
Did the collector have the employee initial the specimen bottle seals after placing them on the bottles?	✓	✓	**Fail**	✓	✓	✓
Did unauthorized people have access to the collection site?	✓	✓	✓	✓	**Fail**	✓
Did the employee have access to the collection materials or supplies?	**Fail**	✓	✓	✓	**Fail**	**Fail**
Did the employee have access to items that could be used to adulterate or dilute the specimen?	**Fail**	**Fail**	✓	**Fail**	**Fail**	**Fail**
Was the employee under the supervision of the collector or appropriate site personnel at all times?	✓	✓	✓	✓	**Fail**	**Fail**
Number of protocols failed	**6**	**4**	**5**	**3**	**6**	**5**

Source: GAO.

Dallas/Fort Worth Metropolitan Area Undercover Testing

Table 6 provides our findings for the Dallas/Fort Worth metropolitan area, which is the fourth area where we tested the 16 key collection protocols.

Table 6: Dallas/Fort Worth Undercover Test Results

Requirement	Site 1	Site 2	Site 3	Site 4	Site 5	Site 6
Did the collector require the employee to provide appropriate identification?	✓	✓	✓	✓	✓	✓
Did the collector ask the employee to empty his/her pockets and display items to ensure no items are present that could be used to defeat the test?	✓	✓	✓	**Fail**	✓	✓
Did the collector instruct the employee to wash his/her hands under the collector's supervision?	✓	**Fail**	✓	**Fail**	✓	✓
Did the collector direct the employee to provide a specimen of at least 45 mL?	✓	**Fail**	✓	✓	✓	✓
Did the collector direct the employee to not flush the toilet?	✓	✓	✓	✓	✓	✓
Did the collector direct the employee to return with the specimen as soon as possible after voiding?	✓	**Fail**	✓	✓	✓	✓
Were all sources of water in the restroom secured?	**Fail**	**Fail**	**Fail**	**Fail**	✓	**Fail**
Was bluing agent placed in the toilet or was it secured with tape?	✓	✓	✓	✓	✓	✓
Did the collector check the temperature of the specimen?	**Unknown**	**Unknown**	✓	**Unknown**	✓	✓
Was the employee allowed to place the tamper-evident seals from the CCF onto the specimen bottles?	✓	✓	✓	✓	✓	✓
Did the collector seal and date the specimen?	✓	✓	✓	✓	✓	✓
Did the collector have the employee initial the specimen bottle seals after placing them on the bottles?	✓	✓	✓	✓	✓	✓
Did unauthorized people have access to the collection site?	✓	✓	✓	✓	✓	✓
Did the employee have access to the collection materials or supplies?	✓	✓	✓	✓	✓	✓
Did the employee have access to items that could be used to adulterate or dilute the specimen?	**Fail**	**Fail**	**Fail**	**Fail**	✓	**Fail**
Was the employee under the supervision of the collector or appropriate site personnel at all times?	✓	✓	✓	✓	✓	✓
Number of protocols failed	**2**	**5**	**2**	**4**	**0**	**2**

Source: GAO.

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United States Government Accountability Office
Washington, DC 20548

November 30, 2007

The Honorable Peter DeFazio
Chairman
The Honorable John Duncan, Jr.
Ranking Member
Subcommittee on Highways and Transit
Committee on Transportation and Infrastructure
House of Representatives

Subject: *Response to Post Hearing Questions Regarding Drug Testing: Undercover Tests Reveal Significant Vulnerabilities in DOT's Drug Testing Program (GAO-08-225T)*

Thank you for the invitation to testify before your Subcommittee on November 1, 2007, to discuss the drug testing of commercial motor vehicle drivers.[1] This letter responds to your request that I provide answers to questions for the record from the hearing. The questions, along with my responses, follow.

Questions from Chairman DeFazio

1) How prevalent is using a fake ID to cheat a drug test? How would that actually work?

Determining whether this form of substitution is prevalent at collection sites was outside the scope of our work. However, we are able to say that in our testing of the 24 urine collection sites we used fake identification at each of the sites we tested and found that 100 percent of the time we were successful in gaining access to the urine collection sites. This demonstrates that a drug user could send someone to take a drug test in their place using fake identification—a form of substitution.

Creating a fake ID was not difficult. We used computer software, hardware, and materials readily available to the public to create fake drivers' licenses with the photographs of our undercover investigators on them. We then presented the identification as requested by collectors at each collection site we visited. None of the 24 collectors at the collection sites we tested were able to identify the fake identification we provided to gain access to the facilities.

[1]See GAO, *Drug Testing: Undercover Tests Reveal Significant Vulnerabilities in DOT's Drug Testing Program*, GAO-08-225T (Washington, D.C.: Nov. 1, 2007).

2) Is staff at the collection facilities trained to look for or identify fake IDs? Should they be?

Department of Transportation (DOT) regulations for staff at collection facilities state that the collectors are required to ask the employee to provide positive identification. This identification can be a photo ID issued by the employer, or a federal, state, or local government. A collector may not accept faxes or photocopies of identification. Positive identification by the employer representative is also acceptable. Collection facilities' staff are required to take qualification training to become a collector, but this training does not specifically cover identifying fake IDs. The qualification training only encourages collectors to check identification closely, compare the photo with the person, and compare signatures, when possible.

Additional training for collectors on how to identify fake IDs may not be the only approach to closing this vulnerability. In previous undercover work including border and nuclear security, we found that even when staff is trained to identify fake IDs, it is still possible to use fake IDs successfully.[2] Changes to the verification process, such as having the collection site fax a copy of the photo identification presented by the donor to the employer to verify the employee's ID, could provide additional defense against this form of substitution until a more secure identification can be developed.

3) Your investigators found numerous household products like soap, bleach, and Lysol in or near the restrooms where the specimens were collected. What would have happened if you had added these to your specimens? Would the lab detect it? What would happen if they did?

Our investigators found numerous household products like soap, bleach, and Lysol in or near the restrooms which could be used to adulterate the specimen. These types of products might be detected by drug testing laboratories; however, we did not test this. In the case where these products or other adulterants are detected by the drug screening lab, the test result would be "invalid."

4) What is the difference between a "positive" result and an "invalid" result?

Whereas an "invalid" test result occurs when a lab identifies suspicious but not drug-related characteristics in the urine, a "positive" test result indicates there are actually traces of illegal drugs in the urine. In the case of an invalid test result, a

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[2]See GAO, *Border Security: Continued Weaknesses in Screening Entrants into the United States*, GAO-06-976T (Washington, D.C.: Aug. 2, 2006); and GAO, *Border Security: Investigators Successfully Transported Radioactive Sources Across Our Nation's Borders at Selected Locations*, GAO-06-583T (Washington, D.C.: Mar. 28, 2006).

drug screening lab identifies an adulterant, substitute, or abnormal physical characteristic in the specimen that prevents the lab from obtaining a valid test result. The medical review officer must then confirm if there is a legitimate medical reason for the invalid test; if so, no further action is required.[3] If not, the employee must take another drug test under direct observation. A directly observed collection procedure is the same as a routine collection with the additional requirement that an observer physically watch the employee urinate into the collection container. In the case of a positive result with no medical explanation, a supervisor or company official is required to immediately remove the employee from the job.

5) ***How long does it take for a lab to report back an "invalid" test? How long before the employee would have until he or she had to take a new test? Is that long enough for marijuana or other drugs to leave your system?***

It took approximately 2 weeks for the labs that processed our samples to report their results. Out of our tests of 24 collection sites, only one test came back as invalid and was cancelled due to incorrect collection procedures. It took approximately a month to receive the test result for this invalid test. We did not study the re-testing process as part of our work, but according to Substance Abuse and Mental Health Services Administration (SAMHSA), the detection periods for drugs in a user's urine can vary depending on the type of drug used and can range from a few days to a month. Based on these estimates, there may be a chance for marijuana and other drugs to leave an employee's system before he or she is called for a re-test.

6) ***You adulterated and substituted 8 samples. Did the labs pass all of them or did any of them get reported as "invalid?"***

We used adulterants and substituted synthetic urine to defeat 8 out of the 24 drug tests. In each of the 8 tests we received a passing result from the labs and did not receive any invalid results. It is important to note that since our investigators' urine specimens did not contain traces of drug use, we cannot report on whether the adulterants we used were able to mask drug use—only on whether the laboratories could detect the presence of the adulterant.

7) ***Do you think it is feasible to make specimen collections tamper-proof? Is 100 percent compliance a possibility? 90 percent?***

It is not feasible for a system of preventative controls to ensure 100 percent compliance. However, we found that with the current DOT drug testing program a drug user could easily pass a drug test and continue to work in his or her safety-sensitive commercial transportation job. Clearly it is possible to substantially improve controls in this system. The problem of adulterating, diluting, or

[3]In the case of pre-employment, return-to-duty, or follow-up tests, a negative result is required.

substituting urine has to be addressed on several levels, not just at the collections phase of the drug testing process. To fully address the vulnerabilities we identified, improvements will need to be made in the design of the entire process and the ability of collection site employees to adhere to current protocols. Some areas that can be looked at to prevent tampering with specimens are: (1) implementing more severe penalties for employees that attempt to subvert the drug testing program, (2) requiring better training for collectors, (3) implementing stricter collection protocols and increasing oversight over collection sites, and finally (4) limiting the marketing and sale of drug-masking products or making the sale of these products illegal. In ongoing work, expected to be complete in May 2008, GAO is examining options to deal with these and related drug testing issues.

8) What is your opinion on the best way to stop or discourage cheating?

Similarly to our response to question 7 above, there is no one way to stop or discourage cheating. The problem needs to be addressed at several levels. To fully address the vulnerabilities we identified, improvements will need to be made in the design of the entire process and the ability of collection site employees to adhere to current protocols. See our response to question 7 for specific areas that can be used to improve the integrity of urine collections in the DOT drug testing program. Additionally, an area that can be looked at to improve the drug screening process for the DOT drug testing program is to require labs to screen for adulterants and other foreign substances. Although this screening is required by SAMHSA for the drug testing of federal employees, the labs are only authorized, not required to perform this screening for employees regulated by the DOT drug testing program. Furthermore, in ongoing work expected to be complete in May 2008, GAO is examining options to deal with these and related drug testing issues.

Questions from Ranking Member Duncan

1) ***Recently, your office has undertaken an investigation to examine aspects of the federal drug and alcohol requirements. Have you shared your investigations with the private sector to gain feedback from industry?***

We have not shared our findings with the private sector to gain their feedback, but as discussed in our response to question 3 below, we did share our findings with DOT during our corrective action briefing.

2) ***To the best of your knowledge, what part of the DOT currently has responsibility to oversee collection facilities?***

DOT publishes rules on who must conduct drug and alcohol tests, how to conduct those tests, and what procedures to use when testing. The Office of Drug & Alcohol Policy & Compliance (ODAPC), within DOT, publishes, implements, and provides authoritative interpretations of these rules included in part 40 of title 49 of the Code of Federal Regulations (CFR). These rules include specific procedures for collecting a urine specimen that must be followed whenever a DOT-required urine specimen collection is performed. There are six operating administrations under DOT that have issued regulations requiring antidrug programs in the aviation, highway, railroad, mass transit, pipeline, and maritime industries. Antidrug programs for commercial truck drivers are regulated by the Federal Motor Carrier Safety Administration (FMCSA), which is the operating administration responsible for enforcing FMCSA regulations and establishing who is tested and when they are tested. Currently, FMCSA does not visit or audit collection sites or any other service agents employed by the carrier to observe procedures and enforce compliance with drug testing requirements except in the case of specific allegations or complaints.[4]

3) ***What has been the DOT's reaction to your investigation and findings?***

We met with DOT officials at the initial stage of our work. They were receptive, helpful, and cooperative throughout our entire investigation and provided us with information about their drug testing program that helped us perform our work. We briefed DOT on the results of our investigation on October 1, 2007. DOT officials agreed with our findings. They were receptive and concerned about the results of our work. They asked for the specific areas and collection site names for those sites that we determined had failures in protocols, which we provided.

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[4]There is some oversight of collection sites by other DOT agencies, including the Federal Aviation Administration, the Federal Railroad Administration, and the Federal Transit Administration, and by the United States Coast Guard in the Department of Homeland Security. These other agencies inspect some collection sites used by the employers and operators they regulate. These collection sites may also be used by FMCSA-regulated carriers.

4) What has been the trucking industry's reaction to your investigation and findings?

We have not shared our findings with the trucking industry to gain its feedback, but as discussed in our response to question 3, we did share our findings with DOT during our corrective action briefing.

5) What was the most surprising finding from the investigation, and how would you suggest it be remedied?

In the planning of our undercover work, we were confident that our investigators could successfully access collection sites using fake IDs, bring adulterants and synthetic urine into collection facilities, and use them to defeat drug tests. We were not sure whether the drug screening labs would be able to detect adulterants and synthetic urine. However, we found that the drug screening labs were unable to detect the adulterated and synthetic urine for the eight tests we performed.

6) Do you think it is feasible to make specimen collections tamper-proof? Is 100 percent compliance a possibility? 90 percent?

It is not feasible for a system of preventative controls to ensure 100 percent compliance. However, we found that with the current DOT drug testing program a drug user could easily pass a drug test and continue to work in his or her safety-sensitive commercial transportation job. Clearly it is possible to substantially improve controls in this system. The problem of adulterating, diluting, or substituting urine has to be addressed on several levels, not just at the collections phase of the drug testing process. To fully address the vulnerabilities we identified, improvements will need to be made in the design of the entire process and the ability of collection site employees to adhere to current protocols. Some areas that can be looked at to prevent tampering with specimens are: (1) implementing more severe penalties for employees that attempt to subvert the drug testing program, (2) requiring better training for collectors, (3) implementing stricter collection protocols and increasing oversight over collection sites, and finally (4) limiting the marketing and sale of drug-masking products or making the sale of these products illegal. In ongoing work, expected to be complete in May 2008, GAO is examining options to deal with these and related drug testing issues.

7) What is your opinion on the best way to stop or discourage cheating?

Similarly to our response to question 6, there is no one way to stop or discourage cheating. The problem needs to be addressed at several levels. To fully address the vulnerabilities we identified, improvements will need to be made in the design of the entire process and the ability of collection site employees to adhere to current protocols. See our response to question 6 for specific areas that can be used to improve the integrity of urine collections in the DOT drug testing program. Additionally, an area that can be looked at to improve the drug screening process for the DOT drug testing program is to require labs to screen

for adulterants and other foreign substances. Although this screening is required by SAMHSA for the drug testing of federal employees, the labs are only authorized, not required to perform this screening for employees regulated by the DOT drug testing program. Furthermore, in ongoing work expected to be complete in May 2008, GAO is examining options to deal with these and related drug testing issues.

If you have any further questions or if you would like to discuss our response further, please feel free to contact me at (202) 512-6722 or kutzg@gao.gov.

Gregory Kutz, Managing Director
Forensic Audits and Special Investigations

Before the

Committee on Transportation and Infrastructure's

Subcommittee on Highways and Transit

U. S. House of Representatives

Testimony of

Fred P. McLuckie

Legislative Director

On

Drug and Alcohol Testing of

Commercial Motor Vehicle Drivers

November 1, 2007

International Brotherhood of Teamsters

25 Louisiana Avenue, N.W.

Washington, D.C. 20001

(202) 624-8741

Chairman DeFazio, Ranking Member Duncan, and Members of the Subcommittee: My name is Fred McLuckie and I serve as Legislative Director for the International Brotherhood of Teamsters, (IBT). The Teamsters Union welcomes the opportunity to testify before the Committee on Transportation and Infrastructure's Subcommittee on Highways and Transit regarding issues concerning "Drug and Alcohol Testing of Commercial Motor Vehicle Drivers". It is our understanding that the purpose of this hearing is to obtain information on whether DOT drug testing regulations, as implemented under the current testing process, effectively detect commercial drivers who abuse controlled substances and once identified, ensure that these individuals do not perform safety-sensitive functions until they complete the return to duty process pursuant to the governing regulations.

The IBT has a long history of being proactive in our efforts to deter the abuse of controlled substances and alcohol in the trucking industry. For well over two decades, the IBT has negotiated drug and alcohol testing programs with virtually all of our larger employers in the trucking industry. The language in our collective bargaining agreements (CBA) provide our employers with a strict set of rules to ensure that the implementation of the testing programs comply with both the provisions of the agreements and governing regulations as promulgated by the Federal Motor Carrier Safety Administration (FMCSA) and its precursors. In addition, the CBAs provide the signatory parties with instruction on how to adjudicate disciplinary issues for which the regulations are "silent" and also provide guidance as to the process that must be followed to allow workers who have substance abuse issues the opportunity to obtain treatment and rehabilitation prior to returning to work in safety-sensitive functions. The IBT and many of its employers conduct periodic training programs for union and management representatives who are responsible for implementing the drug and alcohol testing programs. These training programs are designed to familiarize the participants with the drug and alcohol testing regulations and with the applicable articles of the collective bargaining agreements. At the request of Teamster Local Union affiliates, the IBT provides drug and alcohol testing training to rank-and-file driver membership. Our employers provide such training to rank-and-file driver membership as a result of CBA language and to comply with applicable regulations. We have provided copies of pertinent articles of a representative CBA for the committee's review.[1]

[1] National Master Freight Agreement 2003 – 2008, Article 35.

Is there a problem?

Based on a careful review of the FMCSA Survey for 2005, an "After Action Report " submitted by the Oregon State Police, and drug testing results provided by large less-than-trailer load motor carriers that employ members of the IBT, we determined that illegal controlled substance use among commercial drivers not a major problem.

The IBT was informed that the Oregon State Police (OSP) conducted two roadside collections of urine specimens from commercial drivers in May and September of this year. A polling of our local union affiliates in Oregon indicated that although the local unions were aware of OSP efforts, none of our driver/members reported having actually participated. According to the OSP report for the May 2007 roadside check, of the nearly 500 drivers who agreed to voluntarily provide urine specimens, approximately 10 percent of the drivers were determined to have tested positive for a controlled substance.[2] This positive rate is significantly higher than survey results reported by the FMCSA which indicated a positive test result rate of less than 2 percent for the 2005 Drug and Alcohol Testing Survey. Although there appears to be a great disparity between the positive test rates for drivers in the two reports, detailed below are comments to explain the discrepancies in addition to providing summary drug testing data obtained from several of our larger motor carrier employers.

According to the 2005 Drug and Alcohol Testing Survey, which is a compilation and analysis of drug testing data from the previous calendar year, the Federal Motor Carrier Safety Administration estimates that approximately 1.7 percent of Commercial Driver's License (CDL) qualified drivers used controlled substances. This estimate is based on a national survey of approximately 1,400 motor carriers that submitted data representing random controlled substances testing results of roughly 420,000 drivers. With respect to non-random testing, which included pre-employment, post-accident, and suspicion-based testing, the FMCSA estimates that 2.1 percent of the 504,448 test results reviewed were positive for controlled substances. The urine specimens, for which testing results were used in the FMCSA Survey, were collected, processed, analyzed, and validated in compliance with Health and Human Services (HHS) guidelines, as adopted by the Agency. The specimens were analyzed for five substances and / or their metabolites, i.e., amphetamines, cocaine, marijuana, opiates, and phencyclidine.

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[2] After Action Report OTC-12, Memorandum, Oregon State Police, July 2007.

In the April 2007 OSP study, roadside checks were conducted at the Woodburn Port of Entry, Interstate 5, at milepost 274 southbound, and 468 urine specimens were obtained during a two day period and analyzed for controlled substances. OSP reported positive test results for 9.65 percent of the drivers who participated. The OSP study analyzed urine specimens for the five drugs as required by FMCSA, in addition to benzodiazepines, methadone, and propoxyphene. There were positive test results for the three additional drugs for which analyses were conducted that contributed to the higher overall rate of positive test results reported in the OSP study.

In the FMCSA Survey, all drug testing results were validated by Medical Review Officers (MRO) who possess the necessary credentials, knowledge, and training to accurately conclude that the test results were the consequence of acts committed by the drivers which violate the FMCSA regulations. Prior to validating the test results as positive, pursuant to FMCSA regulations, the MRO must contact the driver to ensure that the result is not due a legitimate medical explanation, e.g., the driver has a valid prescription from a physician.[3]

Due to the manner in which the OSP study was conducted, i.e., roadside collections with anonymous donors, qualified MROs could not contact the drivers to validate the alleged positive test result. Consequently, it is likely that some of the alleged positive test results were due to the legal use of prescription drugs. This is particularly significant when one considers that FMCSA regulations permit commercial drivers to use certain prescription drugs while operating a commercial motor vehicle.

It should be noted that in the OPS study, opiates and synthetic opiates (Propoxyphene) accounted for 19 of the 47 tests for which a controlled substance was identified. According to occupational injury and illness data provided by the US Bureau of Labor Statistics, truck drivers were among the group of workers who experience the most work-related injuries and illnesses with days away from work.[4] Therefore, it is not unusual that these workers would use pain-killers, some of which may contain opiates to mitigate discomfort resulting from work-related injuries. Many drivers have legitimate prescriptions for these pain-killers and consequently may be allowed, in some instances, to operate commercial motor vehicles without violating the FMCSA regulations. In the FMCSA Survey, these "positive" test results, after being investigated by the MRO, would be reported as negative. Because there was no positive test result validation process incorporated

[3] 49 CFR Part 40.137(b), Federal Motor Carrier Safety Regulations, May 2006.
[4] U.S. Bureau of Labor Statistics, Monthly Labor Review, April 2005.

into the OSP study, the assumption is that all positive opiate test results were due to illegal or improper use of controlled substances, which may be an erroneous assumption.

The same conclusion can be reached concerning the use of amphetamines. Although there are instances where illicit use of amphetamines occurs, there are cases where drivers have legal prescriptions and may drive while using the controlled substance. For example, the use of the prescription drug Adderall, which is oftentimes used to control attention deficit / hyperactivity or treatment-resistant depression can cause a positive test result for amphetamines.[5] However, a driver who has been properly prescribed the drug is not automatically disqualified from operating a commercial motor vehicle. The OSP study, again, assumed that all positive drug tests were due to illicit use of controlled substances. The FMCSA Survey took the necessary steps to confirm that positive test results for amphetamine use were the consequence of acts that violate the regulations.

Comparing the FMCSA and OSP reports is further complicated because the OSP tested for benzodiazepines, methadone, and propoxyphene, all of which are not included in the FMCSA 5-panel drug screen. Commercial motor vehicle operators are not prohibited from using benzodiazepines and propoxyphene provided that such use is monitored and approved by the driver's physician who is familiar with the safety-sensitive job tasks performed by the driver. In making the determination that using the prescribed drug will not adversely affect the driver's ability to safely operate a commercial motor vehicle, the treating physician would consider whether the driver is compliant in taking the drug as prescribed, and if there are adverse side effects being experienced by the driver.

The IBT reviewed the random drug testing results for large Less-than-Trailer-Load (LTL) carriers for the period of 2003 to 2006. During this period the LTL companies conducted 64,477 random drug tests of which 395 were validated by MROs as being positive for a positive test rate of 0.6%.

For the reasons described above, the IBT concludes that there is no significant drug use problem among commercial drivers indicating violations of the FMCSA regulations.

FMCSA Oversight

Strong enforcement is a key component in ensuring that motor carriers comply with FMCSA controlled substances regulations. Motor carriers that

[5] Swotinsky, R., Smith, D.: The Medical Review Officer's Manual, 3rd Edition, 2006.

employ Teamster members have agreed to incorporate the drug testing programs into the collective bargaining agreements. Therefore, failure to comply with the drug testing regulations may result in enforcement by the FMCSA and trigger a grievance for violation of the collective bargaining agreement. In a sense, the union contract also acts as an enforcement mechanism which provides an additional impetus for unionized motor carriers to comply with the regulations.

The IBT recommends that the FMCSA take the necessary steps to enable the agency to enhance motor carrier compliance with drug testing regulations in the trucking industry.

HHS Oversight

The IBT and motor carriers that are signatory to CBAs utilize certified laboratories in all of the negotiated testing programs. Although we have not encountered any problems of note with the performance of the certified laboratories or specimen collection personnel, we are keenly aware of the important role of each respective service provider. The credibility, employability, and reputations of our driver membership depend heavily on being able to demonstrate that they are safe, drug-free commercial motor vehicle operators. Therefore, it is necessary that the testing programs in which they are enrolled are able to consistently provide accurate, precise test results. As a result, it is incumbent on HHS and FMCSA to take strong, immediate enforcement actions against laboratories and other service providers who fail to comply with regulations as required.

Proposed Solutions

Establishing a Clearinghouse

The IBT has been involved in discussions regarding the establishment of a clearinghouse for positive drug testing results. We have significant concerns about the creation of a clearinghouse with respect to issues related to driver privacy. However when we consider the fact that certain states, such as North Carolina, have moved forward in collecting this data, we are of the opinion that a national clearinghouse, operated by the Federal Government, may be preferable to these data being collected on a state-by-state basis. Provided below are comments regarding this issue.

Within the context as described above, the IBT could support the implementation of a centralized reporting and inquiry system and believes such a

system could have positive safety benefits; provided, however, that such a requirement should only be imposed if and when the FMCSA is able to devise a system that would: 1) adequately protect the drivers' confidentiality; 2) provide a reasonable mechanism for drivers to learn of and correct reporting errors; and 3) devise a uniform and fair method for expunging the records of drivers that have undergone treatment and are rehabilitated.

Drivers' Confidentiality

The current rules require prospective employers to obtain written authorization from drivers before contacting former employers about previous drug test results. Employers should still be required to obtain such authorization before obtaining information from the national clearinghouse. Further, a system must be devised for the government to verify with reasonable certainty that the driver has consented before it releases the information.

Ideally every inquiry would be accompanied by a signed statement from the driver authorizing the inquiry and any release of data. However, we recognize that this may not be feasible or practical in the case of an electronic database. That said we do not believe it would be acceptable to simply require potential employers to check a box verifying that the driver has authorized release of the information to that employer.

A possible intermediate solution would be to require the employer to provide certain information that is reasonably likely to be obtained only from the driver and combine this with a system of random verification and severe penalties for violations. For example, in addition to providing the driver's name, address and telephone number, the employer could also provide the driver's social security number and/or CDL number. Then, while we recognize it would be impractical to verify every inquiry, a percentage significant enough to act as a deterrent to unauthorized inquiries (e.g., 10-15%) should be automatically subject to audit. A form letter could automatically be printed and sent to the drivers informing them that an inquiry has been made and by whom. If the driver did not authorize the inquiry, he or she should be prompted to contact the Agency. As a further deterrent, persons who make unauthorized inquiries should be subject to substantial penalties (e.g., $10,000 per inquiry). Prospective employers should be made aware both of the audits that will be done to check on the authority of prospective employers to secure this information and the penalties that will be imposed for unauthorized inquiries.

Correcting Erroneous Information / Expunging Records

Drivers should always be permitted to access their own records to ensure that there is no incorrect information. Also, employers should be required to notify drivers if an inquiry produces a report of a verified positive drug test. If there is incorrect information on a driver's record he or she must, as a matter of due process, be permitted to dispute that information and have the record corrected. Once a dispute is filed the burden of proof should be on the employer or MRO to prove that the information was correctly reported.

In addition, records should be expunged after three years, consistent with the current inquiry requirement. At the maximum, records should be only available for five years, which is the existing time frame for employers and MROs to maintain records. If records are maintained in the database longer than the underlying records are required to be kept, there will be no way to correct errors or verify disputed information after that period. Information that cannot be verified or challenged cannot reasonably be used against a driver. Furthermore, the regulations recognize that drivers can undergo treatment and become rehabilitated. In this regard, follow-up testing may only be performed for five years following the driver's return to duty after treatment. There is, therefore, absolutely no reason to permanently scar the driver's record for a positive drug test that occurred years before.

In addition, prior to the records being expunged, if a driver has undergone treatment, his record and reports to inquiring employers should reflect this fact.

CONCLUSION

The IBT is of the opinion that based on the FMCSA Survey and drug testing data obtained from unionized L-T-L motor carriers, commercial drivers are highly compliant with the FMCSA drug testing regulations. We are also able to conclude that virtually all Teamster drivers due to the CBAs negotiated with their employers and the training programs thereto, are familiar with the prohibitions provided in the regulations. Among unorganized drivers the same conclusion can be reached albeit at a lower rate of compliance. The testing program as required by the FMCSA regulations provides commercial drivers with sufficient deterrence so as to compel them to comply with the regulations. Further, we feel that the results obtained in the OSP study are not representative of the state of driver compliance with the aforesaid regulations.

With respect to establishing a clearinghouse for positive drug test results, the extent to which any impact is positive or negative will depend largely upon how it is implemented. If a system can be devised that adequately protects the rights of drivers while improving the ability of employers to screen for unqualified drivers, the overall impact on the industry should be positive and such a system would likely be supported by the IBT.

NATIONAL MASTER FREIGHT AGREEMENT

Covering
OVER-THE-ROAD
and
LOCAL CARTAGE
EMPLOYEES OF PRIVATE,
COMMON, CONTRACT AND
LOCAL CARTAGE CARRIERS

For the Period of
April 1, 2003
through
March 31, 2008

Article 34

ARTICLE 34.

GARNISHMENTS

In the event of notice to an Employer of a garnishment or impending garnishment, the Employer may take disciplinary action if the employee falls to satisfy such garnishment within a seventy-two (72) - hour period- (limited to working days) after notice to the employee. However, the. Employer may not discharge any employee by reason of the fact that his earnings have been subject to garnishment for any one (1) indebtedness. If the Employer is notified of three (3) garnishments irrespective of whether satisfied by the employee within the seventy-two (72) - hour period, the employee maybe subject to discipline, including discharge in extreme cases. However, if the Employer has an established practice of discipline or discharge with a fewer number of garnishments or impending garnishments, if the employee fails to adjust the matter within the seventy-two (72) - hour period, such past practice shall be applicable in those cases.

ARTICLE 35.

Section 1. Employee's Bail

Employees will be bailed out of jail if accused of any offense in connection with the faithful discharge of their duties, and any employee forced to spend time in jail or in courts shall be compensated at his/her regular rate of pay. In, addition, he/she shall be entitled to reimbursement for his/her meals, transportation, court costs, etc.; provided, however, that faithful discharge of duties shall in no case include compliance with any order involving commission of a felony. In case an employee shall be subpoenaed as a company witness, he/she shall be reimbursed for all time lost and expenses incurred.

Section 2. Suspension or Revocation of License

In the event an employee receives a traffic citation for a moving violation which would contribute to a suspension or revocation or suffers a suspension or revocation of his/her right to drive the company's equipment for any reason, he/she must promptly notify his/her Employer in writing. Failure to comply will subject the employee to

disciplinary action up to and including discharge., If such suspension or revocation comes as a result of his/her complying with the Employer's instruction, which results in a succession of size and. weight, penalties or because he/she complied with his/her Employer's instruction to drive company equipment which is in violation of DOT regulations relating to equipment or because the company equipment did not have either a 'speedometer or a tachometer in proper working order and if the employee has notified the Employer of the citation for such violation as above mentioned, the, Employer shall provide employment to such employee at not less than his/her regular earnings at the time of such suspension for the entire period thereof.

When an employee in any job classification requiring driving has his/her operating privilege or license suspended or revoked for reasons other than those for which the employee can be discharged by the Employer, a leave of absence, not to exceed three (3) years, shall be granted for such time as the employee's operating privilege or license has been suspended or revoked.

Section 3. Drug Testing

PREAMBLE

While abuse of alcohol and drugs among our members/employees is the exception rather than the rule, the Teamsters National Freight Industry Negotiating Committee and the Employers signatory to this Agreement share the concern expressed by many over the growth of substance abuse in American society.

The parties have agreed that the Drug and Alcohol Abuse Program will be modified in the event that further federal legislation or Department of Transportation regulations provide for revised testing methodologies or requirements. The parties have incorporated the appropriate changes required by the applicable DOT drug testing rules under 49 CFR Part 40, and agree that if new federally mandated changes are brought about, they too will become part of this Agreement. The drug testing procedure, agreed to by labor and management, incorporates state-of-the-art employee protections during specimen collection and laboratory testing to protect the innocent.

In order to eliminate the safety risks which result from alcohol or drugs, the parties have agreed to the following procedures:

Article 35, Section 3

NMFA UNIFORM TESTING PROCEDURE

A. Probable Suspicion Testing

In cases in which an employee is acting in an abnormal manner and at least one (1) supervisor, two (2) if available, have probable suspicion to believe that the employee is under the influence of controlled substances, the Employer may require the employee. (in the presence of a union shop steward, if possible) to undergo a urine specimen collection and a breath alcohol analysis as provided in Section 4B. The supervisor(s) must have received training in the signs of drug intoxication in a prescribed training program which is endorsed by the Employer. Probable suspicion means suspicion based on specific personal observations that the Employer representative(s) can describe concerning the appearance; behavior, speech or breath odor of the employee. The observations may include the indication of chronic and withdrawal effects of controlled substances. The supervisor(s) must make a written statement of these observations within twenty-four (24) hours. A copy must be provided to the shop steward or other union official after the employee is discharged. Suspicion is not probable and thus not a basis for testing if it is based solely on third (3rd) party observation and reports. If requested, the employee will sign a consent form authorizing the urine collection and breath analysis and releasing the results of the urine laboratory testing to his/her Employer's Medical Review Officer and the breath testing results to the Employer. The employee shall not be required to waive any claim or, cause of action under the law. For all purposes herein, the parties agree that the terms "probable suspicion" and "reasonable cause" shall be synonymous.

A refusal to provide a urine specimen or undertake a breath analysis will constitute a presumption of intoxication and the employee will be subject to discharge without the receipt of a prior warning letter. If the employee is unable to produce 45mL of urine, he/she shall be given up to 40 ounces of fluids to drink and shall remain at the collection site under observation until able to produce a 45mL specimen, for a period of up to three (3) hours. If the employee is still unable to produce a 45mL specimen, the Employer shall direct the employee to undergo an evaluation by a licensed physician concerning the employee's inability to provide an adequate amount of urine. If the physician concludes that there is no medical condition that

would preclude the employee from providing an adequate amount of urine, the employee will be considered to have refused the test. If an employee is unable to provide sufficient breath sample for analysis, the procedures outlined in the DOT regulations shall be followed for all employees. Absent a medical condition, as determined by a licensed physician, the employee's failure to provide an adequate amount of breath will be regarded as a refusal to take the test. Contractual time limits for disciplinary action, as set forth in the appropriate Supplemental Agreement, shall begin on the day on which specimens are taken. In the event the Employer alleges only that the employee is intoxicated on alcohol and not drugs, previously agreed-to procedures under the appropriate Supplemental Agreement for determining alcohol intoxication shall apply.

In the event the Employer is unable to determine whether the abnormal behavior is due to drugs or alcohol, the drug testing procedure contained herein and the breath alcohol testing procedure contained in Section 4B shall be used. If the laboratory results are not known prior to the expiration of the contractual time period for disciplinary action, the cause for disciplinary action shall specify that the basis for such disciplinary action is for "alcohol and/or drug intoxication."

B. DOT. Random Testing

It is agreed by the parties that random urine drug testing will be implemented only in accordance with the DOT rules under 49 CFR Part 382, Section C.

The method of selection for random urine drug testing will be neutral so that all employees subject to testing will have an equal chance to be randomly selected.

The term "employees subject to testing" under this agreement is meant to include any employee required to have a Commercial Drivers License (CDL) under the Department of Transportation regulations.
Employees out on long term injury or disability for any reason shall not be tested.

The provisions of Article 35, Section 3 F 3 (Split-Sample Procedures), and Article 35, Section 3 J 1 (One-Time Rehabilitation), shall apply to random urine drug testing.

Article: 35, Section 3

C. Non-Suspicion-Based Post-Accident Testing

Non-suspicion-based post-accident testing is defined as urine drug testing as a result of an accident. which meets the definition of an accident as outlined in the Federal Motor Carrier Safety Regulations. Urine drug testing will be required after accidents meeting the following conditions and drivers are required to remain readily available for testing for thirty-two (32) hours following the accident or until tested.

Employees subject to non-suspicion-based post-accident drug testing shall be limited to those employees subject to DOT drug testing, who are involved in an accident where there is:

(i) a fatality, or;
(ii) a citation under State or local law is issued to the driver for a moving traffic violation arising from the accident in which:

(a) bodily injury to a person who, as a result of the injury, immediately receives medical treatment away from the scene of the accident, or

(b) one or more motor vehicles incurring disabling damage as a result of the accident, requires the vehicle(s) to be transported away from the scene by a tow truck or other vehicle.

The driver has the responsibility to make himself/herself available for urine drug testing within the thirty-two (32) hour period in accordance with the procedures outlined in this Subsection. The driver is responsible to notify the Employer upon receipt of a citation and to note receipt thereof on the accident report. Failure to so notify the Employer shall subject the driver to disciplinary action.

If a driver receives a citation for a moving violation more than thirty-two (32) hours after a reportable accident, he/she shall not be required to' submit to post-accident urine drug testing.

The Employer shall make available a urine drug testing kit and an appropriate collection site for the driver to provide specimens.

The provisions of Article 35, Section 3 F 3 (Split Sample Procedures), and Article 35, Section 3 J 1 (One-Time Rehabilitation), shall apply to non-suspicion-based post-accident urine drug testing.

D. Chain of Custody Procedures

Any specimens collected for drug testing shall follow the DHHS/DOT (Department of Health and Human Services/Department of Transportation) specimen collection procedures. At the time specimens are collected for any drug testing, the employee shall be given a copy of the specimen collection procedures. In the presence of the employee, the specimens are to be sealed and labeled. As per DOT regulations, it is the employee's responsibility to initial the specimens, additionally ensuring that the specimens tested by the laboratory are those of the employee. The required procedure follows:

When urine specimens are to be provided, at least 30mL of specimen shall be collected and placed in one (1) self-sealing, screw capped container. A urine specimen of at least 15mL shall be placed in a second (2nd) such container. They shall be sealed, labeled and initialed by the employee without the containers leaving the employee's presence. The employee has the responsibility to identify each container and initial same. Following collection, the specimens shall be placed in the transportation container together with the appropriate copies of the chain of custody form. The transportation container shall then be sealed in the employee's presence. The employee has the responsibility to initial the outside of the container. The container shall be sent to the designated testing laboratory at the earliest possible time by the fastest available means.

In this urine collection procedure, the donor shall urinate into a collection container capable of holding at least 60 mL, which shall remain in full view of the employee until transferred to tamper resistant urine bottles, and sealed and labeled, and the employee has initialed the bottles.

It is recognized that the Employer has the right to request the personnel administering a urine collection to take such steps as checking the color and temperature of the urine specimen(s) to detect tampering or substitution, provided that the employee's right to privacy is guaranteed and in no circumstances may observation take place while the employee is producing the urine specimens, unless required by DOT regulations. If it is established that the employee's specimen has been intentionally tampered with or substituted by the employee, the employee is subject to discipline as if the spec-

imen tested positive. In order to deter adulteration of the urine specimen during the collection process, physiologic determinations such as creatinine, specific gravity and/or chloride measurements may be performed by the laboratory.

Any findings by the laboratory outside the "normal" ranges for creatinine, specific gravity and/or chloride shall be immediately reported to the Company's Medical Review Officer (MRO). The parties recognize that the key to chain of custody integrity is the immediate sealing and labeling of the specimen in the presence of the tested employee. If each container is received undamaged at the laboratory properly sealed, labeled and initialed, consistent with DOT regulations as certified by the laboratory, the Employer may take disciplinary action based upon properly obtained laboratory results.

E. Urine Collection Kits and Forms

The contents, of the urine collection kit shall be as follows:

1. The kit shall include two (2) screw-capped self-sealing tamper-resistant urine collection bottles of appropriate capacities, one of which contains a temperature reading device affixed to the outside of the container capable of registering the urine temperature specified in the DOT regulations.

2. A uniquely numbered (i.e. Specimen Identification Number) DOT approved chain of custody form with similarly numbered Bottle Custody Seals, and a transportation kit seal (e.g., Box Seal) shall be utilized during the urine collection process. and completed by the collection site person. The appropriate laboratory copies are to be placed into the transportation container with the urine specimens. The exterior of the transportation kit shall then be secured, e.g., by placing the tamper-proof Box Seal over the outlined area.

The employee has the responsibility to, initial the sealed transportation container.

3. Shrink-wrapped or similarly protected kits shall be used in all instances.

F. Laboratory Requirements

1. Urine Testing

In testing urine samples, the testing laboratory shall test specifically for those drugs and classes of drugs and employing the test methodologies and cutoff levels covered in the DOT Regulations 49 CFR, Part 40.

2. Specimen Retention

All specimens deemed "positive" by the laboratory, according to the prescribed guidelines, must be retained at the laboratory for a period of one (1) year.

3. Split Sample Procedure

There will be a split sample procedure for all employees selected for urine drug testing. When any test kit is received by the laboratory, the "primary" sealed urine specimen bottle shall be immediately removed for testing, and the remaining "split" sealed bottle shall be placed in secured storage. Such specimen shall be placed in refrigerated storage if it is to be tested outside of the DOT mandated period of time.

The employee will be given. a shrink-wrapped or similarly protected urine collection kit containing two (2) containers for the urine specimen. One (1) container must contain at least 3OmL of urine, and a urine specimen of at least 15mL shall be placed in the second (2nd) container. Both shall be sealed in the employee's presence, initialed' by the employee, then forwarded to an approved laboratory for testing. If the employee is advised by the MRO that the first (1st) urine sample tested positive, in a random, return to duty, follow-up, probable suspicion or post-accident urine drug test, the employee may, within seventy-two (7.2) hours of receipt of the actual notice, request from the MRO that the second (2nd) urine specimen be forwarded by the first laboratory to another independent and unrelated approved laboratory of the parties' choice for GC/MS confirmatory testing of the presence of the drug. If the employee chooses to have the second (2nd.) sample -analyzed, he/she shall at that time execute a special check-off authorization form to ensure payment by the employee. If the employee chooses the optional split sample procedure, and so notifies his Employer, disciplinary action can only take place after the first (1st) laboratory reports a

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positive finding and the second (2nd) laboratory confirms the presence of the drug. However, the employee maybe taken out of service once the first (1st) laboratory reports a positive finding while the second (2nd) test is being performed. If the second (2nd) test is positive, and the employee wishes to use the rehabilitation options of this Section, the employee shall reimburse the Employer for the cost of the second (2nd) sample's analysis before entering the rehabilitation program. If the second (2nd) laboratory report is negative, the employee will be reimbursed for the cost of the second (2nd) test and for all lost time. It is also understood that if an employee opts for the split sample procedure, contractual time limits on disciplinary action in the Supplements are waived.

4. Laboratory Accreditation

All laboratories used to perform urine drug testing pursuant to this Agreement must be accredited by the Substance Abuse & Mental Health Services Administration (SAMHSA).

G. Laboratory Testing Methodology

1. Urine Testing

The initial testing 'shall be by immunoassay which meets the requirements of the Food and Drug Administration for commercial distribution. The initial cutoff levels used when screening urine specimens to determine whether they are negative or positive for various classes of drugs shall be those contained in the Scientific and Technical Guidelines for Federal Drug Testing Programs (subject to revision in accordance with subsequent amendments to the HHS Guidelines).

All specimens identified as positive on the initial test shall be confirmed using gas chromatography/mass spectrometry (GC/MS) techniques. Quantitative GC/MS confirmation procedures to determine whether the test is negative or positive for various classes of drugs shall be those contained in the Scientific and Technical Guidelines for Federal Drug Testing Programs (subject to revision in accordance with subsequent amendments to the HHS Guidelines).

All specimens which test negative on either the initial test or the GC/MS confirmation test shall be reported only as negative. Only

specimens which test positive on both the initial test and the GC/MS confirmation test shall be reported as positive.

When a grievance is filed as a result of a positive drug test, the Employer shall obtain the test results from the laboratory relating to the drug test, and shall provide a copy to the Union.

Where Schedule I and II drugs are detected, the laboratory is to report a positive test based on a forensic.-ally acceptable positive quantum of proof. All positive test results must be reviewed by the certifying scientist and certified as accurate.

2. Prescription and Non-prescription Medications

If an employee is taking a prescription or non-prescription medication in the appropriate described manner he/she will not be disciplined. Medications prescribed for another individual, not the employee, shall be considered to be illegally used and subject the employee 'to discipline.

3. Medical Review Officer (MRO)

The Medical Review Officer (MRO) shall be a licensed physician with the knowledge of substance abuse disorders. The MRO shall review and interpret all urine drug test results, as required by the DOT for all employees tested for drugs under this Agreement, from the laboratory and shall examine alternate medical explanations for such positive tests. Prior to the final decision to verify a positive urine drug test result, all employees shall have the opportunity to discuss the results with the MRO. If the employee has not discussed the results of the positive urine drug test with the MRO within five (5) days after being contacted, or refused the opportunity to do so, the MRO shall proceed with the positive verification.

4. Substance Abuse Professional (SAP)

The Substance Abuse Professional (SAP), as provided in the regulations, means 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 substance-related disorders.

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H. Leave of Absence Prior to Testing

1. An employee shall be permitted to take leave of absence in accordance with the FMLA or applicable State leave laws for the purpose of undergoing treatment pursuant to an approved program of alcoholism or drug use. The leave of absence must be requested prior to the commission of any act subject to disciplinary action.

2. Employees requesting to return to work from a -voluntary leave of absence for drug use or alcoholism shall be required to submit to testing as provided for in Part J of this Section. Failure to do so will subject the employee to discipline including discharge without the receipt of a prior warning letter

The provisions of this Section shall not apply to probationary employees.

I. Disciplinary Action Based on Positive Test Results

Consistent with past practice under this Agreement, and notwithstanding any other language in any Supplement, the Employer may take disciplinary action based on the test results as follows:

1. If the MRO reports that a urine drug test is positive, the employee shall be subject to discharge except as provided in Part J.

2. The following actions shall apply in probable suspicion testing based on DOT and contractual mandates.

a. If the urine drug test is positive according to the procedures described in Part G, the employee shall be subject to discharge.

b. If the breath alcohol test results show a blood alcohol concentration equal to or above the level previously determined by the appropriate Supplemental Agreement for alcohol intoxication, the employee shall be subject to discharge pursuant to the Supplemental Agreement.

c. If the breath alcohol test is negative and the urine drug test is negative, the employee shall be immediately returned to work and made whole for all lost earnings.

J. Return to Employment After a Positive Urine Drug Test

1. Any employee testing positive for drugs in a urine drug test (other than under probable suspicion testing), thereby subjecting the employee to discipline, shall be granted reinstatement on a one (1) - time lifetime basis if the employee successfully completes a program of evaluation and/or rehabilitation as prescribed by the Substance Abuse Professional (SAP). The SAP will evaluate the employee, and, if necessary, refer him/her to a treatment program which has been approved by the applicable Health and Welfare Fund, where such is the practice. Any cost of evaluation and/or rehabilitation over and above that paid for by the applicable Health and Welfare Fund, must be borne by the employee.

2. Employees electing the one-time lifetime evaluation and/or rehabilitation must notify the Company within ten (10) days of being notified by the Company of a positive urine drug test. The evaluation process and/or rehabilitation program must take a minimum of ten (10) days. The employee must begin the evaluation process and/or rehabilitation program within fifteen (15) days after notifying the Company. The employee must request reinstatement promptly after successful completion of the evaluation process and/or rehabilitation program. After the minimum ten (10) day period, the employee may request reinstatement, but must first provide a negative return to duty urine drug test, to be conducted by a clinic and laboratory of the Employer's choice, before the employee can be reinstated. Any employee choosing to protest the discharge must file a protest under the applicable Supplement. After the discharge is sustained, the employee must notify the Company within ten (10) days of the date of the decision, of the desire to enter the evaluation process and/or rehabilitation program.

3. While undergoing treatment, the employee shall not receive any of the benefits provided by this Agreement or Supplements thereto except the continued accrual of seniority.

4. Before reinstatement after the minimum ten (10) day period, the employee must have successfully completed any recommended treatment and submitted to a return-to-duty urine drug test with a negative result. The employee will be subject to at least six (6) unannounced follow-up urine drug tests in the first year, as deter-

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mined by the SAP. If, at any time, the employee tests positive or refuses to submit to a test, the employee shall be subject to discharge.

(a) Return-to-duty drug test is a urine drug test which an employee must complete with a negative result, after having been evaluated by a SAP and having successfully completed treatment.

(b) Follow-up drug testing shall mean those unannounced urine drug tests required (minimum of six (6) in a twelve (12) month period) when an employee has tested positive for drugs and has been evaluated by the SAP, completed treatment, and returned to work. The SAP has the authority to order any number of follow-up urine drug tests and to extend the twelve (12) month period up to sixty (60) months.

K. Special Grievance Procedure

1. The parties shall together create a Special Region Joint Area Committee consisting of an equal number of employer and union representatives to hear drug-related discipline disputes. All such disputes arising after the establishment of the Special Region Joint Area Committee shall be taken up between the Employer and Local Union involved. Failing adjustment by these parties, the dispute shall be heard by the Special Region Joint Area Committee within ninety (90) days of the Committee's receipt of the dispute. Where the Special Region Joint Area Committee, by majority vote, settles a dispute, such decision shall be final and binding on both parties with no further appeal. Where the Special Region Joint Area Committee is unable to agree on or come to a decision on a dispute, the dispute will be referred to the National Grievance Committee.

(2) The procedures set forth herein may be invoked only by the authorized Union Representative or the Employer.

L. Paid-for Time

1. Training

Employees undergoing substance abuse training as required by the DOT will be paid for such time and the training will be scheduled in connection with the employee's normal work shift, where possible.

2. Testing

Employees subject to testing and selected by the random selection process for urine drug testing shall be compensated at the regular straight time hourly rate of pay in the following manner provided that the test is negative:

a. Random Drug Tests

(1) for all time at the collection site.

(2) (a) for travel time one way if the collection site is reasonably en route between the employee's home and the terminal, and the employee is going to or from work; or

(b) for travel time both ways between the terminal and the collection site, only if the collection site is not reasonably en route between the employee's home and the terminal.

(3) When an employee is on the clock and a random drug test is taken anytime during the employee's shift, and the shift ends after eight (8) hours, the employee is paid time and one-half for all time past the eight (8) hours.

(4) The Employer will not require the city employee to go for urine drug testing before the city employee's shift, provided the collection site is open during or immediately following the employee's shift.

(5) During an employee's shift, an employee will not be required to use his/her personal vehicle from the terminal' to and from the collection site to **take a** random drug test.

(6) If a road driver is called at home to take a random drug test at a time when the road driver is not en route to or from work, the driver shall be paid, in addition to all time at the collection site, travel time both ways between the driver's home and the collection site with no minimum guarantee.

b. Non-Suspicion-Based Post Accident Testing

(1) In the event of a non-suspicion-based post-accident testing situation, where the employee has advised the Employer of the issuance of a citation for a moving violation, but the Employer does not direct the employee to be tested immediately, but sends the

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employee for testing at some later time [during the thirty-two (32) hour period], the employee shall be paid for all time involved in testing, from the time the employee leaves home until the employee returns home after the test.

(2) When the Employer takes a road driver out of service and directs the employee to be tested immediately, the Employer will make arrangements for the road driver to return to his/her home terminal in accordance with the Supplemental Agreement.

Section 4. Alcohol Testing

During the negotiation of the 1994-1998 National Master Freight Agreement, the parties agreed, under Article 35, Section 4, to negotiate language consistent with the drug and alcohol testing regulations promulgated by the United States Department of Transportation (DOT) and the Federal Highway Administration (FHWA).

The parties agree that in the event of further federal legislation or DOT regulations providing for revised methodologies or requirements, those revisions shall, to the extent they impact this Agreement, unless mandated, be subject to mutual agreement by the parties.

A. Employees Who Must be Tested

There shall be random, non-suspicion-based post-accident and probable suspicion alcohol testing of all employees subject to DOT mandated alcohol testing. This includes all employees who, as a condition of their employment, are required, to have a DOT physical, a CDL and are subject to testing for drugs under Article 35, Section 3 B.

Employees covered by this Collective Bargaining Agreement who are not subject to DOT-mandated alcohol testing are only subject to probable suspicion testing as provided in Article 35, Section 3 of the NMFA or the appropriate article of the applicable supplemental agreement. The alcohol breath testing methodology outlined in this Section will be utilized for all employees required to undergo probable suspicion testing. (For test results and discipline, refer to NMFA, Article 35, Section 3 I 2.)

B. Alcohol Testing Procedure

All alcohol testing under this Section will be conducted in accordance with applicable DOT/FHWA regulations. Breath samples will be collected by a Breath Alcohol Technician (BAT), who has successfully completed the necessary training course that is the equivalent of the DOT model course. The training shall be specific to the type of Evidential Breath Testing (EBT) device being used for testing. The Employer shall provide the employees with material containing the information required by Section 382.601 of the Federal Motor Carrier Safety Regulations.

1. Screening Test

The initial screening test uses an Evidential Breath Testing (EBT) device, unless other testing methodologies or devices are mandated or agreed upon, to determine levels of alcohol. The following initial cutoff levels shall be used when screening breath samples to determine whether they are negative or positive for alcohol.

Breath Alcohol Levels:

Less than 0.02% BAC - Negative

0.02% BAC and above. - Positive (Requires Confirmation Test)

2. Confirmatory Test

All samples identified as positive on the initial screening test, indicating an alcohol concentration of 0.02% BAC or higher, shall be confirmed using an EBT device that is capable of providing a printed result in triplicate; is, capable of assigning a unique sequential' number to each test; and is capable of printing out, on each copy of the printed test result, the manufacturer's name for the device, the device's serial number and the time of the test, unless other testing methodologies or devices are mandated or mutually agreed upon. A confirmation test must be performed a minimum of fifteen (15) minutes after the screening test, but not more than thirty (30) minutes after the screening test.

The following cutoff levels shall be used to confirm a positive test for alcohol:

Article 35, Section 4

Breath Alcohol Levels:
Less than 0.02% BAC - Negative
0.02% BAC to 0.039% BAC- Positive*
0.04% BAC and above - Positive*
*Refer to Section 4 L for Discipline Based on a Positive Test

C. Notification

All employees subject to DOT-mandated random alcohol testing will be notified of testing by the Employer, in person or by direct phone contact.

D. Pre-Qualification Testing for Non-DOT Personnel

An employee who transfers from a non-DOT covered position to a safety sensitive position, requiring DOT-mandated alcohol testing, will be subject to an alcohol test as part of the pre-qualification conditions for filling such position. Employees will be advised in writing prior to transferring to a safety sensitive function as defined by DOT, that pre-qualification testing will be conducted to determine the presence of alcohol. Any employee testing positive below the state DWI/DUI limit in a pre-qualification alcohol test shall not be permitted to requalify, for a period of one (1) year.

E. Random Testing

The method used to randomly select employees for alcohol testing shall be neutral, scientifically valid and in compliance with DOT regulations.

The annual random testing rate for alcohol use shall be the rate established by the Administrator of the FHWA.

In the event of a grievance or litigation, the Employer shall, upon written request from the employee, release to the employee and the Union (in its capacity as representative of. the grievant and as a decision maker in the grievance process), information required to be maintained under the DOT alcohol testing regulations and arising from the results of an alcohol test which is subject to release under the regulations.

The parties agree that no effort will be made to cause the system and method of selection to be anything but a true random selection procedure ensuring that all affected employees are treated fairly and equally.

Employees subject to random alcohol testing shall be tested within one (1) hour prior to starting the tour of duty, during the tour of duty, or immediately after completing the tour of duty.

Employees who are on long-term illness or injury leave of absence, disability or vacation shall not be subject to testing during the period of time they are away from work.

F. Non-Suspicion-Based Post Accident Testing

Employees subject to non-suspicion-based post-accident alcohol testing shall be limited to those employees subject to DOT alcohol testing, who are involved in an accident where there is:

i) a fatality, or;
(ii) a citation under State or local law is issued to the driver for a moving traffic violation arising from the accident in which:

(a) bodily injury to a person: who, as a result of the injury, immediately receives medical treatment away from the scene of the accident, or

(b) one or more motor vehicles incurring disabling damage as a result of the accident, requires the vehicle (s) to be transported away from the scene by a tow truck or other vehicle.

Alcohol testing will be required under the above conditions and employees are required to submit to such testing as soon as practicable. Under no circumstances shall this type of testing be conducted after eight (8) hours from the time of the accident.

It shall be the responsibility of the driver to remain readily available for testing after the occurrence of a commercial motor vehicle accident. It is also the responsibility of the employee to not use alcohol for eight (8) hours or until a DOT post-accident alcohol test is performed, whichever occurs first. It is not the intention of this language to require the delay of necessary medical attention or to prohibit the driver from leaving the scene of an accident for the

period necessary to obtain assistance in responding to the accident or necessary medical attention.

Prior to the effective date of the DOT alcohol testing regulations, the Employer agrees to give each employee subject to DOT non-suspicion-based post-accident testing written notification of the procedures required by the DOT regulations in the event of an accident as defined by the DOT.

G. Substance Abuse Professional (SAP)

1. The Substance Abuse Professional (SAP), as provided in the regulations, means 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 substance-related disorders.

2. The Employer will provide the employee with a list of resources available to the driver in evaluating and resolving problems with the misuse of alcohol as soon as practicable but no later than thirty-six (36) hours after the Employer's receipt of notice from the BAT, exclusive of holidays and weekends. The SAP will be the only person responsible for determining, during the evaluation process, whether an employee will be directed to a rehabilitation program, and if so, for how long.

3. Follow-up and return-to-duty tests need not be confined to the substance involved in the violation. If the SAP determines that a driver needs assistance with an alcohol and drug abuse problem, the SAP may require drug tests to be performed along with any required alcohol follow-up and/or return-to-duty tests, if it has been determined that a driver has violated the drug testing prohibition.

4. Any cost of evaluation by the SAP and/or rehabilitation recommended by the SAP associated with the abuse of alcohol while performing or available to perform safety-sensitive functions under this Agreement, over and above that paid for by the applicable Health and Welfare Fund, must be borne by the employee. The Employer

shall pay for pre-qualification alcohol testing for employees who transfer from a non-DOT covered position to a safety-sensitive position requiring DOT-mandated alcohol testing provided the employee tests negative. The Employer will also pay for random, non-suspicion-based post-accident and probable suspicion alcohol testing. Return-to-duty and follow-up alcohol testing that is prescribed by the SAP, will be paid for by the Employer, provided the employee tests negative.

H. Probable Suspicion Testing

Employees subject to DOT probable suspicion alcohol testing under this Section shall be tested in accordance with current, applicable DOT regulations.

For all purposes herein, the parties agree that the terms "probable suspicion" and "reasonable cause" shall be synonymous.

Probable suspicion is defined as an employee's specific observable appearance, behavior, speech or body odor that clearly indicates the need for probable suspicion alcohol testing.

In the event the Employer is unable to determine whether the abnormal behavior or appearance is due, to alcohol or drugs, the Employer shall specify that the basis for any disciplinary action or testing is for "alcohol and/or drug intoxication." In such cases, the employee shall be tested in accordance with Article 35, Section 3 A, and applicable DOT alcohol testing regulations.

In cases where an employee has specific, observable, abnormal indicators regarding appearance, behavior, speech or body odor, and at least one (1) supervisor, two (2) if available, have probable suspicion to believe that the employee is under the influence of alcohol, the Employer may require the employee,, in the presence of a union shop steward or other employee requested by the employee under observation, to submit to a breath alcohol test. Suspicion is not probable and thus not a basis for testing if it is based solely on third party observation and reports.

The supervisor(s) must make a written statement of these observations within twenty-four (24) hours. Upon request, a copy must be provided to the shop steward or other union official after the employee is discharged or suspended or taken out of service.

Article 35, Section 4

All supervisors and Employer representatives designated to determine whether probable suspicion exists to require an employee to undergo alcohol testing shall receive specific training on the physical, behavioral, speech and performance indicators of how to detect probable suspicion alcohol misuse and use of controlled substances as required by DOT regulations.

In the event the Employer requires a probable suspicion test, the Employer shall provide transportation to and from the testing location.

I. Preparation for Testing

All alcohol testing shall be conducted in conformity with the DOT alcohol regulations. Any alleged abuse by the Employer, such as proven harassment of any employee or deliberate violation. of the regulations or the contract shall be subject to the grievance procedure to provide a reasonable remedy for the alleged violation.

Upon arrival at the testing site, an employee must provide the Breath Alcohol Technician (BAT) with proper identification. If requested, the employee will sign a consent form authorizing the BAT to collect a breath sample and release the result of the breath testing to his/her Employer, but shall not be required to waive any claim or cause of action under the law.

A standard DOT approved alcohol testing form will be used by all testing facilities.

J. Specimen Testing Procedures

All procedures for alcohol testing will, comply with Department of Transportation regulations.

No unauthorized personnel will be allowed in any area of the testing site. Only one alcohol testing procedure will be conducted by a BAT at the same time.

The employee will provide his or her breath sample in a location that allows for privacy. The Employer agrees to recognize all employees' rights to privacy while being subjected to the testing process at all times and at all testing sites. Further, the Employer agrees that in all circumstances the employee's dignity will be considered and all necessary steps will be taken to ensure that the entire process

does nothing to demean, embarrass or offend the employee unnecessarily: Testing will be under the direct observation of a Breath Alcohol Technician (BAT). All procedures shall be conducted in a professional, discreet and objective manner. Direct observation will be necessary in all cases.

The employee shall provide an adequate amount of breath for the Evidential Breath Testing device. If the individual is unable to provide a sufficient amount of breath, the BAT shall direct the individual to again attempt to provide a complete sample.

If an employee is unsuccessful in providing the requisite amount of breath, the Employer then must have the employee obtain, as soon as practical, an evaluation from a licensed physician selected by the Employer and the Local Union concerning the employee's medical ability to provide an adequate amount of breath. If the physician is unable to determine that a' medical condition has, or with a high degree of probability could have, precluded the employee from providing an adequate amount of breath, the employee's failure to provide an adequate amount of breath will be regarded as a refusal to take the test and subject the employee to discharge.

K. Leave of Absence Prior to Testing

An employee shall be permitted to take leave of absence in accordance with the FMLA or applicable State leave laws for the purpose of undergoing treatment pursuant to an. approved program of alcoholism or drug use. The leave of absence must be requested prior to the commission of any act subject to disciplinary action. This provision does not alter or amend the disciplinary provision (Article 35, Section 4 L) of this Section.

Before returning to work from a voluntary leave of absence, the employee must have completed any recommended treatment and taken a return to duty test, with a result of less than 0.02% BAC, and further be subject to six (6) unannounced follow-up alcohol tests in the first twelve (12) months following the employee's return to duty.

The Supplemental Agreements shall address the issue of an extraboard driver who, while at his home terminal, has consumed alcohol, is then called for dispatch and requests additional time off. Requesting time off under this provision shall not be used as a subterfuge to avoid taking a random alcohol (and/or drug) test.

Article 35, Section 4

L. Disciplinary Action Based on Positive Test Results

1. First Positive Test
   - 0.02% BAC-0.039% BAC
     - Out of Service for 24 hours
   - 0.04% BAC-Less than State DWI/DUI Limit
     - Out of Service for the length of time determined by the SAP with a minimum of twenty-four (24) hours
   - State DWI/DUI Limit and Above
     - Subject to discharge
2. Second Positive Test
   - 0.02% BAC-0.039% BAC
     - Out of Service for a five (5) calendar day suspension
   - 0.04% BAC-Less than State DWI/DUI Limit
     - Out of Service for the length of time determined by the SAP with a minimum of a twenty (20) calendar day suspension
   - State DWI/DUI Limit and Above
     - Subject to discharge
3. Third Positive Test
   - 0.02% BAC-0.039% BAC
     - Out of Service for a fifteen (15) calendar day suspension
   - 0.04% BAC-Less than State DWI/DUI Limit
     - Out of Service for the length of time determined by the SAP with a minimum of a thirty (30) calendar day suspension
   - State DWI/DUI Limit and Above
     - Subject to discharge
4. Fourth Positive Test
   - 0.02% BAC-0.039% BAC
     - Subject to discharge
   - 0.04% BAC-Less than State DWI/DUI Limit Subject to discharge
   - State DWI/DUI Limit and Above
     - Subject to discharge

5. An employee who is tested positive in a non-suspicion-based post-accident alcohol testing situation shall be subject to the following discipline for the positive alcohol test or the vehicular accident, whichever is greater:

First Non-Suspicion-Based Post-Accident Positive Test-0.02% BAC- 0.039% BAC - Thirty (30) calendar day suspension. 0.04% BAC and higher - Subject to discharge.

Second Non-Suspicion-Based Post-Accident Positive Test - 0.02% BAC and higher - Subject to discharge.

6. An employee's refusal to submit to any alcohol test will subject the employee to discharge.

M. Return to Duty After a Positive (Greater than .04 to the State Limit) Alcohol Test

Before returning to work the employee must have completed any recommended treatment determined by the SAP and taken a return to duty alcohol test, with a result of less than 0.02% BAC, and further be subject to at least six (6) unannounced follow-up alcohol and/or drug tests as determined by the SAP.

N. Paid-for-time - Testing

Employees subject to testing and selected by the random selection process for alcohol testing shall be compensated at the regular straight time hourly rate of pay provided that the test is negative:

1. Random Alcohol Tests

a. Paid for all time at the collection site.

b. (1) for travel time one way if the collection site is reasonably en route between the employee's home and the terminal, and the employee is going to or from work; or

(2) for travel time both ways between the terminal and the collection site, only if the collection site is not reasonably en route between the employee's home and the terminal.

c. When an employee is on the clock and a random alcohol test is taken any time during the employee's shift, and the shift ends after eight (8) hours, the employee is paid time and one-half for all time past the eight (8) hours.

Article 35, Section 4

d. The Employer will not require the city employee to go for alcohol testing before the city employee's shift, provided the collection site is, open during or immediately following the employee's shift.

e. During an employee's shift, an employee will not be required to use his/her personal vehicle from the terminal to and from the collection site to take a random alcohol test.

f. If a road driver is called to take a random alcohol test at a time when the road driver is not en route to or from work, the driver shall be paid, in addition to all time at the collection site, travel time both ways between the location of the driver when called and the collection site with no minimum guarantee.

2. Non-Suspicion-Based Post-Accident Testing

a. In the event of a non-suspicion-based post-accident testing situation, where the employee has advised the Employer of the issuance of a citation for a moving violation, but the Employer does not direct the employee to be tested immediately, but sends the employee for testing at some later time (during the eight (8) hour period), the-.employee shall be paid for all time involved in testing, from the time the employee leaves home until the employee returns home after the test.

b. When the Employer takes a driver out of service and directs the employee to be tested immediately, the Employer will make arrangements for the driver to return to his/her home terminal in accordance with the Supplemental Agreement.

O. Record Retention

The Employer shall maintain records in a secure manner so that disclosure of information to unauthorized persons does not occur.

Each Employer or its agent is required to maintain the following records for two years:

1. Records of the inspection and maintenance of each EBT used in employee testing;
2. Documentation of the Employer's compliance with the Quality Assurance Program for each EBT it uses for alcohol testing; and
3. Records of the training and proficiency testing of each BAT used in employee testing.

The Employer must maintain for five years records pertaining to the calibration of each EBT used in alcohol testing, including records of the results of external calibration checks.

P. Special Grievance Procedure

1. The parties shall together create a Special Region Joint Area Committee consisting of an equal number of Employer and Union representatives to hear drug and alcohol related discipline disputes. All such disputes arising after the establishment of the Special Region Joint Area Committee shall be taken up between the Employer and Local Union involved. Failing adjustment by these parties, the dispute shall be heard by the Special Region Joint Area Committee within ninety (90) days of the Committee's receipt of the dispute. When the Special Region Joint Area Committee, by majority vote, settles a dispute, such decision shall be final and binding on both parties with no further appeal. Where the Special Region Joint Area Committee is unable to agree or come to a decision on a dispute, the dispute will be referred to the National Grievance Committee.

2. The Procedures set forth herein may be invoked only by the authorized Union representative or the Employer.

ARTICLE 36.

NEW ENTRY (NEW HIRE) RATES

Effective April 1, 1998, all regular employees hired on or after that date and. employees who are in progression shall receive the following hourly and/or mileage rates of pay:

(a) Effective first (1st) day of employment - seventy-five percent (75%) of the current rate.

(b) Effective first (1st) day of employment plus one (1) year - eighty percent (80%) of the current rate.

(c) Effective first (1st) day of employment plus eighteen (18) months - ninety percent (90%) of the current rate.

(d) Effective first (1st) day of employment. plus two (2) years - one hundred percent (100%) of the current rate.

The above rates of pay shall not apply to casual employees.

1. **You state in your testimony that IBT reviewed the random drug testing results for large Less-than-Trailer-Load (LTL) carriers for the period of 2003 to 2006. The positive rate was 0.6%. Was your review of the data the carriers submitted to FMCSA? What do you believe are the reasons for a rate that is far lower than even FMCSA's reported statistics?**

The data we reviewed relating to random drug testing results for large Less-than-Trailer-Load (LTL) carriers for the period 2003-2006 was not submitted to the FMCSA. However, if the FMCSA included the large LTL carriers in their survey, this data would have been submitted by the motor carriers. We believe the primary reasons for the rate far lower than FMCSA's reported statistics include the low turnover rate within the unionized LTL carriers. Good pay, health and pension benefits, and a work environment where members are protected by union representation keep our members from seeking employment with other non-union carriers. In addition, the low turnover rate among the drivers has led to a mature experienced workforce that would not be inclined to use drugs or take chances working while under the influence of alcohol. In addition, the NMFA has contained provisions requiring drug and alcohol testing, in some form, for a period that far exceeds the DOT requirements for random testing. Therefore, there is a culture that dissuades drug and alcohol abuse that has been strongly supported by both motor carriers and the union. Finally, the low rate can also be attributed to the fact that almost all drivers who have been confirmed as testing positive have taken advantage of rehabilitation and upon successful completion can be returned to duty. This is required to be offered by the employer to the employee under the collective bargaining agreement – a once in a lifetime second chance. Knowing that this may be their only chance to be employed as a driver in the industry, most drivers entering and completing rehab do not incur another substance abuse incident. In the non-union sector, many employees testing positive are summarily fired and do not bother to enter rehabilitation, nor does the company necessarily offer them the opportunity to do so.

2. **Mr. Craig's prepared testimony highlights the fact that many drivers do not understand the educational materials or think the regulations do not apply to them as one of the problems with drug and alcohol testing. Your written testimony cites the training that IBT members receive from employers based on your Collective Bargaining Agreement. Do you believe your member are well informed and fully understand their responsibilities under the drug and alcohol testing rules? What does this training entail specifically and how is it provided?**

Teamster members who are subject to drug and alcohol testing pursuant to the FMCSA regulations and the collective bargaining agreements are generally well informed of their responsibilities to comply with both the applicable regulations and the collective bargaining agreement. Employers typically conduct pre-work meetings during which covered drivers are provided with written educational materials and that are reviewed during the meetings. The drivers have the opportunity to ask questions and receive answers from management officials who conduct the meetings. In addition, the IBT develops fact sheets and other educational materials that are distributed to drivers, as requested by local union leadership. IBT staff members also conduct workshops and seminars for drivers during which detailed information is provided to the drivers relative to the governing regulations and applicable articles of the collective bargaining agreements. Individual members who have questions may also directly contact the IBT Safety and Health Department of the appropriate IBT Trade Division for information and materials concerning specific questions they may have regarding drug and alcohol testing regulations and the applicable articles of the CBAs.

3. **Several witnesses have testified that a successful drug and alcohol testing program must carefully balance ensuring the integrity of testing with maintaining the due process and privacy rights of individuals. You suggest, as part of the clearinghouse, that employers be required to obtain authorization from a driver before accessing information from the clearinghouse because the current rules require driver authorization before contacting previous employers. Yet GAO reports that many drivers simply omit previous employer information in order to avoid identification of a past positive. If drivers must authorize each check, does this diminish the effectiveness of the clearinghouse?**

If drivers would be required to authorize each check of the clearinghouse by the prospective employer, we do not think that it would diminish the effectiveness of the clearinghouse. Assuming that the clearinghouse eliminates the practice of drivers omitting previous positive prospective employer drug and alcohol tests by simply moving onto the next carrier to apply for work, the prospective employee should still receive notification that his record is being accessed. This will allow the employee to know that his record is being checked by the carrier to which he has applied, and that a particular inquiry us not an unauthorized access to his records. We do not foresee a situation where a driver authorization would in any way diminish the effectiveness of the clearinghouse.

4. **What other measures do you recommend to protect drivers' information and right to privacy in the clearinghouse?**

A system must be devised for the government to verify with reasonable certainty that the driver consented before the information is released. While it may not be feasible for every inquiry to be accompanied by a signed statement from the driver authorizing the inquiry and any release of data, especially in the case of an electronic database, potential employers should not be permitted to simply check a box verifying notification. A system of random verification and severe penalties, combined with a unique driver identifier – a Social Security number or CDL number, for example – would help protect driver information. Then, a percentage significant to act as a deterrent to unauthorized inquires should be subject to audit. This is further explained in our written testimony.

Drivers should always be permitted to access their own records to ensure that the information contained in this clearinghouse database is correct. Also, employers should be required to notify drivers if an inquiry produces a report of a verified positive drug test. Drivers should be permitted to dispute any incorrect information and have the record corrected. Once a dispute is filed, the burden of proof should be on the employer or MRO to prove that the information was reported correctly.

5. **The data from North Carolina shows that of over 500 positive tests reported to the DMV, only 150 drivers completed their assessment. This is consistent with the estimate cited in the testimony of Ms. Smith, that less than half of CDL holders who test positive complete the return to duty process. What do you believe are the reasons that so many drivers do not return, when required to undergo the return to duty to get their CDLs restored?**

According to the regulations, prior to returning to driving duties, a commercial driver must meet with a Substance Abuse Professional (SAP) for a face-to-face initial evaluation, complete any recommended course of treatment / education, meet with the SAP for a face-to-face follow up evaluation; and provide a negative to return-to-duty test. In addition, the driver must comply with the follow up testing requirements as prescribed by the SAP. For a driver who is out of work, the costs associated with this process are virtually unmanageable. Consequently, drivers who do not work under a collective bargaining agreement or are not employed by an employer that has a drug and alcohol testing policy that pays for costs associated with rehabilitation and return to duty, will simply leave the industry or falsify information concerning their testing history.

In most Teamster contracts, costs related to rehabilitation and return to duty after a positive test are borne by the health and welfare plans under which the drivers work. Further, the union and the employers negotiate terms that allow the drivers to return to driving duties, including payment for unannounced follow up testing.

United States Government Accountability Office

GAO

Testimony

Before the Subcommittee on Highways and Transit, Committee on Transportation and Infrastructure, House of Representatives

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MOTOR CARRIER SAFETY

Preliminary Information on Challenges to Ensuring the Integrity of Drug Testing Programs

Statement of Katherine Siggerud, Director
Physical Infrastructure Issues

GAO-08-220T

November 1, 2007

GAO

Highlights

Why GAO Did This Study

What GAO Found

MOTOR CARRIER SAFETY

Preliminary Information on Challenges to Ensuring the Integrity of Drug Testing Programs

What GAO Found

FMCSA faces two key challenges in ensuring that commercial motor carriers have drug testing programs in place. First, there appears to be a significant lack of compliance among motor carriers, particularly small carriers and self-employed drivers. Violations of drug testing protocols are noted in more than 40 percent of FMCSA's safety audits conducted since 2003 of carriers that have recently started operations and more than 70 percent of the compliance reviews conducted on carriers already in the industry since 2001. These problems also extend to service agents, which are entities that collect urine samples or administer other aspects of the program. For example, GAO investigators working under cover tested 24 collection sites and determined that 22 did not fully comply with applicable protocols. The second challenge is that FMCSA's oversight activities are limited, both in quantity and scope. Safety audits, which are targeted at new entrants, began in 2003 and, as a result, do not affect carriers in business earlier than 2003. Such companies can be covered in compliance reviews, but these reviews occur at only about 2 percent of carriers a year, according to FMCSA data. In addition, FMCSA oversight does not specifically address compliance by service agents, such as collection sites, unless there are particular allegations or complaints.

Even when FMCSA is able to ensure that carriers and others are in compliance with drug testing requirements, there are additional challenges in ensuring the integrity of drug testing programs. The urine test itself can be subverted in various ways, such as adulterating or diluting the urine sample or substituting synthetic urine or a drug-free sample. Products designed to "beat" the test are brazenly marketed on the Internet. The extent to which subversion is occurring is unknown—and is impossible to determine. SAMHSA officials with whom we met told us when adulterants work well and destroy the evidence of their presence, they are undetectable. Furthermore, the required urine test has certain limitations. For example, it covers only five drug categories (marijuana; cocaine; amphetamines; opiates, such as heroin; and phencyclidine (PCP)), and it may provide a clean result if a person has not used any of these drugs within the past several days. Finally, drivers may not disclose instances in which they failed previous drug tests. If they are able to remain drug-free for enough time to pass a preemployment test, their new employer may not know about their past history of drug use.

GAO identified various options to address these challenges, some of which were proposed by carriers, industry associations, DOT, and others. These options include publicizing educational information about the regulations for carriers, service agents, and drivers; encouraging carriers to do more to ensure service agent compliance; improving and expanding FMCSA oversight and enforcement authority; adopting federal legislation to prohibit products designed to tamper with a drug test; and developing a national reporting requirement for past positive drug test results. GAO's ongoing work will examine the advantages and disadvantages of the various options in more detail; we expect to issue the report in May 2008.

Mr. Chairman and Members of the Subcommittee:

We appreciate the opportunity to participate in this hearing on drug testing for those employed in safety-sensitive positions in the motor carrier industry. The Department of Transportation (DOT) estimates that approximately 4.2 million people, including truck and bus drivers, work in such positions, and their safety on the road affects the safety of the traveling public. Commercial motor carriers[1] account for less than 5 percent of all highway crashes, but these crashes result in about 13 percent of all highway deaths, or about 5,500 of the approximately 43,000 highway fatalities that occur nationwide annually. A DOT study on the factors associated with large truck crashes finds that vehicle factors, such as brake problems, and behavioral factors, such as speeding and driver fatigue, are some of the most frequently cited factors involved in large truck crashes.[2] While illegal drug use is not among the most frequently cited factors in the DOT study—appearing as an associated factor in only 2 percent of the crashes included in the study—it is clear that the use of illegal drugs, such as marijuana, heroin, or cocaine, can severely impair the ability of individuals to drive. Since 1988, federal regulations have required that these commercial drivers be drug tested. DOT and the Federal Motor Carrier Safety Administration (FMCSA) publish regulations that govern the drug testing process.[3] FMCSA is responsible for ensuring compliance with these regulations, and does so through safety audits of

[1]There are approximately 711,000 commercial motor carriers registered in Federal Motor Carrier Safety Administration's Motor Carrier Management Information System (MCMIS). This includes an unidentified number of carriers that are registered but are no longer in business. MCMIS contains information on the safety fitness of commercial motor carrier and hazardous materials shippers subject to the Federal Motor Carrier Safety Regulations and the Hazardous Materials Regulations.

[2]DOT, Federal Motor Carrier Safety Administration, Analysis Division, *Large Truck Crash Causation Study*, Publication No: FMCSA-RRA-07-017 (July 2007).

[3]Title 49, Code of Federal Regulations (CFR), Part 40 provides rules governing how drug tests are to be conducted and what protocols are to be used. The tests cover alcohol as well as drugs, but the focus of our work has been on the testing that covers five drug categories: marijuana, cocaine, amphetamines (including methamphetamines), opiates (including heroin), and phencyclidine (PCP). The Office of Drug and Alcohol Policy and Compliance, within the Office of the Secretary of Transportation, publishes these rules. 49 CFR Part 382 contains FMCSA's specific drug testing regulations.

carriers that have recently started operations[4] and compliance reviews conducted on carriers already in the market.

Testing results clearly indicate that some drivers are using illegal drugs. FMCSA data show that each year from 1994 through 2005, between 1.3 and 2.8 percent of drivers tested positive for the presence of illegal drugs under random testing. However, concerns exist that some drivers may be escaping detection. Recent drug tests conducted during roadside inspections of trucks in Oregon suggest that the percentage of truck drivers using illegal drugs while operating vehicles may be somewhat higher than FMCSA reports.[5] Furthermore, recent reports have also suggested that some locations where drug testing specimens are collected are not in compliance with DOT protocols, which can potentially make it easier to tamper with or substitute a urine specimen. In 2005, we reported that products used to tamper with drug use screening tests are widely available, and that the sheer number of these products, and the ease with which they are marketed and distributed through the Internet, present formidable obstacles to the integrity of the drug testing process.[6]

My testimony today addresses what we have learned about these and other challenges to establishing an effective drug testing program. It is based primarily on the work we currently are doing for this Subcommittee and for the Chairman of the full Committee. Our current work, which we expect to complete in May 2008, addresses the challenges that may be encountered in implementing federal drug testing regulations; the roles and responsibilities that federal agencies, state agencies, and others have in overseeing industry compliance with drug testing regulations, and the limitations they encounter in regulations or oversight; and the options, if any, that have been proposed for improving compliance with and

[4]Trucking companies are required to receive a new entrant safety audit within the first 18 months of business. Motor coach companies are required to receive a new entrant safety audit within the first 9 months of business.

[5]Oregon's roadside inspections had important differences to DOT-regulated tests that limit the comparability of the results. For example, these inspections (1) may include some drivers who are not subject to DOT drug testing regulations; (2) tested for more substances than does DOT—for example, the state inspection tested for some prescription medications that are not included in DOT tests; and (3) may not have used procedures comparable to DOT's collection, laboratory analysis, and medical review procedures to ensure accurate results.

[6]GAO, *Drug Tests: Products to Defraud Drug Use Screening Tests Are Widely Available*, GAO-05-653T (Washington, D.C.: May 17, 2005).

addressing the limitations of drug testing regulations, and the advantages and disadvantages of these options. Because this work is not yet finished, my observations today are preliminary in nature. My testimony addresses the types of challenges confronting FMCSA in (1) overseeing and enforcing compliance with drug testing regulations and (2) ensuring the integrity of the drug tests and the processes for keeping drivers with identified problems off the roads. As part of my observations about these challenges, I will discuss options we have identified as possible improvements that we will be looking at in more detail as we continue our work.

To address these issues, we reviewed DOT and FMCSA regulations, policies, and reports and interviewed officials from DOT (FMCSA and the Office of Drug and Alcohol Policy and Compliance (ODAPC)) and the Department of Health and Human Services' (HHS) Substance Abuse and Mental Health Services Administration (SAMHSA). This review focuses on the controlled substance portion of the drug and alcohol testing regulations, and does not address alcohol testing. We analyzed FMCSA data on the results of compliance reviews and safety audits, and data on enforcement activities. We interviewed representatives from six motor carriers, including large carriers, small carriers, and an owner-operator. We interviewed motor carrier industry associations representing many segments of the motor coach and trucking industry, such as the American Trucking Association, the Owner-Operator Independent Drivers Association, the American Bus Association, and the National Association of Small Trucking Companies. We also interviewed officials from unions representing truck and bus drivers and from a variety of associations representing urine specimen collectors, medical review officers, substance abuse professionals, drug testing consortiums, and others involved in the drug testing industry. We also interviewed representatives from one of the largest laboratories involved in the DOT drug testing industry. In addition, we observed FMCSA oversight activities, including two compliance reviews and two new entrant safety audits in California and Virginia. We selected states in which to observe compliance reviews and new entrant safety audits on the basis of the availability of on-going FMCSA oversight activities. As we continue our work, we plan to observe additional compliance reviews and safety audits. Also, our Forensic Audits and Special Investigations (FSI) team tested compliance with protocols of collection sites in three metropolitan areas selected for the large number of truck drivers residing in those areas, as well as Washington, D.C. Our undercover investigators posed as commercial truck drivers who needed a DOT drug test and, in some cases, tested whether they could successfully adulterate or substitute the specimens. They conducted their investigation

from May to September 2007 in accordance with standards prescribed by the President's Council on Integrity and Efficiency. We determined that the data used in this statement are sufficiently reliable for our purposes. We began our review in June 2007 and are performing it in accordance with generally accepted government auditing standards.

Summary

FMCSA's efforts to ensure that commercial motor carriers have drug testing programs in place face two key challenges.

- **Lack of compliance appears to be widespread.** Our review of FMCSA data, visits to individual carriers, and discussions with industry associations, indicate that carriers, particularly small carriers and owner-operators,[7] are often not in compliance with the drug testing requirements. According to FMCSA data, more than 70 percent of compliance reviews conducted since 2001 and more than 40 percent of safety audits conducted since 2003 found violations of drug testing regulations, including finding that the carrier had no drug testing program at all.[8] The most frequently cited drug testing violations in compliance reviews are that drivers operating in safety-sensitive positions have not successfully passed a preemployment drug test, or that drivers are not being tested at all. About 1 percent of compliance reviews per year find carriers that have allowed drivers with a positive drug test to continue to operate in safety-sensitive positions. We also found indications that a lack of compliance with protocols may also be present among entities that collect specimens for testing. Posing as commercial truck drivers needing DOT drug tests, our investigators, in a statement also issued today, determined that 22 of the 24 collection sites they tested were not in compliance with some of the protocols that guide the process of collecting a urine specimen.[9]

- **FMCSA's oversight is limited.** While new entrant safety audits—which began in 2003—are designed to reach all new entrants, compliance

[7]Owner-operators own their own vehicles and hold a valid commercial driver's license. An owner-operator may act as both an employer and a driver at certain times, or as a driver for another employer at other times.

[8]FMCSA data used in this statement include information from compliance reviews and new entrant safety audits conducted through September 21, 2007.

[9]GAO, *Drug Testing: Undercover Test Reveal Significant Vulnerabilities in DOT's Drug Testing Program*, GAO-08-225T (Washington, D.C.: Nov. 1, 2007).

reviews only reach approximately 2 percent of carriers each year.[10] These activities are limited in the extent to which they can identify and rectify problems in carriers' drug testing programs. In particular, these oversight activities do not address compliance by agents used by carriers to implement drug testing programs—such as collection sites—in part, because of limited resources and the lack of enforcement authority over these service agents.[11] However, FMCSA will investigate service agents as a result of specific allegations and complaints. These limitations in FMCSA oversight may lessen incentives for carriers and service agents to comply with drug testing requirements.

Even in situations in which FMCSA is able to ensure that a carrier has a sound framework in place for drug testing, there are additional challenges in ensuring the integrity of drug testing programs.

- **Subversion of the drug test is still possible**. The regulations do not require directly observed collection, nor do they require a thorough search for hidden subversion products. Drivers intent on adulterating or substituting a urine specimen can conceal small vials in socks or other undergarments, which may not be identified. The extent to which subversion is occurring is unknown—and is impossible to determine. SAMHSA officials with whom we met noted that when adulterants work well and destroy the evidence of their presence, they are undetectable. Similarly, when urine samples are successfully substituted with synthetic urine, or another person's drug-free urine, there is no record of them. Our investigators were able to successfully substitute synthetic urine at a collection site that followed all DOT protocols, and the laboratory was not able to detect any of the adulterants or substitutes used in their investigation.

- **There are limitations to the test itself**. Drivers who use illegal substances other than the five that DOT tests for, or misuse certain prescription medications, may not be identified during the drug testing process. Also, the urine test does not provide indications of drug use

[10]There were approximately 12,500 compliance reviews conducted on carriers each year from 2001 through 2006.

[11]Service agent refers to any person or entity, other than an employee of the employer, who provides services to employers and employees in connection with drug and alcohol testing requirements. This category includes, but is not limited to, collectors, laboratories, medical review officers, substance abuse professionals, and consortiums. To act as service agents, persons and organizations must meet the qualifications set forth in applicable sections of federal regulations.

history because it can only detect the presence of drugs taken within the previous several days.

- **Lack of disclosure of past positive drug tests may be a problem.** DOT regulations require that an employer, in addition to testing an applicant and receiving a negative result, also inquire about a driver's drug test history by contacting the driver's recent employers listed on the employment application. Representatives from several motor carriers with whom we met told us it is easy for drivers to simply omit any previous employer for whom they tested positive or any past preemployment test that was positive. Such drivers can remain drug-free for a period of time leading up to their next preemployment test, get a negative result, and get hired—without their new employer knowing about any past positive drug tests.

We have identified various options to address these challenges, some of which have been proposed by carriers, industry associations, DOT, and others. These options include such steps as providing and publicizing information and successful practices regarding drug testing requirements directly to carriers, service agents, and drivers; encouraging carriers to do more to ensure that the service agents they use comply with DOT protocols; improving and expanding FMCSA oversight and enforcement; adopting federal legislation prohibiting the sale, manufacture, or use of adulterants or substitutes; testing for more and different drugs; testing alternative specimens, such as hair; and developing a national reporting requirement for past positive drug test results. There are advantages and disadvantages to implementing any of these various options. Our ongoing work will examine the advantages and disadvantages of these options in more detail.

Background

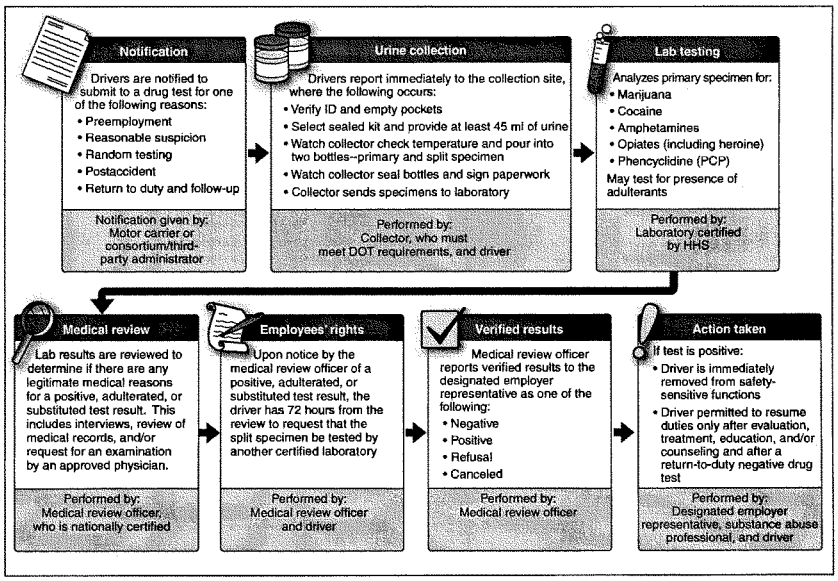
Federal drug testing regulations require commercial motor carriers to have a drug testing program that covers transportation safety-sensitive employees who operate commercial motor vehicles that have a gross vehicle rating of 26,001 pounds or more; are designed to transport 16 or more passengers, including the driver; or are of any size and are used in the transportation of hazardous materials. While the largest motor carriers operate upwards of 50,000 vehicles, most carriers are small, with approximately 80 percent operating between 1 and 6 vehicles. Carriers continually enter and exit the industry, and turnover among small carriers is high, thereby making them harder to track. Since 1998, the industry has increased in size by an average of about 29,000 interstate carriers per year.

The Omnibus Transportation Employee Testing Act of 1991 required DOT to implement drug testing using urine specimens. Carriers are required to obtain a negative test result prior to employing a driver and allowing him or her to engage in safety-sensitive duties. Carriers also must conduct random testing, postaccident testing, and reasonable suspicion testing. As implemented by DOT, testing covers five drug categories: marijuana, cocaine, amphetamines (including methamphetamines), opiates (including heroin), and phencyclidine (PCP). If an employee tests positive, he or she is required to complete a return-to-duty process before reengaging in safety-sensitive duties. The return-to-duty process is guided by a substance abuse professional and may include education, treatment, follow-up testing, and aftercare.

Motor carriers must implement a drug testing program and may use service agents to perform some or all of the tasks needed to comply with DOT drug testing requirements (see fig. 1). A motor carrier must designate an employer representative, who is an employee authorized by the carrier to take immediate action to remove a driver from safety-sensitive duties after being notified of a positive or refusal-to-test result.[12] Service agents must meet qualification requirements and are responsible for implementing the required protocols.

[12]Specimens that have been adulterated or substituted are considered refusals-to-test.

Figure 1: Overview of the DOT Drug Testing Process



Source: GAO analysis of DOT requirements.

Service agents include the following:

- A **collector** instructs drivers during the urine collection process, makes an initial inspection of the specimen provided, divides the specimen into primary and split specimens,[13] and sends it to the laboratory for analysis. A

[13]In DOT drug testing, the split specimen is tested at a second laboratory in the event that the employee requests that it be tested following a verified positive, adulterated, or substituted test result based on the primary specimen. Verified positive, adulterated, or substituted test results are determined after laboratory analysis and medical review.

collection site can be a portable toilet; any toilet in a clinic, hospital, or office building; or a toilet on-site at a carrier's place of business.

- A **laboratory** analyzes the specimen. Laboratories must be certified by HHS; as of January 2007, there were 46 such laboratories.

- A **medical review officer**, who is a licensed physician, is responsible for receiving and reviewing laboratory results for a carrier's drug testing program and evaluating medical explanations for certain drug test results. In cases of confirmed positive or refusal-to-test results, the officer must verify the laboratory results by speaking with the driver and informing the driver of his or her right to have the split specimen tested.

- A **substance abuse professional** evaluates drivers who have tested positive or refused to take a test and makes recommendations about the return-to-duty process, which could include education, treatment, follow-up testing, and aftercare. Drivers are required to complete the recommended steps before they reengage in safety-sensitive functions.

- A **consortium/third-party administrator** is a company that can provide or coordinate either a variety of or all of the above services for carriers and owner-operators.[14]

FMCSA has responsibility for ensuring compliance by trucking and motor coach companies with drug testing requirements. FMCSA does so through safety audits of new entrants and compliance reviews of existing companies—both of which cover compliance with all types of safety regulations, including drug and alcohol testing. Safety audits are required for all new entrants to the trucking industry and are opportunities for FMCSA to provide educational and technical assistance to new carriers, explain carriers' responsibilities under the federal regulations, and check for operational deficiencies. In excess of 40,000 safety audits were conducted in 2006. Compliance reviews occur for four reasons: (1) poor

[14]The regulations require owner-operators to implement a random controlled substances testing program. To comply, owner-operators must be enrolled in a random testing pool that includes other drivers. The random testing pool is managed by a consortium/third-party administrator.

carrier safety record in SafeStat,[15] (2) a fatal accident, (3) a complaint against the carrier or driver, or (4) a follow-up investigation after violations. In 2006, FMCSA and state investigators conducted more than 15,000 compliance reviews. In addition to the audits and compliance reviews, FMCSA also makes educational materials about drug testing available on its Web site.

FMCSA Faces Two Key Challenges in Ensuring Drug Testing Programs Are in Place

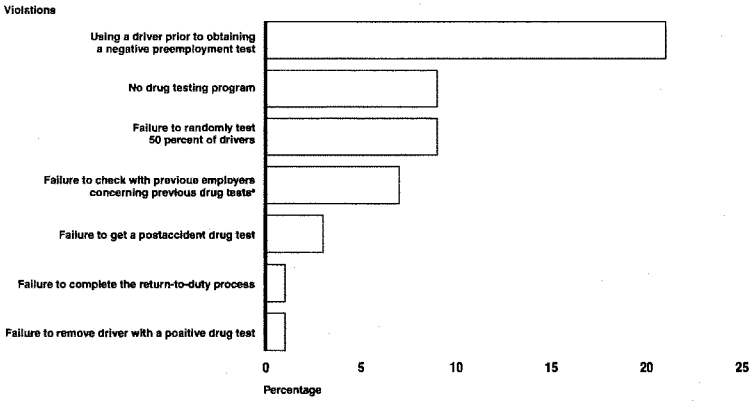
FMCSA's efforts to ensure that commercial motor carriers have drug testing programs in place face two key challenges: limited compliance by carriers and others involved in the process, and limitations in the mechanisms FMCSA uses to ensure that drug testing programs are in place.

Compliance by Carriers and Others Is in Question

Our reviews of FMCSA data, visits to individual carriers, and discussions with industry associations indicate that carriers, particularly small carriers and owner-operators, are often not in compliance with the drug testing regulations, resulting in the possibility that many drivers are not being tested, which increases the potential for drivers who use illegal substances to continue operating in safety-sensitive positions. According to FMCSA data, more than 70 percent of compliance reviews conducted since 2001 and more than 40 percent of safety audits conducted since 2003 found violations of drug testing regulations. The most frequently cited violation found in new entrant safety audits, which was found in 30 percent of safety audits conducted since 2003, was that carriers had no drug testing program at all. The most frequently cited drug testing violations in compliance reviews are that drivers operating in safety-sensitive positions have not successfully passed a preemployment drug test, or that drivers are not being tested at all (see fig. 2). About 1 percent of compliance reviews per year find carriers that have allowed drivers with a positive drug test to continue to operate in safety-sensitive positions.

[15]FMCSA targets compliance reviews toward those carriers that its Motor Carrier Safety Status Measurement System (SafeStat) identifies as having a high potential for being involved in crashes. We have recently reported that a statistical approach would better identify commercial carriers for compliance reviews than the current approach. GAO, *Motor Carrier Safety: A Statistical Approach Will Better Identify Commercial Carriers That Pose High Crash Risks Than Does the Current Federal Approach*, GAO-07-585 (Washington, D.C.: June 11, 2007); and *Motor Carrier Safety: Federal Safety Agency Identifies Many High-Risk Carriers but Does Not Assess Maximum Fines as Often as Required by Law*, GAO-07-584 (Washington, D.C.: Aug. 28, 2007).

Figure 2: Percentage of Selected Violations Identified during FMCSA Compliance Reviews, 2001-2007



Source: GAO analysis of FMCSA data from 2001 to September 21, 2007.

*This violation may be reported under other applicable sections of DOT and FMCSA regulations.

We saw similar problems in our field visits: in the two compliance reviews and two new entrant safety audits we observed, two of the carriers, both of which were small carriers, were not aware of the drug testing requirements and did not have a drug testing program at all. For example, a representative at one of the carriers we interviewed did not understand the comprehensiveness of the drug testing regulations. The carrier had hired owner-operators, who are enrolled in a random drug testing program through a consortium/third-party administrator, but did not fully understand its responsibility to obtain testing results and other information from the consortium in which those owner-operators are enrolled. Furthermore, for those carriers who use drivers on and off throughout the year, there was confusion regarding how to include them in random drug testing.

Compliance with drug testing regulations is particularly problematic for owner-operators who are not hired by other companies. An owner-operator must follow the drug testing regulations and be in a drug testing program just like all other drivers employed by motor carrier companies.

For example, an owner-operator is required to get a preemployment drug test and to enroll in a consortium for random testing purposes. However, it is unclear how an individual who is both the employer and the employee would comply with drug testing regulations. For example, should the owner-operator who participates in a consortium test positive, there is no one who will remove the individual from safety-sensitive duties, and no one beyond the owner-operator will be notified of the positive result.[16]

Posing as commercial truck drivers needing DOT drug tests, our investigators determined that there is also a lack of compliance with protocols among entities that collect specimens for testing, resulting in the ability for drivers to subvert a drug test. Twenty-two of the 24 collections sites our investigators tested were not in compliance with some of the protocols that guide the process of collecting a urine specimen. For example, employees at 10 sites failed to ask the investigator to empty his pants pockets and display items to ensure no items were present that could be used to adulterate the specimen. One employee who did ask the investigator to empty his pockets did not verify that all of his pockets were empty, allowing the investigator to bring an adulterant into the collection area by hiding it in his back pocket.

Mechanisms for Checking Compliance Have Limitations

While almost all compliance reviews and safety audits test compliance with drug and alcohol testing regulations, these activities have several limitations and gaps in how effectively they can identify and correct poor compliance.[17]

- **Most carriers are not reviewed**. Safety audits began in 2003, and since these audits are targeted at new entrants, they do not affect companies in business earlier than 2003. FMCSA compliance reviews only reach approximately 2 percent of carriers each year. Owner-operators and small carriers are less likely than larger companies to be selected for a compliance review. Several associations told us that small carriers may be less likely to comply with the drug testing regulations because they may

[16]According to the regulations, an employer or owner-operator may authorize a consortium/third-party administrator to act as an intermediary for transmitting drug test results. Therefore, a consortium/third-party administrator may also have information on drug test results.

[17]FMCSA does not normally conduct reviews solely on drug testing. However, we have reported that 95 percent of FMCSA compliance reviews in fiscal years 2001 to 2006 included a review of drug and alcohol testing compliance. GAO-07-584.

have less understanding of their responsibilities, and because they have less incentive to comply, given the rarity in which they will be visited by FMCSA or state investigators.

- **Oversight of service agents is lacking**. Except in the case of specific allegations or complaints, FMCSA investigators do not visit or audit collection sites or any other service agents employed by the carrier to observe procedures and enforce compliance with drug testing requirements.[18] FMCSA has a limited number of people to oversee the potentially tens of thousands of sites that can be used to collect urine for DOT drug testing. Collection sites can be located anywhere—for example, a portable toilet or any toilet in a clinic, hospital, or office building—and can operate during differing hours. Few carriers conduct regular oversight of the service agents they employ. One large carrier with whom we spoke tests and verifies that the collection sites it uses are in compliance. Smaller carriers are less likely to conduct such oversight, given their more limited resources. Representatives from a third-party administrator with whom we spoke told us that it observes some of the collection sites it uses, sometimes at a client's request. If significant problems are found, representatives told us they alert the carriers to discontinue use of that collection site. In addition, representatives told us that some major collection companies internally audit their own sites to ensure the sites comply with all requirements.

- **FMCSA conducts enforcement, but enforcement actions on service agents are limited**. Although not all violations result in enforcement actions, FMCSA can use civil penalties, compliance orders, and out-of-service orders to enforce carriers' compliance with drug testing requirements. During safety audits of new entrants, FMCSA typically does not assess fines against the carrier for noncompliance, since the purpose of these audits is to educate and inform to encourage compliance.[19] The result of a safety audit is a list of recommendations for corrective action and a requirement to provide documentation that corrective action was

[18]There is some oversight of collection sites by other DOT agencies, including the Federal Aviation Administration, the Federal Railroad Administration, and the Federal Transit Administration, and by the United States Coast Guard in the Department of Homeland Security. These other agencies inspect some collection sites used by the employers and operators they regulate. These collection sites may also be used by FMCSA-regulated carriers.

[19]Certain violations discovered during a safety audit will result in ending the safety audit and an immediate referral for a compliance review. For example, one such violation is if a carrier is found to have used a driver who had a positive drug test.

taken. FMCSA does not believe it has the authority to levy civil penalties on service agents. If a service agent is found to be out of compliance, FMCSA officials told us that at most, they can only fine the carrier that uses the service agent—not the service agent itself. Several carrier and drug testing industry associations we interviewed also commented that lack of enforcement of the drug testing requirements against service agents, particularly collection sites, is a problem. FMCSA and ODAPC can initiate a process to disqualify service agents from participating in activities related to DOT drug testing programs, known as a Public Interest Exclusion (PIE), in cases of serious noncompliance. While a number of PIEs have been initiated, no PIE has been completed or formally issued. Typically, the service agent has either corrected the noncompliance or gone out of business before the PIE could be completed.

- **There is limited proactive outreach to carriers, service agents, and drivers.** While new entrant safety audits are an important tool for educating and informing new carriers, these audits typically do not occur until after a carrier has been operating for 9 to 18 months. New carriers receive little information about drug testing requirements when they register. When a new carrier applies for a DOT number, the application includes a question in which the carrier must confirm whether it understands its responsibilities related to drug and alcohol testing. However, FMCSA does not provide any educational information on drug testing when it approves the application. The carrier must seek out information on the regulations and other responsibilities. The FMCSA and ODAPC Web sites provide substantial educational information on drug testing responsibilities to carriers, service agents, and drivers. An official from FMCSA told us that its Web site may not effectively reach carriers and drivers, and that there is a need to be more proactive in disseminating information on the drug testing program.

Options that we have identified to address these limitations include

- providing more information to carriers, service agents, and drivers when they enter the industry, and publicizing the materials available on the FMCSA Web site;
- encouraging carriers to do more to test and verify that the service agents they use are in compliance with the requirements; and
- increasing or expanding FMCSA's oversight activities and enforcement authority.

FMCSA's fiscal year 2008 operating plan calls for improving the Web site and better publicizing available information, and its Comprehensive Safety Analysis 2010 (CSA 2010) initiative includes plans to improve current oversight.[20] Our ongoing work will examine the advantages and disadvantages of the various options in more detail.

Additional Challenges Threaten Integrity of the Drug Testing Process

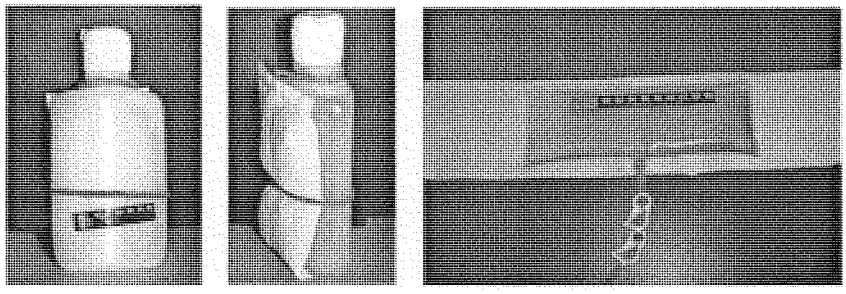
Even in situations in which FMCSA is able to ensure that a carrier has a sound framework in place for drug testing, there are additional challenges that can affect the integrity of results for individual tests. These challenges range from opportunities to subvert the test results to learning about past instances in which applicants may have failed drug tests.

Subversion of Drug Tests Is Still Possible

Adulterating or diluting the urine sample or substituting synthetic urine or drug-free urine is possible, even if carriers and service agents are in perfect compliance with requirements. For example, our investigators were able to successfully substitute synthetic urine at a collection site that appeared to follow all DOT protocols. In most instances, DOT drug testing protocols do not require directly observed collection, nor do they require a thorough search for hidden subversion products. Drivers intent on adulterating or substituting a urine specimen can conceal small vials in socks or other undergarments, such as those shown in figure 3. Products designed to dilute, cleanse, or substitute urine specimens are easily obtained and brazenly marketed on Web sites. Other products—more than 400 in number—are used to adulterate urine samples. The sheer number of these products, and the ease with which they are marketed and distributed through the Internet, present formidable obstacles to the integrity of the drug testing process.

[20]Through CSA 2010, FMCSA expects to reduce motor carrier crashes, fatalities, and injuries by using better ways to identify unsafe carriers and drivers; assessing a larger portion of the motor carrier industry; and expanding the range of interventions to be used with carriers that and drivers who fail to comply with safety requirements.

Figure 3: Devices Used to Hold Adulterants or Substitutes



Sources: American Association of Medical Review Officers, and Substance Abuse Program Administrators Association.

Note: The two left photographs show a container that was used for substituted or synthetic urine, with a heating pad attached. The photograph on the far right shows a belt designed to hold a urine pack filled with synthetic urine.

Another method of substitution is having another person give the urine specimen instead of the driver. Collection sites are required to identify the driver by looking at a photo ID issued by the employer (other than in the case of an owner-operator or other self-employed individual) or a federal, state, or local government (e.g., a driver's license). The protocols do not require carriers to provide photographs or other identification of drivers to collectors to validate the identification. For example, our investigators successfully used bogus driver's licenses to gain access to all 24 collection sites—demonstrating that drug users could send someone to take a drug test in their place using fake identification.

The extent to which subversion is occurring is unknown—and is impossible to determine. SAMHSA officials with whom we met noted that when adulterants work well and destroy the evidence of their presence, they are undetectable by laboratories. DOT issued a Notice of Proposed Rulemaking in 2005 to require specimen validity testing to test for the presence of adulterants, and a final rule is expected in fall 2007.[21] Similarly, when urine samples are successfully substituted, the result is a negative

[21] 70 Fed. Reg. 62276-01.

test result; therefore, no data exist on the extent to which such substitution occurs. For example, our investigators adulterated or substituted eight specimens in their investigation, and the laboratory was not able to detect any of the adulterants or substitutes used.

One potential option to addressing this problem is to restrict the sale of products that allow applicants to subvert tests. As we have previously reported, several states have laws that prohibit the manufacture, sale, or use of products intended to subvert drug tests, but these laws are difficult to enforce.[22] To our knowledge, very few individuals have been cited or convicted for violating these laws. As we also reported, however, South Carolina convicted individuals for marketing and selling masking products: one who sold urine substitution kits over the Internet, and another who advertised that his store carried products that are used to pass drug tests by cleansing the system. However, the interstate nature of the manufacture and sale of products intended to subvert a drug test lessens the impact of state-based laws. Legislation that would have prohibited the manufacture, marketing, sale, or shipment of such products was introduced in Congress in 2005 and 2006, but was not enacted.

Current Testing Covers a Limited Number of Drugs and Amount of Time

Even if drivers submit legitimate, unadulterated urine samples, the current testing regimen has certain limitations.

- **Drivers may misuse substances other than the five being tested.** Drivers who use illegal substances, such as ecstasy, or misuse legal substances, such as prescription medication containing oxycodone[23] and other synthetic opiates, can go unidentified by the drug tests, although the use of these other substances can impair the ability of these drivers to operate in a safety-sensitive position. In addition, the use, and misuse, of prescription drugs may also be a problem.

- **Test detects drug use only within the past few days.** The urine test detects drugs used by the driver within the past several days (range of 1 to 5 days). This is a particular concern for preemployment testing, according

[22]GAO-05-653T.

[23]An example of a prescription medication containing oxycodone is OxyContin®, which is a prescription painkiller used for moderate to high pain relief associated with various injuries, and pain associated with cancer. OxyContin® contains oxycodone, the medication's active ingredient, in a timed-release tablet.

to carriers with whom we spoke, since a habitual user can refrain from drug use for several days before the test in order to test negative.

Utilizing other types of tests, such as hair tests, as well as testing for other types of drugs, have been proposed for dealing with these limitations. Hair tests can detect long-term and habitual drug use and representatives from several associations we interviewed told us that hair tests are, therefore, more suitable for preemployment purposes. In fact, some motor carriers supplement the DOT test with these alternative tests, and some carriers also test for additional drugs. One large carrier we interviewed uses hair tests to complement the DOT-regulated urine test and found higher rates of drug use in the hair test (approximately 8 percent compared with 2 to 3 percent for urine tests on the same individuals). However, union representatives with whom we spoke are not in favor of carriers utilizing alternative tests in addition to DOT-regulated tests, because doing so creates multiple standards throughout the industry that their members have to comply with. In addition, hair testing is not effective at detecting current or very recent drug use, and the test is also more expensive than urine testing. Our ongoing work will further analyze the pros and cons of these options.

Information about Past Test Failures Is Limited

DOT regulations require that an employer, in addition to testing an applicant and receiving a negative result, also inquire about a prospective driver's drug test history by contacting the driver's recent employers listed on the employment application. Representatives from several motor carriers with whom we met told us that drivers' applications are often incomplete. In addition, it is easy for drivers to simply omit any previous employer for which they tested positive or any past preemployment test that was positive. Such drivers can remain drug-free for a period of time leading up to their next preemployment test, get a negative result, and get hired—without their new employer knowing about any past positive drug tests and without having gone through the required return-to-duty process.

Various options have been suggested for dealing with this issue, and in particular, many in the industry have proposed developing a national reporting requirement for past positive drug tests. As with the other types of options that we have previously discussed, our ongoing work will analyze the pros and cons of these improvements. According to a DOT official with whom we met, FMCSA is considering implementing a central repository containing national drug and alcohol testing results to which carriers would have access, but its timeline is uncertain.

According to DOT, several states already require some form of information sharing on drivers' past positive drug tests, though implementation varies by state. For example, Oregon requires the medical review officer to report positive results to the state, while Texas requires carriers to report positive test results. Furthermore, there is variation on what states do with such information that is collected. For example, in North Carolina and Washington, positive drug test results will disqualify drivers until they complete the return-to-duty process, while in other states it is unclear whether the information is being utilized at all.

Our Future Work Will Focus on Options to Address Challenges

Our future work, which we expect to complete in May 2008, will provide more definitive information about many of the matters covered in my statement today. This information will include more detailed information about FMCSA's enforcement activities related to the drug testing regulations. Our report in May 2008 will also focus on the various options that have been proposed to address the challenges and problems we have discussed today.

Mr. Chairman, this concludes my prepared statement. I would be pleased to respond to any questions that you or other Members of the Subcommittee might have.

For further information on this statement, please contact Katherine Siggerud at (202) 512-2834 or siggerudk@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this statement. Individuals making key contributions to this testimony were Andrew Von Ah, Assistant Director; Andrea Chinchilla; Paul Desaulniers; Michelle Everett; Bert Japikse; Sara Ann Moessbauer; John Ryan; Sandra Sokol; Stan Stenersen; and Rebecca Kuhlmann Taylor.

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United States Government Accountability Office
Washington, DC 20548

November 30, 2007

The Honorable Peter A. DeFazio
Chairman
Subcommittee on Highways and Transit
Committee on Transportation and Infrastructure
United States House of Representatives

Dear Chairman DeFazio:

This letter responds to your November 14, 2007, request that we address questions submitted for the record related to the November 1, 2007, hearing entitled *Drug and Alcohol Testing of Commercial Motor Vehicle Drivers.* Our answers to your questions are attached. Our responses are based on our previous work, preliminary results of ongoing work, and our knowledge of the areas addressed by the questions.

If you have any questions or would like to discuss the responses, please contact me at (202) 512-2834 or siggerudk@gao.gov.

Sincerely yours,

[signed]

Katherine Siggerud
Director
Physical Infrastructure Issues

Enclosure

Responses to Questions for the Record
Hearing on Drug and Alcohol Testing of Commercial Motor Vehicle Drivers
Subcommittee on Highways and Transit
Committee on Transportation and Infrastructure
United States House of Representatives
Hearing held on November 1, 2007

Questions for Ms. Katherine Siggerud, Director
Physical Infrastructure Issues
U.S. Government Accountability Office

Questions from Chairman DeFazio

1. **Both you and your GAO counterpart, Mr. Kutz, have testified that the system is vulnerable to drug users who want to cheat and avoid detection. Can you quantify the number of drivers who are actually cheating?**

It is not possible to quantify the number of drivers who successfully cheat. Laboratory results indicate that less than one percent of drug test samples are found to be adulterated, substituted, or invalid. However, when adulterants work well and destroy the evidence of their presence, they are undetectable by laboratories. Similarly, when urine samples are successfully substituted with synthetic urine or another person's clean urine, the result is negative for drugs or adulterants. Therefore, no data exist on the extent to which successful adulteration or substitution occurs.

2. **FMCSA estimates that 2 percent of commercial drivers use drugs, Oregon found drugs in 10 percent of drivers, and drivers themselves report 7.4 percent use. What do you make of these numbers? Which, if any, is the most reliable?**

Each of these estimates uses a different approach, so they are not directly comparable. However, the available evidence indicates that the true percentage of drivers who use drugs is likely to be higher than the Federal Motor Carrier Safety Administration's (FMCSA) estimate of approximately 2 percent.

FMCSA's figure has certain limitations that suggest it may be underestimating the true percentage of drivers who use drugs. FMCSA's estimate comes from positive drug tests reported to FMCSA in an annual sampling of four to five thousand carriers—less than 1 percent of the estimated 711,000 carriers—of which, about one-third typically do not respond, according to a Department of Transportation (DOT) official. The carriers that respond to the survey, by definition, must have a drug-testing program and a corresponding positive testing rate to report. While the positive rate for the carriers that do not respond is unknown, some of these carriers may not have implemented a drug testing program. It is likely that the positive rate for drivers <u>not</u> in a drug testing program will be higher than the positive rate for drivers who are in a drug testing program because there is no deterrence or potential to be detected.

Furthermore, FMCSA's figure is underestimated because it does not include drivers who have successfully defeated a drug test. While the extent to which drivers successfully defeat drug tests is unknown, the opportunity clearly exists for them to do so. Government Accountability Office (GAO) investigators found that some locations where drug testing specimens are collected are not in compliance with DOT protocols, which can potentially make it easier to tamper with or substitute a urine specimen. More striking, however, was that GAO investigators found that even if protocols were followed, it is still possible, and relatively easy, to adulterate or substitute a specimen and successfully defeat a drug test.

The Oregon Trucker Check has a higher positive rate among interstate truckers than the FMCSA estimate in part because the Trucker Check used lower cut-off levels and tested for more drugs than do DOT tests, including testing for some prescription drugs. The Trucker Check also did not use procedures comparable to DOT's collection, laboratory analysis, and medical review procedures. In addition, because the specimen was taken at a roadside inspection and participation was voluntary, there was no opportunity or incentive for a driver to adulterate, substitute, or dilute the specimen. The Trucker Check results are also based on a small sample of drivers on select routes in Oregon, and are not generalizable to the entire population of commercial drivers.

The Substance Abuse and Mental Health Services Administration (SAMHSA) drug use figure—which comes from the Worker Substance Use and Workplace Policies and Programs study and surveys respondents about any illicit drug use in the previous month—also has a higher positive rate than the FMCSA estimate among commercial drivers. The positive rate is higher partly because the SAMHSA survey did not specify cut-off levels for drug use and did not include procedures comparable to DOT's collection, laboratory analysis, and medical review procedures since it used self-reported, unverifiable data. The SAMHSA study also surveyed respondents on use of drugs not included in DOT tests, such as ecstasy. Finally, the SAMHSA study is not generalizable to the entire population of commercial drivers subject to DOT drug testing since it surveyed only full-time workers and may have included truck drivers not subject to DOT drug testing regulations.

3. In your observation of the compliance review process, do you believe FMCSA's investigators are able to determine whether cheating occurs, or whether collection facilities used by the carrier are following the rules?

The drug and alcohol portion of FMCSA's compliance review is primarily a file review. It does not normally include a visit to the collection sites a carrier uses. Therefore, during a compliance review, investigators are not able to determine whether these collection sites are following DOT's collection site guidelines, with the exception of determining whether or not the collector correctly filled out the custody and control form associated with collecting a urine specimen. FMCSA's review of a carrier's paperwork includes a review of test results for the carrier's drivers. If a driver was caught cheating and was either re-tested using direct observation or the laboratory returned a confirmed adulterated or substituted test, the investigator would be able to review this information. In addition, an investigator could potentially notice an inconsistency in a carrier's paperwork that would indicate some forms of cheating. However, for the most part, an investigator is not able to determine whether successful cheating occurs.

4. You testify that more than 70 percent of compliance reviews conducted since 2001 have found at least one drug and alcohol testing violation. How diligent has FMCSA been in making sure those violations are fixed?

While we do not have data specifically on FMCSA's follow-up on drug testing violations, in a previous report, GAO found that FMCSA followed up with 99.7 percent of carriers that received a proposed rating of unsatisfactory, for any reason, following a compliance review in fiscal year 2005.[1] FMCSA's follow-up generally ensured that these carriers either made safety improvements that resulted in an upgraded final safety rating or—as required for carriers that also receive a final safety rating of unsatisfactory—were placed out of service. For 75 percent of the carriers that received an upgraded final safety rating, this upgrade was made after a follow-up compliance review. For 25 percent, this upgrade was made after the carrier submitted evidence of corrective action to FMCSA.

5. In your testimony you distinguish between owner-operators that work purely for themselves and those that are hired by other companies. Can you explain the difference in the two models and how drug-testing requirements affect them differently?

Owner-operators own their own vehicles and hold a valid commercial driver's license. An owner-operator may act as both an employer and a driver at certain times, or as a driver for another employer at other times. The regulations require owner-operators to enroll in a random controlled substances testing program. To comply, owner-operators must be a part of a random testing pool that includes other drivers. The random testing pool is managed by a consortium/third-party administrator. For owner-operators who are leased on by other carriers, the carriers must enroll them in the carriers' drug testing program just as if they were employees of the carrier.

6. What inherent conflicts are there for owner-operators in the way the Drug and Alcohol Testing rules are structured?

Under the current drug testing regulations, an owner-operator is required to get a preemployment drug test and to enroll in a consortium for random testing purposes. However, it is unclear how an individual who is both the employer and the driver would comply with drug testing regulations. For example, should the owner-operator who participates in a consortium test positive, there is no one who will remove the individual from safety-sensitive duties, and no one beyond the owner-operator will be notified of the positive result.

7. Can you give any examples of conflicts that could arise under the current structure?

In addition to the potential conflict for owner-operators who are both employer and driver described above, there are also potential problems for owner-operators who are leased on by other carriers. One of the carriers we interviewed had leased on owner-operators, who were enrolled in a random drug testing program through a consortium/third-party administrator.

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[1] GAO, *Motor Carrier Safety: Federal Safety Agency Identifies Many High-Risk Carriers but Does Not Assess Maximum Fines as Often as Required by Law*, GAO-07-584 (Washington, D.C.: Aug. 28, 2007).

However, the carrier did not fully understand its responsibility to obtain testing results and other information from the consortium in which those owner-operators were enrolled. Furthermore, for those carriers who use drivers on and off throughout the year, there was confusion regarding how to include them in random drug testing.

8. What, if any, safety risks exist because of this conflict?

For an owner-operator who is both the employer and the driver, if the owner-operator receives a positive drug test, it is possible that the owner-operator would continue to drive since there is no one who will remove the individual from safety-sensitive duties and no one beyond the owner-operator will be notified of the positive result. For an owner-operator who is leased on by another carrier or carriers, confusion over whose responsibility it is to receive positive test results and remove the driver from safety-sensitive duties could result in an owner-operator with a positive drug test continuing to drive. Furthermore, confusion over whose responsibility it is to enroll the owner-operator in a drug testing program could lead to owner-operators not being subject to random testing at all.

9. How would you recommend improving the structure to eliminate the conflicts?

We are reviewing various options for improvement in our ongoing work for the committee, including a national reporting requirement for all positive test results that has the potential to address this issue.

10. How has FMCSA's oversight differed between larger carriers and smaller/owner-operators?

FMCSA compliance reviews only reach approximately 2 percent of carriers each year. According to a DOT official, owner-operators and small carriers are less likely than larger companies to be selected for a compliance review. Several associations told us that small carriers may be less likely to comply with the drug testing regulations because they may have less understanding of their responsibilities, and because they have less incentive to comply, given the rarity in which they will be visited by FMCSA or state investigators. FMCSA began to perform safety audits in 2003 and targeted new entrants to the industry which are likely to be small carriers. However, they do not affect companies in business earlier than 2003.

Questions from Ranking Member Duncan

1. What are the challenges for small trucking companies or owner-operators to comply with drug testing regulations?

According to our interviews with small carriers, owner-operators, and their associations, these carriers often do not have a good understanding or awareness of their responsibilities under DOT's drug testing regulations. They also may lack the resources to devote to understanding and implementing the regulations. In addition, the regulations do not specifically address some of the unique situations that owner-operators may face, such as to whom drug test results should be reported if an owner-operator is leased on by multiple carriers.

2. Your testimony says that FMCSA performs compliance reviews of only 2 percent of carriers a year. Is this substantially less than the number of motor carriers that should receive a compliance review because of a poor safety record, fatal accident, complaint filed, or follow-up after violations?

FMCSA prioritizes carriers for compliance reviews by using SafeStat to identify carriers that pose high crash risks.[2] SafeStat is a model that uses information gathered from crashes, roadside inspections, traffic violations, compliance reviews, and enforcement cases to determine a motor carrier's safety performance relative to that of other motor carriers that have similar exposure in these areas. A carrier's score is calculated on the basis of its performance in four safety evaluation areas: (1) accidents, (2) drivers, (3) vehicles, and (4) safety management. FMCSA assigns carriers categories ranging from A to H according to their performance in each of the safety evaluation areas.

FMCSA's prioritization policy results in FMCSA conducting compliance reviews on carriers with a higher aggregate crash risk than carriers not selected, and has value as a method for targeting high-risk carriers. However, as we recently reported, changes to the policy could result in targeting carriers with an even higher aggregate crash risk. FMCSA could target a higher risk group of carriers for compliance reviews by changing its prioritization policy so that high priority is also assigned to carriers that score among the worst 5 percent of carriers in the accident area.

Further, as we also reported, only 23 percent of carriers registered with DOT have a SafeStat rating; the remaining 77 percent of carriers are unlikely to receive a compliance review unless they are involved in a roadside inspection or fatal crash, or are identified by complaint calls to FMCSA.

3. It is particularly challenging to oversee drug and alcohol testing for owner-operators, since they are not employed by a company. How could this class of motor carrier driver be more effectively regulated in terms of drug and alcohol testing?

[2] FMCSA targets compliance reviews toward those carriers that its Motor Carrier Safety Status Measurement System (SafeStat) identifies as having a high potential for being involved in crashes.

We are reviewing various options for improvement in our ongoing work for the committee, including a national reporting requirement for all positive test results that has the potential to address this issue.

4. How has FMCSA's oversight differed between larger carriers and smaller/owner-operators?

FMCSA compliance reviews only reach approximately 2 percent of carriers each year. According to a DOT official, owner-operators and small carriers are less likely than larger companies to be selected for a compliance review. Several associations told us that small carriers may be less likely to comply with the drug testing regulations because they may have less understanding of their responsibilities, and because they have less incentive to comply, given the rarity in which they will be visited by FMCSA or state investigators. FMCSA began to perform safety audits in 2003 and targeted new entrants to the industry which are likely to be small carriers. However, they do not affect companies in business earlier than 2003.

5. Motor Carriers report an industry-wide positive rate of just under 2 percent. Do you believe this is an accurate number? Why or why not?

FMCSA's figure has certain limitations that suggest it may be underestimating the true percentage of drivers who use drugs. FMCSA's estimate comes from positive drug tests reported to FMCSA in an annual sampling of four to five thousand carriers—less than 1 percent of the estimated 711,000 carriers—of which, about one-third typically do not respond, according to a DOT official. The carriers that respond to the survey, by definition, must have a drug-testing program and a corresponding positive testing rate to report. While the positive rate for the carriers that do not respond is unknown, some of these carriers may not have implemented a drug testing program. It is likely that the positive rate for drivers not in a drug testing program will be higher than the positive rate for drivers who are in a drug testing program because there is no deterrence or potential to be detected.

Furthermore, FMCSA's figure is underestimated because it does not include drivers who have successfully defeated a drug test. While the extent to which drivers successfully defeat drug tests is unknown, the opportunity clearly exists for them to do so. GAO investigators found that some locations where drug testing specimens are collected are not in compliance with DOT protocols, which can potentially make it easier to tamper with or substitute a urine specimen. More striking, however, was that GAO investigators found that even if protocols were followed, it is still possible, and relatively easy, to adulterate or substitute a specimen and successfully defeat a drug test.

It is not clear however, the degree to which FMCSA's figure is underestimating the true percentage of commercial drivers using drugs. Alternative estimates—such as the approximately 10 percent of positive drivers found in Oregon's Trucker Check, and the 7.4 percent found among heavy truck drivers in SAMHSA's Worker Substance Use and Workplace Policies and Programs study—have certain limitations and cannot be directly compared to FMCSA's figure. Nonetheless, these other figures also suggest that the true percentage is likely to be higher than FMCSA's estimate.

The Oregon Trucker Check has a higher positive rate among interstate truckers than the FMCSA estimate in part because the Trucker Check used lower cut-off levels and tested for more drugs than do DOT tests, including testing for some prescription drugs. The Trucker Check also did not use procedures comparable to DOT's collection, laboratory analysis, and medical review procedures. In addition, because the specimen was taken at a roadside inspection and participation was voluntary, there was no opportunity or incentive for a driver to adulterate, substitute, or dilute the specimen. The Trucker Check results are also based on a small sample of drivers on select routes in Oregon, and are not generalizable to the entire population of commercial drivers.

The SAMHSA drug use figure is from a survey of respondents about any illicit drug use in the previous month and also has a higher positive rate than the FMCSA estimate among commercial drivers. The positive rate is higher partly because the SAMHSA survey did not specify cut-off levels for drug use and did not include procedures comparable to DOT's collection, laboratory analysis, and medical review procedures since it used self-reported, unverifiable data. The SAMHSA study also surveyed respondents on use of drugs not included in DOT tests, such as ecstasy. Finally, the SAMHSA study is not generalizable to the entire population of commercial drivers subject to DOT drug testing since it surveyed only full-time workers and may have included truck drivers not subject to DOT drug testing regulations.

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Testimony statement: Substance Abuse Program Administrators' Association (SAPAA)

Testimony provided by: Dr. Donna Smith, on behalf of the Board of Directors and the membership of SAPAA before the Committee on Transportation and Infrastructure's Subcommitee on Highways and Transit, November 1, 2007.

SAPAA is a non-profit professional association representing over 250 private and public sector DOT-regulated employers and service agents who administer and manage workplace drug and alcohol testing programs mandated by the Omnibus Transportation Employee Testing Act (OTETA) and DOT agency regulations, as well as non-Federal/non-mandated drug free workplace programs. SAPAA's membership includes employers' substance abuse program administrators, as well as the Third Party Administrators (TPA), collection sites, laboratories, medical review officers (MRO) and substance abuse professionals (SAP) who support employers in their Drug-Free Workplace Program initiatives. SAPPA was founded in 1992 and has provided education, training and consultation expertise in the drug free workplace arena through the SAPAA Training Institute courses, the SAPAAC certification programs, biannual conferences, and SAPAA Advisories and publications.

SAPAA is pleased to provide information and recommendations to the Committee on Transportation and Infrastructure' Subcommittee on Highways and Transit on issues related to Drug and Alcohol Testing of Commercial Motor Vehicle Drivers. In preparation for this testimony, SAPAA conducted a survey of its membership on specific issues related to urine drug testing specimen collections, opportunities to defraud and circumvent the testing process, and compliance with existing DOT regulatory requirements.

First, I will discuss the urine specimen collection process. Best estimates are that there are 8,500-10,000 facilities that provide urine specimen collection services for employers who conduct drug testing mandated by DOT regulations. The majority of the estimated 6-7 million DOT mandated drug tests conducted annually are urine specimens collected at either laboratory owned patient service centers

Substance Abuse Program Administrators Association
1014 Whispering Oak Drive Bardstown, KY 40004
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or independently owned and operated medical clinics, physician's offices, or out-patient health care facilities. Some employers collect urine specimens for drug testing at facilities in their workplaces, some use mobile or on-call services to collect urine specimens, and some post-accident specimens are collected at hospital or trauma centers.

DOT regulations require that specimen collectors meet qualification training standards, including a documented demonstration of proficiency in specimen collection procedures and completion of a specimen custody and control document for each specimen. There is no requirement that specimen collection physical facilities or sites be certified or qualified. The collection procedures detailed in the DOT procedural regulation, 49 CFR Part 40.

The DOT specimen collection procedures have, since the beginning of the testing program, emphasized ensuring the proper identification of the specimen with the donor and the security of the specimen through rigorous chain of custody documentation, largely to insure that a positive test result is legally defensible as "evidence of use of a drug by the individual". While the specimen collection procedures are also designed to protect the integrity of the testing process (e.g. to discourage and detect attempt to defraud or cheat on the test), these processes are balanced with the individual's rights to privacy during urination and other due process protections. The bias in the collection process is toward ensuring that no individual is wrongfully alleged to be a drug user versus ensuring that a drug is detected at the expense of sacrificing an individual's rights.

During my five year tenure as a Senior Policy Analyst in the Office of the Secretary of Transportation during the years that the DOT drug and alcohol testing regulations were promulgated, I don't think anyone envisioned that scores of companies and individual entrepreneurs would launch an entire industry dedicated to developing, selling and delivering services and products designed to cheat on workplace drug tests. The number and sophistication of urine specimen adulteration, dilution and substitution products readily available in brick and mortar stores and from internet sources is staggering—and they are all marketed to people who have to "pass a drug test". The packaging of the products and the sophistication of the devices make it extremely difficult for specimen collectors to detect or deter their use in DOT drug tests. They are easily concealed in clothing and added to or substituted for the urine specimen while the individual is providing a specimen in the privacy of a closed toilet enclosure. Securing the collection site, having specimen donors remove outer clothing and empty their pockets in view of the collector, disabling sources of water, and checking the temperature and physical characteristics of the specimen when presented to the collector, can only prevent or detect the most rudimentary of attempts to defraud the drug test. Cheating on a urine drug test is not unique to the transportation or motor carrier industries—it continues to be a significant problem in drug testing programs in the criminal justice system and sports anti-doping programs. While the Department of Health and Human Services (DHHS) has encouraged certified drug testing laboratories to expand their capabilities to detect adulterated and substituted specimens, it is a continual game of cat and mouse. As the laboratories develop and validate methods to identify

adulterant and substitution products used to mask or invalidate urine drug tests, the "Beat the Drug Test" purveyors change the chemical formulas of their products and further expand their range of application.

SAPAA strongly urges Congress to support and pass the National Drug Testing Integrity Act (last introduced as HR 109 4910) which would make the offering, sale, purchase and use of products designed and marketed to defraud workplace drug tests a crime. To date, 15 states have enacted such measures in an attempt to deter workplace drug testing cheating. While Federal legislation may not be a panacea, it will go a long way to curb the proliferation and availability of specimen adulteration and substitution products.

The existing DOT specimen collection regulations are detailed and comprehensive. It is unlikely that additional regulatory requirements placed on specimen collectors, such as more rigorous training, certification examinations, or state licensure as a health care professional or paraprofessional would substantially improve the overall effectiveness of the DOT drug testing program. Availability of qualified collectors is already an issue for many DOT-regulated employers in the motor carrier industry and placing increased requirements on collector personnel would simply lead to clinics and other medical facilities deciding not to offer DOT specimen collection services. For the vast majority of facilities that offer specimen collection services, it is not their "core service offering", and if doing so becomes prohibitively expensive or difficult, they will opt to discontinue the service. Some have suggested that requiring all DOT specimen collections to be conducted as "directly observed" or "witnessed" collections is appropriate to curtail cheating. Data from DHHS, DOT and the SAPAA survey indicate that adulteration or substitution of urine specimens occurs in less than one percent of all drug tests—however, the prevalence of cheating may be significantly underreported because not all incidents of specimen adulteration or substitution are identified by collectors or the laboratories—however; the invasion of privacy, the embarrassment and loss of dignity associated with direct observation of urination for applicants and employees who over ninety percent are not cheating on their tests is draconian and ill advised. Many of the "Beat the drug test" products available are specifically designed to succeed even in a direct observation collection situation—and these options will only increase.

SAPAA strongly supports continued and increased efforts to ensure that specimen collectors are diligent in following the current DOT specimen collection procedures. For example, SAPAA has endorsed participation in a voluntary "Collector Registry" which tracks and documents collector compliance with DOT qualification standards. SAPAA's Training Institute offers specimen collection training—both web enabled distance and classroom learning. Auditing and inspection of collection facilities is an essential component of enforcement and compliance. This element has been significantly lacking in the DOT agencies' efforts at evaluating, assessing and enforcing compliance with the DOT drug and alcohol testing regulations. A "paper audit" of employers' records, custody and control forms, and collector qualification training documentation is not sufficient. Auditors and inspectors must physically go to collection sites used by employers they are auditing and interview and observe collection site personnel. In fact,

the most effective compliance and enforcement tool is for DOT auditors to perform "mock collections"—to actually see how collectors are complying with the DOT collection procedures. In the motor carrier industry in particular, FMCSA is woefully under staffed and funded to accomplish meaningful audits/inspections of motor carrier employers. The FMCSA safety inspectors have responsibility for enforcement of several of the FMCSRs, and time constraints in covering all safety programs usually produce only a cursory review of the Part 40 and 382 requirements. FMCSA has the largest number of individuals and employers subject to the drug and alcohol testing rules, and yet the audit/inspection resources they have are the smallest of all the DOT agencies. SAPAA strongly urges allocation of additional resources to FMCSA, specifically for compliance monitoring and enforcement of the drug and alcohol testing regulations.

While opportunities for commercial drivers to defraud the drug test by adulterating or substituting a urine specimen are of concern in measuring the effectiveness of the DOT drug and alcohol testing regulations, opportunities for drivers who have failed a drug test to circumvent the return to duty process by moving from employer to employer, still driving a commercial vehicle, without any evidence of undergoing treatment for substance abuse and remaining drug free, represent a threat to public safety and undermine the program's intent. There are multiple factors that contribute to this circumstance in the commercial trucking industry; a chronic labor shortage of experienced drivers, owner/ operators who are both employee and employer; turnover rates in the motor carrier industry; and mobility and ease to move from state to state for licensure. Conservative estimates are that less than one half of CDL holders who test positive or refuse to test successfully complete the return to duty process necessary to work in the transportation industry again. They do not go through the Substance Abuse Professional evaluation and assessment process; they do not complete the recommended treatment/rehabilitation for substance abuse problems; and they are not monitored through a follow-up testing program. One can assume that these drivers do not continue to work commercial transportation; that they seek work in other non-safety related occupations—however, there is little to support this assumption. Drivers retain their CDLs and their DOT Medical cards, even though they have violated Part 382.

While Part 382 does require a motor carrier or other employer to contact previous employers to determine if CDL individuals have tested positive or refused to test within the past two or three years, the provision is minimally effective at keeping drivers from going from one employer to the next without meeting the return to duty requirements. Previous employers often do not respond to requests for drug and alcohol testing information on former employees. Applicants for driver positions are not truthful about their previous employment. If a driver fails a pre-employment drug test for a CDL position, he need simply wait a couple of days, abstain from drug use, and apply at another trucking or transportation company. The positive test is not tracked, since the driver was not employed by the company. Thus, especially in the trucking industry drug users are able to navigate from employer to employer much like using a revolving door. The commercial aviation and commercial maritime industries are largely protected from this "revolving door—no treatment or follow-up monitoring" process because the FAA and the

USCG are able to suspend and revoke licenses, documents and certificates of aviation and maritime employees who test positive or refuse to test. Positive tests and refusals to test are reported to the FAA and USCG by medical review officers and by employers. Individuals whose license or certificate has been suspended or revoked must provide documentation of successful completion of the return to duty process, including substance abuse treatment/rehabilitation before they can apply for reinstatement. Since CDLs are issued by the states and not a Federal agency, there is no effective mechanism for tracking those who are unqualified to drive a commercial motor vehicle as a result of a Part 382 violation. Several states have enacted legislation to require reporting of Part 382 violations to the state CDL issuing authority; in some states the medical review officer is required to report positive tests, in others it is the employer who must report the violation. While these individual state efforts are applauded, there is marked variance in their effectiveness. Medical review officers often do not know in which state a driver is licensed; the driver may be the only source of this information, and may not be truthful, especially if he/she holds a CDL in one of the six states that require reporting of Part 382 violations. In the states where the employer is required to report violations, the independent owner operator presents a unique challenge of "self policing". In order to protect public safety and achieve the objectives of the DOT drug and alcohol testing program, it is essential that drivers who are found to engage in prohibited drug and alcohol use are not permitted to continue driving without appropriate intervention and monitoring. All data available demonstrates that substance abuse escalates without intervention, that relapse is part of addiction and chemical dependency, and that denial and manipulation are frequent responses from those who use illicit drugs and abuse alcohol. Allowing drivers who are current users of illicit drugs or abusers of alcohol to continue to driver commercial motor vehicles without any safeguards to ensure they have received rehabilitation and remain drug-free is a threat to public safety. SAPAA strongly recommends that the FMCSA develop and administer a national database that identifies on the CDL holder's motor vehicle driving record each incidence of a Part 382 violation and the subsequent status of compliance with DOT return to duty requirements. Employers must conduct MVR checks on their drivers at the time of hiring and annually thereafter; motor carriers who use independent owner/operators and leased drivers must also conduct MVR checks.

Enforcement of safety regulations is not an easy task. The effectiveness of any safety regulation, however, is wholly dependent on the willingness of the regulated entities to comply—which in turn is based on the risks associated with non-compliance. The FMCSA has in many ways done a credible job with the meager resources available to the agency, in trying to enforce the DOT drug and alcohol testing regulations, to educate motor carriers about compliance, and to conduct audits/ inspections of the larger carriers. The glaring inadequacies are in the smaller motor carrier operators, the public entity employers (school districts, local governments), and the owner/operators. The DOT drug and alcohol testing program is a complex one; it is not something that falls within the normal scope of a motor carriers expertise or experience. Employers have to rely on numerous "service agents" or vendors for many components of their testing program (laboratory analysis, evidential breath testing, physician review and interpretation of drug test results, urine specimen collection). They are held responsible for their

service agents' actions and compliance with the DOT procedures. However, employers often are very poorly equipped to assess and monitor the vendors' performance. The DOT did put in place in 2001 a provision in 49 CFR Part 40 to assist in identifying service agents who do not adhere to the DOT procedures in performing drug and alcohol testing services for transportation employers. This Public Interest Exclusion (PIE) process, while well constructed and comprehensive, has not yet identified a single collector, laboratory, MRO or other service agent whose performance has warranted their being excluded from providing services to DOT-regulated employers. A tool is there; it needs to be used. The DOT agencies need to share information they gather as part of their compliance and enforcement efforts—particularly as it pertains to service agent performance. A specimen collection facility that is performing poorly on drug tests for a public transit authority is also probably conducting specimen collections on CDL drivers, and maybe commercial aviation position applicants.

The Omnibus Transportation Employee Testing Act of 1991 was a significant piece of legislation to facilitate safer transportation for the US. Based on over 10 years of data from the DHHS National Survey on Drug Abuse, the DOT drug and alcohol testing programs have had a significant impact on reported prevalence of illicit drug use by workers in transportation industries. The decline in reported current use of illicit drugs by workers in transportation occupations has been statistically greater than any decline in the survey general population. The percentage of positive drug tests in DOT-mandated testing has steadily declined since 1991. This is a deterrent program that has measurable success in reducing illicit drug use among transportation workers. With added resources to more effectively monitor compliance and take enforcement actions against those who do not comply, the DOT drug and alcohol testing program for commercial motor vehicle drivers can continue to make progress toward a transportation system that is drug and alcohol free and contributes to improved safety on our highways.

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November 30, 2007

Ms. Leila Kahn
Committee on Transportation and Infrastructure
U.S. House of Representatives
586 Ford House Office Building
Washington DC 20515

Dear Ms. Kahn:

Attached are responses to the questions provided by Congressman DeFazio, Chairman, Subcommittee on Highways and Transit, as follow-up to the testimony presented by Dr. Donna Smith on behalf of SAPAA on November 1, 2007. SAPAA greatly appreciates the opportunity to provide information and assistance to the Committee regarding Drug and Alcohol Testing of Commercial Motor Vehicle Drivers.

I trust the information provided herein is responsive to your inquiries, and please do not hesitate to contact us again for additional clarification or information. SAPAA would like to extend an invitation to you or any of the Committee members to speak at the SAPAA regional conference scheduled for March 17-20, 2008 in Colorado Springs, CO to provide an update on the Committee's initiatives in the area of drug and alcohol testing in the commercial transportation industry. SAPAA is committed to providing the best possible leadership and support in improving the effectiveness of this vital public safety initiative.

Sincerely,

Jeff Morrison

Jeff Morrison
Executive Director

Questions from Chairman Peter A. DeFazio
SUBCOMMITTEE ON HIGHWAYS AND TRANSIT
Oversight and Investigations Hearing on "Drug and Alcohol Testing of Commercial Motor Vehicle Drivers" November 1, 2007

1. GAO testified that their investigators were able to use fake IDs as identification at every facility they tested. Have your members had this happen or heard of anyone trying this?

A: Since the DOT specimen collection procedures allow the donor to present a photo ID issued by a government entity (e.g. passport, drivers' license) or by the employer, there is virtually no way a collector can reasonably determine if the photo ID is authentic. The best they can do is ensure that the photo is of the person presenting for the test, bears the same name as the individual being tested, and has the government agency or employer identified. Some collection sites make a copy of the photo ID when it is presented and attach it to the CCF copy retained by the collector. However, a photo copy of the ID probably does not aid in spotting fake IDs— especially if they reasonably resemble a driver's license or employer ID. The use of fake IDs (and thus having a surrogate donor provide the specimen in the employee's stead) has not been a particular problem identified in the DOT drug/alcohol testing process.

2. Can a TPA share information about employee drug tests with the employers that use that TPA? For example if the TPA knows that Employee A tested positive for Company A and Company B is trying to hire Employee A, can the TPA tell Company B that Employee A tested positive on another drug test.

A: No, under DOT rules, the TPA cannot release drug test results conducted by an employer to another employer without a written release/consent from the donor. § 40.351(c) "You may not provide individual test results or other confidential information to another employer without a specific, written consent from the employee. For example, suppose you are a C/TPA that has employers X and Y as clients. Employee Jones works for X, and you maintain Jones' drug and alcohol test for X. Jones wants to change jobs and work for Y. You may not inform Y of the result of a test conducted for X without having a specific, written consent from Jones. Likewise, you may not provide this information to employer Z, who is not a C/TPA member, without this consent."
However, Company B in your illustration must contact Company A and any other previous employers the applicant lists on his/her application and request information about DOT Drug and Alcohol Testing violations. This requirement is included in the DOT regulations (§40.25, §382.413, and §391.23)

3. GAO testified that it found compliance problems at 75% of the collection facilities it investigated. Is this consistent with the conditions in the industry? Why are there so many problems? What do you think the solution or solutions are?

A: "Compliance problems" is a difficult term to define. It is a reasonably accurate estimate that the majority of collection sites when an on-site audit or "mock collection" is performed are found to have at least one "non-compliance" finding. The urine specimen collection process, as outlined in the DOT regulation, is very detailed, complex and, often, tedious. In the various paragraphs that outline what the collector must do before, during and after each specimen collection there are 42 separate "steps" or tasks the collector must complete—more, if there is an unusual occurrence (e.g. inability to produce enough urine, specimen temperature out of range, etc.). Some of these tasks are more critical to the integrity, security, and identification of the specimen and the collection process than others. The GAO investigation of collection sites, including "undercover" mock collections, concentrated on evaluating compliance with the procedures designed to deter cheating on the test. MRO and TPA review of custody and control forms and drug test results are foeused on the collection procedures that are designed to ensure that the chain of custody of the specimen is maintained, the test result is forensically attributable to the donor, and the custody and control form is properly completed. Thus, compliance by collectors is measured differently in the two scenarios.

The DOT specimen collection procedures address protecting the security and integrity of urine collections. However, the sophistication and packaging of urine adulteration products and devices for substituting a specimen for one's own urine make it extremely difficult to detect tampering with a specimen. Even if a collector follows all 42 steps to the letter, donors can successfully add commercial adulterant products, packaged in very small vials easily "smuggled" into the toilet enclosure in underclothing, wallets, shoes, etc., to their urine without the adulterant being detected by the collector. These products are odorless, do not change the color specimen, and do not affect the specimen temperature—thus evading detection by the specimen integrity checks performed by the collector. Likewise, various devices available for submitting "clean urine" in place of one's own voided specimen (e.g. Urinator, Whizzanator, etc.), are designed to avoid detection by the collector's integrity check processes.
Solutions to the problem must be multi-faceted. (1) More on-site audits, including mock collections, of collectors; (2) Legislation designed to prohibit the sale, distribution, use of products intended to defraud a drug test; and (3)More stringent enforcement measures for collection sites and collectors that do not follow the DOT procedures for specimen collection.

4. How rampant is cheating on drug tests? What do you think the real positive rte is for commercial drivers? In other words what percentage of commercial drivers are using illegal drugs whether they test positive of not.

A: Cheaters who are caught (i.e. donors caught attempting to tamper with a specimen at the collection site, specimens reported as adulterated or substituted by the laboratory) are estimated at <1% of DOT drug tests. If 6-7 million DOT drug tests are conducted annually, that means 60,000 applicants/employees were detected as cheating on their tests. IF 80% of DOT-mandated tests are conducted on CDL holders, that means there are potentially 48,000-50,000 commercial drivers who are caught cheating. Conservative estimates by laboratory personnel and others in the drug testing industry are that at least an additional ½ % of drug tests may be adulterated or substituted, but go undetected at the collection site and/or the testing laboratory.
Accurate estimates of the prevalence of current illegal drug use by commercial drivers are difficult. The U.S. Navy, using a mathematical model, once produced prevalence estimates passed on testing population demographics, random testing rates, and random positive percentages that placed prevalence at approximately 3 times the random positive % when random testing was conducted at a 50% annual rate. Thus, if the random positive % was 2%, the annual random testing rate was 50%, the projected prevalence of use was at least 6%. Another approach to estimates of the prevalence of current illegal drug use by commercial drivers is using the self report data gathered in the SAMHSA annual National Surveys on Drug Use and Health. In a report based on Survey data from 2002-2004, the Past Month Illicit Drug Use among Full-Time Workers Aged 18 to 64 in the Transportation and Material Moving category was 8.4%. This category includes other workers in the transportation sector, not only commercial drivers, but it provides an estimate of illegal drug use prevalence. As presented at the hearing, data from "roadside random tests" similar to that collected in Oregon, also can give some indication of prevalence of illicit drug use among commercial drivers. There are, however, limitations to roadside random drug testing data based on the voluntary participation and the lack of test result verification to identify authorized medical use of controlled substances detected. Based on data available (test results, self-report survey, roadside random tests, etc.) it is probably reasonable to estimate a prevalence rate of 6-8% for current illegal drug use among commercial drivers. It should be noted that current illegal drug use does not equate to operating a commercial vehicle under the influence of, or impaired by, illegal drugs.

5. To what extent do drivers with a positive test go through the return to duty process with the carrier where they received the positive test and begin driving again? For those that don't where do they go?

A: Estimates from our motor carrier members and Substance Abuse Professional (SAP) services providers, indicate that less than 50% of drivers who test positive while employed by a carrier are offered the opportunity to complete the DOT Return to Duty process and return to driving with that carrier. Most

carriers terminate the employment of a driver who tests positive or refuses to test. Some carriers (less than 10%) may terminate the driver's employment, but offer to re-hire upon the driver's providing satisfactory documentation that he has completed the DOT SAP and Return to Duty process. In general drivers who are employed under the Teamsters' Master Freight Agreement are afforded an opportunity to complete the SAP and Return to Duty process, and if successful in compliance with the treatment plan, are eligible to return to driving with the carrier.
There is no tracking mechanism to determine whether terminated drivers remain in the commercial driving industry, with or without completing substance abuse treatment/intervention. Because there is a "driver shortage" in the motor carrier industry and a positive test driver retains his/her CDL, it is possible for these drivers to get hired by another carrier or employer in a driver position. They frequently do not divulge working for the previous employer where they tested positive, or the new employer does not complete the required Safety Performance History, including a check for previous Drug and Alcohol testing violations (49 CFR 391.23(e)). It is also reasonable to assume that many of these CDL holders seek employment in positions that are not subject to Parts 382 and 391, and thus their DOT alcohol and drug testing violations are not checked when they apply for work driving, for example, a CMV weighing less than 26,000 lbs.

6. If a driver is fired after a positive test, how likely is that driver to go through the return to duty process at his own expense so he can begin driving again?

A: It is difficult to track drivers who are terminated in terms of their initiating and completing the DOT return to duty process. The motor carriers are required to provide drivers whom they terminate with the contact information for SAPs. Many carriers meet this requirement by providing drivers with the contact information for SAP referral services— nationwide networks of SAP service providers. If the driver contacts one of these SAP referral services, the driver is provided with the names and contact information of qualified SAPs in the driver's geographic locale, and the fess for the SAP evaluation/assessment process. SAP referral service providers estimate that less than ½ of drivers who contact them for SAP information and fees, actually follow through with initiating and participating in the SAP/RTD process. The fees for SAP assessment and evaluation (not including the costs of recommended in-patient, out-patient or education services) are $450-600. These costs are not covered by medical insurance plans. Substance Abuse education or treatment costs are rarely covered by insurance, and in the case of terminated drivers, they usually do not have insurance coverage. The number of drivers who test positive and are terminated and who do not even contact a SAP referral service or SAP service provider is difficult to estimate. There is no mechanism for SAP service providers to report the number of SAP/Return to Duty cases they open or initiate. Based on the number of DOT return to duty tests conducted by motor carriers annually, estimates of drivers who resume driving in CDL positions after a DOT drug testing violation are less than 10%, but that number may be artificially low, because drivers may begin working for another carrier after a negative pre-employment test, and while they have completed the SAP/RTD process do not have a RTD test—and may not have follow-up testing with the new carrier.

7. A number of sectors have advocated for alternatives to urine testing.
   - How does hair testing compare in accuracy to urine testing?
   - What can you find with a hair test that you can't find with a urine test and vice versa?
   - Are there any valid arguments against hair testing?

A: Laboratories that conduct hair testing for drugs of abuse claim accuracy in detecting drugs comparable to urine drug testing. Laboratory confirmation hair testing procedures use methodology essentially similar to urine testing (e.g. GC/MS, MS/MS, LC/MS). Forensic procedures that maintain chain of custody on the specimen through the analytical process are standard in hair testing laboratories. There is greater variation in the procedures used to prepare the sample for analysis among hair testing laboratories than in urine drug testing. The measurements used to detect drugs in hair are smaller (picograms vs. nanograms per mL) making it more difficult to detect some drug metabolites hair. Some scientists in the

field have raised problems associated with excluding "environmental or passive exposure" to marijuana and cocaine—based on the effectiveness of various wash procedures in removing drugs from the hair surface. Accuracy and precision of urine drug testing is carefully monitored and tracked through the SAMHSA National Laboratory Certification Program's proficiency testing program, semi-annual inspections, and the blind specimen program required of DOT employers and the Federal Executive agencies. There is no comparable quality control program for assessing test result accuracy and precision in place for hair testing. SAMHSA has, as part of its consideration of hair testing for the Federal Agencies' drug testing program conducted several rounds of proficiency testing with several hair testing laboratories to assess tests result accuracy and precision. The outcomes of these studies have yielded mixed results in terms of accuracy and precision in hair analysis.

All drugs and metabolites on the DOT/HHS five-drug panel can be detected in both urine and hair testing. The most significant difference in the two specimens is in the "window of detection". In general, the 5 drug panel provides a "window of detection" in urine of 1-4 days after use of the drug—for marijuana, chronic, frequent use is detectable in a urine specimen for several days up to weeks after last use. In hair, drugs/metabolites take approximately 5-7 days to be deposited in the scalp hair shaft, but are detectable for 90 days or more after last use, if the hair specimen is at least 1-1 ½ inches in length when cut from the scalp at the root-line. So, in hair testing you are more likely to detect recurrent drug use over the past 30-60 days; in urine testing you are more likely to detect drug use, even single dose ingestion, within the previous 1-4 days.

Arguments against the use of hair testing in workplace programs include the following: (1) objections to cutting head hair samples because of cosmetic or religious reasons; (2) lack of adequate specimens in balding individuals, people who shave their heads or have very short hair, individuals with hair loss medical conditions; (3) longer window of detection may mean detection of past drug use more than 30 days ago for the currently abstinent individual. From a specimen collection viewpoint, some believe that collecting and processing a hair specimen correctly requires greater skill and care than collecting and processing a urine specimen. If sufficient quantities of head hair are not available, the collector may have to shave or cut hair from other areas of the body. Others view hair specimens as an alternative to urine specimens as a measure to detect drug users who are able to successfully adulterate or substitute their urine specimens. While there are hair shampoos, dyes, and other products alleged to ensure "passing a hair test", these products, thus far, have not been shown to be as effective as products designed to defraud urine drug tests.

Hair and other specimens (e.g. oral fluid) are certainly viable from a scientific and legal perspective for workplace drug testing programs. However, much remains to be done to ensure that donors have opportunity to challenge results via split specimen or specimen reanalysis at a second laboratory; specimen validity testing methodologies are comparable; and appropriate FDA clearances are obtained for laboratory reagents and assays.

8. Are there legal drugs that can impair drivers to the same extent as illegal drugs?

A: The simple answer is yes. Many controlled substance (Schedule II-V) medications, including painkillers, tranquillizers, sedatives, and stimulants are potentially impairing for individuals driving commercial vehicles or operating machinery. The "extent" of impairment compared to illegal drugs depends on many factors, including the medication dose, the timing of the dose, the individual's tolerance to the medication's effects, and interactions with other factors such as fatigue, other medications, etc. The DOT drug testing program was never intended as a "fitness for duty" program, based on impairment or intoxication. It is a testing program focused on deterring illegal drug use with the objective of improving public safety by preventing crashes/accidents in which the driver's use of illegal drugs may be a contributing factor. Illegal drug use impacts driver safety in far more reaching ways than simply "impairment". Risk taking behavior, cognitive degradation, and inattention are all correlated with illegal drug use, even when the individual is not "impaired" from a toxicological perspective.

9. Should legal drugs taken with or without a prescription (i.e. oxycontin) be treated any differently?

A: Legal drugs taken with appropriate medical authorization should not be treated as a violation of DOT drug testing rules (positive test) when the drug is detected in the individual's urine specimen. Current DOT regulations require the MRO to assess the potential safety risks associated with taking controlled substance medications (e.g. codeine, morphine, Adderall, etc.). If the driver presents a current prescription for a controlled substance detected in the urine test, the MRO reports the test as negative, BUT reports to the employer or other authorized party, that there is a potential safety problem and the employee should undergo a fitness for duty evaluation or further evaluation and certification from his/her prescribing physician that the use of the medication does not adversely affect the employee's ability to safely perform driving duties. Legal drugs taken without medical authorization (obtained from friends or family members, purchased on the street or over the internet) should be reported as a positive test—a violation of DOT rules for the use of a controlled substance without medical authorization. It must be noted however, that the DOT drug testing program is designed as a deterrent program for illegal or illicit drugs—not as a program to detect or deter legal drug abuse/misuse. With testing limited to the 5 drug panel in DHHS and DOT regulations, most commonly abused/misused legal drugs (e.g. Oxycontin, Vicodin, Xanax, etc.) are not detected on the DOT drug test.

10. Many industries are moving away from using the Social Security Number as the primary individual identifier. Is this of concern to drug testing professionals? Can you explain why?

A: Use of an employer issued employee ID number is already used by many DOT regulated employers for employee drug testing. The most difficult aspect of this situation for drug testing is for applicant or pre-employment testing where the individual does not yet have an employee ID number issued by the employer. Many drug testing professionals are encouraging the use of the number on the photo ID the individual presents at the time of the drug test as the personal identifier for the drug test result. However, since a specimen donor can present his/her passport, drivers' license, employer ID, or other government issued photo ID (e.g. military ID), the donor personal ID number could be different for each test . Since, the vast majority of individuals in the transportation industry have a state issued drivers' license, this might be the best alternative to the SSN for use as the primary individual identifier for drug testing. For those individuals who do not have a state issued drivers' license, the number on the photo ID could be used. The current OMB approved version of the federal urine drug testing custody and control form (CCF) has a nine-block section for the collector to record the donor's SSN. However, the donor can give an alternate personal identifier for the collector to record in that space. Revised versions of the Federal CCF could enlarge the area for the personal identifier to more easily accommodate state drivers' license numbers which are typically 12-18 characters. Some sort of alphanumeric personal identifier is necessary to maintain the proper identification of the specimen with the individual; use of the individual's name or date of birth is simply too prone to misidentification.

Testimony
Before the
Subcommittee on Highways and Transit
Committee on Transportation and Infrastructure
United States House of Representatives

Products Used to Thwart Detection in Drug Testing Programs

Statement of
Robert L. Stephenson II, M.P.H.
Director, Division of Workplace Programs
Center for Substance Abuse Prevention
Substance Abuse and Mental Health Services Administration
U.S. Department of Health and Human Services

For Release on Delivery
Expected at 10:00 a.m.
Thursday November 1, 2007

Mr. Chairman, and Members of the Subcommittee, I am Robert L. Stephenson, Director of the Division of Workplace Programs at the Center for Substance Abuse Prevention in the Substance Abuse and Mental Health Services Administration (SAMHSA) of the U.S. Department of Health and Human Services (HHS). On behalf of Terry Cline, SAMHSA Administrator, we thank you for holding this important hearing. We welcome this opportunity to provide testimony about our experience with and knowledge about products that claim to prevent detection of certain substances by drug testing programs. This testimony updates testimony previously presented on May 17, 2005, before the House Energy and Commerce Subcommittee on Oversight and Investigations for the same intended purpose: to address products developed and marketed to thwart detection in drug testing programs.

The Drug Testing Responsibilities of the Division of Workplace Programs

The Federal Agency Drug-Free Workplace Program was established by Executive Order 12564 in 1986, and mandated by Public Law 100-71 in 1987. Together they assigned major responsibilities for the establishment and operation of the Federal Drug-Free Workplace Program to HHS. Most of the responsibilities for day-to-day operation and oversight were delegated to what is now SAMHSA's Division of Workplace Programs.

SAMHSA is responsible for certifying laboratories that perform accurate reliable forensic drug testing in accordance with the Mandatory Guidelines for Federal Workplace Drug Testing Programs. These Mandatory Guidelines were first published as a Final Notice in the Federal Register on April 11, 1988, and the first 10 laboratories were certified to perform drug testing in

December 1988. These Guidelines provide critical support for the overarching Federal Drug-Free Workplace Program that currently covers an estimated 1.8 million non-military Executive Branch Federal employees in 120 Federal agencies. The Guidelines include requirements for the chemical analysis of urine specimens from selected Executive Branch job applicants and employees to determine whether that specimen contained the parent drug or specific metabolic byproducts from marijuana, cocaine, opiates (with the focus on heroin), amphetamines, and phencyclidine.

Even in 1988, based on information from other drug testing programs already in existence, it was known that some non-Federal employee specimen donors used household products and chemicals to try to beat the drug test and mask the presence of illicit drugs in their urine. A few examples of commonly used household products used at that time were drain cleaners (sodium hydroxide), vinegar from the kitchen (dilute acetic acid), and soothing eye drops (a dilute salt solution). Since the late 1980's, many more sophisticated products have been developed and marketed by those in business to sell products to illicit drug users to beat their drug test. The increased use of the Internet in the mid-1990's brought an explosion of new products to the marketplace, openly sold for the sole purpose of defeating a drug test.

The Scope of the Federal Agency Workplace Drug Testing Program

Within the Executive Branch, currently about 502,000 of the 1.8 million non-uniformed services employees are in Testing Designated Positions, based on their Agency or Department mission and approved drug testing plan. Increased national security concerns have increased Federal

agency workplace drug testing from 100,000 to over 212,000 tests per year in 2006. The vast majority, well over 99 percent, of those tested are negative on their drug tests. Since my last appearance before Congress to testify on this issue, the number of adulterated and invalid urine specimens tested in our HHS-certified laboratories for Executive Branch Federal employees and job applicants has significantly increased. Specimens from Federal agency employees reported as adulterated increased from 13 in Fiscal Year (FY) 2003 to 78 in FY 2006. Likewise, invalid specimens not suitable for testing (i.e., containing an unidentified adulterant, containing an unidentified interfering substance, having an abnormal physical characteristic, or having an endogenous substance at an abnormal concentration that prevents the laboratory from completing testing or obtaining a valid drug test result) increased from 14 in FY 2003 to 410 in FY 2006. Although these numbers have remained a very small percentage of the total tested, every one of those adulterated, substituted, and invalid tests represents a potential threat to national security and/or public safety. Further, the discovery of any use of adulterants has required us to further test the remaining specimens at an added cost in time and resources. Perhaps most important is the fact that there were individuals subject to Federal workplace drug testing who were not being deterred from beginning or continuing to use illicit substances. These individuals and numerous young adults soon to enter our national workforce may turn to adulterants, masking agents, and substitution products in the mistaken belief that they can beat any drug test that they may be required to take.

Under separate authorities, other Federal Government programs require workplace drug testing using the HHS-certified laboratories for their covered populations, including industries regulated by the Department of Transportation (DOT) and the Nuclear Regulatory Commission. There are

over 11 million employees and job applicants covered by these federally-mandated workplace drug tests.

Many of the same drug testing products and testing procedures are also used for criminal justice testing, school-based student testing, testing in the Uniformed Services, the U.S. Postal Service, and non-Federal public and private sector employers, with some portion voluntarily tested under our Mandatory Guidelines. It is estimated that 20 to 40 million drug tests are performed each year, with the accuracy of many of these test results particularly vulnerable to undetected adulterant use by those being tested.

Adulterants – The Marketplace

SAMHSA's experience with and knowledge about products marketed to "beat the drug test" came through its national leadership role of setting standards for urine drug testing and certifying laboratories to perform accurate and reliable drug testing. Drug testing has become a necessity for job applicants and workers in jobs that directly impact public safety and positions requiring security clearances. This widespread use of drug testing has resulted in sophisticated marketing of products to beat a drug test, so that illicit drug users can continue their drug use AND be hired for, and stay employed in, jobs where drug testing is a requirement. The 2006 SAMHSA National Survey on Drug Use and Health reports that 74.9% of current illicit drug users aged 18 years old or older are employed.

By 2005, these products were primarily focused on beating the drug test for marijuana, since marijuana was and remains America's most widely used illicit drug. Most of the U.S. workforce specimens that test positive do so for marijuana. One very large laboratory drug testing system reports that in 2006, of all the specimens that test positive in the general U.S. workforce, 49.5% tested positive for marijuana. Cocaine positive drug tests make up 15%, and opiates (focused on heroin) follow with 6.6% of the total (Quest Diagnostics Drug Testing Index, 2006).

Monitoring of Adulterant Products

Between January 2002 and May 2005, SAMHSA had identified more than 400 products marketed to beat a urine, saliva, hair or blood drug test. These products were openly advertised in print media, available in "head shops," through dietary supplement retailers, and through the Internet.

Internet marketing of these products continues to proliferate. In September 2002, an online Internet search of "beat a drug test" revealed 158,000 hits in 0.4 seconds. In October 2007, that same search revealed 2,250,000 hits in 0.04 seconds; an Internet search of "pass a drug test" revealed 2,700,000 hits in 0.13 seconds. There are also newer forms of sharing information over the Internet such as blogs and video sharing sites such as YouTube. Each of these has a long list of informational presentations and discussions on "how to beat a drug test." Searching blogs on the Internet, we found over 26,000 blogs that contained related information. YouTube had 79 videos on the subject; they not only talk about what the products do but give explicit video instructions on how to use them. Employees and job seekers can join listservs and ask others for

information on the issue and receive global responses to products and techniques. There has been a surge of new and more technically skilled users with our growing youth population entering the workforce and having a higher degree of technological abilities.

Internet Product Advertising and Availability

Initially, Internet advertising and access to information on these products primarily focused on job applicants and workers who used marijuana. In fact, some Internet sites had an interactive questionnaire, which asked questions such as: 1) what type of drug test? Urine, Blood/Sweat/Saliva, Hair, or Don't Know; 2) Will you know the exact date and approximate time of the test; and then would guide the inquirer through more questions to gather enough information to be able to recommend products to use to beat the particular type of drug test (e.g., how much of which product to add to the urine specimen, or how to wash the hair with specialized shampoos) and be successful in beating the drug test.

Concerning marijuana use, the questionnaires asked just how much marijuana he or she uses and how frequent that use was to better advise on which product and what quantity to use. Heavy drug users were advised to use more of the product to beat the test. Additionally, some advertisements on Internet home pages stated that the products worked for all toxins and every testing method. They were so confident in the effectiveness of their products that they offered a 200 percent money back guarantee!

The primary change over time in the Internet advertising for these and similar products has shifted the written text to address nicotine detection, and some still offer a 200 percent money back guarantee, but only for nicotine. This is only a facade by the manufacturers and marketers of these products, which are still sold with an understanding that they are also helpful for other tests.

The Types of Adulterants

Since urine drug testing has been used in the civilian Federal and federally regulated workplace since the late1980's, several product types have developed over the years focused specifically on beating the urine drug test. We stated in our May 2005 testimony that there were four major product types: 1) dilution products; 2) cleansing products; 3) adulteration additives; and 4) substitute urines with actual reservoirs, catheters, and life-like prosthetic delivery devices. We believe that these are still the same categories of products available today; however, we have not updated the master product list and purchasing sources since that testimony.

1. Dilution Products

Efforts to dilute urine include those that add water to a small volume of the donor's urine and natural diuretics, such as caffeine, that expedite the elimination of urine from the body. Simply trying to dilute the concentration of drug below the testing cut-off can be done by drinking very large quantities of water, on the order of 120 ounces of fluid. Water loading may be a very effective (but sometimes dangerous) method for beating a drug test, especially if the donor

knows when the drug test specimen will be collected, as in the case of pre-employment drug testing.

2. Cleansing Products

Cleansing products, such as internal colonics, goldenseal, psyllium husks, and specially formulated cleansing drinks, are marketed to "cleanse the body of toxins," more specifically in this case, illicit drugs. For example, one product is advertised as a dietary supplement, guaranteed to "work" in less than an hour. The ingredients label lists very common items in many other drinkable fluids, such as filtered water, fructose, maltodextrin, natural and artificial flavors, citric acid, potassium citrate, potassium benzoate, potassium sorbate, ascorbic acid, red 40, and riboflavin. These cleansing products likely work along the same lines as products advertised to dilute the urine.

3. Chemical Adulterants

Some products that have been developed and openly offered for sale are actually highly caustic and corrosive chemicals, such as acids and aldehydes, chemical oxidants such as nitrites, chromium VI (a carcinogen), and bleaches. The key step is that these harsh chemicals must be added to the donor's specimen, which is easily accomplished when the donor is given the privacy of a restroom stall to provide the specimen. These chemicals were purposely sold in easily concealable small vials and tubes, so they could be brought into the collection site bathroom concealed on the body, or in the donor's clothing, socks, or underwear.

4. Prosthetic Devices Delivering Synthetic or Drug-free Human Urine

The most cumbersome, yet highly effective, way to beat a urine drug test is to use a physical belt-like device hidden under the clothing which contains a reservoir to unobtrusively hold real human urine from another person that is free from drugs, and deliver that bogus urine specimen into the collection container through a straw-like tube, or through a prosthetic device that looks like real human male anatomy, even color-matched. This last described device was heavily marketed in 2005 and continues to be marketed today for workplace drug testing and criminal justice urine collection situations that require directly observed urine specimens to be provided. Synthetic urine can be used in place of real drug-free human urine. As with the adulterants, containers of clean urine specimens can sometimes be successfully carried into the collection area by a creative donor and simply placed into the collection container, rather than a personal, actual specimen.

Concerns to the Federal Workplace Drug Testing Program - The Need to Require Specimen Validity Testing and to Propose Alternative Specimen Drug Testing

In the late 1990's, it became evident that increasing numbers of federally regulated donor specimens contained chemicals intended to mask or beat the drug test. These compounds were identified through routine drug tests that were conducted but gave unusual and unreasonable chemical results. It then became necessary for SAMHSA to establish general testing criteria and issue guidance to laboratories to ensure more consistent analysis of chemicals added to the urine by donors with the intent of beating the drug test. In 1998, testing criteria and guidance were initially provided to the laboratories in an informal manner, with final comprehensive urine

specimen validity testing requirements published in the Federal Register on April 13, 2004. This Notice also required that each and every Federal job applicant or employee urine specimen be tested not only for illicit drugs, but also to determine if the specimen provided is a valid one, i.e., consistent with normal human physiology. These criteria did not solve the problem entirely, because the very nature of some products, particularly those that deliver synthetic urine or drug-free human urine, test negative for illicit drugs and pass specimen validity tests because the specimen tested is in fact drug-free urine. Following the publication of SAMHSA's new urine testing requirements, the advertising for this prosthetic type of device and clean urine has increased.

In 2006, the number of specimens being reported as adulterated by our HHS-certified laboratories for regulated industries has decreased, and the number of invalid specimens reported by laboratories has increased significantly. This is because the companies who produce and market the chemical masking agents are familiar with the chemistry of the specimen validity tests that are currently required for Federal employee drug testing (and optional for DOT-regulated industry drug testing programs as of this time). Some of these firms have continued to formulate new versions of the adulterants so that they are not detected by the current required specimen validity tests.

The Effectiveness of Specimen Validity Testing

The effectiveness of required specimen validity testing has been limited because, as adulterants were identified and reported by laboratories and tests developed for them, the products

themselves were changed by their manufacturers to avoid being detected. One example is the chemical oxidant potassium nitrite, an active ingredient in many adulterants. As soon as the Federal drug testing program established methods to detect potassium nitrite and thresholds beyond which to report it in specimens, new formulations of adulterants were released that had lower concentrations of that compound, so it would not be detected. Additionally, the adulterant product contained more acid, to make that formulation more effective – and undetected. Other marketers of adulterant products containing potassium nitrite chose to actually change the active component to one that the laboratories could not detect.

One of the most disconcerting calls received by SAMHSA staff was from the Perry Nuclear Power Plant located east of Cleveland, Ohio. In September 2002, staff at a drug testing collection site at the Plant found evidence in a refuse container from a specific adulterant product. This product contained a small plastic bottle with a temperature indicator strip attached, two small plastic vials of white crystalline material, and instructions for use. Per the instructions, the user would add a microvial of urine to water and the product and mix to dissolve. In about 30 seconds, the drug-free sample would be ready to be utilized in place of the donor's own specimen. Since it was unclear who or how many applicants used this product, that entire day's group of applicants had to submit another set of urine specimens, which were then tested, and 9 of them drug-tested positive for marijuana use. If it had not been for the careless discard of the package in a trash can near the collection site, the use of this product to beat the drug test, which was required as part of a pre-employment fitness for duty test in order to gain access to a nuclear reactor, would have gone undetected.

The Effectiveness of the Products

In order to know what was in products that were being marketed to beat a urine drug test, SAMHSA had them purchased and tested according to package direction to evaluate their effectiveness. If the specimen adulterant was effective, chemical analyses were performed on them to identify their active ingredients. The goal of most drug test masking agents is to "fool" the initial screening test into showing that there is no drug present in the specimen, so that it does not go on to further confirmatory testing.

SAMHSA and its National Laboratory Certification Program contractor devised an experiment to evaluate the effectiveness of some of these masking agents. Certified negative urine was "spiked" with marijuana metabolite (THCA, delta-9-tetrahydrocannabinol-9-carbozylic acid), cocaine metabolite (benzoylecgonine), phencyclidine, opiate metabolite (morphine), and methamphetamine. The concentration of each analyte was twice the screening test cutoff. This standard analytical approach, taken with each substance that was added to the donor's specimen, was applied to more than 30 products purchased.

Several versions of one particular product were tested and found to be able to significantly mask a positive drug test, especially for marijuana and morphine. What is most noteworthy is that each successive formulation of this product was more effective in masking the drug test. Each formulation of that product had been somewhat effective in masking the presence of marijuana, cocaine, morphine, phencyclidine, and methamphetamine. The chemical composition of each formulation also changed, which was pointed out in its marketing as an asset.

One adulterant manufacturer changed its product formula approximately every 6 to 9 months to stay ahead of the drug testing labs. It was openly stated that if a certain formula stays on the market too long, its product would be reverse-engineered by the labs and eventually become detectable. Older formulations were exchanged for a current formulation free of charge. More recently, the frequency of changes to products has decreased, but not stopped, and the marketing language has shifted from masking illicit drug use to masking nicotine use in health insurance and pre-employment testing. Changing the marketing language has not changed the sale or use of these products by job applicants and employees to try to beat their drug tests.

One product that was purchased in April 2001 contained chromate, an oxidant that became known after it had been used for a time. Another version, which was purchased in April 2002, contained hydrofluoric acid, a powerful corrosive acid that can etch glass, and sodium nitrite, a strong oxidizing agent. Again, after a time, this combination became known, and the formulation again changed. A subsequent product, purchased July 2002, was a newly designed system, this time consisting of two vials of chemicals added sequentially to urine in the donor's specimen collection cup. One of the vials contained an iodine-containing compound, the other vial contained hydrochloric and hydrofluoric acids. Another more recent version of the product is currently available and was recently purchased by the investigator from the Government Accountability Office. We have made arrangements to acquire and test this product.

In addition, our tests of these products have elicited the following points:

- Some products focus on both marijuana and opiates.
- Some products do not affect the initial screening, but affect the mass-spectrometry process used to confirm a positive result from the initial screening, as is required by the Mandatory Guidelines.
- Some products are effective, and then disappear on their own.
- Ironically, some products are marketed and sold as being able to beat a drug test but have no effect at all.

Continued Impact of Adulterants on Public Health and Safety

These products have continued to be marketed with the intent to beat a drug test and are used with a "catch me if you can" attitude by donors who use illicit drugs and want to continue that illicit drug use while engaged in a public health and safety sensitive job. Today the open marketplace for products to beat a drug test, whether for urine, hair, or oral fluid tests, is perhaps more guarded and crafty, but still thriving. Products and suppliers are readily available, as is the information about the use of these products. As noted previously, the Internet has continued to serve as a primary tool to advertise, market, and provide testimonials as to just how effective these products are, in addition to serving as a point of purchase.

The Next Marketing Opportunity for Adulterant Sales

By 2004, SAMHSA's knowledge of the multitude of products available to beat drug tests compelled the Agency to consider adding specimen validity testing requirements for hair, oral

fluid, and sweat because products were being openly marketed and sold to beat any drug test, no matter what specimen was collected. By 2005, there were seven products designed and marketed to remove drugs from hair, and there were four products designed and marketed to remove drugs from oral fluid.

This year, the number and identity of new or continuously marketed adulteration products for urine, oral fluid, sweat, or hair specimens are not known by this office. However, we believe that recent increases in use of alternative specimen drug testing by commercial testing laboratories will likely create strong financial incentives for manufacturers and marketers to sell these kinds of products to current and future users of illicit drugs.

Conclusion

In closing, I want to repeat my earlier concern that although there were relatively few Federal agency employee specimens reported in Fiscal Year 2003 as adulterated, substituted, and invalid, there is a continuing concern about the significant increase in invalid specimens identified through 2006. We believe that there may also be an increase in the use of non-urine and "clean urine" substitutions to foil workplace drug testing programs. It is important to remember that, although the numbers remain a very small percentage of the total tested, every one of those adulterated, substituted, and invalid tests represents a potential threat to national security and/or public safety.

Thank you for the opportunity to provide this information to you. I would be happy to answer any questions you may have.

The Honorable Peter A. DeFazio
Chairman
Subcommittee on Highways and Transit
Committee on Transportation and Infrastructure
House of Representatives
Washington, DC 20515

Dear Mr. DeFazio:

Thank you for your November 14 letter to Mr. Robert Stephenson, Director of Division of Workplace Programs in the Substance Abuse and Mental Health Services Administration (SAMHSA). Mr. Stephenson testified on November 1 at a hearing regarding *Drug and Alcohol Testing of Commercial Motor Vehicle Drivers*. As you requested, enclosed are the additional questions and answers for the hearing record.

Thank you for your interest in SAMHSA. Please let me know if you need additional information.

Sincerely,

Terry L. Cline, Ph.D.
Administrator

Enclosure

Questions from Chairman Peter A. DeFazio
SUBCOMMITTEE ON HIGHWAYS AND TRANSIT
OVERSIGHT AND INVESTIGATIONS HEARING ON
"DRUG AND ALCOHOL TESTING OF COMMERICAL MOTOR VEHICLE DRIVERS"
November 1, 2007

1. Are there products to defraud a hair test? Are they effective?

Answer: Yes, currently there are many commercially available products openly marketed to specifically suborn a hair drug test. Attachment 1 provides a few examples from current Internet Websites offering sueh products that are for sale to the public. We do not know if any, all, or some of the products currently offered for sale are effective in masking drug or drug metabolites in someone's hair, but we do know that there are products that influence test results. Research on such products would be necessary in the event that hair becomes an alternative specimen under the Mandatory Guidelines. It is important to understand that if the products are not effective today, new and improved versions will be developed and marketed that are effective at some point in the future, especially if hair testing becomes more widely used, such as in Federally mandated workplace drug tests. If the open marketplace remains legal and available to manufactures, marketers, and purchasers, some of these products will have an influence on the test results.

2. Statistics show that the numbers of "invalid" DOT drug tests have increased over time, while the number of confirmed adulterated DOT drug tests have decreased over time. What is the explanation for this and what are the consequences of this?

Answer: From page 10 of our previously submitted written testimony, the following statement was made:

> In 2006, the number of specimens being reported as adulterated by our HHS-certified laboratories for regulated industries has decreased, and the number of invalid specimens reported by laboratories has increased significantly. This is because the companies who produce and market the chemical masking agents are familiar with the chemistry of the specimen validity tests that are currently required for Federal employee drug testing (and optional for DOT-regulated industry drug testing programs as of this time). Some of these firms have continued to formulate new versions of the adulterants so that they are not detected by the current required specimen validity tests.

The SAMHSA certified laboratories are able to detect donor specimens that are unsuitable for testing, thus increasing the number of invalids being reported but cannot identify the specific oxidizing agent, thus decreasing the number of confirmed adulterated specimens. Once an invalid specimen has been identified and the result reported back to the appropriate Medical Review Officer, there is a realistic option to have the specimen donor return to a collection site for an observed collection. This observed collection procedure then minimizes the chance to have the donor adulterate or suborn their drug test.

There are serious and ongoing consequences of allowing adulterants and clean or synthetic urine specimens to be openly manufactured, marketed, bought, and used with no legal consequences to the donor. More current illicit drug users will be encouraged to continue their drug use, and will

not be effectively deterred, nor detected and removed from their safety-sensitive jobs for treatment and for the safety of their co-workers and the general public.

3. Is there any way that synthetic urine can be discovered in a laboratory? How many synthetic urine samples are your labs finding?

Answer: Clean urine is actual human urine that has all of the general clinical markers and constituents found in normal human urine. Specific markers that tie a specific specimen to a particular individual could be researched, identified, developed into technologies and applications, but at great cost, and with great continuing cost to the Federal and Federally regulated employers of the 95 percent or more of specimen donors that do abide by the drug testing rules. The whole purpose of forensic drug testing is to establish the collection and documentation process to be legally sure that a specimen submitted for testing was collected from a specific individual. The weakness in the routine non-direct observed specimen collection process lies within the collection site and collection process, and readily available products to adulterate or substitute a clean specimen for a specimen containing drugs and or their metabolites. Synthetic urine is formulated and manufactured to pass all of the established testing criteria for normal human urine, so everything just stated also applies to synthetic urine. Clinical markers such as sodium, potassium, chloride, and bicarbonate vary in individuals and therefore would be difficult to use as a synthetic urine marker. If a specific human urine marker were to be identified and added to the laboratory testing protocol, it might initially identify some synthetic urine specimens, but experience has shown that the human marker would simply be added by the manufacturers of synthetic urine products to foil future validity tests. The detected synthetic urine specimens are tbose without the correct components combined in the right proportions, and thus may be reported as a substituted specimen, which could be water without even the low levels of creatinine that we currently test for, and where the specific gravity of the specimen is outside our established range.

4. How does SAMHSA stay on top of new adulterants/synthetic substitutes in order to update laboratory testing procedures?

Answer: Prior to development of revisions to the Mandatory Guidelines for Specimen Validity Testing, effective November 1, 2004, a great deal of time was spent in identifying and monitoring products and sources, followed by purchasing and testing them for chemical composition, detection potential and interaction with urine specimens containing specific drugs/metabolites in preparation for the development and publishing of the regulations on speeific validity. We are very concerned about the availability and use of current adulterant and clean/synthetic urine products to suborn a Federal or Federally mandated workplace drug test, and understand that we can never keep up with the ability of product manufacturers to modify their adulterants and urine substitutes just as quickly as we learn how to identify them. The only cost-effective, long-term strategy is to make them illegal to manufacture, market, sell, or use in a Federal or Federally mandated workplace drug test, and for there to be real accountability and consequences for violations. Some States have taken individual legislative action, but the Federal Government has not.

5. What is the requirement for HHS to publish the compounds it is testing for and its testing methodologies in the Federal Register?

Answer: As with many Executive Branch Federal Agency rules and regulations, the Mandatory Guidelines are implemented or updated in the spirit of the Administrative Procedure Act to provide notice and opportunity for public comment before proposed revisions are made final. The

HHS requirement is to have the proposed revision published for comment in the Federal Register and allow a reasonable period for public comment. All comments are considered before a final notice is signed by the Secretary of HHS and published in the Federal Register. In the past, some minor administrative issues concerning the laboratories certified by HHS under the National Laboratory Certification Program (NLCP) for forensic drug testing programs were addressed outside of the Administrative Procedure Act as "numbered" Program Documents, and were issued directly from the Division of Workplace Programs, Center for Substance Abuse Prevention, Substance Abuse and Mental Health Services Administration, HHS. These Program Documents were instructional to the participating NLCP laboratories on specific issues, where clarification or standardization of a certain laboratory procedure or process was addressed. These program documents did not have any enforcement potential; and the HHS Office of General Counsel could only provide very limited legal support if an issue of laboratory noncompliance was identified by the program.

Following a specific administrative hearing and a following appeal before the National Transportation Safety Board, stemming from a 1999 case involving Airborne Express Pilot Frank Bosela, an internal decision was made that Program Documents would no longer be issued as laboratory instructions, and that future laboratory standards would be defined and enforced through the notice and comments process in the Federal Register. Three PDF files are attached (Attachments 2, 3, 4) related to the Bosela Case, and demonstrate the concerns and impact of revising specimen validity testing procedures in participating NLCP laboratories without formal notice and comment.

6. Why does this requirement exist?

Answer: The Administrative Procedure Act generally requires notice and comment to provide an opportunity for those being regulated by Federal agency rules and regulations to have an awareness of and input into the final form.

7. What are the pros and cons of requiring this publication?

Answer: The pro side is that the notice and comment process is well established and legally expected to have been part of the rule-making or regulation process or, in our situation, the revisions to the Mandatory Guidelines especially, should a Federal court case arise involving enforcement. Use of the Federal Register notice and comment process has been recently reviewed in great detail in a 2005 Federal case in the Western District of North Carolina, in which the entire NLCP process and enforcement action against a participating laboratory was subject to legal review, and the government action under the Mandatory Guidelines sustained (Attachment 5).

The con side is that detailed notice and comment takes time to internally review and approve within the Executive Branch, and provides a great opportunity to any manufacturer to change its products to continue to suborn a Federal or Federally regulated workplace drug test, often long before the new testing process becomes operational.

8. What would be the downside of eliminating this requirement?

Answer: Eliminating the current rulemaking process may present problems in future enforcement actions for the HHS Office of General Counsel, litigators in the Department of Justice, or for Federal trial judges.

9. Does SAMHSA oversee the collection facilities used for the federal workforce testing? Please describe how HHS ensures that collection facilities are in compliance with HHS collection facility regulations.

Answer: At the present time, SAMHSA does not have direct responsibility to oversee collection sites. However, collection site actions and compliance with the Mandatory Guidelines are a responsibility for each Federal agency to monitor and enforce. The HHS role is in defining the collection process, establishing the collection manual for Federal agencies only to use, and acting as an interested party and consultant to the agencies when there is a problem. There is an oversight process led by the Office of National Drug Control Policy, where program problems are addressed and corrective action directed, when necessary.

10. Are there similar concerns for federal workforce testing as there are for DOT tests that use private-owned and independently operated collection facilities?

Answer: Yes we have similar concerns for Federal workforce testing. HHS has been aware of general collection site issues and concerns and, in 2004, proposed new requirements for Federal agency increased oversight and annual inspection of their internally operated or contracted collection sites. To date, the proposed revisions to the Mandatory Guidelines containing the strengthened collection site requirements have not yet been approved for implementation.

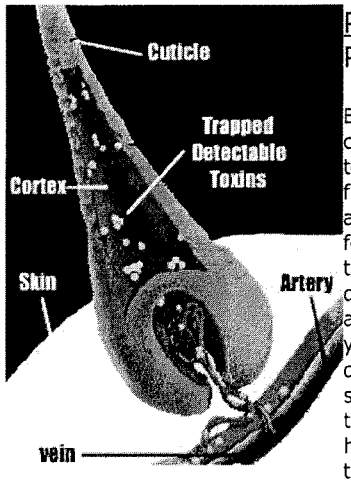
11. What do you see as feasible options for ensuring that collection facilities minimize the opportunity for donors to cheat?

Answer: Because collection sites start the entire collection process, it is essential to:

- Eliminate the manufacture, marketing, and easy open availability of commercial products specifically designed to beat a Federal drug test.
- Require more employer involvement in the process that is used to select good collection site operators, and to frequently review collection site error reports from the NLCP laboratories that are testing the specimens collected from that employer.
- Hold the specimen collector administratively and financially accountable for proven collection errors.
- Have independent objective collection site inspections and audits using undercover inspectors.
- Strengthen Federal oversight of collection sites through specific regulatory changes with inspection and strong enforcement action.

Attachment 1. Follow-up Questions Answer 1

http://www.passadrugtest.com/



Products> Hair Follicle Drug Test: Treatment Programs

Every time you introduce a toxins to your body, the blood carries it around in your veins depositing little bits of the toxins here and there throughout your body. As you can see from the diagram, toxins are deposited into the hair follicle and trapped permanently or until you cut your hair. Our Hair follicle treatment formula penetrates to the core (Cortex) of the hair shaft and immediately seeks out any trapped detectable toxins and dissolves them. The process takes a about 2 hours for the treatment. The only extra ingredient you will need is some vinegar to soften up your hair. While detoxifying you will feel a strong tingling sensation of the scalp. Afterwards, you may experience temporary dryness of the hair, however, NO permanent damage will be done. Your hair will be toxin-free. No adulterants or deposits are lleft in the hair making the this Cleanse Undetectable.

You can pass your hair drug test:

Our hair follicle toxin-cleansing shampoo will remove months or years worth of drug residue history from the root to the end of the hair shaft. Pass with no need to perm, cut, or screw up your hair style. No mixing. No mess. Two convenient sizes. Buy according to your hair's length, thickness, and level of toxicity. Well worth the investment!

Learn more about hair follicle treatment.

Hair Cleansing Products

"Two Steps A'Head" shampoo and conditioner

Brand new formula... works in 30 minutes effective up to 48 hours. 100% money back guarantee. Penetrates hair shaft and cortex. Removes all contaminants and medical residue. Ph balanced safe for permed & color treated hair

$99.95 - ADD TO CART MORE INFO

4 oz Detoxifying Shampoo

Works in twenty minutes, no need to bleach or perm, no need to cut your hair, no hair dryers or shower caps needed. Removes all drugs. Thin hair and light users have a 99.99% success rate

$39.95 - ADD TO CART MORE INFO

8oz Dexotifying Shampoo

Ideal for use on all external hair on your body. Completely undetectable. Removes all detectable toxins and does not damage the hair in any way. 8oz bottle perfect for moderate 3-

4x per week users 99.99% success rate

$79.95 - ADD TO CART MORE INFO

4oz Shampoo Enhancer
This is developed this to be used Before you use your favorite detoxifying shampoo. Improves success by loosening the shaft allowing easy penetration of the shampoo you decide to use. HighlyRecommended.

$49.95 - ADD TO CART

4oz Hair Splash
This Leave-in Conditioner is an after treatment conditioner that you leave in the hair to help stop the flaking and continues cleansing from the inside out as you wait to be tested . A perfect addition to any of our shampoo solutions.

$49.95 - ADD TO CART

8oz Hair Cleansing Mudd

Mix your own-hair cleansing mudd is for those individuals with heavy usage (5-6x per week) of all toxins, both herbal and chemical. Easy 3 step process. (Includes activator and leave-in conditioner. 100% money Back guarantee.

$106.95 - ADD TO CART

Light Hair Follicle Treatment Kit

With this Safe and easy to use program, we concentrate on heavy THC usage only. This kit includes TOXIN removing shampoo, hair enhancer and hair leave-in conditioner to ensure all traces are removed and undetectable. (Includes enhancer and leave-in conditioner.

$104.95 - ADD TO CART

All Toxin Removal-Hair Follicle Treatment Kit

Perfect for those who are exposed to a high level of different Toxins. This all Toxin removing shampoo kit cleanses the hair shaft , follicles and the cortex. . Any foreign toxin in your hair follicles will be erased with this program. (Includes enhancer and leave-in Conditioner.) The Most extreme of all Hair kits.

$139.95 - ADD TO CART

Detoxifying Hair Gel
Works in **10 Min** . Lasts for 4 hours. Removes all Toxins.

$59.95 - ADD TO CART

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http://www.testingclean.com/hairfollicle.asp

Masking Shampoos Designed To Pass A Hair Drug Test No Longer Work In Most Labs

If you've been researching hair follicle drug testing products, you've probably seen many conflicting statements. For example:

Hair testing companies will tell you there is no way to pass a hair drug test.

Some companies similar to ours will tell you that their products will enable you to pass drug tests **with 99.9% effectiveness.**

So What Is The Truth About Passing A Hair Drug Test?

The truth, like most things, is somewhere in the middle. **Hair test labs and products designed to help pass a hair drug test all have something to gain by making absolute statements like "99.9% effective" and "no way".**

The truth is that there are too many factors that come into play to guarantee you'll pass a hair test 100% of the time with any products used. But below are some facts you should know about passing a hair drug test:

- Some lab hair drug tests are easier to pass than others
- Masking or temporary products that coat the hair no longer work. All hair labs now thoroughly wash the hair, rinsing away all masking agents before the hair is tested.
- To have a chance at passing a hair drug test, you must effectively detoxify the hair with a strong cleanser and not mask.

How Does A Lab Detect Drugs In Your Hair?

Any toxin, like drug metabolites in your body, grow into the hair shaft. The inner shaft of the hair is called the **cortex**. This is initially where drug metabolites are found once deposited into newly formed hair strands.

The **cortex** is filled with pigments and proteins, and as the hair grows the metabolites are pushed towards the

outer edge of the cortex. On the outside of the cortex are cuticles, that resemble shingles on a house.

The cortex is very hard to penetrate and only certain substances can get in or near the cortex. But to be able to even get near the outer edges of the cortex where the drug metabolites are stored, to wash them away, you have to open up the cuticles or shingles.

Introducing The Newly Formulated Precision Cleanse™

Hair testing and the ability to pass a hair drug test have changed dramatically since late 2005. Hair labs can detect just trace amounts of drug metabolites.

Whether you are a full fledged drug addict (you should get help if you are) or just someone who used once and are faced with a hair test, the results are the same. A failed test. And the employer who gave the test will see the same results for both people and consider you both the same.

These new advances in hair testing technologies forced us to go back to the drawing board and completely reformulate our product. **We consulted with hair experts, from renowned hair salon stylists to toxicology experts to devise a product that will give the best results.**

These consultants know more about the science of hair than anyone today, and their knowledge went into the new formulation of Precision Cleanse (formerly called **Afterburner**). **Precision Cleanse is a true hair detoxification product and not a masking agent.**

Will Precision Cleanse Work 100% of The Time?

The answer is no. It's simply impossible to pass a hair drug test 100% or "99.9%" of the time as they say. But our **results have dramatically improved since the reformulation** and we are proud to show you the true results below. The numbers below are based on a 350 test sampling. We constantly monitor and update the numbers below on a monthly basis:

THC - 94% success rate

Opiates - 89% success rate

Cocaine, Meth - 89% success rate

While the product is not 100% successful you can at least have a realistic idea of what to expect. **Of course, factors like usage level, type of lab doing the test, your ability to follow directions, and recontamination factors all have something to do with varying the success rate.** The numbers shown above are an average of all different scenarios from heavy to light users and different labs.

While we can give you a very good chance to pass a hair drug test we can not guarantee it. However, we do offer a **100% money back guarantee** if your test does come back positive. We just require you provide us with the failed lab test results. These test results you submit to us are kept completely confidential and only used as data to help us improve the product for the future.

Clean Customer Testimonial

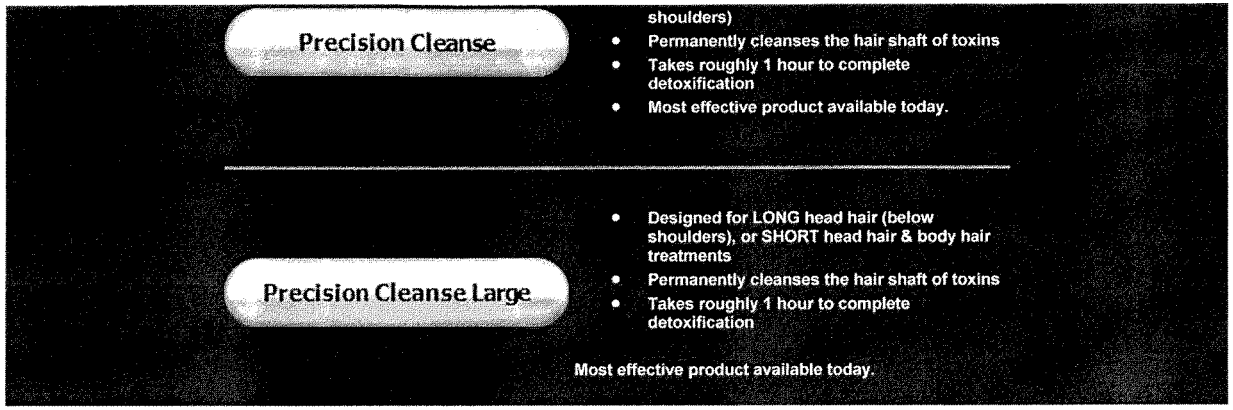
"Just found out today that I passed my hair drug test. Your system worked, that's all I know. Thanks! "

-- D. Stillman - New Orleans, LA

You can place your , or **call toll free at 1-888-516-6120** if you would like further consultation before ordering. **We are here to help 24 hours / 7 days per week.**

Please click the button below labeled Precision Cleanse for more information and online ordering:

- **Designed for SHORT head hair (above**



http://www.passthedrugtestshampoo.com/

Pass Your Hair Sample Drug Test!

Are you facing an upcoming hair sample drug test? No worries! All you have to do is wash your hair with one of our detox shampoos and you are guaranteed to pass your drug test. We have all the information you need about hair drug testing as well as information about other common forms of drug tests: the urine drug test, saliva drug test, and the blood drug test.

Product Line

Detox Drinks
Detox Capsules
Synthetic Urine
Additive
Shampoos
Mouthwash
Detox Programs
Testing Supplies

Special Values

Product Instructions

Test Instructions

Drug Testing Forum

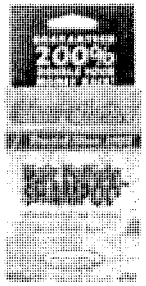
Hair drug testing not only measures toxins in your hair, but can determine how long ago that toxin was in your body. This can be a scary proposition for many, especially those with long hair. Although the drug laboratory is supposed to take only 1½" of hair close to the scalp, not all lab technicians have had proper training. If the proper steps are followed, the lab will be able to determine if you have used any substances in the past 90 days. You can request (by law) that the lab keeps only 1½" of your hair. Feel free to demand that they follow the protocol, especially if you've been clean for the past three months!

We also carry products that insure you will test clean for a urine drug test, the most popular form of drug testing. There are may ways to pass this type of test. If you will be unsupervised while you are giving your sample, (no one watches you pee in the cup) using our synthetic urine is foolproof. Otherwise, we carry "temporary" detox drinks and capsules that will allow you to test clean for five hours. Will you have to submit to a saliva swab drug test? No problem! Just rinse with our Ultra Wash mouthwash and your saliva will remain free of toxins for 30 minutes. We also carry products for whole system rapid detoxification to pass any drug test which will permanently, and quickly, remove drug metabolites from your body.

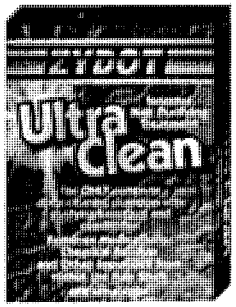
http://www.testclear.com/Pass-Hair-Drug-Test-C2.aspx

Top > **Pass Hair Drug Test**

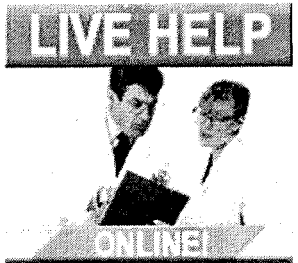
Pass Hair Drug Test



Clear Choice Shampoo
Item #CLEARCHOICE
The Clear Choice Purifying Shampoo is the most effective solution for the hair test. If you have an important hair test coming do risk it. Get the Best!
Your Price: 39.95



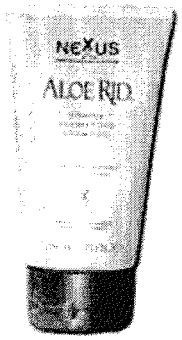
Ultra Clean Shampoo
Item #ULTRACLEAN
Ultra Clean Shampoo and Conditioner Internal Hair Purifying Treatment Removes Medications, Chemical Buildup and Other Impurities From Within the Hair Shaft.
Your Price: 39.95



<< click here >>
My Basket
What's Hot!

1. Powdered Urine Kit
2. Marijuana Drug Test Kit
3. Clear Choice Shampoo
4. Nexxus Aloe Rid Shampoo
5. 5 Panel Drug Testing Kit - DIP
6. XXXtra Gold Cleansing Drink
7. Ultra Clean Shampoo
8. 5 Day Detox Program

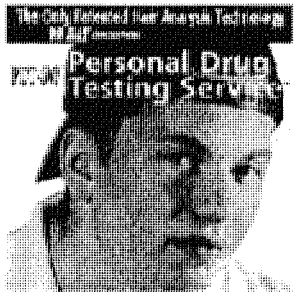
Qty:



Nexxus Aloe Rid Shampoo
Item #ALOERID
Use Aloe Rid as your daily maintenance program. It adds an extra layer of protection in a hair testing situation. It is to be used in conjunction with the Clear Choice Purifying Shampoo.
Your Price: 19.95

Qty:

Qty:



PDT 90 Hair Drug Testing Kit
Item #PDT90
The PDT Hair Drug Test Kit by Psychemedics is the most popular Hair Drug Test used by major corporation and casinos in the world.
MSRP: ~~95.95~~ Your Price: 75.95

Qty:

9. PureGold Cleansing Drink
10. Cocaine Drug Test Kit

What's New!

Contrast II Pregnancy Test
5.95

Hair Confirm Express Hair Drug Testing Kit
Item #HAIREXPRESS
The Hair Confirm Hair Express Testing Kit is more consumer oriented as it provides a detailed drug usage and type report for the past 90 days. A 2 day express envelope is included. Reports are available on the website after sample is processed.
MSRP: ~~95.95~~ Your Price: 75.99

Qty:

Hair Confirm Hair Drug Testing Kit
Item #HAIRCON
The Hair Confirm Hair Testing Kit is more consumer oriented as it provides a detailed drug usage and type report for the past 90 days. The Kit tests for all your major drug classes. Reports are available on the website after sample is processed.
MSRP: ~~95.95~~ Your Price: 69.99

Qty:

Add to Wish List | Add Items to Cart

(Attachment 2) Extract From SAMHSA Meeting

DRUG TESTING ADVISORY BOARD
OPEN SESSION
March 13, 2002

Agenda Item: Welcome

MR. STEPHENSON (Chairman, HHS): At this time I'd like to convene the open session of the Drug Testing Advisory Board Meeting. I'm very happy that you all could join us this morning. It's an abbreviated open session, but we're going to cover some important things. I want to remind everybody to sign in so we'll know who all was here.

End of Open Session -

Agenda Item: Public Comments

CAPT. MORRIS: I am Captain Robert Morris, executive vice-president of the Air Line Pilots Association, International.

ALPA remains concerned with the integrity of our nation's regulated drug testing system. Specifically, we find the due process afforded an individual accused of violating validity testing standards woefully inadequate. Furthermore, limitations on access to test related information severely compromise the ability of individuals to challenge results they view as unfounded. The combination of these factors continues to draw intense judicial, congressional, and media attention. Labor will not retreat until our concerns are adequately addressed.

The Drug Testing Advisory Board fulfills a critical role in formulating policies directly impacting millions of American workers. Let us not overlook that, in addition to the profitability of drug testing, your recommendations directly influence workers' continued employment, professional certification, and personal reputations. Although DTAB is at the nexus of policy development, seasoned observers sometimes question the comprehensiveness of information presented to your distinguished panel. In this light, a brief review of recent development is in order. There are a number of current cases which deserve your particular attention.

***

The Bosela decision by the National Transportation Safety Board firmly establishes that this distinguished panel will not accept testing done under less than forensic standards. An airline pilot was stripped of his licenses based on a single-step nitrite determination. Hopefully, this ruling puts to an end ruining a person's career by dip-stick. This ruling emphasizes that two separate, independent tests are the forensic standards that should apply in validity testing.

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Siotkas v. FAA is the landmark case in terms of validity testing. ALPA's discovery of egregious behavior by the laboratory involved resulted in a nationwide inspection of NLCP-certified processing facilities. This inspection resulted in the cancellation of over 300 individual tests. ALPA believes that a more-thorough consideration of the issues we raised in this cast doubt on all substitute findings during that period of time.

Drake v. FAA is presently before the D.C. Federal Court of Appeals. In this case involving an alleged adulterated sample, the plaintiff challenges a "whitewash" investigation conducted by the agency charged with ensuring the integrity of airline testing. The circumstances surrounding this incident are so serious as to demand widespread attention. The FAA recently announced a $100,000 fine against the employer in an apparent attempt to shift the public's focus. A probing report by the DOT Inspector General is evidence of a range of problems with the testing process and confirms a number of serious concerns previously raised by ALPA.

The Bosela decision by the National Transportation Safety Board firmly establishes that this distinguished panel will not accept testing done under less than forensic standards. An airline pilot was stripped of his licenses based on a single-step nitrite determination. Hopefully, this ruling puts to an end ruining a person's career by dip-stick. This ruling emphasizes that two separate, independent tests are the forensic standards that should apply in validity testing.

The Nelson case involves a petite flight attendant charged with substituting her urine sample. Multiple SAP interviews concluded she had no dependency problems or history of any drug usage. Simply, she is a small woman who consumes a healthy amount of water. To retain employment, she accepted follow-up testing. Predictably, again she tested below the substitute thresholds during an observed follow-up test. The individual then arranged two additional observed tests sent to separate certified labs. One of those samples was also judged as substituted. For over nine months, the DOT's acting director of drug and alcohol policy and compliance attempted to block the MRO's cancellation of her tests. Today she remains on an extensive program of follow-up testing.

Jones is another flight attendant terminated for substituted who won, through the Colorado courts, an order to test her split sample over the objections of the lab, MRO, and her former employer. The split was not found substituted by a respected certified lab. The DOT's acting director of drug and alcohol policy and compliance has refused to cancel her tests and no longer responds to inquiries from her counsel.

Due process can be measured by the progress of real, live cases. Do paper rules protect the lives of actual workers when they are invoked? As above cases show, we have a long way to go before obtaining a meaningful balance in our administrative procedures.

How does anyone clear his or her name? What proof establishes a replication of results under observed condition? Is DOT and Health and Human Services more interested in protecting individuals or in protecting the status quo?

Confidence in any system grows through openness, as opposed to restrictions on information. We can improve drug testing by facilitating challenges and taking corrective actions when warranted. Unfortunately, the controlling authorities in this system choose to stonewall legitimate inquiries into the current rulings and procedures. Freedom of Information requests go unanswered. Calls from accused individuals lay unreturned. Requests for investigations are

routinely dismissed. This situation is an injustice not only to accused individuals, but also the entire drug testing community.

I'd like to thank you for the opportunity to address you.

SERVED: December 14, 2001
NTSB Order No. EA-4928

UNITED STATES OF AMERICA

NATIONAL TRANSPORTATION SAFETY BOARD

WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 13th day of December, 2001

_____

)
JANE F. GARVEY,)
Administrator,)
Federal Aviation Administration,)

)
Complainant,)
) Docket SE-15725
v.)
)
FRANK BOSELA,)
)
Respondent.)
)
_____)

OPINION AND ORDER

The Administrator and respondent both appeal the written initial decision of Administrative Law Judge William A. Pope, II, issued on January 18, 2001, after a hearing that amassed fourteen days of testimony and numerous exhibits over four separate sessions between January and August 2000.1 By that decision, the law judge affirmed the Administrator's emergency revocation of

1 The law judge's 34-page initial decision is attached.

7370A

all airman certificates, including Airline Transport Pilot ("ATP") Certificate Number 0002135921, for respondent's alleged refusal to submit to a Department of Transportation ("DOT")-required random drug test in violation of Federal Aviation Regulation ("FAR") section 61.14(b).2 We grant respondent's

appeal, and deny the Administrator's appeal.

The Administrator's Amended Emergency Order of Revocation (the text of which is set forth in footnote 1 of the law judge's attached initial decision) alleged that on April 14, 1999, respondent, a captain for Airborne Express ("Airborne"), provided a urine specimen pursuant to Airborne's DOT-mandated random drug testing program. Subsequent testing of the specimen by Laboratory Corporation of America ("LabCorp") revealed that it contained an unnaturally high level of nitrite (6,909 µg/mL), indicating that the specimen had been adulterated.3

2 FAR section 61.14(b), 14 C.F.R. Part 61, states:

Sec. 61.14 Refusal to submit to a drug or alcohol test.

* * * * *

(b) Refusal by the holder of any certificate or rating issued under this part to take a drug test required under the provisions of appendix I to part 121 or an alcohol test required under the provisions of appendix J to part 121 is grounds for --
* * * * *

(2) Suspension or revocation of any certificate, rating, or authorization issued under this part.
3 Appendix I, Part 121, defines a refusal to submit to a drug test:
(continued . . .)

2

At the hearing, the Administrator and respondent presented extensive factual and expert testimony, and numerous documentary exhibits.4 The Administrator, in her case in chief, presented testimony about the collection of respondent's sample from the nurse who performed the task, as well as the expert testimony of Federal Aviation Administration ("FAA") Inspector Ralph Gallegos, of the FAA's Office of Aviation Medicine, who concluded that the procedures utilized on April 14, 1999, met the requirements of 49 CFR Part 40, including those pertaining to the security and integrity of collected samples. In addition, the Administrator presented the testimony of the LabCorp individuals who performed, respectively, the qualitative and quantitative nitrite analysis of respondent's specimen. Finally, the Administrator presented the testimony of Dr. Frank Esposito, director of LabCorp, and accepted by the law judge as an expert in forensic toxicology, who testified about the qualitative ("dipstick") and quantitative ("Olympus AU800" or spectrocolorimetric) testing procedures, and

(continued . . .)

Refusal to submit means that an individual failed to provide a urine sample as required by 49 CFR Part 40, without a genuine inability to provide a specimen (as determined by a medical evaluation), after he or she has received notice of the requirement to be tested in accordance with this appendix, or engaged in conduct that clearly obstructed the testing process.

4 The law judge's initial decision sets forth the hearing record in considerable detail. See Initial Decision ("I.D.") at 4-17. We summarize some, but by no means all, of that material here to provide context for our discussion, but our decision is based upon the entire record.

3

chain of custody practices, followed by LabCorp. Dr. Esposito testified that the nitrite testing results of respondent's specimen were reliable.

Respondent denied adulterating his specimen and testified that he did not know of any reason why the specimen tested positive for nitrite. Respondent also presented the testimony of Dr. Bruce Goldberger, accepted by the law judge as an expert in forensic toxicology, who expressed, among other things, concerns about the validation of the nitrite testing procedures utilized by LabCorp.

In rebuttal, the Administrator presented, in addition to more testimony from Dr. Esposito, testimony from Dr. David Kuntz, accepted by the law judge as an expert in forensic toxicology, and Dr. Yale Caplan, accepted by the law judge as an expert in forensic toxicology and urine adulteration testing. Drs. Kuntz and Caplan testified that the nitrite testing results from both the dipstick test and the Olympus AU800 machine were reliable.

The law judge found, after making credibility assessments against respondent's contradictions of the nurse's recollections about the specimen collection process, that:

there is no credible evidence that the collection cup and specimen bottles used by [r]espondent were accidentally contaminated with nitrite at the collection site, or that the urine specimen provided by the [r]espondent was accidentally or maliciously contaminated with nitrite by someone other than [r]espondent after it left the collection site while in transit to the laboratory, or at any time while at the laboratory facility prior to the time the testing of that urine sample occurred.

I.D. at 22. The law judge also found that the dipstick nitrite test was not scientifically suitable, but that the Olympus AU800 nitrite test (which indicated 6,909 µg/mL) was scientifically suitable and, based on that test, upheld the section 61.14(b) violation. The law judge affirmed revocation.

On appeal, respondent argues, among other things, that: (1) required collection procedures were not adequately followed, (2) the nitrite testing at LabCorp was not conducted pursuant to protocols "pre-approved" by the Department of Health and Human Services ("DHHS"), (3) the Olympus AU800 nitrite testing was not sufficiently validated to demonstrate scientific reliability, and

(4) the law judge's finding that the dipstick test was not scientifically suitable mandated dismissal of the action, because two separate tests were required.5 The Administrator appeals the law judge's finding that the dipstick test was not scientifically suitable.

We adopt as our own, for purposes of this appeal, the law judge's credibility-based6 and thoroughly-reasoned determinations regarding the integrity of the collection process and the security of respondent's sample. In terms of the ultimate issues

5 The Board does not have jurisdiction to rule on Constitutional issues. See, e.g., Administrator v. Lloyd, 1 NTSB 1826, 1828 (1972) (Board has no authority to review constitutionality of FAA regulations).

6 See, e.g., Administrator v. Smith, 5 NTSB 1560, 1563 (1986) (deference to credibility determinations, unless shown to be arbitrary or capricious); Chirino v. NTSB, 849 F.2d 1525 (D.C. Cir. 1988) (the Board should reverse a law judge's findings when a witness's testimony is "inherently incredible").

presented by the Administrator's and respondent's appeals, the questions we need to address are: (1) whether the then-applicable guidelines required two tests be used to demonstrate that respondent adulterated his sample with nitrites, and (2) if two tests were required, whether the law judge erred in finding that the qualitative "dipstick" test utilized by LabCorp was not scientifically suitable.

Respondent argues that nitrite adulteration testing was required to be performed using a two-test, two-aliquot process. DHHS document PD-35, which set forth then-applicable binding "guidance" on all Part 40 drug testing laboratories, requires that nitrite concentration tests "follow scientifically suitable methods and produce results which are accurately quantified." Ex. A-5. Respondent argues that it was generally understood by the scientific community that "scientifically suitable methods"

meant that a two-test, two-aliquot process was necessary, and in support of this argument he points to testimony provided by both parties' experts. The Administrator, on the other hand, argues that "DHHS guidance did not call for the use of two procedures and the testing of two aliquots until July 28, 1999 [when PD-37 was issued], approximately two and one-half months after LabCorp tested respondent's specimen."

We think this record demonstrates that the then-applicable DHHS guidance did, in fact, mandate a two-test, two-aliquot approach to testing for nitrite adulteration in the context of mandatory DOT drug testing. When asked by respondent's counsel whether the two-test, two-aliquot requirement specifically

6

mentioned in PD-37 was, essentially, a requirement for scientific suitability, Dr. Esposito, for example, answered "yes." Tr. at 503-10. Dr. David Kuntz, who testified for the Administrator as an expert in forensic toxicology, also appears to have embraced a similar view when he testified that a "two-test system using separate aliquots and separate technology, when available" is a "constituent element" of scientific suitability as it applies to nitrite testing. Tr. at 2276-77. Dr. Goldberger also emphasized the importance of the two-test, two-aliquot approach, calling it "the premise for good forensic laboratory practices."7 Tr. at 1858-59. Indeed, we think the specificity of PD-37 can be seen not as a new requirement, but, rather, a more precise enunciation of what many of the experts who testified already understood: a two-test, two-aliquot approach is necessary to ensure a scientifically suitable test that can be relied upon to yield valid, accurate results.

Turning to the Administrator's appeal of the law judge's finding that the qualitative "dipstick" test performed by LabCorp on respondent's sample was not scientifically suitable, we discern no error in the law judge's determinations and

7 Even Dr. Caplan, whom the law judge cited in support of his determination that PD-35 only required one test, cautioned that his testimony that a single test might be adequate to prove that respondent adulterated his urine sample was from a "purely scientific point of view" and admitted that in the context of forensic toxicology a two-test approach was the better practice. Dr. Caplan also testified that in the context of validity testing, he had recommended the two-test approach "from a forensic point of view."

7

conclusions. The law judge, after noting that LabCorp did not produce any written validation study about the suitability of using the Bayer-manufactured diagnostic dipsticks in a manner contrary to the manufacturer's instructions and for a purpose

other than for which they were engineered, found that the qualitative "dipstick" test "was not validated in any meaningful way that could be reviewed." I.D. at 24-27. Based on this lack of written validation, as well as conflicting expert testimony about whether the qualitative "dipstick" test procedures, as explained by Dr. Esposito, were reliable, the law judge concluded that the "dipstick" test was not scientifically suitable.

The Administrator argues, essentially, that the law judge ignored the opinions of Drs. Esposito, Kuntz and Caplan that the qualitative "dipstick" test was appropriately validated by Dr. Esposito, and, instead, favored the contrary and less-qualified opinions of Dr. Goldberger, who, although qualified as an expert in forensic toxicology, was not qualified as an expert in the field of urine adulteration. Respondent, on the other hand, argues that despite Bayer's warning that its dipstick instructions "MUST BE FOLLOWED EXACTLY TO ACHIEVE RELIABLE RESULTS," the qualitative nitrite adulteration test designed by LabCorp's Dr. Esposito deviated from those instructions and, significantly, was not properly validated in accordance with DHHS guidance.

These factors persuade us that the law judge did not abuse his discretion when he found that LabCorp's qualitative "dipstick" test was not sufficiently validated and, therefore,

was not demonstrated to be scientifically suitable. Although we do not necessarily doubt the scientific explanations rendered by the Administrator's experts as to why LabCorp's deviations from Bayer's instructions were valid, we are troubled somewhat by the lack of any written validation study, or written results from a thorough and formal validation study, in this record. Indeed, although the Administrator's witnesses who listened to Dr. Esposito's testimony generally found his description of the validation experimentation he performed more than two years prior to be descriptive of a reasonable or "excellent" validation, Dr. Esposito, working from memory, incorrectly testified that he believed he only deviated from one of Bayer's instructions when, in fact, he deviated from three of them. Tr. at 967-968. Without a written validation study, or at least contemporaneous scientific notes describing it, we are now unable to reliably evaluate the validity of the qualitative procedure given the uncertainty surrounding the thoroughness of Dr. Esposito's recollections. Moreover, unlike validation documentation created contemporaneously with the development of this procedure, we now must view Dr. Esposito's recollections in the context in which he made them -- in the face of a challenge to the accuracy of the results obtained by a procedure he designed. We discern no error in the law judge's resolution of this matter.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is denied;
2. Respondent's appeal is granted;

3. The law judge's initial decision is reversed to the
9

extent it is inconsistent with this opinion and order; and

4. The Administrator's Amended Order of Revocation is reversed.

HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order. CARMODY, Vice Chairman, did not concur. BLAKEY, Chairman, did not participate.

10

SERVED: January 24, 2005

NTSB Order No. EA-5133

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 19th day of January, 2005

APPLICATION OF FRANK BOSELA For an award of attorney fees and expenses under the Equal Access to Justice Act	Docket 298-EAJA-SE-15725

OPINION AND ORDER

Applicant has appealed from the Equal Access to Justice Act (EAJA) initial decision of Administrative Law Judge William A. Pope, II, issued on May 6, 2003.[1] The law judge denied the application for fees and expenses *in toto*. We affirm the law judge and deny the appeal.

The Administrator's Amended Emergency Order of Revocation alleged that on April 14, 1999, applicant (then called respondent), a captain for Airborne Express, provided a urine specimen pursuant to Airborne's DOT-mandated random drug testing

[1] The initial decision is attached.

program. According to the Administrator, the specimen contained an unnaturally high level of nitrite (6,909 µg/mL), indicating that it had been adulterated.[2]

Both the Administrator and applicant offered the testimony of highly qualified experts with regard to the testing procedures. The law judge found, and the Board agreed, that applicant's challenges to the collection and chain of custody procedures were unconvincing. However, the law judge was not satisfied with the procedure used for testing for adulteration. Two tests had been used. The law judge determined that one of them, the dipstick nitrite test, had not been shown to be "scientifically suitable" because the dipstick had not been used exactly in accordance with its published instructions.[3] Nevertheless, because the other test, the Olympus AU800 nitrite test (which indicated a nitrite level of 6,909 µg/mL) was found to be scientifically suitable, the law judge upheld the section 61.14(b) violation and affirmed revocation.

On appeal, however, the Board reversed the complaint and

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[2] Applicant was charged with violating 14 C.F.R. 61.14(b) (refusal to submit to a drug test) because he engaged in conduct that clearly obstructed the testing process by providing an adulterated sample. The applicable standard provided that to be adulterated with nitrites required a level of nitrites equal to or greater than 500 µg/ml. Department of Health and Human Services (DHHS) Program Document Number 35 (PD-35), dated September 28, 1998.

[3] PD-35 required that testing for adulterants follow "scientifically suitable methods." The Administrator had no more specific regulations on testing for adulterants.

order, finding that two scientifically suitable tests for adulteration were required to ensure accurate results. The Board determined that the dipstick test was not scientifically sui table and, therefore, the Administrator's charge that applicant's urine sample was adulterated with nitrites was not adequately proven. The EAJA petition followed.

There is no question that applicant is a prevailing party and his net worth does not preclude an award. EAJA requires more, however. No award is authorized if the government shows that at all times its case was substantially justified. The relevant inquiry is whether the government's case is "'justified in substance or in the main' -- that is, justified to a degree that could satisfy a reasonable person." Pierce v. Underwood, 487 U.S. 552, 108 S.Ct. 2541 (1988) at 565; Federal Election Com'n v. Rose, 806 F.2d 1081 (D.C. Cir. 1986) (it is not whether the government wins or loses or whether the government appeals that determines whether its position is substantially justified). Accord Catskill Airways, Inc., 4 NTSB 799 (1983) (test is "reasonable basis both in fact and law"). EAJA awards are intended to dissuade the government from pursuing "weak or tenuous" cases; the statute is intended to caution agencies carefully to evaluate their cases, not to prevent them from bringing those that have some risk. Id.

In his ruling on the EAJA petition, the law judge found that the Administrator was substantially justified in bringing this case. We agree with the law judge, and find his decision

carefully and thoroughly reasoned. We adopt it as our own on this point. We know that, during its investigation and in preparation for trial, the FAA consulted with at least the following experts on this issue of the adequacy of the nitrite test: Dr. Frank Esposito, Dr. David Kuntz, and Dr. Yale Caplan. All three had extensive experience in the field; we will not repeat their credentials. All were satisfied that the Administrator's evidence showed nitrite adulteration. All were obviously comfortable assisting the Administrator in her investigation and testifying on behalf of the Administrator in this matter. Their views could be relied on by the FAA both as to the facts and as to the applicable testing standards.

There is no basis to conclude that the FAA proceeded in the face of facts or law that did not support its claims. Applicant argues that the FAA should have done further investigation and, had it done so, would have determined that the dipstick test was not reliable. We disagree, and there is nothing in the record to so indicate other than this Board's first impression conclusions that the dipstick test as conducted was not "scientifically suitable" and that two scientifically suitable tests were required. Further, applicant's characterization of the applicable standard far exceeds what was reasonable for the FAA to assume.

The most that can be said in applicant's favor is that the experts recognized that two tests would be better than one. Nevertheless, and no one here argues to the contrary, the

regulations at the time did not require two different tests for nitrites. The Board's decision on this matter did not explicitly hold that two tests were required under PD-35, but only that, in the Board's view, "scientifically suitable" methods -- a term not defined in the DHHS regulation -- required two tests. Furthermore, the Olympus quantitative test produced readings so much larger than the adulteration criterion that the second and only qualitative dipstick test could reasonably be viewed as a satisfactory check.

Contrary to applicant's claim, there was no "blind faith" in the lab's work. Not only did the FAA carefully explore the practices of the lab, but two of its three experts were not affiliated with that lab yet confirmed its findings. There is no suggestion in the record that at any time the Administrator's experts advised the FAA that its interpretation violated the DHHS standard applicable at the time.[4]

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[4] The law judge found an EAJA award unavailable for another reason, that applicant did not "incur" the fees and expenses as EAJA requires because the Teamsters Local 1224, Airline Professional Association, paid all of applicant's litigation costs. Applicant concedes that this was the case but argues that the union is entitled to be repaid through recovery by applicant here.

The law judge relied on Administrator v. Livingston, NTSB Order No. EA-4797 (1999), wherein we examined in what circumstances it would be reasonable and consistent with EAJA to award fees and expenses despite an applicant not being directly liable for ("incurring," in the statute's words) those costs. We denied EAJA recovery in that case because fees and expenses were paid in full by applicant's former employer. Livingston, in turn, had relied on an earlier decision, Administrator v. Scott, NTSB Order No. EA-4472 (1996). In that case, we focused on use of contingency arrangements whereby if applicant prevailed any

(continued...)

Although the law judge did not reach this issue, we are compelled also to note that applicant's EAJA application fails in a number of important respects to conform to our rules and was therefore subject to rejection. For example, applicant claims an hourly rate of $225 for attorney fees. Applicant is charged with knowing and abiding by the regulations, yet this hourly rate far exceeds the maximum allowed by statute. See 49 C.F.R. 826.6(b)(1). The maximum hourly rate is now $152. Similarly, we have no basis to conclude that expert witness fees do not exceed the statutory maximum. See 49 C.F.R. 826.6(b)(2).

It is not the Board's obligation to recalculate awards and seek extensive additional evidence so that an application may comply with statutory and regulatory requirements. Fees for experts and all travel expenses must be fully justified. Title 49 C.F.R. § 826.23 requires separate itemized statements for each

(continued…)
EAJA recovery would be paid over to the attorney, but that if he did not prevail he would owe nothing. We held that use of such arrangements would not preclude recovery. There is no evidence of such an agreement here.

Instead, applicant argues that Wilson v. General Services Administration, 126 F.3d 1406 (Fed Cir 1997), as well as other cases, require that we treat applicant as if he incurred the fees and expenses. The FAA in response argues that it believes Wilson was wrongly decided, and we see inconsistencies between Wilson and SEC v. Comserv, 908 F.2d 1407 (8th Cir. 1990), a case we discussed in Wilson and Scott. We need not reach the issue here given our conclusions regarding substantial justification. And in light of the FAA's failure to address the issue in a meaningful way, and the fact that many of the cases cited by applicant were decided after Scott and were not reviewed in Livingston, we decline to do so. We prefer to wait for a case where the issues have been more thoroughly examined.

expert. Applicant made no effort to comply. In addition, applicant is required to provide a detailed itemization of work with corresponding hours and fees for legal services. Most of his application fails to do so. For example, there is no indication on most of the bills who performed which work and whether, if more than one attorney worked on the case, each is entitled to the same rate. See 49 C.F.R. § 826.6(c)(1-5). There are significant, wholly unexplained charges for outside counsel. There are considerable expenses clearly unrelated to this case. See June 30, 2000 billings for the "Sipps" case. Overall, applicant's application is deficient, inadequate, and unreliable as a measure of applicant's fees and expenses.

ACCORDINGLY, IT IS ORDERED THAT:

1. Applicant's appeal is denied; and

2. The law judge's decision to the extent consistent with this opinion is affirmed.

ENGLEMAN CONNERS, Chairman, ROSENKER, Vice Chairman, and CARMODY, HEALING, and HERSMAN, Members of the Board, concurred in the above opinion and order.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION

CIVIL NO. 1:05CV346

SCITECK CLINICAL LABORATORIES, INC., a Delaware corporation,	)	
Plaintiff,	)	
Vs.	)	**MEMORANDUM AND ORDER OF DISMISSAL**
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, An Agency of the United States Government,	)	
Defendant.	)	

THIS MATTER came on for hearing before the Court on November 29, 2005, on Plaintiff's motion for a preliminary injunction. The parties were represented by counsel and oral arguments were heard. Having considered the submissions of the parties, arguments of counsel, and the applicable legal standards, the Court denies Plaintiff's motion for preliminary injunction and vacates the temporary restraining order entered November 21, 2005.

I. FACTS

Plaintiff is a drug testing laboratory located in Western North Carolina. In 2003, Plaintiff obtained certification as a Substance Abuse and Mental Health Services Administration (SAMHSA) certified laboratory. **Complaint, ¶ 6.** SAMHSA certification falls within the purview of Defendant. ***Id.*** Continued certification as a SAMHSA certified laboratory is administered through the National Laboratory Certification Program (NLCP), who in turn contracts with Research Triangle Institute (RTI) to conduct inspections and evaluations of SAMHSA certified laboratories in North Carolina. ***Id.*, ¶ 7.**

Plaintiff's SAMHSA certification was suspended on November 14, 2005, with permanent revocation 30 days thereafter. ***See,* Exhibit B, Letter dated November 14, 2005, to John Lizzaraga from Robert Stephenson II, *attached to* Complaint).** Plaintiff filed a verified complaint in this Court on November 21, 2005, seeking a temporary restraining order (TRO) and preliminary injunction to prevent loss of its certification, declaratory relief, and asserting claims for Equal Protection and Due Process violations. On the record before it at the time, this Court granted Plaintiff's motion for a TRO,

and set Plaintiff's motion for preliminary injunction for hearing on November 29, 2005. **See Temporary Restraining Order, filed November 21, 2005.**

II. STANDARD

"Granting a preliminary injunction requires that a district court, acting on an incomplete record, order a party to act, or refrain from acting, in a certain way. The danger of a mistake in this setting is substantial." ***Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 284 (4th Cir. 2002) (quotations omitted).** As such, a preliminary injunction is considered "an extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied 'only in [the] limited circumstances' which clearly demand it." ***Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 811 (4th Cir. 1991) (quoting *Instant Air Freight Co. v. C.F. Air Freight, Inc.,* 882 F.2d 797, 800 (3d Cir. 1989)).** For that reason, "[w]henever the extraordinary writ of injunction is granted, it should be tailored to restrain no more than what is reasonably required to accomplish its ends. Particularly is this so when preliminary relief, on something less than a full record and full resolution of

the facts, is granted." ***Consolidation Coal Co. v. Disabled Miners of Southern W. Va.*, 442 F.2d 1261, 1267 (4th Cir. 1971).**

The standard in this Circuit for entry of a preliminary injunction is the "hardship balancing test." ***Direx Israel, Ltd., supra*; *see also Wetzel v. Edwards*, 635 F.2d 283, 287 (4th Cir. 1980).** Under the "hardship balancing test," the Court must consider four factors in deciding whether to grant or deny interim injunctive relief: "(a) plaintiff's likelihood of success in the underlying dispute between the parties; (b) whether plaintiff will suffer irreparable injury if interim relief is denied; (c) the injury to defendant if an injunction is issued; and (d) the public interest."[1] ***Wetzel*, 635 F.2d at 287 (footnote added).** Of these four factors, the two most important are "probable irreparable injury to the plaintiff if an injunction is not issued and likely harm to the defendant if an injunction is issued." ***Id.***

> When deciding whether to grant a preliminary injunction, the court must first determine whether the plaintiff has made a strong showing of irreparable harm if the injunction is denied; if such a showing is made, the court must then balance the likelihood of harm to the plaintiff against the likelihood of harm to the defendant. If the balance of the hardships tips decidedly in favor

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[1]The Court is also guided by the mandates of the Federal Rules of Civil Procedure, which govern the procedural requirements attendant to the granting of injunctive relief. ***See*, Fed. R. Civ. P. 65.**

> of the plaintiff, then typically it will be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult, and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation. But if the balance of hardships is substantially equal as between the plaintiff and defendant, then the probability of success begins to assume real significance, and interim relief is more likely to require a clear showing of a likelihood of success.

***Scotts Co., supra*, at 271 (quotations and internal citations omitted); *see also Doe v. Wachovia Corp.*, 268 F.Supp.2d 627, 630-31 (W.D.N.C. 2003).** When considering the harm to the parties flowing from the issuance or non-issuance of the requested preliminary injunction, the real issue for the Court's consideration is the level of harm resulting from the *improper* grant or denial of the petitioner's request. ***See Scotts Co., supra*, at 284.**

> If the judge grants the preliminary injunction to a plaintiff who it later turns out is not entitled to any judicial relief – whose legal rights have not been violated – the judge commits a mistake whose gravity is measured by the irreparable harm, if any, that the injunction causes to the defendant while it is in effect. If the judge denies the preliminary injunction to a plaintiff who it later turns out is entitled to judicial relief, the judge commits a mistake whose gravity is measured by the irreparable harm, if any, that the denial of the preliminary injunction does to the plaintiff.

***Id.*, at 284-85 (quoting *American Hosp. Supply Corp. v. Hosp. Prods. Ltd.*, 780 F.2d 589, 593 (7th Cir. 1986)).** Finally, a petitioner must always show some risk of probable irreparable injury, as likelihood of success on the merits

alone, without any showing of a risk of irreparable harm, is not sufficient to warrant the issuance of a preliminary injunction. ***See, Blackwelder Furniture Co. v. Seilig Mfg. Co., Inc.*, 550 F.2d 189, 196 (4th Cir. 1977).**

III. ANALYSIS

A. Irreparable harm to Plaintiff

The first step is for Plaintiff, as the party requesting preliminary injunctive relief, to "make a 'clear showing' that [it] will suffer irreparable harm if the court denies [its] request." ***Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 551 (4th Cir. 1994).** Jack Smith, Plaintiff's President and Chief Operating Officer, has averred that if Plaintiff loses its SAMHSA certification, it will suffer the following damages:[2]

a. Six employees will have to be immediately released from their jobs and many are the sole providers for their families.
b. Income of close to $100,000 per month will be lost.

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[2]The irreparable harm listed by Mr. Smith at ¶ 11d – that clients in Western North Carolina will incur additional time and expense in having to use a laboratory outside the area – is harm flowing to the community or public at large, rather than irreparable harm flowing to Plaintiff, and is, therefore, not considered by the Court at this particular juncture.

c. Hundreds of clients using Sciteck for drug testing, both federal clients and private sector clients, who require SAMHSA certification will be lost.

. . .

e. Sciteck will not be able to competitively compete for drug testing in the market again since the clients lost will not return.

f. The overall loss in investment and income will be in the millions of dollars.

Affidavit of Jack Smith, *attached to* Plaintiff's Motion for Temporary Restraining Order, filed November 21, 2005, ¶ 11.

"[W]hen the record indicates that [plaintiff's loss] is a matter of simple mathematical calculation, a plaintiff fails to establish irreparable injury for preliminary injunction purposes." ***Multi-Channel TV Cable Co.*, 22 F.3d at 551-52 (quotations omitted).** Therefore, were Plaintiff's asserted irreparable injury merely the loss of income or the loss in investment and income as set forth in Smith's Affidavit, Plaintiff would be unable to satisfy its burden and a preliminary injunction would be inappropriate. However, Plaintiff's irreparable harms go beyond mere monetary damages. Loss of its SAMHSA certification, according to Plaintiff, will result in permanent loss of both government and private sector clients, and in Plaintiff being unable to competitively compete in the marketplace. There is no way to quantify these immediate, irreparable harms, and "when the failure to grant preliminary relief creates the possibility

of permanent loss of customers to a competitor or the loss of goodwill, the irreparable injury prong is satisfied." ***Id.*, at 552 (citing *Merrill-Lynch, Pearce, Fenner and Smith v. Bradley*, 756 F.2d 1048, 1055 (4th Cir. 1985)).** Therefore, the Court finds that Plaintiff has satisfied its initial burden of making a clear showing that the improper denial of Plaintiff's motion for a preliminary injunction will result in immediate irreparable harm. ***Id.*, at 551.**

B. Harm to Defendant

The Court must now assess the harm that will flow to Defendant if the preliminary injunction is improperly granted, and balance that harm against the possible irreparable injury to Plaintiff. ***Id.*, at 552.** Defendant is concerned with ensuring that drug testing labs given its imprimatur as "SAMHSA certified" are operated at or above a minimal threshold level of competence and proficiency as established by the mandatory guidelines. **68 Fed. Reg. 19666 at § 3.2.** Defendant's interest, therefore, is in accurate testing in order to protect the safety and rights of employers, employees, the government, and the public at large. ***Id.*, at § 3.2(b) ("The ability to accurately determine the presence or absence of specific drugs/metabolites**

or to accurately determine the validity of a urine specimen is critical to achieving the goals of the testing program and to protect the rights of the Federal employees being tested.").

Defendant's interest is substantial, as is the harm that Defendant could suffer if this Court were to improperly grant Plaintiff's motion for a preliminary injunction. Defendant has questioned, over a significant period of time, the manner in which Plaintiff Sciteck was being operated and the validity of the test results promulgated by the laboratory. ***See,* Exhibit 2, November 14, 2005, Suspension Letter, *included in* Defendant's Exhibits to Response for a Preliminary Injunction, filed November 28, 2005, at 1 ("The deficiencies identified prevent Sciteck Clinical Laboratories from ensuring the reliability and accuracy of its drug testing and reporting. The deficiencies are material and the suspension of certification is required to protect the interests of the United States and its employees and to protect the public health and safety."); Exhibit 4, Affidavit of Ernest W. Street, *included in* Supplemental Exhibits to Defendant's Response, filed November 29, 2005, ¶ 4 ("The number and range of errors observed in PT cycles 8, 9 and 10 bring into question the accuracy of any given report emanating from this laboratory. . .**

. I have never observed the number and type of errors demonstrated by Sciteck Laboratories."); Exhibit 6, Affidavit of Michael R. Baylor, *included in* Supplemental Exhibits to Defendant's Response, ¶ 8 ("[I]n the tenth Performance Testing cycle, Sciteck failed to test properly three samples. One sample Sciteck failed to detect and report as invalid and two samples Sciteck failed to detect and report as adulterated. Sciteck's failure to properly test these samples resulted in false negative reports for these test samples."); *see generally,* Exhibit A, *attached to* Plaintiff's Complaint (containing the documented deficiencies from each of Plaintiff's evaluations). Allowing Plaintiff to continue operating under an erroneously issued preliminary injunction irreparably harms Defendant in that the safety and rights of employers, employees, and the public at large could be compromised by unreliable tests performed by a laboratory in non-compliance with the minimal standards of operation, which laboratory would have been unable to continue performing SAMHSA certified testing but for this Court's erroneously issued preliminary injunction. As Defendant stated in its response to Plaintiff's motion:

> Under the present state of affairs, the Plaintiff's drug testing and reporting are not reliable. Consequently, the unreliability of the

> Plaintiff's drug testing and reporting puts at risk the federal employees and agencies who must rely on such tests to ensure drug free workplaces. . . . To grant a preliminary injunction would create the potential of irreparable harm because it would permit the plaintiff's unreliable drug testing and reporting to continue, with potential impact upon the public at large.

Defendant's Response, at 6.

Having balanced the harm attending the parties from this Court's improperly granting or denying Plaintiff's motion for a preliminary injunction, the Court does not find that the potential harm to Plaintiff clearly outweighs the potential harm to Defendant. Rather, the Court finds that the balance of hardships is substantially equal as between the Plaintiff and Defendant. Therefore, "the probability of success begins to assume real significance," and Plaintiff must make a clearer showing of a likelihood of success on the merits in order to obtain preliminary injunctive relief. ***Scotts Co.*, *supra*, at 271.**

C. Likelihood of Success on the Merits

The thrust of Plaintiff's complaint is that it is in compliance with the minimal standards for a SAMHSA certified laboratory, that it is being treated differently than other SAMHSA certified laboratories, and that its certification is being suspended and revoked not because of any shortcomings in the

laboratory but rather because Defendant, by and through its agent RTI, is attempting to run Plaintiff out of business. ***See generally,* Complaint.** Plaintiff, therefore, claims Equal Protection and Due Process violations under the Fifth and Fourteenth Amendments to the United States Constitution, and also seeks "a judicial declaration striking the suspension and/or proposed revocation of Plaintiff's SAMHSA certification and further directing that the issue of such certification be revisited by the Defendant through supervision and direction of this Court under guidelines to insure an objective inspection directed towards such certification." ***Id.*, ¶¶ 28, 29-32.** The forecast of evidence at this point, however, does not support Plaintiff's position.

The mandatory guidelines establish the minimum standards for a laboratory to attain and sustain SAMHSA certification. "A laboratory must meet all the pertinent provisions of these Guidelines in order to qualify for and maintain certification under these standards." **69 Fed. Reg. 19667 at § 3.3.** The Secretary of the Department of Health and Human Services has the right to suspend or revoke a laboratory's certification "if the Secretary determines that revocation is necessary to ensure the full reliability and accuracy of drug and validity tests and the accurate reporting of tests." ***Id.,* at § 3.13(a).** The

evidence before the Court lends itself substantially more to a conclusion that Defendant was acting within its rights under the mandatory guidelines "to ensure the full reliability and accuracy of drug and validity tests and the accurate reporting of tests," than it does to a conclusion that Plaintiff's certification was suspended as a result of disparate, unfair treatment flowing from some sort of vendetta or ill-will. ***Id.; see also*, Complaint, ¶¶ 13-18, 21, 28, 29-32.**

The records of Plaintiff's evaluations and performance testing reveal numerous concerns dating back as far as June 2003. There have been problems with, among other things, security[3], chain of custody[4], method validation/periodic re-verification[5], and quality assurance.[6] Perhaps most

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[3]**See Document Review and Critique, Date: 26 June 2003, at Section F. Security; Document Review and Critique, Date: 11 December 2003, at Section F. Security; Document Review and Critique, Date: 17 June 2004, at Section D. Chain of Custody; Letter dated May 19, 2005, to John Lizzaraga from Craig Sutheimer (noting security issues during the April 2005 special inspection), *all included in* Exhibit A, *attached to* Complaint; Exhibit C, Document Review and Critique, Date: 25 August 2005, at Section F, *attached to* Complaint.**

[4]**See Document Review and Critique, Date: 11 December 2003, at Section D. Chain-Of-Custody, *included in* Exhibit A, *attached to* Complaint.**

[5]**See Document Review and Critique, Date: 11 December 2003, at Section S. Method Validation/Periodic Re-Verification; Letter dated May 19, 2005, to John Lizzaraga from Craig Sutheimer (noting**

troubling was Plaintiff's testing accuracy problems during the tenth Performance Testing cycle.[7] In fact, Plaintiff was informed as early as January 2005 that it was in danger of losing its SAMHSA certification. ***See* Letter dated January 10, 2005, to John Lizzaraga from Deborah Denson, *included in* Exhibit A, *attached to* Complaint; *see also* Letter dated May 19, 2005, to John Lizzaraga from Craig Sutheimer, *included in* Exhibit A, *attached to* Complaint.**

In addition to these problems, Plaintiff has failed to maintain a fully acceptable Responsible Person (RP) as required by the mandatory guidelines. Plaintiff alleges that its conditional RP, John Lizzaraga, has been treated

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methodvalidation/periodic re-verification issues noticed during the April 2005 special inspection), *all included in* Exhibit A *attached to* Complaint.

[6]***See* Document Review and Critique, Date: 17 June 2004, at Section G. Quality Control Materials and Reagents, and Section H. Quality Assurance: Review of QC Results; Letter dated May 19, 2005, to John Lizzaraga from Craig Sutheimer (noting quality control and quality assurance problems noticed during the April 2005 special inspection), *all included in* Exhibit A, *attached to* Complaint; Exhibit C, Document Review and Critique, Date: 25 August 2005, at Section G. Quality Control Materials and Reagents, and Section H. Quality Assurance: Review of QC Results, *attached to* Complaint.**

[7]***See* Baylor Affidavit, ¶ 8 (noting Plaintiff's failure to properly test three samples, which resulted in false negative reports).**

unfairly by Defendant, and that this unfair treatment is a substantial root cause of the dispute in this case. ***See, e.g.*, Complaint, ¶ 18; Brief in Support of Plaintiff's Motion for Temporary Restraining Order.** However, the evidence shows the following:

Plaintiff proposed Mr. Lizzaraga as the RP in April 2004. ***See* Letter dated April 2, 2004, to Susan Crumpton from Edwin Armitage, *included in* Exhibit A.** Defendant found Mr. Lizzaraga conditionally acceptable in April 2004, and Plaintiff was informed what deficiency was found in Mr. Lizzaraga as well as what needed to be done in order to correct this specific deficiency. ***See* Letter dated April 14, 2004, to Dr. Edwin Armitage from Michael Baylor, *included in* Exhibit A.** Mr. Lizzaraga was also made aware that his "knowledge in all areas of RP responsibilities [would] be assessed during the next regularly scheduled inspection," and that "[i]n order to continue to function as the RP of the laboratory, [he] must be found fully acceptable as RP during that inspection." ***See* Letter, dated April 28, 2004, to John Lizarraga from Michael Baylor, *included in* Exhibit A.** Further deficiencies were noted during the next inspection. Defendant continued to designate Mr. Lizzaraga as conditionally acceptable, outlined the deficiencies, and informed

Mr. Lizzaraga that he needed to be found fully acceptable at the next inspection or the lab would not be able to continue to operate (at least without a different, acceptable, RP). ***See* Letter dated June 25, 2004, to John Lizarraga from Michael Baylor, *included in* Exhibit A.** Mr. Lizarraga was not found fully acceptable at the next inspection, and a special inspection was scheduled specifically to evaluate Mr. Lizarraga's performance for a third time. ***See* Letter dated January 10, 2005, to John Lizzaraga from Michael Baylor, *included in* Exhibit A.** Mr. Lizarraga's performance was found unacceptable during the special inspection, and Plaintiff was informed that its certification would be suspended and/or revoked following the next regular inspection if Plaintiff did not have a fully acceptable RP. ***See* Letter dated May 19, 2005, to John Lizzaraga from Craig Sutheimer, *supra*.** Neither Mr. Lizzaraga nor the newly proposed RP, Dr. Gregory A. Hobbs, were found fully acceptable at the August 25-26,2005, inspection. ***See* Letter dated September 27, 2005, to John Lizzaraga from Craig Sutheimer, *included in* Exhibit A.**

In summary, the evidence appears to be that Mr. Lizzaraga was allowed to operate as Plaintiff's RP for more than a year without ever being found fully acceptable. After each evaluation he was informed of his deficiencies, and

while those particular problems may have been corrected, additional problems arose at subsequent evaluations. Nevertheless, Defendant provided Mr. Lizzaraga with numerous opportunities to qualify as the Responsible Person. Although certainly not conclusive, it would appear to this Court that if Defendant were truly refusing to certify Mr. Lizzaraga in some unfair way, or as the result of some personal dislike or vendetta, Defendant would not have given Mr. Lizzaraga and Plaintiff opportunity after opportunity for more than a year to improve his and its performance.[8] Rather, Defendant would have forced Plaintiff to choose a new RP or suspended Plaintiff's certification long before November 2005.

Based on the above-summarized evidence, as well as all of the remaining evidence submitted by the parties but not herein cited by the Court, the Court finds that Plaintiff has failed to make a sufficient showing of a clear likelihood of success on the merits.

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[8]Additionally, Plaintiff was given the opportunity to have an independent party observe the special inspection, and was also given the opportunity to challenge "for cause," on a conflict of interest basis, the special inspectors who evaluated Plaintiff's laboratory during the April 4 and 5, 2005, special inspection. ***See* Letter dated February 18, 2005, to Jack Smith from Donna Bush, *included in* Exhibit A.**

D. Public Interest

The public interest in this case is twofold. First, as noted by the Plaintiff, if the Court denies Plaintiff's motion for a preliminary injunction, the segment of the public that utilizes Plaintiff's drug testing services and requires testing by a SAMHSA certified laboratory will have to transfer its business to a laboratory outside Western North Carolina. **Smith Affidavit, *supra*, ¶ 11d.** This transference will come with additional time and costs to these clients. ***Id.***

However, the interest of the public at large – including Plaintiff's clients – includes having reliable drug testing conducted by a competent laboratory operating at, at the very least, a minimal level of proficiency under the guidelines and regulations. Additionally, employers and employees have an interest in ensuring that samples are accurately tested and reported, so that employers are not employing drug users falsely reported as clean, and clean employees are not subjected to false positive results. As Defendant stated, "the public interest will be protected and advanced by the suspension [of Plaintiff's SAMHSA certification and the denial of Plaintiff's motion for preliminary injunctive relief] because the samples collected in Western North

Carolina will be express shipped to certified labs which have not been found to be deficient in their testing and reporting, thus ensuring the reliability and accuracy that the Defendant has found is lacking in the Plaintiff."

Defendant's Response, at 8-9.

Considering these conflicting interests, it is clear to this Court that the more important interest is that of public safety, and reliable and accurate testing. The "public interest" factor, therefore, weighs in favor of denying Plaintiff's motion for a preliminary injunction.

Lastly, the mandatory guidelines found in the Federal Register require that "[b]efore any legal action is filed in court challenging the suspension or proposed revocation [of SAMHSA certification], respondent shall exhaust administrative remedies provided under this subpart, unless otherwise provided by Federal Law." **69 Fed. Reg. 19673 at § 4.15.** Based on the pleadings and allegations before the Court at the time Plaintiff's motion for a temporary restraining order was granted, the Court permitted Plaintiff to bypass this requirement on the grounds that the Defendant's agent RTI was alleged to be determined to revoke Plaintiff's certification regardless of the way Plaintiff's lab was operating, and that the result of the administrative appeal

provided in the Regulations would, therefore, be an unwarranted foregone conclusion. ***See* Plaintiff's Brief in Support of Motion for Temporary Restraining Order, at 2-3; *NationsBank Corp. v. Herman*, 174 F.3d 424, 430 (4th Cir. 1999).** With a more complete record before the Court at this stage, the result of the administrative appeal does not appear to be a foregone conclusion in the manner argued by Plaintiff. The Court finds that Plaintiff has, therefore, failed to meet its burden of providing sufficient grounds for waiving the exhaustion of administrative remedies requirement, and this matter, therefore, will not be justiciable unless and until Plaintiff proceeds through the appeals process provided by the mandatory guidelines. ***See* *NationsBank Corp.*, 174 F.3d at 428 ("Where Congress has intended to require administrative exhaustion prior to any judicial challenges to an agency's enforcement of a law or regulation, courts enforce that requirement unless a party provides grounds for waiving it in a particular case."); 69 Fed. Reg. 19670-73 (Subpart D - Procedures for Review of Suspension or Proposed Revocation of a Certified Laboratory).**

IV. ORDER

IT IS, THEREFORE, ORDERED that Plaintiff's motion for a preliminary injunction is **DENIED**.

IT IS FURTHER ORDERED that the temporary restraining order issued by the Court on November, 21, 2005, is **VACATED,** and this matter is hereby **DISMISSED WITHOUT PREJUDICE.**

Signed: December 1, 2005

Lacy H. Thornburg
United States District Judge

Written Testimony

of

John Wilburn Williamson, Assistant Director

North Carolina Division of Motor Vehicles
Training, Evaluation, and CDL
3117 Mail Service Center
Raleigh N.C. 27699-3117

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North Carolina Positive Drug Test Reporting Law

This testimony is based on the following areas of the program:

- History
- The Law
- Positive Drug/Alcohol Reporting
- CDL Disqualification/Motor Vehicle Report (MVR) Acknowledgment of Positive Test
- Request for Preliminary Hearing
- Requirements to end Disqualification for Positive Test or Refusal to Submit
- Current Statistics
- Program Benefits
- Program Costs
- Future Upgrade Costs

History of Program:

In 2004, the Commercial Driver License Branch of the North Carolina Division of Motor Vehicles was approached by the North Carolina Public Transportation Association for the purpose of proposing legislation which would require the employer of a commercial driver who tested positive for drugs or alcohol (as described under Federal Regulation 49 C.F.R. part 382) to report the positive results to the division.

The North Carolina Public Transportation Association wanted to eliminate the problem of an employee who tested positive and who was dismissed from employment from going to another transit company a few weeks later and being employed. In this scenario, the driver would wait until he/she would feel confident they could pass the pre-employment drug/alcohol test, go to the interview, be screened for drugs/alcohol, pass, and be hired and driving the next day.

The Division of Motor Vehicles worked with this group and together drafted legislation which was passed and signed by Governor Mike Easley. This Bill became law on December 1, 2005. During the early stages of the drafting of this legislation, we had the help of the North Carolina Trucking Association, which is very supportive of the Positive Drug/Alcohol reporting program. Also very helpful was the State Director of the Federal Motor Carrier Safety Administration, Chris Hartley and his staff.

In 2007, we asked the legislature to make changes to our law to address refusals to take the test and require pre-employment positives to be reported to the division. We wanted to make it clear that if a driver refuses to take a drug or alcohol test it will be reported to the Division as a positive test. We also wanted the pre-employment positive results reported to the Division as well.

The North Carolina Legislature passed the above changes into law. This effort was greatly enhanced by the North Carolina Trucking Association and President Charlie Diehl who supported the changes and spoke before the legislative subcommittee. House Bill 769 was passed and signed by Governor Mike Easley on August 30, 2007.

The Law:

N.C. G.S. 20-37.19(c). Employer responsibilities.

"(c) The employer of any employee or applicant who tests positive or of any employee who refuses to participate in a drug or alcohol test required under 49 C.F.R. Part 382 and 49 C.F.R. Part 655 must notify the Division in writing within five business days following the employer's receipt of confirmation of a positive drug or alcohol test or of the employee's refusal to participate in the test. The notification must include the driver's name, address, drivers license number,

social security number, and results of the drug or alcohol test or documentation from the employer of the refusal by the employee to take the test."

N.C.G.S. 20-17.4(l) Disqualification to drive a commercial motor vehicle.

"(l) Disqualification Based on Drug or Alcohol Test. – Upon receipt of notice of a positive drug or alcohol test, or of refusal to participate in a drug or alcohol test, pursuant to G.S. 20-37.19(c), the Division must disqualify a CDL holder from operating a commercial motor vehicle until receipt of proof of successful completion of assessment and treatment by a substance abuse professional in accordance with 49 C.F.R. § 382.503."

N.C.G.S. 20-396(b) Unlawful Motor Carrier Operations.

"Any motor carrier, or other person, or any officer, agent, employee, or representative thereof, who shall willfully fail or refuse to make a report to the Division or Department of Crime Control and Public Safety as required by this Article, or other applicable law, or to make specific and full, true, and correct answer to any question within 30 days from the time it is lawfully required by the Division or Department of Crime Control and Public Safety so to do, or to keep accounts, records, and memoranda in the form and manner prescribed by the Division or Department of Crime Control and Public Safety or shall knowingly and willfully falsify, destroy, mutilate, or alter any such report, account, record, or memorandum, or shall knowingly and willfully neglect or fail to make true and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of the carrier, or person required under this Article to keep the same, or shall knowingly and willfully keep any accounts, records, or memoranda contrary to the rules, regulations, or orders of the Division or Department of Crime Control and Public Safety with respect thereto, shall be deemed guilty of a Class 3 misdemeanor and punished for each offense only by a fine of not more than five thousand dollars ($5,000). As used in this subsection the words "kept" and "keep" shall be construed to mean made, prepared or compiled as well as retained."

N.C.G.S. 20-37.20B. Appeal of disqualification for testing positive in a drug or alcohol test.

"Following receipt of notice pursuant to G.S. 20-37.19(c) of a positive test in an alcohol or drug test, the Division shall notify the driver of the pending disqualification of the driver to operate a commercial vehicle and the driver's right to a hearing if requested within 20 days of the date of the notice. If the Division receives no request for a hearing, the disqualification shall become effective at the end of the 20-day period. If the driver requests a hearing, the disqualification shall be stayed pending outcome of the hearing. The hearing shall take place at the offices of the Division of Motor Vehicles in Raleigh. **The hearing shall be limited to issues of testing procedure and protocol.** A copy of a positive test

result accompanied by certification by the testing officer of the accuracy of the laboratory protocols that resulted in the test result shall be prima facia evidence of a confirmed positive test result. The decision of the Division hearing officer may be appealed in accordance with the procedure of G.S. 20-19(c6)."

Positive Drug/Alcohol Reporting:

The North Carolina positive drug test reporting law strengthens the current federal regulations that require a driver who tests positive to be removed from a safety sensitive position such as driving a commercial motor vehicle. Federal regulations would allow the driver to return to duty once he/she has a negative drug/alcohol test performed.

The North Carolina Division of Motor Vehicles will disqualify a driver's CDL if we receive a positive test result following pre-employment, random, reasonable suspicion, or post-accident testing. The North Carolina Division of Motor Vehicles will also disqualify a driver who refuses to take a drug/alcohol test for random, reasonable suspicion, and post accident testing.

Once the motor carrier (employer) reports the positive test to the Division we will send the driver a letter of official notice. This letter gives the effective date of the disqualification (twenty days from the date of letter) and informs the driver a preliminary hearing is allowed.

CDL Disqualification/Motor Vehicle Report (MVR) acknowledgment of positive test:

When the Division receives from the employer the Federal Testing Custody and Control form signed by the Medical Review Officer (MRO) and the CDL-8 (Positive Drug/Alcohol Test Form) or a CDL-9 (Refusal to submit to a Federal Drug/Alcohol Test Form), the Division will enter onto the driver's motor vehicle record a pending disqualification, which will become effective twenty days from the date correspondence is mailed to the driver.

a. Test results form must have the name and signature of the Medical Review Officer, not the certifying scientist.

b. Test results form must have the date and reason for the test.

c. Test results form must certify that the testing was performed by federal requirements and guidelines.

d. Alcohol test form must show a BAC of .04 or more before the disqualification can be entered.

e. Alcohol test form must have the name and signature of the Breath Alcohol Technician.

The disqualification will remain indefinite until the driver completes a substance abuse assessment.

The driver's MVR will only show the date of the disqualification followed by "Disq:" CDL Disqualification GS 20-17.4(l).

Request for Preliminary Hearing:

In accordance with N.C.G.S. 20-37.20B, a driver may request a preliminary hearing, but the request must be made prior to the effective date of the disqualification. **The preliminary hearing may only address the testing protocol and procedures per federal guidelines.** No other issues may be heard based on North Carolina statute. The disqualification is stayed pending the final decision of the hearing. The driver has thirty days to appeal an adverse decision to the Superior Court pursuant to N.C.G.S. 20-19(c6).

Requirements to End a Disqualification for Positive Test or Refusal to Submit:

To end the disqualification, the Division must receive verification from a Substance Abuse Professional that the employee successfully completed the substance abuse assessment and any training or education that was required, per N.C.G.S. 20-17.4(l).

The disqualification will end on the date the completion is received by the Division of Motor Vehicles. Completions are to be sent to the NC DMV, Hearings Unit, 3116 Mail Service Center, Raleigh, NC 27699-3116 or faxed to (919) 861-3822.

Current Statistics:

Program Results as of October 17, 2007:

The positive drug test reporting law was signed by Governor Mike Easley on July 5, 2005, to become effective on December 1, 2005. The Division received its first notice of a violation in February 2006.

The following data represents positive notifications we have received from employers beginning with the first action in February 2006 through October 17, 2007.

Positive Tests Reported	-	544
Current Active Disqualification	-	357
Completed Assessment	-	150
Current Pending Disqualifications	-	20
Completed SAP prior to Disqualification	-	17
Hearings Requested	-	62
Hearings Cancelled or Did not Appear	-	13
Hearings Actually Conducted	-	49

North Carolina CDL Data:

As of October 1, 2007, North Carolina had 325,158 CDL holders, 46,877 of whom held a Hazardous Materials (HazMat) endorsement.

We have approximately 23,000 Interstate Carriers in North Carolina.

Program Benefits:

Though most of the data we currently collect must be retrieved manually, DMV personnel assigned to this unit can provide statistics on a number of issues:

- Determine how many positives are received.
- What segment of the commercial industry the positive test result is from. Example: of the 544 positive tests reported, 53 are from school systems reporting school bus driver positives. This equals 9.6% of all positive test results. This one program benefit makes it all worth our effort. School bus drivers transport the most precious cargo we have in North Carolina, our school children.
- What illegal substance was detected during the test or amount of blood alcohol content (BAC). For instance, of the 53 school bus driver positives 27 tested positive for Marijuana, 23 for Cocaine, one for Amphetamines, one for alcohol, and one for a refusal.
- The geographical location within the state where the positive results were reported.
- Reason for the test or refusal (random, reasonable suspicion, post

accident, or pre-employment).

Other program benefits are:

- North Carolina is disqualifying the commercial driver from driving a commercial motor vehicle legally.
- The disqualification appears in a way on his/her motor vehicle report (MVR) where any future employer could research and determine the cause of the disqualification. "INDEF DISQ:" CDL Disqualification GS 20-17.4(l) Statute: 20-17.4(l).
- The disqualification history remains on the MVR for a period of two years after DMV receives the satisfactory completion letter from the substance abuse assessment program.
- North Carolina requires the driver to receive help for his/her drug/alcohol problem. The driver must successfully complete a substance abuse assessment program prior to reinstatement of the commercial driving privilege. The law provides a motivation for the driver to address his/her substance abuse problem.

Program Costs:

The primary cost of implementation of the program involved changes to our mainframe application software, the State Automated Driver License System (SADLS). The changes included modifications to business rules addressing CDL drivers, suspension/disqualification rules, driver adjudication, and posting of information to the driver record. This turned out to be a programming project with an estimated cost of $50,000 representing about 600 hours of programmer time.

Implementation of the program during the first 20 months has been minimal, given the benefits reaped from the program. The new law has required a maximum of 8 hours per week of time from a clerical staff person and a maximum of 8 hours per week from a hearing officer who hears the appeals.

The office where these records are kept is secure, allowing only limited access. Only the two employees mentioned above and the supervisor have access to this area.

The cost of personnel will grow as more employers learn that they must report positive results. North Carolina has had no media campaign to inform the motor carriers. The North Carolina Trucking Association, North Carolina Highway Patrol

Motor Carrier Section, and the Federal Motor Carrier Safety Administration Auditors, as well as the North Carolina CDL Compliance Auditors are informing the carriers of this new law as they travel across the state conducting audits. At this point, we cannot be certain that all positive drug test results or refusals are being reported to us. Our goal is to get the word out to employers so we can have 100 percent compliance.

Future Upgrade Costs:

As mentioned earlier in this written testimony, much of the data we collect is collected manually. Unfortunately, we have many reasons to believe that the positive drug test reporting in North Carolina has only scratched the surface.

We are looking at ways to automate and enhance the collection of data to provide us with monthly reports which will give us detailed information on the positive drug/alcohol data that will be beneficial to helping our agency and other state and federal agencies to fight this dangerous problem.

The upgrades include adding a new screen to the Adjudication Conviction Maintenance area.

This new screen will display standard demographic information including, Name, Customer ID, SSN, and DOB. Some areas will be pre-filled with data from the most recent issuance, including license type, license class, issue date, expiration date, and endorsements.

The new screen will have the following data items on it:

- Type of Drugs: Amphetamines, Cocaine, Opiates, Cannabinoids and Phencyclidine.
- Type of Test: Alcohol or Drug.
- If alcohol, a BAC level must be entered on the screen.
- Refusal Indicator: Y or N with default to No. If the refusal is marked "Y" the system will have a cross edit on location of refusal, either at the company or lab.
- Reason for Test: Pre-employment, Random, Reasonable Suspicion, Post-Accident, Return to Duty, Follow-up.
- Company Name: Allow this to be a free text field, all caps (It will cross check IRP system).
- Company Address: Allow this to be free text field, all caps (cross check

with IRP system).

- Company phone number: Allow this to be free text field.
- Company Contact Person: Allow this to be free text field.
- County of Employer: Allow this to be free text field.

Monthly Statistical reports will be created. There will be multiple reports. The report data will include:

- What drugs were involved.
- Type of company.
- Test reason (pre-employment included).
- Refusal or positive test.
- Endorsements: how many and what type.
- County of employer.
- What school system.

SADLS will need to add new database tables, PDF files, create new screens, and many new programs to accomplish enhanced functionality.

We will be able to collect all data we currently collect and all of the above new data electronically. All data and information is private and confidential.

To accomplish this and capture the data needed to maximize our efforts with the Positive Drug Test Program will cost an estimated $153,360.00.

Conclusion:

The positive drug testing law, including the original legislation and the recently enacted enhancements, have provided inestimable benefits to highway safety at a minimum of cost to the taxpayers. In just 20 months, North Carolina has disqualified more than 500 commercial drivers who previously might have failed a drug test and turned right around and resumed driving for another carrier within weeks. The impact alone on protecting our school children from school bus drivers with substance abuse problems is well worth the minimal resources required for the program. In addition to the benefits to highway safety, we have to

consider the benefits to our society from providing an incentive to the drivers with a substance abuse problem who, for the first time, are given an incentive to receive treatment and address their problems.

Answers to questions from Chairman Peter A. DeFazio
Subcommittee on Highway and Transit Oversight and Investigations Hearings on
"Drug and Alcohol Testing of Commercial Motor Vehicle Drivers"

November 28, 2007

Question #1)

Under DOT regulations, Owners-Operators are required to meet the same drug and alcohol testing requirements as multi-employee motor carriers. Under the rules, a third party administrator can report a positive test to the employer – in this case the driver – but only the employer has authority to take the driver out of service. Is the same true for reporting positive results to the state? Would an owner-operator have to report himself?

Answer:

The simple answer would seem to be yes.
FMCSA indicates that an "owner-operator" must comply with regulations both as a driver and as an employer. It is unlikely an owner-operator would report a positive result knowing a disqualification of his/her CDL would follow.

The Federal Regulation 40.331(e) allows the employer or service agent (who is conducting the tests) to report the results of the tests if requested by a federal, state or local safety agency with regulatory authority over the employer or the employee. They must provide drug and alcohol test records concerning the employee.

Currently, North Carolina Law will not permit us to collect positive results from any source other than the employer. However if we add this into our current general statute dealing with positive drug testing we could collect the positive results and take action on owner operators who use a third party administrator (service agent).

Question #2)

Are you pursuing any legislative efforts that would enable a third party administrator to provide the state with information about a positive test or refusal?

Answer:

We have met with our representative for the North Carolina Attorney General's office to discuss additional legislation, which would require Medical Review Officers in North Carolina to submit all positive test results to the division. This is work in progress and we will pursue this through the 2008 session of the General Assembly.

We have consulted with the North Carolina Trucking Association and they are giving strong support to changes in the law that will assure all positive results are reported to the division.

Question #3)

Is there any evidence that commercial drivers are attempting to evade the system by obtaining licenses in other states? Have there been any changes in the number of applications for new or renewed CDLs since the law was enacted.

Answer:

Our data received 11/28/07 shows no significant changes in the number of applications for new or renewal CDL's. The data collected goes back to January 2006 through October 2007.

Question #4)

If one of the drivers whose license is suspended attempts to get a license in another state, will the information about the drug tests be available to that state?

Answer:

YES; When North Carolina disqualifies a commercial driver the disqualification shows on a national database called the, Commercial Driver License Information System (CDLIS). This system tracks commercial drivers from state to state and has codes, which will tell the state why the driver (who may be trying to transfer his CDL) is not eligible. The representative will then inform the driver that he or she is not eligible and has a problem in North Carolina and must have it cleared up prior to being issued in that state. The CDLIS system keeps drivers from evading suspensions, disqualification's, fines and judgements by going to other jurisdictions and eluding driver problems.

The disqualification also will appear on the driver's motor vehicle record (MVR). Federal regulations require an employer to have a MVR for new employees. The disqualification will also show on the MVR. If the driver does not satisfy the requirements to have the disqualification lifted it will remain on his/her license indefinitely. If the driver successfully completes the Substance Abuse Assessment program then the disqualification will be lifted. However, a record of the disqualification remains on the MVR for a period of two years from the date the division receives acknowledgement of successful completion of the program.

It is our understanding a motor carrier must have a three-year driving record for new hires. We will be seeking legislation to increase the time a positive drug/alcohol disqualification remains on the MVR to three years. This will better serve the motor carrier and there search for accurate information based on the three-year rule.

Question #5

ATA and others support the creation of a national database of positive tests and refusals.

a) Do you support the national concept?

Answer:

a) We have in-place a national database called the Commercial Driver License Information System (CDLIS). This database along with our collection of information regarding positive test results is important information for our state agency to reduce the number of crashes and fatalities on our highways. I would never object to any plan, which would promote highway safety. However, I feel by looking at what is already available as far as a national database may lead one to believe it unnecessary to build another database solely for the use of the trucking industry.

b) What impact would it have on your state system?

Answer:

b) Currently our state system (DMV) would not be effected.

The ATA proposal would have an additional impact on North Carolina motor carriers. A motor carrier will then be required to report a positive to NCDMV and also report the positive to the ATA national database.

c) Is there a preference to keep it at a state level and why?

Answer:

c) It is our preference to keep it at a state level;

- Because we disqualify the drivers CDL and remove all possibility of this driver being behind the wheel of a CMV legally.
- We require the driver to attend a substance abuse assessment program and successfully complete the program prior to lifting the disqualification. The driver must receive treatment for his addiction.
- The current national database (CDLIS) assures other states are aware of the problem driver when needed.
- The disqualification shows on the motor vehicle record of the driver who tested positive. This means any future employee (motor carrier) will see on the record the driver is disqualified due to the North Carolina general statute G.S. 20-17.4(l). Federal regulation requires a motor carrier to obtain a MVR for all new hires.
- Once the disqualification is lifted and the driver is eligible to receive a CDL the end date of the disqualification and the general statute number remains on the motor vehicle record for two years. We are

proposing this be changed to three years to better serve the trucking industry.

- State law enforcement officers can see this disqualification when conducting a roadside check of a driver's motor vehicle record.
- The North Carolina system has the capability of collecting a large amount of data from each positive reported. We can determine geographical locations of high concentration of drug use among commercial driver. We can pin point motor carriers who may have a large percentage of positive test results. We can determine from what segment of the industry we are seeing positive results reported. Such as School Bus drivers, state government employees, transit drivers and the commercial segment of the industry.

Each state is required by federal regulations to assure the trucking industry and the motor carriers in it meet the federal regulations pertaining to the drug-testing program. Each state must manage its own commercial driver license program. It would seem that the state level would be the most practical solution for accurate ongoing records.
Each state has a more vested interest in protecting their population than does a federal or national service, which is, removed from the day-to-day approval process of licensing.

Questions from ranking Member John J. Duncan, Jr.

November 28, 2007

1. **Why did North Carolina choose to implement a system to report positive substance abuse test results?**

Answer:

We were approached by the North Carolina Public Transportation Association with a problem they had with transit drivers testing positive for drugs or alcohol, being dismissed from employment and a few weeks later (when the driver felt comfortable he/she would test negative for pre-employment testing), be hired by another transit company, and driving a passenger bus the next day. This is what the industry calls, "job hopping".

While working with the NC Public Transportation Association, the North Carolina Trucking Association and other industry officials we became aware this was an industry wide problem.

It became aware to all this problem had a negative impact on the safety of the motoring public.

Now after months have passed with the original positive drug testing law on the books we see that we have only scratched to surface to a problem that is rampant throughout every segment of the trucking industry. We continue to strengthen our drug testing law and will continue in 2008.

2. **Did organized labor in North Carolina support or oppose the law that created your state's reporting requirement?**

Answer:

To my knowledge organized labor never weighed in on either bill we introduced in 2005 or the improvement bill in 2007. We did not hear of any opposition for either bill we have thus far introduced.

3. **How does North Carolina's program differ from the programs in place in Texas, Oregon and Washington?**

Answer:

I have not studied the programs in the state's you have mentioned.

It has been said that North Carolina is the first state to take action and actually disqualify a commercial driver for testing positive.

Our goal was to take and build our program around the current federal regulations dealing with drug testing.

4. **My understanding is that employers are responsible for reporting a positive test result. What is the process for an owner/operator? Do they self report or does the MRO play a role in this process?**

Answer:

FMCSA indicates that an "owner-operator" must comply with regulations both as a driver and as an employer. It is unlikely an owner-operator would report a positive result knowing a disqualification of his/her CDL would follow.

Currently the MRO is not reporting to the division any positive results.

5. As it stands now, are there any weaknesses in this law? Have you spoken to the North Carolina legislature regarding any proposed changes to this legislation and if so what are those changes?

Answer:

Even with the wide range of help we received from the FMCSA representatives, North Carolina Trucking Association, North Carolina Public Transportation Association, NC Attorney General's office and others we realize today we do have weaknesses in the law. When doing something of this magnitude, which we understand had never been tried before, we expected changes to the law would need to be made. Changes were made to the original law this year and we will again seek legislation for changes in 2008. Currently our NC Attorney General's office is reviewing two areas where we would like to make changes and or add to the law.

a) To require the North Carolina Medical Review Officer's to report all positives to the NCDMV. We are considering having all MRO's to possibly register with the division and to report all positives.

b) In our current law, once a disqualified driver has successfully completed the substance abuse assessment program and the division receives acknowledgement of the completion, the disqualification with the end date remains on the motor vehicle report for a period of two years. We will ask to have this changed to three years to correspond with the motor carrier requirement of having a motor vehicle record on new hires which cover the previous three years.

6. Do you have any thoughts on the ATA proposed National Clearinghouse and its impact on The North Carolina enacted law?

Answer:

We would never object to any plan, which would promote highway safety. We feel by looking at what is already available as far as a national database may lead one to believe it unnecessary to build another database solely for the use of the trucking industry. We have in-place a national database called the "Commercial Driver License Information System" (CDLIS). The system tracks commercial drivers from state to state and has codes, which will tell states why the driver (who may be trying to transfer his CDL) is not eligible. This national system is already in place and keeps commercial drivers from evading suspensions, disqualification's, fines and judgements by going to other jurisdictions and eluding driver problems.

Based on the information we have we see no impact on our North Carolina law or the division as it pertains to the ATA proposal. The ATA proposal would have an additional impact on North Carolina Motor Carriers. The NC motor carriers would be required to submit positive test results to the state (per state law) and be required to submit positive test results to the ATA or national clearinghouse.

Submitted to the:

SUBCOMMITTEE ON HIGHWAYS AND TRANSIT
OF THE
U.S. HOUSE OF REPRESENTATIVES
TRANSPORTATION AND INFRASTRUCTURE COMMITTEE

Written Testimony of

THE AMERICAN TRUCKING ASSOCIATIONS

Regarding

Drug and Alcohol Testing of Commercial Motor Vehicle Drivers

Held on

November 1, 2007

Driving Trucking's Success

950 North Glebe Road, Suite 210
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Introduction

Chairman DeFazio, Ranking Member Duncan, and other Members of the Subcommittee, thank you for the opportunity to communicate the American Trucking Associations' (ATA)[1] recommendations on "Drug and Alcohol Testing of Commercial Motor Vehicle Drivers."

I am Greer Woodruff, Senior Vice President of Corporate Safety and Security for J. B. Hunt Transport Inc. (J. B. Hunt) located in Lowell, Arkansas. I am responsible for all aspects of J. B. Hunt's safety, compliance and security programs, including management of our company's drug and alcohol abuse prevention programs. J. B. Hunt is one of the nation's largest motor carriers serving market leaders in a wide number of industries including retail, beverage, consumer goods, food, paper and manufacturing. J. B. Hunt operates in the contiguous 48 states and Canada deploying approximately 11,700 power units and 56,200 trailers, and employing 13,570 commercial motor vehicle drivers.

It is my pleasure to appear before the Subcommittee today on behalf of ATA. J. B. Hunt is a longstanding and active member of ATA, and I currently serve on its Safety Policy Committee and its safety council's Regulations Committee. ATA has long been a proponent of alcohol and drug testing for commercial drivers and actively supported the Omnibus Transportation Employee Testing Act of 1991. This Act required drug and alcohol testing of safety-sensitive transportation employees in aviation, trucking, railroads, mass transit, pipelines and other transportation industries.

Our members' drivers, who hold commercial driver's licenses (CDL), are subject to the requirements of 49 CFR Part 40 – Procedures for Transportation Workplace Drug and Alcohol Testing Programs, and the Federal Motor Carriers Safety Administration (FMCSA) regulations 49 CFR Part 382 – Controlled Substances and Alcohol Use and Testing. Many of our member motor carriers also conduct testing programs beyond federal requirements under internal company policy requirements to help assure the safety of our nation's highways.

ATA's comments are directed primarily at how drug and alcohol testing and reporting can be improved in the motor carrier community. ATA and its member carriers support any reasonable and responsible initiatives to eliminate unauthorized usage among CDL drivers and assure an effective implementation of such prevention programs. ATA believes that Congress can aid advancements by:

- Authorizing and funding a National Clearinghouse for Positive Drug & Alcohol Test Results.
- Encouraging the U.S. Department of Transportation (DOT) to better focus their random testing rate requirements.

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[1] ATA is a united federation of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interests of the trucking industry. Its membership includes more than 2,000 trucking companies and industry suppliers of equipment and services. Directly and indirectly through its affiliated organizations, ATA encompasses over 34,000 companies and every type and class of motor carrier operation.

- Banning the sale of and establishing penalties for the use of adulterant and substitution devices.
- Supporting the use of alternate specimen testing methods (i.e., hair).
- Assuring good practices are followed by drug and alcohol collection sites.

Published Statistics on Driver Usage of Alcohol & Drug Usage

Currently published figures indicate that illicit use of alcohol and drugs by truck drivers is relatively low. FMCSA's Annual Drug and Alcohol Testing Surveys over the last ten years estimate that CDL drivers on the average used controlled substances at the rate of 1.68% and alcohol at the rate of 0.22%. Stated otherwise this is less than two drivers in 100 using controlled substances and about 2 in 1000 using alcohol. This is further illustrated in Table 1 below and in the attached Tables 2 and 3.

Table 1. FMCSA Results of Annual Drug and Alcohol Surveys 1996-2005

Areas of Testing	Estimated Positive Random Rates of Commercial Drivers by Percentage									
	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005
Controlled Substance	2.2	1.3	1.5	1.3	2.0	1.5	1.7	2.0	1.6	1.7
Alcohol (BAC ≥ 0.04)	0.2	0.2	0.4	0.2	0.2	0.1	0.4	0.2	0.1	0.2

FMCSA's November 2005 "Report to Congress on the Large Truck Crash Causation Study" (LTCCS)[2] is also revealing. It was determined that associated factors[3] for *both single vehicle and multi-vehicle truck crashes* mostly involved the driver. This statistically representative study further reports that: "[l]egal drug use, prescription and over-the-counter drugs, show up in a large number of cases. On the other hand, the use of illegal drugs and alcohol and truck driver illness are rare." Significantly, illegal drug use was reported at 2.3% and alcohol use was 0.8%.

In a separate data analysis involving multi-vehicle crashes (i.e., involving at least one truck and one passenger vehicle), the LTCCS found that legal drug use (i.e., prescription drugs) was very common for drivers of both types of vehicles, but illegal drug use was a much

[2] See FMCSA website: http://ai.fmcsa.dot.gov/ltccs/data/documents/reportcongress_11_05.pdf for the LTCCS report to Congress.

[3] Per the LTCCS report, associated factors were defined as: Any of approximately 1,000 conditions or circumstances present at the time of the crash is coded. The factors coded are selected from a broad range of factors thought to contribute to crash risk. No judgment is made as to whether any factor is related to the particular crash, just whether it was present. The factors present work with the assignment of a critical reason to identify the range of events that lead to crashes. The list of the factors that can be coded provides enough information to comprehensively describe circumstances of the crash. *Example:* The passenger vehicle driver was coded with the following factors: alcohol use and fatigue. There were no vehicle or environmental factors coded for the passenger vehicle. The driver of the wrecker was coded with the following factors: being in a hurry prior to the crash and conversing with a passenger. The wrecker was coded with a defective tail light. There were no environmental factors coded for the wrecker.

larger factor for passenger vehicle drivers. Illegal drug use was 7% of passenger vehicle drivers and only 0.4% of large truck drivers. Alcohol usage was found for 9% of passenger vehicle drivers and 0.3% of large truck drivers.

While FMCSA's data on illegal drug use has been consistently around 2% since 1996, other findings suggest there might be a higher positive percentage in the motor carrrier industry. Data from some transportation companies performing drug tests on hair samples pursuant to company policy and not DOT regulations suggests that the drug abuse percentage is higher than 2%, particularly on pre-employment tests. These companies utilizing hair specimens use the same 5 drug panel test and have similar cutoff levels as with DOT urine testing, and employ MROs in the process. Additionally, the Operation Trucker Check Program undertaken by the State of Oregon in 1998, 1999 and 2007 is another example that drug use by commercial drivers might be higher than the FMCSA-published 2% figure. However, Oregon's approach is different from the process regulated by the DOT. The Oregon tests involved four short duration snapshots of driver drug usage, rather a decade of on-going DOT drug and alcohol program information; were locale-specific rather than nationwide in scope; and tested for **more** drugs than the required DOT panel of 5 drugs. The Oregon program also did not appear to use medical review officers (MRO); employed a state forensics lab vs. a Substance Abuse and Mental Health Services Administration (SAMHSA) certified laboratory; and may have involved different cut-off levels for positive drug results. These dissimilarities from the more tightly controlled DOT testing regime makes it difficult to compare the Oregon spot-checks against the more comprehensive data collected by FMCSA.

ATA's Proposed National Clearinghouse for Positive Drug & Alcohol Test Results

Drug abuse, as measured by the percentage of "positive" test results in the trucking industry, is about one quarter of that found in the general workforce.[4] This has remained steady in a range of 1.3 to 2.2 percent of the truck driver population since the beginning of the required testing program.[5]

Nevertheless, since there are at least 3.4 million truck drivers in the industry, a near 2 percent "positive" rate translates into thousands of truck drivers with a drug abuse problem. This is unacceptable to ATA and the trucking industry.

Unfortunately, there is a loophole in the federal drug and alcohol testing regulations for commercial drivers, which is being exploited by some drug-abusing drivers. The loophole is as follows. A driver applies for a job at a trucking company and tests "positive" for drugs on the DOT-required pre-employment drug test. As a result of the positive test result, the driver is not hired. The driver simply waits a limited amount of time to cleanse his system (a few days to a few weeks depending on the drug used) and then applies for a job at a different trucking company and passes the DOT-required pre-employment test. The driver does not

[4] "Worker Substance Use and Workplace Policies and Programs," U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, June 2007.

[5] Information provided by FMCSA in July 2007. This positive test rate is based on an annual statistically valid sampling of trucking fleets subject to testing.

report the previous positive test result on the employment application and, as a result, the second trucking company is not aware of the driver's previous "positive" test result. These drivers have learned to operate a "shell game."

In some cases, collection personnel even recognize that the drivers are coming back in a few days to a few weeks after testing positive. However, these drivers are aware that collection personnel and MROs cannot tell the next motor carrier of a previous positive test result. This is because of the privacy safeguards contained in the current DOT regulations which, in turn, perpetuate this loophole. Thus drivers avoid going through the required substance abuse evaluation, treatment and rehabilitation process that is supposed to follow a positive drug test.

The trucking industry made Congress aware of this loophole and its associated problems in the late 1990s when ATA first began advocating for a national clearinghouse. In 1999, Congress passed the Motor Carrier Safety Improvement Act which, in lieu of directing that a clearinghouse be established, required DOT to evaluate the feasibility and merits of collecting, in some centralized manner, "positive" drug test results of commercial drivers. FMCSA studied this issue and submitted a report to Congress in May of 2004[6]. This report found that a centralized clearinghouse for positive results was feasible, cost-effective and, more importantly, could improve safety. The study also found that a clearinghouse approach was more desirable than the current system of driver self-reporting, and hiring companies contacting previous employers in an attempt to obtain this critical safety-related information.

There are already various forms of positive test results reporting and retention in the states of Arkansas, Oregon, North Carolina, Texas and Washington. We commend the efforts undertaken by these states. However, a national clearinghouse would establish a central and uniform system to report, retain and retrieve information on positive test results more in tune to interstate commerce, while reducing the difficulties and operating conflicts of individual state programs.

ATA urges Congress to address the longstanding loophole by passing legislation that would authorize and fund the development and deployment of a centralized National Clearinghouse for Positive Drug & Alcohol Test Results, with appropriate privacy safeguards for drivers and strict access controls for authorized users. A centralized clearinghouse approach, with strict access controls, will afford drivers more privacy and will be a more secure method of retaining positive tests results than the current distributed system of hundreds of thousands of motor carriers retaining and sharing positive results when this information is sought. ATA also encourages inclusion of positive alcohol test results in the clearinghouse, since both drug and alcohol testing are required as part of DOT's regulatory program.

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[6] "A Report to Congress on the Feasibility and Merits of Reporting Verified Positive Federal Controlled Substance Test Results to the States and Requiring FMCSA-Regulated Employers to Query the State Databases Before Hiring a Commercial Drivers License Holder," FMCSA, March 2004.

DOT Random Rate Requirements

ATA supports a more effective means of random controlled substance (drug) testing under 49 CFR 382.305. Since 1995, motor carriers have been conducting drug testing of their employees performing safety-sensitive functions (e.g., driving). Random testing is a central feature of this testing program. Since the start of the program, the minimum annual percentage rate for random drug testing has been 50 percent. In other words, motor carriers must randomly select and test at least 50 percent of their drivers each year. The FMCSA Administrator may lower this minimum annual percentage rate to 25% of drivers if the "reported positive rate for the entire industry" is less than 1% for two consecutive calendar years. Based on FMCSA's annual data sampling of the trucking industry as previously mentioned, the positive rate for the entire industry has remained around 2%. The fact is that there has not been any progress in lowering this positive rate for years. This is a classic case of **'if you always do what you always did, you'll always get what you always got.'** ATA believes it is past time to consider an incentive-based random testing rate to drive down the positive rate in the industry.

ATA's proposal is simple. FMCSA should require each carrier to determine its own positive rate each year. For carriers that have a positive rate of 1% or higher, the minimum annual percentage rate for random testing would remain at 50%. For carriers that have a positive rate of less than 1%, the minimum annual percentage rate for random drug testing would be 25%. This is a carrier-based, performance and incentive-driven approach to random testing. It rewards those carriers who have effective hiring and drug-free workplace programs by allowing them to realize cost-savings by randomly testing at least 25% of drivers (the performance-based aspect). And, for those carriers that have positive rates of 1% or higher, it provides a financial incentive to conduct better screening of driver applicants, and put in place more effective drug-free workplace programs in an effort to realize the cost-savings of testing at the 25% level (incentive-based aspect). And, for those carriers that realize the cost savings of random testing at the 25% level, there is a built-in incentive to maintain an effective testing program in order to continue the ongoing savings afforded by the reduced random rate level. This approach holds real potential to drive down the positive rate in the industry.

This approach leads a reasonable person to question how it might be enforced. In ATA's view, FMCSA and the States conducting reviews for FMCSA could verify past and current random positive rate levels of motor carriers during conduct of compliance reviews. While FMCSA and the States do not currently review as many carriers as they would like, FMCSA's goal under their Comprehensive Safety Analysis 2010 program,[7] is to conduct 6-8 times as many compliance assessments. And, as part of their CSA 2010 program design, FMCSA already plans to collect and analyze positive drug or alcohol test results of drivers, and evaluate information about motor carrier controlled substances and alcohol testing programs, rather than relying solely on the results of compliance reviews. FMCSA could also employ their Annual Drug and Alcohol Testing Survey to measure differences in positive test results between those motor carriers conducting 25% and 50% random testing to determine any trends and needed system adjustments.

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[7] See FMCSA webpage: http://www.fmcsa.dot.gov/safety-security/csa2010-overview.htm.

ATA Supports a Ban on the Sale and Penalties for the Use of Adulterant and Substitution Devices

ATA supports a federal law to ban the manufacture, sale and distribution of products meant to thwart a drug test and to penalize those drug users who choose to employ them to avoid detection. Unfortunately, a cottage industry selling these products has developed over the past decade and internet-based marketing and sales have perpetuated the distribution of these products. As new products meant to evade drug testing enter the market, collection facilities and laboratories must develop and utilize new approaches and detection technologies to catch the lifestyle drug user. These new approaches and technologies come with costs which are passed on to motor carriers.

More than 12 million employees are subject to mandatory drug testing under the DOT regulations.[8] These employees, including millions of truck drivers, are in safety-sensitive positions. Each drug user who successfully evades testing using these products poses a serious safety risk to the public and imposes a significant financial burden on American businesses. ATA urges Congress to pass a ban to address this continuing problem.

Alternative Specimen Testing

ATA encourages the Substance Abuse and Mental Health Services Administration (SAMHSA) to move forward with rulemaking that would allow the use of alternative specimen testing methods, such as hair, sweat, and oral fluid for federal workplaces.[9] These alternative methods have shown great promise in applied situations to detect "lifestyle drug users" and those that seek to evade the current urine collection method of controlled substance testing. Testing of hair would be a particularly good addition to the drug prevention arsenal. Information from ATA's membership indicates that the regular, chronic user is more likely to show a positive drug test result when a hair specimen is employed.

ATA is eager to work with Congress and DOT to allow for addition of optional testing methods. ATA also urges the DOT's Office of Drug & Alcohol Policy & Compliance (ODAPC) and FMCSA to work closely with SAMHSA to assure that a reliable alternative specimen testing program can be achieved.

Drug & Alcohol Collection Sites

To the best of ATA's knowledge, FMCSA does not oversee or directly regulate the day-to-day operations of drug and alcohol collection sites. However, DOT specifies by regulation certain aspects under 40 CFR such as Subpart C—Urine Collection Personnel; Subpart D—Collection Sites, Forms, Equipment and Supplies Used in DOT Urine Collections; and Subpart E—Urine Specimen Collections. DOT's ODAPC appears to

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[8] See DOT webpage: http://www.dot.gov/ost/dapc/index.html. The Omnibus Transportation Employee Testing Act of 1991 requires drug and alcohol testing of safety-sensitive transportation employees. These regulations cover all transportation employers, safety-sensitive transportation employees and service agents - roughly 12.1 million people.

[9] See "Proposed Revisions to Mandatory Guidelines for Federal Workplace Testing Programs, Federal Register, April 13, 2004, pages 19673-19732.

recognize the need for improvement in collection site practices as evidenced by its recent release of the "10 Steps to Collection Site Security and Integrity." This advisory suggests a need to improve sample collection processes and protocols.

From the motor carrier perspective, many drug and alcohol testing programs share issues involving urine collection sites. These concerns may vary, whether it may be the lack of convenient appointment times, no emergency after hours availability, no off-site collection services, substantial fees, and rejected specimens due to collection errors or undetected adulteration and/or substitution.

ATA supports reasonable efforts for collection sites to improve upon collection practices and for improved government oversight to assure this is accomplished.

Summary

In summary, ATA urges Congress to enhance drug and alcohol testing by:

- Establishing a National Clearinghouse for Positive Drug & Alcohol Test Results.
- Encouraging DOT to modify their random testing rate requirements to focus resources on motor carriers with above average positive test rates.
- Banning the sale of adulterant and substitution devices, and providing for enforcement and penalties for their use.
- Directing SAMHSA to complete rulemaking on alternative specimen testing methods and directing FMCSA to promulgate regulations consistent with the SAMHSA rule.
- Promoting good drug and alcohol collection practices and improved oversight.

Mr. Chairman and Members of the Subcommittee, thank you for the opportunity for ATA to offer its recommendations to improve the drug and alcohol testing programs of commercial motor vehicle drivers. We look forward to working with this Subcommittee, the Congress, DOT, FMCSA, and other reasoned stakeholders to improve the safety and productivity of our Nation's highway transportation system.

ATTACHMENT 1. (ATA Testimony)

Table 2. Estimates of Positive Usage Rates for Drugs Among CDL Drivers from Random and Nonrandom Testing in 2003, 2004, and 2005*

Category	2003		2004		2005	
	Estimate	Standard Error	Estimate	Standard Error	Estimate	Standard Error
Random Testing						
Any drug	2.0%	0.3%	1.6%	0.3%	1.7%	0.3%
Marijuana	0.6%	0.1%	0.8%	0.2%	0.6%	0.1%
Cocaine	0.3%	0.1%	0.5%	0.1%	0.5%	0.1%
Amphetamines	0.1%*	0.05%	0.1%*	0.1%	0.4%*	0.3%
Opiates	0.01%	0.001%	0.1%*	0.1%	0.04%*	0.02%
PCP	0.001%*	0.001%	0.1%*	0.1%	0.0%*	—
Nonrandom Testing						
Pre-employment	3.1%	0.3%	2.2%	0.2%	2.1%	0.1%
Post-crash	1.9%	0.8%	2.5%	0.6%	2.4%	0.5%
Reasonable Suspicion	19.4%*	10.7%	40.3%	14.8%	16.7%	4.1%
Return to Duty	3.6%*	2.3%	9.3%*	6.0%	2.6%	0.9%
Followup	3.1%	0.9%	3.8%	1.4%	2.4%	0.9%

*Indicates extremely low precision.
— = No usage found among sample cases; standard error not calculated.
NA = Category not applicable for survey year.

Table 3. Estimates of Random and Nonrandom Alcohol Usage Rates Among CDL Drivers in 2003, 2004, and 2005*

Category	2003		2004		2005	
	Estimate	Standard Error	Estimate	Standard Error	Estimate	Standard Error
Random Testing						
0.04+ BAC	2.0%	0.1%	0.1%	0.02%	0.2%*	0.1%
Nonrandom Testing						
Pre-employment	0.01%*	0.01%	0.01%*	0.003%	0.03%*	0.03%
Post-crash	0.1%*	0.03%	0.1%*	0.03%	0.1%*	0.02%
Reasonable Suspicion (0.04+)	24.2%	5.3%	11.0%	3.5%	6.4%	1.7%
Return to Duty (0.04+)	0.0%*	—	0.4%*	0.3%	0.05%*	0.02%
Followup (0.04+)	4.7%*	4.8%	0.2%*	0.1%	0.2%	0.06%

*Indicates extremely low precision.
— = No usage found among sample cases; standard error not calculated.
NA = Category not applicable for survey year.

Table 2 and 3 are from Drug and Alcohol Testing Survey: 2004 and 2005 Results, Federal Motor Carrier Safety Administration, Office of Research and Analysis, Analysis Division, July 2007

November 30, 2007

VIA EMAIL: [redacted]

The Honorable Peter A. DeFazio
Chairman, Subcommittee on Highways and Transit
Committee on Transportation and Infrastructure
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman DeFazio:

Thank you for the opportunity to present testimony on behalf of the American Trucking Associations (ATA) regarding "Drug and Alcohol Testing of Commercial Motor Vehicle Drivers." ATA was pleased to offer its recommendations and suggestions for improvements.

Attached you will find our responses to questions posed by you and Ranking Member Duncan subsequent to the hearing. We would appreciate the incorporation of our responses into the hearing record.

ATA looks forward to working with the Subcommittee on ways to enhance the program. Please feel free to contact Dave Osiecki, ATA Vice President of Safety, Security & Operations at 703-838-1996 or dosiecki@trucking.org if you have further questions or concerns. Thank you.

Sincerely,

Greer Woodruff
Sr. Vice President of
Corporate Security
J.B. Hunt Transport Inc.

Questions from Chairman Peter A. DeFazio
SUBCOMMITTEE ON HIGHWAYS AND TRANSIT
OVERSIGHT AND INVESTIGATIONS HEARING ON
"DRUG AND ALCOHOL TESTING OF COMMERCIAL MOTOR VEHICLE DRIVERS"
NOVEMBER 1, 2007

1. **Current drug and alcohol regulations require new employers to contact former employers regarding a job applicant's drug history.**

   a. **In your experience, how responsive have former employers been to these requests?**

   Since the 49 CFR 391.23 regulations (more commonly referred to driver's safety performance history rule) went into effect in April 2004, ATA has received information from its members that previous employers have been generally responsive to inquiries by prospective employers. However, for drivers with 1 or more employers within the last three years, information received by ATA indicates that about 20% of the previous employers cannot be reached because of business closures, bankruptcies, etc. Since ATA tracks trucking failures for carriers with 5 or more trucks, we know that at least 5,580 motor carriers have failed between 2004 and the first half of 2007. If ATA had information on failures of those motor carriers with less than 5 trucks, the number would be significantly greater.

   b. **Are there any enforcement actions or penalties for employers who are non-responsive?**

   49 CFR 391.23 (c)(3) of the Federal Motor Carrier Safety Regulations states that prospective employers should report failures of previous employers to respond to an investigation to the FMCSA following procedures specified at 49 CFR 386.12. The term should is advisory rather than mandatory. This regulation outlines a complaint process. ATA is not familiar with the manner in which FMCSA follows up on these complaints.

   c. **Should there be?**

   Yes. Nevertheless, a better solution for investigating a driver's past positive drug and alcohol test results would be to establish a national clearinghouse for employer inquiries.

2. **ATA is recommending a national clearinghouse for positive and refused drug and alcohol tests. Why does this need to be done at the national level?**

   49 CFR 40 and 382 are federal not state requirements. The rules and associated programs need to be administered at the national level. This is beyond the traditional license checks, roadside inspections, and law enforcement activities currently conducted by the 51 jurisdictions (states and D.C.).

   A national clearinghouse would establish a central and uniform system to report, retain and retrieve information on positive test results more in tune to interstate commerce, while reducing the difficulties and operating conflicts of individual state programs. A

national clearinghouse would allow motor carriers to go to a consistent, single source to determine if drivers have complied with drug and alcohol testing requirements of Parts 40 and 382. This would avoid the inevitable variability in the 51 jurisdictions':

- legislative authority for such programs;
- privacy considerations;
- funding, capability and staffing for program implementation and operation;
- fee structures;
- procedural requirements for access to information; and,
- response times, etc.

As a case in point, the states that currently have with some form of positive test reporting requirement have different authorizing laws, different reporting procedures, different consequences for positive results, different methods for industry to access the information, etc.

Notably, the concept of a national clearinghouse has already been found to be practical. Congress in the 1999 Motor Carrier Safety Improvement Act required DOT to evaluate the feasibility and merits of collecting, in a centralized manner, "positive" drug test results of commercial drivers. FMCSA studied this issue and submitted a report to Congress in May of 2004[1]. This report found that a centralized clearinghouse for such results was feasible, cost-effective and, in many ways, more desirable than the current system of driver self-reports and hiring companies contacting previous employers in an attempt to obtain this critical safety-related information.

3. Since States issue the CDL's, isn't it a more direct program to have employers report to states that can pull the CDL's?

State licensing agencies operate under different authorizing laws, fee structures, response times etc. To apply this type of reporting system to 51 jurisdictions' licensing agencies would likely result in even more licensing inconsistencies for interstate commercial motor vehicle drivers. Further, FMCSA's compliance reviews of state CDL programs have identified many systemic weaknesses, incidents of fraud, and lack of compliance with the program requirements. For example, compliance reviews have revealed that many states are not taking CDL licensing disqualification action of a driver when they are required to do so. And, one of the state licensing agencies basic functions—timely and accurate sharing of driver conviction information among themselves—continues to be a challenge.

To establish a drug & alcohol testing program within the framework of each state's CDL program would undoubtedly create a new burden for states, further weakening state compliance efforts with the program. Additionally, such action would result in

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[1] "*A Report to Congress on the Feasibility and Merits of Reporting Verified Positive Federal Controlled Substance Test Results to the States and Requiring FMCSA-Regulated Employers to Query the State Databases Before Hiring a Commercial Drivers License Holder*," FMCSA, March 2004.

significant costs to states and in lengthy, piecemeal implementation. This approach is ill-advised for these reasons.

4. **Why wouldn't it be more appropriate to have a DOT industry-wide clearinghouse than a modal specific commercial driver database since all modes are covered by the same Part 40 requirements?**

ATA would be open to the prospect of a DOT-wide (U. S. Department of Transportation) program. However, this trucking industry is the only regulated industry seeking a national clearinghouse and the prospect of a DOT-wide approach should not delay implementation of a trucking industry-specific database. The motor carrier industry employs, by a large margin, more safety sensitive employees covered by the DOT requirements than the other transportation modes combined. In recent rulemaking undertaken by FMCSA, the agency estimated that there are 4.2 million active commercial driver license (CDL) holders (Federal Register, Vol. 71 No. 221, Page 66743, November 16, 2006). The number of U.S. motor carriers has been estimated to be over 600,000.

5. **How would you envision owner-operator test results being included in the clearinghouse? Would they have to turn themselves in?**

Currently, owner-operators are required to join a consortium to administer their random drug testing but if the owner-operator tests positive for drugs or alcohol or refuses to test, the consortium may report the positive result or refusal to the owner-operator only, and not to the State or FMCSA. To comply with the ATA proposed clearinghouse, the consortium's MRO(s) should be required to report positives and refusals of owner-operators to the national clearinghouse. Failure to report would subject the consortium (or its agents) to a public interest exclusion investigation, (PIE) under Part 40 and/or the civil/criminal penalty provisions of 49 U.S.C. 521(b).

6. **ATA is also supporting a carrier-based random testing rate. Carriers with lower rates would require fewer random tests.**

   a. **How would this work in reality for third-party administrators who represent hundreds of clients. Would each client have a different random rate? Or would the TPA have a random rate based on its total positive rate?**

Generally speaking, the rate would not be based on motor carrier use of a TPA. To encourage performance, the rate would be based on the positive rate specific to the individual motor carrier. For small motor carriers or owner/operators that participate only in a consortium it may be necessary to base their rate on the consortium performance.

   b. **If a TPA has a high positive rate, and thus a higher random rate, wouldn't that penalize companies with low rates that participate in the TPA?**

The rate for larger motor carriers would be specific to the motor carrier so there will

be no disincentive.

If a motor carrier chooses a consortium approach, the TPA rate would need to be used. A motor carrier could choose to move to a better performing consortium if the rate of the consortium, which the motor carrier currently utilizes, is over the lower qualifying threshold. If the motor carrier chooses not to change, then the random rate threshold currently imposed by DOT would be applied.

c. **On the flip-side, what safety risks would there be to applying a very low rate to a TPA whose overall positive rate is low, but represents a few companies with very high rates?**

The safety risk, if any, would likely be minimal. There would be a 25% testing rate in effect, which would continue to have a deterrent effect. Today, on average one out of two CDL drivers (50%) are being randomly tested for drugs in the motor carrier industry. A very high percentage of these drivers have never tested positive. There is a need to focus on the specific carriers (and driver populations) that have a higher rate of random results by employing the 50% rate. Those compliant drivers employed by conscientious motor carriers should be provided some relief from a higher testing rate. As a community, we need to challenge the conventional thinking to identify program changes that will help drive down the positive rate in this industry in order to further improve safety.

7. **ATA supports alternative specimen testing. Could you explain your rationale for this support?**

Testing data and information from ATA's membership has indicated that the chronic drug abuser is more likely to test positive when using an alternative testing specimen, such as hair. Through the use of such testing methods, carriers would be able to make more informed assessments/hiring decisions about their employees, which will help to keep more drug abusers off of the highway, resulting in improved highway safety.

a. **Is there any prohibition against an employer requiring an employee to submit to an alternate test?**

Some states and even some cities limit the type of drug testing that an employer may perform. ATA believes that the states of Hawaii, Montana, and Vermont restrict the type of drug testing that may be performed. Some states that allow hair testing place certain restrictions on the practice. For example, Arkansas allows hair testing; however, to benefit from the state's voluntary workers' compensation premium reduction law, employers must follow federal DOT regulations for specimen collection and testing (which currently provide for only urine drug testing).

b. **What would have to happen for alternative specimen tests to be allowed by DOT?**

The Substance Abuse and Mental Health Services Administration (SAMHSA) would have to issue guidelines that establish procedures and protocols for

alternative specimen testing. SAMHSA would also have to begin certifying laboratories that conduct testing on alternative specimens. DOT would then have to conduct a rulemaking to amend its 49 CFR 40 rules to incorporate the SAMHSA guidelines, and require that only certified labs be used. ATA and JB Hunt representatives met separately with SAMHSA and DOT on November 28, 2007. SAMHSA appeared willing to develop such guidelines if DOT requested that they do so. DOT appeared willing to adopt SAMHSA guidelines, if they were developed. Based on the meeting with DOT, ATA is unsure whether DOT will be asking SAMHSA to develop such guidelines. We encourage the Committee to ask DOT whether it will be making this request of SAMHSA.

c. **What is holding this up?**

DOT is obligated by statute to use SAMHSA guidelines on drug protocols. SAMHSA has recognized the benefits of using alternative specimen testing methods, such as hair, sweat and oral fluid for federal workplaces. In 2004, the agency published "Proposed Revisions to Mandatory Guidelines for Federal Workplace Testing Program" in the Federal Register. This rule has not been finalized by SAMHSA. Until SAMHSA promulgates its final rule on alternative specimen testing, DOT will not proceed with an independent rulemaking.

ATA urges Congress to direct SAMHSA to complete a rulemaking on alternative specimen testing and, upon final rulemaking, to direct DOT to promulgate regulations consistent with the SAMHSA guidelines.

8. **Hair tests can identify drug use over a longer period of time – in some cases up to a year. Is it fair to penalize someone who smoked marijuana six months ago but has not smoked since then?**

J. B. Hunt limits its hair testing of illicit drugs to a sixty to ninety day window based on the length of hair tested. The sample size is usually 1 and ½ inches of hair taken from the head. This amount of hair can detect illegal drug use within the last 90 days– it will not yield a result from a single use of an illicit drug. The hair test and alternative testing methods are designed to identify a lifestyle pattern of drug abuse.

9. **Is it possible to determine whether the person used drugs six months ago or yesterday from a hair test? Wouldn't a more specific timeframe of drug use be a better indicator of the impairment level of the individual being tested?**

As previously stated, testing a 1 and ½ inch piece of hair (which is the amount of hair usually tested) will detect drug use within the last 90 days. The test will not detect whether the individual used drugs once the day before the test nor will it detect drug use six months prior. The hair test is used to expose "lifestyle drug users" and those who seek to evade the collection of urine specimen testing for controlled substances. The motor carrier industry is not seeking to determine the *level* of an individual's impairment by drugs. Rather, industry is seeking to prevent people who have a lifestyle of drug use from operating trucks on our highways until they resolve their substance abuse problem.

Questions from Ranking Member John J. Duncan, Jr.

1. **Do any other DOT agencies currently use a national clearinghouse for positive test result reporting?**

   ATA is not aware of any other agencies currently using a national clearinghouse for such purposes. The DOT Office of Drug and Alcohol Policy and Compliance may be the best organization to question about other government-operated clearinghouses.

2. **How can the clearinghouse be designed to protect driver's privacy rights?**

   The privacy rights of sensitive safety employees have long been established under the 49 CFR 40 requirements (e. g., driver consent forms for the release of result information, medical review officer review, etc.) These established practices will need to be maintained in regards to a national clearinghouse. In order to further protect driver privacy, the reporting of positive test results to the clearinghouse should be limited to medical review officers (MROs), with an exception being refusals which may need to be reported by a designated employer representative (DER). Similarly, employer access to positive test results in the clearinghouse should be limited to DERs.

   The clearinghouse approach would be an improvement in protecting driver privacy over the current process that is required by 49 CFR 391.23. Although great efforts are undertaken to ensure privacy, hundreds of thousands of motor carriers are now sharing driver drug and alcohol use history over the phone, via letters, fax transmissions, email, etc. in compliance with this regulation.

3. **In those case of a refusal to test, but no specimen was collected and no chain of custody or MRO is involved, who will be responsible for reporting this to the clearinghouse?**

   The motor carrier's DER, as defined under the regulations, should be required to report the refusals described in this question.

4. **Could motor carrier personnel misuse such a clearinghouse to blackball a driver with whom they have a personal or professional dispute?**

   While this may be possible, there should be stringent penalties designed to prevent this possibility. Entry and access procedures and information use requirements need to be clearly defined by regulation and controlled with enforcement, sanctions and penalties for offenses. ATA encourages the Committee to keep in mind that this is possible in today's decentralized and less controlled process for investigating a driver's drug and alcohol testing history, but it has never been identified as an industry problem.

5. **You suggest rewarding carriers by lowering the random testing threshold from 50% to 25% if for two consecutive years they meet the 1% threshold. Would this lower the bar for driver safety by encouraging those who do abuse substances to seek employment with those carriers knowing they are less likely to be randomly tested?**

   No. If the clearinghouse for positive test results is established in conjunction with this performance-based rate approach, a driver that has had a drug (and alcohol) abuse problem will be detected when he/she seeks employment elsewhere. It can then be determined through documentation whether or not the driver has completed the mandated SAP and follow-up requirements.

6. a. **What are the primary differences between the ATA proposal and the North Carolina state clearing house?**

   ATA's proposal calls for a *national* clearinghouse of positive test results and believes that a national, rather than state-by-state, solution is optimal. North Carolina, operates its drug and alcohol reporting system through its state licensing agency.

   In North Carolina's case, all reportable positives and refusals must be reported to the state licensing agency by the employer. Once the agency receives drug/alcohol test positives and/or refusals of a particular CDL driver licensed by the state, it initiates a CDL driver disqualification process and attaches the disqualification directly to the driver's motor vehicle record (MVR). ATA's proposal does not work through state licensing agencies and does not tie the notice of driver disqualification directly to the driver's motor vehicle record. Rather, consistent with the current regulations, the responsibility to take the driver immediately out of service for a drug/alcohol positive test/refusal rests with the motor carrier. This action is far more timely than waiting for the state licensing agency to process a CDL disqualification.

   ATA's proposal provides for enhanced privacy protections and strict access controls by: requiring an MRO to report the results of a positive drug test and/or a designated employee representative (DER) to report a refusal; and, requiring the implementation of a secure process for the registration and authentication of authorized users.

   North Carolina's model only retains the drug/alcohol disqualification on the driver's MVR for two years after the employee successfully completes the substance abuse assessment and treatment process. After the two years have passed, the NC state licensing agency is required to remove the disqualifying information from the driver's record. According to FMCSA's driver safety performance rule at 49 CFR 391.23(a)(2), carriers are required to obtain at least *three* years worth of accident and drug and alcohol history from a prospective driver's previous employers. ATA proposes that positive drug and alcohol test

results/refusals be retained for 5 years in a clearinghouse, which gives an employer or potential employer a more accurate picture of a driver's drug and alcohol history and allows compliance with the current driver safety performance history rule.

b. Would the ATA be opposed to a national clearinghouse modeled off of the North Carolina law? Why or why not?

In its current form, ATA believes that the North Carolina model would be problematic at the national level. This is primarily due to the fact that North Carolina operates its clearinghouse within the framework of its state CDL program. The FMCSA's compliance reviews of state CDL programs have identified many systemic and procedural weaknesses. For example, state CDL compliance reviews have revealed that some states are not taking disqualification action against drivers when required to do so. Additionally, some states continue to have difficulty sharing in a timely and accurate way driver information among themselves. ATA believes that placing the additional burden of capturing positive drug and alcohol test information within the framework of a state CDL program would: further weaken compliance with the CDL program; result in significantly higher costs for all parties involved (federal and state governments and industry); and, take far too long to achieve comprehensive implementation.

7. **a. Could you elaborate a little more on the alternate methods of testing? If science tells us that hair or saliva might be a more accurate form of testing, then why do you believe the regulations haven't been changed?**

The Substance Abuse and Mental Health Services Administration (SAMHSA) has recognized the benefits of using alternative specimen testing methods, such as hair, sweat and oral fluid for federal workplaces. In 2004, the agency published "Proposed Revisions to Mandatory Guidelines for Federal Workplace Testing Program" in the Federal Register. Three years have lapsed and SAMSHA has not completed this rulemaking. The DOT is statutorily obligated to use SAMSHA's guidelines in its drug testing program. Until SAMSHA promulgates its final rule on alternative specimen testing, DOT is not likely to proceed with an independent rulemaking.

J.B. Hunt and the ATA urge Congress to direct SAMSHA to complete its rulemaking on alternative specimen testing and, upon final rulemaking, to direct the DOT to promulgate regulations consistent with the SAMSHA final rule.

b. What process has J.B. Hunt taken to change these regulations- if any?

J.B. Hunt has been a strong industry advocate and active participant in the discussions on alternative specimen drug testing. Specifically, we have collected and processed data on 14,000 donors, using hair and urine testing. These results have served as the impetus for changing the current method of drug testing.

J.B. Hunt and ATA met with DOT and FMCSA representatives approximately a year ago to present the need for a national drug testing clearinghouse and more recently, to present arguments in favor of using alternative specimens for drug testing.

More recently, ATA and JB Hunt representatives met separately with SAMHSA and DOT on November 28, 2007. SAMHSA appeared willing to develop alternative specimen guidelines if DOT requested that they do so. DOT appeared willing to adopt SAMHSA guidelines, if they were developed. Based on the meeting with DOT, ATA is unsure whether DOT will be asking SAMHSA to develop such guidelines. We encourage the Committee to ask DOT whether it will be making this request of SAMHSA.

Also, J.B. Hunt met recently with GAO officials as part of their recent study on drug testing during which we offered our results/data on alternative specimen testing to them. J.B. Hunt representatives have also met with Congressional staff and numerous Members of Congress on the issue.

Additionally, the research arm of ATA, the American Transportation Research Institute (ATRI), in which J.B. Hunt is involved, has combined efforts with the Transportation Research Board (TRB) on priority research objectives concerning the use of alternative specimens across all modes of transportation.

8. **How would you suggest FMCSA provide improved oversight of collection facilities?**

FMCSA should be granted any necessary authority to conduct audits of collection facilities and should more often exercise its authority to conduct public interest exclusion (PIE) investigations. Congress should adequately fund FMCSA to staff and perform these additional agency tasks.

9. **Do you think the reporting of positive test results should be up to the employer to report or should the Medical Review Officer (MRO) play a role in the process?**

Both. MROs should be the individuals responsible for reporting positive drug test results to the clearinghouse. DERs, with documentation, should report test refusals. To ensure privacy, personal identification numbers (PINs) may need to be assigned to the MROs and motor carriers' DERs to ensure proper reporting, limited access, tracking, etc. to ensure privacy.

10. **Is ATA willing to work with the State of North Carolina regarding the possible preemption concerns?**

Yes. In fact, ATA has been working with North Carolina officials on this issue and will continue to do to resolve any concerns.

Written Statement Submitted for the Record

to the

Highways and Transit Subcommittee of the

House Transportation and Infrastructure Committee

on

Drug and Alcohol Testing of

Commercial Motor Vehicle Drivers

Prepared by

Ray Kubacki, President

Psychemedics Corporation

November 15, 2007

As President and CEO of Psychemedics Corporation, I welcome and appreciate this opportunity to make this statement on the deficiencies in the DOT drug testing program.

Psychemedics is a publicly traded drug testing laboratory listed on the American Stock Exchange. Headquartered in Acton, Massachusetts, with a laboratory in Culver City, California, since 1987, our sole business has been providing drug testing service and technology to employers and others.

Your subcommittee's hearing on drug and alcohol testing of commercial motor vehicle drivers highlighted a key deficiency in the DOT drug testing program – the fact that urinalysis is not an observed test, leading to widespread manipulation of the test by illegal drug users.

"Beating the test" is accomplished by carrying into the collection site clean urine for substitution or adulterants that mask the true results of the test. This can be easily accomplished even when every mandated collection procedure is followed to the letter. Moreover, because of the short detection window in the mandated urine test, persons seeking employment in the trucking industry need only abstain from drug use for a few days for most drugs prior to applying for employment to obtain a negative result on the urine test.

The failure of DOT to modernize and update their drug testing program to include advanced and improved drug testing technologies has led to widespread cheating and avoidance, as reported by the GAO. This fact has been common knowledge within the drug testing industry for years.

DOT has acknowledged that with unobserved collection, it is incredibly easy to beat the urine test with adulterants and urine substitution, yet they have resisted updating their mandatory drug testing program for safety-sensitive jobs to include hair testing, a technology that permits an observed test that would eliminate most of the fundamental problem with the DOT program.

The GAO reported that the current urine testing program failed in every category. This is not a system that simply needs to be "tweaked" as suggested by current and former DOT officials. It failed in every category!

As the Subcommittee has recognized, drug abuse continues to be a very serious, pervasive, and entrenched problem in the U.S. today, despite expenditures of hundreds of millions of dollars over the last two decades. If we are ever to make significant progress against drug abuse in the transportation industry, we need to allow the use of the full range of proven technologies since each drug testing technology is optimally suited for uniquely different applications. Providing employers with the choice of the best technologies for the best application is critical. Hair testing is a proven technology in wide use in the private sector and is making a major contribution. It should be available for testing safety-sensitive employees under DOT's mandatory regulations.

DOT's failure to include improved drug testing in their mandatory program for safety-sensitive jobs is endangering pubic safety, particularly in the trucking industry. A few years ago,

a number of trucking companies, in recognition of the fact that illegal drug users are beating the urine test and entering their workplace, began to duplicate their DOT required drug tests by adding hair testing for all employees at their own expense. The results of this effort are astonishing and show the extent to which the DOT program is broken beyond repair.

In 12,721 paired urine and hair drug tests on the same individuals, the positive rates with hair were 8.9%. This is consistent with data from the state of Oregon where 9% of truckers tested positive on anonymous random tests and the HHS self-reported findings that over 8% of workers admit past month drug use. The DOT urine results were 1.48%. As the following data shows, hair testing identified almost 1,000 additional drug users that were missed by the DOT urine test.

Comparison of Urine and Hair Test Results

12,721 paired hair and urine tests on the same individuals in the trucking transportation industry.

May 2006 to September 2007

Urine	
Positive	189
Positive Rate	1.48%

Hair	
Positive	1,142
Positive Rate	8.9%

Ground Transportation Companies

Analysis of Driver Hair Test Results Compared With The Urine Result For The Same Testing Situation (May 2006 - Sep 2007)
Combined Totals

11,694	Negative on Both Tests	90.90%
160	Positive on Both Tests	1.24%
29	Positive on Urine Only	0.23%
982	Positive on Hair Only	7.63%

Positive Hair Only	
568	Cocaine
190	Marijuana
78	Amphetamine
31	Opiates
133	Multi-Drug & Refuse

Positive Urine Only	
4	Cocaine
20	Marijuana
3	Amphetamine
2	Opiates
0	Multi-Drug & Refuse

2

The results of the side by side tests conducted by these trucking companies confirms the findings of the GAO, and the state of Oregon that the DOT program is failing to remove illegal drug users from the trucking workforce because of major deficiencies in urinalysis and large scale manipulation of the program by illegal drug users. The results of these paired hair and urine tests were shared with DOT.

In 1998, the chairman and ranking minority member of the House Commerce Committee's Oversight and Investigations Subcommittee (Representatives Joe Barton and Ron Klink), following a hearing where a panel of experts affirmed the reliability, accuracy and fairness of hair testing, wrote a letter the to Substance Abuse and Mental Health Services Administration (SAMHSA), directing SAMHSA to provide a timeline for incorporating hair drug testing into the HHS Mandatory Guidelines. In 2004, SAMHSA promulgated a rule to

incorporate hair, saliva and sweat patch drug testing technologies. In 2006, SAMHSA withdrew the rule without comment. It is our understanding that the rule was withdrawn in large part due to opposition from DOT.

Robert Stephenson from SAMHSA stated in the hearing, the rule was withdrawn due to concerns another department (presumably DOT) raised about "bias, fairness and legal concerns." This statement illustrates the complete lack of understanding of the science and a disconnect with reality that has pervaded the agency over the last decade. Thousands of corporations have successfully incorporated hair testing into their drug testing programs over the last 20 years. General Motors developed and implemented a hair testing program throughout its entire North American manufacturing operation. This successful program has withstood the test of time for over a decade. Marathon Oil, Kraft Foods, USX, JB Hunt and thousands of other large corporations have implemented hair testing programs. Large city police departments including New York, Chicago, Los Angeles, Boston and San Francisco have implemented hair testing and many court systems rely on hair testing. If these corporations and agencies can implement successful hair testing programs in a matter of months that have been upheld in state and federal courts for almost 20 years, it is laughable for the federal agencies to still be "working on it" over a decade after they started. The "concerns" pointed to by these agencies, when examined closely, turn out to be either nonexistent with proper methodology or are lesser concerns than with the current urine program.

Your hearing highlighted the very real safety issues that should be the foremost concern of DOT. The failure of DOT, over a period of 12 years, to modernize their drug testing program is seriously endangering public safety, particularly in the trucking industry. (There was testimony in the hearing that the railroad industry does not seem to have the same problems as the trucking industry. It should be noted that 3 of the 4 largest railroads have voluntarily included hair testing because the mandatory urinalysis program was failing to adequately detect illegal drug users.) Psychemedics has been advocating to DOT the inclusion of hair testing since 1995, pointing to the raft of scientific studies supporting the accuracy and fairness of drug testing and the continuing expansion of its use by corporations, police departments, schools and in the

criminal justice system. The courts have upheld the science behind Psychemedics' hair testing technology in every case brought.

Conclusion: Given the known failures of the DOT-mandated safety-related urinalysis drug testing program, and the obvious manner in which public safety is being compromised, we are astonished by DOT's continuing opposition to including hair testing in their program. As Robert Stephenson of SAMHSA testified in your hearing, HHS is not responsible for DOT's program. HHS' guidelines are just that – guidelines. DOT is free to modify their program to make it more effective in light of the evident problems they are experiencing – an inability to detect drug users in or entering safety-sensitive jobs. Many regulated companies concerned about the ineffectiveness of the mandated urine programs, at additional expense, have incorporated hair testing into their programs to make them more effective. It is time for the federal agencies to become as concerned with safety as the companies they regulate.

PSYCHEMEDICS
CORPORATION

WILLIAM THISTLE
SENIOR VICE PRESIDENT AND GENERAL COUNSEL

BOSTON • LOS ANGELES • CHICAGO
DALLAS • ATLANTA

November 30, 2007

The Honorable James L. Oberstar
Chairman, Committee on Transportation and Infrastructure
2365 Rayburn House Office Building
Washington, D.C. 20515-2308

Dear Chairman Oberstar:

The Subcommittee on Highways and Transit recently held a hearing that highlighted a key problem with the Department of Transportation (DOT) drug testing program for transportation-related safety sensitive jobs – the low detection rates of illegal drug users in the highway transportation workforce. We have attached our written testimony submitted to the subcommittee record.

The central problem is that urinalysis is not an observed test, and as such is easy for illegal drug users to manipulate in order to beat the test. Illegal drug users are able to pass the urinalysis test in a number of ways – by substituting someone else's urine; by adulterating their own urine; or by sending someone else to take their test for them. The analysis done by the Government Accounting Office (GAO) indicates that all of these tactics have been employed to the point where the DOT safety-sensitive drug testing program is in total breakdown.

These problems have been known to DOT for years. Psychemedics Corporation, a company whose sole business is testing for illegal drug use, first visited officials at DOT in 1995, urging them to improve the detection rates of the program by including other

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www.drugtestwithhair.com

proven technologies, such as hair analysis, in their program. Allowing transportation companies to avail themselves of a more accurate technology that cannot be evaded since it is an observed test would vastly improve public safety.

Hair testing has two significant advantages over urinalysis. First, since it is an observed test, it cannot be evaded through adulteration or substitution. Second, due to its longer window of detection – 90 days compared with hours to a few days with urinalysis – illegal drug users cannot simply abstain for a few days in order to pass the test.

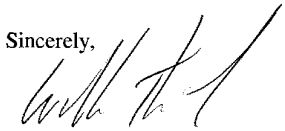
As the attached testimony shows, a number of trucking companies voluntarily undertook to use hair testing to improve their detection rates. Side by side tests resulted in positive detection rates with hair analysis that were 8.9% compared with 1.48% with the mandated DOT urine tests. The hair results match the Oregon State study data (9%) and the Health and Human Services self-report data (over 8%) reporting recent drug use. The differences in illegal drug detection rates mean that DOT's drug program is permitting hundreds of thousands of illegal drug using truck drivers and other transportation workers into the workforce and on to the highways.

Thousands of corporations have successfully incorporated hair testing into their drug testing programs over the last 20 years. General Motors developed and implemented a hair testing program throughout its entire North American manufacturing operation, and this successful program has withstood the test of time for over a decade. Marathon Oil, Kraft Foods, USX, JB Hunt and thousands of other large corporations have implemented hair testing programs. Large city police departments including New York, Chicago, Los Angeles, Boston and San Francisco use hair analysis and many court systems rely on hair testing. <u>If these corporations and agencies can implement successful hair testing programs in a matter of months that have been upheld in state and federal courts for</u>

almost 20 years, it is hard to understand why DOT has opposed modernizing their program in a manner that so obviously will improve public safety.

DOT has resisted improving their program for over 15 years and the result is compromising public safety. We urge you to direct DOT to incorporate hair testing into the program to improve the detection rates and to end the current urine substitution and adulteration manipulation that is leading to massive program failure.

Sincerely,



William Thistle
Senior Vice President and General Counsel

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