

evidence that NO<sub>x</sub> emissions in an upwind area would interfere with attainment or maintenance in a downwind area, that action should be separately addressed by the State(s) or, if necessary, by USEPA in a section 110(a)(2)(D) action. In addition, a section 182(f) exemption request should be independently considered by USEPA. In some cases, then, USEPA may grant an exemption from across-the-board NO<sub>x</sub> RACT controls under section 182(f) and, in a separate action, require NO<sub>x</sub> controls from stationary and/or mobile sources under section 110(a)(2)(D). It should be noted that the controls required under section 110(a)(2)(D) may be more or less stringent than RACT, depending upon the circumstances. Consistent with these principles, USEPA is proposing to approve these exemption requests under section 182(f) of the Act. If evidence appears that NO<sub>x</sub> emissions in an upwind area would interfere with attainment or maintenance in a downwind area, appropriate action shall be taken by the State(s) or, if necessary, by USEPA under section 110(a)(2)(D).

#### Conformity Provisions

With respect to conformity, USEPA's conformity rules<sup>5 6</sup> provide a NO<sub>x</sub> waiver if an area receives a section 182(f) exemption. In its "Conformity; General Preamble for Exemption From Nitrogen Oxides Provisions," 59 FR 31238, 31241 (June 17, 1994), USEPA reiterated its view that in order to conform, nonattainment and maintenance areas must demonstrate that the transportation plan and transportation improvement program (TIP) are consistent with the motor vehicle emissions budget for NO<sub>x</sub> even where a conformity NO<sub>x</sub> waiver has been granted. Due to a drafting error, that view is not reflected in the current transportation conformity rules. The June 17th notice states that USEPA intends to remedy the problem by amending the conformity rule. Although that notice specifically mentions only requiring consistency with the approved maintenance plan's NO<sub>x</sub> motor vehicle emissions budget, USEPA also intends to require consistency with the attainment demonstration's NO<sub>x</sub> motor vehicle emissions budget. However, the exemptions at issue were submitted

pursuant to section 182(f)(3), and USEPA does not believe it is appropriate to delay action on these petitions, especially in light of the statutory deadline, until the conformity rule is amended. As noted above, this issue has also been raised in a formal petition for reconsideration of the Agency's final transportation conformity rule and in litigation pending before the U.S. Court of Appeals for the District of Columbia Circuit on the substance of both the transportation and general conformity rules. Thus the issue is under further consideration, but at this time the Agency's position remains as stated. The USEPA, therefore, believes that the currently applicable rules governing this matter are those that appear in the Agency's final conformity regulations, and the Agency remains bound by their existing terms.

#### IX. Proposed Action

The USEPA is proposing to approve the exemption requests from the requirements contained in section 182(f) of the Act for the areas previously identified. This approval would exempt the following counties in Ohio from the NO<sub>x</sub>-related general and transportation conformity provisions, NO<sub>x</sub> RACT (as applicable), and nonattainment area NSR for new sources and modifications that are major for NO<sub>x</sub>: Hamilton, Butler, Warren, Clermont, Ashtabula, Cuyahoga, Geauga, Lake, Lorain, Medina, Portage, Summit, Stark, Delaware, Franklin, Licking, Mahoning, Trumbull, Jefferson, Columbiana, Preble, and Clinton. Additionally, the following counties in Ohio would not be required to demonstrate compliance with the enhanced I/M performance standard for NO<sub>x</sub>: Hamilton, Butler, Warren, Clermont, Cuyahoga, Geauga, Lake, Lorain, Medina, Portage and Summit.

This proposed approval is based upon the evidence provided by the State and the State's compliance with the requirements outlined in the applicable USEPA guidance.

#### X. Procedural Background

Public comments are solicited on USEPA's proposed rulemaking action. Public comments received by February 16, 1995, will be considered in the development of USEPA's final rulemaking action.

Nothing in this action shall be construed as permitting or allowing or establishing a precedent for any future request for a revision to any state implementation plan. Each request for revision to the state implementation plan shall be considered separately in light of specific technical, economic,

and environmental factors and in relation to relevant statutory and regulatory requirements.

This action has been classified as a Table 2 action by the Regional Administrator under the procedures published in the **Federal Register** on January 19, 1989 (54 FR 2214-2225), as revised by an October 4, 1993 memorandum from Michael H. Shapiro, Acting Assistant Administrator for Air and Radiation. The Office of Management and Budget has exempted this regulatory action from Executive Order 12866 review.

Under the Regulatory Flexibility Act, 5 U.S.C. 600 *et seq.*, USEPA must prepare a regulatory flexibility analysis assessing the impact of any proposed or final rule on small entities (5 U.S.C. 603 and 604). Alternatively, USEPA may certify that the rule will not have a significant impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and government entities with jurisdiction over populations of less than 50,000.

#### List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Nitrogen oxides, Ozone, Volatile organic compounds, Intergovernmental relations, Reporting and recordkeeping requirements.

**Authority:** 42 U.S.C. 4201-767q.

Dated: January 5, 1995.

**Valdas V. Adamkus,**

*Regional Administrator.*

[FR Doc. 95-1066 Filed 1-13-95; 8:45 am]

BILLING CODE 6560-50-P-M

#### 40 CFR Part 81

[VA37-1-6812b; FRL-5139-9]

#### Clean Air Act Promulgation of Reclassification of Ozone Nonattainment Areas in Virginia, and Attainment Determinations

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** EPA proposes to reclassify the Norfolk-Virginia Beach-Newport News (Hampton Roads), VA ozone nonattainment area from marginal nonattainment to moderate nonattainment. This action also proposes a determination that the Allentown-Bethlehem-Easton, PA-NJ; Altoona, PA; Erie, PA; Greenbrier, WV; Harrisburg-Lebanon-Carlisle, PA; Johnstown, PA; Lancaster, PA; Scranton-Wilkes-Barre, PA; Youngstown-Warren-Sharon, PA-OH;

<sup>5</sup> "Criteria and Procedures for Determining Conformity to State or Federal Implementation Plans of Transportation Plans, Programs, and Projects Funded or Approved under Title 23 U.S.C. of the Federal Transit Act," November 24, 1993 (58 FR 62188).

<sup>6</sup> "Determining Conformity of General Federal Actions to State or Federal Implementation Plans; Final Rule," November 30, 1993 (58 FR 63214).

Sussex, DE; and York, PA ozone nonattainment areas classified as marginal have attained the ozone air quality standard by their November 15, 1993 attainment date. Finally, this action proposes a determination that the Kent and Queen Anne's Counties, MD marginal ozone nonattainment area attained the ozone standard by November 1994. These actions are based on monitored air quality readings for ozone during the years 1991-1994.

In the final rules section of this **Federal Register**, EPA is approving the reclassification of the Hampton Roads area and the attainment determinations for the Allentown-Bethlehem-Easton, Altoona, Erie, Greenbrier, Harrisburg-Lebanon-Carlisle, Johnstown, Kent and Queen Anne's Counties, Lancaster, Scranton-Wilkes-Barre, Youngstown-Warren-Sharon, Sussex, and York areas as a direct final rule without prior proposal because the Agency views this as a noncontroversial SIP revision and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this proposed rule, no further activity is contemplated in relation to this rule. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting on this action should do so at this time.

**DATES:** Comments must be received in writing by February 16, 1995.

**ADDRESSES:** Written comments on this action should be addressed to Thomas J. Maslany, Director, Air, Radiation, and Toxics Division (3AT00), U.S. Environmental Protection Agency, Region III, 841 Chestnut Building, Philadelphia, Pennsylvania 19107. Copies of the documents relevant to this action are available for public inspection during normal business hours at the Air, Radiation, and Toxics Division, U.S. Environmental Protection Agency, Region III, 841 Chestnut Building, Philadelphia, Pennsylvania 19107.

**FOR FURTHER INFORMATION CONTACT:** Maria A. Pino, (215) 597-9337, at the EPA Regional office listed above.

**SUPPLEMENTARY INFORMATION:** See the information provided in the Direct Final action of the same title, pertaining to the reclassification of the Hampton Roads ozone nonattainment area, which is located in the Rules and Regulations Section of this **Federal Register**.

By action dated December 20, 1994, the EPA Administrator delegated to the Regional Administrators the authority to determine whether ozone nonattainment areas attained the NAAQS.

#### List of Subjects in 40 CFR Part 81

Environmental protection, Air pollution control, Ozone.

**Authority:** 42 U.S.C. 7401-7671q.

Dated: January 5, 1995.

**Peter H. Kostmayer,**

*Regional Administrator.*

[FR Doc. 95-1009 Filed 1-13-95; 8:45 am]

BILLING CODE 6569-50-P

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## LEGAL SERVICES CORPORATION

### 45 CFR Part 1604

#### Outside Practice of Law

**AGENCY:** Legal Services Corporation.

**ACTION:** Proposed rule.

**SUMMARY:** This proposed regulation would amend the Legal Services Corporation's ("Corporation" or "LSC") regulation relating to the outside practice of law by full-time legal services attorneys. The rule is substantively restructured and revised to clarify the exact scope of the restrictions on compensated and uncompensated outside practice so that program attorneys will not be unduly restricted from complying with their professional obligations. The proposed rule also amends definitions and allows for the separate treatment of court appointments.

**DATES:** Comments should be received on or before March 20, 1995.

**ADDRESSES:** Comments should be submitted to the Office of the General Counsel, Legal Services Corporation, 750 First St., NE, 11th Floor, Washington, DC 20002-4250.

**FOR FURTHER INFORMATION CONTACT:** Victor M. Fortunato, General Counsel, (202) 336-8810.

**SUPPLEMENTARY INFORMATION:** On September 16 and October 27, 1994, the Operations and Regulations Committee ("Committee") of the LSC Board of Directors held public hearings on proposed revisions to 45 CFR Part 1604, LSC's regulation on the outside practice of law. At the October 27, 1994, meeting in Washington, DC, the Committee approved a proposed rule to be published in the **Federal Register** for public comment, and agreed to extend the customary 30-day comment period to 60 days.

The Corporation recognizes that legislation to amend the LSC Act and reauthorize appropriations for the Corporation may be considered by Congress. If such legislation does become law, the Corporation's regulations will be revisited and revised accordingly.

#### Section Analysis

##### Section 1604.1 Purpose

This section sets out the framework for other changes that appear in this proposed rule. The Committee added language to authorize a recipient to adopt written policies to permit its program attorneys to engage in pro bono legal assistance and to comply with their obligations as members of the Bar and officers of the court. The rule recognizes, however, that those demands must not interfere with the attorneys' overriding responsibility to serve the program's eligible clients. The Committee also added language to clarify that this part should not be construed to permit recipients to unduly restrict legal services attorneys from engaging in those activities. The use of the word "unduly" acknowledges that there may be some restrictions imposed by the LSC Act or by recipients that are necessary to accomplish the overriding goals of the LSC Act.

##### Section 1604.2 Definitions

###### Section 1604.2(a) "Full-time Attorney"

The definition of "attorney" is deleted, because it is inconsistent with the definition of "attorney" in Part 1600. Instead, a definition of "full-time attorney" is added that incorporates the definition of "attorney" in Part 1600. A "full-time attorney" is defined as an attorney who is a full-time employee of a recipient.

A separate definition of "full-time" has not been included. The decision of what constitutes "full-time" is left to the recipient's own personnel and outside practice policies and to any appropriate statutory definitions found elsewhere.

###### Section 1604.2(b) "Outside Practice of Law"

This definition explains what outside practice is, rather than what it is not. The regulation is intended to apply only to outside practice of law by recipients' employees and not to other outside activities by recipients' employees that do not constitute the outside practice of law.

The words "receiving that" are substituted for "entitled to receive." This revision makes it clear that an attorney could represent a client who is eligible for representation from the

recipient in an outside practice case even if the client is also receiving legal assistance from the recipient, as long as the recipient is representing the client on a different matter.

This definition is not intended to include work done by legal services attorneys when serving in the military reserves as JAG Corps attorneys. Although the Committee chose not to include language on this issue in the rule, it intends to continue the policy established in prior General Counsel opinions, which have consistently found that an attorney is not engaged in the outside practice of law while serving as a JAG Corps reserve officer. Comments are solicited as to whether the rule should include language expressly stating this policy.

#### *Section 1604.2(c) "Court Appointment"*

The essence of the current definition of "court appointments" is incorporated into this proposed provision. The regulatory definition is used rather than the following language in § 1006(d)(6) of the Act:

Attorneys employed by a recipient shall be appointed to provide legal assistance without reasonable compensation only when such appointment is made pursuant to a statute, rule, or practice applied generally to attorneys practicing in the court where the appointment is made.

The regulatory definition on appointments is broader than the statutory one, which applies only to uncompensated appointments; but the regulatory definition is more protective of program resources.

#### *Section 1604.3 General Policy*

Paragraph (a) would require recipients to adopt written policies relating to outside practice, rather than permitting programs to determine, on an ad hoc basis, whether outside practice is to be permitted in a particular instance. However, the policies would give the project director substantial discretion to decide.

Paragraph (b) addresses the concern that, in revising this regulation to take account of the evolving obligations of all attorneys to do pro bono work, recipients would be subject to pressures from their attorneys to do outside practice that was not absolutely required by professional obligations and that interfered with the program's ability to serve the clients it is funded to serve. This concern is especially important in view of the fact that LSC recipients lack adequate resources to serve more than a small fraction of the eligible clients who have real legal

needs. This provision is included in order to insure that recipients can adopt policies that balance the demands of the profession, the attorney's desire to do outside work, and the needs of the community served by the program.

The restrictions of this part apply only to full-time attorneys. Although recipients are not required to do so, paragraph (c) would allow them to adopt restrictions on outside practice by part-time attorneys.

#### *Section 1604.4 Permissible Outside Practice*

##### Section 1604.4(a)

Proposed paragraph (a) states the rule in the affirmative, rather than as a restriction. It also refers to a full-time attorney's responsibilities to clients, rather than "full-time responsibilities." The Committee intends a director to make a case-by-case determination as to whether involvement in a specific case or matter would be consistent with a full-time attorney's responsibilities to the program's clients. An full-time attorney's responsibilities to program clients should be determined by reference to the program's definition of "full-time," not by reference to a specific attorney's working habits. Thus, an attorney in the habit of working substantial amounts of overtime on program activities should not be penalized for deciding to allot some of that overtime to an outside practice case rather than to program activities. In addition, an attorney should be permitted to take reasonable amounts of leave to engage in permitted outside practice.

##### Section 1604.4(b)

Paragraph (b) is included to address a concern that, if program attorneys handled outside practice cases that were controversial or dealt with areas prohibited to the recipient (e.g., abortion litigation), the recipients would be seen as handling the cases and viewed as using outside practice as a way to get around other restrictions. This language, which is similar to language in the regulation on prohibited political activities, would require the attorney to make it clear that this was not a program case, and to do whatever was necessary to insure that it not be perceived as such.

In practical terms, the restriction might require the attorney to use a home address or post office box for correspondence, or a home telephone number or direct dial number that would not go through the recipient's switchboard or voice mail greeting, or other similar processes to insure that the

recipient was not identified as the sponsor of the representation.

The restriction on identification does not apply to court appointments, which are treated separately throughout this part, since attorneys handle these cases as officers of the court. Recipients do not have great discretion to refuse to permit attorneys to accept them, as long as they are made under a statute, rule or practice that is generally applicable. The restriction also does not apply to cases which are undertaken to fulfill a mandatory pro bono obligation, see § 1604.7(d).

##### Section 1604.4(c)

Paragraph (c)(1) is intended to make explicit what has always been implicit under the current Part 1604, i.e., that work for a client from a previous practice should not be done on program time.

The Committee proposes to add language to paragraph (c)(2) to make it clear that an attorney may represent another member of the recipient's staff without having to prove that the individual is a close friend. The Committee also proposes to add language to make it clear that the attorney may represent him or herself.

The Committee proposes to revise paragraph (c)(4) to make it clear that, in addition to representing a religious, community, or charitable group, an attorney may represent a client who has been referred to him or her by such a group through a formal pro bono or referral program that does regular referrals. For example, it is permissible for an attorney to represent a client who has been referred by the ACLU, NAACP or Catholic Charities. This is an issue that was raised in a recent case involving Evergreen Legal Services. LSC said that an Evergreen attorney could not handle a case for an individual who had been referred to her by the Lawyers' Guild, although presumably she could have represented the Guild itself. Prior General Counsel opinions permitted outside practice both on behalf of organizations such as the ACLU as well as on behalf of individuals referred by those organizations, but those opinions did not distinguish between those two situations.

The Committee added paragraph (c)(5) to make it clear that legal services attorneys should be permitted to act in the same way as other attorneys with respect to pro bono work that is undertaken to meet professional obligations, whether the obligation is aspirational, as under state rules that are modeled on Rule 6.1 of the American Bar Association's ("ABA") Model Rules of Professional Conduct, or mandatory,

as is now the case in a few local jurisdictions across the country.

#### *Section 1604.5 Compensation*

Although the statute prohibits all compensated outside practice, the exception in proposed paragraph (a) for work on cases held over from a previous private practice is justified under the general principle that neither LSC nor the recipient can interfere with an attorney's professional responsibilities to a client. Since the representation was undertaken before the lawyer became a legal services attorney, fairness dictates that the attorney should be permitted to take fees for completion of the work.

Paragraph (b) proposes that a recipient may permit an attorney to accept attorneys' fees for § 1604.4(c)(2)–(5) cases, as long as the fees are remitted to the recipient. Several project directors have questioned why an attorney cannot keep fees awarded for outside practice approved by the recipient. The answer is simple. The LSC Act provision on outside practice, § 1007(a)(4), prohibits all compensated outside practice, subject to overriding considerations of professional responsibility, but permits uncompensated outside practice under LSC guidelines.

What this section does, in essence, is to define as "uncompensated outside practice" any representation where the attorney does not seek or receive personal compensation for the representation. Thus, the attorney can perform work pro bono, without any fee, but can also undertake work where fees could potentially be awarded, as long as the attorney does not keep any such fee but remits it to the recipient.

Proposed § 1604.5(b)(2) provides that attorneys' fees shall be remitted to a recipient when allowed by applicable rules of professional responsibility. The Committee added the reference to the rules of professional responsibility because of a concern that restrictions on fee-splitting could, in some states, prohibit an attorney from turning over attorneys' fees from an outside practice case to the recipient. Recipients would need to consult the status of the law in their state. The Committee understands that, in general, fee-splitting between a staff attorney and a legal services organization such as a recipient is not restricted under state or local rules, but requests comments on the issue.

The Committee also raised the issue of how such attorneys' fees would be treated for tax purposes. Because the Corporation does not generally regulate the tax obligations of recipients' employees, this issue does not appear to be one that should be addressed by

regulation. Rather, it is a matter of local concern which a recipient may want to consider when drafting its policies on outside practice.

The LSC Act and LSC's regulation on fee-generating cases, 45 CFR Part 1609, have consistently been interpreted as prohibiting recipients from taking attorneys' fees from a client's recovery of damages or retroactive statutory benefits. That restriction is accordingly incorporated into this provision of the rule.

Paragraph (b)(3) is intended to make it clear that if a recipient receives attorneys' fees from one of its attorneys' outside practice cases, it could reimburse the attorney, the client, the pro bono or legal referral organization, or anyone else who had contributed resources to cover costs or out-of-pocket expenses to support the representation.

#### *Section 1604.6 Use of Recipient Resources*

For the five types of outside practice cases described in § 1604.4(c)(1)–(5), this provision proposes to allow attorneys to use some recipient resources if necessary to carry out the attorney's professional responsibilities. However, it would be up to the local recipient to establish policies that would determine whether its attorneys could use recipient resources for a specific case to the extent allowed by this rule. For § 1604.4(c)(1) cases, a recipient may allow its attorneys to use only a de minimis amount of program resources, including time. Under a "de minimis" standard, an attorney could make a brief phone call or use the fax machine during working hours, but would have to take leave for court appearances.

For § 1604.4(c)(2)–(5) cases, the standard is somewhat less strict. A recipient may allow its attorneys to use a limited amount of program resources, including time, for those cases. Under the "limited" standard, in addition to whatever an attorney could do under the de minimis standard, the attorney could, for example, make a brief court appearance during normal working hours without taking leave. An attorney could also be permitted to use a program computer or typewriter to prepare pleadings or other documents. However, if the attorney participated in a long trial or extended negotiation, he or she would normally be required to take leave to do so.

The Committee also agreed that, if a recipient had a procedure to identify copying, postage and similar costs, and the attorney reimbursed the recipient, the use of those resources would also be permissible under either standard. This

position is consistent with the longstanding LSC policy, which has been in place for most of LSC's history.

Finally, language is included that allows an attorney to use a recipient's resources only when the recipient's LSC or private funds are not used for any activities for which the use of such funds is prohibited.

The Committee seeks comments on the appropriateness of using recipient resources for any outside practice, and whether or not the distinction between "de minimis" and "limited" use of resources makes sense and is workable.

#### *Section 1604.7 Court Appointments*

This proposed section treats court appointments and mandatory pro bono representation separately from outside practice, because there are substantially different considerations for court appointments and mandatory pro bono than there are for pro bono or other outside cases that an attorney undertakes on a strictly voluntary basis.

Paragraph (a)(1) simply restates a general rule that applies to court appointments as well as to outside practice under the current Part 1604. Paragraph (a)(2) is based on § 1006(d)(6) of the LSC Act. It is intended to protect recipients from efforts that have been made by some judges to appoint legal services attorneys to handle court appointments in lieu of private attorneys, and/or to refuse to provide compensation for appointed cases handled by legal services attorneys, when private attorneys appointed to similar cases would have been paid. Paragraph (a)(3) is also a requirement carried over from the current Part 1604, although it makes more sense under this proposal, since the proposed rule makes it clear that legal services attorneys can handle court appointments on program time.

Paragraph (b) would allow a full-time attorney to use program resources to undertake representation permitted by this section, and paragraph (c) would allow the attorney to identify the recipient as his or her employer when engaged in such representation.

Paragraph (d) provides that, if an attorney is mandated to engage in pro bono representation by applicable state or local court rules or practices or by rules of professional responsibility, such representation shall be treated in the same manner as court appointments for the purposes of paragraphs (a)(1), (a)(3), (b) and (c) of this section. While the Committee recognizes that the ABA Model Rules do not currently mandate pro bono services for any attorney, the Committee also recognizes that mandatory pro bono is under active

consideration in a number of states and is a reality in certain local jurisdictions. It is the intent of the Committee that legal services attorneys be permitted to undertake outside representation to fulfill any mandatory professional obligations to provide pro bono assistance to which they are now or may be subject in the future.

#### List of Subjects in 45 CFR Part 1604

Legal services.

For the reasons set forth in the preamble, LSC proposes to revise 45 CFR part 1604 to read as follows:

#### PART 1604—OUTSIDE PRACTICE OF LAW

Sec.

- 1604.1 Purpose.
- 1604.2 Definitions.
- 1604.3 General policy.
- 1604.4 Permissible outside practice.
- 1604.5 Compensation.
- 1604.6 Use of recipient resources.
- 1604.7 Court appointments.

**Authority:** 42 U.S.C. 2996e(b)(3), 2996e(d)(6), 2996f(a)(4), 2996g(e).

##### § 1604.1 Purpose.

This part is designed to authorize recipients to adopt written policies that permit legal services attorneys employed by recipients to engage in pro bono legal assistance and to comply with the reasonable demands made upon them as members of the Bar and as officers of the Court, as long as those demands do not hinder fulfillment of their overriding responsibility to serve those eligible for assistance under the Act. Nothing in this part shall be construed to permit recipients to unduly restrict the ability of any attorney to engage in such activities.

##### § 1604.2 Definitions.

As used in this part—

(a) *Full-time attorney* means an attorney who is employed full-time by a recipient in legal assistance activities supported in major part by the Corporation, and who is authorized to practice law in the jurisdiction where assistance is provided.

(b) *Outside practice of law* means the provision of legal assistance to a client who is not receiving that legal assistance from the employer of the full-time attorney rendering assistance, but does not include court appointments except where specifically stated.

(c) *Court appointment* means an appointment in a criminal or civil case made by a court or administrative agency under a statute or court rule or practice.

##### § 1604.3 General policy.

(a) A recipient shall adopt written policies governing the outside practice of law by full-time attorneys that are consistent with the applicable rules of professional responsibility.

(b) A recipient's policies may permit the outside practice of law by full-time attorneys only to the extent allowed by this part, but may impose additional restrictions as necessary to meet the recipient's responsibilities to eligible clients.

(c) A recipient may also adopt policies that apply to outside practice by attorneys employed part-time by the recipient, but are not required to do so under the provisions of this part.

##### § 1604.4 Permissible outside practice.

A recipient may permit a full-time attorney to engage in a specific case or matter that constitutes the outside practice of law if:

(a) The director of the recipient or the director's designee determines that representation in such case or matter is consistent with the attorney's responsibilities to the recipient's clients;

(b) The attorney does not intentionally identify the case or matter with the Corporation or the recipient; and

(c) The attorney is—  
(1) Newly employed and has a professional responsibility to close cases from a previous law practice, and does so on the attorney's own time as expeditiously as possible; or

(2) Acting on behalf of him or herself, a close friend, family member or another member of the recipient's staff; or

(3) Acting on behalf of a religious, community, or charitable group; or

(4) Participating in a pro bono or legal referral program affiliated with or sponsored by a bar association, other legal organization or religious, community or charitable group; or

(5) Satisfying an obligation to participate in pro bono work under applicable State or local rules or practices of professional responsibility.

##### § 1604.5 Compensation.

(a) A recipient may permit a full-time attorney to seek and receive personal compensation for work performed pursuant to § 1604.4(c)(1).

(b) A recipient may permit a full-time attorney to seek and accept a fee paid by, awarded or approved by a court or administrative body or included in a settlement if—

(1) The attorney is acting pursuant to § 1604.4(c) (2) through (5);

(2) Subject to the applicable law and rules of professional responsibility, any such fees paid to the attorney are remitted to the recipient; and

(3) The fee is not deducted from the individual client's recovery of compensatory damages or retroactive benefits.

(c) From the fees remitted to the recipient pursuant to paragraph (b)(2) of this section, the recipient may reimburse any individual or organization for actual costs or out-of-pocket expenses incurred in the representation.

##### § 1604.6 Use of recipient resources.

(a) For cases undertaken pursuant to § 1604.4(c)(1), a recipient's written policies may permit a full-time attorney to use de minimis amounts of the recipient's resources for permissible outside practice if necessary to carry out the attorney's professional responsibilities, as long as the recipient's Corporation or private funds are not used for any activities for which the use of such funds is prohibited.

(b) For cases undertaken pursuant to § 1604.4(c) (2) through (5), a recipient's written policies may permit a full-time attorney to use limited amounts of the recipient's resources for permissible outside practice if necessary to carry out the attorney's professional responsibilities, as long as the recipient's Corporation or private funds are not used for any activities for which the use of such funds is prohibited.

##### § 1604.7 Court appointments.

(a) A recipient may permit a full-time attorney to accept a court appointment if the director of the recipient determines that:

(1) Such an appointment or case is consistent with the attorney's responsibilities to the recipient's clients;

(2) The appointment was made and the attorney will receive compensation for the court appointment under the same terms and conditions as are applied generally to attorneys practicing in the court where the appointment is made; and

(3) Subject to the applicable law and rules of professional responsibility, the attorney agrees to remit to the recipient any compensation received.

(b) A recipient may permit a full-time attorney to use program resources to undertake representation pursuant to a court appointment.

(c) A full-time attorney may identify the recipient as his or her employer when engaged in representation pursuant to a court appointment.

(d) If, under the applicable State or local court rules or practices or rules of professional responsibility, legal services attorneys are mandated to provide pro bono legal assistance in addition to the attorneys' work on

behalf of the recipient's clients, such legal assistance shall be treated in the same manner as court appointments under paragraphs (a)(1), (a) (3), (b) and (c) of this section.

Dated: January 10, 1995.

**Victor M. Fortuno,**  
General Counsel.

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BILLING CODE 7050-01-P

## DEPARTMENT OF TRANSPORTATION

### Office of the Secretary

#### 49 CFR Part 40

[Docket No. 50018; RIN 2105-AC20]

#### Procedures for Transportation Workplace Drug and Alcohol Testing Programs; Procedures for Non-Evidential Alcohol Screening Devices

**AGENCY:** Office of the Secretary, DOT.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** When the Department of Transportation published its final alcohol testing rules in February 1994, it said that if non-evidential screening devices were approved, the devices could be used for screening tests in DOT-mandated alcohol testing programs. Several such devices have now met precision and accuracy requirements. This proposed rule is intended to establish procedures for the use of these devices.

**DATES:** Comments should be received by February 16, 1995. Late-filed comments will be considered to the extent practicable.

**FOR FURTHER INFORMATION CONTACT:** Albert Alvarez, Director, Department of Transportation Office of Drug Enforcement and Program Compliance, 400 7th Street, S.W., Washington D.C., 20590, Room 9404, 202-366-3784; or Robert C. Ashby, Deputy Assistant General Counsel for Regulation and Enforcement, 400 7th Street, S.W., Room 10424, 202-366-9306.

**SUPPLEMENTARY INFORMATION:** When the Department published its final alcohol testing rules in February 1994 (59 FR 7302 *et seq.*, February 15, 1994), the Department established breath testing, using evidential breath testing devices (EBTs), as the method to be used. However, in response to comments requesting additional flexibility in testing methods, the Department said that

NHTSA [the National Highway Traffic Safety Administration] will develop model specifications (using precision and accuracy criteria), evaluate additional screening

devices against them, and periodically publish a conforming products list of those additional screening devices (not exclusively breath testing devices) that meet the model specifications. . . . Please note that the Department will also have to undertake separate rulemaking proceedings to establish procedures for the use of any devices after they are approved. (Id. at 7316).

NHTSA published model specifications, tested several screening devices and, on December 2, 1994, published a conforming products list (CPL) including four non-evidential breath testing devices and one saliva testing device. As noted in the February 15 common preamble cited above, while NHTSA has now determined that these devices meet the model specifications, their use in DOT-mandated alcohol testing programs would be authorized only in accordance with these proposed procedures (just as EBTs are authorized for use only in accordance with existing Part 40 procedures). Until these proposed procedures are final and in effect, employers are not authorized to use the non-evidential screening devices.

These devices could be used under final procedural rules, it should be emphasized, only for alcohol *screening* tests. Confirmation tests must be performed on EBTs, within 20 minutes of the screening test, as provided in existing 49 CFR 40.65(b). The Department is aware that increasing this interval for situations in which non-evidential devices are used could provide additional flexibility to employers, by increasing the distance that a non-evidential screening test could be conducted away from a confirmation EBT. However, as noted in the preamble to the February 15, 1994, final Part 40 rule, conducting the confirmation test within a brief time from the screening test is important in order to prevent metabolization of alcohol over time from negating what otherwise would be "positive" test results. This is no less true in a case where the screening test is conducted on a non-evidential device than where the screening test is conducted on an EBT. For this reason, the Department is not proposing to increase this interval, though we seek comment on the degree to which an increased interval between screening and confirmation tests could increase the utility of non-evidential devices, without concomitant loss of otherwise positive tests.

In drafting these proposed procedures, the Department used the model of its existing alcohol testing procedures, with modifications appropriate to the different devices involved. This makes the proposed

procedures simple and achieves the flexibility that is the goal of using non-evidential devices.

Proposed § 40.91 simply states that non-evidential devices, approved by NHTSA, can be used for screening but not for confirmation tests. Proposed § 40.93 addresses the more complex issue of who may act as a screening test technician (STT), with what degree of training. First, any BAT meeting the requirements of the existing Part 40 may act as an STT, provided that the individual has demonstrated proficiency on the particular non-evidential device he or she will use (by completing a "Unit VIII" of the DOT model BAT course, or similar section of a DOT-approved equivalent course, specific to the particular device).

There may be some individuals who will act as STTs who do not act as BATs. These individuals would conduct only screening tests using non-evidential devices and would never use EBTs or conduct confirmation tests. The Department is adapting its model BAT course for use in training such persons. We anticipate that this course will be a substantially shorter version of the BAT course, focusing on screening procedures only. The Department will make this course outline available by the time a final rule based on this proposal is published. Someone who successfully completes this course could act as an STT, under paragraph (b) of this section. The remainder of the section, with respect to additional training, documentation of training, and other subjects, parallels existing Part 40.

Proposed § 40.97 concerns locations for screening tests. Location requirements are the same as the parallel section in the existing Part 40 alcohol procedures. Proposed § 40.99 provides that like employers using an EBT without the features needed for confirmation tests, employers using non-evidential *breath* testing devices would use the same form as, and a log book like, those cited in § 40.59 of the existing alcohol testing procedures. A slightly modified form is described at the end of the proposed rule text. The Department seeks comment on whether it would be better to take this approach or to attempt to modify the existing alcohol testing form to encompass non-breath based testing.

For employers using non-evidential breath testing, proposed § 40.101 provides that the STT or BAT would follow essentially the same procedures as are followed for a screening test using an EBT. The technology and testing process using a non-evidential breath testing device and an EBT are similar enough that the existing procedures can