

DEPARTMENT OF TRANSPORTATION**Office of the Secretary****49 CFR Part 40**

RIN 2105-AE54

Technical Amendment

AGENCY: Office of the Secretary of Transportation (OST), U.S. Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: This final rule amends the U.S. Department of Transportation's (DOT) regulation to conform to recent legislation that changed the definition of the term "service agent" in the DOT drug and alcohol testing regulations. The final rule also revises the definition of "service agent" to include all entities that provide services for DOT mandated drug and alcohol programs.

DATES: This final rule is effective on August 8, 2016.

FOR FURTHER INFORMATION CONTACT: Patrice M. Kelly, Acting Director, Office of Drug and Alcohol Policy and Compliance, 1200 New Jersey Avenue SE.; Washington, DC 20590; telephone: (202) 366-3784; email: ODAPCWebMail@dot.gov.

SUPPLEMENTARY INFORMATION:**Good Cause Exemption From Delayed Effect Date and Notice and Comment**

Section 553(b)(3)(B) of title 5, U.S. Code, authorizes agencies to dispense with notice and comment procedures for rules when the agency for "good cause" finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." In this instance, the Moving Ahead for Progress in the 21st Century Act (MAP-21) required the Federal Motor Carrier Safety Administration (FMCSA) to create a database for records pertaining to drug and alcohol program violations by commercial motor vehicle operators. As part of that legislative mandate, MAP-21 included a definition of the term "service agent" that is inconsistent with the current definition of "service agent" in DOT's drug and alcohol testing regulation at 49 CFR 40.3. This final rule amends the DOT regulation so that it is consistent with MAP-21 and clarifies the scope of the definition of service agent, as the term applies throughout the DOT Agencies that utilize 49 CFR part 40, including FMCSA. Since the definition of "service agent" found in 49 CFR part 40 is now inconsistent with MAP-21, DOT finds that notice and public comment to this final rule, as well as any delay in its

effective date, is unnecessary as the change is already effective under the statute.

I. Authority for This Rulemaking

This rulemaking is promulgated pursuant to the Omnibus Transportation Employee Testing Act (OTETA) of 1991 (Pub. L. 102-143, 105 Stat. 952, (Oct. 28, 1991)) and MAP-21 (Pub. L. 112-141, 126 Stat. 802, (July 6, 2012)).

II. Background

Historically, service agents have played an integral role in many DOT-regulated employers' drug and alcohol testing programs. Many employers use their service agents as advisors and rely on their services to maintain compliance with DOT regulations. Service agents who are focused on compliance typically increase efficiencies and contribute to the safety of the traveling public.

MAP-21 is a transportation reauthorization bill signed into law on July 6, 2012. In response to section 32402 of the bill, codified at 49 U.S.C. 30106a, FMCSA issued a proposed rule, 79 FR 9703 (Feb. 20, 2014), to create the Commercial Driver's License Drug and Alcohol Clearinghouse (Clearinghouse) under 49 CFR part 382. The Clearinghouse would be a database containing drug and alcohol test program violations by the holders of commercial driver's licenses (CDLs) subject to 49 CFR part 382. The proposal contained, among other things, a provision that would permit motor carrier employers to designate service agents to perform various tasks on their behalf within the Clearinghouse (e.g., reporting employees' drug and alcohol violations to the Clearinghouse). MAP-21 defines a service agent as "a person or entity, other than an employee of the employer, who provides services to employers or employees under the [DOT-wide drug and alcohol] testing program" (49 U.S.C. 31306a(m)(8)).

For more than sixteen years, the term "service agent" has been defined as, "any person or entity, other than an employee of the employer, who provides services specified under this part to employers and/or employees in connection with DOT drug and alcohol testing requirements. This includes, but is not limited to, collectors, BATs [Breath Alcohol Technicians] and STTs [Saliva Testing Technicians], laboratories, MROs [Medical Review Officers], substance abuse professionals, and C/TPAs [Consortia/Third Party Administrators]. To act as service agents, persons and organizations must meet the qualifications set forth in applicable sections of this part. Service

agents are not employers for purposes of this part." (49 CFR 40.3)

In addition, over the years, the service agent industry has grown and it provides many services to DOT-regulated employers. As technology has grown, service agents have branched into providing electronic services. As the sophistication of the drug and alcohol testing industry has grown, we have seen service agents offer auditing services to DOT-regulated employers. Given the fact that additional services have been offered to employers related to DOT's drug and alcohol program, the types of providers that fall into the definition of service agent have evolved.

In this final rule, we are deleting from the current definition of "service agent" the phrases "specified under this part" and "set forth in applicable sections of this part" (both of which refer to 49 CFR part 40). We have also inserted the language "if applicable" to the definition because we believe that it is important to continue to note that if a DOT regulation requires specific qualifications, then the service agent must comply. In so doing, we are conforming to MAP-21 and clarifying that the expanding range of drug and alcohol program services has been included in this definition.

III. Regulatory Analyses and Notices

Changes to Federal regulations must undergo several analyses. First, Executive Orders 12866 and 13563 direct that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 (Pub. L. 96-354), as codified in 5 U.S.C. 601 *et seq.*, requires agencies to analyze the economic impact of regulatory changes on small entities. The Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*) requires that DOT consider the impact of paperwork and other information collection burdens imposed on the public and, under the provisions of PRA section 3507(d), obtain approval from OMB for each collection of information it conducts, sponsors, or requires through regulations. Section (a)(5) of division H of the Fiscal Year 2005 Omnibus Appropriations Act, Public Law 108-447, 118 Stat. 3268 (Dec. 8, 2004) and section 208 of the E-Government Act of 2002, Public Law 107-347, 116 Stat. 2889 (Dec. 17, 2002) requires DOT to conduct a Privacy Impact Assessment (PIA) of a regulation that will affect the privacy of individuals. Finally, the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*) requires

DOT to analyze this action to determine whether it will have an effect on the quality of the environment. This portion of the preamble summarizes the DOT's analyses of these impacts with respect to this final rule.

Executive Order 12866 and 13563 and DOT's Regulatory Policies and Procedures

This final rule is not a significant regulatory action under Executive Order 12866 and 13563, as well as the Department's Regulatory Policies and Procedures. This rule deletes a term used in the current definition of "service agent" in 49 CFR part 40. Its provision conforms to MAP-21 and includes entities that provide additional services with respect to DOT mandated drug and alcohol testing. This rule does not propose any major policy changes or impose significant new costs or burdens.

Regulatory Flexibility Analysis

The Regulatory Flexibility Act of 1980 (Pub. L. 96-354, "RFA"), 5 U.S.C. 601 *et seq.*, establishes "as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration." The RFA covers a wide-range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions.

Agencies must perform a review to determine whether a rule will have a significant economic impact on a substantial number of small entities. If the agency determines that it will, the agency must prepare a regulatory flexibility analysis as described in the RFA. However, if an agency determines that a rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) provides that the head of the agency may so certify, and a regulatory flexibility analysis will not be required. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

Service agents provide useful services that employers may use in order to maintain compliance with DOT regulations. This rule creates no additional burdens for service agents or

the DOT-regulated employers that utilize their services. DOT has long interpreted its regulation in part 40 to encompass all services "in connection with DOT drug and alcohol testing requirements" performed by service agents. See 49 CFR 40.3. Thus, in accordance with 5 U.S.C. 605(b), I certify that this rule will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

The PRA requires that the DOT consider the impact of paperwork and other information collection burdens imposed on the public. The rule does not create an impact of paperwork and other information collection burdens.

Privacy Act

The revised definition of "service agent" does not have any impact with respect to the Privacy Act.

National Environmental Policy Act

The agency has analyzed the environmental impacts of this proposed action pursuant to the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*) and has determined that it is categorically excluded pursuant to DOT Order 5610.1C, Procedures for Considering Environmental Impacts (44 FR 56420, Oct. 1, 1979). Categorical exclusions are actions identified in an agency's NEPA implementing procedures that do not normally have a significant impact on the environment and therefore do not require either an environmental assessment (EA) or environmental impact statement (EIS). See 40 CFR 1508.4. In analyzing the applicability of a categorical exclusion, the agency must also consider whether extraordinary circumstances are present that would warrant the preparation of an EA or EIS. Id. Paragraph 3.c.5 of DOT Order 5610.1C incorporates by reference the categorical exclusions for all DOT Operating Administrations. This action is covered by the categorical exclusion listed in the Federal Highway Administration's implementing procedures, "[p]romulgation of rules, regulations, and directives." 23 CFR 771.117(c)(20). The purpose of this rulemaking is to revise the regulation to conform to recent legislation that changed the definition of the term "service agent" in the DOT drug and alcohol testing regulations. The agency does not anticipate any environmental impacts, and there are no extraordinary circumstances present in connection with this rulemaking.

V. How To Obtain Additional Information

A. Rulemaking Documents

An electronic copy of a rulemaking document may be obtained by using the Internet—

1. Search regulations.gov (<http://www.regulations.gov>) for the docket number listed at the beginning of this document; or
2. Search the Office of the Federal Register's Web page (<https://www.federalregister.gov>) for the RIN listed at the beginning of this document.

List of Subjects in 49 CFR Part 40

Administrative practice and procedure, Drug testing, Laboratories, Reporting and recordkeeping requirements, Safety, Transportation.

The Amendment

In consideration of the foregoing, the Department of Transportation amends part 40 of Title 49, Code of Federal Regulations, as follows:

PART 40—PROCEDURES FOR TRANSPORTATION WORKPLACE DRUG AND ALCOHOL TESTING PROGRAMS

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

Authority: 49 U.S.C. 101, 102, 301, 322, 5331, 20140, 31306, and 45101 *et seq.*

- 2. In § 40.3, revise the definition of "Service agent" to read as follows:

§ 40.3 What do the terms of this part mean?

* * * * *

Service agent. Any person or entity, other than an employee of the employer, who provides services to employers and/or employees in connection with DOT drug and alcohol testing requirements. This includes, but is not limited to, collectors, BATs and STTs, laboratories, MROs, substance abuse professionals, and C/TPAs. To act as service agents, persons and organizations must meet DOT qualifications, if applicable. Service agents are not employers for purposes of this part.

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Issued in Washington, DC, on July 25, 2016.

Anthony R. Foxx,

Secretary of Transportation.

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