

POLICY ISSUE
NOTATION VOTE

RESPONSE SHEET

TO: Carrie M. Safford, Secretary
FROM: Commissioner Caputo
SUBJECT: SECY-24-0058: Rulemaking Plan on Drug and Alcohol
Testing: Technical Issues and Editorial Changes

Approved X Disapproved X Abstain _____ Not Participating _____

COMMENTS: Below _____ Attached X None _____

Entered in STAR

Yes X

No _____



Signature

Date

3-27-25

Commissioner Caputo's Comments on SECY-24-0058, "Rulemaking Plan on Drug and Alcohol Testing: Technical Issues and Editorial Changes"

In SECY-24-0058, staff requests Commission approval to develop a rulemaking that would amend Title 10 of the *Code of Federal Regulations* (10 CFR) Part 26, "Fitness for Duty Programs" (Part 26) to address technical and administrative issues associated with the implementation of drug and alcohol testing program requirements. The proposed rulemaking would incorporate lessons learned from implementing Part 26, align Part 26 with updates to the U.S. Department of Health and Human Services (HHS) Mandatory Guidelines for Federal Workplace Drug Testing Programs and the U.S. Department of Transportation (DOT) drug testing requirements, and resolve three petitions for rulemaking. I approve the initiation of a rulemaking as described by the staff in SECY-24-0058 subject to the following comments.

The discussion of regulatory issues that the rulemaking would address includes potential changes to 10 CFR 26.115, "Collecting a urine specimen under direct observation."¹ This potential change is in conflict with Executive Order (EO) 14168 of January 20, 2025, "Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government."² Staff should remove that issue from consideration in this rulemaking, consistent with EO 14168.

The staff proposes to consider a reduction in the number of blind performance test samples (BPTSs) under 10 CFR 26.168, "Blind performance testing,"³ based upon the industry's consolidated use of a limited number of HHS-certified laboratories and the burden of BPTS testing that could serve as a financial barrier for licensees to contract with other HHS-certified laboratories. Unacknowledged by the staff in SECY-24-0058, DOT eliminated the requirement for BPTS in its 2017 rulemaking. The elimination of this requirement was based upon the years of experience that DOT had gained with the accuracy of laboratory testing processes, thorough biannual inspections and quarterly proficiency through the HHS National Laboratory Certification Program, the lack of false positive testing, and the rights of individual employees to request testing of a split sample if there are questions about the accuracy of the results.⁴ Historically, from 1990 through 2001, DOT had required covered employers to submit BPTS in a quantity equal to three percent of the samples submitted.⁵ In 2001, DOT reduced the requirement for BPTS to one percent with a maximum number of 50 per quarter.⁶

There is a wealth of information on the drug testing results under the DOT regulations before and after the elimination of the requirement for blind specimens.⁷ In 2016, employers under the

¹ SECY-24-0058, page 8.

² Executive Order 14168, "Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government," 90 FR 8615; January 30, 2025.

³ SECY-24-0058, page 4.

⁴ "Procedures for Transportation Workplace Drug and Alcohol Testing Programs: Addition of Certain Schedule II Drugs to the Department of Transportation's Drug-Testing Panel and Certain Minor Amendments; Final rule," 82 FR 52229, 52232; November 13, 2017.

⁵ "Procedures for Transportation Workplace Drug and Alcohol Testing Programs: Addition of Certain Schedule II Drugs to the Department of Transportation's Drug-Testing Panel and Certain Minor Amendments; Notice of proposed rulemaking," 82 FR 7771, 7774; January 23, 2017.

⁶ *Id.*

⁷ See, "DOT Agency [Management Information System] MIS Data," https://www.transportation.gov/odapc/DOT_Agency_MIS_Data.

Federal Aviation Administration (FAA) conducted 234,690 drug tests; employers under the Federal Motor Carrier Safety Administration (FMCSA) conducted 866,655 drug tests; employers under the Federal Railroad Administration (FRA) conducted 37,870 drug tests; employers under the Federal Transit Administration (FTA) conducted 228,049 drug tests; and employers under the Pipeline and Hazardous Materials Safety Administration conducted 469,406 drug tests for a total of 1,836,670 drug tests.⁸ Not accounting for the limit of 50 blinds per quarter per employer under DOT regulations, that would have required 18,367 BPTSs.

When questioned on this, staff indicated the following:

a comparison of the DOT and NRC programs is not one-to-one.... The staff's position is to incorporate improvements in the Part 26 BPTS program to enhance the effectiveness and efficiency of the program and minimize burden on licensees. The BPTS is an important element of an effective FFD program that provides reasonable assurance that workers in covered positions are trustworthy, reliable, and not impaired by the use of illicit substances.⁹

Rather than rely on this qualitative judgment, staff should "strive to improve its methods for quantitative analyses," "use the best information available to develop realistic estimates of the cost[s]," and "quantify[] costs to the extent possible,..."¹⁰ to align with the NRCs Principle of Good Regulation of Efficiency. The same principle also explains that "[r]egulatory activities should be consistent with the degree of risk reduction they achieve," in conformity with the essence of the ADVANCE Act and the Administrative Procedure Act.

The 2017 DOT rulemaking resulted in a decrease of about 20,000 annual BPTSs from the DOT drug testing process.¹¹ Despite this change, roadway fatalities and the fatality rate declined in 2018 and 2019.¹² Staff should take advantage of this real-life experimental data on the effect of eliminating blind testing requirements for a drug testing process that is coupled with defense-in-depth elements similar to those embodied in NRC fitness for duty regulations. Specifically, staff should propose a decision basis in the regulatory analysis that compares the costs and benefits of requiring, reducing, or omitting BPTSs in Part 26.

⁸ See <https://www.transportation.gov/sites/dot.gov/files/docs/resources/partners/drug-and-alcohol-testing/332711/2016misdata.xlsx>; last visited March 6, 2025.

⁹ D. Lewis email, "RESPONSE: Blind Performance Test Samples in SECY-24-0058," February, 10, 2025 at 2:36 PM.

¹⁰ "Staff Requirements – SECY-14-0087 – Qualitative Consideration of Factors in the Development of Regulatory Analyses and Backfit Analyses," ML15063A568.

¹¹ In 2018, there were 2,377,513 DOT employer drug tests, which could be equated to 23,775 BPTS, as compared to 1,836,670 drug tests in 2016, which could be equated to 18,367 BPTS. See <https://www.transportation.gov/sites/dot.gov/files/docs/resources/partners/drug-and-alcohol-testing/328936/2018misdata.xlsx>; last visited March 6, 2025.

¹² See <https://www.transportation.gov/NRSS/SafetyProblem>, last visited March 6, 2025. While there were significant increases in 2020 and 2021, continuing declines in this statistic returned in 2022.