



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 Subcommittee on Highways and Transit, November 1, 2007.

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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. SAPAA 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

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.