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.

[FR Doc. 95-1072 Filed 1-13-95; 8:45 am]

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 nonevidential 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 nonevidential 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 nonevidential 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 nonevidential 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 nonbreath 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