be used as they are. For purposes of these proposed procedures, we view the results displayed on non-evidential breath devices as equivalent to those displayed on EBTs, even if the mode of display is different. We seek comment on whether any greater specificity concerning the display of results on non-evidential breath testing devices is needed.

Saliva testing devices are another matter, since they use a different technology and require different procedures. Proposed § 40.101(d) spells out these procedures. After opening the package containing the device, the STT lets the employee choose whether to use the swab him- or herself or whether to have the STT use the swab. For the sake of hygiene, the STT would wear a surgical glove or other adequate sanitary hand protection whenever the STT performs this task. This is advisable both from the point of view of the STT and the employee. Such a requirement is likely to make all parties more accepting of this testing method, and the Department proposes to require it for this reason. The Department is informed by the Occupational Health and Safety Administration (OSHA) that its rules concerning bloodborne pathogens (29 CFR 1910.1030) do not apply to saliva testing of this sort, since those rules do not designate saliva as a ''potentially infectious material'' except in the context of dental procedures. However, employers should check applicable state or local laws to determine if they impose any additional requirements. These same comments apply to the disposal of saliva test materials (see § 40.101(f)).

The point of the swabbing exercise is to get the absorbent end of the swab completely saturated so that it will activate the device. Once the swab is saturated, the STT places it into the receptacle on the device, maintaining pressure on the device until the device is activated. The manufacturer's instructions will describe how the STT is to know whether the device has been activated. For example, the device that is now on the NHTSA CPL has an indicator spot that turns a particular color when the device is activated.

There are two main types of problems that can happen in this process. First, the process of using the device can miscarry (e.g., the swab breaks or falls to the floor). In this case, the STT is instructed to start the process over with a new device and swab. In this case, the STT would note the occurrence in the ''remarks'' section of the form. The Department seeks comments on whether it would be advisable to use a new form in this situation. Second, the process can work correctly, but the device does not activate. In this case, the STT also begins the process anew, but the STT, rather than the employee, must use the swab (this is because insufficient saturation of the swab is a common reason for the failure of the device to activate).

Once the device activates, the STT reads the result. This reading must take place within the time frame specified in the manufacturer's instructions for the device (e.g., 2–15 minutes in the case of the saliva device now on the CPL). The instructions will also indicate the manner in which the reading is made (e.g., a numerical scale or other indication that there is an alcohol concentration of .02 or greater). Following the reading of the result, the STT proceeds in the same manner as does the BAT in a case when an EBT not having the features necessary for confirmation tests is used. The Department is proposing to amend the procedures for this situation, both where an EBT and where a non-evidential screening device is used. Under this proposal, following a screening test showing a result of .02 or greater, the employee would have to be advised against eating, drinking, etc.; would have to be advised against driving (as noted in Block 4 of the form); and would have to be under observation while going from the screening test site to the confirmation test site.

Refusals to test and incomplete tests (proposed § 40.103) are handled in a manner parallel to that of existing alcohol Part 40 procedures. There is also a parallel to existing alcohol Part 40's procedures for situations in which an adequate sample is not provided (§ 40.105). For non-evidential breath devices, the same ''shy lung'' procedures that are used with EBTs (see § 40.69) are employed. For saliva devices, in situations such as the apparent inability of the employee to saturate the swab sufficiently to activate the device, the STT would first conduct a new test, as provided in § 40.101. If the same thing happens on the new test, the STT makes a note in the ''remarks'' section of the form. The employer is then responsible for immediately conducting a breath test. Since an EBT must be available within 20 minutes in order to conduct a confirmation test, this approach appears workable. The Department seeks comment on whether the rule should specify that an EBT be used for this purpose, since going from a saliva device to a non-evidential breath test device to an EBT (if needed for confirmation) could unnecessarily lengthen the entire procedure, perhaps resulting in the loss of what otherwise would be a positive test.

It is our understanding that individuals cannot voluntarily control the production of saliva. Consequently, there is no precise parallel to ''shy lung'' or ''shy bladder''situations in the case of saliva testing, and refusals would occur only if the employee declined to permit the technician to use the swab or declined to take a subsequent breath test. A medical review, parallel to that provided in the urine and breath testing situations, appears unnecessary here.

Proposed § 40.107 is a brief list of ''fatal flaws'' in non-evidential screening tests. For saliva tests, these include results read in an untimely manner, use of a device past its designated shelf life, and the failure of the device to activate. Other fatal flaws are similar to those in the existing Part 40 alcohol testing procedures. The requirements concerning availability and disclosure of information about employees and maintenance and disclosure of records concerning STTs and non-evidential devices are also the same as those of existing Part 40 procedures.

Regulatory Analyses and Notices

This is not a significant rule under Executive Order 12866 or under the Department's Regulatory Policies and Procedures. It does not impose costs on regulated parties. It facilitates the use of devices that may increase flexibility, and decrease costs, for employers who choose to use them. There are not sufficient Federalism implications to warrant the preparation of a Federalism Assessment. The Department certifies that this rule will not have a significant economic impact on a substantial number of small entities. To the extent that there is any such impact, it is expected to be a small favorable impact, since some small entities may be able to conduct screening tests at a lower cost.

List of Subjects in 49 CFR Part 40

Drug testing, Alcohol testing, Laboratories, Reporting and Recordkeeping requirements, Safety, Transportation.

Issued this 10th Day of January, 1995, at Washington, D.C.

Federico Peña,

Secretary of Transportation.

For the reasons set forth in the preamble, 49 CFR part 40 is proposed to be amended as follows:

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

Authority: 49 U.S.C. 102,301,322; 49 U.S.C. app. 1301nt., app. 1434nt., app. 2717, app. 1618a.