

Calendar No. 491

115TH CONGRESS
2D SESSION

S. 2848

[Report No. 115–286]

To improve Department of Transportation controlled substances and alcohol testing, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MAY 15, 2018

Mr. THUNE introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

JUNE 27, 2018

Reported by Mr. THUNE, with an amendment

[Strike out all after the enacting clause and insert the part printed in italic]

A BILL

To improve Department of Transportation controlled substances and alcohol testing, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “~~Fighting Opioid Abuse~~
5 in Transportation Act”.

1 **SEC. 2. RAIL MECHANICAL EMPLOYEE CONTROLLED SUB-**
2 **STANCES AND ALCOHOL TESTING.**

3 (a) RAIL MECHANICAL EMPLOYEES.—Not later than
4 2 years after the date of enactment of this Act, the Sec-
5 retary of Transportation shall publish a final rule in the
6 Federal Register revising the regulations promulgated
7 under section 20140 of title 49, United States Code, to
8 designate a rail mechanical employee as a railroad em-
9 ployee responsible for safety-sensitive functions for pur-
10 poses of that section.

11 (b) DEFINITION OF RAIL MECHANICAL EM-
12 PLOYEE.—The Secretary shall define the term “rail me-
13 chanical employee” by regulation under subsection (a).

14 (c) SAVINGS CLAUSE.—Nothing in this section may
15 be construed as limiting or otherwise affecting the discre-
16 tion of the Secretary of Transportation to set different re-
17 quirements by railroad size or other factors, consistent
18 with applicable law.

19 **SEC. 3. RAIL YARDMASTER CONTROLLED SUBSTANCES**
20 **AND ALCOHOL TESTING.**

21 (a) YARDMASTERS.—Not later than 2 years after the
22 date of enactment of this Act, the Secretary of Transpor-
23 tation shall publish a final rule in the Federal Register
24 revising the regulations promulgated under section 20140
25 of title 49, United States Code, to designate a yardmaster

1 as a railroad employee responsible for safety-sensitive
2 functions for purposes of that section.

3 (b) DEFINITION OF YARDMASTER.—The Secretary
4 shall define the term “yardmaster” by regulation under
5 subsection (a).

6 (c) SAVINGS CLAUSE.—Nothing in this section may
7 be construed as limiting or otherwise affecting the discre-
8 tion of the Secretary of Transportation to set different re-
9 quirements by railroad size or other factors, consistent
10 with applicable law.

11 **SEC. 4. GAO REPORT ON DEPARTMENT OF TRANSPOR-**
12 **TATION'S COLLECTION AND USE OF DRUG**
13 **TESTING DATA.**

14 (a) IN GENERAL.—Not later than 18 months after
15 the date of enactment of this Act, the Comptroller General
16 of the United States shall—

17 (1) review the Department of Transportation
18 Drug and Alcohol Testing Management Information
19 System; and

20 (2) submit to the Committee on Commerce,
21 Science, and Transportation of the Senate and the
22 Committee on Transportation and Infrastructure of
23 the House of Representatives a report on the review,
24 including recommendations under subsection (c).

1 (b) CONTENTS.—The report under subsection (a)
2 shall include—

3 (1) a description of the process the Department
4 of Transportation uses to collect and record drug
5 and alcohol testing data submitted by employers for
6 each mode of transportation;

7 (2) an assessment of whether and, if so, how
8 the Department of Transportation uses the data de-
9 scribed in paragraph (1) in carrying out its respon-
10 sibilities;

11 (3) an assessment of the extent to which the
12 data described in paragraph (1) is distributed and
13 available within the Department of Transportation;
14 and

15 (4) an assessment of the extent to which drug
16 and alcohol positive rates for each mode of transpor-
17 tation are publicly available.

18 (c) RECOMMENDATIONS.—The report under sub-
19 section (a) may include recommendations regarding—

20 (1) how the Department of Transportation can
21 best use the data described in subsection (b)(1);

22 (2) any improvements that could be made to
23 the process described in subsection (b)(1);

24 (3) whether and, if so, how drug and alcohol
25 positive rates for each mode of transportation should

1 be made publicly available in an easily accessible for-
2 mat; and

3 (4) such other recommendations as the Comp-
4 troller General considers appropriate.

5 **SEC. 5. TRANSPORTATION WORKPLACE DRUG AND ALCO-**
6 **HOL TESTING PROGRAM; ADDITION OF**
7 **FENTANYL.**

8 (a) **MANDATORY GUIDELINES FOR FEDERAL WORK-**
9 **PLACE DRUG TESTING PROGRAMS.—**

10 (1) **IN GENERAL.—**Not later than 180 days
11 after the date of enactment of this Act, the Sec-
12 retary of Health and Human Services shall deter-
13 mine whether a revision of the Mandatory Guidelines
14 for Federal Workplace Drug Testing Programs to
15 expand the opiate category on the list of authorized
16 drug testing to include fentanyl is justified, based on
17 the reliability and cost-effectiveness of available test-
18 ing.

19 (2) **REVISION OF GUIDELINES.—**If the expan-
20 sion of the opiate category is determined to be justi-
21 fied under paragraph (1), the Secretary of Health
22 and Human Services shall publish in the Federal
23 Register, not later than 1 year after the date of the
24 determination under that paragraph, a final notice
25 of the revision of the Mandatory Guidelines for Fed-

1 eral Workplace Drug Testing Programs to expand
2 the opiate category on the list of authorized drug
3 testing to include fentanyl.

4 (b) DEPARTMENT OF TRANSPORTATION DRUG-TEST-
5 ING PANEL.—If the expansion of the opiate category is
6 determined to be justified under subsection (a)(1) and the
7 Secretary of Transportation concurs with that determina-
8 tion, the Secretary of Transportation shall publish in the
9 Federal Register, not later than 18 months after the date
10 the final notice is published under subsection (a)(2), a
11 final rule revising part 40 of title 49, Code of Federal Reg-
12 ulations, to include fentanyl in the Department of Trans-
13 portation’s drug-testing panel, consistent with the Manda-
14 tory Guidelines for Federal Workplace Drug Testing Pro-
15 grams as revised by the Secretary of Health and Human
16 Services under subsection (a).

17 (c) SAVINGS PROVISION.—Nothing in this section
18 may be construed as limiting or otherwise affecting any
19 authority of the Secretary of Health and Human Services
20 or the Secretary of Transportation to expand the list of
21 authorized drug testing to include an additional substance.

22 **SEC. 6. REPORT ON HAIR TESTING GUIDELINES.**

23 Not later than 30 days after the date of enactment
24 of this Act, and every 30 days thereafter until the date
25 that the Secretary of Health and Human Services pub-

lishes in the Federal Register a final notice of scientific and technical guidelines for hair testing in accordance with section 5402(b) of the Fixing America's Surface Transportation Act (Public Law 114–94; 129 Stat. 1312), the Secretary of Health and Human Services shall submit to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives a report on—

- (1) the status of the hair testing guidelines;
- (2) an explanation for why the hair testing guidelines have not been issued;
- (3) a schedule, including benchmarks, for the completion of the hair testing guidelines; and
- (4) an estimated date of completion of the hair testing guidelines.

**SEC. 7. MANDATORY GUIDELINES FOR FEDERAL WORK-
PLACE DRUG TESTING PROGRAMS USING
ORAL FLUID.**

(a) DEADLINE.—Not later than December 31, 2018, the Secretary of Health and Human Services shall publish in the Federal Register a final notice of the Mandatory Guidelines for Federal Workplace Drug Testing Programs using Oral Fluid, based on the notice of proposed manda-

1 tory guidelines published in the Federal Register on May
2 15, 2015 (94 FR 28054).

3 (b) **RULE OF CONSTRUCTION.**—Nothing in this sec-
4 tion may be construed as—

5 (1) limiting or otherwise affecting the discretion
6 of the Secretary of Health and Human Services to
7 revise the proposed mandatory guidelines described
8 in subsection (a) to address issues raised during
9 rulemaking, including issues involving passive expo-
10 sure to marijuana use, prior to publishing the final
11 notice; or

12 (2) requiring the Secretary of Health and
13 Human Services to reissue a notice of proposed
14 mandatory guidelines to carry out subsection (a).

15 **SEC. 8. ELECTRONIC RECORDKEEPING.**

16 Not later than December 31, 2019, the Secretary of
17 Transportation shall issue a final rule revising part 40 of
18 title 49, Code of Federal Regulations, to authorize, to the
19 extent practicable, the use of electronic signatures or dig-
20 ital signatures executed to electronic forms instead of tra-
21 ditional handwritten signatures executed on paper forms.

22 **SECTION 1. SHORT TITLE.**

23 *This Act may be cited as the “Fighting Opioid Abuse*
24 *in Transportation Act”.*

1 **SEC. 2. RAIL MECHANICAL EMPLOYEE CONTROLLED SUB-**
2 **STANCES AND ALCOHOL TESTING.**

3 (a) *RAIL MECHANICAL EMPLOYEES.*—Not later than
4 2 years after the date of enactment of this Act, the Secretary
5 of Transportation shall publish a final rule in the Federal
6 Register revising the regulations promulgated under section
7 20140 of title 49, United States Code, to designate a rail
8 mechanical employee as a railroad employee responsible for
9 safety-sensitive functions for purposes of that section.

10 (b) *DEFINITION OF RAIL MECHANICAL EMPLOYEE.*—
11 The Secretary shall define the term “rail mechanical em-
12 ployee” by regulation under subsection (a).

13 (c) *SAVINGS CLAUSE.*—Nothing in this section may be
14 construed as limiting or otherwise affecting the discretion
15 of the Secretary of Transportation to set different require-
16 ments by railroad size or other factors, consistent with ap-
17 plicable law.

18 **SEC. 3. RAIL YARDMASTER CONTROLLED SUBSTANCES AND**
19 **ALCOHOL TESTING.**

20 (a) *YARDMASTERS.*—Not later than 2 years after the
21 date of enactment of this Act, the Secretary of Transpor-
22 tation shall publish a final rule in the Federal Register re-
23 vising the regulations promulgated under section 20140 of
24 title 49, United States Code, to designate a yardmaster as
25 a railroad employee responsible for safety-sensitive func-
26 tions for purposes of that section.

1 (b) *DEFINITION OF YARDMASTER.*—*The Secretary*
 2 *shall define the term “yardmaster” by regulation under sub-*
 3 *section (a).*

4 (c) *SAVINGS CLAUSE.*—*Nothing in this section may be*
 5 *construed as limiting or otherwise affecting the discretion*
 6 *of the Secretary of Transportation to set different require-*
 7 *ments by railroad size or other factors, consistent with ap-*
 8 *plicable law.*

9 **SEC. 4. DEPARTMENT OF TRANSPORTATION PUBLIC DRUG**
 10 **AND ALCOHOL TESTING DATABASE.**

11 (a) *IN GENERAL.*—*Subject to subsection (c), the Sec-*
 12 *retary of Transportation shall—*

13 (1) *not later than March 31, 2019, establish and*
 14 *make publicly available on its website a database of*
 15 *the drug and alcohol testing data reported by employ-*
 16 *ers for each mode of transportation; and*

17 (2) *update the database annually.*

18 (b) *CONTENTS.*—*The database under subsection (a)*
 19 *shall include, for each mode of transportation—*

20 (1) *the total number of drug and alcohol tests by*
 21 *type of substance tested;*

22 (2) *the drug and alcohol test results by type of*
 23 *substance tested;*

24 (3) *the reason for the drug or alcohol test, such*
 25 *as pre-employment, random, post-accident, reasonable*

1 *suspicion or cause, return-to-duty, or follow-up, by*
 2 *type of substance tested; and*

3 (4) *the number of individuals who refused test-*
 4 *ing.*

5 (c) *COMMERCIALLY SENSITIVE DATA.—The Depart-*
 6 *ment of Transportation shall not release any commercially*
 7 *sensitive data furnished by an employer under this section*
 8 *unless the data is aggregated or otherwise in a form that*
 9 *does not identify the employer providing the data.*

10 (d) *SAVINGS CLAUSE.—Nothing in this section may*
 11 *be construed as limiting or otherwise affecting the require-*
 12 *ments of the Secretary of Transportation to adhere to re-*
 13 *quirements applicable to confidential business information*
 14 *and sensitive security information, consistent with applica-*
 15 *ble law.*

16 **SEC. 5. GAO REPORT ON DEPARTMENT OF TRANSPOR-**
 17 **TATION'S COLLECTION AND USE OF DRUG**
 18 **AND ALCOHOL TESTING DATA.**

19 (a) *IN GENERAL.—Not later than 2 years after the*
 20 *date the Department of Transportation public drug and al-*
 21 *cohol testing database is established under section 4, the*
 22 *Comptroller General of the United States shall—*

23 (1) *review the Department of Transportation*
 24 *Drug and Alcohol Testing Management Information*
 25 *System; and*

1 (2) *submit to the Committee on Commerce,*
2 *Science, and Transportation of the Senate and the*
3 *Committee on Transportation and Infrastructure of*
4 *the House of Representatives a report on the review,*
5 *including recommendations under subsection (c).*

6 (b) *CONTENTS.—The report under subsection (a) shall*
7 *include—*

8 (1) *a description of the process the Department*
9 *of Transportation uses to collect and record drug and*
10 *alcohol testing data submitted by employers for each*
11 *mode of transportation;*

12 (2) *an assessment of whether and, if so, how the*
13 *Department of Transportation uses the data described*
14 *in paragraph (1) in carrying out its responsibilities;*
15 *and*

16 (3) *an assessment of the Department of Trans-*
17 *portation public drug and alcohol testing database*
18 *under section 4.*

19 (c) *RECOMMENDATIONS.—The report under subsection*
20 *(a) may include recommendations regarding—*

21 (1) *how the Department of Transportation can*
22 *best use the data described in subsection (b)(1);*

23 (2) *any improvements that could be made to the*
24 *process described in subsection (b)(1);*

1 (3) *whether and, if so, how the Department of*
 2 *Transportation public drug and alcohol testing data-*
 3 *base under section 4 could be made more effective; and*

4 (4) *such other recommendations as the Comp-*
 5 *troller General considers appropriate.*

6 **SEC. 6. TRANSPORTATION WORKPLACE DRUG AND ALCO-**
 7 **HOL TESTING PROGRAM; ADDITION OF**
 8 **FENTANYL.**

9 (a) *MANDATORY GUIDELINES FOR FEDERAL WORK-*
 10 *PLACE DRUG TESTING PROGRAMS.—*

11 (1) *IN GENERAL.—Not later than 180 days after*
 12 *the date of enactment of this Act, the Secretary of*
 13 *Health and Human Services shall determine whether*
 14 *a revision of the Mandatory Guidelines for Federal*
 15 *Workplace Drug Testing Programs to expand the opi-*
 16 *ate category on the list of authorized drug testing to*
 17 *include fentanyl is justified, based on the reliability*
 18 *and cost-effectiveness of available testing.*

19 (2) *REVISION OF GUIDELINES.—If the expansion*
 20 *of the opiate category is determined to be justified*
 21 *under paragraph (1), the Secretary of Health and*
 22 *Human Services shall—*

23 (A) *notify the Committee on Commerce,*
 24 *Science, and Transportation of the Senate and*
 25 *the Committee on Transportation and Infra-*

1 *structure of the House of Representatives of the*
2 *determination; and*

3 *(B) publish in the Federal Register, not*
4 *later than 18 months after the date of the deter-*
5 *mination under that paragraph, a final notice of*
6 *the revision of the Mandatory Guidelines for*
7 *Federal Workplace Drug Testing Programs to ex-*
8 *pend the opiate category on the list of authorized*
9 *drug testing to include fentanyl.*

10 *(3) REPORT.—If the expansion of the opiate cat-*
11 *egory is determined not to be justified under para-*
12 *graph (1), the Secretary of Health and Human Serv-*
13 *ices shall submit to the Committee on Commerce,*
14 *Science, and Transportation of the Senate and the*
15 *Committee on Transportation and Infrastructure of*
16 *the House of Representatives a report explaining, in*
17 *detail, the reasons the expansion of the opiate cat-*
18 *egory on the list of authorized drugs to include*
19 *fentanyl is not justified.*

20 *(b) DEPARTMENT OF TRANSPORTATION DRUG-TESTING*
21 *PANEL.—If the expansion of the opiate category is deter-*
22 *mined to be justified under subsection (a)(1), the Secretary*
23 *of Transportation shall publish in the Federal Register, not*
24 *later than 18 months after the date the final notice is pub-*
25 *lished under subsection (a)(2), a final rule revising part*

1 40 of title 49, Code of Federal Regulations, to include
2 fentanyl in the Department of Transportation's drug-test-
3 ing panel, consistent with the Mandatory Guidelines for
4 Federal Workplace Drug Testing Programs as revised by
5 the Secretary of Health and Human Services under sub-
6 section (a).

7 (c) SAVINGS PROVISION.—Nothing in this section may
8 be construed as—

9 (1) delaying the publication of the notices de-
10 scribed in sections 7 and 8 of this Act until the Sec-
11 retary of Health and Human Services makes a deter-
12 mination or publishes a notice under this section; or

13 (2) limiting or otherwise affecting any authority
14 of the Secretary of Health and Human Services or the
15 Secretary of Transportation to expand the list of au-
16 thorized drug testing to include an additional sub-
17 stance.

18 **SEC. 7. STATUS REPORTS ON HAIR TESTING GUIDELINES.**

19 (a) IN GENERAL.—Not later than 30 days after the
20 date of enactment of this Act, and every 180 days thereafter
21 until the date that the Secretary of Health and Human
22 Services publishes in the Federal Register a final notice of
23 scientific and technical guidelines for hair testing in ac-
24 cordance with section 5402(b) of the Fixing America's Sur-
25 face Transportation Act (Public Law 114-94; 129 Stat.

1 1312), the Secretary of Health and Human Services shall
 2 submit to the Committee on Commerce, Science, and Trans-
 3 portation of the Senate and the Committee on Transpor-
 4 tation and Infrastructure of the House of Representatives
 5 a report on—

6 (1) the status of the hair testing guidelines;

7 (2) an explanation for why the hair testing
 8 guidelines have not been issued;

9 (3) a schedule, including benchmarks, for the
 10 completion of the hair testing guidelines; and

11 (4) an estimated date of completion of the hair
 12 testing guidelines.

13 (b) *REQUIREMENT.*—To the extent practicable and
 14 consistent with the objective of the hair testing described in
 15 subsection (a) to detect illegal or unauthorized use of sub-
 16 stances by the individual being tested, the final notice of
 17 scientific and technical guidelines under that subsection
 18 shall eliminate positive test results, of the individual being
 19 tested, caused solely by the drug use of others and not caused
 20 by the drug use of the individual being tested.

21 **SEC. 8. MANDATORY GUIDELINES FOR FEDERAL WORK-**
 22 **PLACE DRUG TESTING PROGRAMS USING**
 23 **ORAL FLUID.**

24 (a) *DEADLINE.*—Not later than December 31, 2018, the
 25 Secretary of Health and Human Services shall publish in

1 *the Federal Register a final notice of the Mandatory Guide-*
2 *lines for Federal Workplace Drug Testing Programs using*
3 *Oral Fluid, based on the notice of proposed mandatory*
4 *guidelines published in the Federal Register on May 15,*
5 *2015 (94 FR 28054).*

6 (b) *REQUIREMENT.*—*To the extent practicable and*
7 *consistent with the objective of the testing described in sub-*
8 *section (a) to detect illegal or unauthorized use of substances*
9 *by the individual being tested, the final notice of scientific*
10 *and technical guidelines under that subsection shall elimi-*
11 *nate positive test results, of the individual being tested,*
12 *caused solely by the drug use of others and not caused by*
13 *the drug use of the individual being tested.*

14 (c) *RULE OF CONSTRUCTION.*—*Nothing in this section*
15 *may be construed as requiring the Secretary of Health and*
16 *Human Services to reissue a notice of proposed mandatory*
17 *guidelines to carry out subsection (a).*

18 **SEC. 9. ELECTRONIC RECORDKEEPING.**

19 (a) *DEADLINE.*—*Not later than 1 year after the date*
20 *of enactment of this Act, the Secretary of Health and*
21 *Human Services shall—*

22 (1) *ensure that each certified laboratory that re-*
23 *quests approval for the use of completely paperless*
24 *electronic Federal Drug Testing Custody and Control*
25 *Forms from the National Laboratory Certification*

1 *Program's Electronic Custody and Control Form sys-*
2 *tems receives approval for those completely paperless*
3 *electronic forms instead of forms that include any*
4 *combination of electronic traditional handwritten sig-*
5 *natures executed on paper forms; and*

6 *(2) establish a deadline for a certified laboratory*
7 *to request approval under paragraph (1).*

8 *(b) SAVINGS CLAUSE.—Nothing in this section may be*
9 *construed as limiting or otherwise affecting any authority*
10 *of the Secretary of Health and Human Services to grant*
11 *approval to a certified laboratory for use of completely*
12 *paperless electronic Federal Drug Testing Custody and*
13 *Control Forms, including to grant approval outside of the*
14 *process under subsection (a).*

15 *(c) ELECTRONIC SIGNATURES.—Not later than 18*
16 *months after the date of the deadline under subsection*
17 *(a)(2), the Secretary of Transportation shall issue a final*
18 *rule revising part 40 of title 49, Code of Federal Regula-*
19 *tions, to authorize, to the extent practicable, the use of elec-*
20 *tronic signatures or digital signatures executed to electronic*
21 *forms instead of traditional handwritten signatures exe-*
22 *cuted on paper forms.*

1 **SEC. 10. STATUS REPORTS ON COMMERCIAL DRIVER'S LI-**
 2 **CENSE DRUG AND ALCOHOL CLEARING-**
 3 **HOUSE.**

4 (a) *IN GENERAL.*—Not later than 180 days after the
 5 date of enactment of this Act, and biannually thereafter
 6 until the compliance date, the Administrator of the Federal
 7 Motor Carrier Safety Administration shall submit to the
 8 Committee on Commerce, Science, and Transportation of
 9 the Senate and the Committee on Transportation and In-
 10 frastructure of the House of Representatives a status report
 11 on implementation of the final rule for the Commercial
 12 Driver's License Drug and Alcohol Clearinghouse (81 FR
 13 87686), including—

14 (1) *an updated schedule, including benchmarks,*
 15 *for implementing the final rule as soon as practicable,*
 16 *but not later than the compliance date; and*

17 (2) *a description of each action the Federal*
 18 *Motor Carrier Safety Administration is taking to im-*
 19 *plement the final rule before the compliance date.*

20 (b) *DEFINITION OF COMPLIANCE DATE.*—*In this sec-*
 21 *tion, the term “compliance date” means the earlier of—*

22 (1) *January 6, 2020; or*

23 (2) *the date that the national clearinghouse re-*
 24 *quired under section 31306a of title 49, United States*
 25 *Code, is operational.*

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2D SESSION

S. 2848

[Report No. 115-286]

A BILL

To improve Department of Transportation controlled substances and alcohol testing, and for other purposes.

JUNE 27, 2018

Reported with an amendment