State of California
Office of Administrative Law

In re:

Department of Corrections and Rehabilitation

Regulatory Action:

Title 15, California Code of Regulations

Adopt sections:
Amend sections: 3290, 3315
Repeal sections:

NOTICE OF APPROVAL OF CERTIFICATE OF COMPLIANCE

Government Code Section 11349.1 and 11349.6(d)

OAL File No. 2014-0821-02 C

The Department of Corrections and Rehabilitation submitted this timely certificate of compliance action to make permanent the emergency regulations adopted in OAL file no. 2014-0307-03EON. The emergency regulations amended sections 3290 and 3315 of title 15 of the California Code of Regulations to provide for statewide, standardized mandatory random urinalysis testing of inmates for use of controlled substances and alcohol and to add additional sanctions to inmates found to have been using controlled substances or alcohol.

OAL approves this regulatory action pursuant to section 11349.6(d) of the Government Code. The effective date of this action is September 18, 2014.

Date: 9/18/2014

Richard L. Smith

Richard L. Smith
Senior Attorney

For: DEBRA M. CORNEZ
Director

Original: Jeffrey Beard
Copy: Anthony Carter

STATE OF CALIFORNIA–OFFICE OF ADMINISTRATIVE LAW

NOTICE PUBLICATION/REGULATIONS SUBMISSION

CERT

(See instructions on reverse)

For use by Secretary of State only

ENDORSED FILED IN THE OFFICE OF

2014 SEP 18 PM 2:23

Debra Bowen

DEBRA BOWEN SECRETARY OF STATE

STD. 400 (REV. 01-2013)

OAL FILE NUMBERS	NOTICE FILE NUMBER	REGULATORY ACTION NUMBER	EMERGENCY NUMBER
	Z-2014-0321-01	2014-0821-02C	

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2014 AUG 21 PM 3:15

OFFICE OF ADMINISTRATIVE LAW

NOTICE | REGULATIONS

AGENCY WITH RULEMAKING AUTHORITY: Department of Corrections and Rehabilitation

AGENCY FILE NUMBER (If any): 14-0004

A. PUBLICATION OF NOTICE (Complete for publication in Notice Register)

1. SUBJECT OF NOTICE	TITLE(S)	FIRST SECTION AFFECTED	2. REQUESTED PUBLICATION DATE

3. NOTICE TYPE	4. AGENCY CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)
☐ Notice re Proposed Regulatory Action ☐ Other			

OAL USE ONLY	ACTION ON PROPOSED NOTICE	NOTICE REGISTER NUMBER	PUBLICATION DATE
	☐ Approved as Submitted ☐ Approved as Modified ☐ Disapproved/ Withdrawn	2014, 142	4/4/2014

B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)

1a. SUBJECT OF REGULATION(S): Testing for Controlled Substances and Inmate Discipline

1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S): 2014-0307-03EON

2. SPECIFY CALIFORNIA CODE OF REGULATIONS TITLE(S) AND SECTION(S) (Including title 26, if toxics related)

SECTION(S) AFFECTED (List all section number(s) individually. Attach additional sheet if needed.)

ADOPT:

AMEND: 3290, 3315

REPEAL:

TITLE(S): 15

3. TYPE OF FILING

- ☐ Regular Rulemaking (Gov. Code §11346)
- ☐ Resubmittal of disapproved or withdrawn nonemergency filing (Gov. Code §§11349.3, 11349.4)
- ☐ Emergency (Gov. Code, §11346.1(b))
- ☒ Certificate of Compliance: The agency officer named below certifies that this agency complied with the provisions of Gov. Code §§11346.2-11347.3 either before the emergency regulation was adopted or within the time period required by statute.
- ☐ Resubmittal of disapproved or withdrawn emergency filing (Gov. Code, §11346.1)
- ☐ Emergency Readopt (Gov. Code, §11346.1(h))
- ☐ File & Print
- ☐ Other (Specify)
- ☐ Changes Without Regulatory Effect (Cal. Code Regs., title 1, §100)
- ☐ Print Only

4. ALL BEGINNING AND ENDING DATES OF AVAILABILITY OF MODIFIED REGULATIONS AND/OR MATERIAL ADDED TO THE RULEMAKING FILE (Cal. Code Regs. title 1, §44 and Gov. Code §11347.1)

~~April 4, 2014~~ per agency request RS

5. EFFECTIVE DATE OF CHANGES (Gov. Code, §§ 11343.4, 11346.1(d); Cal. Code Regs., title 1, §100)

- ☐ Effective January 1, April 1, July 1, or October 1 (Gov. Code §11343.4(a))
- ☒ Effective on filing with Secretary of State
- ☐ §100 Changes Without Regulatory Effect
- ☐ Effective other (Specify)

6. CHECK IF THESE REGULATIONS REQUIRE NOTICE TO, OR REVIEW, CONSULTATION, APPROVAL OR CONCURRENCE BY, ANOTHER AGENCY OR ENTITY

- ☐ Department of Finance (Form STD. 399) (SAM §6660)
- ☐ Fair Political Practices Commission
- ☐ State Fire Marshal
- ☐ Other (Specify)

7. CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)	E-MAIL ADDRESS (Optional)
Anthony Carter	916-445-2220	916-324-6075	Anthony.Carter@CDCR.ca.gov

8. **I certify that the attached copy of the regulation(s) is a true and correct copy of the regulation(s) identified on this form, that the information specified on this form is true and correct, and that I am the head of the agency taking this action, or a designee of the head of the agency, and am authorized to make this certification.**

SIGNATURE OF AGENCY HEAD OR DESIGNEE: [signature] DATE: 8/19/14

TYPED NAME AND TITLE OF SIGNATORY: Martin Hoshino, Undersecretary-Operations, CDCR

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Office of Administrative Law

TEXT OF PROPOSED REGULATIONS

In the following, underline indicates additional added text, and ~~strikethrough~~ indicates additional deleted text.

California Code of Regulations, Title 15, Division 3, Adult Institutions, Programs, and Parole

Subchapter 4, General Institution Regulations
Article 2. Security

§ 3290. Methods for Testing of Controlled Substances or for Use of Alcohol.

Subection 3290(a) is unchanged but included as reference.
(a) The department shall prescribe the products, equipment, and methods for testing suspected controlled substances or for the use of alcohol. "Field" or on-site testing shall be conducted only by trained personnel.

Subsection 3290(b) is amended to read:

(b) Field tests may be performed on any suspected substance found on institution property or in the possession or under the control of any inmate, or in the possession or under the control of persons other than inmates who come on institution property. Field tests of urine samples may be performed as a screening process prior to laboratory testing.

Subsections 3290(c) through 3290(c)(3) remain unchanged but are included for reference.
(c) The securing of a urine sample from an inmate, for the purpose of testing for the presence of controlled substances or for use of alcohol may be done for the following reasons:
(1) When there is reasonable suspicion to believe the inmate has possessed, distributed, used, or is under the influence of a controlled substance or alcohol.
(2) When mandatory random testing is known to the inmate to be a condition for the inmate's participation in a specific program, assignment, or activity.
(3) As part of an authorized disposition of a disciplinary hearing.

Subsection 3290(c)(4) is amended to read:
(4) The inmate is selected by the ~~institution's/facility's~~ department's mandatory standardized random drug testing selection process.

(A) A small percentage of inmates will be randomly selected at predetermined regular intervals (e.g. weekly) from a data file produced from the department's Strategic Offender Management System.

(B) Inmates shall be tested each time they are selected; however, shall not be subject to additional disciplinary action for a positive test if that positive test is cumulative evidence of a previously charged disciplinary action.

Subsection 3290(d) remains unchanged.

New Subsection 3290(e) is adopted to read:

(e) On-site testing of urine samples are presumptive in nature; however, the results may be used to charge an inmate with a serious rules violation. Disciplinary action for possession of a controlled substance or use of a controlled substance based solely on the field test shall not include the loss of work/behavior credits or pay, or loss of a paid work assignment unless a laboratory has confirmed the results of a positive field test or the inmate has admitted to possessing the controlled substance, accepts the results of a positive field test, waives the requirement of testing by a laboratory, and has signed a CDCR 128-B, General Chrono to that effect.

Existing subsection 3290(e) is renumbered and amended to read:

~~(e)~~ (f) Field testing of seized substances that are suspected of being a controlled substance ~~shall be conducted for "screening" purposes only~~ are presumptive, however the results may be used to charge an inmate with a serious rules violation. Disciplinary action for possession of a controlled substance based solely on a field or on-site test shall not include the loss of work/behavior credits, or pay, or loss of paid work assignment unless a laboratory has confirmed that the suspected substance is in fact a controlled substance, or the inmate has admitted to possessing the controlled substance, accepts the results of a field test, and waives the requirement of testing by a laboratory, and has signed a document to that effect.

Existing subsections 3290(f) through 3290(h) are renumbered:

~~(f)~~ (g)
~~(g)~~ (h)
~~(h)~~ (i)

Note: Authority cited: Section 5058, Penal Code. Reference: Sections 2932, 4573.6 and 5054, Penal Code.

Article 5. Inmate Discipline
§ 3315. Serious Rule Violations.

Subsections 3315(a) through 3315(f)(5)(I)(3) remain unchanged.

Subsection 3315(f)(5)(J) is amended to read:

(J) Violation of subsections 3016(a), 3016(c), and 3290(d) shall result in:

1. For the first offense the inmate shall be required to attend Alcoholic Anonymous or Narcotic Anonymous meetings or assigned to a substance abuse education and/or treatment programs to the extent such programs are available in the institution/facility and loss of pay for 90 days from a paid work assignment.

2. For the second offense, the inmate shall be referred for endorsement to a substance abuse treatment program, provided that program eligibility criteria is met and loss of pay for 180 days from a paid work assignment.

3. For the third offense, the inmate shall be referred for endorsement to a substance abuse treatment program, provided that program eligibility criteria is met, and mandatory treatment shall be a condition of parole. Additionally, the inmate shall be referred for removal from paid work assignment for one year for the third offense.

Subsections 3315(f)(5)(K) through 3315(g) remain unchanged.

Note: Authority cited: Section 5058, Penal Code. Reference: Sections 295-300.3, 314, 530, 532, 646.9, 647, 653m, 2931, 2932, 2933, 4501.1, 4573.6, 4576, 5054, 5068 and 12020, Penal Code.

FINAL STATEMENT OF REASONS:

The Initial Statement of Reasons (ISOR) is incorporated by reference.

UPDATES TO THE INITIAL STATEMENT OF REASONS:

On April 4, 2014, the Notice of Proposed Regulations was published which began the public comment period. The Department's Notice of Change to Regulations #14-04 was also mailed the same day in addition to being posted on the California Department of Corrections and Rehabilitation (CDCR) Internet and Intranet websites. The Department received written comments from eight commenters, which are included below under the heading *Summaries and Responses to the Written Public Comments*. A public hearing was held on May 27, 2014 with no one providing verbal comments.

On June 6, 2014, after the public comment process, the information that was relied upon and posted on the CDCR website regarding the CDCR's Division of Adult Institutions (DAI) drug related incidents for 2013 and the DAI Urinalysis Baseline Testing (2013) http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Offender_Information_Reports.html) was relocated to the CDCR's Regulation and Policy Management Branch's web space in "pending changes to department rules". The information is now posted at http://www.cdcr.ca.gov/Regulations/Adult_Operations/Pending_Rules_Page.html#MRUP.

DETERMINATION:

The Department has determined that no alternative considered would be more effective in carrying out the purpose for which the regulation is proposed, would be as effective and less burdensome to affected private persons than the adopted regulation, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

PUBLIC HEARING COMMENTS:

A public hearing was held on May 27, 2014, at 10:00 a.m.
No comments were received at the hearing.

SUMMARIES AND RESPONSES TO WRITTEN PUBLIC COMMENTS:

Commenter # 1

Comment 1A: Commenter states that Section 3290(c)(4) which reads that the inmate is selected by the department's Mandatory standardized random drug testing selection process, conflicts with Section 3290(c)(1), (2), and (3).

Accommodation: None.

Response to Comment 1A: As stated in the Initial Statement of Reasons, the Department proposes to amend Subsection 3290(c)(4) to implement a statewide mandatory random urinalysis testing program to enhance the safety and security of CDCR institutions, staff, and inmate population and increasing the inmates' abilities to successfully complete substance abuse treatment programs. The Department does not agree with the Commenter that Subsection 3290(c)(4) conflicts with Subsections 3290(c)(1), (2), and (3).

Commenter # 2

Comment 2A: Commenter questions if the action of randomly selected inmates is going to only affect those who have already have the suspicion placed on them of having possessed, distributed, used, or had been under the influence of a controlled substance or alcohol.

Accommodation: None.

Response to Comment 2A: The California Code of Regulations, Title 15, Subsection 3290(c)(4) is amended to clarify that inmates will be required to submit urine samples as part of the Mandatory Random Urinalysis Program testing requirements. The department's Strategic Offender Management System will produce random selections of a small percentage of inmates (approximately 2.3 percent), who shall provide a sample for testing each time they are selected. Inmates will not be subject to additional disciplinary action for a positive test if that positive test is cumulative evidence of a previously charged disciplinary action. The proposed regulation selects inmates randomly without prejudice towards an inmates' prior drug use.

Comment 2B: Commenter asks, "What is the Department's Strategic Offender Management System, who created it, and if there are known errors in it."

Accommodation: None.

Response to Comment 2B: In April of 2009, California Department of Corrections and Rehabilitation (CDCR) awarded a contract to Electronic Data Systems, a Hewlett Packard company, to begin a multimillion-dollar effort to automate and streamline CDCR offender data systems. The department's Strategic Offender Management System (SOMS) consolidates existing databases and records and replaces manual paper processes. In addition, SOMS upgrades and standardizes adult and juvenile data and population management practices to further enhance staff, offender and public safety. Due to the continual uploading and scanning of documents into SOMS, the Department identifies the potential for errors and once an error is identified staff acts immediately towards correcting the error.

Comment 2C: Commenter questions the validity of the 25% of the population during the "Blind Baseline Urine testing," and if the 25% were of a particular prison population.

Accommodation: None.

Response to Comment 2C: As stated in the Initial Statement of Reasons, in June 2013, the California Department of Corrections and Rehabilitation (CDCR) conducted blind baseline urine testing of 25 percent of the inmate population. The results confirmed nearly 23 percent of the inmates who voluntarily participated tested positive for one or more illicit drugs. Approximately 30 percent of inmates randomly selected to voluntarily test declined to do so even though there were no disciplinary actions taken against inmates testing positive. Only inmates randomly selected and who voluntarily accepted to provide a urine sample were tested. The prison population involved was not limited to one prison or one particular segment of the inmate population. It involved several prisons of varying security levels, geographic locations, and missions.

Comment 2D: Commenter believes that there is not enough evidence presented for this system to be implemented at this time and contends that legal and physical harm of implementation could be caused to both staff and inmates.

Accommodation: None.

Response to Comment 2D: The Department disagrees. As stated in the Initial Statement of Reasons, there were over 4000 documented incidents recorded in 2013 related to drugs in our prisons. The presence of illegal drugs in institutions reinforces the strength of prison based gangs, leads to inmate-on-inmate violence due to drug dependency, and increases the possibility of inmate-on-staff attacks because of the reduced inhibition effects of some drugs. Based on the 2013 test results, the Department must do more to reduce the availability of and use of drugs in the prison system. Therefore, the Department seeks to move forward with the implementation of various drug interdiction strategies, which includes a Mandatory Random Urinalysis Program (MRUP) to measure their success. These regulations will require each CDCR institution to implement a mandatory random urinalysis testing program. Increased random urinalyses in the institutions, coupled with other drug and contraband interdiction strategies, such as increased sanctions, will act as a deterrent to the use of illicit drugs.

Commenter #3

Commenter 3A: Commenter states that the regulations fail to reference inmates who have para-uresis, a condition also known as "shy bladder." Commenter contends that his condition would result in his receiving disciplinary action for failure to provide a sample. Commenter cites Larson v. State of Alaska DOC., and wishes that this condition be recognized and alternate methods of obtaining a sample be incorporated in the regulations.

Accommodation: None.

Response to comment 3A: The Department has not identified a systemic issue with inmates having urinary difficulty (Paruresis) in situations where staff collecting urine samples. However, if an inmate has such a medical condition, it should be noted in their medical record. If needed, confirmation from Health Care staff will be sought. Urine samples shall be taken under direct observation. If this is not possible, steps shall be taken to reduce the possibility of manipulation, including checking restroom for other individuals or contraband before allowing inmate to enter, prohibiting inmate from taking anything other than specimen container into restroom, and noting general temperature and color of sample immediately after securing it.

Commenter # 4

Comment 4A: Commenter represents the California Prison Industries Authority and states the importance of regulations that govern the responsibility of CDCR staff to immediately notify CALPIA, as it poses a threat to the enterprise.

Commenter requests that the department incorporate into the regulations the following:

1. CDCR staff to notify CALPIA of positive test of inmates participating in CALPIA programs within 24 hours.
2. Reference that pursuant to Title 15, Division 8, section 8004.3 which states inmates testing positive shall be immediately removed from the CALPIA work training program.

Commenter requests adding language mandating that CDCR notify CALPIA staff immediately if participating inmate has positive test.

Accommodation: None.

Response to comment 4A: The Department is currently meeting this request per the agreement signed by Director, Kathleen L. Dickinson, Division of Adult Institutions and General Manager, Charles L. Pattilo California Prison Industry Authority, *Notice to California Prison Industry Authority of Inmate Positive Drug Tests Results*, dated July 30, 2013 , which states in part, "Please ensure CDCR staff provides immediate notification to CALPIA of positive test results for controlled substance/alcohol for all inmates participating in CALPIA work/training programs within 24 hours." And, per current policy in the Department Operations Manual which states in part, "If a CALPIA inmate tests positive and is found guilty of Rules Violation Report (CDC-115) for Use/Possession of a Controlled Substance, the inmate will be immediately removed from their CALPIA assignment."

Commenter # 5

Comment 5A: Commenter concurs with the seriousness of the use of controlled substances and alcohol in prison, however, argues that the implementation of a mandatory random drug testing program may not be the most cost-effective method. Commenter gives an example of an inmate who was directed to give three urine samples in a span of 19 days, all which resulted in negative results. Commenter alludes that the frequency of testing may become an infringement of the 4th Amendment, potential abuses of staff who may use field testing to profile certain inmates, as well as costly lab tests to confirm positive field tests.

Accommodation: None.

Response to comment 5A: The California Code of Regulations, Title 15, Subsection 3290(c)(4) is amended to clarify that inmates will be required to submit urine samples as part of the Mandatory Random Urinalysis Program testing requirements (emphasis added). The department's Strategic Offender Management System will produce random selections of a small percentage of inmates (approximately 2.3 percent), who shall provide a sample for testing each time they are selected. Inmates will not be subject to additional disciplinary action for a positive test if that positive test is cumulative evidence of a previously charged disciplinary action. The proposed regulation is designed to select inmates randomly without prejudice, or profiling.

Comment 5B: Commenter states that the technology exists such as a photonic device that can see the gas emissions of substances. Commenter recommends that the department contact a business which is commercializing the unique 'snap-shot' hyper spectral imaging technology. Commenter suggests inquiring if said company can develop a portable device that can detect in a small area all chemical gasses that are emitted from narcotics.

Accommodation: None.

Response to comment 5B: Hyper spectral imaging was developed for mining and geology, and although its application has been used in agriculture, eye care, food processing, and chemical imaging on the battlefield, the CDCR is not aware of specific applications for drug detection in prison**.** As stated in the Initial Statement of Reasons, Mandatory Random Urinalysis is the best method for monitoring and tracking the progress and impact of the Department's goal of drug interdiction. Currently, no reasonable alternatives have been brought to the attention of the Department that would alter the Department's initial determination. Although there are alternatives to the Mandatory Random Urinalysis Program, the Department believes the costs of a company designing and creating a commercialized "Snapshot Hyperspectral Imaging" device designed for drug detection would far exceed the costs of the current urinalysis testing system.

Comment 5C: Commenter contends that the sanctions of "loss of pay" will only affect a small segment of inmates assigned to Prison Industries Authority jobs and Joint Venture Programs who make over $100.00 per month. Commenter suggests the department should implement a swift Zero Tolerance Drug/Narcotic/Alcohol/Tobacco Program and should implement regulations that classify Rules Violation Report (RVR) for Possession of Alcohol, Controlled Substances, Tobacco, positive Urinalysis, and refusal to submit a urine sample, as a Division B offense. Commenter contends that the loss of pay should include asset forfeiture for those inmates who have no money, to cover the cost of testing and administration fees for any RVR they are found guilty of.

Accommodation: None.

Response to comment 5C: The Department disagrees with the commenter and contends the amended regulations are sufficient and will have a significant deterrent to inmates that use illicit drugs in prison. As stated in the Notice of Proposed Regulations, the amended regulations are intended to provide guidance and clarity to staff and inmates by identifying a Mandatory Random Urinalysis Program (MRUP), and resulting disciplinary measures that may act as a deterrent to the use of illicit drugs; by establishing and incorporating additional progressive disciplinary actions for drug related offenses. These actions will provide additional deterrents to in-prison drug use and will help incentivize those inmates who choose to remain drug free.

Comment 5D: Commenter suggests that some ways to combat drug use is to implement policy changes to be more inclusive, such as:

- All workers and Men's Advisory Council members be tested no less than twice per month.
- Inmates leaving dining hall and/or kitchen are subjected to searches
- All food carts that inmates use to transport food for cell-feeding should be locked.
- Pill line- All persons taking pills should be required to drink 16 ounces of water through a straw.

Accommodation: None.

Response to comment 5D: The Department disagrees with the commenter and as stated in the Initial Statement of Reasons, believes in order for the Division of Adult Institutions to be successful in its Drug Interdiction Program it must undertake a comprehensive, multi-layered approach, focusing on all avenues of contraband introduction. These strategies include:

increased use of drug detection canines, increased frequency of random drug urinalysis of inmates, increased disciplinary sanctions coupled with mandatory referral to substance abuse programs, increased use of ION mobility spectrometry technology (ION Scanners), and upgrading/installing video surveillance equipment in visiting rooms.

Commenter #6

Comment 6A: Commenter acknowledges drug epidemic within the California Department of Corrections and Rehabilitation and supports drug screening and interdiction; however, is opposed to the regulations. Commenter contends that the current testing method of urinalysis is not sufficient and that the random selection process is a violation of the 5th amendment right to self-incrimination and also illegal search and seizure.

Accommodation: None.

Response to comment 6A: The Department agrees with the commenter in that there is a serious epidemic with drugs in our prison system; however, disagrees with the commenter in that the "random selection process" does not violate the 5th Amendment of the United States Constitution of "Self-incrimination" and "Illegal Search and Seizure." In order for the Division of Adult Institutions to be successful in its Drug Interdiction Program it must undertake a comprehensive, multi-layered approach, focusing on all avenues of contraband introduction. These strategies include: increased use of drug detection canines, increased frequency of random drug urinalysis of inmates, increased disciplinary sanctions coupled with mandatory referral to substance abuse programs, increased use of ION mobility spectrometry technology (ION Scanners), and upgrading/installing video surveillance equipment in visiting rooms.

Comment 6B: Commenter believes that the option to give blood rather than a urine sample should be included in the testing method, due to medical/psychological/religious issues that may result in a subject being unable to provide a urine sample. Commenter also states that the California Penal Code specifically allows an option of methods for specimen collection.

Accommodation: None.

Response to comment 6B: The Department disagrees with the commenter in that drawing blood should be included in the testing method, due to higher cost and being more physically intrusive than urinalysis testing. However, the Department agrees with the commenter that under California Penal Code 296, gives the California Department of Corrections and Rehabilitation has the authority to draw blood. As stated in the Initial Statement of Reasons, Mandatory Random Urinalysis is the best method for monitoring and tracking the progress and impact of the Department's goal of drug interdiction. Currently, no reasonable alternatives have been brought to the attention of the Department that would alter the Department's initial determination. In order for the Division of Adult Institutions to be successful in its Drug Interdiction Program it must undertake a comprehensive, multi-layered approach, focusing on all avenues of contraband introduction. These strategies include: increased use of drug detection canines, increased frequency of random drug urinalysis of inmates, increased disciplinary sanctions coupled with mandatory referral to substance abuse programs, increased use of ION mobility spectrometry

technology (ION Scanners), and upgrading/installing video surveillance equipment in visiting rooms.

Comment 6C: Commenter states that the manner in which the baseline testing was conducted was not consistent with the way Initial Statement of Reason lists. Commenter contends that at his institution inmates were informed that if the set number of samples were not collected voluntarily, then inmates were selected randomly and told it was mandatory.

Accommodation: None.

Response to comment 6C: As stated in the Initial Statement of Reasons, In June 2013, the California Department of Corrections and Rehabilitation (CDCR) conducted blind baseline urine testing of 25 percent of the inmate population. The results confirmed nearly 23 percent of the inmates who ***voluntarily participated*** tested positive for one or more illicit drugs. Approximately 30 percent of inmates randomly selected to voluntarily test declined to do so even though there were no disciplinary actions taken against inmates testing positive. Aside from the commenter's assertion, we have no other information that inmates were coerced to provide a sample. Commenter has access to the administrative appeals process and the courts if you want to pursue a claim.

Commenter 6D: Commenter contends that the Initial Statement of Reason cites that there were no current regulations for mandatory random urinalyses testing, yet the institution has had mandatory testing since December 7, 2013. Commenter provided copy of memorandum signed by Director M. D. Stainer, (dated December 17. 2013) to "all inmates" stating that the CDCR will be implementing a Mandatory Random Urinalysis Program effective January 2014, which will include disciplinary action for positive tests and refusals.

Accommodation: None.

Response to comment 6D: The Department's Mandatory Random Urinalysis Program regulations were certified for emergency adoption on March 18, 2014.

Comment 6E: Commenter states that the current method for toxicology screening (urine only) opens the floodgates to appeals and litigation and results in a large cost to the public.

Accommodation: None.

Response to comment 6E: The Department does not agree with the commenter in that "toxicology screening" will open the floodgates to appeals and litigation nor result in a large cost to the public. As stated in the Initial Statement of Reasons, the Department must determine that no reasonable alternative considered, or that has otherwise been identified and brought to the attention of the Department, would be more effective in carrying out the purpose for which this action is proposed, would be as effective and less burdensome to affected private persons than the action proposed (Mandatory Random Urinalysis Program), or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law. The Department has made an initial determination that no reasonable alternatives to these regulations have been identified or brought to the attention of the Department that would lessen any adverse impact on small business.

Comment 6F: Commenter states that his institution has a new Pilot Program called an Honor Yard, which rewards good behavior and removes inmates who exhibit bad behavior. Commenter believes that the department should shift the paradigm of punishment to that of enticement and good behavior incentives for compliance. Commenter states that when inmates are given privileges to earn tangible items that can be purchased with good behavior, it creates a drug and violence free environment.

Accommodation: None.

Response to comment 6F: The Department agrees with the commenter and as part of the California Department of Corrections and Rehabilitation Blueprint, effective January 1, 2014 we are designating seven General Population and Sensitive Needs Yard institutions/facilities as Enhanced Program Facility (EPF). EPF will offer incentives for inmates who, based on their own behaviors and choices, are ready to take full advantage of programming opportunities. Programs similar to EPF are an instrumental part of the overall rehabilitation strategies the Department is implementing to reduce recidivism.

Commenter #7

Comment 7A - Commenter states that they have not seen any other proposed contraband interdiction strategies, even though commenter is on the Department's mailing list for all "Notices of Change".

Accommodation: None.

Response to comment 7A: The Department currently has four key drug interdiction strategies with varying stages of implementation throughout the institutions: urinalysis testing, canine units, ion scanners and visiting room surveillance.

Comment 7B - Commenter states that the proposed regulations claim of enhancing safety and security are a smokescreen, based upon the Department's decades long condoning of employees bringing the majority of controlled substances into the prison.

Accommodation: None.

Response to comment 7B: The Department disagrees with the commenter. The Department is pursuing several drug interdiction strategies with MRUP being only one. As stated in the Initial Statement of Reasons; the California Department of Corrections and Rehabilitation (CDCR) proposes to amend Sections 3290 and 3315 of the California Code of Regulations (CCR), Title 15. The purpose of these regulations is to implement a department-wide/standardized Mandatory Random Urinalysis Program (MRUP), and increase sanctions for drug use in prison, thereby enhancing the safety and security of CDCR institutions, staff, and inmate population and increasing the inmates' abilities to successfully complete substance abuse treatment programs. The presence of illegal drugs in institutions reinforces the strength of prison based gangs, leads to inmate-on-inmate violence due to drug dependency, and increases the possibility of inmate-on-staff attacks because of the reduced inhibition effects of some drugs. There were over 4000 documented incidents recorded in 2013 related to drugs in our prisons.

Comment 7C - Commenter states that since the Mandatory Random Urinalysis Program (MRUP) has begun, that they have personally witnessed a "tenfold" increase of drug use at the institution.

Accommodation: None.

Response to comment 7C: The Department disagrees with the commenter. But the Department welcomes any information the commenter could provide about the sources of the increase and the individuals involved. As stated in the Initial Statement of Reasons, Mandatory Random Urinalysis is the best method for monitoring and tracking the progress and impact of the Department's goal of drug interdiction. Currently, no reasonable alternatives have been brought to the attention of the Department that would alter the Department's initial determination. In order for the Division of Adult Institutions to be successful in its Drug Interdiction Program it must undertake a comprehensive, multi-layered approach, focusing on all avenues of contraband introduction. These strategies include: increased use of drug detection canines, increased frequency of random drug urinalysis of inmates, increased disciplinary sanctions coupled with mandatory referral to substance abuse programs, increased use of ION mobility spectrometry technology (ION Scanners), and upgrading/installing video surveillance equipment in visiting rooms.

Comment 7D - Commenter states that they personally have seen that most of the inmates not being randomly tested via MRUP are the inmates who constantly use drugs.

Accommodation: None.

Response to comment 7D: The Department disagrees with commenter. A random testing method means all members of the inmate population have an equal chance of being selected each time a sample is drawn. The California Code of Regulations, Title 15, Subsection 3290(c)(4) is amended to clarify that inmates will be required to submit urine samples as part of the Mandatory Random Urinalysis Program testing requirements. The department's Strategic Offender Management System will produce random selections of a small percentage of inmates (approximately 2.3 percent), who shall provide a sample for testing each time they are selected. Inmates will not be subject to additional disciplinary action for a positive test if that positive test is cumulative evidence of a previously charged disciplinary action. The proposed regulation selects inmates randomly without prejudice towards an inmates' prior drug use.

Comment 7E - Commenter states that inmates who are in or have graduated drug abuse treatment programs are routinely using drugs.

Accommodation: None.

Response to comment 7E: The Department disagrees with the commenter. The Substance Abuse Treatment (SAT) program is an evidence-based program that promotes positive social behavior and prepares inmates for release by developing the knowledge and skills necessary to avoid substance use relapse and successfully integrate back into the community, thereby reducing recidivism. The CDCR's Annual Report entitled Year of Accomplishments 2013 states that in nine institutions, "Through October 2013, SAT programs have operated with an enrollment rate of 96.1 percent, a utilization rate of 87.8 percent, and a completion rate of 75.5 percent (http://www.cdcr.ca.gov/Reports/CDCR-Annual-Reports.html). Offenders who receive

substance abuse treatment in prison followed by aftercare services upon release to parole recidivate at approximately 30 percent, which is markedly lower than the 65.3 percent recidivism rate for those who received no substance abuse services. (The Future of California Corrections Blueprint) http://www.cdcr.ca.gov/2012plan/docs/plan/Narrative.pdf

Comment 7F - Commenter states that the majority of violence surrounding drug use is focused on those inmates who cannot or will not pay their drug debt, and that staff "turn a blind-eye" due to the violence is focused on inmate-on-inmate violence.

Accommodation: None.

Response to comment 7F: The Department disagrees with the commenter and takes inmate-on-inmate violence seriously. As stated in the Initial Statement of Reasons, the California Department of Corrections and Rehabilitation (CDCR) proposes to amend Sections 3290 and 3315 of the California Code of Regulations (CCR), Title 15. The purpose of these regulations is to implement a department-wide/standardized Mandatory Random Urinalysis Program (MRUP), and increase sanctions for drug use in prison, thereby enhancing the safety and security of CDCR institutions, staff, and inmate population and increasing the inmates' abilities to successfully complete substance abuse treatment programs. The presence of illegal drugs in institutions reinforces the strength of prison based gangs, leads to inmate-on-inmate violence due to drug dependency, and increases the possibility of inmate-on-staff attacks because of the reduced inhibition effects of some drugs. There were over 4000 documented incidents recorded in 2013 related to drugs in our prisons.

Comment 7G - Commenter states that the Department is failing to comply with the California Penal Code (PC), Section 4573.6, by not using canine teams to interdict illegal drugs brought onto institution property.

Accommodation: None.

Response to comment 7G: The Department disagrees with the commenter. CDCR currently has 38 canine teams; with plans to certify approximately 25 additional canines in fiscal year 14/15.

Comment 7H - Commenter states that the use of canine teams pursuant to PC 4573.6 would be a reasonable alternative to the proposed regulations.

Accommodation: None.

Response to comment 7H: The Department disagrees with the commenter. As stated in the Initial Statement of Reasons, Mandatory Random Urinalysis is one method for monitoring and tracking the progress and impact of the Department's goal of drug interdiction. Currently, no reasonable alternatives have been brought to the attention of the Department that would alter the Department's initial determination. In order for the Division of Adult Institutions to be successful in its Drug Interdiction Program it must undertake a comprehensive, multi-layered approach, focusing on all avenues of contraband introduction. These strategies include: increased use of drug detection canines, increased frequency of random drug urinalysis of inmates, increased disciplinary sanctions coupled with mandatory referral to substance abuse

programs, increased use of ION mobility spectrometry technology (ION Scanners), and upgrading/installing video surveillance equipment in visiting rooms.

Comment 7I - Commenter suggests that the Secretary's proposal is a continuation of the "ostrich-syndrome" of "hide your head in the sand", and that the proposed regulations will probably not have a positive effect due to the "continued tolerance or condonation of allowing employees to slip/slide through the mandate of PC 4573.6" .

Accommodation: None.

Response to comment 7I: The Department disagrees with the commenter. As stated in the Initial Statement of Reasons, Mandatory Random Urinalysis is the best method for monitoring and tracking the progress and impact of the Department's goal of drug interdiction. Currently, no reasonable alternatives have been brought to the attention of the Department that would alter the Department's initial determination. In order for the Division of Adult Institutions to be successful in its Drug Interdiction Program it must undertake a comprehensive, multi-layered approach, focusing on all avenues of contraband introduction. These strategies include: increased use of drug detection canines, increased frequency of random drug urinalysis of inmates, increased disciplinary sanctions coupled with mandatory referral to substance abuse programs, increased use of ION mobility spectrometry technology (ION Scanners), and upgrading/installing video surveillance equipment in visiting rooms.

Commenter #8

Comment 8A - Commenter is a group of 15 organizations that promotes drug policies that are grounded in science, compassion, health and human rights, and have similar interests in these regulations. Commenter states that reasonable alternatives are available and should be explored instead of spending resources on an ineffective random drug testing program and increased sanctions. Commenter contends that the department should approach drug and alcohol use and/or misuse as a public health issue, invest additional resources to improve access to a wider capacity of quality drug and alcohol treatment in its facilities, and encourage prisoners to seek help for their dependency problems. Commenter adds that the MRUP and increased punishment dissuades them from coming forward to seek help with their health problems, and encourages them to use substances in a secret and unsafe manner.

Accommodation: None.

Response to comment 8A: The Department disagrees with the commenter. The California Department of Corrections and Rehabilitation's (CDCR) Substance Abuse Treatment (SAT) program is an evidence-based program that promotes positive social behavior and prepares inmates for release by developing the knowledge and skills necessary to avoid substance use relapse and successfully integrate back into the community, thereby reducing recidivism. The intent of the Mandatory Random Urinalysis Program is to provide treatment to inmates by identifying those inmates using illegal drugs, who are unwilling to voluntarily enter the SAT program, but who require treatment in an evidence-based SAT program. Currently the Division of Adult Institutions has a substance abuse treatment program capacity in excess of 3, 000 beds. Through October 2013, SAT programs have operated with an enrollment rate of 96.1 percent, a utilization rate of 87.8 percent, and a completion rate of 75.5 percent. CDCR intends to increase the funding and availability of SAT programs in the following years. CDCR is committed in exploring reasonable alternatives to drug interdiction and continues to explore

options to provide substance abuse treatment for all offenders, while at the same time attempting to reduce the availability of illegal drugs in our prisons.

Comment 8B - Commenter contends that the forensic science of drug testing is unreliable, as the testing procedure in the MRUP (including on-site and laboratory testing) carries a real risk of false positive test results. Commenter cites numerous publications which find deficiencies in the forensic science systems such as; disparity in operations and methodological flaws, lack of protocols and standards, lack of mandatory certification, operator and equipment error, environmental conditions, sample mix-ups and contamination, vulnerability to tampering, etc. Commenter states that a simple positive toxicology result from a urine screen is not particularly reliable or informative for many scientific reasons, and the department's policy does not have adequate safeguards to protect against false positive test results. Commenter contends that mass testing of mandated random samples at weekly intervals will give rise to false positive test results, and will result in false accusations even when all parties act properly and above reproach.

Accommodation: None.

Response to comment 8B: The Department disagrees with the commenter. In order to ensure the accuracy of the Mandatory Random Urinalysis Program, all positive field tests will be confirmed through laboratory testing. Further, inmates' use of approved medication is tightly regulated and the legitimate use of prescription medications will not result in punishment if that legitimate use results in a positive test. California Department of Corrections and Rehabilitation's (CDCR) contracted laboratory for the Mandatory Random Urinalysis Program, National Toxicology Laboratories, Inc. (NTL) has been on the leading edge of applying toxicology methods as a diagnostic tool for detecting illegal drugs. As a SAMHSA/DHHS certified laboratory for over twenty four (24) years, NTL has extensive experience in high volume forensic urine drug testing for workplace testing, law enforcement agencies, corrections departments, prisons, and probation departments. CDCR and NTL have developed various procedures, protocols and safeguards to provide accurate results and information. CDCR has conducted extensive research to ensure the development of appropriate procedures and chain of custody protocols for the collecting, storing and transporting of the urine sample to the certified lab to ensure the integrity of the sample.

Comment 8C - Commenter states that on-site urine testing may coerce prisoners to waive laboratory confirmation testing from an positive field test result due to the nature of the prison system and power differential between guards and prisoners. Commenter states that this raises serious questions about whether consent in accepting a field test and waiving confirmation testing for a positive result is truly voluntary, due to the fear of harassment, loss of privileges or other consequences.

Accommodation: None.

Response to comment 8C: The Department disagrees with the commenter. California Department of Corrections and Rehabilitation (CDCR) established protocols to address a positive test result during the Mandatory Random Urinalysis Program (MRUP) where the inmate believes the positive test was inaccurate. Through this process, the inmate can submit opposing documentation (i.e. a CDCR 7385, Authorization of Release of Information, etc.) to provide a list of prescribed medications to establish the cause of the positive test result. In the event the positive test is a result of the inmate taking prescribed medication, no disciplinary action shall be taken and the CDCR 115, Rules Violation Report will be dismissed. CDCR does not condone

any misconduct by staff including but not limited to coercing, threatening, or harassing inmates. As such, inmates are informed upon incarceration of the various avenues to report staff misconduct.

Comment 8D - Commenter contends that mandatory drug testing and punishment do not reduce or deter drug use. Commenter cites that different drugs have different detection periods after ingestion. Commenter infers that since marijuana use is more readily detectable than other drugs, an unintended consequence is the drug use patterns will adapt to the CDCR's new testing scheme and switch to other drugs with shorter detection windows, or to potentially more harmful substances for which a urine screen may not test at all. Commenter further adds that random drug testing and sanctions promotes mistrust of authority, dissuades people from seeking help for their drug dependencies which has helped cause the over-incarceration crisis, and that taking away pay or work assignments is inconsistent with rehabilitation.

Accommodation: None.

Response to comment 8D: The Department disagrees with the commenter. The intent of the Mandatory Random Urinalysis Program is to provide treatment to inmates by identifying those inmates using illegal drugs, who are unwilling to voluntarily enter the Substance Abuse Treatment (SAT) program, but who require treatment in an evidence-based SAT program. Unlike dealing with a relatively safe and stable school environment, the various purposes of these regulations is to enhance the safety and security of California Department of Corrections and Rehabilitation staff and inmates, while at the same time increasing the inmates' abilities to successfully complete substance abuse treatment programs. As stated in the Initial Statement of Reasons, Mandatory Random Urinalysis is the best method for monitoring and tracking the progress and impact of the Department's goal of drug interdiction. In order for the Division of Adult Institutions to be successful in its Enhanced Contraband and Drug Interdiction Program it must undertake a comprehensive, multi-layered approach, focusing on all avenues of contraband introduction. These strategies include: increased use of drug detection canines, increased frequency of random drug urinalysis of inmates, increased disciplinary sanctions coupled with mandatory referral to substance abuse programs, increased use of ION mobility spectrometry technology (ION Scanners), and upgrading/installing video surveillance equipment in visiting rooms.