

SFAQ 2022-02 SAE Program Requirements

Security Frequently Asked Questions (SFAQ)

Request Form

SFAQ Number: 2022-02 (Industry Panel Chair to complete)

(Requestor to Complete)

Licensee:	NEI	Date Submitted:	02/23/2022
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Potentially relevant existing SFAQ numbers:	
This question involves: (check all that apply)	Design Basis <input type="checkbox"/> , Force-on-Force <input type="checkbox"/> , Training <input type="checkbox"/> , Access <input type="checkbox"/> , Security Plan <input type="checkbox"/> , Cyber <input type="checkbox"/> , Other <input checked="" type="checkbox"/> FFD

Description of Question: Is the [Substance Abuse Expert] SAE, who is remote and not involved in day-to-day FFD program activities, required to meet FFD requirements such as placement in the FFD random pool and subjection to the Behavior Observation program?

Background: FFD Program personnel, as stated in 26.4(g), include:

(g) All FFD program personnel who are involved in the day-to-day operations of the program, as defined by the procedures of the licensees and other entities in § 26.3(a) through (c), and, as applicable, (d), and whose duties require them to have the following types of access or perform the following activities shall be subject to an FFD program that meets all of the requirements of this part, except subparts I and K of this part, and, at the licensee's or other entity's discretion, subpart C of this part:

- (1) All persons who can link test results with the individual who was tested before an FFD policy violation determination is made, including, but not limited to the MRO.
- (2) All persons who make determinations of fitness.
- (3) All persons who make authorization decisions.
- (4) All persons involved in selecting or notifying individuals for testing; and
- (5) All persons involved in the collection or onsite testing of specimens.

SAE personnel are individuals trained to administer substance abuse evaluative services and make recommendations to FFD. SAE personnel typically administer these services remotely and provide evaluations that are used in the determination of fitness on an occasional basis. Substance abuse evaluation activity requiring SAE expertise increases during outage periods but is typically administered remotely.

Some licensees contract with SAE personnel who administer substance abuse services on licensee property. These SAE professionals are considered FFD program personnel as they are involved in the day-to-day operations of the FFD program; even though substance abuse services may be performed infrequently.

The Supplementary Information published with the 2008 final Part 26 rule states: “26.4 (g) requires MROs and SAEs to be subject to Part 26....Individuals who serve in these positions play the key roles in determining whether an individual is fit to safely and competently perform the duties that require the individual to be subject to this part. Although the NRC recognizes the significant logistical difficulties and cost that may be associated with covering these individuals, the NRC concluded that MRO’s and SAE’s play such critical roles in the effective functioning of an FFD program that ensuring their continuing honesty and integrity by requiring them to be subject to the rule is warranted.”¹

Justification: There is considerable confusion in interpreting the meaning of “those involved in day-to-day operations” of the FFD program. SAE personnel do not hold routine access to site (unless contracted) and routinely provide services remotely on occasion via electronic teleconferencing. Evaluations performed in this manner are not treatment but are the first stage of the evaluative process. Further diagnostic evaluation and actual treatment occurs off-site with clinicians that are not part of the FFD program. An interpretation of “day to day” operations is needed to clarify intent to determine if SAE personnel, who occasionally perform SAE functions and work remotely are subject to FFD program requirements.

Proposed Solution: SAE personnel who are remote and not involved in day-to day FFD operations should not be subject to FFD requirements.

Note: Requestor to complete page 1 of the form and transmit through approved electronic means or mail to NEI Security FAQ, 1201 F St NW Suite 1100, Washington, DC 20004. Alternatively, the form and supporting documentation may be hand delivered to the NEI SFAQ Coord

Additional pages attached? Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>		
(NEI to complete) Request #	Date entered	By: Johnny Rogers

¹ 73 Fed. Reg. 16966, 17003; March 31, 2008

SFAQ Evaluation and Resolution Section

Security Frequently Asked Questions (SFAQ)

Request Form

SFAQ Number: 22-02 (Industry Panel Chair to complete)

Issue presented at Joint NRC/NEI Security Question Panel: Date
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Resolution of SFAQ

The March 31, 2008, 10 CFR Part 26 final rule (73 FR 16966) established the position of Substance Abuse Expert (SAE). The responsibilities of an SAE, as defined in 10 CFR 26.187(g), consist of evaluating individuals who have violated the substance abuse provisions of a licensee's or other entity's Fitness-For-Duty (FFD) policy and making recommendations concerning education, treatment, return to duty, followup drug and alcohol testing, and aftercare. An SAE performs these professional evaluations for a licensee's or other entity's FFD program through a process called a determination of fitness (DOF), which an SAE is authorized to perform in at least three circumstances:

- 1) When potentially disqualifying FFD information² has been identified regarding an individual who has applied for authorization under 10 CFR Part 26;
- 2) When an individual has violated the substance abuse provisions of a licensee's or other entity's FFD policy; and
- 3) When an individual may be impaired by alcohol, prescription or over-the-counter medications, or illegal drugs.

The DOF process is described in 10 CFR 26.189 and defines the circumstances when a DOF must be performed, and the types of qualified professionals that may perform a DOF based on the fitness issue(s) presented by an individual (e.g., substance abuse, mental health, physical illness). An SAE would perform a DOF for only a subset of fitness issues.

The Commission provided clear direction on FFD program applicability to SAEs in the preamble of the 2008 Part 26 final rule when it concluded the discussion of 10 CFR 26.4(i)(1), which described individuals who "are not subject to an FFD program." The Commission stated:

"However, § 26.4(g) of the final rule requires MROs and SAEs to be subject to Part 26...as well as any EAP counselor who serves as the SAE for a licensee's or other entity's FFD program. Individuals who serve in these positions play the key roles of determining...whether an individual is fit to safely and competently perform the duties that require the individual to be subject to this part (i.e., the SAE). Although the NRC recognizes the significant logistical difficulties and costs that may

² "Potentially disqualifying FFD information" is defined in 10 CFR 26.5 as "information demonstrating that an individual has –

- (1) Violated a licensee's or other entity's FFD policy;
- (2) Had authorization denied or terminated unfavorably under §§ 26.35(c)(2), 26.53(i), 26.63(d), 26.65(g), 26.67(c), 26.69(f), or 26.75(b) through (e);
- (3) Used, sold, or possessed illegal drugs;
- (4) Abused legal drugs or alcohol;
- (5) Subverted or attempted to subvert a drug or alcohol testing program;
- (6) Refused to take a drug or alcohol test;
- (7) Been subjected to a plan for substance abuse treatment (except for self-referral); or
- (8) Had legal action or employment action, as defined in this section, taken for alcohol or drug use.

be associated with covering these individuals, the NRC concluded that MROs and SAEs play such critical roles in the effective functioning of an FFD program that ensuring their continuing honesty and integrity by requiring them to be subject to the rule is warranted.”

Based on this clear direction from the Commission, all individuals that perform in the position of SAE under 10 CFR Part 26 are subject to a licensee’s or other entity’s FFD program.

MROs and SAEs fall under the 10 CFR 26.4 FFD program applicability category of FFD program personnel in 10 CFR 26.4(g). An individual other than an MRO or SAE may perform an activity covered under 10 CFR 26.4(g) but may not perform that activity every day, thereby raising the question of whether that individual meets 10 CFR 26.4(g) FFD program personnel applicability. The licensee or other entity has discretion in determining the meaning of the phrase “involved in the day-to-day operations of the [FFD] program” in 10 CFR 26.4(g) and is to do so by defining the phrase in its FFD procedures. Operating experience gained from implementing the 2008 Part 26 final rule demonstrates that many individuals designated as FFD program personnel do not perform those functions every day. For example, a specimen collector may only collect specimens once per week for random testing under the requirements of 10 CFR 26.31(d)(2)(ii), but they are still considered FFD program personnel.

For individuals designated as FFD program personnel under 10 CFR 26.4(g), the licensee or other entity also must implement additional requirements under 10 CFR 26.31(b) to maintain the “highest standards of honesty and integrity” such that these individuals are not compromised and “are not subject to influence attempts attributable to personal relationships with any individuals who are subject to testing, an undetected or untreated substance abuse problem, or other factors.” At a minimum, these requirements must include:

- Completing an appropriate background investigation, credit and criminal history check, and psychological assessment before assignment to tasks directly associated with administration of the FFD program (complying with the access authorization background investigation requirements in 10 CFR 73.56(d) meets this requirement), with an updated credit and criminal history check and psychological assessment performed nominally every 5 years.
- Subjecting the FFD program personnel to a behavioral observation program designed to assure that they continue to meet the highest standards of honesty and integrity.

Given that many FFD program personnel may not conduct their job functions covered under 10 CFR Part 26 at the licensee’s or other entity’s facility, 10 CFR 26.31(b)(2) provides a licensee or other entity with the flexibility to use a collection facility compliant with the U.S. Department of Transportation’s 49 CFR Part 40 to collect specimens for drug and alcohol testing.

(NRC Security Question Panel Chairman) Approved by:	Date:
(Industry Security Question Panel Chairman) Approved by:	Date:

SFAQ closed in tracking system and SFAQ database updated: Date: