DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

49 CFR Part 382

[FHWA Docket No. MC–93–3]

RIN 2125–AD11

Controlled Substances and Alcohol Use and Testing; Foreign-Based Motor Carriers and Drivers

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Final rule.

SUMMARY: The FHWA is extending the applicability of rules on controlled substances and alcohol use and testing to include foreign-based drivers of motor carriers operating in the United States. This action is taken pursuant to the Omnibus Transportation Employee Testing Act of 1991 and is consistent with the international obligations of the United States. The rules will apply to all foreign-based drivers and employers, who are predominantly from Canada and Mexico, to the same extent as those based in the United States.

EFFECTIVE DATE: This rule is effective October 23, 1995.

FOR FURTHER INFORMATION CONTACT: For information regarding FHWA alcohol and controlled substances testing requirements regarding 49 CFR part 382: Office of Motor Carrier Research and Standards, (202) 366–1790. For information regarding alcohol and controlled substances testing legal issues: Office of the Chief Counsel—Motor Carrier Law Division, (202) 366–0834. For requests for presentations on implementation of the alcohol and controlled substance testing requirements in foreign countries: International Program (HPS–1), (202) 366–5370, Office of Motor Carrier Planning and Customer Liaison, Federal Highway Administration, Department of Transportation, 400 Seventh Street, SW., Washington, D.C. 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except United States Federal holidays.

For information regarding Department of Transportation (DOT) procedural issues and testing protocols in 49 CFR part 40: Director (S–1), (202) 366–3784, Office of Drug Enforcement and Program Compliance, Room 10317, Office of the Secretary of Transportation, U.S. Department of Transportation, 400 Seventh Street, S.W., Washington, D.C. 20590. Office hours are from 9:00 a.m. to 5:30 p.m., e.t., Monday through Friday, except United States Federal holidays.

SUPPLEMENTARY INFORMATION:

I. Background

On November 21, 1988, the FHWA, along with certain other agencies within the Department of Transportation (the Department), adopted regulations requiring pre-employment, periodic, post-accident, reasonable cause and random controlled substances testing of safety sensitive employees, including commercial motor vehicle (CMV) drivers. The FHWA rule applied to certain CMV drivers while operating in the United States, regardless of whether they were based in a foreign country or the United States. The rule provided generally, however, that it would not apply to any person for whom compliance would violate the domestic laws or policies of another country. The rule as originally published further provided that it would not be effective until January 1, 1990, with respect to any person for whom a foreign government contends that application of the rules raises questions of compatibility with that country's laws or policies. *See* 53 FR 47134, codified at 49 CFR 391.81 *et seq.*

The FHWA subsequently amended its regulation to delay the effective date of controlled substances testing requirements for foreign-based drivers of foreign-based motor carriers on four occasions. *See* 54 FR 39546, September 27, 1989; 54 FR 53294, December 27, 1989; 56 FR 18994, April 24, 1991; 57 FR 31277, July 14, 1992. The primary reason for each delay was because the DOT thought it would be more effective to address the problem through bilateral or multilateral agreements and wanted to continue exploring the possibility of such an agreement. Prior to implementation of the North American Free Trade Agreement (NAFTA) on December 17, 1995, the only foreign-based motor carriers operating throughout the United States in significant numbers will be Canadians, with Mexicans confined to operating in limited commercial zones.

Meanwhile, on October 28, 1991, the Omnibus Transportation Employee Testing Act of 1991 (Omnibus Act) was enacted. 49 U.S.C. 31306. The Omnibus Act requires the Secretary of Transportation to issue regulations requiring controlled substances and alcohol testing of CMV drivers who are subject to the commercial driver's licensing (CDL) requirements of the Commercial Motor Vehicle Safety Act of 1986. 49 U.S.C. Chapter 313. The final rule implementing such testing was published on February 15, 1994. *See* 59 FR 7302, codified at 49 CFR part 382. The 1994 rule replaced the current controlled substances testing rule in 49 CFR part 391, and instituted alcohol testing. With part 391 to be completely superseded by part 382 on January 1, 1996, the most recent compliance date in part 391 for foreign-based motor carriers was removed. *See* 60 FR 54, January 3, 1995.

The Omnibus Act applies to motor carriers and drivers operating in the United States, which includes foreign employers and drivers. The only express provision for foreign-based operations is that the new rule be ''consistent with international obligations of the United States, and * * * shall consider applicable laws and regulations of foreign countries.'' 49 U.S.C. 31306(h). Thus, foreign-based drivers are required by the statute to be subject to testing to the extent such rules are consistent with United States international obligations, and the Secretary is granted the authority to deem the requirement satisfied by, and must take into consideration, the laws and regulations of foreign nations.

As part of its consideration of foreign laws, the FHWA solicited information from interested parties regarding the applicability of part 382 to foreign-based drivers. 57 FR 59536 (December 15, 1992) (advance notice of proposed rulemaking); 59 FR 7528 (February 15, 1994) (notice of proposed rulemaking). In the notice of proposed rulemaking (NPRM), the FHWA proposed to apply part 382 to foreign-based operations beginning on January 1, 1996, while continuing to explore the possibility of entering into agreements to recognize other nations' testing programs for purposes of compliance with part 382. In today's document, based upon comments received and the FHWA's intent to provide regulatory flexibility for foreign employers, the FHWA is adopting July 1, 1996, as the effective date for large foreign employers and drivers to comply with these regulations and July 1, 1997, as the effective date for small foreign employers and drivers to comply with these regulations. The FHWA has reconsidered the period when implementation of the rule is necessary and believes now that providing a two-tier implementation phase-in period for this rulemaking is consistent with the implementation phase-in periods provided to domestic employers in 1994. The FHWA believes that this is necessary to provide consistency and fairness to foreign employers.

On December 19, 1994, in a letter to United States Secretary of Transportation Federico Peña, Canadian Transport Minister Douglas Young indicated that the Canadian government

would not be introducing legislation on prevention of substance use in transportation at this time. Minister Young further stated that Canada's motor carrier industry should be allowed to develop a voluntary program ''tailored to their particular needs.''

II. Comments

There were twelve comments to the docket for the NPRM of February 15, 1994. Two of the twelve comments did not address the foreign-based testing issue. All references to a foreign nation in the other comments were to Canada or Mexico, with specific information provided about Canada but not about Mexico. No other nations were mentioned in the comments as a base from which drivers or motor carriers operate in the United States. The FHWA is aware of rare, limited instances of drivers from other nations operating in the United States.

Seven relevant comments were received prior to Transport Minister Young's letter to Secretary Peña, from the American Bus Association (ABA), the Owner-Operator Independent Drivers Association (OOIDA), the American Trucking Associations, Inc. (ATA), the Embassy of Canada, the Canadian Bus Association (CBA), the Ontario Motor Coach Association (OMCA), and the Canadian Trucking Association (CTA). Three comments were received from one organization, the Canadian Coalition of Motor Carriers on Substance Use (CCMCSU), after Transport Minister Young's letter. The CCMCSU is a coalition of the CBA, the CTA, the Private Motor Truck Council of Canada, and the COM–CAR Owner-Operators' Association, and represents about 2,000 Canadian motor carriers. There are approximately 8,450 Canadian motor carriers listed on the FHWA's Motor Carrier Management Information System census database that operate in the United States.

A. Applicability

The ABA and the ATA strongly support applying the alcohol and controlled substances testing regulations to foreign-based drivers and motor carriers operating in the United States. The OOIDA stated that although it has never supported alcohol and controlled substances testing without cause, because testing is required of United States-based employers and drivers, ''the Association reluctantly takes the position that the scope of the controlled substance and alcohol testing regulations should be expanded to include drivers of foreign-based motor carriers.''

The comments of the CBA, CTA, and OMCA all supported the Embassy of Canada's comment favoring continuation of reciprocity discussions and negotiations in the interest of efficiency, cost, and comity. Once it became clear that Canada would not have reciprocal standards, at least for testing requirements, the CCMCSU commented that it was prepared to begin assisting implementation of the FHWA alcohol and controlled substances testing regulations in Canada.

FHWA Response: The statutory directive is clear. All drivers operating in the United States are to be subject to controlled substances and alcohol testing, regardless of domicile. The safety concerns which led to the Omnibus Act pertain equally to United States and foreign-based drivers. Furthermore, it would be unfair and competitively harmful to United States' drivers and employers to require them to incur significant costs not borne by foreign-based operations. This is particularly true in light of provisions in NAFTA designed to open United States motor carrier markets to operators based in Mexico, and vice versa, beginning in December 1995.

From their inception in 1988, part 391 controlled substances testing requirements applied to foreign-based carriers. Though Canadians continued to operate throughout the United States, foreign implementation was delayed several times while legal and other issues were discussed bilaterally with Canada. Foreign application of part 382 has, in effect, been delayed for the same reason. Now that it is clear that Canada will not establish, and further discussion will not result in, comprehensive national standards comparable to part 382, there is no reason to delay further, and, indeed, every reason to advance, this important safety rule. The imminence of Mexican operations in the United States reinforces this need.

Applicability of part 382 will therefore be extended to that class of drivers currently expressly excluded—foreign-based drivers of foreign-based motor carrier employers while operating in the United States. The rule as written can be administered wholly in the United States, though perhaps not most efficiently (see discussion below on Testing Procedures). Most parts of the rule can also be administered in Canada or Mexico, though some parts of the rule will have to be administered in the United States, such as use of U.S. Department of Health and Human Services (DHHS) certified laboratories, all of which are in the United States. In any event, unless otherwise provided by the FHWA at a later date based on recognition of comparable foreign standards, the rule will apply to foreign-based drivers of foreign-based employers to exactly the same extent and in exactly the same manner as to domestic operators.

Nevertheless, the FHWA remains very interested in continuing to explore bilateral agreements that would have the effect, subject to the FHWA's rulemaking and waiver authority in this area, of recognizing all or part of any Canadian program and Mexican standards as comparable to part 382, ''consistent with the international obligations of the United States, and * * * [taking] into consideration any applicable laws and regulations of foreign countries.'' Two examples of comprehensive reciprocity agreements with Canada and Mexico are the Memoranda of Understanding that recognize their commercial driver's license (CDL) systems as equivalent to the United States requirements. See 54 FR 22392 (May 23, 1989); 57 FR 31454 (July 16, 1992).

B. Implementation Dates

The FHWA proposed in the NPRM that all foreign employers be required to comply with part 382 requirements beginning on January 1, 1996, one year after large United States carriers, and the same day as smaller United States carriers. The ABA commented that the date should be January 1, 1995, arguing that there was no justification for permitting discrimination against domestic motor carriers by granting an additional year to large foreign employers. The ATA hoped that further extension of the deadline would be unnecessary, but recognized ''the complexities of imposing (the testing) requirements on foreign-based motor carriers and drivers, and that the details remain to be worked out as an integral part of harmonization of medical standards.'' The CCMCSU requested that FHWA impose testing requirements one year from the date of the final rule, in order to provide adequate time to develop and implement effective programs and overcome the perceived level of confusion of its members about implementing testing programs.

FHWA Response: The FHWA is most concerned with the effective implementation of this program and has always provided reasonable implementation schedules to domestic motor carriers to implement the complex requirements of controlled substances and alcohol testing. Given the changing nature and source of the DOT testing programs since 1988 and

the numerous delays, the FHWA believes it would be unreasonable to expect a foreign-based employer to have sufficient understanding to begin implementation immediately.

The FHWA believes the best course is to allow foreign-based employers a similar implementation schedule as was provided to domestic employers. Large domestic employers were provided approximately one year to implement a testing program, while small employers were provided two years. The purpose was to give employers with different capabilities and resources sufficient time to implement technically sound testing programs.

Therefore, the FHWA has decided that large foreign-based employers will be required to implement part 382 on July 1, 1996, and small foreign-based employers will be required to implement part 382 on July 1, 1997. Foreign employers may not implement part 382 testing requirements until the dates specified.

Consistent with implementation by domestic employers, the factor which determines whether a foreign-based employer is considered large or small is the number of drivers of CMVs it employs or uses in North American operations on a certain date. That date will be December 17, 1995, which correlates with the NAFTA implementation date for allowing Mexican drivers to operate in California, Arizona, New Mexico, and Texas. Thus, all drivers assigned by the foreign-based employer to operate in North America on December 17, 1995, are to be included in the count of drivers.

C. Testing Procedures

Various comments from Canadian entities have requested that laboratories certified in Canada be acceptable for analysis of urine specimens for controlled substance testing. The CCMCSU also has asked whether foreign collection sites, medical review officers (MRO), substance abuse professionals (SAP), breath alcohol technicians (BAT), and other personnel involved in the testing process will be allowed to provide services in Canada, or may only United States-based providers provide such services.

FHWA Response: With respect to testing for controlled substances, the Omnibus Act requires that the Secretary incorporate the scientific and technical guidelines established by DHHS, including forensic standards for laboratory procedures and certification. The DOT has fulfilled this directive by requiring that all DOT-mandated testing be conducted only by DHHS-certified laboratories, all of which are currently in the United States.

The DOT recognizes the interest that Canadians have in using Canadian laboratories. Yet, it is critical that the integrity of the testing process be protected, which is why DHHS certification is required for testing in the United States. The DOT will work with the DHHS, Canada, and Mexico in determining whether foreign laboratory procedures may be DHHS certified or are forensically comparable such that reciprocity is possible.

As to the other elements mentioned, there is no requirement that urine collection personnel, MROs, SAPs, or BATs be licensed, certified, or trained in the United States. However, MROs and SAPs must be appropriately licensed or certified by the jurisdiction in which they perform such functions. The definition of an SAP may include professional categories irrelevant in Canada and Mexico, particularly certification by the National Association of Alcohol and Drug Abuse Counselors; however, the DOT is willing to discuss reciprocity with regard to national counterparts.

D. Enforcement

The ATA and the CCMCSU provided comments regarding the enforcement of the alcohol and controlled substances testing regulations on foreign-based motor carriers and drivers. The ATA suggests that foreign-based drivers be required to join a United States-based consortium within 30 days of their initial entry into the United States, pass both alcohol and controlled substance tests, and be issued tamper-resistant photo identification cards documenting compliance that must be presented to United States border officials as a condition of entry into the United States. The CCMCSU notes that it will work with FHWA to facilitate and educate Canadian motor carriers about compliance with these new rules, and suggests that the FHWA coordinate with Transport Canada officials to address program enforcement issues.

FHWA Response: Enforcement of controlled substances and alcohol testing requirements must be seen in the context of the entire motor carrier safety program. The United States and Canada have had a long-term, ongoing, and successful relationship enforcing motor carrier safety regulations. The distinguishing factor in the testing area is the absence of regulatory standards from Transport Canada. The FHWA will work with Transport Canada and the Canadian provincial governments to develop enforcement systems, using existing systems to the extent possible, but also considering some form of certification of compliance and other innovative methods.

The situation with Mexico is altogether different. Since Mexicans will only begin operating in the United States in December 1995, the enforcement systems in place on the northern border may be lacking on the southern. Controlled substances and alcohol testing enforcement will be a part of any systems established. Reciprocity and innovative methods will be considered.

III. Final Rule

The applicability section of the controlled substances and alcohol testing rule is being amended to include coverage of foreign-based drivers of foreign-based carriers. To accomplish this, § 382.103(c)(4), which excludes foreign-based carriers, is deleted. The implementation dates of the requirements of 49 CFR parts 40 and 382 will go into effect on July 1, 1996, for large foreign employers, and will go into effect on July 1, 1997, for small foreign employers. Accordingly, § 382.115 is being amended to require foreign-based carriers to implement the rule by July 1, 1996, and July 1, 1997, whichever is applicable.

IV. Education and Technical Assistance

The FHWA is committed to assisting foreign governments, motor carriers, and drivers to understand and implement effective alcohol and controlled substance testing programs that meet the FHWA requirements. The FHWA will, to the extent possible, make presentations, attend seminars, and meet with interested parties to assist with the foreign implementation of the FHWA alcohol and controlled substances testing rules. If a group of foreign entities would like FHWA involvement in educating their members or providing technical assistance in implementing alcohol and controlled substances testing programs, please provide a written request to the FHWA International Program, at least 4 weeks in advance, at the address noted above under the caption **FOR FURTHER INFORMATION CONTACT.**

Rulemaking Analyses and Notices; Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

The FHWA has determined that this action is not a significant regulatory action within the meaning of Executive Order 12866 but is significant within the meaning of Department of Transportation regulatory policies and procedures. The FHWA prepared a regulatory evaluation for the proposed rule. No comments were received with respect to the evaluation. The evaluation indicates that the rule will have a positive impact of $8.5 million discounted over ten years. A copy of the regulatory evaluation is included in the docket for this final rule.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601–612), the FHWA has evaluated the effects of this rule on small entities. Based on the regulatory evaluation, the FHWA believes that the impact on small entities will be minimal. Furthermore, it should be noted that the Omnibus Act mandates alcohol and controlled substances testing irrespective of the size of the entities.

For these reasons, the FHWA certifies that this action will not have a significant economic impact on a substantial number of small entities.

Executive Order 12612 (Federalism Assessment)

This action has been analyzed in accordance with the principles and criterion contained in Executive Order 12612, and it has been determined that the proposed rulemaking has no federalism implications to warrant the preparation of a Federalism Assessment. This action would require foreign-domiciled employers to test their drivers for the use of controlled substances and alcohol. The action does not place any requirements on the States to comply with this rule.

Executive Order 12372 (Intergovernmental Review)

Catalog of Federal Domestic Assistance Program Number 20.217, Motor Carrier Safety. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.

Paperwork Reduction Act

The information collection requirements associated with compliance by foreign employers and drivers was included in the paperwork approval request submitted to and approved on February 28, 1994, by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.* and has been assigned OMB control number 2125- 0543, approved through March 31, 1997.

National Environmental Policy Act

The agency has analyzed this action for the purpose of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and has determined that this action would not have any effect on the quality of the environment.

Regulation Identification Number

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

List of Subjects in 49 CFR 382

Alcohol testing, Controlled substances testing, Highway safety, Highways and roads, Motor carriers, Motor vehicle safety.

Issued on: September 19, 1995.

Federico Peña,

Secretary of Transportation.

Rodney E. Slater,

Federal Highway Administrator.

In consideration of the foregoing, the FHWA is amending 49 CFR, subtitle B, chapter III, part 382 as set forth below:

PART 382—CONTROLLED SUBSTANCES AND ALCOHOL USE AND TESTING—[AMENDED]

1. The authority citation for part 382 continues to read as follows:

Authority: 49 U.S.C. 31133, 31136, 31301 *et seq.*, 31502; and 49 CFR 1.48.

2. Section 382.103 is revised to read as follows:

§ 382.103 Applicability.

(a) This part applies to every person and to all employers of such persons who operate a commercial motor vehicle in commerce in any State, and is subject to:

(1) The commercial driver's license requirements of part 383 of this subchapter;

(2) The Licencia Federal de Conductor (Mexico) requirements; or

(3) The Canadian National Safety Code commercial driver's license requirements.

(b) An employer who employs himself/herself as a driver must comply with both the requirements in this part that apply to employers and the requirements in this part that apply to drivers. An employer who employs only himself/herself as a driver shall implement an alcohol and controlled substances testing program that includes more persons than himself/herself as covered employees in the random testing pool.

(c) This part shall not apply to employers and their drivers:

(1) Required to comply with the alcohol and/or controlled substances testing requirements of parts 653 and 654 of this title; or

(2) Granted a full waiver from the requirements of the commercial driver's license program; or

(3) Who have been granted a State option waiver from the requirements of part 383 of this subchapter.

3. Section 382.115 is revised to read as follows:

§ 382.115 Starting date for testing programs.

(a) *Large domestic employers.* Each employer with fifty or more drivers on March 17, 1994, will implement the requirements of this part beginning on January 1, 1995.

(b) *Small domestic employers.* Each employer with fewer than fifty drivers on March 17, 1994, will implement the requirements of this part beginning on January 1, 1996.

(c) *All domestic employers.* Each domestic employer that begins commercial motor vehicle operations after March 17, 1994, but before January 1, 1996, will implement the requirements of this part beginning on January 1, 1996. However, such an employer may be subject to the requirements of Part 391, Subpart H on the date they begin operations, if operating commercial motor vehicles in interstate commerce. A domestic employer that begins commercial motor vehicle operations on or after January 1, 1996, will implement the requirements of this part on the date the employer begins such operations.

(d) *Large foreign employers.* Each foreign-domiciled employer with fifty or more drivers assigned to operate commercial motor vehicles in North America on December 17, 1995, must implement the requirements of this part beginning on July 1, 1996.

(e) *Small foreign employers.* Each foreign-domiciled employer with less than fifty drivers assigned to operate commercial motor vehicles in North America on December 17, 1995, must implement the requirements of this part beginning on July 1, 1997.

(f) *All foreign employers.* Each foreign-domiciled employer that begins commercial motor vehicle operations in the United States after December 17, 1995, but before July 1, 1997, must implement the requirements of this part beginning on July 1, 1997. A foreign employer that begins commercial motor vehicle operations in the United States on or after July 1, 1997, must implement the requirements of this part on the date the foreign employer begins such operations.

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