DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

49 CFR Parts 382, 383, 390, 391 and 392

[FHWA Docket Nos. MC–92–19 and MC–92–23]

RIN 2125–AD46

Commercial Driver's License Program and Controlled Substances and Alcohol Use and Testing

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Final rule; technical amendments.

SUMMARY: The Federal Highway Administration is making technical amendments to its alcohol and drug testing rules and its regulations implementing the commercial driver's license program. The testing rules require employers to test drivers who are required to obtain commercial driver's licenses (CDLs) for the illegal use of alcohol and controlled substances. The amendments are necessary to correct minor errors in the final rule, codify final dispositions of waivers of the commercial driver's license program, and make conforming metrification changes.

EFFECTIVE DATE: This rule is effective March 8, 1996.

FOR FURTHER INFORMATION CONTACT: *For information regarding program issues:* Office of Motor Carrier Research and Standards, (202) 366–1790, *For information regarding legal issues:* Office of the Chief Counsel—Motor Carrier Law Division, (202) 366–0834, Federal Highway Administration, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

A final rule published in the Federal Register on February 15, 1994 (59 FR 7484), added 49 CFR part 382 and made conforming amendments to parts 391, 392, and 395.

Applicability

Sections 382.103 and 383.3 are being revised to clarify which driver groups have been exempted from commercial driver's license requirements and, by extension, from alcohol and drug testing requirements. Since the final rule was published on February 15, 1994, numerous questions have arisen about which groups have been granted waivers from CDL requirements and how those waivers apply to alcohol and drug testing. For clarity about the driver groups exempted from Federal CDL requirements in September 1988 (53 FR 37313, September 26, 1988), the FHWA is amending these sections to note those groups (farmers, firefighters, military personnel, emergency response personnel) identified in the waiver notice of final disposition. In the September 1988 waiver notice, States were given the option to exempt these groups from all CDL requirements. Drivers in States which have exercised these options do not have to be tested. Drivers in States which have not exercised these options, but require those drivers to obtain CDLs, must be tested for alcohol and drugs under part 382.

The FHWA is also amending § 383.3 to codify part 383 exceptions to certain CDL requirements for drivers that meet specific conditions in the State of Alaska, in the farm-related service industries or in the pyrotechnics industry. The final dispositions of the restricted CDL requirements for certain Alaskan drivers, farm-related service industry drivers, and pyrotechnic industry drivers allow States to waive certain requirements for CDL applicants under certain conditions. These drivers must still obtain CDLs and will be subject to alcohol and drug testing by their employers. The restrictions placed on the CDL do not exempt these drivers from the requirements of the alcohol and drug testing program. For more information about the State of Alaska, farm-related service industry, and pyrotechnic industry final dispositions, see 54 FR 33230, August 14, 1989, 57 FR 13650, April 17, 1992, and 60 FR 34188, June 30, 1995.

Definitions

The FHWA is adding definitions in § 382.107 for the terms ''controlled substances,'' ''disabling damage,'' and ''licensed medical practitioner.'' The definition of controlled substances will include the substances tested for in part 40 of this title. The FHWA is copying the definition of ''disabling damage'' in § 390.5 for placement in § 382.107 to clarify that this definition is to be used in § 382.303. The FHWA is adding a definition for ''licensed medical practitioner'' that is patterned after the § 390.5 definition of the term ''medical examiner'' to state what types of individuals may prescribe controlled substances to drivers under § 382.213. See the discussion below about *licensed medical practitioners.*

Finally, the FHWA is modifying the definitions of ''driver'' and ''safety-sensitive function.'' ''Driver'' is being modified to remove the last sentence with respect to pre-employment testing. This change, along with modification to pre-employment testing discussed later in this document, will allow employers to conduct pre-hire road testing of applicants that will ensure the applicants know how to properly operate particular equipment of an employer. ''Safety-sensitive function'' is being modified to remove the reference to the § 395.2 *On-duty time* definition and add the text of part of the *on-duty time* definition in its place. The FHWA has received numerous comments that it is difficult for the public to make a cross reference to part 395, especially for employers not subject to it. Also, in light of the FHWA's future recodification of the Federal Motor Carrier Safety Regulations under its zero base regulatory review project, the FHWA is removing most cross referencing within subchapter B of Chapter III of Title 49, Code of Federal Regulations.

Starting Date for Testing Programs

The FHWA has had numerous questions as to which testing regulations an interstate motor carrier is subject to when the motor carrier begins operations after March 17, 1994. To clarify the FHWA's intent in requiring such an interstate motor carrier to start drug testing under part 391, the FHWA is amending paragraph (c) and adding paragraph (d) to § 382.115. This will clarify that employers that begin commercial vehicle operations after March 17, 1994, will have until January 1, 1996, to implement testing programs required by part 382. However, if an employer begins operating in interstate commerce after March 17, 1994, and prior to January 1, 1996, such an employer is considered an interstate motor carrier and may be subject to part 391, subpart H. If such an interstate motor carrier is required to implement the subpart H testing program, it must do so immediately. On January 1, 1996, the motor carrier will modify its drug testing program to part 382 requirements and add alcohol testing at that time.

Licensed Medical Practitioner

The FHWA has had inquiries concerning whether drivers, who are prescribed medications by non-physicians licensed to dispense controlled substances in their jurisdiction, may take such controlled substances and not be considered to be in violation of §§ 382.213 and 392.4. Although the terms ''medical review officer'' and ''substance abuse

professional'' use the term physician with a parenthetical describing the type of physician, the FHWA did not intend that such a condition be applied to the term ''physician'' in §§ 382.213 and 392.4. The term ''physician'' in the definitions of ''medical review officer'' and ''substance abuse professional'' is followed by a parenthetical stating ''medical doctor or doctor of osteopathy.'' Therefore, the FHWA is replacing the term ''physician'' in §§ 382.213 and 392.4 with the term ''licensed medical practitioner.'' A definition of the term ''licensed medical practitioner'' will be added to § 382.107. A licensed medical practitioner means a person who is licensed, certified, and/or registered, in accordance with applicable Federal, State, local, or foreign laws and regulations, to prescribe controlled substances and other drugs. In addition, the FHWA is removing the footnote to § 392.4(a)(1). The Government Printing Office (GPO) publishes Appendix D to the FMCSRs and the FHWA believes all individuals have access to the GPO codified versions of Appendix D.

Pre-Employment Testing

The FHWA is amending § 382.301(a) to clarify that an employer must either administer a pre-employment controlled substances test for drivers who the employer intends to hire or use or utilize the exception and obtain specified information from previous employers. An employer which obtains the information does not have to administer a test. The information may also be obtained from third party service providers that act as agents for employers. Regardless of which option is chosen, an employer must comply with the separate requirements of § 382.413 to obtain certain prior testing information. Of course, all testing information may be released only pursuant to the consent of the driver.

Some questions have arisen regarding whether records prepared by or obtained from former employers about a driver's pre-employment controlled substances test results must be retained. These records must be retained from one to five years in accordance with § 382.401. In order to be absolutely clear, the FHWA is adding the words ''and retain'' to § 382.301(d)(1) and is adding the types of records required to be maintained by § 382.301 to § 382.401, *Retention of records*, to address these concerns. Note, however, that such records would only be subject to an information request under § 382.413 if the driver was actually employed or used as a driver by the employer.

Paragraph (d)(2) of § 382.301 is also being revised. The rule text is being rewritten to better explain use of the pre-employment testing exception for occasional, intermittent, and casual drivers. A similar paragraph has been in the drug testing rules of part 391 since the rules were first promulgated. This paragraph relieves employers who use intermittent, casual, or occasional drivers on a regular basis (generally for short periods, such as trip-lease drivers or drivers called from a union hiring hall) from the requirement to make the verifications in § 382.301(d)(1) each time the driver is used by the employer to operate commercial motor vehicles (CMVs). These drivers may be used as little as once each quarter or once each month by an employer, and are generally in another employer's testing program or are in a union hall's testing program that conforms to part 40 of this title.

In response to questions regarding the intent of this section, the FHWA believes that this revision will make the regulation more understandable. When employer A uses a driver for the first time, employer A must verify the information from former employers to ensure the driver is actively participating in a testing program(s). The driver may then work for employers B, C, or D, driving CMVs on a short term basis, or return to driving on a regular basis for a regular employer. If the driver returns to employer A to operate a CMV within six months of the previous verification, no verification of the information or pre-employment test is needed. If the driver returns to drive a commercial motor vehicle for employer A more than six months after employer A last verified the information as required under § 381.301(d)(1), employer A must again verify and record that the driver is participating in a DOT agency testing program using part 40 procedures.

Post-Accident Testing

The FHWA is clarifying that drivers involved in accidents, as defined in § 390.5, are subject to post-accident testing. Despite the general cross reference to § 390.5 in § 382.107, many people appear to be unclear about what types of accidents require a test. Therefore, the FHWA will include the definition of ''disabling damage'' to § 382.107, revise the introductory phrase of § 382.303(a), add a clarifying phrase to § 382.303(a)(2) that comports to the style of § 382.303(a)(1), and add § 382.303(a)(3), a table to note when a post-accident test is required.

Random Testing

On December 2, 1994, the FHWA, along with other DOT agencies, published a final rule in the Federal Register (59 FR 62218) allowing the agencies' Administrators to adjust the random drug testing rates based on information obtained by the respective agencies in their drug testing management information system reports. The agencies, generally, require certain employers to submit a report covering their drug testing program for a calendar year. The FHWA has randomly selected a sample of interstate motor carriers in the past and will make random selections of employers subject to part 382 in the future.

The FHWA included in the December 2, 1994, rule text of § 382.305(f) an example of when the FHWA Administrator may lower the random drug testing rate. The example incorrectly stated that the Federal Highway Administrator will have the first opportunity, based on reported data, to reduce the random drug testing rate in 1997. In fact, as stated in the DOT common preamble, the FHWA testing rate may first be reduced in 1998. Recodified paragraph (g) of § 382.305 is revised accordingly.

Second, the rule changed the words ''average number of driver positions'' in § 382.305(a) to ''number of drivers each selection period.'' This change was unintentional. Since the change was unintentional, paragraph (a) is revised accordingly. The revised rule is corrected using the original words ''average number of driver positions.''

Third, employers have said that they believed they were not required to have a random testing program, since the random testing section does not specifically state that employers are required to have one. The FHWA, therefore, is adding clarifying language to § 382.305(a) that states every employer must have a random testing program and every driver shall submit to random testing.

Finally, employers have asked whether § 382.305(k), recodified as § 382.305(l), prohibits a driver from driving a commercial motor vehicle to a testing collection site after notification. The FHWA's intent in requiring an employer to ensure that the driver ceases to perform safety-sensitive functions prior to proceeding to the collection site was to allow the driver to finish a task that may affect workplace safety, e.g., lowering a load on a forklift prior to leaving the forklift or finishing the securement of a load prior to proceeding to the collection site. The FHWA did not intend for the random

testing rule proviso in paragraph (k) to include driving a commercial motor vehicle to a collection site to provide a breath, saliva, or urine sample. A prohibition from using such a vehicle to travel to a collection site is not reasonable to the FHWA when there is no reasonable suspicion to suspect the driver is using alcohol or controlled substances. Therefore, the FHWA will allow a driver to drive a commercial motor vehicle to a collection site after being notified of the driver's random selection. This will include allowing a driver to be notified en route to proceed to a collection site en route. However, the FHWA will not allow an employer, who has notified a driver of a random test selection, to permit or require the driver to complete a trip or dispatch the driver on another trip prior to the driver providing the appropriate sample or specimen at the collection site(s) for the random testing requirement. Of course, if an alcohol test result of 0.02 or greater alcohol concentration is obtained from this en route random testing, the driver is prohibited from completing all trips. Recodified paragraph (l) of § 382.305 is revised accordingly.

Computation of the Average Number of Driver Positions for Random Testing

The FHWA explained how to compute the average number of driver positions for the old drug testing program on the February 1, 1990 (55 FR 3546, at 3549). For clarity and to assist those employers that were not subject to the old drug testing program under 49 CFR part 391, the FHWA is reprinting this discussion.

The FHWA realizes that there are fluctuations in an employer's CMV driver work force which will make an accurate computation of a testing rate difficult. An employer's random testing program plan should take into account these fluctuations by estimating the number of random tests needed to be performed over the course of the year. If the employer's CMV driver work force is expected to be relatively constant (i.e., the total number of CMV driver positions are approximately the same or changes at a relatively constant rate), then the number of tests to be performed in any given year could be determined by multiplying the average number of CMV driver positions by the testing rate.

However, if there are large fluctuations in the number of CMV driver positions throughout the year without any clear indication of the average number of CMV driver positions, the employer should make a reasonable estimate of the number of CMV driver positions. After making the estimate, the employer should then be able to determine the number of tests necessary. The total random tests taken for the year, however, must equal or exceed the average number of CMV driver positions (for calendar years 1996 and 1997, 50% for controlled substances testing and 25% for alcohol testing).

For example, if an employer decided to perform random selections four times a year, the number of tests to be performed during each of the testing periods (T) must equal or exceed 50% (25% for alcohol) of the number of CMV driver positions eligible to be tested (D) divided by the number of test periods per year (P). As a formula, the controlled substances formula may be expressed as:

$$T = 50\% \times \frac{D}{P}$$

The alcohol formula may be expressed as:

$$T = 25\% \times \frac{D}{P}$$

At the time of selecting the individuals to be tested, the employer determined that there were an average of 60 CMV drivers eligible for testing during the period covered by the February test, 80 CMV drivers in May, 100 CMV drivers in August, and 70 CMV drivers in November. Using the formulas given above, the employer would have to perform 8 controlled substances tests and 4 alcohol tests in February (50% [25%] times 60 divided by 4 equals 7.5 controlled substances (3.75 alcohol tests) and rounding up to the nearest whole number), 10 controlled substances (5 alcohol tests) in May, 13 tests (7 alcohol tests) in August, and 9 tests (5 alcohol tests) in November for a total of 40 controlled substances and 21 alcohol tests.

However, throughout the year the employer needed to perform 39 controlled substances (20 alcohol) tests in order to assure testing at the 50% (25%) rate. This figure was computed using the same formula with D equal to the summation of the number of drivers eligible for testing in each of the selection periods (D=60+80+100+70=310 CMV drivers), and by completing the formula, T=50% times 310 divided by 4=38.75) and rounding up to the nearest whole number, 39. For alcohol testing, T=25% times 310 divided by 4=19.375) and rounding up to the nearest whole number, 20. In these examples, the employer could perform one less controlled substances test and one less alcohol test in the last testing period.

Since CMV driver populations may vary during any given period in a year, an employer who only conducted random testing during low CMV driver periods would not be able to meet the 50% and 25% random testing ratios.

The employer's random testing policy/plan must be documented. The FHWA emphasizes that each selection for random testing must include *all* CMV drivers to whom the final rule applies, regardless of whether or not the CMV drivers have been tested in the past. This would include individuals who do not regularly drive CMVs (such as clerks, mechanics, supervisors, officials), but are expected by the employer to be immediately available to perform the safety-sensitive function of driving a CMV, as defined in § 382.107, for the employer. It is quite likely with a large driver turnover rate that an employer, over the course of the year, will be employing/using more CMV drivers than there are CMV driver positions. In determining the number of tests, an employer should use the number of CMV driver positions, not the number of CMV drivers used/employed during the testing period.

To illustrate using the previous example, in the February selection (which represents the quarter January 1 through March 31), the employer determined that there were an average of 60 CMV driver positions. However, during the same quarter (at least up to the date the employer performed the random selection of CMV drivers to be tested, say February 12) the employer used/employed a total of 75 individuals as CMV drivers or persons expected to be CMV drivers. Of these 75 individuals, 15 were no longer used by the employer at the time the selection was made (February 12). As noted earlier, eight individuals will be selected for controlled substances testing and four individuals will be selected for alcohol testing.

Training Supervisors for Reasonable Suspicion Testing

The FHWA has learned that some employers and drivers believe that only certain supervisors of a driver are required to be trained in techniques of determining reasonable suspicion of alcohol and drug use or that this is subject to collective bargaining. The intent of the FHWA was, however, to require that all persons designated to supervise drivers be trained under § 382.603. Section 382.307 is being amended to clarify this requirement.

The current rule at § 382.401(b)(2) may also be interpreted to allow employers to discard documents proving that supervisors had received

training to determine whether reasonable suspicion exists to conduct alcohol and controlled substances testing two years after being trained. The FHWA believes it is necessary to maintain documents related to such training during the entire period for which a supervisor is authorized to make such determinations. It was the FHWA's intent to allow employers to discard such training records two years after the supervisor leaves the employer or ceases to perform the tasks requiring the training. The FHWA, therefore, is clarifying the record retention requirements in § 382.401(b)(4) for all persons who are required to be trained or educated under the rules, such as collection site personnel, breath alcohol technicians, screening test technicians and supervisors.

Record Retention Requirements

The FHWA is revising the record retention section to clarify certain requirements and to add items that were included in part 391 requirements for drug testing but inadvertently left out of the part 382 regulations.

The FHWA is clarifying that § 382.401(b) is meant to note the time periods for which records must be kept and § 382.401(c) is meant to specify most of the records that must be kept. The FHWA declines to list every record that could be generated in an alcohol and drug testing program. The FHWA's intent, however, is that all records that are generated by an employer or its agents in the administration of the testing program must be maintained to the same extent as required in part 391. Administrative records are required to be maintained for a minimum of five years under § 391.87(d). The FHWA is adding an item to § 382.401(b) noting that administrative records must be maintained for the same time period.

A new paragraph, § 382.401(e), is also being added to note the locations in the rule of information collection requirements required by part 382. The FHWA believes that this provision will allow the public to easily locate those rule sections which require documents to be prepared and maintained.

Medical Review Officer Notification to the Employer

The FHWA also has received numerous questions regarding the new requirement that signed, written notifications of the results be sent from the MRO to the employer. Many MROs have asked whether their staff may sign the reports, and if not, whether the MRO signature may be handwritten, rubber stamped, or electronically produced. These MROs stated that requiring them to personally sign written reports of negative test results would be extremely burdensome. The FHWA's intent with the new requirement was to get reliable information concerning positive and negative test results into the hands of the employer and avoid communication problems from occurring over the telephone. Some employers have stated that they have heard the MRO say ''negative,'' when in fact, the MROs records indicate the driver was verified positive for illegal controlled substances use.

The FHWA will continue to require that all test results be forwarded to the employer in writing and be signed by the MRO within three business days after completion of the verification of test results. (*Note that the Office of the Secretary of Transportation's Drug Enforcement and Program Compliance office has held, under § 40.33, that positive test result verifications may not be completed until part 2 of the Federal Custody and Control Form is received by the MRO from the laboratory.*) Some consortia have reported that MROs never receive their copy from the collection site, Copy 4, of the Federal Custody and Control Form. The FHWA would expect in these circumstances that the MRO would contact the collection site or the employer to obtain a photocopy of their copy of the form, Copies 6 or 7 in order to complete the verification process for both negatives and positives.

To facilitate transmittal of information, § 382.407(a) is being changed to allow MROs to notify employers using a legible photocopy of the fourth copy of part 40's Appendix A subtitled *COPY 4—SEND DIRECTLY TO MEDICAL REVIEW OFFICER—DO NOT SEND TO LABORATORY* of the *Federal Custody and Control Form*. This copy may be used in lieu of producing a new record to make the signed, written notification to the employer, provided that for verified positive test results the controlled substance(s) identified and verified as positive shall be legibly noted in the remarks section for step 8. If a Copy 4 is used, the MRO must sign his or her name on the form.

The MRO shall forward the test results and other information required by § 382.407(a) within three business days after the completion of the MRO's review of the test result and the MRO must sign his or her name on positive notification records. The FHWA does not believe a driver should be subject to the consequences of the rule based on results that are not signed by a MRO. Therefore, the MRO's signature must be handwritten by the MRO. The MRO's staff will not be allowed to sign or rubber stamp verified positive test results for the MRO. The MRO's staff, however, would be allowed to rubber stamp negative test results for the MRO when the MRO delegates such authority to the MRO staff. At this time, the FHWA shall not allow electronic signature technology to be used. If such electronic signature technology is considered in the future, the public will be provided an opportunity to comment on such a proposal at that time.

Inquiring for Alcohol and Controlled Substances Information From Previous Employers

The FHWA has had numerous questions about the new requirement to obtain prior positive testing information from former employers. Many questions have arisen about the good faith effort discussed in the preamble and about other provisions of the section. Also, since publication of the alcohol and drug testing rule, Congress enacted legislation requiring interstate motor carriers subject to § 391.23 to obtain safety information from former employers of drivers similar to that required under § 382.413 (Hazardous Materials Transportation Authorization Act of 1994 (HazMat Act), Pub. L. 103–311, sec. 114). The FHWA will provide notice and an opportunity for comment in a future rulemaking on § 391.23 about possible conforming changes to § 382.413.

Section 382.413 requires the sharing of information on certain violations of part 382—positive drug test results, alcohol results of 0.04 alcohol concentration or greater, and refusals to be tested. It should be noted that the records required to be obtained under § 382.413 are limited to only those records generated under part 382 after January 1, 1995. See paragraph (h). Employers are expected to request the information from former employers as soon as the employer expects to use/hire the driver to drive or perform other safety-sensitive functions.

The rule continues to require that, if feasible, the employer obtain the information prior to the first performance of safety-sensitive functions by a driver. If obtaining the information prior to the driver's first performance of safety-sensitive functions for the employer is not feasible, the information should be obtained as soon as possible, but not more than 14 days later. If a driver leaves a new employer before the new employer obtains the information, the new employer must continue to attempt to obtain the information. In response to inquiry on this point, a clarifying amendment to § 382.413(b) expressly

limits this provision to drivers actually hired and used by the employer to perform safety-sensitive functions. A prospective employer need not obtain the information from an employer which tested but did not hire a driver. This is consistent with § 391.21, which requires drivers to list only previous employers. However, a prospective employer may request the information if it chooses to obtain the information.

In another clarifying change, § 382.413(a)(2) is being added to explain that a new employer may obtain from a former employer information on all records of that employer relevant to § 382.413(a)(1) (i)–(iii). This includes not only that information recorded as the result of the driver's violations of the rules by that former employer, but also any records of violations within the past two years which the former employer obtained from other former employers. For example, Sue Driver is applying for a job with ABC Trucking. Ms. Driver notes on her application that she previously drove CMVs for three employers—DEF City Schools, XYZ Airlines, and the Minnesota DOT (MnDOT). ABC Trucking obtains from Ms. Driver three written authorization requests to obtain information required by § 382.413(a)(1) and transmits them to the three employers. In response to the request, DEF City Schools transmits all the relevant information it has on file, including not only the information resulting from tests it administered, but also all the information it has in its files from XYZ Airlines and the MnDOT, if any, which it had obtained pursuant to § 382.413 and which referred to tests occurring during the past two years. No information beyond the two year period is required to be obtained. ABC Trucking would then have a complete, perhaps overlapping, picture of Ms. Driver's testing and violation history. ABC Trucking may, in turn, pass this information along to the next employer with the information ABC develops from Ms. Driver's ABC Trucking employment, provided it falls within the two year time period.

New and prospective employers should ensure that the driver's written consent authorizes former employers to disclose all prohibitions listed under § 382.413(a)(1), that occurred within the previous two years, of which the former employer has knowledge. Otherwise, a former employer may be prohibited by § 382.405(f) from passing along to the inquiring employer any § 382.413(a)(1) information that was obtained from another previous employer. Section 382.405(f) states that records under part 382 may only be released to a subsequent employer upon receipt of written authorization from a driver. Disclosure of the part 382 records by the subsequent employer is also permitted only as expressly authorized by the terms of the driver's signed authorization. If the driver's authorization had prohibited the subsequent employer from disclosing the information, sharing that information with the inquiring employer would be in violation of § 382.405(f).

In another change, § 382.413(f) is being added to explain that a new employer may obtain directly from the driver the information required to be shared in § 382.413(a)(1) (i)–(iii). The purpose of the provision is to facilitate information exchange where it might not otherwise be possible. Drivers may be the sole source of their testing records when their previous employers have gone out of business or refuse to provide the required information. Given the fluidity of driver-employer relationships in the commercial motor vehicle industry, employers in some situations might find it difficult to obtain the necessary testing information on certain drivers. Allowing drivers to present the information should prevent § 382.413 from being a hindrance to operations while still ensuring that accurate information is exchanged. It should also result in more information being exchanged.

An employer presented with testing information from a driver must assure itself that the copies of former employer's records provided by the driver are true and accurate. The rule does not specify how an employer can assure itself that the copies of former employer's testing records are true and accurate and it may vary on a case-by-case basis. One method might be to transmit a confidential fax to the former employer's (listed on the employment application required by § 383.35) testing program representative, the driver's written authorization for release of specific information and the list provided by the driver. The prospective employer would then telephone the former employer to verify the information on the testing record copies. A former employer who has a driver's written authorization in hand and verifies a prospective employer's inquiry over the telephone is less sensitive to confidentiality than the former employer providing the information without any written authorization. Verification might also have to be made with SAPs directly when the former employer did not provide for a full rehabilitative program. Prospective employer verification of this information should help prevent drivers who have violated the rules by testing positive from continually skipping from one employer to the next without getting needed treatment. These drivers will be subject to this previous employer verification check at every employer where the drivers seek work. Former employers will be able to share information on these drivers with prospective employers about the problems with alcohol and/or drugs these drivers have had in the past.

For example, Sam Trip works as an occasional driver for interstate motor carriers that use his services in accordance with § 391.63. Mr. Trip arranges with PWC Contract Carriers to haul a load from Chicago to Kansas City. PWC Contract Carriers continues to be subject to § 383.35 and must obtain an employment application from Sam Trip. Mr. Trip lists three employers where he worked as a CMV operator since January 1, 1995. Mr. Trip also provides copies of his testing records for the period January 1, 1995, to the present. PWC Contract Carriers transmits by confidential telecommunications the information in Sam Trip's records for the past two years, including testing information from January 1, 1995, with Mr. Trip's written authorization for release of such information, verifies the information to be accurate, and allows Mr. Trip to haul its load to Kansas City.

A subject of many questions since the publication of the February 15, 1994, final rule is the discussion of good faith effort which appeared in the preamble to the final rule. In response, the good faith concept is being incorporated into § 382.413(b) of the rule. It is recognized that, given the high level of fluidity of the motor carrier population, obtaining responses to information requests may not always prove to be easy. Former employers may have gone out of business, changed locations, been less than diligent in reporting, or simply refused to respond. Drivers and new employers should not be punished for this situation when they have been diligent in requesting the information. Therefore, it is provided that an employer may not use a driver for more than 14 days without having made a good faith effort to obtain the information.

Good faith in this context means a request of each former employer listed on the driver's employment application or known to exist. Where information is not forthcoming, a good faith effort consists of something more than the original mailed request for information and will vary depending on the situation. Except where there is a clear refusal by the former employer to transmit the information, rendering

further requests futile, there should also be a follow-up attempt, preferably by telephone, to obtain the information. Refusals to respond should be reported to the FHWA for investigation as a violation of the requirement in § 382.405(f) to release information to a subsequent employer.

In keeping with the intent of this section, there must be a good faith effort in the first instance to obtain the information before permitting the driver to drive. If that is not feasible, then the information should be obtained as soon as possible, but no later than expiration of the 14-day period. An employer is certainly not acting in good faith when only beginning to attempt to obtain the information on the 13th day. Moreover, if, for example, it is possible to obtain the information in 5 days, it is not good faith and is a violation of the rule to wait until the 12th day to obtain it. In most circumstances, good faith dictates that the information should be requested by the new employer immediately after making a conditional offer of employment.

If, after making a good faith effort, the information is not available, § 382.413(c) requires a record to be made of the attempt. The employer may then continue to use the driver. Paragraph (c) also requires all information obtained in response to a request under paragraph (a) to be recorded, including failures to obtain the information. This includes the information in paragraph (a)(1) (i)–(iii) on violations, as well as the information that the former employer has no records of any violations. If the information somehow is made available after the 14-day period, the employer would then be obligated to take appropriate action on it, including not using a driver with a violation who has not been subsequently evaluated by an SAP.

A typical good faith effort would begin with the employer obtaining the driver's written consent on the employer's letterhead stationary. The driver should complete the document at the time the driver prepares other documents in the hiring process (e.g., the document the employer is required to obtain from the driver in compliance with § 383.35 *Notification of Previous Employment* or § 391.21 *Application for Employment*). Immediately after the employer makes a conditional offer of employment, a written consent letter is sent via certified mail to the former employer(s), along with instructions on how the information should be transmitted back to the requesting employer (e.g., by secure and confidential facsimile, by certified mail, or by telephone to a designated person).

After a reasonable period without a response, the employer should contact the driver's former employers' alcohol and drug testing program managers to ask about the status of the request to obtain the driver's testing records. The employer should not wait until a few days before the first time the employer uses the driver to perform safety-sensitive functions to make a follow-up contact with the former employers. Former employers are required to forward, upon receipt of a former driver's specific written consent, their testing information to the driver, the employer or any third party the driver designates. Failure to do so is a violation of § 382.405.

If a driver's former employer has gone out of business or refuses to comply with part 382, subpart D, requirements to forward its testing information about the driver to the new employer, or for some other reason the employer cannot obtain the testing information from a particular former employer, the employer must document the facts and any related information and retain this information in the employer's files.

Finally, the section heading is being changed to clarify the intent of the section and the current § 382.413(a) is being removed. The FHWA explained in the February 15, 1994, final rule preamble that paragraph (a) restated § 382.405(b) in terms of the prospective employer. The FHWA wrote in the preamble ''An employer may obtain any of the information retained by other employers under part 382, pursuant to a driver's consent.'' Because this paragraph merely repeats § 382.405(f) requirements, it is being removed.

Part 391, Subpart H Record Retention

Questions have also been asked about whether interstate motor carriers who prepare and maintain records under part 391 may discard those records when, in accordance with § 391.125, they cease compliance with part 391 and begin complying with part 382. The intent of the FHWA was to terminate compliance with the applicability, consequences, and testing requirements of part 391. It was the FHWA's intent that the records prepared and maintained under part 391 would continue to be kept in accordance with part 382. The FHWA is amending § 391.125 to specify that the recordkeeping requirements of part 391, subpart H, will be transferred to part 382. Also, part 382 is being amended to note that records generated under part 391, subpart H, must be maintained under § 382.401(c)(6)(v).

Possession of Alcohol

The FHWA has had numerous inquiries about the alcohol possession prohibition in parts 382 and 392. The FHWA has reconsidered its position on whether prohibiting unmanifested possession of alcohol on commercial motor vehicles is necessary given the new regulations for alcohol use. The FHWA believes the possession prohibition is not needed in part 382.

Section 392.5 prohibits the possession of alcoholic beverages and is generally enforced as a part of roadside inspections by FHWA and State officials. Formerly, § 392.5 prohibited possession of intoxicating beverages. On February 15, 1994 (59 FR 7484), § 392.5 was amended to prohibit possession of ''alcoholic beverages.'' The intent of § 392.5 is to prohibit the carrying of any substance on a CMV that could be consumed by the driver and result in impairment. However, it does not prohibit the possession of other forms of alcohol that would be used for the safe operation of commercial motor vehicles, such as alcohol formulations to be used in the fuel tank, on the windshield, as cleaning agents, and for other safety uses.

Section 382.204, in contrast, could be construed as prohibiting the possession of substances such as windshield washer fluid, denatured alcohol, fuel line antifreeze, rubbing alcohol, and other products that contain alcohol and have been allowed in the past for the safe operation of CMVs. This section could also be construed to prohibit the possession of shaving lotion, cologne, or room deodorizers. This is the case because a broader definition of alcohol was used in part 382, rather than ''alcoholic beverage.'' The FHWA believes, however, that mere possession of alcohol in forms other than beverage does not render a person unable to safely operate a CMV. Moreover, the new testing regulations for alcohol will provide controls in addition to the amended § 392.5 to ensure that impaired drivers do not operate CMVs. The FHWA does not believe, therefore, that it is necessary to repeat an alcohol possession prohibition in part 382 and is removing it.

The FHWA will continue to prohibit the possession of alcoholic beverages in § 392.5 for interstate motor carriers and drivers. The term ''alcoholic beverage'' is not defined in the general definitions of § 390.5, so the FHWA has decided to amend § 392.5 to add the content of the definition in § 383.5. This definition is consistent with the Commercial Motor Vehicle Safety Act of 1986 (CMVSA) and is restricted to beer, wine, and

distilled spirits as defined under the Internal Revenue Code of 1954.

In addition, consistent with an interpretation published on November 17, 1993 (58 FR 60734), the FHWA is explaining the exception for the possession of alcoholic beverages on buses and motorcoachs in greater detail. The FHWA will not prohibit motor carriers from transporting alcoholic beverages for distribution to passengers, or alcoholic beverages that have been brought on board by passengers for the passengers' personal consumption. However, any driver who is seated in the passenger seating area or who is resting in sleeper berth equipment shall be prohibited from possessing alcoholic beverages. It should be noted, however, that States may have stricter laws regarding whether bus passengers may possess alcoholic beverages. If a State would have a stricter law regarding bus passenger possession of alcoholic beverages, such a law would not be preempted by this rule.

The FHWA has had, and will continue to have, a strong policy of zero tolerance of consumption and use of alcohol by commercial motor vehicle drivers. The consumption or presence in the body of any form of alcohol, including any alcoholic mixture, preparation, or beverage, is strictly prohibited while driving. This includes any substance containing alcohol, including, but not limited to, windshield washer fluid, liquid fuels, fuel line antifreeze, denatured alcohol, shaving lotion, cologne, beer, wine, and distilled spirits. In terms of possession, the form of prohibited alcohol is narrower. Drivers subject to § 392.5 may not possess beer, wine, or distilled spirits. Many States have laws that are similar to § 392.5 regarding the possession of alcoholic beverages for commercial motor vehicle drivers operating in intrastate commerce and the FHWA does not believe that it must supersede those State laws. The FHWA will allow those States to use and enforce those laws without expressly preempting them.

Metric System

The Omnibus Trade and Competitiveness Act of 1988 (Pub. L. 100–418, sec. 5164) amended the Metric Conversion Act of 1975 to require, among other things, that each Federal agency, by the end of the fiscal year 1992, use the metric system of measurement in its procurements, grants, and other business-related activities, except to the extent that such use is impractical or is likely to cause significant inefficiencies or loss of markets to United States firms, such as when foreign competitors are producing competing products in non-metric units.

The term ''metric system'' means the International System of Units (SI) established by the General Conference of Weights and Measures in 1960, as interpreted or modified from time to time for the United States by the Secretary of Commerce under the authority of the Metric Conversion Act of 1975 and the Metric Education Act of 1978. The Commerce Department requires Federal agencies to coordinate and plan for the use of the metric system in their procurements, grants and other business-related activities consistent with the requirements of the Metric Conversion Act, as amended. The FHWA has begun the transition process to convert to the metric system. In so doing, the FHWA believes it must convert to metric equivalents those parts of the definition of the term, ''commercial motor vehicle,'' which use gross vehicle weight ratings in the U.S. Customary System of measurement. The FHWA is therefore taking this opportunity to change the definition to the SI system in line with 15 CFR part 19. The customary equivalent is provided parenthetically for convenience.

Locations of Regional Offices of Motor Carriers

The FHWA regional Offices of Motor Carriers for regions four and nine have recently moved. The FHWA, therefore, is updating the title of the section and the addresses in the table found in § 390.27.

Rulemaking Analyses and Notices

Because this final rule simply makes minor edits to the FHWA's alcohol and drug testing rules to clarify these regulations, the FHWA believes that prior notice and opportunity for comment are unnecessary under 5 U.S.C. 553(b)(3)(B). In addition, due to the technical nature of this final rule, the FHWA has determined that prior notice and opportunity for comment are not required under the Department of Transportation's regulatory policies and procedures, as it is not anticipated that such action would result in the receipt of useful information. In this final rule, the FHWA is not exercising discretion in a way that could be meaningfully affected by public comment.

This action also effectively grants an exemption from an alcohol and drug testing regulation to employers and MROs. The amendments to § 382.407 relieve MROs from the requirement to prepare, in writing, a document if they wish to legibly photocopy Copy 4 of the Federal Chain of Custody form, fill in verified positive or negative test information, add a statement about compliance with 49 CFR parts 40 and 382, and sign the photocopy.

Because this final rule relieves employers and MROs from certain regulations cited above, the FHWA also believes that good cause exists to publish this rule less than 30 days before it is effective, as is ordinarily required under 5 U.S.C. 553(d). Accordingly, the FHWA is proceeding directly to a final rule which is effective on its date of publication.

Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

The FHWA has determined that this action is neither a significant regulatory action under Executive Order 12866 or significant under the Department of Transportation's regulatory policies and procedures. It is anticipated that the economic impact of this action will not be substantial because this rule simply makes minor, technical changes to the Federal Motor Carrier Safety Regulations to clarify the FHWA's alcohol and drug testing rules. Therefore, a full regulatory evaluation is not warranted.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (5 U.S.C. 601–612), the FHWA has evaluated the effects of this rule on small entities. This final rule will technically amend and clarify the requirements for employers to test drivers for the use of alcohol and controlled substances. Accordingly, 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)

The amendments made by this rule do not have a substantial direct effect on the States or on the relationship or distribution of power between the national government and the States because they do little to limit the policymaking discretion of the States. To the extent that these amendments do require States to make minor modifications to their laws or regulations, the authority to preempt inconsistent State and local laws, regulations, rules and orders was expressly provided under 49 U.S.C. 31306(g). Therefore, the FHWA is not required to prepare a separate Federalism Assessment for 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 Office of Management and Budget (OMB) has approved 2,900,717 hours for the information collection requirements in the existing drug and alcohol testing regulations at 49 CFR part 382, under OMB control no. 2125–0543. One of the changes contained in this rule will decrease the burden hours required to comply with these regulations by a significant amount. Other changes are due to technical modifications, clarification of language, and closing loopholes for drivers with numerous previous employers. Also, a rule amendment published on March 13, 1995, contains a significant decrease in burden hours. Accordingly, the overall effect of these amendments is to decrease the burden of complying with the recordkeeping and reporting requirements of the drug and alcohol testing regulations.

In addition, the FHWA is clarifying the record retention provisions in § 382.401 to require that records documenting supervisors' reasonable suspicion training be retained for two years after the supervisor ceases to perform the tasks requiring this training, replacing the current requirement to retain such records for two years after the training is completed.

Finally, the total number of burden hours will be decreased by this final rule as a result of the FHWA allowing MROs to send Copy 4 of the Federal Custody and Control form rather than complete a new written document that is signed as a notification of test results to the employer of each driver tested. The net effect of these changes will be a decrease in burden hours. The FHWA will be sending a revised burden estimate for this information collection request to the Office of Management and Budget.

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 will 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 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 Parts 382, 383, 390, 391, and 392

Alcohol testing, Controlled substances testing, Drivers, Highways and roads, Highway safety, Motor carriers, Motor vehicle safety, Reporting and recordkeeping requirements, Safety, Transportation.

Issued on: February 29, 1996.

Rodney E. Slater,

Federal Highway Administrator.

In consideration of the foregoing, the FHWA is amending title 49, CFR, subtitle B, chapter III, parts 382, 383, 390, 391, and 392 as set forth below:

1. Part 382 is revised to read as follows:

PART 382—CONTROLLED SUBSTANCES AND ALCOHOL USE AND TESTING

Subpart A—General

Sec.

Subpart B—Prohibitions

Subpart C—Tests Required

Subpart D—Handling of Test Results, Record Retention, and Confidentiality

Subpart E—Consequences for Drivers Engaging in Substance Use-Related Conduct

Subpart F—Alcohol Misuse and Controlled Substances Use Information, Training, and Referral

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

Subpart A—General

§ 382.101 Purpose.

The purpose of this part is to establish programs designed to help prevent accidents and injuries resulting from the misuse of alcohol or use of controlled substances by drivers of commercial motor vehicles.

§ 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 commercial driver's license requirements of the Canadian National Safety Code.

(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 a random alcohol and controlled substances testing program of two or more covered employees in the random testing selection pool.

(c) The exceptions contained in § 390.3(g) of this subchapter do not apply to this part. The employers and drivers identified in § 390.3(g) must comply with the requirements of this part, unless otherwise specifically provided in paragraph (d) of this section.

(d) *Exceptions.* 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 (Federal Transit Administration alcohol and controlled substances testing regulations); or

(2) Who a State must waive from the requirements of part 383 of this subchapter. These individuals include active duty military personnel; members of the reserves; and members of the national guard on active duty, including personnel on full-time national guard duty, personnel on part-time national guard training and national guard military technicians (civilians who are required to wear military uniforms), and active duty U.S. Coast Guard personnel;

(3) Who a State has, at its discretion, exempted from the requirements of part 383 of this subchapter. These individuals may be:

(i) Operators of a farm vehicle which is:

(A) Controlled and operated by a farmer;

(B) Used to transport either agricultural products, farm machinery, farm supplies, or both to or from a farm;

(C) Not used in the operations of a common or contract motor carrier; and

(D) Used within 241 kilometers (150 miles) of the farmer's farm.

(ii) Firefighters or other persons who operate commercial motor vehicles which are necessary for the preservation of life or property or the execution of emergency governmental functions, are equipped with audible and visual signals, and are not subject to normal traffic regulation.

§ 382.105 Testing procedures.

Each employer shall ensure that all alcohol or controlled substances testing conducted under this part complies with the procedures set forth in part 40 of this title. The provisions of part 40 of this title that address alcohol or controlled substances testing are made applicable to employers by this part.

§ 382.107 Definitions.

Words or phrases used in this part are defined in §§ 386.2 and 390.5 of this subchapter, and § 40.3 of this title, except as provided herein—

Alcohol means the intoxicating agent in beverage alcohol, ethyl alcohol, or other low molecular weight alcohols including methyl and isopropyl alcohol.

Alcohol concentration (or content) means the alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath as indicated by an evidential breath test under this part.

Alcohol use means the consumption of any beverage, mixture, or preparation, including any medication, containing alcohol.

Commerce means:

(1) Any trade, traffic or transportation within the jurisdiction of the United States between a place in a State and a place outside of such State, including a place outside of the United States and

(2) Trade, traffic, and transportation in the United States which affects any trade, traffic, and transportation described in paragraph (1) of this definition.

Commercial motor vehicle means a motor vehicle or combination of motor vehicles used in commerce to transport passengers or property if the motor vehicle—

(1) Has a gross combination weight rating of 11,794 or more kilograms (26,001 or more pounds) inclusive of a towed unit with a gross vehicle weight rating of more than 4,536 kilograms (10,000 pounds); or

(2) Has a gross vehicle weight rating of 11,794 or more kilograms (26,001 or more pounds); or

(3) Is designed to transport 16 or more passengers, including the driver; or

(4) Is of any size and is used in the transportation of materials found to be hazardous for the purposes of the Hazardous Materials Transportation Act and which require the motor vehicle to be placarded under the Hazardous Materials Regulations (49 CFR part 172, subpart F).

Confirmation test for alcohol testing means a second test, following a screening test with a result of 0.02 or greater, that provides quantitative data of alcohol concentration. For controlled substances testing means a second analytical procedure to identify the presence of a specific drug or metabolite which is independent of the screen test and which uses a different technique and chemical principle from that of the screen test in order to ensure reliability and accuracy. (Gas chromatography/mass spectrometry (GC/MS) is the only authorized confirmation method for cocaine, marijuana, opiates, amphetamines, and phencyclidine.)

Consortium means an entity, including a group or association of employers or contractors, that provides alcohol or controlled substances testing as required by this part, or other DOT alcohol or controlled substances testing rules, and that acts on behalf of the employers.

Controlled substances mean those substances identified in § 40.21(a) of this title.

Disabling damage means damage which precludes departure of a motor vehicle from the scene of the accident in its usual manner in daylight after simple repairs.

(1) *Inclusions.* Damage to motor vehicles that could have been driven, but would have been further damaged if so driven.

(2) *Exclusions.*

(i) Damage which can be remedied temporarily at the scene of the accident without special tools or parts.

(ii) Tire disablement without other damage even if no spare tire is available.

(iii) Headlight or taillight damage.

(iv) Damage to turn signals, horn, or windshield wipers which make them inoperative.

DOT Agency means an agency (or ''operating administration'') of the United States Department of Transportation administering regulations requiring alcohol and/or drug testing (14 CFR parts 61, 63, 65, 121, and 135; 49 CFR parts 199, 219, 382, 653 and 654), in accordance with part 40 of this title.

Driver means any person who operates a commercial motor vehicle. This includes, but is not limited to: Full time, regularly employed drivers; casual, intermittent or occasional drivers; leased drivers and independent, owner-operator contractors who are either directly employed by or under lease to an employer or who operate a commercial motor vehicle at the direction of or with the consent of an employer.

Employer means any person (including the United States, a State, District of Columbia, tribal government, or a political subdivision of a State) who owns or leases a commercial motor vehicle or assigns persons to operate such a vehicle. The term *employer* includes an employer's agents, officers and representatives.

Licensed medical practitioner means a person who is licensed, certified, and/or registered, in accordance with applicable Federal, State, local, or foreign laws and regulations, to prescribe controlled substances and other drugs.

Performing (a safety-sensitive function) means a driver is considered to be performing a safety-sensitive function during any period in which he or she is actually performing, ready to perform, or immediately available to perform any safety-sensitive functions.

Positive rate means the number of positive results for random controlled substances tests conducted under this part plus the number of refusals of random controlled substances tests required by this part, divided by the total of random controlled substances tests conducted under this part plus the number of refusals of random tests required by this part.

Refuse to submit (to an alcohol or controlled substances test) means that a driver:

(1) Fails to provide adequate breath for alcohol testing as required by part 40

of this title, without a valid medical explanation, after he or she has received notice of the requirement for breath testing in accordance with the provisions of this part,

(2) Fails to provide an adequate urine sample for controlled substances testing as required by part 40 of this title, without a genuine inability to provide a specimen (as determined by a medical evaluation), after he or she has received notice of the requirement for urine testing in accordance with the provisions of this part, or

(3) Engages in conduct that clearly obstructs the testing process.

Safety-sensitive function means all time from the time a driver begins to work or is required to be in readiness to work until the time he/she is relieved from work and all responsibility for performing work. Safety-sensitive functions shall include:

(1) All time at an employer or shipper plant, terminal, facility, or other property, or on any public property, waiting to be dispatched, unless the driver has been relieved from duty by the employer;

(2) All time inspecting equipment as required by §§ 392.7 and 392.8 of this subchapter or otherwise inspecting, servicing, or conditioning any commercial motor vehicle at any time;

(3) All time spent at the driving controls of a commercial motor vehicle in operation;

(4) All time, other than driving time, in or upon any commercial motor vehicle except time spent resting in a sleeper berth (a berth conforming to the requirements of § 393.76 of this subchapter);

(5) All time loading or unloading a vehicle, supervising, or assisting in the loading or unloading, attending a vehicle being loaded or unloaded, remaining in readiness to operate the vehicle, or in giving or receiving receipts for shipments loaded or unloaded; and

(6) All time repairing, obtaining assistance, or remaining in attendance upon a disabled vehicle.

Screening test (also known as initial test) In alcohol testing, it means an analytical procedure to determine whether a driver may have a prohibited concentration of alcohol in his or her system. In controlled substance testing, it means an immunoassay screen to eliminate ''negative'' urine specimens from further consideration.

Substance abuse professional means a licensed physician (Medical Doctor or Doctor of Osteopathy), or a licensed or certified psychologist, social worker, employee assistance professional, or addiction counselor (certified by the National Association of Alcoholism and Drug Abuse Counselors Certification Commission) with knowledge of and clinical experience in the diagnosis and treatment of alcohol and controlled substances-related disorders.

Violation rate means the number of drivers (as reported under § 382.305 of this part) found during random tests given under this part to have an alcohol concentration of 0.04 or greater, plus the number of drivers who refuse a random test required by this part, divided by the total reported number of drivers in the industry given random alcohol tests under this part plus the total reported number of drivers in the industry who refuse a random test required by this part.

§ 382.109 Preemption of State and local laws.

(a) Except as provided in paragraph (b) of this section, this part preempts any State or local law, rule, regulation, or order to the extent that:

(1) Compliance with both the State or local requirement and this part is not possible; or

(2) Compliance with the State or local requirement is an obstacle to the accomplishment and execution of any requirement in this part.

(b) This part shall not be construed to preempt provisions of State criminal law that impose sanctions for reckless conduct leading to actual loss of life, injury, or damage to property, whether the provisions apply specifically to transportation employees, employers, or the general public.

§ 382.111 Other requirements imposed by employers.

Except as expressly provided in this part, nothing in this part shall be construed to affect the authority of employers, or the rights of drivers, with respect to the use of alcohol, or the use of controlled substances, including authority and rights with respect to testing and rehabilitation.

§ 382.113 Requirement for notice.

Before performing an alcohol or controlled substances test under this part, each employer shall notify a driver that the alcohol or controlled substances test is required by this part. No employer shall falsely represent that a test is administered under this part.

§ 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 less 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.

Subpart B—Prohibitions

§ 382.201 Alcohol concentration.

No driver shall report for duty or remain on duty requiring the performance of safety-sensitive functions while having an alcohol concentration of 0.04 or greater. No employer having actual knowledge that a driver has an alcohol concentration of 0.04 or greater shall permit the driver to perform or continue to perform safety-sensitive functions.

§ 382.205 On-duty use.

No driver shall use alcohol while performing safety-sensitive functions. No employer having actual knowledge that a driver is using alcohol while

performing safety-sensitive functions shall permit the driver to perform or continue to perform safety- sensitive functions.

§ 382.207 Pre-duty use.

No driver shall perform safety-sensitive functions within four hours after using alcohol. No employer having actual knowledge that a driver has used alcohol within four hours shall permit a driver to perform or continue to perform safety-sensitive functions.

§ 382.209 Use following an accident.

No driver required to take a post-accident alcohol test under § 382.303 of this part shall use alcohol for eight hours following the accident, or until he/she undergoes a post- accident alcohol test, whichever occurs first.

§ 382.211 Refusal to submit to a required alcohol or controlled substances test.

No driver shall refuse to submit to a post-accident alcohol or controlled substances test required under § 382.303, a random alcohol or controlled substances test required under § 382.305, a reasonable suspicion alcohol or controlled substances test required under § 382.307, or a follow-up alcohol or controlled substances test required under § 382.311. No employer shall permit a driver who refuses to submit to such tests to perform or continue to perform safety-sensitive functions.

§ 382.213 Controlled substances use.

(a) No driver shall report for duty or remain on duty requiring the performance of safety-sensitive functions when the driver uses any controlled substance, except when the use is pursuant to the instructions of a licensed medical practitioner, as defined in § 382.107 of this part, who has advised the driver that the substance will not adversely affect the driver's ability to safely operate a commercial motor vehicle.

(b) No employer having actual knowledge that a driver has used a controlled substance shall permit the driver to perform or continue to perform a safety-sensitive function.

(c) An employer may require a driver to inform the employer of any therapeutic drug use.

§ 382.215 Controlled substances testing.

No driver shall report for duty, remain on duty or perform a safety-sensitive function, if the driver tests positive for controlled substances. No employer having actual knowledge that a driver has tested positive for controlled substances shall permit the driver to perform or continue to perform safety-sensitive functions.

Subpart C—Tests Required

§ 382.301 Pre-employment testing.

(a) Prior to the first time a driver performs safety-sensitive functions for an employer, the driver shall undergo testing for alcohol and controlled substances as a condition prior to being used, unless the employer uses the exception in paragraphs (c) and (d) of this section. No employer shall allow a driver, who the employer intends to hire or use, to perform safety-sensitive functions unless the driver has been administered an alcohol test with a result indicating an alcohol concentration less than 0.04, and has received a controlled substances test result from the MRO indicating a verified negative test result. If a pre-employment alcohol test result under this section indicates an alcohol content of 0.02 or greater but less than 0.04, the provision of § 382.505 shall apply.

(b) *Exception for pre-employment alcohol testing.* An employer is not required to administer an alcohol test required by paragraph (a) of this section if:

(1) The driver has undergone an alcohol test required by this section or the alcohol misuse rule of another DOT agency under part 40 of this title within the previous six months, with a result indicating an alcohol concentration less than 0.04; and

(2) The employer ensures that no prior employer of the driver of whom the employer has knowledge has records of a violation of this part or the alcohol misuse rule of another DOT agency within the previous six months.

(c) *Exception for pre-employment controlled substances testing.* An employer is not required to administer a controlled substances test required by paragraph (a) of this section if:

(1) The driver has participated in a controlled substances testing program that meets the requirements of this part within the previous 30 days; and

(2) While participating in that program, either

(i) Was tested for controlled substances within the past 6 months (from the date of application with the employer) or

(ii) Participated in the random controlled substances testing program for the previous 12 months (from the date of application with the employer); and

(3) The employer ensures that no prior employer of the driver of whom the employer has knowledge has records of a violation of this part or the controlled substances use rule of another DOT agency within the previous six months.

(d)(1) An employer who exercises the exception in either paragraph (b) or (c) of this section shall contact the alcohol and/or controlled substances testing program(s) in which the driver participates or participated and shall obtain and retain from the testing program(s) the following information:

(i) Name(s) and address(es) of the program(s).

(ii) Verification that the driver participates or participated in the program(s).

(iii) Verification that the program(s) conforms to part 40 of this title.

(iv) Verification that the driver is qualified under the rules of this part, including that the driver has not refused to be tested for controlled substances.

(v) The date the driver was last tested for alcohol or controlled substances.

(vi) The results of any tests taken within the previous six months and any other violations of subpart B of this part.

(2) An employer who uses, but does not employ, a driver more than once a year to operate commercial motor vehicles must obtain the information in paragraph (d)(1) of this section at least once every six months. The records prepared under this paragraph shall be maintained in accordance with § 382.401. If the employer cannot verify that the driver is participating in a controlled substances testing program in accordance with this part and part 40, the employer shall conduct a pre-employment alcohol and/or controlled substances test.

(e) Nothwithstanding any other provisions of this subpart, all provisions and requirements in this section pertaining to pre-employment testing for alcohol are vacated as of May 1, 1995.

§ 382.303 Post-accident testing.

(a) As soon as practicable following an occurrence involving a commercial motor vehicle operating on a public road in commerce, each employer shall test for alcohol and controlled substances each surviving driver:

(1) Who was performing safety-sensitive functions with respect to the vehicle, if the accident involved the loss of human life; or

(2) Who receives a citation under State or local law for a moving traffic violation arising from the accident, if the accident involved:

(i) Bodily injury to any person who, as a result of the injury, immediately receives medical treatment away from the scene of the accident; or

(ii) One or more motor vehicles incurring disabling damage as a result of

the accident, requiring the motor vehicle to be transported away from the scene by a tow truck or other motor vehicle.

(3) This table notes when a post-accident test is required to be conducted by paragraphs (a)(1) and (a)(2) of this section.

TABLE FOR § 382.303(a)(3)

Type of accident involved	Citation issued to the CMV driver	Test must be performed by employer
Human fatality	YES	YES.
	NO	YES.
Bodily injury with immediate medical treatment away from the scene.	YES	YES.
	NO	NO.
Disabling damage to any motor vehicle requiring tow away.	YES	YES.
	NO	NO.

(b)(1) *Alcohol tests.* If a test required by this section is not administered within two hours following the accident, the employer shall prepare and maintain on file a record stating the reasons the test was not promptly administered. If a test required by this section is not administered within eight hours following the accident, the employer shall cease attempts to administer an alcohol test and shall prepare and maintain the same record. Records shall be submitted to the FHWA upon request of the Associate Administrator.

(2) For the years stated in this paragraph, employers who submit MIS reports shall submit to the FHWA each record of a test required by this section that is not completed within eight hours. The employer's records of tests that are not completed within eight hours shall be submitted to the FHWA by March 15, 1996; March 15, 1997, and March 15, 1998, for calendar years 1995, 1996, and 1997, respectively. Employers shall append these records to their MIS submissions. Each record shall include the following information:

(i) Type of test (reasonable suspicion/post-accident);

(ii) Triggering event (including date, time, and location);

(iii) Reason(s) test could not be completed within eight hours;

(iv) If blood alcohol testing could have been completed within eight hours, the name, address, and telephone number of the testing site where blood testing could have occurred; and

(3) Records of alcohol tests that could not be completed in eight hours shall be submitted to the FHWA at the following address: Attn: Alcohol Testing Program, Office of Motor Carrier Research and Standards (HCS–1), Federal Highway Administration, 400 Seventh Street, SW., Washington, DC 20590.

(4) Controlled substance tests. If a test required by this section is not administered within 32 hours following the accident, the employer shall cease attempts to administer a controlled substances test, and prepare and maintain on file a record stating the reasons the test was not promptly administered. Records shall be submitted to the FHWA upon request of the Associate Administrator.

(c) A driver who is subject to post-accident testing shall remain readily available for such testing or may be deemed by the employer to have refused to submit to testing. Nothing in this section shall be construed to require the delay of necessary medical attention for injured people following an accident or to prohibit a driver from leaving the scene of an accident for the period necessary to obtain assistance in responding to the accident, or to obtain necessary emergency medical care.

(d) An employer shall provide drivers with necessary post-accident information, procedures and instructions, prior to the driver operating a commercial motor vehicle, so that drivers will be able to comply with the requirements of this section.

(e)(1) The results of a breath or blood test for the use of alcohol, conducted by Federal, State, or local officials having independent authority for the test, shall be considered to meet the requirements of this section, provided such tests conform to the applicable Federal, State or local alcohol testing requirements, and that the results of the tests are obtained by the employer.

(2) The results of a urine test for the use of controlled substances, conducted by Federal, State, or local officials having independent authority for the test, shall be considered to meet the requirements of this section, provided such tests conform to the applicable Federal, State or local controlled substances testing requirements, and that the results of the tests are obtained by the employer.

(f) *Exception.* This section does not apply to:

(1) An occurrence involving only boarding or alighting from a stationary motor vehicle; or

(2) An occurrence involving only the loading or unloading of cargo; or

(3) An occurrence in the course of the operation of a passenger car or a multipurpose passenger vehicle (as defined in § 571.3 of this title) by an employer unless the motor vehicle is transporting passengers for hire or hazardous materials of a type and quantity that require the motor vehicle to be marked or placarded in accordance with § 177.823 of this title.

§ 382.305 Random testing.

(a) Every employer shall comply with the requirements of this section. Every driver shall submit to random alcohol and controlled substance testing as required in this section.

(b)(1) Except as provided in paragraphs (c) through (e) of this section, the minimum annual percentage rate for random alcohol testing shall be 25 percent of the average number of driver positions.

(2) Except as provided in paragraphs (f) through (h) of this section, the minimum annual percentage rate for random controlled substances testing shall be 50 percent of the average number of driver positions.

(c) The FHWA Administrator's decision to increase or decrease the minimum annual percentage rate for alcohol testing is based on the reported violation rate for the entire industry. All information used for this determination is drawn from the alcohol management information system reports required by § 382.403 of this part. In order to ensure reliability of the data, the FHWA Administrator considers the quality and completeness of the reported data, may obtain additional information or reports from employers, and may make appropriate modifications in calculating the industry violation rate. Each year, the FHWA Administrator will publish in the Federal Register the minimum annual percentage rate for random alcohol testing of drivers. The new minimum annual percentage rate for random alcohol testing will be applicable starting January 1 of the calendar year following publication.

(d)(1) When the minimum annual percentage rate for random alcohol testing is 25 percent or more, the FHWA Administrator may lower this rate to 10 percent of all driver positions if the FHWA Administrator determines that the data received under the reporting requirements of § 382.403 for two consecutive calendar years indicate that the violation rate is less than 0.5 percent.

(2) When the minimum annual percentage rate for random alcohol testing is 50 percent, the FHWA Administrator may lower this rate to 25 percent of all driver positions if the FHWA Administrator determines that the data received under the reporting

requirements of § 382.403 for two consecutive calendar years indicate that the violation rate is less than 1.0 percent but equal to or greater than 0.5 percent.

(e)(1) When the minimum annual percentage rate for random alcohol testing is 10 percent, and the data received under the reporting requirements of § 382.403 for that calendar year indicate that the violation rate is equal to or greater than 0.5 percent, but less than 1.0 percent, the FHWA Administrator will increase the minimum annual percentage rate for random alcohol testing to 25 percent for all driver positions.

(2) When the minimum annual percentage rate for random alcohol testing is 25 percent or less, and the data received under the reporting requirements of § 382.403 for that calendar year indicate that the violation rate is equal to or greater than 1.0 percent, the FHWA Administrator will increase the minimum annual percentage rate for random alcohol testing to 50 percent for all driver positions.

(f) The FHWA Administrator's decision to increase or decrease the minimum annual percentage rate for controlled substances testing is based on the reported positive rate for the entire industry. All information used for this determination is drawn from the controlled substances management information system reports required by § 382.403 of this part. In order to ensure reliability of the data, the FHWA Administrator considers the quality and completeness of the reported data, may obtain additional information or reports from employers, and may make appropriate modifications in calculating the industry positive rate. Each year, the FHWA Administrator will publish in the Federal Register the minimum annual percentage rate for random controlled substances testing of drivers. The new minimum annual percentage rate for random controlled substances testing will be applicable starting January 1 of the calendar year following publication.

(g) When the minimum annual percentage rate for random controlled substances testing is 50 percent, the FHWA Administrator may lower this rate to 25 percent of all driver positions if the FHWA Administrator determines that the data received under the reporting requirements of § 382.403 for two consecutive calendar years indicate that the positive rate is less than 1.0 percent. However, after the initial two years of random testing by large employers and the initial first year of testing by small employers under this section, the FHWA Administrator may lower the rate the following calendar year, if the combined positive testing rate is less than 1.0 percent, and if it would be in the interest of safety.

(h) When the minimum annual percentage rate for random controlled substances testing is 25 percent, and the data received under the reporting requirements of § 382.403 for any calendar year indicate that the reported positive rate is equal to or greater than 1.0 percent, the FHWA Administrator will increase the minimum annual percentage rate for random controlled substances testing to 50 percent of all driver positions.

(i) The selection of drivers for random alcohol and controlled substances testing shall be made by a scientifically valid method, such as a random number table or a computer-based random number generator that is matched with drivers' Social Security numbers, payroll identification numbers, or other comparable identifying numbers. Under the selection process used, each driver shall have an equal chance of being tested each time selections are made.

(j) The employer shall randomly select a sufficient number of drivers for testing during each calendar year to equal an annual rate not less than the minimum annual percentage rate for random alcohol and controlled substances testing determined by the FHWA Administrator. If the employer conducts random testing for alcohol and/or controlled substances through a consortium, the number of drivers to be tested may be calculated for each individual employer or may be based on the total number of drivers covered by the consortium who are subject to random alcohol and/or controlled substances testing at the same minimum annual percentage rate under this part or any DOT alcohol or controlled substances random testing rule.

(k) Each employer shall ensure that random alcohol and controlled substances tests conducted under this part are unannounced and that the dates for administering random alcohol and controlled substances tests are spread reasonably throughout the calendar year.

(l) Each employer shall require that each driver who is notified of selection for random alcohol and/or controlled substances testing proceeds to the test site immediately; provided, however, that if the driver is performing a safety-sensitive function, other than driving a commercial motor vehicle, at the time of notification, the employer shall instead ensure that the driver ceases to perform the safety-sensitive function and proceeds to the testing site as soon as possible.

(m) A driver shall only be tested for alcohol while the driver is performing safety-sensitive functions, just before the driver is to perform safety-sensitive functions, or just after the driver has ceased performing such functions.

(n) If a given driver is subject to random alcohol or controlled substances testing under the random alcohol or controlled substances testing rules of more than one DOT agency for the same employer, the driver shall be subject to random alcohol and/or controlled substances testing at the annual percentage rate established for the calendar year by the DOT agency regulating more than 50 percent of the driver's function.

(o) If an employer is required to conduct random alcohol or controlled substances testing under the alcohol or controlled substances testing rules of more than one DOT agency, the employer may—

(1) Establish separate pools for random selection, with each pool containing the DOT-covered employees who are subject to testing at the same required minimum annual percentage rate; or

(2) Randomly select such employees for testing at the highest minimum annual percentage rate established for the calendar year by any DOT agency to which the employer is subject.

§ 382.307 Reasonable suspicion testing.

(a) An employer shall require a driver to submit to an alcohol test when the employer has reasonable suspicion to believe that the driver has violated the prohibitions of subpart B of this part concerning alcohol. The employer's determination that reasonable suspicion exists to require the driver to undergo an alcohol test must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the driver.

(b) An employer shall require a driver to submit to a controlled substances test when the employer has reasonable suspicion to believe that the driver has violated the prohibitions of subpart B of this part concerning controlled substances. The employer's determination that reasonable suspicion exists to require the driver to undergo a controlled substances test must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the driver. The observations may include indications of the chronic and withdrawal effects of controlled substances.

(c) The required observations for alcohol and/or controlled substances

reasonable suspicion testing shall be made by a supervisor or company official who is trained in accordance with § 382.603 of this part. The person who makes the determination that reasonable suspicion exists to conduct an alcohol test shall not conduct the alcohol test of the driver.

(d) Alcohol testing is authorized by this section only if the observations required by paragraph (a) of this section are made during, just preceding, or just after the period of the work day that the driver is required to be in compliance with this part. A driver may be directed by the employer to only undergo reasonable suspicion testing while the driver is performing safety-sensitive functions, just before the driver is to perform safety-sensitive functions, or just after the driver has ceased performing such functions.

(e)(1) If an alcohol test required by this section is not administered within two hours following the determination under paragraph (a) of this section, the employer shall prepare and maintain on file a record stating the reasons the alcohol test was not promptly administered. If an alcohol test required by this section is not administered within eight hours following the determination under paragraph (a) of this section, the employer shall cease attempts to administer an alcohol test and shall state in the record the reasons for not administering the test.

(2) For the years stated in this paragraph, employers who submit MIS reports shall submit to the FHWA each record of a test required by this section that is not completed within 8 hours. The employer's records of tests that could not be completed within 8 hours shall be submitted to the FHWA by March 15, 1996; March 15, 1997; and March 15, 1998; for calendar years 1995, 1996, and 1997, respectively. Employers shall append these records to their MIS submissions. Each record shall include the following information:

(i) Type of test (reasonable suspicion/post-accident);

(ii) Triggering event (including date, time, and location);

(iii) Reason(s) test could not be completed within 8 hours; and

(iv) If blood alcohol testing could have been completed within eight hours, the name, address, and telephone number of the testing site where blood testing could have occurred.

(3) Records of tests that could not be completed in eight hours shall be submitted to the FHWA at the following address: Attn.: Alcohol Testing program, Office of Motor Carrier Research and Standards (HCS–1), Federal Highway Administration, 400 Seventh Street, SW., Washington, DC 20590.

(4) Notwithstanding the absence of a reasonable suspicion alcohol test under this section, no driver shall report for duty or remain on duty requiring the performance of safety-sensitive functions while the driver is under the influence of or impaired by alcohol, as shown by the behavioral, speech, and performance indicators of alcohol misuse, nor shall an employer permit the driver to perform or continue to perform safety-sensitive functions, until:

(i) An alcohol test is administered and the driver's alcohol concentration measures less than 0.02; or

(ii) Twenty four hours have elapsed following the determination under paragraph (a) of this section that there is reasonable suspicion to believe that the driver has violated the prohibitions in this part concerning the use of alcohol.

(5) Except as provided in paragraph (e)(2) of this section, no employer shall take any action under this part against a driver based solely on the driver's behavior and appearance, with respect to alcohol use, in the absence of an alcohol test. This does not prohibit an employer with independent authority of this part from taking any action otherwise consistent with law.

(f) A written record shall be made of the observations leading to a controlled substance reasonable suspicion test, and signed by the supervisor or company official who made the observations, within 24 hours of the observed behavior or before the results of the controlled substances test are released, whichever is earlier.

§ 382.309 Return-to-duty testing.

(a) Each employer shall ensure that before a driver returns to duty requiring the performance of a safety-sensitive function after engaging in conduct prohibited by subpart B of this part concerning alcohol, the driver shall undergo a return-to-duty alcohol test with a result indicating an alcohol concentration of less than 0.02.

(b) Each employer shall ensure that before a driver returns to duty requiring the performance of a safety-sensitive function after engaging in conduct prohibited by subpart B of this part concerning controlled substances, the driver shall undergo a return-to-duty controlled substances test with a result indicating a verified negative result for controlled substances use.

§ 382.311 Follow-up testing.

(a) Following a determination under § 382.605(b) that a driver is in need of assistance in resolving problems associated with alcohol misuse and/or use of controlled substances, each employer shall ensure that the driver is subject to unannounced follow-up alcohol and/or controlled substances testing as directed by a substance abuse professional in accordance with the provisions of § 382.605(c)(2)(ii).

(b) Follow-up alcohol testing shall be conducted only when the driver is performing safety-sensitive functions, just before the driver is to perform safety-sensitive functions, or just after the driver has ceased performing safety-sensitive functions.

Subpart D—Handling Of Test Results, Record Retention and Confidentiality

§ 382.401 Retention of records.

(a) *General requirement.* Each employer shall maintain records of its alcohol misuse and controlled substances use prevention programs as provided in this section. The records shall be maintained in a secure location with controlled access.

(b) *Period of retention.* Each employer shall maintain the records in accordance with the following schedule:

(1) *Five years.* The following records shall be maintained for a minimum of five years:

(i) Records of driver alcohol test results indicating an alcohol concentration of 0.02 or greater,

(ii) Records of driver verified positive controlled substances test results,

(iii) Documentation of refusals to take required alcohol and/or controlled substances tests,

(iv) Driver evaluation and referrals,

(v) Calibration documentation,

(vi) Records related to the administration of the alcohol and controlled substances testing programs, and

(vii) A copy of each annual calendar year summary required by § 382.403.

(2) *Two years.* Records related to the alcohol and controlled substances collection process (except calibration of evidential breath testing devices).

(3) *One year.* Records of negative and canceled controlled substances test results (as defined in part 40 of this title) and alcohol test results with a concentration of less than 0.02 shall be maintained for a minimum of one year.

(4) *Indefinite period.* Records related to the education and training of breath alcohol technicians, screening test technicians, supervisors, and drivers shall be maintained by the employer while the individual performs the functions which require the training and for two years after ceasing to perform those functions.

(c) *Types of records.* The following specific types of records shall be

maintained. ''Documents generated'' are documents that may have to be prepared under a requirement of this part. If the record is required to be prepared, it must be maintained.

(1) Records related to the collection process:

(i) Collection logbooks, if used;

(ii) Documents relating to the random selection process;

(iii) Calibration documentation for evidential breath testing devices;

(iv) Documentation of breath alcohol technician training;

(v) Documents generated in connection with decisions to administer reasonable suspicion alcohol or controlled substances tests;

(vi) Documents generated in connection with decisions on post-accident tests;

(vii) Documents verifying existence of a medical explanation of the inability of a driver to provide adequate breath or to provide a urine specimen for testing; and

(viii) Consolidated annual calendar year summaries as required by § 382.403.

(2) Records related to a driver's test results:

(i) The employer's copy of the alcohol test form, including the results of the test;

(ii) The employer's copy of the controlled substances test chain of custody and control form;

(iii) Documents sent by the MRO to the employer, including those required by § 382.407(a).

(iv) Documents related to the refusal of any driver to submit to an alcohol or controlled substances test required by this part; and

(v) Documents presented by a driver to dispute the result of an alcohol or controlled substances test administered under this part.

(vi) Documents generated in connection with verifications of prior employers' alcohol or controlled substances test results that the employer:

(A) Must obtain in connection with the exception contained in § 382.301 of this part, and

(B) Must obtain as required by § 382.413 of this subpart.

(3) Records related to other violations of this part.

(4) Records related to evaluations:

(i) Records pertaining to a determination by a substance abuse professional concerning a driver's need for assistance; and

(ii) Records concerning a driver's compliance with recommendations of the substance abuse professional.

(5) Records related to education and training:

(i) Materials on alcohol misuse and controlled substance use awareness, including a copy of the employer's policy on alcohol misuse and controlled substance use;

(ii) Documentation of compliance with the requirements of § 382.601, including the driver's signed receipt of education materials;

(iii) Documentation of training provided to supervisors for the purpose of qualifying the supervisors to make a determination concerning the need for alcohol and/or controlled substances testing based on reasonable suspicion;

(iv) Documentation of training for breath alcohol technicians as required by § 40.51(a) of this title, and

(v) Certification that any training conducted under this part complies with the requirements for such training.

(6) Administrative records related to alcohol and controlled substances testing:

(i) Agreements with collection site facilities, laboratories, breath alcohol technicians, screening test technicians, medical review officers, consortia, and third party service providers;

(ii) Names and positions of officials and their role in the employer's alcohol and controlled substances testing program(s);

(iii) Quarterly laboratory statistical summaries of urinalysis required by § 40.29(g)(6) of this title;

(iv) The employer's alcohol and controlled substances testing policy and procedures; and

(v) Records generated in connection with part 391, subpart H of this subchapter.

(d) *Location of records.* All records required by this part shall be maintained as required by § 390.31 of this subchapter and shall be made available for inspection at the employer's principal place of business within two business days after a request has been made by an authorized representative of the Federal Highway Administration.

(e)(1) *OMB control number.* The information collection requirements of this part have been reviewed by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*) and have been assigned OMB control number 2125–0543, approved through March 31, 1997.

(2) The information collection requirements of this part are found in the following sections: Section 382.105, 382.113, 382.301, 382.303, 382.305, 382.307, 382.309, 382.311, 382.401, 382.403, 382.405, 382.407, 382.409, 382.411, 382.413, 382.601, 382.603, 382.605.

§ 382.403 Reporting of results in a management information system.

(a) An employer shall prepare and maintain a summary of the results of its alcohol and controlled substances testing programs performed under this part during the previous calendar year, when requested by the Secretary of Transportation, any DOT agency, or any State or local officials with regulatory authority over the employer or any of its drivers.

(b) If an employer is notified, during the month of January, of a request by the Federal Highway Administration to report the employer's annual calendar year summary information, the employer shall prepare and submit the report to the Federal Highway Administration by March 15 of that year. The employer shall ensure that the annual summary report is accurate and received by March 15 at the location that the Federal Highway Administration specifies in its request. The report shall be in the form and manner prescribed by the Federal Highway Administration in its request. When the report is submitted to the Federal Highway Administration by mail or electronic transmission, the information requested shall be typed, except for the signature of the certifying official. Each employer shall ensure the accuracy and timeliness of each report submitted by the employer or a consortium.

(c) *Detailed summary.* Each annual calendar year summary that contains information on a verified positive controlled substances test result, an alcohol screening test result of 0.02 or greater, or any other violation of the alcohol misuse provisions of subpart B of this part shall include the following informational elements:

(1) Number of drivers subject to Part 382;

(2) Number of drivers subject to testing under the alcohol misuse or controlled substances use rules of more than one DOT agency, identified by each agency;

(3) Number of urine specimens collected by type of test (e.g., pre-employment, random, reasonable suspicion, post-accident);

(4) Number of positives verified by a MRO by type of test, and type of controlled substance;

(5) Number of negative controlled substance tests verified by a MRO by type of test;

(6) Number of persons denied a position as a driver following a pre-employment verified positive controlled substances test and/or a pre-employment alcohol test that indicates

an alcohol concentration of 0.04 or greater;

(7) Number of drivers with tests verified positive by a medical review officer for multiple controlled substances;

(8) Number of drivers who refused to submit to an alcohol or controlled substances test required under this subpart;

(9)(i) Number of supervisors who have received required alcohol training during the reporting period; and

(ii) Number of supervisors who have received required controlled substances training during the reporting period;

(10)(i) Number of screening alcohol tests by type of test; and

(ii) Number of confirmation alcohol tests, by type of test;

(11) Number of confirmation alcohol tests indicating an alcohol concentration of 0.02 or greater but less than 0.04, by type of test;

(12) Number of confirmation alcohol tests indicating an alcohol concentration of 0.04 or greater, by type of test;

(13) Number of drivers who were returned to duty (having complied with the recommendations of a substance abuse professional as described in §§ 382.503 and 382.605), in this reporting period, who previously:

(i) Had a verified positive controlled substance test result, or

(ii) Engaged in prohibited alcohol misuse under the provisions of this part;

(14) Number of drivers who were administered alcohol and drug tests at the same time, with both a verified positive drug test result and an alcohol test result indicating an alcohol concentration of 0.04 or greater; and

(15) Number of drivers who were found to have violated any non-testing prohibitions of subpart B of this part, and any action taken in response to the violation.

(d) *Short summary.* Each employer's annual calendar year summary that contains only negative controlled substance test results, alcohol screening test results of less than 0.02, and does not contain any other violations of subpart B of this part, may prepare and submit, as required by paragraph (b) of this section, either a standard report form containing all the information elements specified in paragraph (c) of this section, or an ''EZ'' report form. The ''EZ'' report shall include the following information elements:

(1) Number of drivers subject to this Part 382;

(2) Number of drivers subject to testing under the alcohol misuse or controlled substance use rules of more than one DOT agency, identified by each agency;

(3) Number of urine specimens collected by type of test (e.g., pre-employment, random, reasonable suspicion, post-accident);

(4) Number of negatives verified by a medical review officer by type of test;

(5) Number of drivers who refused to submit to an alcohol or controlled substances test required under this subpart;

(6)(i) Number of supervisors who have received required alcohol training during the reporting period; and

(ii) Number of supervisors who have received required controlled substances training during the reporting period;

(7) Number of screen alcohol tests by type of test; and

(8) Number of drivers who were returned to duty (having complied with the recommendations of a substance abuse professional as described in §§ 382.503 and 382.605), in this reporting period, who previously:

(i) Had a verified positive controlled substance test result, or

(ii) Engaged in prohibited alcohol misuse under the provisions of this part.

(e) Each employer that is subject to more than one DOT agency alcohol or controlled substances rule shall identify each driver covered by the regulations of more than one DOT agency. The identification will be by the total number of covered functions. Prior to conducting any alcohol or controlled substances test on a driver subject to the rules of more than one DOT agency, the employer shall determine which DOT agency rule or rules authorizes or requires the test. The test result information shall be directed to the appropriate DOT agency or agencies.

(f) A consortium may prepare annual calendar year summaries and reports on behalf of individual employers for purposes of compliance with this section. However, each employer shall sign and submit such a report and shall remain responsible for ensuring the accuracy and timeliness of each report prepared on its behalf by a consortium.

§ 382.405 Access to facilities and records.

(a) Except as required by law or expressly authorized or required in this section, no employer shall release driver information that is contained in records required to be maintained under § 382.401.

(b) A driver is entitled, upon written request, to obtain copies of any records pertaining to the driver's use of alcohol or controlled substances, including any records pertaining to his or her alcohol or controlled substances tests. The employer shall promptly provide the records requested by the driver. Access to a driver's records shall not be contingent upon payment for records other than those specifically requested.

(c) Each employer shall permit access to all facilities utilized in complying with the requirements of this part to the Secretary of Transportation, any DOT agency, or any State or local officials with regulatory authority over the employer or any of its drivers.

(d) Each employer shall make available copies of all results for employer alcohol and/or controlled substances testing conducted under this part and any other information pertaining to the employer's alcohol misuse and/or controlled substances use prevention program, when requested by the Secretary of Transportation, any DOT agency, or any State or local officials with regulatory authority over the employer or any of its drivers.

(e) When requested by the National Transportation Safety Board as part of an accident investigation, employers shall disclose information related to the employer's administration of a post-accident alcohol and/or controlled substance test administered following the accident under investigation.

(f) Records shall be made available to a subsequent employer upon receipt of a written request from a driver. Disclosure by the subsequent employer is permitted only as expressly authorized by the terms of the driver's request.

(g) An employer may disclose information required to be maintained under this part pertaining to a driver, the decisionmaker in a lawsuit, grievance, or other proceeding initiated by or on behalf of the individual, and arising from the results of an alcohol and/or controlled substance test administered under this part, or from the employer's determination that the driver engaged in conduct prohibited by subpart B of this part (including, but not limited to, a worker's compensation, unemployment compensation, or other proceeding relating to a benefit sought by the driver.)

(h) An employer shall release information regarding a driver's records as directed by the specific, written consent of the driver authorizing release of the information to an identified person. Release of such information by the person receiving the information is permitted only in accordance with the terms of the employee's consent.

§ 382.407 Medical review officer notifications to the employer.

(a) The medical review officer may report to the employer using any communications device, but in all instances a signed, written notification must be forwarded within three

business days of completion of the medical review officer's review, pursuant to part 40 of this title. A legible photocopy of the fourth copy of Part 40 Appendix A subtitled *COPY 4—SEND DIRECTLY TO MEDICAL REVIEW OFFICER—DO NOT SEND TO LABORATORY* of the *Federal Custody and Control Form OMB Number 9999–0023* may be used to make the signed, written notification to the employer for all test results (positive, negative, canceled, etc.), provided that the controlled substance(s) verified as positive, and the MRO's signature, shall be legibly noted in the remarks section of step 8 of the form completed by the medical review officer. The MRO must sign all verified positive test results. An MRO may sign or rubber stamp negative test results. An MRO's staff may rubber stamp negative test results under written authorization of the MRO. In no event shall an MRO, or his/her staff, use electronic signature technology to comply with this section. All reports, both oral and in writing, from the medical review officer to an employer shall clearly include:

(1) A statement that the controlled substances test being reported was in accordance with part 40 of this title and this part, except for legible photocopies of Copy 4 of the Federal Custody and Control Form;

(2) The full name of the driver for whom the test results are being reported;

(3) The type of test indicated on the custody and control form (i.e. random, post-accident, follow-up);

(4) The date and location of the test collection;

(5) The identities of the persons or entities performing the collection, analyzing the specimens, and serving as the medical review officer for the specific test;

(6) The results of the controlled substances test, positive, negative, test canceled, or test not performed, and if positive, the identity of the controlled substance(s) for which the test was verified positive.

(b) A medical review officer shall report to the employer that the medical review officer has made all reasonable efforts to contact the driver as provided in § 40.33(c) of this title. The employer shall, as soon as practicable, request that the driver contact the medical review officer prior to dispatching the driver or within 24 hours, whichever is earlier.

§ 382.409 Medical review officer record retention for controlled substances.

(a) A medical review officer shall maintain all dated records and notifications, identified by individual, for a minimum of five years for verified positive controlled substances test results.

(b) A medical review officer shall maintain all dated records and notifications, identified by individual, for a minimum of one year for negative and canceled controlled substances test results.

(c) No person may obtain the individual controlled substances test results retained by a medical review officer, and no medical review officer shall release the individual controlled substances test results of any driver to any person, without first obtaining a specific, written authorization from the tested driver. Nothing in this paragraph shall prohibit a medical review officer from releasing, to the employer or to officials of the Secretary of Transportation, any DOT agency, or any State or local officials with regulatory authority over the controlled substances testing program under this part, the information delineated in § 382.407(a) of this subpart.

§ 382.411 Employer notifications.

(a) An employer shall notify a driver of the results of a pre-employment controlled substance test conducted under this part, if the driver requests such results within 60 calendar days of being notified of the disposition of the employment application. An employer shall notify a driver of the results of random, reasonable suspicion and post-accident tests for controlled substances conducted under this part if the test results are verified positive. The employer shall also inform the driver which controlled substance or substances were verified as positive.

(b) The designated management official shall make reasonable efforts to contact and request each driver who submitted a specimen under the employer's program, regardless of the driver's employment status, to contact and discuss the results of the controlled substances test with a medical review officer who has been unable to contact the driver.

(c) The designated management official shall immediately notify the medical review officer that the driver has been notified to contact the medical review officer within 24 hours.

§ 382.413 Inquiries for alcohol and controlled substances information from previous employers.

(a)(1) An employer shall, pursuant to the driver's written authorization, inquire about the following information on a driver from the driver's previous employers, during the preceding two years from the date of application, which are maintained by the driver's previous employers under § 382.401(b)(1) (i) through (iii) of this subpart:

(i) Alcohol tests with a result of 0.04 alcohol concentration or greater;

(ii) Verified positive controlled substances test results; and

(iii) Refusals to be tested.

(2) The information obtained from a previous employer may contain any alcohol and drug information the previous employer obtained from other previous employers under paragraph (a)(1) of this section.

(b) If feasible, the information in paragraph (a) of this section must be obtained and reviewed by the employer prior to the first time a driver performs safety-sensitive functions for the employer. If not feasible, the information must be obtained and reviewed as soon as possible, but no later than 14-calendar days after the first time a driver performs safety-sensitive functions for the employer. An employer may not permit a driver to perform safety-sensitive functions after 14 days without having made a good faith effort to obtain the information as soon as possible. If a driver hired or used by the employer ceases performing safety-sensitive functions for the employer before expiration of the 14-day period or before the employer has obtained the information in paragraph (a) of this section, the employer must still make a good faith effort to obtain the information.

(c) An employer must maintain a written, confidential record of the information obtained under paragraph (a) or (f) of this section. If, after making a good faith effort, an employer is unable to obtain the information from a previous employer, a record must be made of the efforts to obtain the information and retained in the driver's qualification file.

(d) The prospective employer must provide to each of the driver's previous employers the driver's specific, written authorization for release of the information in paragraph (a) of this section.

(e) The release of any information under this section may take the form of personal interviews, telephone interviews, letters, or any other method of transmitting information that ensures confidentiality.

(f) The information in paragraph (a) of this section may be provided directly to the prospective employer by the driver, provided the employer assures itself that the information is true and accurate.

(g) An employer may not use a driver to perform safety-sensitive functions if

the employer obtains information on a violation of the prohibitions in subpart B of this part by the driver, without obtaining information on subsequent compliance with the referral and rehabilitation requirements of § 382.605 of this part.

(h) Employers need not obtain information under paragraph (a) of this section generated by previous employers prior to the starting dates in § 382.115 of this part.

Subpart E—Consequences For Drivers Engaging In Substance Use-Related Conduct

§ 382.501 Removal from safety-sensitive function.

(a) Except as provided in subpart F of this part, no driver shall perform safety-sensitive functions, including driving a commercial motor vehicle, if the driver has engaged in conduct prohibited by subpart B of this part or an alcohol or controlled substances rule of another DOT agency.

(b) No employer shall permit any driver to perform safety-sensitive functions, including driving a commercial motor vehicle, if the employer has determined that the driver has violated this section.

(c) For purposes of this subpart, commercial motor vehicle means a commercial motor vehicle in commerce as defined in § 382.107, and a commercial motor vehicle in interstate commerce as defined in Part 390 of this subchapter.

§ 382.503 Required evaluation and testing.

No driver who has engaged in conduct prohibited by subpart B of this part shall perform safety-sensitive functions, including driving a commercial motor vehicle, unless the driver has met the requirements of § 382.605. No employer shall permit a driver who has engaged in conduct prohibited by subpart B of this part to perform safety-sensitive functions, including driving a commercial motor vehicle, unless the driver has met the requirements of § 382.605.

§ 382.505 Other alcohol-related conduct.

(a) No driver tested under the provisions of subpart C of this part who is found to have an alcohol concentration of 0.02 or greater but less than 0.04 shall perform or continue to perform safety-sensitive functions for an employer, including driving a commercial motor vehicle, nor shall an employer permit the driver to perform or continue to perform safety-sensitive functions, until the start of the driver's next regularly scheduled duty period, but not less than 24 hours following administration of the test.

(b) Except as provided in paragraph (a) of this section, no employer shall take any action under this part against a driver based solely on test results showing an alcohol concentration less than 0.04. This does not prohibit an employer with authority independent of this part from taking any action otherwise consistent with law.

§ 382.507 Penalties.

Any employer or driver who violates the requirements of this part shall be subject to the penalty provisions of 49 U.S.C. section 521(b).

Subpart F—Alcohol Misuse and Controlled Substances Use Information, Training, and Referral

§ 382.601 Employer obligation to promulgate a policy on the misuse of alcohol and use of controlled substances.

(a) *General requirements.* Each employer shall provide educational materials that explain the requirements of this part and the employer's policies and procedures with respect to meeting these requirements.

(1) The employer shall ensure that a copy of these materials is distributed to each driver prior to the start of alcohol and controlled substances testing under this part and to each driver subsequently hired or transferred into a position requiring driving a commercial motor vehicle.

(2) Each employer shall provide written notice to representatives of employee organizations of the availability of this information.

(b) *Required content.* The materials to be made available to drivers shall include detailed discussion of at least the following:

(1) The identity of the person designated by the employer to answer driver questions about the materials;

(2) The categories of drivers who are subject to the provisions of this part;

(3) Sufficient information about the safety-sensitive functions performed by those drivers to make clear what period of the work day the driver is required to be in compliance with this part;

(4) Specific information concerning driver conduct that is prohibited by this part;

(5) The circumstances under which a driver will be tested for alcohol and/or controlled substances under this part, including post-accident testing under § 382.303(d);

(6) The procedures that will be used to test for the presence of alcohol and controlled substances, protect the driver and the integrity of the testing processes, safeguard the validity of the test results, and ensure that those results are attributed to the correct driver, including post-accident information, procedures and instructions required by § 382.303(d) of this part;

(7) The requirement that a driver submit to alcohol and controlled substances tests administered in accordance with this part;

(8) An explanation of what constitutes a refusal to submit to an alcohol or controlled substances test and the attendant consequences;

(9) The consequences for drivers found to have violated subpart B of this part, including the requirement that the driver be removed immediately from safety-sensitive functions, and the procedures under § 382.605;

(10) The consequences for drivers found to have an alcohol concentration of 0.02 or greater but less than 0.04;

(11) Information concerning the effects of alcohol and controlled substances use on an individual's health, work, and personal life; signs and symptoms of an alcohol or a controlled substances problem (the driver's or a coworker's); and available methods of intervening when an alcohol or a controlled substances problem is suspected, including confrontation, referral to any employee assistance program and or referral to management.

(c) *Optional provision.* The materials supplied to drivers may also include information on additional employer policies with respect to the use of alcohol or controlled substances, including any consequences for a driver found to have a specified alcohol or controlled substances level, that are based on the employer's authority independent of this part. Any such additional policies or consequences must be clearly and obviously described as being based on independent authority.

(d) *Certificate of receipt.* Each employer shall ensure that each driver is required to sign a statement certifying that he or she has received a copy of these materials described in this section. Each employer shall maintain the original of the signed certificate and may provide a copy of the certificate to the driver.

§ 382.603 Training for supervisors.

Each employer shall ensure that all persons designated to supervise drivers receive at least 60 minutes of training on alcohol misuse and receive at least an additional 60 minutes of training on controlled substances use. The training will be used by the supervisors to determine whether reasonable suspicion exists to require a driver to undergo

testing under § 382.307. The training shall include the physical, behavioral, speech, and performance indicators of probable alcohol misuse and use of controlled substances.

§ 382.605 Referral, evaluation, and treatment.

(a) Each driver who has engaged in conduct prohibited by subpart B of this part shall be advised by the employer of the resources available to the driver in evaluating and resolving problems associated with the misuse of alcohol and use of controlled substances, including the names, addresses, and telephone numbers of substance abuse professionals and counseling and treatment programs.

(b) Each driver who engages in conduct prohibited by subpart B of this part shall be evaluated by a substance abuse professional who shall determine what assistance, if any, the employee needs in resolving problems associated with alcohol misuse and controlled substances use.

(c)(1) Before a driver returns to duty requiring the performance of a safety-sensitive function after engaging in conduct prohibited by subpart B of this part, the driver shall undergo a return-to-duty alcohol test with a result indicating an alcohol concentration of less than 0.02 if the conduct involved alcohol, or a controlled substances test with a verified negative result if the conduct involved a controlled substance.

(2) In addition, each driver identified as needing assistance in resolving problems associated with alcohol misuse or controlled substances use,

(i) Shall be evaluated by a substance abuse professional to determine that the driver has properly followed any rehabilitation program prescribed under paragraph (b) of this section, and

(ii) Shall be subject to unannounced follow-up alcohol and controlled substances tests administered by the employer following the driver's return to duty. The number and frequency of such follow-up testing shall be as directed by the substance abuse professional, and consist of at least six tests in the first 12 months following the driver's return to duty. The employer may direct the driver to undergo return-to-duty and follow-up testing for both alcohol and controlled substances, if the substance abuse professional determines that return-to-duty and follow-up testing for both alcohol and controlled substances is necessary for that particular driver. Any such testing shall be performed in accordance with the requirements of 49 CFR part 40. Follow-up testing shall not exceed 60 months from the date of the driver's return to duty. The substance abuse professional may terminate the requirement for follow-up testing at any time after the first six tests have been administered, if the substance abuse professional determines that such testing is no longer necessary.

(d) Evaluation and rehabilitation may be provided by the employer, by a substance abuse professional under contract with the employer, or by a substance abuse professional not affiliated with the employer. The choice of substance abuse professional and assignment of costs shall be made in accordance with employer/driver agreements and employer policies.

(e) The employer shall ensure that a substance abuse professional who determines that a driver requires assistance in resolving problems with alcohol misuse or controlled substances use does not refer the driver to the substance abuse professional's private practice or to a person or organization from which the substance abuse professional receives remuneration or in which the substance abuse professional has a financial interest. This paragraph does not prohibit a substance abuse professional from referring a driver for assistance provided through—

(1) A public agency, such as a State, county, or municipality;

(2) The employer or a person under contract to provide treatment for alcohol or controlled substance problems on behalf of the employer;

(3) The sole source of therapeutically appropriate treatment under the driver's health insurance program; or

(4) The sole source of therapeutically appropriate treatment reasonably accessible to the driver.

(f) The requirements of this section with respect to referral, evaluation and rehabilitation do not apply to applicants who refuse to submit to a pre-employment alcohol or controlled substances test or who have a pre-employment alcohol test with a result indicating an alcohol concentration of 0.04 or greater or a controlled substances test with a verified positive test result.

PART 383—[AMENDED]

2. The authority citation for 49 CFR part 383 is revised to read as follows:

Authority: 49 U.S.C. 31101 *et seq.*, 31136, and 31502; and 49 CFR 1.48.

3. Section 383.3 is revised to read as follows:

§ 383.3 Applicability.

(a) The rules in this part apply to every person who operates a commercial motor vehicle (CMV) in interstate, foreign, or intrastate commerce, to all employers of such persons, and to all States.

(b) The exceptions contained in § 390.3(g) of this subchapter do not apply to this part. The employers and drivers identified in § 390.3(g) must comply with the requirements of this part, unless otherwise provided in this section.

(c) *Exception for certain military drivers.* Each State must exempt from the requirements of this part individuals who operate CMVs for military purposes. This exception is applicable to active duty military personnel; members of the military reserves; member of the national guard on active duty, including personnel on full-time national guard duty, personnel on part-time national guard training, and national guard military technicians (civilians who are required to wear military uniforms); and active duty U.S. Coast Guard personnel. This exception is not applicable to U.S. Reserve technicians.

(d) *Exception for farmers, firefighters and emergency response vehicle drivers.* A State may, at its discretion, exempt individuals identified in paragraphs (d)(1), (d)(2), and (d)(3) of this section from the requirements of this part. The use of this waiver is limited to the driver's home State unless there is a reciprocity agreement with adjoining States.

(1) Operators of a farm vehicle which is:

(i) Controlled and operated by a farmer, including operation by employees or family members;

(ii) Used to transport either agricultural products, farm machinery, farm supplies, or both to or from a farm;

(iii) Not used in the operations of a common or contract motor carrier; and

(iv) Used within 241 kilometers (150 miles) of the farmer's farm.

(2) Firefighters and other persons who operate CMVs which are necessary to the preservation of life or property or the execution of emergency governmental functions, are equipped with audible and visual signals and are not subject to normal traffic regulation. These vehicles include fire trucks, hook and ladder trucks, foam or water transport trucks, police SWAT team vehicles, ambulances, or other vehicles that are used in response to emergencies.

(e) *Restricted commercial drivers license (CDL) for certain drivers in the State of Alaska.* (1) The State of Alaska may, at its discretion, waive only the following requirements of this part and issue a CDL to each driver that meets

the conditions set forth in paragraphs (e)(2) and (3) of this section:

(i) The knowledge tests standards for testing procedures and methods of subpart H, but must continue to administer knowledge tests that fulfill the content requirements of subpart G for *all* applicants;

(ii) All the skills test requirements; and

(iii) The requirement under § 383.153(a)(4) to have a photograph on the license document.

(2) Drivers of CMVs in the State of Alaska must operate exclusively over roads that meet *both* of the following criteria to be eligible for the exception in paragraph (e)(1) of this section:

(i) Such roads are not connected by land highway or vehicular way to the land-connected State highway system; and

(ii) Such roads are not connected to any highway or vehicular way with an average daily traffic volume greater than 499.

(3) Any CDL issued under the terms of this paragraph must carry two restrictions:

(i) Holders may not operate CMVs over roads other than those specified in paragraph (e)(2) of this section; and

(ii) The license is not valid for CMV operation outside the State of Alaska.

(f) *Restricted CDL for certain drivers in farm-related service industries.* (1) A State may, at its discretion, waive the required knowledge and skills tests of subpart H of this part and issue restricted CDLs to employees of these designated farm-related service industries:

(i) Agri-chemical businesses;

(ii) Custom harvesters;

(iii) Farm retail outlets and suppliers;

(iv) Livestock feeders.

(2) A restricted CDL issued pursuant to this paragraph shall meet all the requirements of this part, except subpart H of this part. A restricted CDL issued pursuant to this paragraph shall be accorded the same reciprocity as a CDL meeting all of the requirements of this part. The restrictions imposed upon the issuance of this restricted CDL shall not limit a person's use of the CDL in a non-CMV during either validated or non-validated periods, nor shall the CDL affect a State's power to administer its driver licensing program for operators of vehicles other than CMVs.

(3) A State issuing a CDL under the terms of this paragraph must restrict issuance as follows:

(i) Applicants must have a good driving record as defined in this paragraph. Drivers who have not held any motor vehicle operator's license for at least one year shall not be eligible for this CDL. Drivers who have between one and two years of driving experience must demonstrate a good driving record for their entire driving history. Drivers with more than two years of driving experience must have a good driving record for the two most recent years. For the purposes of this paragraph, the term *good driving record* means that an applicant:

(A) Has not had more than one license (except in the instances specified in § 383.21(b));

(B) Has not had *any* license suspended, revoked, or canceled;

(C) Has not had *any* conviction for any type of motor vehicle for the disqualifying offenses contained in § 383.51(b)(2);

(D) Has not had *any* conviction for any type of motor vehicle for serious traffic violations; and

(E) Has not had *any* conviction for a violation of State or local law relating to motor vehicle traffic control (other than a parking violation) arising in connection with any traffic accident, and has no record of an accident in which he/she was at fault.

(ii) Restricted CDLs shall have the same renewal cycle as unrestricted CDLs, but shall be limited to the seasonal period or periods as defined by the State of licensure, provided that the total number of calendar days in any 12-month period for which the restricted CDL is valid does not exceed 180. If a State elects to provide for more than one seasonal period, the restricted CDL is valid for commercial motor vehicle operation only during the currently approved season, and must be revalidated for each successive season. Only one seasonal period of validity may appear on the license document at a time. The good driving record must be confirmed prior to any renewal or revalidation.

(iii) Restricted CDL holders are limited to operating Group B and C vehicles, as described in subpart F of this part.

(iv) Restricted CDLs shall not be issued with *any* endorsements on the license document. Only the limited tank vehicle and hazardous materials endorsement privileges that the restricted CDL automatically confers and are described in paragraph (f)(3)(v) of this section are permitted.

(v) Restricted CDL holders may not drive vehicles carrying any placardable quantities of hazardous materials, except for diesel fuel in quantities of 3,785 liters (1,000 gallons) or less; liquid fertilizers (i.e., plant nutrients) in vehicles or implements of husbandry in total quantities of 11,355 liters (3,000 gallons) or less; and solid fertilizers (i.e., solid plant nutrients) that are not transported with any organic substance.

(vi) Restricted CDL holders may not hold an unrestricted CDL at the same time.

(vii) Restricted CDL holders may not operate a commercial motor vehicle beyond 241 kilometers (150 miles) from the place of business or the farm currently being served.

(g) *Restricted CDL for certain drivers in the pyrotechnic industry.* (1) A State may, at its discretion, waive the required hazardous materials knowledge tests of subpart H of this part and issue restricted CDLs to part-time drivers operating commercial motor vehicles transporting less than 227 kilograms (500 pounds) of fireworks classified as DOT Class 1.3G explosives.

(2) A State issuing a CDL under the terms of this paragraph must restrict issuance as follows:

(i) The GVWR of the vehicle to be operated must be less than 4,537 kilograms (10,001 pounds);

(ii) If a State believes, at its discretion, that the training required by § 172.704 of this title adequately prepares part-time drivers meeting the other requirements of this paragraph to deal with fireworks and the other potential dangers posed by fireworks transportation and use, the State may waive the hazardous materials knowledge tests of subpart H of this part. The State may impose any requirements it believes is necessary to ensure itself that a driver is properly trained pursuant to § 172.704 of this title.

(iii) A restricted CDL document issued pursuant to this paragraph shall have a statement clearly imprinted on the face of the document that is substantially similar as follows: ''For use as a CDL only during the period from June 30 through July 6 for purposes of transporting less than 227 kilograms (500 pounds) of fireworks classified as DOT Class 1.3G explosives in a vehicle with a GVWR of less than 4,537 kilograms (10,001 pounds).

(3) A restricted CDL issued pursuant to this paragraph shall meet all the requirements of this part, except those specifically identified. A restricted CDL issued pursuant to this paragraph shall be accorded the same reciprocity as a CDL meeting all of the requirements of this part. The restrictions imposed upon the issuance of this restricted CDL shall not limit a person's use of the CDL in a non-CMV during either validated or non-validated periods, nor shall the CDL affect a State's power to administer its driver licensing program for operators of vehicles other than CMVs.

(4) Restricted CDLs shall have the same renewal cycle as unrestricted CDLs, but shall be limited to the seasonal period of June 30 through July 6 of each year or a lesser period as defined by the State of licensure.

(5) Persons who operate commercial motor vehicles during the period from July 7 through June 29 for purposes of transporting less than 227 kilograms (500 pounds) of fireworks classified as DOT Class 1.3G explosives in a vehicle with a GVWR of less than 4,537 kilograms (10,001 pounds) and who also operate such vehicles for the same purposes during the period June 30 through July 6 shall not be issued a restricted CDL pursuant to this paragraph.

4. Section 383.5 is amended by revising the term ''commercial motor vehicle'' to read as follows:

§ 383.5 Definitions.

* * * * *

Commercial motor vehicle (CMV) means a motor vehicle or combination of motor vehicles used in commerce to transport passengers or property if the motor vehicle—

(a) Has a gross combination weight rating of 11,794 kilograms or more (26,001 pounds or more) inclusive of a towed unit with a gross vehicle weight rating of more than 4,536 kilograms (10,000 pounds); or

(b) Has a gross vehicle weight rating of 11,794 or more kilograms (26,001 pounds or more); or

(c) Is designed to transport 16 or more passengers, including the driver; or

(d) Is of any size and is used in the transportation of materials found to be hazardous for the purposes of the Hazardous Materials Transportation Act and which require the motor vehicle to be placarded under the Hazardous Materials Regulations (49 CFR part 172, subpart F). * * *

* * * * *

5. Section 383.91 is amended by revising paragraph (a) to read as follows:

§ 383.91 Commercial motor vehicle groups.

(a) Vehicle group descriptions. Each driver applicant must possess and be tested on his/her knowledge and skills, described in subpart G of this part, for the commercial motor vehicle group(s) for which he/she desires a CDL. The commercial motor vehicle groups are as follows:

(1) Combination vehicle (Group A)—Any combination of vehicles with a gross combination weight rating (GCWR) of 11,794 kilograms or more (26,001 pounds or more) provided the GVWR of the vehicle(s) being towed is in excess of 4,536 kilograms (10,000 pounds).

(2) Heavy Straight Vehicle (Group B)—Any single vehicle with a GVWR of 11,794 kilograms or more (26,001 pounds or more), or any such vehicle towing a vehicle not in excess of 4,536 kilograms (10,000 pounds) GVWR.

(3) Small Vehicle (Group C)—Any single vehicle, or combination of vehicles, that meets neither the definition of Group A nor that of Group B as contained in this section, but that either is designed to transport 16 or more passengers including the driver, or is used in the transportation of materials found to be hazardous for the purposes of the Hazardous Materials Transportation Act and which require the motor vehicle to be placarded under the Hazardous Materials Regulations (49 CFR part 172, subpart F).

* * * * *

PART 390—[AMENDED]

6. The authority citation for part 390 continues to read as follows:

Authority: 49 U.S.C. 5901–5907, 31132, 31133, 31136, 31502, and 31504; and 49 CFR 1.48.

§ 390.5 [Amended]

7. Section 390.5 is amended by revising the definition of ''commercial motor vehicle'' to read as follows:

* * * * *

Commercial motor vehicle means any self-propelled or towed vehicle used on public highways in interstate commerce to transport passengers or property when:

(a) The vehicle has a gross vehicle weight rating or gross combination weight rating of 4,537 or more kilograms (10,001 or more pounds); or

(b) The vehicle is designed to transport more than 15 passengers, including the driver; or

(c) The vehicle is used in the transportation of hazardous materials in a quantity requiring placarding under regulations issued by the Secretary under the Hazardous Materials Transportation Act (49 U.S.C. 5101 *et. seq.*).

* * * * *

8. Section 390.27 is revised to read as follows:

§ 390.27 Locations of regional offices of motor carriers.

Region No.	Territory included	Location of regional office
1	Connecticut, Maine, Massachusetts, New Jersey, New Hampshire, New York, Rhode Island, Vermont, Puerto Rico, and the Virgin Islands. That part of Canada east of Highways 19 and 8 from Port Burwell to Goderich, thence a straight line running north through Tobermory and Sudbury, and thence due north to the Canadian border.	Leo W. O'Brien Federal Office Building, Clinton & Pearl Streets, Room 737, Albany, NY 12207–2334.
3	Delaware, District of Columbia, Maryland, Pennsylvania, Virginia, and West Virginia.	City Crescent Building, #10 South Howard Street, Suite 4000, Baltimore, MD 21201–2819.
4	Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee.	1720 Peachtree Road, NW., Suite 200, Atlanta, GA 30367–2349.
5	Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin. That part of Canada west of Highways 19 and 8 from Port Burwell to Goderich, thence a straight line running north through Tobermory and Sudbury, and thence due north to the Canadian border, and east of the boundary between the Provinces of Ontario and Manitoba to Hudson Bay and thence a straight line north to the Canadian border.	19900 Governors Drive, Suite 210, Olympia Fields, IL 60461–1021.
6	Arkansas, Louisiana, New Mexico, Oklahoma, and Texas. All of Mexico, except the States of Baja California and Sonora and the Territory of Baja California Sur., Mexico. All nations south of Mexico.	Room 8A00, Federal Building, 819 Taylor Street, P.O. Box 902003, Fort Worth, TX 76102.

Region No.	Territory included	Location of regional office
7	Iowa, Kansas, Missouri, and Nebraska	6301 Rockhill Road, P.O. Box 419715, Kansas City, MO 64141–6715.
8	Colorado, Montana, North Dakota, South Dakota, Utah, Wyoming. That part of Canada west of the boundary between the Provinces of Ontario and Manitoba to Hudson Bay and thence a straight line due north to the Canadian border, and east of Highway 95 from Kingsgate to Blaeberry and thence a straight line due north to the Canadian border.	555 Zang Street, room 190, Lakewood, CO 80228–1014.
9	Arizona, California, Hawaii, Nevada, Guam, American Samoa, and Mariana Islands. The States of Baja California and Sonora, Mexico, and the Territory of Baja California Sur., Mexico.	201 Mission Street, Suite 2100, San Francisco, CA 94105.
10	Alaska, Idaho, Oregon and Washington. That part of Canada west of Highway 95 from Kingsgate to Blaeberry and thence a straight line due north to the Canadian border, and all the Province of British Columbia.	KOIN Center, suite 600, 222 SW Columbia Street, Portland, OR 97201–2491.

PART 391—[AMENDED]

9. The authority citation for part 391 continues to read as follows:

Authority: 49 U.S.C. 504, 31133, 31136, and 31502; and 49 CFR 1.48.

10. Section 391.85 is amended by removing the term and definition of ''drivers subject to testing'' and by revising the definition ''commercial motor vehicle'' to read as follows:

§ 391.85 Definitions.

* * * * *

Commercial motor vehicle means any self-propelled or towed motor vehicle used on public highways in interstate commerce to transport passengers or property when:

(a) The motor vehicle has a gross vehicle weight rating or gross combination weight rating of 11,794 or more kilograms (26,001 or more pounds); or

(b) The motor vehicle is designed to transport more than 15 passengers, including the driver; or

(c) The motor vehicle is used in the transportation of hazardous materials in a quantity requiring placarding under regulations issued by the Secretary under the Hazardous Materials Transportation Act (49 U.S.C. 5101 *et. seq.*).

* * * * *

11. Section 391.125 is revised to read as follows:

§ 391.125 Termination schedule of this subpart.

(a) All motor carriers shall retain all records generated in connection with this subpart as required by § 382.401 of this subchapter.

(b) *Large employers.* Except as provided in paragraph (a) of this section, each motor carrier with fifty or more drivers on March 17, 1994, shall terminate compliance with this subpart and shall implement the requirements of part 382 of this subchapter beginning on January 1, 1995.

(c) *Small employers.* Except as provided in paragraph (a) of this section, each motor carrier with fewer than fifty drivers on March 17, 1994, shall terminate compliance with this subpart and shall implement the requirements of Part 382 of this subchapter beginning on January 1, 1996.

(d) Except as provided in paragraph (a) of this section, all motor carriers shall terminate compliance with this subpart on January 1, 1996.

PART 392—[AMENDED]

12. The authority citation for part 392 continues to read as follows:

Authority: 49 U.S.C. 31136 and 31502; and 49 CFR 1.48.

13. Section 392.4 is revised to read as follows:

§ 392.4 Drugs and other substances.

(a) No driver shall be on duty and possess, be under the influence of, or use, any of the following drugs or other substances:

(1) Any Schedule I drug or other substance identified in appendix D to this subchapter;

(2) An amphetamine or any formulation thereof (including, but not limited, to ''pep pills,'' and ''bennies'');

(3) A narcotic drug or any derivative thereof; or

(4) Any other substance, to a degree which renders the driver incapable of safely operating a motor vehicle.

(b) No motor carrier shall require or permit a driver to violate paragraph (a) of this section.

(c) Paragraphs (a) (2), (3), and (4) do not apply to the possession or use of a substance administered to a driver by or under the instructions of a licensed medical practitioner, as defined in § 382.107 of this subchapter, who has advised the driver that the substance will not affect the driver's ability to safely operate a motor vehicle.

(d) As used in this section, ''possession'' does not include possession of a substance which is manifested and transported as part of a shipment.

14. Section 392.5 is amended by revising paragraph (a) to read as follows:

§ 392.5 Alcohol prohibition.

(a) No driver shall—

(1) Use alcohol, as defined in § 382.107 of this subchapter, or be under the influence of alcohol, within 4 hours before going on duty or operating, or having physical control of, a commercial motor vehicle; or

(2) Use alcohol, be under the influence of alcohol, or have any measured alcohol concentration or detected presence of alcohol, while on duty, or operating, or in physical control of a commercial motor vehicle; or

(3) Be on duty or operate a commercial motor vehicle while the driver possesses wine of not less than one-half of one per centum of alcohol by volume, beer *as defined in 26 U.S.C. 5052(a), of the Internal Revenue Code of 1954,* and distilled spirits *as defined in section 5002(a)(8), of such Code.* However, this does not apply to possession of wine, beer, or distilled spirits which are:

(i) Manifested and transported as part of a shipment; or

(ii) Possessed or used by bus passengers.

* * * * *

[FR Doc. 96–5373 Filed 3–7–96; 8:45 am]

BILLING CODE 4910–22–P