

DEPARTMENT OF TRANSPORTATION**Federal Highway Administration**

49 CFR Parts 355, 382, 383, 384, 389, 391, and 392

RIN 2125-AE16

Commercial Driver's License Program and Controlled Substances and Alcohol Use and Testing; Conforming and Technical Amendments

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Final rule; technical amendments.

SUMMARY: The FHWA is making technical amendments to its regulations regarding physical qualifications and examinations for interstate drivers, and controlled substance and alcohol use and testing for drivers under the commercial driver's license program. The amendments are necessary to correct minor errors and to remove obsolete regulations. This final rule will clarify the agency's statutory authorities and will provide current applicable controlled substances and alcohol testing regulations.

EFFECTIVE DATE: This rule is effective August 11, 1997.

FOR FURTHER INFORMATION CONTACT: *For information regarding program issues:* Mr. Mark Snider, Office of Motor Carrier Safety and Technology, (202) 366-6121, *For information regarding legal issues:* Ms. Grace Reidy, 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 containing technical amendments was published in the **Federal Register** on March 8, 1996 (61 FR 9546) and made conforming amendments to 49 CFR parts 382, 383, 390, 391, and 392. The amendments were necessary to correct minor errors in the February 15, 1994, final rule (59 FR 7484), codify final dispositions of waivers of the commercial driver's license program, and make conforming metrication amendments.

The February 15, 1994, final rule established the dates when domestic motor carrier employers were to begin testing. Large domestic employers (each employer with fifty or more drivers on March 17, 1994) were required to implement the requirements of part 382

on January 1, 1995, and small domestic employers (each employer with less than fifty drivers on March 17, 1994) were required to implement the requirements of part 382 on January 1, 1996. Currently, all domestic employers are required to test for controlled substances and alcohol use as set forth in part 382. Technical amendments in this rulemaking proceeding will remove all requirements and references to part 391, subpart H, Controlled Substance Testing, from parts 355 through 391. The implementation of part 382 makes part 391, subpart H, obsolete.

The FHWA is also making conforming amendments to replace authority citations in various regulations in parts 355, 383, 384, 389, 391, and 392. The FHWA's authority has not changed. The authority citations, however, have been recodified. In certain instances, the regulations refer to various common names of a congressional act. The FHWA believes it is better to cite to the United States Code (U.S.C.) rather than the common name of the act or the public law number.

Rulemaking Analyses and Notices

Because this final rule simply makes minor edits to the FHWA's regulations to conform them to various U.S.C. citations and to remove obsolete 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.

Because this final rule makes conforming amendments and removes obsolete regulations, 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 and conforming changes to the Federal Motor Carrier Safety Regulations (FMCSRs) to properly cite the FHWA's statutory authority. A full regulatory evaluation, therefore, 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 make technical and conforming amendments to various authority citations and remove an obsolete regulation. 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)

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 12612 and it has been determined this action does not have sufficient federalism implications to warrant the preparation of a federalism assessment. The amendments made by this rule do not have a substantial direct effect on the States, nor on the relationship or distribution of power between the national government and the States because these changes do little to limit the policymaking discretion of the States. The only direct impact to the various States will be the requirement for the Governors of States to modify their certification statements for compliance with 49 CFR 384.305. This statement incorrectly cites the proper authority necessary for a Governor to certify substantial compliance with the FMCSRs.

To the extent these amendments require States to make minor modifications to their laws or regulations, a State must make these amendments to obtain Motor Carrier Safety Assistance Program benefits. The rule, therefore, is not intended to preempt any State law or State regulation. Moreover, the changes made by this rule would impose no additional cost or burden upon any State. Nor will the rule have a significant effect upon the ability of the States to discharge traditional State governmental functions. The FHWA, therefore, 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 do not apply to this program.

Paperwork Reduction Act

This final rule does not contain new information collection requirements for purposes of the Paperwork Reduction Act of 1995, 44 U.S.C. 3501-3520.

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 355, 382, 383, 384, 389, 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: June 27, 1997.

Jane F. Garvey,

Acting Administrator for the Federal Highway Administration.

In consideration of the foregoing, the FHWA is amending title 49, CFR, chapter III, parts 355, 382, 383, 384, 389, 391, and 392 as set forth below:

PART 355—[AMENDED]

1. The authority citation for 49 CFR part 355 is revised to read as follows:

Authority: 49 U.S.C. 504 and 31101 *et seq.*; 49 CFR 1.48.

2. In appendix A, under the headings "Definitions" and "Driver Qualifications" revise the paragraphs to read as follows:

Appendix A to Part 355—Guidelines for the Regulatory Review

* * * * *

Definitions

Definitions of terms must be consistent with those in the FMCSR. For example, a commercial motor vehicle is a vehicle operating in interstate commerce on a public highway, that:

- (1) Has a gross vehicle weight rating (GVWR) of 4,537 or more kilograms;
- (2) Is designed to transport more than 15 passengers (including the driver); or
- (3) Is used to transport hazardous materials in a quantity requiring placarding under regulations issued by the Secretary under the Hazardous Materials Transportation Act, as amended (49 U.S.C. 5101 *et seq.*).

Driver Qualifications

Require a driver to be properly licensed to drive a commercial motor vehicle; require a driver to be in good physical health, at least 21 years of age, able to operate a vehicle safely, and maintain a good driving record; prohibit drug and alcohol abuse; require a motor carrier to maintain a driver qualification file for each driver; and require a motor carrier to ensure that a driver is medically qualified.

Note: The requirements for testing apply only to drivers of commercial motor vehicles as defined in 49 CFR part 383.

* * * * *

PART 382—[AMENDED]

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

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

4. Section 382.115 is revised to read as follows:

§ 382.115 Starting date for testing programs.

(a) *All domestic employers.* Each domestic-domiciled employer that begins commercial motor vehicle operations will implement the requirements of this part on the date the employer begins such operations.

(b) *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.

(c) *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.

(d) *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.

5-6. In § 382.401, paragraph (c)(6) is amended by adding the word "and" at

the end of paragraph (c)(6)(iii); by removing "; and" and adding a period at the end of paragraph (c)(6)(iv); and by removing paragraph (c)(6)(v), and paragraph (e)(1) is revised to read as follows:

§ 382.401 Retention of records.

* * * * *

(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 1995 (44 U.S.C. 3501 *et seq.*) and have been assigned OMB control number 2125-0543.

* * * * *

PART 383—[AMENDED]

7. The authority citation for 49 CFR part 383 continues to read as follows:

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

8. Section 383.5 is amended by revising the term "controlled substance" to read as follows:

§ 383.5 Definitions.

* * * * *

Controlled substance has the meaning such term has under 21 U.S.C. 802(6) and includes all substances listed on schedules I through V of 21 CFR 1308 (§§ 1308.11 through 1308.15), as they may be amended by the United States Department of Justice.

* * * * *

9. Section 383.51 is amended by revising paragraphs (b)(2)(ii) and (b)(2)(v); and by removing the reference "(49 U.S.C. App. 1801-1813)" and replacing it with "(49 U.S.C. 5101 *et seq.*)" in paragraphs (b)(3)(i), (b)(3)(ii), and (d)(2)(iv) in all places it appears. As revised, paragraphs (b)(2)(ii) and (b)(2)(v) read as follows:

§ 383.51 Disqualification of drivers.

* * * * *

(b) * * *

(2) * * *

(ii) Driving a commercial motor vehicle while under the influence of a controlled substance as defined by § 383.5 of this part.

* * * * *

(v) The use of a commercial motor vehicle in the commission of a felony involving manufacturing, distributing, or dispensing a controlled substance as defined by § 383.5 of this part.

* * * * *

10. In § 383.111, paragraph (a) is amended by adding "382," between the words "49 CFR parts" and "391".

PART 384—[AMENDED]

11. The authority citation for 49 CFR part 384 continues to read as follows:

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

12. Section 384.101 is revised to read as follows:

§ 384.101 Purpose and scope.

(a) *Purpose.* The purpose of this part is to ensure that the States comply with the provisions of section 12009(a) of the Commercial Motor Vehicle Safety Act of 1986 (49 U.S.C. 31311(a)).

(b) *Scope.* This part:

(1) Includes the minimum standards for the actions States must take to be in substantial compliance with each of the 22 requirements of 49 U.S.C. 31311(a);

(2) Establishes procedures for determinations to be made of such compliance by States; and

(3) Specifies the consequences of State noncompliance.

13. Section 384.301 is revised to read as follows:

§ 384.301 Substantial compliance—general requirement.

To be in substantial compliance with 49 U.S.C. 31311(a), a State must meet each and every standard of subpart B of this part by means of the demonstrable combined effect of its statutes, regulations, administrative procedures and practices, organizational structures, internal control mechanisms, resource assignments (facilities, equipment, and personnel), and enforcement practices.

14. Section 384.305(b) is revised to read as follows:

§ 384.305 State certifications for Federal fiscal years after FY 1994.

* * * * *

(b) *Certification content.* The certification shall consist of a statement signed by the Governor of the State, or by an official designated by the Governor, and reading as follows: "I (name of certifying official), (position title), of the State (Commonwealth) of _____, do hereby certify that the State (Commonwealth) has continuously been in substantial compliance with all requirements of 49 U.S.C. 31311(a), as defined in 49 CFR 384.301, since [the first day of the current Federal fiscal year], and contemplates no changes in statutes, regulations, or administrative procedures, or in the enforcement thereof, which would affect such substantial compliance through [the last date of the current Federal fiscal year]."

(Approved by the Office of Management and Budget under control number 2125—0542)

15. Section 384.309 is revised to read as follows:

§ 384.309 Results of compliance determination.

(a) A State shall be determined not substantially in compliance with 49 U.S.C. 31311(a) for any fiscal year in which it:

(1) Fails to submit the certification as prescribed in this subpart; or

(2) Does not meet one or more of the standards of subpart B of this part, as established in a final determination by the FHWA under § 384.307(c).

(b) A State shall be in substantial compliance with 49 U.S.C. 31311(a) for any fiscal year in which neither of the eventualities in paragraph (a) of this section occurs.

PART 389—[AMENDED]

16. The authority citation for part 389 is revised to read as follows:

Authority: 49 U.S.C. 104, 501 *et seq.*, 31101 *et seq.*, 31138, 31139, 31301 *et seq.*, and 31502; 42 U.S.C. 4917; and 49 CFR 1.48.

17. Section 389.1 is revised to read as follows:

§ 389.1 Applicability.

This part prescribes rulemaking procedures that apply to the issuance, amendment and revocation of rules under an Act.

18. Section 389.3 is revised to read as follows:

§ 389.3 Definitions.

Act means statutes granting the Secretary authority to regulate motor carrier safety.

Administrator means the Federal Highway Administrator.

19. Section 389.11 is revised to read as follows:

§ 389.11 General.

Unless the Administrator, for good cause, finds a notice is impractical, unnecessary, or contrary to the public interest, and incorporates such a finding and a brief statement of the reasons for it in the rule, a notice of proposed rulemaking must be issued, and interested persons are invited to participate in the rulemaking proceedings involving rules under an Act.

PART 391—[AMENDED]

20. 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.

21. Section 391.15 is amended by revising paragraphs (c)(2) (ii) and (iii) to read as follows:

§ 391.15 Disqualification of drivers.

* * * * *

(c) * * *

(2) * * *

(ii) Driving a commercial motor vehicle under the influence of a 21 CFR 1308.11 *Schedule I* identified controlled substance, an amphetamine, a narcotic drug, a formulation of an amphetamine, or a derivative of a narcotic drug;

(iii) Transportation, possession, or unlawful use of a 21 CFR 1308.11 *Schedule I* identified controlled substance, amphetamines, narcotic drugs, formulations of an amphetamine, or derivatives of narcotic drugs while the driver is on duty, as the term on-duty time is defined in § 395.2 of this subchapter;

* * * * *

22–23. Section 391.41 is amended by revising paragraph (b)(12) and by removing paragraph (c) to read as follows:

§ 391.41 Physical qualifications for drivers.

* * * * *

(b) * * *

(12)(i) Does not use a controlled substance identified in 21 CFR 1308.11 *Schedule I*, an amphetamine, a narcotic, or any other habit-forming drug.

(ii) *Exception.* A driver may use such a substance or drug, if the substance or drug is prescribed by a licensed medical practitioner who:

(A) Is familiar with the driver's medical history and assigned duties; and

(B) Has advised the driver that the prescribed substance or drug will not adversely affect the driver's ability to safely operate a commercial motor vehicle; and

* * * * *

§ 391.43 [Amended]

24. Section 391.43 is amended as follows:

A. In paragraph (a), remove paragraph (a)(2) and redesignate "(a)(1)" as "(a)";

B. Under the heading "Instructions for Performing and Recording Physical Examinations" remove the entry for "Controlled Substances Testing", but leave unchanged the undesignated paragraph reading "The medical examiner must date and sign his/her findings upon completion of the examination."; and

C. Under the undesignated center heading "Physical Examination" remove the following entry on controlled substances testing: "Controlled Substances Testing

Controlled substances test performed—

In accordance with subpart H.

Not in accordance with subpart H.

Controlled substances test NOT performed."

Subpart H—[Removed]

25. Subpart H of part 391, consisting of §§ 391.81 through 391.125, is removed.

PART 392—[AMENDED]

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

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

27. Section 392.4 is amended by revising paragraph (a)(1) to read as follows:

§ 392.4 Drugs and other substances.

* * * * *

(1) Any 21 CFR 1308.11 *Schedule I* substance;

* * * * *

Appendices D and E—[Removed and Reserved]

28. Appendices D and E to subchapter B of chapter III are removed and reserved.

[FR Doc. 97-18260 Filed 7-10-97; 8:45 am]

BILLING CODE 4910-22-P

DEPARTMENT OF TRANSPORTATION**National Highway Traffic Safety Administration****49 CFR Part 531**

[Docket No. 96-115; Notice 2]

Passenger Automobile Average Fuel Economy Standards; Final Decision To Grant Exemption

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Final decision.

SUMMARY: This final decision responds to a petition filed by Lotus Cars Ltd. (Lotus) requesting that it be exempted from the generally applicable average fuel economy standard of 27.5 miles per gallon (mpg) for model years (MYs) 1994, 1995, 1997 and 1998 and that lower alternative standards be established. In this document, NHTSA establishes an alternative standard for Lotus of 24.2 mpg for MY 1994 and 23.3 mpg for MY 1995 and denies the requests for MYs 1997 and 1998.

DATES: *Effective date:* August 25, 1997. This exemption and the alternative standards apply to Lotus for MYs 1994 and 1995.

Petitions for reconsideration: Petitions for reconsideration must be received no later than August 25, 1997.

ADDRESSES: Petitions for reconsideration of this rule should refer to the docket

number and notice number cited in the heading of this notice and must be submitted to: Administrator, National Highway Traffic Safety Administration, 400 Seventh Street, SW, Washington DC 20590.

FOR FURTHER INFORMATION CONTACT: Ms. Henrietta Spinner, Office of Planning and Consumer Programs, NHTSA, 400 Seventh Street, S.W., Washington, DC 20590. Ms. Spinner's telephone number is: (202) 366-4802.

SUPPLEMENTARY INFORMATION:**Statutory Background**

Pursuant to 49 U.S.C. section 32902(d), NHTSA may exempt a low volume manufacturer of passenger automobiles from the generally applicable average fuel economy standards if NHTSA concludes that those standards are more stringent than the maximum feasible average fuel economy for that manufacturer and if NHTSA establishes an alternative standard for that manufacturer at its maximum feasible level. Under the statute, a low volume manufacturer is one that manufactured (worldwide) fewer than 10,000 passenger automobiles in the second model year before the model year for which the exemption is sought (the affected model year) and that will manufacture fewer than 10,000 passenger automobiles in the affected model year. In determining the maximum feasible average fuel economy, the agency is required under 49 U.S.C. 32902(f) to consider:

- (1) Technological feasibility
- (2) Economic practicability
- (3) The effect of other Federal motor vehicle standards on fuel economy, and
- (4) The need of the United States to conserve energy.

The statute permits NHTSA to establish alternative average fuel economy standards applicable to exempted low volume manufacturers in one of three ways: (1) a separate standard for each exempted manufacturer; (2) a separate average fuel economy standard applicable to each class of exempted automobiles (classes would be based on design, size, price, or other factors); or (3) a single standard for all exempted manufacturers.

Proposed Decision and Public Comment

This final decision was preceded by a proposal announcing the agency's tentative conclusion that Lotus should be exempted from the generally applicable MYs 1994, 1995, 1997 and 1998 passenger automobile average fuel economy standard of 27.5 mpg, and that alternative standards of 24.2 mpg for MY 1994, 23.3 mpg for MY 1995, and

21.2 mpg for MYs 1997 and 1998 be established for Lotus. (61 FR 67518; December 23, 1996). The agency received one comment from a Mr. Lance Tunick, a consultant acting on behalf of Lotus, supporting the establishment of an alternative standard for Lotus for MYs 1994, 1995, 1997 and 1998.

NHTSA Final Determination

With the exception of establishing an alternative standard for the 1997 and 1998 model years, the agency is adopting the tentative conclusions set forth in the proposed decision as its final conclusions, for the reasons set forth in the proposed decision. Based on these conclusions, the maximum feasible average fuel economy level for Lotus is 24.2 mpg for MY 1994 and 23.3 mpg for MY 1995. NHTSA has determined that other Federal motor vehicle standards will not affect achievable fuel economy beyond the extent considered in the proposed decision and that the national effort to conserve energy will not be affected by granting this exemption. NHTSA hereby exempts Lotus from the generally applicable passenger automobile average fuel economy standard for the 1994 and 1995 model years and establishes an alternative standard of 24.2 mpg for MY 1994 and 23.3 mpg for MY 1995 for Lotus.

In regard to the 1997 and 1998 model years, NHTSA notes that in October 1996, Perusahaan Otomobil Nasional Berhad (Proton) acquired a controlling interest in Lotus Cars Ltd. Proton, which is a manufacturer of automobiles operating primarily in Malaysia, has an annual worldwide production of more than 10,000 vehicles.

Section 32902(d) provides that an alternative standard may only be established for a manufacturer that manufactured (whether in the United States or not) fewer than 10,000 passenger automobiles in the model year 2 years before the model year for which the application is made. The section further provides that an exemption for a model year applies only if the manufacturer manufactures (whether in the United States or not) fewer than 10,000 passenger automobiles in the model year.

On September 21, 1990, the agency published a notice (55 FR 38822) containing NHTSA's interpretation that the definition of "manufacture," derived from section 32902(d)(1)'s phrase "manufactured (whether in the United States or not)," applied for purposes of determining eligibility for a low volume exemption under that section. In considering whether an entity is eligible for a low volume exemption, the agency