(Catalog of Federal Domestic Assistance No. 83.100, ''Flood Insurance.'')

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Robert F. Shea,

Acting Administrator, Federal Insurance and Mitigation Administration.

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DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Part 382

[Docket No. FMCSA–2000–8456]

RIN 2126–AA58

Controlled Substances and Alcohol Use and Testing

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Final rule.

SUMMARY: The Department of Transportation published its drug and alcohol testing procedures regulations on December 19, 2000. The FMCSA is revising its conforming regulations entitled ''Controlled Substances and Alcohol Use and Testing.'' The purpose of this revision is to make the FMCSA's controlled substances and alcohol testing regulations consistent with DOT's revised testing procedures and to avoid duplication. Additionally, the FMCSA is amending its drug and alcohol testing regulations to update obsolete provisions and to clarify certain provisions of the rules.

DATES: The final rule is effective August 17, 2001.

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SUPPLEMENTARY INFORMATION: The Department of Transportation published a comprehensive revision to the departmental drug and alcohol testing procedural rule (49 CFR part 40) (December 19, 2000, 65 FR 79462). The new part 40 makes numerous changes in the way that drug and alcohol testing will be conducted in the future. The rule in its totality became effective August 1, 2001.

Part 40 is one element of a One-DOT set of regulations designed to deter and detect the use of illegal drugs and the misuse of alcohol by employees performing safety-sensitive transportation functions. It is important that the FMCSA, which regulates the motor carrier industry, publish rules that are consistent with the revised part 40 to avoid duplication, conflict, or confusion among DOT regulatory requirements. Therefore, we are publishing amended drug and alcohol testing regulations to conform to part 40. We are also amending part 382 to clarify certain provisions of the rules in response to public comments received in this docket.

Background

On December 19, 2000, (65 FR 79462) the Department published a final rule titled ''Procedures for Transportation Workplace Drug and Alcohol Testing Programs.'' This rule revised 49 CFR part 40 to improve the clarity of the organization and language of the regulation, to incorporate guidance and interpretations of the rule into its text, and to update the rule to respond to changes in technology, the testing industry, and the Department's drug and alcohol testing program.

Consequently, the FMCSA proposed to change its drug testing rules (49 CFR part 382) so that they would conform to the new requirements contained in part 40. As such, the FMCSA is deleting provisions from part 382 that are also covered in the new part 40. Employers and employees affected by part 382 have always been required to adhere to parts 40 and 382 to comply with the FMCSA's drug and alcohol testing requirements. Referring the reader directly to part 40 instead of duplicating part 40 rule text in part 382 would promote both drafting economy and consistency of interpretation. This final rule removes regulatory text from part 382 regarding return to duty testing, follow-up testing, medical review officer (MRO) notifications, inquiries from previous employers, and referral, evaluation and treatment requirements. Instead, the regulation incorporates by reference the appropriate provisions of part 40 that address these issues.

The primary purpose of this final rule is to conform part 382 to the new part 40. However, the FMCSA also proposed to update and clarify existing text references that were either outdated or in need of clarification. This included replacing references to the Federal Highway Administration with the Federal Motor Carrier Safety Administration, removing obsolete implementation dates and reporting requirements, and providing clarification of the meaning of existing requirements that were frequently the subject matter of questions from the motor carrier industry.

The FMCSA issued a notice of proposed rulemaking (NPRM) on April 30, 2001 (66 FR 21538). We received 22 comments in response to this NPRM. The final rule responds to these comments and makes appropriate modifications to the existing rules governing the FMCSA's drug and alcohol testing program.

Structure of the Rule

The Department restructured part 40 in the question and answer format. Comments received were very complimentary about the reorganization of that rule, generally praising the rule as much clearer and easier to follow. As a result, the Department received the plain English award ''No Gobbledygook'' for its efforts.

The FMCSA received several comments suggesting that we follow suit with the Department and publish our final rule in the question and answer format. Although this is a desirable concept that we hope to implement eventually, the FMCSA was under an ambitious timetable to publish this final rule to be effective simultaneously with the effective date of part 40. Rewriting part 382 in question and answer format would have taken a considerable amount of additional time. Therefore, the FMCSA decided to publish the final rule in the current format so that it will be effective as close at possible to the August 1, 2001, effective date for part 40.

In addition to detailed paragraph-by-paragraph comments on the text of the NPRM, commenters focused on common policy issues that involved interpretations of the current regulatory text. A comment was received suggesting that we incorporate the published interpretations of part 382 into the regulations, as was done in part 40. Unlike the case with part 40, the NPRM did not incorporate all of the published regulatory guidance into the rule text for purposes of soliciting public comment. Eventually, the FMCSA will rewrite the existing Federal Motor Carrier Safety Regulations in question and answer format. This will include incorporating regulatory guidance, however, this will not be accomplished in this rulemaking proceeding. Consequently, we have incorporated regulatory guidance into the final rule only to a limited extent, i.e., when necessary to clarify confusion expressed by commenters regarding the meaning of a particular regulatory provision.

Effective Dates

Generally, final rules must be published at least 30 days before their

effective dates. However, the Administrative Procedure Act (5 U.S.C. sec. 553(d)(3)) creates an exception to this general rule on the basis of good cause found by the agency and published rule. The FMCSA is making this rule effective immediately upon publication, rather than 30 days from now. The good cause supporting this action is that the purpose of this rule is to ensure that the FMCSA's drug and alcohol testing regulation is consistent with the Department-wide 49 CFR part 40, which went into effect on August 1, 2001. This consistency is very important in order to avoid overlap, conflict, duplication, or confusion between different DOT drug and alcohol testing regulations. Unless this regulation goes into effect immediately, this purpose of the rule cannot be achieved during the 30-day period in which part 40 would be in effect but the conforming changes to this rule would not. The FMCSA must make this rule effective immediately in order to ensure that its purpose is achieved. We would point out that because the new part 40 was published over seven months ago, affected parties have had ample time to prepare to implement the changes it makes and to which this amendment conforms the FMCSA's regulation.

Owner-Operators

Many of the comments received focused on the inherent problems that arise in regards to controlled substances and alcohol testing for owner-operators. The regulations require self-employed owner-operators to join consortiums in order to meet the requirements of part 382. Most of the comments addressed the role of a service agent in relation to owner-operators. Section 40.355(f) permits service agents to act as intermediaries in the transmission of substance abuse professional (SAP) reports to an owner-operator or other self-employed individual. Section 40.355(h) states that service agents may make decisions to test an owner-operator based upon reasonable suspicion, post-accident, return-to-duty, and follow-up determination criteria. Section 40.355(j) permits service agents to determine that an owner-operator has refused a drug or alcohol test, but only if authorized by a DOT agency regulation..

Many service agents believe that they should be permitted, with the owner-operator's consent, to serve as the designated employer representative (DER) for the purpose of drug and alcohol compliance.

This is an area of great concern to the FMCSA. We are exploring ways of dealing with this problem. For example, in section 226 of the Motor Carrier Safety Improvement Act (MCSIA) of 1999, Congress required the Secretary to conduct a study of the feasibility and merits of requiring medical review officers or employers to report to the State that issued the driver's commercial driver's license (CDL) all verified positive controlled substances test results for any driver subject to controlled substances testing in 49 CFR part 382. The study would also consider the feasibility of requiring all prospective employers, before hiring any driver, to query the State that issued the CDL on whether the State has any record of a verified positive drug test on that driver. Currently there are drivers who are found to have positive drug and/or alcohol test results who quit a job after testing positive. They may or may not receive any counseling or treatment and simply go to another motor carrier/employer without any record of the positive drug or alcohol test result. The motor carrier industry has expressed interest in having a database that would house drug and alcohol test results. The safety benefit of having records of positive drug and/or alcohol tests would be in the ability to identify these drivers who are safety risks to themselves and to the public.

In carrying out the study, Congress requires an assessment on identifying methods for safeguarding the confidentiality of verified drug test results. In addition, the study shall examine the costs, benefits, and safety impacts of requiring States to maintain records of verified positive drug test results; and whether a process should be established to allow drivers to correct errors in their records and to expunge information from their records after a reasonable period of time. A notice soliciting public comment on this study was published in the **Federal Register** on July 9, 2001 (66 FR 35825).

We hope the results of this report will help significantly in addressing the issues relative to owner-operators. We recognize that the drug and alcohol program is a deterrent program and that it does not offer 100 percent guarantees that employers and employee alike will adhere to the requirements outlined in the regulations.

We received various comments that suggested C/TPAs be allowed to report positive test results on owner-operators to the FMCSA. To date, we have not allowed this practice. The FMCSA believes to the extent possible, all employers should be treated similarly regardless of size in order to promote uniformity in the program. Employers are only required to report drug and alcohol test results if they have been requested by FMCSA to submit their annual calendar year summaries. The FMCSA does not support the idea of C/TPAs reporting positive test results on owner-operators. We believe that reporting positive test results for owner-operators will not improve compliance or enforcement efforts. We reached this conclusion because a positive test result in and of itself does not indicate non-compliance with the regulations. Non-compliance only occurs when the evidence suggests that an employer allowed a driver to operate a CMV without adhering to the referral, evaluation, and treatment and return to duty testing requirements after testing positive for alcohol or a controlled substance. Additionally, an argument can be made that all aspects of the Federal Motor Carrier Safety Regulations (FMCSRs) should be strengthened to ensure owner-operators comply with the various requirements in the safety regulations. However, the FMCSA has no plausible data that suggest the problems regarding owner-operators are so great that we should establish specific requirements that target this class of employers. The FMCSA remains confident the safety systems currently in place will continue to allow us to focus our resources on problem employers to ensure corrective actions are taken to resolve problems that may arise.

Section-by-Section Discussion

The following discussion addresses the comments received on the NPRM on a section-by-section basis. Sections not specifically discussed below generated no comments and, consequently, have been adopted without further modification.

Subpart A—General

Section 382.103 Applicability

Two comments were received regarding the exceptions in section 382.103(d). Specifically, 382.103(d)(1) states that employers subject to the Federal Transit Administration's (FTA) drug and alcohol testing rules are not subject to part 382. However, although section 382.103(d)(1) references the requirements of 49 CFR parts 653 and 654, the FTA has recodified its drug and alcohol testing requirements in part 655. The FMCSA has amended the final rule to reference the correct part.

Section 382.107 Definitions

Actual Knowledge

Most comments were favorable and praised the fact that we placed the definition of actual knowledge in the regulatory text. However, the comments

suggested this section should be removed from Subpart B—Prohibitions because the definition of actual knowledge is not a prohibition. In response, we have removed this section from subpart B and placed it in section 382.107.

One comment voiced concern that including the ''employer's direct observation'' within the definition of actual knowledge contradicts the requirements for reasonable suspicion testing. The commenter suggested inserting language stating, ''direct observation as used in this definition does not include reasonable suspicion testing.''

Direct observation, for purposes of this definition, refers to observation of actual drug and alcohol use rather than observation of behavior or physical characteristics that indicate that the driver may be under the influence of drugs or alcohol. We have adopted the commenter's request to modify the definition to distinguish between actual knowledge and the reasonable suspicion testing requirements.

Another comment described a scenario where a driver received a traffic citation for driving a CMV while under the influence of alcohol or controlled substances. The commenter noted that part 40 states that only a violation of DOT rules triggers a SAP evaluation and questioned whether a driver is subject to a SAP evaluation if the driver is cited while driving a commercial motor vehicle. Subpart B of part 382 states that no employer having actual knowledge that a driver has tested positive for an alcohol or controlled substances test shall permit the driver to perform safety-sensitive functions. Actual knowledge ''includes'' knowledge that the driver has received a traffic citation for driving a CMV while under the influence of alcohol or controlled substances. A CMV driver who receives a traffic citation while in a CMV is considered to have violated subpart B. In this case, the employee is subject to the referral, treatment, and evaluation requirements.

Driver

Comments regarding the definition of a driver suggested the language is inconsistent with the new employer definition and proposed that the definition be modified to delete the following reference shown in quotation marks: ''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.'' We concur with the comments and have modified the definition to remove the language in question for consistency.

Employer

Comments were received regarding the definition of employer as it relates to an owner-operator. The comments suggested that language in the revised definition of the word ''employer'' which references an individual who is self-employed is confusing and can be misconstrued. The definition of employer in section 382.107 was modified to correspond with the definition in revised part 40. Employer is defined as a person or entity employing one or more employees (including an individual who is self-employed) that is subject to DOT agency regulations requiring compliance with this part. The term, as used in these regulations, refers to the entity responsible for overall implementation of DOT drug and alcohol program requirements, as well as those individuals employed by the entity who take personnel action resulting from violations of this part and any applicable DOT agency regulation. Service agents are not employers for the purpose of this part.

In spite of the change in terminology, we do not believe that the part 40 definition intended to change the circumstances under which a motor carrier is responsible for compliance with part 382 by self-employed individuals whose CMV operations it directs or controls. In published regulatory guidance, we have stated that ''an owner-operator may act as both an employer and a driver at certain times, or as a driver for another employer at certain times depending on contractual arrangements and operational structure'' (62 FR 16384), and that owner-operators who are not leased to motor carriers must belong to a consortium for random testing purposes (62 FR 16387). A carrier that uses owner-operators is not responsible for ensuring the owner-operator's compliance with part 382 unless it can be shown that the primary carrier has control of the owner-operator's operation of his or her CMV.

A motor carrier is not automatically responsible for an owner-operator's compliance with part 382 simply because the parties have entered into an agreement or subcontract to provide transportation services. However, inasmuch as our owner-operator leasing regulations, at 49 CFR § 376.12(c), require authorized carrier lessees to have exclusive possession, control and use of the equipment during the term of the lease, we consider an owner-operator operating a CMV under such a lease to be under the lessee carrier's control and direction for purposes of part 382 compliance. In the absence of a lease subject to part 376, there are other activities which may indicate whether a motor carrier controls or directs self-employed individuals including, but not limited to (1) establishing work schedules, (2) providing the origin, destination and/or routes for trips, (3) establishing worksite procedures, or (4) determining what drivers shall do as work progresses or assignments change. However, we decline to establish a bright line rule defining what constitutes sufficient control and direction in every case, as that determination depends on consideration of the totality of circumstances, which may vary among carriers.

Refuse To Submit

A commenter stated the definition used in part 382 is inconsistent with the definition used in part 40 and suggested that part 382 defer to part 40. The commenter stated that part 382's definition of ''refusal to submit'' does not incorporate the entire refusal to submit definition in part 40. In response, we have modified the definition in part 382 to be consistent with part 40 and have retained the definition in part 382 so that the employer and employee clearly understand what constitutes a refusal to submit. Another commenter was concerned that certain employee actions that could be considered a refusal to test may fall outside of the parameters outlined in this definition. The commenter suggested that we should maintain the previously existing language in part 382 which reads ''engaging in conduct that clearly obstructs the testing process'' and use the language as a deterrent to employees engaging in such conduct. We believe the definition in part 40, which we are adopting in these rules, satisfactorily addresses the concern of the commenter by ensuring that any employee who fails to cooperate with any part of the testing process could be in violation of the regulation by refusing to submit to drug or alcohol testing.

Section 382.113 Requirement for Notice

One commenter suggested that we clarify that employers must give notice to their drivers that an alcohol or controlled substances test is required by part 382 prior to each test, rather than providing a general notice. We have already published an interpretation to that effect and, for clarification purposes, have inserted the word

''each'' in the regulatory text for this section.

Section 382.115 Starting Date for Testing Programs

The starting date for testing programs has been modified to reflect that all previously codified implementation dates have elapsed. The implementation dates for large foreign employers and small foreign employers have been removed. This section now requires all motor carriers, both domestic and foreign, to implement the testing program requirements when they begin operating commercial motor vehicles in the United States.

Section 382.117 Public Interest Exclusion

This section has been included to ensure consistency with 49 CFR part 40, subpart R. In an attempt to protect the public interest, and transportation employers and employees, the Department incorporated the public interest exclusion (PIE) into its regulations. The FMCSA has included this section to inform motor carriers subject to the controlled substances and alcohol testing regulations that they may not use a service agent who has had a PIE issued against it. The Department uses public interest exclusions to exclude service agents who are in serious noncompliance with the drug and alcohol testing regulations from participating in DOT's drug and alcohol testing program.

Section 382.119 Stand-Down Waiver Provision

This section has been added to implement the stand-down waiver provision contained in 49 CFR part 40. Section 40.21 maintains the departmental policy of prohibiting employers from standing an employee down, that is, removing the employee from safety-sensitive service after the medical review officer (MRO) has received a laboratory report of either a confirmed positive test result, adulterated test result, or substituted test result before the result has been verified by the MRO. The new section 40.21(d) authorizes each Administrator (or his or her designee) to waive this prohibition if doing so would effectively enhance safety while protecting employee fairness and confidentiality. Therefore, the new section 382.119 stand-down waiver provision outlines the procedures for applying for a waiver to the FMCSA. The FMCSA would review petitions for a waiver and decide to grant or deny the petition based on the requirements established in section 40.21.

We received a comment stating that we should strengthen the language in the preamble as it relates to sections 40.21 and 382.119. In response, we have further clarified in the rule text that an employer is prohibited from standing employees down, except as consistent with the waiver provisions contained in section 40.21.

The FMCSA intends to grant waivers only to employers who present a sound factual basis for their request and have in place a number of provisions to protect employees' legitimate interests. The FMCSA has the authority to grant or deny a stand-down petition and will make a case-by-case decision about the merits of a stand-down petition with respect to each company that applies for a waiver.

Section 382.121 Employee Admission of Alcohol and Controlled Substances Use

This section appeared in the NPRM as section 382.219. It has been moved from subpart B to subpart A because it is more in the nature of a general regulatory requirement as opposed to a prohibition.

A number of commenters requested clarification concerning issues raised by this section. The common issues centered around five areas. The first area of concern was whether the self-admission program is a voluntary program. The intent of this section is to allow employers to establish programs that permit employees to self-identify drug use or alcohol abuse without DOT consequences. The decision whether to establish such a program is voluntary, and is not mandated by this rule. However, if an employer chooses to implement a self-admission program, the employer must ensure the program complies with the requirements of this part.

The second area of concern involves employees who have admitted to having a controlled substance or alcohol problem and want clarification on what is meant by the requirement that the driver make the admission of alcohol misuse or controlled substances use before performing a safety sensitive function. The FMCSA's objective is to deter employees from operating a CMV if they are using a controlled substance or misusing alcohol. If an employer has a self-admission program, the intent of that program is to allow a driver to disclose a problem and not be subject to DOT sanctions. However, the employer's program is not an excuse for an employee to abuse the good faith intent of the program. The goal is to encourage employees to disclose a drug or alcohol problem prior to reporting for duty on any given day. Once an employee has reported for duty and participated in a safety-sensitive function, it will be too late to self-disclose under the provisions of the employer's self-admission program.

The third area of contention seeks a clarification on what criteria are acceptable for employee treatment and evaluation prior to returning to a safety-sensitive function. The FMCSA will require that employers ensure the employee has obtained treatment from a drug and alcohol abuse evaluation expert prior to the employee returning to a safety-sensitive function. The expert can be an employee assistance professional, substance abuse professional, or a qualified drug and alcohol counselor. The criteria for returning to a safety-sensitive function will be determined by sound clinical and established substance abuse standards of care in clinical practice, and utilizing reliable alcohol and drug abuse assessment tools. The evaluations must be conducted face-to-face with the employee and should include a standard psycho-social history; an in-depth drug and alcohol use history (with information regarding onset, duration, frequency, and amount of use; substance(s) of use and choice; emotional and physical characteristics of use; associated health, work, family, personal, and interpersonal problems); and a current evaluation of the employee's mental status. The evaluation should provide a clinical assessment, treatment recommendations, and a treatment plan to be successfully complied with prior to the employee becoming eligible for follow-up evaluation and subsequent return to safety-sensitive functions. The regulatory text has been modified to add two new paragraphs to this section. Section 382.121(b)(4) establishes return-to-duty testing requirements and section 382.121(b)(5) permits employers to incorporate employee monitoring and non-DOT follow-up tests as part of a self-admission program.

The fourth area of concern involves the required action to be taken if an employee refuses to submit to the treatment required under the self-admission program. The FMCSA believes that an employee who has admitted to a problem with drugs or alcohol under the employer's self-admission program must comply with the requirements of the employer's self-admission program. If an employee fails to comply with any part of the program, or fails to obtain the recommended treatment as prescribed by the employee assistance professional, substance abuse professional, or drug and alcohol abuse

counselor, the employee has violated the conditions of the employer's self-admission program and is therefore subject to the provisions of subpart B of part 382. The employer would be required to remove the employee from a safety-sensitive function and comply with the DOT referral, evaluation, and treatment requirements contained in Subpart O of part 40.

The fifth area of concern centers upon what is meant by adverse action. The FMCSA's intent is that the self-admission program not be used as a disciplinary tool, as it would defeat the purpose of encouraging employees to voluntarily seek treatment. Because the program is voluntary, an employer can choose not to have such a program and still abide by DOT requirements. The FMCSA has remained silent on disciplinary actions, hiring/firing decisions, or financial matters. We have been steadfast in insisting that employers establish policies that outline their drug and alcohol program in accordance with 382.601. However, if an employer establishes a self-admission program, it must not take adverse action against an employee who makes a disclosure under the provisions of the self-admission program.

Subpart B—Prohibitions

As noted above, proposed sections 382.217 and 382.219 have been moved to subpart A. None of the other sections in this subpart generated comments and no other modifications have been made.

Subpart C—Tests Required

Section 382.301 Pre-Employment Testing

One comment received on pre-employment alcohol testing expressed concern that it is confusing to include detailed requirements on permissive pre-employment alcohol testing, as it appears to endorse employer pre-employment alcohol testing programs. This section neither endorses nor discourages an employer from conducting pre-employment alcohol testing. It simply requires an employer that chooses to conduct pre-employment alcohol testing to comply with 49 CFR part 40 and the requirements outlined in paragraph (d)(1)–(5) of this section.

Section 382.303 Post-Accident Testing

We proposed to modify this section because it was brought to our attention that post-accident testing procedures were routinely being misinterpreted for requiring post-accident testing for either controlled substances or alcohol, but not both. Consequently, we tried to clarify this section by separating the provisions for alcohol and controlled substances testing into two distinct requirements in the rule text. Most comments that addressed this change were favorable. However, some commenters pointed out that situations exist where law enforcement officers do not give citations at the time of the accident and, in some cases, do so after the time limitations for conducting post-accident tests have expired. The post-accident testing rules state that employers should cease attempts to conduct post-accident tests once the allotted time has expired and document the reason why post-accident tests were not performed. We believe that reinforcing these time constraints enhances understanding of the rule text. As a result, we incorporated the appropriate time limits into sections 382.303(a)(2) and (b)(2). If the law enforcement officer does not issue a citation within the specified time frames, the employer should not attempt to conduct post-accident testing and should proceed with documenting the reason why the test was not performed. If an employer wants to pursue testing under its own program, the employer may conduct non-DOT test accordingly.

In response to a comment seeking clarification of an employer's obligation to test surviving drivers, we have changed the regulatory text of sections 382.303(a) and (b) to require each employer to test each ''of its'' surviving drivers for alcohol and controlled substances following an accident.

As proposed in the NPRM, we have eliminated the outdated reporting requirements that formerly appeared in sections 382.303(b)(2) and (b)(3).

Section 382.305 Random Testing

The NPRM proposed revising this section to require publication of the notice of minimum annual random testing percentage rates only when the rates change. There were several comments that opposed this proposal. Commenters stated the proposal would cause employers to constantly monitor Federal Registers to ensure compliance, imposing a greater regulatory burden on employers and service agents.

The FMCSA considered the potential burden on the industry if the testing rates were only published when changed. Currently, the FMCSA has experienced difficulties in publishing the rates on a timely basis as prescribed in the regulations. This is in large part due to the lack of compliance from the industry in responding to the drug and alcohol surveys needed to determine the appropriate percentage testing rates. Often, the FMCSA has to resubmit survey requests and extend reporting deadlines in order to obtain a valid sample of participants to properly assess the testing rates. As a result, it has been difficult to publish the notice of applicable percentage testing rates prior to the beginning of each calendar year, as required by the regulations. The FMCSA contends that publishing the rates when a change is required will not pose additional burdens upon the industry. In addition to publishing the prospective testing rates in the **Federal Register**, the FMCSA would post them on its Website and provide the information to various industry newsletters, trade magazines, and other relevant publications. There would be ample time for the industry to implement the new testing rates.

In an attempt to make the rules more clear and concise and easier to follow, the FMCSA has separated the specific requirements of sections 382.305(i) and (k) into separate paragraphs. Section 382.305(i)(1) describes the types of methods to be used for selecting drivers for random testing. The requirement is the same as before, but now stands alone. In newly designated section 382.305(i)(2), we require that each driver selected for random testing shall have an equal chance of being tested. This restates the existing requirement, but is intended toclarify that employers must test the drivers selected and may not choose alternate drivers for the purpose of complying with the applicable rates at the expense of ensuring that random testing is conducted properly. Section 382.305(i)(3) has been added to require that drivers be tested during the applicable testing selection periods. Some employers are not testing drivers selected during a testing period because the drivers are not available for testing on a given day, i.e., a pre-determined testing date. Therefore, the employer skips the driver and moves to the next driver on the list. This prevents the driver that was initially selected from having an equal chance of being tested. Most employers are using quarterly testing cycles to conduct their random testing. Therefore, employers should have ample time to ensure that drivers selected during a testing cycle can be tested within that testing cycle. Although events may occur that prohibit a driver from being tested during a testing cycle, we want to ensure that this is the exception, and not the normal practice.

In response to a comment expressing confusion about the meaning of the second sentence of section 382.305(j), we have eliminated the words ''or any DOT alcohol or controlled substances

random testing rule may be calculated for the employer.''

The final section that we modified for clarity is 382.305(k). The newly designated 382.305(k)(1) requires employers to ensure that random testing is unannounced. Correspondingly, 382.305(k)(2) requires that random testing dates be spread apart reasonably throughout the calendar year. Section 382.305(k) was separated into distinct paragraphs to clarify that the employer must address two specific requirements.

Section 382.307 Reasonable Suspicion Testing

A commenter noted that 382.307(f) requires a written record of the observations leading to a controlled substance test and makes a case that documentation should also be required for alcohol testing. The FMCSA agrees with the commenter and has modified this section to require a written record for observations leading to a reasonable suspicion alcohol test.

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

Section 382.401 Retention of Records

Commenters were generally pleased that the laboratory quarterly statistical summaries had been modified to a semi-annual requirement, thus reducing the paperwork burden.

Section 382.413 Inquiries for Alcohol and Controlled Substances Information From Previous Employers

We proposed changing this section by eliminating most of the regulatory text and incorporating the requirements of part 40, subpart B. The FMCSA received one comment stating the changes in this section had no effects on the requirements in part 40; therefore, the commenter was in support of the proposed change.

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

Section 382.507 Penalties

We received one comment proposing that we add ''civil and/or criminal'' to this section to further define the requirements. We agree, and have modified this section accordingly.

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

Section 382.603 Training for Supervisors

We often receive inquiries regarding the need for recurring supervisory training. We received a comment suggesting that this section should be modified to require recurring training. The FMCSA requires that supervisors obtain 60 minutes of training on alcohol misuse and receive an additional 60 minutes of training on controlled substances use. This regulation does not require additional training for supervisors and we do not believe a recurring training requirement is necessary.

Rulemaking Analyses and Notices

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

These final rules have been designated as non-significant under Executive Order 12866 and the Department of Transportation's Regulatory Policies and Procedures. They are non-significant because they merely make changes to conform to the revised 49 CFR part 40, which has already been subject to extensive comment and analysis, or seek to remove obsolete provisions or clarify existing law. The proposed changes would not have any incremental economic impacts. The economic impacts of the underlying part 40 changes were analyzed in connection with the part 40 rulemaking.

Regulatory Flexibility Act

Because this rule has no incremental economic impacts, the FMCSA certifies, under the Regulatory Flexibility Act, that it will not have a significant economic impact on a substantial number of small entities.

Executive Order 13132 (Federalism)

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, dated August 4, 1999. The FMCSA has determined this final rule would not have a substantial direct effect on, or sufficient federalism implications for, the States, nor would it limit the policymaking discretion of the States.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the FMCSA has determined that there are no new requirements for information collection associated with this final rule. All the information collection requirements of part 40 have been analyzed and approved by OMB. This rule would impose no information collection requirements that have not already been reviewed in the context of the part 40 rulemaking, so no further Paperwork Reduction Act review is necessary.

Unfunded Mandates Reform Act

This rule would not impose a Federal mandate resulting in the expenditure by State, local or tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year (2 U.S.C. 1531 *et seq.*).

Executive Order 12988 (Civil Justice Reform)

This action meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Executive Order 13045 (Protection of Children)

We have analyzed this rule under Executive Order 13045, ''Protection of Children from Environmental Health Risks and Safety Risks''. This rule would not be economically significant and would not concern an environmental risk to health or safety that would disproportionately affect children.

Executive Order 12630 (Taking of Private Property)

The FMCSA certifies that this rule has no taking implications under the Fifth Amendment or Executive Order 12630, Governmental Actions and Interference With Constitutionally Protected Property Rights.

Executive Order 12372 (Intergovernmental Review)

The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this program.

National Environmental Policy Act

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

List of Subjects in 49 CFR Part 382

Administrative practice and procedure, Alcohol abuse, Alcohol testing, Drug abuse, Drug testing, Highway safety, Motor carriers, Penalties, Reporting and recordkeeping requirements, Safety, Transportation.

Accordingly, the FMCSA revises part 382 of 49 CFR to read as follows:

PART 382—CONTROLLED SUBSTANCES AND ALCOHOL USE AND TESTING

Subpart A—General

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 1.73.

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 drivers 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(f) of this subchapter do not apply to this part. The employers and drivers identified in § 390.3(f) of this subchapter 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 part 655 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; or

(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 in this section—

Actual knowledge for the purpose of subpart B of this part, means actual knowledge by an employer that a driver has used alcohol or controlled substances based on the employer's direct observation of the employee, information provided by the driver's previous employer(s), a traffic citation for driving a CMV while under the influence of alcohol or controlled substances or an employee's admission of alcohol or controlled substance use, except as provided in § 382.121. Direct observation as used in this definition means observation of alcohol or controlled substances use and does not include observation of employee behavior or physical characteristics sufficient to warrant reasonable suspicion testing under § 382.307.

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 drinking or swallowing of any beverage, liquid 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 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 (49 U.S.C. 5103(b)) and which require the motor vehicle to be placarded under the Hazardous Materials Regulations (49 CFR part 172, subpart F).

Confirmation (or confirmatory) drug test means a second analytical procedure performed on a urine specimen to identify and quantify the presence of a specific drug or drug metabolite.

Confirmation (or confirmatory) validity test means a second test performed on a urine specimen to further support a validity test result.

Confirmed drug test means a confirmation test result received by an MRO from a laboratory.

Consortium/Third party administrator (C/TPA) means a service agent that provides or coordinates one or more drug and/or alcohol testing services to DOT-regulated employers. C/TPAs typically provide or coordinate the provision of a number of such services and perform administrative tasks concerning the operation of the employers' drug and alcohol testing programs. This term includes, but is not limited to, groups of employers who join together to administer, as a single entity, the DOT drug and alcohol testing programs of its members (e.g., having a combined random testing pool). C/TPAs are not ''employers'' for purposes of this part.

Controlled substances mean those substances identified in § 40.85 of this title.

Designated employer representative (DER) is an individual identified by the employer as able to receive communications and test results from service agents and who is authorized to take immediate actions to remove employees from safety-sensitive duties and to make required decisions in the testing and evaluation processes. The individual must be an employee of the company. Service agents cannot serve as DERs.

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, and 655), 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.

Employer means a person or entity employing one or more employees (including an individual who is self-employed) that is subject to DOT agency regulations requiring compliance with this part. The term, as used in this part, means the entity responsible for overall implementation of DOT drug and alcohol program requirements, including individuals employed by the entity who take personnel actions resulting from violations of this part and any applicable DOT agency regulations. Service agents are not employers for the purposes of this part.

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) Fail to appear for any test (except a pre-employment test) within a reasonable time, as determined by the employer, consistent with applicable DOT agency regulations, after being directed to do so by the employer. This includes the failure of an employee (including an owner-operator) to appear for a test when called by a C/TPA (see § 40.61(a) of this title);

(2) Fail to remain at the testing site until the testing process is complete. Provided, that an employee who leaves the testing site before the testing process commences (see § 40.63(c) of this title) a pre-employment test is not deemed to have refused to test;

(3) Fail to provide a urine specimen for any drug test required by this part or DOT agency regulations. Provided, that an employee who does not provide a urine specimen because he or she has left the testing site before the testing process commences (see § 40.63(c) of this title) for a pre-employment test is not deemed to have refused to test;

(4) In the case of a directly observed or monitored collection in a drug test, fails to permit the observation or monitoring of the driver's provision of a specimen (see §§ 40.67(l) and 40.69(g) of this title);

(5) Fail to provide a sufficient amount of urine when directed, and it has been determined, through a required medical evaluation, that there was no adequate medical explanation for the failure (see § 40.193(d)(2) of this title);

(6) Fail or declines to take a second test the employer or collector has directed the driver to take;

(7) Fail to undergo a medical examination or evaluation, as directed by the MRO as part of the verification process, or as directed by the DER under § 40.193(d) of this title. In the case of a pre-employment drug test, the employee is deemed to have refused to test on this basis only if the pre-employment test is conducted following a contingent offer of employment;

(8) Fail to cooperate with any part of the testing process (e.g., refuse to empty

pockets when so directed by the collector, behave in a confrontational way that disrupts the collection process); or

(9) Is reported by the MRO as having a verified adulterated or substituted test result.

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 (or initial test) means:

(1) In drug testing, a test to eliminate ''negative'' urine specimens from further analysis or to identify a specimen that requires additional testing for the presence of drugs.

(2) In alcohol testing, an analytical procedure to determine whether an employee may have a prohibited concentration of alcohol in a breath or saliva specimen.

Stand-down means the practice of temporarily removing an employee from the performance of safety-sensitive functions based only on a report from a laboratory to the MRO of a confirmed positive test for a drug or drug metabolite, an adulterated test, or a substituted test, before the MRO has completed verification of the test results.

Violation rate means the number of drivers (as reported under § 382.305) 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 in 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 each 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) All domestic-domiciled employers must implement the requirements of this part on the date the employer begins commercial motor vehicle operations.

(b) All foreign-domiciled employers must implement the requirements of this part on the date the employer begins commercial motor vehicle operations in the United States.

§ 382.117 Public interest exclusion.

No employer shall use the services of a service agent who is subject to public interest exclusion in accordance with 49 CFR part 40, Subpart R.

§ 382.119 Stand-down waiver provision.

(a) Employers are prohibited from standing employees down, except consistent with a waiver from the Federal Motor Carrier Safety Administration as required under this section.

(b) An employer subject to this part who seeks a waiver from the prohibition against standing down an employee before the MRO has completed the verification process shall follow the procedures in 49 CFR 40.21. The employer must send a written request, which includes all of the information required by that section to the Federal Motor Carrier Safety Administrator (or the Administrator's designee), U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

(c) The final decision whether to grant or deny the application for a waiver will be made by the Administrator or the Administrator's designee.

(d) After a decision is signed by the Administrator or the Administrator's designee, the employer will be sent a copy of the decision, which will include the terms and conditions for the waiver or the reason for denying the application for a waiver.

(e) Questions regarding waiver applications should be directed to the Office of Enforcement and Compliance, Federal Motor Carrier Safety Administration, 400 Seventh Street, SW., Washington, DC 20590. The telephone number is (202) 366–5720.

§ 382.121 Employee admission of alcohol and controlled substances use.

(a) Employees who admit to alcohol misuse or controlled substances use are not subject to the referral, evaluation and treatment requirements of this part and part 40 of this title, provided that:

(1) The admission is in accordance with a written employer-established voluntary self-identification program or policy that meets the requirements of paragraph (b) of this section;

(2) The driver does not self-identify in order to avoid testing under the requirements of this part;

(3) The driver makes the admission of alcohol misuse or controlled substances use prior to performing a safety sensitive function (i.e., prior to reporting for duty); and

(4) The driver does not perform a safety sensitive function until the employer is satisfied that the employee has been evaluated and has successfully completed education or treatment requirements in accordance with the self-identification program guidelines.

(b) A qualified voluntary self-identification program or policy must contain the following elements:

(1) It must prohibit the employer from taking adverse action against an employee making a voluntary admission of alcohol misuse or controlled substances use within the parameters of the program or policy and paragraph (a) of this section;

(2) It must allow the employee sufficient opportunity to seek evaluation, education or treatment to establish control over the employee's drug or alcohol problem;

(3) It must permit the employee to return to safety sensitive duties only upon successful completion of an educational or treatment program, as determined by a drug and alcohol abuse evaluation expert, i.e., employee assistance professional, substance abuse professional, or qualified drug and alcohol counselor;

(4) It must ensure that:

(i) Prior to the employee participating in a safety sensitive function, the employee shall undergo a return to duty test with a result indicating an alcohol concentration of less than 0.02; and/or

(ii) Prior to the employee participating in a safety sensitive function, the employee shall undergo a return to duty controlled substance test with a verified negative test result for controlled substances use; and

(5) It may incorporate employee monitoring and include non-DOT follow-up testing.

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 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, 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 or has adulterated or substituted a test specimen for controlled substances. No employer having actual knowledge that a driver has tested positive or has adulterated or substituted a test specimen 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 controlled substances as a condition prior to being used, unless the employer uses the exception in paragraph (b) of this section. No employer shall allow a driver, who the employer intends to hire or use, to perform safety-sensitive functions unless the employer has received a controlled substances test result from the MRO or C/TPA indicating a verified negative test result for that driver.

(b) 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.

(c)(1) An employer who exercises the exception in paragraph (b) of this section shall contact the 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 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 (c)(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 of this title, the employer shall conduct a pre-employment controlled substances test.

(d) An employer may, but is not required to, conduct pre-employment alcohol testing under this part. If an employer chooses to conduct pre-employment alcohol testing, it must comply with the following requirements:

(1) It must conduct a pre-employment alcohol test before the first performance of safety-sensitive functions by every covered employee (whether a new employee or someone who has transferred to a position involving the performance of safety-sensitive functions).

(2) It must treat all safety-sensitive employees performing safety-sensitive functions the same for the purpose of pre-employment alcohol testing (i.e., it must not test some covered employees and not others).

(3) It must conduct the pre-employment tests after making a contingent offer of employment or transfer, subject to the employee passing the pre-employment alcohol test.

(4) It must conduct all pre-employment alcohol tests using the alcohol testing procedures of 49 CFR part 40 of this title.

(5) It must not allow a covered employee to begin performing safety-sensitive functions unless the result of the employee's test indicates an alcohol concentration of less than 0.04.

§ 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 for each of its surviving drivers:

(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 within 8 hours of the occurrence 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.

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

(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 within thirty-two hours of the occurrence 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.

(c) The following table notes when a post-accident test is required to be conducted by paragraphs (a)(1), (a)(2), (b)(1), and (b)(2) of this section:

TABLE FOR § 382.303(A) AND (B)

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

(d)(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 FMCSA upon request.

(2) *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 FMCSA upon request.

(e) 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.

(f) 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.

(g)(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.

(h) *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 10 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 FMCSA 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. In order to ensure reliability of the data, the FMCSA 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. In the event of a change in the annual percentage rate, the FMCSA Administrator will publish in the **Federal Register** the new 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 in the **Federal Register**.

(d)(1) When the minimum annual percentage rate for random alcohol testing is 25 percent or more, the FMCSA Administrator may lower this rate to 10 percent of all driver positions if the FMCSA 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 FMCSA Administrator may lower this rate to 25 percent of all driver positions if the FMCSA 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 FMCSA 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 FMCSA Administrator will increase the minimum annual percentage rate for random alcohol testing to 50 percent for all driver positions.

(f) The FMCSA 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. In order to ensure reliability of the data, the FMCSA 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. In the event of a change in the annual percentage rate, the FMCSA Administrator will publish in the **Federal Register** the new minimum annual percentage rate for 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 in the **Federal Register**.

(g) When the minimum annual percentage rate for random controlled substances testing is 50 percent, the FMCSA Administrator may lower this rate to 25 percent of all driver positions if the FMCSA 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.

(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 FMCSA Administrator will increase the minimum annual percentage rate for random controlled substances testing to 50 percent of all driver positions.

(i)(1) 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.

(2) Each driver selected for random alcohol and controlled substances testing under the selection process used, shall have an equal chance of being tested each time selections are made.

(3) Each driver selected for testing shall be testing during the selection period.

(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 FMCSA Administrator. If the employer conducts random testing for alcohol and/or controlled substances through a C/TPA, 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 C/TPA who are subject to random alcohol and/or controlled substances testing at the same minimum annual percentage rate under this part.

(k)(1) Each employer shall ensure that random alcohol and controlled substances tests conducted under this part are unannounced.

(2) Each employer shall ensure that the dates for administering random alcohol and controlled substances tests conducted under this part 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. 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) 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.

(3) 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 an alcohol or controlled substances 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 alcohol or controlled substances tests are released, whichever is earlier.

§ 382.309 Return-to-duty testing.

The requirements for return-to-duty testing must be performed in accordance with 49 CFR part 40, Subpart O.

§ 382.311 Follow-up testing.

The requirements for follow-up testing must be performed in accordance with 49 CFR part 40, Subpart O.

Subpart D—Handling of Test Results, Records 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 part 40, subpart G, of this title;

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

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

(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, and

(B) Must obtain as required by § 382.413.

(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 § 40.213(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) Semi-annual laboratory statistical summaries of urinalysis required by § 40.111(a) of this title; and

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

(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 employee's principal place of business within two business days after a request has been made by an authorized representative of the Federal Motor Carrier Safety Administration.

(e) *OMB control number.* (1) 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 2126–0012.

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

§ 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 Motor Carrier Safety Administration to report the employer's annual calendar year summary information, the employer shall prepare and submit the report to the FMCSA 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 FMCSA specifies in its request. The report shall be in the form and manner prescribed by the FMCSA in its request. When the report is submitted to the FMCSA 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 this part;

(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, including those who submitted substituted or adulterated specimens;

(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 part 40, subpart O of this title), 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;

(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, including those who submitted substituted or adulterated specimens;

(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 part 40, subpart O, of this title), 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 C/TPA 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 C/TPA.

§ 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 to the decision maker in a lawsuit, grievance, or administrative proceeding initiated by or on behalf of the individual, and arising from a positive DOT drug or alcohol test or a refusal to test (including, but not limited to, adulterated or substituted test results) 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). Additionally, an employer may disclose information in criminal or civil actions in accordance with § 40.323(a)(2) of this title.

(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 specific written consent as outlined in § 40.321(b) of this title.

§ 382.407 Medical review officer notifications to the employer.

Medical review officers shall report the results of controlled substances tests to employers in accordance with the requirements of part 40, Subpart G, of this title.

§ 382.409 Medical review officer record retention for controlled substances.

(a) A medical review officer or third party administrator 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 or third party administrator 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 or third party administrator, and no medical review officer or third party administrator 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 (c) shall prohibit a medical review officer or third party administrator 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 part 40, Subpart G, of this title.

§ 382.411 Employer notifications.

(a) An employer shall notify a driver of the results of a pre-employment controlled substances 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 employer representative 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 employer representative shall immediately notify the medical review officer that the driver has been notified to contact the medical review officer within 72 hours.

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

Employers shall request alcohol and controlled substances information from previous employers in accordance with the requirements of § 40.25 of this title.

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 part 40, subpart O, of this title. 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 part 40, subpart O, of this title.

§ 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 civil and/or criminal penalty provisions of 49 U.S.C. 521(b). In addition, any employer or driver who violates the requirements of 49 CFR part 40 shall be subject to the civil and/or criminal penalty provisions of 49 U.S.C. 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);

(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 part 40, subpart O, of this title;

(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 co-worker'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. Recurrent training for supervisory personnel is not required.

§ 382.605 Referral, evaluation, and treatment.

The requirements for referral, evaluation, and treatment must be performed in accordance with 49 CFR part 40, Subpart O.

Date Issued: August 8, 2001.

Brian M. McLaughlin,

Associate Administrator for Policy and Program Development.

[FR Doc. 01–20426 Filed 8–16–01; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 571

[Docket No. NHTSA–01–10381]

RIN 2127–AI51

Federal Motor Vehicle Safety Standards: Interior Trunk Release

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

ACTION: Final rule; response to petitions for reconsideration.

SUMMARY: In October 2000, NHTSA published a final rule establishing a new Federal motor vehicle safety standard that will require passenger cars with trunks to be equipped with a release latch inside the trunk compartment. Four organizations filed petitions for reconsideration of this rule.

In response to these petitions, the agency is making several substantive changes to the final rule. It is excluding hatchbacks and station wagons. It is also excluding sub-compartments that are formed within the trunk compartment when a convertible power top folds down into the trunk. The agency is changing the definition of ''trunk lid'' to explicitly exclude the lids of interior storage compartments. The agency is revising the definition of ''trunk compartment'' to include standard equipment in the determination of the size of the trunk compartment. The agency is amending the standard to require that interior trunk releases on passenger cars with front trunk compartments unlatch the primary, but not the secondary, latch if the passenger car is moving when the trunk release is actuated. The agency is providing an additional year of lead-time for passenger cars with front trunk compartments.

The agency is also denying requests: To exclude passenger cars with trunk lids that contact the three-year-old child dummy (used to determine whether a trunk compartment is large enough to be subject to the standard) before latching, or provide those cars with an additional year of lead-time; to require that the ignition be in the ''off'' position for an automatic trunk release system to operate; to require that an automatic trunk release system may unlatch the trunk lid only when a person inside the trunk compartment is moving; and to allow means for temporary disabling of automatic trunk release systems.

Finally, the agency is adding a requirement that manufacturers irrevocably select which compliance option, manual or automatic, they will employ.

DATES: Effective date: The effective date for the amendments in this final rule is September 1, 2001.

Petitions for reconsideration deadline: If you wish to petition for reconsideration of this final rule, you must submit it so that we receive your petition not later than October 1, 2001.

ADDRESSES: Petitions for reconsideration should refer to the docket number and be submitted to: Administrator, Room 5220, National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: For technical and policy questions: Kenneth O. Hardie, Office of Crash Avoidance Standards, NHTSA, 400 Seventh Street,