DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

49 CFR Chapter III

Regulatory Guidance for the Federal Motor Carrier Safety Regulations

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Regulatory guidance.

SUMMARY: This document presents interpretive guidance material for the Federal Motor Carrier Safety Regulations (FMCSRs) now contained in the FHWA's Motor Carrier Regulation Information System (MCREGIS). The FHWA has consolidated previously issued interpretations and regulatory guidance materials and developed concise interpretive guidance in question and answer form for each part of the FMCSRs. These questions and answers are generally applicable to drivers, commercial motor vehicles, and motor carrier operations on a national basis. All prior interpretations and regulatory guidance of the FMCSRs issued previously in the **Federal Register**, as well as FHWA memoranda and letters, may no longer be relied upon as authoritative insofar as they are inconsistent with the guidance published today. Many of the interpretations of the FMCSRs published on November 23, 1977, and the interpretations of the Inspection, Repair, and Maintenance regulations published on July 10, 1980, have been revised. These revisions are reflected in the new questions and answers. This document also includes regulatory guidance issued since November 17, 1993, when the agency last published a collection of such guidance. Future regulatory guidance will be issued within the MCREGIS which will be kept current in the FHWA's Office of Motor Carrier Standards. The MCREGIS will be updated periodically and published in the **Federal Register** so that interested parties may have ready reference to official interpretations and guidance regarding the FMCSRs. This guidance will provide the motor carrier industry with a clearer understanding of the applicability of many of the requirements contained in the FMCSRs in particular situations.

EFFECTIVE DATE: May 4, 1997.

FOR FURTHER INFORMATION CONTACT: Mr. Neill L. Thomas or Mr. Nathan C. Root, Office of Motor Carrier Standards, (202) 366–1790, or Mr. Charles E. Medalen, Office of the Chief Counsel, (202) 366–1354, Federal Highway Administration, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal legal holidays.

SUPPLEMENTARY INFORMATION: This document is an update of the notice of regulatory guidance for the FMCSRs issued by the FHWA November 17, 1993 (58 FR 60734). This notice contains previously issued, revised, and new regulatory guidance pertaining to Title 49, Code of Federal Regulations (CFR), Parts 40, 325, 382, 383, 384, 386, 387, 390 to 393, 395 to 397, and 399 of the FMCSRs. In some instances, old regulatory guidance has been removed. The information published in this document supersedes all previously issued interpretations and regulatory guidance, to the extent they are inconsistent with the guidance published today, including that published on November 23, 1977, at 42 FR 60078, and on July 10, 1980, at 45 FR 46425. To the maximum extent possible, all valid prior opinions have been incorporated into this document. This notice is consistent with the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121, March 29, 1996).

The FHWA issued a final rule on March 8, 1996, which codified most of the regulatory guidance for CDL waivers under § 383.3 (61 FR 9546). Guidance concerning CDL waivers had been issued under § 383.7. From the 1993 Regulatory Guidance notice for § 383.7, only questions 7(a), 8, 9, 10, 16, 17, 21, and 22 still remain. These questions and guidance are now listed as guidance for § 383.3, where the CDL waivers have been codified.

Guidance for question 3 under § 383.5 has been changed to reflect a more expansive version of the same guidance in existence prior to the November 1993 Notice. Guidance for question 2 under § 383.93, as it appeared in the 1993 notice, has been revised to clarify the existing guidance. Guidance for question 1 under § 390.31 has been expanded to include guidance derived from a Final Order issued by the Department (58 FR 62467). Guidance for question 1 of § 391.1 has been changed to remove a reference to part 391 subpart H. Guidance for question 6 under § 391.11 has been moved to § 392.9. Guidance for question 2 under § 391.27 has been removed: violations of size and weight laws are not considered violations of motor vehicle traffic laws. Question 1 for § 391.41 has been changed for clarity. Guidance for question 1 under § 391.43 has been expanded for greater clarity. Guidance for § 392.62 has been moved to § 391.41. Guidance for question 1 of § 393.51, question 1 of § 393.65, question 1 of § 393.75, question 5 of § 393.100, and question 1 of § 393.106 have been amended for clarity. Guidance for question 1 under § 393.95 has been incorporated into the regulations (58 FR 34708) and is therefore removed from this document. Guidance for § 395.1 has been reordered to consecutively follow the paragraphs within the section. Question 15 under § 395.2 was expanded by guidance issued June 11, 1995. Question 20 under § 395.2 has been revised to reflect an interpretation previously issued August 15, 1991, treating the same issue in a more explicit manner. Question 1 under § 397.1 has been changed to more accurately explain who must comply with part 397. The 1994 Regulatory Guidance booklet, which reprinted the interpretations issued in the **Federal Register** in 1993, is available in the public docket on this rulemaking for reference

The FHWA issued an advance notice of proposed rulemaking on November 5, 1996 (61 FR 57252) concerning the hours of service regulations (49 CFR part 395). On page 57258 of the notice, the FHWA erroneously indicated that an interpretation which allowed CMVs to be driven from motels to restaurants in the vicinity as ''off-duty time'' had recently been rescinded. The FHWA intended to rescind *recent* interpretations that describe conditions under which a CMV may be used as a ''personal conveyance'' (issued August 10, 1995), and address the entire issue of personal conveyance through notice and comment rulemaking. Question 8 under § 395.2 has been expanded by guidance issued November 18, 1996, and placed more appropriately under § 395.8 (see § 395.8, question 27). All prior interpretations of personal conveyance are invalid.

Since 1993, new interpretive guidance has been issued for, or existing guidance has been removed from, the following sections:

49 CFR Part 40 §§ 40.3, 40.21, 40.23, 40.25, 40.29, 40.31, 40.33, 40.35, 40.39, 40.69, 40.81, 40.93, Special Topics—Requirements for Random Testing, Special Topics—Procedures for Handling and Processing a Split Specimen

49 CFR Part 382 §§ 382.103, 382.105, 382.107, 382.109, 382.113, 382.115, 382.204, 382.205, 382.213, 382.301, 382.303, 382.305, 382.307, 382.401, 382.403, 382.405, 382.413, 382.501, 382.507, 382.601, 382.603, 382.605, Subpart B—Prohibitions, Special Topics—Responsibility for Payment for Testing, Special Topics—

Multiple Service Providers, Special Topics—Medical Examiners Acting as MRO, Special Topics—Biennial (Periodic) Testing Requirements
49 CFR Part 383 §§ 383.3, 383.5, 383.7, 383.31, 383.71, 383.73, 383.91, 383.93, Special Topics—International
49 CFR Part 384 §§ 384.209, 384.211
49 CFR Part 387 §§ 387.9, 387.15, 387.39
49 CFR Part 390 §§ 390.3, 390.5, 390.15, Special Topics—Serious Pattern of Violations
49 CFR Part 391 §§ 391.1, 391.11, 391.27, 391.41, 391.43, 391.49, 391.51, 391.63
49 CFR Part 392 §§ 392.5, 392.9, 392.62
49 CFR Part 393 §§ 393.11, 393.42, 393.48, 393.51, 393.65, 393.75, 393.89, 393.95, 393.100, 393.106, 393.201
49 CFR Part 395 §§ 395.1, 395.2, 395.8, 395.13, 395.15
49 CFR Part 396 §§ 396.11, 396.17, 396.23

Additional guidance will continue to be published in future issues of the **Federal Register**. The FHWA will be modifying or removing numerous regulations as part of President Clinton's Regulatory Reform Initiative. Many of these changes will have an impact on the regulatory guidance in this document. These changes will be reflected in future issues of the **Federal Register**. Members of the motor carrier industry and other interested parties may access the guidance in this document through the FHWA's Electronic Bulletin Board System (FEBBS) using a microcomputer and modem. The FEBBS is a read-only facility. Access numbers for FEBBS are (202) 366–3764 for the Washington, DC area, or toll-free at (800) 337–3492. The system supports a variety of modem speeds up to 14,400 baud line speeds, and a variety of terminal types and protocols. Modems should be set to 8 data bits, full duplex, and no parity for optimal performance. Once a connection has been established, new users will have to go through a registration process. Instructions are given on the screen. FEBBS is mostly menu-drive and hot keys are indicated with ''< >'' enclosing the hot key. After logging on to FEBBS and arriving at the MAIN MENU, select <C> for Conference; then <M> for Motor Carrier; then either <M> again for MCREGIS Questions and Answers, or <I> for Information (more detailed help).

For Technical Assistance to gain access to FEBBS, contact: FHWA Computer Help Desk, HMS–40, room 4401, 400 Seventh Street, SW, Washington, DC 20590 (202) 366–1120. Specific questions addressing any of the interpretive material published in this document may be directed to the contact persons listed above, the FHWA Regional Offices, or the FHWA Division Office in each State.

For ease of reference, the following listing of acronyms used throughout this document is provided:

Appendix G—The Minimum Periodic Inspection Standards published as an appendix to the Federal Motor Carrier Safety Regulations
BAT—Breath Alcohol Technician
CDL—Commercial Driver's License
CDLIS—Commercial Driver's License Information System
CFR—Code of Federal Regulations
CMV—Commercial Motor Vehicle
CMVSA—Commercial Motor Vehicle Safety Act of 1986
COE—Cab-over-engine truck tractor
C/TPA—Consortium or Third-Party Administrator
CVSA—Commercial Vehicle Safety Alliance
DHHS–SAMHSA—Department of Health and Human Services, Substance Abuse Mental Health Services Administration
DOT—U.S. Department of Transportation
DVIR—Driver Vehicle Inspection Report
DWI—Driving While Intoxicated
EAP—Employee Assistance Program
EPA—U.S. Environmental Protection Agency
FHWA—Federal Highway Administration
FMCSRs—Federal Motor Carrier Safety Regulations
FMVSS—Federal Motor Vehicle Safety Standards (developed and issued by the National Highway Traffic Safety Administration)
FR—Federal Register
FRSI—Farm-Related Service Industries
GCWR—Gross Combination Weight Rating
GVW—Gross Vehicle Weight
GVWR—Gross Vehicle Weight Rating
HM—Hazardous Materials
HMRs—Hazardous Materials Regulations
HMTUSA—Hazardous Materials Transportation Uniform Safety Act of 1990
ICC—Interstate Commerce Commission
Forms MCS–90 and MCS–90B—Endorsements for Motor Carrier Policies of Insurance for Public Liability Under Sections 29 and 30 of the Motor Carrier Act of 1980 issued by an insurer
MCSA—Motor Carrier Safety Act of 1984
MPH—Miles Per Hour
MRO—Medical Review Officer
NDR—National Driver Register
NHTSA—National Highway Traffic Safety Administration within DOT
RDMC—Regional Director of Motor Carriers
SAP—Substance Abuse Professional
SSN—Social Security Number
STAA—Surface Transportation Assistance Act of 1982
STT—Screening Test Technician
U.S.C.—United States Code

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Regulatory Guidance

Part 40—Procedures for Transportation Workplace Drug and Alcohol Testing Programs

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Section 40.3 Definitions

Question 1: May a Doctor of Chiropractic, holding a Certified Addiction Professional degree, serve as an MRO?

Guidance: A Doctor of Chiropractic, holding a Certified Addiction Professional degree, is not considered to be a licensed medical doctor or doctor of osteopathy and, therefore, cannot serve as an MRO.

Question 2: What are the qualifications and responsibilities of the MRO? Are MROs required to be certified?

Guidance: Section 40.3 defines the qualifications for an MRO and § 40.33 specifies the MRO's responsibilities. An MRO is defined as a licensed physician (medical doctor or doctor of osteopathy) responsible for receiving laboratory

results generated by an employer's drug testing program who has knowledge of substance abuse disorders and has appropriate medical training to interpret and evaluate an individual's confirmed positive test result together with his or her medical history and any other relevant biomedical information. An MRO is responsible for reviewing and interpreting confirmed positive test results obtained through the employer's testing program. The DOT does not require any certification of MROs at the present time. However, there are several national professional organizations which provide MRO certification.

Section 40.21 The Drugs

Question 1: Is testing for additional drugs authorized? Must a separate specimen be obtained?

Guidance: Under part 40, an employer must test for the following drugs: marijuana, cocaine, amphetamines, opiates, and phencyclidine. An employer may not test for any other substances *under DOT authority.* Part 40 does not, however, prohibit an employer from testing for other controlled substances *as long as that testing is done under the authority of the employer.*

Employers in the transportation industry who establish a drug testing program that tests beyond the five drugs currently required by part 40 must also make clear to their employees what testing is required by DOT authority and what testing is required by the company. Additionally, employers must ensure that DOT urine specimens are collected in accordance with the provisions outlined in part 40 and that a separate specimen collection process including a separate act of urination is used to obtain specimens for company testing programs.

Question 2: Should labs conduct tests for five (5) drugs even if the drug testing custody and control form fails to indicate what tests are to be performed?

Guidance: Part 40 indicates that DOT agency drug testing programs require that employers test for marijuana, cocaine, opiates, amphetamines, and phencyclidine (§ 40.21). All DOT specimens, therefore, must be tested for the above five categories of drugs even if the accompanying drug testing custody and control form fails to indicate this.

While the DOT does not view this type of collection site error as a fatal flaw, it nevertheless jeopardizes the integrity of the entire collection process and could lead to a challenge and subsequent third party review. These errors should be addressed with the site supervisor in the hope of preventing future mistakes.

Section 40.23 Preparation for Testing

Question 1: On the testing of a split specimen, is it necessary to maintain anonymity of a person, at the laboratory level, when both the primary laboratory and the laboratory testing the split may have fees and could directly bill the employee?

Guidance: Section 40.23(a) addresses mandatory use of the Federal Drug Testing Custody and Control Form in DOT urine collection and testing. This paragraph states, in part, that ''* * * personal identifying information on the donor (other than the social security number or other employee ID number) may not be provided to the laboratory.'' If circumstances arise in which the MRO orders a test of the split specimen, at the request of the employee, no additional identifying information on the employee may be provided to the laboratory that will be testing the split specimen. As directed by § 40.33(f), ''* * * The MRO shall direct, in writing, the laboratory to provide the split specimen to another DHHS-certified laboratory for analysis.'' This request would reference only items contained on the face of the Drug Testing Custody and Control Form (e.g., Specimen Identification No., SSN or Employee ID No., Collection Date, etc.); the MRO would not specify the employee's name. Should a personal check (bearing the employee's name) accompany the request (e.g., a letter from the MRO), the MRO should not make any particular reference linking the split request with the person signing the check. In actuality, the primary laboratory will most likely bill the employer for the cost of sending the split specimen to the split laboratory; the split laboratory will normally require a cashier's check, money order, or an account to be set up (generally by the employer) prior to initiating processing.

Question 2: In a case where an employee is providing a urine specimen *and* a breath test is conducted *at the same time,* may a laboratory receive both the Federal Drug Testing Custody and Control Form (with the specimens for testing) and the employer's copy of the Breath Alcohol Testing Form (with the test results) from the collection site?

Guidance: The DOT provided clarification in its *Guidance on the Role of Consortia and Third-Party Administrators in DOT Drug and Alcohol Testing Programs* published on July 25, 1995 in the **Federal Register** which stated in part ''* * * MROs and BATs must send final individual test results directly to the actual employer as soon as the results are available * * * results may be maintained afterwards by the C/TPA * * * while there is no objection to the MRO or BAT transmitting results simultaneously both to the employer and to the C/TPA, it is not appropriate for the MRO or BAT to send the results only to the C/TPA, which subsequently retransmits them to the employer.''

A laboratory, regardless of what type of arrangement it has with the employer, is prohibited from receiving the employer's copy of the Breath Alcohol Testing Form *together* with the Federal Drug Testing Custody and Control Form(s) which accompany the urine specimen. The breath testing form contains individual identifying information. The DOT rule specifically states that this information may not be provided to a laboratory.

However, a laboratory functioning as a C/TPA may receive the employer's copies of the Federal Drug Testing Custody and Control Form and the employer's copy of the Breath Alcohol Testing Form from the collection site under the following conditions:

a. The employer's copy of the Federal Drug Testing Custody and Control Form (Copy 7) *must not* be included with the laboratory copies (Copies 1 and 2) which accompany the urine specimen.

b. The employer's copies of the Federal Drug Testing Custody and Control Form and the Breath Alcohol Testing Forms *must not* be received by the accession/receiving (testing) section of the laboratory.

These procedures should prevent that portion of the laboratory which conducts the drug analysis from having access to the identity (from the alcohol testing form) of the donor.

The DOT rule requires the BAT immediately to transmit the results to the employer, regardless of what procedures have been established for providing to the employer or the C/TPA, the employer's copy of the breath testing form.

In all instances, it is the employer (not the C/TPA) who designates in writing to the BAT or the BAT's company, who the employer's agent is and the procedures that the employer wants the BAT to use for transmission of data and forms.

Question 3: Is a specific MRO name required in Step 1 on the Federal Drug Testing Custody and Control Form, or may a clinic, hospital, health care organization, or MRO company name appear in the MRO Name and Address area?

Guidance: The DOT has determined that a specific physician's name and address *is required* in Step 1 of the

Federal Drug Testing Custody and Control Form as opposed to only a generic clinic, health care organization, or company name. The name should be that of a responsible physician rather than an administrative staff member or other company official. However, a company name may appear as part of the address, provided it is followed by or includes the MRO's name. Collection sites send copies of the MRO's custody and control form to this address, and drug testing laboratories use it to submit laboratory results to the MRO. The use of the MRO name will preclude potential compromises of confidentiality. In many cases, where only the name of a clinic, hospital or company appears on the mailing address, the laboratory results are sent to the clinic or hospital and are either circulated through numerous departments or, in some cases, never reach the MRO.

The physician named in Step 1 may be the MRO who will actually perform the verification review or the name of a physician within the practice (company), but not necessarily the one who will actually perform the verification (in those cases where there is more than one MRO working in that office or company).

Question 4: Is the collector's signature required on the chain of custody section of drug testing custody and control form?

Guidance: The collector's signature is required in both the ''received by'' and the ''released by'' spaces in Step 6 of the drug testing custody and control form. Part 40 Appendix A specifies that the form shall provide both ''received by'' and ''released by'' entries of the collector's signature and printed names (see the instructions on the back of Appendix A, copy 7, Step 6. Combining these entries is not authorized by the rule.

Question 5: May the drug testing custody and control form be used for non-DOT tests?

Guidance: Employee drug testing conducted under local, State, or private authority must not be represented to the employee as being Federally mandated or required. The use of the custody and control form required under 49 CFR part 40 conveys that the testing is being conducted in accordance with applicable Federal regulations. A ''look-alike'' form that deletes references to DOT, Part 40, and Federal requirements may be used for non-DOT testing.

Question 6: Is collection of blood authorized? May blood specimens be supported by the drug testing custody and control form? May blood test results be used to take DOT-required administrative actions?

Guidance: The collection of blood for alcohol or drug testing under DOT authority is not authorized. Therefore, while a company, under its own authority, may require a blood specimen to be collected and tested for drugs and/or alcohol under certain circumstances, it is not acceptable for the company-required blood specimen to be supported by the same custody and control form that accompanies a DOT-required urine specimen.

If a urine specimen for a DOT reasonable suspicion test is rejected for testing at the laboratory, results from a blood specimen collected in accordance with a company policy could be used to take action against an employee depending upon the drug testing policy established by that company. Under no circumstances, however, may the results of the blood test be used to take administrative or disciplinary action against an employee using DOT authority, for the reasons cited above.

Question 7: Is the collector required to sign or initial the shipping container label?

Guidance: Sections 40.23(c) and 40.25(h) describe the requirements for packaging the specimen and custody and control form in preparation for shipment to the laboratory. Section 40.23(c) states that the shipping container must be sealed and initialed to prevent undetected tampering. Section 40.25(h) states that the collection site person shall sign and enter the date specimens were sealed in the shipping containers for shipment. The DOT has determined that initialing and dating the seal by the collection site person is sufficient to meet the intent of the regulation.

Question 8: How and to whom are copies of drug testing custody and control forms distributed?

Guidance: The historically acceptable procedures for handling the custody and control form have been as follows: Parts 1, 2, and 3 must accompany the urine specimen in a sealed shipping container to the laboratory; Part 3 (Split Specimen) must be retained by the laboratory in case the split specimen must be sent to a second laboratory; Part 4 must be sent from the collection site directly to the physician (MRO); Part 5 is given to the donor at the collection site; Part 6 is retained by the collection site personnel; and Part 7 is provided to the employer representative. It is unacceptable for the MRO copy of the form to accompany the urine specimen to the laboratory. Clearly the intent of the regulation is for the urine specimen and Parts 1, 2, and 3 of the Federal custody and control form to be sent directly from the collection site to the laboratory, and the MRO (Part 4) copy of the custody and control form to be sent directly to the physician. There is no need to maintain a chain of custody tracking the handling of the sealed shipping container. In fact, the August 19, 1994 **Federal Register** (59 FR 42996) expressly notes this fact in changes to § 40.25 to clarify this point.

Question 9: Should a specimen be rejected by a lab if the donor-identifying information is erroneously provided?

Guidance: The intent of the DOT procedures is to limit the amount of personal identifying information that is recorded on the specimen bottle and those copies of the drug testing custody and control form that accompany the specimen bottle to the laboratory. The rule only requires that a donor initial the specimen bottle label/seal and provide an SSN or employee identification number to be recorded on the laboratory copies of the drug testing custody and control form. The rule does not allow for additional personal information to be provided to the laboratory. In fact, the intent was to prevent the donor's identity from being *routinely* disclosed to the laboratory.

It was never intended, however, that the *inadvertent or erroneous* disclosure of the donor's identity (i.e., name or signature) on the specimen bottle or laboratory copies of the drug testing custody and control form be a justification, in and of itself, for a laboratory to reject the specimen for testing or for an MRO to invalidate the test results. Furthermore, all accessioning procedures at laboratories certified by the DHHS–SAMHSA requires that specimens be identified by specimen identification number, donor identification number, and laboratory accession number only. Even though laboratory accessioning personnel may have access to a donor's name in these cases, the analytical personnel will not. Therefore, the donor's identity is still protected during the actual testing process.

Question 10: Must the collector provide a real name on the collector certification section of drug testing custody and control form?

Guidance: The intent of the DOT drug testing custody and control form is to provide complete documentation of the specimen collection process including the name of the collector and the location of the collection site. The collection site person who receives the urine specimen from the donor should be identified by name on the block specifying ''collector's name.'' Use of a ''code name,'' collector I.D. number, or

other substitution for the collector's name is not acceptable. The collector's name should be the same as that appearing on the identification each collector is required to make available to the donor, if so requested.

Section 40.25 Specimen Collection Procedures

Question 1: Under what circumstances must an employee be observed while submitting a urine sample? Under what circumstances is observation an optional choice of the employer?

Guidance: A direct-observation collection is *mandatory* only when the collection site person observes behavior clearly indicating an attempt to tamper or when the specimen temperature is outside the normal range and an oral body temperature reading is refused or is inconsistent with the specimen temperature.

The collection site person would contact a higher-level supervisor, or a designated employer representative, to relay the circumstances which require the observed collection. The supervisor or representative would review the circumstances for compliance with Part 40 requirements, and finding such, would approve in advance the decision to do the observed collection. The collection site person—of the same gender as the employee—would immediately conduct the observed collection.

The *employer has the discretion* to require the employee to provide a specimen under direct-observation collection procedures for the return-to-duty test and any subsequent follow-up tests. The employer also has the authority to require an employee to provide a specimen under direct-observation procedures when the specific gravity *and* creatinine content of the employee's previous sample are below the regulatory standards. In the latter case, the MRO would receive the test results from the laboratory (i.e., positive, negative, or in the case where no immunoassay result is reported) along with information that the specimen had a specific gravity of less than 1.003 *and* creatinine concentration less than 0.2g/L. The MRO would inform the employer of the laboratory findings. The employer would make the decision to do a direct-observation collection on the employee on the next DOT test that the employee is required to take.

It would be the employer's responsibility to notify the employee of the decision to exercise the option to do the collection(s) under the direct-observation procedure. The employer would authorize the collection site person to do the observed collection(s), as applicable. Directly observed collections are always performed by a collector of the same gender as the employee.

Question 2: In a ''shy bladder'' situation, if the physician conducting the medical examination is not the MRO, may that physician report his/her conclusions directly to the employer? Also, if a company has a corporate or contract physician, may that physician perform the examination?

Guidance: The rule does not preclude the MRO from performing this medical evaluation if the MRO has the expertise and is willing to conduct this evaluation. The DOT's requirement that the MRO review the results of the medical evaluation is related to the fact that the MRO may have additional information on the circumstances surrounding the attempt to provide the urine specimen, other pertinent information regarding the collection process, problems or lack of problems during previous collections, etc.

All reporting to the employer regarding the final determination on the results of a urine specimen is accomplished by the MRO. This includes the findings and conclusions of the medical examination.

If a company has a physician on the staff or has a contract physician, this individual may perform the medical examination if he/she has the required expertise. The company should ensure that the MRO is informed of this arrangement and makes the referral to that particular physician. However, the requirement still exists to submit the findings of the evaluation to the MRO, who then reports his/her conclusions to the employer. A company may also designate its staff physician or contract physician as the MRO if that individual meets the regulatory criteria.

Question 3: In a ''shy bladder'' scenario, may an employer require an individual to provide a specimen within three hours, and if the individual doesn't provide a specimen, is the inability considered to be a refusal?

Guidance: The individual must provide the specimen within three hours. The inability to provide does not automatically mean that the individual being tested will be deemed to have refused testing. The required medical evaluation would produce the information which the MRO will use to draw final conclusions. If the finding by the MRO is that there was no legitimate medical reason for the individual's inability to provide the sufficient quantity of urine, then this finding constitutes a refusal. A refusal to provide a specimen has the same sanctions under the DOT rule as a positive test.

Once it has been determined that the employee has violated a DOT rule (e.g., verified positive test, refusal), the employee must be immediately removed from performing any safety-sensitive duties. The employee may not again perform safety-sensitive duties until he or she has met the conditions of the applicable operating administration (e.g., Federal Highway Administration) rule for return to duty. The DOT rule does not address employer policies on subsequent personnel actions.

Question 4: In a ''shy bladder'' scenario, does DOT consider a company's ordering the donor back to work prior to completion of the time and fluid intake period an obstruction of the collection process? Or, is the donor's failure to complete the collection, after having been compelled by the employer to leave the collection site, considered a refusal to test if no medical reason is provided for donor's failure to provide the required amount of urine?

Guidance: A company's ordering the employee to return to work prior to the expiration of the time period, with no provisions for personal observation or for ensuring the employee's return to the collection site, appears to be in clear violation of DOT rules. The employer is not authorized to discontinue a test or to conduct a subsequent collection at a later time in lieu of a current collection. The employer could order the employee back to work while waiting for the three-hour period to elapse, but the employer must ensure that the employee drinks the prescribed amount of liquids, is under observation during the entire period of time, and returns to the collection site prior to the expiration of the three hours.

It should be noted that because the donor was not afforded the full time period during which to provide a specimen, the donor's inability to provide the required amount of urine does not constitute a refusal to test but is the result of employer hindrance with the collection process. The MRO should advise the employer of its violation of 49 CFR part 40 and propose corrective action accordingly (i.e., establish correct policy). In addition, the MRO may report the violation to the appropriate DOT operating administration or may request that the DOT Drug Enforcement and Program Compliance office report the matter. The company is required to maintain, in accordance with the appropriate governing regulation, a record of this ''test'' for review by a DOT operating administration in the event of an audit.

Question 5: Is a current and valid picture/photo identification required before a urine collection takes place or may a physical description verification by telephone by an employer representative suffice?

Guidance: The rule does not address if the photo identification is current nor does it prohibit telephonic verification of identity. The intent of the rule was that if the employee did not have proper identification, an employer's representative would be on site to identify that employee. There is no requirement that the representative sign any type of form, although procedures should be established to ensure the true identity of the representative.

If telephonic identification is used, specific procedures should be in place to ensure that the employer representative is fully identified to the collection site person and that reasonable procedures exist to ensure that the employer's representative can truly identify the employee. If the employee's identification cannot be established to the satisfaction of the collection site person (or based on the collection site protocol for identification), the collection should not be completed. Additionally, any identification procedure allowed under specific DOT operating administration's rules is also permissible.

Exception: If the donor is self-employed and has no photo identification, the collector should notify the collection site supervisor and record in the remarks section that positive identification is not available. The donor must be asked to provide *two* items of identification bearing his/her signature. Proceed with the collection. When the donor signs the certification statement, compare the donor's signature with signatures on the identification presented. If the signatures appear consistent, continue the collection process. If the signature does not match signatures on the identification presented, make an additional note in remarks section stating that ''signature identification is unconfirmed'' and continue the collection process.

When this (self-employed) donor does not have appropriate identification this should *not* be considered a refusal. The collector should remember that his/her primary function is to obtain a specimen that can be tested for drugs under DOT rules. The collector should provide sufficient information in the remarks section to help the MRO make a determination regarding the merit of the collection process or for the employer to determine if there are systemic problems or other shortfalls in its policy/program.

Question 6: May a urine specimen collection site be constructed to have two or more collectors or must each collection ''station'' be physically separated by a barrier or wall to ensure modesty and privacy of the donor?

Guidance: In specifying privacy and security of the collection site, the DOT was concerned that the act of urination by a donor would have maximum privacy under most circumstances and that the specimen sample would be under sufficient security to prevent any allegation of tampering. Additionally, the regulatory requirement exists that the collection site person have only one donor under his/her supervision at any one time. In other words, one collection site person may not process the paperwork or collect a specimen from more than one donor at a time. There are collection sites, particularly at health clinics, that may have ''stations'' or booths which are partially partitioned from each other or from the rest of the clinic. The collection site person usually gathers relevant information from the donor at the booth, completes the necessary paperwork, and escorts the donor to a toilet area where the donor can provide a specimen in privacy.

The rule does not permit unauthorized personnel in any part of the designated collection site where urine specimens are collected or stored. In the multiple booth situation, another collection site person would not be considered an unauthorized person. However, when other donors are present in a waiting area or another donor is being processed by another collection site person, the integrity of the specimen must be ensured. During the collection process, the collection site person must ensure that the specimen is under his or her direct control from the time the specimen is provided by the donor to the time it is sealed in the mailer. Additionally, regardless of the physical configuration of the collection site, there is the expectation that the donor will have some semblance of aural and visual privacy. For example, a donor may tell the collector that he/she is suffering from a particular illness, is on medication, or that he/she has an indwelling catheter, and wonder if this will impact on the test results. The donor should be able to make these statements without embarrassment or concern that another individual (i.e., another collector or donor) may overhear or see what the donor is providing to the collector.

Question 7: May donors be required to remove all clothing, wear a hospital gown, or empty pockets?

Guidance: The DOT's procedures for transportation workplace drug testing programs contained in § 40.25(f)(4) states: ''The collection site person shall ask the individual to remove any *unnecessary outer garments* such as a coat or jacket that might conceal items or substances that could be used to tamper with or adulterate the individual's urine specimen. The collection site person shall ensure that all personal belongings such as a purse or briefcase remain with the outer garments. The individual may retain his or her wallet.'' (Emphasis added.)

While it is clear that the rule does allow for collectors to request that donors remove unnecessary outer garments in order to ensure the integrity of the collection, the rule does not authorize collectors to require or request that donors remove other garments as well, e.g. shirts, blouses, pants, or skirts, thereby ensuring a modicum of privacy and reducing potential embarrassment. Additionally, donors may not be required or requested to wear hospital or examination gowns when providing a specimen.

There is an exception to the above. The DOT has determined that if a urine specimen is being collected as part of a DOT-required physical examination (i.e., § 391.43 Medical examination; certificate of physical examination) in which an individual is required to disrobe and wear a hospital or examination gown, the collection may be completed with the donor so attired.

It should also be noted that if a collection site person, during the course of a collection procedure, notices an unusual indicator that an individual may attempt to tamper with or adulterate a specimen as evidenced by a bulging or overstuffed pocket for example, the collector may request that the donor empty his or her pockets, display the items, and explain the need for them during the collection. This procedure may be done only when there is a suspicion that an individual may be about to tamper with or adulterate a specimen. Otherwise, requiring donors to empty their pockets as a common practice is also prohibited under the current rules.

Question 8: Please clarify donor identifying information requirements on the drug testing custody and control form.

Guidance: In accordance with § 40.25(f)(20), the donor/employee is required to initial the specimen bottle seal/label. The employee/donor's identification number or SSN is to be

provided on the custody and control form and shall not be included on the specimen bottle seal/label. Other donor identification (i.e., name, signature) should not be provided on the copies of the custody and control form that accompany the specimen to the laboratory. However, disclosure of the donor's name/signature does not, in and of itself, require that the specimen be rejected for testing by the laboratory.

Question 9: Is a consent form authorized?

Guidance: Section 40.25(f)(22)(ii) states, ''When specified by DOT agency regulation or required by the collection site (other than an employer site) or by the laboratory, the employee may be required to sign a consent or release form authorizing the collection of the specimen, analysis of the specimen for designated controlled substances, and release of the results to the employer.'' The purpose of this statement is to allow collection sites or laboratories, of their own accord, or when required by a DOT agency regulation, to utilize consent or release of information forms for the collection, analysis, and release of specimen results to the employer. § 40.25(f)(22)(ii) continues, ''The employee may not be required to waive liability with respect to negligence on the part of any person participating in the collection, handling, or analysis of the specimen or to indemnify any person for the negligence of others.'' The intent of this statement is to prevent anyone who participates in either the collection, handling, or analysis of the specimen from trying to require the employee to exempt them from liability arising from their actions. This pertains not only to collection site and laboratory personnel, but also to MROs, their staff, if applicable, and to the employer. Failure of an employee to sign the consent form does not equal a refusal to test and the test must proceed in all circumstances. The DOT also intends that this interpretation shall be followed for alcohol testing requirements.

Question 10: Is the donor's presence required when the collector prepares a specimen for shipment?

Guidance: The tamper-proof seal placed on the specimen bottle must be affixed in the presence of the donor, but the regulation is clear that the donor does not have to be present when the specimens are prepared for shipment to the laboratory. The collection site person is the only person required to sign or initial the seal on the shipment container. In fact, the rule allows the use of shipment containers that accommodate multiple specimen bottles. It would be impossible to have more than one donor witness the sealing of their specimen bottles in one shipment container when collectors are required by rule to deal with only one donor at a time.

Question 11: In a post-accident situation requiring both a company test and a DOT test, which should be conducted first?

Guidance: In a post-accident situation in which drug/alcohol testing is required under company authority or policy, and DOT-mandated tests are required, the DOT tests must be conducted first.

Question 12: Please address the issue of low specific gravity/creatinine.

Guidance: Laboratory reports. The laboratory may report in the laboratory remarks section of the custody and control form that specific gravity is less than 1.003 and creatinine is less than 0.2 grams per liter. Actual values of specific gravity and creatinine should not be reported.

Medical Review Officer Interpretations MROs shall report the laboratory findings (positive, negative or not tested (canceled)) to the employer and that specific gravity *and* creatinine are below 1.003 and 0.2 g/l, respectively.

Employer Actions The employer shall not require the driver to submit to another specimen collection under FHWA authority. A dilute specimen does not constitute reasonable suspicion of controlled substance use. The employer *may* require the next specimen, required by DOT regulations, submitted by the driver to be collected under direct observation.

Question 13: What should donors do if specimen collection procedures are not being followed?

Guidance: Under DOT agency regulations, the employer is responsible for ensuring that specimens are collected in accordance with part 40. If the employees subject to DOT-mandated drug testing regulations believe that part 40 collection procedures are not being followed, they should so inform the employer. If the employer does not respond to the complaints and take appropriate corrective actions, the employees may seek resolution of their complaints through a DOT agency that has regulatory authority over the employer.

Question 14: Is failure to check the temperature box on the drug testing custody and control form considered a fatal flaw?

Guidance: In accordance with § 40.29, the collector is to check the temperature of the specimen to ensure the integrity of the specimen. The fact that it was checked should be marked appropriately on the custody and control form. Inadvertently *not* marking the temperature-taken box, in and of itself, does not constitute a ''fatal flaw'' in the DOT chain of custody process.

Question 15: What are the collection site requirements?

Guidance: Section 40.25(a)–(b) outlines employer requirements for designating and maintaining the security of collection sites. To summarize the contents of this section, a collection site must at a minimum provide: (1) An enclosure where privacy for urination is possible; (2) A toilet for urination (unless a single use, disposable container is used with sufficient capacity to contain the entire void); (3) A source of water for washing hands; (4) A suitable writing surface for completing the required paperwork (custody and control form); and (5) Restricted access so that the site is secure during collection.

Any facility, including a physician's office, that meets the minimum requirements may be used as a collection site for DOT-required drug tests. It is the employer's responsibility to not only designate and ensure that collection sites meet these minimum requirements, but also to ensure that collection site personnel at these locations are properly trained and/or qualified to collect urine specimens in accordance with the provisions outlined in 49 CFR part 40.

Question 16: Are middle names required on the drug testing custody and control form?

Guidance: Section 40.25(a) specifies that the custody and control form used to document DOT mandated drug testing shall provide space for collector, donor, and laboratory certifying scientist names and signatures. The regulation does *not* specify that a middle name or initial must be used. The intent of the regulation is to provide for the identification of the person(s) signing the certification statements. The use of supplemental instructions on the custody and control form (e.g. further defining name to include first, middle, last), does not impact on the security, identification, or integrity of the urine specimen and should not be used as a basis for invalidating the specimen results.

Section 40.29 Laboratory Analysis Procedures

Question 1: May a laboratory provide ''one-stop shopping'' to an employer by including the services of a MRO or a list of MROs (which the laboratory does not employ) from which the employer or client could select a specific MRO?

Guidance: Under current DOT interpretation of the rule, a laboratory

would be prohibited from supplying a limited list of MROs from which the employer would select individuals that would provide MRO services. In this circumstance, there is a clear financial advantage to the MROs who appear on the laboratory list, since this makes them among the candidates for use by that laboratory's clients. This advantage could readily be viewed as providing these MROs an incentive to maintain a good relationship with the laboratory, so as to ensure that they remain on the list, which is in their financial interest. The existence of this incentive could, in turn, call into question the objectivity and independence of the MROs in the review of the test results and the reporting to relevant officials of any potential errors in test results or procedures. The regulatory prohibition is not limited to actual, demonstrated conflict of interest. It includes matters that ''may be construed as a potential conflict of interest''. The DOT position is that the above described laboratory arrangement presents the appearance of a conflict of interest.

Question 2: May a laboratory continue to submit monthly summary reports to the employer/consortia or is the laboratory limited to quarterly reports only?

Guidance: The DOT changed the requirement for a monthly statistical report to a quarterly report to provide cost savings to the industry without substantially decreasing the effectiveness of the report. Although the original regulatory language appears to require reporting only on a quarterly basis, the intent of this change was to require, *as a minimum,* a quarterly report, but not to limit those employers or laboratories who desired monthly reports. Monthly reports may be generated provided the reports do not contain personal identifying information or other data from which it is reasonably likely that information about individuals' tests can be readily inferred. If a laboratory provides monthly reports, there is no requirement to additionally provide a quarterly aggregate report. Likewise, the regulatory requirement to prevent individual identifying information remains for both monthly and quarterly reports. If a report is withheld for this reason, the laboratory will notify the employer.

Question 3: Explain the requirements for quarterly lab summaries.

Guidance: Section 40.29(g)(6) requires each laboratory to ''provide the employer an aggregate quarterly statistical summary of urinalysis testing of the employer's employees. Laboratories may provide the report to a consortium provided the laboratory provides employer-specific data and the consortium forwards the employer-specific data to the respective employers within 14 days of receipt of the laboratory report.''

The above reference also contains the following information: ''Quarterly reports shall not contain personal identifying information or other data from which it is reasonably likely that information about individuals' tests can be readily inferred. If necessary, in order to prevent disclosure of such data, the laboratory shall not send a report until data are sufficiently aggregated to make such an inference unlikely. In any quarter in which a report is withheld for this reason, or because no testing was conducted, the laboratory shall so inform the consortium/employer in writing.''

As referred to above, the DOT has held that during a quarter in which there was ''no activity'' the laboratory is still required to inform the employer, in writing, of the negative activity. This provision is necessary to assist Federal auditors during inspections of employers that are required by an Operating Administration to conduct a drug testing program. Unless the auditor has a complete quarter-by-quarter history and record of drug testing results from a laboratory, there is nothing to preclude an employer, for example, from destroying a quarterly summary that does contain a confirmed positive result and claim that there simply was no activity during the month. This, of course, would allow the company to continue to use that individual in a safety-sensitive function with no evidence that there was a confirmed positive drug test result. In effect, the negative lab report serves as an important check and balance used by auditors in their compliance and enforcement efforts.

Question 4: May labs transmit results to an MRO by faxing Part 2 of drug testing custody and control form?

Guidance: Laboratory test results may be provided to the MRO via facsimile transmission of the custody and control form. However, the ''true copy'' of the custody and control form must also be sent to the MRO. The purpose of permitting facsimile transmission of the custody and control form is to facilitate a quicker administrative review of test results by the MRO. The MRO may complete verification of a negative result based on the facsimile of the custody and control form; however, the verification of a positive result cannot be completed until the ''true copy'' of the custody and control form bearing the original signature of the laboratory's certifying scientist is received by the MRO.

Question 5: May a lab certifying scientist use a ''signature stamp''?

Guidance: In accordance with § 40.29(g)(5), ''in the case of a positive report for drug use [the drug testing custody and control form (part 2)], shall be signed (after the required certification block) by the individual responsible for day-to-day management of the drug testing laboratory or the individual responsible for attesting to the validity of the test reports.* * *''

In accordance with § 40.29(g)(1), ''Before any test result is reported (the results of initial tests, confirmatory tests, or quality control data), it shall be reviewed and the test certified as an accurate report by the responsible individual.'' The DOT's opinion is that negative reports must be reviewed and the test certified as an accurate report by the laboratory's responsible individual. This certification must be accomplished by a signature for positive test results while a signature stamp with initials for negative test results on the custody and control form may be used.

Question 6: Does the regulation require lab ''batch reporting'' of drug test results?

Guidance: The laboratory may report results to the MRO as soon as the results have been reviewed by the appropriate laboratory personnel. There is no requirement for ''batch reporting,'' or reporting simultaneously all results for specimens received in a given shipment. Nor does part 40 require ''batch reporting'' of results by the MRO to the employer. Batch reporting, which causes the transmission of negative results before positive results have been verified, may create a problem by leading an employer to make premature assumptions about a particular test result. However, the rule provides no authority for an employer to take any adverse action against an employee whose test result is pending. The differences in reporting time of test results may be due to a variety of circumstances including laboratory processing time, MRO administrative review processes for negatives, or the verification process for positives.

Question 7: Is a lab required to send results directly to the MRO?

Guidance: Yes. Section 40.29(g) requires confidentiality and limited access to laboratory test results, and the laboratory must send *only to the MRO* the original or a certified true copy of the drug testing custody and control form (Part 2). Furthermore, § 40.33(b)(3) states: ''The role of the MRO is to review and interpret confirmed positive test results obtained through the employer's

testing program.'' Section 40.33(c)(2) states: ''The MRO shall contact the individual directly, on a confidential basis, to determine whether the employee wishes to discuss the test result. A staff person under the MRO's supervision may make the initial contact, and a medically licensed or certified staff person may gather information from the employee.''

Given the above, it should be clear that the intent of the current regulations is that all laboratory test results be sent directly to the MRO. When the test result is positive, the MRO must make the verification determination; when the test result is negative, the MRO may delegate to a person *under his/her direct supervision* the administrative review of the negative results.

Question 8: Does the regulation allow the MRO to disclose to the employer the drug(s) involved in a positive test?

Guidance: Section 40.29(g)(3) requires MROs to report to employers whether the drug test was positive or negative. It also *allows* the MRO to report the drug(s) for which there was a positive test.

Section 40.31 Quality Assurance and Quality Control

Question 1: Please explain the timing of blind performance test specimens.

Guidance: Section 40.31(d) delineates employer and consortia blind performance test requirements. The intent of these requirements is to test the laboratory's ability to correctly identify positive and negative samples. These samples are to be unidentifiable as blind samples by the laboratory.

The regulation does not specify the distribution or the timing of the submissions except to stipulate in § 40.31(d)(2) that each ''employer shall submit three blind performance test specimens for each 100 employee specimens it submits, up to a maximum of 100 blind performance test specimens submitted per quarter.'' This is the basic requirement. The optimum program would be to evenly space the submission of blind samples throughout the period.

Section 40.33 Reporting and Review of Results

Question 1: Does the MRO have to personally conduct the verification of a positive drug test result?

Guidance: The DOT requirement that the MRO be a licensed physician with knowledge of substance abuse disorders (§ 40.33(b)(1)) indicates the importance that the DOT placed on this function. The regulatory requirement is that prior to making a final decision to verify a positive test result, the individual is given an opportunity to discuss the test result directly with the MRO. An appropriately medically trained staff person (e.g., a nurse with substance abuse training) may gather information from an employee about the employee's explanation for a positive result. In every case, however, the MRO must talk to the employee before making the decision to confirm a laboratory positive as a verified positive drug test result. No staff person may make this decision for the MRO.

Question 2: Does the DOT drug testing rule permit the use of a second and different MRO to whom the results of the split specimen can be sent by the second laboratory?

Guidance: There is no appropriate role for a second and different MRO to whom the results of the split specimen would be submitted. The DOT's interpretation is that this procedure is not permissible under the DOT rule.

The laboratory results of the split specimen are for the presence of the drug or drug metabolite and the rule text does not authorize a ''second'' verification process of the split results. Therefore, the use of a second MRO does not add to the overall verification process required by the rule. Additionally, if the split specimen fails to reconfirm or is not available for testing, it is the responsibility of the (original) MRO to cancel the test and provide notification of this cancellation to the appropriate parties. It would be inappropriate for the second MRO to cancel the test nor would the second MRO have the appropriate information to accomplish the cancellation notification.

Question 3: If the MRO determines that a donor has a legitimate prescription for Marinol, would this be reported as a negative result? What if in the MRO's opinion, the use of the prescribed medication may compromise safety?

Guidance: Section 40.33(a)(1) states in part, that ''* * * A positive test result does not automatically identify an employee/applicant as having used drugs in violation of a DOT agency regulation. An individual with a detailed knowledge of possible alternate medical explanations is essential to the review of the results.'' The DOT's interpretation has been that if the MRO can determine that the donor has a legitimate prescription, the positive result would be ''down graded'' to a negative. This would apply to any legitimately prescribed drug, including Marinol. If the MRO determines that the use of that particular prescription/substance may compromise safety in the performance of a transportation related safety sensitive function (whether or not the substance is prescribed for the appropriate condition), the MRO should discuss this with the donor's (prescribing) physician. The donor's physician may decide to prescribe an alternate substance that may not have adverse effects on the donor's performance of his/her duties.

Section 40.33(i) states in part, that ''(1) The MRO may disclose such [medical] information to the employer, a DOT agency * * * or a physician responsible for determining the medical qualification of the employee * * * if * * * (iii) * * * the information indicates that continued performance by the employee * * * could pose a significant safety risk. (2) Before obtaining medical information from the employee as part of the verification process, the MRO shall inform the employee that information may be disclosed to third parties as provided in this paragraph * * *''. If after talking to the prescribing physician, the MRO still determines that a safety risk exists, he/she may inform the employer, DOT, or the employer's physician of the existence of a medical condition that could preclude the donor from performing a safety sensitive function. However, the MRO must ensure that he/she informed the employee prior to the verification process that this (medical) information may be provided to a third party.

Question 4: Is there such a thing as an MRO management company or does the law specify that a single certified MRO review each lab result from tested employees and personally transmit the test results to the specific employer? Does the law require that the owner of an MRO management company be a physician? Do negative test results have to be handled by a physician MRO, or may the results be handled by the MRO management company administrators?

Guidance: While part 40 makes no mention of an ''MRO management company'' the regulations do address the role of the C/TPA. The rules do not permit the C/TPA to receive drug testing results directly from either the laboratory or from the MRO. The laboratory results are reported directly to the MRO, and the MRO results are reported directly to the employer.

Through interpretation of § 40.33(a), the DOT has permitted the administrative review to be conducted by *staff* persons working *under the direct supervision* of the MRO. While allowing this delegation of MRO responsibility, the DOT never intended nor can it condone a practice which allows for MROs to appoint outside ''agents'' to perform this review. The

MRO should have a direct supervisory relationship with the reviewer and not simply have access to the ''process'' of the administrative review. Conversely, a C/TPA cannot contract for the MRO to review only positive drug test results, leaving the review or processing of negatives to the C/TPA.

Question 5: May a C/TPA act as an agent of the MRO for the purpose of conducting administrative reviews of all negative urine drug test results and receive drug testing results directly from the laboratory?

Guidance: No. The DOT never intended nor can it condone a practice which allows MROs to appoint outside agents to conduct such reviews. Additionally, § 40.29(g) requires that *all* drug test results be transmitted by the laboratory directly to the MRO. Transmission to the MRO means to the MRO's place of business and not to a subsidiary or contractor for the MRO. There is also the requirement that, regardless of what forms/records a consortium or third party administrator maintains for an employer, notification of all positive results will be performed by the MRO and not through or by anyone else.

Question 6: What are the MRO's review requirements during the verification process when the MRO copy of the custody and control form is not available?

Guidance: The MRO may complete the verification process if the MRO's copy of the custody and control form is not available for review. The MRO needs to review a copy of the chain of custody which contains the employee's signature. A copy may be obtained from the employee, the collector, or the employer. These copies have the employee's signature.

The preamble to part 40 (Medical Officer Issues) published on December 1, 1989 requires the MRO not to declare a verified positive result until he or she receives the hard copy of the original chain of custody form from the laboratory. This is because, prior to determining that the test is a verified positive, the MRO verifies the identifying information and the facial completeness of the chain of custody (i.e., determines that, on the face of the document, all the sign-offs are in the right places).

Question 7: Does the MRO have to verify each drug when the laboratory reports a multiple positive drug test results for the same individual under the DOT drug and alcohol rule?

Guidance: Section 40.33(a) states ''Medical review officer shall review confirmed positive results.'' The DOT drug rule requires analysis of urine for five drugs. Multiple drug positive results for the same specimen (donor) require the MRO to verify each reported drug to determine if there is a medical explanation for each positive result. Additionally, the DOT drug and alcohol management information system requests information on *multiple* drug results (for each individual). The intent is to capture this information.

However, in the preemployment process, it would appear that with the employer's consent, the MRO may report a verified positive result for one drug out of several laboratory positive results (for one individual) without continuing to seek verification for the other drugs reported by the laboratory. The MRO may need to use his/her professional judgement to determine if verification of the other drugs may be accomplished expeditiously. Regardless of the number of drugs that are reported as verified for one individual, that individual cannot perform safety-sensitive work until he/she provides a urine specimen that is negative.

In the case where the MRO verifies and reports only one drug, the other drugs should *not* be reported to the employer if they have not been verified. The MRO may document these unverified positive results in his/her records as unverified and unreported results.

Question 8: Is a company obligated to pay for the processing of a split urine specimen when the primary specimen is positive? Does a company have to pay for testing the split specimen if it was a pre-employment test?

Guidance: The split sample procedure is a statutory requirement of the Omnibus Transportation Employee Testing Act of 1991 for employers in the aviation, highway, rail, and transit industries, as well as the DOT rules. Section 40.3 states, in part: ''Employee. An individual designated in a DOT agency regulation as subject to drug testing and/or alcohol testing. As used in this part ''employee'' includes an applicant for employment.'' And § 40.33(f) states, in part: ''If the employee requests an analysis of the split specimen within 72 hours of having been informed of a verified positive test, the MRO shall direct, in writing, the laboratory to provided the split specimen to another DHHS-certified laboratory for analysis.'' In other words, if the applicant or employee makes the request within this time period, the split specimen must be tested. This is true of all types of tests, including pre-employment.

The employer is responsible for ensuring that the test occurs, including taking responsibility for paying for it. The employer may arrange with the applicant or employee for reimbursement, but in *no* case does the refusal by the applicant or employee to contribute to the cost of the test excuse the employer from ensuring that the test takes place. A previous agreement negotiated between the employee and employer or a labor-management agreement that specifies payment arrangements, could dictate the ultimate payment source.

The split specimen testing process, initiated by the MRO's written request, should not be delayed while awaiting payment to come from the applicant or employee. If there is a dispute, the fall-back position would be for the employer to be billed (by either the primary laboratory for sending the split specimen, or the receiving laboratory for testing the split specimen) and then for the employer to settle the matter after-the-fact with the applicant or employee.

Question 9: When may the MRO notify an employer of a positive drug test result?

Guidance: The MRO may not notify the employer of a positive test until he/she has *verified* the test as positive. Verification requires that the MRO review the chain of custody documentation, contact the employee, review any documentation of a legitimate medical explanation for a positive test, and determine that the positive resulted from unauthorized use of a controlled substance. The MRO is not required to delay verification pending the outcome of the reanalysis or the split specimen. Only upon verification shall the MRO notify the employer of the positive result, and the employer shall then remove the employee from the safety-sensitive duties/position. Once having received notice of a verified positive result from the MRO, the employer shall not delay removal of the employee from safety-sensitive duties pending the outcome of the reanalysis or the split specimen.

Question 10: Must the MRO report to employers be in writing

Guidance: Part 40 does not require the MRO to provide written notification to employers of verified drug test results. The FHWA, however, does require MROs to forward a signed, written notification to the employer within three business days of the completion of the MRO's review for both positive and negative results. A legible photocopy of the fourth copy of the *Federal Drug Testing Custody and Control Form* required by part 40 appendix A may be used to make the signed, written notification to the employer for all test results (positive, negative, canceled, etc.), provided that the controlled

substance(s) verified as positive, and the MRO's signature, shall be legibly noted in the remarks section of step 8 of the form completed by the MRO.

Question 11: May an MRO use part 2 of drug testing custody and control form to report negative results?

Guidance: No. The MRO should not provide the employer with a copy of the custody and control form bearing the results from the laboratory. Often, positive results reported by the laboratory are determined by the MRO to be explained by authorized medical use of a substance, and thus are verified and reported negative. Employers are not permitted to have the laboratory information, only the MRO's determination.

Question 12: Please explain an MRO's review of negative results.

Guidance: The duties of the MRO with respect to reviewing negative urine drug test results are strictly administrative, but must include a review of the drug testing custody and control form prior to releasing the results to the employer. This is necessary to substantiate that the reported negative result is correctly identified with the donor and to ensure that the form is complete and sufficient on its face (§ 40.33(a) (1–2)). While the DOT, through interpretation, has permitted the administrative review to be conducted by a staff person working under the direct supervision of the MRO, the requirement to conduct the review in accordance with current regulations remains in effect.

Question 13: Please explain MRO verification of opiate positives.

Guidance: The MRO verification process of any positive laboratory report requires several specific actions. These include a review of the drug testing custody and control form for completeness and accuracy, notifying and providing the donor an opportunity to discuss the results, reviewing the donor's medical history and medical records, and investigating other biomedical factors that may account for the positive result.

The above actions are especially important when the MRO is confronted with an opiate positive, as the result may be caused by the use of a legally prescribed medication or an ingested substance, such as poppy seeds. Using the above steps as a guide, the MRO first ensures that the drug testing custody and control form is complete and accurate on its face. Next, the MRO notifies the donor of the positive test result and offers the individual an opportunity to discuss the results. If the donor expressly declines the opportunity to discuss the test results, or fails to contact the MRO within five days after being notified by a designated employer representative to do so, the MRO may verify the laboratory test result as a positive. This includes results that are positive for opiates.

If the donor accepts the opportunity to discuss the results with the MRO, the MRO must review any medical records provided by the donor to determine if the opiate positive resulted from a legally prescribed medication. If the donor is unable to produce medical evidence and admits to unauthorized use of an opiate, the MRO should verify the result as a positive. However, if the donor is unable to produce medical evidence, denies unauthorized use of an opiate, or denies using another individual's medication, the MRO *must determine that there is clinical evidence—in addition to the urine test—of unauthorized use of any opium, opiate, or opium derivative before verifying the test result as positive.* Examples of clinical evidence include recent needle tracks or behavioral or psychological signs of acute opiate intoxication or withdrawal. If a laboratory confirms the presence of 6-acetylmorphine (6–AM) through a GC/MS test, no clinical evidence is necessary, since 6–AM is a direct deacetylated metabolite of heroin, detectable within minutes, and its presence proves the recent use of heroin. If 6–AM is not found, clinical evidence will be required to verify a positive opiate result whether or not the donor claims poppy seed ingestion as a defense for the positive result.

The verification process for an opiate positive result can be a very complex and very difficult task for the MRO and should be undertaken with a great deal of caution.

Question 14: Please clarify the MRO/lab relationship.

Guidance: Section 40.29(n)(6) states: ''The laboratory shall not enter into any relationship with an employer's MRO that may be construed as a potential conflict of interest or derive any financial benefit by having an employer use a specific MRO.'' Section 40.33(b)(2) further states: ''The MRO shall not be an employee of the laboratory conducting the drug test unless the laboratory establishes a clear separation of functions to prevent any appearance of a conflict of interest, including assuring that the MRO has no responsibility for, and is not supervised by or the supervisor of, any persons who have responsibility for the drug testing or quality control operations of the laboratory.'' Therefore, the rule prohibits an employer-employee or contract relationship between the laboratory and the MRO, and it is obvious that there must be a clear separation of functions between the MRO and the laboratory.

Question 15: In what situations may an MRO reopen a verification of a drug test?

Guidance: Section 40.33 specifically allows the reopening of an MRO's verification of a confirmed positive drug test in only two situations. When a donor provides documentation that serious illness, injury, or other circumstances unavoidably prevented the employee from timely contacting the MRO, the MRO may conclude from the documentation that there is a legitimate explanation for the employee's failure to contact the MRO (see § 40.33(c)(6)). The second situation is if neither the employer nor the MRO is able to contact the employee and the MRO declares the test result to be positive, and the employee *subsequently* provides documentation that serious illness, injury, or other circumstances unavoidably prevented the employee from contacting the MRO in a timely manner, the MRO may conclude from the documentation that there is a legitimate explanation for the employee's failure to contact the MRO (see § 40.33(g)).

Section 40.35 Protection of Employee Records

Question 1: Please clarify release of alcohol and drug test results with or without written authorization.

Guidance: The rules governing release of employee test results (§§ 40.35 and 40.81) permit disclosure to persons other than the employee, employer, or decision-maker in a lawsuit or grievance action, only with the written authorization of the employee. The authorization must be an informed consent, in that the employee fully understands the intended use and disclosure of the test results. Each entity's request for test results would require a separate authorization and must be specific. Specific items including the purpose of the release, specific test(s) to be released, the party(ies) to whom these specific results will be released must be included.

Question 2: May employees be required to sign release forms for third-party disclosures?

Guidance: The intent of (§§ 40.29(g)(3), 40.35 and 40.37) is to ensure confidentiality of employee drug test results. Employees cannot be required to sign release or consent statements for third-party disclosure as part of the drug testing process. Information concerning the drug test may be released by the employer in

unemployment or workmen's compensation proceedings, or other situations in which the employee is seeking a benefit or challenges an action taken by the employer as a result of a drug test.

It should be noted, however, that employers are required to request written authorization from CMV drivers to obtain past verified positive drug test results, refusals to test, and alcohol concentrations of 0.04 or greater over the past 2 years of driving a CMV (§§ 382.405(f) and 382.413(a)).

Section 40.39 Use of DHHS-Certified Laboratories

Question 1: May additional testing be conducted on a DOT specimen reported by the laboratory as negative?

Guidance: Section 2.4(e)(3) of the Department of Health and Human Service's Mandatory Guidelines for Federal Workplace Drug Testing Programs states, ''Specimens that test negative on all initial immunoassay tests shall be reported as negative. No further testing of those negative specimens for drugs is permitted and the specimens shall be either discarded or pooled for use in the laboratory's internal quality control program.''

The DOT requires use of DHHS-certified laboratories to do all DOT-required testing. Therefore, the above DHHS requirement is a DOT requirement as well. When a DOT specimen is reported as negative by the laboratory, no additional testing of the specimen is permissible.

Question 2: Why use DHHS-certified laboratories?

Guidance: The DOT requires that all drug testing mandated under the provisions of its drug testing rules must be conducted in DHHS-certified laboratories. The DOT decision to use DHHS-certified laboratories for drug testing is mandated by statute (Omnibus Transportation Employee Testing Act of 1991). The DHHS standards for certification and the proficiency testing requirements comprise the most stringent laboratory accreditation program available in analytical forensic toxicology for urine drug testing. Additionally, the DHHS certification program provides for standardization of laboratory methodology and procedures, ensuring equal treatment of all specimens analyzed. Finally, the use of DHHS-certified laboratories provides a standard that has withstood the test of legal challenges in Federal drug testing.

Section 40.69 Inability To Provide an Adequate Amount of Breath

Question 1: If an employee is unable to provide an amount of breath sufficient to permit a valid breath test, but does not allege that such inability is due to a medical condition, what actions must follow?

Guidance: The rules prohibit a covered employee from refusing to submit to required alcohol tests. Post-accident, random, reasonable suspicion, or follow-up tests must be taken when those tests are required. Section 40.69 sets forth the procedures to be followed when an employee is unable to provide an adequate amount of breath for *any* reason. These procedures apply to the employee who claims a particular medical condition is creating the inability to provide breath; they also apply to the employee who claims to have no idea as to the cause of the inability, or to the employee who says nothing at all.

It is imperative that the employee understands that during the required follow-on medical evaluation, the physician will concentrate solely on finding a medical condition to explain the inability. Paragraphs (d)(2)(i) and (d)(2)(ii) of § 40.69 dictate that the *only* acceptable reason for an employee to be unable to provide an adequate amount of breath for testing is a medical condition. If a medical condition is not found, the employee will be deemed to have refused testing.

Section 40.81 Availability and Disclosure of Alcohol Testing Information About Individual Employees

Question 1: If there is one or more BAT working for a company, does the BAT supervisor have the right to review (have access to) the Breath Alcohol Testing Forms for purposes of supervisory control? Likewise, may this form be passed along by the BAT or the employer to billing personnel?

Guidance: The rule holds employers responsible for implementation of the *total* program. This includes confidentiality of information and maintenance of records (including BAT and MRO records). Individuals such as supervisors of BATs and billing personnel with a ''need to know'' are considered authorized company personnel and are permitted to have access to breath alcohol testing documentation. Access to information would be for a specific purpose and necessary for the employer's successful implementation of the program. This would include review of the forms for completion, obtaining specific billing data from the forms, filing the forms, etc. Individuals with access to these forms are under the same regulatory requirements for maintaining confidentiality of these records as are employers and BATs. Breath Alcohol Testing Forms should not be duplicated for purposes of supervision or billing as this would create additional ''data bases'' or files with potential problems of disclosure of confidential information. Access to these records by unauthorized personnel would be difficult to control. This does not preclude use of input forms filled out by the BAT or other personnel that would contain appropriate billing data and which could be maintained as backup documentation.

When the employer uses a C/TPA to act as the agent of the employer, then that C/TPA could have access to the Breath Alcohol Testing Form or the authority to obtain a copy of the form. Likewise, the employer's copy of the form may be submitted to the C/TPA by the employer or by the BAT when the employer has directed the BAT in writing to do so. In all cases of positive results at or above the .02 BAC level, the employer must be notified immediately, *and* prior to notification of the C/TPA. Positive results may *not* be sent from the BAT to the C/TPA and then submitted to the employer.

Section 40.93 The Screening Test Technician

Question 1: May an STT become trained to proficiency on an evidential breath tester (EBT) for the purposes of conducting screening tests on that device?

Guidance: No. Section 40.93 only authorizes the STT to operate an alcohol screening device (ASD); it does not authorize the STT to operate an EBT. This was by design. Likewise, the STT training manual does not address the use of an EBT by the STT. This is in contrast with the training manual for the BAT which concentrates solely on the EBT; in fact, an entire unit in the BAT training manual is devoted to ''EBT Methodology.'' Additionally, the proficiency requirements for the ASD, as contained in the STT manual, are different from the proficiency requirements for the EBT, as contained in the BAT manual.

When an EBT is used to conduct a DOT alcohol test, the operator must be a BAT. An STT is limited to conducting only the alcohol screening test, and the only instrument the STT may use is an ASD.

Special Topics—Requirements for Random Testing

Question 1: Please explain the random testing rates for alcohol and drugs.

Guidance: The DOT drug testing rules require employers initially to conduct

random drug testing at a rate equal to 50 percent of their covered employees. Thus, if an employer has 100 covered employees, the employer must administer 50 random drug tests. The number of random tests is determined by the covered employee population, while the number of employees randomly tested varies depending on the random selection process. It is possible that 50 random tests may be conducted on less than 50 employees, some employees being tested two or more times due to the random selection of donors. The highway industry may be allowed to reduce the annual rate to 25 percent in calendar year 1998 based on the highway industry's performance in calendar years 1995 and 1996. The rate may be lowered to 25 percent based on two years of data reported to FHWA indicating a positive rate of less than 1.0 percent use of drugs by CMV drivers. The rate may increase again, however, to 50 percent based on one year of data reported to FHWA indicating a positive rate equal to or greater than 1.0 percent use of drugs by CMV drivers.

The alcohol testing rules require employers initially conduct random testing at a rate equal to 25 percent of their covered employees. Thus, if an employer has 100 covered employees, the employer must administer 25 random drug tests. The number of random tests is determined by the covered employee population, while the number of employees randomly tested varies depending on the random selection process. It is possible that 25 random tests may be conducted on less than 25 employees, some employees being tested two or more times due to the random selection of donors. The highway industry may be allowed to reduce the annual rate to 10 percent in calendar year 1999 based on the highway industry's performance in calendar years 1996 and 1997. The rate may be lowered to 10 percent based on two years of data reported to FHWA indicating a violation rate of less than 0.5 percent use of alcohol by CMV drivers. The highway industry would be required to raise the annual rate to 50 percent in calendar year 1998 or later years based on the highway industry's performance in calendar year 1996 or later years. The rate may increase to 50 percent based on one year of data reported to FHWA indicating a violation rate of is equal to or greater than 1.0 percent use of alcohol by CMV drivers.

Question 2: Is use of a consortium to conduct random testing allowed?

Guidance: The FHWA requires individual owner-operators to be in a random testing pool of two or more persons. This, in effect, requires an individual owner-operator to be in a consortium for random testing purposes. The DOT allows and even advocates the use of a consortium to assist smaller companies in complying with the alcohol and drug testing regulations. While it is true that in a combined employer pool, some employers will have a higher percentage of their employees selected for testing than others in a given 12-month period, over time this will even out. Additionally, the DOT believes that the deterrent effect of random drug testing remains as powerful in a combined employers pool as it would be in a stand-alone single company pool. With this in mind, the DOT has determined that combining employer pools within a consortium meets the spirit and intent of the alcohol and drug testing regulations and is, therefore, permissible.

Question 3: May an employer combine DOT and non-DOT random pools?

Guidance: No. While it would seem to be advantageous for an employer to combine all employees into one random testing pool, this move could dilute the number of DOT-covered employees who would actually be tested. For example, in a pool that is comprised of 50 DOT-covered employees and 50 non-DOT-covered employees, and assuming a testing rate of 50 percent, it is possible that no DOT-covered employees would be tested (100 employees, 50 tests, all 50 tests conducted on non-DOT employees). The likelihood of this happening, albeit remote, is possible under a truly random scheme. On the other hand, keeping the above two classes of employees in separate pools *assures* that at least 25 of the tests conducted by the company will be conducted on DOT-covered employees. It is this assurance that ultimately mandates that DOT-covered employees remain in separate random pools.

Question 4: May an employer combine employees covered by different operating administration rules into a single pool for random testing?

Guidance: The DOT has determined that it is, indeed, permissible for an employer to combine covered employees from different operating administrations (e.g. Research and Special Programs Administration, Coast Guard, and FHWA), into a single selection pool for the purpose of conducting random drug testing under DOT authority. When exercising this option, however, the employer must ensure that the random testing rate is at least equal to the highest rate required by each of the operating administrations.

Question 5: Is it permissible to separate union and non-union employees, both covered by DOT, into stand-alone pools?

Guidance: The DOT has determined that it is permissible for an employer to separate union and non-union employees into separate pools for the purpose of random drug testing. If using this approach, the employer must ensure that employees from each pool are tested at equal rates. For example, if pool ''A'' consists of 50 non-union employees and pool ''B'' consists of 300 union employees, the employer must ensure, if testing is done at a 50 percent rate, that 25 tests are conducted annually on employees from pool ''A'' and that 150 tests are conducted annually on employees from pool ''B.''

Special Topics—Procedures for Handling and Processing a Split Specimen

Question: Describe the proper handling and processing of a split specimen.

Guidance: ''Where the employer has used the split sample method, and the laboratory observes that the split sample is untestable, inadequate, or unavailable for testing, the laboratory shall nevertheless test the primary specimen. The laboratory does not inform the MRO or the employer of the untestability, inadequacy, or unavailability of the split specimen until and unless the primary specimen is a verified positive test and the MRO has informed the laboratory that the employee has requested a test of the split specimen.'' (§ 40.29(b)(1)(ii))

''In situations where the employer uses the split sample collection method, the laboratory shall log in the split specimen, with the split specimen bottle seal remaining intact.'' (§ 40.29(b)(2))

''When directed in writing by the MRO to forward the split specimen to another DHHS-certified laboratory for analysis, the second laboratory shall analyze the split specimen by GC/MS to reconfirm the presence of the drug(s) or drug metabolite(s) found in the primary specimen.'' (§ 40.29(b)(3))

''If the employee requests an analysis of the split specimen within 72 hours of having been informed of a verified positive test, the MRO shall direct, in writing, the laboratory to provide the split specimen to another DHHS-certified laboratory for analysis. If the analysis of the split specimen fails to reconfirm the presence of the drug(s) or drug metabolite(s) found in the specimen, or if the split specimen is unavailable, inadequate for testing or untestable, the MRO shall cancel the test and report cancellation and the

reasons for it to the DOT, the employer, and the employee.'' (§ 40.33(f))

If the primary laboratory does not receive a split specimen with the primary, or the split specimen is leaking, or the split specimen's seal is broken, or has any other problem that would make it unavailable for testing, the primary laboratory must *still* process the primary specimen as if there were no problems with the split specimen. The laboratory should not bring any split specimen deficiency to the attention of the MRO at this time. (§ 40.29(b)(1)(ii))

The seal on the split specimen must remain intact—just as the split specimen was sealed at the collection site. (§ 40.29(b)(2))

The MRO will direct the primary laboratory to forward the split specimen to a second DHHS-certified laboratory. At the second DHHS-certified laboratory, the split specimen shall only be used to reconfirm the presence of the drug(s) or drug metabolite(s) found in the primary specimen. (§ 40.29(b)(3))

Only a request from the employee can authorize the MRO to initiate the forwarding of the split specimen to the second DHHS-certified laboratory for analysis. (§ 40.33(f))

PART 325—COMPLIANCE WITH INTERSTATE MOTOR CARRIER NOISE EMISSION STANDARDS

Sections Interpreted

325.1

Section 325.1 Scope Of The Rules In This Part

Question 1: What noise emission requirements are applicable to auxiliary generators?

Guidance: Auxiliary generators which normally operate only when a CMV is stopped or moving at 5 mph or less are ''auxiliary equipment'' of the kind contemplated by EPA and are, therefore, exempt from the noise limits in Part 325. However, noise from generators that run while the CMV is moving at higher speeds would be measured as part of total vehicle noise.

Question 2: Do refrigeration units on tractor-trailer combinations fall within the exemption listed in part 325, subpart A of the FMCSRs?

Guidance: No.

PART 382—CONTROLLED SUBSTANCES AND ALCOHOL USE AND TESTING

Sections Interpreted

382.103 Applicability
382.105 Testing Procedures
382.107 Definitions
382.109 Preemption of State and Local Laws
382.113 Requirement for Notice
382.115 Starting Date for Testing Programs
382.205 On-Duty Use
382.213 Controlled Substances Use
382.301 Pre-employment Testing
382.303 Post-accident Testing
382.305 Random Testing
382.307 Reasonable Suspicion Testing
382.401 Retention of Records
382.403 Reporting of Results in a Management Information System
382.405 Access to Facilities and Records
382.413 Release of Alcohol and Controlled Substances Test Information by Previous Employers
382.501 Removal From Safety-Sensitive Functions
382.507 Penalties
382.601 Motor Carrier Obligation to Promulgate a Policy on the Misuse of Alcohol and Use of Controlled Substances
382.603 Training for Supervisors
382.605 Referral, Evaluation, and Treatment

Subpart B—Prohibitions

Special Topics—Responsibility for Payment for Testing
Special Topics—Multiple Service Providers
Special Topics—Medical Examiners Acting as MRO
Special Topics—Biennial (Periodic) Testing Requirements

Section 382.103 Applicability

Question 1: Are intrastate drivers of CMVs, who are required to obtain CDLs, required to be alcohol and drug tested by their employer?

Guidance: Yes. The definition of commerce in 382.107 is taken from 49 U.S.C. § 31301 which encompasses interstate, intrastate and foreign commerce.

Question 2: Are students who will be trained to be motor vehicle operators subject to alcohol and drug testing? Are they required to obtain a CDL in order to operate training vehicles provided by the school?

Guidance: Yes. Section 382.107 includes the following definitions:

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

Driver means any person who operates a CMV.

Truck and bus driver training schools meet the definition of an employer because they own or lease CMVs and assign students to operate them at appropriate points in their training. Similarly, students who actually operate CMVs to complete their course work qualify as drivers.

The CDL regulations provide that ''no person shall operate'' a CMV before passing the written and driving tests required for that vehicle (49 CFR 383.23(a)(1)). Virtually all of the vehicles used for training purposes meet the definition of a CMV, and student drivers must therefore obtain a CDL.

Question 3: Are part 382 alcohol and drug testing requirements applicable to firefighters in a State which gives them the option of obtaining a CDL or a non-commercial class A or B license restricted to operating fire equipment only?

Guidance: No. The applicability of part 382 is coextensive with part 383—the general CDL requirements. Only those persons required to obtain a CDL under Federal law and who actually perform safety-sensitive duties, are required to be tested for drugs and alcohol.

The FHWA, exercising its waiver authority, granted the States the option of waiving firefighters from CDL requirements. A State which gives firefighters the choice of obtaining either a CDL or a non-commercial license has exercised the option not to require CDLs. Therefore, because a CDL is not required, by extension part 382 is not applicable.

A firefighter in the State would not be required under Federal law to be tested for drugs and alcohol regardless of the type of license which the employer required as a condition of employment or the driver actually obtained. It is the Federal requirement to obtain a CDL, nonexistent in the State, that entails drug and alcohol testing, not the fact of actually holding a CDL.

Question 4: An employer or State government agency requires CDLs for drivers of motor vehicles: (1) with a GVWR of 26,000 pounds or less; (2) with a GCWR of 26,000 pounds or less inclusive of a towed unit with a GVWR of 10,000 pounds or less; (3) designed to transport 15 or less passengers, including the driver; or (4) which transport HM, but *are not* required to be placarded under 49 CFR part 172, subpart F. Are such drivers required by part 382 to be tested for the use of alcohol or controlled substances?

Guidance: No. Part 382 requires or authorizes drug and alcohol testing only of those drivers required by part 383 to obtain a CDL. Since the vehicles described above do not meet the definition of a CMV in part 383, their drivers are not required by Federal regulations to have a CDL.

Question 5: Are Alaskan drivers with a CDL who operate CMVs and have been waived from certain CDL requirements subject to controlled substances and alcohol testing?

Guidance: Yes. Alaskan drivers with a CDL who operate CMVs are subject to controlled substances and alcohol

testing because they have licenses marked either ''commercial driver's license'' or ''CDL''. The waived drivers are only exempted from the knowledge and skills tests, and the photograph on license requirements.

Question 6: Do the FHWA's alcohol and controlled substances testing regulations apply to employers and drivers in U.S. territories or possessions such as Puerto Rico and Guam?

Guidance: No. The rule by definition applies only to employers and drivers domiciled in the 50 states and the District of Columbia.

Question 7: Which drivers are to be included in a alcohol and controlled substances testing program under the FHWA's rule?

Guidance: Any person who operates a CMV, as defined in § 382.107, in intrastate or interstate commerce and is subject to the CDL requirement of 49 CFR part 383.

Question 8: Is a foreign resident driver operating between the U.S. and a foreign country from a U.S. terminal for a U.S.-based employer subject to the FHWA alcohol and controlled substances testing regulations?

Guidance: Yes. A driver operating for a U.S.-based employer is subject to part 382.

Question 9: What alcohol and drug testing provisions apply to foreign drivers employed by foreign motor carriers?

Guidance: Foreign employers are subject to the alcohol and drug testing requirements in part 382 (see § 382.103). All provisions of the rules will be applicable while drivers are operating in the U.S. Foreign drivers may also be subject to State laws, such as probable cause testing by law enforcement officers.

Section 382.105 Testing Procedures

Question 1: What does a BAT do when a test involves an independent, self-employed owner-operator with a confirmed alcohol concentration of 0.02 or greater, to notify a company representative as required by § 40.65(i)?

Guidance: The independent, self-employed owner-operator will be notified by the BAT immediately and the owner-operator's certification in Step 4 notes that the self-employed owner-operator has been notified. No further notification is necessary. The BAT will provide copies 1 and 2 to the self-employed owner-operator directly.

Question 2: A driver does not have a photo identification card. Must an employer representative identify the driver in the presence of the BAT/urine specimen collector or may the employer representative identify the driver via a telephone conversation?

Guidance: Those subject to part 382 are subject first, generally, to part 383. Part 383 requires all States, with an exception in Alaska for a very small group of individuals, to provide a CDL document to the individual that includes, among other things: the full name, signature, and mailing address of the person to whom such license is issued; physical and other information to identify and describe the person including date of birth (month, day, and year), sex, and height; and, a color photograph of the person. Except in these rare Alaskan instances, the FHWA fully expects most employer's to require the driver to present the CDL document to the BAT or urine collector.

A driver subject to alcohol and drug testing should be able to provide the CDL document. In those rare instances that the CDL or other form of photo identification is not produced for verification, an employer representative must be contacted and must provide identification. The FHWA will allow employer representatives to identify drivers in any way that the employer believes will positively identify the driver.

Question 3: Will foreign drug testing laboratories need to be certified by the National Institute on Drug Abuse (NIDA)? Will they need to be certified by the Department of Health and Human Services (DHHS)?

Guidance: The NIDA, an agency of the DHHS, no longer administers the workplace drug testing laboratory certification program. This program is now administered by the DHHS' Substance Abuse and Mental Health Services Administration. All motor carriers are required to use DHHS-certified laboratories for analysis of alcohol and controlled substances tests as neither Mexico nor Canada has an equivalent laboratory certification program.

Question 4: Particularly in light of the coverage of Canadian and Mexican employees, how should MROs deal, in the verification process, with claims of the use of foreign prescriptions or over-the-counter medication?

Guidance: Possession or use of controlled substances are prohibited when operating a CMV under the FHWA regulations regardless of the source of the substance. A limited exception exists for a substance's use in accordance with instructions provided by a licensed medical practitioner who knows that the individual is a CMV driver who operates CMVs in a safety-sensitive job and has provided instructions to the CMV driver that the use of the substance will not affect the CMV driver's ability to safely operate a CMV (see §§ 382.213, 391.41(b)(12), and 392.4(c)). Individuals entering the United States must properly declare controlled substances with the U.S. Customs Service. 21 CFR 1311.27.

The FHWA expects MROs to properly investigate the facts concerning a CMV driver's claim that a positive controlled substance test result was caused by a prescription written by a knowledgeable, licensed medical practitioner or the use of an over-the-counter substance that was obtained in a foreign country without a prescription. This investigation should be documented in the MRO's files.

If the CMV driver lawfully obtained a substance in a foreign country without a prescription which is a controlled substance in the United States, the MRO must also investigate whether a knowledgeable, licensed medical practitioner provided instructions to the CMV driver that the use of the ''over-the-counter'' substance would not affect the driver's ability to safely operate a CMV.

Potential violations of § 392.4 must be investigated by the law enforcement officer at the time possession or use is discovered to determine whether the exception applies.

Sections 382.107 Definitions

Question 1: What is an owner-operator?

Guidance: The FHWA neither defines the term ''owner-operator'' nor uses it in regulation. The FHWA regulates ''employers'' and ''drivers.'' An owner-operator may act as both an employer and a driver at certain times, or as a driver for another employer at other times depending on contractual arrangements and operational structure.

Section 382.109 Preemption Of State And Local Laws

Question 1: An employer is required by State or local law, regulation, or order to bargain with unionized employees over discretionary elements of the DOT alcohol and drug testing regulations (e.g., selection of DHHS-approved laboratories or MROs). May the employer defer the 1995 or 1996 implementation dates for testing employees until the collective bargaining process has produced agreement on these discretionary elements, or must the employer implement testing as required by part 382?

Guidance: The FHWA provided large employers 45 weeks and small employers 97 weeks collectively to bargain the discretionary elements of

the part 382 testing program. An employer must implement alcohol and controlled substances testing in accordance with the schedule in § 382.115. If observance of the collective bargaining process would make it impossible for the employer to comply with these deadlines, § 382.109(a)(1) preempts the State or local bargaining requirement to the extent needed to meet the implementation date.

Section 382.113 Requirement For Notice

Question 1: Must a notice be given before each test or will a general notice given to drivers suffice?

Guidance: A driver must be notified before submitting to each test that it is required by part 382. This notification can be provided to the driver either verbally or in writing. In addition, the FHWA believes that the use of the DOT Breath Alcohol Testing Form, OMB No. 2105–0529, and the Drug Testing Custody and Control Form, 49 CFR part 40, appendix A, will support the verbal or written notice that the test is being conducted in accordance with Part 382.

Section 382.115 Starting Date For Testing Programs

Question 1: In a governmental entity structured into various subunits such as departments, divisions, and offices, how is the number of an employer's drivers determined for purposes of the implementation date of controlled substances and alcohol testing?

Guidance: Part 382 testing applies to governmental entities, including those of the Federal government, the States, and political subdivisions of the States. An employer is defined as any person that owns or leases CMVs, or assigns drivers to operate them. Therefore, any governmental entity, or a subunit of it that controls CMVs and the day-to-day operations of its drivers, may be considered the employer for purposes of part 382. For example, a city government divided into various departments, such as parks and public works, could consider the departments as separate employers if the CMV operations are separately controlled. The city also has the option of deeming the city as the employer of all of the drivers of the various departments.

Section 382.205 On-duty Use

Question 1: What is meant by the terms ''use alcohol'' or ''alcohol use?'' Is observation of use sufficient or is an alcohol test result required?

Guidance: The term ''alcohol use'' is defined in § 382.107. The employer is prohibited in § 382.205 from permitting a driver to drive when the employer has actual knowledge of the driver's use of alcohol, regardless of the level of alcohol in the driver's body. The form of knowledge is not specified. It may be obtained through observation or other method.

Section 382.213 Controlled Substances Use

Question 1: Must a physician specifically advise that substances in a prescription will not adversely affect the driver's ability to safely operate a CMV or may a pharmacist's advice or precautions printed on a container suffice for the advice?

Guidance: A physician must specifically advise the driver that the substances in a prescription will not adversely affect the driver's ability to safely operate a CMV.

Section 382.301 Pre-Employment Testing

Question 1: What is meant by the phrase, ''an employer who uses, but does not employ, a driver * * * ?'' Describe a situation to which the phrase would apply.

Guidance: This exception was contained in the original drug testing rules and was generally applied to ''trip-lease'' drivers involved in interstate commerce. A trip-lease driver is generally a driver employed by one motor carrier, but who is temporarily leased to another motor carrier for one or more trips generally for a time period less than 30 days. The phrase would also apply to volunteer organizations that use loaned drivers.

Question 2: Must school bus drivers be pre-employment tested after they return to work after summer vacation in each year in which they do not drive for 30 consecutive days?

Guidance: A school bus driver whom the employer expects to return to duty the next school year does not have to be pre-employment tested so long as the driver has remained in the random selection pool over the summer. There is deemed to be no break in employment if the driver is expected to return in the fall.

On the other hand, if the driver is taken out of all DOT random pools for more than 30 days, the exception to pre-employment drug testing in § 382.301 would be unavailable and a drug test would have to be administered after the summer vacation.

Question 3: Is a pre-employment controlled substances test required if a driver returns to a previous employer after his/her employment had been terminated?

Guidance: Yes. A controlled substances test must be administered any time employment has been terminated for more than 30 days and the exceptions under § 382.301(c) were not met.

Question 4: Must all drivers who do not work for an extended period of time (such as layoffs over the winter or summer months) be pre-employment drug tested each season when they return to work?

Guidance: If the driver is considered to be an employee of the company during the extended (layoff) period, a pre-employment test would not be required so long as the driver has been included in the company's random testing program during the layoff period. However, if the driver was not considered to be an employee of the company at any point during the layoff period, or was not covered by a program, or was not covered for more than 30 days, then a pre-employment test would be required.

Question 5: What must an employer do to avail itself of the exceptions to pre-employment testing listed under § 382.301(c)?

Guidance: An employer must meet all requirements in § 382.301(c) and (d), including maintaining all required documents. An employer must produce the required documents at the time of the Compliance Review for the exception to apply.

Question 6: May a CDL driving skills test examiner conduct a driving skills test administered in accordance with 49 CFR part 383 before a person subject to part 382 is tested for alcohol and controlled substances?

Guidance: Yes. A CDL driving skills test examiner, including a third party CDL driving skills test examiner, may administer a driving skills test to a person subject to part 382 without first testing him/her for alcohol and controlled substances. The intent of the CDL driving skills test is to assess a person's ability to operate a commercial motor vehicle during an official government test of their driving skills. However, this guidance does not allow an employer (including a truck or bus driver training school) to use a person as a current company, lease, or student driver prior to obtaining a verified negative test result. An employer must obtain a verified negative controlled substance test result prior to dispatching a driver on his/her first trip.

Section382.303 Post-Accident Testing

Question 1: Why does the FHWA allow post-accident tests done by Federal, State or local law enforcement agencies to substitute for a § 382.303 test even though the FHWA does not allow a Federal, State or local law

enforcement agency test to substitute for a pre-employment, random, reasonable suspicion, return-to-duty, or follow-up test? Will such substitutions be allowed in the future?

Guidance: A highway accident is generally investigated by a Federal, State, or local law enforcement agency that may determine that probable cause exists to conduct alcohol or controlled substances testing of a surviving driver. The FHWA believes that testing done by such agencies will be done to document an investigation for a charge of driving under the influence of a substance and should be allowed to substitute for a FHWA-required test. The FHWA expects this provision to be used rarely.

The FHWA is required by statute to provide certain protection for drivers who are tested for alcohol and controlled substances. The FHWA believes that law enforcement agencies investigating accidents will provide similar protection based on the local court's prior action in such types of testing.

The FHWA will not allow a similar approach for law enforcement agencies to conduct testing for the other types of testing. A law enforcement agency, however, may act as a consortium to provide any testing in accordance with parts 40 and 382.

Question 2: May an employer allow a driver, subject to post-accident controlled substances testing, to continue to drive pending receipt of the results of the controlled substances test?

Guidance: Yes. A driver may continue to drive, so long as no other restrictions are imposed by § 382.307 or by law enforcement officials.

Question 3: A commercial motor vehicle operator is involved in an accident in which an individual is injured but does not die from the injuries until a later date. The commercial motor vehicle driver does not receive a citation under State or local law for a moving traffic violation arising from the accident. How long after the accident is the employer required to attempt to have the driver subjected to post-accident testing?

Guidance: Each employer is required to test each surviving driver for alcohol and controlled substances as soon as practicable following an accident as required by § 382.303. However, if an alcohol test is not administered within 8 hours following the accident, or if a controlled substance test is not administered within 32 hours following the accident, the employer must cease attempts to administer that test. In both cases the employer must prepare and maintain a record stating the reason(s) the test(s) were not promptly administered.

If the fatality occurs following the accident and within the time limits for the required tests, the employer shall attempt to conduct the tests until the respective time limits are reached. The employer is not required to conduct any tests for cases in which the fatality occurs outside of the 8 and 32 hour time limits.

Question 4: What post-accident alcohol and drug testing requirements are there for U.S. employer's drivers involved in an accident occurring outside the U.S.?

Guidance: U.S. employers are responsible for ensuring that drivers who have an accident (as defined in § 390.5) in a foreign country are post-accident alcohol and drug tested in conformance with the requirements of 49 CFR parts 40 and 382. If the test(s) cannot be administered within the required 8 or 32 hours, the employer shall prepare and maintain a record stating the reasons the test(s) was not administered (see §§ 382.303 (b)(1) and (b)(4)).

Question 5: What post-accident alcohol and drug testing requirements are there for foreign drivers involved in accidents occurring outside the United States?

Guidance: Post-accident alcohol and drug testing is required for CMV accidents occurring within the U.S. and on segments of interstate movements into Canada between the U.S.-Canadian border and the first physical delivery location of a Canadian consignee. The FHWA further believes its regulations require testing for segments of interstate movements out of Canada between the last physical pick-up location of a Canadian consignor and the U.S.-Canadian border. The same would be true for movements between the U.S.-Mexican border and a point in Mexico.

For example, a motor carrier has two shipments on a CMV from a shipper in Chicago, Illinois. The first shipment will be delivered to Winnipeg, Manitoba and the second to Lloydminster, Saskatchewan. A driver is required to be post-accident tested for any CMV accident that meets the requirements to conduct 49 CFR 382.303 Post-accident testing, that occurs between Chicago, Illinois and Winnipeg, Manitoba (the first delivery point). The FHWA would not require a foreign motor carrier to conduct testing of foreign drivers for any accidents between Winnipeg and Lloydminster.

The FHWA *does not* believe it has authority over Canadian and Mexican motor carriers that operate within their own countries where the movement does not involve movements into or out of the United States. For example, the FHWA does not believe it has authority to require testing for transportation of freight from Prince George, British Colombia to Red Deer, Alberta that does not traverse the United States.

If the driver is not tested for alcohol and drugs as required by § 382.303 and the motor carrier operates in the U.S. during a four-month period of time after the event that triggered the requirement for such a test, the motor carrier will be in violation of part 382 and may be subject to penalties under § 382.507.

Section 382.305 Random Testing

Question 1: Is a driver who is on-duty, but has not been assigned a driving task, considered to be ready to perform a safety-sensitive function as defined in § 382.107 subjecting the driver to random alcohol testing?

Guidance: A driver must be about to perform, or immediately available to perform, a safety-sensitive function to be considered subject to random alcohol testing. A supervisor, mechanic, or clerk, etc., who is on call to perform safety-sensitive functions may be tested at any time they are on call, ready to be dispatched while on-duty.

Question 2: What are the employer's obligations, in terms of random testing, with regard to an employee who does not drive as part of the employee's usual job functions, but who holds a CDL and may be called upon at any time, on an occasional or emergency basis, to drive?

Guidance: Such an employee must be in a random testing pool at all times, like a full-time driver. A drug test must be administered each time the employee's name is selected from the pool.

Alcohol testing, however, may only be conducted just before, during, or just after the performance of safety-sensitive functions. A safety-sensitive function as defined in § 382.107 means any of those on-duty functions set forth in § 395.2 On-Duty time, paragraphs (1) through (7), (generally, driving and related activities). If the employee's name is selected, the employer must wait until the next time the employee is performing safety-sensitive functions, just before the employee is to perform a safety-sensitive function, or just after the employee has ceased performing such functions to administer the alcohol test. If a random selection period expires before the employee performs a safety-sensitive function, no alcohol test should be given, the employee's name should be returned to the pool, and the number of employees subsequently selected should be adjusted accordingly to achieve the required rate.

Question 3: How should a random testing program be structured to account for the schedules of school bus or other drivers employed on a seasonal basis?

Guidance: If no school bus drivers from an employer's random testing pool are used to perform safety sensitive functions during the summer, the employer could choose to make random selections only during the school year. If the employer nevertheless chooses to make selections in the summer, tests may only be administered when the drivers return to duty.

If some drivers continue to perform safety-sensitive functions during the summer, such as driving buses for summer school, an employer could not choose to forego all random selections each summer. Such a practice would compromise the random, unannounced nature of the random testing program. The employer would test all selected drivers actually driving in the summer. With regard to testing drivers not driving during the summer, the employer has two options. One, names of drivers selected who are on summer vacation may be returned to the pool and another selection made. Two, the selected names could be held by the employer and, if the drivers return to perform safety-sensitive functions before the next random selection, the test administered upon the drivers' return.

Finally, it should be noted that reductions in the number of drivers during summer vacations reduces the average number of driving positions over the course of the year, and thus the number of tests which must be administered to meet the minimum random testing rate.

Question 4: Are driver positions that are vacant for a testing cycle to be included in the determination of how many random tests must be conducted?

Guidance: No. The FHWA random testing program tests employed or utilized drivers, not positions that are vacant.

Question 5: May an employer use the results of another program in which a driver participates to satisfy random testing requirements if the driver is used by the employer only occasionally?

Guidance: The rules establish an employer-based testing program. Employers remain responsible at all times for ensuring compliance with all of the rules, including random testing, for all drivers which they use, regardless of any utilization of third parties to administer parts of the program. Therefore, to use another's program, an employer must make the other program, by contract, consortium agreement, or other arrangement, the employer's own program. This would entail, among other things, being held responsible for the other program's compliance, having records forwarded to the employer's principal place of business on 2 days notice, and being notified of and acting upon positive test results.

Question 6: Once an employee is randomly tested during a calendar year, is his/her name removed from the pool of names for the calendar year?

Guidance: No, the names of those tested earlier in the year must be returned to the pool for each new selection. Each driver must be subject to an equal chance of being tested during each selection process.

Question 7: Is it permissible to make random selections by terminals?

Guidance: Yes. If random selection is done based on locations or terminals, a two-stage selection process must be utilized. The first selection would be made by the locations and the second selection would be of those employees at the location(s) selected. The selections must ensure that each employee in the pool has an equal chance of being selected and tested, no matter where the employee is located.

Question 8: When a driver works for two or more employers, in whose random pool must the driver be included?

Guidance: The driver must be in the pool of each employer for which the driver works.

Question 9: After what period of time may an employer remove a casual driver from a random pool?

Guidance: An employer may remove a casual driver, who is not used by the employer, from its random pool when it no longer expects the driver to be used.

Question 10: If an employee is off work due to temporary lay-off, illness, injury or vacation, should that individual's name be removed from the random pool?

Guidance: No. The individual's name should not be removed from the random pool so long as there is a reasonable expectation of the employee's return.

Question 11: Is it necessary for an owner-operator, who is not leased to a motor carrier, to belong to a consortium for random testing purposes?

Guidance: Yes.

Question 12: If an employer joins a consortium, and the consortium is randomly testing at the appropriate rates, will these rates meet the requirements of the alcohol and controlled substances testing for the employer even though the required percent of the employer's drivers were not randomly tested?

Guidance: Yes.

Question 13: Is it permissible to combine the drivers from the subsidiaries of a parent employer into one pool, with the parent employer acting as a consortium?

Guidance: Yes.

Question 14: How should an employer compute the number of random tests to be given to ensure that the appropriate testing rate is achieved given the fluctuations in driver populations and the high turnover rate of drivers?

Guidance: An employer should take into account fluctuations by estimating the number of random tests needed to be performed over the course of the year. If the carrier's driver workforce is expected to be relatively constant (i.e., the total number of driver positions is approximately the same) then the number of tests to be performed in any given year could be determined by multiplying the average number of driver positions by the testing rate.

If there are large fluctuations in the number of driver positions throughout the year without any clear indication of the average number of driver positions, the employer should make a reasonable estimate of the number of positions. After making the estimate, the employer should then be able to determine the number of tests necessary.

Question 15: May an employer or consortium include non-DOT-covered employees in a random pool with DOT-covered employees?

Guidance: No.

Question 16: Canadians believe that their laws require employer actions be tied to the nature of the job and the associated safety risk. Canadian employers believe they will have to issue alcohol and drug testing policies that deal with *all* drivers in an identical manner, not just drivers that cross the border into the United States. If a motor carrier wanted to add cross border work to an intra-Canadian driver's duties, and the driver was otherwise qualified under the FHWA rules, may the pre-employment test be waived?

Guidance: The FHWA has long required, since the beginning of the drug testing program in 1988, that transferring from intrastate work into interstate work requires a ''pre-employment'' test regardless of what type of testing a State might have required under intrastate laws. This policy also applied to motor carriers that had a pre-employment testing program similar to the FHWA requirement. The FHWA believes it is reasonable to apply this same interpretation to the first time a Canadian or Mexican driver enters the United States.

This policy was delineated in the **Federal Register** of February 15, 1994 (59 FR 7302, at 7322). The FHWA believes motor carriers should separate drivers into intra-Canadian and inter-State groups for their policies and the random selection pools. If a driver in the intra-Canadian group (including the random selection pool) were to take on driving duties into the United States, the driver would be subject to a pre-employment test to take on this driving task. Although the circumstance is not actually a first employment with the motor carrier, such a test would be required because it would be the first time the driver would be subject to part 382.

Section 382.307 Reasonable Suspicion Testing

Question 1: May a reasonable suspicion alcohol test be based upon any information or observations of alcohol use or possession, other than a supervisor's actual knowledge?

Guidance: No. Information conveyed by third parties of a driver's alcohol use may not be the only determining factor used to conduct a reasonable suspicion test. A reasonable suspicion test may only be conducted when a trained supervisor has observed specific, contemporaneous, articulable appearance, speech, body odor, or behavior indicators of alcohol use.

Question 2: Why does § 382.307(b) allow an employer to use indicators of chronic and withdrawal effects of controlled substances in the observations to conduct a controlled substances reasonable suspicion test, but does not allow similar effects of alcohol use to be used for an alcohol reasonable suspicion test?

Guidance: The use of controlled substances by drivers is strictly prohibited. Because controlled substances remain present in the body for a relatively long period, withdrawal effects may indicate that the driver has used drugs in violation of the regulations, and therefore must be given a reasonable suspicion drug test.

Alcohol is generally a legal substance. Only its use or presence in sufficient concentrations while operating a CMV is a violation of FHWA regulation. Alcohol withdrawal effects, standing alone, do not, therefore, indicate that a driver has used alcohol in violation of the regulations, and would not constitute reasonable suspicion to believe so.

Question 3: A consignee, consignor, or other party is a motor carrier employer for purposes of 49 CFR parts 382 through 399. They have trained their supervisors in accordance with 49 CFR 382.603 to conduct reasonable suspicion training on their own drivers. A driver for another motor carrier employer delivers, picks up, or has some contact with the consignee's, consignor's, or other party's trained supervisor. This supervisor believes there is reasonable suspicion, based on their training, that the driver may have used a controlled substance or alcohol in violation of the regulations. May this trained consignee, consignor, or other party's supervisor order a reasonable suspicion test of a driver the supervisor does not supervise for the employing/using motor carrier employer?

Guidance: No, the trained supervisor may not order a reasonable suspicion test of a driver the supervisor does not supervise for the employing/using motor carrier employer. Motor carrier employers may not conduct reasonable suspicion testing based ''on reports of a third person who has made the observations, because of that person's possible credibility problems or lack of appropriate training.''

The trained supervisor for the consignee, consignor, or other party may, however, choose to do things not required by regulation, but encouraged by the FHWA. They may inform the driver that they believe the driver may have violated Federal, State, or local regulations and advise them not to perform additional safety-sensitive work. They may contact the employing/using motor carrier employer to alert them of their reasonable suspicion and request the employing/using motor carrier employer take appropriate action. In addition, they may contact the police to request appropriate action.

Question 4: Are the reasonable suspicion testing and training requirements of §§ 382.307 and 382.603 applicable to an owner-operator who is both an employer and the only employee?

Guidance: No. The requirements of §§ 382.307 and 382.603 are not applicable to owner-operators in non-supervisory positions. Section 382.307 requires employers to have a driver submit to an alcohol and/or controlled substances test when the employer has reasonable suspicion to believe that the driver has violated the prohibitions of subpart B of part 382. Applying § 382.307, Reasonable Suspicion Testing, to an owner-operator who is an employer and the only employee contradicts both ''reason'' and ''suspicion'' implicit in the title and the purpose of § 382.307. A driver who has self-knowledge that he/she has violated the prohibitions of subpart B of part 382 is beyond mere suspicion. Furthermore, § 382.603 requires ''all persons designated to supervise drivers'' to receive training that will enable him/her to determine whether reasonable suspicion exists to require a driver to undergo testing under § 382.307. An owner-operator who does not hire or supervise other drivers is not in a supervisory position, nor are they subject to the testing requirements of § 382.307. Therefore, such an owner-operator would not be subject to the training requirements of § 382.603.

Section 382.401 Retention of Records

Question 1: Many small school districts are affiliated through service units which are, in essence, a coalition of individual districts. Can these school districts have one common confidant for purposes of receiving results and keeping records?

Guidance: Yes. Employers may use agents to maintain the records, as long as they are in a secure location with controlled access. The employer must also make all records available for inspection at the employer's principal place of business within two business days after a request has been made by an FHWA representative.

Section 382.403 Reporting of Results in a Management Information System

Question 1: The FHWA regulations are written on an annual calendar year basis. Will foreign motor carriers, using this system, work from July 1 to June 30, or is everything to be managed on a six-month basis for the first year and then fall into annual calendar years subsequently?

Guidance: All motor carriers must manage their programs and report results under § 382.403, if requested by FHWA, on a January 1 to December 31 basis. This means that foreign motor carriers will report July 1 to December 31 results the first applicable year.

Section 382.405 Access to Facilities and Records

Question 1: May employers who are subject to other Federal agencies' regulations, such as the Nuclear Regulatory Commission, Department of Energy, Department of Defense, etc., allow those agencies to view or have access to test records required to be prepared and maintained by parts 40 and/or 382?

Guidance: Federal agencies, other than those specifically provided for in § 382.405, may have access to an employer's driver test records maintained in accordance with parts 40 or 382 only when a specific, contemporaneous authorization for release of the test records is allowed by the driver.

Question 2: Must a motor carrier respond to a third-party administrator's request (as directed by the specific, written consent of the driver authorizing release of the information on behalf of an entity such as a motor carrier) to release driver information that is contained in records required to be maintained under § 382.401?

Guidance: Yes. However, the third-party administrator must comply with the conditions established concerning confidentiality, test results, and record keeping as stipulated in the ''Notice: Guidance on the Role of Consortia and Third-Party Administrators (C/TPA) in DOT Drug and Alcohol Testing Programs'' published on July 25, 1995, in Volume 60, No. 142, in the **Federal Register**. Motor carriers must comply completely with 49 CFR 382.413 and 382.405 as well as any applicable regulatory guidance. Please note that written consent must be obtained from the employee each time part 382 information is provided to a C/TPA, the consent must be specific to the individual or entity to whom information is being provided, and that blanket or non-specific consents to release information are not allowed.

Question 3: May employers allow unions or the National Labor Relations Board to view or have access to test records required to be prepared and maintained by parts 40 and/or 382, such as the list(s) of all employees actually tested?

Guidance: Unions and the National Labor Relations Board may have access to the list(s) of all employees in the random pool or the list(s) of all employees actually tested. The dates of births and SSNs must be removed from these lists prior to release. However, access to the employee's negative or positive test records maintained in accordance with parts 40 or 382 can be granted only when a specific, contemporaneous authorization for release of the test records is allowed by the driver.

Question 4: May an employer (motor carrier) disclose information required to be maintained under 49 CFR part 382 (pertaining to a driver) to the driver or the decision maker in a lawsuit, grievance, or other proceeding (including, but not limited to, worker's compensation, unemployment compensation) initiated by or on behalf of the driver, without the driver's written consent?

Guidance: Yes, a motor carrier has discretion without the driver's consent as provided by § 382.405(g), to disclose information to the driver or the decision maker in a lawsuit, grievance, or other proceeding (including, but not limited to, worker's compensation, unemployment compensation) initiated by or on behalf of the driver concerning prohibited conduct under 49 CFR part 382.

Also, an employer (motor carrier) may be required to provide the test result information pursuant to other Federal statutes or an order of a competent Federal jurisdiction, such as an administrative subpoena, as allowed by § 382.405(a) without the driver's written consent.

Question 5: What is meant by the term ''as required by law'' in relation to State or local laws for disclosure of public records relating to a driver's testing information and test results?

Guidance: The term ''as required by law'' in § 382.405(a) means Federal statutes or an order of a competent Federal jurisdiction, such as an administrative subpoena. The Omnibus Transportation Employee Testing Act of 1991, and the implementing regulations in part 382, require that test results and medical information be confidential to the maximum extent possible. (Pub. L. 102–143, Title V, sec. 5(a)(1), 105 Stat. 959, codified at 49 U.S.C. 31306). In addition, the Act preempts inconsistent State or local government laws, rules, regulations, ordinances, standards, or orders that are inconsistent with the regulations issued under the Act.

The FHWA believes the only State and local officials that may have access to the driver's records under § 382.405(d) and 49 U.S.C. 31306, without the driver's written consent, are State or local government officials that have regulatory authority over an employer's (motor carrier's) alcohol and drug testing programs for purposes of enforcement of part 382. Such State and local agencies conduct employer (motor carrier) compliance reviews under the FHWA's Motor Carrier Safety Assistance Program (MCSAP) on the FHWA's behalf in accordance with 49 CFR part 350.

Section 382.413 Release of Alcohol and Controlled Substances Test Information by Previous Employers

Question 1: What is to be done if a previous employer does not make the records available in spite of the employer's request along with the driver's written consent?

Guidance: Employers must make a reasonable, good faith effort to obtain the information. If a previous employer refuses, in violation of § 382.405, to release the information pursuant to the new employer's and driver's request, the new employer should note the attempt to obtain the information and place the note with the driver's other testing information (59 FR 7501, February 14, 1994).

Question 2: Within 14 days of first using a driver to perform safety-sensitive functions, an employer discovers that a driver had a positive controlled substances and/or 0.04 alcohol concentration test result within the previous two years. No records are discovered that the driver was evaluated by an SAP and has been released by an SAP for return to work. The employer removes the driver immediately from the performance of safety-sensitive duties. Is there a violation of the regulations?

Guidance: Based on the scenario as presented, only the driver is in violation of the rules.

Question 3: Must an employer investigate a driver's alcohol and drug testing background prior to January 1, 1995?

Guidance: No. The first implementation date of the part 382 testing programs was January 1, 1995. Section 382.413 requires subsequent employers to obtain information retained by previous employers that the previous employers generated under a part 382 testing program. Since no employer was allowed to conduct any type of alcohol or drug test under the authority of part 382 prior to January 1, 1995, no tests conducted prior to 1995 are required to be obtained under § 382.413. An employer may, however, under its own authority, request that a driver who was subject to part 391 drug testing provide prior testing information.

Question 4: Must a motor carrier respond to a third-party administrator's request (as directed by the specific, written consent of the driver authorizing release of the information on behalf of an entity such as a motor carrier) to release driver information that is contained in records required to be maintained under § 382.401?

Guidance: Yes. However, the third-party administrator must comply with the conditions established concerning confidentiality, test results, and record keeping as stipulated in the ''Notice: Guidance on the Role of Consortia and Third-Party Administrators (C/TPA) in DOT Drug and Alcohol Testing Programs'' published on July 25, 1995, in Volume 60, No. 142, in the **Federal Register**. Motor carriers must comply completely with §§ 382.413 and 382.405 as well as any applicable regulatory guidance. Please note that written consent must be obtained from the employee each time part 382 information is provided to a C/TPA, that the consent must be specific to the individual or entity to whom

information is being provided, and that blanket or non-specific consents to release information are not allowed.

Section 382.501 Removal From Safety-Sensitive Functions

Question 1: What work may the driver perform for an employer, if a driver violates the prohibitions in subpart B?

Guidance: A driver who has violated the prohibitions of subpart B may perform any duties for an employer that are not considered ''safety-sensitive functions.'' This may include handling of materials exclusively in a warehouse, regardless of whether the materials are considered hazardous as long as safety-sensitive functions are not performed. Safety-sensitive functions may not be performed until the individual has been evaluated by an SAP, complied with any recommended treatment, has been re-evaluated by an SAP, has been allowed by the SAP to return to work and has passed a return to duty test.

Section 382.507 Penalties

Question 1: What is the fine or penalty for employers who refuse or fail to provide Part 382 testing information to a subsequent employer?

Guidance: Title 49 U.S.C. 521(b)(2)(A) provides for civil penalties not to exceed $500 for each instance of refusing or failing to provide the information required by § 382.405. Criminal penalties may also be imposed under 49 U.S.C. 521(b)(6).

Section 382.601 Motor Carrier Obligation To Promulgate a Policy on the Misuse of Alcohol and Use of Controlled Substances

Question 1: If a driver refuses to sign a statement certifying that he or she has received a copy of the educational materials required in § 382.601 from their employer, will the *employee* be in violation of § 382.601? May the driver's supervisor sign the certificate of receipt indicating that the employee refused to sign?

Guidance: The *employer* is responsible for ensuring that each driver signs a statement certifying that he or she has received a copy of the materials required in § 382.601. The *employer* is required to maintain the original of the signed certificate and may provide a copy to the driver. The employer would be in violation if it uses a driver, who refuses to comply with § 382.601, to perform any safety sensitive function, because § 382.601 is a requirement placed on the employer. The employee would not be in violation if he or she drove without signing for the receipt of the policy. It is not permissible for the driver's supervisor to sign the certificate of receipt; however, it is advisable for the employer to note the attempt, the refusal, and the consequences of such action. Also, please note that the signing of the policy by the employee is in no way an acknowledgment that the policy itself complies with the regulations.

Question 2: Does § 382.601 require employers to provide educational materials and policies and procedures to drivers after the initial distribution of required educational materials?

Guidance: No.

Section 382.603 Training for Supervisors

Question 1: Does § 382.603 require employers to provide recurrent training to supervisory personnel?

Guidance: No.

Question 2: May an employer accept proof of supervisory training for a supervisor from another employer?

Guidance: Yes.

Section 382.605 Referral, Evaluation, and Treatment

Question 1: Must an SAP evaluation be conducted in person or may it be conducted telephonically?

Guidance: Both the initial and follow-up SAP evaluations are clinical processes that must be conducted face-to-face. Body language and appearance offer important physical cues vital to the evaluation process. Tremors, needle marks, dilated pupils, exaggerated movements, yellow eyes, glazed or bloodshot eyes, lack of eye contact, a physical slowdown or hyperactivity, appearance, posture, carriage, and ability to communicate in person are vital components that cannot be determined telephonically. In-person sessions carry with them the added advantage of the SAP's being able to provide immediate attention to individuals who may be a danger to themselves or others.

Question 2: Are employers required to provide intervention and treatment for drivers who have a substance abuse problem or only refer drivers to be evaluated by an SAP?

Guidance: An employer who wants to continue to use or hire a driver who has violated the prohibitions in subpart B in the past must ensure that a driver has complied with any SAP's recommended treatment prior to the driver returning to safety-sensitive functions. However, employers must only refer to an SAP drivers who have tested positive for controlled substances, tested 0.04 or greater alcohol concentration, or have violated other prohibitions in subpart B.

Question 3: Under the DOT rules, must an SAP be certified by the DOT in order to perform SAP functions?

Guidelines: The DOT does not certify, license, or approve individual SAPs. The SAP must be able to demonstrate to the employer qualifications necessary to meet the DOT rule requirements. The DOT rules define the SAP to be a licensed physician (medical doctor or doctor of osteopathy), a licensed or certified psychologist, a licensed or certified social worker, or a licensed or certified employee assistance professional. All must have knowledge of and clinical experience in the diagnosis and treatment of substance abuse-related disorders (the degrees and certificates alone do not confer this knowledge). In addition, alcohol and drug abuse counselors certified by the National Association of Alcoholism and Drug Abuse Counselors Certification Commission, a national organization that imposes qualification standards for treatment of alcohol-related disorders, are included in the SAP definition.

Question 4: Are employers required to refer a discharged employee to an SAP?

Guidance: The rules require an employer to advise the employee, who engages in conduct prohibited under the DOT rules, of the available resources for evaluation and treatment including the names, addresses, and telephone numbers of SAPs and counseling and treatment programs. In the scenario where the employer discharges the employee, that employer would be considered to be in compliance with the rules if it provided the list to the employee and ensured that SAPs on the list were qualified. This employer has no further obligation (e.g., to facilitate referral to the SAP; ensure that the employee receives an SAP evaluation; pay for the evaluation; or seek to obtain, or maintain the SAP evaluation synopsis).

Question 5: How will the SAP evaluation process differ if the employee is discharged by the employer rather than retained following a rule violation?

Guidance: After engaging in prohibited conduct and prior to performing safety-sensitive duties in any DOT regulated industry, the employee must receive a SAP evaluation. And, when assistance with a problem is clinically indicated, the employee must receive that assistance and demonstrate successful compliance with the recommendation as evaluated through an SAP follow-up evaluation.

The SAP process has the potential to be more complicated when the employee is not retained by the employer. In such circumstances, the SAP will likely not have a connection with the employer for whom the employee worked nor have immediate

access to the exact nature of the rule violation. In addition, the SAP may have to hold the synopsis of evaluation and recommendation for assistance report until asked by the employee to forward that information to a new employer who wishes to return the individual to safety-sensitive duties. In some cases, the SAP may provide the evaluation, referral to a treatment professional, and the follow-up evaluation before the employee has received an offer of employment. This circumstance may require the SAP to hold all reports until asked by the individual to forward them to the new employer. If the new employer has a designated SAP, that SAP may conduct the follow-up evaluation despite the fact that the employee's SAP has already done so. In other words, a new employer may determine to its own satisfaction (e.g., by having the prospective employee receive a follow-up SAP evaluation utilizing the employer's designated SAP) that the prospective employee has demonstrated successful compliance with recommended treatment.

Question 6: Do community lectures and self-help groups qualify as education and/or treatment?

Guidance: Self-help groups and community lectures qualify as education but do not qualify as treatment. While self-help groups such as Alcoholics Anonymous (AA) and Narcotics Anonymous (NA) are crucial to many employees' recovery process, these efforts are not considered to be treatment programs in and of themselves. However, they can serve as vital adjuncts in support of treatment program efforts. AA and NA programs require a level of anonymity which makes reporting client progress and prognosis for recovery impossible. If the client provides permission, AA and NA sponsors can provide attendance status reports to the SAP. Therefore, if a client is referred to one of these groups or to community lectures as a result of the SAP evaluation, the employee's attendance, when it can be independently validated, can satisfy a SAP recommendation for education as well as a gauge for determining successful compliance with a treatment program when both education and treatment are recommended by the SAP's evaluation.

Question 7: Can an employee who has violated the rules return to safety-sensitive functions prior to receiving an SAP evaluation?

Guidance: The employee is prohibited from performing any DOT regulated safety-sensitive function until being evaluated by the SAP. An employer is prohibited from permitting the employee to engage in safety-sensitive duties until evaluated. If the evaluation reveals that assistance is needed, the employee must receive the assistance, be re-evaluated by the SAP (and determined to have demonstrated successful compliance with the recommendation), and pass a return-to-duty alcohol and/or drug test prior to performing safety-sensitive duties.

Question 8: Can an employer overrule an SAP treatment recommendation?

Guidance: No. If found to need assistance, the employee cannot return to safety-sensitive functions until an SAP's follow-up evaluation determines that the employee has demonstrated successful compliance with the recommended treatment. An employer who returns a worker to safety-sensitive duties when the employee has not complied with the SAP's recommendation is in violation of the DOT rule and is, therefore, subject to a penalty.

Question 9: Is an employer obligated to return an employee to safety-sensitive duty following the SAP's finding during the follow-up evaluation that the employee has demonstrated successful compliance with the treatment recommendation?

Guidance: Demonstrating successful compliance with prescribed treatment and testing negative on the return-to-duty alcohol test and/or drug test, are not guarantees of employment or of return to work in a safety-sensitive position; they are preconditions the employee must meet in order to be considered for hiring or reinstatement to safety-sensitive duties by an employer.

Question 10: Can an employee receive the follow-up from an SAP who did not conduct the initial SAP evaluation?

Guidance: Although it is preferable for the same SAP to conduct both evaluations, this will not be realistic in some situations. For instance, the initial SAP may no longer be in the area, still under contract to the employer, or still hired by the employer to conduct the service. Additionally, the employee may have moved from the area to a new location. In all cases, the employer responsibility is to ensure that both the initial SAP and the follow-up SAP are qualified according to the DOT rules.

Question 11: Who is responsible for reimbursing the SAP for services rendered? Who is responsible for paying for follow-up testing recommended by the SAP?

Guidance: The DOT rules do not affix responsibility for payment for SAP services upon any single party. The DOT has left discussions regarding payment to employer policies and to labor-management agreements. Therefore, in some instances, this issue has become part of labor-management negotiations.

Some employers have hired or contracted staff for the purpose of providing SAP services. For some employees, especially those who have been released following a violation, payment for SAP services will become their responsibility. In any case, the SAP should be suitable to the employer who chooses to return the employee to safety-sensitive functions. Employer policies should address this payment issue.

Regarding follow-up testing recommended by the SAP, when an employer decides to return the employee to safety-sensitive duty, the employer is essentially determining that the costs associated with hiring and training a new employee exceeds the costs associated with conducting follow-up testing of the returning employee. In any case, whether the employer pays or the employee pays, if the employee returns to performance of safety-sensitive functions, the employer must ensure that follow-up testing occurs as required. The employer will be held accountable if the follow-up testing plan is not followed.

Question 12: Can the SAP direct that an employee be tested for both alcohol and drugs for the return-to-duty test and during the follow-up testing program?

Guidance: If the SAP determines that an employee referred for alcohol misuse also uses drugs, or that an employee referred for drugs use also misuses alcohol, the SAP can require that the individual be tested for both substances. The SAP's decision to test for both can be based upon information gathered during the initial evaluation, the SAP's consultation contacts with the treatment program, and/or the information presented during the follow-up evaluation.

Question 13: Can random testing be substituted for required follow-up testing?

Guidance: Follow-up testing is directly related to a rule violation and subsequent return to safety-sensitive duty. Random tests are independent of rule violations. Therefore, the two test types are to be separated—one cannot be substituted for the other or be conducted in lieu of the other. Follow-up testing should be unpredictable, unannounced, and conducted not less than six times throughout the first 12 months after the employee returns to safety-sensitive functions. Follow-up testing can last up to 60 months. An employee subject to follow-up testing

will continue to be subject to an employer's random testing program.

Question 14: If a company has several employees in follow-up testing, can those employees be placed into a follow-up random testing pool and selected for follow-up testing on a random basis?

Guidance: Follow-up testing is not to be conducted in a random way. An employee's follow-up testing program is to be individualized and designed to ensure that the employee is tested the appropriate number of times as directed by the SAP. Random testing is neither individualized nor can it ensure that the employee receives the requisite number of tests.

Question 15: What actions are to occur if an employee tests positive while in the follow-up testing program?

Guidance: Employees testing positive while in follow-up testing are subject to the same specific DOT operating administration rules as if they tested positive on the initial test. In addition, the employees are subject to employer policies related to second violations of DOT rules.

Question 16: Can an SAP recommend that six follow-up tests be conducted in less than six months and then be suspended after all six are conducted?

Guidance: Follow-up testing must be conducted a minimum of six times during the first twelve months following the employee's return to safety-sensitive functions. The intent of this requirement is that testing be spread throughout the 12 month period and not be grouped into a shorter interval. When the SAP believes that the employee needs to be tested more frequently during the first months after returning to duty, the SAP may recommend more than the minimum six tests or can direct the employer to conduct more of the six tests during the first months rather than toward the latter months of the year.

Question 17: Can you clarify the DOT's intent with respect to a SAP's determination that an individual needs education?

Guidance: A SAP's decision that an individual needs an education program constitutes a clinically based determination that the individual requires assistance in resolving problems with alcohol misuse and controlled substances use. Therefore, the SAP is prohibited from referring the individual to her or his own practice for this recommended education unless exempted by DOT rules.

Question 18: In rare circumstances, it is necessary to refer an individual immediately for inpatient substance abuse services. May the SAP provide direct treatment services or refer the individual to services provided by a treatment facility with which he or she is affiliated, or must the inpatient provider refer the individual to another provider?

Guidance: SAPs are prohibited from referring an employee to themselves or to any program with which they are financially connected. SAP referrals to treatment programs must not give the impression of a conflict of interest. However, a SAP is not prohibited from referring an employee for assistance through a public agency; the employer or person under contract to provide treatment on behalf of the employer; the sole source of therapeutically appropriate treatment under the employee's health insurance program; or the sole source of therapeutically appropriate reasonably accessible to the employee.

Question 19: What arrangement for SAP services would be acceptable in geographical areas where no qualified SAP is readily available?

Guidance: The driver must be given the names, addresses, and phone numbers of the nearest SAPs. Because evaluation by a qualified SAP rarely takes more than one diagnostic session, the requirement for an in-person evaluation is not unreasonable, even if it must be conducted some distance from the employee's home.

Question 20: May an employee who tests positive be retained in a non-driving capacity?

Guidance: Yes. Before an employee returns to performing safety-sensitive functions, the requirements of § 382.605 must be met.

Question 21: Are foreign motor carriers required to have an employee assistance program?

Guidance: No. The employee assistance program was an element of the original FHWA drug testing program under 49 CFR part 391, which has been superseded by 49 CFR part 382. All motor carriers under part 382 alcohol and drug testing regulations must refer drivers, who operate in the U.S. and violate the FHWA's alcohol and drug testing regulations, to a substance abuse professional.

Subpart B—Prohibitions

Question 1: Does the term, ''actual knowledge,'' used in the various prohibitions in subpart B of part 382, require direct observation by a supervisor or is it more general?

Guidance: The form of actual knowledge is not specified, but may result from the employer's direct observation of the employee, the driver's previous employer(s), the employee's admission of alcohol use, or other occurrence. (59 FR 7320, February 15, 1994)

Special Topics—Responsibility for Payment for Testing

Question 1: Who is responsible for paying for any testing under the alcohol and drug testing program, the employer or the driver?

Guidance: Part 382 is silent as to the responsibility for paying for testing required under the rule. The employer remains responsible at all times for ensuring compliance with the rule, regardless of who pays for testing.

Special Topics—Multiple Service Providers

Question 1: May an employer use more than one MRO, BAT, or SAP?

Guidance: Yes.

Special Topics—Medical Examiners Acting as MRO

Question 1: A medical examiner conducts a physical examination of a driver (§ 391.43) and also acts as the MRO for the driver's pre-employment controlled substances test. Though the driver is otherwise physically qualified, the medical examiner declines to issue a medical examiner's certificate because the driver tested positive for controlled substances. What should the medical examiner do when the same driver, under the aegis of a different employer, returns a short period later, is otherwise physically qualified, and tests negative for controlled substances? What, if anything, may the medical examiner reveal to the second employer if he/she declines to issue a certificate to the driver?

Guidance: The driver may be physically unqualified under § 391.41(b)(12) if the medical examiner determines, based on other evidence besides the drug test, including, but not limited to knowledge of the prior positive test result, that the driver continues to use prohibited drugs (§ 391.43 *Medical examination; certificate of physical examination*). If the medical examiner so determines, a medical examiner's certificate may not be issued. If the medical examiner determines that the driver does not use prohibited drugs, a medical examiner's certificate may be issued.

The FHWA does not regulate communications between a medical examiner and employer, other than requiring notification by the MRO to the employer of controlled substances test results under Part 382 [see § 382.407(a)]. Though medical examiners must retain the physical examination form, employers are not required to do so. Many employers choose, however, to

contract with medical examiners to provide copies of the ''long form'' to the employers. The FMCSRs leave it solely a matter between the medical examiner and the employer whether the medical examiner merely declines to issue a medical examiner's certificate or also makes available to the employer the long form, which may include notes on alcohol and controlled substances use.

Special Topics—Biennial (Periodic) Testing Requirements

Question 1: May an employer perform testing beyond that required by the DOT?

Guidance: An employer may perform any testing provided it is consistent with applicable law and agreements, and is not represented as a DOT test.

Question 2: Does part 382 require a CMV driver to carry proof of compliance with part 382 and part 40?

Guidance: No. The drug and alcohol testing is employer-based and proof of compliance must be maintained by the employer. The only certificate that is required to be in the driver's possession while operating a CMV is the medical examiner's certificate required in § 391.41(a) and, if applicable, a waiver of certain physical defects issued under § 391.49.

Part 383—Commercial Driver's License Standards; Requirements and Penalties

Sections Interpreted

383.3 Applicability
383.5 Definitions
383.21 Number of Drivers' Licenses
383.23 Commercial Driver's License
383.31 Notification of Convictions for Driver Violations
383.33 Notification of Driver's License Suspensions
383.37 Employer Responsibilities
383.51 Driver Disqualifications —General Questions—
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383.75 Third Party Testing
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383.91 Vehicle Groups
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383.131 Test Procedures
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383.153 Information on the Document and Application
Special Topics—Motor Coaches and CDL
Special Topics—State Reciprocity

Section 383.3 Applicability

Question 1: Are school and church bus drivers required to obtain a CDL?

Guidance: Yes, if they drive vehicles designed to transport 16 or more people.

Question 2: Do mechanics, shop help, and other occasional drivers need a CDL if they are operating a CMV or if they only test drive a vehicle?

Guidance: Yes, if the vehicle is operated or test-driven on a public highway.

Question 3: Does part 383 apply to drivers of recreational vehicles?

Guidance: No, if the vehicle is used strictly for non-business purposes.

Question 4: Does part 383 apply to drivers of vehicles used in ''van pools''?

Guidance: Yes, if the vehicle is designed to transport 16 or more people.

Question 5: May a person operate a CMV wholly on private property, not open to public travel, without a CDL?

Guidance: Yes.

Question 6: Does off-road motorized construction equipment meet the definitions of ''motor vehicle'' and ''commercial motor vehicle'' as used in §§ 383.5 and 390.5?

Guidance: No. Off-road motorized construction equipment is outside the scope of these definitions: (1) When operated at construction sites; and (2) when operated on a public road open to unrestricted public travel, provided the equipment is not used in furtherance of a transportation purpose. Occasionally driving such equipment on a public road to reach or leave a construction site does not amount to furtherance of a transportation purpose. Since construction equipment is not designed to operate in traffic, it should be accompanied by escort vehicles or in some other way separated from the public traffic. This equipment may also be subject to State or local permit requirements with regard to escort vehicles, special markings, time of day, day of the week, and/or the specific route.

Question 7: What types of equipment are included in the category of off-road motorized construction equipment?

Guidance: The definition of off-road motorized construction equipment is to be narrowly construed and limited to equipment which, by its design and function is obviously not intended for use, nor is it used on a public road in furtherance of a transportation purpose. Examples of such equipment include motor scrapers, backhoes, motor graders, compactors, tractors, trenchers, bulldozers and railroad track maintenance cranes.

Question 8: Do operators of motorized cranes and vehicles used to pump cement at construction sites have to meet the testing and licensing requirements of the CDL program?

Guidance: Yes, because such vehicles are designed to be operated on the public highways and therefore do not qualify as off-road construction equipment. The fact that these vehicles are only driven for limited distances, at less than normal highway speeds and/or incidental to their primary function, does not exempt the operators from the CDL requirements.

Question 9: May a State require persons operating recreational vehicles or other CMVs used by family members for non-business purposes to have a CDL?

Guidance: Yes. States may extend the CDL requirements to recreational vehicles.

Question 10: Do drivers of either a tractor trailer or straight truck that is converted into a mobile office need a CDL?

Guidance: Yes, if the vehicle meets the definition of a CMV.

Question 11: Do State motor vehicle inspectors who drive trucks and motorcoaches on an infrequent basis and for short distances as part of their job have to obtain a CDL?

Guidance: Yes.

Question 12: Are State, county and municipal workers operating CMVs required to obtain CDLs?

Guidance: Yes, unless they are waived by the State under the firefighting and emergency equipment exemption in § 383.3(d).

Question 13: Do the regulations require that a person driving an empty school bus from the manufacturer to the local distributor obtain a CDL?

Guidance: Yes. Any driver of a bus that is designed to transport 16 or more persons, or that has a GVWR of 26,001 pounds or more, is required to obtain a CDL in the applicable class with a passenger endorsement.

Question 14: Are employees of any governmental agency who drive emergency response vehicles that transport HM in quantities requiring placarding subject to the CDL regulations?

Guidance: No, as long as the vehicle does not meet the weight/configuration thresholds for Groups A or B (in § 383.91). However, under the HMTUSA of 1990, when a Federal, State or local government agency ''offers HM for transportation in commerce or transports HM in furtherance of a commercial enterprise,'' its vehicles are subject to the placarding requirements of part 172, subpart F. Vehicles that are controlled and operated by government agencies in the conduct of governmental functions normally are not subject to placarding, since governmental activities usually are not commercial enterprises. Based on the above, local police emergency responders driving a vehicle having a gross vehicle or combination weight rating under 26,001 pounds do not need a CDL, according to

the Federal minimum standards, when transporting HM as a function of their agency. The drivers should check with their State licensing agency to determine what class of license the State may require to operate the vehicles.

Question 15: Are public transit employees known as ''hostlers,'' who maintain and park transit buses on transit system property, subject to CDL requirements?

Guidance: No, unless operating on public roads.

Question 16: Are non-military amphibious landing craft that are usually used in water but occasionally used on a public highway CMVs?

Guidance: Yes, if they are designed to transport 16 or more people.

Question 17: Are students who will be trained to be motor vehicle operators subject to alcohol and drug testing? Are they required to obtain a CDL in order to operate training vehicles provided by the school?

Guidance: Yes. Section 382.107 includes the following definitions:

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

Driver means any person who operates a CMV. * * *

Truck and bus driver training schools meet the definition of an employer because they own or lease CMVs and assign students to operate them at appropriate points in their training. Similarly, students who actually operate CMVs to complete their course work qualify as drivers.

The CDL regulations provide that ''no person shall operate'' a CMV before passing the written and driving tests required for that vehicle (§ 383.23(a)(1)). Virtually all of the vehicles used for training purposes meet the definition of a CMV, and student drivers must therefore obtain a CDL.

Question 18: May States exempt motor carriers which operate wholly in intrastate commerce from the Federal HMRs, thus exempting from the CDL requirement the driver of an unplacarded vehicle with a GVWR of less than 26,001 pounds?

Guidance: The HMRs apply to motor carriers in intrastate commerce only if they transport hazardous wastes, hazardous substances, flammable cryogenic liquids in portable tanks and cargo tanks, and marine pollutants (as those terms are defined in the HMRs) (see 49 CFR 171.1(a)(3)). Such carriers transporting any other cargo are not required to use HM placards, even if the cargo qualifies as hazardous under the Federal HMRs. Unless the vehicles used by these carriers had GVWRs of 26,001 pounds or more, they would not meet either the placarding or the GVWR test in the jurisdictional definition of a CMV (§ 383.5), and the driver would be exempt from the CDL requirements.

However, if the State has adopted the HMRs, or the placarding requirements of 49 CFR part 172, as regulations applicable to intrastate commerce, then the drivers of all vehicles required to use placards must also have CDLs.

If the State promulgates its own rules for the regulation of HM in intrastate commerce, instead of adopting the HMRs, and those rules are approved by the FHWA under 49 CFR 355.21(c)(3) and paragraph 3(d) of the Tolerance Guidelines (49 CFR part 350, appendix C), the drivers of vehicles with GVWRs of less than 26,001 pounds transporting such materials in intrastate commerce are required to obtain CDLs only if State law requires the use of placards.

Question 19: Must a civilian operator of a CMV, as defined in § 383.5, who operates wholly within a military facility open to public travel, have a CDL?

Guidance: Yes. The CDL requirement applies to every person who operates a CMV in interstate, foreign or intrastate commerce. Driving a CMV on a road, street or way which is open to public travel, even though privately-owned or subject to military control, is *prima facie* evidence of operation in commerce.

Question 20: Does the FHWA include the Space Cargo Transportation System (SCTS) off-road motorized military equipment under the definitions of ''motor vehicle'' and ''commercial motor vehicle'' as used in § 383.5?

Guidance: No. Although the SCTS has vehicular aspects (it is mechanically propelled on wheels), the SCTS is obviously incompatible with highway traffic and is found only at locations adjacent to military bases in California and Florida, and is operated by skilled technicians. The SCTS is moved to and from its point of manufacture to its launch site by ''driving'' the ''vehicles'' short distances on public roads at speeds of five MPH or less. This is only incidental to their primary functions; the SCTS is not designed to operate in traffic; and its mechanical manipulation often requires a different set of knowledge and skills. In most instances, the SCTS has to be specially marked, escorted, and attended by numerous observers.

Question 21: Are police officers who operate buses and vans which are designed to carry 16 or more persons and are used to transport police officers during demonstrations and other crowd control activities required to obtain a CDL?

Guidance: Yes. The CMVSA applies to anyone who operates a CMV, including employees of Federal, State and local governments. Crowd control activities do not meet the conditions for a waiver of operators of firefighting and other emergency vehicles in § 383.3(d).

Question 22: May fuel be considered ''farm supplies'' as used in § 383.3(d)(1)?

Guidance: Yes. The decision to grant the waiver is left to each individual State.

Question 23: Is the transportation of seed-cotton modules from the cotton field to the gin by a module transport vehicle considered a form of custom harvesting activity that may be included under the FRSI waiver (§ 383.3(f))?

Guidance: Yes. The transportation of seed-cotton modules from field to gin may, at the State's discretion, be considered as custom harvesting and therefore eligible for the FRSI waiver. However, cotton ginning operations as an industry and, specifically the transport of cotton from the gin, are not eligible activities under the FRSI waiver because these activities are not considered appropriate elements of custom harvesting.

Question 24: Does the amendment of the CMVSA by the Motor Carrier Act of 1991 exempt all custom harvesting operations from the CDL requirements or only the operation of combines?

Guidance: Section 4010 of the Motor Carrier Act of 1991 (Title IV of Pub. L. 102–240, 105 Stat 1914, 2156, December 18, 1991) modifies the definition of a ''motor vehicle'' in 49 U.S.C. 31301(11) by excluding ''custom harvesting farm machinery'' from the definition. The conference report clarifies the intent of the exclusion by stating: ''The substitute [provision] removes custom harvesting farm machinery from the Act. Operators of such machinery are not covered by the Commercial Motor Vehicle Safety Act of 1986. A State, however, may still impose a requirement for a commercial driver's license if it so desires. The change does not apply to vehicles used to transport this type of machinery.'' (H.R. Conf. Rep. No. 404, 102d Cong., 1st Sess. 449 (1991)).

Therefore, the intent of Congress was only to exempt operators of combines and other equipment used to cut the grain and not the operators of trucks, tractors, trailers, semitrailers or any other CMV.

Question 25: May a State (1) require an applicant for a CDL farmer waiver

(§ 383.3(d)) to take HM training as a condition for being granted a waiver and (2) reduce the 150-mile provision in the waiver to 50 miles if the driver is transporting HM?

Guidance: Yes. The Federal farm waiver is permissive, not mandatory.

Question 26: Do active duty military personnel, not wearing military uniforms, qualify for a waiver from the CDL requirements if the CMVs are rental trucks or leased buses from the General Services Administration?

Guidance: Yes. The drivers in question do not need to be in military uniforms to qualify for the waivers as long as they are on active duty. In regard to the vehicles, they may be owned or operated by the Department of Defense.

Question 27: Are custom harvesters who harvest trees for tree farmers eligible to be considered ''custom harvesters'' for purposes of the FRSI waiver from selected CDL requirements?

Guidance: If the State considers a firm that harvests trees for tree farmers to be a custom harvesting operation, then its employees could qualify for the FRSI-restricted CDLs, subject to the stringent conditions and limitations of the waiver provisions in § 383.3(f).

Question 28: May a farmer who meets all of the conditions for a farm waiver be waived from the CDL requirements when transporting another farmer's products absent any written contract?

Guidance: If a farmer is transporting another farmer's products and being paid for doing so, he or she is acting as a contract carrier and does not meet the conditions for a farm waiver. The existence of a contract, written or verbal, is not relevant to the CDL waiver provisions.

Question 29: May a State exempt commercial motor vehicle drivers employed by a partnership, corporation or an association engaged in farming from the CDL requirements under the farmer waiver (49 CFR 383.3(d)) or is the waiver only available to drivers employed by a family-owned farm?

Guidance: The purpose of the farmer exemption was to give relief to family farms (53 FR 37313, September 26, 1988). The conditions for the waiver were established to ensure that the waiver focused on this type of farm operation. However, ''farmer'' is defined in § 390.5 as ''any person who operates a farm or is directly involved in the cultivation of land, crops, or livestock which (a) [a]re owned by that person; or (b) [a]re under the direct control of that person.'' Since farming partnerships, corporations and associations are legal ''persons,'' States may exempt drivers working for these organizations from the CDL requirements, provided they can meet the strict limits imposed by the waiver conditions.

Question 30: May a State exempt commercial motor vehicle drivers employed by farm cooperatives from the commercial driver's license (CDL) requirements under the farmer waiver (§ 383(d))?

Guidance: No. The waiver covers only operators of farm vehicles which are controlled and operated by ''farmers'' as defined in § 390.5. The waiver does not extend to ancillary businesses, like cooperatives, that provide farm-related services to members. As stated in the waiver notice (53 FR 37313, September 26, 1988), ''[t]he waiver would not be available to operators of farm vehicles who operate over long distances, operate to further a commercial enterprise, or operate under contract or for-hire for farm cooperatives or other farm groups. Such operators drive for a living and do not drive only incidentally to farming.''

Question 31: Is a person who grows sod as a business considered a farmer and eligible for the farmer waiver?

Guidance: Yes, a sod farmer is eligible for the farmer waiver provided the State of licensure recognizes the growing of sod to be a farming activity.

Section 383.5 Definitions

Question 1: a. Does ''designed to transport'' as used in the definition of a CMV in § 383.5 mean original design or current design when a number of seats are removed?

b. If all of the seats except the driver's seat are removed from a vehicle originally designed to transport only passengers to convert it to a cargo-carrying vehicle, does this vehicle meet the definition of a CMV in § 383.5?

Guidance: a. ''Designed to transport'' means the original design. Removal of seats does not change the design capacity of the CMV.

b. No, unless this modified vehicle has a GVWR over 26,000 pounds or is used to transport placarded HM.

Question 2: Are rubberized collapsible containers or ''bladder bags'' attached to a trailer considered a tank vehicle, thus requiring operators to obtain a CDL with a tank vehicle endorsement?

Guidance: Yes.

Question 3: If a vehicle's GVWR plate and/or VIN number are missing but its actual gross weight is 26,001 pounds or more, may an enforcement officer use the latter instead of GVWR to determine the applicability of the Part 383?

Guidance: Yes. The only apparent reason to remove the manufacturer's GVWR plate or VIN number is to make it impossible for roadside enforcement officers to determine the applicability of part 383, which has a GVWR threshold of 26,001 pounds. In order to frustrate willful evasion of safety regulations, an officer may therefore presume that a vehicle which does not have a manufacturer's GVWR plate and/or does not have a VIN number has a GVWR of 26,001 pounds or more if: (1) It has a size and configuration normally associated with vehicles that have a GVWR of 26,001 pounds or more; and (2) It has an actual gross weight of 26,001 pounds or more.

A motor carrier or driver may rebut the presumption by providing the enforcement officer the GVWR plate, the VIN number or other information of comparable reliability which demonstrates, or allows the officer to determine, that the GVWR of the vehicle is below the jurisdictional weight threshold.

Question 4: If a vehicle with a manufacturer's GVWR of less than 26,001 pounds has been structurally modified to carry a heavier load, may an enforcement officer use the higher actual gross weight of the vehicle, instead of the GVWR, to determine the applicability of part 383?

Guidance: Yes. The motor carrier's intent to increase the weight rating is shown by the structural modifications. When the vehicle is used to perform functions normally performed by a vehicle with a higher GVWR, § 390.33 allows an enforcement officer to treat the actual gross weight as the GVWR of the modified vehicle.

Question 5: When a State agency contracts with private parties for services involving the operation of CMVs, is the State agency or contractor considered the employer?

Guidance: If the contractor employs individuals and assigns and monitors their driving tasks, the contractor is considered the employer. If the State agency assigns and monitors driving tasks, then the State agency is the employer for purposes of part 383.

Question 6: A driver operates a tractor of exactly 26,000 pounds GVWR, towing a trailer of exactly 10,000 pounds GVWR, for a GCWR of 36,000 pounds. HM and passengers are not involved. Is it a CMV and does the driver need a CDL?

Guidance: No to both questions. Although the vehicle has a GCWR of 36,000 pounds, it is not a CMV under any part of the definition of that term in § 383.5, and a CDL is not federally required.

Question 7: Does the definition of a ''commercial motor vehicle'' in § 383.5 of the CDL requirements include

parking lot and/or street sweeping vehicles?

Guidance: If the GVWR of a parking lot or street sweeping vehicle is 26,001 or more pounds, it is a CMV under the CDL regulations.

Question 8: Is an employee of a Federal, State, or local government who operates a CMV, as defined in § 383.5, including an emergency medical vehicle, required to obtain a CDL? If so, why are such drivers considered as operating ''in commerce?''

Guidance: Government employees who drive CMVs are generally required to obtain a CDL. However, operators of firefighting and related emergency equipment may be exempt from the CDL requirement [53 FR 37313, September 26, 1988], at a State's discretion. Drivers of large advanced life support vehicles operated by municipalities would therefore, at a State's discretion, qualify for the exemption.

Government employees who drive CMVs are operating in ''commerce,'' as defined in § 383.5, because they perform functions that affect interstate trade, traffic, or transportation. Nearly all government CMVs are used, directly or indirectly, to facilitate or promote such trade, traffic, and transportation.

Question 9: The definition of a passenger CMV is a vehicle ''designed to transport'' more than 15 passengers, including the driver. Does that include standing passengers if the vehicle was specifically designed to accommodate standees?

Guidance: No. ''Designed to transport'' refers only to the number of designated seats; it does not include areas suitable, or even designed, for standing passengers.

Question 10: What is considered a ''public road''?

Guidance: A public road is any road under the jurisdiction of a public agency and open to public travel or any road on private property that is open to public travel.

Section 383.21 Number of Drivers' Licenses

Question 1: Are there any circumstances under which the driver of a CMV as defined in § 383.5 is allowed to hold more than one driver's license?

Guidance: Yes. A recipient of a new driver's license may hold more than one license during the 10 days beginning on the date the person is issued a driver's license.

Question 2: Is a person from Puerto Rico required to surrender his or her driver's license in order to obtain a nonresident CDL?

Guidance: Since Puerto Rico and the U.S. Territories are not included in the definition of a State in section 12016 of the CMVSA (49 U.S.C. § 31301(13)), they must be considered foreign countries for purposes of the CDL requirements. Under part 383, a person domiciled in a foreign country is not required to surrender his or her foreign license in order to obtain a nonresident CDL. There are two reasons for permitting this dual licensing to a person domiciled in Puerto Rico: (a) There is no reciprocal agreement with Puerto Rico recognizing its CMV testing and licensing standards as equivalent to the standards in part 383 and, (b) the nonresident CDL may not be recognized as a valid license to drive in Puerto Rico.

Section 383.23 Commercial Driver's License

Question 1: May a holder of a CMV learner's permit continue to hold his/her basic driver's license from any State without violating the single-license rule?

Guidance: Yes, since the learner's permit is not a license.

Question 2: The requirements for States regarding CMV learners' permits in § 383.23 appear to be ambiguous. For example, if the CMV learner's permit is ''considered a valid CDL'' for instructional purposes, is the State to enter the learner's permit issuance as a CDLIS transaction?

Guidance: No such requirement currently exists.

Question 3: Is a CDL required for CMV operations that occur exclusively in places where the general public is never allowed to operate, such as airport taxiways or other areas restricted from the public?

Guidance: No. FHWA regulations would not require a CMV driver to obtain a CDL under those circumstances. The Federal rules are minimum standards, however, and State law may require a CDL for operations not covered by part 383.

Section 383.31 Notification of Convictions for Driver Violations

Question 1: Must an operator of a CMV (as defined in § 383.5), who holds a CDL, notify his/her current employer of a conviction for violating a State or local (non-parking) traffic law in any type of vehicle, as required by § 383.31(b), even though the conviction is under appeal?

Guidance: Yes. The taking of an appeal does not vacate or annul the conviction, nor does it stay the notification requirements of § 383.31. The driver must notify his/her employer within 30 days of the date of conviction.

Section 383.33 Notification of Driver's License Suspensions

Question 1: When a driver (a) receives an Administrative Order of Suspension due to a blood alcohol reading in excess of the legal limit with notice that the suspension is not to be effective until 45 days after the notice or after an administrative hearing, and (b) a hearing is subsequently held, in effect suspending the license, what is the effective date of suspension for purposes of notifying the employer under § 383.33?

Guidance: The effective date of the suspension for notification purposes is the day the employee received notice of the suspension.

Section 383.37 Employer Responsibilities

Question 1: Section 383.37(a) does not allow employers to knowingly use a driver whose license has been suspended, revoked or canceled. Do motor carriers have latitude in their resulting actions: firing, suspension, layoff, authorized use of unused vacation time during suspension duration, transfer to nondriving position for duration of the suspension?

Guidance: Yes. The employer's minimum responsibility is to prohibit operation of a CMV by such an employee.

Question 2: a. A motor carrier recently found a driver who had a detectable presence of alcohol, placed him off-duty in accordance with § 392.5, and ordered a blood test which disclosed a blood alcohol concentration of 0.05 percent. Is the carrier obligated to place the driver out of service for 24 hours as prescribed by § 392.5(c)?

b. Is the carrier obligated to disqualify the driver for a period of one year as prescribed by §§ 383.51(b) and 391.15(c)(3)(i) of the FMCSRs?

Guidance: a. Only a State or Federal official can place a driver out of service. Instead, the carrier is obligated to place the driver off-duty and prevent him/her from operating or being in control of a CMV until he/she is no longer in violation of § 392.5.

b. No. A motor carrier has no authority to disqualify a driver. Disqualification for such an offense only occurs upon a conviction.

Question 3: If an individual driver had two convictions for serious traffic violations while driving a CMV, and neither FHWA nor his/her State licensing agency took any disqualification action, does the motor carrier have any obligation under FHWA regulations to refrain from using this driver for 60 days? If so, when does that time period begin?

Guidance: No. Only the State or the FHWA has the authority to take a disqualification action against a driver. The motor carrier's responsibility under § 383.37(a) to refrain from using the driver begins when it learns of the disqualification action and continues until the disqualification period set by the State or the FHWA is completed.

Question 4: Is a driver who has a CDL, and has been convicted of a felony, disqualified from operating a CMV under the FMCSRs?

Guidance: Not necessarily. The FMCSRs do not prohibit a driver who has been convicted of a felony, such as drug dealing, from operating a CMV unless the offense involved the use of a CMV. If the offense involved a non-CMV, or was unrelated to motor vehicles, there is no FMCSR prohibition to employment of the person as a driver.

Section 383.51 Driver Disqualifications

—General Questions—

Question 1: a. If a driver received one ''excessive speeding'' violation in a CMV and the same violation in his/her personal passenger vehicle, would the driver be disqualified? or,

b. If a driver received two ''excessive speeding'' violations in his/her personal passenger vehicle, would the driver be disqualified?

Guidance: No, in both cases. Convictions for serious traffic violations, such as excessive speeding, only result in disqualification if the offenses were committed in a CMV—unless the State has stricter regulations.

Question 2: Section 383.51 of the FMCSRs disqualifies drivers if certain offenses were committed while operating a CMV. Will the States be required to identify on the motor vehicle driver's record the class of vehicle being operated when a violation occurs?

Guidance: No, only whether or not the violation occurred in a CMV. The only other indication that may be required is if the vehicle was carrying placardable amounts of HM.

Question 3: If a CDL holder commits an offense that would normally be disqualifying, but the CDL holder is driving under the farm waiver, must conviction result in disqualification and action against the CDL holder?

Guidance: Yes. Possession of the CDL means the driver is not operating under the waiver. In addition, the waiver does not absolve the driver from disqualification under part 391.

Question 4: What is meant by leaving the scene of an accident involving a CMV?

Guidance: As used in part 383, the disqualifying offense of ''leaving the scene of an accident involving a CMV'' is all-inclusive and covers the entire range of situations where the driver of the CMV is required by State law to stop after an accident and either give information to the other party, render aid, or attempt to locate and notify the operator or owner of other vehicles involved in the accident.

Question 5: If a State disqualifies a driver for two serious traffic violations under § 383.51(c)(2)(i), and that driver, after being reinstated, commits a third serious violation, what additional period of disqualification must be imposed on that driver?

Guidance: If three years have not elapsed since the original violation, then the driver is now subject to a full 120-day disqualification period.

Question 6: May a State issue a ''conditional,'' ''occupational'' or ''hardship'' license that includes CDL driving privileges when a CDL holder loses driving privileges to operate a private passenger vehicle (non-CMV)?

Guidance: Yes, provided the CDL holder loses his/her driving privileges for operating a non-CMV as the result of a conviction for a disqualifying offense that occurred in a non-CMV. A State is prohibited, however, from issuing any type of license which would give the driver even limited privileges to operate a CMV when the conviction is for a disqualifying offense that occurred in a CMV.

Question 7: What information needs to be contained on a ''conditional,'' ''occupational'' or ''hardship'' license document that includes CDL driving privileges?

Guidance: The same information that is required under § 383.153, including an explanation of restrictions of driving privileges.

Question 8: Is a State obligated to grant reciprocity to another State's ''conditional,'' ''occupational'' or ''hardship'' license that includes CDL driving privileges?

Guidance: Yes, in regard to operating a CMV as stated in § 383.73(h).

Section 383.51 Driver Disqualifications

—Alcohol Questions—

Question 1: Are States expected to make major changes to their enforcement procedures in order to apply the alcohol disqualifications in the Federal regulations?

Guidance: No. Sections 383.51 and 392.5 do not require any change in a State's existing procedures for initially stopping vehicles and drivers.

Roadblocks, random testing programs, or other enforcement procedures which have been held unconstitutional in the State or which the State does not wish to implement are not required.

Question 2: Is a driver disqualified for driving a CMV while off-duty with a blood alcohol concentration over 0.04 percent?

Guidance: Yes. Section 383.51 applies to any person who is driving a CMV, as defined in § 383.5, regardless of the person's duty status under other regulations. Therefore, the driver, if convicted, would be disqualified under § 383.51.

Question 3: Does a temporary license issued pursuant to the administrative license revocation (ALR) procedure authorize the continued operation of CMVs when the license surrendered is a CDL? Does the acceptance of a temporary driver's license place the CDL holder in violation of the one driver's license requirement?

Guidance: The ALR procedure of taking possession of the driver's CDL and issuing a ''temporary license'' for individuals who either fail a chemical alcohol test or refuse to take the test is valid under the requirements of part 383. Since the CDL that is being held by the State is still valid until the administrative revocation action is taken, the FHWA would interpret the document given to the driver as a ''receipt'' for the CDL, not a new ''temporary'' license. The driver violates no CDL requirements for accepting the receipt which may be used to the extent authorized.

Question 4: Is a driver disqualified under § 383.51 if convicted of driving under the influence of alcohol while operating a personal vehicle?

Guidance: The convictions triggering mandatory disqualification under § 383.51 all pertain to offenses that occur while the person is driving a CMV. However, a driver could be disqualified under § 383.51(b)(2)(i) if the State has stricter standards which apply to offenses committed in a personal vehicle. (The same principle applies to all other disqualifying offenses listed in § 383.51.)

Question 5: Would a driver convicted under a State's ''open container'' law be disqualified under the CDL regulations if the violation occurred while he/she was operating a CMV?

Guidance: If a conviction under a particular State's ''open container law'' is a conviction for ''driving under the influence'' or ''driving while intoxicated,'' and if the person committed the violation while driving a CMV, then the driver is disqualified for one year under § 383.51, assuming it is a first offense.

Section 383.71 Driver Application Procedures

Question 1: What must a driver certify if he/she is in interstate commerce but is excepted or exempted from part 391 under the provisions of parts 390 or 391?

Guidance: The State should instruct the driver to certify that he/she is not subject to part 391.

Question 2: Since an applicant is required to turn in his/her current license when issued an FRSI-restricted CDL, should the applicant return to the State exam office and be re-issued the old license when the seasonal validation period expires?

Guidance: No. This approach violates the requirements of part 383 and the FRSI waiver regarding the single-license concept. It violates the waiver requirement that the FRSI-restricted CDL is to have the same renewal cycle as an unrestricted CDL and shall serve as an operator's license for vehicles other than CMVs. The license issued under the waiver is a CDL and must be treated the same as an unrestricted CDL in regard to the driver record being maintained through the CDLIS and subject to all disqualifying conditions for the full renewal cycle. The restriction determining when the driver may use the CDL to operate a CMV should be clearly printed on the license.

Question 3: Do the regulations require that a driver be recertified for the hazardous materials ''H'' endorsement every two years?

Guidance: No. If the driver wishes to retain an HM endorsement, he/she is required at the time of license renewal to pass the test for such endorsement. The only times a driver may be required to pass the test for such endorsement in a condensed time frame is within the 2 years preceding a license transfer if he/she is transferring a CDL from one State of domicile to a new State of domicile (see § 383.73(b)(4)), or if the State has exercised its prerogative to establish more stringent requirements.

Question 4: May a CDL driving skills test examiner conduct a driving skills test administered in accordance with 49 CFR part 383 before a person subject to Part 382 is tested for alcohol and controlled substances?

Guidance: Yes. A CDL driving skills test examiner, including a third party examiner, may administer a driving skills test to a person subject to Part 382 without first testing him/her for alcohol and controlled substances. The intent of the CDL driving skills test is to assess a person's ability to operate a commercial motor vehicle during an official government test of their driving skills. However, this guidance does not allow an employer (including a truck or bus driver training school) to use a person as a current company, lease, or student driver prior to obtaining a verified negative test result. An employer must obtain a verified negative controlled substance test result prior to dispatching a driver on his/her first trip.

Section 383.73 State Procedures

Question 1: Does the State have any role in certifying compliance with § 391.11(b)(2) of the FMCSRs, which requires driver competence in the English language?

Guidance: No. The driver must certify that he or she meets the qualifications of part 391. The State is under no duty to verify the certification by giving exams or tests.

Question 2: Are States required to change their current medical standards for drivers who need CDLs?

Guidance: No, but interstate drivers must continue to meet the Federal standards, while intrastate drivers are subject to the requirements adopted by the State.

Question 3: To what does the phrase ''. . . as contained in § 383.51'' refer to in § 383.73(a)(3)?

Guidance: The phrase refers only to the word ''disqualification.'' Thus the State must check the applicant's record to ensure that he/she is not subject to any suspensions, revocations, or cancellations for any reason, and is not subject to any disqualifications under § 383.51.

Question 4: Is a State required to refuse a CDL to an applicant if the NDR check shows that he/she had a license suspended, revoked, or canceled within 3 years of the date of the application?

Guidance: Yes, if the person's driving license is currently suspended, revoked, or canceled.

Question 5: Must a new State of record accept the out-of-State driving record on CDL transfer applications and include this record as a permanent part of the new State's file?

Guidance: Yes.

Question 6: What does the term ''initial licensure'' mean as used in § 383.73?

Guidance: The term ''initial licensure'' as used in the context of § 383.73 is meant to refer to the procedures a State must follow when a person applies for his/her first CDL.

Question 7: May a State allow an applicant to keep his/her current valid State license when issued an FRSI-restricted CDL?

Guidance: No. That would violate the single-license concept.

Question 8: Does the word ''issuing'' as used in § 383.73(a) include temporary 60-day CDLs as well as permanent CDLs?

Guidance: Yes, the word ''issuing'' applies to all CDLs whether they are temporary or permanent.

Question 9: When a State chooses to meet the certification requirements of § 383.73 (a)(1), (b)(1), (c)(1) and (d)(1) by demanding, as part of its licensing process, that a commercial driver maintain with the Department of Motor Vehicles (DMV) currently valid evidence of compliance with the physical qualification standards of part 391, subpart E, may the State suspend, cancel or revoke the driver's CDL if he/she does not maintain such evidence with the DMV?

Guidance: Yes. Section 383.73 requires a State to obtain from a driver applicant a certification that he/she meets the qualification standards of part 391, including subpart E (Physical Qualifications and Examinations). A requirement that a driver maintain currently valid evidence of compliance with subpart E does not conflict with part 383, since the CMVSA made it clear that the DOT was to issue ''regulations to establish minimum Federal standards * * *'' (49 U.S.C. 31305(a)). A State may therefore demand more information or tests than the Federal CDL regulations require. If a driver fails to comply with State requirements which are not inconsistent with part 383, the State may suspend, cancel or revoke the driver's CDL. This action is not a disqualification for purposes of § 383.51, but a withdrawal of the commercial driving privilege.

Question 10: What action should enforcement officers take when a commercial driver's CDL has been declared invalid by the issuing State because of a lapse in the driver's medical certificate?

Guidance: Whatever the reason for the State's decision, a driver with an invalid CDL may not lawfully drive a CMV.

Question 11: May licensing jurisdictions meet their stewardship requirements for surrendered licenses by physically marking the license in some way as not valid and returning it to a driver as part of the driver's application for a new or renewal of an existing CDL?

Guidance: Yes. Provided the licensing jurisdiction meets the test of guaranteeing that the returned license document cannot possibly be mistaken for a valid document by a casual observer. A document perforated with the word ''VOID'' conspicuously and unmistakably displayed with holes large enough to be easily distinguished by a

casual observer in limited light, which cannot be obscured by the holder of the document, would meet the test of being invalidated.

Section 383.75 Third Party Testing

Question 1: May the CDL knowledge test be administered by a third party?

Guidance: No. The third party testing provision found in § 383.75 applies only to the skills portion of the testing procedure. However, if an employee of the State who is authorized to supervise knowledge testing is present during the testing, then the FHWA regards it as being administered by the State and not by the third party.

Question 2: Do third party skills test examiners have to meet all the requirements of State-employed examiners—i.e. all the State's qualification and training standards?

Guidance: No. Section 383.75(a)(2)(iii) requires third party examiners to meet the same standards as State examiners only ''to the extent necessary to conduct skills tests.''

Question 3: Do third-party skills test examiners have to be qualified to administer skills tests in all types of CMVs?

Guidance: No.

Section 383.77 Substitute for Driving Skills Test

Question 1: May a State grandfather drivers from skills testing under § 383.77?

Guidance: Yes, provided the applicant meets all the eligibility conditions under § 383.77, including current operation of a CMV (§ 383.77(b)(1)). Therefore, the pool of applicants eligible for grandfathering is limited to drivers with current CMV operating experience under a CDL waiver (e.g., farm, FRSI, firefighting, emergency and military vehicles).

Question 2: May a driver applicant be ''grandfathered'' from any CDL knowledge test?

Guidance: No. ''Grandfathering'' of CDL basic or endorsement knowledge testing is not permitted by part 383.

Section 383.91 Vehicle Groups

Question 1: May a State expand a vehicle group to include vehicles that do not meet the Federal definition of the group?

Guidance: Yes, if: a. A person who tests in a vehicle that does not meet the Federal standard for the Group(s) for which the issued CDL would otherwise be valid, is restricted to vehicles not meeting the Federal definition of such Group(s); and

b. The restriction is fully explained on the license.

Question 2: Is a driver of a combination vehicle with a GCWR of less than 26,001 pounds required to obtain a CDL even if the trailer GVWR is more than 10,000 pounds?

Guidance: No, because the GCWR is less than 26,001 pounds. The driver would need a CDL if the vehicle is transporting HM requiring the vehicle to be placarded or if it is designed to transport 16 or more persons.

Question 3: Can a State which expands the vehicle group descriptions in § 383.91 enforce those expansions on out-of-State CMV drivers by requiring them to have a CDL?

Guidance: No. They must recognize out-of-State licenses that have been validly issued in accordance with the Federal standards and operative licensing compacts.

Question 4: What CMV group are drivers of articulated motorcoaches (buses) required to possess?

Guidance: Drivers of articulated motorcoaches are required to possess a Class B CDL.

Question 5: Do tow truck operators need CDLs? If so, in what vehicle group(s)?

Guidance: For CDL purposes, the tow truck and its towed vehicle are treated the same as any other powered unit towing a nonpowered unit:

—*If* the GCWR of the tow truck and its towed vehicle is 26,001 pounds or more, and the towed vehicle alone exceeds 10,000 pounds GVWR, *then* the driver needs a Group A CDL.

—*If* the GVWR of the tow truck alone is 26,001 pounds or more, and the driver either (a) drives the tow truck without a vehicle in tow, or (b) drives the tow truck with a towed vehicle of 10,000 pounds or less GVWR, *then* the driver needs a Group B CDL.

—A driver of a tow truck or towing configuration that does not fit either configuration description above, requires a Group C CDL *only* if he or she tows a vehicle required to be placarded for hazardous materials on a ''subsequent move,'' i.e. after the initial movement of the disabled vehicle to the nearest storage or repair facility.

Section 383.93 Endorsements

Question 1: Is the HM endorsement needed for operation of State and local government vehicles carrying HM?

Guidance: No.

Question 2: Are drivers of double and triple saddle mount combinations required to have the double/triple trailers endorsement on their CDLs?

Guidance: Yes, if the following conditions apply:

—There is more than one point of articulation in the combination;

—The GCWR is 26,001 or more pounds; and

—The combined GVWR of the vehicle(s) being towed is in excess of 10,000 pounds.

Question 3: Are drivers delivering empty buses in driveaway-towaway operations required to have the passenger endorsement on their CDLs?

Guidance: No.

Question 4: Would the driver in the following scenarios be required to have a CDL with a HM endorsement?

a. A driver transports 1,000 or more pounds of Division 1.4 (Class C explosive) materials in a vehicle with a GVWR of less than 26,001 pounds?

b. A driver transports less than 1,000 pounds of Division 1.4 (Class C explosive) materials in a vehicle with a GVWR of less than 26,001 pounds?

c. The driver transports any quantity of Division 1.1, 1.2 or 1.3 (Class A or B explosive) materials in any vehicle.

Guidance: a. Yes.

b. No.

c. Yes.

Question 5: Do drivers of ready-mix concrete mixers need a tank vehicle endorsement (''N'') on their CDL?

Guidance: No.

Question 6: Does an unattached tote or portable tank with a cargo capacity of 1,000 gallons or more meet the definition of ''portable tank'' requiring a tank vehicle endorsement on the driver's CDL?

Guidance: Yes.

Question 7: Must all drivers of vehicles required to be placarded have CDLs containing the HM endorsement?

Guidance: Yes, unless waived.

Question 8: Is a driver who operates a truck tractor pulling a heavy-haul trailer with a ''jeep'' attached to the front of the trailer that meets the definition of a CMV under part 383 required to have a CDL with a double/triple trailer endorsement?

Guidance: Yes. The ''jeep,'' also referred to as a dolly or load divider, is a short frame-type trailer complete with upper coupler, fifth wheel and undercarriage assembly and designed in such a manner that when coupled to a semitrailer and tractor it carries a portion of the trailer kingpin load while transferring the remainder to the tractor's fifth wheel.

Question 9: Do persons transporting battery-powered forklifts need to obtain an HM endorsement?

Guidance: No.

Question 10: Do tow truck operators who hold a CDL require endorsements to tow ''endorsable'' vehicles?

Guidance: For CDL endorsement purposes, the nature of the tow truck operations determines the need for endorsements:

—*If* the driver's towing operations are restricted to emergency ''first moves'' from the site of a breakdown or accident to the nearest appropriate repair facility, *then* no CDL endorsement of any kind is required.

—*If* the driver's towing operations include any ''subsequent moves'' from one repair or disposal facility to another, *then* endorsements requisite to the vehicles being towed are required. *Exception:* Tow truck operators need not obtain a passenger endorsement.

Section 383.95 Air Brake Restrictions

Question 1: A driver has a Group B or C CDL valid for airbrake-equipped vehicles. He or she later upgrades to a Group A license by testing in a vehicle that is not equipped with airbrakes. Must the State restrict the upgraded license to nonairbrake-equipped vehicles?

Guidance: No, because the airbrake systems on combination versus single vehicles do not differ significantly.

Question 2: May a driver who has an air brake restriction as defined in § 383.95 operate a CMV equipped with an air-over-hydraulic brake system?

Guidance: No. Under § 383.95(b), the term ''air brakes'' includes any braking system operating fully or partially on the air brake principle. Air-over-hydraulic brake systems operate partially on the air brake principle and are therefore air brakes for purposes of the CDL regulations. The NHTSA also considers ''air over hydraulic'' brakes to be air brakes under FMVSS 121.

Question 3: May a State issue a restriction to a driver who passes the air brake knowledge test and the skills test in a vehicle equipped with an air-over-hydraulic brake system that limits the driver to operate only vehicles equipped with an air-over-hydraulic air brake system?

Guidance: Yes. A State may issue the additional restriction, provided it is fully explained on the CDL. This would give a State the option to allow a driver who tests in a vehicle equipped with an air-over-hydraulic brake system (rather than a full air brake system) to operate a vehicle equipped with either a hydraulic or air-over-hydraulic brake system, while restricting them from operating vehicles equipped with a full air brake system.

Question 4: May a driver with an air brake restriction on his or her CDL operate a CMV equipped with a hydraulic braking system that has an air-assisted parking brake release?

Guidance: Yes. The air brake restriction applies only to the principal braking system used to stop the vehicle. Section 383.95(b) is not applicable to an air-assisted mechanism to release the parking brake.

Section 383.131 Test Procedures

Question 1: Are there any Federal regulations which require the States to retain for a specified period of time the CDL knowledge tests (or the test results) used to test CMV drivers?

Guidance: No, there are no Federal regulations regarding such record retention.

Section 383.133 Testing Methods

Question 1: May States administer the CDL knowledge and endorsement test in foreign languages or in other than a written format?

Guidance: Yes.

Question 2: Do the Federal standards limit the number of times a driver may take a test if he or she fails?

Guidance: The rule does not limit the number of times a driver may take a test.

Question 3: Is a State allowed to provide for an alternative test (e.g., oral) or administer an alternate exam format providing the test meets FHWA requirements?

Guidance: Yes. The knowledge portion of the test may be administered in written form, verbally, in automated formats, or otherwise at the discretion of the State.

Section 383.153 Information on the Document and Application

Question 1: May a State use the residence address as opposed to the mailing address on the CDL?

Guidance: Yes.

Question 2: May a State issue temporary nonphoto CDLs?

Guidance: Yes, as long as:

a. the State does not liberalize any existing procedures for issuing nonphoto licenses; and

b. the State does not allow drivers to operate CMVs indefinitely without a CDL which meets all the standards of § 383.153.

Question 3: May a State choose to implement a driver license system involving multiple part license documents?

Guidance: Yes. A two or more part document, as currently used in some States, is acceptable, provided:

a. All of the documents must be present to constitute a ''license;''

b. Each document is explicitly ''tied'' to the other document(s), and to a single driver's record. Each document must indicate that the driver is licensed as a CMV driver, if that is the case; and

c. The multipart license document includes all of the data elements specified in part 383, subpart J.

Question 4: If the State restricts the CDL driving privilege, must that restriction be shown on the license?

Guidance: Yes.

Question 5: Is a State required to show the driver's SSN on the CDL?

Guidance: No. Section 383.153 does not specify the SSN as a required element of the CDL document although the regulation does require a driver applicant who is domiciled in the U.S. to provide his or her SSN on the CDL application.

Question 6: Is a State prohibited from issuing a CDL to an applicant who, for religious reasons, does not possess an SSN?

Guidance: No. The determination of whether a person needs an SSN is left up to the Social Security Administration.

Question 7: Is a color-digitized image of a driver acceptable for purposes of a CDL?

Guidance: Yes. The FHWA will accept a color-digitized image of a driver on a CDL in lieu of a color photograph.

Special Topics—Motor Coaches and CDL

Question 1: May a State develop a knowledge test exclusively for motorcoach operators which excludes cargo handling and hazardous materials?

Guidance: Yes. A State could develop a basic knowledge test for bus drivers only, by deleting the cargo handling and HM questions from its normal basic knowledge test. In that case, the driver applicant would still need to pass the specialized knowledge and skills tests for the passenger endorsement, and the State would need to restrict the CDL to passenger operations only.

Question 2: What skills test is required for a CDL holder seeking to add a passenger endorsement?

Guidance: If a person already holds a CDL without a passenger endorsement, and subsequently applies for such endorsement, three situations may arise:

a. The passenger test vehicle is in the same vehicle group as that shown on the CDL. This situation poses no problem since there is no discrepancy.

b. The passenger test vehicle is in a greater vehicle group than that shown on the preexisting CDL. This is an upgrade situation. The driver and the State must meet the requirements of §§ 383.71(d) and 383.73(d), and the upgraded CDL must show the vehicle group of the passenger test vehicle.

c. The passenger test vehicle is in a lesser vehicle group than that shown on the preexisting CDL. In this situation, the CDL retains the vehicle group of the preexisting CDL, but also restricts the driver, when engaged in CMV passenger operations, to vehicles in the group in which the passenger skills test was taken, or to a lesser group.

Special Topics—State Reciprocity

Question 1: May a State place an ''intrastate only'' or similar restriction on the CDL of a driver who certifies that he or she is not subject to part 391?

Guidance: Yes; however, this restriction would not apply to drivers in interstate commerce who are excepted or exempted from part 391 under the provisions of parts 390 or 391.

Question 2: May a State allow a driver possessing an out-of-State CDL containing an intrastate restriction to operate a CMV in their jurisdiction?

Guidance: Yes, provided the driver operates exclusively intrastate.

Question 3: May States choose to interpret ''intrastate'' in ways that differ from established transportation practice?

Guidance: No. States do not have the discretion to change the Federal definition of either ''interstate'' or ''intrastate'' commerce.

Special Topics—International

Question 1: The driver's medical exam is part of the Mexican Licencia Federal. If a roadside inspection reveals that a Mexico-based driver has not had the medical portion of the Licencia Federal re-validated, is the driver considered to be without a valid medical certificate or without a valid license?

Guidance: The Mexican Licencia Federal is issued for a period of 10 years but must be re-validated every 2 years. A condition of re-validation is that the driver must pass a new physical examination. The dates for each re-validation are on the Licencia Federal and must be stamped at the completion of each physical. This constitutes documentation that the driver is medically qualified. Therefore, if the Licencia Federal is not re-validated every 2 years as specified by Mexican law, the driver's license is considered invalid.

PART 384—STATE COMPLIANCE WITH COMMERCIAL DRIVER'S LICENSE PROGRAM

Sections Interpreted

384.209 Notification of traffic violations
384.211 Return of Old Licenses

Section 384.209 Notification of Traffic Violations

Question 1: Must a CDL holder's out-of-State conviction for a traffic violation be included in the driving record of the State of licensure (and thus CDLIS), if there are no traffic violation points assigned to the conviction?

Guidance: All out-of-State convictions of a CDL holder for traffic violations committed in any vehicle must be sent to the State of licensure, but only the convictions for offenses specified in 49 CFR 383.51 must be included in that State's driving record (and thus CDLIS). Assigning points to a conviction is strictly a State decision and has no bearing on the inclusion of the conviction.

The FHWA recommends the inclusion by the State of licensure of all convictions of a CDL holder for traffic violations committed in any vehicle, so that the State will have the full driver record available as an aid in making licensing decisions.

Question 2: Must the licensing agency establish a commercial driver record, including a CDLIS pointer record, for a person holding a non-commercial license issued by that jurisdiction upon receiving notification of a conviction of any offense committed while (illegally) operating a CMV?

Guidance: Yes.

Section 384.211 Return of Old Licenses

Question 1: May licensing jurisdictions meet their stewardship requirements for surrendered licenses by physically marking the license in some way as not valid and returning it to a driver as part of the driver's application for a new or renewal of an existing CDL?

Guidance: Yes. Provided the licensing jurisdiction meets the test of guaranteeing that the returned license document cannot possibly be mistaken for a valid document by a casual observer. A document perforated with the word ''VOID'' conspicuously and unmistakably displayed with holes large enough to be easily distinguished by a casual observer in limited light, which cannot be obscured by the holder of the document would meet the test of being invalidated.

PART 386—RULES OF PRACTICE FOR MOTOR CARRIER SAFETY AND HAZARDOUS MATERIALS PROCEEDINGS

Sections Interpreted

386.1 Scope of Rules in this Part

Section 386.1 Scope of Rules in This Part

Question 1: What is the authority of the RDMC to issue provisions as a part of the terms in a Notice of Abatement, Notice of Assessment, Compliance Order and Consent Order?

Guidance: The MCSA of 1984 provided the authority to penalize violators of Notices and Orders issued by the FHWA. Regulations were issued under part 386 which specify these penalties. Notices to Abate and Notices of Assessment/Claim generally deal with specific regulatory requirements. Consent Orders and Compliance Orders often require remedial measures not specifically mentioned in the FMCSRs since the motor carrier's compliance record often indicates that additional measures are needed to improve safety and compliance with the regulations.

PART 387—MINIMUM LEVELS OF FINANCIAL RESPONSIBILITY FOR MOTOR CARRIERS

Sections Interpreted

Subpart A—Motor Carriers of Property

387.1 Purpose and Scope
387.3 Applicability
387.5 Definitions
387.7 Financial Responsibility Required
387.9 Financial Responsibility, Minimum Levels
387.11 State Authority and Designation of Agent
387.15 Forms

Subpart B—Motor Carriers of Passengers

387.25 Purpose and Scope
387.27 Applicability
387.31 Financial Responsibility Required
387.39 Forms

Subpart A—Motor Carriers of Property

Section 387.1 Purpose and Scope

Question 1: May a State require a higher level of financial responsibility coverage than is required by part 387?

Guidance: Yes.

Section 387.3 Applicability

Question 1: At what GVWR, as assigned by a manufacturer, does the requirement to comply with the financial responsibility regulations begin?

Guidance: Generally, part 387, subpart A applies if the vehicle has a GVWR of 10,000 pounds or more. Part 387, subpart A, does not apply to the intrastate transportation of nonbulk oil, nonbulk HM, substances or wastes. Motor vehicles used to transport any quantity of Divisions 1.1, 1.2 or 1.3 (explosive) materials, poison gas, or highway route controlled quantity of radioactive materials in interstate or foreign commerce are subject to Federal regulation regardless of the GVWR.

Question 2: Does the GVWR apply to the power unit only?

Guidance: No.

Question 3: When are tow trucks subject to financial responsibility coverage?

Guidance: For-hire tow trucks with a GVWR or GCWR of 10,000 pounds or more performing emergency moves in interstate or foreign commerce are required to maintain minimum levels of financial responsibility in the amount of $750,000. For-hire tow trucks performing secondary moves are required to maintain levels of coverage applicable to the commodity being transported by the vehicle being towed.

Question 4: Are Federal, State or local political subdivisions subject to the financial responsibility regulations?

Guidance: No.

Question 5: Is a motor vehicle owned by an owner-operator, and being dead-headed (returning empty), or a tractor that is being bobtailed (operating without a trailer), subject to the financial responsibility regulations?

Guidance: A motor vehicle deadheading or bobtailing while in the service of a motor carrier would be subject to the financial responsibility regulations.

Question 6: Is a motor carrier transporting mail under contract for the U.S. Postal Service wholly within the boundaries of a single State subject to the minimum levels of financial responsibility requirements of part 387?

Guidance: Yes. The transportation of U.S. mail is considered to be interstate commerce because of the intermingling of inter- and intrastate mail on every vehicle.

Question 7: Are motor carriers transporting HM that are excepted from the HMRs subject to financial responsibility regulations?

Guidance: Yes. Packaging or transportation exceptions in the HMRs do not change the need for financial responsibility at the appropriate level commensurate with the commodity being transported.

Question 8: Are motor vehicles being transported considered to be HM for purposes of the financial responsibility requirements, thus requiring the higher limits set forth in the regulations?

Guidance: No, while motor vehicles are identified as HM in the Hazardous Materials Table at § 172.101, motor vehicles, by themselves, are not to be treated as HM and should be considered nonhazardous property.

Question 9: Is a travel trailer or motor home that has propane cylinders attached subject to part 387 of the FMCSRs?

Guidance: No. The FHWA considers such propane cylinders to be an integral part of the recreational vehicle and not subject to the financial responsibility regulations.

Section 387.5 Definitions

Question 1: Does the definition of the term ''in bulk'' include solids as well as liquids even though the definition refers to containment systems with capacities in excess of 3,500 water gallons?

Guidance: Yes, the term ''3,500 water gallons'' is used as a volumetric value and includes solids as well as liquids.

Section 387.7 Financial Responsibility Required

Question 1: May a large corporation which has many wholly owned subsidiaries have one policy for the parent corporation and maintain the policy and the Form MCS–90 at the corporate headquarters?

Guidance: Generally, the required financial responsibility must be in the exact name of the motor carrier and the proof of that coverage must be maintained at the motor carrier's principal place of business. A parent corporation may, however, have a single policy of insurance or surety bond covering the parent and its subsidiaries, provided the name of the parent and the name of each subsidiary are listed on the policy or bond. Further, the required proof must have listed thereon the name of the parent and its subsidiaries. A copy of that proof of financial responsibility coverage must be maintained at each motor carrier subsidiary's principal place of business.

Question 2: What is the definition of ''Certificate of Registration'' in § 387.7(b)(3)?

Guidance: ''Certificate of Registration'' means a document issued by the FHWA to all Mexican motor carriers, for-hire as well as private, that allows them to enter the U.S., but restricts them to the commercial zone for a particular border municipality, as previously adopted by the ICC. The border municipality is the Port of Entry wherever the motor carrier's vehicle enters the U.S.

Question 3: How does a Mexican motor carrier prove that it is complying with § 387.7?

Guidance: Mexican motor carriers are permitted to obtain trip insurance and are required to carry, on the vehicle, a Form MCS–90 along with an insurance verification document listing the date and time the insurance coverage began and expires.

Question 4: Is the financial responsibility requirement met when an owner-operator (lessor) provides the motor carrier (lessee) a copy of the policy and Form MCS–90 where the carrier is named as an additional insured to the policy (Form MCS–90)?

Guidance: No. The motor carrier has the responsibility to obtain the proper financial responsibility levels.

Section 387.9 Financial Responsibility, Minimum Levels

Question 1: Is gasoline listed as a hazardous material, and, if so, what is the minimum level of financial responsibility currently required?

Guidance: Gasoline is a listed hazardous material in the table found at 49 CFR 172.101. Section 387.9 requires for-hire and private motor carriers transporting any quantity of oil in interstate or foreign commerce to have a minimum $1,000,000 of financial responsibility coverage. The Clean Water Act of 1973, as amended, declares that gasoline is an ''oil,'' not a ''hazardous substance.'' The $1,000,000 coverage also applies to for-hire and private motor carriers transporting gasoline ''in-bulk'' in intrastate commerce.

Question 2: Is a motor carrier transporting liquefied petroleum gas (LPG) in any quantity required to have $1,000,000 or $5,000,000 of financial responsibility coverage?

Guidance: Liquefied petroleum gas (LPG) is a flammable compressed gas. All transportation of LPG in containment systems with capacities in excess of 3,500 water gallons requires $5 million financial responsibility coverage. Interstate and foreign commerce movements of LPG in containment systems *not* in excess of 3,500 water gallons requires $1 million coverage. Intrastate movements of LPG in those smaller containment systems are subject *only* to state financial responsibility requirements.

Question 3: What is the definition of a ''hopper type'' vehicle as indicated in § 387.9?

Guidance: A ''hopper type'' vehicle is one which is capable of discharging its load through a bottom opening without tilting. This vehicle type would also include belly dump trailers. Rear dump trailers and roll-off containers do not meet the definition of a bottom discharging vehicle.

Section 387.11 State Authority and Designation of Agent

Question 1: How does a Mexican motor carrier demonstrate that its insurance company complies with § 387.11?

Guidance: With a properly executed Form MCS–90 from an insurance company licensed in the U.S.

Section 387.15 Forms

Question 1: May the motor carrier meet the financial responsibility requirements by aggregating insurance in layers?

Guidance: Yes. A motor carrier may aggregate coverage, by purchasing insurance in layers with each layer consisting of a separate policy and endorsement. The first layer of coverage is referred to as primary insurance and each additional layer is referred to as excess insurance. Example: ABC Motor Carrier transports Division 1.1 explosive material and is required to maintain $5 million coverage. ABC Motor Carrier decides to meet this requirement by purchasing a primary insurance policy of $1 million from insurance company A, an excess policy of $1 million from insurance company B, and a $3 million excess policy from insurance company C. Each policy would have a separate endorsement (Form MCS–90). The endorsement provided by insurer A would state ''This insurance is primary and the company shall not be liable for amounts in excess of $1,000,000 for each accident.'' The endorsement provided by insurer B would state ''This insurance is excess and the company shall not be liable for amounts in excess of $1 million for each accident in excess of the underlying limit of $1 million for each accident.'' The endorsement provided by insurer C would state ''This insurance is excess and the company shall not be liable for amounts in excess of $3 million for each accident in excess of the underlying limit of $2 million for each accident.''

Question 2: May the Form MCS–90 required by part 387 for proof of minimum financial responsibility be modified?

Guidance: The prescribed text of the document may not be changed. However, the format (i.e., number of pages, layout of the text, etc.) may be altered.

Question 3: Is the use of a printed or stamped signature on the Form MCS–90 endorsement acceptable?

Guidance: Yes.

Question 4: Must a motor carrier obtain a new Form MCS–90 each year if it retains the same insurance company?

Guidance: If the insurance policy, as identified by the policy number on the Form MCS–90, is still valid upon the renewal of insurance, no new Form MCS–90 is required. If the policy number has changed or the insurance policy has been canceled in accordance with the terms shown on Form MCS–90, then a new Form MCS–90 must be completed and attached to the valid insurance policy.

Subpart B—Motor Carriers of Passengers

Section 387.25 Purpose and Scope

Question 1: May a State require a higher level of financial responsibility coverage than is required by part 387?

Guidance: Yes.

Section 387.27 Applicability

Question 1: Is a nonprofit corporation, providing for-hire interstate transportation of passengers, subject to the minimum levels of financial responsibility for motor carriers of passengers?

Guidance: Yes.

Question 2: What determines the level of coverage required for a passenger carrier: the number of passengers or the number of seats in the vehicle?

Guidance: The level of financial responsibility required is predicated upon the manufacturer's designed seating capacity, not on the number of passengers riding in the vehicle at a particular time. The minimum levels of financial responsibility required for various seating capacities are found in § 387.33.

Question 3: Are luxury limousines with a seating capacity of fewer than seven passengers and not operated on a regular route or between specified points exempted under § 387.27(b)(2)?

Guidance: No. Taxi cab service is highly regulated by local governments, usually conducted in marked vehicles, which makes them readily identifiable to enforcement officials. Limousines are not taxi cabs and are therefore not exempted from the financial responsibility requirements.

Question 4: When must a contract school bus operator comply with part 387?

Guidance: When the contractor is not engaged in transportation to or from school and the transportation is not organized, sponsored, and paid for by the school district.

Question 5: Does the exemption for the transportation of school children end at the high school level or does it extend to educational institutions beyond high school, for example junior college or college?

Guidance: The exemption does not extend beyond the high school level.

Section 387.31 Financial Responsibility Required

Question 1: May a large corporation which has many wholly-owned subsidiaries have one policy of insurance for the parent corporation and maintain the policy and Form MCS–90B at the corporate headquarters?

Guidance: Generally, the required financial responsibility must be in the exact name of the motor carrier and the proof of that coverage must be maintained at the motor carrier's principal place of business. A parent corporation may, however, have a single policy of insurance or surety bond covering the parent and its subsidiaries, provided the name of the parent and the name of each subsidiary are listed on the policy or bond. Further, the required proof must have listed thereon the name of the parent and its subsidiaries. A copy of that proof of financial responsibility coverage must be maintained at each motor carrier subsidiary's principal place of business.

Section 387.39 Forms

Question 1: May a motor carrier of passengers meet the financial responsibility requirements by aggregating insurance in layers?

Guidance: Yes. A motor carrier of passengers may aggregate coverage, by purchasing insurance in layers with each layer consisting of a separate policy and endorsement. The first layer of coverage is referred to as primary insurance and each additional layer is referred to as excess insurance. Each policy would have a separate endorsement (Form MCS–90B). The endorsement provided by insurer A would state ''This insurance is primary and the company shall not be liable for amounts in excess of $1,500,000 or $5,000,000 for each accident.'' The endorsement provided by insurer B would state ''This insurance is excess and the company shall not be liable for amounts in excess of $1 million for each accident in excess of the underlying limit of $1,500,000 or $5,000,000 million for each accident.'' The endorsement provided by insurer C would state ''This insurance is excess and the company shall not be liable for amounts in excess of $3 million for each accident in excess of the underlying limit of $2 million for each accident.''

Question 2: May the Form MCS–90B required by part 387 for proof of minimum financial responsibility be modified?

Guidance: The prescribed text of the document may not be changed. However, the format (i.e., number of pages, layout of the text, etc.) may be altered.

Question 3: Is the use of a facsimile signature (e.g., printed, stamped, autopenned, etc.) on the Form MCS–90B endorsement acceptable?

Guidance: Yes.

PART 390—FEDERAL MOTOR CARRIER SAFETY REGULATIONS; GENERAL

Sections Interpreted

390.3 General Applicability
390.5 Definitions
390.9 State and Local Laws, Effect on
390.15 Assistance in Investigations and Special Studies
390.21 Marking of Commercial Motor Vehicles
390.23 Relief From Hours-of-Service Regulations—Disasters
390.31 Copies of Records or Documents

Special Topics—Serious Pattern of Violations

Section 390.3 General Applicability

Question 1: Does the government exception in § 390.3(f)(2) apply to motor carriers doing business with the government?

Guidance: No. The exception applies only when the government is the motor carrier.

Question 2: Are the FMCSRs applicable to drivers and CMVs which transport tools, equipment, and supplies across State lines in a CMV?

Guidance: Yes, the FMCSRs are applicable to drivers and CMVs in interstate commerce which transport property. The property in this situation is the tools, equipment and supplies.

Question 3: Are the operations of a church which provides bus tours to the general public for compensation subject to the FMCSRs as a for-hire motor carrier?

Guidance: Yes, the church is a for-hire motor carrier of passengers subject to the FMCSRs.

Question 4: Are the FMCSRs applicable to the rail movement of trailers and intermodal container chassis that previously or subsequently were moved by highway by a motor carrier in interstate commerce?

Guidance: No. They are only subject when being moved as a motor vehicle by highway by a motor carrier.

Question 5: Are personnel involved in road testing CMVs across a State line subject to the FMCSRs?

Guidance: Yes, any driver (including mechanics, technicians, driver trainees and other personnel) operating a CMV in interstate commerce must be in compliance with the FMCSRs.

Question 6: How does one distinguish between intra- and interstate commerce for the purposes of applicability of the FMCSRs?

Guidance: Interstate commerce is determined by the essential character of the movement, manifested by the shipper's fixed and persistent intent at the time of shipment, and is ascertained from all of the facts and circumstances surrounding the transportation. When the intent of the transportation being performed is interstate in nature, even when the route is within the boundaries of a single State, the driver and CMV are subject to the FMCSRs.

Question 7: Are Red Cross vehicles/drivers subject to the FMCSRs?

Guidance: Red Cross vehicles/drivers used to provide emergency relief under the provisions of § 390.23 are not subject to the FMCSRs while providing the relief. However, these vehicles/drivers would be subject when operating at other times, provided they are used in interstate commerce and the vehicles meet the definition of a CMV.

Question 8: May a motor carrier require fingerprinting as a pre-employment condition?

Guidance: The FMCSRs do not require or prohibit fingerprinting as a condition of employment. Section 390.3(d) allows employers to enforce more stringent requirements.

Question 9: Are the FMCSRs applicable to drivers/vehicles operated by a State or local educational institution which is a political subdivision of the State?

Guidance: Section 390.3(f)(2) specifically exempts transportation performed by a State or a political subdivision including any agency of a State or locality from the FMCSRs. The drivers, however, may be subject to the CDL requirements and/or State laws that are similar to the FMCSRs.

Question 10: Are the FMCSRs applicable to drivers/vehicles operated by a transit authority owned and operated by a State or a political subdivision of the State?

Guidance: Section 390.3(f)(2) specifically exempts transportation performed by the Federal Government, a State, or any political subdivision of a State from the FMCSRs. However, this exemption does not apply to the CDL requirements in part 383. Also, if governmental entities engage in interstate charter transportation of passengers, they must comply with accident report retention requirements of part 390.

Question 11: Is the interstate transportation of students, teachers and parents to school events such as athletic contests and field trips performed by municipalities subject to the FMCSRs? If a fee is charged to defer the municipality's expenses, does this affect the applicability of the regulations?

Guidance: Section 390.3(f)(2) specifically exempts transportation performed by the Federal Government, a State, or any political subdivision of a State from the FMCSRs. Charging a fee to defer governmental costs does not affect this exemption.

However, this exemption does not apply to the CDL requirements in part 383. Also, if governmental entities engage in interstate charter transportation of passengers, they must comply with accident report retention requirements of part 390.

Question 12: What is the applicability of the FMCSRs to school bus operations performed by Indian Tribal Governments?

Guidance: Transportation performed by the Federal Government, States, or political subdivisions of a State is generally excepted from the FMCSRs. This general exception includes Indian Tribal Governments, which for purposes of § 390.3(f) are equivalent to a State governmental entity. When a driver is employed and a bus is operated by the governmental entity, the operation would not be subject to the FMCSRs, with the following exceptions: The requirements of part 383 as they pertain to commercial driver licensing standards are applicable to every driver operating a CMV, and the accident report retention requirements of part 390 are applicable when the governmental entity is performing interstate charter transportation of passengers.

Question 13: A motor carrier dispatches an empty CMV from State A into adjoining State B in order to transport cargo or passengers between two points in State B, and then to return empty to State A. Does the transportation of cargo or passengers within State B constitute interstate commerce?

Guidance: Yes. The courts and the ICC developed a test that clarifies the legal status of intrastate portions of interstate trips. The character of the intrastate leg depends on the shipper's fixed and persistent intent when the transportation began. The fixed and persistent intent in this case was to move property—the vehicle itself—across State lines and between two points in State B where it was used to haul cargo or passengers. The transportation within State B, therefore, constitutes interstate commerce. In some cases the motor carrier may be the shipper.

Question 14: What is the applicability of the FMCSRs to motor carriers owning and operating school buses that contract with a municipality to provide pupil transportation services?

Guidance: For the purposes of the FMCSRs, parts 390–399, ''school bus operation'' means the use of a school bus to transport school children and/or school personnel from home to school and from school to home. A ''school bus'' is a passenger motor vehicle

designed to carry more than 10 passengers in addition to the driver, and used primarily for school bus operations (see § 390.5). School bus operations and transportation performed by government entities are specifically exempted from the FMCSRs under § 390.3(f).

However, anyone operating school buses under contract with a school is a for-hire motor carrier. When a nongovernment, for-hire motor carrier transports children to school-related functions other than ''school bus operation'' such as sporting events, class trips, etc., and operates across State lines, its operation must be conducted in accordance with the FMCSRs. This applies to motor carriers that operate CMVs as defined under part 390 which includes vehicles which have a GVWR of 10,001 pounds or more or are designed or used to carry passengers for compensation, except 6-passenger taxicabs not operating on fixed routes.

In certain instances, carriers providing school bus transportation are not subject to the Bus Regulatory Reform Act of 1982 and the minimum financial responsibility requirements (part 387) issued under this Act. Transportation of school children and teachers that is organized, sponsored, and paid for by the school district is not subject to part 387. Therefore, school bus contractors must comply with the FMCSRs for interstate trips such as sporting events and class trips but are not required by Federal regulations to carry a specific level of insurance coverage.

For those operations provided by school bus contractors that are subject to the FMCSRs, the motor carriers must keep driver and vehicle records as required by the regulations. This would include driver qualifications records (part 391), driver records of duty status (part 395), accident report retention (part 390), and inspection, repair, and maintenance records (part 396) for the drivers and vehicles that are used on the trips that are subject to the FMCSRs. These records are not required under the FMCSRs for the other vehicles in the motor carrier's fleet that are not subject to the regulations.

Question 15: May drivers be coerced into employing loading or unloading assistance (lumpers)?

Guidance: No. The Motor Carrier Act of 1980 made it illegal to coerce someone into unwanted loading or unloading and require payment for it (49 U.S.C. 14103, previously 49 U.S.C. 11109). The FHWA is responsible for the enforcement of regulations forbidding coercion in the use of lumpers.

Question 16: a. Are vehicles which, in the course of interstate transportation over the highway, are off the highway, loading, unloading or waiting, subject to the FMCSRs during these times?

b. Are vehicles and drivers used wholly within terminals and on premises or plant sites subject to the FMCSRs?

Guidance:

a. Yes.

b. No.

Question 17: What protection is afforded a driver for refusing to violate the FMCSRs?

Guidance: Section 405 of the STAA (49 U.S.C. 31105) states, in part, that no person shall discharge, discipline, or in any manner discriminate against an employee with respect to the employee's compensation, terms, conditions, or privileges of employment for refusing to operate a vehicle when such operation constitutes a violation of any Federal rule, regulation, standard, or order applicable to CMV safety. In such a case, a driver may submit a signed complaint to the Occupational Safety and Health Administration.

Question 18: Are persons who operate CMVs for the personal conveyance of their friends or family members ''private motor carriers of passengers (nonbusiness)'' as defined in § 390.5?

Guidance: No. Nonbusiness private motor carriers of passengers (PMCPs) *do not* include individuals providing personal conveyance of passengers for recreational purposes. A nonbusiness PMCP must be engaged in some group activity. For example, organizations that are exempt under the Internal Revenue Code (26 U.S.C. 501) and provide transportation for their members would generally be considered nonbusiness PMCPs: Religious, charitable, scientific, and educational organizations, scouting groups, sports clubs, fraternal societies or lodges, etc.

Question 19: ''Unless otherwise specifically provided,'' § 390.3(f)(2) exempts certain government entities and their drivers from compliance with 49 CFR Chapter III, Subchapter B, i.e., parts 350–399. Which parts are covered by this exemption and which are ''otherwise specifically'' excluded?

Guidance: Government employers and drivers are exempt from compliance with parts 325, 385, 387, and 390–399. However, they must comply with the drug and alcohol testing requirements in part 382 and the CDL requirements in part 383. Parts 350, 355, 384, 386, 388, and 389 do not directly regulate CMV operators, public or private, and the question of an exemption therefore does not arise.

Question 20: Do the FMCSRs apply to Indian Tribal Governments?

Guidance: Under § 390.3(f)(2), transportation performed by the Federal Government, States, or political subdivisions of a State is generally exempt from the FMCSRs. Indian Tribal Governments are considered equivalent to a State governmental entity for purposes of this exemption. Thus, when a driver is employed by and is operating a CMV owned by a governmental entity, neither the driver, the vehicle, nor the entity is subject to the FMCSRs, with the following exceptions:

(1) The requirements of part 383 relating to CMV driver licensing standards;

(2) The drug testing requirements in part 382;

(3) Alcohol testing when an employee is performing, about to perform, or just performed safety-sensitive functions. For the purposes of alcohol testing, safety-sensitive functions are defined in § 382.107 as any of those on-duty functions set forth in § 395.2 On-Duty time, paragraphs (1) through (6), (generally, driving and related activities) and;

(4) The accident report retention requirements of § 390.15 are applicable when the governmental entity is performing interstate charter transportation of passengers.

Question 21: Does the exemption in § 390.3(f)(3) for the ''occasional transportation of personal property by individuals not for compensation nor in the furtherance of a commercial enterprise'' apply to persons who occasionally use CMVs to transport cars, boats, horses, etc., to races, tournaments, shows or similar events, even if prize money is offered at these events?

Guidance: The exemption would apply to this kind of transportation, provided: (1) The underlying activities are not undertaken for profit, i.e., (a) prize money is declared as ordinary income for tax purposes, and (b) the cost of the underlying activities is not deducted as a business expense for tax purposes; and, where relevant; (2) corporate sponsorship is not involved. Drivers must confer with their State of licensure to determine the licensing provisions to which they are subject.

Question 22: If, after December 18, 1995, a Mexico-based driver is found operating beyond the boundaries of the four border States allowed by the North American Free Trade Agreement (NAFTA), is that driver in violation of the FMCSRs? If so, which one?

Guidance: No. Driving beyond the four border States is not, in and of itself, a violation of the FMCSRs.

Question 23: Is transportation within the boundaries of a State between a place in an Indian Reservation and a place outside such reservation interstate commerce?

Guidance: No, such transportation is considered to be intrastate commerce. An Indian reservation is geographically located within the area of a State. Enforcement on Indian reservations is inherently Federal, unless such authority has been granted to the States by Congressional enactment, accepted by the States where appropriate, and consented to by the Indian tribes.

Question 24: To what extent does the FHWA have jurisdiction to regulate the qualifications and hours of service of CMV drivers engaged in interstate or foreign commerce if the drivers only occasionally operate in interstate or foreign commerce?

Guidance: The FHWA published an interpretation in the **Federal Register** on July 23, 1981 (46 FR 37902) on this subject. The FHWA must show that the driver or motor carrier has engaged in interstate or foreign commerce within a reasonable period of time prior to its assertion of jurisdiction under 49 U.S.C. 31136 and 31502.

The FHWA must show that the driver or motor carrier has actually operated in interstate commerce within a reasonable period of time prior to its assertion of jurisdiction. Mere solicitation of business that would involve operations in interstate commerce is not sufficient to establish jurisdiction. If jurisdiction is claimed over a driver who has not driven in interstate commerce, evidence must be presented that the carrier has operated in interstate commerce and that the driver could reasonably be expected to make one of the carrier's interstate runs. Satisfactory evidence would include, but not be limited to, statements from drivers and carriers and any employment agreements.

Evidence of driving or being available for use in interstate commerce makes the driver subject to the FMCSRs for a 4-month period from the date of the proof. For that period, the motor carrier is also required to comply with those portions of the FMCSRs that deal with drivers, driving, and records related to or generated by drivers, primarily those in 49 CFR parts 387, 391, 392, 395 and 396. The FHWA believes that the 4-month period is reasonable because it avoids both a week-by-week determination of jurisdiction, which is excessively narrow, and the assertion that a driver who is used or available for use once remains subject to the FMCSRs for an unlimited time, which is overly inclusive.

Section 390.5 Definitions

Question 1: Do the definitions of ''farm,'' ''farmer'' and ''agricultural crops'' apply to greenhouse operations?

Guidance: Yes.

Question 2: Is a vehicle used to transport or tow anhydrous ammonia nurse tanks considered a CMV and subject to FMCSRs?

Guidance: Yes, provided the vehicle's GVWR or GCWR meets or exceeds that of a CMV as defined in § 390.5 and/or the vehicle transports HM in a quantity that requires placarding.

Question 3: If a vehicle's GVWR plate and/or VIN number are missing but its actual gross weight is 10,001 pounds or more, may an enforcement officer use the latter instead of GVWR to determine the applicability of the FMCSRs?

Guidance: Yes. The only apparent reason to remove the manufacturer's GVWR plate or VIN number is to make it impossible for roadside enforcement officers to determine the applicability of the FMCSRs, which have a GVWR threshold of 10,001 pounds. In order to frustrate willful evasion of safety regulations, an officer may therefore presume that a vehicle which does not have a manufacturer's GVWR plate and/or does not have a VIN number has a GVWR of 10,001 pounds or more if: (1) It has a size and configuration normally associated with vehicles that have a GVWR of 10,001 pounds or more; and (2) It has an actual gross weight of 10,001 pounds or more.

A motor carrier or driver may rebut the presumption by providing the enforcement officer the GVWR plate, the VIN number or other information of comparable reliability which demonstrates, or allows the officer to determine, that the GVWR of the vehicle is below the jurisdictional weight threshold.

Question 4: If a vehicle with a manufacturer's GVWR of less than 10,001 pounds has been structurally modified to carry a heavier load, may an enforcement officer use the higher actual gross weight of the vehicle, instead of the GVWR, to determine the applicability of the FMCSRs?

Guidance: Yes. The motor carrier's intent to increase the weight rating is shown by the structural modifications. When the vehicle is used to perform functions normally performed by a vehicle with a higher GVWR, § 390.33 allows an enforcement officer to treat the actual gross weight as the GVWR of the modified vehicle.

Question 5: A driver used by a motor carrier operates a CMV to and from his/her residence out of State. Is this considered interstate commerce?

Guidance: If the driver is operating a CMV at the direction of the motor carrier, it is considered interstate commerce and is subject to the FMCSRs. If the motor carrier is allowing the driver to use the vehicle for private personal transportation, such transportation is not subject to the FMCSRs.

Question 6: Is transporting an empty CMV across State lines for purposes of repair and maintenance considered interstate commerce?

Guidance: Yes. The FMCSRs are applicable to drivers and CMVs in interstate commerce which transport property. The property in this situation is the empty CMV.

Question 7: Does off-road motorized construction equipment meet the definitions of ''motor vehicle'' and ''commercial motor vehicle'' as used in §§ 383.5 and 390.5?

Guidance: No. Off-road motorized construction equipment is outside the scope of these definitions: (1) When operated at construction sites: and (2) when operated on a public road open to unrestricted public travel, provided the equipment is not used in furtherance of a transportation purpose. Occasionally driving such equipment on a public road to reach or leave a construction site does not amount to furtherance of a transportation purpose. Since construction equipment is not designed to operate in traffic, it should be accompanied by escort vehicles or in some other way separated from the public traffic. This equipment may also be subject to State or local permit requirements with regard to escort vehicles, special markings, time of day, day of the week, and/or the specific route.

Question 8: What types of equipment are included in the category of off-road motorized construction equipment?

Guidance: The definition of off-road motorized construction equipment is to be narrowly construed and limited to equipment which, by its design and function is obviously not intended for use, nor is it used on a public road in furtherance of a transportation purpose. Examples of such equipment include motor scrapers, backhoes, motor graders, compactors, tractors, trenchers, bulldozers and railroad track maintenance cranes.

Question 9: Are mobile cranes operating in interstate commerce subject to the FMCSRs?

Guidance: Yes, the definition of CMV encompasses mobile cranes.

Question 10: Does the FHWA define for-hire transportation of passengers the same as the former ICC did?

Guidance: To the extent FHWA's authority stems from 49 U.S.C. 31502 or other sections of Title 49 which are rooted in the Interstate Commerce Act, the FHWA is bound by judicial precedent and legislative history in interpreting that Act, much of which relates to the operations of the former ICC. However, since the MCSA of 1984 re-established the FHWA's jurisdictional authority and resulted in a re-promulgation of the FMCSRs, the FHWA has been establishing its own precedents based on ''safety'' rather than ''economics'' as the overriding consideration. This has resulted in some deviation in the definition of terms by the two agencies, e.g., commercial zones, for-hire transportation, etc.

The term ''for-hire motor carrier'' as defined in part 390 means a person engaged in the transportation of goods or passengers for compensation. The FHWA has determined that any business entity that assesses a fee, monetary or otherwise, directly or indirectly for the transportation of passengers is operating as a for-hire carrier. Thus, the transportation for compensation in interstate commerce of passengers by motor vehicles (except in six-passenger taxicabs operating on fixed routes) in the following operations would typically be subject to all parts of the FMCSRs, including part 387: whitewater river rafters, hotel/motel shuttle transporters, rental car shuttle services, etc. These are examples of for-hire carriage because some fee is charged, usually indirectly in a total package charge or other assessment for transportation performed.

Question 11: A company has a truck with a GVWR under 10,001 pounds towing a trailer with a GVWR under 10,001 pounds. However, the GVWR of the truck added to the GVWR of the trailer is greater than 10,001 pounds. Would the company operating this vehicle in interstate commerce have to comply with the FMCSRs?

Guidance: Section 390.5 of the FMCSRs includes in the definition of CMV a vehicle with a GVWR or GCWR of 10,001 or more pounds. The section further defines GCWR as the value specified by the manufacturer as the loaded weight of a combination (articulated) vehicle. Therefore, if the GVWR of the truck added to the GVWR of the trailer exceeds 10,001 pounds, the driver and vehicle are subject to the FMCSRs.

Question 12: A CMV becomes stuck in a median or on a shoulder, and has had no contact with another vehicle, a pedestrian, or a fixed object prior to becoming stuck. If a tow truck is used to pull the CMV back onto the traveled portion of the road, would this be considered an accident?

Guidance: No.

Question 13: To what extent would the windshield and/or mirrors of a vehicle have to be damaged in order for it to be considered ''disabling damage'' as used in the definition of an accident in § 390.5?

Guidance: The decision as to whether damage to a windshield and/or mirrors is disabling is left to the discretion of the investigating officer.

Question 14: Is the tillerman who controls the steerable rear axle of a vehicle so equipped a driver subject to the FMCSRs while operating in interstate commerce?

Guidance: Yes. Although the tillerman does not control the vehicle's speed or braking, the rear-axle steering he/she performs is essential to prevent the trailer from offtracking into other lanes or vehicles or off the highway entirely. Because this function is critical to the safe operation of vehicles with steerable rear axles, the tillerman is a driver.

Question 15: Does the definition of a ''commercial motor vehicle'' in § 390.5 of the FMCSRs include parking lot and/or street sweeping vehicles?

Guidance: If the GVWR of a parking lot or street sweeping vehicle is 10,001 or more pounds, and it operates in interstate commerce, it is a CMV.

Question 16: Does a driver leasing company that hires, assigns, trains, and/or supervises drivers for a private or for-hire motor carrier become a motor carrier as defined by 49 CFR 390.5?

Guidance: No.

Question 17: May a motor carrier that employs owner-operators who have their own operating authority issued by the ICC or the Surface Transportation Board transfer the responsibility for compliance with the FMCSRs to the owner-operators?

Guidance: No. The term ''employee,'' as defined in § 390.5, specifically includes an independent contractor employed by a motor carrier. The existence of operating authority has no bearing upon the issue. The motor carrier is, therefore, responsible for compliance with the FMCSRs by its driver employees, including those who are owner-operators.

Question 18: Must a person who is injured in an accident and immediately receives treatment away from the scene of the accident be transported in an ambulance?

Guidance: No. Any type of vehicle may be used to transport an injured person from the accident scene to the treatment site.

Question 19: What is the meaning of ''immediate'' as used in the definition of ''accident?''

Guidance: The term ''immediate'' means without an unreasonable delay. A person immediately receives medical treatment if he or she is transported directly from the scene of an accident to a hospital or other medical facility as soon as it is considered safe and feasible to move the injured person away from the scene of the accident.

Question 20: A person involved in an incident discovers that he or she is injured after leaving the scene of the incident and receives medical attention at that time. Does the incident meet the definition of accident in 49 CFR 390.5?

Guidance: No. The incident does not meet the definition of accident in 49 CFR 390.5 because the person did not receive treatment immediately after the incident.

Question 21: Do electronic devices which are advertised as radar jammers meet the definition of a radar detector in 49 CFR 390.5?

Guidance: Devices that are said to reflect incoming energy passively or to transmit steadily on the same frequency as police radar units are not radar detectors because they do not detect radio microwaves. Devices that are said to detect and isolate the incoming signal and then to transmit on the same frequency to interfere with the police unit would qualify as radar detectors.

Question 22: Is a motor vehicle drawing a non-self-propelled mobile home that has one or more set of wheels on the roadway, a driveaway-towaway operation?

Guidance: Yes, if the mobile home is a commodity. For example, the mobile home is transported from the manufacturer to the dealer or from the dealer or other seller to the buyer.

Question 23: Can a truck tractor drawing a trailer be a driveaway-towaway operation?

Guidance: Yes, if the trailer is a commodity. For example, the trailer is transported from the manufacturer to the dealer or from the dealer or other seller to the buyer.

Question 24: Are trailers which are stacked upon each other and drawn by a motor vehicle by attachment to the bottom trailer, a driveaway-towaway operation.

Guidance: No. Only the bottom trailer has one or more sets of wheels on the roadway. The other trailers are cargo.

Question 25: The definition of a passenger CMV is a vehicle ''designed to transport'' more than 15 passengers, including the driver. Does that include standing passengers if the vehicle was

specifically designed to accommodate standees?

Guidance: No. ''Designed to transport'' refers only to the number of designated seats; it does not include areas suitable, or even designed, for standing passengers.

Question 26: What is considered a ''public road''?

Guidance: A public road is any road under the jurisdiction of a public agency and open to public travel or any road on private property that is open to public travel.

Section 390.9 State and Local Laws, Effect on

Question 1: If an interstate driver gets stopped by a State enforcement officer for an inspection, would the inspecting officer be enforcing the Federal regulations or State regulations?

Guidance: A State enforcement officer can only enforce State laws. However, under the Motor Carrier Safety Assistance Program, quite often State laws are the same as or similar to the FMCSRs.

Section 390.15 Assistance in Investigations and Special Studies

Question 1: May a motor carrier create an accident register of its own, or is there a specified form that must be used?

Guidance: There is no specified form. A motor carrier may create or use any accident register as long as it includes the elements required by § 390.15.

Question 2: Would the accident report retention requirement in § 390.15(b)(2) include an ''Adjuster's Report'' that is normally considered to be an internal document of an insurance company?

Guidance: No. The intent of § 390.15(b)(2) is that motor carriers maintain copies of all documents which the motor carrier is required by the insurance company to complete and/or maintain. Section 390.15(b)(2) does not require motor carriers to maintain documents, such as ''Adjuster's Reports,'' that are typically internal documents of the insurance company.

Question 3: What types of documents must a motor carrier retain to support its accident register and be in compliance with § 390.15(b)?

Guidance: The documents required by § 390.15(b)(2) include all information about a particular accident generated by a motor carrier or driver to fulfill its accident reporting obligations to State or other governmental entities or that motor carrier's insurer. The language of paragraph (b)(2) does not require a motor carrier to seek out, obtain, and retain copies of accident reports prepared by State investigators or insurers.

Section 390.21 Marking of Commercial Motor Vehicles

Question 1: What markings must be displayed on a CMV when used by two or more motor carriers?

Guidance: The markings of the motor carrier responsible for the operation of the CMV must be displayed at the time of transportation. If 2 or more names are on the vehicle, the name of the operating motor carrier must be preceded by the words ''operated by.''

Section 390.23 Relief From Hours-of-service Regulations—Disasters

Question 1: Does § 390.23 create an exemption from the FMCSRs each and every time the delivery of electricity is interrupted, no matter how isolated or minor the occurrence?

Guidance: The rule creates an exemption from the FMCSRs when interruptions of electricity are severe enough to trigger a declaration of an emergency by a public official authorized to do so.

An interruption of electricity that does not produce a declaration by a public official is not an emergency for purposes of the regulation and does not exempt a motor carrier or driver from the FMCSRs. A call reporting a downed power line, whether directed to the State police or a public utility company, does not create a declared emergency.

The authority to declare emergencies has been delegated to different officials in the various States. The FHWA has not attempted to list these officials. In order to utilize the exemption provided by § 390.23, drivers and motor carriers must therefore ascertain that a declaration of an emergency was made by a State or local official authorized to do so.

Question 2: Section 390.23(a) provides that parts 390 through 399 do not apply to any motor carrier or driver operating a CMV to provide direct assistance in an emergency. Is a motor carrier or driver required to keep a record of the driver's on-duty or driving time while providing relief?

Guidance: No.

Question 3: After providing emergency relief under § 390.23, what on-duty hours must a driver use to determine how much off-duty time he/she must have before returning to the service of the employing motor carrier?

Guidance: The driver must total the number of hours worked while the driver actually provided direct assistance to the emergency relief effort.

Section 390.31 Copies of Records or Documents

Question 1: May records required by the FMCSRs be maintained in an electronic format?

Guidance: Yes, provided the motor carrier can produce the information required by the regulations. Documents requiring a signature must be capable of replication (i.e., photocopy, facsimile, etc.) in such form that will provide an opportunity for signature verification upon demand. If computer records are used, all of the relevant data on the original documents must be included in order for the record to be valid.

Question 2: How long does a motor carrier have to produce records if a motor carrier maintains all records in an electronic format?

Guidance: A motor carrier must produce all records maintained in an electronic format within 2 working days after the request. Documents requiring a signature must be capable of replication (e.g., photocopy, facsimile, etc.) in such form that will provide an opportunity for signature verification upon demand.

Special Topics—Serious Pattern of Violations

Question 1: What constitutes a ''serious pattern'' of violations?

Guidance: A serious pattern constitutes violations that are both widespread and continuing over a period of time. A serious pattern is more than isolated violations. A serious pattern does not require a specific number of violations.

PART 391—QUALIFICATION OF DRIVERS

Sections Interpreted

391.2 General Exemptions
391.11 Qualifications of Drivers
391.15 Disqualification of Drivers
391.21 Application for Employment
391.23 Investigation and Inquiries
391.25 Annual Review of Driving Record
391.27 Record of Violations
391.31 Road Test
391.41 Physical Qualifications for Drivers
391.43 Medical Examination; Certivicate of Physical Examination
391.45 Persons who Must be Medically Examined and Certified
391.47 Resolution of Conflicts of Medical Evaluation
391.49 Waiver of Certain Physical Defects
391.51 Driver Qualification Files
391.63 Intermittent, Casual, or Occasional Drivers
391.65 Drivers Furnished by Other Motor Carriers

Section 391.2 General Exemptions

Question 1: Must exempt intracity zone (see § 390.5) drivers comply with the medical requirements of this subpart?

Guidance: No, provided: a. the driver was otherwise qualified and operating in a municipality or exempt intracity zone thereof throughout the 1-year period ending November 18, 1988; and,

b. the driver's medical condition has not substantially worsened since August 23, 1988.

Question 2: What driver qualification requirements must a farm vehicle driver (as defined in § 390.5) comply with in part 391?

Guidance: Drivers meeting the definition of ''farm vehicle driver'' who operate straight trucks are exempted from all driver qualification requirements of part 391. All drivers of articulated motor vehicles with a GCWR of 10,001 pounds or more are required to possess a current medical certificate as required in §§ 391.41 and 391.45.

Section 391.11 Qualifications of Drivers

Question 1: Is there a maximum age limit for driving in interstate commerce?

Guidance: The FMCSRs do not specify any maximum age limit for drivers.

Question 2: Does the age requirement in § 391.11(b)(1) apply to CMV drivers involved entirely in intrastate commerce?

Guidance: No. Neither the CDL requirements in part 383 nor the FMCSRs in parts 390–399 require drivers engaged purely in intrastate commerce to be 21 years old. The States may set lower age thresholds for intrastate drivers.

Question 3: What effect does the Age Discrimination in Employment Act have on the minimum age requirement for an interstate driver?

Guidance: None. The Age Discrimination in Employment Act, 29 U.S.C. 621–634, recognizes an exception when age is a bona fide occupational qualification. 29 U.S.C. 623(f)(1).

Question 4: May a motor carrier be exempt from driver qualification requirements by hiring a driver leasing company or temporary help service?

Guidance: No. The FMCSRs apply to, and impose responsibilities on, motor carriers and their drivers. The FHWA does not regulate driver leasing companies or temporary help service companies.

Question 5: May a motor carrier lawfully permit a person not yet qualified as a driver in accordance with § 391.11 to operate a vehicle in interstate commerce for the purpose of attending a training and indoctrination course in the operation of that specific vehicle?

Guidance: No. If the trip is in interstate commerce, the driver must be fully qualified to operate a CMV.

Question 6: Does the Military Selective Service Act of 1967 require a motor carrier to place a returning veteran in his/her previous position (driving interstate) even though he/she fails to meet minimum physical standards?

Guidance: No. The Act does not require a motor carrier to place a returning veteran who does not meet the minimum physical standards into his/her previous driving position. The returning veteran must meet the physical requirements and obtain a medical examiner's certificate before driving in interstate operations.

Section 391.15 Disqualification of Drivers

Question 1: May a driver convicted of a disqualifying offense be ''disqualified'' by a motor carrier?

Guidance: No. Motor carriers have no authority to disqualify drivers. However, a conviction for a disqualifying offense automatically disqualifies a driver from driving for the period specified in the regulations. Thus, so long as a motor carrier knows, or should have known, of a driver's conviction for a disqualifying offense, it is prohibited from using the driver during the disqualification period.

Question 2: Is a decision of probation before judgment sufficient for disqualification?

Guidance: Yes, provided the State process includes a finding of guilt.

Question 3: Is a driver holding a valid driver's license from his or her home State but whose privilege to drive in another State has been suspended or revoked, disqualified from driving by § 391.15(b)?

Guidance: Yes, the driver would be disqualified from interstate operations until his privileges are restored by the authority that suspended or revoked them, provided the suspension resulted from a driving violation. It is immaterial that he holds a valid license from another State. All licensing actions should be accomplished through the CDLIS or the controlling interstate compact.

Question 4: What are the differences between the disqualification provisions listed in §§ 383.51 and 383.5 and those listed in § 391.15?

Guidance: Part 383 disqualifications are applicable generally to drivers who drive CMVs above 26,000 pounds GVWR, regardless of where the CMV is driven in the U.S. Part 391 disqualifications are applicable generally to drivers who drive CMVs above 10,000 pounds GVWR, only when the vehicle is used in interstate commerce in a State, including the District of Columbia.

Question 5: Do the disqualification provisions of § 391.15 apply to offenses committed by a driver who is using a company vehicle for personal reasons while off-duty?

Guidance: No. For example, an owner-operator using his own vehicle in an off-duty status, or a driver using a company truck, or tractor for transportation to a motel, restaurant or home, would be outside the scope of this section if he returns to the same terminal from which he went off-duty (see § 383.51 for additional information).

Question 6: If a driver has his/her privileges to drive a pleasure vehicle revoked or suspended by State authorities, but his/her privileges to operate a CMV are left intact, would the driver be disqualified under the terms set forth in § 391.15?

Guidance: No. The driver would not be disqualified from operating a CMV.

Question 7: If a driver is convicted of one of the specified offenses in § 391.15(c), but is allowed to retain his driver's license, is he/she still disqualified?

Guidance: Yes. A driver who is convicted of one of the specified offenses in § 391.15(c), or has forfeited bond in collateral on account of one of these offenses, and who is allowed to retain his/her driver's license, is still disqualified. The loss of a driver's license and convictions of certain offenses in § 391.15(c) are entirely separate grounds for disqualification.

Question 8: If a driver has his/her license suspended for driving while under the influence of alcohol, and 2 months later, as a result of this same incident, the driver is convicted of a DWI, must the periods of disqualification be combined since these are both disqualifying offenses?

Guidance: No. Disqualification during the suspension of an operating license continues until the license is restored by the jurisdiction that suspended it. Disqualification for conviction of DWI is for a fixed term. The fact that the driver was already disqualified for driving under the influence of alcohol because of the suspension action may mean that the total time under disqualification for the DWI conviction may exceed the stated term.

Question 9: If a driver commits a felony while operating a CMV but not in the employ of a motor carrier, is the offense disqualifying?

Guidance: No. There are 2 conditions required to be present for a felony conviction to be a disqualifying offense

under § 391.15: (1) The offense was committed during on-duty time; and (2) the driver was employed by a motor carrier or was engaged in activities that were in furtherance of a commercial enterprise. However, neither of these conditions is a prerequisite for a disqualifying offense under § 383.51.

Section 391.21 Application for Employment

Question 1: If a driver submits an application for employment and has someone else type, write, or print the answers to the questions for him and he signs the application, does this constitute a valid application?

Guidance: Yes. The applicant, by signing the application, certifies that all entries on it and information therein are true and complete to the best of the applicant's knowledge.

Question 2: Is there a prescribed or specified form that must be used when a driver applies for employment, or can a carrier develop its own application?

Guidance: There is no specified form to be used in an application for employment. Carriers may develop their own forms, which may be tailored to their specific needs. The application form must, at the minimum, contain the information specified in § 391.21(b).

Question 3: Section 391.21(b)(11) requires that an application for employment contain 10 years of prior employment information on the driver. If a foreign motor carrier's home country requires that an application for employment contain only five years of data, will a foreign carrier need to change its application to collect 10 years of data? Will the foreign carrier be required to go back and collect 10 years of data on its current drivers? What will a U.S. motor carrier who employs foreign drivers be required to do in this regard?

Guidance: A foreign motor carrier would not be required to collect 10 years of prior employment information as long as a foreign driver has an appropriate foreign commercial driver's license, i.e., (1) the Licencia Federal de Conductor (Mexico), or (2) the Canadian National Safety Code commercial driver's license. A U.S. motor carrier, on the other hand, would be required to collect 10 years of prior employment information when hiring foreign drivers. The carrier should also remember to contact the U.S. Immigration and Naturalization Service for their regulations and policies with respect to hiring foreign drivers.

Section 391.23 Investigation and Inquiries

Question 1: When a motor carrier receives a request for driver information from another motor carrier about a former or current driver, is it required to supply the requested information?

Guidance: Generally no. See § 382.405, however, for requests pertaining to drug and alcohol records.

Section 391.25 Annual Review of Driving Record

Question 1: To what extent must a motor carrier review a driver's overall driving record to comply with the requirements of § 391.25?

Guidance: The motor carrier must consider as much information about the driver's experience as is reasonably available. This would include all known violations, whether or not they are part of an official record maintained by a State, as well as any other information that would indicate the driver has shown a lack of due regard for the safety of the public. Violations of traffic and criminal laws, as well as the driver's involvement in motor vehicle accidents, are such indications and must be considered. A violation of size and weight laws should also be considered.

Question 2: Is a driver service or leasing company that is not a motor carrier permitted to perform annual reviews of driving records (§ 391.25) on the drivers it furnishes to motor carriers?

Guidance: The driver service or leasing company may perform annual reviews if designated by a motor carrier to do so.

Section 391.27 Record of Violations

Question 1: Are notifications to a motor carrier by a driver convicted of a driver violation as required by § 383.31 to be maintained in the driver's qualification file as part of the supporting documentation or certifications noted in the requirements listed in § 391.27(d)?

Guidance: Section 391.27(d) does not require documentation in the qualification file. However, § 391.51 does require that such notifications be maintained in the qualification file.

Section 391.31 Road Test

Question 1: Are employers still required to administer road tests since all States have implemented CDL skills testing?

Guidance: The employer may accept a CDL in lieu of a road test if the driver is required to successfully complete a road test to obtain a CDL in the State of issuance. However, if the employer intends to assign to the driver a vehicle necessitating the doubles/triples or tank vehicle endorsement, the employer must administer the road test under § 391.31 in a representative vehicle.

Question 2: How does a student enrolled in a driver training school comply with the requirement to pass a road test?

Guidance: The road test is administered only after the student has demonstrated a sufficient degree of proficiency on a range or off-road course. A student who passes the road test and is qualified to operate in interstate commerce could cross a State line in the process of receiving training.

Question 3: May a carrier use a blanket certification of road test for specific vehicles (driver's names, etc., left out)?

Guidance: No.

Question 4: May a motor carrier designate another person or organization to administer the road test?

Guidance: Yes. A motor carrier may designate another person or organization to administer the road test as long as the person who administers the road test is competent to evaluate and determine the results of the tests.

Section 391.41 Physical Qualifications for Drivers

Question 1: Who is responsible for ensuring that medical certifications meet the requirements?

Guidance: Medical certification determinations are the responsibility of the medical examiner. The motor carrier has the responsibility to ensure that the medical examiner is informed of the minimum medical requirements and the characteristics of the work to be performed. The motor carrier is also responsible for ensuring that only medically qualified drivers are operating CMVs in interstate commerce.

Question 2: Do the physical qualification requirements of the FMCSRs infringe upon a person's religious beliefs if such beliefs prohibit being examined by a licensed doctor of medicine or osteopathy?

Guidance: No. To determine whether a governmental regulation infringes on a person's right to freely practice his religion, the interest served by the regulation must be balanced against the degree to which a person's rights are adversely affected. *Biklen v. Board of Education*, 333 F. Supp. 902 (N.D.N.Y. 1971) aff'd 406 U.S. 951 (1972).

If there is an important objective being promoted by the requirement and the restriction on religious freedom is reasonably adapted to achieving that objective, the requirement should be upheld. *Burgin v. Henderson*, 536 F.2d 501 (2d. Cir. 1976).

Based on the tests developed by the courts and the important objective served, the regulation meets Constitutional standards. It does not deny a driver his First Amendment rights.

Question 3: What are the physical qualification requirements for operating a CMV in interstate commerce?

Guidance: The physical qualification regulations for drivers in interstate commerce are found at § 391.41. Instructions to medical examiners performing physical examinations of these drivers are found at § 391.43. Interpretive guidelines are distributed upon request.

The qualification standards cover 13 areas which directly relate to the driving function. All but four of the standards require a judgement by the medical examiner. A person's qualification to drive is determined by a medical examiner who is knowledgeable about the driver's functions and whether a particular condition would interfere with the driver's ability to operate a CMV safely. In the case of vision, hearing, insulin-using diabetes, and epilepsy, the current standards are absolute, providing no discretion to the medical examiner.

Question 4: Is a driver who is taking prescription methadone qualified to drive a CMV in interstate commerce?

Guidance: Methadone is a habit-forming narcotic which can produce drug dependence and is not an allowable drug for operators of CMVs.

Question 5: May the medical examiner restrict a driver's duties?

Guidance: No. The only conditions a medical examiner may impose upon a driver otherwise qualified involve the use of corrective lenses or hearing aids, securement of a waiver or limitation of driving to exempt intracity zones (see § 391.43(g)). A medical examiner who believes a driver has a condition not specified in § 391.41 that would affect his ability to operate a CMV safely should refuse to sign the examiner's certificate.

Question 6: If an interstate driver tests positive for alcohol or controlled substances under part 382, must the driver be medically re-examined and obtain a new medical examiner's certificate to drive again?

Guidance: The driver is not required to be medically re-examined or to obtain a new medical examiner's certificate *provided* the driver is seen by an SAP who evaluates the driver, does not make a clinical diagnosis of alcoholism, and provides the driver with documentation allowing the driver to return to work. However, if the SAP determines that alcoholism exists, the driver is not qualified to drive a CMV in interstate commerce. The ultimate responsibility rests with the motor carrier to ensure the driver is medically qualified and to determine whether a new medical examination should be completed.

Question 7: Are drivers prohibited from using CB radios and earphones?

Guidance: No. CB radios and earphones are not prohibited under the regulations, as long as they do not distract the driver and the driver is capable of complying with § 391.41(b)(11).

Question 8: Is the use of coumadin, an anticoagulant, an automatic disqualification for drivers operating CMVs in interstate commerce?

Guidance: No. Although the FHWA 1987 ''Conference on Cardiac Disorders and Commercial Drivers'' recommended that drivers who are taking anticoagulants not be allowed to drive, the agency has not adopted a rule to that effect. The medical examiner and treating specialist may, but are not required to, accept the Conference recommendations. Therefore, the use of coumadin is not an automatic disqualification, but a factor to be considered in determining the driver's physical qualification status.

Section 391.43 Medical Examination; Certificate of Physical Examination

Question 1: May a motor carrier, for the purposes of § 391.41, or a State driver licensing agency, for the purposes of § 383.71, accept the results of a medical examination performed by a foreign medical examiner?

Guidance: Yes. Foreign drivers operating in the U.S. with a driver's license recognized as equivalent to the CDL may be medically certified in accordance with the requirements of part 391, subpart E, by a medical examiner in the driver's home country who is licensed, certified, and/or registered to perform physical examinations in that country. *However,* U.S. drivers operating in interstate commerce within the U.S. must be medically certified in accordance with part 391, subpart E, by a medical examiner licensed, certified, and/or registered to perform physical examinations in the U.S.

Question 2: May a urine sample collected for purposes of performing a subpart H test be used to test for diabetes as part of a driver's FHWA-required physical examination?

Guidance: In general, no. However, the DOT has recognized an exception to this general policy whereby, after 60 milliliters of urine have been set aside for subpart H testing, any remaining portion of the sample may be used for other nondrug testing, but only if such other nondrug testing is required by the FHWA (under part 391, subpart E) such as testing for glucose and protein levels.

Question 3: Is a chest x-ray required under the minimum medical requirements of the FMCSRs?

Guidance: No, but a medical examiner may take an x-ray if appropriate.

Question 4: Does § 391.43 of the FMCSRs require that physical examinations of applicants for employment be conducted by medical examiners employed by or designated by the carrier?

Guidance: No.

Question 5: Does a medical certificate displaying a facsimile of a medical examiner's signature meet the ''signature of examining health care professional'' requirement?

Guidance: Yes.

Question 6: The driver's medical exam is part of the Mexican Licencia Federal. If a roadside inspection reveals that a Mexico-based driver has not had the medical portion of the Licencia Federal re-validated, is the driver considered to be without a valid medical certificate or without a valid license?

Guidance: The Mexican Licencia Federal is issued for a period of 10 years but must be re-validated every 2 years. A condition of re-validation is that the driver must pass a new physical examination. The dates for each re-validation are on the Licencia Federal and must be stamped at the completion of each physical. This constitutes documentation that the driver is medically qualified. Therefore, if the Licencia Federal is not re-validated every 2 years as specified by Mexican law, the driver's license is considered invalid.

Section 391.45 Persons Who Must Be Medically Examined and Certified

Question 1: Is it intended that the words ''person'' and ''driver'' be used interchangeably in § 391.45?

Guidance: Yes.

Question 2: Do the FMCSRs require applicants, possessing a current medical certificate, to undergo a new physical examination as a condition of employment?

Guidance: No. However, if a motor carrier accepts such a currently valid certificate from a driver subject to part 382, the driver is subject to additional controlled substance testing requirements unless otherwise excepted in subpart H.

Question 3: Must a driver who is returning from an illness or injury undergo a medical examination even if

his current medical certificate has not expired?

Guidance: The FMCSRs do not require an examination in this case unless the injury or illness has impaired the driver's ability to perform his/her normal duties. However, the motor carrier may require a driver returning from any illness or injury to take a physical examination. But, in either case, the motor carrier has the obligation to determine if an injury or illness renders the driver medically unqualified.

Section 391.47 Resolution of Conflicts of Medical Evaluation

Question 1: Does the FHWA issue formal medical decisions as to the physical qualifications of drivers on an individual basis?

Guidance: No, except upon request for resolution of a conflict of medical evaluations.

Section 391.49 Waiver of Certain Physical Defects

Question 1: Since 49 CFR 391.49 does not mandate a Skill Performance Evaluation, does the term ''performance standard'' mean that the State must give a driving test or other Skill Performance Evaluation to the driver for every waiver issued or does this term mean that, depending upon the medical condition, the State may give some other type of performance test? For example, in the case of a vision waiver, would a vision examination suffice as a performance standard?

Guidance: Under the Tolerance Guidelines, Appendix C, Paragraph 3(j), each State that creates a waiver program for intrastate drivers is responsible for determining what constitutes ''sound medical judgment,'' as well as determining the performance standard. In the example used above, a vision examination would suffice as a performance standard. It is the responsibility of each State establishing a waiver program to determine what constitutes an appropriate performance standard.

Section 391.51 Driver Qualification Files

Question 1: When a motor carrier purchases another motor carrier, must the drivers of the acquired motor carrier be requalified by the purchasing motor carrier?

Guidance: No.

Question 2: Is a driver training school required to keep a driver qualification file on each student?

Guidance: Yes, if operating in interstate commerce.

Question 3: Before December 23, 1994, motor carriers were required to maintain documentary evidence that their drivers had completed the written examination specified by 49 CFR 391.35 (1994). The rule removing § 391.35 became effective on that date (59 FR 60319, November 23, 1994). Are motor carriers required to maintain such documentary evidence for drivers employed prior to December 23, 1994?

Guidance: No.

Question 4: If a motor carrier maintains complete driver qualification files but cannot produce them at the time of the review or within two business days, is it in violation of § 391.51?

Guidance: Yes. Driver qualification files must be produced on demand. Producing driver qualification files after the completion of the review does not cure a record-keeping violation of § 391.51.

Question 5: Must a driver/employee who was employed prior to the deletion of the section of the FMCSRs requiring certain documentary proof of written examination, and who does not have such proof in his driver qualification file, complete the exam?

Guidance: No. The requirement of former 49 CFR 391.35(h) that a driver qualification file contains certain documents substantiating the driver examination may not be the basis of a citation after November 23, 1994, the date on which all requirements pertinent to a driver's written test were rescinded (59 FR 60319).

Section 391.63 Intermittent, Casual, or Occasional Drivers

Question 1: Is a person employed by a nonmotor carrier in his normal duties considered an intermittent, casual, or occasional driver when employed by a motor carrier as a driver on a part-time basis?

Guidance: No. A person who drives for one motor carrier (even if it is only one day per month) would not meet the definition of an intermittent, casual or occasional driver in § 390.5 since he/she is employed by only one motor carrier. The motor carrier must fully qualify the driver and maintain a qualification file on the employee as a regularly employed driver.

Question 2: How does § 391.63 apply when motor carriers obtain, from a driver leasing service, intermittent, casual, or occasional drivers who are on temporary assignments to multiple motor carriers?

Guidance: If an intermittent, casual, or occasional driver has only been fully qualified by a driver leasing service or similar non-motor carrier entity, and has never been fully qualified by a motor carrier, the first motor carrier employing such a driver must ensure that the driver is fully qualified, and must keep a complete driver qualification file for that driver. It was the intention of §§ 391.63 and 391.65 to require that a driver, before entering the status of an ''intermittent, casual, or occasional'' driver, be fully qualified by a motor carrier. In a contractual relationship between a motor carrier and a driver leasing service, this may be accomplished by a motor carrier designating a driver leasing service as its agent to perform the qualification procedures in accordance with parts 383 and 391. However, in such a case, the motor carrier will be held liable for any violations of the FMCSRs committed by its agent.

Question 3: Must a motor carrier that employs an intermittent, casual, or occasional driver to operate a CMV, as defined in § 383.5, (1) require the driver to prepare and submit an employment application in accordance with § 391.21 and (2) conduct the background investigation of the driver's previous employers required by § 391.23?

Guidance: Section 391.63(a) (1)–(2) exempts from compliance with §§ 391.21 and 391.23 motor carriers that use intermittent, casual or occasional drivers to operate CMVs with a gross vehicle (or combination) weight rating (GVWR/GCWR) of 10,001 pounds or more. These exemptions also apply to carriers operating the heavier CMVs subject to parts 382 and 383.

However, the more limited driver information and motor carrier investigation required by parts 382 and 383 are not covered by § 391.63. Therefore, a carrier using intermittent, casual or occasional drivers to operate CMVs with a GVWR/GCWR of 26,001 pounds or more need not require an employment application in accordance with § 391.21, but the driver must furnish the information required by § 383.35(c). The carrier may conduct a background investigation of the driver's previous employers (§ 383.35(f)), and it must investigate his/her previous alcohol and controlled substance test results (§ 382.413).

Section 391.65 Drivers Furnished by Other Motor Carriers

Question 1: May a nonmotor carrier which owns a CMV prepare the qualification certificate provided for in § 391.65?

Guidance: No, only a motor carrier which regularly employs a driver may issue the required certification.

Question 2: May the certificate of qualification as prescribed by § 391.65

be incorporated into another carrier's forms such as a lease and/or interchange agreement?

Guidance: Yes. However, the certificate of qualification must be signed and dated by an officer or authorized employee of the regularly employing carrier.

Question 3: Is a motor carrier required to accept a certificate from the driver's regularly employing motor carrier certifying that the driver is qualified per § 391.65?

Guidance: No. If the motor carrier chooses not to accept the certificate issued by the regularly employing motor carrier furnishing the driver, the motor carrier must then assume responsibility for assuring itself that the driver is fully qualified in accordance with part 391.

Question 4: If a driver furnished by another motor carrier is in the second carrier's service for a period of 7 consecutive days or more, may the driver still fall under the exemption in § 391.65?

Guidance: No. The driver becomes a regularly employed driver of the second motor carrier and the exemption in § 391.65 is inapplicable.

PART 392—DRIVING OF MOTOR VEHICLES

Sections Interpreted

392.3 Ill or Fatigued Operator
392.5 Intoxicating Beverage
392.6 Schedules To Conform With Speed Limits
392.7 Equipment, Inspection, and Use
392.9 Safe Loading
392.14 Hazardous Conditions; Extreme Caution
392.16 Use of Seat Belts
392.42 Notification of License Revocation
392.60 Unauthorized Persons Not To Be Transported

Section 392.3 Ill or Fatigued Operator

Question 1: What protection is afforded a driver for refusing to violate the FMCSRs?

Guidance: Section 405 of the STAA (49 U.S.C. 31105) states, in part, that no person shall discharge, discipline, or in any manner discriminate against an employee with respect to the employee's compensation, terms, conditions, or privileges of employment for refusing to operate a vehicle when such operation constitutes a violation of any Federal rule, regulation, standard, or order applicable to CMV safety. In such a case, a driver may submit a signed complaint to the Occupational Safety and Health Administration.

Section 392.5 Intoxicating Beverage

Question 1: Do possession and use of alcoholic beverages in the passenger area of a motorcoach constitute ''possession'' of such beverages under § 392.5(a)(3)?

Guidance: No.

Question 2: Can a motor carrier, which finds a driver with a detectable presence of alcohol, place him/her out of service in accordance with § 392.5?

Guidance: No. The term ''out of service'' in the context of § 392.5 refers to an act by a State or Federal official. However, the motor carrier must prevent the driver from being on-duty or from operating or being in physical control of a CMV for at least as long as is necessary to prevent a violation of § 392.5.

Question 3: Does the prohibition against carrying alcoholic beverages in § 392.5 apply to a driver who uses a company vehicle, for personal reasons, while off-duty?

Guidance: No. For example, an owner-operator using his/her own vehicle in an off-duty status, or a driver using a company truck or tractor for transportation to a motel, restaurant, or home, would normally be outside the scope of this section.

Question 4: Would an alcohol test, performed by an employer pursuant to 49 CFR part 382, with a result greater than 0.00 BAC, but less than 0.02 BAC, establish that a driver was in violation of 49 CFR 392.5(a)(2), having any measured alcohol concentration while on duty?

Guidance: No. The FHWA believes that a 0.02 BAC is the lowest level at which a scientifically accurate breath/blood alcohol concentration can be measured in an employer-based test under part 382. The FHWA further believes that this use of a 0.02 BAC standard is consistent with FHWA's long established zero tolerance standard for alcohol. This guidance in no way impedes or precludes any action taken by a law enforcement official because of a finding that a BAC level was less than 0.02 BAC.

Section 392.6 Shedules to Conform With Speed Limits.

Question 1: How many miles may a driver record on his/her daily record of duty status and still be presumed to be in compliance with the speed limits?

Guidance: Drivers are required to conform to the posted speed limits prescribed by the jurisdictions in or through which the vehicle is being operated. Where the total trip is on highways with a speed limit of 65 mph, trips of 550–600 miles completed in 10 hours are considered questionable and the motor carrier may be asked to document that such trips can be made. Trips of 600 miles or more will be assumed to be incapable of being completed without violations of the speed limits and may be required to be documented. In areas where a 55 mph speed limit is in effect, trips of 450–500 miles are open to question, and runs of 500 miles or more are considered incapable of being made in compliance with the speed limit and hours of service limitation.

Section 392.7 Equipment, Inspection, and Use

Question 1: Must a driver prepare a written report of a pretrip inspection performed under § 392.7?

Guidance: No.

Question 2: Must both drivers of a team operation comply with the provisions of § 392.7 before driving?

Guidance: Section 392.7 states that a driver must be satisfied that the vehicle is in good working order before operating the vehicle. If a driver is satisfied with a co-driver's inspection, or a safety lane inspection, then the requirement of this section will have been met.

Section 392.9 Safe Loading

Question 1: Is a vehicle's cargo compartment considered sealed according to the terms of § 392.9(b)(4) when it is secured with a padlock, to which the driver holds a key?

Guidance: No. The driver has ready access to the cargo compartment by using the padlock key and would be required to perform the examinations of the cargo and load-securing devices described in § 392.9(b).

Question 2: Does the FHWA have authority to enforce the safe loading requirements against a shipper that is not the motor carrier?

Guidance: No, unless HM as defined in § 172.101 are involved. It is the responsibility of the motor carrier and the driver to ensure that any cargo aboard a vehicle is properly loaded and secured.

Question 3: How may the motor carrier determine safe loading when a shipper has loaded and sealed the trailer?

Guidance: Under these circumstances, a motor carrier may fulfill its responsibilities for proper loading a number of ways. Examples are: a. Arrange for supervision of loading to determine compliance; or

b. Obtain notation on the connecting line freight bill that the lading was properly loaded; or

c. Obtain approval to break the seal to permit inspection.

Question 4: Is there a requirement that a driver must personally load, block, brace, and tie down the cargo on the property carrying CMV he/she drives?

Guidance: No. But the driver is required to be familiar with methods and procedures for securing cargo, and

may have to adjust the cargo or load securing devices pursuant to § 392.9(b).

Section 392.14 Hazardous Conditions; Extreme Caution

Question 1: Who makes the determination, the driver or carrier, that conditions are sufficiently dangerous to warrant discontinuing the operation of a CMV?

Guidance: Under this section, the driver is clearly responsible for the safe operation of the vehicle and the decision to cease operation because of hazardous conditions.

Section 392.16 Use of Seat Belts

Question 1: May a driver be exempted from wearing seat belts because of a medical condition such as claustrophobia?

Guidance: No.

Question 2: Are motorcoach passengers required to wear seat belts?

Guidance: No.

Section 392.42 Notification of License Revocation

Question 1: If a driver's driving privilege is suspended as a result of a violation committed off-duty, in a personal vehicle, is the driver required to notify the employing motor carrier under the provisions of § 392.42?

Guidance: Yes.

Section 392.60 Unauthorized Persons Not To Be Transported

Question 1: Does § 392.60 require a driver to carry a copy of the written authorization (required to transport passengers) on board a CMV?

Guidance: No, the authorization must be maintained at the carrier's principal place of business. At the discretion of the motor carrier, a driver may also carry a copy of the authorization.

PART 393—PARTS AND ACCESSORIES NECESSARY FOR SAFE OPERATION

Sections Interpreted

393.11 Lighting Devices and Reflectors
393.17 Lamps and Reflectors—Combinations in Driveaway-Towaway Operation
393.24 Requirements for Head Lamps and Auxiliary Road Lighting Lamps
393.25 Requirements for Lamps Other Than Head Lamps
393.28 Wiring To Be Protected
393.31 Overload Protective Devices
393.40 Required Brake Systems
393.41 Parking Brake Systems
393.42 Brakes Required on All Wheels
393.43 Breakaway and Emergency Braking System
393.44 Front Brake Lines, Protection
393.48 Brakes To Be Operative
393.49 Single Valve To Operate All Brakes
393.51 Warning Devices and Gauges
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393.71 Coupling Devices and Towing Methods, Driveaway-Towaway Operations
393.75 Tires
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393.89 Buses, Driveshaft Protection
393.92 Buses, Marking Emergency Doors
393.93 Seats, Seat Belt Assemblies and Seat Belt Assembly Anchorages
393.95 Emergency Equipment on All Power Units
393.100 General Rules for Protection Against Shifting or Falling Cargo
393.102 Securement Systems
393.106 Front-end Structure
393.201 Frames

Special Topics—CMV Parts and Accessories

Section 393.11 Lighting Devices and Reflectors

Question 1: What is the definition of ''body'' with respect to trucks and trailers?

Guidance: The FMCSRs do not include a definition of ''body.'' However, a truck or trailer body generally means the structure or fixture designed to contain, or support, the material or property to be transported on the vehicle.

Question 2: May retroreflective tape be used in place of side reflex reflectors?

Guidance: Section 393.26(b) cross references FMVSS 108 (49 CFR 571.108, S5.1.1.4) which allows reflective material to be used for side reflex reflectors under the conditions described below. Retroreflective tape conforming to Federal specification L–S–300, ''Sheeting and Tape, Reflective; Non-exposed Lens, Adhesive Backing,'' September 7, 1965, may be used in place of side reflex reflectors if this material as used on the vehicle, meets the performance standards in either Table I or Table IA of Society of Automotive Engineers J594f, *Reflex Reflectors*, January 1977.

Question 3: Section 393.11, Footnote 5, requires that each converter dolly be equipped with turn signals at the rear if the converter dolly obscures the turn signals at the rear of the towing vehicle when towed singly by another vehicle. Are turn signals required on the rear of the converter dolly when the towing of the unladen dolly prevents other motorists from seeing only a portion of the lenses of the turn signals on the towing vehicle?

Guidance: Yes. Although a portion of the rear turn signal lenses on the towing vehicle may be visible to other drivers, the turn signal generally would not satisfy the visibility requirements of FMVSS No. 108 (49 CFR 571.108) if the converter dolly prevents other motorists from seeing the entire lens. The visibility requirements of FMVSS No. 108 help to ensure that other drivers can see the turn signal from a range of positions to the rear of the vehicle. Therefore, turn signals on the towing vehicle are considered to be obscured by the converter dolly if other motorists' view of the lens is even partially blocked.

Question 4: Does a CMV equipped with amber tail lamps in addition to the red tail lamps required to designate the rear of a CMV meet the lighting requirements of § 393.11?

Guidance: No. Section 393.11 requires that lighting devices on CMVs placed in operation after March 7, 1989, meet the requirements of FMVSS No. 108 in effect at the time of manufacture. The NHTSA has issued interpretations which indicate that the use of amber tail lamps impairs the effectiveness of the required lighting equipment and as such is prohibited by FMVSS No. 108 (S5.1.3). Since NHTSA does not allow vehicle manufacturers to install amber tail lamps, the FHWA has concluded that the use of amber tail lamps on vehicles placed in operation after March 7, 1989, is prohibited by § 393.11.

In the case of vehicles placed in operation on or before March 7, 1989, § 393.11 requires that vehicles meet *either* the lighting requirements of part 393 *or* FMVSS No. 108 in effect at the time of manufacture. Prior to the December 7, 1988, final rule on part 393 (53 FR 49397), amber tail lamps were prohibited by § 393.25. Section 393.25(e)(3) (in the October 1, 1988 edition of the Code of Federal Regulations) required all rear lamps, with certain exceptions, to be red. Since tail lamps were not included in the exceptions, the use of amber tail lamps was implicitly prohibited. Therefore, a vehicle placed in operation on or before March 7, 1989, must not be equipped with amber tail lamps because the use of such lamps meets *neither* the lighting requirements of part 393 *nor* FMVSS No. 108 in effect at the time of manufacture.

Section 393.17 Lamps and Reflectors-Combinations in Driveaway-Towaway Operation

Question 1: What are the lighting requirements when a tow truck is pulling a wrecked or disabled vehicle?

Guidance: A wrecker pulling a vehicle would be considered a driveaway-towaway operation and would have to be equipped with the lighting devices specified in § 393.17 when operating in interstate commerce.

Section 393.24 Requirements for Head Lamps and Auxiliary Road Lighting Lamps

Question 1: Must additional lamps that are not required be operative if all required lamps are operative?

Guidance: No.

Section 393.25 Requirements for Lamps Other Than Head Lamps

Question 1: Are lighting devices on mobile homes/house trailers required to be permanently mounted?

Guidance: No. The movement of mobile homes/house trailers is considered to be a driveaway-towaway operation.

Question 2: Are there any special lighting requirements for large containers?

Guidance: No.

Question 3: What are the lighting requirements when a container assumes the structural requirements of a trailer?

Guidance: All relevant requirements of the regulations must be met by this container/trailer.

Section 393.28 Wiring to be Protected

Question 1: Does a frame channel of a CMV constitute a protective ''sheath or tube'' as specified in § 393.28?

Guidance: No. To be acceptable, a sheath or tube must enclose the wires throughout their circumference. In the absence of a sheath or tube, the group of wires must be protected by nonconductive tape, braid, or other covering capable of withstanding severe abrasion.

Section 393.31 Overload Protective Devices

Question 1: Must all trailers be equipped with overload protective devices?

Guidance: No. Trailers do not need overload protective devices when protection of trailer circuits is provided on the towing vehicle. A circuit breaker is required only when the head lamp circuit is protected in common with one or more other circuits. A circuit breaker, if required, must be an automatic reset type.

Section 393.40 Required Brake Systems

Question 1: May a system such as ''driveline brakes'' be used as an emergency brake provided it complies with the requirements of § 393.52?

Guidance: Yes. CMVs which were not subject to the emergency brake requirements of FMVSS Nos. 105 or 121 may use ''driveline brakes'' provided those vehicles meet the requirements of § 393.52.

Section 393.41 Parking Brake Systems

Question 1: May the ''park'' position of a CMV's transmission be used as a parking brake to comply with the § 393.41?

Guidance: No. The ''park'' position of the transmission is only a locking device used to lock the transmission.

Question 2: Does § 393.41 prohibit air brake systems from being equipped with a means to release the spring brakes for purposes of towing disabled vehicles in emergency situations?

Guidance: No, provided the brakes are designed and maintained so they cannot be released unless adequate energy is available to make immediate reapplication of the brakes when the brake system is operable.

Question 3: Are parking brakes required on every CMV manufactured before March 7, 1990?

Guidance: No.

Section 393.42 Brakes Required on All Wheels

Question 1: Do retractable or lift axles have to be equipped with brakes?

Guidance: Yes, when the wheels are in contact with the roadway.

Question 2: Are unladen converter dollies covered by the exemption in § 393.42(b)(3)?

Guidance: Yes. However, if the converter dolly is laden, the brakes must be operable.

Question 3: Section 393.42(b)(3) of the FMCSRs states that any full trailer, any semitrailer, or any pole trailer having a GVWR of 3,000 pounds or less must be equipped with brakes if the weight of the towed vehicle resting on the towing vehicle exceeds 40 percent of the GVWR of the towing vehicle. Is the manufacturer of the trailer responsible for ensuring that the trailer is equipped with brakes when required?

Guidance: No. The motor carrier pulling the trailer is responsible for ensuring that the trailer is in compliance with all applicable FMCSRs.

Section 393.43 Breakaway and Emergency Braking System

Question 1: Are tractor protection valves required by § 393.43(b), or may similar devices be used?

Guidance: No. Similar devices may be used provided the devices meet the performance requirements of § 393.43(b).

Question 2: Are all brakes on a trailer required to be applied automatically upon breakaway?

Guidance: Yes.

Section 393.44 Front Brake Lines, Protection

Question 1: Does the term ''rear wheels'' include the tag axle on a bus/motorcoach?

Guidance: Yes. The braking system on a bus/motorcoach must be constructed so that if any brake line to either front wheel is broken, the driver can apply the brakes to all of the wheels on each rear axle.

Section 393.48 Brakes To Be Operative

Question 1: Do surge brakes comply with § 393.48?

Guidance: No. Section 393.48 requires that brakes be operable at all times. Generally, surge brakes are only operative when the vehicle is moving in the forward direction and as such do not comply with § 393.48 (see question number 1 in § 393.49).

Question 2: If a CMV manufactured on or after July 25, 1980 (see § 393.42) has brake components on the front axle, and the brakes are not operable, does the vehicle comply with § 393.48?

Guidance: No.

Question 3: If a truck or truck tractor manufactured prior to July 25, 1980, and having 3 or more axles, has inoperable brakes on the front axle or some of the brake components are missing, would the vehicle be in violation of § 393.48?

Guidance: Yes. Section 393.48(a) requires that all brakes with which the vehicle is equipped must be operable at all times. Although § 393.42(b)(1) provides an exception to the requirement for brakes on all wheels for trucks and truck tractors with 3 or more axles and manufactured prior to July 25, 1980, the exception does not affect the applicability of § 393.48 for those cases in which the vehicle is equipped with inoperable front wheel brakes or only has certain portions of the front wheel brake system (e.g., shoes, linings, chambers, hoses) in place.

Question 4: Are the brakes on a vehicle towed in a driveaway-towaway operation or towed disabled vehicle required to be operable at all times?

Guidance: Section 393.48(c) provides an exception to the requirement that brakes be operable at all times. This exception covers disabled vehicles being towed and vehicles towed in a driveaway-towaway operation.

The driveaway-towaway exception in § 393.48(c) is contingent upon the conditions outlined in § 393.42(b)(2). Towed vehicles must have brakes as may be necessary to ensure compliance

with the performance requirements of § 393.52. A motor vehicle towed by means of a tow-bar when any other vehicle is full-mounted on the towed vehicle, or any combination of motor vehicles utilizing 3 or more saddle-mounts, would not be covered under the exception found at § 393.48(c).

With regard to the disabled-vehicle provision of § 393.48(c)(1), the combination vehicle would have to meet the applicable performance requirements of § 393.52.

Section 393.49 Single Valve To Operate All Brakes

Question 1: Does a combination of vehicles using a surge brake to activate the towed vehicle's brakes comply with § 393.49?

Guidance: No. The surge brake cannot keep the trailer brakes in an applied position. Therefore, the brakes on the combination of vehicles are not under the control of a single valve as required by § 393.49 (see question number 1 in § 393.48)

Section 393.51 Warning Devices and Gauges

Question 1: Is the low pressure warning device required to activate before the tractor protection valve?

Guidance: No. Section 393.51 does not explicitly require the warning device to operate before the protection valve. It is implied that if the operating pressure of the warning device is at least ½ of the governor cut-out pressure, and that pressure is not less than the pressure at which the protection valve (or similar device) activates, the requirements of § 393.51 are satisfied.

Question 2: Is the vacuum portion of vacuum-assisted hydraulic brake systems required to have a warning device?

Guidance: No. Only the hydraulic portion of vacuum-assisted hydraulic brake systems is required to have a warning device. FMVSS No. 105 does not require a warning device for the vacuum portion of the vacuum-assisted hydraulic brake systems. It is the intention of the FHWA that § 393.51 be consistent with FMVSS No. 105.

Question 3: Are vacuum gauges required on the vacuum portion of vacuum-assisted hydraulic brakes?

Guidance: No. Section 393.51(d)(2) requires only that CMVs with vacuum brakes (not hydraulic brakes applied or assisted by vacuum) be equipped with a vacuum gauge.

Question 4: Is a warning device required in a CMV with a single hydraulic brake system which uses the driveline parking brake as the emergency brake system?

Guidance: No. Warning devices are not required on such CMVs because the driver will be given ample warning of system failure by the movement and feel of the brake pedal.

Question 5: What difference, if any, is there between a warning device and a warning signal?

Guidance: For purposes of § 393.51, the terms may be used interchangeably.

Section 393.52 Brake Performance

Question 1: May the information in the stopping distance table be used to determine the stopping distances at speeds greater than 20 mph?

Guidance: No, the table is not intended to be used to predict or determine stopping distances at speeds greater than 20 mph.

Section 393.60 Glazing in Specified Openings

Question 1: May windshields and side windows be tinted?

Guidance: Yes, as long as the light transmission is not restricted to less than 70 percent of normal (refer to the American Standards Association publication Z26.1–1966 and Z26.1a-1969).

Question 2: May a decal designed to comply with the periodic inspection documentation requirements of § 396.17 be displayed on the windshields or side windows of a CMV?

Guidance: Yes, provided the decal is being used in lieu of an inspection report and is in compliance with § 393.60(c).

Question 3: If a crack extended into the thickness of the glass at such an angle as to measure ¼'' or more, measuring from the top edge of the crack on the outside surface of the windshield to vertical line drawn through the windshield to the far edge of this angled crack on the inside of the windshield, would this constitute a crack of ¼'' or more in width as defined in § 393.60(b)(2)?

Guidance: No. The crack, in order to fall outside the exception, would have to be a gap of ¼'' or more on the same surface of the windshield.

Section 393.61 Window Construction

Question 1: Do school buses used for purposes other than school bus operations (as defined in § 390.5), have to meet additional emergency exits requirements under § 393.61?

Guidance: Yes. Section 393.61(b)(2) says that ''a bus, including a school bus, manufactured on and after September 1, 1973,'' must conform with NHTSA's § 571.217 (FMVSS 217). At the time this provision was adopted, FMVSS 217 applied only to other buses and it was optional for school buses. The FHWA inserted the language, ''including school buses,'' in § 393.61(b)(2) to make clear that school buses used in interstate commerce and, therefore, subject to the FMCSRs, were required to comply with the bus exit standards in Standard FMVSS 217.

Section 393.61(b)(3) regarding push-out windows provides that older buses must conform with the requirements of §§ 393.61(b) or 571.217. Buses which are subject to § 571.217 would follow NHTSA's interpretation on push-out windows. Buses which are subject to § 393.61(b)(1) of the FMCSRs are required to have emergency windows that are either push-out windows or that have laminated safety glass that can be pushed out in a manner similar to a push-out window.

Question 2: For emergency exits which consist of laminated safety glass, is the window frame or sash required to move outward from the bus as is the case with push-out windows?

Guidance: No. Laminated safety glass is an alternative to the use of push-out windows for buses manufactured before September 1, 1973. Section 393.61(c) requires that every glazed opening used to satisfy the emergency exit space requirements, ''if not glazed with laminated safety glass, shall have a frame or sash so designed, constructed, and maintained that it will yield outwardly to provide the required free opening. * * *'' Laminated safety glass meeting Test No. 25, Egress, American National Standard ''Safety Code for Safety Glazing Materials for Glazing Motor Vehicles Operating on Land Highways,'' Z26.1–1966 as supplemented by Z26.1a–1969 (referenced in §§ 393.61(c) and 393.60(a)) is intended to provide an adequate means of emergency exit on older buses without resorting to push-out windows.

However, buses with a seating capacity of more than 10 people manufactured after September 1, 1973, must have push-out windows that conform to 49 CFR 571.217.

Question 3: When calculating the minimum emergency exit space required on school buses used in non-school bus operations, should two or three passengers per bench seat be used in determining the adult seating capacity?

Guidance: The NHTSA has indicated that ''School buses can transport 3 to a seat if the passengers are in grades 1 through 5, and 2 per seat in grades 9 through 12.'' (May 9, 1995, 60 FR 24562, 24567) Therefore, for vehicles originally manufactured as school buses, the total pupil seating capacity provided by the

bus manufacturer should be multiplied by ⅔ to determine the adult seating capacity for the purposes of § 393.61. This generally yields the same result as using two adults per bench seat.

Question 4: Do school buses which meet the school bus emergency exit requirements established by the NHTSA's November 2, 1992, final rule on FMVSS No. 217 have to be retrofitted with additional emergency exits when used in interstate commerce for non-school bus operations?

Guidance: No. On May 9, 1995, the NHTSA amended FMVSS No. 217 to permit non-school buses to meet either the current non-school bus emergency exit requirements or the upgraded school bus exit requirements established by the November 2, 1992 (57 FR 49413), final rule which became effective on September 1, 1994. Therefore, school buses which meet the upgraded emergency exit standards meet the requirements of § 393.61 without the retrofitting of additional exits.

Question 5: Which edition of FMVSS No. 217 is required to be used in determining the emergency exit space requirements when retrofitting buses?

Guidance: The cross reference to FMVSS No. 217 applies to the requirements in effect at the time of manufacture of the bus. Motor carriers are not, however, prohibited from retrofitting their buses to the most up-to-date requirements in FMVSS No. 217. Therefore, at a minimum, motor carriers must meet the non-school bus emergency exit requirements in effect at the time of manufacture, and have the option of retrofitting their buses to meet the emergency exit requirements established by the November 2, 1992 (57 FR 49413), final rule which became effective on September 1, 1994.

Section 393.62 Window Obstructions

Question 1: May a bus being operated by a for-hire motor carrier of passengers, under contract with a governmental agency to provide transportation of prisoners in interstate commerce, be allowed to operate with security bars covering the emergency push-out windows and with locked emergency door exits?

Guidance: Yes. Even when the transportation is performed by a contract carrier, the welfare, safety, and security of the prisoners is under the authority of the governmental corrections agency and, thus, the agency may require additional security measures. For these types of operations, a carrier may meet the special security requirements of the governmental corrections agency regarding emergency exits. However, CMVs that have been modified to meet the security requirements of the corrections agency may not be used for other purposes that are subject to the FMCSRs unless they meet the emergency exit requirements.

Section 393.65 All Fuel Systems

Question 1: May a fuel fill pipe opening be placed above the passenger floor level if it is not physically within the passenger compartment?

Guidance: Yes. In addition, the fill pipe may intrude into the passenger compartment as long as the fill pipe opening complies with § 393.65(b)(4), and the fill pipe is protected by a housing or covering to prevent leakage of fuel or fumes into the passenger compartment.

Question 2: Must a motor vehicle that meets the definition of a ''commercial motor vehicle'' in § 390.5 because it transports hazardous materials in a quantity requiring placarding under the Hazardous Materials Regulations (49 CFR parts 171–180) comply with the fuel system requirements of Subpart E of Part 393, even though it has a gross vehicle weight rating (GVWR) of 10,000 pounds or less?

Guidance: No. FMVSS No. 301 contains fuel system integrity requirements for passenger cars and multipurpose passenger vehicles, trucks, and buses that have a GVWR of 10,000 pounds or less and use fuel with a boiling point above 0° Celsius (32° Fahrenheit). Subpart E of part 393 was issued to provide fuel system requirements to cover motor vehicles with a GVWR of 10,001 or more pounds. The fuel systems of placarded motor vehicles with a GVWR of less than 10,001 pounds are adequately addressed by FMVSS No. 301 and compliance with subpart E of part 393 would be redundant. However, commercial motor vehicles that are not covered by FMVSS No. 301 must continue to comply with subpart E of part 393.

Section 393.67 Liquid Fuel Tanks

Question 1: May a properly vented fuel cap be used on a fuel tank equipped with another fuel venting system?

Guidance: Yes (see § 393.3).

Question 2: Do the FMCSRs specify a particular pressure relief system?

Guidance: No, but the performance standards of § 393.67(d) must be met.

Question 3: What standards under the FMCSRs must be met when a liquid fuel tank is repaired or replaced?

Guidance: A replacement/repaired tank must meet the applicable standards in § 393.67.

Section 393.70 Coupling Devices and Towing Methods, Except for Driveaway-Towaway Operations

Question 1: Is there a minimum number of fasteners required to fasten the upper fifth wheel plate to the frame of a trailer?

Guidance: The FMCSRs do not specify a minimum number of fasteners. However, the industry recommends that a minimum of ten ⅝ inch bolts be used. If ½ inch bolts are used, the industry recommends at least 14 bolts. The CVSA has adopted these industry standards as a part of its vehicle out-of-service criteria.

Question 2: When two safety chains are used, must the ultimate combined breaking strength of each chain be equal to the gross weight of the towed vehicle(s) or would the requirements be met if the combined breaking strength of the two chains is equal to the gross weight of the towed vehicle(s)?

Guidance: If the ultimate combined breaking strength of the two chains is equal to the gross weight of the towed vehicle(s), the requirements of § 393.70(d) are satisfied. It should be noted that some States may have more stringent requirements for safety chains.

Question 3: Section 393.70(d) requires that every full trailer must be coupled to the frame, or an extension of the frame, of the motor vehicle which tows it with one or more safety devices to prevent the towed vehicle from breaking loose in the event the tow-bar fails or becomes disconnected. The safety device must be connected to the towed and towing vehicles and to the tow-bar in a manner which prevents the tow-bar from dropping to the ground in the event it fails or becomes disconnected. Would the use of a pair of safety chains/cables between the towing vehicle and the front of a fixed-length draw bar, or an extendible draw bar, with a separate pair of safety chains/cables between the end of the draw bar and the front of the towed vehicle meet the requirements of § 393.70(d)?

Guidance: Generally, separate safety devices at the front and rear of the draw bar could be used to satisfy the requirements of § 393.70(d) provided the safety devices are attached to the drawbar and the vehicles in a manner that prevents the drawbar from dropping to the ground in the event that it fails or becomes disconnected. Also, the arrangement of the safety device(s) must be such that the vehicles will not separate if the draw bar fails or becomes disconnected.

If the drawbar design is such that bolts, connecting pins, etc., are used to connect structural members of the

drawbar, and are located at or near the midpoint of the drawbar (beyond the attachment points for the safety chain at the ends of the draw bar) the safety devices would have to extend from either the frame of the towed or towing vehicle to a point beyond the bolts, connecting pins or similar devices.

In the case of an extendible draw bar or reach, if a separate safety device(s) is used for the front and rear of the drawbar, a means must be provided to ensure that the drawbar will not separate at the movable portion of the drawbar. The use of welded tube stops would satisfy the intent of § 393.70(d) if the ultimate strength of the welds exceeds the impact forces associated with the drawbar extending suddenly with a fully loaded trailer attached.

Section 393.71 Coupling Devices and Towing Methods, Driveaway-Towaway Operations

Question 1: May a fifth wheel be considered as a coupling device when towing a semi-trailer in a driveaway-towaway operation?

Guidance: Yes. Section 393.71(g) requires the use of a tow-bar or a saddle-mount. Since a saddle-mount performs the function of a conventional fifth wheel, the use of a fifth wheel is consistent with the requirements of this section.

Section 393.75 Tires

Question 1: If a CMV has a defective tire, may the driver remove the defective tire from the axle and drive with three tires on an axle instead of four?

Guidance: Yes, provided the weight on all of the remaining tires does not exceed the maximum allowed under § 393.75(f).

Question 2: May a CMV be operated with tires that carry a greater weight than the weight marked on the sidewall of the tires?

Guidance: Yes, but only if the CMV is being operated under the terms of a State-issued special permit, and at a reduced speed that is appropriate to compensate for tire loading in excess of the rated capacity.

Question 3: May a vehicle transport HM when equipped with retreaded tires?

Guidance: Yes. The only CMV that may not utilize retreaded tires is a bus, and then only on its front wheels.

Question 4: May tires be filled with materials other than air (e.g., silicone, polyurethane)?

Guidance: Section 393.75 does not prohibit the use of tires filled with material other than air. However, § 393.3 may prohibit the use of such tires under certain circumstances. Some substances used in place of air in tires may not maintain a constant physical state at different temperatures. While these substances are solid at lower temperatures, the increase in temperature from highway use may result in the substance changing from a solid to a liquid. The use of a substance which could undergo such a change in its physical characteristics is not safe, and is not in compliance with § 393.3.

Section 393.76 Sleeper Berths

Question 1: If a compartment in a CMV is no longer used as a sleeper berth, must it be maintained and equipped as a sleeper berth as required in § 393.76?

Guidance: No.

Section 393.78 Windshield Wipers

Question 1: Are windshield washer systems required?

Guidance: No, only windshield wipers are required.

Section 393.81 Horn

Question 1: Do the FMCSRs specify what type of horn is to be used on a CMV?

Guidance: No.

Question 2: Are there established criteria in the FMCSRs to determine the minimum sound level of horns on CMVs?

Guidance: No.

Section 393.82 Speedometer

Question 1: What does the phrase ''reasonable accuracy'' mean?

Guidance: ''Reasonable accuracy'' is interpreted to mean accuracy to within plus or minus 5 mph at a speed of 50 mph.

Section 393.83 Exhaust System

Question 1: Is a heat shield mandatory on a vertical exhaust stack?

Guidance: No. However, § 393.83 requires the placement of the exhaust system in such a manner as to prevent the burning, charring, or damaging of the electrical wiring, the fuel supply, or any combustible part of the CMV.

Question 2: Does § 393.83 specify the type of exhaust system, vertical or horizontal, to be used on trucks or truck tractors?

Guidance: No.

Section 393.87 Flags on Projecting Loads

Question 1: May a triangular-shaped flag or device be used by itself to mark an oversized load?

Guidance: No. However, nothing prohibits using a triangular-shaped flag in conjunction with the prescribed flag.

Section 393.88 Television Receivers

Question 1: Does § 393.88 restrict the use of closed circuit monitor devices being used as a safety viewing system that would eliminate blind-side motor carrier accidents?

Guidance: No. The restriction of this section would not apply because the device cannot receive television broadcasts or be used for the viewing of video tapes.

Section 393.89 Buses, Drive Shaft Protection

Question 1: For the purposes of § 393.89, would a spline and yoke that is secured by a nut be considered a sliding connection?

Guidance: No. To be considered a sliding connection, the spline must be able to move within the sleeve. When the end of the spline is secured by a nut, it no longer has that freedom.

Question 2: On multiple drive shaft buses, does § 393.89 require that all segments of the drive shaft be protected no matter the segments' length?

Guidance: Yes. Each drive shaft must have one guard or bracket for each end of a shaft which is provided with a sliding connection (spline or other such device).

Question 3: How does an existing pillow bearing (shaft support) on a multiple driveshaft system affect the requirement?

Guidance: It does not affect the requirement. It is part of the requirement.

Section 393.92 Buses, Marking Emergency Doors

Question 1: Is a contractor-operated school bus operating in interstate commerce required to have emergency lights over the exit door?

Guidance: Yes. Any bus used in interstate commerce for other than school bus operations, as defined in § 390.5, is subject to the FMCSRs.

Section 393.93 Seats, Seat Belt Assemblies, and Seat Belt Assembly Anchorages

Question 1: If a CMV, other than a motorcoach, is equipped with a passenger seat, is a seat belt required for the passenger seat?

Guidance: Yes.

Section 393.95 Emergency Equipment on all Power Units

Question 1: Are pressure gauges the only acceptable means for a visual determination that a fire extinguisher is fully charged?

Guidance: No, as long as there is some means to permit a visual determination that a fire extinguisher is fully charged.

Section 393.100 General Rules for Protection Against Shifting or Falling Cargo

Question 1: When securing cargo, is the use of a tiedown every 10 linear feet, or fraction thereof, adequate?

Guidance: Yes, as long as the aggregate strength of the tiedowns is equal to the requirements of § 393.102, and each article is secured.

Question 2: Are CMVs transporting metal objects required to use option C?

Guidance: Only those CMVs which cannot comply with options A, B, or D, are required to conform to option C (see § 393.100(c)).

Question 3: Are the requirements of § 393.100 the only cargo securement requirements motor carriers must comply with?

Guidance: No. A motor carrier, when transporting cargo, must comply with all the applicable cargo securement requirements of subpart I and § 392.9.

Question 4: Do the rules for protection against shifting or falling cargo apply to CMVs with enclosed cargo areas?

Guidance: Yes. All CMVs transporting cargo must comply with the applicable provisions of §§ 393.100–393.106 (subpart I) to prevent the shifting or falling of cargo aboard the vehicle.

Question 5: How many tiedowns are required for the transportation of logs on pole trailers with trip-bolsters or other stanchions?

Guidance: The regulations do not specify a minimum number of tiedowns. Section 393.100(b) provides motor carriers with several options for complying with § 393.100. Although option B specifically addresses the use of tiedowns for each 10 linear feet of lading or fraction thereof (with certain exceptions), option D indicates the motor carrier may use ''other means * * * which are similar to, and at least as effective * * *'' as options A, B, and C. Therefore, the trip-bolsters or other stanchions in conjunction with securement devices meeting the requirements of § 393.102 may (depending on the amount by which the logs exceed the length of the trailer) be used to satisfy option D.

Question 6: Are logs which are bundled together with tiedowns and transported on pole trailers with trip-bolsters or stanchions required to be fastened to the vehicle?

Guidance: Yes. Generally, cargo is not considered to be secured in accordance with subpart I of part 393 unless tiedowns or other securement devices prevent the cargo from moving relative to the vehicle. Two rules in § 393.100 are directly applicable to the transportation of logs on a pole trailer.

Section 393.100(b)(2), *Option B,* requires one tiedown assembly for each 10 linear feet of lading or fraction thereof. However, ''a pole trailer * * * is required only to have two * * * of those tiedown assemblies at each end of the trailer,'' i.e., at the stanchions, because the cargo cannot effectively be secured at mid-trailer where its structure is limited to the pole or boom.

Section 393.100(b)(4), *Option D,* allows the motor carrier to use a securement system that is similar to, and at least as effective as Option B.

Section 393.100(d) states that the rules in § 393.100 do not apply to the transportation of ''one or more articles which, because of their size, shape, or weight, must be carried on special purpose vehicles or must be fastened by special methods.'' However, since pole trailers are explicitly included in § 393.100(b)(2), they are not special purpose vehicles and logs must be secured in accordance with § 393.100(b).

Section 393.102 Securement Systems

Question 1: Does § 393.102(b) prohibit the use of securement devices for which manufacturing standards have not been incorporated by reference?

Guidance: Section 393.102(b) requires that chain, wire rope, synthetic webbing, cordage, and steel strapping meet minimum manufacturing standards. It does not, however, prohibit the use of other types of securement devices or establish manufacturing standards for those devices. Therefore, if the securement device(s) has an aggregate working load limit of at least 1/2 the weight of the article, and the load is secured to prevent it from shifting or falling from the vehicle, §§ 393.100 and 393.102(b) would be satisfied.

If the cargo is not firmly braced against a front-end structure that conforms to the requirements of § 393.106, the securement system would have to provide protection against longitudinal movement [§ 393.104(a)]. If the load may shift sideways in transit then § 393.104(b) would also be applicable.

Question 2: Does § 393.102(b) require that securement devices be marked or labeled with their working load limit or any other information?

Guidance: No. Although § 393.102(b) requires chain, wire rope, synthetic webbing, cordage, and steel strapping tiedowns to meet applicable manufacturing standards, it explicitly excludes marking identification provisions of those manufacturing standards. Since § 393.102(b) does not establish manufacturing standards or marking requirements for other types of securement devices, such devices are not required to be marked with their working load limit.

Section 393.106 Front-end Structure

Question 1: When describing a headerboard or cab protection device, the regulations state that similar devices may be used. What is meant by the term ''similar devices''?

Guidance: The term ''similar devices'' has reference to devices equivalent in strength and function, though not necessarily in appearance and construction, to headerboards.

Section 393.201 Frames

Question 1: Are crossmembers of CMVs considered part of the frame?

Guidance: Yes.

Question 2: Does § 393.201 of the FMCSRs apply to trailers?

Guidance: No. Section 393. 201 is specific to buses, trucks, and truck tractors.

Question 3: Are welded repairs or modifications to the frame of a CMV violations of the FMCSRs?

Guidance: Welding would not be a violation of the FMCSRs unless the process used for the metals being welded or the location of the weld reduced the safety of operation of the vehicle. The safety of a repaired and/or modified vehicle would depend on the structural design of the frame, as well as the modifications performed. The manufacturer of the vehicle should be contacted for assistance.

Special Topics—CMV Parts and Accessories

Question 1: Do tires marked ''NHS'' (not for highway service) mean that highway use is prohibited by § 393.75?

Guidance: No, provided the use of such tires does not decrease the safety of operations (see Periodic Inspection Requirements, Appendix G to subpart B).

PART 395—HOURS OF SERVICE OF DRIVERS

Sections Interpreted

395.1 Scope of the Rules in This Part
395.2 Definitions
395.3 Maximum Driving and On-Duty Time
395.8 Driver's Record of Duty Status
395.13 Drivers Declared Out of Service
395.15 Automatic On-Board Recording Devices

Section 395.1 Scope of the Rules in This Part

Question 1: What hours-of-service regulations apply to drivers operating between the United States and Mexico or between the United States and Canada?

Guidance: When operating CMVs, as defined in § 390.5, in the United States, all hours-of-service provisions apply to all drivers of CMVs, regardless of nationality, point of origin, or where the driving time or on-duty time was accrued.

Question 2: If a driver invokes the exception for adverse driving conditions, does a supervisor need to sign the driver's record of duty status when he/she arrives at the destination?

Guidance: No.

Question 3: May a driver use the adverse driving conditions exception if he/she has accumulated driving time and on-duty (not driving) time, that would put the driver over 15 hours or over 70 hours in 8 consecutive days?

Guidance: No. The adverse driving conditions exception applies only to the 10-hour rule.

Question 4: Are there allowances made in the FMCSRs for delays caused by loading and unloading?

Guidance: No. Although the regulations do make some allowances for unforeseen contingencies such as in § 395.1(b), adverse driving conditions, and § 395.1(b)(2), emergency conditions, loading and unloading delays are not covered by these sections.

Question 5: How may a driver utilize the adverse driving conditions exception or the emergency conditions exception as found in § 395.1(b), to preclude an hours of service violation?

Guidance: An absolute prerequisite for any such claim must be that the trip involved is one which could normally and reasonably have been completed without a violation and that the unforeseen event occurred after the driver began the trip.

Drivers who are dispatched after the motor carrier has been notified or should have known of adverse driving conditions are not eligible for the two hours additional driving time provided for under § 395.1(b), adverse driving conditions. The term ''in any emergency'' shall not be construed as encompassing such situations as a driver's desire to get home, shippers' demands, market declines, shortage of drivers, or mechanical failures.

Question 6: What does ''servicing'' of the field operations of the natural gas and oil industry cover?

Guidance: Servicing of field operations, as described by the ICC report issued with this exemption, covers those services generally performed by specialized companies supporting the petroleum drilling and producing industry, ''including testing, mudfilling, cementing, hydraulic fracturing, voltage, logging, and resistivity measurements, and cleaning of industrial equipment, as the particular requirement might arise in the normal course of well digging or maintenance operations * * *'' (89 M.C.C. 19, at 28, March 29, 1962). Water servicing companies, whose operations are exclusive to servicing the natural gas and oil industry, are also covered by the provisions of § 395.1(d).

Section 395.1(d) applies only to situations involving drilling or the operation of wells. It does not apply to exploration activities.

Question 7: What is considered ''oilfield equipment'' for the purposes of 395.1(d)(1)?

Guidance: Oilfield equipment is not specifically defined in this section. However, its meaning is broader than the ''specially constructed'' commercial motor vehicles referred to in § 395.1(d)(2), and may encompass a spectrum of equipment ranging from an entire vehicle to hand-held devices.

Question 8: What kinds of oilfield equipment may drivers operate while taking advantage of the special rule in § 395.1(d)(2)?

Guidance: The special rule in § 395.1(d)(2) applies only to drivers transporting the equipment identified by the former Interstate Commerce Commission (now part of the Federal Highway Administration) in a 1962 report to accompany the oilfield rule. The report indicated the specialized equipment normally consists of heavy machinery permanently mounted on commercial motor vehicles, designed to fill a specific need.

Question 9: Are drivers required to be dedicated permanently to the oilfield industry, or must they exclusively transport oilfield equipment or service the field operations of the industry only for each eight-day (or shorter) period ended by an off-duty period of 24 or more consecutive hours?

Guidance: A driver must exclusively transport oilfield equipment or service the field operations of the industry for each eight-day (or shorter) period before his/her off-duty period of 24 or more consecutive hours. However, he/she must be in full compliance with the requirements of 395.3(b) before driving other commercial motor vehicles not used to service the field operations of the natural gas or oil industry.

Question 10: A driver is used exclusively to transport materials (such as sand or water) which are used exclusively to service the field operations of the natural gas or oil industry. Occasionally, the driver has leftover materials that must be transported back to a motor carrier facility or service depot. Would such a return trip be covered by § 395.1(d)(1)?

Guidance: Yes. Transporting excess materials back to a facility from the well site is part of the servicing operations. However, such servicing operations are limited to transportation back and forth between the service depot or motor carrier facility and the field site. Transportation of materials from one depot to another, from a railhead to a depot, or from a motor carrier terminal to a depot, is not considered to be in direct support of field operations.

Question 11: May specially trained drivers of specially constructed oil well servicing vehicles cumulate the 8 consecutive hours off duty required by § 395.3 by combining off-duty time or sleeper-berth time at a natural gas or oil well site with off-duty time or sleeper-berth time while en route to or from the well?

Guidance: These drivers may cumulate the required 8 consecutive hours off duty by combining two separate periods, each at least 2 hours long, of off-duty time or sleeper-berth time at a natural gas or oil well location with sleeper-berth time in a CMV while en route to or from such a location. They may also cumulate the required 8 consecutive hours off duty by combining an off-duty period of at least 2 hours at a well site with: (1) Another off-duty period at the well site that, when added to the first such period, equals at least 8 hours, or (2) a period in a sleeper-berth, either at or away from the well site, or in other sleeping accommodations at the well site, that, when added to the first off-duty period, equals at least 8 hours.

However, such drivers may not combine a period of less than 8 hours off duty *away* from a natural gas or oil well site with another period of less than 8 hours off duty *at* such well sites. The special provisions for drivers at well sites are strictly limited to those locations.

The following table indicates what types of off-site and on-site time periods may be combined.

	On Site Off Duty Time	On Site Sleeper Berth	On Site Other Sleeping Accommodation
Away from Site Off Duty Time Away from Site Sleeper Berth Time. Away from Site Other Sleeping Accommodation	X Combination must be 8 or more hours.	X Combination must be 8 or more hours.	X Combination must be 8 or more hours.

Question 12: What constitutes the 100-air-mile radius exemption?

Guidance: The term ''air mile'' is internationally defined as a ''nautical mile'' which is equivalent to 6,076 feet or 1,852 meters. Thus, the 100 air miles are equivalent to 115.08 statute miles or 185.2 kilometers.

Question 13: What documentation must a driver claiming the 100-air-mile radius exemption [§ 395.1(e)] have in his/her possession?

Guidance: None.

Question 14: Must a motor carrier retain 100-air-mile driver time records at its principal place of business?

Guidance: No. However, upon request by an authorized representative of the FHWA or State official, the records must be produced within a reasonable period of time (2 working days) at the location where the review takes place.

Question 15: May an operation that changes its normal work-reporting location on an intermittent basis utilize the 100-air-mile radius exemption?

Guidance: Yes. However, when the motor carrier changes the normal reporting location to a new reporting location, that trip (from the old location to the new location) must be recorded on the record of duty status because the driver has not returned to his/her normal work reporting location.

Question 16: May a driver use a record of duty status form as a time record to meet the requirement contained in the 100-air-mile radius exemption?

Guidance: Yes, provided the form contains the mandatory information.

Question 17: Is the ''mandatory information'' referred to in the previous guidance that required of a normal RODS under § 395.8(d) or that of the 100-air-mile radius exemption under § 395.1(e)(5)?

Guidance: The ''mandatory information'' referred to is the time records specified by § 395.1(e)(5) which must show: (1) The time the driver reports for duty each day; (2) the total number of hours the driver is on duty each day; (3) the time the driver is released from duty each day; and (4) the total time for the preceding 7 days in accordance with § 395.8(j)(2) for drivers used for the first time or intermittently.

Using the RODS to comply with § 395.1(e)(5) is not prohibited as long as the RODS contains driver identification, the date, the time the driver began work, the time the driver ended work, and the total hours on duty.

Question 18: Must the driver's name and each date worked appear on the time record prepared to comply with § 395.1(e), 100-air-mile radius driver?

Guidance: Yes. The driver's name or other identification and date worked must be shown on the time record.

Question 19: May drivers who work split shifts take advantage of the 100-air-mile radius exemption found at § 395.1(e)?

Guidance: Yes. Drivers who work split shifts may take advantage of the 100-air-mile radius exemption if: 1. The drivers operate within a 100-air-mile radius of their normal work-reporting locations; 2. The drivers return to their work-reporting locations and are released from work at the end of each shift and each shift is less than 12 consecutive hours; 3. The drivers are off-duty for more than 8 consecutive hours before reporting for their first shift of the day and spend less than 12 hours, in the aggregate, on-duty each day; 4. The drivers do not exceed a total of 10 hours driving time and are afforded 8 or more consecutive hours off-duty prior to their first shift of the day; and 5. The employing motor carriers maintain and retain the time records required by 395.1(e)(5).

Question 20: A company prepares and maintains time records for drivers classified as 100-air-mile radius drivers. The drivers usually do not work every day of the week. Does the motor carrier have to maintain time records for the days the drivers do not work?

Guidance: The motor carrier must maintain time records stating that the drivers were off-duty during the days the drivers did not work. However, if the drivers are off consecutive days, the employer may prepare a single time record stating the days each driver was off-duty.

Question 21: May a driver who is taking advantage of the 100-air-mile radius exemption in § 395.1(e) be intermittently off-duty during the period away from the work-reporting location?

Guidance: Yes, a driver may be intermittently off-duty during the period away from the work-reporting location provided the driver meets all requirements for being off-duty. If the driver's period away from the work-reporting location includes periods of off-duty time, the time record must show both total on-duty time and total off-duty time during his/her tour of duty. In any event, the driver must return to the work-reporting location and be released from work within 12 consecutive hours.

Question 22: When a driver fails to meet the provisions of the 100-air-mile radius exemption (§ 395.1(e)), is the driver required to have copies of his/her records of duty status for the previous seven days? Must the driver prepare daily records of duty status for the next seven days?

Guidance: The driver must only have in his/her possession a record of duty status for the day he/she does not qualify for the exemption. A driver must begin to prepare the record of duty status for the day immediately after he/she becomes aware that the terms of the exemption cannot be met. The record of duty status must cover the entire day, even if the driver has to record retroactively changes in status that occurred between the time that the driver reported for duty and the time in which he/she no longer qualified for the 100 air-mile radius exemption. This is the only way to ensure that a driver does not claim the right to drive 10 hours after leaving his/her exempt status, in addition to the hours already driven under the 100-air-mile exemption.

Question 23: A driver returns to his/her normal work reporting location from a location beyond the 100-air-mile radius and goes off duty for 7 hours. May the driver return to duty after being off-duty for 7 hours and utilize the 100-air-mile radius exemption?

Guidance: No. The 7-hour off-duty period has not met the requirement of 8 consecutive hours separating each 12-hour on-duty period. The driver must first accumulate 8 consecutive hours off-duty before operating under the 100-air-mile radius exemption.

Question 24: Is the exemption contained in § 395.1(f) concerning department store deliveries during the period from December 10 to December

25 limited to only drivers employed by department stores?

Guidance: No. The exemption applies to all drivers engaged solely in making local deliveries from retail stores and/or retail catalog businesses to the ultimate consumer, when driving solely within a 100-air-mile radius of the driver's work-reporting location, during the dates specified.

Question 25: May time spent in sleeping facilities being transported as cargo (e.g., boats, campers, travel trailers) be recorded as sleeper berth time?

Guidance: No, it cannot be recorded as sleeper berth time.

Question 26: May sleeper berth time and off-duty periods be combined to meet the 8-hour off-duty requirement?

Guidance: Yes, as long as the 8-hour period is consecutive and not broken by on-duty or driving activities. This does not apply to drivers at natural gas or oil well locations who may separate the periods.

Question 27: May a driver record sleeper berth time as off-duty time on line one of the record of duty status?

Guidance: No. The driver's record of duty status must accurately reflect the driver's activities.

Question 28: After accumulating 8 consecutive hours of off-duty time, a driver spends 2 hours in the sleeper berth. The driver then drives a CMV for 10 hours, then spends 6 hours in the sleeper berth. May the driver combine the two sleeper berth periods to meet the required 8 consecutive hours of off-duty time per § 395.1(h), then drive for up to 10 more hours?

Guidance: No. The 10 hours of driving time between the first and second sleeper berth periods must be considered in determining the amount of time that the driver may drive after the second sleeper berth period. Sleeper berths are intended to be used between periods of on-duty time. When a driver has already been off duty for more than 8 consecutive hours, and has therefore had adequate opportunity to rest, he/she may not ''save'' additional hours before going on duty and add them to the next sleeper berth period. In short, a driver must be on duty before he/she begins to accumulate sleeper berth time. The driver in your scenario is operating in violation of the hours of service regulations for the entire second 10-hour driving period until that driver is able to secure at least 8 consecutive hours of off-duty time.

Section 395.2 Definitions

Question 1: A company told all of its drivers that it would no longer pay for driving from the last stop to home and that this time should not be shown on the time cards. Is it a violation of the FMCSRs to operate a CMV from the last stop to home and not show that time on the time cards?

Guidance: The FMCSRs do not address questions of pay. All the time spent operating a CMV for, or at the direction of, a motor carrier must be recorded as driving time.

Question 2: What conditions must be met for a CMV driver to record meal and other routine stops made during a tour of duty as off-duty time?

Guidance: 1. The driver must have been relieved of all duty and responsibility for the care and custody of the vehicle, its accessories, and any cargo or passengers it may be carrying.

2. The duration of the driver's relief from duty must be a finite period of time which is of sufficient duration to ensure that the accumulated fatigue resulting from operating a CMV will be significantly reduced.

3. If the driver has been relieved from duty, as noted in (1) above, the duration of the relief from duty must have been made known to the driver prior to the driver's departure in written instructions from the employer. There are no record retention requirements for these instructions on board a vehicle or at a motor carrier's principal place of business.

4. During the stop, and for the duration of the stop, the driver must be at liberty to pursue activities of his/her own choosing and to leave the premises where the vehicle is situated.

Question 3: A driver has been given written permission by his/her employer to record meal and other routine stops made during a tour of duty as off-duty time. Is the driver required to record such time as off-duty, or is it the driver's decision whether such time is recorded as off-duty?

Guidance: It is the employer's choice whether the driver shall record stops made during a tour of duty as off-duty time. However, employers may permit drivers to make the decision as to how the time will be recorded.

Question 4: A driver has been given written permission by his/her employer to record meal and other routine stops made during a tour of duty as off-duty time. Is the driver allowed to record his stops during a tour of duty as off-duty time when the CMV is laden with HM and the CMV is parked in a truck stop parking lot?

Guidance: Drivers may record meal and other routine stops made during a tour of duty as off-duty time, except when a CMV is laden with explosive HM classified as hazard divisions 1.1, 1.2, or 1.3 (formerly Class A or B explosives). In addition, when HM classified under hazard divisions 1.1, 1.2, or 1.3 are on a CMV, the employer and the driver must comply with § 397.5 of the FMCSRs.

Question 5: Do telephone calls to or from the motor carrier that momentarily interrupt a driver's rest period constitute a change of the driver's duty status?

Guidance: Telephone calls of this type do not prevent the driver from obtaining adequate rest. Therefore, the FHWA does not consider these brief telephone calls to be a break in the driver's off-duty status.

Question 6: If a driver is required by a motor carrier to carry a pager/beeper to receive notification to contact the motor carrier for a duty assignment, how should this time be recorded?

Guidance: The time is to be recorded as off-duty.

Question 7: May a sleeper berth be used for a period of less than 2 hours' duration?

Guidance: Yes. The sleeper berth may be used for such periods of inactivity. Periods of time of less than 2 hours spent in a sleeper berth may not be used to accumulate the 8 hours of off-duty time required by § 395.3 of the FMCSRs.

Question 8: If a ''driver trainer'' occasionally drives a CMV, thereby becoming a ''driver'' (regardless of whether he/she is paid for driving), must the driver record all nondriving (training) time as on-duty (not driving)?

Guidance: Yes.

Question 9: A driver drives on streets and highways during the week and jockeys CMVs in the yard (private property) on weekends. How is the yard time to be recorded?

Guidance: On-duty (driving).

Question 10: How does compensation relate to on-duty time?

Guidance: The fact that a driver is paid for a period of time does not always establish that the driver was on-duty for the purposes of part 395 during that period of time. A driver may be relieved of duty under certain conditions and still be paid.

Question 11: Must nontransportation-related work for a motor carrier be recorded as on-duty time?

Guidance: Yes. All work for a motor carrier, whether compensated or not, must be recorded as on-duty time. The term ''work'' as used in the definition of ''on-duty time'' in § 395.2 of the FMCSRs is not limited to driving or other nontransportation-related employment.

Question 12: How should time spent in transit on a ferry boat be recorded?

Guidance: Time spent on a ferry by drivers may be recorded as off-duty time

if they are completely relieved from work and all responsibility and obligation to the motor carriers for which they drive. This relief must be consistent with existing regulations of the ferry company and the U.S. Coast Guard.

Question 13: What is the duty status of a co-driver (truck) who is riding seated next to the driver?

Guidance: On-duty (not driving).

Question 14: How much a CMV driver driving a non-CMV at the direction of a motor carrier record this time?

Guidance: If CMV drivers operate motor vehicles with GVWRs of 10,000 pounds or less at the direction of a motor carrier, the FHWA requires those drivers to maintain records of duty status and record such time operating as on-duty (not driving).

Question 15: How much the time spent operating a motor vehicle on the rails (roadrailers) be recorded?

Guidance: On-duty (not driving).

Question 16: Must a driver engaged in union activities affecting the employing motor carrier record such time as on-duty (not driving) time?

Guidance: The union activities of a driver employed by a unionized motor carrier must be recorded as on-duty (not driving) time if the collective bargaining agreement requires the motor carrier to pay the driver for time engaged in such activities. Otherwise these activities may be recorded as off duty time unless they are combined with normal duties performed for the carrier.

Efforts by a driver to organize co-workers employed by a non-unionized motor carrier, either on the carrier's premises or elsewhere, may be recorded as off duty time unless the organizing activities are combined with normal duties performed for the carrier.

Question 17: How is the 50 percent driving time in the definition of ''driver-salesperson'' in § 395.2 determined?

Guidance: The driving time is determined on a weekly basis. The driver must be employed solely as a driver-salesperson. The driver-salesperson may not participate in any other type of work activity.

Question 18: May a driver change to and from a driver-salesman status at any time?

Guidance: Yes, if the change is made on a weekly basis.

Question 19: May the time a driver spends attending safety meetings, ceremonies, celebrations, or other company-sponsored safety events be recorded as off-duty time?

Guidance: Yes, if attendance is voluntary.

Question 20: How must a driver record time spent on-call awaiting dispatch?

Guidance: The time that a driver is free from obligations to the employer and is able to use that time to secure appropriate rest may be recorded as off-duty time. The fact that a driver must also be available to receive a call in the event the driver is needed at work, even under the threat of discipline for non-availability, does not by itself impair the ability of the driver to use this time for rest.

If the employer generally requires its drivers to be available for call after a mandatory rest period which complies with the regulatory requirement, the time spent standing by for a work-related call, following the required off-duty period, may be properly recorded as off-duty time.

Question 21: How does a driver record the hours spent driving in a school bus operation when he/she also drives a CMV for a company subject to the FMCSRs?

Guidance: If the school bus meets the definition of a CMV, it must be recorded as driving time.

Question 22: A motor carrier relieves a driver from duty. What is a suitable facility for resting?

Guidance: The only resting facility which the FHWA regulates is the sleeper berth. The sleeper berth requirements can be found in § 393.76.

Question 23: How many times may a motor carrier relieve a driver from duty within a tour of duty?

Guidance: There is no limitation on the number of times a driver can be relieved from duty during a tour of duty.

Question 24: If a driver is transported by automobile from the point of a breakdown to a terminal, and then dispatched on another run, how is the time spent in the automobile entered on the record of duty status? How is the time entered if the driver goes off-duty once he reaches the terminal?

Guidance: The time spent in the automobile would be on-duty (not driving) if dispatched on another run once he/she reaches the terminal, and off-duty if he/she is given 8 consecutive hours off-duty upon reaching the terminal.

Question 25: When a driver experiences a delay on an impassable highway, should the time he/she is delayed be entered on the record of duty status as driving time or on-duty (not driving)?

Guidance: Delays on impassable highways must be recorded as driving time because § 395.2 defines ''driving time'' as all time spent at the driving controls of a CMV in operation.

Question 26: Is time spent operating controls in a CMV to perform an auxiliary, non-driving function (e.g., lifting a loaded container, compacting waste, etc.) considered driving time? Does the location of the controls have a bearing on the answer?

Guidance: The location of the controls does have a bearing on the answer. Section 395.2 defines ''driving time'' as all time spent at the driving controls of a CMV in operation. If a driver, seated at the driving controls of the vehicle, is able to simultaneously perform the driving and auxiliary function (for example, one hand on the steering wheel and one hand on a control mechanism), the time spent performing the auxiliary function must be recorded as ''driving time.'' If a driver, seated at the driving controls of the vehicle, is unable to simultaneously perform the driving and auxiliary function, the time spent performing the auxiliary function may be recorded as ''on-duty not driving time.''

Question 27: A motor carrier has full-time drivers who are also volunteer fire fighters. Some of the drivers carry pagers and leave their normal activities only when notified of a fire. Others consistently work 3 to 4 non-consecutive 24-hour shifts at a fire station each month, resting between calls. The drivers receive no monetary compensation for their work. How should the time spent on these activities be logged on the record of duty status when the drivers return to work?

Guidance: When drivers are free from obligations to their employers, that time may be recorded as off-duty time. Drivers who are allowed by the motor carrier to leave their normal activities to fight fires and those who spend full days in a fire station are clearly off duty. Their time should be recorded as such.

Question 28: How should time spent at National Guard meetings and training sessions be recorded for the hours of service requirements?

Guidance: A member of a military reserve component, serving on either an inactive duty status, such as on a weekend drill, or in an active duty status, such as annual training, need only log as ''on duty'' time that time during which he or she is required to perform work, and not that time during which he or she is required or permitted to rest.

Section 395.3 Maximum Driving and On-duty Time

Question 1: May a motor carrier switch from a 60-hour/7-day limit to a 70-hour/8-day limit or vice versa?

Guidance: Yes. The only restriction regarding the use of the 70-hour/8-day rule is that the motor carrier must have CMVs operating every day of the week. The 70-hour/8-day rule is a permissive

provision in that a motor carrier with vehicles operating every day of the week is not required to use the 70-hour/8-day rules for calculating its drivers' hours of service. The motor carrier may, however, assign some or all of its drivers to operate under the 70-hour/8-day rule if it so chooses. The assignment of individual drivers to the 60-hour/7-day or the 70-hour/8-day time rule is left to the discretion of the motor carrier.

Question 2: Does a driver, employed full time by one motor carrier using the 60-hours in 7-days rule, and part-time by another motor carrier using the 70-hours in 8-days rule, have the option of using either rule in computing his hours of service?

Guidance: No. The motor carrier that employs the driver on a full-time basis determines which rule it will use to comply with § 395.3(b). The driver does not have the option to select the rule he/she wishes to use.

Question 3: May a carrier which provides occasional, but not regular service on every day of the week, have the option of the 60 hours in 7 days or 70 hours in 8 days with respect to all drivers, during the period in which it operates one or more vehicles on each day of the week?

Guidance: Yes.

Question 4: A Canadian driver is subjected to a log book inspection in the U.S. The driver has logged one or more 13-hour driving periods while in Canada during the previous 7 days, but has complied with all the FMCSRs while operating in the U.S. Has the driver violated the 10-hour driving requirement in the U.S.?

Guidance: No. Canadian drivers are required to comply with the FMCSRs only when operating in the U.S.

Question 5: May a driver domiciled in the United States comply with the Canadian hours of service regulations while driving in Canada? If so, would the driving and on-duty time accumulated in Canada be counted toward compliance with one or more of the limits imposed by part 395 when the driver re-enters the United States?

Guidance: A driver domiciled in the United States may comply with the Canadian hours of service regulations while driving in Canada. Upon re-entering the United States, however, the driver is subject to all of the requirements of part 395, including the 10- and 15-hour rules, and the 60- or 70-hour rules applicable to the previous 7 or 8 consecutive days.

In other words, a driver who takes full advantage of Canadian law may have to stop driving for a time immediately after returning to the U.S. in order to restore compliance with part 395. Despite its possible effect on decisions a U.S. driver must make while in Canada, this interpretation does not involve an exercise of extraterritorial jurisdiction.

Question 6: If a motor carrier operates under the 70-hour/8-day rule, does any aspect of the 60-hour rule apply to its operations? If a motor carrier operates under the 60-hour/7-day rule, does any part of the 70-hour rule apply to its operations?

Guidance: If a motor carrier operates 7 days per week and chooses to require all of its drivers to comply with the 70-hour/8-day rule, the 60-hour/7-day rule would not be applicable to these drivers. If this carrier chooses to assign some or all of its drivers to the 60-hour/7-day rule, the 70-hour rule would not be applicable to these drivers. Conversely, if a motor carrier *does not* operate 7 days per week, it *must* operate under the 60-hour/7-day rule and the 70-hour rule would not apply to its operations.

Question 7: What is the liability of a motor carrier for hours of service violations?

Guidance: The carrier is liable for violations of the hours of service regulations if it had or should have had the means by which to detect the violations. Liability under the FMCSRs does not depend upon actual knowledge of the violations.

Question 8: Are carriers liable for the actions of their employees even though the carrier contends that it did not require or permit the violations to occur?

Guidance: Yes. Carriers are liable for the actions of their employees. Neither intent to commit, nor actual knowledge of, a violation is a necessary element of that liability. Carriers ''permit'' violations of the hours of service regulations by their employees if they fail to have in place management systems that effectively prevent such violations.

Section 395.8 Driver's Record of Duty Status

Question 1: How should a change of duty status for a short period of time be shown on the driver's record of duty status?

Guidance: Short periods of time (less than 15 minutes) may be identified by drawing a line from the appropriate on-duty (not driving) or driving line to the remarks section and entering the amount of time, such as ''6 minutes,'' and the geographic location of the duty status change.

Question 2: May a rubber stamp signature be used on a driver's record of duty status?

Guidance: No, a driver's record of duty status must bear the signature of the driver whose time is recorded thereon.

Question 3: If a driver's record of duty status is not signed, may enforcement action be taken on the current day's record if it contains false information?

Guidance: Enforcement action can be taken against the driver even though that record may not be signed. The regulations require the driver to keep the record of duty status current to the time of last change of duty status (whether or not the record has been signed). Also, § 395.8(e) states that making false reports shall make the driver and/or the carrier liable to prosecution.

Question 4: Must drivers, alternating between interstate and intrastate commerce, record their intrastate driving time on their record of duty status?

Guidance: Yes, to account for all on-duty time for the prior 7 or 8 days preceding an interstate movement.

Question 5: May a driver, being used for the first time, submit records of duty status for the preceding 7 days in lieu of a signed statement?

Guidance: The carrier may accept true and accurate copies of the driver's record of duty status for the preceding 7 days in lieu of the signed statement required by § 395.8(j)(2).

Question 6: How should multiple short stops in a town or city be recorded on a record of duty status?

Guidance: All stops made in any one city, town, village or municipality may be computed as one. In such cases the sum of all stops should be shown on a continuous line as on-duty (not driving). The aggregate driving time between such stops should be entered on the record of duty status immediately following the on-duty (not driving) entry. The name of the city, town, village, or municipality, followed by the State abbreviation where all the stops took place, must appear in the ''remarks'' section of the record of duty status.

Question 7: Is the Canadian bilingual or any other record of duty status form acceptable in the U.S.?

Guidance: Yes, provided the grid format and specific information required are included.

Question 8: May a motor carrier return a driver's completed record of duty status to the driver for correction of inaccurate or incomplete entries?

Guidance: Yes, although the regulations do not require a driver to submit ''corrected'' records of duty status. A driver may submit corrected records of duty status to the motor

carrier at any time. It is suggested the carrier mark the second submission ''CORRECTED COPY'' and staple it to the original submission for the required retention period.

Question 9: May a duplicate copy of a record of duty status be submitted if an original was seized by an enforcement official?

Guidance: A driver must prepare a second original record of duty status to replace any page taken by an enforcement official. The driver should note that the first original had been taken by an enforcement official and the circumstances under which it was taken.

Question 10: What regulation, interpretation, and/or administrative ruling requires a motor carrier to retain supporting documents and what are those documents?

Guidance: Section 395.8(k)(1) requires motor carriers to retain all supporting documents at their principal places of business for a period of 6 months from date of receipt.

Supporting documents are the records of the motor carrier which are maintained in the ordinary course of business and used by the motor carrier to verify the information recorded on the driver's record of duty status. Examples are: Bills of lading, carrier pros, freight bills, dispatch records, driver call-in records, gate record receipts, weight/scale tickets, fuel receipts, fuel billing statements, toll receipts, international registration plan receipts, international fuel tax agreement receipts, trip permits, port of entry receipts, cash advance receipts, delivery receipts, lumper receipts, interchange and inspection reports, lessor settlement sheets, over/short and damage reports, agricultural inspection reports, CVSA reports, accident reports, telephone billing statements, credit card receipts, driver fax reports, on-board computer reports, border crossing reports, custom declarations, traffic citations, overweight/oversize reports and citations, and/or other documents directly related to the motor carrier's operation, which are retained by the motor carrier in connection with the operation of its transportation business. Supporting documents may include other documents which the motor carrier maintains and can be used to verify information on the driver's records of duty status. If these records are maintained at locations other than the principal place of business but are not used by the motor carrier for verification purposes, they must be forwarded to the principal place of business upon a request by an authorized representative of the FHWA or State official within 2 business days.

Question 11: Is a driver who works for a motor carrier on an occasional basis and who is regularly employed by a non-motor carrier entity required to submit either records of duty status or a signed statement regarding the hours of service for all on-duty time as ''on-duty time'' as defined by § 395.2?

Guidance: Yes.

Question 12: May a driver use ''white-out'' liquid paper to correct a record of duty status entry?

Guidance: Any method of correction would be acceptable so long as it does not negate the obligation of the driver to certify by his or her signature that all entries were made by the driver and are true and correct.

Question 13: Are drivers required to draw continuous lines between the off-duty, sleeper berth, driving, and on-duty (not driving) lines on a record of duty status when changing their duty status?

Guidance: No. Under § 395.8(h) the FMCSRs require that continuous lines be drawn between the appropriate time markers within each duty status line, but they do not require that continuous lines be drawn between the appropriate duty status lines when drivers change their duty status.

Question 14: What documents satisfy the requirement to show a shipping document number on a record of duty status as found in § 395.8(d)(11)?

Guidance: The following are some of the documents acceptable to satisfy the requirement: shipping manifests, invoices/freight bills, trip reports, charter orders, special order numbers, bus bills or any other document that identifies a particular movement of passengers or cargo.

In the event of multiple shipments, a single document will satisfy the requirement. If a driver is dispatched on a trip, which is subsequently completed, and then is dispatched on another trip on that calendar day, two shipping document numbers or two shippers and commodities must be shown in the remarks section of the record of duty status.

Question 15: If a driver from a foreign country only operates in the U.S. one day a week, is he required to keep a record of duty status for every day?

Guidance: A foreign driver, when in the U.S., must produce a current record of duty status, and sufficient documentation to account for his duty time for the previous 6 days.

Question 16: Are drivers required to include their total on-duty time for the previous 7 to 8 days (as applicable) on the driver's record of duty status?

Guidance: No.

Question 17: Can military time be used on the grid portion of the driver's record of duty status?

Guidance: Yes. The references to 9 a.m., 3 p.m., etc. in § 395.8(d)(6) are examples only. Military time is also acceptable.

Question 18: Section 395.8(d)(4) requires that the name of the motor carrier be shown on the driver's record of duty status. If a company owns more than one motor carrier subject to the FMCSRs, may the company use logs listing the names of all such motor carrier employers and require the driver to identify the carrier for which he or she drives?

Guidance: Yes, provided three conditions are met. First, the driver must identify his or her motor carrier employer by a method that would be visible on a photocopy of the log. A dark check mark by the carrier's name would be acceptable. However, a colored highlight of the name would not be acceptable, since these colors are often transparent to photocopiers.

Second, the driver may check off the name of the motor carrier employer only if he or she works for a single carrier during the 24 hour period covered by the log.

Third, if the parent company uses Multiday Logs (Form 139 or 139A), the log for each day must list all motor carrier employers and the driver must identify his or her carrier each day.

Question 19: Regulatory guidance issued by the Office of Motor Carriers states that a driver's record-of-duty-status (RODS) may be used as the 100 air-mile radius time record ''. . . provided the form contains the mandatory information.'' Is this ''mandatory information'' that required of a normal RODS under § 395.8(d) or that of the 100 air-mile radius exemption under § 395.1(e)(5)?

Guidance: The ''mandatory information'' referred to is the time records specified by § 395.1(e)(5) which must show: (1) The time the driver reports for duty each day; (2) the total number of hours the driver is on duty each day; (3) the time the driver is released from duty each day; and (4) the total time for the preceding 7 days in accordance with § 395.8(j)(2) for drivers used for the first time or intermittently.

Using the RODS to comply with § 395.1(e)(5) is not prohibited as long as the RODS contains driver identification, the date, the time the driver began work, the time the driver ended work, and the total hours on duty.

Question 20: When a driver fails to meet the provisions of the 100 air-mile radius exemption (§ 395.1(e)), is the driver required to have copies of his/her

records of duty status for the previous seven days? Must the driver prepare daily records of duty status for the next seven days?

Guidance: The driver must only have in his/her possession a record of duty status for the day he/she does not qualify for the exemption. The record of duty status must cover the entire day, even if the driver has to record retroactively changes in status that occurred between the time that the driver reported for duty and the time in which he/she no longer qualified for the 100 air-mile radius exemption. This is the only way to ensure that a driver does not claim the right to drive 10 hours after leaving his/her exempt status, in addition to the hours already driven under the 100 air-mile exemption.

Question 21: What is the carrier's liability when its drivers falsify records of duty status?

Guidance: A carrier is liable both for the actions of its drivers in submitting false documents and for its own actions in accepting false documents. Motor carriers have a duty to require drivers to observe the FMCSRs.

Question 22: If a driver logs his/her duty status as ''driving'' but makes multiple short stops (each less than 15 minutes) for on-duty or off-duty activities, marks a vertical line on the grid for each stop, and records the elapsed time for each in the remarks section of the grid, would the aggregate time spent on those non-driving activities be counted against the 10-hour driving limit?

Guidance: No. On-duty not driving time or off-duty time is not counted against the 10-hour driving limit.

Question 23: When the driver's duty status changes, do §§ 395.8(c) or 395.8(h)(5) require a description of on-duty not driving activities (''fueling,'' ''pre-trip,'' ''loading,'' ''unloading,'', etc.) in the remarks section in addition to the name of the nearest city, town or village followed by the State abbreviation?

Guidance: No. Many motor carriers require drivers to identify work performed during a change of duty status. Part 395 neither requires nor prohibits this practice.

Question 24: When must a driver complete the signature/certification of the driver's record of duty status?

Guidance: In general, the driver must sign the record of duty status immediately after all required entries have been made for the 24-hour period. However, if the driver is driving at the end of the 24-hour period, he/she must sign during the next stop. A driver may also sign the record of duty status upon going off duty if he/she expects to remain off duty until the end of the 24-hour period.

Question 25: Is a driver (United States or foreign) required to maintain a record of duty status (log book) in a foreign country before entering the U.S.?

Guidance: No. The FHWA does not require drivers to prepare records of duty status while operating outside the jurisdiction of the United States. *However,* it may be advantageous for any driver (U.S. or foreign) to prepare records of duty status for short-term foreign trips. Upon entering the U.S., each driver must either: (a) Have in his/her possession a record of duty status current on the day of the examination showing the total hours worked for the prior seven consecutive days, including time spent outside the U.S.; or, (b) Demonstrate that he/she is operating as a ''100 air-mile (161 air-kilometer) radius driver'' under § 395.1(e).

Question 26: If a driver is permitted to use a CMV for personal reasons, how must the driving time be recorded?

Guidance: When a driver is relieved from work and all responsibility for performing work, time spent traveling from a driver's home to his/her terminal (normal work reporting location), or from a driver's terminal to his/her home, may be considered off-duty time. Similarly, time spent traveling short distances from a driver's en route lodgings (such as en route terminals or motels) to restaurants in the vicinity of such lodgings may be considered off-duty time. The type of conveyance used from the terminal to the driver's home, from the driver's home to the terminal, or to restaurants in the vicinity of en route lodgings would not alter the situation unless the vehicle is laden. A driver may not operate a laden CMV as a personal conveyance. The driver who uses a motor carrier's CMV for transportation home, and is subsequently called by the employing carrier and is then dispatched from home, would be on-duty from the time the driver leaves home.

A driver placed out of service for exceeding the requirements of the hours of service regulations may not drive a CMV to any location to obtain rest.

Section 395.13 Drivers Declared Out of Service

Question 1: May a driver operate any motor vehicle, at the direction of the motor carrier, after being placed out of service for an hours of service violation?

Guidance: An out of service order issued under § 395.13 extends only to the operation of CMVs. State procedures may differ.

Question 2: May a driver operating a CMV under a lease arrangement with a motor carrier, after being placed out of service for an hours of service violation, cancel the lease and continue to operate the vehicle as a private personal conveyance?

Guidance: No. Cancellation of a lease does not relieve the driver of the responsibility of complying with the out of service order which prohibits the driver from operating a CMV.

Section 395.15 Automatic On-Board Recording Devices

Question 1: Must a motor carrier maintain a second (back-up copy) of the electronic hours-of-service files, by month, in a different physical location than where the original data is stored if the motor carrier retains the original hours-of-service printout signed by the driver and provides the driver with a copy?

Guidance: No. By creating and maintaining the signed original record-of-duty status printed from the electronic hours-of-service file, the motor carrier has converted the electronic document into a paper document subject to § 395.8(k). That section requires the motor carrier to retain at its principal place of business the records of duty status and supporting documents for a period of 6 months from date of receipt. If the motor carrier did not generate a paper copy of the electronic document and retain a signed original, it would be required to maintain the electronic file and a second (back-up) copy.

Question 2: May a driver who uses an automatic on-board recording device amend his/her record of duty status during a trip?

Guidance: No. Section 395.15(i)(3) requires automatic on-board recording devices, to the maximum extent possible, be tamperproof and preclude the alteration of information collected concerning a driver's hours of service. If drivers, who use automatic on-board recording devices, were allowed to amend their record of duty status while in transit, legitimate amendments could not be distinguished from falsifications. Records of duty status maintained and generated by an automatic on-board recording device may only be amended by a supervisory motor carrier official to accurately reflect the driver's activity. Such supervisory motor carrier official must include an explanation of the mistake in the remarks section of either the original or amended record of duty status. Both the original and amended record of duty status must be retained by the motor carrier.

PART 396—INSPECTION, REPAIR, AND MAINTENANCE

Sections Interpreted

396.3 Inspection, Repair, and Maintenance
396.9 Inspection of Motor Vehicles in Operation
396.11 Driver Vehicle Inspection Report(s)
396.13 Driver Inspection
396.17 Periodic Inspection
396.19 Inspector Qualifications
396.21 Periodic Inspection Recordkeeping Requirements
396.23 Equivalent to a Periodic Inspection
396.25 Qualifications of Brake Inspectors

Section 396.3 Inspection, Repair, and Maintenance

Question 1: What is meant by ''systematic inspection, repair, and maintenance''?

Guidance: Generally, systematic means a regular or scheduled program to keep vehicles in a safe operating condition. Section 396.3 does not specify inspection, maintenance, or repair intervals because such intervals are fleet specific and, in some instances, vehicle specific. The inspection, repair, and maintenance intervals are to be determined by the motor carrier. The requirements of §§ 396.11, 396.13, and 396.17 are in addition to the systematic inspection, repair, and maintenance required by § 396.3.

Question 2: Section 396.3(b)(4) refers to a record of tests. What tests are required of push-out windows and emergency door lamps on buses?

Guidance: Generally, inspection of a push-out window would require pushing out the window. However, if the window may be destroyed by pushing out to test its proper functioning, a visual inspection may qualify as a test if the inspector can ascertain the proper functioning of the window without opening it. Checking to ensure that the rubber push-out molding is properly in place and has not deteriorated and that any handles or marking instructions have not been tampered with would meet the test requirement. Inspection of emergency door marking lights would require opening the door to test the lights.

Question 3: Who has the responsibility of inspecting and maintaining leased vehicles and their maintenance records?

Guidance: The motor carrier must either inspect, repair, maintain, and keep suitable records for all vehicles subject to its control for 30 consecutive days or more, or cause another party to perform such activities. The motor carrier is solely responsible for ensuring that the vehicles under its control are in safe operating condition and that defects have been corrected.

Question 4: Is computerized recordkeeping of CMV inspection and maintenance information permissible under § 396.3 of the FMCSRs?

Guidance: Yes, if the minimum inspection, repair, and maintenance records required are included in the computer information system and can be reproduced on demand.

Question 5: Where must vehicle inspection and maintenance records be retained if a vehicle is not housed or maintained at a single location?

Guidance: The motor carrier may retain the records at a location of its choice. If the vehicle maintenance records are retained at a location apart from the vehicle, the motor carrier is not relieved of its responsibility for ensuring that the records are current and factual. In all cases, however, upon request of the FHWA the maintenance records must be made available within a reasonable period of time (2 working days).

Section 396.9 Inspection of Motor Vehicles in Operation

Question 1: Under what conditions may a vehicle that has been placed ''out of service'' under § 396.3 be moved?

Guidance: The vehicle may be moved by being placed entirely upon another vehicle, towed by a vehicle equipped with a crane or hoist, or driven if the ''out of service'' condition no longer exists.

Question 2: Is it the intent of § 396.9 to allow ''out of service'' vehicles to be towed?

Guidance: Yes; however, not all out of service vehicles may be towed away from the inspection location. The regulation sets up a flexible situation that will permit the inspecting officer to use his/her best judgment on a case-by-case basis.

Section 396.11 Driver Vehicle Inspection Report(s)

Question 1: Does § 396.11 require the DVIR to be turned in each day by a driver dispatched on a trip of more than one day's duration?

Guidance: A driver must prepare a DVIR at the completion of each day's work and shall submit those reports to the motor carrier upon his/her return to the home terminal. This does not relieve the motor carrier from the responsibility of effecting repairs and certification of any items listed on the DVIR, prepared at the end of each day's work, that would be likely to affect the safety of the operation of the motor vehicle.

Question 2: Does § 396.11 require that the power unit and the trailer be inspected?

Guidance: Yes. A driver must be satisfied that both the power unit and the trailer are in safe operating condition before operating the combination.

Question 3: May more than one power unit be included on the DVIR if two or more power units were used by a driver during one day's work?

Guidance: No. A separate DVIR must be prepared for each power unit operated during the day's work.

Question 4: Does § 396.11 require a motor carrier to use a specific type of DVIR?

Guidance: A motor carrier may use any type of DVIR as long as the report contains the information and signatures required.

Question 5: Does § 396.11 require a separate DVIR for each vehicle and a combination of vehicles or is one report adequate to cover the entire combination?

Guidance: One vehicle inspection report may be used for any combination, provided the defects or deficiencies, if any, are identified for each vehicle and the driver signs the report.

Question 6: Does § 396.11(c) require a motor carrier to effect repairs of all items listed on a DVIR prepared by a driver before the vehicle is subsequently driven?

Guidance: The motor carrier must effect repairs of defective or missing parts and accessories listed in Appendix G to the FMCSRs before allowing the vehicle to be driven.

Question 7: What constitutes a ''certification'' as required by § 396.11(c)(1) and (2)?

Guidance: A motor carrier or its agent must state, in writing, that certain defects or deficiencies have been corrected or that correction was unnecessary. The declaration must be immediately followed by the signature of the person making it.

Question 8: Who must certify under § 396.11(c) that repairs have been made when a motor vehicle is repaired en route by the driver or a commercial repair facility?

Guidance: Either the driver or the commercial repair facility.

Question 9: Must certification for trailer repairs be made?

Guidance: Yes. Certification must be made that all reported defects or deficiencies have been corrected or that correction was unnecessary. The certification need only appear on the carrier's copy of the report if the trailer is separated from the tractor.

Question 10: What responsibility does a vehicle leasing company, engaged in the daily rental of CMVs, have regarding

the placement of the DVIR in the power unit?

Guidance: A leasing company has no responsibility to comply with § 396.11 unless it is the carrier. It is the responsibility of a motor carrier to comply with part 396 regardless of whether the vehicles are owned or leased.

Question 11: Which carrier is to be provided the original of the DVIR in a trip lease arrangement?

Guidance: The motor carrier controlling the vehicle during the term of the lease (i.e. the lessee) must be given the original of the DVIR. The controlling motor carrier is also responsible for obtaining and retaining records relating to repairs.

Question 12: Must the motor carrier's certification be shown on all copies of the DVIR?

Guidance: Yes.

Question 13: Must a DVIR carried on a power unit during operation cover both the power unit and trailer being operated at the time?

Guidance: No. The DVIR must cover the power unit being operated at the time. The trailer identified on the report may represent one pulled on the preceding trip.

Question 14: In instances where the DVIR has not been prepared or cannot be located, is it permissible under § 396.11 for a driver to prepare a DVIR based on a pre-trip inspection and a short drive of a motor vehicle?

Guidance: Yes. Section 396.11 of the FMCSRs places the responsibility on the motor carrier to require its drivers to prepare and submit the DVIR. If, in unusual circumstances, the DVIR has not been prepared or cannot be located the motor carrier may cause a road test and inspection to be performed for safety of operation and the DVIR to be prepared.

Question 15: Is it permissible to use the back of a record of duty status (daily log) as a DVIR?

Guidance: Yes, but the retention requirements of § 396.11 and § 395.8 must be met.

Question 16: Does § 396.11 require that specific parts and accessories that are inspected be identified on the DVIR?

Guidance: No.

Question 17: Is the Ontario pretrip/posttrip inspection report acceptable as a DVIR under § 396.11?

Guidance: Yes, provided the report from the preceding trip is carried on board the motor vehicle while in operation and all entries required by §§ 396.11 and 396.13 are contained on the reports.

Question 18: Where must DVIRs be maintained?

Guidance: Since § 396.11 is not specific, the DVIRs may be kept at either the motor carrier's principal place of business or the location where the vehicle is housed or maintained.

Question 19: Who is responsible for retaining DVIRs for leased vehicles including those of owner-operators?

Guidance: The motor carrier is responsible for retaining the original copy of each DVIR and the certification of repairs for at least 3 months from the date the report was prepared.

Question 20: Is a multi-day DVIR acceptable under §§ 396.11 and 396.13?

Guidance: Yes, provided all information and certifications required by §§ 396.11 and 396.13 are contained on the report.

Question 21: Is a DVIR required by a motor carrier operating only one tractor trailer combination?

Guidance: No. One tractor semitrailer/full trailer combination is considered one motor vehicle. However, a carrier operating a single truck tractor and multiple semitrailers, which are not capable of being operated as one combination unit, would be required to prepare DVIRs.

Question 22: Are motor carriers required to retain the ''legible copy'' of the last vehicle inspection report (referenced in § 396.11(c)(3)) which is carried on the power unit?

Guidance: No. The record retention requirement refers only to the original copy retained by the motor carrier.

Question 23: Does the record retention requirement of § 396.11(c)(2) apply to all DVIRs, or only those reports on which defects or deficiencies have been noted?

Guidance: The record retention requirement applies to all DVIRs.

Question 24: How would the DVIR requirements apply to a driver who works two or more shifts in a single calendar day?

Guidance: Section 396.11(a) requires every driver to prepare a DVIR at the completion of each day's work on each vehicle operated. A driver who operates two or more vehicles in a 24-hour-period must prepare a DVIR at the completion of the tour of duty in each vehicle.

Question 25: Section 396.11 requires the driver, at the completion of each day's work, to prepare a written report on each vehicle operated that day. Does this section require a ''post trip inspection'' of the kind described in § 396.15?

Guidance: No. However, the written report must include all defects in the parts and accessories listed in § 396.11(a) that were discovered by or reported to the driver during that day.

Question 26: Is the motor carrier official or agent who certifies that defects or deficiencies have been corrected or that correction was unnecessary required to be a mechanic or have training concerning commercial motor vehicle maintenance?

Guidance: No. Section 396.11 does not establish minimum qualifications for motor carrier officials or agents who certify that defects or deficiencies on DVIRs are corrected. With the exception of individuals performing the periodic or annual inspection (§ 396.19), and motor carrier employees responsible for ensuring that brake-related inspection, repair, or maintenance tasks are performed correctly (§ 396.25), Part 396 of the FMCSRs does not establish minimum qualifications for maintenance personnel. Motor carriers, therefore, are not prohibited from having DVIRs certified by company officials or agents who do not have experience repairing or maintaining commercial motor vehicles.

Section 396.13 Driver Inspection

Question 1: If a DVIR does not indicate that certain defects have been repaired, and the motor carrier has not certified in writing that such repairs were considered unnecessary, may the driver refuse to operate the motor vehicle?

Guidance: The driver is prohibited from operating the motor vehicle if the motor carrier fails to make that certification. Operation of the vehicle by the driver would cause the driver and the motor carrier to be in violation of § 396.11(c) and both would be subject to appropriate penalties. However, a driver may sign the certification of repairs as an agent of the motor carrier if he/she is satisfied that the repairs have been performed.

Question 2: At the end of the day's work and upon completion of the required DVIR, what does the driver do with the copy of the previous DVIR carried on the power unit?

Guidance: There is no requirement that the driver submit the copy of that previous DVIR to the motor carrier nor is there a retention requirement for the motor carrier.

Section 396.17 Periodic Inspection

Question 1: Some of a motor carrier's vehicles are registered in a State with a mandated inspection program which has been determined to be as effective as the Federal periodic inspection program, but these vehicles are not used in that State. Is the motor carrier required to make sure the vehicles are inspected under that State's program in

order to meet the Federal periodic inspection requirements?

Guidance: If the State requires all vehicles registered in the State to be inspected through its mandatory program then the motor carrier must go through the State program to satisfy the Federal requirements. If, however, the State inspection program includes an exception or exemption for vehicles which are registered in the State but domiciled outside of the State, then the motor carrier may meet the Federal requirements through a self-inspection, a third party inspection, a CVSA inspection, or a periodic inspection performed in any State with a program that the FHWA determines is comparable to, or as effective as, the part 396 requirements.

Question 2: May the due date for the next inspection satisfy the requirements for the inspection date on the sticker or decal?

Guidance: No. The rule requires that the date of the inspection be included on the report and sticker or decal. This date may consist of a month and a year.

Question 3: Must each vehicle in a combination carry separate periodic inspection documentation?

Guidance: Yes, unless a single document clearly identifies all of the vehicles in the CMV combination.

Question 4: Does the sticker have to be located in a specific location on the vehicle?

Guidance: No. The rule does not specify where the sticker, decal or other form of documentation must be located. It is the responsibility of the driver to produce the documentation when requested. Therefore, the driver must know the location of the sticker and ensure that all information on it is legible and current. The driver must also be able to produce the inspection report if that form of documentation is used.

Question 5: Is new equipment required to pass a periodic inspection under § 396.17?

Guidance: Yes, but a dealer who meets the inspection requirements may provide the documentation for the initial periodic inspection.

Question 6: Are the Federal periodic inspection requirements applicable to U.S. Government trailers operated by motor carriers engaged in interstate commerce?

Guidance: Yes. The transportation is not performed by a governmental entity but by a for-hire carrier in interstate commerce.

Question 7: Does a CMV equipped with tires marked ''Not for Highway Use'' meet the periodic inspection requirements?

Guidance: No. Appendix G to subchapter B—Minimum Periodic Inspection Standards, lists tires so labeled as a defect or deficiency which would prevent a vehicle from passing an inspection.

Question 8: Is a CMV subject to a roadside inspection by State or Federal inspectors if it displays a periodic inspection decal or other evidence of a periodic inspection being conducted in the past 12 months?

Guidance: Yes. Evidence of a valid periodic inspection only precludes a citation for a violation of § 396.17.

Question 9: Is a State required to accept the periodic inspection program of another State having a periodic inspection program meeting minimum FHWA standards as contained in appendix G to the FMCSRs?

Guidance: Yes. Section 210 of the MCSA (49 U.S.C. 31142) establishes the principle that State inspections meeting federally approved criteria must be recognized by every other State.

Question 10: Do vehicles inspected under a periodic Canadian inspection program comply with the FHWA periodic inspection standards?

Guidance: Yes. The FHWA has determined that the inspection programs of all of the Canadian Provinces meet or exceed the Federal requirements for a periodic inspection program.

Question 11: Must a specific form be used to record the periodic inspection mandated by § 396.17?

Guidance: No. Section 396.21 does not designate any particular form, decal, or sticker, but does specify the information which must be shown on these documents.

Question 12: May an inspector certify a CMV as meeting the periodic inspection standards of § 396.17 if he/she cannot see all components required to be inspected under appendix G?

Guidance: No. The affixing of a decal or sticker or preparation of a report as proof of inspection indicates compliance with all requirements of appendix G to part 396.

Question 13: If an intermodal container is attached to a chassis at the time of a periodic inspection, must the container also be inspected to comply with § 396.17 inspection requirements?

Guidance: Yes. Safe loading is one of the inspection areas covered under appendix G. If the chassis is loaded at the time of inspection, the method of securement of the container to the chassis must be included in the inspection. Although integral securement devices such as twist locks are not listed in appendix G, the operation of these devices must be included in the inspection without removal of the container.

Question 14: Is it acceptable for the proof of periodic inspection to be written in Spanish?

Guidance: Yes. There is no requirement under § 396.17, or appendix G to subchapter B that the proof of periodic inspection be written in English.

Section 396.19 Inspector Qualifications

Question 1: May an entity other than a motor carrier maintain the evidence of inspector qualifications required by § 396.19(b)?

Guidance: Yes. In those cases in which the inspection is performed by a commercial garage or similar facility or a leasing company, the motor carrier may allow the commercial garage or leasing company to maintain a copy of the inspector's qualifications on behalf of the motor carrier. The motor carrier, however, is responsible for obtaining copies of evidence of the inspector's qualifications upon the request of Federal, State, or local officials. If, for whatever reason, the motor carrier is unable to obtain this information from the third party, the motor carrier may be cited for noncompliance with § 396.19.

Question 2: Is there a specific form or format to be used in ensuring that inspectors are qualified in accordance with § 396.19?

Guidance: No. Section 396.19(b) requires the motor carrier to retain evidence satisfying the standards without specifying any particular form.

Section 396.21 Periodic Inspection Recordkeeping Requirements

Question 1: What recordkeeping requirements under § 396.21 is a carrier subject to when it utilizes an FHWA-approved State inspection program?

Guidance: The motor carrier must comply with the recordkeeping requirements of the State. The requirements specified in § 396.21 (a) and (b) are applicable only in those instances where the motor carrier self-inspects its CMVs or has an agent perform the periodic inspection.

Section 396.23 Equivalent to a Periodic Inspection

Question 1: Is a CVSA Level I or Level V inspection a ''State * * * roadside inspection program'' through which a motor carrier may meet the periodic inspection requirements of § 396.17? If so, what evidence of inspection is required?

Guidance: A CVSA Level I or Level V inspection is equivalent to the Federal periodic inspection requirements. A

CMV that passes such an inspection has therefore met § 396.17, *unless* the vehicle is subject to a mandatory State inspection program that the FHWA has determined is comparable to, or as effective as, the Federal requirements [see § 396.23(b)(1)]. A CVSA decal displayed on the CMV, or a copy of the Level I or Level V inspection report maintained in the vehicle, constitutes sufficient evidence of inspection.

Section 396.25 Qualifications of Brake Inspectors

Question 1: Does a CDL with an airbrake endorsement qualify a person as a brake inspector under § 396.25?

Guidance: No.

Question 2: May a driver who does not have the necessary experience perform the adjustment under directions issued by telephone by a qualified inspector?

Guidance: Yes. A driver is permitted to perform brake adjustments at a roadside inspection providing they are done under the supervision of a qualified brake adjuster and the carrier is willing to assume responsibility for the proper adjustment.

Question 3: May a driver or other motor carrier employee be qualified as a brake inspector under § 396.25 by way of experience or training to perform brake adjustments without being qualified to perform other brake-related tasks such as the repair or replacement of brake components?

Guidance: Yes. A driver may be qualified by the motor carrier to perform a limited number of tasks in connection with the brake system, e.g., inspect and/or adjust the vehicle's brakes, but not repair them.

Question 4: Would a mechanic who is employed by a leasing company and only works on CMVs that the leasing company leases to other motor carriers be required to meet the brake inspector certification requirements?

Guidance: No. The mechanic is not required to meet the certification requirements of § 396.25(d) since he/she is not employed by a motor carrier.

PART 397—TRANSPORTATION OF HAZARDOUS MATERIALS; DRIVING AND PARKING RULES

Sections Interpreted

397.1 Application of the Rules in This Part
397.5 Attendance and Surveillance of Motor Vehicles
397.7 Parking
397.9 Routes
397.13 Smoking

Section 397.1 Application of the Rules in This Part

Question 1: Who is subject to part 397?

Guidance: Part 397 applies to motor carriers that transport HM in interstate commerce in types and quantities requiring marking or placarding under 49 CFR 177.823. The routing requirements of part 397 establish guidelines State and Indian tribal routing agencies must employ in designating and/or restricting routes for the transportation of HM. Interstate motor carriers transporting HM, in interstate or intrastate commerce, must comply with the designations and restrictions established by the routing agencies.

Question 2: Is the interstate transportation of anhydrous ammonia, in nurse tanks, subject to part 397?

Guidance: The requirements of part 397 do not apply to the direct application of ammonia to fields from nurse tanks. However, part 397 does apply to the transportation of nurse tanks on public highways, when performed by interstate motor carriers.

Section 397.5 Attendance and Surveillance of Motor Vehicles

Question 1: What defines a ''public highway'' or ''shoulder'' of a public highway for the purpose of determining violations under § 397.5(c)?

Guidance: The applicable engineering/highway design plans.

Question 2: Must a driver of a motor vehicle transporting HM, other than Division 1.1, 1.2, or 1.3 (Class A or B) explosives, always maintain an unobstructed view and be within 100 feet of that vehicle?

Guidance: No. If the vehicle is not located on a public street or highway or on the shoulder of a public highway, then the vehicle need not be within 100 feet of the driver's unobstructed view, unless it contains Division 1.1, 1.2, or 1.3 (Class A or B) materials.

Question 3: May a motor carrier consider fuel stop operators as ''qualified representative(s)'' for purposes of the attendance and surveillance requirements of § 397.5?

Guidance: Yes. However, the fuel stop operator must be able to perform the required functions.

Question 4: Who determines what is a ''safe haven''?

Guidance: The selection of safe havens is a decision of the ''competent government authorities'' having jurisdiction over the area. The definition found in § 397.5(d)(3) is purposely void of any specific guidelines or criteria. A truck stop may be considered a safe haven if it is so designated by local or State governmental authorities.

Question 5: Section 397.5(d)(3) describes a safe haven as ''* * * an area specifically approved in writing by local, State, or Federal governmental authorities for the parking of unattended vehicles containing Division 1.1, 1.2, or 1.3 materials.'' Do guidelines exist for establishing approval criteria for safe havens? Is there a national list of approved safe havens available to the public?

Guidance: The FHWA believes the safe haven concept is becoming increasingly obsolete due to readily available alternatives for providing ''attendance at all times'' for vehicles laden with explosives. The FHWA is aware of two documents that may be used as resources for establishing approval criteria for safe havens. The first document, *Construction and Maintenance Procedure Recommendations for Proposed Federal Guidelines of Safe Havens for Vehicles Carrying Class A or Class B Explosives* (1985), contains design, construction, and maintenance guidelines. The second document, *Recommended National Criteria for the Establishment and Operation of Safe Havens* (1990), contains recommended national uniform criteria for approval of safe havens and an inventory of all State-approved safe havens in existence at the time of the report. These two documents may be used both as resources for establishing guidelines for safe haven design and construction, and as source documents for finding other materials that may be used toward the same purpose. These two documents are available to the public through the U.S. Department of Commerce, National Technical Information Service (NTIS), Springfield, Virginia 22161 (phone: (703) 487–4650). The NTIS publications database is also accessible on the internet's world wide web at

http://www.fedworld.gov/ntis.

Question 6: May video monitors be used to satisfy the attendance requirements in § 397.5?

Guidance: The purpose of the attendance requirement is to ensure that motor vehicles containing hazardous materials are attended at all times and that, in the event of an emergency involving the motor vehicle, the attendant is able to respond immediately. The use of video monitors could satisfy the attendance requirements in § 397.5, provided the monitors are operable and continuously manned, the attendant is within 30.48 meters (100 feet) of the parked vehicle with an unobstructed view, and the attendant is able to go to the vehicle immediately from the monitoring location.

Section 397.7 Parking

Question 1: When is a vehicle considered ''parked''?

Guidance: For the purposes of part 397, ''parked'' means the vehicle is stopped for a purpose unrelated to the driving function, (e.g., fueling, eating, loading, unloading).

Question 2: What constitutes ''knowledge and consent of the person in charge,'' as used in § 397.7(a)(2)?

Guidance: In order to satisfy the requirement for ''knowledge and consent,'' actual notice of ''the nature of the hazardous materials the vehicle contains'' must be given to the person in charge, and that person must affirmatively agree to allow the vehicle to be parked on the property under his/her control.

Question 3: Is the motor carrier or driver relieved from the requirements of § 397.7(a)(3) if the person in charge of the private property is notified of the explosive HM contained in the vehicle?

Guidance: No. A vehicle transporting Division 1.1, 1.2, or 1.3 (Class A or B) explosives must meet the 300-foot separation requirement, regardless of any notification made to any person.

Question 4: What is meant by the term ''brief periods when necessities of operation require * * *'' in § 397.7(a)(3)?

Guidance: Brief periods of time depend upon the ''necessities of operation'' in question. Parking a vehicle containing Division 1.1, 1.2, or 1.3 (Class A or B) materials closer than 300 feet to buildings, dwellings, etc. for periods up to 1 hour for a driver to eat would not be permitted under the provisions of § 397.7(a)(3). Parking at fueling facilities to obtain fuel, oil, etc., or at a carrier's terminal would be considered necessities of operation.

Question 5: May a safe haven be designated within 300 feet of an area where buildings and other structures are likely to be occupied by large numbers of people?

Guidance: The selection and designation of safe havens are a decision of the ''competent government authorities'' having jurisdiction over the area.

Question 6: If a motor vehicle is transporting Division 1.1, 1.2, or 1.3 (Class A or B) explosives and is parked in a safe haven, must it be in compliance with the parking requirements of § 397.7?

Guidance: Yes. Safe havens, as outlined in § 397.5, relate to attendance and surveillance requirements. The parking restrictions of § 397.7 still apply.

Question 7: May a driver transporting Division 1.1, 1.2, or 1.3 (Class A or B) materials park within 100 feet of an eating establishment in order to meet the attendance and surveillance requirements?

Guidance: No, because it will result in a violation of § 397.7(a)(3).

Section 397.9 Routes

Question 1: May a motor vehicle which contains HM use expressways or major thoroughfares to make deliveries within a populated area?

Guidance: Yes, unless otherwise specifically prohibited by State or local authorities. In many instances a more circuitous route may present greater hazards due to increased exposure. However, in those situations where a vehicle is passing through a populated or congested area, use of a beltway or other bypass would be considered the appropriate route, regardless of the additional economic burden.

Section 397.13 Smoking

Question 1: May a driver of a CMV transporting HM, listed in § 397.13, smoke while at the controls or in the sleeper berth of the vehicle?

Guidance: No. All persons are prohibited from smoking or carrying lighted smoking materials at any time while on or within 25 feet of such a vehicle. The word ''on'' includes any time while in the cab, sleeper berth, etc.

PART 399—EMPLOYEE SAFETY AND HEALTH STANDARDS

Sections Interpreted

399.207 Truck and Truck-Tractor Access Requirements

Section 399.207 Truck and Truck-Tractor Access Requirements

Question 1: If a high-profile COE truck or truck-tractor is equipped with a seat on the passenger's side, must steps and handholds be provided for any person entering or exiting on that side of the vehicle?

Guidance: Yes, all high-profile COE trucks and truck tractors shall be equipped on each side of the vehicle where a seat is located, with a sufficient number of steps and handholds to comply with the requirements of § 399.207(a).

Question 2: What does the foot accommodation rule mean when it states: ''The step need not retain the disc at rest''?

Guidance: The note under § 399.207(b)(4) states that the disc referred to is a measuring device. The step or rung does not have to be configured in such a manner as to keep the measuring disc from falling off the step or rung.

Question 3: In § 399.207(b)(4), Illustration III, what does the unshaded area within the disc suggest?

Guidance: The unshaded area illustrates the height of the open area required for a driver to insert his or her foot.

Question 4: May the step be a rung? If so, what minimum diameter must the rung be?

Guidance: Yes, the step may be a rung. There is no minimum requirement for the diameter of a step rung. However, it must meet the performance requirements in § 399.207(b)(5).

(5 U.S.C. 553(b); 49 CFR 1.48)

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