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wages or other remuneration but not including reimbursement for actual expenses incurred;

(4) "discharge" means spilling, leaking, pumping, pouring, emitting, emptying, or dumping;

(5) "gross combination weight rating" means the value specified by the manufacturer as the loaded weight of a combination vehicle, except that, if a value has not been specified by the manufacturer, the gross combination weight rating is determined by adding the gross vehicle weight rating of the power unit and the total weight of the towed unit and the load on the towed unit;

(6) "gross vehicle weight rating" means the value specified by the manufacturer as the loaded weight of a single vehicle;

(7) "hazardous substance" has the meaning given in AS 43.03.[illegible] means a substance found by the United States secretary of transportation to be hazardous for purposes of 49 U.S.C. 1801 - 1813 (Hazardous Materials Transportation Act);

(8) "operate an aircraft" means to use, navigate, pilot, or taxi an aircraft in the airspace over this state or upon the land or water inside this state;

(9) "operate a train" means to be employed as an engineer, a conductor, or a brakeman and to be on a train under power inside this state;

(10) "operate a vessel" means to be employed as a pilot, master, or crewmember, and to be on a vessel in any water, fresh or salt, inland or coastal, inside the territorial limits or under the jurisdiction of this state;

(11) "vessel" means all foreign or domestic vessels, except

(A) a cannery tender, fishing tender, or fishing vessel of not more than 500 gross tons, when actually engaged in the fishing industry; and

(B) a vessel of not more than 5,000 gross tons used in processing and assembling fishery products, when not carrying flammable or combustible liquid cargo in bulk.

HOUSE COMMITTEE REPORT

(7)
Date Referred: February 22, 1990 FURTHER REFERRALS:

Date of Committee Action: _____

The JUDICIARY Committee considered: HB 317

HOUSE BILL NO. 317 DWI/COMMERCIAL SHIP/PLANE/VEHICLE/TRAIN
"An Act relating to operating a commercial motor vehicle carrying a cargo of hazardous substances, a vessel or an aircraft for compensation, or a train, while under the influence of an intoxicating substance; and relating to the duties of the operator immediately after an accident or unlawful discharge of oil or another hazardous substance."

RECOMMENDATIONS:
[ ] be replaced with _____ [ ] the same title [ ] a new title

[ ] have attached amendment(s)

[ ] do pass

[ ] do not pass

[ ] no recommendation

[ ] individual recommendations

[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(s): (Dept)

[ ] fiscal impact_____
[ ] zero fiscal note_____
[ ] zero with analysis_____

APPROVES PREVIOUS: (Date/Dept)

[ ] fiscal note(s) _____
[ ] zero fiscal note(s)_____
[ ] zero fn/analysis _____

SIGNING DO PASS:

_____

SIGNING: (Check approp. column)

	Do Not Pass	No Rec	Amend

_____
Chairman's Signature

HOUSE COMMITTEE REPORT

(5)
Date Referred: April 26, 1989 FURTHER REFERRALS: JUDICIARY

Date of Committee Action: 2/15/90

The TRANSPORTATION Committee considered: HB 317

HOUSE BILL NO. 317 [DWI/COMMERCIAL SHIP/PLANE/VEHICLE/TRAIN]
"An Act relating to operating a commercial motor vehicle carrying a cargo of hazardous substances, a vessel or an aircraft for compensation, or a train, while under the influence of an intoxicating substance; and relating to the duties of the operator immediately after an accident or unlawful discharge of oil or another hazardous substance."

RECOMMENDATIONS:
[✓] be replaced with CS HB 317 (Trsp) [✓] the same title [✓] a new title
[ ] have attached amendment(s)
[✓] do pass
[ ] do not pass
[ ] no recommendation
[ ] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: House Transportation letter of intent

ATTACHES NEW FISCAL NOTE(s): (Dept) APPROVES PREVIOUS: (Date/Dept)

[ ] fiscal impact _____ [ ] fiscal note(s) _____
[ ] zero fiscal note _____ [ ] zero fiscal note(s) _____
[X] zero with analysis Public Safety [ ] zero fn/analysis _____

SIGNING DO PASS:

Richard Foster FOSTER
Bill Hudson HUDSON
Loren D. Leman LEMAN
Eugene Kubina KUBINA

SIGNING: (Check approp. column)

	Do Not Pass	No Rec	Amend
with Letter of Concern			

Foster Richard Foster
Chairman's Signature

Alaska State Legislature

HOUSE OF REPRESENTATIVES

HOUSE TRANSPORTATION COMMITTEE

Official Business

P.O. Box V
State Capitol
Juneau, Alaska 99811

TO: All House Judiciary Committee members

FROM: House Transportation Committee members

SUBJECT: Committee substitute for HB 317 (Transportation)

DATE: February 19, 1990

Last week, the House Transportation Committee considered HB 317 - An act relating to operating a motor vehicle, vessel, aircraft or train for compensation while under the influence of an intoxicating substance.

After a long discussion, the committee adopted and passed a committee substitute for HB 317. While this CS does address the transportation related concerns, committee members believe that there are still several important areas in the bill that need to be reviewed. Members of the Transportation Committee believe the Judiciary Committee would be a more appropriate place to deal with these points.

Areas of concern:

1. The definition of commercial motor vehicle should be expanded to include taxis, buses, vans and other vehicles where the operator/owner is compensated for providing the transportation service.

2. Several duplicative and confusing definitions in Title 28 need to be clarified. The attached memo from Mr. Mike Ford, legislative legal services, outline these areas.

2. Three members on the House Transportation Committee believe that the current level of 0.1 grams of alcohol per 210 litres of a person's breath should be reduced to 0.08 percent blood alcohol content. As CS HB 317 deals specifically with commercial operators, members believe that this change should be dealt with in a separate bill.

Thank you

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU ALASKA 998
907 4[illegible]

MEMORANDUM February 15, 1990

SUBJECT: Operating certain vehicles while intoxicated - CSHB 317(Trsp)
(Work Order No. 6-1269)

TO: Representative Richard Foster

FROM: Michael F. Ford
Legislative Couns l

The attached work draft contains numerous form and style changes, and contains the following issues that still need resolution:

1. There are several duplicative definitions in AS 28.35. Possibly AS 28.35.029(c)(1) and AS 28.35.030(h)(1) should be repealed and other sections containing cross references to them amended.

2. AS 28.35.033(a) should be amended to except proposed AS 28.35.033(g) (section 6 of the work draft).

3. In sec. 28.35.055(a)(1), a person operating a vessel or aircraft is required to immediately stop at the scene of an accident and remain there. Is this practical or safe for an aircraft or vessel in all circumstances?

4. There are several driver's license revocation sections that should be amended to apply to violations contained in sections 3 and 9 of the draft.

5. The application of both section 9 and the existing law in AS 28.35.030 to watercraft and aircraft is confusing. There should be clear distinctions between the type of vehicle covered by each section of law.

MFF:pl
WKP2/[illegible]8

Enclosure

HOUSE TRANSPORTATION COMMITTEE STAFF OVERVIEW
CS HOUSE BILL 317

Currently, all persons who commit a crime of driving while intoxicated are guilty of a class A misdemeanor and subject to the penalties in AS 28.35. This includes drivers of commercial vehicles including trains, aircraft, motor vehicles or vessels.

HB 317 proposes to add a new section to the current DWI laws that would deal specifically with **operating a *commercial* vehicle while intoxicated.**

How would the new laws differ from those currently in place?

Under current law, a driver of a commercial vehicle is guilty of driving while intoxicated if the person's alcohol level is found to be

- 100 milligrams per 100 millilitres of blood
- 0.10 grams of alcohol per 210 litres of person's breath
- or if it is determined that the person is under the influence of a controlled substance

HB 317 proposes

- 40 milligrams per 100 millilitres of blood
- 0.04 grams of alcohol per 210 litres of person's breath
- While under the influence of a controlled substance
- HB 317 also defines actions an operator of a commercial vehicle must take immediately after an accident.

NOTE:

The reductions proposed in HB 317 would bring the state laws in line with the federal laws. Currently, the blood/breath alcohol legal limits under federal law for commercial operators of trains, boats, planes and vehicles are:

- 40 milligrams per 100 millilitres of blood
- 0.04 grams of alcohol per 210 litres of persons breath

Also, Alaska must comply with the Federal Commercial Drivers License Law no later than October 1, 1993. One of the requirements of this law is that each state set a maximum level of 0.04 for offences relating to operation of a commercial vehicle while intoxicated. (See attachment #3)

SECTIONAL ANALYSIS OF HB 317

AS 28.35.031 deals with IMPLIED CONSENT
Page 2 Line 14 adds a new subsection to Section 3.
This subsection specifys three areas where an operator of a commercial vehicle is considered to have given consent for chemical test.

- Damage to a person
- Damage to property
- Unlawful discharge of oil or another hazardous substance

AS 28.35.033 deals with presumption and chemical analysis of breath or blood
(Page 3 Line 6) adds a new subsection to Section 5
This subsection defines the legal limit of alcohol, or controlled substance, allowable in a persons blood or breath while operating a commercial vehicle.

Sec. 28.35.039 - This is a new section (page 4, line 16) Operating commercial vehicle while under influence of intoxicating substance
This section defines when a person operating a commercial vehicle has commited a crime of driving while intoxicated and, states the procedures/penalties for refusing to submit to a chemical test.

AS. 28.35 adds a new section Sec. 28.35.055
Action of operator of commercial vehicle immediately after accident.

This section defines steps that must be taken by an operator of a commercial vehicle after an accident involving damage to person or property, or unlawful discharge of a hazardous substance.

- stop the vehicle
- remain on the scene until a peace officer arrives
- immediately notify local police department or Dept of Public Safety.
- may not consume alcohol for 6 hours following accident unless required chemical tests have been done. If a person knowingly violates this requirement, he/she is guilty of a class A misdemeanor.

NOTE: Under HB 317, penalties for driving a commercial vehicle while intoxicated differ slightly from exisiting DWI penalties. Both make the offense a class A misdemeanor however, unlike current DWI laws there would would be no **minimum** penalties imposed under HB 317

DISCUSSION DRAFT - PROPOSED AMENDMENTS TO HB 317

Page 2, line 15:

Delete "carrying a cargo of hazardous substances"

Page 2, line 18, following "breath":

Insert

"if lawfully arrested for an offense arising out of acts alleged to have been committed while the person was operating a commercial vehicle while under the influence of an intoxicating substance as described in AS 28.35.039 or"

Page 2, line 24, following "discharged":

Delete "oil or another"

Insert "a"

Page 2, line 27, following "subsection,":

Delete "oil"

Insert "hazardous substance"

Page 2, line 28:

Delete "AS 46.04.120"

Insert "AS 46.03.826"

Page 3, line 12:

Delete "0.01"

Insert "0.04"

Page 3, line 13:

Delete "1"

Insert "40"

Page 3, line 14:

Delete "0.01"

Insert "0.04"

Page 3, line 20:

Delete "0.01"

Insert "0.04"

Page 3, line 21:

Delete "1"

Insert "40"

Page 3, line 22:

Delete "0.01"

Insert "0.04"

Page 4, line 20, following "vehicle"

Delete "carrying a cargo of hazardous substances"

Page 4, line 23:

Delete "listed in AS 11.71.140 - 11.71.190"

Insert "as defined in AS 11.71.900"

Page 4, line 25:

Delete "0.01"

Insert "0.04"

Page 4, line 26:

Delete "1"

Insert "40"

Page 4, line 27:

Delete "0.01"

Insert "0.04"

Page 4, line 28, following "breath;"

Insert "or"

Page 4, line 29 and page 5, line 1:

Delete all material

Page 5, line 3:

Delete "another substance"

Insert

"a controlled substance as defined in AS 11.71.900"

Page 5, line 25:

Delete "carrying a cargo of hazardous substances"

Page 5, line 28, following "discharges":

Delete "oil or another"

Insert "a"

Page 6, lines 25 - 28:

Delete all material

Insert:

(A) used to transport passengers or property upon a highway or vehicular way in the state;

(B) which

(i) has a gross vehicle weight rating or gross combination weight rating greater than 10,000 pounds;

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

(iii) is used in the transportation of hazardous substances;

(C) except that the following vehicles meeting the criteria in (A) -- (B) of this paragraph are not commercial vehicles:

(i) emergency or fire equipment that is necessary to the preservation of life or property;

(ii) farm vehicles that are controlled and operated by a farmer; used to transport agricultural products, farm machinery, or farm supplies to or from that farmer's farm; not used in the operations of a common or contract motor carrier; and used within 150 miles of the farmer's farm;

(iii) recreational vehicles used exclusively for non-commercial purposes.

(3) "commercial purposes" means activities for which a person receives direct monetary compensation or activities for which a person receives no direct monetary compensation but are incidental to and done in furtherance of the person's primary business;

Page 7, lines 13 - 15:

Delete all material

Insert

(7) "hazardous substance" has the meaning given in AS 43.03.826"

MEMORANDUM State of Alaska

TO: Gayle Horetski
Deputy Commissioner
Department of Public Safety

COMMISSIONER
Juneau, Alaska
NOV 20 1989

DATE: November 29, 1989

FILE NO:

TELEPHONE NO: 465-4335

FROM: Bill Brown
Chief of Driver Services
Division of Motor Vehicles

SUBJECT: Commercial Motor Vehicle Penalties Bill

My understanding from Laurie Otto, Department of Law, is that DMV was to provide her with items to be included in a commercial motor vehicles penalties bill, however, not the actual wording, as this would be handled by Law. Following are the items I feel are necessary in order for Alaska to comply with the Federal Commercial Driver License Law. These are to be in effect no later than October 1, 1993. However, I do not feel we should wait until that date, but should get this in the mill as soon as possible. I have attached a copy of the latest Rule dated September 22, 1989, regarding "requirements and penalties", that addresses disqualifications. Also the Rule dated September 29, 1988, on "requirements and penalties" that addresses the blood alcohol concentration.

1. "Disqualification" needs to be defined.

2. Establish a 60 day ineligibility period for obtaining a commercial driver's license for providing false information when applying for CDL. Recommend adding wording to AS 28.15.161(b).

3. Establish penalties for DWI; Refusal; leaving scene of accident involving CMV; and a felony involving use of a CMV, which for conviction of first offense the revocation for all driving is the same as current law, PLUS one year for operation of commercial vehicles, or three years if the offense was while operating a vehicle with HAZMAT. For second conviction, while operating a commercial vehicle, the revocation of all driving same as current law, PLUS lifetime for commercial vehicles.

   New law should contain wording to the effect that "only offenses committed in a commercial motor vehicle after the effective date of this law may be considered in applying additional penalties for operation of a commercial motor vehicle".

   May also want to include a section reflecting that the department may issued regulations establishing guidelines, including conditions, under which a disqualification for life may be reduced to a period of not less than 10 years. Would have to further reflect that should a driver reinstated after this 10 year period be subsequently convicted of another disqualifying offense that requires revocation for life, he/she shall be ineligible to again apply for reduction of the lifetime disqualification.

New law would need to specify person is disqualified for life from driving commercial motor vehicle if convicted of offense in which commercial motor vehicle was used in commission of felony involving manufacturing, distributing, or dispensing a controlled substance.

4. Establish disqualifying penalties for "Serious Violations".

   This could probably be done by regulations, however, statute may need amended to give DMV the authority.

   Need to disqualify operation of CMV (Commercial Motor Vehicle) for not less than 60 days when convicted of two "serious violations" (as defined by Feds) within 3 years, and not less than 120 days when convicted of three "serious violations" within 3 years.

   Need to be sure to work in with current revocation for driving any vehicle because in some circumstances the current revocation period is for a longer period of time than the Feds minimum requirement is. An example is Reckless Driving in which current law requires minimum of 90 days for 2nd offense, and minimum of 1 year for 3rd offense.

5. Require record be updated within 10 days of revoking a commercial driver's license, and require notification of <u>home</u> state if other than Alaska.

6. Establish section on "Prohibited Alcohol Offenses".

   a) No alcohol in system while operating CMV - require 24 hour out-of-service if any detection of alcohol.

   b) .04 or more per se. Does not need to be a criminal offense. Can be handled as civil - disqualification by administrative revocation.

7. Determine whether or not Alaska's current Implied Consent law is sufficient to meet minimum standards required of commercial vehicle drivers in Federal regulation.

8. Establish section regarding "Notification Required by Driver" as outlined in model legislation. I have not been able to get a straight answer from the Federal Government in regard to whether or not this is necessary to meet minimum standards to avoid loss of federal highway funds.

9. Establish section regarding "Employer Responsibilities" as outlined in model legislation. Comments same as #8 above.

Attachment

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

49 CFR Parts 383 and 391

[FHWA Docket No. MC-88-14]

RIN 2125-AC19

Commercial Driver's License Standards; Disqualifications

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Final rule.

SUMMARY: The FHWA is amending 49 CFR part 383 to define the serious traffic violations for which commercial motor vehicle operators may be disqualified for periods of 60 and 120 days under § 383.51. Specifically, the FHWA is defining these serious traffic violations to include a conviction for "excessive speeding," which is any speed of 15 miles per hour or more above the posted speed limit; "reckless driving"; "improper or erratic traffic lane changes"; "following the vehicle ahead too closely"; and, any other motor vehicle traffic control laws which arise in connection with a fatal traffic accident. The FHWA is also allowing States, under certain circumstances, to reduce a lifetime disqualification from driving a commercial motor vehicle (CMV) to ten years. This final rule also clarifies other issues pertaining to convictions and disqualifications of CMV drivers, and makes a conforming amendment to 49 CFR part 391 of the Federal Motor Carrier Safety Regulations.

EFFECTIVE DATE: November 2, 1989.

FOR FURTHER INFORMATION CONTACT: Mr. Jill L. Hochman, Chief, Standards Review Division, Office of Motor Carrier Standards, (202) 366-4001, or Mr. Paul Brennan, Office of the Chief Counsel (202) 366-0834, Federal Highway Administration, 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 legal holidays.

SUPPLEMENTARY INFORMATION:

Background

On October 27, 1986, the Commercial Motor Vehicle Safety Act of 1986, Title XII of Public Law 99-570 (the Act), was signed into law by the President. As a first step in implementing the requirements of the Act, a final rule and request for comments on "Commercial Driver Licensing Standards; Requirements and Penalties" was published in the Federal Register on June 1, 1987 (52 FR 20574), implementing the single license requirement, notification requirements, Federal disqualifications, and other provisions of the Act required to be effective on July 1, 1987.

The June 1, 1987 rule left several components under "serious traffic violations" undefined, and sought public comment on these areas. On January 27, 1989 the FHWA published a notice of proposed rulemaking (NPRM) (54 FR 5036) based on those comments, seeking to rectify the omissions and clarify other points of the June 1, 1987 rule. The FHWA received 60 responses to the NPRM; these are listed by category in Exhibit 1.

The final rule amends 49 CFR part 383, "Commercial Driver Licensing Standards; Requirements and Penalties," to clarify which violations will be defined as "serious traffic violations." It amends § 383.51 to clarify certain notification requirements, especially how such requirements would apply to casual, intermittent, or occasional drivers. Section 383.51, "Disqualification of Drivers," is modified to allow reduction of lifetime disqualifications under certain circumstances. Also, the final rule adds precision to the wording of other existing regulations pertaining to the disqualification of drivers in 49 CFR parts 383 and 391.

Each of these changes is discussed below in the context of the relevant public responses to the docket.

Exhibit 1.—Respondents to the NPRM by Category

State agencies representing 16 States:	
Department of Motor Vehicles	11
State Police Departments	2
Other State Agencies	1
Total State Agencies	13
State Organizations (AAMVA)	1
Trucking industry and related parties:	
Associations	8
Carriers	2
Unions	1
Total trucking-related	5
Bus industry and related parties:	
Associations	1
Carriers	1
Unions	4
Total Bus-related	6
Individuals	17
Insurance Industry	5
Trade associations	2
Consultant	1
Public Association (AAA)	1
Total respondents	53

Definition of "Serious Traffic Violations"

Excessive Speeding

As demonstrated in Exhibit 2, the majority of respondents in most categories supported the definition of excessive speed proposed in the NPRM—15 miles per hour or more above the posted limit. In endorsing the FHWA's proposal, most respondents also favored a single standard which could be applied universally in all speed zones and under all conditions and situations. Several opposing views were, however, also presented for consideration.

Exhibit 2.—Respondents' Proposed Definitions of "Excessive Speeding"

	Number of responses by category answering		
	NPRM definition 15 mph or more above posted speed limit	Definition more strict than NPRM	Definition less strict than NPRM
State Agencies	7	1	1
AAMVA	1		
Trucking Carriers and associations	5	1	2
Trucking Unions	1		
Bus Carriers and associations		1	1
Bus Unions			2
Trade Associations	2		
AAA		1	
Individual Drivers	3		2
Other Individuals	2		
Insurance Industry	1	2	
Totals	22	10	8

A motor carrier asserted that a "flat rate" concept of greater than 15 m.p.h. over the posted speed limit for excessive speed is not consistent with providing greater restriction for greater hazard. Claiming that areas that are posted with speed limits less than 55/65 m.p.h. are lower because excessive speed presents a greater danger, the respondent suggested that a standard based on percentage of increase over posted limits, specifically 20%, would provide a standard which is more representative of the risk factor at all speeds.

Another respondent from a bus transit company explained that many factors should influence the development of an appropriate definition for excessive speed. As an example, the respondent explained that a truck carrying hazardous materials loaded to 80,000 pounds, going 50 in a 35 m.p.h. zone should be considered to be traveling at an excessive speed. However, a bus or empty vehicle traveling at the same speed in the same speed zone may not be considered to be traveling at an excessive speed.

Other respondents recommended that maximum speed limits be included in the definition. The American Automobile Association (AAA) pointed out that in forty-one States which have a 65 m.p.h. maximum speed limit, the proposal would allow drivers to speed up to 80 m.p.h. before being charged with an excessive speeding violation. Thus, the AAA recommends a cap of 75 m.p.h. above which any speeding would be considered "excessive."

The majority of respondents reiterated the FHWA's belief that Congress intended the definition for "excessive speed" to be used to identify and penalize the most severe cases of speeding violations. Several respondents, however, maintain that any speed over the posted limit should be considered to be "excessive."

One commenter noted that no provision for appeal has been provided for those drivers with impeccable records who, quite inadvertently in many cases, are stopped for operating at 15 m.p.h. or more above the posted speed limit. The respondent suggested that the driver's record be taken into consideration before disqualifying him/her for two serious violations.

Although some of the alternatives offered by respondents may have merit, each one has related enforcement or administrative problems. For example, a standard which would change with posted limits would be confusing to drivers and to enforcement officials. The FHWA agrees with the overwhelming number of respondents who explained that anything other than a practical, straightforward definition would not be effective. To be practical, "excessive speed" needs to be defined in terms that are both easy to understand and practical to administer. Thus, the FHWA has elected to retain the proposed definition of "excessive speed" as any single conviction for any speed of 15 miles per hour or more, above the posted speed limit. This definition is not intended to supplant existing State cumulative point systems which continue to control the licensing privilege under existing administrative procedures. The concerns, therefore, expressed by commenters who believe that there would be no provisions for appeal or that conditions or special zones would no longer be considered will continue to be dealt within existing enforcement of State speeding convictions.

In retaining the proposed definition, the FHWA does not want to give the impression that other single speeding violations or that repeated violations of driving above the posted speed limit should be condoned because they may not be considered to be "excessive" according to the definition. On the contrary, the FHWA believes that all speeding violations—either driving above the post limit or driving too fast for conditions—pose a potential hazard and should continue to be strictly enforced by the States. While a more stringent, encompassing definition which includes a cap of 75 m.p.h. or a standard based on percentage above posted limits may appear to give more recognition to the greater potential dangers associated with the higher speeds, the FHWA agrees with the majority of respondents that a single definition would be more enforceable than a more intricate definition which incorporates other factors. However, States are free to establish more stringent definitions to address local or particular concerns. The comments submitted by the Owner-Operators Independent Drivers Association of America, Inc. (OOIDA) reflect the concerns expressed by majority of the respondents who objected to a multi-part definition for "excessive speed." The OOIDA wrote: "The Association feels strongly that the CMVSA must be interpreted by the FHWA in a simple and straightforward manner such that drivers are aware of the specific offenses for which they may be disqualified, as well as the penalties to be imposed. OOIDA feels that a situational definition that includes other factors in the definition of "excessive speed" would needlessly confuse the issue among drivers, and create a very cumbersome administrative process." Also, the single license provision of the Act will greatly reinforce the states' authority to assess points for speeding, since drivers can no longer spread convictions over several licenses. The points will add up and the likelihood that a driver who habitually speeds will lose his/her license will be greatly increased. Thus, all CMV drivers will be deterred from speeding, even at levels below the 15 m.p.h. standard. Furthermore, States may apply other charges to address local concerns or special conditions. For example, States apply charges, such as "reckless driving" in cases of speeding at less than 15 m.p.h. above the posted speed limit where weather, traffic, hazardous cargo or other conditions combine to constitute a willful or wanton disregard for safety. Such actions are not prohibited by this rulemaking.

In sum, the FHWA believes that when considered in conjunction with the current State penalty systems, the definition that has been adopted will fully satisfy the Act's goal to promote compliance with the posted speed limits and encourage drivers to use good judgement under all kinds of driving conditions.

Reckless Driving

Regarding the definition of "reckless driving," section 12019 of the Act states that: "reckless driving shall be as defined under State or local law." To promote uniformity and because a majority of the States are already using the Uniform Vehicle Code and Model Traffic Ordinance (UVCMTO) definition, the FHWA proposed to amend the definition of reckless driving to incorporate the language used in the UVCMTO, 1987 Edition, published by the National Committee on Uniform Traffic Laws and Ordinances. Such language states (in chapter 11, Rules of the Road, at section 11-901—Reckless Driving (a) that "any person who drives any vehicle in willful or wanton disregard for the safety of persons or property is guilty of reckless driving." The FHWA further proposed to amend the definition of "reckless driving" to clarify that it would include two additional traffic offenses, both of which are frequently associated with excessive speeding and/or reckless driving. These two additional offenses were:

1. Improper/erratic lane changes (incorporating the concepts cited in the UVCMTO section 11-304 through section 11-306 and section 11-309); and

2. Following the vehicle ahead too closely (incorporating the concepts in the UVCMTO section 11-310).

The FHWA asked for comments on whether these two infractions should be listed separately as serious traffic violations instead of being included under "reckless driving." Of the 31 docket respondents who addressed this issue, of whom 12 represented State agencies, 23 (including 10 from State agencies) supported treating these two infractions as serious traffic violations either as part of "reckless driving" or as separate serious violations. However, most respondents stated that the inclusion of the two additional violations in the basic definition of "reckless driving" would overly complicate that definition and the manner in which existing State traffic codes are enforced and handled in the courts.

In opposition, several drivers, motor carriers, and union representatives asserted that the two additional violations should neither be included in the definition of "reckless driving" nor listed separately as serious violations. The Owner-Operators Independent Drivers Association of America contended that the two additional violations are relatively minor traffic infractions in the majority of cases in which they occur. They further claimed that since "following the vehicle ahead too closely" can be the equal fault of both vehicles, it would be unfair for a truck driver to be subject to a severe penalty for an infraction for which he/

she was only partly to blame. The International Brotherhood of Teamsters presented a similar argument for its recommendation against mentioning these additional violations in the rule.

Accident data available to FHWA show that these two violations are commonly attributed to commercial motor vehicle accidents in which human factors or driver error is cited as a casual factor. In a 1988 report entitled "Gearing Up for Safety: Motor Carrier Safety in a Competitive Enviornment," the Office of Technology Assessment (OTA) lists "following too closely" as a contributor in nearly 10 percent of the heavy truck accidents. The same report identifies "improper lane change" violations as major contributors in more than 13 percent of heavy truck accidents. The "Heavy Truck Safety Study" final report of the National Highway Traffic Safety Administration (NHTSA, 1987), explains that regardless of any improvements made to vehicle characteristics, to the roadways, or to other features of the operating environment to improve safety, the manner in which a vehicle is driven will always play a paramount role in the safe operation of the vehicle. The NHTSA report cites an analysis by the State of Ohio of crashes in which the truck driver was at fault. The analysis identifies "improper lane changes" and "following too closely" as the two most frequent driver errors contributing to the accident. On the basis of available accident data, and in light of the comments to the docket from State agencies which support including these violations because of their potential for causing serious accidents, the FHWA has concluded that "improper/erratic lane changes" and "following too closely" should be treated as serious violations for the purposes of the final rule.

The FHWA shares the concern of some of the respondents that enforcement officials may cite CMV drivers for these offenses when they are the equal fault of both drivers or the fault of noncommercial drivers. However, a CMV driver is not disqualified until he or she is convicted of the offense. The due process embodied in a conviction determination should prevent unfair or unfounded violations from becoming a conviction.

Finally, some of the respondents opposed including "improper/erratic lane changes" and "following too closely" as serious violations because of the resultant penalties. Under § 383.51, a CMV driver who is convicted a second time for a serious violation within a three-year period is disqualified for 60 days; the penalty for a third such violation in a three-year period is a 120 day disqualification. Given the potential importance of these penalties on a driver's employment and livelihood, the FHWA recognizes the possibility that more "improper/erratic lane changes" and "following too closely" traffic violations may be contested, resulting in lost time to drivers and an increased burden on the judicial system. The expected safety benefit, however, is considered countervailing, especially since these two types of violations are major contributors to accidents in which driver error is the casual factor. The penalties related to convictions for these violations are also considered by the FHWA to be appropriate.

In formulating the final definition for "reckless driving," the FHWA agrees with the numerous respondents who asserted that the two additional violations should be listed separately in order to minimize any administrative complications. Therefore, the definition of "reckless driving" in the final rule incorporates the UVCMTO wording regarding "willful or wanton disregard for the safety of persons or property." The other two items, "improper or erratic lane changes" and "following the vehicle ahead too closely" are included, however, as serious traffic violations. States may apply their existing corresponding violations to deal with situations involving improper/erratic lane changes and following the vehicle ahead too closely.

Lifetime Disqualifications

The FHWA proposed to amend § 383.51(b)(3)(v), to allow States the option of providing an opportunity for sanctioned drivers to apply for a reduction of their lifetime penalty only after they serve a minimum disqualification period of ten years, and only after they successfully complete a requisite rehabilitation program as determined by their State's driver licensing agency. The lifetime disqualification would not be expunged from the driver's record for any reason even after successful rehabilitation and reinstatement; and a third conviction of an offense under § 383.51(b) would lead to permanent disqualification for life. A CMV driver convicted of any felony involving the manufacture, distribution, or dispensing of controlled substances (under § 383.51(b)(2)(v)) will continue to be ineligible to apply for any reduction whatsoever of the lifetime disqualification, hence, permanently disqualified for life.

Most respondents on this issue supported the FHWA's proposal, which is adopted in the final rule. Several States and the American Association of Motor Vehicle Administrators (AAMVA), however, alerted the FHWA that other concerns related to the content and effectiveness of rehabilitation programs still need to be addressed. Since the States have until October 1, 1993, to begin enforcement of commercial driver qualifications, ample time remains for the States to develop, in concert, appropriate CMV driver rehabilitation programs. FHWA could then consider such State-developed programs in future rules. This approach is consistent with federalism considerations.

Section-by-Section Analysis

Items not discussed in detail in this section-by-section analysis are either highlighted as major issues above, adopted verbatim from the NPRM and discussed in its preamble, or of a nonsubstantive nature (for example, wording changes to conform with other items).

Section 383.1 Purpose and Scope

The wording changes in this section are for conformity with § 383.31, discussed below.

Section 383.5 Definitions

Disqualification. The FHWA has incorporated a definition for "disqualification" in the final rule in response to several requests that FHWA provide further clarification on how to apply the sanctions included in the Act and the implementing regulations. The FHWA agrees with the contention of the AAMVA's Model CDL Law Subcommittee that nothing in the Act or Federal rules prohibits the holder of a CDL, disqualified from driving a commercial motor vehicle, from driving a non-commercial motor vehicle, if he/she is otherwise legally eligible to do so. The FHWA further agrees with the Subcommittee that a CDL holder subject to a disqualification should not be allowed to operate a commercial motor vehicle under any circumstances during that period. The Act does not provide for any type of "limited" driving privilege for someone who is disqualified from operating a commercial motor vehicle.

In developing a definition for "disqualification," the FHWA recognized that procedures differ from State to State, and that the most effective way to impose the disqualification sanctions is to allow States to use their own current systems. States may impose the disqualification through a suspension, revocation, cancellation or any other means a State

determines to be appropriate. (...ng as the driver's privilege to operate a commercial motor vehicle is withdrawn in conformance with the Act. While the definition also provides for Federal disqualifications by the FHWA, the disqualification of drivers under the provisions of part 383 will be primarily the responsibility of the States through their existing driver's licensing mechanisms.

Employee. The FHWA noted in the NPRM that because the casual, intermittent or occasional type of driver has no "regular employer" per se, the regulations published on June 1, 1987, are unclear as to whom such casual, intermittent or occasional drivers should report their convictions and adverse actions against their driving privileges, as set forth in §§ 383.33 and 383.35. In response, the FHWA proposed to amend the definition of "Employee" to include all casual, intermittent or occasional type drivers; and to specify in § 383.31(b) that notification must be given to the "current" employer.

All the respondents to this issue agreed with FHWA's proposed definition, which has been incorporated in the final rule.

Section 383.31 Notification of Convictions for Driver Violations

The FHWA has made the following technical modifications to this section:

(1) Drivers must notify their licensing State and employer of "convictions" for violations of State or local motor vehicle traffic control laws (other than parking violations). Notification of the "violations" themselves is not required. This clarification, which is in keeping with due process, was endorsed by most commenters on this issue.

(2) The FHWA has replaced the term "State," as used in the June 1, 1987 rule, with the term "State or jurisdiction" in order to include convictions incurred in Canadian provinces and territories and other foreign jurisdictions which the FHWA recognizes, as testing drivers and issuing CDLs in accordance with or under standards similar to the standards of part 383. This change is consistent with the intent of the Act and incorporates concerns of AAMVA and several States that drivers licensed in the United States may fail to report their convictions by foreign jurisdictions to their employers and licensing States. In accordance with the commercial driver licensing reciprocity recently announced by the United States and Canada (at 54 FR 22392, May 23, 1989), the FHWA believes that foreign convictions must be reported in order to allow States to ascertain the driver's qualifications and fully implement the intent of the Act. (A conforming change has also been ma... to § 383.33.)

(3) Section 383.31 requires that CDL holders report their convictions irrespective of the type of vehicle in which the violation occurs. This requirement, however, is only explicit in § 383.31(c)(5) which specifies that the notification to the State and employer must state whether the violation was in a commercial motor vehicle. To provide further clarification and eliminate any doubt on the applicability of the notification requirements, FHWA has included language in § 383.31(a) and § 383.31(b) to make it explicit that the notifications apply to "any type of motor vehicle."

The FHWA does not have the authority to impose disqualifications, or to require States to impose disqualifications, on CDL holders who commit criminal or other offenses under § 383.51 in noncommercial vehicles. However, the purpose of requiring drivers to report such convictions in noncommercial vehicles is to provide additional information to States which may wish to consider such convictions in their licensing actions. (Also see discussion of self-reporting below.)

(4) As discussed above under the definition of "employee," notification is to be made to the "current employer." Conforming changes have been made in §§ 383.1 and 383.33. If a driver is not currently employed, he/she must still notify the State of licensure. One respondent from a State motor vehicle department recommended that the rule further clarify that intermittent and occasional drivers need to also notify their permanent employers. Since it is the current employer who is in a position to take immediate action (including the permanent employer), and since the addition of further subtleties to this section will make its enforcement more difficult, the FHWA has not adopted that suggestion.

Several respondent States questioned the need for and efficacy of any self-reporting of convictions by drivers to their licensing States. These States assert that they cannot legally impose sanctions against a driver until they receive formal notification about the conviction. Similar objections were expressed prior to the publication of the June 1, 1987, final rule, "Commerical Driver Licensing Standards: Requirements and Penalties." As noted in that rule, one purpose of requiring driver notification to the State is to alert a State of violations which may ultimately warrant the suspension, revocation, or disqualification of the driver's CDL. At this time, States are not required to impose sanctions based on the driver's informal notification. When the State-to-State reporting of convictions through the Commerical Driver's License Information System (CDLIS) is fully operational, the FHWA will consider elimination of this requirement.

Section 383.51 Disqualification of Drivers

Period of Disqualification

The FHWA has received several questions asking whether the period of time for which a driver may be disqualified is to begin on the date of the violation or the date of conviction. In the NPRM, the FHWA explained that, because the Act requires that drivers be disqualified when they are "found to have committed" certain offenses, the disqualification period should begin at the time when the driver is convicted of the disqualifying offense.

Several States and the AAMVA pointed out potential problems with the proposal that disqualification begin at the time of conviction. They asserted that, in many instances, the "conviction" is determined by a court or another State agency, and the motor vehicle agency responsible for taking action against the license is not notified of the conviction until sometime later. Others indicated that because of differences in the due process and appeals mechanisms among the various States, setting the disqualification starting point at the "time of conviction" is not manageable.

The FHWA is aware of the varying procedures used by the States in applying sanctions. The FHWA is also aware that under certain circumstances—i.e., when a driver is considered to be dangerous, or when the violation is severe enough—the courts are able to revoke the driver's driving privileges immediately upon conviction. On the other hand, the FHWA appreciates the administrative problems to which the AAMVA refers.

As a compromise between the practical reality adduced by the AAMVA and the expectations of the underlying legislation, the final rule omits the phrase "at the time of such conviction" from § 383.51 (b)(1) and (c)(1), and defers establishment of a time limit on when a State would begin the disqualification of drivers until the forthcoming rulemaking on State compliance under section 12009 of the Act. In the meantime, States should attach at least the same degree of urgency to CDL sanctions as they now do in similar instances. Without precluding States from using their

current penalty systems or from dealing with any due-process issues, the FHWA expects States to begin the disqualification process immediately upon conviction; and if circumstances warrant it, to provide an administrative mechanism whereby the CDL holder's driving privileges can also be taken away immediately upon conviction. In any event, whenever the disqualification period begins for a CDL sanction, States will still need to comply with sections 12009(a) (8) and (9) of the Act which specify that a State convicting a CMV operator of any traffic violation (other then a parking violation) must notify the State of license issuance within 10 days after such conviction; and that disqualifications must be reported to the CDLIS and to the State of license issuance within 10 days from the date of disqualification.

Leaving the Scene of an Accident

Because the driver of a large commercial motor vehicle may be involved in a minor accident of which he/she is genuinely unaware, the FHWA proposed to add "knowingly and willfully" to the disqualifying offense of "leaving the scene of an accident while operating a commercial motor vehicle."

Most respondents, including the States and the AAMVA, considered the addition of the "knowingly and willfully" qualifiers to be unnecessary, and to place a potentially unreasonable burden of proof on the States. Since the issues inherent in the words "knowingly and willfully" would undergo examination during the due process leading to a conviction, the FHWA has elected to eliminate "knowingly and willfully" from the proposed description of "leaving the scene of an accident." Section 383.51(b)(2)(iii) will therefore remain unchanged.

Lifetime Disqualification From Separate Incidents

In the NPRM, the FHWA proposed to clarify that the driver is disqualified for life if he or she is convicted for offenses which arise from two or more separate incidents.

All comments which addressed this issue agreed with this proposal, which is incorporated in § 383.51(b)(3)(iv) and applied by analogy to § 383.51(c)(2) (i) and (ii) dealing with serious traffic violations.

Section 383.73 State Procedure

All States currently have laws which deal with falsification of information on license documents. These laws, however, are not consistent. As part of the NPRM, the FHWA included a requirement that States must impose a penalty on a CDL applicant who is discovered by the State to have falsified information required for the CDL. The FHWA explained in the NPRM that it believes that a minimum level for such penalties need to be established to ensure similar treatment of CMV operators across the country. Such penalties would also help deter an applicant from attempting to get a second license or a new CDL during the time he/she is disqualified.

All respondents who provided information on this issue endorsed the proposed 60 day penalty. Several respondents indicated, however, that they currently have and will continue to impose stringent penalties, a policy which the FHWA endorses.

Thus, the FHWA has amended § 383.73(g) to provide minimum penalties of at least 60 days for those persons who knowingly falsify or evade submitting required information when applying for any CDL licensing action under §§ 383.71 and 383.73. States may apply the sanction either through a license suspension, revocation, cancellation, or disqualification.

The deadline for imposing the penalty (formerly "30 days after discovering the falsification") has been eliminated because it does not allow for due process and State administrative procedures.

Regulatory Impact

The FHWA has determined that this action does not constitute a major rule under Executive Order 12291. The final rule is not expected to result in an annual effect on the economy of $100 million or more, or lead to a major increase in costs or prices, or have significant adverse effects on the United States economy. Because of the public interest in the issue of commercial motor vehicle safety and the expected benefits of improved transportation safety, however, this action is considered significant under the regulatory policies and procedures of the DOT. For this reason and pursuant to Executive Order 12498, this rulemaking action has been included on the Regulatory Program for significant rulemaking actions.

The economic impacts of this rulemaking that will occur are primarily mandated by the statutory provisions themselves. For this reason, a full regulatory evaluation is not required. However, since an analysis of impacts, including economic factors, is necessarily involved in the preparation of related motor vehicle safety regulations, a regulatory evaluation has been prepared for this rulemaking action as well as other actions needed to implement the Commercial Motor Vehicle Safety Act of 1986. This evaluation addresses the provisions contained in this action and has been placed in the public docket and is available for inspection in the Headquarters office of the FHWA, 400 Seventh Street SW., Washington, DC 20590.

A significant part of the motor carrier industry and other employers covered by the Act are made up of small firms, from one-person, one-truck operations of some owner-operators, to the thousands of small fleet operators throughout the country. For this reason, the benefit and cost considerations described in the regulatory evaluation/regulatory flexibility analysis as applicable to employers and the motor carrier industry in general, are equally applicable to the small entity component of the industry. Small entities have been represented at public meetings held to discuss the Act and small entities have had the opportunity to submit comments to the public docket established in conjunction with FHWA's August 1, 1988, ANPRM as well as the several other rulemaking notices required by the Act. The FHWA is fully committed to doing all that it can to ensure that no undue burdens are placed on small entities as a result of this action.

For the foregoing reasons and under the criteria of the Regulatory Flexibility Act, the FHWA hereby certifies that this action will not have a significant economic impact on a substantial number of small entities.

Federalism Impact

The FHWA has reviewed these changes to the Commercial Driver Licensing Standards in light of the purposes of the Act and the President's Executive Order on Federalism (Executive Order 12612, October 26, 1987). In enacting the Commercial Motor Vehicle Safety Act of 1986, the Congress found that it is in the public interest to enhance commercial motor vehicle safety. Congress identified commercial motor vehicle safety as a matter of national importance and included requirements for a single license and driver disqualifications as part of the mandates in the Act.

In the Executive Order on Federalism, Executive Departments and agencies were directed to be guided by certain fundamental federalism principles in formulating and implementing policies that have federalism implications. These policies have been taken fully into account in the development of this rule. This rule would limit the policy making discretion of the States only in narrow ways, and does so only to achieve the

national purposes of the act. For example, States would continue to have sole discretion as to whether or not to license any CMV operator and what specific procedures, tests, fees or penalty applications are applicable. Thus, it is certified that the policies contained in this document have been assessed in light of the principles, criteria, and requirements of the Federalism Executive Order, and accord fully with the letter and spirit of the President's federalism initiative.

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

Paperwork Reduction Act

The collection of information required by the final rule published on June 1, 1987, to implement the single license and certain reporting and notification requirements has been approved by the Office of Management and Budget (OMB No. 2125-0542). No additional burdens are expected to result from this rulemaking.

List of Subjects in 49 CFR Part 383

Commercial driver's license standards requirements and penalties, Highways and roads, Motor carriers, Motor vehicle safety, Reporting and recordkeeping requirements.

(Catalog of Federal Domestic Assistance Program Number 20.217, motor carrier safety)

Issued on: September 22, 1989.

T.D. Larson,

Administrator.

In consideration of the foregoing, the FHWA hereby proposes to amend title 49, Code of Federal Regulations, subtitle B, chapter III, as set forth below:

PART 383—COMMERCIAL DRIVER'S LICENSE STANDARDS; REQUIREMENTS AND PENALTIES

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

Authority: Title XII of Pub. L. 99-570, 100 Stat. 3207-170; 49 U.S.C. 3102; 49 U.S.C. App. 2505; and 49 CFR 1.48.

2. Section 383.1(b) (2) and (5) are revised as follows:

§ 383.1 Purpose and scope.

* * * * *

(b) * * *

(2) Requires a driver to notify the driver's current employer and the driver's State of domicile of certain convictions;

* * * * *

(5) Establishes periods of disqualification and penalties for those persons convicted of certain criminal and other offenses and serious traffic violations, or subject to any suspensions, revocations, or cancellations of certain driving privileges;

* * * * *

3. Section 383.5 is amended by adding one definition entitled "Disqualification", and by revising four other definitions and placing them in alphabetical order as follows:

§ 383.5 Definitions.

* * * * *

Controlled substance has the meaning such term has under section 102(6), of the Controlled Substances Act (21 U.S.C. 802(6)) and includes all substances listed on schedules I through V of 21 CFR part 1308, as they may be revised from time to time. Schedule I substances are identified in appendix D of this subchapter and schedules II through V are identified in appendix E of this subchapter.

* * * * *

Disqualification means either:

(a) The suspension, revocation, cancellation, or any other withdrawal by a State of a person's privileges to drive a commercial motor vehicle; or

(b) A determination by the FHWA, under the rules of practice for motor carrier safety contained in part 386 of this title, that a person is no longer qualified to operate a commercial motor vehicle under part 391; or

(c) The loss of qualification which automatically follows conviction of an offense listed in § 383.51.

* * * * *

Driver's license means a license issued by a State or other jurisdiction, to an individual which authorizes the individual to operate a motor vehicle on the highways.

* * * * *

Employee means any operator of a commercial motor vehicle, including full time, regularly employed drivers; casual, intermittent or occasional drivers; leased drivers and independent, owner-operator contractors (while in the course of operating a commercial motor vehicle) who are either directly employed by or under lease to an employer.

* * * * *

Serious traffic violation means conviction, when operating a commercial motor vehicle, of:

(a) Excessive speeding, involving any single offense for any speed of 15 miles per hour or more above the posted speed limit;

(b) Reckless driving, as defined by State or local law or regulation, including but not limited to offenses of driving a commercial motor vehicle in willful or wanton disregard for the safety of persons or property;

(c) Improper or erratic traffic lane changes;

(d) Following the vehicle ahead too closely; or

(e) A violation, arising in connection with a fatal accident, of State or local law relating to motor vehicle traffic control (other than a parking violation). (Serious traffic violations exclude vehicle weight and defect violations.)

* * * * *

4. Section 383.31 is amended by revising paragraphs (a), (b) and (c)(4) as follows:

§ 383.31 Notification of convictions for driver violations.

(a) Each person who operates a commercial motor vehicle, who has a commercial driver's license issued by a State or jurisdiction, and who is convicted of violating, in any type of motor vehicle, a State or local law relating to motor vehicle traffic control (other than a parking violation) in a State or jurisdiction other than the one which issued his/her license, shall notify an official designated by the State or jurisdiction which issued such license, of such conviction. The notification must be made within 30 days after the date that the person has been convicted.

(b) Each person who operates a commercial motor vehicle, who has a commercial driver's license issued by a State or jurisdiction, and who is convicted of violating, in any type of motor vehicle, a State or local law relating to motor vehicle traffic control (other than a parking violation), shall notify his/her current employer of such conviction. The notification must be made within 30 days after the date that the person has been convicted. If the driver is not currently employed, he/she must notify the State or jurisdiction which issued the license according to § 383.31(a).

(c) * * *

(4) The specific criminal or other offense(s), serious traffic violation(s), and other violation(s) of State or local law relating to motor vehicle traffic control, for which the person was convicted and any suspension, revocation, or cancellation of certain

driving privileges which resulted from such conviction(s);

* * * * *

5. Section 383.33 is revised to read as follows:

§ 383.33 Notification of driver's license suspensions.

Each employee who has a driver's license suspended, revoked, or canceled by a State or jurisdiction, who loses the right to operate a commercial motor vehicle in a State or jurisdiction for any period, or who is disqualified from operating a commercial motor vehicle for any period, shall notify his/her current employer of such suspension, revocation, cancellation, lost privilege, or disqualification. The notification must be made before the end of the business day following the day the employee received notice of the suspension, revocation, cancellation, lost privilege, or disqualification.

6. The subpart heading for subpart D is revised to read as follows:

Subpart D—Driver Disqualifications and Penalties

7. Section 383.51 is amended by revising paragraphs (b)(1), (b)(3), (j) through (v), and (c)(1) and (2), to read as follows:

§ 383.51 Disqualification of drivers.

* * * * *

(b) * * *

(1) *General rule.* A driver who is convicted of a disqualifying offense specified in paragraph (b)(2) of this section, is disqualified for the period of time specified in paragraph (b)(3) of this section, if the offense was committed while operating a commercial motor vehicle.

* * * * *

(3) * * *

(i) *First offenders.* A driver who is convicted of an offense described in paragraphs (b)(2)(i) through (b)(2)(iv) of this section, is disqualified for a period of one year provided the vehicle was not transporting hazardous materials required to be placarded under the Hazardous Materials Transportation Act (49 U.S.C. App. 1801–1813).

(ii) *First offenders transporting hazardous materials.* A driver who is convicted of an offense described in paragraphs (b)(2)(i) through (b)(2)(iv) of this section, is disqualified for a period of three years if the vehicle was transporting hazardous materials required to be placarded under the Hazardous Materials Transportation Act (49 U.S.C. App. 1801–1813).

(iii) *First offenders of controlled substance felonies.* A driver who is convicted of an offense described in paragraph (b)(2)(v) of this section, is disqualified for life.

(iv) *Subsequent Offenders.* A driver who is convicted of an offense described in paragraphs (b)(3)(i) through (b)(2)(iv) of this section, is disqualified for life if the driver had been convicted once before in a separate incident of any offense described in paragraphs (b)(2)(i) through (b)(2)(iv) of this section.

(v) Any driver disqualified for life under § 383.51(b)(3)(iv) of this paragraph, who has both voluntarily enrolled in and successfully completed, an appropriate rehabilitation program which meets the standards of his/her State's driver licensing agency, may apply to the licensing agency for reinstatement of his/her commercial driver's license. Such applicants shall not be eligible for reinstatement from the State unless and until such time as he/she has first served a minimum disqualification period of 10 years and has fully met the licensing State's standards for reinstatement of commercial motor vehicle driving privileges. Should a reinstated driver be subsequently convicted of another disqualifying offense, as specified in paragraphs (b)(2)(i) through (b)(2)(iv) of this section, he/she shall be permanently disqualified for life, and shall be ineligible to again apply for a reduction of the lifetime disqualification.

(c) * * *

(1) *General rule.* A driver who is convicted of serious traffic violations is disqualified for the period of time specified in paragraph (c)(2) of this section, if the offenses were committed while operating a commercial motor vehicle.

(2) *Duration of disqualification for serious traffic violations—*(i) *Second violation.* A driver who, during any 3-year period, is convicted of two serious traffic violations in separate incidents, is disqualified for a period of 60 days.

(ii) *Third violation.* A driver who, during any 3-year period, is convicted of three serious traffic violations in separate incidents, is disqualified for a period of 120 days.

* * * * *

8. Section 383.73(g) is revised to read as follows:

§ 383.73 State procedures.

* * * * *

(g) *Penalties for false information.* If a State determines, in its check of an applicant's license status and record prior to issuing a CDL, or at any time after the CDL is issued, that the applicant has falsified information contained in subpart J of this part or any of the certifications required in § 383.71(a), the State shall, at a minimum suspend, cancel, or revoke the person's CDL or his/her pending application, or disqualify the person from operating a commercial motor vehicle for a period of at least 60 consecutive days.

* * * * *

PART 391—QUALIFICATIONS OF DRIVERS

9. Section 391.15(c)(2)(iv) is revised to read as follows:

§ 391.15 Disqualification of drivers.

* * * * *

(c) * * *

(2) * * *

(iv) Leaving the scene of an accident while operating a commercial motor vehicle; or

* * * * *

[FR Doc. 89-22883 Filed 10-2-89; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

49 CFR Parts 383, 390, 391, and 392

[FHWA Docket No. MC-128]

RIN 2125-AB-AB79

Blood Alcohol Concentration Level for Commercial Motor Vehicle Drivers

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Final rule.

SUMMARY: The FHWA is amending Parts 383, 390, 391, and 392 of the Federal Motor Carrier Safety Regulations (FMCSRs) in accordance with the Commercial Motor Vehicle Safety Act of 1986 (the Act). The revisions establish 0.04 percent as the blood alcohol concentration (BAC) level at or above which a commercial motor vehicle (CMV) operator would be disqualified from operating a CMV under Section 12006 of the Act. As used in this document, BAC means alcohol concentration expressed in grams of alcohol per 100 milliliters of blood, or in grams of alcohol per 210 liters of breath, regardless of the means of measurement employed. The rule also requires CMV operators with any measured or detected BAC to be placed out-of-service for a 24-hour period in accordance with Section 392.5 of the FMCSRs. Sections 12009 and 12011 of the Act require States to adopt similar licensing sanctions for CMV operators to avoid a withholding of Federal-aid highway funds.

The rule is based on comments received to a notice of proposed rulemaking (NPRM) published in the Federal Register on May 10, 1988 (53 FR 16656), and findings of a study by the National Academy of Sciences (NAS), 1987, Special Report No. 218, "Zero Alcohol and Other Options: Limits for Truck and Bus Drivers" (the NAS Study).

EFFECTIVE DATE: October 27, 1988.

FOR FURTHER INFORMATION CONTACT: Ms. Jill L. Hochman, Chief, Standards Review Division, Office of Motor Carrier Standards (202) 366-4009, or Mr. Thomas P. Holian, Office of the Chief Counsel, (202) 366-1350, Federal Highway Administration, 400 Seventh Street, SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m. ET, Monday through Friday, except legal holidays.

SUPPLEMENTARY INFORMATION:

Background

Summary of the BAC Level Provisions of the Act

Section 12006(f) of the Act requires the Secretary of Transportation (Secretary) to establish the BAC level, not to exceed 0.10 percent, at or above which a person when operating a CMV shall be deemed to be driving while under the influence (DUI) of alcohol and subject to the licensing sanctions described in the Act in Section 12006 (discussed below). Failure to issue such a rule by October 27, 1988, will result in this level being set at 0.04 percent.

Under section 12009(a)(3) of the Act, each State must, by October 1, 1993, adopt and enforce laws consistent with the Federal requirement, and consistent with any out-of-service regulations issued by the Secretary under section 12008(d)(1) of the Act, in order to avoid having Federal-aid highway construction funds withheld.

Also under section 12009, States must adopt disqualification provisions for CMV operators described in the Act. These disqualification provisions became effective on July 1, 1987 (52 FR 20574), and are contained in Section 383.51 of the FMCSRs (49 CFR 383.51). Disqualifications under the Act apply to operators of "commercial motor vehicles" as defined in the Act and occur for offenses which were committed after July 1, 1987. Certain of these disqualifications, or licensing sanctions, would apply to CMV drivers who are "deemed to be under the influence of alcohol."

Section 12006 of the Act provides that CMV operators who are found to have committed a first violation of driving a CMV under the influence of alcohol shall be disqualified for a least 1 year. For a CMV operator carrying hazardous materials, this disqualification shall be for at least 3 years. Any CMV operator found to have committed a second such offense (at any time without regard to a time limit for the second offense) shall receive a lifetime disqualification or a disqualification for a period of not less than 10 years, as may be prescribed by the Secretary.

The requirement in the Act for the Secretary to commence a rulemaking to determine the appropriate BAC level by October 27, 1987, was fulfilled by publication of the advance notice of proposed rulemaking (ANPRM) of March 23, 1987 (52 FR 9192), to which 31 responses were received. Also as required by the Act, the FHWA contracted with the NAS to conduct a study of the appropriateness of reducing the BAC level at or above which a person, when operating a CMV, is deemed to be driving while under the influence of alcohol from 0.10 to 0.04 percent. The findings of the NAS study and comments received on the ANPRM formed the basis of the NPRM of May 10, 1988.

Comments on the NPRM

The FHWA received 78 responses to the NPRM; these are enumerated by category in Exhibit 1. In addition to considering the written docket, the FHWA sponsored two public information forums (in Washington, DC and Denver, Colorado) at which 17 persons testified on behalf of a wide range of organizations.

Exhibit 1

Respondents to the BAC NPRM by Category

National Transportation Safety Board	1
National Academy of Sciences	1
Other Federal agencies	1
State agencies representing 37 States:	
Departments of motor vehicles	28
State Police departments	11
Other State agencies	7
Total State agencies	46
Localities	4
State- and locality-related organizations	2
Trucking industry and related parties:	
Associations	6
Carriers	4
Unions	1
Total trucking-related	11
Bus industry	3
Trade associations	2
Insurance industry	3
Public interest groups	3
Individuals	1
Total respondents	78

The FHWA expects to assess whether and what types of duplication or overlap may exist between alcohol-related requirements of the Commercial Driver's License (CDL) program (i.e., Part 383) and the requirements in Parts 390, 391, and 392 of the FMCSRs. This will be part of the FHWA's continuing efforts to ensure that the CDL program is practical and effective. Any reduction or elimination of burdens on drivers, States, local jurisdictions, or motor carriers that may be realized as part of this assessment would be incorporated into future rulemaking actions.

The rest of this supplementary information section summarizes the major differences between the NPRM and this final rule, discusses the FHWA's selected approach to establishing the BAC levels and penalties as mandated in the Act, discusses the resultant enforcement

issues, and presents a section-by-section analysis of the rule.

Major Differences Between NPRM and Final Rule

In response to the comments on the NPRM, the FHWA has incorporated numerous changes and refinements in the final rule, all of which are discussed in detail further below. In brief, the FHWA has:

1. Established 0.04 percent as the BAC level at or above which a person when operating a CMV shall be deemed to be driving while under the influence of alcohol;
2. Revised the definition of "conviction" to specifically include administrative determinations;
3. Specifically stated that CDL holders, by the act of driving a CMV, have given their implied consent to such testing as is requisite to the enforcement of this rule;
4. Clarified that the 24-hour out-of-service sanction applies to all drivers having any measured or detected alcohol concentration while on duty, or operating, or in physical control of a CMV or other motor vehicle covered by Section 392.5; and
5. Delineated the minimum requirements for State compliance with the BAC-related disqualification provisions of the Act and clarified that States need not necessarily apply their other DUI sanctions at the 0.04 percent BAC level.

Selection of BAC Levels and Associated Penalties

The NPRM addressed both the substance and the form of the BAC offenses and penalties mandated by the Act.

In terms of substance, the NPRM designated 0.04 percent as the BAC level at or above which the disqualification provisions of the Act—generally, one year for the first offense and life for the second offense—would take effect. The final rule retains this 0.04 percent threshold because it garnered the implicit or explicit support of most docket respondents and because the NAS study recommended a 0.04 percent level.

With respect to the docket, the overwhelming majority of respondents in all categories supported no change in the 0.04 level, as demonstrated in Exhibit 2. Among the commenters seeking a different level, there was no agreement as to what that level should be. For example, while the NTSB urged a 0.00 percent standard, the International Association of Chiefs of Police urged the retention of 0.10 percent or existing State per se percentages, if lower, as the trigger for disqualification for one year or more.

EXHIBIT 2.—RECOMMENDED BAC LEVELS FOR DISQUALIFICATION

Respondent Category	0.00	0.04 per NPRM	0.10 or State DUI	0.05 or 0.06
NTSB	1			
NAS		1		
Other Federal agencies		1		
State agencies	4	31	8	3
Localities		3	1	
State-/locality-related		1	1	
Trucking industry and related	2	8		
Bus industry	1	2		
Trade associations		2		
Insurance industry		3		
Public interest groups		3		
Individuals		1		

In the absence of any consensus for change from the proposed 0.04 percent level, the FHWA continues to agree with the scientific findings of the NAS study. Briefly, the NAS committee concluded that any BAC level above zero, most commercial drivers would experience a degradation in skill that would increase the risk of crash involvement. The majority (three-fourths) of the committee recommended that penalties required by the Act be applied to violations of 0.04 percent or higher BAC. (The report may be purchased from the Transportation Research Board, 2101 Constitution Avenue, NW., Washington, DC 20418, for a $20.00 fee. A copy of the report is available for examination in the docket.)

Thus, the FHWA has retained 0.04 percent as the BAC level at or above which CMV operators will be subject to the disqualification provisions of the Act. Furthermore, in light of the NAS recommendations and the Act, the final rule retains the 24-hour out-of-service sanction to be applied to drivers who have any measured BAC or any detected presence of alcohol.

The form of the proposed rule elicited significant comment. Setting up a three-tiered structure of alcohol-related offenses and penalties for CMV operators, the NPRM—

1. Defined "driving under the influence" (DUI) for CMV operators at 0.10 percent BAC or the State DUI level, whichever is lower. At this level, State criminal and/or administrative penalties, the disqualifications specified in the Act, and the 24-hour out-of-service would all apply. (The purpose of this proposed definition was to formally satisfy the requirements of the Act without conflicting with existing State DUI statutes.)

2. Expanded the list of offenses under Part 383 to include "driving a commercial motor vehicle with an alcohol concentration of 0.04 percent or more." At this level, the disqualifications of the Act and the 24-hour out-of-service sanction would both apply. (This provision was intended to meet the substantive thrust of the Act, which was to provide for disqualification at a BAC level consonant with the Act's goal of improved highway safety.)

3. Modified Section 392.5 of the FMCSRs to apply the 24-hour out-of-service sanctions to CMV operators having any positive alcohol concentration. (This was in consideration of the NAS study majority recommendations, and in keeping with sections 12006(a)(21) and 12006(d)(1) of the Act and the FHWA's existing authority regarding Section 392.5.)

In commenting on the three-tiered structure of the NPRM, the International Brotherhood of Teamsters (IBT) asserted that "the DOT has exceeded Congress' grant of authority by creating a disqualifying offense not found in the statute"—that is, number 2 above. According to the IBT, the Act only gave the Secretary the authority to determine "the blood alcohol concentration level at or above which a person when operating a commercial motor vehicle shall be deemed to be driving under the influence of alcohol" and subject to the penalties included in the Act.

Although the FHWA believes that the "three-tiered" structure included in the NPRM would fully accord with the substantive requirements of the Act, the FHWA has altered the form of the final rule to accommodate objections such as those raised by the IBT. Under this revised, two-tiered structure, the FHWA has—

1. Established 0.04 percent as the level at or above which a person when operating a commercial motor vehicle shall be deemed to be driving under the influence of alcohol and subject to the disqualification provisions of the Act; and
2. Continued to specify that drivers having any positive alcohol concentration will be subject to the 24-hour out-of-service sanctions.

To elicit a broad range of opinion and to assist the FHWA in the long-term planning of its regulatory agenda, the NPRM raised three specific questions related to the proposed BAC levels and associated penalties.

First, the NPRM asked whether additional penalties (i.e., over and above

the 24-hour out-of-service) would be appropriate for second offenses below 0.04 percent BAC. The respondent State agencies expressed a 2-to-1 preference against the imposition of such an ascending scale of sanctions, largely because of the associated record-keeping and administrative problems. On the other hand, the International Association of Chiefs of Police, the National Transportation Safety Board, and five other non-State respondents favored the idea. Since the Act provides no explicit authority for penalties other than 24 hours out-of-service for violations of section 392.5, and since the State agencies generally opposed the concept, the FHWA has not added such ascending penalties to this regulation and does not currently intend to seek additional authority to impose them.

Second, the NPRM asked whether there were any practical alternatives to the repeal or amendment, with respect to CMV operators, of State laws presuming that a person with a BAC of less than 0.05 percent is not under the influence of alcohol. Nine States asserted that no such alternative exists; four States stated that no conflict would exist as long as the CMV offense is treated administratively at levels below 0.05 percent. The final rule, as discussed further below under "enforcement," allows the States to treat violations of the disqualifying BAC level by means of administrative or criminal proceedings, or both.

Third, the NPRM asked whether CMV drivers having a BAC between 0.04 percent and 0.10 percent (or the State DUI level, if lower) should receive shorter-term disqualifications than those specified in the Act for violations of the disqualifying BAC level. Of the 49 respondent State agencies, 13 suggested such a change. However, the restructuring of offenses and penalties in this final rule into a "two-tiered approach" obviates any such possibility.

Enforcement Issues

Enforcement of this regulation will be primarily a State responsibility. However, the docket revealed that 20 of the respondent State agencies (representing 18 of the 37 respondent States) foresaw enforcement difficulties with the BAC levels proposed in the NPRM.

In essence, the enforcement problem is as follows. (Chapter 4 of the NAS report, cited above, provides further details.) Each State, in working out its DUI policies as a synthesis of legislative, judicial, and enforcement precedents and actions, has laboriously developed a set of standard procedures with which to deal with DUI cases. In general, as a typical DUI case progresses through the successive stages of identification of a vehicle to be stopped, determination of the driver's alcohol use, testing for impairment, arrest, evidential testing, and criminal and/or administrative proceedings, an ever-higher degree of reasonable suspicion/probable cause is required. The fundamental concern of the States is that, at the relatively low levels of BAC established in this rule, driver performance behind the wheel may not be sufficiently erratic to justify stopping a given vehicle much less proceeding with driver testing procedures. Furthermore, even if the driver is already stopped consistent with proper legal procedures, such as at a roadblock or weigh station or pursuant to other legitimate enforcement actions, the lack of reasonable suspicion/probable cause (which are generally not present at the lowest BAC levels) may prohibit proceeding with driver testing procedures.

An analysis of the enforcement problem demonstrates that the States will indeed be able to enforce this rule to the FHWA's satisfaction without compromising their individual positions on legal and constitutional issues. This rule does not require, nor does FHWA intend to mandate, any change in a State's existing procedures for initially stopping vehicles and their drivers for the enforcement of DUI laws. A State will not have to institute 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. On the other hand, FHWA does view the institution of additional enforcement techniques as consonant with the highway safety goals of the Act, and encourages the implementation of such techniques as are legally permissible within a given State.

This rule does, however, intensify the stringency of the procedures and sanctions to be applied to those CMV operators who are stopped, whether the stop is instituted to enforce the State DUI laws or is a routine stop, such as at a weigh station. Any measured alcohol concentration or detected presence of alcohol according to permissible State procedures, will be cause for a 24-hour out-of-service order. Moreover, if an enforcement officer has reasonable suspicion/probable cause or other legal justification to require a CMV operator to submit to alcohol concentration testing as permitted by the State, levels of 0.04 percent and above will subject a driver, after due process, to disqualification under the Act and to such other State sanctions as may be appropriate. Because the final rule specifically extends implied consent to all CDL holders, a CMV operator who refuses a test required of him/her by the State will be subject to the disqualifications of the Act as well. Thus, within the limits of each State's unique compromise between law enforcement needs and the protection of individual rights, the States will be expected to intensify the stringency with which they deal with CMV operators who are identified for alcohol enforcement.

In sum, to be in compliance with the BAC regulations, a State will adopt and enforce legislation that—

1. Establishes 0.04 percent as the BAC level at or above which a person when operating a commercial motor vehicle shall be deemed to be driving under the influence of alcohol according to section 12009 of the Act, and enforces the corresponding disqualification [illegible] of the Act by means of administrative and/or civil proceedings. Nothing in the Act, or in Part 383 as revised in this final rule, requires a State to handle the violation of the disqualifying BAC level as a criminal offense, or to necessarily apply its other DUI sanctions at the 0.04 percent BAC level. However, the States would also be expected to continue to apply their existing criminal and/or administrative DUI statutes to CMV operators found to be operating a vehicle at or above the BAC level otherwise established by State law as DUI, and to subject violators of the disqualifying BAC level to any consequent additional penalties;

2. Establishes and enforces a 24-hour out-of-service sanction against any CMV operator having any measured alcohol concentration or any detected presence of alcohol; and

3. Implements and enforces an implied consent provision for all CMV operators with respect to any testing requisite to the enforcement of the items numbered 1 and 2 above, so that refusal to submit to testing would subject a person to penalties that are no less stringent than those to which testing could lead.

A sample of legislation accomplishing the above purposes, prepared by legal consultants to AAMVA, is reproduced herein as Appendix A.

Furthermore, to be in compliance with the BAC provisions of the Act, a State will *not* have to adopt legislation or procedures which would run counter to the State's constitutional limitations or policy choices on enforcement techniques (e. g., a State would not have to implement roadblocks if such a measure has been held to be unconstitutional by that State's courts.

or if the State chooses not to use that measure). States are, however, encouraged to strengthen their testing methods and procedures.

Section-By-Section Analysis

Section 383.5 Definitions.

Alcohol concentration. "Alcohol concentration," when expressed as a percentage, is here defined to mean grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath. This definition is not intended to restrict the types of bodily fluids tested by the States in order to arrive at the blood or breath alcohol level. Tests of urine or saliva, if part of a State's available procedures, would be perfectly acceptable under this regulation as long as the scientific accuracy of the test meets the State's requirements, and as long as the results are expressible in terms of alcohol concentration as defined herein.

Conviction. Seven States commented that the definition of "conviction" in the regulatory text of the NPRM needed to be revised to include an administrative finding by a State that a violation was committed. Based on Section 6-205(c) of the Uniform Vehicle Code (1987) as adopted by the Legal Services Committee of AAMVA, the revised definition specifically includes such administrative findings. According to this definition, a "conviction" will occur even if a person is referred to a remedial program as a substitute for the imposition of a penalty, fine, or other sanction.

Driving a commercial motor vhicle while under the influence of alcohol. This definition embodies § 383.51(b)(2)(i), which is analyzed in detail further below.

Section 383.51 Disqualification of drivers.

The final rule revises the wording of the *introductory text of paragraph (b)* because the wording in the NPRM, "Disqualification for criminal offenses," implied that the violation of the disqualifying BAC level is to be treated as a criminal offense. However, nothing in the Act requires such a violation to be dealt with exclusively through criminal proceedings. Thus, the revised language, "Disqualification for driving under the influence, leaving the scene of an accident, or commission of a felony," affords a State the flexibility to handle violations of the disqualifying BAC level by whatever administrative and/or criminal procedures it deems appropriate. A conforming change has been made in the wording of the introductory text of paragraph (b)(3) as well.

Paragraph (b)(2)(i) defines the disqualifying offense of "driving a commercial motor vehicle while under the influence of alcohol." This offense may occur in any case meeting any one or more of the following three criteria:

(A) Driving a commercial motor vehicle while the person's alcohol concentration is 0.04 percent or more. This is one of the *per se* offenses of violating the disqualifying BAC level for CMV operators.

(B) The Uniform Vehicle Code (section 11-902(a)(2)) retains the offense of driving under the influence of alcohol to cover cases where no determination of the alcoholic content of a driver's blood was performed or available for use as evidence. For the same reason, the final rule includes the behavioral determination of driving under the influence of alcohol as one of the three criteria, any one or more of which would trigger BAC-related disqualification proceedings if the person is driving a CMV.

(C) Finally, seven States, the NTSB, the NAS, AAMVA, and two other respondents commented that implied consent provisions are essential to the enforcement of the disqualifying BAC level. To be effective, a State must provide that the penalty arising from refusal to take a test that is required of a CMV driver in accordance with State procedures is no less stringent than the worst potential outcome of the test. This can be accomplished by modifying existing implied consent laws or by enacting implied consent laws which apply specifically to CMV drivers. Therefore, the third of the criteria, any one or more of which may trigger proceedings under § 383.51(b)(2)(i), is a refusal to undergo such testing as is required by any State or jurisdiction in the enforcement of the BAC-related disqualification as defined in criteria (A) and/or (B) above.

To be in compliance with the Act, the FHWA would expect a State to ensure by statute that a CMV operator is subject to disqualification proceedings if his/her offense meets *any one* or more of the criteria outlined above. In other words, the FHWA does not intend to give States the option of selecting one or the other of the criteria for enforcement; instead, States are expected to enforce all of them.

In addition, States must ensure that the procedures and consequent penalties for CMV operators' violations of the disqualifying BAC level are in addition to any applicable procedures and penalties under State DUI laws for all drivers. For example, if a CMV operator is found to have a measured BAC level of 0.20, he/she will have violated not only the disqualifying CMV offense but also the State illegal per se statute for DUI. Likewise, if a CMV operator is convicted of "driving under the influence" as specified in State law, he/she would likewise be subject to disqualification for excessive BAC as well as to additional penalties imposed by the State on all motorists so convicted. Finally, in refusing to take the test required under the provisions of this regulation, a CMV operator will most often be violating State implied consent provisions applicable to all drivers, and will thus be subject both to the disqualifications of the Act and to general penalties.

The purpose of the new *paragraph (c)* is to clarify what the FHWA expects each State to do, at a minimum, to be in compliance with section 12009(a)(3) of the Act (49 U.S.C. app. 2708), which requires State enforcement of the alcohol concentration level established herein. The FHWA will not require States to amend their existing criminal statutes dealing with "driving under the influence." Instead, it will suffice for States to establish an administrative procedure to disqualify (by license suspension, revocation, or cancellation) CMV operators who violate any element of paragraph (b)(2)(i) of § 383.51. This administrative procedure would be in addition to any pre-existing State criminal or administrative procedures applicable to the CMV operator's specific offense.

Section 383.72 Implied consent to alcohol testing.

The final rule adds a new section to the CDL testing and licensing portion of Part 383. This new section states that, by the act of driving a CMV, a CDL holder has given his/her implied consent to alcohol testing required of him/her by a State or jurisdiction in the enforcement of the BAC-related disqualifying offense as defined in § 383.51, and of the 24-hour out-of-service provision (Section 392.5) for any positive BAC.

Section 383.131 Test procedures.

The change to paragraph (a)(1) requires the State to inform every CDL applicant of the implied consent stated in new Section 383.72, and of the resultant exposure to procedures and penalties. The purpose of this change is to assure that applicants for the CDL are fully apprised of the terms implicit in their acceptance and use of the CDL. In addition, States are encouraged to mak

full disclosure in the manual (to be provided to all CDL applicants in accord with Section 383.131) of *all* the disqualification offenses and penalties for CMV operators, so that driver applicants will understand that the offenses may have more serious consequences on their CDL than on other types of licenses.

Parts 390 and 391

Part 383 applies to all CMV operators. All drivers covered by Parts 390 and 391 of the FMCSRs are also covered by Part 383, except for drivers in interstate commerce who operate vehicles that have a gross vehicle rating of greater than 10,000 pounds and less than 26,001 pounds, and that are neither placarded for hazardous materials nor designed to carry 16 occupants or more. The purpose of the revision to Part 390 is to incorporate the new definitions for alcohol concentration, conviction, and driving a commercial motor vehicle under the influence of alcohol. These definitions were included in the NPRM under Part 391 revisions. However, with the revisions to Parts 390 and 391 (53 FR 18056) published May 19, 1988 the definitions will now be contained in Part 390. The purpose of the revisions to Part 391, as contained in this final rule, is to make consistent the BAC level requirements for all drivers covered by Part 391. The penalties applicable at 0.04 percent BAC and above will continue to differ for the two groups (CDL-holders and non-CDL-holders) covered by Part 391. The revision to Part 391 also changes the term "criminal offenses" to "criminal and other offenses" to reflect the fact that violation of the 0.04 BAC standard need not be a criminal offense.

Section 392.5 Intoxicating beverages.

The revised paragraph (a)(2) forbids a CMV operator from having "any measured alcohol concentration, or any detected presence of alcohol, while on duty, or operating, or in physical control of a motor vehicle." The penalty for violation of this regulation, as mandated in Section 12008(d)(1) of the Act, is a 24-hour out-of-service order.

The new wording ("*measured * * * or detected * * *"*) follows the recommendations of three States and of the International Association of Chiefs of Police, which noted that "there are many times that the driver will not be available to an instrument for measuring blood alcohol." Each State will have the discretion to determine whether "detection" alone is sufficient to justify imposition of the 24-hour out-of-service penalty, or whether and by what means "measurement" will be required. States will be responsible for enacting appropriate legislation and for issuing conforming policy guidelines to enforcement officials.

The responses of five States exhibited some uncertainty over the applicability of 392.5 to CDL holders who are not in interstate commerce and who are thus not covered by the FMCSRs in Parts 390 through 397. By virtue of the Act (at Sections 12009(a)(21) and 12008(d)(1)), the FHWA believes that State application of § 392.5 *to all CDL holders* is one of the 21 requirements with which States must comply to avoid a withholding of Federal-aid highway funds. The FHWA will, therefore, expect the States to enact legislation adapting § 392.5 to apply to all CDL holders in addition to any other drivers subject to the FMCSRs.

The 24-hour out-of-service penalty for violations of § 392.5 is an explicit requirement of the Act, and is thus not subject to regulatory change. Nevertheless, nine State agencies emphasized potential enforcement difficulties with the 24-hour penalty. For example, States are concerned about what mechanism to use to implement the out-of-service requirement and how to actually keep the driver out of service for the required period. Commenters questioned what should be done with trucks pulled over on the side of the road, the cargo, and the driver, and what records they will be required to keep and transmit. Respondents pointed to problems with the transmittal of out-of-service information, and with recordkeeping for out-of-service violations.

Most of the out of service comments address the mechanics of putting a driver out of service for 24 hours. Currently, if a driver is inspected at a State-operated MCSAP inspection station the standard inspection form must be forwarded to FHWA. If the driver is put out of service this is noted on the form. In 1987 slightly over 1 million state MCSAP inspections were reported, of which 57,581 resulted in driver out-of-service violations. (Admittedly, the majority of these out-of-service sanctions were for less than 24 hours.) If an authorized official takes a driver out of service after stopping him along the road, State procedures, which are not controlled by FHWA, apply. These procedures will not be changed by this regulation.

While foreseeing some difficulties arising when a driver is put out of service at the side of the road, as opposed to an inspection station, the FHWA does not anticipate that these problems will be drastically different from those that now exist with out-of-service orders, which may already be issued under a variety of circumstances. (For instance, drivers are already placed out of service for violations of hours-of-service regulations.) States will be free to implement these orders in whatever way they deem effective. While the State may wish to utilize out-of-service tags, secure the vehicle, or if necessary tow or impound it, these decisions will be made by the States. Whether or not a citation is issued is also a State decision. Recordkeeping and record transmittal practices also do not need to differ from those currently used.

Although 46 State agencies commented on the proposed rule, only nine presented comments which suggested difficulties with this proposal. Of eleven State police agencies that commented, only three suggested difficulties with the proposal. One, New Jersey, commented that this proposal should be workable.

Regulatory Impact

The FHWA has determined that this action does not constitute a major rule under Executive Order 12291. The rule is not expected to result in an annual effect on the economy of $100 million or more, or lead to a major increase in costs or prices, or have significant adverse effects on the United States economy. However, because of the public interest in the issue of CMV safety and alcohol use and the expected benefit in transportation safety, this rule is considered significant under the regulatory policies and procedures of the DOT. For this reason, and pursuant to Executive Order 12498, this rulemaking action has been included on the Regulatory Program for significant rulemaking actions.

The economic impacts of this rulemaking that will occur are primarily mandated by the statutory provisions themselves. The FHWA has prepared an overall regulatory evaluation for the various motor vehicle rulemaking actions that will be issued to implement the Act. This evaluation, which addresses some of the provisions contained in the final rule issued on June 1, 1987 (52 FR 20574, FHWA Docket No. MC-125), and the testing and licensing standards issued on July 21, 1988 (53 FR 27628 FHWA Docket No. 87-18), is in the public docket and available for inspection in the Headquarters office of the FHWA, Room 4232, 400 Seventh Street, SW., Washington, DC 20590. Specific impacts associated with this NPRM were analyzed in the NAS study and are summarized below.

The NAS study examined the costs and benefits of a scenario which

involved increased enforcement at three BAC levels, 0.10, 0.04, and zero percent. In this enforcement scenario, passive sensors and/or portable breath testers were assumed to be used. Using $1 million as the value of a life, the specified minimum value for DOT regulatory purposes, the benefit to cost ratio for the 0.10 percent BAC option would be 6.8 to 1. For both the 0.04 percent and zero BAC options the benefit cost ratio was found to be 8.7 to 1.

Using the same increased enforcement strategy assumptions, but assuming that the use of passive sensors and or portable breath testers would not be legally permitted, resulted in benefit-to-cost ratio ranging from 4.1 to 1 to 4.9 to 1 for the three BAC levels studied.

As noted in the NAS report, the estimated benefits and costs are based on extrapolation from a limited and imperfect data base. Nonetheless, the benefits would have to be overestimated in excess of 850 percent, relative to cost, before any of the stated increased enforcement levels and/or lower BAC levels would not be cost-effective when the above devices are used to determine probable cause. Greatest absolute benefits were with the zero BAC option with the least being at 0.10 percent BAC.

A significant part of the motor carrier industries covered by the Act are made up of small firms, from one-person, one-truck operations of some owner-operators, to the thousands of small fleet operators throughout the country. For this reason, the benefit and cost considerations described in the NAS study and the regulatory evaluation as applicable to employers and the motor carrier industry in general, are equally applicable to the small entity component of the industry. Small entities have been represented at public meetings held to discuss the Act and have had opportunities to submit comments to the public docket established in conjunction with FHWA's ANPRM of March 23, 1987 (52 FR 9192) and the NPRM of May 10, 1988 (53 FR 16656). The FHWA is fully committed to doing all that it can to ensure that no undue burdens are placed on small entities as a result of this proposal.

Federalism Assessment

This action amends portions of the FMCSRs primarily to include driving at BAC levels of 0.04 percent or higher as a disqualifying offense for CMV operators. Section 12006(f) of the Act directs the Secretary to take this action pursuant to notice and comment rulemaking. Failure to establish a BAC level will result in the adoption of a 0.04 level by operation of law.

State laws and regulations are not preempted by this action. However, in order to avoid a withholding of Federal-aid highway funds, States are required to adopt for CMV operators the BAC level established pursuant to this rulemaking or that level which is established by Section 12006 if the agency does not set the level, as well as conforming laws and procedures necessary to enforce the new requirements.

The statutory basis for this action is expressly set forth in the Act [Section 12006(f)]. The FHWA has carefully considered the federalism implications of this action in light of the principles, criteria, and requirements of the President's Executive Order on Federalism, E.O. 12612, October 26, 1987. This action limits the policy making discretion of the States only to the extent required by the Act, and does so only to achieve the national safety goals of the Act. This action would impose only minimal additional costs and burdens on the States. The FHWA does not believe that this action would materially reduce the scope of the governmental functions discharged by the States, or other aspects of State sovereignty. Furthermore, the final rule accords significant flexibilities to the States in the implementation of the congressionally-mandated BAC standards. For example, States will be able to treat violations of the 0.04 BAC level as administrative and/or criminal proceedings. For all these reasons, the FHWA believes that this action will be consistent with the President's Executive Order on Federalism.

Appendix A—Typical example of State implementing legislation.

The following excerpts from the fifth draft of the Model Uniform Commercial Driver's License Act (prepared in July 1988 by the Model CDL Law Subcommittee of the Legal Services Committee of AAMVA) exemplify the approaches that States may wish to consider in meeting the requirements of the final rule. Adoption of this specific wording is not binding on the States. Furthermore, States are advised that AAMVA is continuing to refine its model legislation, and is expected to incorporate the results of this final rule in its subsequent editions. However, the FHWA believes that this draft contains a useful approach to the substance of this rule.

Section 12: Disqualification and cancellation

(a) *Disqualification offenses*

Any person is disqualified from driving a CMV for a period of not less than one year if convicted of a first violation of:

(1) Driving a commercial motor vehicle under the influence of alcohol or a controlled substance;

(2) Driving a commercial motor vehicle while the alcohol concentration of the person's blood [,] [or] breath [, or other body substance] is 0.04 or more.

* * * * *

(5) Refusal to submit to a test to determine the driver's alcohol concentration while driving a commercial motor vehicle.

If any of the above violations occurred while transporting a hazardous material required to be placarded, the person is disqualified for a period of not less than three years.

(b) A person is disqualified for life if convicted of two or more violations of any of the offenses specified in paragraph (a), or any combination of those offenses, arising from two or more separate incidents.

* * * * *

Section 13. Commercial drivers prohibited from operating with any alcohol in system.

(a) Notwithstanding any other provision of this [Code], a person may not drive, operate or be in physical control of a CMV while having alcohol in his or her system.

(b) A person who drives, operates, or is in physical control of a CMV while having alcohol in his or her system or who refuses to take a test to determine [his/her] alcohol content as provided by [Section 14 of this draft model legislation] must be placed Out-of-Service for 24 hours.

Section 14. Implied consent requirements for CMV drivers.

(a) A person who drives a CMV within this State is deemed to have given consent, subject to provisions of [cite State law establishing alcohol testing standards] to take a test or tests of that person's blood, breath, or urine for the purpose of determining that person's alcohol concentration, or the presence of other drugs.

(b) A test or tests may be administered at the direction of a law enforcement officer, who after stopping or detaining the CMV driver, has probable cause to believe that driver was driving a CMV while having alcohol in his/her system.

(c) A person requested to submit to a test as provided in subsection (a) above must be warned by the law enforcement officer requesting the test, that a refusal to submit to the test will result in that person being disqualified from operating a CMV under [Section of this draft model legislation.]

([ ] person refuses testing, or submits [ ] which discloses an alcohol [ ]ation of 0.04 [percent] or more, the law enforcement officer must submit a sworn report to [State Licensing Agency] certifying that the test was requested pursuant to [subsection (a) above] and that the person refused to submit to testing, or submitted to a test which disclosed an alcohol concentration of 0.04 [percent] or more.

(e) Upon receipt of the sworn report of a law enforcement officer submitted under Subsection (d), the [state licensing agency] must disqualify the driver from driving a commercial motor vehicle under [Section 12 of this draft model legislation].

[Note by the AAMVA model law subcommittee: "To facilitate the alcohol testing of CMV drivers at BACs recommended by the FHWA * * * the Committee recommends incorporation of the above implied consent provision into the

Model State CDL law. The above provision first clarifies the authority of law enforcement officers to request a CMV driver to submit to a test of their alcohol concentration at lower levels than currently allowed under State implied consent laws. The adoption of this provision would also eliminate the necessity of officers estimating a driver's specific BAC at roadside, as a condition to requesting a CMV driver taking an alcohol test. Appropriate administrative actions would then be imposed upon the test results. Since drivers face being disqualified from operating a CMV, for test results of 0.04 or greater, the Committee recommends adopting a like disqualification period for those who refuse to be tested. To insure that the sanctioning of CMV drivers complies with due process requirements, each State should integrate provisions of the Act into existing notice, hearing, and appeal procedures currently utilized for other motor vehicle administrative sanctioning actions."]

* * * * *

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

In consideration of the foregoing, the FHWA hereby amends Title 49, Code of Federal Regulations, Chapter III, Subchapter B, as set forth below:

List of Subjects in 49 CFR Parts 383, 390, 391, and 392

Highway safety driver requirements, Highways and roads, Licensing, Motor carriers—Driver qualification, Reporting and recordkeeping requirements.

(Catalog of Federal Domestic Assistance Program Number 20.217, Motor Carrier Safety)

Issued on September 29, 1988.

Robert E. Farris,

Federal Highway Administrator.

PART 383—COMMERCIAL DRIVER'S LICENSE STANDARDS; REQUIREMENTS AND PENALTIES

1. The authority citation for Part 383 continues to read as follows:

Authority: Title XII of Pub. L. 99-570, 100 Stat. 3207-170; 49 U.S.C. 3102; 49 U.S.C. App. 2505; 49 CFR 1.48.

2. Section 383.5 is amended by adding two definitions and revising the definition entitled "conviction," placing them in alphabetical order as follows:

§ 383.5 Definitions.

* * * * *

"Alcohol concentration" (AC) means the concentration of alcohol in a person's blood or breath. When expressed as a percentage it means grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath.

* * * * *

"Conviction" means an unvacated adjudication of guilt, or a determination that a person has violated or failed to comply with the law in a court of original jurisdiction or by an authorized administrative tribunal, an unvacated forfeiture of bail or collateral deposited to secure the person's appearance in court, a plea of guilty or nolo contendere accepted by the court, the payment of a fine or court cost, or violation of a condition of release without bail, regardless of whether or not the penalty is rebated, suspended, or probated."

* * * * *

"Driving a commercial motor vehicle while under the influence of alcohol" means committing any one or more of the following acts in a CMV: driving a CMV while the person's alcohol concentration is 0.04 percent or more; driving under the influence of alcohol, as prescribed by State law; or refusal to undergo such testing as is required by any State or jurisdiction in the enforcement of § 383.51(b)(2)(i)(A) or (B), or § 392.5(a)(2).

* * * * *

§ 383.51 [Amended]

3. In § 383.51, paragraph (b) is revised, and a new paragraph (d) is added, to read as follows:

§ 383.51 Disqualification of drivers.

* * * * *

(b) Disqualification for driving while under the influence, leaving the scene of an accident, or commission of a felony.

(1) *General rule.* A driver who is convicted of a disqualifying offense specified in paragraph (b)(2) of this section, is disqualified for the time specified in paragraph (b)(3) of this section, if the offense was committed while operating a commercial motor vehicle.

(2) *Disqualifying offenses.* The following offenses are disqualifying offenses:

(i) Driving a commercial motor vehicle while under the influence of alcohol. This shall include:

(A) Driving a commercial motor vehicle while the person's alcohol concentration is 0.04 percent or more; or

(B) Driving under the influence of alcohol, as prescribed by State law; or

(C) Refusal to undergo such testing as is required by any State or jurisdiction in the enforcement of § 383.51(b)(2)(i)(A) or (B), or § 392.5(a)(2).

(ii) Driving a commercial motor vehicle while under the influence of a controlled substance as defined under Section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), including all substances listed in Schedules I through V of 21 CFR Part 1308, as they may be amended from time to time. Schedule I substances are identified in Appendix D of this subchapter and Schedules II through V are identified in Appendix E of this subchapter.

(iii) Leaving the scene of an accident involving a commercial motor vehicle;

(iv) A felony involving the use of a commercial motor vehicle, other than a felony described in paragraph (b)(2)(v) of this section; or

(v) The use of a commercial motor vehicle in the commission of a felony involving manufacturing, distributing, or dispensing a controlled substance when defined as any substance under Section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)) including all substances listed in Schedules I through V of 21 CFR Part 1308, as they may be amended from time to time. Schedule I substances are identified in Appendix D of this subchapter and Schedules II through V are identified in Appendix E of this subchapter.

(3) *Duration of disqualification for driving while under the influence, leaving the scene of an accident, or commission of a felony.*

(i) *First offenders.* A drive is disqualified for 1 year after the date the driver is found to have committed an offense described in paragraphs (b)(2)(i) through (b)(2)(iv) of this section, provided the vehicle was not transporting hazardous materials required to be placarded under the Hazardous Materials Transportation Act (49 U.S.C. App. 1801-1813).

(ii) *First offenders transporting hazardous materials.* A driver is disqualified for 3 years after the date the driver is found to have committed an offense described in paragraphs (b)(2)(i) through (b)(2)(iv) of this section, if the vehicle was transporting hazardous materials required to be placarded under the Hazardous Materials Transportation Act (49 U.S.C. App. 1801-1813).

(iii) *First offenders of controlled substance felonies.* A driver is disqualified for life after the driver is found to have committed an offense described in paragraph (b)(2)(v) of this section.

(iv) *Subsequent Offenders.* A driver is disqualified for life after the date the driver is found to have committed an offense described in paragraphs (b)(2)(i) through (b)(2)(iv) of this section, if the driver had been found to have

committed once before any offense described in paragraphs (b)(2)(i) through (b)(2)(iv) of this section.

• • • • •

(d) *Substantial compliance by States.* (1) Nothing in this rule shall be construed to require a State to apply its criminal or other sanctions for driving under the influence to a person found to have operated a commercial motor vehicle with an alcohol concentration of 0.04 percent, except licensing sanctions including suspension, revocation, or cancellation.

(2) A State that enacts and enforces through licensing sanctions the disqualifications prescribed in § 383.51(b) at the 0.04 alcohol concentration level and gives full faith and credit to the disqualification of commercial motor vehicle drivers by other States shall be deemed in substantial compliance with section 12009(a)(3) of the Commercial Motor Vehicle Safety Act of 1986.

• • • • •

4. Section 383.72 is added to Subpart E, as follows:

§ 383.72 Implied consent to alcohol testing.

Any person who holds a CDL shall be deemed to have consented to such testing as is required of him/her by any State or jurisdiction in the enforcement of § 383.51(b)(2)(i) and § 392.5(a)(2). Consent is implied by driving a commercial motor vehicle.

5. Section 383.131 is amended by revising paragraph (a)(1) to read as follows:

§ 383.131 Test procedures.

(a) • • •

(1) Information on the requirements described in § 383.71, the implied consent to alcohol testing described in § 383.72, the procedures and penalties, contained in § 383.51(b) to which a CDL holder is exposed for refusal to comply with such alcohol testing, State procedures described in § 383.73, and other appropriate driver information contained in Subpart E of this part;

• • • • •

PART 390—FEDERAL MOTOR CARRIER SAFETY REGULATIONS: GENERAL

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

Authority: 49 U.S.C. App. 2503 and 2505; 49 U.S.C. 3102 and 3104; 49 CFR 1.48.

7. Section 390.5 is amended by adding three definitions.

§ 390.5 Definitions.

• • • • •

"Alcohol concentration" (AC) means the concentration of alcohol in a person's blood or breath. When expressed as a percentage it means grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath.

"Conviction" means an unvacated adjudication of guilt, or a determination that a person has violated or failed to comply with the law in a court of original jurisdiction or by an authorized administrative tribunal, an unvacated forfeiture of bail or collateral deposited to secure the person's appearance in court, a plea of guilty or nolo contendere accepted by the court, the payment of a fine or court cost, or violation of a condition of release without bail, regardless of whether or not the penalty is rebated, suspended, or probated.

"Driving a commercial motor vehicle while under the influence of alcohol" means committing any one or more of the following acts in a CMV: driving a CMV while the person's alcohol concentration is 0.04 percent or more; driving under the influence of alcohol, as prescribed by State law; or refusal to undergo such testing as is required by any State or jurisdiction in the enforcement of § 383.51(b)(2)(i)(A) or (B), or § 392.5(a)(2).

• • • • •

PART 391—QUALIFICATIONS OF DRIVERS

8. The authority citation for Part 391 continues to read as follows:

Authority: 49 U.S.C. App. 2505; 49 U.S.C. 504 and 3102; 49 CFR 1.48.

9. In § 391.15, paragraph (c) is revised to read as follows:

§ 391.15 Disqualification of drivers.

• • • • •

(c) Disqualification for criminal and other offenses.

1. *General rule.* A driver who is convicted of (or forfeits bond or collateral upon a charge of) a disqualifying offense specified in paragraph (c)(2) of this section is disqualified for the period of time specified in paragraph (c)(3) of this section, if—

(i) The offense was committed during on-duty time as defined in § 395.2(a) of this subchapter or as otherwise specified; and

(ii) The driver is employed by a motor carrier or is engaged in activities that are in furtherance of a commercial enterprise in interstate, intrastate, or foreign commerce;

(2) *Disqualifying offenses. The* following offenses are disqualifying offenses:

(i) Driving a commercial motor vehicle while under the influence of alcohol. This shall include:

(A) Driving a commercial motor vehicle while the person's alcohol concentration is 0.04 percent or more;

(B) Driving under the influence of alcohol, as prescribed by State law; or

(C) Refusal to undergo such testing as is required by any State or jurisdiction in the enforcement of § 391.15(c)(2)(i)(A) or (B), or § 392.5(a)(2).

(ii) Driving a motor vehicle under the influence of a Schedule I drug or other substance identified in Appendix D to this subchapter [1], an amphetamine, a narcotic drug, a formulation of an amphetamine or a derivative of a narcotic drug;

(iii) Transportation, possession, or unlawful use of a Schedule I drug or other substance identified in Appendix D of this subchapter [1], amphetamines, narcotic drugs, formulations of an amphetamine, or derivatives of narcotic drugs while on on-duty time;

(iv) Leaving the scene of an accident which resulted in injury or death; or

(v) A felony involving the use of a motor vehicle.

(3) *Duration of disqualification*—(i) *First offenders.* A driver is disqualified for 1 year after the date of conviction or forfeiture of bond or collateral if, during the 3 years preceding that date, the driver was not convicted of, or did not forfeit bond or collateral upon a charge of an offense that would disqualify the driver under the rules of this section. Exemption. The period of disqualification is 6 months if the conviction or forfeiture of bond or collateral soley concerned the transportation or possession of substances named in paragraph (c)(2)(iii) of this section.

(ii) *Subsequent offenders.* A driver is disqualified for 3 years after the date of his conviction or forfeiture of bond or collateral if, during the 3 years preceding that date, he was convicted of, or forfeited bond or collateral upon charge of, an offense that would disqualify him under the rules in this section.

PART 392—DRIVING OF MOTOR VEHICLES

10. The authority citation for Part 39 continues to read as follows:

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[1] A copy of the Schedule I drugs and other substances may be obtained by writing to the Director, Office of Motor Carrier Standards, Washington, DC 20590, or to any Regional office Motor Carrier and Highway Safety of the Federal Highway Administration at the address given in § 390.27 of this subchapter.

Authority: 49 U.S.C. App. 2305; 49 U.S.C. 3102; 49 CFR 1.48.

11. In Part 392, § 392.5(a)(2) is revised to read as follows:

§ 392.5 Intoxicating beverages.

(a) • • •

(1) • • •

(2) Consume an intoxicating beverage regardless of its alcohol content, be under the influence of an intoxicating beverage, or have any measured alcohol concentration or any detected presence of alcohol, while on duty, or operating, or in physical control of a motor vehicle; or

• • • • •

[FR Doc. 88-22835 Filed 9-30-88; 8:45 am]

BILLING CODE 4910-62-M

	currently DWI under AS 28.35.030	HB 317 DWI under AS 28.35.039
Class A Misdemeanor	Yes	Yes
Mandatory Jail Term	Yes	No
Mandatory Fine	Yes	No
Suspended Sentence Permitted	No	Yes
Mandatory Treatment	Yes	No
Mandatory Court Revocation	Yes	No
Mandatory Administrative Revocation	Yes	No
Permissive Forfeiture For Repeat Offenders	Yes	No
Counts As Prior Conviction For DWI Sentencing, License Revocation, or Forfeiture	Yes	No

COMPARISON OF PENALTIES
CSHB 53 (JUD)

CRIME	CURRENT LAW	CSHB 53 (Jud)
1st DWI	3 days in jail; 90 day loss/license $250 fine	3 days in jail; 90 day loss/license Earn back last 60 dy $250 fine
2nd DWI	20 days in jail; 1 yr loss/license $500 fine	20 days in jail; 1 yr loss/license Earn back last 60 dy $500 fine
3rd DWI	30 days in jail; 10 yr loss/license $1000 fine	60 days in jail; 5 yr loss/license Earn back last 2 yrs $1000 fine
4th DWI	30 days in jail; 10 yr loss/license $1000 fine	120 days in jail; 10 yr loss/license Earn back last 5 yrs $2000 fine
5th DWI	30 days in jail; 10 yr loss/license $1000 fine	240 days in jail; 10 yr loss/license Earn back last 5 yrs $3000 fine
6th DWI	30 days in jail; 10 yr loss/license $1000 fine	360 days in jail; 10 yr loss/license Earn back last 5 yrs $4000 fine
DWLR/DWLS 1/non-DWI	10 days in jail; 1 yr loss/license	10 days/jail w/10 sus 90 day loss/license 80 hrs comm. service
DWLR/DWLS 2/non-DWI	10 days in jail; 1 yr loss/license	10 days in jail 90 day loss/license
DWLR/DWLS Court ordered revoc for 1/DWI	30 days in jail; 1 yr loss/license $500 fine	20 days/jail w/10 sus 90 day loss/license 80 hrs comm. service $500 fine
DWLR/DWLS Court ordered revoc for 2 or more DWI	90 days in jail; 1 yr loss/license $1000 fine	30 days in jail; 90 day loss/license $1000 fine

ALASKA STATUTES

Title 28
Motor Vehicles

SEPTEMBER 1989

Collateral references. — Criminal offenses in connection with rental of motor vehicles, 38 ALR3d 949.

Article 2. Offenses Related to Alcohol and Controlled Substances; Implied Consent.

Sec. 28.35.029. Open container. (a) A person may not drive a motor vehicle on a highway or vehicular way or area, when there is an open bottle, can, or other receptacle containing an alcoholic beverage in the passenger compartment of the vehicle, except as provided in (b) of this section.

(b) A person may transport an open bottle, can, or other receptacle containing an alcoholic beverage

(1) in the trunk of a motor vehicle;

(2) on a motor driven cycle, or behind the last upright seat in a motor home, station wagon, hatchback, or similar trunkless vehicle, if the open bottle, can, or other receptacle is enclosed within another container;

(3) behind a solid partition that separates the vehicle driver from the area normally occupied by passengers; or

(4) if the open bottle, can, or other receptacle is in the possession of a passenger in a commercial motor vehicle.

(c) In this section

(1) "alcoholic beverage" has the meaning given in AS 04.21.080(b);

(2) "commercial motor vehicle" means a motor vehicle for which the owner receives direct monetary compensation and that has a capacity of 12 or more persons;

(3) "motor vehicle" means a vehicle for which a driver's license is required;

(4) "open" includes having a broken seal;

(5) "passenger compartment" means the area normally occupied by the driver and passengers and includes a utility or glove compartment accessible to the driver or a passenger while the motor vehicle is being operated.

(d) A person who violates (a) of this section is guilty of an infraction. (§ 1 ch 142 SLA 1988)

Sec. 28.35.030. Operating a vehicle, aircraft or watercraft while intoxicated. (a) A person commits the crime of driving while intoxicated if the person operates or drives a motor vehicle or operates an aircraft or a watercraft

(1) while under the influence of intoxicating liquor, or any controlled substance listed in AS 11.71.140 — 11.71.190;

(2) when, as determined by a chemical test taken within four hours after the alleged offense was committed, there is 0.10 percent or more by weight of alcohol in the person's blood or 100 milligrams or more of alcohol per 100 milliliters of blood, or when there is 0.10 grams or more of alcohol per 210 liters of the person's breath; or

(3) while the person is under the combined influence of intoxicating liquor and another substance.

(b) Driving while intoxicated is a class A misdemeanor.

(c) Upon conviction under this section the court shall impose a minimum sentence of imprisonment of not less than 72 consecutive hours and a fine of not less than $250 if the person has not been previously convicted in this or another jurisdiction of driving while intoxicated under this or another law or ordinance with substantially similar elements or refusal to submit to a chemical test under AS 28.35.032 or another law or ordinance with substantially similar elements. Upon conviction under this section the court shall impose a minimum sentence of imprisonment of not less than 20 consecutive days and a fine of not less than $500 if, within the preceding 10 years, the person has been previously convicted once in this or another jurisdiction of driving while intoxicated under this or another law or ordinance with substantially similar elements or refusal to submit to a chemical test under AS 28.35.032 or another law or ordinance with substantially similar elements. Upon conviction under this section the court shall impose a minimum sentence of imprisonment of not less than 30 consecutive days and a fine of not less than $1,000 if, within the preceding 10 years, the person has been previously convicted in this or another jurisdiction of more than one of the following offenses or has more than once been previously convicted of one of the following offenses: (1) driving while intoxicated under this or another law or ordinance with substantially similar elements; (2) refusal to submit to a chemical test under AS 28.35.032 or another law or ordinance with substantially similar elements. The execution of sentence may not be suspended nor may probation be granted except on condition that the minimum imprisonment provided in this section is served. Probation may be conditioned as provided in AS 12.55.102. Imposition of sentence may not be suspended. In addition, if the offense involved driving a motor vehicle for which a driver's license is required, the person's driver's license shall be revoked in accordance with AS 28.15.181 and the vehicle used in commission of the offense may be forfeited under AS 28.35.036. In addition, the court shall order, and a person

convicted under this section shall undertake, for a term specified by the court, that program of alcohol education or rehabilitation that the court, after consideration of any information compiled under (d) of this section, finds appropriate.

(d) Except as prohibited by federal law or regulation, every provider of treatment programs to which persons are ordered under (c) of this section shall supply the Alaska court system with the information regarding the condition and treatment of those persons as the supreme court may require by rule. Information compiled under this subsection is confidential and may only be used by a court in sentencing a person convicted under (c) of this section, or by an officer of the court in preparing a presentence report for the use of the court in sentencing a person convicted under (c) of this section.

(e) A person who is sentenced to imprisonment for 72 consecutive hours upon a first conviction under (c) of this section and who is not released from imprisonment after 72 hours may not bring an action against the state or a municipality or its agents, officers, or employees for damages resulting from the additional period of confinement if

(1) the employee or employees who released the person exercised due care and, in releasing the person, followed the standard release procedures of the prison facility; and

(2) the additional period of confinement did not exceed 12 hours.

(f) For purposes of this section, convictions for both driving while intoxicated and for refusal to submit to a chemical test of breath under AS 28.35.031(a), if arising out of a single transaction and a single arrest, are considered one previous conviction.

(g) Notwithstanding (c) of this section, if the court imposes probation under AS 12.55.102 the court may reduce the fine required to be imposed under (c) of this section by the cost of the ignition interlock device.

(h) In this section,

(1) "operate an aircraft" means to use, navigate, pilot, or taxi an aircraft in the airspace over this state, or upon the land or water inside this state;

(2) "operate a watercraft" means to navigate or use a vessel used or capable of being used as a means of transportation on water for recreational or commercial purposes on all waters, fresh or salt, inland or coastal, inside the territorial limits or under the jurisdiction of the state. (§ 50-5-3 ACLA 1949; am § 1 ch 107 SLA 1955; am § 1 ch 121 SLA 1967; am § 45 ch 32 SLA 1971; am § 4 ch 74 SLA 1974; am §§ 2, 3 ch 152 SLA 1978; am § 28 ch 91 SLA 1980; am § 10 ch 129 SLA 1980; am § 21 ch 45 SLA 1982; am §§ 13 — 15 ch 117 SLA 1982; am §§ 13 — 15 ch 77 SLA 1983; am §§ 4, 5 ch 57 SLA 1989)

Sec. 28.35.031. Implied consent. (a) A person who operates or drives a motor vehicle in this state or who operates an aircraft as defined in AS 28.35.030(h)(1) or who operates a watercraft as defined in AS 28.35.030(h)(2) shall be considered to have given consent to a chemical test or tests of the person's breath for the purpose of determining the alcoholic content of the person's blood or breath if lawfully arrested for an offense arising out of acts alleged to have been committed while the person was operating or driving a motor vehicle or operating an aircraft or a watercraft while intoxicated. The test or tests shall be administered at the direction of a law enforcement officer who has reasonable grounds to believe that the person was operating or driving a motor vehicle or operating an aircraft or a watercraft in this state while intoxicated.

(b) A person who operates or drives a motor vehicle in this state or who operates an aircraft or watercraft shall be considered to have given consent to a preliminary breath test for the purpose of determining the alcoholic content of the person's blood or breath. A law enforcement officer may administer a preliminary breath test at the scene of the incident if the officer has reasonable grounds to believe that a person's ability to operate a motor vehicle, aircraft, or watercraft is impaired by the ingestion of alcoholic beverages and that the person

(1) was operating or driving a motor vehicle, aircraft, or watercraft that is involved in an accident;

(2) committed a moving traffic violation or unlawfully operated an aircraft or watercraft; in this paragraph, "unlawfully" means in violation of any federal, state, or municipal statute, regulation, or ordinance, except for violations that do not provide reason to believe that the operator's ability to operate the aircraft or watercraft was impaired by the ingestion of alcoholic beverages; or

(3) was operating or driving a motor vehicle in violation of AS 28.35.029(a).

(c) Before administering a preliminary breath test under (b) of this section, the officer shall advise the person that refusal may be used against the person in a civil or criminal action arising out of the incident and that refusal is an infraction. If the person refuses to submit to the test, the test shall not be administered.

(d) The result of the test under (b) of this section may be used by the law enforcement officer to determine whether the driver or operator should be arrested.

(e) Refusal to submit to a preliminary breath test at the request of a law enforcement officer is an infraction.

(f) If a driver or operator is arrested, the provisions of (a) of this section apply. The preliminary breath test authorized in this section is in addition to any tests authorized under (a) of this section. (§ 1 ch 83 SLA 1969; am § 11 ch 129 SLA 1980; am § 16 ch 117 SLA 1982; am

§ 16 ch 77 SLA 1983; am §§ 1 — 4 ch 76 SLA 1985; am § 2 ch 142 SLA 1988)

Revisor's notes. — The last clause of (b)(2) of this section was enacted as AS 28.35.031(g). Reorganized in 1985.

Effect of amendments. — The 1985 amendment in subsection (b) inserted "or who operates an aircraft or watercraft" in the first sentence, inserted "aircraft, or watercraft" in the second sentence, in paragraph (1) inserted "operating or" and "aircraft, or watercraft," and in paragraph (2) added the language beginning "or unlawfully operated"; and in subsections (d) and (f) inserted "or operator."

The 1988 amendment, in subsection (b), deleted "or" at the end of paragraph (1), added "or" at the end of paragraph (2), and added paragraph (3).

Opinions of attorney general. — The Intoximeter 3000, an infrared alcohol breath test apparatus, is a "chemical test" under this section. 1984 Op. Att'y Gen. No. 01.

NOTES TO DECISIONS

Editor's notes. — Anchorage v. Geber, 592 P.2d 1187 (Alaska 1979), and other cases cited in the notes below, were decided prior to the enactment of AS 28.35.035, which authorizes the administration of a chemical test without consent in certain circumstances to determine the amount of alcohol in breath or blood.

Section constitutional. — The portable breath test authorized by this section does not constitute an unreasonable search under the fourth amendment to the United States Constitution. Leslie v. State, 711 P.2d 575 (Alaska Ct. App. 1986).

The imposition of criminal penalties upon a motorist for his peaceful refusal to submit to a breath test does not violate his right to equal protection under the law. Burnett v. Municipality of Anchorage, 634 F. Supp. 1029 (D. Alaska), aff'd, 806 F.2d 1447 (9th Cir. 1986).

The implied consent statute clearly serves a legitimate state interest. All drivers lawfully stopped are treated equally, and, from the perspective of the fourth and fourteenth amendments, those drivers are treated no differently from other sorts of persons suspected of committing criminal acts. 806 F.2d 1447 (9th Cir. 1986).

Legislative intent. — In the implied consent statutes, the legislature has gone to great lengths to avoid authorizing the police to take blood alcohol tests forcibly from defendants charged with driving while intoxicated; the legislature has, instead, provided extremely strong incentives to a defendant to take a breath test for blood alcohol by providing criminal penalties. Bass v. Municipality of Anchorage, 692 P.2d 961 (Alaska Ct. App. 1984).

Consent to breathalyzer test when driver operates motor vehicle in state. — It is clear from this section that a driver consents to take the breathalyzer test when he operates a motor vehicle in the State of Alaska. State v. Nease, Superior Court, 1st Jud. Dist., Cr. No. 72-23 (1972).

Just as a driver's failure to cooperate in the search conducted by means of a breathalyzer test is no impediment to the classification of the proceeding as a search incident to arrest, the absence of cooperation is no bar to the characterization of the taking of breath as a consent search for which consent has already been supplied by the act of driving on Alaska roads. Burnett v. Municipality of Anchorage, 634 F. Supp. 1029 (D. Alaska), aff'd, 806 F.2d 1447 (9th Cir. 1986).

Analysis of this section and AS 28.35.032 demonstrates the legislature's intention that drivers be considered to have consented to a chemical test for determining the alcohol content of their blood and that refusal on the driver's part to submit to such a test will trigger certain specified consequences. Wirz v. State, 577 P.2d 227 (Alaska 1978).

As the supreme court analyzes the legislature's intent in enacting this section and AS 28.35.032, the sections provide that the operator of a motor vehicle in Alaska has consented to chemical tests of his blood's alcohol content and that after the arrested operator refuses to take the chemical test, he must be advised of the consequences flowing from his contemplated refusal. The arrestee must be permitted to reconsider his refusal in light of that information. Wirz v. State, 577 P.2d 227 (Alaska 1978).

Sec. 28.35.032. Refusal to submit to chemical test. (a) If a person under arrest refuses the request of a law enforcement officer to submit to a chemical test under AS 28.35.031(a), after being advised by the officer that the refusal will, if that person was arrested while operating or driving a motor vehicle for which a driver's license is required, result in the denial or revocation of the license or nonresident privilege to drive, that the refusal may be used against the person in a civil or criminal action or proceeding arising out of an act alleged to have been committed by the person while operating or driving a motor vehicle or operating an aircraft or a watercraft while intoxicated, and that the refusal is a misdemeanor, a chemical test may not be given, except as provided by AS 28.35.035.

(b) *[Repealed, § 25 ch 77 SLA 1983.]*

(c) *[Repealed, § 25 ch 77 SLA 1983.]*

(d) *[Repealed, § 25 ch 77 SLA 1983.]*

(e) The refusal of a person to submit to a chemical test of breath under (a) of this section is admissible evidence in a civil or criminal action or proceeding arising out of an act alleged to have been committed by the person while operating or driving a motor vehicle or operating an aircraft or watercraft while intoxicated.

(f) Refusal to submit to the chemical test of breath authorized by AS 28.35.031(a) is a class A misdemeanor.

(g) Upon conviction of a person under this section, the court shall impose a minimum sentence of imprisonment of not less than 72 consecutive hours and a fine of not less than $250 if the person has not been previously convicted in this or another jurisdiction of driving while intoxicated under AS 28.25.030 or another law or ordinance with substantially similar elements or refusal to submit to a chemical test under this section or another law or ordinance with substantially similar elements. Upon conviction under this section the court shall impose a minimum sentence of imprisonment of not less than 20 consecutive days and a fine of not less than $500 if, within the preceding 10 years, the person has been previously convicted once in this or another jurisdiction of driving while intoxicated under AS 28.35.030 or another law or ordinance with substantially similar elements or refusal to submit to a chemical test under this section or another law or ordinance with substantially similar elements. Upon conviction under this section the court shall impose a minimum sentence of imprisonment of not less than 30 consecutive days and a fine of not less than $1,000, if, within the previous 10 years, the person has been previously convicted in this or another jurisdiction of more than one of the following offenses or has more than once been previously convicted of one of the following offenses: (1) driving while intoxicated under AS 28.35.030 or another law or ordinance with substantially similar elements; (2) refusal to submit to a chemical test under this section or another law or ordinance with substantially similar elements. The

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execution of sentence may not be suspended nor may probation be granted except on condition that the minimum imprisonment provided in this section is served. Probation may be conditioned as provided in AS 12.55.102. Imposition of sentence may not be suspended. If the offense involved driving a motor vehicle for which a driver's license is required, the person's driver's license shall be revoked under AS 28.15.181. In addition, the court shall order, and a person convicted under this section shall undertake, for a term specified by the court, that program of alcohol education or rehabilitation that the court, after consideration of any information compiled under (h) of this section, finds appropriate. The sentence imposed by the court under this subsection shall run consecutively with any other sentence of imprisonment imposed on the committed person.

(h) Except as prohibited by federal law or regulation, every provider of treatment programs to which persons are ordered under (g) of this section shall supply the Alaska court system with the information regarding the condition and treatment of those persons as the supreme court may require by rule. Information compiled under this subsection is confidential and may only be used by a court in sentencing a person convicted under (g) of this section, or by an officer of the court in preparing a pre-sentence report for the use of the court in sentencing a person convicted under (g) of this section.

(i) A person who is sentenced to imprisonment for 72 consecutive hours under (g) of this section and who is not released from imprisonment after 72 hours may not bring an action against the state or a municipality or its agents, officers, or employees for damages resulting from the additional period of confinement if

(1) the employee or employees who released the person exercised due care and, in releasing the person, followed the standard release procedures of the prison facility; and

(2) the additional period of confinement did not exceed 12 hours.

(j) For purposes of this section, convictions for both driving while intoxicated and for refusal to submit to a chemical test of breath under AS 28.35.031(a), if arising out of a single transaction and a single arrest, are considered one previous conviction.

(k) Notwithstanding (g) of this section, if the court imposes probation under AS 12.55.102 the court may reduce the fine required to be imposed under (g) of this section by the cost of the ignition interlock device. (§ 1 ch 83 SLA 1969; am § 28 ch 71 SLA 1972; am § 12 ch 129 SLA 1980; am § 17 ch 117 SLA 1982; am §§ 17 — 20, 25 ch 77 SLA 1983; am § 17 ch 60 SLA 1986; am §§ 6, 7 ch 57 SLA 1989)

Effect of amendments. — The 1986 amendment substituted "may" for "shall" following "chemical test" near the end of subsection (a).

The 1989 amendment, effective August 28, 1989, inserted "Probation may be conditioned as provided in AS 12.55.102" near the end of subsection (g) and added subsection (k).

Legislative history reports. — For re-

In order to convict a person of refusing to submit to a chemical test of his or her breath, the state must prove that the individual in question knew or perhaps should have known that the breath test was sought as evidence in connection with an investigation of his or her driving while intoxicated, and, second, that with that culpable mental state, he or she declined the test. Brown v. State, 739 P.2d 182 (Alaska Ct. App. 1987).

Admission of intoxication. — While a trial court might consider defendant's admission of intoxication in mitigation of punishment, it is not a defense to a refusal to provide a chemical breath test. Brown v. State, 739 P.2d 182 (Alaska Ct. App. 1987).

Duty to public. — This section does not create a duty by the Department of Public Safety toward the public which, if breached, can form the basis of a civil action for negligence against the department. Lundquist v. Department of Pub. Safety, 674 P.2d 780 (Alaska 1983).

Limitation for purposes other than DWI prosecutions. — AS 28.35.032(a) cannot be restricted to apply solely to driving while intoxicated prosecutions, and to the extent that the statute, by providing that "a chemical test shall not be given" following a breathalyzer refusal, affirmatively limits the manner in which evidence of intoxication may be obtained, its limitation must apply with equal force in all prosecutions "arising out of acts alleged to have been committed while the defendant was operating or driving a motor vehicle while intoxicated." Pena v. State, 664 P.2d 169 (Alaska Ct. App. 1983), rev'd on other grounds, 684 P.2d 864 (Alaska 1984).

Conviction affirmed. — See McCracken v. State, 685 P.2d 1275 (Alaska Ct. App. 1984).

Former subsection (b) construed. — See Graham v. State, 633 P.2d 211 (Alaska 1981).

Applied in Skuse v. State, 714 P.2d 368 (Alaska Ct. App. 1986); Callahan v. State, 769 P.2d 444 (Alaska Ct. App. 1989).

Quoted in Cunningham v. State, 768 P.2d 634 (Alaska Ct. App. 1989).

Cited in Wilson v. State, 714 P.2d 362 (Alaska Ct. App. 1984); Witt v. State, 692 P.2d 976 (Alaska Ct. App. 1984); Srala v. Municipality of Anchorage, 765 P.2d 103 (Alaska Ct. App. 1988); Stocker v. State, 766 P.2d 48 (Alaska Ct. App. 1988).

Collateral references. — 7A Am. Jur. 2d. Automobiles and Highway Traffic, §§ 122 to 132, 141.

60 C.J.S., Motor Vehicles, § 164.16; 61A C.J.S., Motor Vehicles, § 593(1).

Requiring submission to physical examination or test as violation of constitutional rights, 25 ALR2d 1407.

Admissibility in criminal case of evidence that accused refused to submit to scientific test to determine amount of alcohol in system, 87 ALR2d 370; 26 ALR4th 1112.

Suspension or revocation of driver's license for refusal to take sobriety test, 88 ALR2d 1064.

Request before submitting to chemical sobriety test to communicate with counsel as refusal to take test, 97 ALR3d 852.

Request for prior administration of additional test as constituting refusal to submit to chemical sobriety test under implied consent law, 98 ALR3d 572.

Validity, construction and application of statutes proscribing driving with blood-alcohol level in excess of established percentage, 54 ALR4th 149.

Use of horizontal gaze nystagmus test in impaired driving prosecution, 60 ALR4th 1129.

Sec. 28.35.033. Presumptions and chemical analysis of breath or blood. (a) Upon the trial of a civil or criminal action or proceeding arising out of acts alleged to have been committed by a person while operating or driving a motor vehicle or operating an aircraft or a watercraft while intoxicated, the amount of alcohol in the person's blood or breath at the time alleged shall give rise to the following presumptions:

(1) If there was 0.05 percent or less by weight of alcohol in the person's blood, or 50 milligrams or less of alcohol per 100 milliliters of the person's blood, or 0.05 grams or less of alcohol per 210 liters of the person's breath, it shall be presumed that the person was not under the influence of intoxicating liquor.

(2) If there was in excess of 0.05 percent but less than 0.10 percent by weight of alcohol in the person's blood, or in excess of 50 but less than 100 milligrams of alcohol per 100 milliliters of the person's blood, or in excess of 0.05 grams but less than 0.10 grams of alcohol per 210 liters of the person's breath, that fact does not give rise to any presumption that the person was or was not under the influence of intoxicating liquor, but that fact may be considered with other competent evidence in determining whether the person was under the influence of intoxicating liquor.

(3) *[Repealed, § 13 ch 129 SLA 1980.]*

(4) If there was 0.10 percent or more by weight of alcohol in the person's blood, or 100 milligrams or more of alcohol per 100 milliliters of the person's blood, or 0.10 grams or more of alcohol per 210 liters of the person's breath, it shall be presumed that the person was under the influence of intoxicating liquor.

(b) For purposes of this chapter, percent by weight of alcohol in the blood shall be based upon milligrams of alcohol per 100 milliliters of blood.

(c) The provisions of (a) of this section may not be construed to limit the introduction of any other competent evidence bearing upon the question of whether the person was or was not under the influence of intoxicating liquor.

(d) To be considered valid under the provisions of this section the chemical analysis of the person's breath or blood shall have been performed according to methods approved by the Department of Public Safety. The Department of Public Safety is authorized to approve satisfactory techniques, methods, and standards of training necessary to ascertain the qualifications of individuals to conduct the analysis. If it is established at trial that a chemical analysis of breath or blood was performed according to approved methods by a person trained according to techniques, methods, and standards of training approved by the Department of Public Safety, there is a presumption that the test results are valid and further foundation for introduction of the evidence is unnecessary.

(e) The person tested may have a physician, or a qualified technician, chemist, registered nurse, or other qualified person of the person's own choosing administer a chemical test in addition to the test administered at the direction of a law enforcement officer. The failure or inability to obtain an additional test by a person does not preclude the admission of evidence relating to the test taken at the direction of a law enforcement officer; the fact that the person under arrest sought

to obtain such an additional test, and failed or was unable so to do, is likewise admissible in evidence.

(f) Upon the request of the person who submits to a chemical test at the request of a law enforcement officer, full information concerning the test, including the results of it, shall be made available to the person or the person's attorney. (§ 1 ch 83 SLA 1969; am § 6 ch 104 SLA 1971; am § 13 ch 129 SLA 1980; am §§ 18 — 20 ch 117 SLA 1982; am E.O. No. 67, § 2 (1987))

Effect of amendments. — The 1987 amendment substituted "The Department of Public Safety" for "The Department of Health and Social Services" in three places in subsection (d).

NOTES TO DECISIONS

Editor's notes. — Anchorage v. Geber, 592 P.2d 1187 (Alaska 1979), cited in the notes below, was decided prior to the enactment of AS 28.35.035, which authorizes the administration of a chemical test without consent in certain circumstances to determine the amount of alcohol in breath or blood.

The Implied Consent Statute was intended to provide an exclusive method for obtaining direct evidence of a suspect's blood alcohol content, absent his or her express consent to the use of some other form of testing. Anchorage v. Geber, 592 P.2d 1187 (Alaska 1979).

No other chemical test allowed after breath test refused. — The express language of AS 28.35.032(a), coupled with the legislative history of the Implied Consent Statute, leads to the conclusion that in enacting the Implied Consent Statute the legislature intended that once a breath test had been refused no other chemical test would be allowed. Anchorage v. Geber, 592 P.2d 1187 (Alaska 1979).

In prosecuting a charge of operating a motor vehicle while under the influence of intoxicating liquor, law enforcement officials cannot utilize the results of a blood alcohol test, when the blood used in performing the test was extracted from the accused against his or her will, after refusal to submit to a breathalyzer examination. Anchorage v. Geber, 592 P.2d 1187 (Alaska 1979).

"Chemical test" means any chemical test. — The language of AS 28.35.032(a) stating that after refusal to submit to a test of the breath, "a chemical test shall not be given," means any chemical test, be it of the breath, blood, urine or otherwise, and not just a chemical test of the breath. Anchorage v. Geber, 592 P.2d 1187 (Alaska 1979).

Alaska legislature has specified the foundational facts necessary for the admissibility of a chemical analysis of breath in subsection (d). Wester v. State, 528 P.2d 1179 (Alaska 1974), cert. denied, 423 U.S. 836, 96 S. Ct. 60, 46 L. Ed. 2d 54 (1975).

This section does not specify the method of proof of the foundational facts, which is controlled by the applicable rules of evidence. Wester v. State, 528 P.2d 1179 (Alaska 1974), cert. denied, 423 U.S. 836, 96 S. Ct. 60, 46 L. Ed. 2d 54 (1975).

Rigid proof of such facts not required. — With the increasing acceptance and reliability of the breathalyzer has come a relaxation of any notion of rigid proof of foundational facts. Wester v. State, 528 P.2d 1179 (Alaska 1974), cert. denied, 423 U.S. 836, 96 S. Ct. 60, 46 L. Ed. 2d 54 (1975).

Effect of last sentence of subsection (d). — The last sentence of subsection (d) merely defines the elements that must be proved before breathalyzer test results may be admitted into evidence; it does not make those results unassailable. Indeed, the statute creates only a presumption of the test's validity. Keel v. State, 609 P.2d 555 (Alaska 1980).

Compliance with "Breathalyzer Operational Checklist" required. — The approved methods of administering the breathalyzer, established by the Department of Health and Social Services in accord with subsection (d) of this section, are set forth in 7 Alaska Administrative Code, SEC 30.020. Completion of the "Breathalyzer Operational Checklist" is the first of 13 procedures established for

proper test administration. Completion of the checklist is required under subsection (d) of this section; however, absolute compliance in completing the checklist is not required in order to render the test results valid and admissible in evidence. Oveson v. Municipality of Anchorage, 574 P.2d 801 (Alaska 1978).

Effect of compliance with "Breathalyzer Operational Checklist". — The "Breathalyzer Operational Checklist" is a simplified method of establishing the admissibility of the evidence. It furnished the court with a clear record that all the substantive test procedures were accomplished, thereby minimizing the possibilities of human error and failed memory. This then warrants the presumption under subsection (d) of this section that the results are valid without any additional showing of foundational facts. If the checklist is not complete, the presumption of validity is inapplicable. But it does not necessarily follow that the test results are, therefore, automatically inadmissible. Oveson v. Municipality of Anchorage, 574 P.2d 801 (Alaska 1978).

Where there has been substantial compliance with the "Breathalyzer Operational Checklist" provision of 7 AAC § 30.020, and where the record demonstrates that the test was properly performed, the test results are admissible under subsection (d) of this section. Oveson v. Municipality of Anchorage, 574 P.2d 801 (Alaska 1978).

Where the checklist for administering the breathalyzer test was complete but for one checkmark, all other pertinent data were filled in, and there was uncontroverted testimony that the step in question was performed despite the failure to check off the box representing that step, once the trier of fact believed the evidence that the step in question was performed, a proper foundation was laid to find the results valid under subsection (d) of this section. Oveson v. Municipality of Anchorage, 574 P.2d 801 (Alaska 1978).

Compliance with the observation period of 7 AAC § 30.020 prior to the administration of the breathalyzer test is a requirement for the admissibility of the test results. Wester v. State, 528 P.2d 1179 (Alaska 1974), cert. denied, 423 U.S. 836, 96 S. Ct. 60, 46 L. Ed. 2d 54 (1975).

Where substantial compliance with the observation period provision is established on the record, a prima facie showing of the foundational fact of the observation period necessary to establish admissibility is satisfied. Wester v. State, 528 P.2d 1179 (Alaska 1974), cert. denied, 423 U.S. 836, 96 S. Ct. 60, 46 L. Ed. 2d 54 (1975); Oveson v. Municipality of Anchorage, 574 P.2d 801 (Alaska 1978).

A clerical error by the breathalyzer test operator ought not to render the results inadmissible without a showing that the validity of the results is tainted. Oveson v. Municipality of Anchorage, 574 P.2d 801 (Alaska 1978).

Mere assertion that ingestion was hypothetically possible ought not to vitiate the observation period foundational fact so as to render the breathalyzer test results inadmissible. Wester v. State, 528 P.2d 1179 (Alaska 1974), cert. denied, 423 U.S. 836, 96 S. Ct. 60, 46 L. Ed. 2d 54 (1975).

Personal testimony not necessary as to breathalyzer calibration or ampoule certification. — While it is required that a qualified witness explain the functional effect of the chemical testing, personal testimony is not required as to the calibration of the instrument or the accuracy of the ampoules. Wester v. State, 528 P.2d 1179 (Alaska 1974), cert. denied, 423 U.S. 836, 96 S. Ct. 60, 46 L. Ed. 2d 54 (1975).

A defendant can guarantee the reliability of the results of a breathalyzer test by retesting the ampoules. The ampoules are preserved and the amount of fluid and the chemical composition of the control ampoule are not significantly altered by performance of the test. Oveson v. Municipality of Anchorage, 574 P.2d 801 (Alaska 1978).

Defendant should be permitted to check the specific ampoules used in his breathalyzer test. Lauderdale v. State, 548 P.2d 376 (Alaska 1976).

Since they could be evidence of propriety of test. — The test and reference ampoules could be probative evidence of the propriety or impropriety of the breathalyzer test. Lauderdale v. State, 548 P.2d 376 (Alaska 1976).

Denial of right to analyze components is reversible error. — Where defendant was charged with operating a motor vehicle while intoxicated, denial of the right to make an analysis of some of the components of the breathalyzer machine, that is to say, to "cross-examine" the results of the test, would be reversible error without any need for a showing of prejudice. It would be a denial of a right to a fair trial, and a fair trial is essential to affording an accused due process of law.

Lauderdale v. State, 548 P.2d 376 (Alaska 1976).

Discretion of district court properly exercised in requiring production of ampoules used in breathalyzer test. — See Lauderdale v. State, 548 P.2d 376 (Alaska 1976).

District court was correct in suppressing results of breathalyzer test where state unable to produce ampoules used in test. — See Lauderdale v. State, 548 P.2d 376 (Alaska 1976).

Rule announced generally to have prospective effect but also to have partial retroactive effect. — See Lauderdale v. State, 548 P.2d 376 (Alaska 1976).

No evidentiary privilege established. — Subsection (a) does not expressly establish an evidentiary privilege, and the Court of Appeals of Alaska stated that it would be inappropriate for the courts to construe subsection (a) as establishing such a privilege by implication. Russell v. Municipality of Anchorage, 706 P.2d 687 (Alaska Ct. App. 1985).

Testing breathalyzer for radio frequency interference. — When a timely and appropriate challenge to admissibility of a breathalyzer test result is made, a municipality must, at a minimum, demonstrate that the breathalyzer instrument in question was tested successfully for radio frequency interference (RFI) at least once in a manner substantially complying with the manufacturer's recommendations, and that none of the conditions for retesting listed in the manufacturer's RFI advisory occurred between the time of the initial RFI test and the challenged breath test. Thayer v. Municipality of Anchorage, 686 P.2d 721 (Alaska Ct. App. 1984).

This section contains no requirement that advice of the right to obtain an independent blood alcohol test be given, and it is not required by any provision of the state or federal constitution. Palmer v. State, 604 P.2d 1106 (Alaska 1979).

Independent chemical test forfeited if not demanded. — A statutory right to an independent sobriety test is available but it is forfeited if not demanded. Gundersen v. Municipality of Anchorage, 762 P.2d 104 (Alaska Ct. App. 1988).

Police interference with independent testing. — The statutory right to an independent sobriety test is actually a motorist's right to be free of police interference when obtaining such a test by his own efforts and at his own expense. Whether the police have substantially interfered with a defendant's opportunity to obtain an independent test is a question of fact to be decided by the trial judge. Gundersen v. Municipality of Anchorage, 762 P.2d 104 (Alaska Ct. App. 1988).

Denial of right to independent chemical test. — Where the police deprive a defendant of his or her statutory right to an independent blood test, the results of the defendant's breath test must be excluded. Ward v. State, 758 P.2d 87 (Alaska 1988).

Police denied defendant his right to obtain an independent blood test, where the only reason given for not taking him to the hospital where he had requested the test be performed was that the state did not have a contract with that hospital. Ward v. State, 758 P.2d 87 (Alaska 1988).

Failure to present evidence of results of independent testing. — Where the court allowed the prosecution to present testimony establishing that the arresting officers gave defendant a sample of his breath for independent testing, and the prosecution was allowed to argue that his failure to present evidence concerning the results of the independent tests of this sample indicated the accuracy of the intoximeter test, any error was clearly harmless since overwhelming evidence was presented to establish that he was under the influence of intoxicating liquor when contacted by the troopers following his arrest and in his own testimony he acknowledged consuming a substantial quantity of alcoholic beverages. Lee v. State, 760 P.2d 1039 (Alaska Ct. App. 1988).

Discovery of results of independent test. — No statute expressly prohibits a blood test of a defendant where the defendant consents to a chemical test of his breath, nor does any statute limit prosecution access to the results of an independent test performed pursuant to subsection (e); the state is entitled to discover the results of any independent test actually obtained. Cunningham v. State, 768 P.2d 634 (Alaska Ct. App. 1989).

Cross-examination improperly restricted. — In a prosecution for operation of a motor vehicle while intoxicated, the court improperly restricted defendant's cross-examination of the person who administered the breathalyzer test when it sustained the state's objection to defendant's line of inquiry, where defendant was seeking through his attempted questioning to raise doubts in the jury's mind

regarding the reliability of the test. Keel v. State, 609 P.2d 555 (Alaska 1980).

Presumption in breathalyzer result. — Under the wording of this section, the breathalyzer result is clearly viewed as the presumptive equivalent of the amount of alcohol in the person's blood "at the time alleged"; in other words, at the time that the offense was committed, not just when the breathalyzer examination was administered. Doyle v. State, 633 P.2d 306 (Alaska Ct. App. 1981).

Substantial compliance with regulations. — Under subsection (d), even if the state does not strictly comply with the regulations, it can still show that it has substantially complied with the regulations in order to establish a sufficient foundation to admit the breathalyzer examination. Ahsogaek v. State, 652 P.2d 505 (Alaska Ct. App. 1982); Gilbreath v. Municipality of Anchorage, 773 P.2d 218 (1989).

Results of the breathalyzer test were admissible even though the records for the breathalyzer instrument showed that it had been calibrated at an interval of 61 days instead of within 60 days as required by 7 AAC § 30.050. Ahsogaek v. State, 652 P.2d 505 (Alaska Ct. App. 1982).

Admission of breath test results where substantial compliance with regulations. — Even where defendant's breath test was administered by an uncertified officer on an intoximeter that was not recalibrated at 60-day intervals as required by 7 AAC 30.050, the test results were still admissible because only substantial compliance with the applicable regulations is required. Herter v. State, 715 P.2d 274 (Alaska Ct. App. 1986).

Breathalyzer packet admissible as evidence. — The admission of the breathalyzer packet as a foundation for the introduction of breathalyzer evidence in a drunk driving case is the introduction of a public record of factual findings recorded in the regular course of official business, made independently and well in advance of any particular prosecution, and does not violate the defendant's right to confrontation under the 6th amendment. State v. Huggins, 659 P.2d 613 (Alaska Ct. App. 1982).

Documents referred to as a breathalyzer packet were admissible under the public records exception to the hearsay rule. State v. Huggins, 659 P.2d 613 (Alaska Ct. App. 1982).

Suppression of breath test results. — A defendant has the burden of showing that by virtue of some action or inaction on the part of the prosecuting authority, he was not furnished a reasonable means of verifying an adverse breath test result. Once the defendant has sustained his burden of showing that he was not furnished a reasonable means of verification, he has established a prima facie case that the breath test results should be suppressed; and in order to avoid suppression, the governmental agency in question must then prove by a preponderance of the evidence that its failure to provide the defendant an independent means of verifying the result was free of fault. State v. Kerr, 712 P.2d 400 (Alaska Ct. App. 1985).

Waiver of objection — In the absence of a specific reservation of the issue during the course of a trial, a party failing to object on foundational grounds to admission of blood- or breath-alcohol test results cannot later object to the application of the statutory presumption of intoxication. Macauly v. State, 734 P.2d 1020 (Alaska Ct. App. 1987).

Effect of alcohol consumption after accident is jury question. — The issue of whether and to what extent defendant's consumption of alcohol after the accident but before a breathalyzer examination affected his breathalyzer result was a question which was properly left for the jury. Doyle v. State, 633 P.2d 306 (Alaska Ct. App. 1981).

Jury should be made aware of statutory presumption. — A jury considering drunk driving, assault (involving motor vehicles), manslaughter, and negligent homicide cases should be made aware of the statutory presumption concerning intoxication in subsection (a). Dresnek v. State, 697 P.2d 1059 (Alaska Ct. App. 1985), aff'd, 718 P.2d 156 (Alaska), cert. denied, 479 U.S. 1021, 107 S. Ct. 679, 93 L. Ed. 2d 729 (1986).

Jury instructions. — In prosecution for drunk driving manslaughter and second-degree assault, the trial court did not err in instructing the jury that if it found that there was .10% or more alcohol in defendant's blood at the time of the accident, it could infer that he was under the influence of intoxicating liquor. Dresnek v. State, 697 P.2d 1059 (Alaska Ct. App. 1985), aff'd, 718 P.2d 156 (Alaska), cert. denied, 479 U.S. 1021, 107 S. Ct. 679, 93 L. Ed. 2d 729 (1986).

Applied in Catlett v. State, 585 P.2d 553 (Alaska 1978); Erickson v. Municipality of Anchorage, 662 P.2d 963 (Alaska Ct. App. 1983).

Quoted in Godwin v. State, 554 P.2d 453 (Alaska 1976); Simpson v. Municipality of Anchorage, 635 P.2d 1197 (Alaska Ct. App. 1981); Cooley v. Municipality of Anchorage, 649 P.2d 251 (Alaska Ct. App. 1982).

Stated in Wren v. State, 577 P.2d 235 (Alaska 1978); Lyle v. State, 600 P.2d 1357 (Alaska 1979); O'Leary v. State, 604 P.2d 1099 (Alaska 1979); Municipality of Anchorage v. Serrano, 649 P.2d 256 (Alaska Ct. App. 1982).

Cited in Sullivan v. Municipality of Anchorage, 577 P.2d 1070 (Alaska 1978); Reeves v. State, 599 P.2d 727 (Alaska 1979); Nygren v. State, 616 P.2d 20 (Alaska 1980); Graham v. State, 633 P.2d 211 (Alaska 1981); Morris v. Farley Enters., Inc., 661 P.2d 167 (Alaska 1983); Pena v. State, 664 P.2d 169 (Alaska Ct. App. 1983); Edgmon v. State, 702 P.2d 643 (Alaska Ct. App. 1985).

Collateral references. — 7A Am. Jur. 2d, Automobiles and Highway Traffic, §§ 361, 375 to 380.

61A C.J.S., Motor Vehicles, § 633(2).

Admissibility and weight of evidence based on scientific test for intoxication or presence of alcohol in system, 127 ALR 1513; 159 ALR 209.

Degree or nature of intoxication for purposes of statute making it a criminal offense to operate an automobile while in that condition, 142 ALR 555.

Validity, construction, and application of legislation creating presumption of intoxication or the like from presence of specified percentage of alcohol in blood, 46 ALR2d 1176; 16 ALR3d 748.

Qualification as expert to testify as to findings or results of scientific test to determine alcoholic content of blood, 77 ALR2d 971.

Constitutional right of one charged with intoxication to summon a physician at accused's own expense to make test for alcohol in system, 78 ALR2d 905.

Admissibility in criminal case of blood alcohol test where blood was taken from unconscious driver, 72 ALR3d 325.

Necessity and sufficiency of proof that tests of blood alcohol concentration were conducted in conformance with prescribed methods, 96 ALR3d 745.

Admissibility in criminal case of blood alcohol test where blood was taken despite defendant's objection or refusal to submit to test, 14 ALR4th 690.

Destruction of ampoule used in alcohol breath test as warranting suppression of result of test, 19 ALR4th 509.

Validity, construction and application of statutes proscribing driving with blood-alcohol level in excess of established percentage, 54 ALR4th 149.

Use of horizontal gaze nystagmus test in impaired driving prosecution, 60 ALR4th 1129.

Sec. 28.35.034. Surrender of license or permit. A person whose license or permit to operate or drive a motor vehicle has been revoked under AS 28.15.165 or 28.15.181 shall surrender the license or permit to the department on receipt of notice of the revocation. After the period of revocation has expired, the person may make application for a new license as provided by law. (§ 1 ch 83 SLA 1969; am § 14 ch 129 SLA 1980; am § 21 ch 77 SLA 1983)

NOTES TO DECISIONS

Quoted in Graham v. State, 633 P.2d 211 (Alaska 1981).

Cited in Anchorage v. Geber, 592 P.2d 1187 (Alaska 1979); Pena v. State, 664 P.2d 169 (Alaska Ct. App. 1983).

Collateral references. — 7A Am. Jur. 2d, Automobiles and Highway Traffic, § 141.

60 C.J.S., Motor Vehicles, § 164.24.

Sec. 28.35.035. Administration of chemical tests without consent. (a) If a person is under arrest for an offense arising out of acts alleged to have been committed while the person was driving a motor vehicle while intoxicated, and that arrest results from an accident that causes death or physical injury to another person, a chemical test may be administered without the consent of the person arrested to determine the amount of alcohol in that person's breath or blood.

(b) A person who is unconscious or otherwise in a condition rendering that person incapable of refusal is considered not to have withdrawn the consent provided under AS 28.35.031(a) and a chemical test may be administered to determine the amount of alcohol in that person's breath or blood. A person who is unconscious or otherwise incapable of refusal need not be placed under arrest before a chemical test may be administered.

(c) If a chemical test is administered to a person under (a) or (b) of this section, that person is not subject to the penalties for refusal to submit to a chemical test provided by AS 28.35.032 and 28.35.034. (§ 21 ch 117 SLA 1982; am § 22 ch 77 SLA 1983)

NOTES TO DECISIONS

Section should not be read broadly. — In light of the fact that the legislature has gone to great lengths to avoid authorizing the police to forcibly take blood tests, this section should not be read broadly. Bass v. Municipality of Anchorage, 692 P.2d 961 (Alaska Ct. App. 1984).

Effect of section. — The legislature has eliminated a driver's ability to refuse a chemical sobriety test when an arrestee is involved in an accident that results in the death of or injury to another person. Pena v. State, 684 P.2d 864 (Alaska 1984).

Application of subsection (b). — The fact that it was not practical to offer a defendant a breathalyzer test does not bring the case within subsection (b) of this section; what does seem to fall within subsection (b) is a narrow class of cases where the defendant is unconscious or otherwise incapable of manifesting his intent to refuse. Bass v. Municipality of Anchorage, 692 P.2d 961 (Alaska Ct. App. 1984).

The legislature's choice of language seems to be consistent with the theory that subsection (b) of this section was intended to apply only to situations where a blood-alcohol test could be conducted without any violence such as where an arrestee is unconscious. Bass v. Municipality of Anchorage, 692 P.2d 961 (Alaska Ct. App. 1984).

Stated in Copelin v. State, 659 P.2d 1206 (Alaska 1983); Pena v. State, 664 P.2d 169 (Alaska Ct. App. 1983).

Cited in Herter v. State, 715 P.2d 274 (Alaska Ct. App. 1986); Srala v. Municipality of Anchorage, 765 P.2d 103 (Alaska Ct. App. 1988).

Sec. 28.35.036. Forfeiture of motor vehicle. (a) After conviction of an offense under AS 28.35.030 or 28.35.032 involving a motor vehicle of a type for which a driver's license is required, the state may move the court to order the forfeiture of the motor vehicle involved in the commission of the offense if the convicted person has been previ-

ously convicted in this or another jurisdiction of more than one of the following offenses or has more than once been previously convicted of one of the following offenses:

(1) driving while intoxicated under AS 28.35.030 or another law or ordinance with substantially similar elements, or

(2) refusal to submit to a chemical test under AS 28.35.032 or another law or ordinance with substantially similar elements.

(b) For purposes of this section, convictions for both driving while intoxicated and for refusal to submit to a chemical test of breath under AS 28.35.031(a), if arising out of a single transaction and a single arrest, are considered one previous conviction.

(c) Upon receipt of a motion for forfeiture, the court shall schedule a hearing on the matter and shall notify the state and the convicted person of the time and place set for the hearing. At the hearing, the court may order the forfeiture of the motor vehicle if the court, sitting without a jury, determines by a preponderance of the evidence that the forfeiture of the motor vehicle will serve one or more of the following purposes:

(1) deterrence of the convicted person from the commission of future offenses under AS 28.35.030;

(2) protection of the safety and welfare of the public;

(3) deterrence of other persons who are potential offenders under AS 28.35.030; or

(4) expression of public condemnation of the serious or aggravated nature of the convicted person's conduct.

(d) Upon forfeiture of a motor vehicle the court shall require the surrender of the registration and certificate of title of that motor vehicle. The registration and certificate of title shall be delivered to the department.

(e) If not released under AS 28.35.037, a motor vehicle forfeited under this section may be disposed of at the discretion of the department. (§ 23 ch 77 SLA 1983)

NOTES TO DECISIONS

Section inapplicable to airboats. — A court may not forfeit the vehicle of a person convicted of driving while intoxicated on public property in an airboat; an airboat is not "a motor vehicle of a type for which a driver's license is required." State v. Stagno, 739 P.2d 198 (Alaska Ct. App. 1987).

Sec. 28.35.037. Remission of forfeitures. (a) Upon receiving notice from the court of the time and place set for a hearing under AS 28.35.036, the state shall provide to every person who has an ascertainable ownership or security interest in the motor vehicle written notice that includes

(1) a description of the motor vehicle;

(2) the time and place of the forfeiture hearing;

(3) the legal authority under which the motor vehicle may be forfeited;

(4) notice of the right to intervene to protect the interest in the motor vehicle.

(b) At the hearing, a person who claims an ownership or security interest in the motor vehicle must establish by a preponderance of the evidence that

(1) the petitioner has an interest in the motor vehicle acquired in good faith;

(2) a person other than the petitioner was convicted of the offense that resulted in the forfeiture; and

(3) before parting with the motor vehicle, the petitioner did not know or have reasonable cause to believe that it would be used in the commission of an offense.

(c) If a person satisfies the requirements of (b) of this section, the court shall order that an amount equal to the value of the petitioner's interest in the motor vehicle be paid to the petitioner or the court shall order that the motor vehicle be released to the petitioner together with title to the motor vehicle.

(d) Forfeiture of a motor vehicle under AS 28.35.036 is without prejudice to the rights, and does not extinguish the claims of a creditor with an interest in the motor vehicle. (§ 23 ch 77 SLA 1983)

Sec. 28.35.038. Municipal impoundment and forfeiture. Notwithstanding other provisions in this title, a municipality may adopt an ordinance providing for the impoundment or forfeiture of a motor vehicle involved in the commission of an offense under AS 28.35.030, 28.35.032, or an ordinance with elements substantially similar to AS 28.35.030 or 28.35.032. An ordinance adopted under this section is not required to be consistent with this title or regulations adopted under this title. (§ 23 ch 77 SLA 1983)

Article 3. Reckless and Negligent Driving.

Section
40. Reckless driving
45. Negligent driving

Sec. 28.35.040. Reckless driving. (a) A person who drives a motor vehicle in the state in a manner that creates a substantial and unjustifiable risk of harm to a person or to property is guilty of reckless driving. A substantial and unjustifiable risk is a risk of such a nature and degree that the conscious disregard of it or a failure to perceive it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

VESSELS

SUBCHAPTER F—VESSEL OPERATING REGULATIONS

ART 95—OPERATING A VESSEL WHILE INTOXICATED

THORITY: 46 U.S.C. 2302, 3306, and 7701; FR 1.46.

URCE: CGD 84-099, 52 FR 47532, Dec. 87, unless otherwise noted.

001 Purpose.

) The purpose of this part is to es- ish intoxication standards under .S.C. 2302 and to prescribe restric- s and responsibilities for personnel essels inspected, or subject to in- tion, under Chapter 33 of Title 46 ted States Code. This part does not empt enforcement by a State of its licable laws and regulations con- ing operating a recreational vessel le intoxicated.

) Nothing in this part shall be con- ed as limiting the authority of a el's marine employer to limit or nibit the use or possession of alco- on board a vessel.

003 Applicability.

) This part is applicable to a vessel cept those excluded by 46 U.S.C. 9) operated on waters subject to jurisdiction of the United States, to a vessel owned in the United tes on the high seas. This includes foreign vessel operated on waters ject to the jurisdiction of the ited States.

) This part is also applicable at all es to vessels inspected, or subject to inspection, under Chapter 33 of Title 46 United States Code.

[CGD 84-099, 52 FR 47532, Dec. 14, 1987; CGD 84-009, 53 FR 13117, Apr. 21, 1988]

§ 95.010 Definition of terms as used in this part.

"Alcohol" means any form or derivative of ethyl alcohol (ethanol).

"Alcohol concentration" means either grams of alcohol per 100 milliliters of blood, or grams of alcohol per 210 liters of breath.

"Chemical test" means a test which analyzes an individual's breath, blood, urine, saliva and/or other bodily fluids or tissues for evidence of drug or alcohol use.

"Controlled substance" has the same meaning assigned by 21 U.S.C. 802 and includes all substances listed on Schedules I through V as they may be revised from time to time (21 CFR Part 1308).

"Drug" means any substance (other than alcohol) that has known mind or function-altering effects on a person, specifically including any psychoactive substance, and including, but not limited to, controlled substances.

"Intoxicant" means any form of alcohol, drug or combination thereof.

"Law enforcement officer" means a Coast Guard commissioned, warrant, or petty officer; or any other law enforcement officer authorized to obtain a chemical test under Federal, State, or local law.

"Marine employer" means the owner managing operator, charterer, agent master, or person in charge of a vessel other than a recreational vessel.

"Recreational vessel" means a vessel meeting the definition in 46 U.S.C. 2101(25) that is then being used only for pleasure.

"Underway" means that a vessel is not at anchor, or made fast to the shore, or aground.

"Vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

"Vessel owned in the United States" means any vessel documented or numbered under the laws of the United States; and, any vessel owned by a citizen of the United States that is not documented or numbered by any nation.

[CGD 84-099, 52 FR 47532, Dec. 14, 1987; CGD 84-099, 53 FR 13117, April 21, 1988]

§ 95.015 Operating a vessel.

For purposes of this part, an individual is considered to be operating a vessel when:

(a) The individual has an essential role in the operation of a recreational vessel underway, including but not limited to navigation of the vessel or control of the vessel's propulsion system.

(b) The individual is a crewmember (including a licensed individual), pilot, or watchstander not a regular member of the crew, of a vessel other than a recreational vessel.

§ 95.020 Standard of intoxication.

An individual is intoxicated when:

(a) The individual is operating a recreational vessel and has an alcohol concentration of .10 percent by weight or more in their blood;

(b) The individual is operating a vessel other than a recreational vessel and has an alcohol concentration of .04 percent by weight or more in their blood; or,

(c) The individual is operating any vessel and the effect of the intoxicant(s) consumed by the individual on the person's manner, disposition, speech, muscular movement, general appearance or behavior is apparent by observation.

[CGD 84-099, 52 FR 47532, Dec. 14, 1987; CGD 84-099, 53 FR 13117, April 21, 1988]

§ 95.025 Adoption of State standards.

(a) This section applies to recreational vessels on waters within the geographical boundaries of a State having a statute defining a percentage of alcohol in the blood for the purposes of establishing that a person operating a vessel is intoxicated or impaired due to alcohol.

(b) If the applicable State statute establishing a standard for determining

AIRCRAFT

ay operate a civil aircraft in a Cate-
ry II or Category III operation con-
cted by the holder of a certificate
ued under Part 121, 123, 125, 129, or
5 of this chapter unless the oper-
on is conducted in accordance with
at certificate holder's operations
ecifications.

mdt. 91-173, 46 FR 2289, Jan. 8, 1981]

1.7 Flight crewmembers at stations.

a) During takeoff and landing, and
ile en route, each required flight
wmember shall—
1) Be at his station unless his ab-
ice is necessary in the performance
his duties in connection with the
eration of the aircraft or in connec-
n with his physiological needs; and
2) Keep his seat belt fastened while
his station.
b) After July 18, 1978, each re-
ired flight crewmember of a U.S.
gistered civil airplane shall, during
keoff and landing, keep the shoulder
rness fastened while at his station.
is paragraph does not apply if—
1) The seat at the crewmember's
ation is not equipped with a shoul-
r harness; or
2) The crewmember would be
able to perform his required duties
th the shoulder harness fastened.

oc. No. 1580, Amdt. 1-1, 28 FR 6704, June
1963, as amended by Amdt. 91-24, 30 FR
120, Oct. 15, 1965; Amdt. 91-139, 42 FR
303, June 16, 1977]

1.8 Prohibition against interference with crewmembers.

a) No person may assault, threaten,
imidate, or interfere with a crew-
mber in the performance of the
wmember's duties aboard an air-
ft being operated.

mdt. 91-152, 43 FR 22640, May 25, 1978]

1.9 Careless or reckless operation.

No person may operate an aircraft in
careless or reckless manner so as to
danger the life or property of an-
her.

§ 91.10 Careless or reckless operation other than for the purpose of air navigation.

No person may operate an aircraft other than for the purpose of air navigation, on any part of the surface of an airport used by aircraft for air commerce (including areas used by those aircraft for receiving or discharging persons or cargo), in a careless or reckless manner so as to endanger the life or property of another.

[Amdt. 91-43, 32 FR 9641, July 4, 1967]

§ 91.11 Alcohol or drugs.

(a) No person may act or attempt to act as a crewmember of a civil aircraft—
(1) Within 8 hours after the consumption of any alcoholic beverage;
(2) While under the influence of alcohol;
(3) While using any drug that affects the person's faculties in any way contrary to safety; or
(4) While having .04 percent by weight or more alcohol in the blood.
(b) Except in an emergency, no pilot of a civil aircraft may allow a person who appears to be intoxicated or who demonstrates by manner or physical indications that the individual is under the influence of drugs (except a medical patient under proper care) to be carried in that aircraft.
(c) A crewmember shall do the following:
(1) On request of a law enforcement officer, submit to a test to indicate the percentage by weight of alcohol in the blood, when—
(i) The law enforcement officer is authorized under State or local law to conduct the test or to have the test conducted; and
(ii) The law enforcement officer is requesting submission to the test to investigate a suspected violation of State or local law governing the same or substantially similar conduct prohibited by paragraph (a)(1), (a)(2), or (a)(4) of this section.
(2) Whenever the Administrator has a reasonable basis to believe that a person may have violated paragraph (a)(1), (a)(2), or (a)(4) of this section, that person shall, upon request by the Administrator, furnish the Administrator, or authorize any clinic, hospital, doctor, or other person to release to the Administrator, the results of each test taken within 4 hours after acting or attempting to act as a crewmember that indicates percentage by weight of alcohol in the blood.
(d) Whenever the Administrator has a reasonable basis to believe that a person may have violated paragraph (a)(3) of this section, that person shall, upon request by the Administrator, furnish the Administrator, or authorize any clinic, hospital, doctor, or other person to release to the Administrator, the results of each test taken within 4 hours after acting or attempting to act as a crewmember that indicates the presence of any drugs in the body.
(e) Any test information obtained by the Administrator under paragraph (c) or (d) of this section may be evaluated in determining a person's qualifications for any airman certificate or possible violations of this chapter and may be used as evidence in any legal proceeding under section 602, 609, or 901 of the Federal Aviation Act of 1958.

[Doc. No. 21956, Amdt. 91-188, 50 FR 15380, Apr. 17 1985, as amended by Amdt. 91-194, 51 FR 1229, Jan. 9, 1986]

§ 91.12 Carriage of narcotic drugs, marihuana, and depressant or stimulant drugs or substances.

(a) Except as provided in paragraph (b) of this section, no person may operate a civil aircraft within the United States with knowledge that narcotic drugs, marihuana, and depressant or stimulant drugs or substances as defined in Federal or State statutes are carried in the aircraft.
(b) Paragraph (a) of this section does not apply to any carriage of narcotic drugs, marihuana, and depressant or stimulant drugs or substances authorized by or under any Federal or State statute or by any Federal or State agency.

[Doc. No. 12035, Amdt. 91-117, 38 FR 17493, July 2, 1973]

§ 91.13 Dropping objects.

No pilot in command of a civil aircraft may allow any object to be

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TRAINS

(b) Creates a private right of action on the part of any person for enforcement of the provisions of this part or for damages resulting from noncompliance with this part.

§ 219.19 Field Manual.

(a) Technical procedures for post-accident testing required by Subpart C of this part, recommended practice standards for breath and urine testing under Subpart D of this part, and related materials designed to assist the railroads in establishing programs for control of alcohol and drug use are contained in the FRA Alcohol and Drug Field Manual which is revised from time to time by the Office of Safety, FRA.

(b) The Field Manual may be inspected at the Office of the Associate Administrator for Safety, FRA, 400 Seventh Street, SW., Washington, DC 20590. The Field Manual may be purchased the National Technical Information Service, Order Department, 5285 Port Royal Road, Springfield, Virginia 22161.

§ 219.21 Information collection.

(a) The information collection requirements of this part have been reviewed by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*) and have been assigned OMB control number 2130-0526.

(b) The information collection requirements are found in the following sections:

(1) Section 219.203.
(2) Section 219.205.
(3) Section 219.207.
(4) Section 219.209.
(5) Section 219.211.
(6) Section 219.213.
(7) Section 219.301.
(8) Section 219.303.
(9) Section 219.305.
(10) Section 219.307.
(11) Section 219.309.
(12) Section 219.401.
(13) Section 219.405.
(14) Section 219.407.
(15) Section 219.501.
(17) Section 219.503.

[50 FR 38660, Sept. 24, 1985]

Subpart B—Prohibitions

§ 219.101 Alcohol and drug use prohibited.

(a) *Prohibitions.* Except as provided in § 219.103—

(1) No employee may use or possess alcohol or any controlled substance while assigned by a railroad to perform covered service;

(2) No employee may report for covered service, or go or remain on duty in covered service while—

(i) Under the influence of or impaired by alcohol;

(ii) Having .04 percent or more alcohol in the blood; or

(iii) Under the influence of or impaired by any controlled substance.

(b) *Controlled substance.* "Controlled substance" is defined by § 219.5 of this part. Controlled substances are grouped as follows: marijuana, narcotics (such as heroin and codeine) stimulants (such as cocaine and amphetamines), depressants (such as barbiturates and minor tranquilizers), and hallucinogens (such as the drugs known as PCP and LSD). Controlled substances include illicit drugs (Schedule I), drugs that are required to be distributed only by a medical practitioner's prescription or other authorization (Schedules II through IV, and some drugs on Schedule V), and certain preparations for which distribution is through documented over the counter sales (Schedule V only).

(c) *Railroad rules.* Nothing in this section restricts a railroad from imposing an absolute prohibition on the presence of alcohol or any drug in the body fluids of persons in its employ, whether in furtherance of the purpose of this part or for other purposes.

(d) *Construction.* This section shall not be construed to prohibit the presence of an unopened container of an alcoholic beverage in a private motor vehicle that is not subject to use in the business of the railroad; nor shall it be construed to restrict a railroad from prohibiting such presence under its own rules.

§ 219.103 Prescribed and over-the-counter drugs.

(a) This subpart does not prohibit the use of a controlled substance (on

ALASKA RAILROAD CORPORATION

P.O. Box 107500 • Anchorage, Alaska 99510-7500

VIA U.S. MAIL AND FACSIMILE

March 13, 1990

Honorable Max F. Gruenberg, Jr.
and Honorable Peter Goll
Co-Chairmen, House Judiciary Committee
Alaska State Legislature
P.O. Box V (MS 3100)
Juneau, Alaska 99811

Re: CSHB 317 Relating to Operating a Commercial Motor Vehicle While Intoxicated

Gentlemen:

I have enclosed a copy of a letter to Assistant Attorney General Laurie Otto who invited the Alaska Railroad Corporation to comment upon CSHB 317 which, as you know, relates to operating a commercial motor vehicle while intoxicated. Train operations in Alaska are affected by the legislation and we are keenly interested in the outcome of your deliberations. We believe that there are several important modifications which should be considered to the House Bill and have explained these to Ms. Otto. If there are any hearings planned with respect to CSHB 317, we would also appreciate the opportunity to discuss the bill with you at that time.

Thank you very much for your attention to this matter.

Sincerely yours,

Larry D. Wood

Larry D. Wood
General Counsel

cc: F. G. Turpin, President & CEO
L. J. Houle, ARRC Legislative Liaison

Enclosure

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ALASKA RAILROAD CORPORATION

P.O. Box 107500 • Anchorage, Alaska 99510-7500

March 13, 1990

VIA U.S. MAIL AND FACSIMILE

Laurie H. Otto
Assistant Attorney General
Department of Law
State of Alaska
P.O. Box KC
Juneau, Alaska 99811-0310

Re: CSHB No. 317 Relating to Operation of Commercial Equipment While Intoxicated

Dear Laurie:

Thank you for inviting our comments with respect to CSHB No. 317. In light of the Exxon Valdez disaster, we certainly understand the state's interest in adopting more comprehensive anti-drug and alcohol use legislation in the commercial area. However, we're hopeful that you can support some important modifications to this legislation which we believe will improve its practicality and fairness. In addition, the rail industry is already subject to significant federal regulation in this area and, unless changed, the new state law may unreasonably burden interstate commerce. Also, could you please keep us posted with respect to legislative hearings regarding the bill? Thank you very much. These are our comments:

1. Page 2, lines 16-23: The Implied Consent Law currently provides that a motorist is considered to have given consent to a chemical test if lawfully arrested for operating his automobile while intoxicated. In addition, a peace officer may administer a preliminary breath test at the scene, but only if he has reasonable grounds to believe that a person's driving ability is impaired and that the person was operating a motor vehicle which is involved in an accident, committed a moving traffic violation, or violated the Open Container Law. However, CSHB 317 permits a peace officer to direct chemical testing even in the absence of probable cause to believe that an individual operated a commercial vehicle while intoxicated so long as property was damaged, a person was injured, or a hazardous substance was discharged. Consent is implied for this search even if the person is not under arrest at the time. We believe that probable cause ought to be required before chemical testing for practical and constitutional reasons.

Virtually all railroad mishaps involve some property damage. Minor mishaps are not infrequent since the nature of the business includes the risk and delays inherent in derailments. Chemical testing as a result of minor incidents may add little to the deterrent effect of this legislation, but will undoubtedly result in much waste of time and economic resources for municipal authorities, commercial enterprises, and, ultimately, Alaska consumers. To avoid a similar problem, the federal Department of Transportation adopted testing thresholds which trigger chemical testing requirements under the Control of Alcohol and Drug Use regulations, 49 CFR 219.201. For example, such testing is only required if a fatality results to any person, a hazardous materials release occurs which results in injury or evacuation, railroad property is damaged in the amount of $500,000 or more, or a collision results with a "reportable" injury or at least $50,000 damage to railroad property.

However, even if CSHB 317 was amended to restrict chemical testing to only serious incidents, the statute will largely duplicate Federal Railroad Administration and Alaska Railroad Corporation ("ARRC") testing procedures. In addition, the statute would impose new and significant health and safety responsibilities upon local and state police in metropolitan and remote locations whose resources are already limited by funding cuts. To the extent that such additional testing interferes with federal testing procedures, it will also be preempted. Federal and ARRC policies already require post-accident testing in a broad array of circumstances. At least as regards the rail industry, sufficient deterrents already exist to penalize illicit drug and alcohol use even in the absence of obvious impairment. Hence, chemical testing for criminal law enforcement reasons should be limited to those cases where the police officer has probable cause to believe that impairment is involved.

In addition, my understanding is that the breathalyzer and other chemical tests do amount to a search of the person. However, so long as probable cause exists to charge an individual with driving while intoxicated, such testing amounts to a lawful search incident to an arrest. Svedlund v. Municipality of Anchorage, 671 P.2d 378, 384 (Alaska 1983). No warrant or consent is required. Burnett v. Municipality of Anchorage, 806 F.2d 1447 (9th Cir. 1986). Accordingly, there is no Fourth Amendment right to refuse a breathalyzer examination and, by criminalizing a breathalyzer refusal, the state has not attached an unconstitutional condition to the privilege of using the state's highways. Id., p. 1450.

In contrast, by directing a search of a commercial vehicle operator without probable cause to believe that a violation of

the state's new intoxication statute has occurred, and by criminalizing a refusal to submit to such a test, CSHB 317 may invite constitutional challenges on the basis that such a search is unreasonable since there is no "clear indication" that in fact the desired evidence will be found (Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966)) and because the search is not incident to a lawful arrest. Even if the breathalyzer search is viewed to be minimally intrusive, no showing of individualized suspicion is required by the bill's provisions. In addition, the government may not impose conditions which require the relinquishment of constitutional rights (Burnett, p. 1450) and, under such circumstances, commercial vehicle operators arguably have a right to refuse chemical testing without fear that refusal will constitute a separate criminal act.

We believe that post-accident chemical testing and severe employment-related penalties already deter alcohol and drug use among railroad employees. Although CSHB 317 will supplement federal and company procedures which are already in place, because of practical and constitutional reasons, the new law's testing requirements should be limited to those cases where, as in the case of the motorist statute, grounds for arrest already exist.

You are undoubtedly aware that the U.S. Supreme Court sustained the Federal Railroad Administration's safety regulations even though alcohol and drug tests of railroad employees do not require warrants or individualized suspicion. Skinner v. Railway Labor Executives' Association, 439 U.S. ___, 103 L.Ed 639, 109 S.Ct. ___ (1989). However, I believe that Skinner will not serve as useful precedent to help defend constitutional attacks against CSHB 317 on privacy and search and seizure grounds if the bill is enacted as currently written.

Skinner notes that the "FRA has prescribed toxicological tests, not to assist in the prosecution of employees but rather 'to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs.'" 103 L.Ed 2d at 662 (emphasis added). It left "for another day the question whether routine use in criminal prosecutions of evidence obtained pursuant to the administrative scheme would give rise to an inference of pretext, or otherwise impugn the administrative nature of the Agency's program." Id., fn. 5. A majority of the Court authorized FRA-sanctioned civil searches only on the basis that "'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'" Id., p. 661 (emphasis added). The balancing test applied by the court tipped the scales against employees' privacy interests in light of the governmental

interest in ensuring the safety of the traveling public and railroad employees. But Skinner carefully emphasizes that FRA already pervasively regulates railroad operations to insure safety. Expectations of privacy of covered employees are accordingly lessened by their participation in this industry, and drug and alcohol testing was sanctioned on this basis. Nonetheless, criminal sanctions were not imposed by the agency's administrative scheme and the court consciously avoided the question of whether such prosecutions would measurably influence its balancing test. Should this occur, employee liberty interests, not merely employment interests, would be added to the constitutional equation. The result is predicted by a strong dissent. CSHB 317 authorizes criminal prosecutions based on suspicionless searches of the human body and I am not aware of case precedents which authorize this approach.

2. Page 3, lines 9-16: There is an inconsistency between section 6(g)(1) and existing statute AS 28.35.033. Under current law, if .05% or less by weight of alcohol is found in a motorist's blood, it is presumed that the person was not under the influence of intoxicating liquor. However, section 6(g)(1) states that less than .04% in a commercial vehicle operator's blood will not give rise to any presumption and may be considered in determining whether a person was under the influence of an intoxicating substance. Are there clearly defined medical, scientific, and policy bases for this inconsistency? Although ARRC operating rules prohibit any use of alcohol or drugs on or within eight hours of duty, imposing criminal penalties in addition to employment-related penalties is, of course, a serious matter and, in all fairness to the accused, clear deviations from what is expected of motorists from a criminal law perspective should require sound justification. For example, even though legislators may tolerate a higher blood alcohol level in motorists' blood, shouldn't a commercial vehicle operator be entitled to claim the same presumption available to a motorist when blood alcohol content falls below .05%? Do facts indicate that commercial vehicle operators have a tendency for intoxication at lower blood alcohol levels?

Finally, while I note that CSHB 317 has raised the prohibited blood alcohol content level from an earlier .01% to .04%, we would appreciate any information you may have regarding the general trend of similar statutes elsewhere. Also, are there scientific/medical articles which indicate that most people are impaired at this level? If there has been a shift in medical thought since the original DWI statute was enacted, should the motorist blood alcohol limit also be reduced at this time? Is there any concern that limitations of testing equipment could lead to unfair results at this level? I believe the tolerance range of most equipment is plus or minus .01%.

To reiterate, ARRC tolerates no on-the-job drug or alcohol use and FRA's regulations require action when .04% alcohol content is exceeded. However, as noted, these rules impose employment-related penalties and, from ARRC's perspective, the federal regulations help enforce its long-standing Rule G prohibition. However, imposition of criminal penalties should call for a higher blood alcohol level in view of the liberty interests at stake. Note, for example, that the federal criminal law applicable to common carrier operations imposes a .10% threshold. 18 USC §343.

3. Page 4, lines 19-22: As mentioned above, we would appreciate receiving further information regarding the bill's proposed lower blood alcohol content level, .04%, for commercial vehicle operators. If medical/scientific information supports the view that impairment should be assumed at this lower level, won't the same information support lowering the level for motorists as well? Do impaired motorists or impaired commercial vehicle operators cause more deaths/serious injuries/property damage each year? Particularly if data does not support this distinction, will it invite attacks on equal protection grounds?

4. Page 4, Line 27: Insert "under arrest" after "[i]f a person" to follow language which appears in the motorist statute. A.S. 28.35.032(a). As noted above, unless a person is lawfully arrested for operating a commercial vehicle while intoxicated, a warrantless search of his body cannot be justified as a search incident to an arrest. An arrest, of course, must be predicated upon probable cause that an operator violated this proposed statute. Therefore, he probably has a constitutional right to refuse a chemical test and this section, because it would inhibit the exercise of such a right, seems invalid.

5. Page 5, line 10: Sec. 10 requires commercial vehicle operators to generally wait at accident scenes until released by a peace officer. We first note another inconsistency when this proposed law is compared to the motorist statutes. AS 28.35.050 does not require motorists to remain at accident scenes until released by a peace officer. However, I suspect that private motorists cause most serious accidents and are more frequently impaired than commercial vehicle operators. As you know, a motorist involved in an accident is required to stop, leave his name on an unattended vehicle, give his name, address, and license number to any person struck or injured, render assistance if necessary, and report the accident to the police. But he need not remain at the scene of the accident to report. Preliminarily, why are motorists exempted from this aspect of the bill?

Secondly, unless this section is limited to certain types of serious accidents, it will be entirely impractical if strictly applied.

In typical metropolitan highway/railroad crossing accidents, train crews always stop and render assistance. When time and safety permits, the crossing is then "cleared" so that other traffic may proceed. Most often, local law enforcement officials have already arrived at the scene and participate in decisions such as moving the equipment to avoid traffic congestion and unnecessary railroad delays. We are not aware of any law enforcement complaints that ARRC crews have not fully cooperated so as to justify this legislative mandate. Has anyone complained that trains are not stopping at accident scenes or that this aspect of this legislation is needed to remedy problems created by ARRC operations? You may not know that ARRC's security officers are specially-commissioned state troopers (AS 42.40.250(20)) and work closely with local and state police to insure that law enforcement agencies receive all the information they require to fully investigate incidents which interest them, particularly grade crossing accidents.

The word "immediately" is troublesome since to "immediately stop" a train in any situation can be dangerous to crew, passengers, and lading. Emergency braking can injure persons on board and may result in a derailment. Train crews must exercise their discretion as regards emergency braking -- it will not be required in all circumstances. If trains are not entirely deleted from this section, "immediately" should be deleted before "stop" in line 16 and the train crew should retain discretion to clear highway crossings so as not to unnecessarily impede other traffic. Will "until...a peace officer authorizes the person to leave the scene" in line 20 permit state troopers or local police to release trains by radio or telephone?

Accidents which do not involve injuries to the members of the public, private automobile damage, or a hazardous materials release with an evacuation should be entirely deleted from this section. As noted, serious accidents in this category are already regulated by FRA rules and ARRC policies. Adding a third layer of regulation applicable to all train accidents strictly for law enforcement purposes invites unnecessary costs and delays and adds much to the new assignments made to police departments without greatly promoting the public safety aspects of the bill. The private automobile damages which will invoke this provision should involve damage above a certain threshold, say $5,000.

The other subsections of Section 10 will also be affected by changes to subparagraph (1).

6. Page 7, line 29: This section defines "operate a train" to mean "to be employed as an engineer, a conductor, or a brakeman and to be on a train under power inside this state." Delete "brakeman" from this definition. For criminal law, as opposed to employment, purposes, it is unfair to say that a brakeman is either operating or directing the operation of a train. The engineer is behind the controls; the conductor is the supervisor. Note that the federal criminal law requires the employee to "operate a train or direct the operation of a train" before criminal liability may apply to illicit conduct. 18 USC §342.

Thank you for providing us with this opportunity to submit comments.

Sincerely yours,

Larry D. Wood
General Counsel

cc: Honorable Max F. Gruenberg and Honorable Peter Goll
Co-chairmen, House Judiciary Committee
F.G. Turpin, President & CEO

9573L

HB

318

STATE OF ALASKA
1990 LEGISLATIVE SESSION

CC

BILL VERSION : HB 318
PUBLISH DATE : HOUSE 1/17/90

FISCAL NOTE

REQUEST:

Revision Date: 1/15/90
Title : An act relating to the Fair Campaign Practices Act
Sponsor : Rep. Finkelstein, et. al.
Requestor :

Agency Affected : AK Pub. Offices Commission
BRU :
Components :

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES	22.7	22.7	23.4	23.4	24.1	24.1
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	22.7	22.7	23.4	23.4	24.1	24.1
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	1	1	1	1	1	1
TEMPORARY	0	0	0	0	0	0

ANALYSIS : (Attach a separate page if necessary)

Prepared by : Karla L. Forsythe, Executive Director
Phone : 276-4176
Division : Alaska Public Offices Commission
Date : 1/15/90

Approved by Commissioner : Burke Riley, Chair
Date : 1-12-90
Agency : Alaska Public Offices Commission

Distribution (by preparer) :
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

REVISED FISCAL NOTE

HB 318 NARRATIVE

This measure establishes a fair campaign practices code. It requires the commission to prepare a form for candidates to sign indicating they will abide by the code. The commission would be required to send a copy to each candidate who files reports under AS 15.13 and by implication would maintain copies of signed forms for public review. These administrative tasks could be absorbed with existing resources.

The commission anticipates a high volume of calls from citizens complaining that candidates have engaged in behavior which is contrary to the code. Since commission resources are stretched to the limit particularly in investigatory matters, the commission will need additional staff to handle the increased workload.

It is assumed that the time required to handle complaints of this nature, given the existing workload, would warrant a half-time paralegal investigator, Range 16.

HOUSE COMMITTEE REPORT

(7)
Date Referred: January 17, 1990 FURTHER REFERRALS:

Date of Committee Action: 2/9/90

The JUDICIARY Committee considered: HB 318

HOUSE BILL NO. 318 CODE OF FAIR CAMPAIGN PRACTICES

"An Act relating to the Fair Campaign Practices Code."

RECOMMENDATIONS:
[ ] be replaced with CSHB 318 (Judiciary) [X] the same title
[ ] a new title
[ ] have attached amendment(s)
[X] do pass
[ ] do not pass
[ ] no recommendation
[X] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(s): (Dept)
[ ] fiscal impact _____
[ ] zero fiscal note _____
[ ] zero with analysis _____

APPROVES PREVIOUS: (Date/Dept)
[ ] fiscal note(s) _____
[X] zero fiscal note(s) Div. of Elections 1/31/90
[ ] zero fn/analysis _____

SIGNING DO PASS:

J. Ellis
J. Greenberg
Peter Patt

SIGNING: (Check approp. column)

	Do Not Pass	No Rec	Amend
Terry Master		X	

J. Greenberg Peter Patt
Chairman's Signature

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION: HB 318
PUBLISH DATE: 4/27/89

FISCAL NOTE

REQUEST:

Revision Date: 2/1/90
Title: Relating to the Fair Campaign Practices Code
Sponsor: Rep. Finkelstein
Requestor: Rep. Finkelstein

Agency Affected: Office of the Governor
BRU: Elections
Components: 1 Elections

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL	-0-	-0-	-0-	-0-	-0-	-0-
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

The fiscal impact for FY 90 is -0-.

Prepared by: Linda Edgeworth
Phone: 465-4611
Division: Division of Elections
Date: 1/31/90

Approved by Commissioner:
Date: 2.1.90
Agency:

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

Original sponsor(s): BY REP. FINKELSTEIN, Wallis, M.Davis, Gruenberg, Menard, Ellis, Donley, Ulmer, Brown, Goll, Koponen, Boucher

IN THE HOUSE BY THE JUDICIARY COMMITTEE

CS FOR HOUSE BILL NO. 318 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to the Fair Campaign Practices Code."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 15.20 is amended by adding new sections to read:

ARTICLE 6. FAIR CAMPAIGN PRACTICES CODE.

Sec. 15.20.810. SUBSCRIPTION TO FAIR CAMPAIGN PRACTICES CODE. (a) The director shall prepare a form that contains the Fair Campaign Practices Code established under AS 15.20.820 with a place for a candidate to sign the form and to indicate that the candidate endorses, subscribes to, and pledges to abide by the code.

(b) The director shall provide a copy of the Fair Campaign Practices Code to each candidate who files a declaration of candidacy or nominating petition with the director. A candidate who agrees to comply with the Fair Campaign Practices Code shall sign the form and return the signed copy to the director at the time the candidate files a declaration of candidacy or nominating petition. A candidate who does not sign the Fair Campaign Practices Code does not violate a provision of this chapter.

Sec. 15.20.820. FAIR CAMPAIGN PRACTICES CODE. The Fair Campaign Practices Code is:

There are basic principles of decency, honesty, and fair play that every candidate for public office in the state has a moral obligation to observe and uphold in order that, after vigorously contested but fairly conducted campaigns, our citizens may exercise their

constitutional right to a free and untrammeled choice and the will of the people may be clearly expressed on the issues before the state. Therefore,

I will conduct my campaign without the use of personal vilification, character defamation, whispering campaigns, libel, slander, or scurrilous attacks on my opponent or the personal or family life of my opponent.

I will not use campaign material of any sort that misrepresents, distorts, or otherwise falsifies the facts nor will I use malicious or unfounded accusations that aim at creating or exploiting doubts, without justification, as to the loyalty and patriotism of my opponent.

I will not make any appeal to prejudice based on race, sex, creed, or national origin.

I will not undertake or condone any dishonest or unethical practice that tends to corrupt or undermine our American system of free elections or that hampers or prevents the free and full expression of the will of the voters.

Insofar as is possible, I will immediately and publicly repudiate support deriving from any individual or group that resorts, on behalf of my candidacy or in opposition to that of my opponent, to the methods and tactics that I have pledged not to use or condone.

* Sec. 2. AS 15.58.030 is amended by adding a new subsection to read:

(h) The page that contains the candidate's photograph or statement must also prominently reflect whether the candidate has agreed to the Fair Campaign Practices Code under AS 15.20.810 - 15.20.820.

(Election conduct)

6-1282H
Bradley
2/5/90

Original sponsor(s): BY REP. FINKELSTEIN, Wallis, M.Davis, Gruenberg, Menard, Ellis, Donley, Ulmer, Brown, Goll, Koponen, Boucher

IN THE HOUSE

CS FOR HOUSE BILL NO. 318 ( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to the Fair Campaign Practices Code."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 15.20 is amended by adding new sections to read:

ARTICLE 6. FAIR CAMPAIGN PRACTICES CODE.

Sec. 15.20.810. SUBSCRIPTION TO FAIR CAMPAIGN PRACTICES CODE. (a) The director shall prepare a form that contains the Fair Campaign Practices Code established under AS 15.20.820 with a place for a candidate to sign the form and to indicate that the candidate endorses, subscribes to, and pledges to abide by the code.

(b) The director shall send a copy of the form containing the Fair Campaign Practices Code to each candidate who files a declaration of candidacy or nominating petition with the director. The director shall also make copies of the form containing the Fair Campaign Practices Code available to each municipal clerk for distribution to candidates for municipal office. A candidate who agrees to comply with the Fair Campaign Practices Code shall sign the form and return the signed copy to the director. A candidate who fails or refuses to sign the Fair Campaign Practices Code does not violate a provision of this chapter.

Sec. 15.20.820. FAIR CAMPAIGN PRACTICES CODE. The Fair Campaign Practices Code is:

There are basic principles of decency, honesty, and fair play that every candidate for public office in the state has a moral

obligation to observe and uphold in order that, after vigorously contested but fairly conducted campaigns, our citizens may exercise their constitutional right to a free and untrammeled choice and the will of the people may be clearly expressed on the issues before the state. Therefore,

I will conduct my campaign in the best American tradition, discussing the issues as I see them, presenting my record and policies with sincerity and frankness, and criticizing without fear or favor the record and policies of my opponent and the party of my opponent that merit such criticism.

I will defend and uphold the right of every Alaskan voter to full and equal participation in the electoral process.

I will conduct my campaign without the use of personal vilification, character defamation, whispering campaigns, libel, slander, or scurrilous attacks on my opponent or the personal or family life of my opponent.

I will not use campaign material of any sort that misrepresents, distorts, or otherwise falsifies the facts nor will I use malicious or unfounded accusations that aim at creating or exploiting doubts, without justification, as to the loyalty and patriotism of my opponent.

I will not make any appeal to prejudice based on race, sex, creed, or national origin.

I will not undertake or condone any dishonest or unethical practice that tends to corrupt or undermine our American system of free elections or that hampers or prevents the free and full expression of the will of the voters.

Insofar as is possible, I will immediately and publicly repudiate support deriving from any individual or group that resorts, on

behalf of my candidacy or in opposition to that of my opponent, to the methods and tactics that I have pledged not to use or condone.

* Sec. 2. AS 15.58.030 is amended by adding a new subsection to read:

(h) The page that contains the candidate's photograph or statement must also prominently reflect whether the candidate has agreed to the Fair Campaign Practices Code under AS 15.20.810 - 15.20.820.

HOUSE COMMITTEE ON STATE AFFAIRS

RECAP OF
HB 318

Code of Fair Campaign Practices

Received April 27, 1989
By Reps. Finkelstein, Wallis, M. Davis, Gruenberg, Menard, Ellis, Donley, Ulmer, Brown, Goll, Koponen, and Boucher

Heard May 3, 1989
Heard January 16, 1990

Passed Out of Committee January 16, 1990
3 Do Pass
1 No Recommendation

TABLE OF CONTENTS

HB 318: Code of Fair Campaign Practices

HOUSE COMMITTEE REPORT

(7)
Date Referred: April 27, 1989 FURTHER REFERRALS: JUDICIARY

Date of Committee Action: _____

The STATE AFFAIRS Committee considered: HB 318

HOUSE BILL NO. 318 [CODE OF FAIR CAMPAIGN PRACTICES]
"An Act relating to the Fair Campaign Practices Code."

RECOMMENDATIONS:
[ ] be replaced with _____ [ ] the same title [ ] a new title
[ ] have attached amendment(s)
[X] do pass
[ ] do not pass
[ ] no recommendation
[ ] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(s): (Dept)
[X] fiscal impact ADOC 1/15/90
[ ] zero fiscal note _____
[ ] zero with analysis _____

APPROVES PREVIOUS: (Date/Dept)
[ ] fiscal note(s) _____
[ ] zero fiscal note(s) _____
[ ] zero fn/analysis _____

SIGNING DO PASS:

David Finkelstein

W. O. Bunker

SIGNING: (Check approp. column)

	Do Not Pass	No Rec	Amend
Bryce Hensley		✓	

W. O. Bunker
Chairman's Signature

Item 2

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION : HB 318
PUBLISH DATE : 4/27/89

FISCAL NOTE

REQUEST:

Revision Date: 1/15/90
Title : An act relating to the Fair Campaign Practices Act
Sponsor : Rep. Finkelstein, et. al.
Requestor :

Agency Affected : AK Pub. Offices Commission
BRU :
Components :

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES	22.7	22.7	23.4	23.4	24.1	24.1
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	22.7	22.7	23.4	23.4	24.1	24.1
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	1	1	1	1	1	1
TEMPORARY	0	0	0	0	0	0

ANALYSIS : (Attach a separate page if necessary)

Prepared by : Karla L. Forsythe, Executive Director
Phone : 276-4176
Division : Alaska Public Offices Commission
Date : 1/15/90

Approved by Commissioner : Burke Riley, Chair
Date : 1-12-90
Agency : Alaska Public Offices Commission

Distribution (by preparer) :
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agencies)

Item 2

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: HB 318
PUBLISH DATE: 4/27/89

FISCAL NOTE

REQUEST:

Revision Date:
Title: An Act Relating to Fair Campaign Practices Code
Sponsor: Finkelstein, et. al.
Requestor: House State Affairs Committee

Agency Affected: AK Public Offices Commission
BRU:
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME	-0-	-0-	-0-	-0-	-0-	-0-
TEMPORARY	-0-	-0-	-0-	-0-	-0-	-0-

ANALYSIS: (Attach a seperate page if necessary)

Prepared by: Karla T. Forsythe, Executive Director
Phone: 276-4176
Division: Alaska Public Offices Commission
Date: 5/2/89

Approved by Commissioner: Acting Chairman, Curtis Riley
Date: 5/2/89
Agency: Alaska Public Offices Commission

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

FISCAL NOTE

HB 318

NARRATIVE

This measure establishes a fair campaign practices code. It requires the commission to prepare a form for candidates to sign indicating they will abide by the code. The commission would have to send a copy to each candidate who files reports under AS 15.13, and by implication would maintain copies of signed forms for public review. These administrative tasks could be absorbed with existing resources.

The commission has been advised that the bill is not intended to authorize citizens to file complaints alleging that candidates who signed the code have not abided by it. Nonetheless, the commission anticipates a high volume of calls from citizens who will be aware of the code, but will not be aware that APOC's investigatory, quasi-judicial authority does not extend to these types of complaints. Staff time will be expended responding to citizens' confusion and disappointment about APOC's inability to investigate and responding to inquiries about remedies available to a member of the public who believes a candidate has not abided by the code. Although the additional time dealing with these questions cannot be quantified for purposes of this fiscal note, the commission believes this bill would result in a noticeable increase in work which will have to be absorbed by an already overextended staff.

Item 3

Alaska State Legislature
House

Official Business

P.O. BOX V
State Capitol
Juneau, Alaska 99811

January 10, 1990

MEMORANDUM

TO: Representative Red Boucher
State Affairs Committee Chairman

FR: Representative David Finkelstein

RE: Background on HB 318, Fair Campaign Practices Code

HB 313 is based on the Fair Campaign Practices Code adopted by Montana in 1979. Since that statutue was implemented, campaigns are considered to have gotten much cleaner there.

The Montana Commission of Campaign Practices is responsible for providing the code to all local, county and state candidates. Signing the code is voluntary although Commissioner Delores Colberg states no candidate has ever refused to sign the code.

Attachment

MONTANA CODE ANNOTATED

Adopted by Chapter 1, Laws of 1979

Gregory J. Petesch
Code Commissioner
&
Director Legal Services

Staff Attorneys

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H. David Cogley
Lee Heiman
Jim Lear
Valencia Lane
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Eddye McClure, Legal Reseacher
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Published by
Montana Legislative Council
Room 133, State Capitol
Helena, Montana 59620
Telephone (406)444-3064
1987

13-35-230. Repealed. Sec. 407, Ch. 571, L. 1979.
History: En. 23-47-137 by Sec. 37, Ch. 334, L. 1977; R.C.M. 1947, 23-47-137.

13-35-231. Unlawful for political party to endorse judicial candidate. A political party may not endorse, contribute to, or make an expenditure to support or oppose a judicial candidate.
History: En. 23-47-138 by Sec. 38, Ch. 334, L. 1977; R.C.M. 1947, 23-47-138, amd. Sec. 223, Ch. 571, L. 1979.

Cross-References
Election of Supreme Court Justices, 3-2-101, 3-2-102.
Election of District Court Judges, 3-5-201, 3-5-202.
Election of Justice of the Peace, 3-10-201.
Violation as misdemeanor, 13-35-103.

13-35-232. Repealed. Sec. 407, Ch. 571, L. 1979.
History: En. 23-47-139 by Sec. 39, Ch. 334, L. 1977; R.C.M. 1947, 23-47-139.

13-35-233. Solicitation of votes on election day. (1) It is unlawful for a person or a political committee to place an advertisement supporting or opposing a candidate or a ballot issue for use on election day. Failure to remove billboards, yard signs, or posters on election day is not considered a violation.

(2) A person convicted of solicitation of votes on election day is guilty of a misdemeanor and shall be imprisoned in the county jail for a term not to exceed 6 months or be fined not to exceed $1,000, or both.
History: En. Sec. 1, Ch. 539, L. 1979.

13-35-234. Political criminal libel — misrepresenting voting records. (1) It is unlawful for any person to make or publish any false statement or charge reflecting on any candidate's character or morality or to knowingly misrepresent the voting record or position on public issues of any candidate. A person making such a statement or representation with knowledge of its falsity or with a reckless disregard as to whether it is true or not is guilty of a misdemeanor.

(2) In addition to the misdemeanor penalty of subsection (1), a successful candidate who is adjudicated guilty of violating this section may be removed from office as provided in 13-35-106 and 13-35-107.
History: En. Sec. 2, Ch. 539, L. 1979; amd. Sec. 1, Ch. 545, L. 1983.

Cross-References
When owner of radio station not held responsible for defamatory broadcast, 27-1-811.
Misdemeanor penalty, 46-18-212.

Part 3
Code of Fair Campaign Practices

13-35-301. Adoption of code of fair campaign practices. The following code of fair campaign practices is adopted by Montana:

"There are basic principles of decency, honesty, and fair play that every candidate for public office in the United States has a moral obligation to observe and uphold, in order that, after vigorously contested but fairly conducted campaigns, our citizens may exercise their constitutional right to a free and untrammeled choice and the will of the people may be fully and clearly expressed on the issues before the country. Therefore:

I will conduct my campaign in the best American tradition, discussing the issues as I see them, presenting my record and policies with sincerity and frankness, and criticizing without fear or favor the record and policies of my opponent and his party which merit such criticism.

I will defend and uphold the right of every qualified American voter to full and equal participation in the electoral process.

I will conduct my campaign without the use of personal vilification, character defamation, whispering campaigns, libel, slander, or scurrilous attacks on my opposition or his personal or family life.

I will not use campaign material of any sort which misrepresents, distorts, or otherwise falsifies the facts, nor will I use malicious or unfounded accusations which aim at creating or exploiting doubts, without justification, as to the loyalty and patriotism of my opposition.

I will not make any appeal to prejudice based on race, sex, creed, or national origin.

I will not undertake or condone any dishonest or unethical practice which tends to corrupt or undermine our American system of free elections or which hampers or prevents the full and free expression of the will of the voters.

Insofar as is possible, I will immediately and publicly repudiate support deriving from any individual or group which resorts, on behalf of my candidacy or in opposition to that of my opponent, to the methods and tactics that I have pledged not to use or condone."

History: En. Sec. 1, Ch. 475, L. 1979.

13-35-302. Candidates to be given opportunity to subscribe to campaign practices code — publicity. (1) The commissioner of campaign practices shall prepare a form which contains the code of fair campaign practices provided for in 13-35-301 and a place for a candidate to sign the form and to indicate that the candidate endorses, subscribes to, and pledges to abide by the code.

(2) Each candidate required to file statements or reports with the commissioner shall be sent a copy of this form. Signing the form is voluntary, and a failure or refusal to sign is not a violation of the election laws. A form shall be sent for each election as soon as feasible. The signed form shall be returned to the commissioner.

(3) The commissioner shall supply the secretary of state, the county registrars, and the city and town clerks with forms. Any candidate not required to file with the commissioner but wishing to subscribe to the code may obtain the form from the commissioner, the secretary of state, a county registrar, or a city or town clerk and may sign the form and deliver it to the commissioner.

History: En. Sec. 2, Ch. 475, L. 1979.

CHAPTER 36

CONTESTS

Part 1 — General Provisions

Chapter Cross-References
Salaries withheld during
2-16-202.
Role and duties of Cc
Recorder, 7-4-2611.
Challenges to local gover
tions, 7-7-105.
Definitions applicable
13-1-101.

13-36-101. Groun
public office. An elect
tion or election to pub
for any of the following
(1) on the ground c
provision of the law rela
(2) whenever the pe
the election, eligible to s
(3) on account of ille
vass of votes.

History: En. Sec. 45, Init.
R.C.M. 1935; Sec. 94-1464, R.
59, Ch. 365, L. 1977; R.C.M. 1

Cross-References
Definition of "elector" and
13-1-101.

13-36-102. Time f
a candidate has been ce
nomination to any publi
whose nomination he int
test. The contestant shal