FR 47134, codified at 49 CFR 391.81 *et seq.*

The FHWA has delayed the effective date of drug testing requirements for foreign-based employees of foreignbased motor carriers on four occasions. *See* 54 FR 39546, September 27, 1989; 54 FR 53294, December 27, 1989; 56 FR 18994, April 24, 1991; 57 FR 31277, July 14, 1992. The last of these established January 2, 1995, as the date for compliance with subpart H of part 391.

Meanwhile, on October 28, 1991, the Omnibus Transportation Employee Testing Act of 1991 (Omnibus Act) was enacted (Pub. L. 102-143, Title V). The Omnibus Act requires the Secretary of Transportation to issue regulations requiring drug and alcohol testing of commercial motor vehicle drivers. Final rules implementing such testing were published on February 15, 1994. See 59 FR 7484, 49 CFR part 382. These new rules institute alcohol testing and will completely replace the current drug testing rule in subpart H of 49 CFR part 391 by January 1, 1996. After that time, subpart H of part 391 will no longer be in effect. However, because § 391.83(c) provides that foreign-based employees of foreign-domiciled carriers shall be subject to the drug testing rules in part 391 as of January 2, 1995, foreign motor carriers would be required to conduct testing for 1995 alone. The FHWA published a notice of proposed rulemaking (NPRM) on February 15, 1994, which proposed to require foreign-based motor carriers to conduct both alcohol and controlled substances testing under the rules in 49 CFR part 382 rather than requiring foreign-based motor carriers to conduct just controlled substances testing under the rules in 49 CFR part 391. See 59 FR 7528.

The Omnibus Act applies to foreignbased motor carriers and drivers on its face, with the proviso that the new rules be "consistent with the international obligations of the United States, and * * * consider applicable laws and regulations of foreign countries." 49 U.S.C. 31306(h). Thus, foreign-based drivers are required by the statute to be covered, but the Secretary is granted the authority to deem the requirement satisfied by the testing laws of foreign nations or through international agreements.

On February 15, 1994, the FHWA published an NPRM soliciting comments on methods for conducting testing of foreign drivers. The FHWA proposed that the final controlled substances and alcohol testing rule under 49 CFR part 382 be amended to cover foreign-based drivers of foreignbased carriers. To accomplish this, § 382.103(c)(4), which excludes foreign-

based carriers, would be deleted. Based on the comments about the efficacy and progress of the negotiations process aimed at achieving compatibility and reciprocity of testing standards, the implementation date was chosen to provide the greatest opportunity for the negotiation process to be completed successfully. However, if the process were not completed successfully, the requirements of 49 CFR parts 40 and 382 were proposed to go into effect on January 1, 1996. The FHWA continues to analyze comments and negotiate with foreign governments to achieve compatible laws and reciprocity of testing standards. To permit these discussions to progress in an orderly fashion, and to allow additional time to work on compatibility and reciprocity with foreign governments, the FHWA is removing the date on which foreignbased motor carriers would be subject to the drug testing rules at 49 CFR part 391.

This final rule removes the date by which testing programs must commence for persons located outside the territory of the United States, including foreignbased employees of American companies (or their foreign subsidiaries). This action does not postpone testing for any other person, including U.S.-based employees of foreign companies and their American subsidiaries.

Rulemaking Analyses and Notices

The FHWA finds that further notice and opportunity for comment are unnecessary under 5 U.S.C. § 553(b)(3)(B) inasmuch as the issue of when foreign-based employees of foreign-domiciled carriers should be subject to the FHWA's new alcohol and controlled substances testing rules at 49 CFR part 382, rather than the current part 391 rules, has already been the subject of notice-and-comment rulemaking (RIN 2125-AD11) in a December 15, 1992, advance notice of proposed rulemaking (57 FR 59356) and a February 15, 1994, notice of proposed rulemaking (59 FR 7528). In addition, the FHWA believes that further notice and opportunity for comment are not required under the regulatory policies and procedures of the Department of Transportation. In light of the earlier opportunities to comment on this subject, the FHWA does not anticipate that providing an additional comment period would result in the receipt of useful information.

The FHWA also believes that this final rule is exempt from the 30-day delayed effective date requirement of the Administrative Procedure Act under 5 U.S.C. § 553(d)(1) because it "grants or

recognizes an exemption or relieves a restriction." If 49 CFR § 391.83(c) were not amended to remove the compliance date, foreign-based drivers would be subject to the drug testing rules of 49 CFR part 391 as of January 2, 1995. This action provides that foreign-based drivers will continue to be excluded from the requirements of 49 CFR part 391, effectively granting an exemption to the controlled substances testing requirements in 49 CFR part 391 which would otherwise soon apply to these drivers. Therefore, the FHWA finds that good cause exists to proceed directly to a final rule which is effective upon its date of publication.

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

The FHWA has determined that this action is neither a significant regulatory action under Executive Order 12866 nor significant under the Department of Transportation's regulatory policies and procedures. In this final rule, the FHWA removes the date on which the drug testing rules at 49 CFR part 391 would apply to foreign-based employees of foreign-domiciled carriers, thereby continuing to exempt these employees from these drug testing rules. It is anticipated that the economic impact of this rulemaking will not be substantial because, in removing the compliance date for foreign-based employees of foreign carriers, the FHWA is not altering existing regulations in such a way as to either impose or eliminate any economic burden. These employees are not now subject to the drug testing rules at 49 CFR part 391, and this action simply maintains their exempt status.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. L. 96-354, 5 U.S.C. 601-612), the FHWA has evaluated the effects of this rule on small entities. This final rule will remove the compliance date by which foreigndomiciled motor carriers would have been required to test drivers for the use of controlled substances under 49 CFR part 391. In removing this compliance date, the FHWA is simply continuing to exempt these employees from the agency's controlled substances testing requirements. Therefore, a full regulatory evaluation is not required. For this reason 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.