



**The Canada – US Entry/Exit Initiative:
Tracking of Time Spent in the US – A Cross-Border Review for Canadian Carriers**

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I. OVERVIEW

This document provides a summary of the current status of the Canada-U.S. Entry Exit Initiative (the “**Initiative**”) and an overview of the Canadian and U.S. immigration and federal income tax¹ considerations for commercial truck drivers who frequently and/or for longer periods travel to the U.S. as part of their duties. The Initiative does not affect existing U.S. or Canadian immigration and income tax rules, but increases cooperation between the countries on the tracking of the movement across the Canada-U.S. border as further outlined below.

For purposes of this document, it is assumed that the commercial truck drivers are (i) individuals; (ii) not U.S. citizens; (iii) either (A) Canadian citizens or (B) lawful Canadian residents under Canadian immigration law; and (iv) are engaged in commercial trucking under contract with one or more Canadian trucking companies. Drivers who are also U.S. citizens or are under contract with U.S. trucking companies may have very different considerations than those set out in this document.

The information presented in this document is intended to be a general summary. It is not exhaustive and may not address particular or unique circumstances. It should not be construed as legal, business or tax advice or representations to any person.

This document does not address related income tax considerations for commercial trucking companies. Canadian commercial trucking companies whose operations extend to the U.S. are encouraged to seek U.S. tax advice.

Each section contains an overview of the relevant rules applicable to commercial truck drivers along with answers to commonly asked questions.

¹ Provincial, state, county, municipal, excise, value added tax, sales tax and other taxes, duties, levies and similar obligations may also apply to drivers operating in Canada and the U.S. These considerations are beyond the scope of this document.

II. THE INITIATIVE

A. What is the Initiative and what is its current status?

The Initiative is part of the Canada U.S. Beyond the Border Action Plan. Under the Initiative, the two countries plan to exchange Biographical Entry Data collected from persons who enter into one country with the other country, so that the data can be used by the country of exit to establish the traveller's exit from that country.

In essence, it is a coordinated entry and exit information system. When the roll out of the program is complete, a record of entry into one country will be considered as a record of exit from the other.

The Initiative has a number of purposes that aim to strengthen the border and immigration systems of both countries, by helping the two countries to have better information on who has left the country. For example, superior data will allow Canada and the U.S. to:

- identify persons who overstay the length of time they are lawfully permitted to be in one of the two countries;
- monitor the departure of individuals who are subject to removal or departure orders;
- assist one another in locating individuals who are involved in organized crime, terrorism and other crimes; and
- verify compliance with various residency requirements and help manage border crossings efficiently.

The Initiative is being implemented in phases, some of which have already been completed or are currently being undertaken.

Phase I of the Initiative was a “test” or “proof of concept” phase that was implemented at only four land border ports of entry. The scope of Phase I excluded information of Canadian and U.S. citizens.

The Phase I “test” phase was completed on January 15, 2013. A report produced regarding Phase I indicated that the two countries exceeded expectations in terms of their ability to reconcile entry and exit records (*i.e.*, the “test” phase confirmed that entry data could be used to establish exit with a high level of accuracy).

Phase II of the Initiative began on June 30, 2013 and is currently ongoing. Phase II extended the program to all automated land border ports of entry (this is defined to include all ports of entry on the shared Canada-U.S. land border that have a primary processing capacity to capture traveller passage as an electronic record. This includes land, ferry and pedestrian crossings, but not large cruise vessels).

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Similar to Phase I, the information that is exchanged relates only to individuals who are *not* Canadian or U.S. citizens.

Contrary to many media reports, Phases III and IV of the Initiative have not yet been initiated and the Government of Canada has stated that these Phases will require legislative and regulatory changes prior to implementation in Canada.

Phase III was supposed to have been initiated by June 30, 2014, and would have expanded the Initiative to include the exchange of data on all travelers at automated common land border ports of entry (*i.e.*, including Canadian and U.S. citizens).

Phase IV was supposed to have been initiated at the same time, and contemplates the development by Canada of a system under which airlines will be required to submit their passenger manifest information on outbound international flights.

B. What information is gathered under this Initiative?

It is not yet known precisely which data elements will be exchanged under Phases III and IV of the Initiative, since the personal information elements collected (and precise uses of that data) will be determined when Privacy Impact Analysis Assessments are conducted for these future phases.

We do know the scope of information exchanged as part of Phase II of the Initiative. Under Phases I and II of the Initiative, the Biographic Entry Data exchanged between Canada and the U.S. was defined to include the following elements:

- (a) First/Given Name;
- (b) Last Name/Surname;
- (c) Middle Name;
- (d) Date of Birth;
- (e) Nationality/Citizenship;
- (f) Gender;
- (g) Document Type;
- (h) Document Number;
- (i) CBSA Location Code/U.S. Port of Entry Code;
- (j) Date of Entry; and
- (k) Document Country of Issuance.

On entry into the country, as per its normal practice, each country collects the following data elements: Name, Date of Birth, Nationality/Citizenship, Gender, and Document information (type, number and country of issuance). The only data actually exchanged between the countries is the date of entry, time of entry and the port through which the individual has entered the other country. This information can be used to reconcile entry into one country with exit from another.

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As noted, it is not yet known precisely which data elements will be exchanged as part of Phases III and IV.

The 2003 *Statement of Mutual Understanding on Information Sharing* (“**2003 MOU**”) certainly contemplates that Citizenship and Immigration Canada and the U.S. Immigration and Naturalization Service/U.S. Department of State may share many types of information when a *specific* request is made for records pertaining to *specific* persons or entities, or groups of persons, for law enforcement purposes. Types of information may include, for example, aliases, biometric data such as photographs and fingerprints, work history, travel itinerary, addresses, marital status, criminal history, occupational and educational information, *etc.*

However, in order for information to be shared on a *systematic* basis, this must be provided for by adopting an Annex to the 2003 MOU. Canada and the U.S. adopted such an Annex in order to govern the exchange of information within Phase II of the Initiative. Presumably, when Phases III and IV of the Initiative are rolled out, Canada and the U.S. will also adopt an Annex to the 2003 MOU that sets out the data elements to be exchanged as part of those Phases. It is unknown whether those data elements will be broader than the information exchanged for purposes of Phases I and II.

C. While that information is said to be for border control and Homeland Security purposes, should we expect that the information is shared with other government departments which might be interested in it? Is it made available to third parties?

The Government of Canada has been careful to inform the public that it takes the privacy of individuals very seriously and therefore has built privacy protections “into the core” of the Initiative.

For purposes of Phase II, the entities to which the biographic data may be disclosed as well as the purposes for which that disclosure is permitted to occur were specifically set out. In particular, the Biographic Entry Data that may be disclosed under Phase II is:

- (a) To a domestic court or in a domestic administrative or judicial proceeding to assist in the administration and enforcement of immigration laws;
- (b) To any domestic government agency for any law enforcement purpose, to include the enforcement of immigration laws consistent with each country’s respective domestic laws;
- (c) With any domestic government agency when the disclosure is otherwise required by the country’s respective domestic law;
- (d) To any domestic government agency with a counterterrorism or national security mission, for a counterterrorism or national security purpose, within the same framework established for domestic information collected and

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provided to those same agencies consistent with each country's respective domestic law; and

- (e) To partner countries in the Five Country Conference (the United Kingdom, Australia, and New Zealand) in accordance with applicable international agreements or arrangements and where the primary purpose of the exchange is to assist in the effective administration and enforcement of their respective immigration laws.

As a result, the receiving country has quite broad latitude to disclose the data that is received from the other country to its own domestic government agencies, for the purposes of law enforcement. It is notable that the "law enforcement purposes" for which the information may be disclosed are "open ended", enforcement of immigration laws is included as an example, but disclosure is not limited to that purpose. Meaning, governments have allowed flexibility; they may or may not share information with the IRS or any other government agency for that matter.

Similar to the discussion relating to the data elements to be collected, we do not yet know the scope of disclosure that will be permitted under Phases III and IV of the Initiative, including whether Canada and the U.S. will more narrowly circumscribe the government agencies with whom the information may be shared and for what purposes.

III. CANADIAN IMMIGRATION MATTERS

Set out below are answers to common questions of Canadian citizens and Canadian permanent residents in respect of the effect of travel to the U.S. under Canadian immigration law.

A. Canadian Citizen Questions

- (1) *If I am a Canadian citizen, are there limits to the time I am permitted to be out of the country? Do I risk losing my citizenship if I am out of the country longer than a certain period of time?*

There are no limits on the amount of time that a Canadian citizen can be outside of Canada. There is no risk of losing Canadian citizenship due to a citizen spending time outside of Canada.

B. Canadian Permanent Resident Questions

- (1) *What are the residency requirements for me to maintain my permanent resident status?*

Once you become a permanent resident, in order to maintain Canadian permanent resident status, a permanent resident must be able to show at least 730 days (equivalent to 2 years worth of days) of physical presence in Canada out of any 5 year period.

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(2) *What are the residency requirements for me to be eligible to be a Canadian citizen?*

Under Bill C-24, Canada changed the residency rules for a permanent resident to be eligible to apply for Canadian citizenship.

To be eligible to apply for citizenship the applicant must (since becoming a permanent resident of Canada):

- (a) be physically present in Canada for 1,460 days (equivalent to 4 years worth of days) during the six years immediately before the date of application for citizenship, and
- (b) be physically present in Canada for at least 183 days during each of the four years immediately before the date of application.

There are no exceptions to this physical residency requirement.

It is expected that the Bill C-24 citizenship resident test will be implemented in the first half of 2015. Until then, anyone who applies for citizenship will do so under the pre-Bill C-24 residency test. That required an applicant to have 1,095 days of physical presence in Canada in the four years prior to making the citizenship application.

(3) *How does time spent in the U.S. as a requirement of my employment affect the calculation for me (a) to maintain my permanent resident status, or (b) to be eligible for Canadian citizenship?*

- (a) As a general rule, you cannot count days outside Canada towards the residency requirement to maintain permanent resident status.

There is a potential exception to this general rule where a permanent resident is an employee of, or under contract to provide services to, a Canadian business and is assigned on a full-time basis as a term of the employment or contract to a position that is outside of Canada or to an affiliated enterprise outside Canada. If this exception applies, days spent outside Canada may be counted as if they were days of residence in Canada when assessing whether a permanent resident has met the residency requirement to maintain permanent status (which is 730 days of presence out of any 5 year period). However, commercial drivers should not rely on this potential exception and commercial drivers are cautioned that the best way to be able to demonstrate that the residency test for maintaining permanent status is met is to be able to show at least 730 days of physical presence in Canada in any 5 year period.

- (b) You cannot count days outside Canada when assessing your eligibility to apply for Canadian citizenship. There are no exceptions.

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- (4) *How does time spent in the U.S. for vacation purposes affect the above calculations?*

You cannot count these days as they are not days of physical presence in Canada.

- (5) *How are part days in the U.S. counted in this calculation, such as the day I enter the U.S. and the day I leave the U.S. to come back to Canada?*

For the residency requirement to maintain permanent resident status, “day” is defined to include any part of a day that a permanent resident is physically present in Canada. Therefore, if you spend any part of a day in Canada, you may count that as a day in Canada when determining if you have at least 730 days in Canada under the permanent resident residency test.

For assessing days of physical presence in Canada for the purpose of determining eligibility to apply for citizenship, there is no definition of “day” in the *Citizenship Act*. Immigration Canada generally allows an individual to count either the day they leave Canada or the day they return, but not both, as a day in Canada. A same day return trip is counted as a day in Canada. Under this approach, one of the travel days on any trip that lasts for more than one day would not be counted as a day in Canada when assessing citizenship eligibility. We understand that there may be some controversy about this approach, and so we would urge anyone who may need to rely on both travel days to reach the eligibility threshold to seek legal advice.

- (6) *How is time present in the U.S. calculated if it is for circumstances beyond my control, such as due to the breakdown of my vehicle?*

You cannot count these days as they are not days of physical presence in Canada.

- (7) *Is there any permit or exemption to the above rules available where the requirements of my employment result in any of the above tests not being met?*

No, other than the limited exception discussed in 3(a) above in respect of the permanent residency test.

IV. U.S. IMMIGRATION MATTERS

A. Summary

Commercial drivers on Canada-U.S. routes are considered “business visitors” to the U.S. There is no limit on the number of visits to the U.S. so long as the person maintains his or her primary residence in Canada and does not engage in U.S. employment. In analyzing these factors to determine admissibility as a visitor, periods of continuous time in the U.S. are more important than the number of separate trips.

U.S. immigration law distinguishes between immigrants and nonimmigrants. The nonimmigrant category of visitor for business or pleasure is defined as one “having a

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residence in a foreign country, which he has no intention of abandoning and who is visiting the U.S. temporarily for business or temporarily for pleasure.” This is the authority for the B-1 and B-2 visa categories for business or pleasure, respectively. Commercial truck drivers are admitted to the U.S. as business visitors in the B-1 visa category.

The Department of State’s Foreign Affairs Manual describes five important elements that characterize business visitors:

- (1) A primary residence in a foreign country, which they do not intend to abandon;
- (2) Intent to enter the U.S. for a period of specifically limited duration;
- (3) The intention to depart the U.S. at the end of the temporary stay;
- (4) Adequate financial arrangements and travel documents to effectuate the travel and departure; and
- (5) Seeking admission for the sole purpose of engaging in legitimate activities relating to business or pleasure.

The visitor must also establish that he or she is admissible to the U.S. A person may be inadmissible for a number of reasons including prior criminal convictions or immigration law violations.

The North American Free Trade Agreement (“**NAFTA**”) regulations contain specific provisions relating to transportation operators within the three NAFTA countries. NAFTA provides that a business visitor is admissible if he or she can produce, among other things, “evidence demonstrating that the proposed business activity is international in scope and that the business person is not seeking to enter the local labor market.” U.S. immigration regulations incorporate NAFTA’s provisions to define permissible distribution activities of transportation operators within the NAFTA countries (including Canada and the U.S.). Specifically, transportation operators transporting goods or passengers to the territory of one NAFTA country from the territory of another NAFTA country or loading and transporting goods or passengers from the territory of one NAFTA country, with no unloading in that territory, to the territory of another NAFTA country. In other words, these operators may make intermediate deliveries in the U.S. if all commodities or passengers to be delivered were loaded in Canada. Furthermore, they may load from intermediate locations in the U.S. if all commodities or passengers to be loaded will be delivered in Canada. Purely U.S. domestic service or solicitation in competition with U.S. operators is not permitted.

B. Permissible Activities

The term “business” in the context of “business visitor” generally relates to legitimate activities of a commercial or professional nature on behalf of a Canadian employer in

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international commerce. It does not include local employment or labour for hire such as the point to point movement of domestic U.S. freight (also known as “cabotage”).

The following is a summary of permissible activities of commercial drivers as business visitors set out on the U.S. Customs and Border Protection website.²

1. General Principles

- The goods must be entering or leaving the U.S., and remain in the stream of international commerce.
- Cargo that has its origin and final destination within the U.S. generally moves in the stream of domestic, rather than international commerce. The mere fact that goods originate from a foreign source does not make such goods “foreign” for purposes of immigration laws. The goods must remain in the international stream of commerce - once they have come to rest they assume a domestic character.
- A driver bringing goods from Canada or Mexico may transport those goods to one or several locations in the U.S., and may pick up goods from one or several U.S. locations for delivery to Canada or Mexico, but the driver may not load, haul, or deliver a cargo that is both picked up and dropped off at a destination within the U.S.
- The entry of the driver must be for the purpose of an international movement of goods.
- Drivers may not engage in any activity that qualifies as local labor for hire. The burden of proof remains with the driver to establish eligibility for entry.

2. Frequently Asked Questions

Q. A Canadian driver is taking a shipment from Canada for delivery to a point in the U.S. The dispatcher has been notified of a shipment destined to Canada that is located in another state. May the driver take an empty trailer (deadhead) from the delivery point to the other state to pick up the shipment and deliver it to Canada?

A. A driver may deadhead a trailer from one location to another within the U.S. PROVIDED the deadhead trailer is either the one the driver came in with or the one he or she is departing with. The driver may not haul an empty trailer from one location to drop it off at another location.

Q. Under what circumstances may a driver enter with an empty tractor?

² <http://www.cbp.gov/border-security/ports-entry/cargo-security/carriers/land-carriers/how>.

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- A. A driver may enter with an empty tractor to pick up a trailer for delivery to Canada or Mexico.

The driver may enter with an empty tractor to pick up a loaded trailer or goods previously brought from Canada or Mexico and left at the port-of-entry or a Customs warehouse or lot for government inspection or entry processing by a government agency, even if the driver did not bring the goods. (Note - this only applies when the goods have been held for U.S. federal inspection by a government agency. It does not apply to goods that have already cleared inspection.)

- Q. Does the driver have to depart with the same trailer with which he or she entered the U.S.?

- A. The driver may drop a trailer at one location and drive empty to another location to pick up a loaded trailer destined to Canada or Mexico.

- Q. May a foreign driver taking a shipment from the U.S. to Canada also take merchandise destined to another point in the U.S. since it is on the way?

- A. No. For Immigration purposes, that is considered point-to-point hauling within the U.S. and is not permitted. The driver may only take goods loaded in the U.S. to Canada or Mexico.

- Q. May a driver perform associated functions such as loading and unloading cargo?

- A. The driver may perform a function that is a necessary incident to international trade. Loading and unloading that is merely incidental to the primary purpose of transporting goods into or out of the U.S. is permitted.

C. Documentary Requirements

Canadian citizens entering the U.S. as visitors for business are exempt from the standard visa requirement and are admissible upon presentation of a Canadian passport or approved substitute document such as enhanced drivers' license, NEXUS or FAST card.

Non-Canadian citizens require a valid passport and visitor visa unless they are citizens from one of 38 "visa waiver" countries. The Visa Waiver Program ("**VWP**") allows citizens of those countries to travel to the U.S. as visitors without a visa for stays of up to 90 days. Travelers must be eligible to use the VWP and have a valid Electronic System for Travel Authorization approval prior to travel.³

³ For more information on the VWP, see: <http://travel.state.gov/content/visas/english/visit/visa-waiver-program.html>.

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The person seeking entry must also have a passport or travel document that will remain valid throughout the intended duration of the trip, to avoid being stranded without the ability to depart the U.S. The general rule is that the person should have a passport or other approved travel document with at least six months' validity. U.S. Customs and Border Protection (“**CBP**”) will not admit a person for a period of fixed duration that extends beyond the passport expiration date.

The CBP traditionally issued Form I-94 to document the arrival and departure of visitors and to provide evidence of the terms of admission. The I-94 card is a white paper card that contains an admission stamp, date of arrival and annotation of the class of admission. Until 2013, Canadian visitors generally did not receive an I-94 document except in unusual circumstances such as for persons entering with an approved waiver of inadmissibility. However in 2013, as part of implementation of its Advance Passenger Information System, CBP eliminated the paper I-94 card for entries at international airports and seaports and now collects information on visitors and maintains the I-94 information electronically. CPB also makes electronic records of entry at land ports of entry, but continues to issue the paper I-94 cards at such ports, when applicable, as in the past. The movement to an electronic record system for entries by Canadian and non-Canadian visitors has resulted in the establishment of a formal record of admission for a fixed duration with a maximum stay of six months for Canadians, contrary to prior practice.

D. Duration of Stay

When an electronic record of admission is made for Canadian business visitors, the maximum term of stay is six months. Although Canadian citizens do not need a visitor visa and traditionally did not get a passport stamp or entry document that authorized entry for a specific term, CBP takes the position that Canadian citizens are deemed to be admitted for a maximum of six months regardless of whether there is an electronic record of entry. The six month maximum stay is consistent with the standard entry period for visitors from other countries who do need formal visitor visas in their passports. A person is in violation of U.S. immigration law if he or she does not depart the U.S. within the six-month limit, thereby becoming deportable and ineligible for other immigration law benefits such as a change or extension of status. A person who overstays beyond the six month term begins to accrue “unlawful presence” on the first day after the six-month admission expires. Remaining unlawfully present in the U.S. for a continuous period of 180 days after the original 6-month term is subject to a ban on subsequent re-entry for 3 years. Overstaying for more than a year is subject to a 10-year ban. To become subject to the 3-year or 10-year bans, the unlawful presence must be continuous and uninterrupted; a departure from the U.S. interrupts the effect of the unlawful presence if the ban has not already been triggered.

There is no aggregate maximum time limit on the number of days that a person can be a legal visitor to the U.S. There is no statutory or automatic immigration law violation for aggregate time in the U.S. as a visitor for 180 days or more in a year and there is no restriction on the number of entries a person can make as a visitor annually. There is

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no rule that automatically creates an immigration violation for a person who has been a visitor for more than 180 days or more than 180 times in a year.⁴ A person can theoretically be a visitor in the U.S. for 365 days in a year without creating an immigration violation. An example would be a Canadian resident commercial driver who makes a daily run between Niagara Falls, Ontario and Niagara Falls, New York to pick up and drop off goods in either direction. There is no annual limit on the number of short, daily trips as a visitor in such circumstances. The key factors in such a case would be proof of Canadian residency, the same-day departure and the short duration of time spent in the U.S. In contrast, if the CBP officer suspects that the driver resides in the U.S. or will engage in illegal point to point movements in the U.S., the driver will not be admitted at all.

That is not to say that a same-day entry and departure does not count as a day of presence in the U.S. An entry for any part of a day, regardless of how short duration, counts as a day in the U.S. But the nature of such short trips might allow individuals to remain admissible as *bona fide* visitors, regardless of frequency.

The pattern and nature of a person's visits, and the aggregate time in the U.S., do have a bearing on admissibility. It is one thing to make more than 180 day-trips and quite another to spend more than 50% of one's time in the U.S. Anyone who spends more than half of his or her time in the U.S. raises questions about the person's primary residence. Someone who makes frequent short trips to the U.S., or has a pattern of long visits to the U.S. followed by short departures, could come under scrutiny during the inspection process. The CBP officer might want to rule out the possibility that the person is working or living illegally in the U.S. The application of the immigration laws create an unusual paradox. The person who seeks admission for a short visit is granted an automatic six month entry, but the person who seeks admission for six months might not be admitted at all. There is no right to enter the U.S. for six months at a time; the person bears the burden of proof that he or she is a legitimate visitor and that the intended trip is consistent with immigration law principles for visitors. The longer the intended trip, the more a person accrues consecutive days in the U.S., and the greater the aggregate number of days in the U.S., the harder it is to establish visitor status. Those factors are more likely to make the CBP officer suspicious that the driver is living in the U.S., working illegally in the U.S., or both. But there is no numerical point that triggers automatic consequences or inadmissibility.

It is improper to view immigration admissibility determinations as solely arithmetic functions of the number of days in the U.S. While the number of days in the U.S. may point to underlying factors that will determine one's admissibility, the number of days, *per se*, is not the sole deciding factor. As a result, adopting a plan to keep the number

⁴ 180 days is used because it is the number stated in the unlawful presence statute and is a number that approximates a six-month period. When the specific issue relates to one-half of the calendar year, such as in the context of the "Substantial Presence Test" for U.S. tax residency purposes (discussed below), the relevant number is usually stated as 183 days.

of days in the U.S. below a certain number under the belief that one's admissibility will be affected automatically by being above that number is inaccurate. The number of trips to the U.S. is not as important as aggregate time, consecutive days, and the number of trips in excess of 24 hours. A more accurate indicator of one's status is where one sleeps on a daily basis. In the U.S. State Department's list of criteria for the business visitor, discussed above, the first criteria is "a primary residence in a foreign country." When the number of days in the U.S. becomes the focal point in a determination of admissibility as a visitor, the fundamental question is this: Given the past travel history, how can that person prove that he or she has a primary residence in Canada which has not been abandoned? If that question is answered satisfactorily, the secondary focus will be on the nature of the visits and whether the driver was and is "engaging in legitimate activities relating to business." If both answers are satisfactory, the driver is admissible as a visitor without respect to an annual limitation on the number of days in the U.S.

E. Answers to Common Questions

(1) *Is there a threshold number of days I am permitted to be in the U.S.?*

No. U.S. immigration law does not limit a person to a maximum number of days in the U.S. However, an aggregate stay in the U.S. of six months or more in any 12-month period could raise the questions of whether the person maintains a primary residence in Canada and, therefore, whether he or she is a legitimate visitor.

There is no statutory maximum. A driver who violates the law by residing or working illegally in the U.S. can face a variety of consequences including refusal of admission, vehicle seizure and/or future inadmissibility to the U.S.

(2) *Is my time in the U.S. for work purposes calculated differently from my time in the U.S. for vacation purposes?*

No. For immigration purposes, any day, or part of a day, in the U.S. for any purpose counts as a day of presence. The nature and duration of the trip and/or stay in the U.S. matters more than the number of days for determining admissibility.

(3) *Does my time in the U.S. include time in the U.S. for purposes beyond my control, such as if my commercial vehicle breaks down and my employer requires me to stay with it in the U.S. until it is repaired?*

Yes, but it is also a factor in the nature and duration of the trip. Time in the U.S. that relates to planned or unplanned visitor activity would not affect future admissibility.

(4) *How does the U.S. define a day?*

Any part of a day is considered one day. If you enter the U.S. at 11:59 pm on Monday and depart at 12:01 am on Wednesday, you will be considered to have accrued three days of presence despite it being a trip that lasted only 24 hours and two minutes.

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(5) *Is there a point when I must report to the U.S. that I have been, or will be, present for a certain number of days or more?*

No.

(6) *Is there a point when I have to obtain a class of approval from U.S. Immigration because of the number of days I am spending in the U.S.?*

No. So long as you can prove you are a visitor, you are admissible regardless of the number of days spent in the U.S. If the CBP officer believes you reside or intend to work illegally in the U.S., you will be refused admission. There is no work permit available to commercial drivers to allow you to work or reside in the U.S.

(7) *Do the answers above differ if the subject is a permanent resident of Canada and not a Canadian citizen?*

No, but there are different documentary requirements. A non-citizen requires a visitor visa unless the visitor is from a visa waiver country.

(8) *As the employer (highway carrier) what are the implications and/or consequences for me if one of my employees (the driver) violates any of the above U.S. immigration laws?*

As a general rule, immigration law consequences are personal to the driver because he is the “master” of the conveyance. It is possible that CBP could seize the tractor and/or trailer if it is viewed an instrumentality of the illegal conduct, such as smuggling of people or goods. In egregious cases where the employer has participated in and encouraged violations of law, CBP could refuse entry to all drivers for that company.

(9) *Under each section above; what relief/flexibility/exemptions are available, if any, under NAFTA?*

As noted above, the NAFTA regulations clarified and formalized rules regarding commercial drivers that were already in force. The biggest difference between Canadian citizens and nationals of other countries is that Canadian citizen visitors have always been exempt from the standard visa requirement for entry to the U.S., and are admitted to the U.S. without presentation or issuance of any formal document other than proof of citizenship. The rules regarding duration of stay and maximum periods of stay are the same for everyone in the world. There are no special exceptions under NAFTA.

V. U.S. TAX MATTERS

A. U.S. Income Tax Residency Rules

Determining the U.S. residency status of a non-U.S. citizen for U.S. tax purposes is a two-step process. Under the U.S. Internal Revenue Code (“**Code**”), an individual will be considered to a U.S. resident for U.S. federal income tax purposes if he or she meets

either the (i) “lawful permanent resident” test or (ii) the substantial presence test (“**Substantial Presence Test**”).

If the individual meets either of the Code tests, there are two exceptions, one of which involves the tie breaker rules under the Canada-U.S. Tax Treaty.

As noted above, the below does not address the U.S. income tax considerations of U.S. citizens, even those ordinarily resident in Canada. U.S. citizens should seek independent tax advice in respect of their U.S. income tax obligations.

1. Lawful Resident Test

Under the lawful resident test, an individual is considered to be a U.S. resident for U.S. tax purposes if lawfully admitted to the U.S. as an immigrant under U.S. immigration law. This generally requires obtaining a type of visa commonly known as a “green card”.

2. Substantial Presence Test

Under the Substantial Presence Test, an individual is considered a U.S. resident for U.S. tax purposes for a particular calendar year if present in the U.S.:

- (a) at least 31 days during that calendar year; and
- (b) 183 or more days in the aggregate during the 3 year period that includes the present year.

For purposes of applying this test, days of presence are weighted as follows: days in the current year are counted in full, days in the first preceding year are counted 1/3, and days in the second preceding year are counted 1/6.

This is best illustrated by example. Assume you are present for 180 days in the U.S. each year. In determining your residency for the current year (2015) you would count the following days:

- (a) All 180 days in 2015; plus
- (b) 60 days in 2014 ($180 \times 1/3$); plus
- (c) 30 days in 2013 ($180 \times 1/6$).

The total of $180 + 60 + 30$ is 270 days. In this example, you would meet the Substantial Presence Test for 2015 and would be considered a U.S. resident for 2015 for U.S. tax purposes. If you meet the Substantial Presence Test in a given year there are still several exceptions noted below.

3. Commuter Exception

Certain days an individual is otherwise present in the U.S. are not counted for purposes of calculating the Substantial Presence Test. An individual is not considered present in the U.S. on any day that he is regularly commuting to work in the U.S. from a residence in Canada or Mexico.

A non-resident of the U.S. that is a non-U.S. national will be considered to “commute regularly” if he commutes to his location of employment or self-employment in the U.S. from his residence in Canada on more than 75% of the workdays during the working period. For these purposes the term “commutes” means to travel to employment and to return to one’s residence within a 24 hour period.

4. Closer Connection Exception

An individual who meets the Substantial Presence Test may still be considered a non-resident of the U.S. for the current year if they qualify under a closer connection exception (“**Closer Connection Exception**”). In order to qualify for this exception, the following conditions must be met:

- (a) You must be present in the U.S. fewer than 183 days in the current year;
- (b) You must maintain a “tax home” in a foreign country during the current year; and
- (c) You must have a “closer connection” during the current year to a foreign country in a which a tax home is maintained than to the U.S. This is essentially a test of where you have more significant ties (home, family, business, organizations, *etc.*)

An individual elects the Closer Connection Exception by filing U.S. Internal Revenue Service (“**IRS**”) Form 8840 by April 15 of the following year.

You cannot claim a Closer Connection Exception if you are a green card holder.

5. Canada-U.S. Tax Treaty Tie-Breaker Rules

If an individual is resident in the U.S. under U.S. domestic tax law either under (i) the lawful resident test or (ii) the Substantial Presence Test and is unable to file a Closer Connection Exception (for example, if they exceed 183 days in a given year), they can file a “**Treaty Election**” on IRS Form 8833 *Treaty Based Return Position Disclosure*, if they are a non-resident of the U.S. for income tax purposes as a result of the Canada-U.S. Tax Treaty “tie-breaker” rules.

More specifically, the Canada-U.S. Tax Treaty will apply certain “tie-breaker rules” where an individual is a resident for income tax purposes of both Canada and the U.S. under the respective domestic tax law of each country. The effect of the tie-breaker

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rules results in the individual being deemed to be resident only in one of those countries for income tax purposes. Generally, the factors that require consideration under the tie-breaker rules are the place where one's settled routine of life is most closely connected to or their "residential and economic ties". The most significant residential ties will be an individual's home or dwelling, the country where their spouse or common law partner is settled and where their dependants are. Economic ties will include where an individual's employer is located, where their bank accounts and credit cards are held, the jurisdiction in which they hold a driver's licence and the passport they carry, among other factors. Generally, an individual will "tie-break" to Canada, and therefore be a resident of only Canada for Canadian and U.S. income tax purposes, if that individual's permanent home is in Canada and their closer economic connections are to Canada.

In limited circumstances, where an individual has homes available to them in both Canada and the U.S. and their other residential and economic ties are relatively evenly split between the two countries, specific advice should be sought as to the effect of the application of the Canada-U.S. Tax Treaty tie-breaker rules.

Where a person would, but for the filing of a Treaty Election, be a resident of the U.S. under U.S. domestic tax law, they are still required to file a U.S. income tax return (IRS Form 1040 NR) along with related filings and their Treaty Election in IRS Form 8833. This includes reporting their world-wide income to the IRS, even if such income is not subject to tax in the U.S. as a result of the Treaty Election.

B. Answers to Common Questions

- (1) *Is there a point when I have to file a U.S. tax return because I have been present in the U.S. in excess of a certain number of days? Do I then have to declare all my income and all my assets, wherever the income is earned and wherever the assets are located?*

Yes. If an individual meets the Substantial Presence Test discussed above they will be deemed a U.S. resident for U.S. income tax purposes for that year and be required to file a U.S. income tax return and all required compliance related to their worldwide income. This is subject to the Closer Connection Exception and Treaty Election exceptions discussed above, though each still requires filing applicable forms with the IRS. For individuals who meet the Substantial Presence Test, U.S. income tax returns, Form 8840 for the Closer Connection Exception and/or Form 8833 for the Treaty Election, as applicable, are required to be filed on or before April 15 of the following year.

- (2) *What about my U.S. filing obligations in future years, if I do not exceed the threshold time in the U.S. in those years?*

If an individual does not meet the Substantial Presence Test in a future year they will not be required to file a U.S. income tax return for that year.

(3) *How are “days” calculated for U.S. income tax purposes?*

The relevant test for U.S. income tax purposes is the “Substantial Presence Test” which is a three year rolling average more specifically outlined above, subject to the Closer Connection Exception and Treaty Election.

(4) *Do the answers above differ if the subject is a permanent resident of Canada and not a Canadian citizen?*

No. The relevant U.S. income tax issues are the same whether the individual is a Canadian citizen or a Canadian permanent resident under Canadian immigration law.

VI. CANADIAN TAX MATTERS

A. Overview of Canadian Income Tax Matters

Under the Canadian tax system, an individual’s liability and reporting/filing obligations for income tax are based on whether they are considered a resident or a non-resident of Canada for income tax purposes. Canadian residents are subject to income tax on their worldwide income, regardless of where it is earned. Residency of an individual for Canadian income tax purposes is different than that for immigration purposes. There are two ways in which an individual can be resident in Canada.

First, a person is resident in Canada for income tax purposes if they are “ordinarily resident in Canada”. This determination is similar to the “tie-breaker rules” under the Canada-U.S. Tax Treaty discussed above and are generally based on considering a number of factors rather than being a clear “yes” or “no” test. These factors generally require consideration of the place where one’s settled routine of life is most closely connected to or their “residential and economic ties”. The most significant residential ties will be an individual’s home or dwelling, the country where their spouse or common law partner is settled and where their dependants are. Economic ties will include where an individual’s employer is located, where their bank accounts and credit cards are held, the jurisdiction in which they hold a driver’s licence and the passport they carry, among other factors. The Canadian resident status for income tax purposes of an individual who is “ordinarily resident in Canada” will generally not change because the individual is out of the country for any length of time.

Second, an individual who spends 183 days or more in Canada in any particular calendar year is deemed to be a resident of Canada for Canadian income tax purposes in that year. Days in the year on which the individual was present in Canada and another country are counted towards the 183 days.

Where a particular individual’s presence in the U.S. also causes them to be deemed to be resident in the U.S., the Canada-U.S. Tax Treaty “tie-breaker” rules must be applied (as discussed above) with the result that they will be deemed to be resident only in Canada provided their permanent home is in Canada and their closer economic connections are to Canada. If the individual’s residential and economic ties under the

first test outlined above are weighted to Canada, the person will still be resident in Canada for Canadian income tax purposes even if they spent less than 183 days in Canada in the year.

B. Overview of Canada Pension Plan

The Canada Pension Plan (“**CPP**”) provides pension and benefits when contributors retire, become disabled or die. The amount of the benefit receivable from the CPP is based on how much and how long an individual contributed to the CPP. Contributions to the CPP in turn are based on the individual’s “pensionable earnings” from “pensionable employment” up to a prescribed maximum for a particular year.

Most “pensionable employment” is limited to employment in Canada, however, “pensionable employment” includes employment in international transportation in respect of a motor vehicle that is licensed to operate in one or more provinces of Canada and in one or more states of the U.S., if the person so employed is resident in Canada for income tax purposes and the motor vehicle is operated for purposes of an enterprise of Canada. Therefore, the status of the employment of a Canadian resident employee of a Canadian-based carrier as “pensionable employment” should not be affected by travel between Canada and the U.S. in an appropriately licensed motor vehicle in the course of their duties. Earnings from such employment should therefore constitute pensionable earnings for purposes of the CPP if they would otherwise qualify.

C. Answers to Common Questions

- (1) *Are there Canadian tax consequences if I am out of the country longer than a prescribed period of time? If so, what is that time period, and generally speaking, what consequences should I be concerned about?*

Generally, so long as the individual remains a resident of Canada (as described above), the individual will remain subject to tax in Canada on their worldwide income regardless of the amount of time spent outside Canada during the particular year.

- (2) *If I have to file a U.S. income tax return, do I still have to file an income tax return in Canada?*

The Canadian income tax obligations of a resident of Canada are not affected by any additional obligations to comply with obligations under U.S. income tax law. A resident of Canada will remain subject to tax on their worldwide income and be required to file Canadian income tax returns. To the extent an individual resident in Canada is subject to income tax in another jurisdiction, such as the U.S., Canada will generally allow the individual to claim a foreign tax credit for any foreign tax paid when the individual files their Canadian income tax return.

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- (3) *Will regular travel to the U.S. as part of the employment for a Canadian based carrier affect my eligibility for the Canada Pension Plan?*

No. The status of the employment of a Canadian resident employee of a Canadian-based carrier as “pensionable employment” should not be affected by travel between Canada and the U.S. in an appropriately licensed motor vehicle in the course of their duties.

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