

licensor to audit the end user's compliance with this agreement is hereby amended as follows:

(A) Discrepancies found in an audit may result in a charge by the commercial supplier or licensor to the ordering activity. Any resulting invoice must comply with the proper invoicing requirements specified in the underlying Government contract or order.

(B) This charge, if disputed by the ordering activity, will be resolved in accordance with paragraph (d) of this clause; no payment obligation shall arise on the part of the ordering activity until the conclusion of the dispute process.

(C) Any audit requested by the contractor will be performed at the contractor's expense, without reimbursement by the Government.

(x) *Taxes or surcharges.* Any taxes or surcharges which the commercial supplier or licensor seeks to pass along to the Government as end user will be governed by the terms of the underlying Government contract or order and, in any event, must be submitted to the Contracting Officer for a determination of applicability prior to invoicing unless specifically agreed to otherwise in the Government contract.

(xi) *Non-assignment.* This agreement may not be assigned, nor may any rights or obligations thereunder be delegated, without the Government's prior approval, except as expressly permitted under paragraph (b) of this clause.

(xii) *Confidential information.* If this agreement includes a confidentiality clause, such clause is hereby amended to state that neither the agreement nor the contract price list, as applicable, shall be deemed "confidential information." Issues regarding release of "unit pricing" will be resolved consistent with the Freedom of Information Act. Notwithstanding anything in this agreement to the contrary, the Government may retain any confidential information as required by law, regulation or its internal document retention procedures for legal, regulatory or compliance purposes; provided, however, that all such retained confidential information will continue to be subject to the confidentiality obligations of this agreement.

(2) If any language, provision, or clause of this agreement conflicts or is inconsistent with paragraph (w)(1) of this clause, the language, provisions, or clause of paragraph (w)(1) shall prevail to the extent of such inconsistency.

*(End of clause)*

#### **1552.332–39 Unenforceability of unauthorized obligations (far deviation).**

As prescribed in 1513.507(b) and 1532.1070, use clause 1552.332–39 (FAR DEVIATION) instead of the nondeviated version for purchase orders, modifications and contracts that include commercial supplier agreements.

#### **UNENFORCEABILITY OF UNAUTHORIZED OBLIGATIONS (FAR DEVIATION) (OCT. 2021)**

(a) Except as stated in paragraph (b) of this clause, when any supply or service acquired

under this contract is subject to any commercial supplier agreement (as defined in 1502.100) that includes any language, provision, or clause requiring the Government to pay any future fees, penalties, interest, legal costs or to indemnify the Contractor or any person or entity for damages, costs, fees, or any other loss or liability that would create an *Anti-Deficiency Act* violation (31 U.S.C. 1341), the following shall govern:

(1) Any such language, provision, or clause is unenforceable against the Government.

(2) Neither the Government nor any Government authorized end user shall be deemed to have agreed to such language, provision, or clause by virtue of it appearing in the commercial supplier agreement. If the commercial supplier agreement is invoked through an "I agree" click box or other comparable mechanism (e.g., "click-wrap" or "browse-wrap" agreements), execution does not bind the Government or any Government authorized end user to such clause.

(3) Any such language, provision, or clause is deemed to be stricken from the commercial supplier agreement.

(b) Paragraph (a) of this clause does not apply to indemnification or any other payment by the Government that is expressly authorized by statute and specifically authorized under applicable agency regulations and procedures.

*(End of clause)*

[FR Doc. 2021–21629 Filed 10–6–21; 8:45 am]

**BILLING CODE 6560–50–P**

## **DEPARTMENT OF TRANSPORTATION**

### **Federal Motor Carrier Safety Administration**

#### **49 CFR Parts 382, 383, 384, 390, and 392**

[Docket No. FMCSA–2017–0330]

**RIN 2126–AC11**

#### **Controlled Substances and Alcohol Testing: State Driver's Licensing Agency Non-Issuance/Downgrade of Commercial Driver's License**

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

**ACTION:** Final rule.

**SUMMARY:** FMCSA is amending its regulations to establish requirements for State Driver's Licensing Agencies (SDLAs) to access and use information obtained through the Drug and Alcohol Clearinghouse (DACH or Clearinghouse), an FMCSA-administered database containing driver-specific controlled substance (drug) and alcohol records. SDLAs must not issue, renew, upgrade, or transfer a commercial driver's license (CDL), or

commercial learner's permit (CLP), as applicable, for any individual prohibited under FMCSA's regulations from performing safety-sensitive functions, including driving a commercial motor vehicle (CMV), due to one or more drug and alcohol program violations. Further, SDLAs must remove the CLP or CDL privilege from the driver's license of an individual subject to the CMV driving prohibition, which would result in a downgrade of the license until the driver complies with return-to-duty (RTD) requirements. This rule also requires States receiving Motor Carrier Safety Assistance Program (MCSAP) grant funds to adopt a compatible CMV driving prohibition applicable to CLP and CDL holders who violate FMCSA's drug and alcohol program requirements and makes clarifying and conforming changes to current regulations. The final rule will help keep unsafe drivers off the road by increasing compliance with the CMV driving prohibition.

#### **DATES:**

*Effective date:* November 8, 2021.

*Compliance date:* Compliance with the final rule is required November 18, 2024.

Petitions for Reconsideration of this final rule must be submitted to the FMCSA Administrator no later than November 8, 2021.

**FOR FURTHER INFORMATION CONTACT:** Ms. Gian Marshall, Drug and Alcohol Programs Division, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590–0001, [clearinghouse@dot.gov](mailto:clearinghouse@dot.gov), (202) 366–0928. If you have questions on viewing material in the docket, contact Dockets Operations, (202) 366–9826.

**SUPPLEMENTARY INFORMATION:** This final rule is organized as follows:

- I. Rulemaking Documents
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  - F. Paperwork Reduction Act (Collection of Information)
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  - J. National Environmental Policy Act of 1969

## I. Rulemaking Documents

### *Availability of Rulemaking Documents*

To view any documents mentioned as being available in the docket, go to <https://www.regulations.gov/docket/FMCSA-2017-0330/document> and choose the document to review. To view comments, click this final rule, then click "Browse Comments." If you do not have access to the internet, you may view the docket online by visiting Dockets Operations in Room W12-140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE Washington, DC 20590-0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366-9317 or (202) 366-9826 before visiting Dockets Operations.

## II. Executive Summary

### *A. Purpose and Summary of the Regulatory Action*

The purpose of this final rule is to improve highway safety by ensuring that CLP or CDL holders with drug and alcohol program violations do not operate a CMV until they complete the return to duty (RTD) process and can lawfully resume driving. Currently, most SDLAs do not receive drug and alcohol program violation information about CDL or CLP holders licensed in their State. Therefore, these SDLAs are unaware when a CMV operator is subject to the driving prohibition set forth in 49 CFR 382.501(a), and the CMV operator continues to hold a valid CDL or CLP despite the driving prohibition.<sup>1</sup> The rule closes that knowledge gap by ensuring that all SDLAs are able to determine whether CMV drivers licensed in their State are subject to FMCSA's CMV driving

<sup>1</sup> As discussed further below in section V.C., several States currently require motor carrier employers or their service agents to report positive test results and/or test refusals to the SDLA.

prohibition. The rule facilitates enforcement of the driving prohibition by requiring that SDLAs deny certain commercial licensing transactions and remove the commercial driving privileges of individuals who are prohibited from operating a CMV and performing other safety-sensitive functions, due to drug and alcohol program violations. By requiring SDLAs to downgrade the driver's licensing status by removing the commercial driving privilege, the final rule will also permit all traffic safety enforcement officers to readily identify prohibited drivers by conducting a license check during a traffic stop or other roadside intervention.

In the final rule titled "Commercial Driver's License Drug and Alcohol Clearinghouse" (81 FR 87686 (Dec. 5, 2016)), FMCSA implemented the statutory requirement of the Moving Ahead for Progress in the 21st Century Act (MAP-21), codified at 49 U.S.C. 31306a, to establish the Clearinghouse as a repository for driver-specific drug and alcohol program violation records, as well as RTD information. The 2016 final rule incorporated the statutory requirement, imposed by MAP-21, codified at 49 U.S.C. 31311(a)(24), that States check the Clearinghouse prior to renewing or issuing a CDL to avoid having Federal highway funds withheld under 49 U.S.C. 31314. The 2016 final rule did not otherwise address the SDLAs' use of Clearinghouse information for CMV drivers licensed, or seeking to become licensed, in their State. This final rule establishes requirements for SDLAs to access and use information from the Clearinghouse indicating that CLP or CDL holders or applicants may not lawfully operate a CMV because they violated the drug and alcohol use and testing prohibitions in 49 CFR part 382, subpart B. The rule also makes certain clarifying and conforming changes to existing regulations, as described below.

### *B. Summary of Major Provisions*

#### *Non-Issuance*

As noted above, the Clearinghouse regulations require that SDLAs check the driver's status by querying the Clearinghouse prior to issuing, renewing, transferring, or upgrading a CDL.<sup>2</sup> The final rule provides that, if the reply to the query indicates the driver is prohibited from operating a CMV, the SDLA must deny the requested commercial licensing transaction, resulting in non-issuance. Drivers may

<sup>2</sup> See 49 CFR 383.73(b)(10); (c)(10); (d)(9); (e)(8); and (f)(4).

re-apply to complete the transaction after complying with the RTD requirements set forth in 49 CFR part 40, subpart O, and a negative RTD test result has been reported to the Clearinghouse. As discussed further below, the rule extends the SDLAs' query requirement to applicants seeking to obtain, renew, or upgrade a CLP.

#### *Mandatory CDL Downgrade*

In addition to the non-issuance requirement, the rule requires that SDLAs initiate the process to remove the CLP or CDL privilege from the driver's license after receiving notification from FMCSA that, in accordance with 49 CFR 382.501(a), an individual is prohibited from operating a CMV. Pursuant to 49 CFR 383.5, "CDL downgrade" is defined to include removal of the commercial privilege;<sup>3</sup> the final rule requires the State to complete and record the CDL downgrade on the CDLIS driver record within 60 days of notification. The CDL downgrade requirement rests on the simple, but safety-critical, premise that drivers who cannot lawfully operate a CMV because they engaged in prohibited use of drugs or alcohol or refused a test should not hold a valid CDL or CLP.

There are two ways the SDLA will receive notification of the driver's prohibited status: (1) The SDLA "pulls" the information from the Clearinghouse by conducting a required query prior to a specified commercial licensing transaction; and (2) FMCSA "pushes" the information to the SDLA whenever a drug or alcohol program violation is reported to the Clearinghouse for a CLP or CDL holder licensed in that State. FMCSA will also "push" a notification to the SDLA when the driver complies with RTD requirements and is no longer prohibited by FMCSA's regulations<sup>4</sup> from operating a CMV. In addition, if FMCSA determines that a driver was erroneously identified as prohibited, the Agency will notify the SDLA that the individual is not prohibited from operating a CMV; the SDLA must promptly reinstate the commercial driving privilege to the driver's license, and expunge the driving record accordingly.

The final rule does not establish specific downgrade or reinstatement procedures. All States currently have established procedures to downgrade

<sup>3</sup> In 49 CFR 383.5, "CDL downgrade" is defined, in part, as: "(4) A State removes the CDL privilege from the driver license." The final rule amends this definition to include removal of the CLP privilege.

<sup>4</sup> The impact of MAP-21 and this rule on existing State requirements is discussed below in Section V.C.

the CDL or CLP of a driver whose medical certification has expired or otherwise been invalidated, as required by 49 CFR 383.73(o)(4). The Agency anticipates that States will adapt their existing processes to remove the CLP or CDL credential from the license of any driver subject to the CMV driving prohibition set forth in 49 CFR 382.501(a), and to reinstate the commercial privilege following receipt of notification from FMCSA that the individual is no longer prohibited from driving a CMV (or was incorrectly identified as prohibited).

#### Application of the State Query Requirement to CLP Holders

Pursuant to 49 CFR 383.25, CLPs are deemed a valid CDL for purposes of behind-the-wheel training on public roads and highways. Because CLP holders are authorized to operate a CMV on a public road if accompanied by a CDL holder, they are subject to drug and alcohol testing under 49 CFR part 382, and thus subject to the CMV driving prohibition in 49 CFR 382.501(a). Accordingly, the final rule adds CLP holders to the scope of the States' query requirements set forth in 49 CFR 383.73, requiring SDLAs to conduct a check of the Clearinghouse prior to issuing, renewing, or upgrading a CLP.

#### Addition of the CMV Driving Prohibition to Part 392

The final rule amends 49 CFR part 392, subpart B, "Driving of Commercial Motor Vehicles," to add the CMV driving prohibition currently set forth in 49 CFR 382.501(a), thereby requiring States receiving MCSAP funding to adopt and enforce a comparable prohibition.<sup>5</sup> State-based MCSAP personnel authorized to enforce highway safety laws can electronically access the operating status of a CLP or CDL holder through *cdlis.dot.gov* or Query Central. If, during a roadside intervention, the MCSAP officer determines the driver is prohibited from operating a CMV due to a drug and alcohol program violation, the driver will be placed out-of-service and subject to citation. The final rule will further facilitate enforcement of the driving prohibition for CMV operators who still hold a valid CLP or CDL—*i.e.*, during the period in which the State is notified of the driver's prohibited status, but before the downgrade has been recorded

<sup>5</sup> In order to qualify for MCSAP Funds, 49 CFR 350.207(a)(2) requires, in part, that States adopt and enforce State laws compatible with the Federal Motor Carrier Safety Regulations (49 CFR parts 390–397). Amending part 392 in the final rule will provide State-based enforcement personnel specific authority to enforce the prohibition in 382.501(a).

on the CDLIS driver record—by clarifying the basis for citing the CMV operator during this period.

As explained in the notice of proposed rulemaking (NPRM), some non-MCSAP traffic safety enforcement personnel cannot electronically access the driver's prohibited status at roadside during this period.<sup>6</sup> The Agency notes, however, that after the SDLA completes the downgrade, thereby changing the driver's license status, non-MCSAP officers will be aware the driver is not lawfully operating a CMV, simply by conducting a routine license check. Operating a CMV without a valid CDL is currently prohibited under 49 CFR 383.23(a)(2) and 49 CFR 391.11(b)(5). The downgrade requirement ensures the CMV driver's license status is available to all traffic safety enforcement personnel, thus closing the loophole that currently permits these drivers to evade detection.

#### Actual Knowledge Violations Based on Issuance of a Citation for DUI in a CMV

The final rule revises how employers' reports of *actual knowledge*, as currently defined in 49 CFR 382.107, of a driver's prohibited use of drugs or alcohol, based on a citation for Driving Under the Influence (DUI) in a CMV, would be maintained in the Clearinghouse. Currently, employers who have actual knowledge of a driver's prohibited use of drugs or alcohol, based on the issuance of a citation or other document charging DUI in a CMV, must report the "actual knowledge" violation to the Clearinghouse in accordance with 49 CFR 382.705(b)(4). The final rule clarifies that a CLP or CDL holder who is charged with DUI in a CMV has violated part 382, subpart B, regardless of whether the driver is ultimately convicted of the offense. Therefore, the driver is prohibited from operating a CMV until completing RTD. The rule amends the Clearinghouse regulations by requiring that this type of actual knowledge violation remain in the Clearinghouse for 5 years, or until the driver has completed RTD, whichever is later, regardless of whether the driver is convicted of the DUI charge.<sup>7</sup> The rule also permits drivers to add documentary evidence of non-

<sup>6</sup> See 85 FR 23670, 23682 (Apr. 28, 2020). Nationwide, there are approximately 12,000 State-based MCSAP traffic safety officers, who have specialized knowledge and training related to CMV safety. There are also more than 500,000 State and local safety personnel throughout the United States authorized to enforce traffic safety laws.

<sup>7</sup> 49 CFR 382.717(a)(2)(i) currently permits drivers to request that an actual knowledge violation, based on the issuance of a citation for DUI in a CMV, be removed from the Clearinghouse, when the citation did not result in a conviction.

conviction to their Clearinghouse record so that future employers will be aware of that outcome. FMCSA makes this change to fully comply with the MAP-21 requirements that all violations of part 382, subpart B, be reported to the Clearinghouse and retained for 5 years (49 U.S.C. 31306a(a)(3), (g)(1)(C), and (g)(6)(A), (B)), and to provide full disclosure to employers, while maintaining fairness to drivers.

#### Compliance Date

States must achieve substantial compliance with the applicable requirements of the final rule as soon as practicable, but not later than November 18, 2024. The requirements set forth in 49 CFR 390.3, 390.3T, and 392.15 amend the Federal Motor Carrier Safety Regulations (FMCSRs). In accordance with the MCSAP eligibility requirements in 49 CFR 350.303(b), the State must amend its laws or regulations to ensure compatibility with any new addition or amendment to the FMCSRs as soon as practicable, but not later than 3 years after the effective date of such changes. The Agency believes a 3-year period also allows States sufficient time to adopt necessary changes in State law and regulation, conduct training for SDLA personnel, and complete information technology (IT) changes that will allow SDLAs to request and receive Clearinghouse information electronically. This time frame also accounts for FMCSA's development of technical specifications that will allow the information to be efficiently and securely transmitted to the SDLAs, via CDLIS or a direct web-based interface with the Clearinghouse. In the meantime, SDLAs may determine whether a CLP or CDL applicant is qualified to operate a CMV by accessing the Clearinghouse as an authorized user, as currently permitted by 49 CFR 382.725(a)(1).

#### C. Costs and Benefits

This rule will result in IT costs for SDLAs, the American Association of Motor Vehicle Administrators (AAMVA), and the Federal government, customer service costs for SDLAs, and opportunity costs for drivers and motor carriers. This rule finalizes the Agency's preferred alternative by requiring a mandatory downgrade, while allowing the SDLAs to choose the most cost beneficial method of information transmission.

In the NPRM, FMCSA proposed two alternative methods for information transmission; CDLIS and a web-based services option, which relies on cloud technology. The Agency estimated that the CDLIS option would be more costly

to implement. Under the final rule, SDLAs may choose between transmitting information via CDLIS or a web-based services platform. FMCSA anticipates that SDLA costs for IT system development will depend on many variables and could range from \$60,000 to \$300,000. For analysis purposes, the Agency estimates that each SDLA will incur IT development costs of approximately \$200,000 in the first year of the analysis, and operation and maintenance costs equal to 20 percent of development cost in each of years 2 through 10. Two States also indicated they will incur costs to manage additional customer service inquiries related to the mandatory downgrade. FMCSA estimates that the annual cost for all SDLAs to manage additional customer service inquiries will total approximately \$159,000. In addition to SDLA costs, AAMVA indicated it may incur costs for aligning the Clearinghouse information with disqualification data that already exists

in CDLIS. FMCSA will work with AAMVA to determine the necessity and extent of these costs, but for analysis purposes estimates that they would not be greater than \$200,000 for development, with an annual operations and maintenance cost of \$40,000. FMCSA will incur costs of approximately \$1 million for development of a web-based services application and approximately \$200,000 for annual operations and maintenance costs in years 2 through 10 of the analysis. Under the final rule, a driver may incur an opportunity cost equal to the income forgone between the time he or she is eligible to resume operating a CMV (*i.e.*, when an employer reports a negative RTD test result to the Clearinghouse) and when the SDLA reinstates the driver's privilege to operate a CMV. The estimate of opportunity costs drivers may incur is a function of the number of drivers that may be subject to a downgrade, the time spent at the SDLA to reinstate their

CLP/CDL privileges, the forgone wages, and the travel costs to drive to and from the SDLA. As discussed in Section XI. below, FMCSA estimates that, annually, approximately 5,000 drivers will spend one 10-hour day at the SDLA, resulting in annual costs for all drivers of approximately \$1.6 million. Motor carrier opportunity costs are estimated because drivers subject to reinstatement would not be eligible to resume safety-sensitive functions, such as driving a CMV, until the SDLA restores the CLP or CDL privilege to the driver's license. FMCSA estimates that motor carrier opportunity cost resulting from this rule will total just below \$200,000 per year.

The table below shows the 10-year and annualized total cost estimates for the final rule. The Agency estimates the 10-year total cost of the rule at \$51.7 million; the estimated annualized cost is \$5.2 million. At a 7 percent discount rate, the 10-year total estimated cost is \$38.5 million, and the estimated annualized cost is \$5.5 million.

TABLE 1—TOTAL 10-YEAR AND ANNUALIZED COSTS OF THE FINAL RULE

Cost category	Undiscounted (2019 \$ million)		Discounted at 7% (\$ million)	
	10-year total cost	Annualized	10-year total cost	Annualized
SDLA Cost .....	\$30.1	\$3.0	\$23.1	\$3.3
AAMVA IT Cost .....	0.6	0.1	0.4	0.1
Federal Government IT Cost .....	2.8	0.3	2.2	0.3
Driver Opportunity Cost .....	16.4	1.6	11.5	1.6
Motor Carrier Opportunity Cost .....	1.8	0.2	1.3	0.2
<b>Total .....</b>	<b>51.7</b>	<b>5.2</b>	<b>38.5</b>	<b>5.5</b>

This rule will improve the enforcement of the current driving prohibition by requiring that States refrain from issuing, renewing, transferring, or upgrading the CLP or CDL of affected drivers. Removal of the commercial privilege from the driver's license (mandatory CLP or CDL downgrade) will ensure more consistent roadside enforcement against drivers who continue to operate a CMV in violation of the prohibition. The mandatory downgrade may also reduce drug and alcohol program violations, since a driver's loss of the commercial privilege directly impacts his or her ability to obtain employment that involves operating a CMV. This rule will also permit the Agency to use its enforcement resources more effectively. The final rule's costs and benefits are addressed further below in Section XI.

**III. Abbreviations and Acronyms**

AAMVA American Association of Motor Vehicle Administrators

ATA American Trucking Associations  
 CA DMV California (CA) Department of Motor Vehicles  
 CFR Code of Federal Regulations  
 CDL Commercial Driver's License  
 CDLIS Commercial Driver's License Information System  
 CLP Commercial Learner's Permit  
 CMV Commercial Motor Vehicle  
 DACH or Clearinghouse Drug and Alcohol Clearinghouse  
 DOT Department of Transportation  
 DUI Driving Under the Influence  
 FMCSA Federal Motor Carrier Safety Administration  
 FR Federal Register  
 Greyhound Greyhound Lines Inc.  
 Illinois Office of the Illinois Secretary of State  
 IOT Intensive Outpatient Treatment  
 Iowa DOT Iowa Department of Transportation  
 IT Information Technology  
 MCSAP Motor Carrier Safety Assistance Program  
 MDOJ—MVD Montana Department of Justice—Motor Vehicle Division  
 Nebraska State of Nebraska Department of Motor Vehicles

NMFTA National Motor Freight Traffic Association  
 Nlets The International Justice and Public Safety Network  
 NRCME National Registry of Certified Medical Examiners  
 NSTA The National School Transportation Association  
 NYS DMV New York State Department of Motor Vehicles  
 OOIDA Owner-Operator Independent Drivers Association  
 Oregon Oregon Department of Transportation, Driver and Motor Vehicle Services  
 RTD Return to Duty  
 SDLA State Driver's Licensing Agency  
 Secretary U.S. Secretary of Transportation  
 Texas DPS State of Texas, Department of Public Safety  
 TCA Truckload Carriers Association  
 Trucking Alliance The Alliance for Driver Safety & Security  
 U.S.C. United States Code  
 Virginia DMV Commonwealth of Virginia, Department of Motor Vehicles

#### IV. Legal Basis for the Rulemaking

Title 49 of the Code of Federal Regulations (CFR), sections 1.87(e) and (f), delegates authority to the FMCSA Administrator to carry out the functions vested in the Secretary of Transportation (the Secretary) by 49 U.S.C. chapter 313 and 49 U.S.C. chapter 311, subchapters I and III, relating to CMV programs and safety regulations.

MAP-21 identified the remedial purposes of the Clearinghouse as twofold: To improve compliance with the drug and alcohol program applicable to CMV operators and to improve roadway safety by “reducing accident and injuries involving the misuse of alcohol or use of controlled substances” by CMV operators (49 U.S.C. 31306(a)(2)). As noted above, MAP-21 requires that the Secretary establish a national clearinghouse for records relating to alcohol and controlled substances testing by CMV operators who hold CDLs. The Agency implemented that requirement in the “Commercial Driver’s License Drug and Alcohol Clearinghouse” final rule (81 FR 87686 (Dec. 5, 2016)). MAP-21 also requires that the Secretary establish a process by which the States can request and receive an individual’s Clearinghouse record, for the purpose of “assessing and evaluating the qualifications of the individual to operate a commercial motor vehicle” (49 U.S.C. 31306(h)(2)). MAP-21 (49 U.S.C. 31311(a)(24)) requires that States request information from the Clearinghouse before renewing or issuing a CDL to an individual to avoid having Federal highway funds withheld under 49 U.S.C. 31314. This final rule establishes the processes by which SDLAs will access DACH information to determine whether the driver has the qualifications to operate a CMV. (Drivers prohibited from operating a CMV under 49 CFR 382.501(a) are not so qualified.)

The rule is also based on FMCSA’s broad authority in 49 U.S.C. chapter 313, (provisions originally enacted as part of the Commercial Motor Vehicle Safety Act of 1986 (1986 Act)). Section 31308 requires the Secretary, through regulation, to establish minimum standards for the issuance of CLPs and CDLs by the States. The final rule requires that States must not issue a CLP or CDL to an individual prohibited, under 49 CFR 382.501(a), from operating a CMV due to a drug and alcohol program violation. Pursuant to this same authority, the rule also establishes standards for the States’ removal of the CLP or CDL privilege

from the driver’s license of such individuals, as well as subsequent reinstatement of the commercial privilege.

Section 31305(a) requires the Secretary to establish minimum standards for, among other things, “ensuring the fitness of an individual operating a commercial motor vehicle.” In order to avoid having Federal highway funds withheld under 49 U.S.C. 31314, section 31311(a)(1) requires States to adopt and carry out a program for testing and ensuring the fitness of individuals to operate CMVs consistent with the minimum standards imposed by the Secretary under 49 U.S.C. 31305(a).

The final rule will help ensure the fitness of CMV operators by requiring that States must not issue, renew, transfer, or upgrade a CDL, or issue, renew, or upgrade a CLP, for any driver prohibited from operating a CMV due to a drug and alcohol program violation. Driver fitness is further ensured by the final rule’s requirement that States remove the CLP or CDL privilege from the driver’s licenses of individuals who violate the Agency’s drug and alcohol program requirements, until those drivers complete the RTD requirements established by 49 CFR part 40, subpart O.

The Department’s drug and alcohol use and testing regulations are authorized by 49 U.S.C. 31306 (originally enacted as part of the Omnibus Transportation Employee Testing Act of 1991). Among other things, 49 U.S.C. 31306(f) authorizes the Secretary to determine “appropriate sanctions for a commercial motor vehicle operator who is found, based on tests conducted and confirmed under this section, to have used alcohol or a controlled substance” in violation of applicable use testing requirements (*i.e.*, 49 CFR parts 40 and 382). As explained elsewhere in this preamble, FMCSA believes that non-issuance, as well as the mandatory downgrade, are appropriate sanctions that will improve compliance with existing drug and alcohol program requirements.

This final rule also relies on the authority of 49 U.S.C. chapter 311, subchapter III (provisions originally enacted as part of the Motor Carrier Safety Act of 1984), which provides concurrent authority to regulate drivers, motor carriers, and vehicle equipment. Section 31136(a) requires the Secretary to prescribe safety standards for CMVs which, at a minimum, shall ensure that: (1) CMVs are maintained, equipped, loaded, and operated safely; (2) the responsibilities imposed on CMV operators do not impair their ability to

operate the vehicles safely; (3) the physical condition of the CMV operators is adequate to enable them to operate vehicles safely; (4) CMV operation does not have a deleterious effect on the physical condition of the operators; and (5) CMV drivers are not coerced by a motor carrier, shipper, receiver, or transportation intermediary to operate a CMV in violation of the regulations promulgated under 49 U.S.C. 31136 or 49 U.S.C. chapters 51 or 313 (49 U.S.C. 31136(a)).

The final rule will help ensure that CMVs are “operated safely,” as mandated by section 31136(a)(1), and that the physical condition of CMV operators is adequate to enable their safe operation, as required by section 31136(a)(3). The requirement that States enforce the CMV driving prohibition on individuals who engage in prohibited use of drugs or alcohol will promote the safe operation of CMVs. Specifically, it will improve compliance with current regulatory requirements set forth in 49 CFR 382.501(a) and 382.503, which prohibit a CLP or CDL holder from operating a CMV, or performing other safety-sensitive functions, after engaging in prohibited use of drugs or alcohol, until the driver has completed the RTD requirements established by 49 CFR part 40, subpart O. The final rule does not directly address the operational responsibilities imposed on CMV drivers (section 31136(a)(2)) or possible physical effects caused by driving (section 31136(a)(4)). FMCSA has no reason to believe that the final rule will result in the coercion of CMV drivers by motor carriers, shippers, receivers, or transportation intermediaries (section 31136(a)(5)), as the rule primarily concerns the transmission of Clearinghouse information between FMCSA and the States, and the use of that information by the SDLAs and State-based traffic safety enforcement personnel. The Agency notes, however, that the 2016 Clearinghouse final rule prohibits employers from submitting false violation reports to the Clearinghouse, or from using Clearinghouse information for any purpose other than determining whether a driver is prohibited from operating a CMV, which could have coercive effects on drivers.<sup>8</sup>

Before prescribing regulations, FMCSA must consider their “costs and benefits” and “State laws and regulations on commercial motor vehicle safety, to minimize their unnecessary preemption” (section 31136(c)(2)). Those factors are addressed elsewhere in this preamble.

<sup>8</sup> See 49 CFR 382.705(e), 382.723.

## V. Background

The NPRM addressed the MAP–21 mandates underlying the 2016 Clearinghouse final rule (identified above), the MAP–21 provisions addressing the preemption of State laws, the Agency’s interpretation of those provisions, and the AAMVA petition for reconsideration of the 2016 final rule (see 85 FR 23670, 23675–23677, 23679 (Apr. 28, 2020)). The elements of that discussion most relevant to this final rule are summarized below.

### A. Purpose and Intent of State-Related Clearinghouse Requirements

Though the CDL program was established by Federal statute (the 1986 Act) and is governed in part by Federal regulations (49 CFR parts 383 and 384), the authority to issue and remove CDLs and CLPs resides solely in the States. As explained in the NPRM, FMCSA considers the separate MAP–21 provisions requiring that (1) States request information from the Clearinghouse before renewing or issuing a CDL to an individual (49 U.S.C. 31311(a)(24)); and (2) the Secretary establish a process enabling State licensing authorities to access the Clearinghouse to determine whether an individual applying for a CDL is qualified to operate a CMV (49 U.S.C. 31306a(h)(2)(B)(ii)), as two parts of an integrated whole.<sup>9</sup> Both provisions implicitly recognize that only SDLAs may act on commercial licenses.<sup>10</sup>

FMCSA acknowledges that neither of these State-specific statutory provisions requires that States restrict the issuance of commercial licenses or endorsements of CMV operators subject to the driving prohibition in 49 CFR 382.501(a), or that States downgrade the CDLs of drivers subject to the prohibition. However, in promulgating this final rule, FMCSA does not view the two State-related MAP–21 provisions in a vacuum. The stated goals of the Clearinghouse are to

<sup>9</sup> This interpretation clarifies the Agency’s views expressed in the 2016 Clearinghouse final rule. See 81 FR 87686, 87708 (Dec. 5, 2016). In discussing the two statutory provisions, both of which contemplate that SDLAs would have access to Clearinghouse information, FMCSA characterized section 31311(a)(24) as requiring access and 31306a(h)(2) as permitting such access, viewing the separate requirements as inconsistent. In the Clearinghouse final rule, FMCSA ultimately required States to access the Clearinghouse prior to issuing CDLs. As noted above, in this final rule, FMCSA views the two provisions as part of a unified statutory scheme.

<sup>10</sup> The term *Chief Commercial Driver’s Licensing Official* is defined as “the official in a State who is authorized to (A) maintain a record about commercial driver’s licenses issued by the State; and (B) take action on commercial driver’s licenses issued by the State” (49 U.S.C. 31306a(m)(2)) (emphasis supplied).

increase compliance with existing DOT-regulated drug and alcohol program requirements and to improve highway safety by reducing crashes and injuries caused by the misuse of drugs or alcohol by CMV drivers (49 U.S.C. 31306a(a)(2)). And MAP–21 authorizes SDLAs to access Clearinghouse information and requires SDLAs to request information from the Clearinghouse before renewing or issuing a CDL to an individual. With this framework in mind, and given the fact that commercial licensing authority is vested exclusively in the States, FMCSA relies on 49 U.S.C. 31306a and 31311(a)(24), as well as FMCSA’s authority under 49 U.S.C. 31305(a) and 31308, to require that States use their licensing authority to help ensure compliance with the CMV driving prohibition. This final rule thus achieves the broad remedial purpose of MAP–21, *i.e.*, the reduction of risk to public safety caused by CMV operators who are prohibited from driving due to drug and alcohol program violations but continue to be commercially licensed.

### B. AAMVA’s Petition for Reconsideration

Following FMCSA’s publication of the 2016 Clearinghouse final rule, AAMVA, asserting that “[t]he authority for taking action based on federal clearinghouse records should remain solely with the employer and FMCSA,”<sup>11</sup> requested that FMCSA remove SDLAs from the scope of the rule. In response, the Agency explained that, because MAP–21 requires the States to access Clearinghouse information in order to avoid a loss of funds apportioned from the Highway Trust Fund (49 U.S.C. 31311(a)(24)), MAP–21 did not vest in FMCSA the discretion to “remove” the States from the Clearinghouse process.<sup>12</sup> Further, the Agency does not have authority to issue or remove CDLs, which is exclusively a State function.

In its petition, AAMVA also identified questions and concerns related to the States’ role in the Clearinghouse, which were not addressed in the 2016 final rule. These included: What specific information would States receive about

<sup>11</sup> See AAMVA Petition for Reconsideration of the Commercial Driver’s License Drug and Alcohol Clearinghouse Final Rule (June 29, 2017), Docket No. FMCSA–2011–0031. AAMVA petitioned for reconsideration of the Clearinghouse final rule but did not submit the petition within 30 days after publication of the rule in the *Federal Register*, as required by 49 CFR 389.35(a). Therefore, in accordance with 49 CFR 389.35(a), the Agency considers AAMVA’s submission to be a petition for rulemaking submitted under 49 CFR 389.31.

<sup>12</sup> See Letter from Raymond Martinez (FMCSA) to Anne Ferro (AAMVA) (Apr. 12, 2018), p. 2, Docket No. FMCSA–2011–0031.

an individual CDL holder or applicant; how would States be expected to use information they receive from the Clearinghouse; how would the privacy of driver-specific Clearinghouse information transmitted to the States be protected; how would erroneous Clearinghouse information be corrected; to what extent would foreign-licensed drivers be included in the query and reporting process; and what would be the cost implications for the SDLAs. FMCSA agreed that AAMVA raised legitimate issues regarding the States’ use of driver-specific Clearinghouse information and granted AAMVA’s request for regulatory clarification. This final rule addresses the issues identified by AAMVA.

### C. Impact of MAP–21 on State Laws

MAP–21 expressly preempts State laws and regulations that are inconsistent with the Clearinghouse regulations, including State-based requirements for “the reporting of violations of valid positive results from alcohol screening tests and drug tests,” as well as alcohol and drug test refusals and other violations of part 382, subpart B (49 U.S.C. 31306a(l)(1) and (2)). The Agency interprets 49 U.S.C. 31306a(l)(1) and (2) to mean that State-based reporting requirements inconsistent with the reporting requirements in 49 CFR 382.705 are preempted. As noted in the NPRM, as of 2018, at least eight States required that, for testing conducted in accordance with 49 CFR part 382 or part 40, CDL holders’ positive test results and/or test refusals be reported to the SDLA. States uncertain about whether their reporting requirements are inconsistent with preemption provisions set forth in 49 U.S.C. 31306a(l)(1) and (2) may request an advisory opinion from the Agency.

MAP–21 specifically exempts from preemption State requirements relating to “an action taken with respect to a commercial motor vehicle operator’s commercial driver’s license or driving record” due to violations of FMCSA’s drug and alcohol program requirements (49 U.S.C. 31306a(l)(3)). FMCSA is aware, for example, that at least three States currently disqualify CDL holders who test positive or refuse a drug or alcohol test regulated under 49 CFR part 382 or part 40, from operating a CMV until completing RTD requirements. Based on its interpretation of 49 U.S.C. 31306a(l)(3), the Agency believes that State-based requirements such as these likely fall within the scope of the statutory exception because they relate to an action taken on a CDL.

As discussed further below, in Section VI. B., *Meaning of the Term CDL*

*Downgrade*, the downgrade requirement, based on the authority of 49 U.S.C. 31305(a) and 31308, is the minimum action States must take, to avoid having Federal highway funds withheld under 49 U.S.C. 31314, to remove the CLP or CDL privilege from the license of drivers prohibited from operating a CMV due to a drug and alcohol program violation. Consistent with the MAP-21 preemption exception in 49 U.S.C. 31306a(l)(3), the final rule does not prohibit States from taking an alternative licensing action (e.g., suspension, revocation, disqualification) to accomplish the removal of the commercial privilege.

The final rule also affords States maximum flexibility to maintain the driving records of individuals who are prohibited from operating a CMV due to a drug and alcohol program violation. The final rule does not require any State action related to the driving record, other than the requirement that States record the downgrade on the CDLIS driver record within 60 days of receiving notification of a CLP or CDL holder's prohibited status. States will determine whether the reason for the downgrade (or other discretionary licensing action), or the individual's prohibited CMV driving status, is posted on a CMV operator's driving record, and for how long the information would remain.

## VI. Discussion of Proposed Rulemaking and Comments

### A. Proposed Rulemaking

On April 28, 2020, FMCSA published in the **Federal Register** (Docket No. FMCSA-2017-0330, (85 FR 23670)) an NPRM titled "Controlled Substances and Alcohol Testing: State Driver's Licensing Agency Non-Issuance/Downgrade of Commercial Driver's License." The NPRM proposed to prohibit SDLAs from issuing, renewing, transferring, or upgrading a CDL or CLP for any driver banned from operating a CMV under 49 CFR 382.501(a) ("non-issuance"). Further, the Agency proposed two alternatives addressing how SDLAs would receive and use Clearinghouse information pertaining to CDL or CLP holders licensed in their State who are prohibited from operating a CMV: (1) FMCSA's preferred alternative, a "push" notification of the driver's prohibited status and the SDLA's mandatory downgrade of the driver's license; or (2) permitting SDLAs the option to receive notification of a driver's prohibited status, with the State determining whether, and how, the information would be used to enforce the driving prohibition. FMCSA also

proposed several clarifying and conforming changes to current regulations.

### B. Comments and Responses

FMCSA solicited comments on the NPRM for 60 days, through June 29, 2020. By that date, 32 comments were received from commenters representing 9 individual States (CA, IA, IL, MT, NE, NY, OR, TX, and VA), 9 entities, and 14 private citizens. The following entities submitted comments: AAMVA, American Trucking Associations (ATA), Driver IQ, Greyhound Lines, Inc. (Greyhound), National Motor Freight Traffic Association (NMFTA), National Student Transportation Association (NSTA), Owner-Operator Independent Drivers Association (OOIDA), Truckload Carriers Association (TCA), and the Alliance for Driver Safety & Security (Trucking Alliance).

Comments on the NPRM were mixed. Most commenters, including all States, supported the proposed non-issuance requirement. Most entities, several States, and some individuals supported the proposed mandatory downgrade (or other State enforcement action on the driver's license), while other States and AAMVA opposed it. Two commenters suggested alternative approaches to the mandatory downgrade. The majority of commenters addressing FMCSA's second proposed alternative, optional notice to States of a driver's prohibited status, opposed it. Several comments addressed drug and alcohol testing issues outside the scope of the rulemaking. The comments and the Agency's responses, organized by topic, are summarized below.

#### Non-Issuance

The NPRM proposed that States be prohibited from completing specified CDL/CLP transactions if the mandatory SDLA query to the Clearinghouse indicates the applicant is currently subject to the CMV driving prohibition in 49 CFR 382.501(a).

*Comments:* All commenters specifically addressing this proposal, including the nine State commenters, supported it, citing the benefit to public safety. The Commonwealth of Virginia, Department of Motor Vehicles (Virginia DMV) observed that ". . . SDLAs are the only entities that can enforce the driving prohibition through the licensing process." Similarly, the Iowa Department of Transportation (Iowa DOT) noted that non-issuance "would effectively close the DACH regulatory loopholes allowing drivers testing positive to avoid detection, continue holding a valid CDL, and evade the CMV driving prohibition." The Oregon

Department of Transportation, Driver and Motor Vehicle Services (Oregon DOT) said that it said that it agrees with FMCSA's interpretation that the intent of MAP-21 was "to deny issuance when an individual has adverse information in the Clearinghouse . . ." Driver IQ expressed a similar opinion regarding congressional intent. The ATA commented that non-issuance "is a necessary step to close the loophole in FMCSA's regulations that continues to allow prohibited drivers to operate," while TCA described the proposal as "commonsense."

*FMCSA Response:* The Agency acknowledges the commenters' broad support for this provision. We agree that non-issuance is an important next step in achieving MAP-21's goal of using Clearinghouse information to improve highway safety. As noted above in Section II. B., FMCSA retains the non-issuance requirements in the final rule, with one clarifying change, addressed below.

#### Renewal of the H Endorsement Subject to Non-Issuance

*Comment:* The Oregon DOT asked FMCSA to clarify whether a driver renewing a hazardous material endorsement under 49 CFR 383.141 is "subject to non-issuance when adverse information is present in the Clearinghouse."

*FMCSA Response:* Yes. Drivers transporting hazardous materials, as defined in 49 CFR 383.5, are subject to the CDL requirements of part 383 and, therefore, subject to FMCSA's drug and alcohol testing regulations. The hazardous material (H) endorsement is unique, however, in that it is the only endorsement subject to renewal, as required by 49 CFR 383.141(d). The initial issuance of the H endorsement would, therefore, be an upgrade, and the SDLA would query the Clearinghouse in accordance with 49 CFR 383.73(e)(8) prior to issuance. The renewal of the H endorsement falls within the SDLA's query requirement in 49 CFR 383.73(d)(9). If the driver is prohibited from operating a CMV, the SDLA must not renew the H endorsement, and must comply with the downgrade requirements in 49 CFR 383.73(q), as applicable. FMCSA clarifies the regulatory text of 49 CFR 383.73(d)(9) accordingly.

#### Mandatory Downgrade (Alternative #1)

Under the Agency's preferred proposed alternative ("Alternative #1"), SDLAs would be required to remove the CLP or CDL privilege from the driver's license after receiving electronic notification from FMCSA (by "push" or

“pull”) that the individual is prohibited from operating a CMV. Upon receiving notification, SDLAs would initiate State downgrade procedures, and must complete and record the downgrade on the CDLIS driver record within 30 days of receiving such notice.

*Comments Supporting Alternative #1:* Eight of the nine entities commenting on the NPRM supported the downgrade (or some other form of mandatory State action on the driver’s license), as did several States and individuals. The New York State Department of Motor Vehicles (NYSDMV) said that, under this alternative, “a uniform nationwide system will improve safety and consistency.” Greyhound also noted the benefit of a uniform approach, stating that “[a]s a nationwide carrier, Greyhound needs this uniformity.” The Virginia DMV, though concerned about FMCSA’s ability to efficiently implement the electronic notification process, nevertheless supported this alternative, stating that “[d]owngrading a credential allows for more avenues of enforcement that will ultimately take unsafe drivers off the road.” The State of Nebraska Department of Motor Vehicles (Nebraska DMV) supported the downgrade “at the time of issuance (*i.e.*, renewal, upgrade, adding/removing restrictions or transferring from another state),” but not otherwise, due to “complexities” associated with downgrading the license outside of the issuance process. The State of Texas Department of Public Safety (DPS), citing safety concerns posed by prohibited drivers, said that it favored State action on the driver’s license, but would prefer an enforcement action, such as revoking, suspending, or disqualifying the CDL, over a license downgrade. The NSTA expressed a similar preference. (*Note:* State-based enforcement actions on the driver’s license are discussed separately below, under the topic, *Meaning of the Term “CDL Downgrade”*.) Driver IQ said that, under Alternative #1, “the carrier is far more likely to become aware of this downgrade either through established employer notification systems, the required annual motor vehicle record review required under 49 CFR 391.25(a), or via a roadside inspection, and remove the driver from the safety sensitive function.” The NMFTA noted that, in addition to the safety benefits of Alternative #1, it would also reduce motor carriers’ exposure to liability. An individual said the downgrade “will give [CMV drivers] more incentive to not do drugs or drink and drive.” The ATA observed that failing to require the downgrade would allow “some states to

ignore readily available safety information,” while requiring the downgrade “would provide a level of assurance to motor carriers and the motoring public that individuals who maintain a valid CLP/CDL are both safe and qualified.” OOIDA recognized that Alternative #1 “would ensure that drivers with legitimate drug and alcohol violations are not able to operate CMVs until they have satisfied return-to-duty protocols.”

*FMCSA Response:* The Agency agrees with comments recognizing the safety benefits of the proposed mandatory downgrade. As explained in the NPRM, FMCSA prefers this alternative because it uses driver-specific Clearinghouse information to increase compliance with the CMV driving prohibition, consistent with the purpose of MAP–21, as set forth in 49 U.S.C. 31306a(a)(2)(A) and (B). The downgrade requirement, retained in the final rule, will accomplish this objective in a uniform and effective way by ensuring that CMV drivers subject to the prohibition in 49 CFR 382.501(a) do not hold a valid CLP or CDL.

*Comments Opposing Alternative #1:* The States of CA, IA, IL, MT, and OR opposed the mandatory downgrade, as did AAMVA and several individual commenters. As noted above, Nebraska DMV believed that the downgrade should be required only during the CLP/CDL issuance process. Commenters based their opposition on various implementation and policy concerns, which are addressed separately by topic, below.

#### Proposed 30-Day Time Window for Completing the Downgrade

In the NPRM, FMCSA asked whether the proposed 30-day timeline for completing the downgrade allowed SDLAs sufficient time to comply with State-based procedural due process requirements. FMCSA noted its intention, when notifying drivers that a violation has been reported to the Clearinghouse, to also inform them that their State of licensure has been notified and must downgrade the driver’s license within 30 days. FMCSA asked whether its notification of drivers would satisfy existing State-based notice requirements, thereby relieving States of this administrative burden.

*Comments:* Most SDLAs confirmed that, even if FMCSA notified the driver of an impending downgrade, they would still be required to notify the driver directly, as required by State law. Two State commenters noted the proposed 30-day time frame would not allow sufficient time for the SDLA to comply with these requirements, which

include notifying the driver of the pending license action (*e.g.*, downgrade) and, in some cases, providing opportunity for an administrative hearing prior to completing the action. One State said the time period should be consistent with the medical certification downgrade process, which allows the State 60 days to downgrade the license and update the CDLIS driver record. ATA and NMFTA commented that 30 days is sufficient and expressed concern that extending the time frame beyond 30 days would adversely impact highway safety.

Other commenters were concerned that drivers would complete RTD well within the 30-day window, rendering the downgrade procedures meaningless. The Office of the Illinois Secretary of State (Illinois) said that “[w]e do not feel downgrading the driver is the best action because they may be cleared to return to service by the time the downgrade is completed.” AAMVA and several State commenters suggested that FMCSA withhold the push notification to the SDLA for 30 days, which would give drivers an opportunity to avert a licensing action by quickly completing RTD, and would allow SDLAs to avoid the administrative burden of providing procedural due process for such drivers. In support of this approach, commenters pointed to FMCSA’s estimate, discussed in the NPRM, that 82 percent of drivers choosing to complete the RTD process would do so before the SDLA records the downgrade.<sup>13</sup> The Iowa DOT noted that, based on FMCSA’s estimate, some individuals could conceivably complete RTD before receiving the initial downgrade notice from the SDLA, resulting in confusion for drivers, and the SDLA’s need to hire additional staff to address drivers’ questions. The Oregon DOT commented that a “waiting period” of 15 to 30 days before FMCSA notifies the SDLA of a driver’s status “would remove the burden on States to notify individuals who go on to resolve their § 382.501(a) CMV driving prohibition” within the waiting period.

*FMCSA response:* FMCSA accepts the SDLAs’ explanation that they must abide by the driver notification requirements in their respective States, even if FMCSA notifies the driver that

<sup>13</sup> See 85 FR 23670, 23688. As discussed in the NPRM, this estimate is based on: (1) The assumption, as stated in the Regulatory Impact Analysis for the Clearinghouse final rule, that 75 percent of drivers violating FMCSA’s drug and alcohol program would be referred to a 16-hour education program that can be completed well within 30 days; and (2) a 2018 report, issued by HHS’ Substance Abuse and Mental Health Services Administration, indicating that 82 percent of individuals receiving substance abuse treatment participated in outpatient education programs.

his or her license is subject to downgrade. The Agency also acknowledges that 30 days would not provide some SDLAs enough time to accommodate applicable due process requirements. FMCSA, therefore, extends the time frame for completing the downgrade from 30 days, as proposed, to 60 days, in this final rule. FMCSA notes the 60-day time window aligns with current medical certification downgrade requirements in 49 CFR 383.73(o)(4). The Agency acknowledges the concern that extending the period beyond 30 days could negatively impact safety. In response, FMCSA notes that SDLAs may complete and record the downgrade sooner than 60 days, if their State processes allow. FMCSA encourages SDLAs to complete the downgrade as soon as possible, as permitted by State law.

FMCSA does not agree with the suggestion to withhold notification to SDLAs of the driver's prohibited status for up to 30 days, to allow States to avoid downgrade-related administrative costs for drivers who timely complete RTD. The Agency emphasizes that CMV drivers who engage in the prohibited use of drugs or alcohol pose an immediate risk to public safety, and it would be irresponsible for FMCSA to withhold that information from SDLAs. As noted in the NPRM, the prohibition in 49 CFR 382.501(a) takes effect as soon as the drug and alcohol program violation occurs. Moreover, FMCSA's estimate that 82 percent of drivers completing RTD will do so within 30 days, as set forth in the NPRM, must be viewed in context. The NPRM, citing the Regulatory Impact Analysis (RIA) of the 2016 Clearinghouse final rule, also estimated that 45 percent of drivers who test positive elect to consult with an SAP and begin the RTD process.<sup>14</sup> The remaining 55 percent presumably leave the industry, voluntarily give up their CDL to drive CMVs not requiring a commercial license, or continue to operate in violation of the driving prohibition. Given that the majority of drivers who test positive do not complete RTD, FMCSA's withholding notice of prohibited status from SDLAs, for any length of time, would be contrary to public safety. (The Agency's estimate of the number of drivers who will complete RTD is discussed further

below, in Section XI., Regulatory Analyses.)

#### Procedural/Due Process Concerns

*Comments:* The Nebraska DMV commented that downgrading the license outside the issuance process, which would be "the result of [FMCSA's] request," raises procedural questions. Specifically, Nebraska DMV asked: ". . . who the driver is supposed contact with questions; Who sends the driver the downgrade letter? How will we know when the driver's issue is resolved with FMCSA? If FMCSA sends the letter, but the SDLA is responsible for the CDLIS record, what happens if FMCSA doesn't send the letter in a timely manner or at all?" AAMVA asked whether the surrender of a CLP or CDL would be required as part of the proposed downgrade. The Virginia DMV, though supporting the downgrade, expressed concern "with conducting hearings for individuals contesting the downgrade of their credential." The Virginia DMV noted that it would have no evidence to justify the downgrade "other than the notification based on the report of an employer received from the Clearinghouse."

*FMCSA Response:* As discussed above, State laws determine whether the SDLA must notify a driver of the impending downgrade, and, if so, how and when that would be accomplished. Drivers with questions about their specific licensing status, including how they can reinstate the CLP or CDL if a downgrade occurs, will need to contact the SDLA that issued the license. Drivers with questions about their Clearinghouse record, the impact of a violation on their CMV operating status, or what the Federal regulations require the SDLAs to do once notified of a driver's prohibited status, may contact FMCSA through the Clearinghouse website (<https://clearinghouse.fmcsa.dot.gov/>). As explained in the NPRM, State downgrade processes will be initiated when FMCSA notifies the SDLA, through CDLIS or other electronic means, of a driver's prohibited status. The Agency will also notify the SDLA when the driver, having complied with RTD requirements, is no longer prohibited from operating a CMV. FMCSA's first notification to the SDLA will occur when a driver's employer, or the employer's service agent (*i.e.*, medical review officer, consortium/third party administrator), reports a violation to the Clearinghouse. The second notice will occur when a driver's negative RTD test result is reported to the Clearinghouse.

The final rule retains these notification requirements, as proposed.

As noted in the NPRM, FMCSA, when notifying drivers of a reported violation, as required by 49 CFR 382.707(a), intends to also let drivers know their SDLA has been informed of their prohibited status, and is required to initiate a downgrade of their license. If the driver is registered in the Clearinghouse, FMCSA will notify the driver via email; otherwise, drivers will receive notification by U.S. mail. The purpose of this notice is simply to further clarify the process for drivers and let them know what to expect. In response to AAMVA's question about surrender of the CLP or CDL, the Agency notes that States will rely on their established procedures to remove the CLP or CDL privilege from the driver's license. Whether a physical surrender of the credential is required as part of that process will, therefore, be determined by the State.

In response to the Virginia DMV's comment, the Agency notes that each State maintains its own due process requirements. It is, therefore, entirely within the States' discretion to determine whether CMV drivers may contest a downgrade or other pending license action. The evidentiary standards and burden of proof applicable in such proceedings would be determined on a State-by-State basis.

#### Downgrade for Issuance of Citation for DUI

*Comment:* The Iowa DOT opposed Alternative #1 because it "would require us to initiate a commercial downgrade after receiving an OWI and prior to receiving an OWI conviction," which would create confusion and cause delays to existing processes. (In Iowa, 'operating while intoxicated,' or OWI, is the equivalent of DUI.) The Iowa DOT takes action only when the driver refuses or fails an OWI test, or is criminally convicted of OWI. In that situation, the Iowa DOT revokes "a person's base driving privilege, which thereby disqualifies their commercial driving privileges."

*FMCSA Response:* Currently, if a motor carrier employer knows that a driver it employs has received a citation for DUI in a CMV, the employer has "actual knowledge" of the employee's prohibited use of drugs or alcohol, as defined in 49 CFR 382.107. The employer's report of actual knowledge of prohibited use ("actual knowledge violation"), based on the issuance of a citation for DUI in a CMV, must be reported to the Clearinghouse, as required by 49 CFR 382.705(b)(4). (This issue is discussed further below under

<sup>14</sup> The NPRM cited the 2016 Clearinghouse final rule RIA's estimate that 53,500 drivers would test positive and be required to complete RTD before resuming safety-sensitive functions, including operating a CMV. Of these, 24,000 drivers (45 percent) would complete RTD. See 85 FR 23670, 23688.

the topic heading, “*Actual Knowledge Violations Based on Issuance of Citation for DUI in a CMV.*”) FMCSA notes that, after the employer reports the actual knowledge violation to the Clearinghouse, the SDLA will receive notice only of the driver’s prohibited status, and will not be aware of the driver’s specific drug or alcohol violation (*i.e.*, positive test result, test refusal, or the employer’s actual knowledge of prohibited use of drugs or alcohol). The downgrade is therefore triggered by the actual knowledge violation reported to the Clearinghouse by the employer, rather than the DUI citation itself.

FMCSA notes, however, that drivers prohibited from operating a CMV under 49 CFR 382.501(a) face separate, and more severe, consequences if they are ultimately convicted of DUI in a CMV. If a driver is convicted of that offense, he/she would be disqualified from operating a CMV for a minimum of 1 year, in accordance with 49 CFR 383.51(b)(1) or (2).

#### Necessity of Downgrade

*Comments:* The Montana Department of Justice, Motor Vehicle Division (MDOJ–MVD) commented that the downgrade is unnecessary since a driver’s prohibited operating status is accessible to roadside enforcement officers through Nlets.<sup>15</sup> Similarly, the Iowa DOT noted that roadside detection of the driver’s prohibited status through the “CDLIS Central Site” would preclude the need for SDLA involvement. AAMVA commented that, instead of a downgrade, “direct law enforcement access to DACH data could more appropriately accomplish the goal of enforcing against prohibited drivers.” The Oregon DOT believed that CDLIS is “not an appropriate location to attempt to represent adverse Clearinghouse data,” and suggested that “FMCSA may instead wish to provide for enhanced capabilities for law enforcement to view an individual’s status in the Clearinghouse during roadside stops.”

*FMCSA Response:* A license downgrade and roadside access to a driver’s prohibited status are not mutually exclusive; each provides a separate basis for enforcement intervention. As explained in the NPRM (85 FR 23670, 23682) and above in

Section II. B., MCSAP officers’ roadside access to the driver’s prohibited status (determined before the downgrade takes effect and the CLP/CDL is still valid), will enable enforcement of the driving prohibition under 49 CFR 392.15. However, some non-MCSAP State and local traffic safety officers would be unaware of the driver’s prohibited status during the period before the downgrade is completed because, unlike MCSAP personnel, they lack reliable roadside access to FMCSA’s enforcement data through *cdlis.dot.gov* or Query Central (the driver’s DACH status is not currently accessible through Nlets). The downgrade of a CMV driver’s license will allow these State and local traffic safety officers to determine the driver is not legally authorized to operate a CMV by conducting a routine license check. If the SDLA has completed the downgrade at the time the check is conducted, the officer will know the driver does not hold a valid CLP or CDL, thereby providing a basis for enforcement action in accordance with 49 CFR 391.11(b)(5). In the absence of a license downgrade, some of these officers would be unaware of the driver’s prohibited status because, unlike MCSAP personnel, they lack reliable roadside access to FMCSA’s enforcement data through *cdlis.dot.gov*. Non-MCSAP officers will, however, be able to detect prohibited drivers by conducting a routine license check, if the SDLA has completed the downgrade at the time the check is conducted. The downgrade will therefore strengthen roadside enforcement of the CMV driving prohibition by allowing all traffic safety personnel to be aware that the prohibited driver is not licensed to operate a CMV. Further, the downgrade, by increasing the consequences of non-compliance for CMV drivers, provides an incentive for drivers to complete RTD to restore their commercial driving privileges. The Agency believes it may also deter the prohibited use of drugs and alcohol.

#### FMCSA’s Legal Authority/Congressional Intent

*Comments:* The MDOJ–MVD questioned whether “federal law authorizes FMCSA to regulate SDLAs to downgrade CLP/CDL outside of issuance transactions.” AAMVA maintained that congressional intent underlying the State-specific Clearinghouse statutory requirements is “less clear than FMCSA concludes.” AAMVA further asserted that, “[c]ontrary to FMCSA’s proposal in this NPRM, there is no legal basis for a state to downgrade, not issue, or otherwise take a state licensing action for a driver

refusal or failure of a drug or alcohol test.”

*FMCSA Response:* The Agency’s legal authority to issue the final rule is explained above in Section IV., Legal Basis for the Rulemaking (and was set forth in the Legal Basis section of the NPRM). As noted therein, in addition to MAP–21, FMCSA relies on the concurrent statutory authority of 49 U.S.C. chapter 313, which establishes the Agency’s jurisdiction to set minimum standards for the issuance of CLPs and CDLs and the fitness of CMV operators. As discussed in Section V.A., FMCSA relies on the authority of 49 U.S.C. 31308 and 31305(a) to adopt the downgrade requirement in this final rule. The Agency notes that the downgrade requirement is also consistent with the MAP–21 requirements in 49 U.S.C. 31311(a)(24) and 49 U.S.C. 31306a(h)(2).

#### Suggested Alternatives to Proposed Mandatory Downgrade

*Comments:* In lieu of a downgrade, an individual commenter suggested that SDLAs issue a “temporary CDL,” valid for 30–60 days, which would provide time for drivers to resolve the issue while still driving legally; “[t]he fact that it is a temporary CDL and the reason why would be shown on their MVR.” The Iowa DOT said that a better way to ensure effective enforcement of the driving prohibition would be the adoption of uniform standards for disqualification when a CLP or CDL holder “has a certain number or severity of violations under the drug and alcohol program,” for example, “a certain number of positive test results within an established time frame results in a 30-day disqualification.” AAMVA stated that “FMCSA must make a determination on whether the driver is disqualified and notify the licensing authority accordingly.”

*FMCSA Response:* As noted above, the CMV driving prohibition in 49 CFR 382.501(a) takes effect at the time the driver engages in conduct violating FMCSA’s drug and alcohol program. The issuance of a temporary CDL allowing the driver to operate after a violation occurs would be contrary to the prohibition and poses an obvious risk to public safety. As explained in the NPRM, CLP and CDL holders subject to the downgrade are not “disqualified” under 49 CFR part 383.<sup>16</sup> Each of the driver disqualifications required under part 383 is specifically set forth in statute (49 U.S.C. 31310). Driver disqualifications under 49 CFR 383.51 require that the individual be convicted

<sup>15</sup> Nlets, formerly the National Law Enforcement Telecommunications System, is now operating as the Nlets-International Justice and Public Safety Network. Its mission is to facilitate the electronic exchange of public-safety information, including motor vehicle and drivers’ data, among State law enforcement agencies, Federal agencies with a justice component, and other strategic partners serving the law enforcement community.

<sup>16</sup> 85 FR 23670, 23678.

of a specified traffic violation, while drivers are disqualified under § 383.52 only if they are determined to constitute an imminent hazard, as defined in § 383.5. While drug and alcohol program violations raise obvious safety concerns, drivers subject to the CMV driving prohibition do not meet either of these disqualification criteria. Moreover, under the drug and alcohol program requirements set forth in 49 CFR parts 40 and 382, a driver is eligible to resume safety-sensitive functions following completion of RTD requirements. The purpose of the RTD requirements is rehabilitative, not punitive. FMCSA believes that disqualifying drivers for a pre-determined period of time, regardless of their RTD status, is inconsistent with this principle.

#### Meaning of the Term “CDL Downgrade”

The NPRM proposed that, for individuals subject to the CMV driving prohibition, SDLAs downgrade the driver’s license (*i.e.*, remove the commercial driving privilege) by changing the commercial status on the CDLIS driver record from “licensed” to “eligible” for CDL holders, and changing the permit status from “licensed” to “eligible” for CLP holders. These designations, currently set forth in the AAMVA CDLIS State Procedures Manual<sup>17</sup> (AAMVA CDLIS Manual), describe how the State currently records the downgrade on the CDLIS driver record of individuals whose medical certification status changes from “certified” to “not certified,” as required by 49 CFR 383.73(o)(4). In order to further clarify the meaning of the term *downgrade*, as used in the NPRM, FMCSA proposed to amend the current definition of *CDL downgrade*, set forth in 49 CFR 383.5, and to add a new definition of *CLP downgrade*, incorporating the AAMVA CDLIS Manual procedures described above.

*Comments:* As noted previously, both the Texas DPS and the NSTA stated their preference for enforcement action on the license, such as suspension, revocation, or cancellation of the CDL, over a downgrade. Texas noted that “[t]he act of downgrading a CMV driver does not have the same impact as suspending, revoking, or disqualifying the CDL,” and that an enforcement action, recorded in the driver history, “would allow for proper tracking and enforcement roadside.” The NSTA said that a downgrade “results in additional steps for the SDLAs, and leaves room for

error as a result.” AAMVA urged FMCSA to clarify what is to appear on the driver record, observing that “[S]tates should not be left to interpret what the [prohibited] designation means in terms of eligibility.”

*FMCSA Response:* As set forth in 49 CFR 383.5, the term *CDL downgrade* means, among other things, the State’s removal of the CDL privilege from the driver’s license. In the NPRM, FMCSA intended to clarify how SDLAs would accomplish the downgrade by proposing that AAMVA’s CDLIS procedures, described above, be incorporated into the regulatory definition of downgrade. We did not, however, intend to convey that changing the commercial license or permit status from “licensed” to “eligible” would be the only action States could take to remove the CLP or CDL privilege from the driver’s license. Accordingly, to avoid confusion on this issue, FMCSA does not incorporate the proposed definitions of *CDL downgrade* and *CLP downgrade* in the regulatory text of this final rule. (The final rule does, however, clarify that the term *CDL downgrade* also includes the removal of the CLP privilege.)

As explained in the NPRM, and discussed above in Section V.C., *Impact of MAP–21 on State Laws*, MAP–21 exempts from Federal preemption State licensing actions relating to a driver’s CDL, or driving record, due to violations of FMCSA’s drug and alcohol program.<sup>18</sup> The final rule requires that the SDLA downgrade the driver’s license of CLP or CDL holders who are subject to the CMV driving prohibition, as proposed; this is a minimum requirement. FMCSA anticipates that States will record the downgrade by changing the commercial status on the CDLIS driver record from “licensed” to “eligible,” consistent with current practice for medical certification downgrades required by 49 CFR 383.73(o)(4).<sup>19</sup> The Agency notes that States may, at their discretion, suspend, revoke, cancel, or otherwise remove the CLP or CDL from the license, relying on existing State procedures to record the action on the CDLIS driver record. In the Agency’s judgment, this approach is consistent with the preemption exception in MAP–21, discussed above,

<sup>18</sup> 82 FR 23670, 23679–23680. MAP–21 exempts from Federal preemption State requirements relating to “an action taken with respect to a commercial motor vehicle operator’s commercial driving license or driving record” due to a verified positive test result, a test refusal, or other violations of 49 CFR part 382, subpart B (49 U.S.C. 31306a(l)(3)).

<sup>19</sup> AAMVA CDLIS State Procedures Manual, Release 5.3.3 (Dec. 2015), at 95; AAMVA CDLIS Technical Specifications Manual, Release 5.3.3 (Dec. 2015), at pp. 669–70; 683.

while also maintaining a uniform outcome across the country, *i.e.*, the States’ removal of the commercial driving privilege from the driver’s license of CMV operators subject to the prohibition. Regardless of how the State removes the commercial privilege, the CDLIS driver record must show that the driver does not hold a valid CLP or CDL. The State must record the downgrade, or other discretionary licensing action, on the CDLIS driver record within 60 days of receiving notice of the driver’s prohibited status.

#### Integration of Clearinghouse and Medical Fitness Requirements

*Comments:* AAMVA observed that the Agency’s citation of 49 U.S.C. 31305(a), which requires the Secretary to prescribe minimum standards for testing and fitness of CMV drivers, “implies that [Clearinghouse] program requirements are directly linked to medical fitness requirements rather than any new or additional requirements.” AAMVA further stated: “. . . from a policy standpoint, if drug and alcohol testing failures are to be comprehensively considered as part of ‘medical fitness’ it seems those programs should also be contracted as a single, comprehensive source for making medical fitness determinations by external entities (including SDLAs)” (emphasis in original).

*FMCSA Response:* Because *fitness*,<sup>20</sup> as the term is used in 49 U.S.C. 31305(a), is not defined in statute, FMCSA interprets the term according to its plain meaning. For example, the Oxford Dictionary defines *fitness* as, alternatively, “the condition of being physically fit and healthy,” or “the quality of being suitable to fulfill a particular role or task.” The Agency’s reference to 49 U.S.C. 31305(a) simply reflects that CLP or CDL holders or applicants who are subject to the prohibition in 49 CFR 382.501(a) are not “fit” to operate a CMV. FMCSA did not, therefore, intend to imply a “direct link” between its drug and alcohol program requirements in 49 CFR part 382 and medical certification requirements in 49 CFR part 391, subpart E. The two sets of regulatory requirements each have distinct purposes and underlying statutory authorities. These programs have always been administered separately, and the NPRM did not propose to change that.

<sup>17</sup> AAMVA CDLIS Procedures Manual, Release 5.3.3 (Dec. 2015), at 95; AAMVA CDLIS Technical Specifications Manual, Release 5.3.3 (Dec. 2015), at pp. 669–70, 683.

<sup>20</sup> The Oxford Dictionary, available at <https://www.lexico.com/definition/fitness> (accessed Jan. 14, 2021).

### Downgrades Based on Incorrect Clearinghouse Information

As noted in the NPRM, if violation information reported to the Clearinghouse is subsequently determined to be incorrect, or fails to meet reporting requirements, it may be removed from the Clearinghouse in accordance with 49 CFR 382.717, or DOT's Privacy Act regulations in 49 CFR part 10. FMCSA proposed that, if a driver's license is downgraded as the result of incorrect Clearinghouse information, the SDLA should reinstate the commercial privilege, and update the driving record, "as fairly and efficiently as possible" following notification from the Agency that the driver is not prohibited from operating a CMV. We requested comment from SDLAs and drivers on whether FMCSA should include corrective action procedures in the final rule, or whether States should rely on their own processes to address this issue.

*Comments:* The seven State commenters addressing this question all preferred that the SDLAs rely on existing State procedures to correct errors on an individual's license or driving record, once notified by FMCSA. AAMVA commented that FMCSA should not mandate how the reinstatement should occur since SDLAs have existing correction procedures, but that "FMCSA should be the sole party responsible for correcting erroneous information contained in the DACH. . . ." The Agency received no driver comments in response to this question.

*FMCSA Response:* The final rule does not establish specific procedures for States' reinstatement of the CDL or CLP to the driver's license, or correction of the driving record, following FMCSA's notification that a Clearinghouse error occurred. It does, however, require the SDLA to reinstate the commercial privilege, and expunge the driving record, following error correction. As explained in the NPRM, FMCSA is responsible for ensuring the accuracy of information in a driver's Clearinghouse record, and for informing the SDLA when an error affecting a driver's licensing status is discovered. Accordingly, the Agency will promptly notify the SDLA that the driver's prohibited status, previously reported to the SDLA, was based on erroneous Clearinghouse information, and the driver is not prohibited from operating a CMV. If the State has completed the downgrade (or other discretionary licensing action) at that point, it must expeditiously reinstate the commercial privilege to the driver's license, and

correct the driving record,<sup>21</sup> in accordance with established State procedures. FMCSA believes these requirements will mitigate, to the extent possible, the impact of State licensing actions on drivers based on erroneous Clearinghouse information.

The Agency notes that reinstatement following error correction is distinct from the "regular" reinstatement process proposed in the NPRM. In that scenario, the driver's drug and alcohol program violation is reported to the Clearinghouse; the SDLA initiates a downgrade of the driver's license following notification from FMCSA of the driver's prohibited status; and, following the driver's completion of RTD requirements, the SDLA receives notification that the driver is no longer prohibited from operating a CMV. At that point, the driver would be eligible for reinstatement of the CLP or CDL, as permitted by State law. The final rule retains this reinstatement provision, essentially as proposed (49 CFR 383.73(q)(2)).

### Optional Notice of Prohibited Status (Alternative #2)

This proposed alternative would permit, but not require, SDLAs to receive "push" notifications of a driver's prohibited status. States would determine whether, and how, to use the information to improve compliance with the CMV driving prohibition.

*Comments:* AAMVA and the MDOJ-MVD preferred this alternative over the mandatory downgrade, citing the flexibility it affords to States. Other commenters expressed concern about the lack of uniformity inherent in this approach. The Iowa DOT opposed the adoption of Alternative #2, stating that it "will create inconsistent consequences for a driver's drug and alcohol program violation, and therefore, create confusion and complaints among drivers and carriers." Driver iQ said that this approach "would allow States to abdicate their responsibility for highway safety by ignoring risk and/or failing to act." The NMFTA noted that Alternative #2 would result in "a complicated and confused regulatory framework" in which "drivers and carriers operating in states with less stringent CDL and [CLP] checks would have a competitive advantage over others operating under stricter rulesets."

*FMCSA Response:* The Agency agrees with commenters noting the drawbacks

<sup>21</sup> In this context, the term *driving record* includes the CDLIS driver record, as defined in 49 CFR 383.5, and the *Motor vehicle record*, as defined in 49 CFR 390.5, if applicable.

of the State-by-State approach envisioned under Alternative #2. As discussed above, the final rule does not adopt this alternative.

### Inclusion of CLP Holders in State Query

The proposed inclusion of CLP holders in the States' mandatory query was intended to correct an oversight in the Clearinghouse final rule, as the query requirement is currently limited to CDL holders.

*Comments:* AAMVA noted that "until an applicant is issued a CLP, they would not have a corresponding record in the DACH, making this process irrelevant in some cases."

*FMCSA Response:* The Agency acknowledges that CLP applicants who have no prior commercial license history will not have a Clearinghouse record. However, the query is necessary because some CLP applicants may have previously held a CLP or CDL issued by another State. The final rule requires, as proposed, that States query the Clearinghouse prior to issuing, renewing, or upgrading a CLP.

### Addition of CMV Driving Prohibition to 49 CFR Part 392

FMCSA proposed to add the prohibition, set forth in 49 CFR 382.501(a), to part 392, to further assist the States' enforcement of the prohibition in connection with CMV traffic stops, inspections, and other roadside interventions.

*Comments:* Driver iQ supported this proposal, noting that "all state law enforcement should be authorized to hold drivers accountable at roadside." AAMVA asked for confirmation that the "FMCSA views the new prohibition incorporated into § 392.15 as a 'disqualification' for purposes of performing a CDLIS record check [as required by § 384.205]."

*FMCSA Response:* As explained in the NPRM, the purpose of adding the prohibition to part 392 is to assist in the States' roadside enforcement during the period in which a driver, who is prohibited, nevertheless holds a valid CLP or CDL because the commercial privilege has not yet been removed from the driver's license. The provision is therefore adopted as proposed. This provision does not render the prohibited driver "disqualified" for purposes of the CDLIS check required in 49 CFR 384.205. In the NPRM, FMCSA noted that, if the SDLA "pulled" driver-specific information from the Clearinghouse using the existing CDLIS platform, the driver's status would be provided as part of the CDLIS check already required under 49 CFR 384.205. The point was merely that using the

CDLIS platform would make a separate SDLA query to the Clearinghouse unnecessary. Adding the prohibition to part 392 is entirely unrelated to the SDLAs' CDLIS check, and the NPRM did not suggest any connection between the two.

#### Actual Knowledge Violations Based on Issuance of Citation for DUI in a CMV

Under 49 CFR 382.107, employers have "actual knowledge" of a driver's prohibited drug or alcohol use if they are aware that the driver was issued a traffic citation for DUI in a CMV; under the 2016 Clearinghouse final rule, the actual knowledge violations must be reported to the Clearinghouse. Drivers who are not convicted of the offense may petition to have the actual knowledge violation removed from their Clearinghouse record. The NPRM clarified that under current regulations, when a CLP or CDL holder is cited for DUI in a CMV, the driver has engaged in conduct prohibited by 49 CFR part 382, subpart B, regardless of whether the driver is ultimately convicted of the offense. FMCSA proposed, therefore, that reports of actual knowledge based on the issuance of a traffic citation for DUI in a CMV should remain in the Clearinghouse for 5 years, regardless of whether the driver is convicted; drivers not convicted of the offense could add evidence of non-conviction to their Clearinghouse record so that future prospective employers would be aware that the driver, though charged with DUI in a CMV, was not convicted of the offense.

*Comments:* The ATA supported the proposed revision, commenting that it would "ensure compliance with the Clearinghouse's statutory requirements to include all DOT alcohol and drug violations while providing fairness to drivers and full disclosure to employers." The Trucking Alliance was also in favor of the change, noting that "[c]onviction of a traffic citation is a separate issue and carries different consequences." There were no comments opposing the proposed revision.

*FMCSA Response:* As proposed, the final rule requires that actual knowledge violations based on this issuance of a traffic citation<sup>22</sup> for DUI in a CMV remain in the Clearinghouse for 5 years, commensurate with other drug and alcohol prohibitions identified in 49

CFR part 382, subpart B.<sup>23</sup> Drivers may submit documentary evidence of non-conviction to their Clearinghouse record, which will ensure future prospective employers who conduct pre-employment queries on the driver will be aware that the driver was not convicted of DUI in a CMV by viewing his/her Clearinghouse record.

#### Proposed Change to 49 CFR 382.503—Resumption of Safety-Sensitive Functions

This section currently provides that a driver who has engaged in conduct prohibited by 49 CFR part 382, subpart B, must not perform safety-sensitive functions, including operating a CMV, until completing RTD requirements. Under Alternative #1, the NPRM proposed to clarify this provision by stating that a driver whose CLP or CDL was downgraded, in accordance with 49 CFR 383.73(q), could not resume driving a CMV until the State restored the commercial driving privilege to the driver's license.

*Comment:* AAMVA interpreted the proposed change "to mean that a driver may only resume driving operations once the driver record transaction has been completed by the SDLAs," and noted that "the possible conflict in timing of clearance creates an inequity for drivers that is inconsistent with Clearinghouse law."

*FMCSA Response:* AAMVA correctly interprets the proposed change, which is adopted in this final rule. As discussed in the NPRM, FMCSA is aware that processes for reinstating the CLP/CDL privilege following a downgrade vary among the States. Depending on applicable State procedures, a gap may exist between the time the SDLA receives notification that the driver is no longer prohibited from operating a CMV, and the time the SDLA restores the CLP or CDL to the driver's license. The amendment to 49 CFR 382.503, by implicitly recognizing this possibility, is intended to clarify that an individual may not resume driving a CMV until fully licensed to do so. In the NPRM, FMCSA acknowledged that drivers and their employers may incur modest opportunity costs during this "gap" period and estimated what those costs would be. (The Agency's estimates of motor carrier and driver opportunity costs related to reinstatement following completion of RTD are discussed further below in Section XI.)

<sup>23</sup> 49 U.S.C. 31306a(g)(6)(A) requires that violations be retained in the Clearinghouse for 5 years; this requirement is set forth in 49 CFR 382.719(a)(4).

#### Transmission of Clearinghouse Information to the SDLAs

FMCSA proposed two alternatives for the electronic transmission of the driver's CMV operating status (prohibited or not prohibited) to SDLAs: (1) The existing CDLIS platform; or (2) a web-based service call, which would require an electronic interface between the SDLA and the Clearinghouse. We invited comment on the alternatives, and asked whether States should have the option to determine which method of electronic transmission would best suit their existing IT infrastructure.

*Comments:* Some State commenters addressing this question preferred the CDLIS platform, while others were unsure which option would be more efficient. The NYSDMV opposed "shifting to a web-based system when CDLIS is an established working system that meets all our needs." The Virginia DMV commented that CDLIS would be a more efficient and cost-effective alternative, noting that "SDLAs already use CDLIS to obtain other information during licensing transactions." The Nebraska DMV strongly preferred using "the existing CDLIS platform for electronic transmission of Clearinghouse information during time of issuance." Illinois said that CDLIS is currently the most efficient option but noted that they "are in the process of system modernization so this may change to web based by the time this program is implemented." AAMVA recommended that "the final rule be developed in such a way that the technology solution is not prescriptive and affords states maximum flexibility in complying with regulatory requirements."

*FMCSA Response:* The comments reflect that States have varying IT system capabilities and resources. The Agency, therefore, does not establish a specific method of electronic transmission in the final rule. As AAMVA noted, a non-prescriptive IT requirement will allow each SDLA the flexibility to determine the IT solution that is the best fit for them. FMCSA will work closely with AAMVA and the States in developing system specifications that will accommodate the States' use of the CDLIS platform, as well as web-based alternatives, to request and receive information from the Clearinghouse.

#### Compliance Date

FMCSA requested comment on how long it would take States to implement changes to their IT systems that would enable them to electronically request and receive Clearinghouse information,

<sup>22</sup> In 2019, the Agency amended 49 CFR 382.107 to clarify that *traffic citation*, as the term is used in the definition of *actual knowledge* in § 382.107, means "a ticket, complaint, or other document charging driving a CMV while under the influence of alcohol or controlled substances." See 84 FR 51427, 51428 (Sept. 30, 2019).

once FMCSA makes the technical specifications available.<sup>24</sup>

*Comments:* State responses to this question varied, ranging from 18 months to 4 years following FMCSA's development of technical specifications. The Virginia DMV also pointed out that simultaneous implementation of the electronic initiatives associated with the National Registry of Certified Medical Examiners (NRCME), the Training Provider Registry (TPR), and the Clearinghouse, would place an intolerable burden on the SDLAs. State commenters also noted the need to obtain State legislative authority to take licensing actions based on Clearinghouse information. AAMVA explained that "the time frame needs to account for legislative changes that may span multiple sessions, or be applicable to State legislatures that do not meet annually."

*FMCSA Response:* FMCSA concludes that, in order to achieve full implementation of the State requirements set forth in the final rule, a 3-year compliance date is necessary. The Agency believes a 3-year period allows FMCSA sufficient time to develop the technical specifications States will need to modify their IT systems, and for States to implement those system changes. This time frame will also accommodate the SDLAs' need to obtain necessary legislative and fiscal authority from their respective States. In response to the Virginia DMV's concern about the "intolerable burden" of simultaneously implementing this final rule, along with the TPR and NRCME initiatives, FMCSA notes that implementation of the TPR (and other provisions of the Entry-Level Driver Training final rule) is on schedule to meet the compliance date of February 7, 2022. FMCSA recently extended the date by which States must comply with the medical examiners certification integration requirements, from June 22, 2021 to June 23, 2025. FMCSA is committed to providing States with the technical specifications underlying both the NRCME and DACH initiatives as soon as possible, so that States will have ample time complete the necessary modifications to their IT systems. (As noted above, in accordance with 49 CFR 350.303(b), FMCSA also adopts a 3-year compliance date for the requirements in 49 CFR 390.3, 390.3T, and 392.15 as set forth in this final rule.)

#### Costs

In the NPRM, FMCSA estimated cost impacts of the proposal, including CLP/CDL reinstatement costs and opportunity costs for drivers whose licenses are downgraded, opportunity costs for carriers that employ downgraded drivers, and SDLA costs related to IT modifications. In estimating SDLA costs, the Agency included IT system development and annual expenses for operations and maintenance for each proposed method of electronic transmission, as well as each of the proposed regulatory alternatives (downgrade; optional notice of prohibited status). FMCSA requested comment on the estimated costs and asked whether there are other costs to SDLAs that the Agency should consider.

*Comments:* State commenters identified various cost impacts not addressed in the NPRM, including: processing driver reinstatements, notifying drivers of a pending downgrade, training SDLA personnel, updating training materials, hiring additional personnel to process the downgrade and respond to customer questions and complaints, and updating SDLA websites to provide links and other information about the impact of the final rule on State licensing processes. AAMVA noted that "[e]ven with reliance on existing downgrade procedures, the cost associated with ongoing record maintenance and fulfilling the additional volume of data transactions on the record represent additional labor hours, IT resources, and systems testing," and provided qualitative cost information for each of the proposed methods for electronic transmission. In addition, AAMVA indicated CDLIS system modifications would be necessary. As noted above, FMCSA did not receive comments specifically addressing the estimated costs to drivers and motor carriers.

*FMCSA Response:* FMCSA acknowledges the information that AAMVA and SDLAs provided concerning costs not accounted for in the NPRM; we considered these comments when revising the cost estimates for the final rule. The Agency notes that State-based due process requirements, such as notice, already exist, and are therefore not imposed by this final rule. For example, the rule does not require that States notify drivers of an impending downgrade. Therefore, to the extent a State incurs notification costs, they derive directly from State-based requirements. (As discussed above, FMCSA intends to notify drivers of the downgrade requirement when informing them that

a drug or alcohol violation has been reported to the Clearinghouse.) FMCSA agrees that States will likely need to train their employees on any new process and procedures related to the final rule. FMCSA assumes this will occur as part of routine training related to periodic changes in statutory or regulatory requirements, and therefore does not estimate a separate training cost in this rule. FMCSA agrees that States will incur costs for customer service inquiries and for initial IT development, and ongoing operations and maintenance, in order to comply with this rule. In Section XI., the Agency explains the assumptions used to determine cost impacts of the final rule on SDLAs. FMCSA acknowledges that AAMVA may need to make updates to CDLIS in order to transmit additional data elements on the driver record and incorporated a cost for CDLIS updates in Section XI.

#### Comments Outside the Scope of the NPRM

An individual commenter suggested increased oversight on the substance abuse professionals who administer RTD requirements. Another individual, noting that motor carrier employers must pay a fee to access Clearinghouse information, recommended that FMCSA also charge the States a fee for their use of the Clearinghouse. One commenter thought the current regulations are too harsh and suggested that drivers who fail a drug test for the first time should have the violation removed from their record if no further program violations occur within one year. The NSTA, noting increased delays in CLP and CDL issuance due to COVID-related backlogs, suggested that FMCSA consider the merits of a "School Bus Only" CDL as a means of ensuring qualified drivers. The Trucking Alliance proposed that FMCSA amend the definition of *actual knowledge* in 49 CFR 382.107, to include the employer's knowledge of a driver's positive hair test result. Several entities, including the Alliance, TCA, and the ATA, supported some form of employer notification of a driver's prohibited status, or a change in the driver's licensing status. The ATA and TCA proposed that FMCSA expand the 30-day "lookback" provision, currently applicable only to pre-employment queries, to annual queries as well.

*FMCSA Response:* With the exception of minor conforming changes, the NPRM did not propose changes to FMCSA's drug and alcohol program, or to the operation of the Clearinghouse vis-à-vis employers. The comments summarized above are, therefore, outside the scope of the proposed rule,

<sup>24</sup> As noted in the NPRM, the current compliance date of January 6, 2023, which applies to the States' query requirements set forth in 49 CFR 382.725(a) and 383.73, will be replaced by the date established by the final rule.

and FMCSA does not respond to these suggestions in this final rule.

## VII. International Impacts

FMCSA's drug and alcohol program requirements apply to drivers who are licensed in Canada and Mexico and operate CMVs in commerce in the United States, and to their employers (49 CFR 382.103(a)). Accordingly, foreign-licensed drivers and their employers are subject to the CMV driving prohibitions set forth in 49 CFR 382.501(a) and (b). Canadian and Mexican licensing authorities are not authorized users of the Clearinghouse, however, as MAP-21 granted direct access only to the SDLAs in the 50 States and the District of Columbia.

In the NPRM, FMCSA described how it would enforce the CMV driving prohibition for drivers licensed in Canada and Mexico. Currently, a foreign-licensed driver's operating status is available to enforcement officials. Enforcement personnel who electronically initiate a foreign-licensed driver status request through *cdlis.dot.gov* or Query Central can discern that, under § 382.501(a), the driver is prohibited from operating a CMV in the United States. The foreign-licensed driver is cited for violating the driving prohibition and placed out of service at roadside.

FMCSA also notifies the foreign-licensed driver that he/she is prohibited from operating a CMV within the borders of the United States until he or she complies with RTD requirements, as required by § 382.503. When the driver's negative RTD test is reported to the Clearinghouse, FMCSA removes the prohibited status designation from the Clearinghouse and notifies the driver that the individual is no longer prohibited from operating a CMV in the United States. In addition, FMCSA notifies drivers if they are erroneously identified as prohibited from operating a CMV and removes the prohibited status from the Clearinghouse. The Agency notes that, because these procedures rely on FMCSA's existing enforcement authority, no revision to 49 CFR parts 382, 383, or 384 is necessary.

## VIII. Privacy Act Applicability

MAP-21 requires that the "release of information" from the Clearinghouse comply with the applicable provisions of the Privacy Act of 1974 (49 U.S.C. 31306a(d)(1)). The Privacy Act (5 U.S.C. 552a) prohibits the disclosure of information maintained in a Federal system of records, except to the extent disclosures are specifically permitted by the Privacy Act, or pursuant to a written request by, or with the prior written

consent of, the individual to whom the record pertains.<sup>25</sup> Section (b)(3) of the Privacy Act permits disclosure of information from a system of records when the disclosure is a "routine use." As defined in 5 U.S.C. 552a(a)(7), "the term 'routine use' means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected." Under the Privacy Act, each routine use for a record maintained in the system, including the categories of users and the purpose of such use, must be included in a System of Records Notice (SORN) published in the **Federal Register**.

The Agency published a SORN for the new system of records titled "Drug and Alcohol Clearinghouse (Clearinghouse)," on October 22, 2019 (84 FR 56521). The SORN describes the information to be maintained in the Clearinghouse and the circumstances under which the driver's consent must be obtained prior to the release of information to a current or prospective employer. The SORN also identifies the general and specific routine uses applicable to the Clearinghouse, including the disclosure of a driver's CMV operating status (prohibited or not prohibited) to an SDLA. As explained in the SORN, this routine use permits the SDLA to verify the driver's eligibility to obtain or hold a CLP or CDL, as required by MAP-21.

## IX. Explanation of Changes From the NPRM

### 49 CFR Part 382

Currently 49 CFR 382.725(a)(1) permits SDLAs to access DACH information for CDL applicants on a voluntary basis until January 6, 2023; subparagraph (a)(2) requires the SDLA to check the DACH prior to issuing a CDL on or after January 6, 2023. In the NPRM, FMCSA proposed to revise 49 CFR 382.725 by combining subparagraphs (a)(1) and (2), which would account for the fact that, as of the compliance date of this final rule, subparagraph (a)(1), granting SDLAs' permissive access to the DACH, would be moot. However, FMCSA's proposed revision inadvertently eliminated the permissive Clearinghouse access provision for SDLAs, which the Agency adopted in the 2019 final rule extending the compliance date for the SDLA's mandatory query requirements in 49 CFR 382.725 and 383.73.<sup>26</sup> FMCSA

<sup>25</sup> See 5 U.S.C. 552a(b). The Clearinghouse final rule requires the individual's prior written consent for the release of certain Clearinghouse records to employers. See 49 CFR 382.703.

<sup>26</sup> 84 FR 68052 (Dec.13, 2019).

added subparagraph (1) to 49 CFR 382.725(a) in 2019 so that States wishing to voluntarily access the DACH could do so until the compliance date established by this final rule. Consistent with that intent, the Agency retains 49 CFR 382.725(a)(1) and changes the compliance date to November 18, 2024. FMCSA also revises subparagraph (a)(1) to clarify that SDLAs may check the DACH record of CLP applicants. As proposed, FMCSA updates the compliance date for the mandatory query and requires that CLP holders be included within the scope of the mandatory query in subparagraph(a)(2). The Agency adopts the proposed revisions to 49 CFR 382.503 and 382.717 without change.

### 49 CFR Parts 390 and 392

FMCSA also adopts a 3-year compliance date for the requirements set forth in 49 CFR 390.3, 390.3T and 392.15. The Agency makes this change to comply with 49 CFR 350.303(b), which requires that, no later than 3 years after the effective date of any new amendment to the FMCSRs, the State must amend its laws, regulations, standards, and orders to ensure compatibility.

### 49 CFR 383.73(a)(3), (b)(10), (c)(10), (d)(9), (e)(8), and (f)(4)

FMCSA adopts the non-issuance requirements in 49 CFR 383.73 as proposed, but for one minor change: in § 383.73(d)(9), the H endorsement is added to the scope of the provision, to clarify that, if a driver seeking to renew the H endorsement is prohibited from operating a CMV, the SDLA must not renew the endorsement.

### 49 CFR 383.73(q)

As noted above, the Agency adopts the mandatory downgrade requirement, proposed as one of two regulatory alternatives, in this final rule. FMCSA made two changes in the downgrade procedures set forth in 49 CFR 383.73(q). First, the time period in which SDLAs must complete and record the downgrade on the CDLIS driver record is extended from 30 days, as proposed, to 60 days from the date the SDLA receives notification from FMCSA of the driver's prohibited status. The Agency makes this change in response to comments that 30 days did not provide adequate time for some SDLAs to comply with driver notice and other State-based due process requirements. The final rule does not prohibit SDLAs from completing the downgrade in less than 60 days, if their State processes permit them to do so. Second, the Agency adds a requirement, set forth in

§ 383.73(q), new subparagraph (3), “Reinstatement after Clearinghouse error correction,” that SDLAs must promptly reinstate the commercial driving privilege following notification that FMCSA incorrectly identified the driver as prohibited from operating a CMV. Further, any reference to the driver’s prohibited status must be expunged from his or her State-maintained driving record. SDLAs will rely on their existing error correction processes to comply with these requirements.

#### 49 CFR 383.5

The term *CDL downgrade* is currently defined, in 49 CFR 383.5, subparagraph (4) to reference a situation in which “a State removes the CDL privilege from the driver’s license.” FMCSA proposed to amend the definition of *CDL downgrade* in subparagraph (4) by specifying that the privilege is removed by changing the commercial status from “licensed” to “eligible” on the CDLIS driver record. FMCSA also proposed to add a similar definition of *CLP downgrade* to subparagraph (4). The Agency proposed the revisions to clarify how SDLAs would accomplish the downgrade. In the final rule, FMCSA does not amend subparagraph (4) as proposed. Instead, the final rule amends subparagraph (4) only to clarify that the term *CDL downgrade* also includes the removal of the CLP privilege. The reason for this change from the proposal is that some commenters understood the proposed revisions to mean that States could remove the CLP or CDL only by changing the commercial status in the manner proposed. As explained above, that was not FMCSA’s intention. At their discretion, SDLAs may also disqualify the CLP or CDL, in accordance with State law.

### X. Section-by-Section Analysis

FMCSA amends 49 CFR parts 382, 383, 384, 390, and 392 as follows.

#### A. Part 382

Part 382 establishes controlled substances and alcohol use and testing requirements for CLP and CDL holders and their employers. FMCSA amends part 382 in the following ways.

##### Section 382.503

This section currently states that drivers who violate drug or alcohol use or testing prohibitions cannot resume safety-sensitive functions, including driving a CMV, until completing RTD requirements. FMCSA designates the current provision as paragraph (a). New paragraph (b) clarifies that drivers whose license was downgraded due to

a drug and alcohol program violation cannot resume driving a CMV until the State reinstates the CLP or CDL privilege.

##### Section 382.717

Under the current § 382.717(a)(2)(i), drivers may request that FMCSA remove from the Clearinghouse an employer’s report of actual knowledge, based on the issuance of a citation for driving under the influence (DUI) in a CMV, if the citation did not result in the driver’s conviction. FMCSA revises subparagraph (a)(2)(i) by deleting the reference to removal of the employer’s actual knowledge report from the Clearinghouse and providing, instead, that the driver may request that FMCSA add documentary evidence of non-conviction of the offense of DUI in a CMV to the driver’s Clearinghouse record.

##### Section 382.725

Subparagraphs (a)(1) and (a)(2) of Section 382.725 currently state that, prior to January 6, 2023, SDLAs may determine whether a CDL applicant is qualified to operate a CMV by accessing the Clearinghouse as an authorized user, and that, beginning January 6, 2023, SDLAs must request information from the Clearinghouse for CDL applicants. Section 382.725(b) currently provides that a driver applying for a CDL is deemed to have consented to the release of information from the Clearinghouse. FMCSA amends § 382.725(a)(1) and (2) by changing the date from January 6, 2023, to November 18, 2024. FMCSA also revises paragraphs (a) and (b) to clarify that the provisions also apply to CLP applicants.

#### B. Part 383

Part 383 sets forth the requirements for the issuance and administration of CLPs and CDLs. FMCSA amends part 383 in the following ways.

##### Section 383.5

Subparagraph (4) of the definition of *CDL downgrade* currently provides that the term means that a State removes the CDL privilege from the driver’s license. FMCSA revises subparagraph (4) to clarify that the term also includes the removal of the CLP privilege.

##### Section 383.73

FMCSA adds subparagraph (3) to paragraph (a) and revises paragraphs (b)(10); (c)(10); (d)(9); (e)(8); and (f)(4) to require that if, in response to the required request for information, FMCSA notifies the SDLA that, pursuant to § 382.501(a), the individual is prohibited from operating a CMV, the

SDLA must not complete the specified CLP, CDL, non-domiciled CDL, or non-domiciled CLP transaction, and must initiate the downgrade process, as set forth in new paragraph (q). In addition, FMCSA makes a non-substantive conforming change to paragraphs (b)(10); (c)(10); (d)(9); (e)(8); and (f)(4) by deleting the phrase “in accordance with § 382.725 of this chapter”, which is unnecessary. FMCSA also revises paragraph (d)(9) to clarify that the SDLA must not renew an H endorsement if FMCSA notifies the SDLA that the individual is prohibited from operating a CMV, and must initiate a downgrade, as applicable. FMCSA revises paragraph (f)(4) to clarify that the requirement also applies to non-domiciled CLPs.

FMCSA adds new paragraph (q) to specify the actions that SDLAs are required to take upon receipt of information from FMCSA. SDLAs must complete and record a CLP or CDL downgrade on the CDLIS driver record within 60 days of receiving notification from FMCSA that the driver is prohibited from operating a CMV due to a drug and alcohol program violation. SDLAs will rely on established State processes to initiate and complete the downgrade. Under subparagraph (1), headed “Termination of the downgrade process when the driver is no longer prohibited”, if FMCSA notifies the SDLA that the driver completed the RTD process before the SDLA completes and records the downgrade on the CDLIS driver record, the SDLA, if permitted by State law, must terminate the downgrade process at that point. Subparagraph (2), headed “Reinstatement after FMCSA notification that the driver is no longer prohibited”, provides that drivers who complete RTD after the downgrade is completed and recorded by the SDLA will be eligible for reinstatement of the CLP or CDL privilege to their driver’s license. Subparagraph (3), headed “Reinstatement after Clearinghouse error correction”, requires SDLAs to reinstate the CDL or CLP privilege to a driver’s license as expeditiously as possible, following notification by FMCSA that the driver’s prohibited status, previously reported to the SDLA, was based on erroneous Clearinghouse information. States must also clear the individual’s driving record of any reference to the driver’s prohibited status.

#### C. Part 384

The purpose of Part 384 is to ensure that the States comply with 49 U.S.C. 31311(a). FMCSA amends part 384 in the following ways.

## Section 384.225

FMCSA revises this section by adding new subparagraph (a)(3) to require the State to post and maintain, as part of the CDLIS driver record, the removal of the CLP or CDL privilege from the driver's license, in accordance with § 383.73(q).

## Section 384.235

FMCSA amends this section by establishing the date by which the State must begin complying with the requirements set forth in § 383.73 applicable to request for Clearinghouse information, noncompletion of the transaction, downgrade, and reinstatement.

## Section 384.301

This section sets forth the general requirements for the State to be in substantial compliance with 49 U.S.C. 31311(a). FMCSA adds new paragraph (o) to require that the State be in substantial compliance with the requirements in §§ 383.73, 384.225, and 384.235 no later than the compliance date established by this final rule.

## D. Part 390

This part, entitled "Federal Motor Carrier Safety Regulations; General", establishes general applicability provisions, definitions, general requirements, and information as they pertain to persons subject to 49 CFR chapter 3. FMCSA amends § 390.3T(f)(1) to add new § 392.15 to the list of provisions that remain applicable to school bus operations as defined in § 390.5T. FMCSA also amends § 390.3(f)(1) in the same way, so when the temporary section is removed and the changes made by the Unified Registration System final rule take effect,<sup>27</sup> the change made by this final rule will also be in effect.

## E. Part 392

This part, entitled "Driving of Commercial Motor Vehicles", sets forth requirements pertaining to the management, maintenance, operation or driving of CMVs. FMCSA adds new § 392.15 to prohibit any driver subject to § 382.501(a) from operating a CMV.

## XI. Regulatory Analyses

A. Executive Order (E.O.) 12866 (Regulatory Planning and Review), E.O. 13563 (Improving Regulation and Regulatory Review), and DOT Regulatory Policies and Procedures

FMCSA has considered the impacts of this rule under E.O. 12866 (58 FR 51735, Oct. 4, 1993), Regulatory

Planning and Review, as supplemented by E.O. 13563 (76 FR 3821, Jan. 21, 2011), Improving Regulation and Regulatory Review, and DOT's regulatory policies and procedures. The Office of Information and Regulatory Affairs within the Office of Management and Budget (OMB) has determined that this rulemaking is not a significant regulatory action under section 3(f) of E.O. 12866. Accordingly, OMB has not reviewed it under that E.O.

As described above, this rule prohibits SDLAs from issuing, renewing, upgrading, or transferring the CDL, or issuing, renewing, or upgrading the CLP, of any driver who is prohibited from operating a CMV due to drug and alcohol program violations. In addition, SDLAs will be required to downgrade the CLP or CDL of drivers who are prohibited from operating a CMV due to drug and alcohol program violations. FMCSA believes that the rule will increase safety by enhancing the enforcement of the current CMV driving prohibition. These factors are discussed below.

## Need for Regulation

The 2016 Clearinghouse final rule included the MAP-21 requirement that SDLAs check the Clearinghouse prior to renewing or issuing a CDL. However, the rule did not address how SDLAs should use Clearinghouse information for drivers licensed, or seeking to become licensed, in their State. Therefore, under the current rule, drivers who violate the drug and alcohol program can continue to hold a valid CLP or CDL, even though they are prohibited from operating a CMV until completing RTD. These drivers, who are illegally operating a CMV, are thus able to evade detection by enforcement personnel. The Agency considers this result a form of market failure caused by "inadequate or asymmetric information," as described in OMB Circular A-4.<sup>28</sup> The final rule addresses this failure by improving the flow of information to SDLAs and enforcement officials from the Clearinghouse.

## Cost Impacts

The RIA published with the Clearinghouse final rule in 2016 (2016 RIA) assumed that SDLAs would incur no costs to query the Clearinghouse using CDLIS. However, the 2016 RIA did not include SDLAs' IT development costs or operating and maintenance expenses (O&M) associated with the

interface that would connect the Clearinghouse and CDLIS. Hence, they are accounted for in the estimate of the costs associated with this rule.

The NPRM proposed two alternatives related to the States' use of Clearinghouse information, and two methods for electronically transmitting information from the Clearinghouse to the SDLAs. The estimated cost of the proposed rule varied based on the regulatory alternative and method of information transmission. The final rule follows the Agency's preferred alternative by requiring a license downgrade, but allows the SDLA to choose the most cost beneficial method of information transmission. This rule will result in IT costs for SDLAs, AAMVA, and the Federal government, and in opportunity costs for drivers and motor carriers.

In the NPRM, FMCSA proposed two methods for information transmission: CDLIS and a web-based services option. The Agency estimated that the CDLIS option would be more costly. Some States commented they preferred to use CDLIS due to familiarity with that platform, while others were not sure which method would be most cost effective. Under the final rule, SDLAs can choose between transmitting information via CDLIS or a web-based services platform.

As provided by MAP-21 and current FMCSA regulations, SDLAs, prior to issuing a CLP or CDL, will be required to check the CDLIS driver record to ensure that the driver has not been disqualified in another State and that other regulatory requirements have been met. This final rule, by electronically linking the CDLIS pointer system either directly to the Clearinghouse or indirectly through a web-based services call, will allow this record check to electronically capture relevant Clearinghouse information (*i.e.*, a driver's prohibited status) along with other driver-specific data, such as moving violations or medical certification status. Thus, the Agency intends that SDLAs will therefore request information from the Clearinghouse by initiating a check of the CDLIS driver record. Under either method of transmission, no additional query or request by the SDLA will be required at the time of the licensing transaction, thereby minimizing the burden of performing the required check of the Clearinghouse.

Because SDLAs already perform CDLIS driver record checks when conducting a commercial license transaction, FMCSA finds that SDLAs would not incur labor costs to "pull" Clearinghouse information through

<sup>28</sup> OMB, Circular A-4: Regulatory Analysis, September 17, 2003, pp. 4-5. Available at <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf>, (accessed April 22, 2021).

<sup>27</sup> 82 FR 5292 (Jan. 17, 2017).

CDLIS by performing a query. The Agency also assumes that AAMVA would not charge SDLAs additional CDLIS-related costs to receive driver-specific violation information “pushed” to the SDLAs by FMCSA, because CDLIS already provides daily updates of licensing information to the SDLAs. FMCSA intends that Clearinghouse information would be an additional data element included in the daily transmission. Thus, the Agency finds that SDLAs will not incur transaction-specific CDLIS costs as a result of this rule.

Using the existing CDLIS platform will result in costs to SDLAs for initial system development, and to make the needed upgrades and modifications, as well as ongoing operations and maintenance expenses. In the NPRM, the Agency reviewed four SDLA grant applications submitted in 2017 for IT system upgrades needed to interface and receive information from the NRCME database, and used the grant applications as a proxy for the IT development costs SDLAs would incur using CDLIS to access Clearinghouse information. FMCSA estimated that each SDLA’s IT development costs would total approximately \$200,000. In preparation for the final rule, FMCSA reviewed 2020 Commercial Driver’s License Program Implementation (CDLPI) grant applications and found that four States requested funds focused on the Clearinghouse, with an average cost of \$300,000. However, some of these applications deal with Clearinghouse issues unrelated to this final rule, and thus FMCSA assumes that \$300,000 per SDLA would be an overestimate for costs attributed to using the CDLIS platform.

SDLAs will also have the option of transmitting information from the Clearinghouse to the SDLAs using a web-based services call, which relies on cloud-based technology. The capacity for this alternative would reside within the DOT’s Amazon Web Service (AWS) cloud. By using the DOT AWS cloud, FMCSA would be able to make efficient updates to the system on an as-needed basis. As explained below, FMCSA anticipates that the web-based services call IT development cost will average approximately \$56,500 per SDLA.

AAMVA indicated it may incur costs for aligning the Clearinghouse information with disqualification data that already exists in CDLIS. FMCSA will work with AAMVA to determine the necessity and extent of these costs, but for analysis purposes estimates that they would not be greater than \$200,000 for development, with an annual operations and maintenance cost of

\$40,000. FMCSA will incur costs of approximately \$1 million for development of a web-based services application and approximately \$200,000 for annual operations and maintenance costs in years 2 through 10 of the analysis.

In order to implement a web-based services call, FMCSA will develop an interface between the Clearinghouse and the SDLAs. FMCSA envisions that the interface would connect seamlessly to the existing State interface so that when a State employee initiates the CDLIS driver record check, the State system would simultaneously query the Clearinghouse. FMCSA would provide the application programming interface (API) code, or other technical specifications, and work with the States to integrate the interface into their existing technology platforms. In developing this interface, FMCSA would leverage the current FMCSA web-based services calls, such as Query Central, to reduce development costs wherever possible.

SDLAs using this method will incur costs for initial modification of their systems to interface with the Clearinghouse, and annual operations and maintenance expenses. FMCSA expects that SDLAs’ costs to implement the interface specifications would vary based on the characteristics of their individual IT systems. The Agency’s IT staff estimated a representative initial/upfront cost taking into account that some States currently use a mainframe application and others use an existing web interface. The initial development costs for each method to interface with the Clearinghouse were estimated based on the labor hours it would take a programmer to develop an application for use in a mainframe environment and in a non-mainframe environment. Developing a web interface in a mainframe environment is estimated to take 1,080 hours. Developing a web interface in a non-mainframe environment is estimated to take 360 hours. These hours were monetized in 2019 dollars using the United States Department of Labor, Bureau of Labor Statistics (BLS) \$41.61 per hour median wage for a computer programmer.<sup>29</sup> The hourly wage is adjusted for a 73 percent fringe benefit rate obtained from the BLS June 2019 “Employer Cost of Employee Compensation News Release,”<sup>30</sup> and a 15.9 percent overhead

rate based on indirect cost rates provided by States in their 2020 CDLPI grant applications. The resulting labor cost is \$78.53 per hour. At that hourly rate, the cost for a programmer to develop an interface in a non-mainframe environment is estimated at \$28,271 (360 hours × \$78.53 per hour) and \$84,812 (1,080 hours × \$78.53 per hour) in a mainframe environment. The average of these two cost estimates results in an initial IT development of \$56,500 per SDLA (rounded to the nearest hundred).

Because the Agency is allowing SDLAs to choose the method that works best for their particular system and framework, FMCSA continues to estimate initial IT development costs for SDLAs to be \$200,000 per SDLA, accounting for both CDLIS costs of likely just below \$300,000 and web-based services costs of less than \$60,000. Multiplying this cost by the number of SDLAs (51) results in a total of \$10.2 million (\$200,000 × 51) in SDLA initial/upfront development costs. This one-time cost occurs in the first year of the 10-year analysis period.

The Agency assumes that SDLAs’ annual operations and maintenance expenses would be equal to 20 percent of the upfront costs, or \$40,000 (\$200,000 × 20 percent). Multiplying the operations and maintenance expense rate by the number of SDLAs resulted in \$2.04 million of annual operations and maintenance expenses (\$40,000 × 51 SDLAs). The Agency assumes that SDLAs would incur operations and maintenance expenses annually, beginning in the second year of the 10-year analysis period. Operations and maintenance expenses over the 10-year analysis period are estimated at \$18.4 million (\$2.04 million × 9 years). FMCSA estimates that the total undiscounted IT development and operations and maintenance expenses over the 10-year analysis period are \$28.6 million (\$10.2 million IT development costs + \$18.4 million operations and maintenance expenses).

In response to comments from two States, FMCSA includes a recurring cost to manage in-person and phone or email inquiries related to the downgrade procedures. The States did not indicate how long it takes to handle customer service inquiries, but FMCSA estimates that an average of one hour per downgraded license is a conservative

<sup>29</sup> This hourly median wage is for the BLS–SOC 15–1251 computer programmer. See <https://www.bls.gov/oes/current/oes151251.htm> (accessed November 2, 2020).

<sup>30</sup> BLS, “Employer Cost of Employee Compensation 4th Quarter News Release,” Table 4—employer Costs for Employee Compensation for

private industry workers by occupational and industry group, available at [https://www.bls.gov/news.release/archives/ecec\\_03192020.pdf](https://www.bls.gov/news.release/archives/ecec_03192020.pdf) (accessed Nov. 2, 2020). The fringe benefit rate is the ratio of hourly wage for average hourly wage for a private industry worker and the associated hourly benefit rate (73 percent = \$25.85/14).

estimate, and values this time at a loaded median hourly rate of \$31.50 for customer service representatives.<sup>31</sup> This results in an annual cost of approximately \$159,000 (5,045 downgraded licenses per year × 1 hour × \$31.50).

In sum, FMCSA estimates 10-year total costs for SDLAs to be approximately \$30.1 million undiscounted. At a 7 percent discount rate, the 10-year total cost is estimated at \$23.1 million and the annualized cost is estimated at \$3.3 million. FMCSA notes that States can apply for CDLPI grant program funding to offset the cost associated with IT development and operations and maintenance.

FMCSA will incur initial IT development costs of just over \$1.0 million in 2019 dollars in the first year of the 10-year analysis period. FMCSA would incur annual operations and maintenance expenses of \$203,000 (\$1.02 million × 20 percent) beginning in the second year of the 10-year analysis period. Over the remaining 9 years of the analysis period, the Agency will incur \$1.8 million of operations and maintenance expenses (\$203,000 × 9 years). The sum of initial IT development costs and annual O&M expenses results in FMCSA incurring total undiscounted costs of \$2.8 million over the 10-year analysis period (\$1.0 million + \$1.8 million). At a 7 percent discount rate, the Agency is estimated to incur \$2.2 million in IT development and operations and maintenance expenses over the 10-year analysis period. The annualized cost at a 7 percent discount rate is estimated at \$0.3 million.

#### Driver Opportunity Cost and CLP/CDL Reinstatement Cost

Under the final rule, a driver could incur an opportunity cost equal to the income forgone between the time he or she is eligible to resume operating a CMV (*i.e.*, when an employer reports a negative RTD test result to the Clearinghouse) and when the SDLA reinstates the commercial privilege to the driver's license.

The estimate of opportunity costs drivers may incur is a function largely of the number of drivers that SAPs refer to outpatient education programs versus intensive outpatient treatment (IOT) programs. In the 2016 RIA, the Agency assumed an education program would be completed in 16 hours and an IOT

program would be completed in 108 hours over 12 weeks. The final rule requires SDLAs to record a downgrade on the driver's CDLIS record within 60 days. If the driver completes the RTD process before the SDLA records a downgrade in CDLIS, the SDLA would be required to terminate the downgrade, consistent with State law. A driver referred to a 16-hour education program by a SAP may complete the RTD process before the SDLA records the downgrade in CDLIS. In this case, a driver would be qualified to operate a CMV without having to comply with State-established procedures to reinstate the CMV driving privilege and would not incur opportunity costs.

In the 2016 RIA, the Agency assumed that 75 percent of drivers who violated the drug and alcohol program would be referred to a 16-hour education program. The remaining drivers would be referred to a 108-hour IOT program. In July 2018, the Substance Abuse and Mental Health Service Administration (SAMHSA), published a report titled *National Survey of Substance Abuse Treatment Services (N-SSATS): 2017. Data on Substance Abuse Treatment Facilities*. SAMHSA reported that 82 percent of individuals in outpatient programs participated in education programs. The remaining 18 percent participated in IOT programs.<sup>32</sup> FMCSA reviewed the 2018 SAMHSA survey report and found that the client characteristics regarding outpatient program attendance were not reported, and therefore the 2017 report provides the most recent estimate of the percentage of individuals completing education programs. The Clearinghouse, which has been operational since January 2020, accurately reports driver count information that informs the percentage of drivers who complete RTD procedures within the 60-day timeframe.<sup>33</sup> However, this data was collected during the coronavirus disease 2019 (COVID-19) pandemic, which has had significant short-term impacts on the U.S. economy and labor market. While the long-term impacts remain unclear, FMCSA does not think it prudent to estimate costs over a 10-year

period based on information collected during the COVID-19 pandemic, which drastically affected employment, freight rates, and even mental health and substance abuse prevalence. Further, FMCSA did not receive comments regarding any inaccuracy of the SAMHSA data and therefore continues to rely on it for the purposes of this analysis.

Based on the U.S. DOT's survey data for 2018, extrapolated to the entire CDL population, FMCSA estimates that 62,279 drivers will test positive and be required to complete the RTD process annually.<sup>34</sup> The 2016 RIA estimated that 45 percent, or 28,026 of these drivers, will complete the RTD process.<sup>35</sup> Based on SAMHSA's survey, the Agency estimates that 82 percent, or 22,981 of the 28,026 drivers, will complete the RTD process before SDLAs record the downgrade and will not incur opportunity costs.<sup>36</sup> The remaining 5,045 drivers (28,026 drivers × 18 percent) presumably will be referred to an IOT program and be required to comply with any reinstatement procedures established by the State that could cause a driver to incur opportunity costs.

Depending on the State, a driver may be required to appear in person at the SDLA to complete the reinstatement process that could require the driver to incur opportunity costs for the time to travel to and from the SDLA. Some SDLAs allow the transaction to be completed by email or through the SDLA website. For purposes of this analysis, the Agency assumes that drivers will need to complete the transaction in person, which may result in an overestimation of the cost to drivers. The Agency assumes that it will take one day for a driver to travel to an SDLA and complete the reinstatement

<sup>34</sup> U.S. DOT Agency MIS data. Available at: [https://www.transportation.gov/odapc/DOT\\_Agency\\_MIS\\_Data](https://www.transportation.gov/odapc/DOT_Agency_MIS_Data). Accessed on November 2, 2020.

<sup>35</sup> DOT FMCSA Commercial Driver's License Drug and Alcohol Clearinghouse: Final Rulemaking Regulatory Impact Analysis. December 13, 2016. Available at: <https://beta.regulations.gov/document/FMCSA-2011-0031-0183>.

<sup>36</sup> FMCSA notes that, while States have 60 days to complete a downgrade of the CLP/CDL, they may elect to record the downgrade sooner, thereby reducing the time frame for drivers to complete the RTD process requirements prior to the downgrade. If this occurs, drivers referred to the 16-hour education program may be subject to reinstatement procedures at the SDLA. FMCSA is unable to estimate the likelihood or frequency of such an occurrence, and continues to assume all drivers referred to a 16-hour education program will complete the RTD process prior to the State recording the downgrade. The Agency believes this is a reasonable assumption, particularly given the increased incentive to quickly complete the RTD process following the notification to drivers of an impending downgrade.

<sup>32</sup> The report is available at <https://www.samhsa.gov/data/report/national-survey-substance-abuse-treatment-services-n-ssats-2017-data-substance-abuse>, Table 5-1a (accessed June 16, 2019).

<sup>33</sup> As of January 1, 2021, the Clearinghouse recorded just over 52,000 drivers with a drug or alcohol violation, of which more than 60% had not started the RTD process. Over 30% of drivers with a violation had either started or completed RTD. While this data is logically consistent with the assumptions in this analysis, FMCSA cannot determine how the COVID pandemic affected either the total number of violations or the RTD process and is not using Clearinghouse data to inform impact estimates at this time.

<sup>31</sup> The hourly median wage for the BLS-SOC 43-4051 Customer Service Representative is \$16.69. FMCSA adjusts this wage rate using the previously identified fringe benefits rate of 73 percent and the overhead rate of 15.9 percent. See <https://www.bls.gov/oes/current/oes151251.htm>.

process. Thus, drivers will incur opportunity cost for time spent traveling and out-of-pocket travel costs. The Agency's estimate of driver opportunity costs and reinstatement costs is based on the following assumptions:

1. One day to travel to and from the SDLA and complete the reinstatement process.
2. 10 hours of lost wages.
3. 5,045 drivers subject to mandatory downgrades.
4. A representative driver wage of \$31.00 per hour to estimate income forgone.
5. \$0.575 per-mile cost for use of private vehicle.<sup>37</sup>
6. 50 miles round-trip to the SDLA.

Based on these assumptions, the upper bound of annual opportunity costs for one day spent traveling to the SDLA and completing the reinstatement process is estimated at \$1.6 million ((10 hours × 5,045 drivers × \$31 per hour) + (5,045 drivers × 50 miles × \$0.575 per mile)), and the 10-year total cost is estimated at \$16.3 million. At a 7 percent discount rate, the 10-year cost is estimated at \$11.5 million and the annualized cost is estimated at \$1.6 million.

Drivers may also incur reinstatement costs attributed to SDLA requirements for restoring the commercial privilege, such as payment of a reinstatement fee, and partial or full retesting.<sup>38</sup> The States have established a broad spectrum of procedures for reinstatement of the CLP/CDL privilege to the driver's license following a downgrade due to invalid medical certification as required by § 383.73(o)(4), and the Agency expects that the States will adopt or modify existing procedures when downgrading a CLP/CDL due to a drug or alcohol violation. FMCSA reviewed current procedures used by the States for drivers whose CLP or CDL has been downgraded for failure to maintain their medical certification. The Agency is aware that about half of the States require knowledge and/or skills retesting before removing a downgrade. However, in these States, retesting is required only if a driver is not able to present a new medical certificate before the expiration of a prescribed grace period. None of these States has a retesting grace period less than six

<sup>37</sup> The mileage rate is the General Services Administration current reimbursement rate for use of private vehicles. The mileage rate for private vehicle use is available at <https://www.gsa.gov/travel/plan-book/transportation-airfare-rates-pov-rates/private-owned-vehicle-pov-mileage-reimbursement-rates> (accessed Oct. 29, 2020).

<sup>38</sup> A requirement to retake the knowledge and skills test would cause the driver to forgo income during the 14-day waiting period required before taking the skills test.

months. In the 2016 RIA, the Agency conservatively assumed that it would take a driver 12 weeks to complete a 108-hour program based on one 9-hour session per week. Thus, the Agency finds that drivers referred to IOT programs will complete the IOT program and the RTD process without having to retest to have the CLP or CDL privilege restored to their license. Therefore, FMCSA is not estimating reinstatement costs or fee payments resulting from this rule.

#### Motor Carrier Opportunity Costs

Motor carrier opportunity costs are estimated because drivers subject to reinstatement would not be eligible to resume safety-sensitive functions, such as driving, until the SDLA restores the CLP or CDL privilege to the driver's license. This represents a change from current requirements in parts 382 and 40, which permit resumption of safety-sensitive functions immediately following a negative RTD test result. Thus, motor carriers may also incur opportunity costs based on the profits forgone from the loss of productive driving hours between the time the driver completes the RTD process and State reinstatement. The Agency estimates that a motor carrier will lose 10 hours of productive driving time while a driver completes the reinstatement process. FMCSA bases this estimate on current processes the States employ to reinstate a CLP or CDL privilege following a downgrade of the driver's license due to invalid medical certification.

In concert with the driver opportunity cost estimates, the Agency estimates that motor carriers would lose 50,446 hours of productive driving time each year (5,045 drivers × 10 hours) while drivers complete the reinstatement process. Broadly speaking, the opportunity cost to the motor carrier (the firm) of a given regulatory action is the value of the best alternative that the firm must forgo in order to comply with the regulatory action. In this analysis, FMCSA follows the methodology used in the Entry-Level Driver Training rulemakings published in 2016<sup>39</sup> and 2019<sup>40</sup> and values the change in time spent in nonproductive activity as the opportunity cost to the firm, which is represented by the now attainable profit, using three variables: The marginal cost of operating a CMV, an estimate of a typical average motor carrier profit margin, and the change in nonproductive time.

<sup>39</sup> 81 FR 88732 (Dec. 8, 2016).

<sup>40</sup> 84 FR 10437 (Mar. 21, 2019).

The American Transportation Research Institute (ATRI) report, *An Analysis of the Operational Costs of Trucking: 2019 Update*, found that marginal operating costs were \$71.78 per hour in 2018.<sup>41</sup> These marginal costs include vehicle-based costs (e.g., fuel costs, insurance premiums, etc.), and driver based costs (i.e., wages and benefits).

Next, the Agency estimated the profit margin for motor carriers. Profit is a function of revenue and operating expenses, and ATA defines the operating ratio of a motor carrier as a measure of profitability based on operating expenses as a percentage of gross revenues.<sup>42</sup> Armstrong & Associates, Inc. (2009) states that trucking companies that cannot maintain a minimum operating ratio of 95 percent (calculated as Operating Costs ÷ Net Revenue) will not have sufficient profitability to continue operations in the long run.<sup>43</sup> Therefore, Armstrong & Associates states that trucking companies need a minimum profit margin of 5 percent of revenue to continue operating in the future. Transport Topics publishes data on the "Top 100" for-hire carriers, ranked by revenue.<sup>44</sup> For 2014, 39 of these Top 100 carriers also had net income information reported by Transport Topics. FMCSA estimates that the 39 carriers with both revenue and net income information have an average profit margin of approximately 4.3 percent for 2014. For 2018, 33 of these Top 100 carriers had net income information reported by Transport Topics, with an average profit margin of approximately 6 percent for 2018.<sup>45</sup> The higher profit margin experienced in 2018 is reinforced by a Forbes article that found net profit margin for freight trucking companies "expanded to 6 percent in 2018, compared with an annual average of between 2.5 percent and 4 percent each

<sup>41</sup> ATRI. *An Analysis of the Operational Costs of Trucking: 2019 Update*. October 2019. Table 10, pg. 19. Available at: <https://truckingresearch.org/wp-content/uploads/2019/11/ATRI-Operational-Costs-of-Trucking-2019-1.pdf> (accessed April 19, 2021). Source data are assumed to be presented in 2018 dollar terms.

<sup>42</sup> ATA. *American Trucking Trends 2015*. Page 79.

<sup>43</sup> Armstrong & Associates, Inc. *Carrier Procurement Insights*. 2009. Pages 4–5. Available at: <https://www.3plogistics.com/product/carrier-procurement-insights-trucking-company-volume-cost-and-pricing-tradeoffs-2009/> (accessed Jan. 5, 2016).

<sup>44</sup> Transport Topics. 2014. *Top 100 For-Hire Carriers*. Available at: <http://ttnews.com/top100/for-hire/2014> (accessed April 19, 2021).

<sup>45</sup> Transport Topics. 2018. *Top 100 For-Hire Carriers*. Available at: <https://www.ttnews.com/top100/for-hire/2018> (accessed April 19, 2021).

year since 2012.”<sup>46</sup> In 2019, the data provided by Transport Topics showed a similar pattern based on the 28 companies that provided net income information, with an average profit margin of 5.8 percent.<sup>47</sup> It is uncertain whether the recent surge in net profit margin will continue through the analysis period, so FMCSA assumes the lower profit margin of 5 percent for motor carriers for purposes of this analysis.

Using the assumed profit margin of 5 percent for motor carriers, FMCSA estimates the revenue gained per hour

for motor carriers by multiplying the marginal cost per hour by the profit margin. This calculation results in a profit per hour of \$3.59.

Based on the loss of 50,446 driving hours, the Agency estimates motor carrier undiscounted opportunity costs at \$1.8 million over the 10-year analysis period (\$3.59 per hour × 50,446 hours × 10 years). The annualized cost is estimated at \$181,051. At a 7 percent discount rate, motor carrier opportunity costs are estimated at \$1.3 million over 10 years. The annualized cost is estimated at \$181,051.

Summary of the Estimated Cost of the Proposed Rule

Table 2 compares the total 10-year and annualized costs, both undiscounted and at a 7 percent discount rate. FMCSA estimates the total 10-year costs of this final rule at \$51.7 million undiscounted, and \$38.5 million discounted at 7 percent. Expressed on an annualized basis, this equates to \$5.2 million undiscounted, and \$5.5 million in costs at a 7 percent discount rate.

TABLE 2—TOTAL 10-YEAR AND ANNUALIZED COST OF THE FINAL RULE

Cost category	Undiscounted (2019 \$ million)		Discounted at 7% (\$ million)	
	10-Year total cost	Annualized	10-Year total cost	Annualized
SDLA Costs .....	\$30.1	\$3.0	\$23.1	\$3.3
AAMVA IT Cost .....	0.6	0.1	0.4	0.1
Federal Government IT Cost .....	2.8	0.3	2.2	0.3
Driver Opportunity Cost .....	16.4	1.6	11.5	1.6
Motor Carrier Opportunity Cost .....	1.8	0.2	1.3	0.2
<b>Total .....</b>	<b>51.7</b>	<b>5.2</b>	<b>38.5</b>	<b>5.5</b>

Benefits

The 2016 Clearinghouse final rule required States to request information from the Clearinghouse when processing specified licensing transactions. This final rule builds on that requirement by prohibiting SDLAs from issuing, renewing, upgrading, or transferring the CDL, or issuing, renewing, or upgrading the CLP, of any driver prohibited from operating a CMV due to drug and alcohol program violations. In addition, the rule requires SDLAs to downgrade the driver licenses of individuals prohibited from operating a CMV due to drug and alcohol program violations. SDLAs will rely on applicable State law and procedures to accomplish the downgrade and any subsequent reinstatement of the CLP or CDL privilege. FMCSA believes these requirements will improve highway safety by increasing the detection of CLP or CDL holders not qualified to operate a CMV due to a drug or alcohol program violation. The safety benefits attributable to the increased distribution of information about the driver’s prohibited status must be viewed in the context of the current regulatory scheme, as explained below.

The current CMV driving prohibition has been largely self-enforcing in that it

relies on motor carrier employers to prevent non-compliant drivers from operating. The Agency is aware, through motor carrier compliance reviews, targeted investigations, and other forms of retrospective compliance monitoring, that non-compliance with the driving prohibition occurs. Non-compliant drivers evade detection because, although subject to the driving prohibition, these drivers continue to hold a valid CLP or CDL in 47 States and the District of Columbia. Consequently, during a traffic stop or roadside inspection, traffic safety enforcement officers had no way of knowing the driver is not qualified to operate a CMV. The Clearinghouse changed that by making the information available to highway safety enforcement officers able to access the driver’s operating status in real time at roadside through FMCSA’s electronic enforcement tools, thereby increasing the detection of drivers not qualified to operate a CMV. MCSAP personnel can immediately place these drivers out of service.

The mandatory downgrade will further strengthen detection of drivers not qualified to operate due to a drug and alcohol program violation. The reason is that not all traffic safety

enforcement officers have reliable access to FMCSA’s electronic enforcement tools that, after the Clearinghouse became operational, made the driver’s prohibited status available at roadside. While the approximately 12,000 officers who are trained and certified under MCSAP have consistent roadside access to a CMV driver’s prohibited status, most of the approximately 500,000 non-MCSAP enforcement officers do not. Accordingly, if a driver subject to the prohibition holds a valid CLP or CDL at the time of a traffic stop, non-MCSAP personnel do not have access to the driver’s prohibited operating status. However, all traffic safety officers have access to the driver’s license status; a check of the license is conducted whenever there is a roadside intervention. Therefore, a driver whose license is downgraded due to a drug and alcohol program violation will be detected, through a routine license check, as not qualified to operate a CMV. The downgrade, by increasing the detection of individuals unlawfully driving a CMV, will therefore improve public safety.

Just as a driver’s prohibited status is not currently available to non-MCSAP officers, most SDLAs cannot currently

<sup>46</sup> Forbes. *Trucking Companies Hauling in Higher Sales*. Available at: <https://www.forbes.com/sites/sageworks/2018/03/04/trucking-companies->

[hauling-in-higher-sales/#40e0012f3f27](https://www.forbes.com/sites/sageworks/2018/03/04/trucking-companies-hauling-in-higher-sales/#40e0012f3f27) (accessed April 19, 2021).

<sup>47</sup> Transport Topics. 2019. *Top 100 For-Hire Carriers*. Available at: <https://www.ttnews.com/top100/for-hire/2019> (accessed April 19, 2021).

identify drivers who are subject to the prohibition. This rule will address this information gap by making the driver's prohibited status known to SDLAs at the time of a driver's requested licensing transaction. Under this approach, if the SDLA's mandated Clearinghouse query results in notice that the driver is subject to the CMV driving prohibition in § 382.501(a), the SDLA must not complete the transaction, resulting in non-issuance. This requirement will strengthen enforcement of the CMV prohibition by ensuring that these drivers complete RTD requirements before obtaining, renewing, transferring, or upgrading a CLP or CDL, as applicable.

The Agency anticipates that, by "raising the stakes" of non-compliance, the non-issuance and mandatory downgrade requirements will increase compliance with the CMV driving prohibition. As a result, FMCSA expects that some CLP and CDL holders will be deterred from the misuse of drugs or alcohol, though the Agency is unable to estimate the extent of deterrence.

Finally, this rule permits the Agency to use its enforcement resources more efficiently. Previously, FMCSA generally became aware that a driver was operating a CMV in violation of § 382.501(a) during the course of a compliance review of a motor carrier, or through a focused investigation of a carrier or service agent. The process for imposing sanctions on a driver who tested positive for a controlled substance, but continued to operate a CMV, is a lengthy one that involves outreach to the driver to determine whether RTD requirements have been met, issuance of a Notice of Violation, the driver's possible request for a hearing (and potentially a subsequent request for administrative review), and possible issuance of a Letter of Disqualification (LOD) to the driver, based on § 391.41(b)(12).<sup>48</sup> FMCSA may then forward the LOD to the SDLA, requesting that the driver's CDL be downgraded. Under current regulations, the SDLA is not obligated to comply with that request. The downgrade requirement obviates the need for this time-consuming and labor-intensive process, thus enabling the Agency's enforcement resources to be deployed more effectively.

### B. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801, *et seq.*), the Office of

<sup>48</sup> Section 391.41(b)(12) applies only to the use of controlled substances; alcohol use, test refusals, and actual knowledge violations are not a basis for disqualification under this provision.

Information and Regulatory Affairs (OIRA) designated this rule as not a "major rule," as defined by 5 U.S.C. 804(2).<sup>49</sup>

### C. Regulatory Flexibility Act (Small Entities)

The Regulatory Flexibility Act of 1980 (RFA) (5 U.S.C. 601, *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) (Pub. L. 104–121, 110 Stat. 857), requires Federal agencies to consider the impact of their regulatory proposals on small entities, analyze effective alternatives that minimize small entity impacts, and make their analyses available for public comment. Accordingly, DOT policy requires an analysis of the impact of all regulations on small entities and mandates that agencies strive to lessen any adverse effects on these entities. Consistent with SBREFA and DOT policy, FMCSA conducted an initial regulatory flexibility analysis (IRFA), published the analysis with the NPRM, and requested comments. FMCSA subsequently reviewed the available information on the number affected small entities and the impact of the rule on those small entities and presents the analysis and certification below.

#### Affected Small Entities

The term *small entities* means small businesses and not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations under 50,000. This rule will impact States, AAMVA, drivers, motor carriers, and FMCSA. Under the standards of the RFA, as amended, States are not small entities because they do not meet the definition of a small entity in section 601 of the RFA. Specifically, States are not small governmental jurisdictions under section 601(5) of the RFA, both because State government is not among the various levels of government listed in section 601(5), and because, even if this were the case, no State, including the District of Columbia, has a population of less than 50,000, which is the criterion

<sup>49</sup> A "major rule" means any rule that the Administrator of OIRA at OMB finds has resulted in or is likely to result in (a) an annual effect on the economy of \$100 million or more; (b) a major increase in costs or prices for consumers, individual industries, Federal agencies, State agencies, local government agencies, or geographic regions; or (c) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets (5 U.S.C. 804(2)).

to be a small governmental jurisdiction under section 601(5) of the RFA.

CLP and CDL holders are not considered small entities because they do not meet the definition of a small entity in Section 601 of the RFA. Specifically, these drivers are considered neither a small business under Section 601(3) of the RFA nor a small organization under Section 601(4).

Under the RFA, as amended, motor carriers may be considered small entities based on the SBA-defined size standards used to classify entities as small. SBA establishes separate standards for each industry, as defined by the North American Industry Classification System (NAICS).<sup>50</sup> This rule could affect motor carriers in many different industry sectors in addition to the Transportation and Warehousing sector (NAICS sectors 48 and 49); for example, the Construction sector (NAICS sector 23), the Manufacturing sector (NAICS sectors 31, 32, and 33), and the Retail Trade sector (NAICS sectors 44 and 45). Industry groups within these sectors have size standards for qualifying as small based on the number of employees (*e.g.*, 500 employees), or on the amount of annual revenue (*e.g.*, \$27.5 million in revenue). Not all entities within these industry sectors will be impacted by this rule, and therefore FMCSA cannot determine the number of small entities based on the SBA size standards. However, it is plausible to estimate that if each affected driver worked for a distinct motor carrier, a maximum of 5,045 motor carriers would be impacted by this rule annually. The 2020 Pocket Guide to Large Truck and Bus Statistics estimates that there were approximately 603,000 interstate motor carriers and intrastate hazardous materials motor carriers in 2019.<sup>51</sup> Therefore, this rule could impact a maximum of 0.84 percent of interstate motor carriers and intrastate hazardous materials motor carriers. FMCSA does not consider 0.84 percent to be a substantial number of small entities.

#### Impact

Motor carriers may incur opportunity costs as a result of this rule if a driver employed by a given motor carrier is

<sup>50</sup> Executive Office of the President, OMB. "North American Industry Classification System." 2017. Available at: [https://www.census.gov/eos/www/naics/2017NAICS/2017\\_NAICS\\_Manual.pdf](https://www.census.gov/eos/www/naics/2017NAICS/2017_NAICS_Manual.pdf) (Accessed July 24, 2020).

<sup>51</sup> U.S. Department of Transportation, Federal Motor Carrier Safety Administration. "2020 Pocket Guide to Large Truck and Bus Statistics" October 2020. Available at: <https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/2020-10/FMCSA%20Pocket%20Guide%202020-v8-FINAL-10-29-2020.pdf> (accessed on October 30, 2020).

subject to reinstatement and is ineligible to resume safety-sensitive functions, such as driving, until the SDLA restores the CLP or CDL privilege to the driver's license. In order to determine if this impact would be significant, FMCSA considers the impact as a percentage of annual revenue and estimates the impact to be significant if it surpasses one percent of revenue. For each affected driver, the motor carrier will incur an opportunity cost of \$36 (\$3.59 × 10 hours). The motor carrier would need to have annual revenue below \$3,589 (\$36 ÷ 0.01) in order for this impact to reach the threshold of significance. It is not possible to determine the maximum number of drivers that would be affected at a given motor carrier in any one year. For illustrative purposes, FMCSA depicts the impact if a motor carrier employed 15 affected drivers. The annual opportunity cost would be \$538 (\$3.59 × 10 hours × 15 drivers), and the motor carrier would need to have annual revenues of \$53,835 for the impact to be considered significant. FMCSA considers it unlikely that a motor carrier would be able to operate with such low revenues in light of the sizeable expenses to own and maintain CMVs, and support employees. The impact of this rule increases linearly with the number of affected drivers (*i.e.*, for each affected driver, the impact increases by \$36 per year), and as such, FMCSA does not anticipate that this rule will result in a significant impact on small motor carriers regardless of the number of affected drivers per motor carrier.

Therefore, I hereby certify that this rule will not have a significant impact on a substantial number of small entities.

#### D. Assistance for Small Entities

In accordance with section 213(a) of SBREFA, FMCSA wants to assist small entities in understanding this final rule so they can better evaluate its effects on themselves and participate in the rulemaking initiative. If the final rule will affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

Small businesses may send comments on the actions of Federal employees who enforce or otherwise determine compliance with Federal regulations to the Small Business Administration's Small Business and Agriculture Regulatory Enforcement Ombudsman (Office of the National Ombudsman, see <https://www.sba.gov/about-sba/>

*oversight-advocacy/office-national-ombudsman*) and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of FMCSA, call 1-888-REG-FAIR (1-888-734-3247). DOT has a policy regarding the rights of small entities to regulatory enforcement fairness and an explicit policy against retaliation for exercising these rights.

#### E. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or Tribal government, in the aggregate, or by the private sector of \$168 million (which is the value equivalent of \$100 million in 1995, adjusted for inflation to 2019 levels) or more in any one year. Though this final rule would not result in such an expenditure, the Agency does discuss the effects of this rule elsewhere in this preamble.

#### F. Paperwork Reduction Act (Collection of Information)

This final rule contains no new information collection requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520). The information collection requirements established in the 2016 final rule were approved under OMB Control Number 2126-0057. Notwithstanding any other provision of law, no person is required to respond to a collection of information unless that collection displays a valid OMB control number.

#### G. E.O. 13132 (Federalism)

A rule has implications for federalism if, pursuant to Section 1(a) of E.O. 13132, it has "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." FMCSA analyzed this final rule under that Order and determined that it has implications for federalism. A summary of the impact of federalism in this rule follows.

MAP-21 (49 U.S.C. 31306a(l)(1) and (2)) expressly preempts State laws and regulations pertaining to CDL holders who have violated drug and alcohol program requirements that are inconsistent with Section 31306a or Federal regulations implementing Section 31306a. Section 31306a(l)(2)

specifies that State-based requirements pertaining to the reporting of violations of FMCSA's drug and alcohol use and testing program are included within the scope of the preemption set forth in subparagraph (1). MAP-21 excepts from preemption State laws and regulations relating to an action taken on the CDL of a driver who violates FMCSA's drug and alcohol program (49 U.S.C. 31306a(l)(3)). The impact of these statutory provisions on the States is discussed in Section V. as noted below.

In addition, this final rule establishes minimum requirements for the issuance of CLPs and CDLs by the States, consistent with the Agency's authority under 49 U.S.C. 31308 and 31305(a). Though the Agency's CDL regulations in 49 CFR parts 383 and 384 impact the States, they do not directly preempt any State law or regulation. In order to avoid having amounts withheld from their Highway Trust Fund apportionment, States participating in the CDL program must substantially comply with the requirements of 49 U.S.C. 31311(a), as defined in 49 CFR 384.301, and must annually certify substantial compliance as set forth in 49 CFR 384.305. States determined by FMCSA to be in substantial non-compliance are subject to withholding of a portion of the State's Highway Trust Fund apportionment in accordance with 49 U.S.C. 31314 and 49 CFR 384.401.

In accordance with section 6(c)(2) of E.O. 13132, the Agency's federalism summary impact statement, set forth below, describes FMCSA's prior consultation with State officials, summarizes their concerns and the Agency's position supporting the need to issue the final rule, and addresses the extent to which the concerns of State officials have been met.

#### Federalism Summary Impact Statement

In accordance with sections 4(e) and 6(c)(1) of E.O. 13132, FMCSA consulted with the National Governors Association, the National Conference of State Legislatures, and AAMVA early in the process of developing this rule to gain insight into the federalism implications of regulations implementing the MAP-21 requirements. The States' representatives requested that the rule delineate the States' role and responsibilities regarding the Clearinghouse, as well as the potential cost implications for the States, as clearly as possible and in a manner consistent with congressional intent. They also requested that the preemptive effect of MAP-21 on existing State laws requiring the reporting of FMCSA's drug and alcohol program violation to the

SDLA be specifically discussed, and that FMCSA allow States the time they need to enact laws or regulations implementing Federal regulatory requirements related to the Clearinghouse. AAMVA recommended that the Agency disqualify drivers who commit drug or alcohol violations, which would provide SDLAs a clear basis on which to take action on the commercial license. Additionally, prior to issuance of the NPRM, the Agency consulted directly with the SDLAs during FMCSA's CDL Roundtable, a bimonthly forum convened to discuss regulatory developments. Following publication of the NPRM, FMCSA presented an overview of the proposal to SDLAs participating in AAMVA's CDLIS Working Group and encouraged the States to submit comments to the rulemaking docket.

Drivers who violate FMCSA's drug and alcohol program and continue to operate a CMV despite the existing prohibition pose a significant risk to public safety. The Agency believes the final rule is necessary in order to mitigate that risk. By requiring States receiving MCSAP grant funds to adopt the CMV driving prohibition, and requiring that States, to avoid having Federal highway funds withheld under 49 U.S.C. 31314, deny certain commercial licensing transactions and remove the commercial driving privileges of drivers prohibited from operating a CMV due to drug and alcohol program violations, the final rule will improve safety by keeping prohibited drivers off our Nation's highways.

The final rule addresses the questions and concerns of the States, as noted above, in Section II., subsections A. (Purpose and Summary of the Regulatory Action), B. (Summary of Major Provisions), and C. (Costs and Benefits); Section IV. (Legal Basis for the Rulemaking); Section V., subsections A. (Purpose and Intent of State-Related Clearinghouse Requirements), B. (AAMVA's Petition for Rulemaking), and C. (Impact of MAP-21 on State Laws); Section VI., subsection B. (Comments and Responses); Section XI., subsection A. (E.O. 12866 (Regulatory Planning and Review), E.O. 13563 (Improving Regulation and Regulatory Review), and DOT Regulatory Policies and Procedures); and in relevant portions of the regulatory text.<sup>52</sup>

<sup>52</sup> For more detailed information regarding questions and concerns raised about the extent and nature of the States' role in the Clearinghouse, and the preemptive effect of MAP-21 on State-based reporting requirements, see the NPRM (85 FR 23670), located in docket FMCSA-2017-0330 accessible at [www.regulations.gov](http://www.regulations.gov).

#### H. Privacy

Section 522 of title I of division H of the Consolidated Appropriations Act, 2005, enacted December 8, 2004 (Pub. L. 108-447, 118 Stat. 2809, 3268, note following 5 U.S.C. 552a), requires the Agency to conduct a Privacy Impact Assessment of a regulation that will affect the privacy of individuals. The assessment considers impacts of the rule on the privacy of information in an identifiable form and related matters. The FMCSA Privacy Officer has evaluated the risks and effects the rulemaking might have on collecting, storing, and sharing personally identifiable information and has evaluated protections and alternative information handling processes in developing the rule to mitigate potential privacy risks. FMCSA preliminarily determined that this rule would not require the collection of individual personally identifiable information beyond that which is already required by the Clearinghouse final rule.

In addition, the Agency submitted a Privacy Threshold Assessment analyzing the rulemaking and the specific process for collection of personal information to the DOT, Office of the Secretary's Privacy Office. The DOT Privacy Office has determined that this rulemaking does not create privacy risk.

The E-Government Act of 2002, Public Law 107-347, sec. 208, 116 Stat. 2899, 2921 (Dec. 17, 2002), requires Federal agencies to conduct a Privacy Impact Assessment for new or substantially changed technology that collects, maintains, or disseminates information in an identifiable form. No new or substantially changed technology would collect, maintain, or disseminate information because of this final rule.

#### I. E.O. 13175 (Indian Tribal Governments)

This rule does not have Tribal implications under E.O. 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

#### J. National Environmental Policy Act of 1969

FMCSA analyzed this rule pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and determined this action is categorically

excluded from further analysis and documentation in an environmental assessment or environmental impact statement under FMCSA Order 5610.1 (69 FR 9680, March 1, 2004), Appendix 2, paragraph (6)(t)(2). The categorical exclusion (CE) in paragraph (6)(t)(2) covers regulations ensuring States comply with the Commercial Motor Vehicle Act of 1986, by having the appropriate information technology systems concerning the qualification and licensing of persons who apply for and persons who are issued a CDL. The requirements in this rule are covered by this CE, and this action does not have the potential to significantly affect the quality of the environment.

#### List of Subjects

##### 49 CFR Part 382

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

##### 49 CFR Part 383

Administrative practice and procedure, Alcohol abuse, Drug abuse, Highway safety, Motor carriers.

##### 49 CFR Part 384

Administrative practice and procedure, Alcohol abuse, Drug abuse, Highway safety, Motor carriers.

##### 49 CFR Part 390

Highway safety, Intermodal transportation, Motor carriers, Motor vehicle safety, Reporting and recordkeeping requirements.

##### 49 CFR Part 392

Alcohol abuse, Drug abuse, Highway safety, Motor carriers.

For the reasons discussed in this preamble, FMCSA amends 49 CFR parts 382, 383, 384, 390, and 392 as follows:

#### PART 382—CONTROLLED SUBSTANCES AND ALCOHOL USE AND TESTING

- 1. The authority citation for part 382 is revised to read as follows:

**Authority:** 49 U.S.C. 31133, 31136, 31301 *et seq.*, 31502; sec. 32934 of Pub. L. 112-141, 126 Stat. 405, 830; and 49 CFR 1.87.

- 2. Amend § 382.503 by:
  - a. Revising the section heading;
  - b. Designating the text as paragraph (a); and
  - c. Adding paragraph (b).

The revision and addition read as follows:

**§ 382.503 Required evaluation and testing, reinstatement of commercial driving privilege.**

\* \* \* \* \*

(b) No driver whose commercial driving privilege has been removed from the driver's license, pursuant to § 382.501(a), shall drive a commercial motor vehicle until the State Driver Licensing Agency reinstates the CLP or CDL privilege to the driver's license.

■ 3. Amend § 382.717 by revising paragraph (a)(2)(i) to read as follows:

**§ 382.717 Procedures for correcting information in the database.**

(a) \* \* \*  
(2) \* \* \*

(i) Petitioners may request that FMCSA add documentary evidence of a non-conviction to an employer's report of actual knowledge that the driver received a traffic citation for driving a commercial motor vehicle while under the influence of alcohol or controlled substances if the citation did not result in a conviction. For the purposes of this section, conviction has the same meaning as used in 49 CFR part 383.

\* \* \* \* \*

■ 4. Amend § 382.725 by revising paragraphs (a) and (b) to read as follows:

**§ 382.725 Access by State licensing authorities.**

(a)(1) Before November 18, 2024, in order to determine whether a driver is qualified to operate a commercial motor vehicle, the chief commercial driver's licensing official of a State may obtain the driver's record from the Clearinghouse if the driver has applied for a commercial driver's license or commercial learner's permit from that State.

(2) On or after November 18, 2024, in order to determine whether a driver is qualified to operate a commercial motor vehicle, the chief commercial driver's licensing official of a State must obtain the driver's record from the Clearinghouse if the driver has applied for a commercial driver's license or commercial learner's permit from that State.

(b) By applying for a commercial driver's license or a commercial learner's permit, a driver is deemed to have consented to the release of information from the Clearinghouse in accordance with this section.

\* \* \* \* \*

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

■ 5. The authority citation for part 383 is revised to read as follows:

Authority: 49 U.S.C. 521, 31136, 31301 *et seq.*, and 31502; secs. 214 and 215 of Pub. L. 106–159, 113 Stat. 1748, 1766, 1767; sec. 1012(b) of Pub. L. 107–56, 115 Stat. 272, 297, sec. 4140 of Pub. L. 109–59, 119 Stat. 1144, 1746; sec. 32934 of Pub. L. 112–141, 126 Stat. 405, 830; and 49 CFR 1.87.

■ 6. Amend § 383.5 by revising paragraph (4) of the definition of “CDL downgrade” to read as follows:

**§ 383.5 Definitions.**

\* \* \* \* \*

*CDL downgrade* \* \* \*

(4) A State removes the CLP or CDL privilege from the driver's license.

\* \* \* \* \*

■ 7. Amend § 383.73 by:

- a. Adding paragraph (a)(3);
- b. Revising paragraphs (b)(10), (c)(10), (d)(9), (e)(8), and (f)(4); and
- c. Adding paragraph (q).

The additions and revisions read as follows:

**§ 383.73 State procedures.**

(a) \* \* \*

(3) Beginning November 18, 2024, the State must request information from the Drug and Alcohol Clearinghouse, and if, in response to the request, the State receives notification that pursuant to § 382.501(a) of this chapter the applicant is prohibited from operating a commercial motor vehicle, the State must not issue, renew, or upgrade the CLP. If the applicant currently holds a CLP issued by the State, the State must also comply with the procedures set forth in paragraph (q) of this section.

(b) \* \* \*

(10) Beginning November 18, 2024, the State must request information from the Drug and Alcohol Clearinghouse. If, in response to that request, the State receives notification that pursuant to § 382.501(a) of this chapter the applicant is prohibited from operating a commercial motor vehicle, the State must not issue the CDL.

\* \* \* \* \*

(c) \* \* \*

(10) Beginning November 18, 2024, the State must request information from the Drug and Alcohol Clearinghouse. If, in response to that request, the State receives notification that pursuant to § 382.501(a) of this chapter the applicant is prohibited from operating a commercial motor vehicle, the State must not transfer the CDL.

(d) \* \* \*

(9) Beginning November 18, 2024, the State must request information from the Drug and Alcohol Clearinghouse. If, in response to that request, the State receives notification that pursuant to § 382.501(a) of this chapter the applicant is prohibited from operating a

commercial motor vehicle, the State must not renew the CDL or H endorsement and must comply with the procedures set forth in paragraph (q) of this section.

(e) \* \* \*

(8) Beginning November 18, 2024, the State must request information from the Drug and Alcohol Clearinghouse. If, in response to that request, the State receives notification that pursuant to § 382.501(a) of this chapter the applicant is prohibited from operating a commercial motor vehicle, the State must not issue an upgrade of the CDL and must comply with the procedures set forth in paragraph (q) of this section.

\* \* \* \* \*

(f) \* \* \*

(4) Beginning November 18, 2024, the State must request information from the Drug and Alcohol Clearinghouse. If, in response to that request, the State receives notification that pursuant to § 382.501(a) of this chapter the applicant is prohibited from operating a commercial motor vehicle, the State must not issue, renew, transfer or upgrade a non-domiciled CLP or CDL and must comply with the procedures set forth in paragraph (q) of this section, as applicable.

\* \* \* \* \*

(q) *Drug and Alcohol Clearinghouse.* Beginning November 18, 2024, the State must, upon receiving notification that pursuant to § 382.501(a) of this chapter, the CLP or CDL holder is prohibited from operating a commercial motor vehicle, initiate established State procedures for downgrading the CLP or CDL. The downgrade must be completed and recorded on the CDLIS driver record within 60 days of the State's receipt of such notification.

(1) *Termination of downgrade process when the driver is no longer prohibited.* If, before the State completes and records the downgrade on the CDLIS driver record, the State receives notification that pursuant to § 382.503(a) of this chapter the CLP or CDL holder is no longer prohibited from operating a commercial motor vehicle, the State must, if permitted by State law, terminate the downgrade process without removing the CLP or CDL privilege from the driver's license.

(2) *Reinstatement after FMCSA notification that the driver is no longer prohibited.* If, after the State completes and records the downgrade on the CDLIS driver record, FMCSA notifies the State that pursuant to § 382.503(a) of this chapter a driver is no longer prohibited from operating a commercial motor vehicle, the State must make the driver eligible for reinstatement of the

CLP or CDL privilege to the driver's license, if permitted by State law.

(3) *Reinstatement after Clearinghouse error correction.* If, after the State completes and records the downgrade on the CDLIS driver record, FMCSA notifies the State that the driver was erroneously identified as prohibited from operating a commercial motor vehicle, the State shall:

(i) Reinstatement the CLP or CDL privilege to the driver's license as expeditiously as possible; and

(ii) Expunge from the CDLIS driver record and, if applicable, the motor vehicle record, as defined in § 390.5T of this chapter, any reference related to the driver's erroneous prohibited status.

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

■ 8. The authority citation for part 384 is revised to read as follows:

**Authority:** 49 U.S.C. 31136, 31301, *et seq.*, and 31502; secs. 103 and 215 of Pub. L. 106–159, 113 Stat. 1748, 1753, 1767; sec. 32934 of Pub. L. 112–141, 126 Stat. 405, 830; sec. 5524 of Pub. L. 114–94, 129 Stat. 1312, 1560; and 49 CFR 1.87.

■ 9. Amend § 384.225 by adding paragraph (a)(3) to read as follows:

**§ 384.225 CDLIS driver recordkeeping.**

(a) \* \* \*

(3) The removal of the CLP or CDL privilege from the driver's license in accordance with § 383.73(q) of this chapter.

\* \* \* \* \*

■ 10. Revise § 384.235 to read as follows:

**§ 384.235 Commercial driver's license Drug and Alcohol Clearinghouse.**

Beginning November 18, 2024, the State must:

(a) Request information from the Drug and Alcohol Clearinghouse in accordance with § 383.73 of this chapter and comply with the applicable provisions therein; and

(b)(1) Comply with § 383.73(q) of this chapter upon receiving notification from FMCSA that, pursuant to § 382.501(a) of this chapter, the driver is prohibited from operating a commercial motor vehicle; and

(2) Comply with § 383.73(q) of this chapter upon receiving notification from FMCSA that, pursuant to § 382.503(a) of this chapter, the driver is no longer prohibited from operating a commercial motor vehicle; or that FMCSA erroneously identified the driver as prohibited from operating a commercial motor vehicle.

■ 11. Amend § 384.301 by adding paragraph (o) to read as follows:

**§ 384.301 Substantial compliance—general requirements.**

\* \* \* \* \*

(o) A State must come into substantial compliance with the requirements of subpart B of this part and part 383 of this chapter in effect as of November 8, 2021, as soon as practicable, but, unless otherwise specifically provided in this part, not later than November 18, 2024.

#### **PART 390—FEDERAL MOTOR CARRIER SAFETY REGULATIONS; GENERAL**

■ 12. The authority citation for part 390 continues to read as follows:

**Authority:** 49 U.S.C. 504, 508, 31132, 31133, 31134, 31136, 31137, 31144, 31149, 31151, 31502; sec. 114, Pub. L. 103–311, 108 Stat. 1673, 1677; secs. 212 and 217, Pub. L. 106–159, 113 Stat. 1748, 1766, 1767; sec. 229, Pub. L. 106–159 (as added and transferred by sec. 4115 and amended by secs. 4130–4132, Pub. L. 109–59, 119 Stat. 1144, 1726, 1743; sec. 4136, Pub. L. 109–59, 119 Stat. 1144, 1745; secs. 32101(d) and 32934, Pub. L. 112–141, 126 Stat. 405, 778, 830; sec. 2, Pub. L. 113–125, 128 Stat. 1388; secs. 5403, 5518, and 5524, Pub. L. 114–94, 129 Stat. 1312, 1548, 1558, 1560; sec. 2, Pub. L. 115–105, 131 Stat. 2263; and 49 CFR 1.87.

■ 13. Amend § 390.3 as follows:

- a. Lift the suspension of the section;
- b. Revise paragraph (f)(1); and
- c. Suspend the section indefinitely.

**§ 390.3 General applicability.**

\* \* \* \* \*

(f) \* \* \*

(1) All school bus operations as defined in § 390.5, except for §§ 391.15(e) and (f), 392.15, 392.80, and 392.82 of this chapter;

\* \* \* \* \*

■ 14. Amend § 390.3T by revising paragraph (f)(1) to read as follows:

**§ 390.3T General applicability.**

\* \* \* \* \*

(f) \* \* \*

(1) All school bus operations as defined in § 390.5T, except for §§ 391.15(e) and (f), 392.15, 392.80, and 392.82 of this chapter;

\* \* \* \* \*

#### **PART 392—DRIVING OF COMMERCIAL MOTOR VEHICLES**

■ 15. The authority citation for part 392 is revised to read as follows:

**Authority:** 49 U.S.C. 504, 13902, 31136, 31151, 31502; Section 112 of Pub. L. 103–311, 108 Stat. 1673, 1676 (1994), as amended by sec. 32509 of Pub. L. 112–141, 126 Stat. 405–805 (2012); and 49 CFR 1.87.

■ 16. Add § 392.15 to read as follows:

**§ 392.15 Prohibited driving status.**

No driver, who holds a commercial learner's permit or a commercial driver's license, shall operate a commercial motor vehicle if prohibited by § 382.501(a) of this subchapter.

Issued under authority delegated in 49 CFR 1.87.

**Meera Joshi,**

*Deputy Administrator.*

[FR Doc. 2021–21928 Filed 10–6–21; 8:45 am]

**BILLING CODE 4910–EX–P**

#### **DEPARTMENT OF COMMERCE**

#### **National Oceanic and Atmospheric Administration**

#### **50 CFR Part 665**

[Docket No. 210929–0200]

**RIN 0648–BH65**

#### **Pacific Island Fisheries; Modifications to the American Samoa Longline Fishery Limited Entry Program**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Final rule.

**SUMMARY:** This final rule implements Amendment 9 to the Fishery Ecosystem Plan for Pelagic Fisheries of the Western Pacific (FEP). It modifies the American Samoa longline fishery limited entry program to consolidate vessel class sizes, modify permit eligibility requirements, and reduce the minimum harvest requirements for small vessels. This final rule also makes several housekeeping changes to the program's regulations. The intent of this rule is to reduce regulatory barriers that may be limiting small vessel participation in the fishery, and provide for sustained community and American Samoan participation in the fishery.

**DATES:** The final rule is effective November 8, 2021.

**ADDRESSES:** Copies of Amendment 9, including an environmental analysis and Regulatory Impact Review, and other supporting documents for this action are available at <https://www.regulations.gov/document/NOAA-NMFS-2018-0023-0001>.

Written comments and recommendations for the information collection contained in this final rule may be submitted to Michael D. Tosatto, Regional Administrator, NMFS Pacific Islands Region (PIR), 1845 Wasp Blvd., Bldg. 176, Honolulu, HI 96818, and to [www.reginfo.gov/public/do/PRAMain](http://www.reginfo.gov/public/do/PRAMain).