

**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), DOT.**ACTION:** Notice of proposed rulemaking; request for comments.

**SUMMARY:** FMCSA proposes to prohibit State Driver's Licensing Agencies (SDLAs) from issuing, renewing, upgrading, or transferring a commercial driver's license (CDL), or commercial learner's permit (CLP), for individuals prohibited under current regulations from driving a commercial motor vehicle (CMV) due to controlled substance (drug) and alcohol program violations. The CMV driving ban is intended to keep these drivers off the road until they comply with return-to-duty (RTD) requirements. FMCSA also seeks comment on alternate proposals establishing additional ways that SDLAs would use information, obtained through the Drug and Alcohol Clearinghouse (Clearinghouse), to increase compliance with the CMV driving prohibition. Further, the Agency proposes to revise how reports of actual knowledge violations, based on a citation for Driving Under the Influence (DUI) in a CMV, would be maintained in the Clearinghouse. These proposed changes would improve highway safety by increasing compliance with existing drug and alcohol program requirements.

**DATES:** Comments on this document must be received on or before June 29, 2020.

**ADDRESSES:** You may submit comments identified by Docket Number FMCSA-2017-0330 using any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the online instructions for submitting comments.

- *Mail:* Docket Operations, U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Ground Floor, Room W12-140, Washington, DC 20590-0001.

- *Hand Delivery or Courier:* West Building, Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5

p.m., Monday through Friday, except Federal holidays.

- *Fax:* 202-493-2251.

To avoid duplication, please use only one of these four methods. See the "Public Participation and Request for Comments" portion of the **SUPPLEMENTARY INFORMATION** section for instructions on submitting comments, including collection of information comments for the Office of Information and Regulatory Affairs, OMB.

**FOR FURTHER INFORMATION CONTACT:** Juan Moya, Compliance Division, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590-0001, by email at [fmcasadrugandalcohol@dot.gov](mailto:fmcasadrugandalcohol@dot.gov), or by telephone at 202-366-4844. If you have questions on viewing or submitting material to the docket, contact Docket Services, telephone (202) 366-9826.

**SUPPLEMENTARY INFORMATION:**

This notice of proposed rulemaking (NPRM) is organized as follows:

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**I. Public Participation and Request for Comments****A. Submitting Comments**

If you submit a comment, please include the docket number for this NPRM (Docket No. FMCSA-2017-0330), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so that FMCSA can contact you if there are questions regarding your submission. The Agency specifically invites comment on the 13 issues identified below in section V.J, "Major Issues on Which the Agency Seeks Comment."

To submit your comment online, go to <http://www.regulations.gov>, enter the docket number, FMCSA-2017-0330, in the keyword box, and click "Search." When the new screen appears, click on the "Comment Now!" button and type your comment into the text box on the following screen. Choose whether you are submitting your comment as an individual or on behalf of a third party and then submit.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope.

FMCSA will consider all comments and material received during the comment period and may change this proposed rule based on your comments. FMCSA may issue a final rule at any time after the close of the comment period.

**Confidential Business Information**

Confidential Business Information (CBI) is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain

commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission that constitutes CBI as “PROPIN” to indicate it contains proprietary information. FMCSA will treat such marked submissions as confidential under the Freedom of Information Act, and they will not be placed in the public docket for this rulemaking. Submissions containing CBI should be sent to Mr. Brian Dahlin, Chief, Regulatory Analysis Division, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590. Any comments FMCSA receives that are not specifically designated as CBI will be placed in the public docket for this rulemaking.

#### B. Viewing Comments and Documents

To view comments, as well as any documents mentioned in this preamble as being available in the docket, go to <http://www.regulations.gov>. Insert the docket number, FMCSA–2017–0330, in the keyword box, and click “Search.” Next, click the “Open Docket Folder” button and choose the document to review. If you do not have access to the Internet, you may view the docket online by visiting Docket Operations in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays.

#### C. Privacy Act

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to [www.regulations.gov](http://www.regulations.gov), as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at [www.dot.gov/privacy](http://www.dot.gov/privacy).

#### D. Waiver of Advance Notice of Proposed Rulemaking

Under the Fixing America’s Surface Transportation Act (FAST Act) (Pub. L. 114–94), FMCSA is required to publish an advance notice of proposed rulemaking (ANPRM) or conduct a negotiated rulemaking “if a proposed rule is likely to lead to the promulgation of a major rule” (49 U.S.C. 31136(g)(1)). As this proposed rule is not likely to result in the promulgation of a major rule, the Agency is not required to issue

an ANPRM or to proceed with a negotiated rulemaking.

## II. Executive Summary

### A. Purpose and Summary of the Proposal

The NPRM would assist enforcement and improve compliance with existing regulations prohibiting CMV drivers who violate FMCSA’s drug and alcohol from operating a CMV or performing other safety-sensitive functions until completing RTD requirements set forth in part 40, subpart O. In effect, the CMV driving prohibition has been largely self-enforcing; FMCSA relies primarily on drivers themselves, and their employers, to comply (49 CFR 382.501(a) and (b)).<sup>1</sup> The reason is that, before the Clearinghouse was established, the Agency did not have real time access to drug and alcohol program violations of CDL holders. The Clearinghouse final rule addressed that information gap so that, based on violations reported to the Clearinghouse, FMCSA can now provide certain State enforcement personnel real-time notice of the driver’s prohibited driving status. However, the information gap still exists with regard to the SDLAs. This NPRM would establish how, and when, SDLAs would access and use driver-specific information from the Clearinghouse to keep CMV drivers who violate drug and alcohol use testing rules off the road until they complete RTD requirements.

In the final rule titled “Commercial Driver’s License Drug and Alcohol Clearinghouse” (Clearinghouse) (81 FR 87686 (Dec. 5, 2016)), FMCSA implemented the MAP–21 requirement to establish the Clearinghouse as a repository for drivers’ drug and alcohol program violations. The final rule primarily addressed how motor carrier employers and their service agents will interact with the Clearinghouse by accessing and adding drug and alcohol testing information to a driver’s record. While the final rule did incorporate the

<sup>1</sup> 49 CFR 382.501(a) prohibits a driver from performing safety-sensitive functions, including operating a CMV, if the driver has engaged in drug or alcohol-related conduct prohibited by part 382, subpart B, or violated the drug and alcohol rules of another DOT agency. Section 382.501(b) states that no employer may permit a driver to perform safety-sensitive functions, including driving a CMV, if the employer has determined that the driver violated this section. Section 382.503 prohibits any driver who violates drug and alcohol program rules from performing safety-sensitive functions until completing the RTD requirements of part 40, subpart O that enable the individual to resume operating a CMV and other safety-sensitive functions. Under § 382.503, no employer is permitted to allow the driver to resume safety-sensitive functions until the driver has completed RTD.

statutory requirement that SDLAs check the Clearinghouse prior to renewing or issuing a CDL, the rule did not otherwise address the SDLAs’ use of Clearinghouse information for drivers licensed, or seeking to become licensed, in their State. This proposal responds to operational questions and legal issues identified by SDLAs, individually and through the American Association of Motor Vehicle Administrators<sup>2</sup> (AAMVA), following publication of the final rule.

### B. Summary of Major Provisions

#### Non-Issuance

As noted above, the Clearinghouse regulations require that SDLAs check a driver’s status by querying the Clearinghouse prior to issuing, renewing, upgrading or transferring a CDL.<sup>3</sup> When an SDLA’s required query to the Clearinghouse indicates the driver is prohibited from operating a CMV, the NPRM would require the SDLA to deny the licensing transaction, resulting in non-issuance. A driver whose licensing transaction is denied would need to re-apply after completing RTD requirements. The manner in which SDLAs would electronically request (“pull”) and receive information from the Clearinghouse in connection with the required queries (e.g., via CDLIS or other electronic means) is discussed below in section V.A., “Impact on SDLAs.”

In addition to non-issuance, FMCSA proposes alternative ways in which SDLAs would use Clearinghouse information to further aid in the enforcement of the CMV driving prohibition.

#### Preferred Alternative—Mandatory Downgrade

This alternative would require that SDLAs remove the CLP or CDL privilege of any driver subject to the CMV driving prohibition (mandatory downgrade), after receiving a “push” notification from the Clearinghouse that the driver is prohibited from operating a CMV. Currently, most States are not aware when a CDL holder licensed in their State is prohibited from driving a CMV due to an alcohol or drug testing violation. Consequently, there is no Federal requirement that SDLAs take any action on the license of drivers subject to that prohibition. As a result,

<sup>2</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.

<sup>3</sup> See 49 CFR 383.73(b)(10); (c)(10); (d)(9); (e)(8); and (f)(4). MAP–21, as codified in 49 U.S.C. 31311(a)(24), explicitly requires that States query the Clearinghouse.

a driver can continue to hold a valid CLP or CDL, even while prohibited from operating a CMV under FMCSA's drug and alcohol regulations. The proposed downgrade would align a driver's CLP or CDL status with his or her CMV driving status under § 382.501(a), thus closing the current regulatory loophole that allows these CMV drivers to evade detection.

SDLAs would accomplish the mandatory downgrade by changing the commercial status on the CDLIS driver record (as defined in 383.5)<sup>4</sup> from "licensed" to "eligible" for CDL holders, and changing the permit status from "licensed" to "eligible" for CLP holders. This proposed mandatory downgrade procedure is identical to the process SDLAs currently use to record the removal of the CLP/CDL privilege on the CDLIS driver records of individuals whose medical certification standing changes from "certified" to "not certified," as required under § 383.73(o)(4).<sup>5</sup>

Under this alternative, FMCSA also proposes to revise the definition of "CDL downgrade," as set forth in § 383.5, and add a new definition of "CLP downgrade" to specifically set forth how removal of the CDL/CLP privilege is recorded on the CDLIS driver record. FMCSA proposes these definitional changes to ensure clarity and consistency in the downgrade process.

FMCSA prefers this alternative because it would enable effective and uniform enforcement of the CMV driving prohibition, minimize disruption at the State level by largely relying on existing processes, and take into account the SDLAs' preference for clear direction from the Agency concerning their use of Clearinghouse information.

#### Alternative #2—Optional Notice of Prohibited Status

This alternative would permit, but not require, SDLAs to receive "push" notifications from the Clearinghouse whenever CMV drivers licensed in their State are prohibited from driving due to a drug or alcohol testing violation (optional notice of prohibited status). SDLAs opting to receive this information through the Clearinghouse would also be notified when the driver

is able to resume operating a CMV following completion of the RTD process, in accordance with § 382.503. Under this optional notification alternative, the State would determine whether, and how, to use the information to enhance enforcement of the driving prohibition. For example, the State could make the CLP or CDL holder's "prohibited" status more accessible to roadside enforcement officers,<sup>6</sup> or, under State law, use the information to initiate an action on the driver's license, such as suspending the CLP or CDL privilege while the driving prohibition is in effect. This approach would afford maximum flexibility to the States.

#### Application to CLP Holders

The Clearinghouse final rule required that SDLAs query the Clearinghouse before issuing, renewing, upgrading, or transferring a CDL. However, CLP holders are currently subject to drug and alcohol testing under part 382 and the Clearinghouse final rule, and therefore subject to the driving prohibition. Accordingly, the NPRM would include CLP holders within the scope of the States' query required in § 383.73, meaning that SDLAs would check the Clearinghouse before issuing, renewing, or upgrading a CLP (CLPs cannot be transferred). In addition, CLP holders would also be subject to non-issuance and mandatory downgrade (removal of the CLP privilege) if they are prohibited from driving under § 383.501(a).

#### Addition of Driving Prohibition to Part 392

In order to receive MCSAP funding, a State must, among other things, adopt and enforce safety regulations comparable to those set forth in parts 390–397 (§ 350.201(a)). The NPRM would add the CMV driving prohibition now set forth in § 383.501, to part 392, subpart B, "Driving of Commercial Motor Vehicles," as well. The purpose of this proposed amendment is to facilitate States' enforcement of the driving prohibition. Currently, 49 States and the District of Columbia receive MCSAP funding.

#### Actual Knowledge Violations Reported to the Clearinghouse—Issuance of Citation for DUI in a CMV

The NPRM would revise how an employer's report of actual knowledge of a driver's drug or alcohol use to the Clearinghouse, based on the issuance of a citation to the employee-driver for DUI

in a CMV, are handled. First, the employer's report would remain in the Clearinghouse, regardless of whether the driver is ultimately convicted of the offense. The reason is that a driver violates part 382, subpart B, *when he or she receives a citation for DUI in a CMV*;<sup>7</sup> a subsequent conviction carries separate consequences under part 383.<sup>8</sup> Second, drivers who are not convicted of the offense of DUI in a CMV could petition FMCSA to add documentary evidence of that fact to their Clearinghouse record.

These proposed changes, explained more fully below, would ensure compliance with the statutory requirement that all violations identified in part 382, subpart B, be reported and retained in the Clearinghouse (49 U.S.C. 31306a(g)(1) and (6)), and would provide fairness to drivers and full disclosure to employers.

#### C. Costs and Benefits

The Agency proposes two ways that SDLAs could use Clearinghouse information. Alternative #1 would require SDLAs to initiate a mandatory downgrade of the CLP and CDL driving privilege. Drivers would be required to complete the RTD process and comply with any State-established procedures for reinstatement of the CMV driving privilege.<sup>9</sup> Under Alternative #2, SDLAs would be provided optional notice of a driver's prohibited status from the Clearinghouse. The States would decide whether, and how they would use the information under State law and policy to prevent a driver from operating a CMV without a valid CLP or CDL.

After completing the RTD process, a driver might incur an opportunity cost in the form of forgone income between the time he or she completes RTD requirements that permit the driver to resume operating a CMV and the point at which the SDLA reinstates the privilege to operate a CMV. Motor carriers might incur opportunity costs in the form of forgone profits due to the loss of productive driving hours during the same period. Alternative #1 would require the States to rely on their own

<sup>7</sup> FMCSA, when adopting the current definition of "actual knowledge," noted: "Actual knowledge 'includes' knowledge that the driver has received a traffic citation for driving a CMV while under the influence of alcohol or controlled substances. A CMV driver who receives a traffic citation while in a CMV is considered to have violated subpart B." (66 FR 43103, 43097, 43099 (Aug. 17, 2001))

<sup>8</sup> Any driver convicted of that offense is, under 383.51(b), disqualified from operating a CMV for a minimum of one year.

<sup>9</sup> The cost incurred by drivers to complete the RTD process were accounted for in the Regulatory Impact Analysis (RIA) published with the Clearinghouse final rule.

<sup>4</sup> § 383.5 defines "CDLIS driver record" as "the electronic record for the CDL driver's status and history stored by the State-of-Record as part of the Commercial Driver's License Information System (CDLIS) established under 49 U.S.C. 31309."

<sup>5</sup> See, 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.

<sup>6</sup> The means by which roadside enforcement officers, including non-MCSAP personnel, will be able to access the driver's prohibited status is explained in section V.E., "Roadside Enforcement."

established procedures to accomplish the downgrade and any subsequent reinstatement. The loss of productive driving hours and the associated costs would be the result of the proposed rule.

Under Alternative #2, in addition to determining when and how an SDLA would use Clearinghouse information, the States could establish reinstatement procedures that would follow drivers' completion of the RTD process. Were States to establish reinstatement procedures, any opportunity costs or reinstatement costs that drivers would incur to comply with such procedures would be the result of a State action, not the proposed rule. Any associated motor carrier opportunity costs would also be the result of a State action, not the proposed rule.

Under Alternative #1, the procedures States establish for reinstating the CMV driving privilege could vary significantly. The Agency bases this assumption on the variations in downgrade procedures the States have established to reinstate CMV driving privilege following a medical certification-related mandatory downgrade pursuant to § 383.73(o)(4).

Based on currently available information, under existing State procedures, a number of States would likely reinstate the CMV driving privilege upon receiving Clearinghouse information that a driver has completed the RTD process, but require no reinstatement fee; other States would restore the CLP or CDL to the license upon payment of the reinstatement fee; and other States would require the driver to retake knowledge and/or skills test prior to reinstatement. All States imposing a retesting requirement do so only after a defined period of time has elapsed between the time of the downgrade and reinstatement, ranging from six months to a year or more. One State requires full retesting if more than 90 days has passed.

The Agency believes that, based on established downgrade procedures, drivers will incur minimal opportunity costs and reinstatement costs for a number of reasons. First, the vast majority of drivers (82 percent) would be referred by substance abuse professionals (SAPs) to two-day education programs, as part of the RTD process. This finding is based on results substance abuse treatment survey performed by Substance Abuse and Mental Health Service Administration

(SAMHSA).<sup>10</sup> Given the short duration of these programs, the Agency expects that drivers would complete the RTD process before a downgrade would be recorded on their CDLIS record (the NPRM proposes that the downgrade be recorded within 30 days of the SDLA's receiving notification of the driver's prohibited status through the Clearinghouse). Thus, they would incur neither opportunity costs nor reinstatement costs. The Agency expects that downgrades will be recorded on the CDLIS records of drivers referred by SAPs to intensive outpatient treatment programs (IOT) because of the length of these programs, many of which last for a minimum of 90 days. As noted above, the Agency reviewed current State reinstatement procedures for restoring the CMV privilege for drivers downgraded due to invalid medical certification.

Assuming that States would apply these procedures, described above, to drivers downgraded due to drug or alcohol program violations, the Agency anticipates that drivers in most States would complete the RTD process before having to retest in order to have the CMV driving privilege restored. All but one State imposing retesting requirements do so no earlier than 6 months following the downgrade, which would allow ample time to complete most RTD programs. The remaining States require only that drivers provide a new medical certificate, and in some cases, pay a reinstatement fee to have the CMV driving privilege restored. Reinstatement fees would be a transfer payment. Thus, the Agency finds that the only opportunity costs and reinstatement costs that drivers would incur is the value of their time and the expense to travel to and from the SDLA, if they are licensed in a State that requires the driver to appear in person, and the Agency assumes this would be accomplished in one day. Since many States permit drivers to pay reinstatement fees electronically, many drivers will be able to complete the process in less than one day.

The Agency requests comments on the reinstatement procedures an SDLA

would institute under Alternative #1, and the time it would take for a driver to comply with the requirements for reinstatement.

The Agency proposes two IT solutions, (referred to as Method #1 and Method #2) for transmitting Clearinghouse information to the SDLAs. The costs include IT system development costs and annual operating and maintenance expenses (O&M) incurred by the SDLAs and FMCSA. Method #1 uses the existing CDLIS platform to interface with the Clearinghouse. The Agency included these costs in the Regulatory Impact Analysis prepared for the Clearinghouse final rule. Therefore, only the SDLAs would incur costs under Method #1. Method #2 uses a web-based service call to transfer Clearinghouse information. SDLAs and FMCSA would incur IT development and O&M expenses under Method #2. Table 1 shows two cost estimates for Alternative #1 and Alternative #2. The totals include IT development and annual O&M expenses, driver opportunity costs and reinstatement costs and motor carrier opportunity costs. Driver opportunity costs and reinstatement costs, and motor carrier opportunity costs are included in Alternative #1 costs only. This is because these costs would only be incurred under Alternative #2 by drivers and motor carriers if SDLAs choose to initiate a downgrade based on receiving optional notification from the Clearinghouse that a driver has tested positive. Undiscounted costs are expressed in 2016 dollars. The total costs for the 10-year analysis period and the annualized costs are also estimated at a 7 percent discount rate. The Agency estimates the cost of Alternative #1, with Clearinghouse information transmitted using Method #1 at \$44.0 million over the 10-year analysis period. The annualized cost is estimated at \$4.4 million. At a 7 percent discount rate, the 10-year cost of the proposed rule is estimated at \$32.8 million, with an annualized cost of \$4.7 million. If Clearinghouse information is transmitted using Method #2, the cost of Alternative #1 is estimated at \$25.5 million over the 10-year analysis period, and the estimated annualized cost is \$2.5 million. At a 7 percent discount rate, the 10-year total cost is estimated at \$18.5 million. The estimated annualized cost is \$2.6 million.

<sup>10</sup> The report is titled *National Survey of Substance Abuse Treatment Services (N-SSATS): 2017. Data on Substance Abuse Treatment Facilities*. SAMHSA. 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).

TABLE 1—COMPARISON OF THE COST OF OPTIONS FOR TRANSMITTING AND USING CLEARINGHOUSE INFORMATION

Option	Undiscounted (2016 \$ million)		Discounted at 7% (\$ million)	
	10-year total cost	Annualized	10-year total cost	Annualized
<b>Alternative #1</b>				
Method 1: CDLIS Option .....	\$44.0	\$4.4	\$32.8	\$4.7
Method 2 Web Services Option .....	25.5	2.5	18.5	2.6
<b>Alternative #2</b>				
Method 1: CDLIS Option .....	28.0	2.8	21.5	3.1
Method 2 Web Services Option .....	9.4	0.9	7.2	1.0

Under Alternative #2, with Clearinghouse information transmitted using Method #1, the 10-year total cost of the proposed rule is estimated at \$28.0 million. The estimated annualized cost is \$2.8 million. At a 7 percent discount rate, the 10-year total cost is estimated at \$21.5 million. The estimated annualized cost is estimated at \$3.1 million. If Clearinghouse information is transmitted to SDLAs using Method #2, the 10-year total cost of Alternative #2 is estimated at \$9.4 million, and the annualized cost is estimated at \$0.9 million. At a 7 percent discount rate, the 10-year total cost is estimated at \$7.2 million, and the annualized cost is estimated at \$1.0 million.

The NPRM would improve the enforcement of the current driving prohibition by requiring that States not issue, renew, transfer or upgrade the CLP or CDL of affected drivers. Removal of the commercial privilege from the driver’s license (mandatory CLP or CDL downgrade), as proposed in FMCSA’s preferred alternative, would ensure more consistent roadside enforcement against drivers who continue to operate a CMV in violation of the prohibition. The Agency also believes that the mandatory downgrade would further reduce drug and alcohol testing violations, since a driver’s loss of the commercial privilege directly impacts his or her ability to obtain employment that involves operating a CMV. The Agency’s preferred alternative would also permit the Agency to use its enforcement resources more effectively. The NPRM’s costs and benefits are addressed further below in section VIII.A, of “E.O. 12866”.

**III. 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 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.

The “Commercial Driver’s License Drug and Alcohol Clearinghouse” final rule (81 FR 87686 (Dec. 5, 2016)) implements section 32402 of the Moving Ahead for Progress in the 21st Century Act (MAP–21) (Pub. L. 112–41, 126 Stat. 405, codified at 49 U.S.C. 31306a), which requires that the Secretary establish a national clearinghouse for records relating to alcohol and controlled substances testing by CMV operators who hold CDLs. As part of that mandate, MAP–21 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. 31306a(h)(2)). Section 32305(b)(1) of MAP–21, codified at 49 U.S.C. 31311(a)(24), requires that States request information from the Clearinghouse before renewing or issuing a CDL to an individual. This NPRM proposes the processes by which the Agency and the States would implement these statutory requirements.

FMCSA also relies on the broad authority of the Commercial Motor Vehicle Safety Act of 1986 (the 1986 Act) (Pub. L. 99–570, Title XII, 100 Stat. 3207–170, codified at 49 U.S.C. chapter 313). Section 31308 requires the Secretary, through regulation, to establish minimum standards for the issuance of CLPs and CDLs by the States. This proposal would establish the requirement that States could not issue a CLP or CDL to an individual prohibited, under 49 CFR 382.501(a), from operating a CMV due to a drug or alcohol testing violation. The NPRM would also establish standards for the States’ removal and reinstatement of the CLP or CDL privilege from the driver’s licenses of such individuals, proposed

under the Agency’s preferred mandatory downgrade alternative. Additionally, 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.” This NPRM will help ensure the fitness of CMV operators by requiring that States do 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 or alcohol program violation. Under the Agency’s preferred alternative, States would 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. 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 Department’s drug and alcohol use and testing regulations are authorized by the Omnibus Transportation Employee Testing Act of 1991 (OTETA) (Pub. L. 102–143, Title V, 105 Stat. 917, at 952, codified at 49 U.S.C. 31306). Among other things, OTETA authorizes the Secretary to determine “appropriate sanctions for a commercial motor vehicle operator who is found to have used alcohol or a controlled substance” in violation of applicable use testing requirements (e.g., 49 CFR parts 40 and 382) (49 U.S.C. 31306(f)). As explained further below, FMCSA believes that non-issuance, as well as the proposed mandatory downgrade, are appropriate sanctions which will improve compliance with existing drug and alcohol program requirements.

Additionally, this NPRM is based on the authority of the Motor Carrier Safety Act of 1984 (the 1984 Act) (Pub. L. 98–554, Title II, 98 Stat. 2832, codified at 49 U.S.C. 31136), which provides concurrent authority to regulate drivers, motor carriers, and vehicle equipment. Section 31136(a) of the 1984 Act 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)).

This NPRM would 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 proposed mandatory downgrade alternative, requiring that States remove the CLP or CDL privilege from the license of an individual who engages in prohibited drug and/or alcohol-related conduct would promote the safe operation of CMVs. Specifically, it would 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 conduct prohibited by FMCSA’s drug and alcohol testing and use program, until the driver has completed the RTD requirements established by 49 CFR part 40, subpart O. The NPRM 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 does not believe this NPRM would result in the coercion of CMV drivers by motor carriers, shippers, receivers, or transportation intermediaries (section 31136(a)(5)), as these proposed regulatory changes concern only the transmission of Clearinghouse information between FMCSA and the States and the use of that information by the SDLAs. The Agency notes, however, that the Clearinghouse final rule

prohibits employers from submitting false reports of drug or alcohol violations to the Clearinghouse, which could have coercive effects on drivers.<sup>11</sup>

The 1984 Act also requires that, 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 below.

#### IV. Background

##### A. MAP–21 Mandate

The Clearinghouse final rule implemented the Congressional mandate, set forth in section 32402 of MAP–21 requiring the establishment of a national Drug and Alcohol Clearinghouse containing CDL holders’ violations of FMCSA’s drug and alcohol testing regulations set forth in 49 CFR part 382. MAP–21 identified the purposes of the Clearinghouse as twofold: To improve compliance with the drug and alcohol testing program applicable to CMV operators and to improve roadway safety by “reducing accident and injury involving the misuse of alcohol or use of controlled substances” by CMV operators (49 U.S.C. 31306a(a)(2)). Accordingly, the Clearinghouse regulations will enable FMCSA and motor carrier employers to identify drivers who, under 49 CFR 382.501(a), are prohibited from operating a CMV due to drug and alcohol program violations. The NPRM would help ensure that such drivers receive the required evaluation and treatment before operating a CMV on public roads, as required by § 382.503.

Additionally, MAP–21 required that SDLAs be provided access to the Clearinghouse records of individuals applying for a CDL in order to determine whether that person is qualified to operate a CMV and that SDLAs request information from the Clearinghouse before renewing or issuing a CDL to an individual (49 U.S.C. 31311(a)(24)). This NPRM further addresses those requirements.<sup>12</sup> The Clearinghouse information would allow the SDLA to determine whether the applicant is qualified to operate a CMV (49 U.S.C. 31306a(h)(2)(B)(ii)).

In the preamble to the Clearinghouse final rule, FMCSA noted that information in the Clearinghouse “may have a direct impact on the ability of the individual to hold or obtain a CDL,” and that if an applicant is not qualified to operate a CMV, “that driver should not

be issued a CDL.”<sup>13</sup> However, as explained above, although drivers who incur drug and alcohol program violations are prohibited from operating a CMV until achieving a negative result on a RTD test, there is no current regulatory requirement that SDLAs take any specific licensure action if the driver’s Clearinghouse record shows a violation of the Agency’s drug and/or alcohol prohibitions in part 382.

Following publication of the Clearinghouse final rule, AAMVA, as well as some individual States, noted that the rule did not provide any direction to SDLAs should they become aware of a driver’s drug or alcohol violation after conducting the required check of the Clearinghouse. AAMVA also raised a number of other questions and concerns. The NPRM is intended to address those issues by clarifying how SDLAs would use Clearinghouse information.

##### B. AAMVA’s Petition

AAMVA’s petition for reconsideration of the Clearinghouse final rule raised concerns related to the requirement, as set forth in § 383.73, that SDLAs request information from the Clearinghouse prior to the issuance, renewal, transfer, or upgrade of a CDL.<sup>14</sup> AAMVA asserted that FMCSA should not expect States to play any role in the Clearinghouse process, noting that “states cannot be expected to take action on a license as the result of a query against the Clearinghouse even if that process is integrated seamlessly.”<sup>15</sup> Concluding that “[t]he authority for taking action based on federal clearinghouse records should remain solely with the employer and FMCSA,” AAMVA requested that “SDLAs be removed from the process as described in the final rule.”<sup>16</sup>

As noted above, 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)). As explained in the Agency’s response to

<sup>13</sup> See 81 FR 87686, 87708 (Dec. 5, 2016).

<sup>14</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; however, it 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 382.35(a), the Agency considers AAMVA’s submission to be a petition for rulemaking submitted under 49 CFR 389.31.

<sup>15</sup> *Ibid.*, at 2.

<sup>16</sup> *Ibid.*, at 3.

<sup>11</sup> See 49 CFR 382.723.

<sup>12</sup> See 49 CFR 382.725; 49 CFR 383.73(b)(10), (c)(10), (d)(9), (e)(8), and (f)(4); and 49 CFR 384.235.

AAMVA's petition,<sup>17</sup> FMCSA therefore has no discretion to "remove" the States from the Clearinghouse process. Further, although a Federal statute required that the CDL program be established, and the program is governed in part by Federal regulations, the Agency does not have authority to issue or rescind CDLs. Under the current regulatory scheme, only States may act on a commercial license. As discussed further below, FMCSA believes Congress intended that States, as the issuers and administrators of CDLs and CLPs, should exercise their commercial licensing authority to help keep drug and alcohol program violators off the road until they are legally permitted to operate a CMV.

AAMVA also asserted that various operational questions related to the States' role in the Clearinghouse process were not addressed in the final rule. These concerns included: What does FMCSA intend that the States do with information they receive from the Clearinghouse; what specific information would States receive in response to a request for information about an individual CDL holder or applicant; what privacy and data controls will be applied to the transmission of Clearinghouse information to SDLAs; how would an erroneous Clearinghouse record be corrected; to what extent would foreign-licensed drivers be included in the query and reporting process; and what are the cost implications for the SDLAs. AAMVA also cautioned FMCSA against requiring SDLAs to take a licensing action based on information received from the Clearinghouse, noting the direct impact of such action on an individual's livelihood.

This NPRM responds to the SDLAs' questions and concerns, as identified by AAMVA. The Agency explains how the NPRM addresses these issues in section V, "Discussion of Proposed Rulemaking," below. The NPRM's estimated cost impact on the States, noted above in section II.C, "Costs and Benefits", is discussed further below in section VIII.A, "Regulatory Analyses, E.O. 12866."

## V. Discussion of Proposed Rulemaking

### A. The SDLAs' Role in the Clearinghouse

While the MAP-21 requirements pertaining to the SDLAs' role in the Clearinghouse are straightforward, the intent of these provisions is less clear and thus subject to interpretation. The

Agency therefore relies on its authority, delegated by Congress through the Secretary, to interpret and implement the MAP-21 requirements summarized above.

First and foremost, FMCSA views the Clearinghouse provisions in MAP-21 as remedial, intended to address the risk to public safety posed by CLP and CDL holders who commit drug or alcohol testing violations, but continue to operate a CMV without completing RTD requirements. This NPRM is part of FMCSA's effort to address that problem. According to the National Highway Traffic Safety Administration's Fatality Analysis Reporting System (FARS), the number of large truck drivers involved in fatal crashes who tested positive for drug use increased 48.2 percent between 2012 and 2017.<sup>18</sup>

FMCSA, proceeding under accepted standards of statutory construction, interprets the Clearinghouse requirements in a way that will achieve Congress's remedial purpose as stated in MAP-21: Increasing compliance with current drug and alcohol program requirements and improving highway safety (49 U.S.C. 31306a(a)(2)). The Agency starts with the assumption that Congress intended that the separate statutory requirements pertaining specifically to States and to SDLAs be read as a whole, and therefore in harmony with one another.<sup>19</sup> The provision requiring States (through SDLAs) check the Clearinghouse before issuing or renewing a CDL (49 U.S.C. 31311(a)(24)) does not indicate the specific purpose of that request for information. The provision does, however, expressly cross-reference the Clearinghouse provisions in 49 U.S.C. 31306a. FMCSA therefore views these statutory sections, both enacted as part of MAP-21, as two parts of an integrated whole.

With this in mind, the Agency reaches the following conclusions. First, the required check of the Clearinghouse is intended to provide SDLAs with information about the driver's qualifications to operate a CMV (49 U.S.C. 31306a(h)(2)(B)(ii)). Second,

<sup>18</sup> The FARS data is available at <https://www-fars.nhtsa.dot.gov/QueryTool/QuerySection/SelectYear.aspx>, (accessed August 19, 2019).

<sup>19</sup> This interpretation differs from the Agency's views expressed in the 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(24) as requiring access and 31306a(h)(2) as permitting such access. FMCSA concluded the separate requirements were therefore contradictory. As explained above, the Agency now views the two provisions as part of an integrated statutory scheme.

Congress included SDLAs in the process because they are the only authorized user of the Clearinghouse with authority to take action on a driver's license, such as issuance or renewal.<sup>20</sup> Third, SDLAs should use their licensing authority to enforce the existing CMV driving prohibition in 382.501(a). The Agency acknowledges that a licensing action, based on information from the Clearinghouse, is not an explicit statutory requirement. However, to assume that Congress required that States (SDLAs) query the Clearinghouse to assess the driver's qualifications to drive a CMV and *then take no action* if the query discloses that the driver is prohibited from operating a CMV would ascribe to Congress an irrational purpose, plainly contrary to the stated goals of the statute, noted above.

Having concluded that Congress intended SDLAs to use their licensing authority to further the goals of MAP-21, FMCSA proposes to require SDLAs "act" on the license by denying the requested issuance, upgrade, renewal or transfer of the CLP or CDL, as applicable, if the Clearinghouse query results in notice that the individual is prohibited from operating a CMV. For purposes of the NPRM, FMCSA considers non-issuance to be the minimum licensing action required by MAP-21.

However, in FMCSA's judgment, it would be contrary to public safety to infer that non-issuance is the only license action authorized under MAP-21.<sup>21</sup> Drug and alcohol information reported to the Clearinghouse will make it possible to identify current CLP or CDL holders subject to the driving prohibition. But non-issuance applies only to a subset of that group: Individuals seeking a specified license transaction. For example, the non-issuance requirement would preclude a current CDL holder from adding an endorsement to their license if the SDLA's Clearinghouse query disclosed that the individual is subject to the driving prohibition and therefore not qualified to operate a CMV. If denying the upgrade is the only action taken by the SDLA, however, that driver would continue to hold a valid CDL, which may not expire for years. FMCSA does not believe Congress intended that

<sup>20</sup> 49 U.S.C. 31306a(m)(2) defines "chief commercial driver's licensing official" as the State official authorized to "maintain a record about commercial driver's licenses issued by the State" and "take action on commercial driver's licenses issued by the State."

<sup>21</sup> As discussed in Section III, "Legal Basis", in addition to MAP-21, the NPRM is also based on the concurrent statutory authorities of the Commercial Motor Vehicle Safety Act of 1986 and the Motor Carrier Safety Act of 1984.

<sup>17</sup> See Letter from Raymond Martinez (FMCSA) to Anne Ferro (AAMVA) (April 12, 2018), p. 2, Docket No. FMCSA-2011-0031.

result, because these drivers pose an obvious risk to highway safety. A driver not qualified to add an endorsement to their license due to a drug or alcohol testing violation is also not qualified to hold that license until he or she complies with RTD requirements that will allow the commercial driving privilege to be reinstated.

The Agency therefore proposes alternate means to further effectuate Congress's intent and increase compliance with the driving prohibition. FMCSA's preferred alternative, "mandatory downgrade" would require that SDLAs downgrade the license of any CLP or CDL holder subject to the CMV driving prohibition, whether the driver is actively pursuing a commercial licensing transaction or not. Under this approach, SDLAs would receive "push" notifications from the Clearinghouse, in addition to "pulling" driver status information through the query process.

Under the second proposed alternative, "optional notice of prohibited status," States would decide whether, and how, they would use the information to enforce the CMV driving prohibition in accordance with State law or policy (e.g., suspend the CLP or CDL privilege until the driver can operate a CMV in accordance with § 382.503, and/or make the driver's prohibited status more widely available to traffic safety enforcement officers in their State). This alternative would allow, but not require, SDLAs to identify all individuals in their State subject to the CMV prohibition by choosing to receive "push" notifications.

#### B. Impact of the NPRM on SDLAs

##### Non-Issuance

The Clearinghouse regulations require that SDLAs request ("pull") information from the Clearinghouse prior to issuing, transferring, renewing, or upgrading a CDL (§ 383.73(b)(c)(d)(e)(f)). The NPRM proposes that if, in response to that request, the SDLA is notified that the applicant is prohibited from operating a CMV due to a drug or alcohol testing violation, the SDLA must not complete the licensing transaction (non-issuance). The driver would need to re-apply after complying with RTD requirements that permit him or her to resume safety-sensitive functions, such as driving a CMV.

##### Application to CLP Holders

The Clearinghouse final rule did not require that States request information from the Clearinghouse for CLP applicants. The NPRM addresses this

apparent oversight by proposing that SDLAs must check the Clearinghouse prior to issuing, renewing or upgrading a CLP. FMCSA believes it is appropriate that SDLAs query the Clearinghouse for information pertaining to CLP applicants, because the driver may have previously held a CLP or CDL from another State, and a drug and alcohol program violation may have been reported to the Clearinghouse during that licensure period. In accordance with 382.103, CLP holders are subject to the requirements of part 382 and are therefore subject to the driving prohibition in § 382.501(a). Accordingly, States could not issue, renew, or upgrade the CLP of an applicant prohibited from operating a CMV under § 382.501(a). The proposed mandatory downgrade would also apply to CLP holders.

##### Mandatory Downgrade

Under the Agency's preferred alternative, FMCSA proposes that, in addition to non-issuance, SDLAs also would be required to downgrade the driver's license of CLP and CDL holders who violate FMCSA's drug and alcohol program rules. As discussed above, the proposed downgrade requirement is based on a simple premise: An individual prohibited from operating a CMV due to a drug and alcohol program violation should not hold a valid CLP or CDL until they are legally permitted to operate a CMV. As previously noted, and discussed further below, the NPRM would add the CMV driving prohibition to part 392, so that States receiving MCSAP funds would be required to adopt and enforce a comparable provision.

SDLAs would accomplish the downgrade by changing the commercial status from "licensed" to "eligible" on the CDLIS driver record, thereby removing the CLP or CDL privilege from the license. The downgrade would be initiated following notification from FMCSA that, under § 382.501(a), the CLP or CDL holder is prohibited from operating a CMV. SDLAs would learn of the driver's prohibited status by "pulling" the information from the Clearinghouse prior to a requested license transaction, and by receiving a "push" notification whenever a violation is reported to the Clearinghouse for a CLP or CDL holder licensed in that State. The SDLAs would rely on their respective State laws and processes to downgrade the license and to reinstate the CLP or CDL privilege to the license following "push" notification of the driver's completion of RTD requirements. Pushing notifications to SDLAs is necessary to

address the situation under which drivers who are prohibited from operating a CMV continue to possess a valid CDL or CLP, enabling them to avoid detection while driving unlawfully.

Under this alternative, SDLAs must complete and record the downgrade on the CDLIS driver record within 30 days of the date the State received notification from FMCSA that the driver is prohibited from operating a CMV. FMCSA understands that immediate licensing action may not be feasible in all States. The Agency believes that the 30-day period would allow SDLAs sufficient time to take the required action, taking into account any State-imposed due process requirements, such as providing notice of the pending downgrade to the affected driver.<sup>22</sup> However, the NPRM would not prohibit SDLAs from completing the downgrade before the end of the 30-day period. FMCSA requests comment on the proposed 30-day time frame for SDLAs to complete and record the downgrade on the CDLIS driver record.

The Agency prefers the mandatory downgrade alternative because (1) it could be implemented through the States' existing downgrade processes; (2) would ensure more consistent treatment of drivers subject to the CMV driving prohibition; and (3) it would strengthen enforcement of the prohibition by making the driver's status readily available to all roadside enforcement personnel, not just those specifically trained through MCSAP funding to enforce the Federal Motor Carrier Safety Regulations (FMCSRs). This issue is discussed further below in section V.F., "Roadside Enforcement of the CMV Driving Prohibition." Other benefits of the proposed mandatory downgrade are discussed in section VIII.A., "E.O. 12866."

FMCSA requests comment on the mandatory downgrade alternative. The Agency invites SDLAs to identify any specific operational issues associated with implementing the downgrade, as proposed.

##### Reinstatement of the CLP/CDL Following RTD Completion

Under the mandatory downgrade alternative, FMCSA would "push" notice to the SDLAs when a driver's negative RTD test result is reported to the Clearinghouse, thereby informing

<sup>22</sup> However, FMCSA, notes that affected drivers would nevertheless remain subject to en route enforcement of the driving prohibition during the period before the downgrade is recorded on the individual's driving record. See, section V.F., "Roadside Enforcement," *infra*.

them that the driver is no longer prohibited from operating a CMV. If the SDLA receives that notification *before* the downgrade is recorded, FMCSA would require that, subject to applicable State law, SDLAs terminate the downgrade process, since the CLP or CDL holder is no longer prohibited from driving a CMV. If the SDLA receives notice from FMCSA that the driver is no longer prohibited from operating a CMV *after* completing and recording the downgrade, the driver would be eligible for reinstatement of the CLP or CDL privilege to their license in accordance with State law and procedures. However, if the downgrade has been recorded on the CDLIS driver record, the driver could not operate a CMV until the CLP or CDL privilege is reinstated to the driver's license by the State. The NPRM would amend § 382.503 to make this clear.

FMCSA believes the reinstatement should be as efficient as possible so that drivers can resume their operation of a CMV as soon as they are qualified to do so. The Agency requests information on current reinstatement processes, including how long it takes to reinstate the CLP or CDL privilege to the driver's license.

#### Notice to Drivers of Downgrade/Reinstatement

The NPRM does not require that States notify the CLP or CDL holder that the downgrade process, proposed under the preferred alternative, is underway. (Such notice is currently required prior to the downgrade of a driver's license due to a change in medical certification status (§ 383.73(o)(4)(i)(A)). The Agency, by implementing its own notification procedures required by the Clearinghouse regulations, would like to relieve SDLAs of the administrative burden of directly notifying a CLP or CDL holder of the licensing action (*i.e.*, downgrade or reinstatement). Pursuant to § 382.707(a), FMCSA must notify drivers whenever information about them has been added to, revised, or removed from the Clearinghouse. When notifying the driver that a violation has been reported to the Clearinghouse, the Agency intends to let drivers know that FMCSA has informed their SDLA of the driver's prohibited operating status, and that the State must downgrade of the driver's license within 30 days. In addition, as part of FMCSA's required notification to the driver that a negative RTD test result has been reported to the Clearinghouse, the Agency would also inform drivers that FMCSA has notified their SDLA that the driver is no longer subject to the driving prohibition. FMCSA would notify drivers through

first-class mail, or through electronic mail if the driver has registered in the Clearinghouse and selected that option. FMCSA requests comment on whether its intended method of notice to drivers, as described above, would satisfy existing State-based driver notification requirements.

#### Impact of Removing the CLP or CDL Privilege From the Driver's License

In its petition, AAMVA cautioned the Agency against requiring the SDLAs to take a licensing action that could affect the individual's livelihood. In response, FMCSA notes that a person's ability to earn a living can be impacted anytime an SDLA removes or restricts a driver's license, for any type of vehicle. Taking away the privilege to drive has serious consequences to the affected individual; that is the essence of the States' licensing authority when exercised to protect the public by keeping unsafe drivers off the road.

Further, SDLAs are already required to downgrade the CLP or CDL of any driver not having valid medical certification (§ 383.73(o)(4)). That requirement is intended to keep drivers from operating a CMV until they are medically certified to do so, as required under § 391.41(a)(1)(i). Similarly, the proposed licensing actions related to a drug or alcohol program testing violation (*i.e.*, non-issuance and mandatory downgrade) would improve compliance with current regulations (§ 382.501). Individuals who obtain the CLP or CDL credential are responsible for knowing the associated regulatory requirements, as well as the consequences of noncompliance. CMV drivers can therefore avoid the threat to their livelihood, posed by non-issuance or a downgrade, by complying with FMCSA's drug and alcohol program.

AAMVA's petition also asked whether licensing action would be in the form of a downgrade or a disqualification. FMCSA notes that CMV drivers subject to downgrade are not "disqualified" under part 383. Driver disqualifications under § 383.51 require that the individual be convicted of a specified traffic violation. Drivers prohibited from operating a CMV due to a drug or alcohol testing violation do not meet that criteria for disqualification.<sup>23</sup> Further, violation of FMCSA's drug and alcohol use testing regulations do not necessarily indicate impairment while driving.<sup>24</sup> Therefore, while a positive

drug or alcohol test, or other program violation certainly raises safety concerns, such violations do not inherently constitute a basis for disqualification under § 383.51.

#### Alternative #2—Optional Notice of Prohibited Status

Under the second proposed alternative, the push notifications described above would also be available to SDLAs so that they could choose whether to receive the information and how to use it. As discussed above in section II.B, "Summary of Major Provisions," the NPRM would add the driving prohibition, currently set forth in § 382.501, to part 392, thereby requiring States that receive MCSAP funding to adopt and enforce a comparable prohibition under State law. This would enable roadside enforcement by providing law enforcement personnel with electronic access to the CMV driver's prohibited operating status. However, as explained below in section V.F., "Roadside Enforcement of the CMV Driving Prohibition," traffic enforcement officers who are not funded through the MCSAP program may have limited electronic access to that information.

Under this optional notification alternative, SDLAs choosing to receive "push" notifications of a driver's prohibited status could use the information to enhance their enforcement efforts in a number of different ways, consistent with MAP-21<sup>25</sup> and State law or policy. Although the Agency would not require SDLAs to take action on CDLs, they would have the option to receive push notifications of a CLP or CDL holder's prohibited operating status. The SDLA would then choose how to use the information to facilitate enforcement of the driving prohibition, as required by MCSAP funding. States would remain responsible for enforcing the driving prohibition, but would have the flexibility to determine how to comply with that requirement.

For example, SDLAs could make the driver's prohibited CMV operating status more accessible to non-MCSAP law enforcement at roadside, depending on their technological capability to do so. States opting to receive "push" notifications could also enact a law to suspend the commercial privilege from the driver's license until he or she completes RTD requirements, as three

<sup>23</sup> Driver disqualifications under part 383 are required by statute (49 U.S.C. 31310).

<sup>24</sup> Under § 383.51(b), persons convicted of driving under the influence of drugs or alcohol are disqualified from operating a CMV for a minimum of one year.

<sup>25</sup> MAP-21 requires that States ensure information in the driver's Clearinghouse record "is not divulged to any person not directly involved in assessing and evaluating the qualifications of the individual to operate a commercial motor vehicle" (49 U.S.C. 31306a(h)(2)(B)(ii)).

States have already done.<sup>26</sup> Under this proposed alternative, it would be up to the State to determine whether, and how, to use the information.

The Agency invites comment on the optional notification proposal. Would States opt to receive the CMV driver status information if FMCSA did not require a downgrade? Why or why not? How would States choosing to receive driver notification specifically use that information to enhance enforcement of the driving prohibition? If FMCSA did not require a downgrade, should SDLAs be required to receive the information, rather than having the option to do so? Why or why not?

#### Content of Driver-Specific Information Provided to SDLAs

The driver-specific information that would be provided to SDLAs, through both “push” and “pull” notifications, would indicate only that the driver is prohibited from operating a CMV. Because FMCSA would not disclose any specific information concerning the details of the driver’s drug and alcohol program violation (*e.g.*, whether the driver tested positive or refused a test), SDLAs would not need to interpret drug or alcohol test results or other Clearinghouse data. After a negative RTD test has been reported to the Clearinghouse, FMCSA would “push” a notification to the SDLA that initially received notification of prohibited status, indicating the driver is no longer prohibited from operating a CMV.

#### Proposed Methods of Transmitting Driver-Specific Information to SDLAs

FMCSA expects to notify the SDLAs of the driver’s status, either by “pull” or “push”, through either the existing CDLIS platform, a web services call, some combination of the two, or other automated electronic means. The Agency invites comment concerning the preferred method for FMCSA’s automated electronic transmission, by “push” or “pull”, of the CLP or CDL holder’s Clearinghouse information to the SDLAs, including associated costs and benefits. For example, if the existing CDLIS platform is utilized, what new data elements or fields would be required? Would a new AAMVA Code Dictionary (ACD) code be required? As noted below in the discussion of the estimated costs of the NPRM, if States “pulled” notification of a driver’s CMV operating status from the Clearinghouse via the CDLIS platform,

the Agency intends that, under this option, the information would be provided as part of the CDLIS driver record check already required under § 384.205. Under this approach, SDLAs would not be required to perform a separate query of the Clearinghouse; they would receive relevant Clearinghouse information along with any other driver-specific data, such as medical certification status, provided in response to the CDLIS record check.

Alternatively, the Agency requests comment on whether a web service call should be used to transmit information between the Clearinghouse and SDLAs. As noted above, this option would presumably require FMCSA to establish an interface between the SDLAs and the Clearinghouse. Should SDLAs have the option to determine which electronic transmission format best suits their needs, or is a uniform system of Clearinghouse data transmission preferable? How would the NPRM affect States that permit drivers to complete commercial license transactions online?

#### C. Compliance Date

The Agency generally allows States three years to achieve compliance with new requirements imposed on them under parts 383 and 384. Accordingly, the NPRM proposes that States come into compliance with the proposed requirements no later than three years following publication of a final rule. FMCSA acknowledges, however, that the time needed for implementation of the proposed data transmission options, identified above, may vary. FMCSA therefore requests comment on the time necessary for SDLAs to implement changes to their information technology systems in order to electronically request and receive information from the Clearinghouse, once the technical specifications are made available. To the extent possible, commenters should estimate the length of time needed to comply, depending on how the Clearinghouse information would be transmitted (*i.e.*, through the existing CDLIS platform, a web-based service, or some other electronic means). For example, can one method of transmission be implemented more quickly than another?

The Agency previously extended the date by which States must comply with the query requirement established by the Clearinghouse final rule. The initial compliance date of January 6, 2020, was extended to January 6, 2023 (84 FR 68052). As FMCSA noted at the time that change made, the extension was necessary because the way in which SDLAs would electronically receive Clearinghouse information, as well as

the way SDLAs would be required to use that information, has not yet been determined. This NPRM addresses those factors. The current compliance date of January 23, 2023 will, if necessary, be replaced by the date established by the final rule resulting from this NPRM; however, the Agency does not expect the “final” compliance date to occur before January 23, 2023.

#### D. Impact of MAP-21 and the NPRM on State Laws

##### Reporting Requirements

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)(2)). Once the Clearinghouse is operational, drug and alcohol testing violation information must be reported to the Clearinghouse in accordance with § 382.705 (“Reporting to the Clearinghouse”). The Agency interprets 49 U.S.C. 31306a(l)(2) to mean that State-based reporting requirements inconsistent with the requirements in § 382.705 would be preempted.

FMCSA is aware that at least eight States (Arkansas, California, New Mexico, North Carolina, Oregon, South Carolina, Texas, and Washington<sup>27</sup>) currently require that CDL holders’ positive test results and/or test refusals be reported to the State. States uncertain about whether their reporting requirements are inconsistent with the Clearinghouse statute (49 U.S.C. 31306a) or the Clearinghouse final rule may request a determination from the Agency.

##### State Actions on the Commercial Driver License or Driving Record

MAP-21 specifically *excepts* from Federal 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)). Several States currently take such licensing actions based on certain violations of FMCSA’s drug and alcohol testing program. At least three States (North Carolina, South Carolina, and Washington) currently disqualify CDL

<sup>26</sup> The ways in which States currently use information of driver violations of FMCSA’s drug and alcohol program is described below in section V.C., “Impact of MAP-21 and the NPRM on State Laws.”

<sup>27</sup> See A.C.A. section 27-23-205; Ann. Cal. Vehicle Code sections 34520(c), 13376(b)(3); N.M.S.A. section 65-13-14(B); O.R.S. section 825.410(3); 37 T.A.C. section 4.21(a).

holders who test positive for drugs or alcohol, or refuse to submit to a test, from operating a CMV until completing RTD requirements.<sup>28</sup> Some States take additional licensing actions related to drug and alcohol program violations. For example, in Washington State, persons disqualified from driving a CMV due to a positive drug or alcohol confirmation test under the DOT testing program, more than twice in a five-year period, “are disqualified for life.”<sup>29</sup> In North Carolina, drivers testing positive for drugs or alcohol, or refusing to test, under 49 CFR part 382 are disqualified from operating a CMV for a minimum of 30 days and until completion of RTD requirements.<sup>30</sup> Based on its interpretation of 49 U.S.C. 31306a(l)(3), the Agency believes that State-based requirements such as these would likely fall within the scope of the exception because they relate to an action taken on a CDL.

The exception in 49 U.S.C. 31306a(l)(3) also applies to State actions related to a CMV operator’s driving record resulting from an individual’s violation of FMCSA’s drug and alcohol program. The NPRM’s sole impact on the driving record is the requirement, proposed in FMCSA’s preferred alternative, that the downgrade of the CLP or CDL be recorded on the CDLIS driver record for the downgrade to take effect. FMCSA does not propose that the reason for the downgrade, or the individual’s prohibited CMV driving status, be posted on a CMV operator’s driving record, though the NPRM does not prohibit States from doing so. Nor does the Agency propose any time limit for how long posted violation information may be retained on the driving record. Accordingly, the NPRM complies with Congress’s intent, as expressed in MAP–21, to accord States the flexibility to record drug and alcohol violation information on the driving records of CLP and CDL holders as they deem appropriate.

States should, however, be aware of the MAP–21 privacy protection requirements applicable to SDLAs, including the need to “ensure that the information in the [Clearinghouse] record is not divulged to any person [who] is not directly involved in assessing and evaluating the qualifications of the person to operate a commercial motor vehicle.”<sup>31</sup> Further, State-maintained records of a driver’s status and history are subject to the

requirements of the Federal Driver’s Privacy Protection Act of 1994.<sup>32</sup> State laws and procedures must therefore comply with these statutory requirements.

#### *E. Impact on CLP/CDL Holders*

##### Proposed Commercial Licensing Actions

As discussed above, pursuant to § 382.501(a), CLP and CDL holders are currently prohibited from operating a CMV if they engage in drug or alcohol-related conduct prohibited by subpart B of part 382, or if they violate the drug and alcohol requirements of another DOT agency. Once the CLP or CDL holder has met the RTD evaluation and testing requirements of part 40, the driver is eligible to resume operating a CMV, in accordance with § 382.503.

FMCSA proposes to enforce those requirements by prohibiting SDLAs from issuing, renewing, upgrading, or transferring a CDL, or issuing, renewing or upgrading a CLP, of any driver subject to the CMV driving prohibition in § 382.501(a).

Additionally, under the Agency’s preferred mandatory downgrade alternative (#1), SDLAs would be required to downgrade the driver license of individuals prohibited from operating a CMV, resulting in the removal of the CDL or CLP privilege by changing the commercial or permit status from “licensed” to “eligible” on the CDLIS driver record. In this way, a driver’s commercial license status would be aligned with his or her CMV driving status under § 382.501(a). Simply put, FMCSA believes that an individual prohibited from operating a CMV due to a drug and alcohol program violation should not hold a valid CLP or CDL until they are legally permitted to operate a CMV. This proposed approach is consistent with the Agency’s current requirement that SDLAs downgrade the CDL or CLP of drivers who do not comply with FMCSA’s medical certification requirements.<sup>33</sup>

Under the optional notice of prohibited status alternative (#2), States would have the flexibility to decide whether to receive notice of the driver’s prohibited status in order to enhance roadside enforcement of the prohibition or to suspend the CDL/CLP privilege in accordance with State law.

##### Driver-Specific Notifications to SDLAs

FMCSA proposes to notify the SDLA that a CLP or CDL holder is prohibited from operating a CMV, pursuant to

§ 382.501(a), and, when applicable, that the driver is no longer prohibited from operating a CMV, in accordance with § 382.503. The Agency notes that, while the notification that a driver is prohibited from operating a CMV would be based on specific violation information reported to the Clearinghouse (e.g., a verified positive drug test result), the Agency would not disclose that information to the SDLA. FMCSA believes the proposed limited disclosure of an individual’s CMV driving status under § 382.501(a) would provide the States with the information they need to take commercial licensure actions (non-issuance; mandatory downgrade) required under the NPRM, while also reasonably accommodating the privacy interests of drivers.

##### Economic Impact of Proposed Mandatory Downgrade

Under FMCSA’s preferred alternative, States must complete and record the downgrade on the CDLIS driver record within 30 days of receiving notice from FMCSA that the driver is prohibited from operating a CMV. Depending on the State, a driver whose license is downgraded may be required to pay a reinstatement fee, re-apply for a CLP or CDL, and/or repeat applicable skills or knowledge tests before the State would reinstate the CLP/CDL privilege to the driver license. Potential reinstatement-related costs on drivers are addressed in sections II.C., “Costs and Benefits,” and VIII. A., “E.O. 12866.”

Under § 383.23(a)(2), no person may legally operate a CMV without possessing a valid CDL; under § 323.25(a), a CLP is considered a valid CDL for purposes of behind-the-wheel training on public roads. Therefore, drivers who complete the RTD requirements after the downgrade is recorded by the SDLA could not drive a CMV until the CLP or CDL privilege is reinstated. The Agency acknowledges that this outcome could be viewed as inconsistent with § 382.503, which currently states that drivers may resume safety sensitive functions, including driving a CMV, once the driver satisfies the RTD requirements of part 40, subpart O.<sup>34</sup> In order to clarify this issue, the mandatory downgrade proposal would amend § 382.503 to make clear that a valid CLP or CDL is required before the driver can operate a CMV after complying with RTD requirements. FMCSA notes, however, that the driver could perform other

<sup>28</sup> N.C.G.S.A. section 20–17.4(l); S.C. Code Ann. section 56–1–2110(G); Wash. Rev. Code section 46.25.090(7).

<sup>29</sup> Wash. Rev. Code 46.25.090(7).

<sup>30</sup> N.C.G.S.A. section 20–17.4(l).

<sup>31</sup> 49 U.S.C. 31306a(h)(2)(B)(ii). See also 49 CFR 382.725(c).

<sup>32</sup> See 18 U.S.C. 2721–2725 (1994 & Supp. IV 1998), amended by Public Law 106–69, section 350, 113 Stat. 956, 1025–26 (1999).

<sup>33</sup> See 49 CFR 383.73(c)(4).

<sup>34</sup> Under 49 CFR 40.305(b), an employer cannot return an employee to safety-sensitive duties until the employee has a negative result on a RTD drug or alcohol test.

safety-sensitive functions that do not involve driving a CMV, such as loading or unloading a vehicle, since those functions do not require a valid CLP or CDL.

FMCSA is aware that a CDL holder, otherwise qualified to operate a CMV by completing RTD requirements, may lose driving-related income while waiting for the CDL privilege to be reinstated. Similarly, a driver's behind-the-wheel training on public roads could not be completed until the CLP privilege is restored following completion of RTD requirements. The Agency requests comment on these potential economic impacts.

As discussed further below in section VIII.A. "E.O. 12866," the Agency anticipates that most drivers could complete RTD requirements within 16 hours if the substance abuse professional (SAP) refers the driver to an outpatient education program. If the SAP refers the driver to an intensive outpatient treatment program, the time to complete the RTD is estimated at 108 hours. For drivers referred to an outpatient education program, it is possible the driver would complete the RTD process before the SDLA records the downgrade on the CDLIS driver record. The proposed rule would allow SDLAs 30 days to complete the downgrade. Under the proposed mandatory downgrade, SDLAs, consistent with applicable State law, would be required to terminate the downgrade process if FMCSA notifies the SDLA that the driver is no longer prohibited from operating a CMV before the SDLA has recorded the downgrade on the driving record. Because no licensing action would be taken in that situation, drivers would be qualified to operate a CMV upon completing the RTD requirements.

#### Licensing Actions Based on Inaccurate Clearinghouse Information

The Agency recognizes that CLP and CDL holders may be concerned that non-issuance or a license downgrade could occur due to erroneous information reported to the Clearinghouse. AAMVA's petition also noted the potential impact of inaccurate Clearinghouse information on the commercial licensure process. FMCSA understands the importance of maintaining the accuracy and privacy of driver information in the Clearinghouse. The Agency notes, for example, that in response to drivers' concerns about the potential for false reports of actual knowledge of drug or alcohol use (other than actual knowledge that the driver received a citation for operating a CMV under the influence of drugs or alcohol)

or test refusals to the Clearinghouse, the final rule requires specified supporting documentation, such as an affidavit, to prevent false reporting of these violations.<sup>35</sup> Further, as part of its Clearinghouse implementation protocol, FMCSA intends to ensure that the required documentation has been provided before releasing the actual knowledge or test refusal violations from the Clearinghouse in accordance with § 382.701, and before relying on those reports as a basis for notifying the SDLA that the driver is prohibited from operating a CMV.

Further, due to the extensive and time-tested procedures for verifying the accuracy of positive drug and alcohol test results, as set forth in 49 CFR part 40, FMCSA expects that the reporting of inaccurate test results to the Clearinghouse will be exceedingly rare.

However, the reporting of inaccurate driver information to the Clearinghouse may occur, despite the Agency's best efforts to prevent it.<sup>36</sup> In such cases, incorrect information could result in non-issuance (*i.e.*, the SDLA would not process the requested license issuance, renewal, upgrade, or transfer). Under the Clearinghouse regulations, if FMCSA corrects driver information, or removes it from the Clearinghouse, the driver must be notified (§ 382.707(a)). Therefore, if non-issuance occurred due to inaccurate information subsequently corrected or removed from the Clearinghouse, the driver, after receiving notice of correction or removal, would return to the SDLA to complete the licensing transaction.

Under the proposed mandatory downgrade alternative, if a driver's license is downgraded based on erroneous information subsequently corrected or removed from the Clearinghouse, FMCSA would notify the SDLA that the driver is not subject to the CMV driving prohibition. The SDLA should reinstate the CLP or CDL privilege as fairly and efficiently as possible after receiving such notification. In addition, if an SDLA chooses to enter drug or alcohol testing violation information on a CMV operator's driving record, and FMCSA later determines the information is inaccurate and removes it from the Clearinghouse, the SDLA should also remove it from the individual's State-based driving record. FMCSA requests comment from drivers and SDLAs on whether a mandatory corrective action

process should be included in the final rule resulting from this NPRM, and, if so, what the elements of that process should be.

#### CMV Driving Prohibition Adopted Under State Law

The NPRM proposes that the CMV driving prohibition in § 382.501 be added to part 392, so that States receiving MCSAP funds would be required to adopt and enforce a comparable provision. As discussed further below, the proposed change would enable roadside enforcement of the prohibition. Drivers who operate a CMV in violation of the prohibition would therefore be subject to appropriate intervention by safety enforcement personnel in these jurisdictions.

#### Actual Knowledge Violation Based on Citation for DUI in a CMV

Finally, drivers could be impacted by proposed changes to the way in which an actual knowledge violation, based on the employer's knowledge that the driver was issued a citation for DUI in a CMV, would be maintained in the Clearinghouse. Section § 382.717(a)(2)(i) states that, when the DUI citation does not result in the driver's conviction, the driver can petition FMCSA to remove the employer's report of the actual knowledge violation from the Clearinghouse. As the Agency then explained: "Prohibiting a driver from performing safety sensitive functions when a citation does not result in a conviction contravenes fundamental principles of fairness."<sup>37</sup> This provision was based on the erroneous assumption that drivers issued a citation for DUI in a CMV, but not convicted, do not have to complete RTD requirements.

Under the NPRM, drivers would no longer be permitted to request removal of the actual knowledge report if the DUI citation did not result in a conviction. The proposed change is necessary for two reasons. First, as explained above in section II.B., "Summary of Major Provisions," when an employer is aware that a driver received a citation for DUI in a CMV, that employer has actual knowledge that a driver engaged in the prohibited use of drugs or alcohol (§ 382.107). The driver therefore has violated FMCSA's drug and alcohol program requirements (§ 382.501(a)). The violation occurs whether the driver is ultimately convicted of the offense or not. Consequently, the Agency erred in stating that drivers not convicted of DUI in a CMV are not required to complete

<sup>35</sup> See 49 CFR 382.705(b)(3) and (4).

<sup>36</sup> The Clearinghouse regulations provide for the timely correction of inaccurate information, as do the Privacy Act regulations. See 49 CFR 382.717(e)(2); 49 CFR 10.43.

<sup>37</sup> 81 FR 87686, 87706 (Dec. 5, 2016).

RTD requirements. If an employer reports an actual knowledge violation to the Clearinghouse, based on the issuance of a citation for DUI in a CMV, the driver must not perform safety-sensitive functions until complying with RTD requirements, as required by § 382.503.

The second reason is that MAP-21 requires all violations of part 382, subpart B, be reported to the Clearinghouse, and that reported violations remain in the Clearinghouse for five years.<sup>38</sup> These statutory requirements therefore preclude the Agency from removing the actual knowledge violation report from the Clearinghouse, based solely on evidence that the driver was not convicted of DUI in a CMV.

The Agency believes that, in the interest of fairness, a driver who is not convicted of the offense of DUI in a CMV should be permitted to request that FMCSA add documentary evidence of non-conviction to their Clearinghouse record. The information, if accepted, would be available to employers who subsequently check the driver's record in accordance with § 382.701(a) or (b). Making the information available to employers would allow them to assess the relevance of non-conviction when deciding whether to hire or retain the driver.

#### F. Enforcement of the CMV Driving Prohibition

Under FMCSA's current regulations, a CLP or CDL holder who engages in prohibited drug or alcohol-related conduct cannot lawfully operate a CMV until complying with RTD requirements (§ 382.501(a)). The driving prohibition applies as soon as the drug or alcohol testing violation occurs. Ideally, traffic safety enforcement officials conducting roadside interventions should be able to determine whether a CMV driver is subject to the prohibition as soon as possible after the violation occurs. Today, however, the Agency's State and local enforcement partners have limited ability to identify drivers who pose a safety risk by continuing to drive CMVs in violation of FMCSA's drug and alcohol rules. As discussed above, only three States currently suspend the CDL of drivers who violate FMCSA's drug and alcohol program. Consequently, most individuals prohibited from driving a CMV due to a drug or alcohol testing violation can still hold a valid CLP or CDL.

The Clearinghouse will help close this knowledge gap. Based on violations reported to the Clearinghouse, FMCSA

will be able to provide its State-based roadside enforcement partners notice of the driver's prohibited CMV operating status in real time by making the information available after a driver violation is reported to the Clearinghouse. (The Agency emphasizes that traffic safety personnel would not have access to the Clearinghouse, and would not receive any specific violation information about a CLP or CDL holder.) Additionally, the NPRM proposes to add the CMV driving prohibition to part 392, thereby requiring States receiving MCSAP funding to adopt and enforce a comparable provision, in accordance with § 350.201(a). The combined effect of these actions will improve highway safety by increasing the roadside detection of drivers who hold a valid CLP or CDL, but continue to operate a CMV in violation of the prohibition.

FMCSA will exercise its existing enforcement authority to make the driver's prohibited CMV operating status available to CMV safety enforcement personnel authorized to enforce highway safety laws. Incident to a traffic stop, or inspection at a roadside check point (e.g., a CMV weigh station), highway traffic safety officers trained under FMCSA's Motor Carrier Safety Assistance Program (MCSAP) have access, through *cdlis.gov*, to the CLP or CDL holder's driving record through FMCSA's electronic enforcement tools. Nation-wide, there are approximately 12,000 MCSAP officers, who have specialized knowledge and experience related to CMV safety. In addition, there are more than 500,000 safety personnel authorized to enforce traffic laws throughout the United States. Some non-MCSAP enforcement officers are currently able to access FMCSA's data through *cdlis.gov* or National Law Enforcement Telecommunication System (Nlets), and would therefore be aware of the driver's prohibited status. However, this information is not consistently and widely available to non-MCSAP enforcement personnel, due to resource limitations, or the inability to access an electronic database at roadside. Consequently, these traffic safety officers would not necessarily know the CMV driver's prohibited status.

However, at a minimum, *all* traffic safety enforcement officers, including non-MCSAP personnel, initiate a license check on any driver stopped for a traffic violation. Under the proposed mandatory downgrade alternative, drivers unlawfully operating a CMV would be detected through a license check if the CLP or CDL privilege had been removed from the license when the check is made. FMCSA believes that the

downgrade requirement would therefore strengthen enforcement of the driving ban because it would enable all traffic safety officers, not just those trained and funded under MCSAP, to detect drivers prohibited from operating a CMV (i.e., drivers whose license is downgraded due to a drug or alcohol testing violation).

FMCSA invites comment, particularly from traffic safety stakeholders, on the Agency's intended enforcement protocol, as described above. FMCSA also seeks comment on whether the proposed downgrade would further improve highway safety by enabling more extensive roadside detection of drivers not qualified to operate a CMV.

#### G. Foreign-Licensed Drivers

FMCSA's drug and alcohol program requirements apply to drivers licensed in Canada and Mexico who operate CMVs in commerce in the United States, and to those who employ such drivers.<sup>39</sup> Accordingly, pursuant to §§ 382.501(a) and 382.503, if a drug or alcohol violation is reported to the Clearinghouse for a driver licensed in Canada or Mexico, that individual cannot operate a CMV in the United States until completing RTD requirements.

As the Agency acknowledged in the preamble to the Clearinghouse final rule, Canadian and Mexican licensing authorities will not have direct access to the Clearinghouse because MAP-21 authorized such access only for SDLAs in the 50 States and the District of Columbia. FMCSA noted, however, that it would explore other ways in which drug and alcohol information in the Clearinghouse could be made available to foreign licensing authorities and to U.S. enforcement personnel. Accordingly, FMCSA intends to rely on the following enforcement protocol when a drug or alcohol violation by a foreign-licensed driver is reported to the Clearinghouse. The Agency intends to "push" a notification from the Clearinghouse to the Foreign Convictions and Withdrawal Database (FCWD) indicating that, under § 382.501(a), the driver is prohibited from operating a CMV in the United States. Enforcement personnel who use CDLIS to electronically initiate a foreign-licensed driver status request will also receive notifications provided to the FCWD and would thus be informed that the driver is prohibited from operating a CMV in the United States. The foreign-licensed driver could

<sup>38</sup> See 49 U.S.C. 31306a(g)(1)(C); 31306a(g)(6).

<sup>39</sup> See 49 CFR 382.103(a)(2) and (3).

be subject to citation for violating the driving prohibition.<sup>40</sup>

FMCSA would also notify the foreign-licensed driver (and the relevant foreign licensing authority) that the driver 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, a similar notification would be "pushed" to the FCWD, and FMCSA would also notify the driver and foreign licensing authority that the individual is no longer prohibited from operating a CMV in the United States. Under this process, foreign-licensed drivers who commit drug and alcohol program violations would, in effect, be treated no differently than their U.S.-licensed counterparts.

The Agency notes that these notification procedures are based on FMCSA's existing enforcement authority; therefore, no revision to 49 CFR parts 382, 383, or 384 is necessary. However, FMCSA intends to provide additional guidance on this enforcement protocol prior to its implementation.

#### H. 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 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>41</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(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's proposed SORN for the new system of records titled "Drug and

Alcohol Clearinghouse (Clearinghouse)," was published on October 22, 2019 (84 FR 56521). The SORN described 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 proposed SORN also identified 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.

#### I. Fair Credit Reporting Act (FCRA) Applicability

In the preamble to the 2016 Clearinghouse final rule, the Agency briefly discussed how the FCRA would apply to FMCSA's administration of the Clearinghouse.<sup>42</sup> The Agency takes this opportunity to clarify its position. The FCRA, among other things, imposes certain obligations on "consumer reporting agencies" as that term is defined in the statute.<sup>43</sup> Because the Agency does not fall within FCRA's definition of "consumer reporting agency," it is not subject to those obligations. Consequently, the FCRA requirements imposed on "consumer reporting agencies" do not apply to the Agency's administration of the Clearinghouse regulations, including these proposed requirements.

#### J. Major Issues on Which the Agency Seeks Comment

1. The NPRM proposes that SDLAs be prohibited from completing certain CLP or CDL transactions if the driver is subject to the CMV driving prohibition in § 382.501(a), resulting in non-issuance. Do you agree with that proposal? Why or why not?

2. In addition to non-issuance, should SDLAs be required to downgrade the license of CMV drivers subject to the driving prohibition, as proposed in FMCSA's preferred alternative? Why or why not?

3. How would SDLAs choosing to receive notice of a driver's prohibited CMV driving status, as proposed in the second alternative, use the information to enforce the prohibition? For example,

would the State enact a law to suspend the CLP or CDL of affected drivers?

4. The Agency's preferred alternative proposes that SDLAs must complete and record the downgrade on the CDLIS driver record within 30 days after receiving notice that a driver is prohibited from operating a CMV due to a drug and alcohol program violation. Does 30 days allow sufficient time to complete and record the downgrade? If not, please explain why more time would be needed.

5. If the SDLA removes the CLP or CDL privilege, or takes other action on the license or driving record, based on information that FMCSA subsequently corrects or removes from the Clearinghouse, should FMCSA determine how States would reinstate the privilege and/or amend the driving record, or should that process be left to the States? Do SDLAs currently have established processes to correct errors on an individual's license or driving record?

6. Based on SDLAs' experience with the medical certification downgrade requirements currently in effect under § 383.73(o)(4), how long does it take to reinstate the CLP or CDL privilege to the driver's license?

7. If a driver's license is downgraded, he or she may incur costs, including fees associated with license reinstatement; time spent complying with reinstatement requirements; or the inability to earn income from driving during the period after RTD is completed, but before the license is reinstated. FMCSA invites comment, including quantitative data, addressing the economic impact of the proposed downgrade.

8. How would the proposed non-issuance and downgrade rules impact SDLAs and drivers in States allowing commercial licensing transactions, such as renewals, upgrades and transfers, to be completed online?

9. How can FMCSA electronically transmit Clearinghouse information to the SDLAs most efficiently (*e.g.*, by using the existing CDLIS platform, a web-based service, or some other automated means)? What are the pros and cons of these transmittal options?

10. How would the two options proposed for electronically transmitting Clearinghouse information (*i.e.*, CDLIS or a web-based alternative) impact the States in terms of cost? Please be as specific as possible when answering this question, and include, for example, one-time development costs, as well as the cost of ongoing operation and maintenance, if applicable.

11. In addition to IT-related costs, driver and motor carrier opportunity

<sup>42</sup> See 81 FR 87686, 87691 (Dec. 5, 2016).

<sup>43</sup> See 15 U.S.C. 1681a(f). This statute defines "consumer reporting agency" as "any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports."

<sup>40</sup> The NPRM proposes to add the CMV driving prohibition to part 392, so that States receiving MCSAP funds would be required to adopt and enforce a comparable provision.

<sup>41</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.

costs, and the cost incurred by drivers to have their CLP or CDL privilege reinstated, are there other costs to SDLAs that the Agency should consider in evaluating the regulatory impact of the proposed requirements?

12. How much time do the SDLAs need to adapt their IT systems and implement related processes to request, receive, and act on information from the Clearinghouse, as proposed in this NPRM? Please indicate whether the amount of time needed would vary according to the method of electronic transmission (*i.e.*, CDLIS or web-based), and whether the proposed downgrade would impact the time needed to make IT system changes.

13. Can the SDLAs that, under State law, currently disqualify CDL holders from operating a CMV due to violations of FMCSA's drug and alcohol program, provide quantitative or qualitative data addressing the safety benefit of those requirements?

## VI. International Impacts

The specific impact of this NPRM on foreign-licensed drivers operating a CMV in the United States is discussed above in section V.E.

## VII. Section-by-Section Analysis

This section includes a summary of the regulatory changes proposed for 49 CFR parts 382, 383, 384, 390, and 392, organized by section number.

### A. Proposed Changes to Part 382

Part 382 establishes controlled substances and alcohol use and testing requirements for CLP and CDL holders and employers of such persons. FMCSA proposes to amend 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. Under the mandatory downgrade alternative, the section would be revised by designating the current provision as new paragraph (a). New paragraph (b) would be added to clarify that drivers whose licenses were downgraded due to a drug or alcohol testing violation cannot resume driving a CMV until the CLP or CDL privilege has been reinstated.

#### Section 382.717

Under § 382.717(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 DUI in a CMV, if the

citation did not result in the driver's conviction. This sub-paragraph would be revised 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

This section would be revised to require that SDLAs request information from the Clearinghouse for CLP applicants. A driver applying for a CLP would be deemed to have consented to the release of information from the Clearinghouse.

### B. Proposed Changes to Part 383

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

#### Section 383.5

Under the mandatory downgrade alternative, the definition of "CDL downgrade" would be revised to clarify that the CDL privilege is removed from the driver license by changing the commercial status from "licensed" to "eligible" on the CDLIS driver record. A new definition of "CLP downgrade" would be added, clarifying that the CLP privilege is removed from the driver license by changing the permit status from "licensed" to "eligible" on the CDLIS driver record.

#### Section 383.73

*Paragraph (a):* Sub-paragraph (3) would be added to paragraph (a) to require that States request information from the Clearinghouse prior to CLP issuance, renewal or upgrade, beginning on the date established by the final rule resulting from this NPRM. If, in response to that request, FMCSA notifies the SDLA that the driver is prohibited from operating a CMV, the SDLA would not complete the CLP licensing transaction. Further, under the proposed mandatory downgrade alternative, if the applicant holds a CLP from that State at the time of the requested transaction, SDLAs would be required to initiate the downgrade process at that time, as set forth in new paragraph (g).

*Paragraphs (b)(10); (c)(10); (d)(9); (e)(8) and (f)(4):* These paragraphs address the issuance, transfer, renewal, or upgrade of a CDL, and the issuance, renewal, upgrade, or transfer of a non-domiciled CDL or CLP, respectively. Paragraph (f)(4) would be revised to

include non-domiciled CLPs. Paragraphs (b)(10), (c)(10), (d)(9), (e)(8), and (f)(4) would each be revised to require that, beginning on the date established by the final rule resulting from this NPRM, States request information from the Clearinghouse incident to the specified licensing transaction. If, in response to that request for information, FMCSA notifies the SDLA that, pursuant to § 382.501(a), the individual is prohibited from operating a CMV, the SDLA would not complete the specified CDL, non-domiciled CDL, or non-domiciled CLP transaction. Under the mandatory downgrade alternative, the State would be required to initiate the downgrade process at that time, as set forth in new paragraph (q).

*New paragraph (q):* Under the preferred alternative, this new paragraph specifies the actions that SDLAs would be required to take upon receipt of information from the Clearinghouse, as proposed under the mandatory downgrade alternative. SDLAs, upon receiving notification from FMCSA that the driver is prohibited from operating a CMV due to a drug and alcohol program violation, would be required to initiate established State procedures to downgrade the license. States would be required to complete and record the CLP or CDL downgrade on the CDLIS driver record within 30 days of receiving notification from FMCSA that the driver is prohibited from operating a CMV. 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, would terminate the downgrade process at that point. Drivers who complete RTD *after* the downgrade is completed and recorded by the SDLA would be eligible for reinstatement of the CLP or CDL privilege to their driver license. Under Alternative #2, States who elect to receive push notifications from the Clearinghouse would be required to use such information in accordance with § 382.725(c).

### C. Proposed Changes to Part 384

The purpose of Part 384 is to ensure that the States comply with the provisions of section 12009(a) of the Commercial Motor Vehicle Safety Act of 1986 (49 U.S.C. 31311(a)). FMCSA proposes to amend part 384 in the following ways.

#### Section 384.225

Under the mandatory downgrade alternative, this section would be revised by adding new sub-paragraph

(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 license in accordance with § 383.73(q).

#### Section 384.235

This Agency has proposed, in a separate rulemaking, that the State, beginning December 13, 2019 (84 FR 68052) must request information from the Clearinghouse in accordance with § 383.73. The section would be amended by replacing the current compliance date with the date established by the final rule resulting from this NPRM, and by adding that the State must comply with the provisions of § 383.73 applicable to non-issuance. Under the mandatory downgrade alternative, additional text would be added to require compliance with those requirements. Under Alternative #2, additional text would be added to require States to adhere to the permissible use of information received from the Clearinghouse.

#### 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). New paragraph (m) would be added to require that the State be in substantial compliance with the requirements in §§ 383.73 and 384.235 no later than the compliance date established by the final rule resulting from this NPRM.

#### D. Proposed Changes to Part 390

This part, entitled “Federal Motor Carrier Safety Regulations; General”, establishes general applicability, definitions, general requirements and information as they pertain to persons subject to 49 CFR chapter 3. FMCSA proposes to amend § 390.3T(f)(1) to add the newly proposed § 392.13, described below, to the list of provisions that remain applicable to school bus operations as defined in § 390.5T. FMCSA also proposes to amend § 390.3(f)(1) in the same way; this amendment would become effective on the date that § 390.3T(f)(1) is no longer in effect.

#### E. Proposed Changes to Part 392

This part, entitled “Driving of Commercial Motor Vehicles”, sets forth requirements pertaining to the management, maintenance, operation or driving of CMVs. New section 392.13, “Driving prohibition,” would be added to prohibit any driver subject to § 382.501(a) from operating a CMV.

### VIII. Regulatory Analyses

*A. E.O. 12866 (Regulatory Planning and Review), E.O. 13563 (Improving Regulation and Regulatory Review), and DOT Regulations*

Under E.O. 12866, “Regulatory Planning and Review” (issued September 30, 1993, published October 4 at 58 FR 51735, as supplemented by E.O. 13563 and DOT policies and procedures, FMCSA must determine whether a regulatory action is “significant” and therefore subject to Office of Management and Budget (OMB) review. E.O. 12866 defines “significant regulatory action” as one likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal government or communities. (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency. (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof. (4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles. OMB has determined that this proposed rule is not a significant regulatory action under Executive Order 12866, Regulatory Planning and Review.

As described above, the proposed 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. Additionally, under the Agency’s preferred alternative, SDLAs would be required to downgrade the CLP or CDL of drivers who are prohibited from operating a CMV due to drug and alcohol program violations. Depending on which of the alternatives for the use of Clearinghouse information, and which method for transmitting Clearinghouse information to the SDLAs is selected, the proposed rule would result in differences in the costs, as well as the extent to which all or some of the entities would be affected by the rule (*i.e.*, SDLAs, drivers, motor carriers and FMCSA). The FMCSA also believes that the proposed rule would result in an increase in safety benefits. These factors are discussed below.

#### Need for Regulation

The 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, a driver who violates 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 roadside 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>44</sup> The NPRM would address this failure by improving the flow of information to SDLAs and enforcement officials from the Clearinghouse.

#### Costs

The RIA published with the Clearinghouse final rule assumed that SDLAs would incur no costs to query the Clearinghouse using CDLIS. However, the final rule 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 the proposed rule.

The estimated cost of the proposed rule varies based on the alternative the Agency ultimately selects for the licensing action SDLAs would take in response to a positive test reported in the Clearinghouse. The estimated cost also depends on the method used to electronically transmit information from the Clearinghouse to SDLAs. The choice of two alternatives for SDLA use of Clearinghouse information, and the choice of two methods to transmit Clearinghouse information to SDLAs, results in four options the Agency is considering. The Agency notes that the non-issuance requirement pertaining to SDLAs’ query of the Clearinghouse prior to completing a licensing transaction would apply to both Alternative #1 and Alternative #2, and thus, applies to the four options the Agency is considering.

The Agency estimates the cost of Alternative #1 (mandatory downgrade), transmitting Clearinghouse information to the SDLAs using Method #1 (CDLIS), at \$44.0 million over 10 years with an annualized cost of \$4.4 million. At a 7

<sup>44</sup> Office of Management and Budget, 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 August 1, 2019).

percent discount rate, the 10-year cost is estimated at \$32.8 million, with an annualized cost at a 7 percent discount rate is estimated at \$4.7 million.

Alternative #1 (mandatory downgrade) using Method #2 (web services/API) is estimated to cost \$25.5 million over the 10-year analysis period. The annualized cost is estimated at \$2.5 million. At a 7 percent discount rate, the 10-year total cost is estimated at \$18.5 million. The annualized cost is estimated at \$2.6 million.

The Agency estimates the cost of Alternative #2 (optional notice of prohibited status), with data transmitted using Method #1 (CDLIS), at \$28.0 million. The annualized cost is estimated at \$2.8 million. At a 7 percent discount rate the 10-year total cost is estimated at \$21.5 million. The annualized cost is estimated at \$3.1 million. The estimated costs of Alternative #2 with data transmitted using Method #2 over the 10-year analysis period is estimated at \$9.4 million. The annualized cost is estimated at \$0.9 million. At a 7 percent discount rate, the estimated 10-year cost is \$7.2 million. The annualized cost is estimated at \$1.0 million.

Although the alternatives addressing the SDLAs' use of Clearinghouse information and the method by which the information would be electronically transferred vary, they all include consideration of SDLA and FMCSA IT development costs, and annual operating and maintenance (O&M) expenses. Driver opportunity costs and reinstatement costs, and motor carrier opportunity costs, are considered under Alternative #1 only, because they would be incurred because of the proposed rule. With respect to Alternative #2, the States would determine whether to receive the Clearinghouse information to enforce the driving prohibition. Thus, State law or policy, and not the proposed rule would cause drivers to incur opportunity costs and reinstatement costs.

#### Electronic Transmission Method #1: Information Transfer via CDLIS

Method #1 would transmit Clearinghouse information to the SDLAs using the existing CDLIS technology platform. SDLAs, in conducting the required query, prior to issuing, renewing, upgrading or transferring a commercial license, would check the CDLIS driver record in order to ensure that the driver has not been disqualified in another State and that other regulatory requirements have been met. The proposed rule, by electronically linking the CDLIS pointer system to the Clearinghouse, the record check would

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 would comply with the requirement that they request information from the Clearinghouse by initiating a check of the CDLIS driver record. No additional query or request by the SDLA would be required at the time of the licensing transaction.

Because SDLAs already perform CDLIS driver record checks when engaging in a commercial license transaction, FMCSA finds that SDLAs would not incur labor costs to "pull" Clearinghouse information through CDLIS by performing a query.<sup>45</sup> 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. According to AAMVA's October 1, 2018 *Product & Services Catalog-Government Rate Schedule*, AAMVA allocates the cost of Program Services and Technology Services based on the ratio of State population to national population using Census Bureau data.<sup>46</sup> Thus, the Agency finds that SDLAs would not incur transaction-specific CDLIS costs. FMCSA requests comment on whether either "pull" or "push" notifications would result in additional costs to the SDLAs.

By using the existing CDLIS platform, Method #1 would result in costs to SDLAs for initial system development and to make the needed upgrades and

<sup>45</sup> SDLAs' CDLIS-related labor costs for licensing transactions were accounted for in the Agency's Final Regulatory Evaluation published with the final rule "Commercial, Driver's License Testing and Commercial Learner's Permit Standards," 76 FR 26853, (May 11, 2011). The current information collection request (ICR) for that rule estimates, SDLAs on average, perform 6.5 million licensing transactions per year that include renewals, transfers, endorsements, disqualifications and establishing new driver records. The Agency estimates that the proposed rule would result in 77,600 transactions per year, many of which would be among the of the 6.5 million transactions estimated in the current ICR. For example, some renewal transactions in the 6.5 million would be denied, resulting in a non-issuance. The current ICR was approved by OMB on December 31, 2018. The ICR is available at [https://mobile.reginfo.gov/public/do/PRAViewDocument?ref\\_nbr=201810-2126-001](https://mobile.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201810-2126-001) (accessed June 21, 2019).

<sup>46</sup> AAMVA, *Product & Services Catalog-Government Rate Schedule*, October, 1 2018. The catalogue is available at [https://www.aamva.org/NetworkServices\\_government/](https://www.aamva.org/NetworkServices_government/) (accessed June 21, 2019).

modifications, as well as ongoing O&M expenses. The Agency reviewed four SDLA grant applications submitted in 2017 for IT system upgrades needed to interface and receive information from the National Registry of Certified Medical Examiners (NRCME) database and used the grant application requests as a proxy for the IT development costs. SDLAs would incur under Method #1. The four States requested grant funds ranging from \$64,000 to \$549,993 for the system upgrades, with an average value of just over \$200,000 in 2017 dollars (\$196,000 in 2016 dollars). IT development costs vary because of individual differences in the SDLAs' IT systems. The FMCSA accounted for this variation by estimating the average of the four grants the upfront/initial system development costs. Multiplying this cost by the number of SDLAs (51) resulted in a total of \$10 million (\$196,000 × 51, rounded to the nearest million) in SDLA initial/upfront development costs. This one-time cost would occur in the first year of the 10-year analysis period.

The Agency assumed that SDLAs' annual O&M expenses would be equal to 20 percent of the upfront costs, or \$39,200 (\$196,000 × 20%). Multiplying the O&M expense rate by the number of SDLAs resulted in \$2.0 million of annual O&M expenses (\$39,200 × 51 SDLAs, rounded to the nearest million). The Agency assumed that SDLAs would incur O&M expenses in the second year of the 10-year analysis period. O&M expenses over the 10-year analysis period are estimated at \$18.0 million (\$2.0 million × 9 years).<sup>47</sup>

The sum of Method #1 undiscounted IT development costs and O&M expenses over the 10-year analysis period is estimated at \$28.0 million (\$10.0 million IT development costs + \$18.0 million O&M expenses). At a 7 percent discount rate, the 10-year total cost is estimated at \$21.5 million. The annualized cost is estimated at \$3.1 million.

Under Method #1, the Agency would not incur system development cost or O&M expenses. This annual cost was accounted for in the RIA published with the Clearinghouse final rule. The Agency estimated its annual cost to develop, operate and maintain the Clearinghouse at \$2.2 million.

<sup>47</sup> If IT development costs would vary plus or minus 10 percent above the average, undiscounted initial IT development costs would change plus or minus \$996,600. Total O&M expenses over the 10-year analysis period would change plus or minus \$1.8 million.

Electronic Transmission Method #2: Information Transfer via a Web-Based Services Call (AKA: Application Program Interface (API))

Method #2 involves the transmission of 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.

In order to implement Method #2 FMCSA would develop an interface between the Clearinghouse and the SDLAs. FMCSA envisions that the API 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 API code and work with the States to integrate the API 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. In addition to the initial development cost, FMCSA would incur costs for annual O&M expenses.

Under Method #2, SDLAs would incur costs for initial modification of their systems to interface with the Clearinghouse, and annual O&M 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 man 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 2016 dollars using the United States

Department of Labor, Bureau of Labor Statistics (BLS) \$38.39 per hour median wage for a computer programmer.<sup>48</sup> The hourly wage is adjusted for a 70 percent fringe benefit rate obtained from the BLS June 2016 "Employer Cost of Employee Compensation News Release."<sup>49</sup> The resultant labor cost is \$65.42 per hour. At that hourly rate, the cost for a programmer to develop an interface in a non-mainframe environment is estimated at \$23,551 (360 hours × \$65.42 per hour, rounded to the nearest dollar) and \$70,654 (1,080 hours × \$65.42 per hour, rounded to the nearest dollar) in a mainframe environment. The average of these two cost estimates results in an initial IT development of \$47,100 per SDLA (rounded to the nearest hundred). Multiplying this cost by the number of SDLAs results in \$2.4 million (\$47,100 × 51) of initial IT development costs in the first year of the 10-year analysis period.

The Agency estimates an SDLA's annual O&M expenses equal to 20 percent of the initial IT development cost, or \$9,420 (\$47,100 × 20%). The total annual O&M expense for the 51 SDLAs is estimated at \$480,420 (\$9,420 × 51). SDLAs would begin incurring O&M expenses in the second year of the 10-year analysis period. Total O&M expenses over the 10-year analysis period are estimated at \$4.3 million (\$480,420 × 9). Under Method #2, the undiscounted cost SDLAs would incur over the 10-year analysis period is estimated at \$6.7 million consisting of \$2.4 million in initial IT development costs, \$4.3 million of O&M expenses. The undiscounted annualized cost is estimated at \$0.6 million. It consists of \$0.2 million of IT development costs and \$0.4 million of O&M expenses. At a 7 percent discount rate, the total cost SDLAs would incur over the 10-year analysis period is estimated at \$5.1 million that consists of \$2.2 million of

IT development costs and \$2.9 million of O&M expenses. The annualized cost is estimated at \$0.7 million, which consists of \$0.3 million in IT development costs and \$0.4 million of O&M expenses.

The Agency estimates that under Method #2, FMCSA would incur initial IT development costs of nearly \$1.0 million in 2016 dollars in the first year of the 10-year analysis period. Annual O&M expenses are estimated at \$192,000 (\$0.96 million × 20%, rounded to the nearest million) beginning in the second year of the 10-year analysis period. Over remaining nine years of the analysis period, the Agency would incur \$1.7 million of O&M expenses (\$192,000 × 9 years, rounded to the nearest hundred). The sum of initial IT development costs and annual O&M expenses results in FMCSA incurring total undiscounted costs of \$2.7 million over the 10-year analysis period (\$1.0 million + \$1.7 million). At a 7 percent discount rate, the Agency is estimated to incur \$2.1 million IT development and O&M expenses over the 10-year analysis period. The annualized cost at a 7 percent discount rate is estimated at \$0.3 million.

Table 2 compares total and annualized costs, undiscounted and at a 7 percent discount rate, that SDLAs and FMCSA would incur to transmit Clearinghouse information using Method #1 and Method #2. The total cost estimate for Method #1 would be the same under Alternative #1 and Alternative #2. Likewise, the total cost estimated for Method #2 would be the same under Alternative #1 and Alternative #2. FMCSA does not incur any IT development or annual operating and maintenance expenses under Method #1 because they have been accounted for in the Clearinghouse final rule RIA. However, the SDLAs' IT development and annual O&M expenses are greater under Method #1. Thus, the undiscounted 10-year overall cost of Method #2 is \$21.3 million less than Method #1 (\$28.0 million – \$9.4 million).

The Agency requests comments on the feasibility and the estimated cost of allowing the SDLAs the flexibility to receive Clearinghouse information by choosing either method of electronic transmission.

<sup>48</sup> This hourly wage is for the BLS-SOC 15-1131 computer programmer. See <https://www.bls.gov/oes/2016/may/oes151131.htm> (accessed June 21, 2019)

<sup>49</sup> BLS, "Employer Cost of Employee Compensation 2nd Quarter News Release," Table 4- State and Local Employees, available at [https://www.bls.gov/news.release/archives/ecec\\_09082016.pdf](https://www.bls.gov/news.release/archives/ecec_09082016.pdf) (accessed June 21, 2019). The fringe benefit rate is the ratio of hourly wage for average hourly wage for State and local government administrative personnel and the associated hourly benefit rate (70 percent = \$13.13/\$18.65).

TABLE 2—COMPARISON OF COST TO TRANSMIT CLEARINGHOUSE INFORMATION

	Undiscounted (2016 \$ million)		Discounted at 7% (\$ million)	
	10-year total cost	Annualized	10-year total cost	Annualized
<b>Electronic Transmission Method #1 (CDLIS Platform)</b>				
SDLA Initial IT Development Costs .....	\$10.0	\$1.0	\$9.3	\$1.3
SDLA System Operating and Maintenance Expense .....	18.0	1.8	12.2	1.7
Method #1 Total .....	28.0	2.8	21.5	3.1
<b>Electronic Transmission Method #2 (Web Service Call)</b>				
Initial IT Development Costs:				
Government .....	1.0	0.1	0.9	0.1
SDLAs .....	2.4	0.2	2.2	0.3
System Operating and Maintenance Expense:				
Government .....	1.7	0.2	1.2	0.2
SDLAs .....	4.3	0.4	2.9	0.4
Method #2 Total Cost .....	9.4	0.9	7.2	1.0

Totals are subject to rounding error.

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

Under Alternative #1 (mandatory downgrade), 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 result to the Clearinghouse) and when the SDLA reinstates the driver’s privilege to operate a CMV. Drivers may also incur reinstatement costs attributed to SDLA requirements for removing the downgrade. These reinstatement procedures could include payment of a reinstatement fee, and partial or full retesting.<sup>50</sup> The Agency finds mandatory downgrade required by Alternative #1 would cause drivers to incur modest opportunity costs and reinstatement costs. As discussed above in section II.C, “Costs and Benefits”, 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. Thus, the Agency expects that the States will rely on existing procedures established for downgrading a CLP/CDL for invalid medical certification, as required by 383.73(o)(4). Any time drivers would spend to comply with State procedures for reinstatement would be a cost of the proposed rule under Alternative #1.

Under Alternative #2, the States would determine whether to receive the Clearinghouse information to enforce

<sup>50</sup> A requirement to retake the knowledge and skills test would cause the driver to forego income during the 14-day waiting period required before taking the skills test.

the driving prohibition under State law. Thus, any opportunity costs and reinstatement costs a driver would incur to comply with State procedures under Alternative #2 would be the result of State law or policy, not the proposed rule.

The estimate of opportunity costs drivers might incur under Alternative #1 would be a function of the number of drivers that SAPs refer to outpatient education programs versus intensive outpatient treatment (IOT) programs. In the RIA published with the Clearinghouse final rule, 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. Alternative #1 would require SDLAs to record a downgrade on the driver’s CDLIS record within 30 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 would likely 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. Under these circumstances, drivers would not incur opportunity costs or reinstatement costs.

In the RIA published with the Clearinghouse final rule, the Agency assumed that 75 percent of drivers that violated the drug or 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>51</sup>

The Clearinghouse final rule RIA estimated that 53,500 drivers would test positive and be required to complete the RTD process. Of these, 24,100 drivers would complete the RTD process.<sup>52</sup> Based on SAMHSA’s most recent survey, the Agency estimates that 82 percent, or 19,762 of the 24,100 drivers who would complete the RTD process before a downgrade would be recorded by SDLAs. These drivers would not incur opportunity or reinstatement costs. The remaining 4,338 drivers (24,100 drivers × 18 percent) presumably would be referred to an IOT program. Based on the proposed requirement that SDLAs record a downgrade within 30 days of receiving notice of the driver’s prohibited status, the Agency assumes that a driver’s license would be downgraded before he or she completes an IOT program and related RTD requirements. Therefore,

<sup>51</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>52</sup> Federal Motor Carrier Administration, “Final Rulemaking Regulatory Impact Analysis,” November 2016, p. 32, available at <https://www.regulations.gov/document?D=FMCSA-2011-0031-0183> (accessed August 6, 2019).

these drivers would have to comply with any reinstatement procedures established by the State that could cause a driver to incur opportunity costs and reinstatement costs.

As noted above, 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 would be 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 have a retesting grace period less than six months.

In the RIA published with the Clearinghouse final rule 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 would complete the IOT program and the RTD process without having to retest to have the CLP or CDL privilege restored to their license.

To reinstate CMV driving privileges, SDLAs may require a driver to pay a reinstatement fee that would be a transfer payment. Additionally, a driver could 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 over the internet. For purposes of this analysis, the Agency conservatively assumes that drivers would need to complete the transaction in person. The Agency assumes that it would take one day for a driver to travel to an SDLA and complete the reinstatement process. Thus, drivers would incur opportunity cost for time spent traveling and out of pocket travel costs.

The estimated of driver opportunity costs and reinstatement costs are 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. 4,338 drivers subject to mandatory downgrades.
4. The \$31.00 per hour wage to estimate income foregone.
5. \$0.557 per-mile cost for use of private vehicle.<sup>53</sup>

<sup>53</sup> The mileage rate is the General Services Administration current reimbursement rate for use of private vehicles expressed in 2016 dollars using

Based on these assumptions, the upper bound of annual opportunity costs for one day spent traveling and completing the reinstatement process is estimated at \$1.3 million in 2016 dollars (10 hours × 4,338 drivers × \$31.0 per hour) and \$13.4 million over 10 years. Annual travel costs are estimated at \$120,800 in 2016 dollars (4,338 drivers × 50 miles × \$0.557 per mile, rounded to the nearest hundred) and \$1.2 million over 10 years. Thus, the total annual cost to drivers to have their CMV privilege restored is \$14.7 million over 10 years. At a 7 percent discount rate, the 10-year cost is estimated at \$10.3 million and the annualized cost is estimated at \$1.5 million.

#### Motor Carrier Opportunity Costs

Motor carrier opportunity costs are estimated for Alternative #1, 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 under Alternative #1 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. The Agency requests that States comment on the time needed to reinstate a CLP or CDL privilege to a downgraded license, including the extent to which a driver can be reinstated without appearing in person at the SDLA.

The Agency uses a typical motor carrier's marginal hourly cost to operate a CMV as a measure of profit margin. The Agency estimates that motor carriers would lose 43,380 hours of productive driving time (4,338 drivers × 10 hours) while a driver completes the reinstatement process.

The FMCSA used an estimate of the marginal cost to operate a vehicle

the Bureau of Economic Analysis 2018 GDP price deflator. The mileage rate for private vehicle use is available at <https://www.gsa.gov/travel/plan-book/transportation-airfare-rates-pov-rates/privately-owned-vehicle-pov-mileage-reimbursement-rates> (accessed August 9, 2019).

reported in "An Analysis of the Operational Costs of Trucking: 2017 Update," published by the American Transportation Research Institute.<sup>54</sup> The Agency used this as the base from which it estimated an hourly profit margin. The elements of marginal operating costs consist of vehicle-based costs (e.g., fuel costs, insurance premiums, etc.), and driver based-costs (i.e., wages and benefits). The ATRI survey found that marginal operating costs were \$63.60 per hour in 2016, rounded to \$64 per hour in this analysis.

Profit is a function of revenue and operating expenses. The ATA defines the operating ratio of a motor carrier as a measure of profitability based on operating expenses as a percentage of gross revenues. Armstrong & Associates, Inc. (2009) states that trucking companies that cannot maintain a minimum operating ratio of 95% (calculated as Operating Costs ÷ Net Revenue) will not have sufficient profitability to continue operations in the long run. *Forbes* reported the average profit margin for general freight trucking companies at 6 percent in 2017, with annual profit margins ranging from 2.5 percent to 4 percent since 2012. Based on this range, the Agency assumed a 5 percent profit margin.<sup>55</sup>

Applying the assumed 5 percent motor carrier profit margin to the \$64 per-hour marginal operating cost noted above yields an hourly operating profit of \$3.20 per-hour. Based on the loss of 43,380 hours of product driving hours, the Agency estimates motor carrier undiscounted opportunity costs at \$1.4 million over the 10-year analysis period (\$3.20 per hour × 43,380 hours × 10 years, rounded to the nearest one hundred thousand). The annualized cost is estimated at \$138,816. At a 7 percent discount rate, motor carrier opportunity costs are estimated at \$1 million (rounded to the nearest million) over 10 years. The annualized cost is estimated at \$1 million (rounded to the nearest million). The Agency did not estimate motor carrier opportunity costs for

<sup>54</sup> The ATRI report presents industry operating data for the 10-year period ending in 2016. The report is available at <https://atri-online.org/wp-content/uploads/2017/10/ATRI-Operational-Costs-of-Trucking-2017-10-2017.pdf> (accessed August 10, 2019).

<sup>55</sup> Mary Ellen Biery and Sagework Stats, *Forbes*, "Trucking Companies Hauling in Higher Sales," available at <https://www.forbes.com/sites/sageworks/2018/03/04/trucking-companies-hauling-in-higher-sales/> (accessed June 25, 2019).

Alternative #2, because any downgrade/reinstatement procedures States might choose to establish would not be required by the proposed rule.

Summary of the Estimated Cost of the Proposed Rule

Table 3 compares the total and annualized costs estimated for the four pairings of Alternatives #1 (non-

issuance/mandatory downgrade) and Alternative #2 (optional notice of prohibited status) with electronic transmission Method #1 (CDLIS) and Method #2 (web services/API).<sup>56</sup>

TABLE 3—ESTIMATED COST OF PROPOSED RULE

Option	2016 \$ million						Costs discounted at 7%	
	State	Driver	Motor carrier	FMCSA	Total	Annualized	Total	Annualized
Alternative #1 with Method #1 .....	\$28.0	\$14.7	\$1.4	\$0	\$44.0	\$4.4	\$32.8	\$4.7
Alternative #1 with Method #2 .....	6.7	14.7	1.4	2.7	25.5	2.5	18.5	2.6
Alternative #2 with Method #1 .....	28.0	0	0	0	28.0	2.8	21.5	3.1
Alternative #2 with Method #2 .....	6.7	0	0	2.7	9.4	0.9	7.2	1.0

The total cost estimates over the 10-year analysis period range from \$9.4 million to \$44.0 million in 2016 dollars. Annualized costs range from \$0.9 million to \$4.4 million. At a 7 percent discount rate, the 10-year total cost estimates from \$7.2 million to \$32.8 million. Annualized costs at a 7 percent discount rate range from \$1.0 million to \$4.7 million. Alternative #1 cost estimates are larger than Alternative #2 because neither drivers nor motor carriers would incur opportunity costs and reinstatement costs because of the rule. SDLA IT costs are also larger under Alternative #1. Alternative #2 does not require the States to implement downgrade/reinstatement procedures. States are not precluded from acting on the optional notice of a driver's prohibited status. However, any costs incurred by drivers and motor carriers because of a State-initiated action would not be a cost of the proposed rule. The States will still incur IT development and O&M expenses under Alternative #2 because they are required to query the Clearinghouse when performing a licensing transaction.

Benefits

The Clearinghouse final rule required States to request information from the Clearinghouse when processing specified licensing transactions. This NPRM builds on that requirement by proposing that SDLAs could not issue, renew, upgrade, or transfer the CDL, or issue, renew or upgrade the CLP, of any driver prohibited from operating a CMV due to drug and alcohol program violations. The Agency's preferred alternative proposes that, in addition, SDLAs downgrade the driver licenses of individuals prohibited from operating a

CMV due to drug and alcohol program violations. SDLAs would rely on applicable State law and procedures<sup>57</sup> to accomplish the downgrade and any subsequent reinstatement of the CLP or CDL privilege. FMCSA believes these proposed requirements would improve highway safety by increasing the detection of CLP or CDL holders not qualified to operate a CMV due to a drug or alcohol testing 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 is 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 checkpoint inspection, traffic safety enforcement officers have no way of knowing the driver is not qualified to operate a CMV. The Clearinghouse will change that by making the information available to certain highway safety enforcement officers 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 would be able to immediately place these drivers out of service.

The mandatory downgrade, as proposed in Alternative # 1, would further strengthen roadside detection of drivers not qualified to operate due to a drug or alcohol testing violation. The reason is that not all traffic safety enforcement officers have reliable access to FMCSA's electronic enforcement tools that, after the Clearinghouse is operational, would make the driver's prohibited status available at roadside. While the 12,000 officers who are trained, and certified under MCSAP would have consistent roadside access to a CMV driver's prohibited status, most of the 500,000 non-MCSAP enforcement officers likely would 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 would 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 would be detected, through a routine license check, as not qualified to operate a CMV. The proposed downgrade, by increasing the detection of individuals unlawfully driving a CMV, would therefore improve public safety.

Just as a driver's prohibited status is not currently available to traffic safety personnel, most SDLAs cannot currently identify drivers who are subject to the prohibition. Both alternatives would 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

<sup>56</sup> The Agency notes that the CDL Program Implementation (CDLPI) grant program provides financial assistance to States to achieve compliance with 49 CFR parts 383 and 384. States would therefore be eligible to apply for CDLPI funds to help offset the cost of SDLA IT system upgrades

necessary to comply with the CLP/CDL downgrade requirement, as proposed.

<sup>57</sup> Under 383.73(o)(4), States are currently required to downgrade the license of CLP and CDL holders not in compliance with medical certification requirements, by changing the

commercial status on the driver's license from "licensed" to "eligible", thereby removing the CLP or CDL privilege from the license. Accordingly, States have established procedures to implement those downgrade requirements.

Clearinghouse query results in notice that the driver is subject to the CMV driving prohibition in § 382.501(a), the SDLA would not complete the transaction, resulting in non-issuance. This proposed requirement would 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.

As described above, both alternatives would allow improved SDLA and traffic safety enforcement officer enforcement of the CMV driving prohibition. In that sense, the prohibition would no longer be self-enforcing. As a result, FMCSA expects that, by “raising the stakes” of non-compliance, some CLP and CDL holders would be deterred from drugs or alcohol misuse, though the Agency is unable to estimate the extent of

deterrence. FMCSA invites comment on this issue.

Finally, this proposal would permit the Agency to use its enforcement resources more efficiently. Currently, FMCSA generally becomes aware that a driver is 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>58</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 proposed downgrade requirement will obviate the need for this time-consuming and labor-intensive process, thus enabling the Agency’s enforcement resources to be deployed more effectively elsewhere.

Table 4 summarizes information on the cost to the Agency to conduct different types of investigations. It provides a measure of the costs the Agency would avoid due to the availability of driver-specific information, in real time, in the Clearinghouse. The average cost of an investigation is \$2,012. This cost savings was not included in the Clearinghouse final rule RIA.

TABLE 4—COST COMPARISON OF INVESTIGATIONS WITH AND WITHOUT FUTURE ENFORCEMENT SLATED FOR COMPREHENSIVE AND ONSITE FOCUSED INVESTIGATIONS

Investigation type	Enforcement	Cases	Average cost
Offsite .....	No .....	31	\$1,088
Offsite .....	Yes .....	5	1,495
Onsite Comprehensive .....	No .....	302	2,424
Onsite Comprehensive .....	Yes .....	108	2,866
Onsite Focused .....	No .....	652	1,965
Onsite Focused .....	Yes .....	2172	2,236
Average .....	.....	.....	2,012

*B. E.O. 13771 Reducing Regulation and Controlling Regulatory Costs*

This rule is not subject to the requirements of E.O. 13771 because it has been designated a non-significant regulatory action.

*C. Congressional Review Act*

Pursuant to the Congressional Review Act (5 U.S.C. 801, *et seq.*), the Office of Information and Regulatory Affairs designated this rule as not a “major rule,” as defined by 5 U.S.C. 804(2).

*D. 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, (March 29, 1996)), 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. 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 (5 U.S.C. 601). 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. Therefore, FMCSA is publishing this initial regulatory flexibility analysis (IRFA) to aid the public in commenting on the potential small business impacts of the proposals in this NPRM. FMCSA invites all interested parties to submit data and information regarding the potential economic impact that would result from adoption of the proposals in this NPRM. FMCSA will consider all comments received in the public comment process when deciding on the final regulatory flexibility assessment.

An IRFA must include six components (5 U.S.C. 603(b) and (c)).

The Agency discusses each of the components below.

*1. A description of the reasons why the action by the agency is being considered.*

The Agency is taking this action to respond to operational and legal issues identified by individual SDLAs and AAMVA following publication of the Clearinghouse final rule.

*2. A succinct statement of the objectives of, and legal basis for, the proposed rule.*

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 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.

The “Commercial Driver’s License Drug and Alcohol Clearinghouse” final rule (81 FR 87686 (Dec. 5, 2016)) implements section 32402 of the Moving Ahead for Progress in the 21st Century Act (MAP–21) (Pub. L. 112–41, 126 Stat. 405, codified at 49 U.S.C.

<sup>58</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.

31306a), which requires that the Secretary establish a national clearinghouse for records relating to alcohol and controlled substances testing by CMV operators who hold CDLs. As part of that mandate, MAP-21 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. 31306a(h)(2)). Section 32305(b)(1) of MAP-21, codified at 49 U.S.C. 31311(a)(24), requires that States request information from the Clearinghouse before renewing or issuing a CDL to an individual. This NPRM proposes the processes by which the Agency and the States would implement these statutory requirements. A full explanation of the legal basis for this rulemaking is set forth in Section III.

3. *A description, and, where feasible, an estimate of the number of small entities to which the proposed rule will apply.*

"Small entity" is defined in 5 U.S.C. 601(6) as having the same meaning as the terms "small business" in paragraph (3), "small organization" in paragraph (4), and "small governmental jurisdiction" in paragraph (5). Section 601(3) defines a small business as a "small business concern" under section 3 of the Small Business Act (15 U.S.C. 632(a)), which mean a business that is independently owned and operated and is not dominant in its field of operation. Section 601(4) defines small organizations as not-for-profit enterprises that are independently owned and operated, and are not dominant in their fields of operation. Additionally, section 601(5) defines small governmental jurisdictions as governments of cities, counties, towns, townships, villages, school districts, or special districts with populations of less than 50,000.

This proposed rule would affect SDLAs, CDL, or CLP applicants, interstate motor carriers, interstate passenger carriers, and intrastate hazardous materials motor carriers. However, drivers do not meet the definition of a small entity in section 601 of the RFA. Specifically, CMV drivers are considered neither a small business under section 601(3) of the RFA, nor are they considered a small organization under section 601(4) of the RFA. SDLAs do not meet the definition of a small entity because they are governmental entities with statewide jurisdiction over licensing CMV operators.

FMCSA used data from the 2012 Economic Census to determine the percentage of motor carriers with annual revenue at or below the Small Business Administration's (SBA) thresholds.<sup>59</sup> The SBA thresholds are used to classify a business as a small business for purposes of determining eligibility to participate in SBA and Federal contracting programs.<sup>60</sup> The Economic Census sums the number of firms classified according to their North American Industry Classification System (NAICS) code by ranges of annual revenue. The range with the high end closest to the SBA thresholds was used to determine the percentage of motor carriers that meet the definition of an SBA small business. FMCSA used the Economic Census as the basis for estimating the number of small entities affected by the proposed rule. As discussed below, the Agency estimates that 98.7 percent of trucking firms and 95.2 percent of passenger carriers are classified as small businesses.

The Economic Census aggregates the Truck Transportation industry under the NAICS Code 484—Trucking Firms. Survey respondents are categorized in one of 10 revenue ranges. The range with the high end closely aligned with the SBA \$27.5 million threshold that includes trucking firms with annual revenue up to \$24.9 million. Of the trucking firms surveyed that operated for the entire year, 98.7 percent had revenues less than or equal to \$24.9 million. The Agency finds that this 98.7 percent is a reasonable proxy for the number of trucking firms with annual revenue, equal to or less than the \$27.5 million SBA threshold.

The Agency used the same methodology to determine the percentage of passenger carriers that qualify as an SBA small business. The SBA threshold for Transit and Ground Transportation firms (NAICS Code 485) is \$15 million. For purposes of determining the percentage of passenger carriers with annual revenue less than or equal to \$15 million, the Agency considered the number of passenger carriers in three NAICS Code subsectors: Charter Bus; Interurban Transportation and Rural Transportation; and School and Employee Transportation

subsectors.<sup>61</sup> The Economic Census revenue range closest to the SBA \$15 million threshold includes passenger carriers with revenue ranging from \$5 million to \$9.9 million. Passenger carriers with revenue less than or equal to \$9.9 million accounted for 95.2 percent of survey respondents within the three subsectors. Thus, the Agency finds that 95.2 percent of passenger carriers with revenue less than or equal to \$9.9 million is approximately the same percentage of those with annual revenue less than the \$15 million SBA threshold.

4. *A description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirement and the types of professional skills necessary for preparation of the report or record.*

The purpose of the proposed rule is to develop the information technology platform through which the States would query the Clearinghouse when initiating a licensing transaction. If the Clearinghouse transmits information that a driver is prohibited from operating a CMV because of a violation of the drug and alcohol program, the SDLA would be required to deny the transaction, resulting in a non-issuance. Once a transaction is denied, a driver would need to reapply after completing the RTD process. The proposed information technology platform would provide for transmission of Clearinghouse information on a real-time. In light of the capability to electronically transmit Clearinghouse information to the SDLAs, the Agency is proposing alternative uses of the Clearinghouse data by the SDLAs to improve the States' enforcement of the prohibition of the use of drugs and alcohol by CMV drivers. The SDLAs are the only entities with reporting and recordkeeping requirements under the proposed rule.

The SDLAs would incur IT development costs and annual O&M expenses for an interface with the Clearinghouse. FMCSA would also incur costs IT development and annual O&M expenses for one of the proposed methods for transmitting Clearinghouse information to the SDLAs. The SDLAs are not small entities. As discussed in Item 3, motor carriers are small entities that would be affected by the proposed rule. However, the propose rule does

<sup>59</sup> U.S. Census Bureau, *2012 Economic Survey*, Table EC1248SSSZ4—Summary Statistics by Revenue and Size of Firm. Available at <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk#> (accessed April 24, 2019).

<sup>60</sup> The SBA regulation defining small business size standards by North American Industry Classification System codes is set forth in 13 CFR 121.201.

<sup>61</sup> Commuter rail, public transit systems, taxi, limousine, and special needs transportation that are included in Subsector 485 are excluded from the analysis.

not impose reporting or recordkeeping on motor carriers.

5. *An identification, to the extent practicable of all relevant Federal rules that may overlap, duplicate or conflict with the proposed rule.*

The Agency is proposing this rule in furtherance of the MAP-21 requirement that the Agency establish the Clearinghouse. The Agency finds that no other Federal rules exist that would be duplicative, overlap or conflict with the proposed rule.

6. *A description of any significant alternative to the proposed rule which accomplish the stated objections of the applicable statutes and which minimize significant economic impact on small entities.*

The Agency did not identify any significant alternatives to the proposed rule that would minimize the impact on small entities.

#### *E. Assistance for Small Entities*

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

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 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.

#### *F. 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 \$165 million (which is the value equivalent of \$100,000,000 in 1995, adjusted for inflation to 2018 levels) or more in any 1 year. Though this proposed rule will not result in such an expenditure, the Agency does discuss the effects of this rule elsewhere in this preamble.

#### *G. Paperwork Reduction Act*

This proposed rule would call for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520). The current ICR will expire on January 1, 2020, and is being renewed through the established process.

#### *H. E.O. 13132 (Federalism)*

A rule has implications for federalism under section 1(a) of Executive Order (E.O.) 13132 if 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 proposed rule under that Order and determined that it has implications for federalism. In accordance with section 6(c)(2) of E.O. 13132, the Agency's federalism summary impact statement follows.

MAP-21 (49 U.S.C. 31306a(l)(1) and (2)) specifically preempts State laws and regulations inconsistent with the establishment of the Clearinghouse and Federal regulations implementing the Clearinghouse mandate, including State-based requirements pertaining to the reporting of violations of FMCSA's drug and alcohol use and testing program. In addition, this NPRM imposes minimum requirements for the issuance of CLPs and CDLs by the States, consistent with the Agency's authority under the Commercial Motor Vehicle Safety Act of 1986 (1986 Act) (codified at 49 U.S.C. chapter 313). 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 the American Association of Motor Vehicle Administrators (AAMVA) early in the process of developing the proposal to gain insight into the federalism implications of the NPRM.

The States' representatives requested that the NPRM 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 drug and alcohol program violation reporting

requirements be specifically discussed, and that FMCSA allow States the time they need to enact laws or regulations implementing Federal regulatory requirements related to the Drug and Alcohol Clearinghouse. AAMVA suggested that the Agency disqualify drivers who commit drug or alcohol violations before requiring the SDLAs to take action on the commercial license. The Agency addresses these issues above, in section II (Executive Summary), subsection C (Costs and Benefits); section III (Legal Basis); section V (Discussion of Proposed Rulemaking), subsections B (Impact on SDLAs), C (Compliance Date) and D (Impact of MAP-21 and the NPRM on State Laws); and below in section VIII, subsection A (E.O. 12866 (Regulatory Planning and Review), E.O. 13563 (Improving Regulation and Regulatory Review), and DOT Regulatory Policies and Procedures (Benefits)). Additionally, as discussed in section IV (Background), subsection B (AAMVA's Petition), the NPRM responds, in part, to a petition for rulemaking submitted to FMCSA by AAMVA in June 2017. The petition, available in the docket of this rulemaking, raised questions and concerns about the extent and nature of the States' role in the Clearinghouse; the NPRM addresses those issues directly. Finally, the Agency notes that, while the 1986 Act grants broad authority to the Secretary to prescribe regulations on minimum uniform standards for the issuance of commercial drivers' licenses and learners' permits by the States, the CDL program itself does not have preemptive effect. It is voluntary; States may withdraw their participation at any time, although doing so could result in the loss of certain Federal highway funds, pursuant to 49 U.S.C. 31314.

#### *I. 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 proposed rule would not require the collection of individual personally identifiable information beyond that which is already required by the Clearinghouse final rule.

Additionally, 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 proposed rule.

*J. E.O. 13783 (Promoting Energy Independence and Economic Growth)*

E.O. 13783 directs executive departments and agencies to review existing regulations that potentially burden the development or use of domestically produced energy resources, and to appropriately suspend, revise, or rescind those that unduly burden the development of domestic energy resources. In accordance with E.O. 13783, DOT prepared and submitted a report to OMB that provides specific recommendations that, to the extent permitted by law, could alleviate or eliminate aspects of agency action that burden domestic energy production. This rule has not been identified by DOT under E.O. 13783 as potentially alleviating unnecessary burdens on domestic energy production.

*K. 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.

*L. National Technology Transfer and Advancement Act (Technical Standards)*

The National Technology Transfer and Advancement Act (15 U.S.C. 272

note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through OMB, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards (*e.g.*, specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) are standards that are developed or adopted by voluntary consensus standards bodies. This rule does not use technical standards. Therefore, FMCSA did not consider the use of voluntary consensus standards.

*M. Environment (National Environmental Policy Act)*

FMCSA analyzed this NPRM for the purpose of 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, paragraphs (6)(t)(2). The Categorical Exclusion (CE) in paragraph (6)(t)(2) covers regulations ensuring States comply with the provisions of 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 proposed requirements in this rule are covered by this CE, and the proposed action does not have the potential to significantly affect the quality of the environment. The CE determination is available for inspection or copying in the regulations.gov website listed under **ADDRESSES**.

**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.

In consideration of the foregoing, FMCSA proposes the following amendments to 49 CFR chapter III, parts 382, 383, 384, 390, and 392 for each alternative to read as follows:

**Regulatory Text for the Preferred Alternative—Mandatory Downgrade**

**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. Revise § 382.503 to read as follows:

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

(a) No driver who has engaged in conduct prohibited by subpart B of this part shall perform safety-sensitive functions, including driving a commercial motor vehicle, unless the driver has met the requirements of part 40, subpart O, of this title. No employer shall permit a driver who has engaged in conduct prohibited by subpart B of this part to perform safety-sensitive functions, including driving a commercial motor vehicle, unless the driver has met the requirements of part 40, subpart O, of this title.

(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 the section heading and paragraph (a)(2)(i) to read as follows:

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

(a) \* \* \*

(2) *Exceptions.* (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) If a driver has applied for a commercial driver's license or a commercial learner's permit from a State, to determine whether the driver is qualified to operate a commercial motor vehicle, the chief commercial driver's licensing official of a State must have access to information from the Clearinghouse in accordance with § 383.73 of this chapter.

(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:

- a. Revising paragraph (4) of the definition of “CDL downgrade”; and
- b. Adding a definition for “CLP downgrade” in alphabetical order.

The revision and addition read as follows:

**§ 383.5 Definitions.**

\* \* \* \* \*

*CDL downgrade* means either:

\* \* \* \* \*

(4) A State removes the CLP or CDL privilege from the driver's license by changing the commercial status from “licensed” to “eligible” on the CDLIS driver record.

\* \* \* \* \*

*CLP Downgrade* means a State removes the CLP privilege from the driver record by changing the permit status from “licensed” to “eligible” on the CDLIS driver record.

\* \* \* \* \*

■ 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 [compliance date], the State must request information from the Drug and Alcohol Clearinghouse in accordance with § 382.725 of this chapter, 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 [compliance date], the State must request information from the Drug and Alcohol Clearinghouse in accordance with § 382.725 of this chapter. 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 [compliance date], the State must request information from the Drug and Alcohol Clearinghouse in accordance with § 382.725 of this chapter. 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 [compliance date], the State must request information from the Drug and Alcohol Clearinghouse in accordance with § 382.725 of this chapter. 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 and must comply with the procedures set forth in paragraph (q) of this section.

(e) \* \* \*

(8) Beginning [compliance date], the State must request information from the Drug and Alcohol Clearinghouse in accordance with § 382.725 of this chapter. 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 [compliance date], the State must request information from the Drug and Alcohol Clearinghouse in accordance with § 382.725 of this chapter. 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.

\* \* \* \* \*

(q) *Drug and Alcohol Clearinghouse.* Beginning [compliance date], the State must, upon receiving notification from the Drug and Alcohol Clearinghouse 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 30 days of the State's receipt of such notification.

(1) If, before the State completes and records the downgrade on the CDLIS driver record, the State receives notification from the Drug and Alcohol Clearinghouse 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) If, after the State completes and records the downgrade on the CDLIS driver record, the Drug and Alcohol Clearinghouse 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 driver must, if permitted by State law, be eligible for reinstatement of the CLP or CDL privilege to the driver's license.

**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.**

(a) Beginning [compliance date], the State must:

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

(2)(i) Comply with the provisions of § 383.73(q) of this chapter upon receiving notification from the Drug and Alcohol Clearinghouse that pursuant to § 382.501(a) of this chapter the CLP or CDL holder is prohibited from operating a commercial motor vehicle; and

(ii) Comply with the provisions of § 383.73(q) of this chapter upon receiving notification from the Drug and Alcohol Clearinghouse that pursuant to § 382.503(a) of this chapter the CLP or CDL holder is no longer prohibited from operating a commercial motor vehicle.

■ 11. Amend § 384.301 by revising paragraph (m) to read as follows:

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

\* \* \* \* \*

(m) 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 [EFFECTIVE DATE OF FINAL RULE] as soon as practical, but, unless otherwise specifically provided in this part, not later than [compliance date].

**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 1.81, 1.81a, 1.87.

■ 13. Amend § 390.3 as follows:

- a. Lift the stay of the section;
- b. Revise paragraph (f)(1); and
- c. Stay § 390.3 indefinitely.

**§ 390.3 General applicability.**

\* \* \* \* \*

(f) \* \* \*

(1) All school bus operations as defined in § 390.5, except for the provisions of §§ 391.15(e) and (f), 392.13, 392.80, and 392.82 of this chapter;

\* \* \* \* \*

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

**§ 390.3T General applicability.**

\* \* \* \* \*

(f) \* \* \*

(1) All school bus operations as defined in § 390.5T, except for the provisions of §§ 391.15(e) and (f), 392.13, 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 § 392.13 to read as follows:

**§ 392.13 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 of this subchapter.

**Regulatory Text for Alternative #2—Optional Notice of Prohibited Status****PART 382—CONTROLLED SUBSTANCES AND ALCOHOL USE AND TESTING**

■ 17. 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.

■ 18. Revise § 382.503 to read as follows:

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

(a) No driver who has engaged in conduct prohibited by subpart B of this part shall perform safety-sensitive functions, including driving a commercial motor vehicle, unless the driver has met the requirements of part 40, subpart O, of this title. No employer shall permit a driver who has engaged

in conduct prohibited by subpart B of this part to perform safety-sensitive functions, including driving a commercial motor vehicle, unless the driver has met the requirements of part 40, subpart O, of this title.

(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.

■ 19. Amend § 382.717 by revising the section heading and paragraph (a)(2)(i) to read as follows:

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

(a) \* \* \*

(2) *Exceptions.* (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.

\* \* \* \* \*

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

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

(a) If a driver has applied for a commercial driver's license or a commercial learner's permit from a State, to determine whether the driver is qualified to operate a commercial motor vehicle, the chief commercial driver's licensing official of a State must have access to information from the Clearinghouse in accordance with § 383.73 of this chapter.

(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**

■ 21. 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.

■ 22. 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 to read as follows:

#### § 383.73 State procedures.

(a) \* \* \*

(3) Beginning [compliance date], the State must request information from the Drug and Alcohol Clearinghouse in accordance with § 382.725 of this chapter, 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.

(b) \* \* \*

(10) Beginning [compliance date], the State must request information from the Drug and Alcohol Clearinghouse in accordance with § 382.725 of this chapter. 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 [compliance date], the State must request information from the Drug and Alcohol Clearinghouse in accordance with § 382.725 of this chapter. 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 [compliance date], the State must request information from the Drug and Alcohol Clearinghouse in accordance with § 382.725 of this chapter. 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.

(e) \* \* \*

(8) Beginning [compliance date], the State must request information from the Drug and Alcohol Clearinghouse in accordance with § 382.725 of this chapter. 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.

\* \* \* \* \*

(f) \* \* \*

(4) Beginning [compliance date], the State must request information from the Drug and Alcohol Clearinghouse in accordance with § 382.725 of this chapter. If, in response to that request, the State receives notification that pursuant to § 382.501(a) of this section 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.

\* \* \* \* \*

(q) *Drug and Alcohol Clearinghouse.*

Beginning [compliance date], States may elect to receive automatic notification from the Drug and Alcohol Clearinghouse that, pursuant to § 382.501(a), of this chapter a CLP or CDL holder is prohibited from operating a commercial motor vehicle. The State's use of such information must be in accordance with § 382.725(c) of this chapter.

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

- 23. 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.

- 24. Revise § 384.235 to read as follows:

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

Beginning [compliance date], the State:

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

(2) Comply with the provisions of § 383.73(q) of this chapter if the State elects to receive automatic notification from the Drug and Alcohol Clearinghouse that, pursuant to § 382.501(a) of this chapter, a CLP or CDL holder is prohibited from operating a commercial motor vehicle.

- 25. Amend § 384.301 by revising paragraph (m) to read as follows:

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

\* \* \* \* \*

(m) 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 [EFFECTIVE DATE OF FINAL RULE] as soon as practical, but, unless otherwise specifically provided in this part, not later than [compliance date].

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

- 26. 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 1.81, 1.81a, 1.87.

- 27. Amend § 390.3 as follows:

- a. Lift the stay of the section;
- b. Revise paragraph (f)(1); and
- c. Stay § 390.3 indefinitely.

#### § 390.3 General applicability.

\* \* \* \* \*

(f) \* \* \*

(1) All school bus operations as defined in § 390.5, except for the provisions of §§ 391.15(e) and (f), 392.13, 392.80, and 392.82 of this chapter.

\* \* \* \* \*

- 28. Amend § 390.3T(f)(1) to read as follows:

#### § 390.3T General applicability.

\* \* \* \* \*

(f) \* \* \*

(1) All school bus operations as defined in § 390.5T, except for the provisions of §§ 391.15(e) and (f), 392.13, 392.80, and 392.82 of this chapter.

\* \* \* \* \*

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

■ 29. 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.

■ 30. Add § 392.13 to read as follows:

**§ 392.13 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 of this subchapter.

Issued under authority delegated in 49 CFR 1.87.

**James A. Mullen,**

*Acting Administrator.*

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