order to show why they should not be required to implement imbalance trading.

By the Commission.

David P. Boergers,

Secretary.

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DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

Federal Highway Administration

23 CFR Part 1275

[Docket No. NHTSA–98–4537]

RIN 2127–AH47

Repeat Intoxicated Driver Laws

AGENCIES: National Highway Traffic Safety Administration (NHTSA) and Federal Highway Administration (FHWA), Department of Transportation.

ACTION: Final rule.

SUMMARY: This document adopts as a final rule, with some changes, the regulations that were published in an interim final rule to implement a new program established by the Transportation Equity Act for the 21st Century (TEA 21) Restoration Act. The final rule provides for a transfer of Federal-aid highway construction funds authorized under 23 U.S.C. 104 to the State and Community Highway Safety Program under 23 U.S.C. 402 for any State that fails to enact and enforce a conforming ''repeat intoxicated driver'' law.

DATES: This final rule becomes effective on October 4, 2000.

FOR FURTHER INFORMATION CONTACT: In NHTSA: Mr. Glenn Karr, Office of State and Community Services, NSC–01, telephone (202) 366–2121; or Ms. Heidi L. Coleman, Office of Chief Counsel, NCC–30, telephone (202) 366–1834, National Highway Traffic Safety Administration, 400 Seventh Street SW., Washington, DC 20590. In FHWA: Mr. Byron E. Dover, Safety, HSA–1, telephone (202) 366–2161; or Mr. Raymond W. Cuprill, Office of the Chief Counsel, HCC–20, telephone (202) 366–0834, Federal Highway Administration, 400 Seventh Street SW., Washington, DC 20590–0001.

SUPPLEMENTARY INFORMATION:

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I. Background

The Transportation Equity Act for the 21st Century (TEA 21), H.R. 2400, Pub. Law 105–178, was signed into law on June 9, 1998. On July 22, 1998, the TEA 21 Restoration Act (the Act), Pub. Law 105–206, was enacted to restore provisions that had been agreed to by the conferees on TEA 21, but were not included in the TEA 21 conference report. Section 1406 of the Act amended chapter 1 of title 23, United States Code (U.S.C.), by adding section 164, which established a program to transfer a percentage of a State's Federal-aid highway construction funds to the State's apportionment under section 402 of Title 23 of the United States Code, if the State fails to enact and enforce a conforming ''repeat intoxicated driver'' law that provides for certain specified minimum penalties for persons who have been convicted of driving while intoxicated or under the influence upon their second and subsequent convictions.

In accordance with section 164, these funds are to be used for alcohol-impaired driving countermeasures or the enforcement of driving while intoxicated (DWI) laws, or States may elect instead to use all or a portion of the funds for hazard elimination activities, under 23 U.S.C. section 152.

A. The Problem of Impaired Driving

Injuries caused by motor vehicle traffic crashes are the leading cause of death in America for people aged 5 to 29. Each year, traffic crashes in the United States claim approximately 41,000 lives and cost Americans an estimated $150 billion, including $19 billion in medical and emergency expenses, $42 billion in lost productivity, $52 billion in property damage, and $37 billion in other crash-related costs. In 1999, alcohol was involved in approximately 38 percent of fatal traffic crashes. Every 33 minutes, someone in this country dies in an alcohol-related crash. Impaired driving is the most frequently committed violent crime in America.

B. Repeat Intoxicated Driver Laws

State laws that are directed to individuals who have been convicted more than once of driving while intoxicated or driving under the influence are critical tools in the fight against impaired driving. To encourage States to enact and enforce effective impaired driving laws, Congress has created a number of different programs. Under the section 410 program (23 U.S.C. 410), and its predecessor the section 408 program (23 U.S.C. 408), for example, States could qualify for incentive grant funds if they adopted and implemented certain specified laws and programs designed to deter impaired driving. Some of these laws and programs were directed specifically toward repeat impaired driving offenders.

For example, prior to the enactment of TEA 21, to qualify for an incentive grant under the section 410 program, a State was required to meet five out of seven basic grant criteria that were specified in the Act and the implementing regulation. The criteria included, among others, an expedited driver license suspension system, which required a mandatory minimum one-year license suspension for repeat offenders, and a mandatory minimum sentence of imprisonment or community service for individuals convicted of driving while intoxicated more than once in any five-year period.

States that were eligible for a basic section 410 grant could qualify also for additional grant funds by meeting supplemental grant criteria, such as the suspension of registration and return of license plate program. States could demonstrate compliance with this program by showing that they provided for the impoundment, immobilization or confiscation of an offender's motor vehicles.

TEA 21 changed the section 410 program and, specifically, the section 410 criteria that were directed toward repeat offenders. The conferees to that legislation had intended to create a new repeat intoxicated driver transfer program to encourage States to enact repeat intoxicated driver laws, but this new program was inadvertently omitted from the TEA 21 conference report. The program was included instead in the TEA 21 Restoration Act, which was signed into law on July 22, 1998.

C. Section 164 Repeat Intoxicated Driver Law Program

Section 164 provides that, on October 1 of each year, the Secretary must transfer a portion of a State's Federal-aid highway construction funds apportioned under sections 104(b)(1), (3), and (4) of title 23 of the United States Code, for the National Highway System, Surface Transportation Program and Interstate System, to the State's apportionment under section 402 of that title, if the State fails to enact and enforce a conforming ''repeat intoxicated driver'' law. If a State does not meet the statutory requirements on October 1, 2000 or October 1, 2001, an amount equal to one and one-half percent of the funds apportioned to the State will be transferred. If a State does not meet the statutory requirements on October 1, 2002, or on October 1 of any subsequent year, an amount equal to three percent of the funds apportioned to the State will be transferred.

To avoid the transfer of funds, a State must enact and enforce a law that establishes, at a minimum, certain specified penalties for second and subsequent convictions for driving while intoxicated or under the influence. These penalties include: a one-year driver's license suspension; the impoundment or immobilization of, or the installation of an ignition interlock system on, the repeat intoxicated driver's motor vehicles; assessment of the repeat intoxicated driver's degree of alcohol abuse, and treatment as appropriate; and the sentencing of the repeat intoxicated driver to a minimum number of days of imprisonment or community service.

II. Interim Final Rule

On October 19, 1998, NHTSA and the FHWA published an interim final rule in the **Federal Register** to implement the section 164 program (63 FR 55798). The interim final rule provided that, to avoid the transfer of funds, a State must have a law that has been enacted and made effective, and the State must be actively enforcing the law. In addition, the law must meet certain requirements.

A. Compliance Criteria

The interim final rule provided that, to avoid a transfer of funds, a State must meet the following requirements:

1. *A minimum one-year license suspension.* The State's law must impose a mandatory minimum one-year driver's license suspension or revocation on all repeat intoxicated drivers. Accordingly, during the one-year term, the offender cannot be eligible for any driving privileges, such as a restricted or hardship license.

2. *Impoundment or immobilization of, or the installation of an ignition interlock system on, motor vehicles.* The State's law must require the impoundment or immobilization of, or the installation of an ignition interlock on, all motor vehicles owned by the repeat intoxicated offender. To comply with this criterion, the State law must require that the impoundment or immobilization be imposed during the one-year suspension term, or that the ignition interlock system be installed at the conclusion of the suspension period.

3. *An assessment of their degree of alcohol abuse, and treatment as appropriate.* To avoid the transfer of funds, the State's law must require that all repeat intoxicated drivers undergo an assessment of their degree of alcohol abuse and the law must authorize the imposition of treatment as appropriate.

4. *Mandatory minimum sentence.* The State's law must impose a mandatory minimum sentence on all repeat intoxicated drivers. For a second offense, the law must provide for a mandatory minimum sentence of not less than five days of imprisonment or 30 days of community service. For a third or subsequent offense, the law must provide for a mandatory minimum sentence of not less than ten days of imprisonment or 60 days of community service.

A more detailed discussion of the four elements described above is contained in the interim final rule (63 FR 55798–800).

B. Demonstrating Compliance

Section 164 provides that nonconforming States will be subject to the transfer of funds beginning in fiscal year 2001. The interim final rule provides that, to avoid the transfer, each State must submit a certification by an appropriate State official that the State has enacted and is enforcing a repeat intoxicated driver law that conforms to 23 U.S.C. 164 and section 1275 of this part. A more detailed discussion regarding the certifications is contained in the interim final rule (63 FR 55800).

C. Enforcement

Section 164 provides that a State must not only enact a conforming law, but must also enforce the law. In the interim final rule, the agencies encouraged the States to enforce their repeat intoxicated driver laws rigorously. In particular, the agencies recommended that States incorporate into their enforcement efforts activities designed to inform law enforcement officers, prosecutors, members of the judiciary and the public about all aspects of their repeat intoxicated driver laws. States should also take steps to integrate their repeat intoxicated driver enforcement efforts into their enforcement of other impaired driving laws.

To demonstrate that they are enforcing their laws under the regulations, the interim rule indicated that States are required to submit a certification that they are enforcing their laws.

D. Notification of Compliance

The interim final rule provided that, for each fiscal year, beginning with FY 2001, NHTSA and the FHWA will notify States of their compliance or noncompliance with section 164, based on a review of certifications received. If, by June 30 of any year, beginning with the year 2000, a State has not yet been determined by the agencies, based on the State's laws and a conforming certification, to comply with section 164 and the implementing regulations, the agencies will make an initial determination that the State does not comply with section 164, and the transfer of funds will be noted in the FHWA's advance notice of apportionment for the following fiscal year, which generally is issued in July.

Each State determined to be in noncompliance will have until September 30 to rebut the initial determination or to come into compliance. The State will be notified of the agencies' final determination of compliance or noncompliance and the amount of funds to be transferred as part of the certification of apportionments, which normally occurs on October 1 of each fiscal year.

III. Written Comments

The agencies requested written comments from interested persons on the interim final rule. The agencies stated in the interim rule that all comments submitted would be considered and that, following the close of the comment period, the agencies would publish a document in the **Federal Register** responding to the comments and, if appropriate, make revisions to the provisions of part 1275.

A. Comments Received

The agencies received submissions from thirteen commenters in response to the interim final rule. Comments were received from five States, three organizations representing State interests and five other individuals or organizations with an interest in the issues being considered as part of these proceedings. The State comments were submitted by Tricia Roberts, Director of the Delaware Office of Highway Safety, Brian J. Bushweller, Secretary of the Delaware Department of Public Safety and Anne P. Canby, Secretary of the Delaware Department of Transportation (Delaware); James R. DeSana, Director of the Michigan Department of Transportation and Betty J. Mercer, Division Director of the Office of Highway Safety Planning, Michigan Department of State Police (Michigan); Thomas E. Stephens, P.E., Director of the Nevada Department of Transportation (Nevada); Keith C. Magnusson, Director of Driver and Vehicle Services, North Dakota Department of Transportation (North Dakota); and Charles H. Thompson, Secretary of the Wisconsin Department of Transportation (Wisconsin).

The comments received from organizations representing State interests were submitted by Kenneth M. Beam, President and CEO of the American Association of Motor Vehicle Administrators (AAMVA); Carl D. Tubbesing, Deputy Executive Director of the National Conference of State Legislatures (NCSL); and K. Craig Allred, Director of the Utah Highway Safety Office, who commented in his capacity as the Chair of the National Association of Governors' Highway Safety Representatives (NAGHSR).

The comments from individuals or organizations with an interest in the issues being considered in these proceedings were submitted by Mothers Against Drunk Driving (MADD); Richard Freund, President of LifeSafer Interlock, Inc. (LifeSafer); Henry Jasny, General Counsel for Advocates for Highway and Auto Safety (Advocates); Robert B. Voas, Ph.D., of the Pacific Institute (Dr. Voas); and James Hedlund of Highway Safety North (Dr. Hedlund).

Additionally, while not written in response to this rulemaking action, the National Transportation Safety Board (NTSB) issued a Safety Recommendation (H–00–27) to the Secretary of Transportation on August 7, 2000, related to the section 164 program.

The comments, and the agencies' responses to them, are discussed in detail below. Also discussed below are certain changes that the agencies have decided to make in this final rule based on their experience reviewing State laws and proposed legislation since the issuance of the interim final rule.

B. General Comments

Some of the comments submitted in response to the interim final rule commended the agencies on the manner in which the interim rule implemented the statutory requirements. North Dakota, for example, stated that it did ''not have any problems with the text of the regulation'' and that the regulations ''appear to track with the law'' and ''seem to be straight forward and appropriate.'' Advocates also supported the interim regulations. Its comments provided that ''in nearly all respects, the agencies have made reasoned and well thought out decisions in areas left to agency discretion by the statute.''

Many of the comments, however, were critical of the section 164 program in general. While most commenters recognized that the criteria that States must meet and the consequences that will result to any State that fails to comply with them were defined by statute, many of the commenters were critical of these features of the program.

For example, regarding the use of consequences for State non-compliance, Delaware asserted that, while it ''has long supported efforts to reduce impaired driving on our roadways, we strongly oppose the sanctions related to this Repeat Intoxicated Driver Law. We believe that transfer penalties interfere with the [States'] progress towards comprehensive efforts.'' Michigan recommended that Congress should establish instead a ''performance-based alternative'' under which States ''can demonstrate measurable, significant success in reducing recidivism, either within the state or as compared to the national average.'' NCSL and the State of Wisconsin also objected to the use of transfer sanctions.

Regarding the statutory criteria that States must meet to avoid the sanction, NCSL expressed its belief that ''a one-size-fits-all approach is not the best way to tackle the nation's drunk driving problem.'' In addition, NAGHSR and some of the State commenters predicted that the criteria are so stringent, it is unlikely that any State will fully comply.

NHTSA and the FHWA acknowledge that some of the compliance criteria are strictly defined in section 164 and that some may consider the consequences established in section 164 for States that fail to comply with these criteria to be rather severe. However, the agencies are bound to implement the section 164 program, in accordance with the requirements that were established by the statute. Regarding Michigan's suggestion that a performance-based alternative be established, we note that Congress has established performance-based programs under section 157 (for seat belt use) and section 410 (for impaired driving), but Congress has thus far chosen to use a different approach in the area of repeat intoxicated drivers.

Moreover, we note that this program has had a significant impact on State repeat intoxicated driver laws. Since the enactment of the TEA 21 Restoration Act, State repeat intoxicated driver laws have been strengthened, through the passage of new legislation, in 19 States and the District of Columbia. NHTSA has determined that the laws of nearly half the States (23 of them to date) and the District of Columbia fully comply with the section 164 requirements.

Finally, we note that, in the Safety Recommendation that it issued to the Secretary on August 7, 2000, NTSB submitted detailed comments regarding the statutory requirements contained in section 164. NTSB stated that the section 164 program represents ''a substantial effort by Congress to address the hard core drinking driver problem * * * However, the Safety Board believes that this legislation could be even more effective.'' The Board recommended that the agency:

> Evaluate modifications to the provisions of [the TEA 21 Restoration Act] so that it can be more effective in assisting the States to reduce the hard core drinking driver problem [and] recommend changes to Congress as appropriate. Considerations should include (a) a revised definition of ''repeat offender'' to include administrative actions on DWI offenses; (b) mandatory treatment for hard core offenders; (c) a minimum period of 10 years for records retention and DWI offense enhancement; (d) administratively imposed vehicle sanctions for hard core drinking drivers; (e) elimination of community service as an alternative to incarceration; and (f) inclusion of home detention with electronic monitoring as an alternative to incarceration.

Since NTSB's comments recommend that the agency seek legislative changes to the section 164 program, these comments will not be addressed specifically in this final rule. These recommendations are being considered separately by the agency, outside the scope of this rulemaking action.

C. Definitions Adopted in the Interim Final Rule

Section 164 provides that, to avoid the transfer of funds under this program, a State must enact and enforce:

> a ''repeat intoxicated driver law'' * * * that provides * * * that an individual

convicted of a second or subsequent offense for driving while intoxicated or driving under the influence [must be subject to certain specified minimum penalties].

The statute defines the term ''repeat intoxicated driver law'' to mean ''a State law that provides [certain specified minimum penalties for] an individual convicted of a second or subsequent offense for driving while intoxicated or driving under the influence * * *'' The agencies incorporated this definition into the interim final rule. The interim rule also defined the term ''repeat intoxicated driver.'' Consistent with other programs conducted by the agencies and with State laws and practices, the interim regulations provided that an individual is a ''repeat intoxicated driver'' if the driver was convicted of driving while intoxicated or driving under the influence of alcohol more than once in any five-year period.

The terms ''driving while intoxicated'' and ''driving under the influence'' were defined in the statute to mean ''driving or being in actual physical control of a motor vehicle while having an alcohol concentration above the permitted limit as established by each State.'' The statute also defined the term ''alcohol concentration.'' The interim regulations adopted these definitions without change.

The agencies received a number of comments regarding these definitions. Most of the comments sought to expand the definition of the terms ''driving while intoxicated'' and ''driving under the influence,'' so that a broader set of offenses would result in mandatory sanctions.

For example, MADD, Dr. Hedlund and Dr. Voas questioned the use of language in this definition, which provides that offenders must have had ''an alcohol concentration above the permitted limit as established by [the] State.'' As Dr. Hedlund explained in his comments, the inclusion of this language ''raises the issue of whether an alcohol concentration test is required to establish the offense of driving while intoxicated (or driving under the influence). In practice, for a variety of reasons, it is not possible to obtain an alcohol concentration test for every individual arrested for driving while intoxicated. In particular, some individuals refuse to provide a breath test. But many individuals are convicted of driving while intoxicated without an alcohol concentration test, based on other evidence obtained by the arresting officer.'' Accordingly, these three commenters urged the agencies to modify the interim regulations to clarify that the mandatory sanctions must apply to offenders who are convicted of ''driving while intoxicated'' or ''driving under the influence,'' even if their alcohol concentrations are not known.

The agencies agree with these comments. Offenders who were convicted of driving while intoxicated or driving under the influence should not avoid the mandatory sanctions, simply because their alcohol concentrations are not known. Congress would not have intended such an outcome. To provide clarification in the implementing regulations, the agencies have modified the definition of the terms ''driving while intoxicated'' and ''driving under the influence'' to mean ''driving or being in actual physical control of a motor vehicle while having an alcohol concentration above the permitted limit as established by each State, or an equivalent non-BAC intoxicated driving offense.''

These definitions should clarify that, to comply with the Section 164 program, a State's law must apply the mandatory sanctions to any offender who is convicted of driving while intoxicated or driving under the influence of alcohol, whether or not the conviction is based on the offender's alcohol concentration level. The definitions should clarify also that the driving while intoxicated or driving under the influence offense must be the ''standard'' offense in the State. In other words, the sanctions need not apply to lesser included offenses (such as .05 BAC driving while impaired offenses), but it is not sufficient if the sanctions apply only to ''high BAC'' (such as .17 or .20 BAC) offenses.

MADD and the State of Wisconsin recommended two additional changes. They urged the agencies to expand these definitions to require the imposition of mandatory sanctions on offenders who refuse to submit to an alcohol test, even if they are not convicted of driving while intoxicated or driving under the influence, and on offenders who are convicted of driving while under the influence ''of drugs'' other than alcohol.

The agencies are unable to adopt these recommendations because they are outside the scope of the section 164 program, as authorized by Congress. section 164 specifically provides that a conforming ''repeat intoxicated driver law'' is a law that applies the specified mandatory sanctions to individuals ''convicted'' of a second or subsequent offense. Accordingly, the agencies do not have the authority to require that States apply these sanctions to offenders who are not convicted of the driving while intoxicated or driving while under the influence offense. As discussed above, the agencies have modified the regulations to clarify that the mandatory sanctions specified in section 164 must apply to offenders who refuse to submit to an alcohol test and are convicted of driving while intoxicated or driving under the influence. However, the sanctions need not apply to offenders who refuse to submit to an alcohol test and are not convicted of such an offense. Of course, if States choose to apply additional sanctions to these offenders, the section 164 program will not prevent them from doing so.

Similarly, there is nothing in the language or the legislative history of section 164 that indicates that Congress expected that the mandatory sanctions must apply to offenders convicted of driving under the influence ''of drugs'' other than alcohol. In fact, several portions of the statute make it clear that the program was designed specifically to address repeat offenders convicted only of driving while intoxicated or under the influence ''of alcohol.'' For example, the offenses are defined to require that the driver had ''an alcohol concentration above the permitted limit.'' In addition, two of the sanctions that must be imposed include requiring ''an assessment of the individual's degree of abuse of alcohol [not drugs]'' and vehicle sanctions, such as ''the installation of an ignition interlock system'' on the offenders'' vehicles, which would prevent the offender from starting or operating a vehicle with any alcohol (not drugs) in his or her system.

Since these recommended changes would exceed the scope of section 164, they have not been adopted in this final rule.

As stated above, the interim regulations defined the term ''repeat intoxicated driver'' to mean ''a person who has been convicted previously of driving while intoxicated or driving under the influence within the past five years.'' The agencies received two comments, from the State of Delaware and from Advocates, regarding the meaning of this definition.

Specifically, Delaware noted that ''this provision does not take into account an offender who has been arrested of more than one DUI offense within a 5 year period but has not been convicted of both at the time of the second or subsequent arrest.'' Advocates requested clarification about the effect of this definition on States that do not maintain or, ''look back'' at, records for the full five-year period. According to Advocates, ''the agencies do not unequivocally state that laws with only a 3 year ''look back'' provision do not comply with the implementing regulations in the interim final rule.''

The agencies wish to verify that Delaware's interpretation of the regulations is correct. To determine whether an individual is a repeat intoxicated offender for the purpose of this program, the State is required to consider whether an individual was convicted (not arrested) more than once within a five-year period. In response to the comments received from Advocates, we wish to clarify that, to comply with the section 164 requirements, States must not only provide that mandatory sanctions apply to offenders convicted more than once within a five-year period, the States must also ensure that such sanctions are imposed. This requires necessarily that the State has the ability to, and in fact does, ''look back'' five (or more) years to determine whether the sanctions should be applied.

To further clarify this definition, the agencies have modified the language slightly, so that it now provides that the term ''repeat intoxicated driver'' means ''a person who has been convicted of driving while intoxicated or driving under the influence of alcohol more than once in any five-year period.''

D. Specific Comments Regarding the Repeat Intoxicated Driver Criteria

Most comments received by the agencies in response to the interim final rule related to the specific criteria that repeat intoxicated driver laws must meet for a State to avoid a transfer of funds. Comments were received regarding each of the four penalties, described in the criteria, that State laws must impose on repeat intoxicated drivers. These comments and the agencies' responses to them are discussed in greater detail below.

1. A Minimum One-Year License Suspension

Section 164 provides that, to avoid a transfer of funds, the State must have a law that imposes a mandatory minimum one-year driver's license suspension on all repeat intoxicated drivers. The statute defines the term ''license suspension'' to mean ''the suspension of all driving privileges.'' Accordingly, the interim final rule provided that the offender must be subject to a hard suspension (or revocation), for a minimum period of one year, during which the offender cannot be eligible for any driving privileges, such as a restricted or hardship license.

The agencies received comments from NAGHSR, LifeSafer, and the States of Wisconsin, Michigan and Delaware objecting to the one-year hard license suspension requirement. These commenters cited a number of reasons for their objections. Wisconsin, NAGHSR and Michigan, for example, thought a one-year hard license suspension could result in financial hardships to some offenders, particularly those who live in rural communities. According to comments from both NAGHSR and Michigan, ''Rural offenders would be especially adversely impacted since they may not be able to arrange for alternative means of transportation during such an extended period.'' In addition, Delaware, Wisconsin and Michigan suggested that, ultimately, this strict requirement might have the unintended effect of, as Delaware put it, offering some offenders with ''no alternatives'' and encouraging them to drive without a valid license. These commenters all seem to agree that repeat intoxicated drivers should be subject to a one-year driver's license suspension that includes some period of hard suspension, but they suggested hard suspension periods of less than one year, such as 30 or 60 days.

Further, NAGHSR asserted that it had ''found nothing in the legislative history of [section 164] which would support the need for a one-year hard license suspension.'' In addition, Michigan stated that it thought it ''unlikely that any State will be in compliance with the provision'' and NAGHSR predicted that ''few State legislatures will be willing to enact [conforming] legislation.''

The agencies do not share the concerns that were expressed in these comments. Regarding the agencies' authority to include in the regulations a one-year hard driver's license suspension requirement, the agencies have determined that inclusion of this requirement is not only supported by section 164's legislative history, but is required by the plain language of the statute itself. The statute provides specifically that State laws must provide, ''as a minimum penalty, that [repeat intoxicated drivers] * * * shall receive a driver's license suspension for not less than 1 year'' and the statute defines the term ''license suspension'' to mean ''the suspension of *all* driving privileges.'' [Emphasis added.]

Regarding the predictions that few, if any, States would enact conforming legislation, we note that, to date, 23 States and the District of Columbia have laws that NHTSA has determined meet all the section 164 requirements and at least 11 additional States meet the one-year hard driver's license suspension criterion, although they do not meet all the requirements of the section 164 program. We note also that, although they objected initially to this criterion in their comments to the interim final rule, Michigan and Utah are two of the States whose laws have been determined to comply fully with section 164, including the one-year hard license suspension requirement.

Regarding the comments that suggest that a one-year hard license suspension could result in financial hardships to some offenders, particularly those who live in rural communities, the agencies note that the research that has been performed in this area does not support that conclusion. Although the research to date has not studied the impact of hard suspensions of a full one-year period, there has been research that found that hard suspensions of a shorter length of time did not have an impact at all on an offender's employment. In a 1996 study of three States with administrative license revocation programs, for example, researchers found that 94% of the offenders who were employed at the time of arrest were still working after a one-month revocation period. The researchers found also that the percentage of offenders still employed one month after arrest was the same in comparison States that did not apply a license revocation sanction. Moreover, the agencies note that many of the States with conforming laws contain regions that are rural in nature. Some of the States with conforming laws include Alabama, Arizona, Iowa, New Hampshire, Oregon and Utah.

The agencies recognize, as the commenters do, that many offenders who are subject to license suspensions or revocations operate motor vehicles anyway, without a valid license. As we noted in the interim final rule, some studies have found that as many as 70 percent of all repeat offenders continue to drive even after their driver's licenses have been suspended or revoked.

However, the agencies do not believe that the elimination or even the reduction of driver licensing sanctions is the best remedy for this problem. We believe that Congress hoped that States would address that concern instead by enacting strong vehicle sanctions, including those outlined in the second criterion of the section 164 program (and discussed in greater detail below), such as by impounding or immobilizing the motor vehicles owned by the offender during the suspension or revocation period. In addition, States are encouraged, under NHTSA's Section 410 program, to establish separate vehicle sanctions for offenders who operate a motor vehicle while their license is under suspension or revocation.

For the reasons discussed above, this portion of the interim regulations has been adopted without change.

2. Impoundment or Immobilization of, or the Installation of an Ignition Interlock System, on Motor Vehicles

Section 164 provides that, to avoid the transfer of funds, the State must have a law that requires the impoundment or immobilization of, or the installation of an ignition interlock on, each motor vehicle owned by the repeat intoxicated offender.

The term ''impoundment or immobilization'' was defined in the interim regulations to mean ''the removal of a motor vehicle from a repeat intoxicated driver's possession or the rendering of a repeat intoxicated driver's motor vehicle inoperable,'' and the agencies indicated that the definition would also include ''the forfeiture or confiscation of a repeat intoxicated driver's motor vehicle or the revocation or suspension of a repeat intoxicated driver's motor vehicle license plate or registration.'' The agencies defined the term ''ignition interlock system'' in the interim regulations to mean ''a State-certified system designed to prevent drivers from starting their [motor vehicles] when their breath alcohol concentration is at or above a preset level.''

The interim final rule explained that the State law does not need to provide for all three types of penalties to comply with this criterion, but it must require that at least one of the three penalties will be imposed on all repeat intoxicated drivers for the State to avoid the transfer of funds.

The interim final rule also specified that, to comply with the interim regulations, the State law must require that the impoundment or immobilization must be imposed during the one-year suspension period, or that the ignition interlock be installed at the conclusion of the suspension period. The interim regulations did not specify the length of time during which these penalties must remain in effect.

The impoundment, immobilization or ignition interlock criterion is the most complex of the section 164 requirements. Accordingly, it is not surprising that it generated the most comments. Every respondent that submitted comments in response to the interim final rule addressed at least some aspect of this requirement. The comments received regarding this criterion and the agencies' responses to them are discussed in detail below.

a. *Mandatory Penalty.* The agencies explained, in the preamble to the interim final rule, that the State law does not need to provide for all three types of penalties to comply with this criterion, but it must require that at least one of the three penalties will be imposed on all repeat intoxicated drivers, for the State to avoid the transfer of funds. Later in the interim rule, when describing the time frame for these three penalties, the agencies stated that the State law must require that the impoundment or immobilization be imposed during the one-year suspension term, and that the ignition interlock system be installed at the conclusion of the one-year term. These statements generated four comments regarding the mandatory nature of this criterion.

AAMVA and the State of North Dakota objected to the statement that the State law must ''require that at least one of the three penalties will be imposed.'' They asserted that the impoundment, immobilization or ignition interlock sanctions need only ''be available'' or that they ''may'' be imposed. These commenters did not believe that these sanctions ''must'' be imposed. The agencies disagree. Section 164 provides for four minimum penalties, and we find that there is nothing in either the statutory language or the legislative history to suggest that three of the penalties are mandatory and the fourth (the impoundment, immobilization or ignition interlock requirement) is optional.

The commenters seem to base their assertion on the fact that the statute provides that State laws must require that repeat intoxicated drivers must ''receive'' license suspensions, minimum sentences and assessment and treatment, while the statute provides that they must ''be subject to'' the impoundment, immobilization or ignition interlock requirement. The agencies conclude that the difference in language in this provision does not signify any difference in the mandatory nature of the requirement, but is simply a grammatical device used, since an offender may ''receive'' a suspension, a sentence, an assessment and treatment, but an offender would not ''receive'' an impoundment, immobilization or ignition interlock installation. Rather the offender is ''subject to'' these sanctions when the sanctions are applied to the offender's vehicles. The agencies continue to conclude that, to avoid a sanction, the State law must require that at least one of these three penalties must be imposed on all repeat intoxicated drivers.

The State of Nevada objected to the statement in the interim final rule that ''the State law must require that the impoundment or immobilization be imposed during the one-year suspension term, *and* that the ignition interlock system be installed at the conclusion of the one-year term.'' [Emphasis added.] Nevada thought this statement was meant to signify that States must impose the impoundment or immobilization penalty (during the license suspension period) *and also* the ignition interlock penalty (at the end of the suspension period).

However, this was not the meaning that the agencies had intended to convey. Rather, the statement was included simply to clarify the time frames for each of these sanctions. Regarding the mandatory nature of these sanctions, the agencies believe the plain language in the interim regulations is clear. It provides, ''to avoid the transfer of funds * * *, a State must enact and enforce a law that establishes that all repeat intoxicated drivers shall * * * be subject to either * * * the impoundment * * *, immobilization * * * or ignition interlock [sanction].'' In addition, as the agencies explain in the preamble to the interim final rule, ''the State law does not need to provide for all three types of penalties to comply with this criterion, but it must require that at least one of the three penalties will be imposed.'' Since the statement which Nevada found ambiguous was in the preamble to the rule, and not the interim regulations themselves, no regulatory changes are needed in this final rule to clarify this statement.

Moreover, we note that no other commenters interpreted the interim final rule in this way. Advocates, for example, stated in its comments, ''The agencies appropriately analyzed the distinct purposes of these sanctions, and correctly noted that section 164 requires the imposition only of one sanction since they are set forth disjunctively in the statute.''

Accordingly, no changes to the interim regulations have been adopted in response to these comments.

b. *Timing of the Sanctions.* In the interim final rule, the agencies explained that Section 164 does not specify when a State must impose the impoundment or immobilization of, or the installation of an ignition interlock system on, motor vehicles. Therefore, to determine when these penalties must be imposed, the agencies considered the purpose of the three penalties.

The agencies recognized in the interim rule that the purpose of an impoundment or immobilization sanction is very different from that of the installation of an ignition interlock system. We explained that, when an individual convicted of driving while intoxicated is subject to a driver license suspension, it is expected that the

individual will not drive for the length of the suspension term. However, some studies have found that as many as 70 percent of all repeat offenders continue to drive even after their driver's licenses have been suspended or revoked.

Accordingly, the agencies concluded that the laws that provide for the impoundment or immobilization of motor vehicles are designed to ensure that driver's license suspension sanctions are not ignored. They seek to prevent offenders from driving vehicles while their driver's licenses are under suspension.

The agencies explained in the interim final rule that laws that provide for the installation of an ignition interlock system on a motor vehicle, on the other hand, are not designed to prevent the individual from driving. Such laws generally provide that these systems will be installed on a motor vehicle once the individual's driver's license has been restored. The agencies stated that these laws recognize that many individuals convicted of driving while intoxicated have difficulty controlling their drinking. Accordingly, they are designed to prevent individuals, once they are permitted to drive again, from drinking and driving.

Based on the nature of these penalties, the agencies decided in the interim final rule not to adopt a uniform time frame for these three penalties. Instead, the interim regulations provided that the State law must require either the impoundment or immobilization of the offender's vehicles during the one-year suspension term or the installation of an ignition interlock system at the conclusion of the suspension. The interim regulations did not specify the length of time during which these penalties must remain in effect.

The agencies received a number of comments regarding these features of the interim regulations.

Some of the comments expressed support for these aspects of the interim regulations. For example, Advocates stated, ''the agencies accurately recognize that impoundment or immobilization are sanctions that should be imposed concurrently with a one-year suspension, whereas the ignition interlock would logically apply after the suspension is completed.'' However, most of the comments received by the agencies were critical of these aspects of the interim rule.

Regarding the application of impoundment or immobilization sanctions, many of the commenters were troubled that the interim regulations did not establish a minimum length of time for these penalties. NCSL, NAGHSR and the State of Michigan, for example, were concerned that a State could comply with this requirement by impounding or immobilizing a vehicle for a single day, and MADD and LifeSafer ventured that a State may even be able to comply by impounding or immobilizing a vehicle for only an hour. Some of the commenters specified a minimum period of time that would be appropriate, such as 30 days, which was suggested by MADD and Dr. Voas, or 15–30 days, which was suggested by LifeSafer.

Some of the commenters also suggested that the impoundment or immobilization sanction should be imposed quickly, to maximize the impact of these sanctions and to prevent offenders from transferring their vehicles. MADD, LifeSafer and Dr. Voas, for example, urged the agencies to require that such sanctions occur immediately, at the time of the offender's arrest.

Regarding the installation of ignition interlock devices, many of the commenters objected to the requirement that ignition interlock devices must be installed at the conclusion of the one-year driver's license suspension. LifeSafer asserted that these devices have been shown to be effective and predicted that a one-year delay would greatly curtail their use. NCSL and the State of Michigan thought it was unlikely that any State would adopt the ignition interlock sanction under these conditions. MADD asserted that, ''the longer the ignition interlock device remains on the offender's vehicle, the more effective it is in changing his or her behavior and increasing the likelihood of reducing recidivism.'' Accordingly, MADD suggested that ignition interlock devices should be installed at the time of arrest and should remain on the offender's vehicle for a minimum period of one year following license reinstatement.

The agencies have decided not to change the regulations in response to these comments. As the agencies explained in the interim final rule, while section 164 required that State laws must provide for the impoundment or immobilization of, or the installation of an ignition interlock device on, motor vehicles, the statute was silent regarding the timing of these sanctions. Section 164 did not specify the length of time that these sanctions must remain in effect, or require that these sanctions must take place immediately at the time of arrest.

Moreover, the use of these sanctions is still a relatively new development in the field of impaired driving countermeasures. The agencies do not believe there are currently sufficient research findings to dictate a minimum period of time for these sanctions, in the absence of statutory direction. In addition, while States may choose to require the imposition of these sanctions at the time of the offender's arrest as part of their programs, the agencies do not believe we have sufficient information, in the absence of statutory direction, to make this a condition of compliance. Plus, we do not want to stifle innovation. The rule has been drafted, within the framework of the statute, to provide States with as much flexibility as possible, to enable them to establish the terms for conducting their programs in ways that are most appropriate under their own statutory schemes.

While a number of the commenters were concerned that States would be able to qualify under this criterion by impounding or immobilizing vehicles for only a day or even an hour, the agencies note that, to date, 11 States and the District of Columbia have demonstrated compliance with this section 164 criterion based on an impoundment or immobilization law, and no State law provides that vehicles (or the license plate or registration) will be impounded or immobilized for such an insignificant period of time. Although two States provide for a five-day minimum and one State requires a 30 day minimum impoundment or immobilization, all other States and the District of Columbia require that the impoundment or immobilization remain in effect for the duration of the license suspension or for a minimum of at least one year.

Regarding the installation of ignition interlock devices, the agencies recognize that a significant number of offenders continue to drive even after they lose their driving privileges, and that many of them choose not to reapply for a license even once they become eligible to do so. We recognize also that ignition interlock devices have been shown to be effective at reducing the incidence of impaired driving during their use. Accordingly, the agencies appreciate the sentiments expressed by a number of the commenters, who suggested that strategies be used to create an incentive for repeat offenders to drive only with a valid license and not to drink and drive. These commenters recommended that we permit States to restore restricted driving privileges to repeat intoxicated drivers and install ignition interlock devices on their vehicles prior to the completion of a one-year hard license suspension.

However, the agencies continue to conclude that such a strategy is not permitted under section 164, since the

statute specifically provides under the first criterion (discussed in detail above) that State laws must require that repeat intoxicated drivers receive a one-year suspension of *all* their driving privileges. In addition, we find that, while the installation of ignition interlocks has been shown to reduce the incidence of drinking and driving, other strategies (such as impoundment, immobilization or strict driving while suspended laws) may be more appropriate when seeking to prevent offenders whose licenses have been suspended from getting behind the wheel of a vehicle during their periods of suspension.

Morever, we note that, if States choose to install ignition interlock devices on offenders' vehicles prior to the end of the one-year license suspension, as an extra measure of protection against impaired driving, even though the offender should not be driving at all, the regulations will not prevent the States from doing so. However, to satisfy the one-year license suspension criterion of section 164, such States may not restore to these offenders any driving privileges during the one-year period. In addition, to satisfy the impoundment, immobilization or ignition interlock criterion of section 164, the ignition interlock devices must remain on the offenders' vehicles for some period of time after the license suspension has ended.

While some commenters were concerned that States would not be willing to adopt a law that provides for the installation of ignition interlock devices under the conditions established in the interim regulations, the agencies note that, to date, 12 States have demonstrated compliance with this section 164 criterion based on an ignition interlock law.

For all of the reasons discussed above, the agencies have adopted this portion of the interim regulations without change.

c. *All Vehicles Owned by the Offender.* The agencies indicated in the interim final rule that, in order to qualify under this criterion, each motor vehicle owned by the repeat intoxicated driver must be subject to one of the three penalties.

A number of comments were submitted to the agencies objecting to this feature of the rule. The comments raised two types of concerns. Some considered this requirement to be overly broad; others considered its scope not to be broad enough.

The commenters who considered the requirement to be overly broad called it ''unreasonably severe,'' ''unjustified'' and ''counter productive.'' Dr. Hedlund of Highway Safety North, for example, explained that ''State impoundment and immobilization laws typically apply to a single vehicle (the vehicle driven by the offender when the offense was committed), not to all vehicles owned by the offender'' and that ''State interlock programs typically require the offender to install an interlock on his (or her) primary vehicles and require the offender to drive only that vehicle.''

Dr. Hedlund, LifeSafer, NAGHSR and others expressed concern that such a strict application of this requirement could prove to be a disincentive to its adoption and use. In addition, the State of Wisconsin questioned whether the impoundment or seizure of all vehicles owned by an offender would raise constitutional issues. As an alternative, LifeSafer recommended that the ignition interlock sanction should be ''tied'' to the offender's license, rather than to the vehicles owned by the offender (*i.e.*, as a license restriction that provides that the offender may drive only vehicles on which ignition interlocks are installed). Finally, NAGHSR asserted that ''nothing in the legislative history of this provision indicates that Congress intended the sanctions to apply to every vehicle owned by the offender.''

Regarding the agencies' authority to require that these sanctions apply to every vehicle owned by the offender, the agencies have determined that inclusion of this requirement is not only supported by section 164's legislative history, but is required by the plain language of the statute itself. Section 164 provides specifically that repeat intoxicated offenders must ''be subject to the impoundment or immobilization of *each of the individual's motor vehicles* or the installation of an ignition interlock system on *each of the motor vehicles* [emphasis added].''

The agencies believe Congress established these requirements because, for repeat offenders, taking his or her vehicle at the time of arrest and placing an ignition interlock restriction on the offender's license may not be enough. Congress wanted to do more than get the attention of these offenders. Congress wanted States to take steps to prevent repeat intoxicated drivers from driving at all during their license suspension or from drinking and driving once their licenses were returned. If one of the offender's vehicles has been impounded or immobilized, but another vehicle is available at home, or if one of the offender's vehicles is fitted with an ignition interlock device and another is not, these objectives may not be achieved.

Moreover, the agencies note that, to date, 25 States and the District of Columbia have been determined to comply with this criterion, by applying either an impoundment, immobilization or the installation of ignition interlock devices on all motor vehicles owned by repeat intoxicated drivers.

The commenters who considered the requirement not to be broad enough were concerned that offenders could avoid these sanctions by using a variety of ''loopholes.'' Dr. Hedlund of Highway Safety North, MADD and the State of Michigan, for example, were concerned that offenders could transfer title to their vehicles after arrest and prior to conviction; the State of Wisconsin suggested that offenders could register vehicles using the names of friends or family members, or other aliases; and MADD was concerned that offenders could operate vehicles that are ''owned'' by other people.

Section 164 did not require that State laws address these particular issues, and the agencies have not expanded this criterion by adding any such requirements. The agencies note, however, that some States have enacted laws that surpass the minimum requirements established in section 164, and include provisions that have the potential to ''close'' some of these ''loopholes.'' Some States, for example, apply their vehicle sanctions not only to vehicles ''owned'' by the repeat offender, but also to vehicles ''operated'' by such offender. Other State laws contain provisions that specifically prohibit offenders from transferring title to their vehicles. States that choose to include in their laws similar provisions, which exceed the section 164 requirements, are able (and encouraged) to do so, but such provisions are not necessary for the State to demonstrate compliance with the impoundment, immobilization or ignition interlock criterion.

For the reasons discussed above, this portion of the interim regulations has been adopted without change.

d. *Exceptions Permitted.* In the interim final rule, the agencies explained that, consistent with past practices under the section 410 program, the agencies will permit States to provide limited exceptions to the impoundment or immobilization requirements on an individual basis, to avoid undue hardship to an individual, including a family member of the repeat intoxicated driver, or a co-owner of the motor vehicle, but not including the repeat intoxicated driver. However, the agencies decided not to permit an exception to the installation of the ignition interlock system requirement.

The interim final rule explained that the agencies believe that an exception to the requirement that an ignition interlock system be installed is not necessary, since the requirement does not prevent a motor vehicle from being available for others dependent on that vehicle. It only prevents an individual from operating the vehicle under the influence of alcohol.

Comments regarding this portion of the interim regulations suggested that additional exceptions should be permitted. NAGHSR, NCSL and the States of Delaware, Michigan and Wisconsin emphasized that the imposition of an impoundment or immobilization or the installation of ignition interlock devices can be very costly to offenders and their families. Not only do these sanctions cause vehicles to be unavailable, but there are also administrative costs associated with the sanctions. The commenters asserted that these costs can result in an undue financial hardship for many families.

In addition, NAGHSR and LifeSafer both asserted that there is a need for an employer exception. LifeSafer explained that, in States where the ignition interlock device is tied to a restriction on the license, States ''have recognized the need for an employer exemption that allows the offender to operate an employer vehicle in the course and scope of employment without the [ignition interlock device]'' so long as certain conditions are met. LifeSafer states that the exemption is necessary ''to avoid undue hardship on an employer.''

NAGHSR and LifeSafer indicated that the employer exception they seek is needed if the ignition interlock device is tied to a restriction on the offender's license. Since section 164 requires that the installation of ignition interlocks must be tied to all vehicles owned by the offender, and not to the offender's driver's license, the agencies believe the employer exception sought by NAGHSR and LifeSafer is not needed. Accordingly, the agencies have not added an employer exception to the regulations.

Based on the concerns raised in the comments regarding the financial hardship that families may suffer due to the administrative expenses that may be imposed in connection with the installation of ignition interlock devices on each vehicle owned by the offender, however, the agencies have reconsidered their decision to not permit a hardship exception to the ignition interlock sanction.

Accordingly, the interim regulations have been modified in this final rule to add an exception to the ignition interlock requirement. A State may provide an exception to the ignition interlock requirement for financial hardship, provided the State law requires that the offender may not drive a vehicle without an ignition interlock system, such as by requiring that a restriction be placed on the offender's license.

To ensure that the availability of these exceptions do not undermine the impoundment, immobilization or ignition interlock requirements, exceptions must be made in accordance with Statewide published guidelines developed by the State, and in exceptional circumstances specific to the offender's motor vehicle.

e. *Other Comments Related to the Sanctions.* The interim regulations provided that ''impoundment or immobilization'' included ''the removal of a motor vehicle from a repeat intoxicated driver's possession or the rendering of a repeat intoxicated driver's motor vehicle inoperable.'' The interim regulations provided that these terms include also ''the forfeiture or confiscation of a repeat intoxicated driver's motor vehicle or the revocation or suspension of a repeat intoxicated driver's motor vehicle license plate or registration.''

LifeSafer objected to this aspect of the interim regulations. According to LifeSafer, ''physically revoking the license plate or canceling the registration is not anywhere near as strong a message of physically taking or rendering incapable the operation [of] a motor vehicle. Secondly, the sanction is rendered ineffective because another license plate can be quickly obtained or transferred from another vehicle or the vehicle re-registered under another name.''

The agencies find, based on studies conducted in Minnesota and Ohio, that the research demonstrates that the revocation or suspension of vehicle registrations and license plates is an effective sanction. In fact, NHTSA has encouraged States to impose such a sanction on repeat offenders and individuals who drive with a suspended driver's license, under its section 410 program since 1992. Moreover, the agencies are not aware of any research findings that demonstrate a significant difference in effectiveness between the impoundment or immobilization of a motor vehicle as compared with the revocation or suspension of a vehicle registration or license plate. In the absence of any such findings, the agencies prefer to provide the States with some flexibility in this regard.

Finally, NAGHSR recommended in its comments that ignition interlocks should be used as part of a comprehensive, interrelated system, such as one under which the driver's license of the offender is suspended and the offender's vehicle is impounded or immobilized for a short period (*e.g.,* 15–30 days), at the time of arrest. Once that period of time passes, limited driving privileges are restored, the vehicle may be reclaimed and an ignition interlock is installed. Then, when the offender participates and completes treatment, the ignition interlock is removed.

The agencies appreciate the objectives that NAGHSR seeks to meet by suggesting such an approach, and we note that States may take this type of approach, if they wish to do so, when fashioning sanctions for first offenders. However, as stated previously in this final rule, such an approach would not be permitted under section 164 for repeat offenders. Under such an approach, a repeat intoxicated driver would be permitted to receive driving privileges during the initial one-year driver's license suspension period, and the statutory language contained in section 164 specifically requires that *all* driving privileges must be suspended for a period of one year. Accordingly, the agencies are unable to address this comment without an amendment to the underlying statute.

Accordingly, no changes will be made to the interim regulations in response to these particular comments.

3. An Assessment of Their Degree of Alcohol Abuse, and Treatment as Appropriate

Section 164 provides that, to avoid the transfer of funds, the State must have a law that requires that all repeat intoxicated drivers must receive ''an assessment of the individual's degree of abuse of alcohol and treatment as appropriate.'' In the interim final rule, the agencies specified further that the State's law must require that all repeat intoxicated drivers must undergo an alcohol assessment and the law must authorize the imposition of treatment as appropriate.

The agencies received comments regarding this criterion from LifeSafer, NAGHSR, MADD, the State of Delaware and Dr. Voas. Both NAGHSR and LifeSafer indicated that they are aware that there are some States that provide for mandatory treatment of repeat intoxicated offenders, but may not require that these offenders be assessed. In their view, since the treatment is provided automatically, these States should be considered to be fully in

compliance with the assessment and treatment requirement.

It is the view of the agencies that, if a State provides for mandatory treatment of repeat intoxicated offenders and the State's mandatory treatment program includes a mandatory assessment component, such a program will enable the State to demonstrate compliance with the section 164 assessment and treatment criterion. If assessments are not conducted of all repeat offenders as part of such a program, however, the agencies will find that the State's program does not fully comply. This decision is based on the agencies' conclusion that the purpose of the assessment is to determine not only whether an offender should undergo treatment, but also what type and level of treatment is appropriate for that offender. Programs that assign treatment to offenders without first assessing the needs of those offenders may be ineffective in resolving any alcohol abuse problems that the offenders may have. The agencies note that, in addition to the District of Columbia and the 23 States that meet all of the section 164 requirements, at least 10 additional States meet the assessment and treatment criterion.

The agencies received comments also from MADD, the State of Delaware and Dr. Voas regarding this criterion. According to their statements, these commenters do not believe the agencies went far enough in the interim regulations when we provided that the State's law ''must authorize the imposition of treatment as appropriate.'' These commenters urged the agencies instead to require that States make treatment mandatory. MADD, for example, stated that, ''while the rule requires mandatory alcohol assessment, there is no requirement that treatment is mandatory even when the results of the assessment calls for treatment.'' Dr. Voas explained why he thought such a requirement should be adopted. He asserted that ''the value of assessment is entirely dependent on the offender receiving the treatment.''

As the agencies indicated in the interim final rule, there is a wide array of programs and activities that can be used to treat offenders who have alcohol abuse problems. Because of the many options available, the agencies believe it would be difficult to establish a specific requirement in the regulations that would have meaning, and also provide the States and their judicial systems with the flexibility they need to have the greatest impact.

In his comments, Dr. Voas took particular issue with a statement that was included in the preamble to the interim final rule, in which the agencies said that, ''to qualify under this criterion, the State law must make it mandatory for the repeat intoxicated driver to undergo an assessment, but the law need not impose any particular treatment (or any treatment at all).'' The agencies wish to clarify that, the agencies did not mean to imply by this statement that States should not refer individuals to treatment if treatment is warranted. Since the Section 164 requirements provide that all repeat intoxicated drivers must be assessed, we trust that the court systems will refer those offenders to treatment when warranted, and that offenders will be referred to the treatment that is most appropriate. Since the statement to which Dr. Voas objected was in the preamble to the rule, and not the interim regulations themselves, no regulatory changes are needed in this final rule to clarify this statement.

For the reasons discussed above, this portion of the interim regulations has been adopted without change.

4. Mandatory Minimum Sentence

Section 164 provides that, to avoid a transfer of funds, the State must have a law that imposes a mandatory minimum sentence on all repeat intoxicated drivers. For a second offense, the law must provide for a mandatory minimum sentence of not less than five days of imprisonment or 30 days of community service. For a third or subsequent offense, the law must provide for a mandatory minimum sentence of not less than ten days of imprisonment or 60 days of community service.

The agencies explained in the interim final rule that, consistent with NHTSA's administration of the section 410 program, the term ''imprisonment'' has been defined to include ''confinement in a jail, minimum security facility, community corrections facility, * * * inpatient rehabilitation or treatment center, or other facility, provided the individual under confinement is in fact being detained.'' In addition, we indicated in the interim final rule that house arrests would be included within the definition of ''imprisonment'' under the section 164 program, provided that electronic monitoring is used.

We received five comments in response to the interim final rule regarding this criterion. Most of the comments received related to the agencies' decision to include house arrests within the definition of imprisonment.

MADD and Dr. Voas objected to its inclusion. They argued that a house arrest for a period of only five or ten days is not a sufficiently strong penalty. MADD, for example, asserted ''House arrest does not carry with it the specific deterrence or social stigma that incarceration in a jail facility does.'' According to MADD, such a penalty ''will have little or no impact on reducing recidivism which is the very purpose of this legislation.''

Conversely, LifeSafer, NAGHSR and Advocates supported the inclusion of house arrest, coupled with electronic monitoring, within the definition of the term imprisonment. LifeSafer ''applauded'' this decision based on its belief that ''jail is the least effective sanction to reduce recidivism, States have severe jail overcrowding problems * * * [and] studies which indicate electronic monitoring has an impact greater than jail on reducing recidivism.'' NAGHSR called this aspect of the interim rule the ''most positive attribute of the interim final regulations.'' According to Advocates, ''although the historic use of the word imprisonment entails confinement in a traditional prison facility, we agree with the agencies that non-traditional approaches and the use of technological advancements should be utilized in attempt to make inroads against repeat intoxicated offenders. In this regard it is clear that courts are using home confinement and monitoring as an alternative means of detaining criminal offenders.''

As noted in the interim final rule, recent NHTSA research seems to indicate that house arrests are effective if they are coupled with electronic monitoring. While the agencies recognize that the periods of house arrest studied tended to be longer than five or ten days, we consider this alternative means of detaining offenders to be a promising strategy that should not be stifled under the provisions of these regulations. Accordingly, the agencies have decided to continue to permit States to use house arrest, coupled with electronic monitoring, in lieu of other confinement methods.

Dr. Voas suggested in his comments that, if the use of house arrest is permitted under the regulations, the State should extend the period of detention from five or ten days to a period of 90 days. The agencies do not find authority for establishing such an alternative length of time in the section 164 statute. Accordingly, we have not adopted this change in the regulations.

Finally, NCSL pointed out that many States have, over the years, enacted mandatory minimum sentences for repeat intoxicated drivers, in response to the Federal requirements that were established in the section 410 program.

However, since section 164 requires States to establish a longer mandatory sentence (five and ten days, rather than 48 hours), even these States will need to enact new legislation. The agencies agree with NCSL's observation. However, these longer sentencing requirements are dictated by the statute.

This portion of the interim regulations has been adopted without change.

E. Certifications

The interim final rule provided that, to avoid a transfer of funds, each State must submit a certification demonstrating compliance with the four section 164 criteria, which includes citations to all applicable provisions of their laws, as well as regulations or case law, as needed. The certifications must also assert that the State is enforcing its law. According to the interim final rule, once a State has been determined to be in compliance with the section 164 requirements, the State would not be required to resubmit certifications in subsequent fiscal years, unless the State's law had changed or the State had ceased to enforce its repeat intoxicated driver law. The interim final rule provided that it is the responsibility of each State to inform the agencies of any such change in a subsequent fiscal year, by submitting an amendment or supplement to its certification.

The interim final rule provided further that, to avoid a transfer in FY 2001, the agencies must receive a State's certification no later than September 30, 2000, and the certification must indicate that the State ''has enacted and is enforcing a repeat intoxicated driver law that conforms to 23 U.S.C. 164 and [the agencies' implementing regulations].'' States found in noncompliance with the requirements in any fiscal year, once they have enacted complying legislation and are enforcing the law, must submit a certification to that effect before the following fiscal year to avoid a transfer of funds in that following fiscal year. The interim rule indicated that such certifications must be submitted by October 1 of the following fiscal year.

In its comments in response to the interim final rule, Advocates recommended that States should be required to submit more than a certification to demonstrate that they are enforcing their repeat intoxicated driver laws. Advocates stated, ''while the agencies need not require burdensome evidence of such enforcement, some indicia that a good faith effort is being made to enforce the repeat offender law should be sought. Since convictions and penalties imposed under such a law are relatively simple to establish through computerized records, the agencies can require some indicia as to the level of state enforcement without imposing significant burdens on the states.''

The agencies have not adopted this change. While there may be information in computerized records that States would be able to compile and submit to the agencies, we are uncertain how such a sufficient ''level of enforcement'' would be defined. Moreover, we find that the benefit of such a reporting requirement would not justify the effort that would be required.

Although the agencies did not receive any comments regarding the dates by which certifications must be submitted, we have concluded that this feature of the regulations requires clarification. The interim final rule provided that conforming certifications were due by September 30 to avoid a transfer of funds in FY 2001, and that certifications from States that did not previously comply with section 164 were due by October 1 to avoid a transfer of funds in subsequent fiscal years. To avoid confusion, the agencies have concluded that the same date should apply in any fiscal year. Accordingly, the regulations have been changed to provide that, to avoid a transfer of funds in FY 2001 or in any subsequent fiscal year, States will be required to submit certifications by September 30.

In addition, some States enacted conforming laws prior to September 30, 2000, but their new laws will not be effective until the next day, on October 1, 2000. The interim rule, which requires States to assert that they are already enforcing their laws on September 30, did not anticipate this occurrence. The agencies have determined that a conforming law that becomes effective on October 1 will enable a State to avoid a transfer of funds on that date. Accordingly, the agencies have amended the regulations to enable these States to certify that they have enacted a repeat intoxicated driver law that conforms to 23 U.S.C. 164 and the agencies' implementing regulations, and that the law will become effective and be enforced by October 1 of the following fiscal year.

F. Transfer of Funds

As explained in the interim final rule, section 164 provides that the Secretary must transfer a portion of a State's Federal-aid highway funds apportioned under sections 104(b)(1), (3), and (4) of Title 23 of the United States Code, for the National Highway System, Surface Transportation Program and Interstate System, to the State's apportionment under section 402 of that title, if the State does not meet certain statutory requirements.

The interim rule indicated that, in accordance with the statute, the amount to be transferred from a non-conforming State will be calculated based on a percentage of the funds apportioned to the State under each of sections 104(b)(1), (3) and (4). However, the actual transfers need not be drawn evenly from these three sources. The transferred funds may come from any one or a combination of the apportionments under sections 104(b)(1), (3) and (4), as long as the total amount meets the statutory requirement.

One commenter noted that the interim rule did not specify which State agency has authority to decide from which category funds should be transferred. The agencies believe that, because the decision concerning which of the three highway apportionments should lose funds solely affects State Department of Transportation (DOT) programs, the State DOT should have authority to inform the FHWA of any changes in distribution. The agencies have added language to the final rule, in the section on Transfer of Funds, indicating that on October 1, the FHWA will make the transfers based on a proportionate amount, then the State's Department of Transportation will be given until October 30 to notify the FHWA if they would like to change the distribution among sections 104(b)(1), (3) and (4).

The interim rule indicated that the funds transferred to section 402 could be used for alcohol-impaired driving countermeasures or directed to State and local law enforcement agencies for the enforcement of laws prohibiting driving while intoxicated, driving under the influence or other related laws or regulations. In addition, the interim final rule indicated that States may elect to use all or a portion of the transferred funds for hazard elimination activities under 23 U.S.C. 152.

NAGHSR, Michigan, Delaware and NCSL noted that the interim final rule did not specify which State agency has the authority to determine how transferred funds should be used. NAGSHR stated that ''it is unclear whether these decisions are state department of transportation decisions, state highway safety office decisions, or both.'' Michigan suggested that ''it should be made clear that all affected state agencies are to participate, and that states' decisions may be guided by the traffic safety benefit returned by the investment.''

The agencies have determined that all of the affected State agencies should participate in deciding how transferred funds should be directed. Accordingly, the agencies have added language to the section on Use of Transferred Funds

specifying that both the State DOT, which will ''lose'' the funds, and the State Highway Safety Office (SHSO), which will ''gain'' the funds must decide jointly.

The State DOT and SHSO officials will provide written notification of their funding decisions to the agencies, within 60 days of the transfer, identifying the amounts of apportioned funds to be obligated to alcohol-impaired driving programs, hazard elimination programs, and related planning and administration costs allowable under section 402. This process will permit account entries to be made. Joint decision making by the DOT and SHSO is the same process required by NHTSA and the FHWA for other TEA 21 programs in which Congress authorized flexible highway safety/highway construction funding choices—the section 157 Seat Belt Use Incentive Grant Program, the section 163.08 BAC *Per Se* Incentive Program and the section 154 Open Container Transfer Program.

IV. Regulatory Analyses and Notices

A. Executive Order 12778 (Civil Justice Reform)

This final rule will not have any preemptive or retroactive effect. The enabling legislation does not establish a procedure for judicial review of final rules promulgated under its provisions. There is no requirement that individuals submit a petition for reconsideration or pursue other administrative proceedings before they may file suit in court.

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

The agencies have determined that this action is not a significant action within the meaning of Executive Order 12866 or significant within the meaning of Department of Transportation Regulatory Policies and Procedures. States can choose to enact and enforce a repeat intoxicated driver law, in conformance with Pub. Law 105–206, and thereby avoid the transfer of Federal-aid highway construction funds. Alternatively, if States choose not to enact and enforce a conforming law, their funds will be transferred, but not withheld. Accordingly, the amount of funds provided to each State will not change.

In addition, the costs associated with this rule are minimal and are expected to be offset by resulting highway safety benefits. The enactment and enforcement of repeat intoxicated driver laws should help to reduce impaired driving, which is a serious and costly problem in the United States. Accordingly, further economic assessment is not necessary.

C. Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. Law 96–354, 5 U.S.C. 601–612), the agencies have evaluated the effects of this action on small entities. This rulemaking implements a new program enacted by Congress in the TEA 21 Restoration Act. As the result of this new Federal program and the implementing regulations, States will be subject to a transfer of funds if they do not enact and enforce repeat intoxicated driver laws that provide for certain specified mandatory penalties. This final rule will affect only State governments, which are not considered to be small entities as that term is defined by the Regulatory Flexibility Act. Thus, we certify that this action will not have a significant impact on a substantial number of small entities and find that the preparation of a Regulatory Flexibility Analysis is unnecessary.

D. Paperwork Reduction Act

This action does not contain a collection of information requirement for purposes of the Paperwork Reduction Act of 1980, 44 U.S.C. Chapter 35, as implemented by the Office of Management and Budget (OMB) in 5 CFR part 1320.

E. National Environmental Policy Act

The agencies have analyzed this action for the purpose of the National Environmental Policy Act, and have determined that it will not have a significant effect on the human environment.

F. The Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (Pub. Law 104–4) requires agencies to prepare a written assessment of the costs, benefits and other effects of final rules that include a Federal mandate likely to result in the expenditure by the State, local or tribal governments, in the aggregate, or by the private sector, of more than $100 million annually. In the interim final rule, the agencies indicated that the section 164 program did not meet the definition of a Federal mandate, because the resulting annual expenditures were not expected to exceed $100 million and because the States were not required to enact and enforce a conforming repeat intoxicated driver law.

NCSL asserted that the rule will result in an unfunded mandate. It stated that ''the total cost to the states to enforce these repeat offender laws will exceed one hundred million dollars in cost.'' NCSL noted that the UMRA requires agencies to prepare a written assessment of the anticipated costs and benefits of any unfunded Federal mandate and that NHTSA failed to do so. NCSL asserted also that NHTSA failed to consult with State officials to determine the financial and political ramifications of this regulatory proposal.

The agencies have determined that the rule will not result in an unfunded mandate because the section 164 program is optional to the States. States may choose to enact and enforce a conforming repeat intoxicated driver law and avoid the transfer of funds altogether. Alternatively, if States choose not to enact and enforce a conforming law, funds will be transferred, but no funds will be withheld from any State. Moreover, the agencies do not believe that the resulting cost to States from implementing conforming laws will be over $100 million. Prior to the passage of TEA 21, States already had enacted and were enforcing repeat intoxicated driver laws. Some of these States have amended their laws to conform to the new section 164 requirements, but such changes will not result in expenditures of over $100 million. For States that have amended their repeat intoxicated driver laws, the cost to enact such amendments will be minimal. There may be some costs to provide training to law enforcement or other officials or to educate the public about these changes, but these costs are not likely to be significant.

In the interim final rule, the agencies recommended that States incorporate into their enforcement efforts activities designed to inform law enforcement officers, prosecutors, members of the judiciary and the public about their repeat intoxicated driver laws. In addition, the agencies advised States to take steps to integrate their repeat intoxicated driver enforcement efforts into their enforcement of other impaired driving laws. If States take these steps, the cost to enforce such laws would likely be absorbed into the State's overall law enforcement budget because the States would not be required to conduct separate enforcement efforts to enforce their repeat intoxicated driver laws.

Accordingly, the agencies have determined that it is not necessary to prepare a written assessment of the costs and benefits, or other effects of the rule.

G. Executive Order 13132 (Federalism)

This action has been analyzed in accordance with the principles and

criteria contained in Executive Order 13132, and it has been determined that this action does not have sufficient federalism implications to warrant the preparation of a federalism assessment. Accordingly, a Federalism Assessment has not been prepared.

List of Subjects in 23 CFR Part 1275

Alcohol and alcoholic beverages, Grant programs—transportation, Highway safety.

In consideration of the foregoing, the interim final rule published in the **Federal Register** of October 19, 1998, 63 FR 55796, is adopted as final, with the following changes:

PART 1275—REPEAT INTOXICATED DRIVER LAWS

1. The authority citation for part 1275 continues to read as follows:

Authority: 23 U.S.C. 164; delegation of authority at 49 CFR 1.48 and 1.50.

2. Section 1275.3 is amended by revising paragraphs (c) and (k) to read as follows:

§ 1275.3 Definitions.

* * * * *

(c) *Driving while intoxicated* means driving or being in actual physical control of a motor vehicle while having an alcohol concentration above the permitted limit as established by each State, or an equivalent non-BAC intoxicated driving offense.

* * * * *

(k) *Repeat intoxicated driver* means a person who has been convicted of driving while intoxicated or driving under the influence of alcohol more than once in any five-year period.

* * * * *

3. In § 1275.4, paragraph (b)(2) is redesignated as paragraph (b)(3) and a new paragraph (b)(2) is added to read as follows:

§ 1275.4 Compliance criteria.

* * * * *

(b) * * *

(2) A State may provide limited exceptions to the requirement to install an ignition interlock system on each of the offender's motor vehicles, contained in paragraph (a)(2)(iii) of this section, on an individual basis, to avoid undue financial hardship, provided the State law requires that the offender may not operate a motor vehicle without an ignition interlock system.

* * * * *

4. Section 1275.5 is amended by revising paragraph (b) to read as follows:

§ 1275.5 Certification requirements.

* * * * *

(b) The certification shall be made by an appropriate State official, and it shall provide that the State has enacted and is enforcing a repeat intoxicated driver law that conforms to 23 U.S.C. 164 and § 1275.4 of this part.

(1) If the State's repeat intoxicated driver law is currently in effect and is being enforced, the certification shall be worded as follows:

(Name of certifying official), (position title), of the (State or Commonwealth) of _____, do hereby certify that the (State or Commonwealth) of _____, has enacted and is enforcing a repeat intoxicated driver law that conforms to the requirements of 23 U.S.C. 164 and 23 CFR 1275.4, (citations to pertinent State statutes, regulations, case law or other binding legal requirements, including definitions, as needed).

(2) If the State's repeat intoxicated driver law is not currently in effect, but will become effective and be enforced by October 1 of the following fiscal year, the certification shall be worded as follows:

(Name of certifying official), (position title), of the (State or Commonwealth) of _____, do hereby certify that the (State or Commonwealth) of _____, has enacted a repeat intoxicated driver law that conforms to the requirements of 23 U.S.C. 164 and 23 CFR 1275.4, (citations to pertinent State statutes, regulations, case law or other binding legal requirements, including definitions, as needed), and will become effective and be enforced as of (effective date of the law).

* * * * *

5. Section 1275.6 is amended by adding paragraph (c) to read as follows:

§ 1275.6 Transfer of funds.

* * * * *

(c) On October 1, the transfers to section 402 apportionments will be made based on proportionate amounts from each of the apportionments under 23 U.S.C. 104(b)(1),(b)(3) and (b)(4). Then the States will be given until October 30 to notify FHWA, through the appropriate Division Administrator, if they would like to change the distribution among 23 U.S.C. 104(b)(1),(b)(3) and (b)(4).

6. Section 1275.7 is amended by redesignating paragraphs (c) through (f) as paragraphs (d) through (g), and by adding a new paragraph (c) to read as follows:

§ 1275.7 Use of transferred funds.

* * * * *

(c) The Governor's Representative for Highway Safety and the Secretary of the State's Department of Transportation for each State shall jointly identify, in writing to the appropriate NHTSA Administrator and FHWA Division Administrator, how the funds will be programmed among alcohol-impaired driving programs, hazard elimination programs, and planning and administration costs, no later than 60 days after the funds are transferred.

* * * * *

Issued on: September 28, 2000.

Kenneth R. Wykle,

Administrator, Federal Highway Administration.

Dr. Sue Bailey,

Administrator, National Highway Traffic Safety Administration.

[FR Doc. 00–25384 Filed 9–29–00; 3:34 pm]

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DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 66

[USCG 2000–7466]

RIN 2115–AF98

Allowing Alternatives to Incandescent Light in Private Aids to Navigation

AGENCY: Coast Guard, DOT.

ACTION: Direct final rule.

SUMMARY: The Coast Guard is removing the requirement to use only tungsten-incandescent lighting for private aids to navigation. It will enable private industry and owners of private aids to navigation to take advantage of recent changes in lighting technology-specifically to use lanterns based on light-emitting diodes (LEDs). The greater flexibility will reduce the consumption of power and simplify the maintenance of private aids to navigation.

DATES: This direct final rule is effective January 3, 2001, unless a written adverse comment, or written notice of intent to submit one, reaches the Docket Management Facility on or before December 4, 2000. If an adverse comment, or notice of intent to submit one, does reach the Facility on or before then, the Coast Guard will withdraw this rule and publish a timely notice of withdrawal in the **Federal Register**.

ADDRESSES: You may mail your comments or notices of intent to submit them to the Docket Management Facility [USCG 2000–7466], U.S. Department of Transportation, room PL–401, 400 Seventh Street SW., Washington DC 20590–0001, or deliver them to room PL–401 on the Plaza level of the Nassif Building at the same address between 10 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.