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DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

Federal Highway Administration

23 CFR Parts 1270 and 1275

[Docket No. NHTSA-2016-0099]

RIN 2127-AL45

Regulatory Update of Transfer and Sanction Programs

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

ACTION: Interim final rule; request for comments.

SUMMARY: This action revises the Federal implementing regulations for the Section 154 (Open Container) and Section 164 (Repeat Intoxicated Driver) programs as a result of enactment of the Fixing America's Surface Transportation (FAST) Act. It incorporates the new compliance criteria for the Section 164 program and updates the regulations to reflect current practice. This document is being issued as an interim final rule to ensure that States receive instructions that are important to upcoming compliance determinations to be made on October 1, 2016. The agencies request comments on this rule. The agencies will publish a document responding to any comments received and, if appropriate, will amend provisions of the regulations.

DATES: This interim final rule is effective on October 1, 2016. Comments concerning this interim final rule are due on November 30, 2016.

ADDRESSES: You may submit comments using the number identified in the heading of this document by any of the following methods:

- Federal eRulemaking Portal: Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.
- Mail: Docket Management Facility, M-30, U.S. Department of Transportation, West Building, Ground Floor, Rm. W12-140, 1200 New Jersey Avenue, SE., Washington, D.C. 20590.
- Hand Delivery or Courier: West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, S.E., between 9 am and 5 pm Eastern Time, Monday through Friday, except Federal holidays.
- Fax: (202) 493-2251.

Regardless of how you submit your comments, please mention the docket number of this document.

You may also call the Docket at 202-366-9324.

Instructions: For detailed instructions on submitting comments and additional information on the rulemaking process, see the Public Participation heading of the Supplementary Information section of this document. Note that all comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

Privacy Act: Please see the Privacy Act heading under Regulatory Analyses and Notices.

Docket: All documents in the docket are listed in the <http://www.regulations.gov> index. Publicly available docket materials are available either electronically in

www.regulations.gov or in hard copy at the Docket Management Facility, M-30, U.S.

Department of Transportation, West Building, Ground Floor, Room W12-140, 1200 New Jersey Avenue, S.E., Washington, DC. The Docket Management Facility is open between 9 a.m. and 5 p.m., Eastern Time, Monday through Friday, except Federal holidays.

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I. Introduction

On December 4, 2015, the President signed into law the Fixing America's Surface Transportation Act (FAST Act), Public Law 114–94, the first authorization enacted in over ten years that provides long-term funding certainty for surface transportation. The FAST Act amended 23 U.S.C. § 154 (Section 154) and 23 U.S.C. § 164 (Section 164), which address the serious national problems of impaired driving by encouraging States to meet minimum standards for their open container laws and repeat intoxicated driver laws. The FAST Act built on prior amendments to those sections in the Moving Ahead for Progress in the 21st Century Act (MAP-21), Public Law 112–141, signed into law on July 6, 2012.

The National Highway Traffic Safety Administration (NHTSA) and the Federal Highway Administration (FHWA) (collectively, “the agencies”) are issuing this interim final rule (IFR), with immediate effectiveness, to ensure that States receive instructions that are important to upcoming compliance determinations to be made on October 1, 2016, as the changes in the FAST Act are effective on that date. This IFR amends the Federal implementing regulations for Section 154 (23 CFR Part 1270) and Section 164 (23 CFR Part 1275) to reflect the changed requirements from the recent Federal legislation. At the same time, the agencies are taking this opportunity to update the regulations to improve clarity, codify longstanding interpretation of the statutes and current regulations, and streamline procedures for States.

This preamble will first address the history of and modifications to the minimum compliance requirements of Section 154 and Section 164, respectively. It will then address the elements common to both programs, including the penalties for noncompliance, the limitations on use of funds associated with noncompliance, and the responsibilities of compliant and non-compliant States.

II. Section 154: Open Container Laws

A. Background

The Transportation Equity Act for the 21st Century (TEA-21), Public Law 105–178, was signed into law on June 9, 1998. On July 22, 1998, the TEA-21 Restoration Act, Public Law 105–206 (a technical corrections bill), was enacted to restore provisions that were agreed to by the conferees to TEA-21, but were not included in the conference report. Section 1405 of the TEA-21 Restoration Act amended chapter 1 of title 23, United States Code (U.S.C.), by adding Section 154, which established a transfer program under which a percentage of a State’s Federal-aid highway construction funds would be transferred to the State’s apportionment under 23 U.S.C. § 402 (Section 402) if the State failed to enact and enforce a conforming “open container” law. These funds could be used for alcohol-impaired driving countermeasures or the enforcement of driving while intoxicated laws, or States could elect to use all or a portion of the funds for hazard elimination activities under 23 U.S.C. § 152.

Under Section 154, to avoid the transfer of funds, a State must enact and enforce an open container law “that prohibits the possession of any open alcoholic beverage container, or the consumption of any alcoholic beverage, in the passenger area of any motor vehicle (including possession or consumption by the driver of the vehicle) located

on a public highway, or the right-of-way of a public highway, in the State.” 23 U.S.C. § 154(b)(1). All 50 States, the District of Columbia, and Puerto Rico are considered to be States for the purposes of this program.

On October 6, 1998, the agencies published an interim final rule implementing the Section 154 program, 63 FR 53580 (Oct. 6, 1998), followed by a final rule published on August 24, 2000. 65 FR 51532 (Aug. 24, 2000). Since that time, the minimum requirements that a State’s open container law must meet to comply with Section 154 have not changed. However, subsequent legislation amended the penalty provisions that apply to non-compliant States. Under current law, noncompliance results in the reservation of funds rather than an immediate transfer to Section 402; funds are reserved from different Federal-aid highway programs and in a different amount (based on a percentage defined in law); the transfer to Section 402 is dependent upon a State’s election to use funds for alcohol impaired driving countermeasures; and funds may be used for highway safety improvement program activities eligible under 23 U.S.C. § 148 rather than hazard elimination activities. The Federal implementing regulations were never updated to reflect these statutory changes governing procedures.

This IFR updates the Federal implementing regulations to reflect these procedural changes. In addition, it makes changes to improve clarity, codify longstanding interpretations of the Federal statute and regulations, streamline procedures for States, and eliminate regulatory provisions that were not effectuated in practice for reasons discussed below. These changes are intended to ensure a uniform understanding among the States of the minimum requirements their open container laws must meet. Revisions to the procedures for demonstrating compliance, the penalties for noncompliance, and the

responsibilities of compliant and non-compliant States are discussed later in the preamble as those aspects are common to the Section 154 program and the Section 164 program.

B. Compliance Criteria for State Open Container Laws

NHTSA is delegated the authority by the Secretary of Transportation to determine State compliance under Section 154 (49 CFR § 1.95(f)). While Congress has not changed the minimum requirements that a State's open container law must meet to comply with Section 154 since the inception of the program, NHTSA's experience implementing the compliance criteria since the regulations were finalized in 2000 suggests the need to provide additional clarity to the States on particular aspects of the requirements. States are responsible for ensuring and maintaining their own compliance with these requirements. The agencies believe that the discussion in this preamble and the revisions to the regulations will allow States to better understand the program and attain and maintain compliance. These revisions are not intended to substantively amend the compliance requirements of the Section 154 program.

1. Definitions (23 CFR § 1270.3)

The agencies are adding definitions for the terms "FHWA," "NHTSA," and "open container law" and eliminating the definition for "enact and enforce." The added definitions are for terms used in the regulation, while the elimination of the definition of "enact and enforce" is simply because the term is plain and does not need a definition. The regulations continue to require a State to "enact and enforce" a compliant law.

The agencies are amending the definition of "open alcoholic beverage container" to add the parenthetical phrase "(regardless of whether it has been closed or resealed.)"

23 CFR § 1270.3(e).¹ This is intended to make clear that “cork and carry” or “resealed wine container” laws exempting a recorked or resealed alcoholic beverage container from the State’s open container laws are not allowed under the Federal law. Recorking or resealing does not negate the fact that the contents in the bottle have been partially removed, a direct concern under the Federal statute. Due to the preponderance of these laws in States, the agencies determined that this clarification is necessary. Recorked or resealed alcoholic beverages containers must be stored outside of the passenger area, such as in the trunk of a motor vehicle.

2. Compliance Criteria (23 CFR § 1270.4(a)-(c))

Congress has made no changes to the substantive compliance criteria of Section 154 since the inception of the program. Therefore, the agencies are not making any substantive changes to these sections of the regulations. The six compliance criteria are discussed extensively in the interim final rule (63 FR 53580 [Oct. 6, 1998]) and final rule (65 FR 51532 [Aug. 24, 2000]) that first implemented the program. Those discussions provide background and explanations regarding the Federal minimum requirements.

3. Exceptions (23 CFR § 1270.4(d))

The Federal implementing regulations require a State’s open container law to apply to “the passenger area of any motor vehicle,” with passenger area meaning “the area designed to seat the driver and passengers while the motor vehicle is in operation and any area that is readily accessible to the driver or a passenger while in their seating positions, including the glove compartment.” 23 CFR §§ 1270.3(g), 1270.4(b)(2).

¹ Throughout this preamble, citations to the Section 154 and Section 164 implementing regulations refer to the version as amended by the IFR.

However, certain exceptions to this rule are permitted provided they comply with the requirements in 23 CFR § 1270.4(d)(1).

The Federal regulations have long permitted possession of an open alcoholic beverage container in a locked glove compartment. NHTSA has accepted as compliant a State provision permitting storage of an open container in a locked center console because a locked center console is functionally equivalent to a locked glove compartment. This IFR logically extends that exception to allow possession of an open alcoholic beverage container in any locked container (including a locked fixed console or a locked glove compartment). The agencies emphasize that this exception does not permit the possession in the passenger area of an open alcoholic beverage container in tamper-evident packaging. (See the earlier discussion about “cork and carry” and “resealed wine container” provisions.) While tamper-evident packaging may assist law enforcement officers in identifying whether consumption of the alcoholic beverage has occurred, it does not restrict access to the alcoholic beverage, which is the purpose of open container laws.

This IFR also moves the location of the phrase “in a motor vehicle that is not equipped with a trunk” to remove any ambiguity that this is a prerequisite for allowing placement of an open alcoholic beverage container behind the last upright seat or in an area not normally occupied by the driver or a passenger. No substantive change is intended—the agencies have always interpreted and applied this provision in this manner.

The Federal implementing regulations require a State’s open container law to apply to all occupants of a motor vehicle. However, the Federal statute and implementing regulations permit exceptions allowing a passenger, but never a driver, to

possess an open alcoholic beverage container or consume an alcoholic beverage in the passenger area of “a motor vehicle designed, maintained, or used primarily for the transportation of persons for compensation, or in the living quarters of a house coach or house trailer.” 23 CFR § 1270.4(d)(2). The agencies are making technical corrections to this provision that do not change its application.

III. Section 164: Repeat Intoxicated Driver Laws

A. Background

Section 1406 of the TEA-21 Restoration Act amended chapter 1 of title 23, U.S.C., by adding Section 164, which established a transfer program under which a percentage of a State’s Federal-aid highway construction funds would be transferred to the State’s apportionment under Section 402 if the State failed to enact and enforce a conforming “repeat intoxicated driver” law. As with Section 154, transfer funds could be used for alcohol-impaired driving countermeasures or the enforcement of driving while intoxicated laws, or States could elect to use all or a portion of the funds for hazard elimination activities under 23 U.S.C. § 152.

Under Section 164, to avoid the transfer of funds, a State must enact and enforce a repeat intoxicated driver law that establishes, at minimum, certain specified penalties for second and subsequent convictions of driving while intoxicated or driving under the influence. As originally enacted, Section 164 required that States impose the following minimum penalties: 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; an 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. All 50 States, the District of Columbia, and Puerto Rico are considered to be States for the purposes of this program.

On October 19, 1998, the agencies published an interim final rule that implemented the Section 164 program, 63 FR 55796 (Oct. 19, 1998), followed by a final rule published on October 4, 2000. 65 FR 59112 (Oct. 4, 2000). The SAFETEA-LU Technical Corrections Act of 2008, Pub. L. 110-244 (enacted June 6, 2008), amended some of the minimum penalties States must impose on repeat offenders, and both MAP-21 and the FAST Act further amended these minimum penalties. These Acts also updated, in the same ways as Section 154, the penalty provisions that apply to States that are not compliant with the program. Despite these significant statutory changes over the past eight years, the Federal implementing regulations have not been updated since 2000.

This IFR updates the minimum compliance criteria based on these legislative changes, as well as to improve clarity, codify longstanding interpretations, streamline procedures for States, and eliminate regulatory provisions that were not effectuated in practice for reasons discussed below. As with Section 154, these changes are intended to ensure a uniform understanding among the States of the minimum requirements their repeat intoxicated driver laws must meet. Revisions to the procedures for demonstrating compliance, the penalties for noncompliance, and the responsibilities of compliant and non-compliant States are discussed later in the preamble as those apply also to the Section 154 program.

B. Minimum Repeat Intoxicated Driver Law Requirements

Unlike the Section 154 program, Congress has made substantive amendments to the requirements that a State's repeat intoxicated driver law must meet to comply with Section 164. Many of the revisions described in this section codify those substantive statutory changes, as the regulations have not been updated since 2000. In other cases, the agencies are simply improving the clarity of the regulations to reflect longstanding application of the Federal statute since 2000.

1. Definitions (23 CFR § 1275.3)

The agencies are adding definitions for "FHWA" and "NHTSA" and eliminating the definition for "enact and enforce," consistent with the approach for 23 CFR § 1270.3. The agencies are eliminating the definitions for "driver's motor vehicle" and "impoundment or immobilization," as the compliance criterion to which these applied was repealed by the FAST Act. The agencies are eliminating the definition for "license suspension," as the compliance criterion to which it applied has been reworded, rendering the definition superfluous. The agencies are adding a definition for "24-7 sobriety program" due to FAST Act revisions to the general compliance criteria. Because the definition of the term in the FAST Act cross-references 23 U.S.C. § 405(d)(7)(A), the agencies have similarly tied the definition here to the meaning given to it in NHTSA's Section 405 implementing regulations (see 23 CFR § 1300.23(b)). 23 CFR § 1270.3(a). This necessitates adding a reference to a "combination of laws or programs" to the definition of "repeat intoxicated driver law" to accommodate these 24-7 sobriety programs. Finally, the agencies are adding a definition for "mandatory sentence." As used in combination with "imprisonment," the definition is intended to ensure that repeat offenders are in fact detained for the minimum periods specified.

Although the IFR makes no change to the definition of “repeat intoxicated driver,” the agencies emphasize that a State may not expunge an offender’s prior conviction in order to exclude it from the five-year lookback period. Any mechanism (including expungement) that causes a State to exclude from consideration prior convictions of driving while intoxicated or driving under the influence, when such convictions occurred within the prior five years, generally does not comply with Section 164.

2. Compliance Criteria (23 CFR § 1275.4(a))

The substantive compliance criteria of Section 164 have been significantly amended since their inception. This IFR updates the compliance criteria to reflect the current law, as most recently amended by the FAST Act. In addition, the agencies are providing clarifications as appropriate.

a. License Sanction (23 CFR § 1275.4(a)(1))

Section 164, as created by the TEA-21 Restoration Act, required all repeat offenders to receive a minimum one-year hard license suspension or revocation. Under the Federal implementing regulations, during the one-year term, the offender could not be eligible for any driving privileges, such as a restricted or hardship license. Because the Federal implementing regulations have not been updated since 2000, this language remained in the Code of Federal Regulations. The SAFETEA-LU Technical Corrections Act of 2008 and MAP-21 made further changes that were effectuated by the agencies, but that were never written into the regulations.

The FAST Act completely rewrote the license sanction criterion in 23 U.S.C. § 164(a)(5)(A) to loosen the requirements and provide for additional compliance options

for States. This IFR codifies the revised criterion. Under today's IFR, all repeat offenders must receive one or a combination of three license sanctions for a period of not less than one year (365 days). States may therefore "mix-and-match" these sanctions, provided that, in combination, they last for the full one year period.

The first license sanction is a suspension of all driving privileges. During that period, the repeat offender is not permitted to operate any motor vehicle under any circumstances. The second license sanction is a restriction on driving privileges that limits the individual to operating only motor vehicles with an ignition interlock device installed. Section 164 and the implementing regulations permit certain limited exceptions to this license sanction, discussed later in this preamble. The third license sanction is that the repeat offender may only operate a motor vehicle provided the individual is participating in, and complying with, a 24-7 sobriety program. For a State's law or 24-7 sobriety program to comply with this requirement, it must make clear that any participant who is kicked out of the program must be subject to either a hard license suspension or an ignition interlock restriction, as provided under the other two license sanctions, for the remainder of the one year sanction period.

b. Vehicle Sanction (Repealed)

The TEA-21 Restoration Act required all repeat offenders to "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." The Federal implementing regulations further required impoundment or immobilization to occur during the one-year license suspension, while installation of an ignition interlock device was required to occur at the conclusion of the one-year license suspension. The FAST

Act repealed this vehicle sanction. With the vast majority of States moving to ignition interlocks as a license sanction, the vehicle sanction requirement was largely redundant. This IFR removes these requirements from 23 CFR § 1275.4.

c. Assessment and Treatment (23 CFR § 1275.4(a)(2))

Under Section 164, the State law must require that all repeat intoxicated drivers undergo an assessment of their degree of alcohol abuse, and it must authorize the imposition of treatment as appropriate. An assessment is required of all repeat offenders because it allows for a determination not only of whether an offender should undergo treatment, but also of what type and level of treatment is appropriate for that offender. While treatment is not required for all repeat offenders, the State must authorize the imposition of treatment as appropriate. Congress has not changed this criterion since its inception, and the agencies are making no changes in this IFR.

d. Minimum Sentence (23 CFR § 1275.4(a)(3))

Since the beginning of the program, Section 164 has required that each State 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 sentence of not less than 5 days of imprisonment or 30 days of community service. For a third or subsequent offense, the law must provide for a mandatory sentence of not less than 10 days of imprisonment or 60 days of community service. The terms “mandatory sentence” and “imprisonment” are defined in 23 CFR § 1275.3. The FAST Act retains these minimum sentence provisions, but allows States the option to certify as to their “general practice” for incarceration in lieu of having a compliant mandatory minimum sentence. The new certification option is addressed in the next section regarding exceptions.

In this IFR, the agencies are clarifying the number of hours for the various sentences identified above that are considered equivalent to each “day.” Many States provide for sentencing in terms of hours rather than days. The agencies recognize that imprisonment and community service function differently. While imprisonment is generally an extended period of detainment that lasts through waking and sleeping hours, community service is a form of labor that occurs while the detainee is awake. A “day” for purposes of each of these penalties is therefore not equivalent. NHTSA’s longstanding interpretation has been that one “day” of imprisonment equals 24 hours, and one “day” of community service equals 8 hours (a work day). The agencies have added corresponding hour equivalents to the minimum sentence criterion.

3. Exceptions (23 CFR §§ 1275.4(b), 1275.5)

a. Special Exceptions (23 CFR § 1275.4(b))

One of the three sanctions under the license sanction criterion described above is restriction of the repeat offender’s driving privileges to the operation of only motor vehicles with an ignition interlock device installed. However, the FAST Act allows two exceptions to this restriction, which the agencies are adopting in this IFR verbatim. (Prior to enactment of the FAST Act, neither was allowed under the Section 164 program.) No other exceptions to a State’s ignition interlock law are permitted.

First, the FAST Act allows a repeat offender subject to an ignition interlock restriction to operate an employer’s motor vehicle in the course and scope of employment without an ignition interlock device installed, provided the business entity that owns the vehicle is not owned or controlled by the individual. A State’s exception must explicitly exclude business entities owned or controlled by the repeat offender or it will not comply

with the license sanction criterion. An exclusion for “self-employment,” for example, does not cover all business entities potentially owned or controlled by a repeat offender, and would not allow a State’s exception to comply with the license sanction criterion. Second, a State may except from its ignition interlock law a repeat offender that is certified by a medical doctor as being unable to provide a deep lung breath sample for analysis by an ignition interlock device.

b. “General Practice” Certifications (23 CFR § 1275.5)

The FAST Act amends the minimum sentence criterion to provide an alternative compliance option. In lieu of enacting and enforcing a law that complies with the minimum sentence criterion, a State may certify to its “general practice” of incarceration. According to the FAST Act, the State must certify for a second offender that its “general practice is that such an individual will be incarcerated” and for a third or subsequent offender that its “general practice is that such an individual will receive 10 days of incarceration.” 23 U.S.C. § 164(a)(5)(C)(i)-(ii). This IFR establishes the process for a State to submit a “general practice” certification as an alternative means of satisfying the minimum sentence criterion.

The IFR sets forth separate certifications for second offender incarceration and for third and subsequent offender incarceration. This will allow maximum flexibility to States, because it allows a State whose laws are partly in compliance to satisfy the minimum sentence criterion through a combination of statute and certification.

To meet the statutory standard of “general practice,” the agencies have elected to require a State to certify that 75 percent of repeat offenders are subject to mandatory incarceration. The agencies believe this percentage is a reasonable interpretation of what

would constitute “general practice” in a State. Consistent with the FAST Act requirements, the certification for a second offender does not contain a minimum incarceration period, while that for third and subsequent offenders specifies 10 days.

The agencies elected not to base “general practice” on a State’s average incarceration period for repeat offenders. That approach would allow a State to meet the standard for second offenders if a single offender is sentenced to any period of incarceration. For third and subsequent offenders, lengthy prison sentences could skew the average even if the vast majority of offenders received sentences well below 10 days. The agencies do not believe such an approach falls within the reasonable meaning of “general practice.”

Each certification is required to be based on data from the full calendar year immediately preceding the date of certification. In other words, if the State is certifying for fiscal year 2018 (which begins on October 1, 2017), the State’s “general practice” certification must be based on data from the entire period of January 1, 2016 through December 31, 2016. The certification must be signed by the Governor’s Representative for Highway Safety and must be based on personal knowledge and other appropriate inquiry.

Because the State’s “general practice” may change over time, the agencies are requiring States electing this compliance option to provide a new certification annually. Although certifications are due by October 1 each year, States are encouraged to submit their certification by August 15 to avoid any delay in the release of funds on October 1 of that calendar year.

IV. Non-Compliance Penalties and Procedures

This section describes the penalties affecting States that do not comply with one or both of the Section 154 and Section 164 programs. In general, these changes merely update the regulations to reflect amendments made by Federal statutes, such as MAP-21. The agencies are also streamlining some of the procedures that apply to States.

A. Reservation of Funds for Non-Compliance (23 CFR §§ 1270.6 and 1275.6)

States that fail to enact or enforce compliant open container or repeat intoxicated driver laws by October 1 of each fiscal year will have an amount equal to 2.5 percent of Federal-aid funds apportioned under 23 U.S.C. § 104(b)(1) and 23 U.S.C. § 104(b)(2) for the National Highway Performance Program (NHPP) and the Surface Transportation Block Grant Program (STBG) reserved by FHWA. The penalties are separate and distinct; a 2.5 percent penalty applies separately for each program where non-compliance occurs. The IFR eliminates as obsolete the penalty provisions that applied to fiscal years 2001 and 2002. In addition, it updates the procedures to reflect the change to a reservation program (rather than immediate transfer to a State's Section 402 apportionment), the change in the penalty amount to 2.5 percent of Federal-aid funds (rather than 3 percent), and the change in the funds from which the penalty is reserved to those apportioned under 23 U.S.C. § 104(b)(1) and (b)(2) (rather than 23 U.S.C. § 104(b)(1), (b)(3), and (b)(4)), which all resulted from MAP-21.

The initial reservation of Federal-aid funds by FHWA for noncompliant States will be on a proportional basis from each of the apportionments under Sections 104(b)(1) and (b)(2). Each fiscal year, the State's Department of Transportation must inform FHWA, through the appropriate Division Administrator, within 30 days if it wishes to change the derivation of the total penalty amounts from the NHPP and STBG

apportionments from the default proportional amounts. Prior to this IFR, States were required to submit this request by October 30. The change in the IFR ensures that States always receive 30 days to process this request in the event issuance of the notice of apportionments is delayed.

B. Use of Reserved Funds (23 CFR §§ 1270.7 and 1275.7)

The agencies have reorganized 23 CFR §§ 1270.7 and 1275.7 to improve clarity and better align them with the order of procedures for States. Not later than 60 days after the penalty funds are reserved, the Governor's Representative for Highway Safety and the Chief Executive Officer of the State's Department of Transportation must jointly identify, in writing, to the appropriate NHTSA Regional Administrator and FHWA Division Administrator how the penalty funds will be distributed for use among alcohol-impaired driving programs and highway safety improvement program (HSIP) eligible activities under 23 U.S.C. § 148. The primary change in the IFR is to reflect the change in available uses from hazard elimination to HSIP eligible activities, which resulted from Federal legislation.

The penalty funds will continue to be reserved until the State provides this distribution request. As soon as practicable after its receipt by the agencies, the funds will either be transferred to the State's Section 402 apportionment for alcohol-impaired driving programs or released to the State Department of Transportation for HSIP eligible activities, pursuant to the changes in MAP-21. The Federal statutes do not authorize additional transfers between the Section 402 and HSIP programs. As a result, the IFR adds that once penalty funds have been transferred or released for the fiscal year, States are not able to revise their request.

The allowable uses for funds (specifically, for alcohol-impaired driving programs and HSIP eligible activities) are described in the implementing regulations and updated only to reflect the switch from hazard elimination to HSIP, pursuant to Federal legislation. Under both programs, the Federal share of the cost of any project carried out with penalty funds remains 100 percent.

Section 154 and 164 penalty funds are transferred or released from the State's apportionment of contract authority under 23 U.S.C. § 104(b)(1) and 23 U.S.C. § 104(b)(2). The contract authority is transferred or released with accompanying obligation authority, which is the maximum amount the State can obligate to eligible projects. If the State elects to transfer funds to its Section 402 apportionment for alcohol-impaired driving programs, the obligation limitation is provided based on a ratio specified in 23 CFR §§ 1270.7 and 1275.7, which comes directly from 23 U.S.C. § 154(c)(6) and 23 U.S.C. § 164(b)(6). The IFR makes technical corrections and amendments to improve clarity in these provisions of the Federal implementing regulations, but they do not result in any change in how the ratio is calculated.

C. Procedures Affecting States in Noncompliance (23 CFR §§ 1270.8 and 1275.8)

Under the original Federal implementing regulations, the agencies intended for States to be notified of their compliance status in FHWA's advance notice of apportionment, normally issued ninety days prior to final apportionment. Noncompliant States were then granted 30 days to submit documentation showing why they were in compliance. The agencies would then issue a final determination as part of the final notification of apportionments, which normally occurs on October 1 of each year. While

the agencies have strived to notify States of pending changes in their compliance status in the advance notice of apportionment whenever possible, the Federal statute requires formal compliance determinations to be based on the State's law enacted and enforced on October 1 of each fiscal year. As a result, State compliance status may change up to that date, making this system unworkable in many cases. The IFR revises 23 CFR §§ 1270.8 and 1275.8 to better reflect the actual practice the agencies have undertaken to give States full opportunity to present additional documentation (with some minor changes to streamline the process for States).

Each State determined to be noncompliant with 23 U.S.C. § 154 or 23 U.S.C. § 164 receives notice of its compliance status and the funds being reserved from apportionment as part of the final certification of apportionments required under 23 U.S.C. 104(e), which normally occurs on October 1 of each fiscal year. All States will be afforded 30 days from the date the final notice of apportionments is issued to submit additional documentation showing why they are in compliance. For the Section 164 program, this documentation may include a "general practice" certification. Previously, only newly noncompliant States were afforded 30 days to submit additional documentation demonstrating compliance.

While the agencies consider any additional documentation provided by the State, the reservation will remain in place on the State's affected funds. However, the State must still provide the requests regarding the derivation and distribution of funds referenced in Sections A and B (within 30 and 60 days, respectively) while the documentation is reviewed to expedite the distribution of funds. If the agencies affirm the noncompliance determination, the State will be notified of the decision and the

affected funds will be processed in accordance with the requests provided by the State. If the agencies reverse the noncompliance determination, the funds will be released from reservation and restored to the State's NHPP and STBG accounts. These procedures are intended to preserve the maximum possible flexibility for States, while ensuring that the agencies meet their statutory obligations.

D. States' Responsibilities Regarding Compliance (23 CFR §§ 1270.9 and 1275.9)

Under the original Federal implementing regulations, if a State enacted a newly compliant law, the State was required to submit to the NHTSA Regional Office a copy of the law along with a certification meeting the requirements of the applicable Federal regulation (23 CFR §§ 1270.5 or 1275.5, prior to amendment by this IFR). States were required to promptly submit an amendment or supplement to their certifications if their law changed or they ceased to enforce their law.

The agencies are eliminating this certification requirement in this IFR, thereby reducing the paperwork burden on the States. In practice, few States submitted certifications, and the agencies found them to be of limited value in enforcement. Instead, this IFR adds a new section for each of the programs (23 CFR §§ 1270.9 and 1275.9) related to States' responsibilities regarding compliance. First, these sections make clear that it is the State's sole responsibility to ensure compliance with the Section 154 and 164 programs. While NHTSA conducts an annual review of State laws to assess whether legislation has affected their compliance status, this does not occur until late in the fiscal year, often after State legislative sessions have ended. NHTSA cannot and does not actively monitor all pending legislation in all States. Instead, each State Highway

Safety Office and State Department of Transportation should actively monitor their legislatures for potential amendments to their open container and repeat intoxicated driver laws.

Second, the agencies have added a provision indicating that States must promptly notify the appropriate NHTSA Regional Administrator in writing of any change or change in enforcement to the State's open container or repeat intoxicated driver law, identifying the specific change(s). This replaces the requirement to submit a supplement or amendment to the State's certification. To the extent appropriate, NHTSA will conduct a preliminary review of the State's amended law and identify to the State any potential compliance issues resulting from the change. Absent early notification from the State, NHTSA may not identify a potential compliance issue until later in the fiscal year, often after the State's legislative session has ended.

V. Notice and Comment, Effective Date, and Request for Comments

The Administrative Procedure Act authorizes agencies to dispense with certain procedures for rules when they find "good cause" to do so. The agencies must ensure that States receive instructions that are important to upcoming compliance determinations to be made on October 1, 2016, as the changes in the FAST Act are effective on that date. In light of the short time frame for implementing the FAST Act, the agencies find good cause to dispense with the notice and comment requirements and the 30-day delayed effective date requirement.

Under Section 553(b)(B), the requirements of notice and comment do not apply when the agency, for good cause, finds that those procedures are "impracticable, unnecessary, or contrary to public interest." Because of the short time frame for

implementing the FAST Act, the agencies find it impracticable to implement the new compliance criteria with notice and comment for FY 2017. However, the agencies invite public comment on all aspects of this IFR. The agencies will consider and address comments in a final rule, which the agencies commit to publishing during the first quarter of calendar year 2017, and which will be effective beginning with FY 2018.

Under Section 553(d), the agencies may make a rule effective immediately, avoiding the 30-day delayed effective date requirement for good cause. We have determined that it is in the public interest for this IFR to have an immediate effective date. The agencies are expediting this rulemaking to provide instructions that are important to upcoming compliance determinations to be made on October 1, 2016, such as those related to the new “general practice” certifications. States also need clarification for the processes related to noncompliance.

For these reasons, the agencies are issuing this rulemaking as an interim final rule that will be effective immediately. As an interim final rule, this regulation is fully in effect and binding upon its effective date. No further regulatory action by the agencies is necessary to make this rule effective. However, in order to benefit from comments that interested parties and the public may have, the agencies are requesting that comments be submitted to the docket for this notice.

Comments received in response to this notice will be considered by the agencies. The agencies will then issue a final rule, including any appropriate amendments based on those comments. The notice for that final rule will respond to substantive comments received.

VI. Regulatory Analyses and Notices.

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

The agencies have considered the impact of this rulemaking action under Executive Order 12866, Executive Order 13563, and the Department of Transportation's regulatory policies and procedures. This rulemaking document was not reviewed under Executive Order 12866 or Executive Order 13563. This rule will only affect the compliance status of a very small handful of States and will therefore affect far less than \$100 million annually. Whether a State chooses to enact a compliant law or make a certification is dependent on many variables, and cannot be linked with specificity to the issuance of this rule. States choose whether to enact and enforce compliant laws, thereby complying with the programs. If a State chooses not to enact and enforce a conforming law, its funds are conditioned, but not withheld. Accordingly, the total amount of funds provided to each State does not change. The costs to States associated with this rule are minimal (e.g., passing and enforcing alcohol impaired driving laws) and are expected to be offset by resulting highway safety benefits. Therefore, this rulemaking has been determined to be not "significant" under the Department of Transportation's regulatory policies and procedures and the policies of the Office of Management and Budget.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) of 1980 (5 U.S.C. 601 et seq.) requires agencies to evaluate the potential effects of their proposed and final rules on small businesses, small organizations, and small governmental jurisdictions. Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the proposed rulemaking is not expected to have a significant economic impact on a substantial

number of small entities. The Small Business Regulatory Enforcement Fairness Act (SBREFA) amended the RFA to require Federal agencies to provide a statement of the factual basis for certifying that an action would not have a significant economic impact on a substantial number of small entities.

This IFR is a rulemaking that will update the Section 154 and Section 164 regulations based on recent Federal legislation. The requirements of these programs only affect State governments, which are not considered to be small entities as that term is defined by the RFA. Therefore, 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.

C. Executive Order 13132 (Federalism)

Executive Order 13132 on “Federalism” requires the agencies to develop an accountable process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” 64 FR 43255 (August 10, 1999). “Policies that have federalism implications” are defined in the Executive Order to include regulations that have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.” Under Executive Order 13132, an agency may not issue a regulation with Federalism implications that imposes substantial direct compliance costs and that is not required by statute unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments or the agency consults with State and local governments in the process of developing the proposed regulation. An agency also may

not issue a regulation with Federalism implications that preempts a State law without consulting with State and local officials.

The agencies have analyzed this rulemaking action in accordance with the principles and criteria set forth in Executive Order 13132, and have determined that this IFR would not have sufficient Federalism implications as defined in the order to warrant formal consultation with State and local officials or the preparation of a federalism summary impact statement. However, the agencies continue to engage with State representatives regarding general implementation of the FAST Act, including these programs, and expects to continue these informal dialogues.

D. Executive Order 12988 (Civil Justice Reform)

Pursuant to Executive Order 12988 (61 FR 4729 (February 7, 1996)), “Civil Justice Reform,” the agencies have considered whether this rule would have any retroactive effect. We conclude that it would not have any retroactive or preemptive effect, and judicial review of it may be obtained pursuant to 5 U.S.C. 702. That section does not require that a petition for reconsideration be filed prior to seeking judicial review. This action meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

E. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, et seq.), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct, sponsor, or require through regulations. This rulemaking would not establish any new information collection requirements.

F. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in expenditures by State, local or tribal governments, in the aggregate, or by the private sector, of more than \$100 million annually (adjusted annually for inflation with base year of 1995). This IFR would not meet the definition of a Federal mandate because the resulting annual State expenditures to comply with the programs would not exceed the minimum threshold.

G. National Environmental Policy Act

NHTSA has considered the impacts of this rulemaking action for the purposes of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321-4347). The agency has determined that this IFR would not have a significant impact on the quality of the human environment. FHWA has analyzed this action for the purposes of NEPA and has determined that it would not have any effect on the quality of the environment and meets the criteria for the categorical exclusion at 23 CFR 771.117(c)(20).

H. Executive Order 13211

Executive Order 13211 (66 FR 28355, May 18, 2001) applies to any rulemaking that: (1) is determined to be economically significant as defined under Executive Order 12866, and is likely to have a significantly adverse effect on the supply of, distribution of, or use of energy; or (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. This rulemaking is not likely to have a significantly adverse effect on the supply of, distribution of, or use of

energy. This rulemaking has not been designated as a significant energy action. Accordingly, this rulemaking is not subject to Executive Order 13211.

I. Executive Order 13175 (Consultation and Coordination With Indian Tribes)

The agencies have analyzed this IFR under Executive Order 13175, and have determined that today's action would not have a substantial direct effect on one or more Indian tribes, would not impose substantial direct compliance costs on Indian tribal governments, and would not preempt tribal law. Therefore, a tribal summary impact statement is not required.

J. Plain Language

Executive Order 12866 and the President's memorandum of June 1, 1998, require each agency to write all rules in plain language. Application of the principles of plain language includes consideration of the following questions:

- Have we organized the material to suit the public's needs?
- Are the requirements in the rule clearly stated?
- Does the rule contain technical language or jargon that isn't clear?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the rule easier to understand?
- Would more (but shorter) sections be better?
- Could we improve clarity by adding tables, lists, or diagrams?
- What else could we do to make the rule easier to understand?

If you have any responses to these questions, please include them in your comments on this IFR.

K. Regulatory Identifier Number (RIN)

The Department of Transportation assigns a regulation identifier number (RIN) to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in or about April and October of each year. You may use the RIN contained in the heading at the beginning of this document to find this action in the Unified Agenda.

L. Privacy Act

Please note that anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the Federal Register published on April 11, 2000 (65 FR 19477) or you may visit <http://dms.dot.gov>.

VII. Public Participation**How do I prepare and submit comments?**

Your comments must be written and in English. To ensure that your comments are correctly filed in the Docket, please include the docket number of this document in your comments.

Your comments must not be more than 15 pages long. (49 CFR 553.21). We established this limit to encourage you to write your primary comments in a concise fashion. However, you may attach necessary additional documents to your comments. There is no limit on the length of the attachments.

Comments may also be submitted to the docket electronically by logging onto the Docket Management System Web site at <http://www.regulations.gov>. Follow the online instructions for submitting comments.

Please note that pursuant to the Data Quality Act, in order for substantive data to be relied upon and used by the agencies, it must meet the information quality standards set forth in the OMB and DOT Data Quality Act guidelines. Accordingly, we encourage you to consult the guidelines in preparing your comments. OMB's guidelines may be accessed at <http://www.whitehouse.gov/omb/fedreg/reproducible.html>.

How can I be sure that my comments were received?

If you wish Docket Management to notify you upon its receipt of your comments, enclose a self-addressed, stamped postcard in the envelope containing your comments. Upon receiving your comments, Docket Management will return the postcard by mail.

How do I submit confidential business information?

If you wish to submit any information under a claim of confidentiality, you should submit three copies of your complete submission, including the information you claim to be confidential business information, to the Chief Counsel, NHTSA, at the address given above under FOR FURTHER INFORMATION CONTACT. In addition, you should submit a copy, from which you have deleted the claimed confidential business information, to the docket at the address given above under ADDRESSES. When you send a comment containing information claimed to be confidential business information, you should include a cover letter setting forth the information specified in our confidential business information regulation. (49 CFR part 512.)

Will the agencies consider late comments?

We will consider all comments received before the close of business on the comment closing date indicated above under DATES. To the extent possible, we will also consider comments that the docket receives after that date. If the docket receives a comment too late for us to consider in developing a final rule (assuming that one is issued), we will consider that comment as an informal suggestion for future rulemaking action.

How can I read the comments submitted by other people?

You may read the comments received by the docket at the address given above under ADDRESSES. The hours of the docket are indicated above in the same location. You may also see the comments on the Internet. To read the comments on the Internet, go to <http://www.regulations.gov>. Follow the online instructions for accessing the dockets.

Please note that even after the comment closing date, we will continue to file relevant information in the docket as it becomes available. Further, some people may submit late comments. Accordingly, we recommend that you periodically check the Docket for new material. You can arrange with the docket to be notified when others file comments in the docket. See <http://www.regulations.gov> for more information.

Authority: 23 U.S.C. 154 and 164; delegation of authority at 49 CFR 1.85 and 1.95.

List of Subjects in 23 CFR Parts 1270 and 1275

Reservation and transfer programs—Transportation, Highway safety, Intergovernmental relations, Alcohol abuse.

For the reasons discussed in the preamble, under the authority of 23 U.S.C. 154 and 164, the National Highway Traffic Safety Administration and the Federal Highway Administration amend 23 CFR Chapter II as follows:

1. Revise part 1270 to read as follows:

PART 1270—OPEN CONTAINER LAWS

Sec.

1270.1 Scope.

1270.2 Purpose.

1270.3 Definitions.

1270.4 Compliance criteria.

1270.5 [Reserved].

1270.6 Reservation of funds.

1270.7 Use of reserved funds.

1270.8 Procedures affecting States in noncompliance.

1270.9 States' responsibilities regarding compliance.

AUTHORITY: 23 U.S.C. 154; delegation of authority at 49 CFR 1.85 and 1.95.

§ 1270.1 Scope.

This part prescribes the requirements necessary to implement Section 154 of Title 23 of the United States Code which encourages States to enact and enforce open container laws.

§ 1270.2 Purpose.

The purpose of this part is to specify the steps that States must take to avoid the reservation and transfer of Federal-aid highway funds for noncompliance with 23 U.S.C. 154.

§ 1270.3 Definitions.

As used in this part:

(a) Alcoholic beverage means:

(1) Beer, ale, porter, stout, and other similar fermented beverages (including sake or similar products) of any name or description containing one-half of 1 percent or more of alcohol by volume, brewed or produced from malt, wholly or in part, or from any substitute therefor;

(2) Wine of not less than one-half of 1 per centum of alcohol by volume; or

(3) Distilled spirits which is that substance known as ethyl alcohol, ethanol, or spirits of wine in any form (including all dilutions and mixtures thereof from whatever source or by whatever process produced).

(b) FHWA means the Federal Highway Administration.

(c) Motor vehicle means a vehicle driven or drawn by mechanical power and manufactured primarily for use on public highways, but does not include a vehicle operated solely on a rail or rails.

(d) NHTSA means the National Highway Traffic Safety Administration.

(e) Open alcoholic beverage container means any bottle, can, or other receptacle that:

(1) Contains any amount of alcoholic beverage; and

(2) Is open or has a broken seal or the contents of which are partially removed (regardless of whether it has been closed or resealed).

(f) Open container law means a State law or combination of laws that meets the minimum requirements specified in § 1270.4.

(g) Passenger area means the area designed to seat the driver and passengers while the motor vehicle is in operation and any area that is readily accessible to the driver or a passenger while in their seating positions, including the glove compartment.

(h) Public highway or right-of-way of a public highway means the width between and immediately adjacent to the boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel; inclusion of the roadway and shoulders is sufficient.

(i) State means any of the 50 States, the District of Columbia, or the Commonwealth of Puerto Rico.

§ 1270.4 Compliance criteria.

(a) To avoid the reservation of funds specified in § 1270.6, a State must enact and enforce an open container law that prohibits the possession of any open alcoholic beverage container, and the consumption of any alcoholic beverage, in the passenger area of any motor vehicle (including possession or consumption by the driver of the vehicle) located on a public highway, or the right-of-way of a public highway, in the State.

(b) The law must apply to:

(1) The possession of any open alcoholic beverage container and the consumption of any alcoholic beverage;

(2) The passenger area of any motor vehicle;

(3) All alcoholic beverages;

(4) All occupants of a motor vehicle; and

(5) All motor vehicles located on a public highway or the right-of-way of a public highway.

(c) The law must provide for primary enforcement.

(d) Exceptions. (1) If a State has in effect a law that makes unlawful the possession of any open alcoholic beverage container and the consumption of any

alcoholic beverage in the passenger area of any motor vehicle, but permits the possession of an open alcoholic beverage container in a locked container (such as a locked glove compartment), or, in a motor vehicle that is not equipped with a trunk, either behind the last upright seat or in an area not normally occupied by the driver or a passenger, the State will be deemed to have in effect a law that applies to the passenger area of any vehicle, as provided in paragraph (b)(2) of this section.

(2) If a State has in effect a law that makes unlawful the possession of any open alcoholic beverage container and the consumption of any alcoholic beverage by the driver (but not by a passenger) in the passenger area of a motor vehicle designed, maintained, or used primarily for the transportation of persons for compensation, or in the living quarters of a house coach or house trailer, the State shall be deemed to have in effect a law that applies to all occupants of a motor vehicle with respect to such motor vehicles, as provided in paragraph (b)(4) of this section.

§ 1270.5 [Reserved].

§ 1270.6 Reservation of funds.

(a) On October 1 of each fiscal year, if a State has not enacted or is not enforcing a law that complies with § 1270.4, FHWA will reserve an amount equal to 2.5 percent of the funds apportioned to the State for that fiscal year under each of 23 U.S.C. 104(b)(1) and (b)(2).

(b) The reservation of funds will be made based on proportionate amounts from each of the apportionments under 23 U.S.C. 104(b)(1) and (b)(2). The State's Department of Transportation will have 30 days from the date the funds are reserved under this section to notify FHWA, through the appropriate Division Administrator, if it would like

to change the distribution of the amounts reserved between 23 U.S.C. 104(b)(1) and (b)(2).

§ 1270.7 Use of reserved funds.

(a) Not later than 60 days after the funds are reserved under § 1270.6, the Governor's Representative for Highway Safety and the Chief Executive Officer of the State's Department of Transportation for each State must jointly identify, in writing to the appropriate NHTSA Regional Administrator and FHWA Division Administrator, how the funds will be programmed between alcohol-impaired driving programs under paragraph (c) of this section and highway safety improvement program activities under paragraph (d) of this section. Funds will remain reserved until this notification is provided by the State.

(b) As soon as practicable after NHTSA and FHWA receive the notification described in paragraph (a) of this section, the Secretary will:

(1) Transfer the reserved funds identified by the State for alcohol-impaired driving programs under paragraph (c) of this section to the apportionment of the State under 23 U.S.C. 402; and

(2) Release the reserved funds identified by the State for highway safety improvement program activities under paragraph (d) of this section to the State Department of Transportation.

(c) Any funds transferred under paragraph (b)(1) of this section shall be—

(1) Used for approved projects for alcohol-impaired driving countermeasures; or

(2) Directed to State and local law enforcement agencies for enforcement of laws prohibiting driving while intoxicated or driving under the influence and other related laws

(including regulations), including the purchase of equipment, the training of officers, and the use of additional personnel for specific alcohol-impaired driving countermeasures, dedicated to enforcement of the laws (including regulations).

(d) Any funds released under paragraph (b)(2) of this section shall be used for highway safety improvement program activities eligible under 23 U.S.C.148.

(e) Once the funds have been transferred or released under paragraph (b) of this section, the State may not revise the notification described in paragraph (a) of this section identifying how the funds will be programmed between alcohol-impaired driving programs and highway safety improvement program activities.

(f) The Federal share of the cost of any project carried out with the funds transferred or released under paragraph (b) of this section is 100 percent.

(g)(1) If any funds are transferred under paragraph (b)(1) of this section to the apportionment of a State under Section 402 for a fiscal year, the amount of obligation authority determined under paragraph (g)(2) of this section shall be transferred for carrying out projects described in paragraph (c) of this section.

(2) The obligation authority referred to in paragraph (g)(1) of this section shall be transferred from the obligation authority distributed for the fiscal year to the State for Federal-aid highways and highway safety construction programs, and the amount shall be determined by multiplying:

(i) The amount of funds transferred under paragraph (b)(1) of this section to the apportionment of the State under Section 402 for the fiscal year; by

(ii) The ratio that:

(A) The amount of obligation authority distributed for the fiscal year to the State for Federal-aid highways and highway safety construction programs; bears to

(B) The total of the sums apportioned to the State for Federal-aid highways and highway safety construction programs (excluding sums not subject to any obligation limitation) for the fiscal year.

(h) Notwithstanding any other provision of law, no limitation on the total obligations for highway safety programs under Section 402 shall apply to funds transferred under paragraph (b)(1) of this section.

§ 1270.8 Procedures affecting States in noncompliance.

(a) Each fiscal year, each State determined to be in noncompliance with 23 U.S.C. 154 and this part will be advised of the funds reserved from apportionment under § 1270.6 in the notice of apportionments required under 23 U.S.C. 104(e), which normally occurs on October 1.

(b) Each State whose funds are reserved under § 1270.6 will be afforded 30 days from the date of issuance of the notice of apportionments described in paragraph (a) of this section to submit documentation showing why it is in compliance. Documentation must be submitted to the appropriate NHTSA Regional Administrator. If such documentation is provided, a reservation will remain in place on the State's affected funds while the agencies consider the information. If the agencies affirm the noncompliance determination, the State will be notified of the decision and the affected funds will be processed in accordance with the requests regarding the derivation and distribution of funds provided by the State as required by §§ 1270.6(b) and 1270.7(a).

§ 1270.9 States' responsibilities regarding compliance.

(a) States are responsible for ensuring compliance with 23 U.S.C. 154 and this part.

(b) A State that has been determined to be in compliance with the requirements of 23 U.S.C. 154 and this part must promptly notify the appropriate NHTSA Regional Administrator in writing of any change or change in enforcement of the State's open container law, identifying the specific change(s).

2. Revise part 1275 to read as follows:

PART 1275—REPEAT INTOXICATED DRIVER LAWS

Sec.

1275.1 Scope.

1275.2 Purpose.

1275.3 Definitions.

1275.4 Compliance criteria.

1275.5 "General practice" certification option.

1275.6 Reservation of funds.

1275.7 Use of reserved funds.

1275.8 Procedures affecting States in noncompliance.

1275.9 States' responsibilities regarding compliance.

AUTHORITY: 23 U.S.C. 164; delegation of authority at 49 CFR 1.85 and 1.95.

§ 1275.1 Scope.

This part prescribes the requirements necessary to implement Section 164 of Title 23, United States Code, which encourages States to enact and enforce repeat intoxicated driver laws.

§ 1275.2 Purpose.

The purpose of this part is to specify the steps that States must take to avoid the reservation and transfer of Federal-aid highway funds for noncompliance with 23 U.S.C. 164.

§ 1275.3 Definitions.

As used in this part:

(a) 24-7 sobriety program has the meaning given the term in § 1300.23(b) of this title.

(b) Alcohol concentration means grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath.

(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.

(d) Driving under the influence has the same meaning as “driving while intoxicated.”

(e) FHWA means the Federal Highway Administration.

(f) Ignition interlock system means a State-certified system designed to prevent drivers from starting their car when their breath alcohol concentration is at or above a preset level.

(g) Imprisonment means confinement in a jail, minimum security facility, community corrections facility, house arrest with electronic monitoring, inpatient rehabilitation or treatment center, or other facility, provided the individual under confinement is in fact being detained.

(h) Mandatory sentence means a sentence that cannot be waived, suspended, or otherwise reduced by the State.

(i) Motor vehicle means a vehicle driven or drawn by mechanical power and manufactured primarily for use on public highways, but does not include a vehicle operated solely on a rail line or a commercial vehicle.

(j) NHTSA means the National Highway Traffic Safety Administration.

(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.

(l) Repeat intoxicated driver law means a State law or combination of laws or programs that impose the minimum penalties specified in § 1275.4 for all repeat intoxicated drivers.

(m) State means any of the 50 States, the District of Columbia or the Commonwealth of Puerto Rico.

§ 1275.4 Compliance criteria.

(a) To avoid the reservation of funds specified in § 1275.6, a State must enact and enforce a repeat intoxicated driver law that establishes, as a minimum penalty, that all repeat intoxicated drivers:

(1) Receive, for a period of not less than one year, one or more of the following penalties:

(i) A suspension of all driving privileges;

(ii) A restriction on driving privileges that limits the individual to operating only motor vehicles with an ignition interlock device installed, unless a special exception described in paragraph (b) of this section applies; or

(iii) A restriction on driving privileges that limits the individual to operating motor vehicles only if participating in, and complying with, a 24-7 sobriety program;

(2) Receive an assessment of their degree of alcohol abuse, and treatment as appropriate; and

(3) Except as provided in § 1275.5, receive a mandatory sentence of—

(i) Not less than five days (120 hours) of imprisonment or 30 days (240 hours) of community service for a second offense; and

(ii) Not less than ten days (240 hours) of imprisonment or 60 days (480 hours) of community service for a third or subsequent offense.

(b) Special exceptions. As used in paragraph (a)(1)(ii) of this section, special exception means an exception under a State alcohol-ignition interlock law for the following circumstances only:

(1) The individual is required to operate an employer’s motor vehicle in the course and scope of employment and the business entity that owns the vehicle is not owned or controlled by the individual; or

(2) The individual is certified by a medical doctor as being unable to provide a deep lung breath sample for analysis by an ignition interlock device.

§ 1275.5 “General practice” certification option.

(a) Notwithstanding § 1275.4(a)(3), a State that otherwise meets the requirements of § 1275.4 may comply with 23 U.S.C. 164 and this part based on the State’s “general practice” for incarceration. A State electing this option shall—

(1) If the State law does not comply with the requirements of § 1275.4(a)(3)(i), submit the following certification signed by the Governor’s Representative for Highway Safety:

I, [Name], Governor’s Representative for Highway Safety, certify that, in [State name], at least 75 percent of repeat intoxicated drivers receive a mandatory sentence of imprisonment for a second offense, as those terms

are defined in 23 CFR 1275.3. This certification is based on data from the period of twelve consecutive months of the calendar year immediately preceding the date of this certification. I sign this certification based on personal knowledge and other appropriate inquiry. [Signature of Governor's Representative for Highway Safety] [Date of signature]

(2) If the State law does not comply with the requirements of § 1275.4(a)(3)(ii), submit the following certification signed by the Governor's Representative for Highway Safety:

I, [Name], Governor's Representative for Highway Safety, certify that, in [State name], at least 75 percent of repeat intoxicated drivers receive a mandatory sentence of not less than ten days (240 hours) of imprisonment for a third or subsequent offense, as those terms are defined in 23 CFR 1275.3. This certification is based on data from the period of twelve consecutive months of the calendar year immediately preceding the date of this certification. I sign this certification based on personal knowledge and other appropriate inquiry. [Signature of Governor's Representative for Highway Safety] [Date of signature]

(b) A State electing the option under this section must submit a new certification to the appropriate NHTSA Regional Administrator by not later than October 1 of each fiscal year to avoid the reservation of funds specified in § 1275.6. The State is encouraged to submit the certification by August 15 to avoid any delay in release of funds on October 1 of that calendar year while NHTSA evaluates its certification.

§ 1275.6 Reservation of funds.

(a) On October 1 of each fiscal year, if a State has not enacted or is not enforcing a law that complies with § 1275.4, FHWA will reserve an amount equal to 2.5 percent of the funds apportioned to the State for that fiscal year under each of 23 U.S.C. 104(b)(1) and (b)(2).

(b) The reservation of funds will be made based on proportionate amounts from each of the apportionments under 23 U.S.C. 104(b)(1) and (b)(2). The State's Department of Transportation will have 30 days from the date the funds are reserved under this section to notify FHWA, through the appropriate Division Administrator, if it would like to change the distribution of the amounts reserved between 23 U.S.C. 104(b)(1) and (b)(2).

§ 1275.7 Use of reserved funds.

(a) Not later than 60 days after the funds are reserved under § 1275.6, the Governor's Representative for Highway Safety and the Chief Executive Officer of the State's Department of Transportation for each State must jointly identify, in writing to the appropriate NHTSA Regional Administrator and FHWA Division Administrator, how the funds will be programmed between alcohol-impaired driving programs under paragraph (c) of this section and highway safety improvement program activities under paragraph (d) of this section. Funds will remain reserved until this notification is provided by the State.

(b) As soon as practicable after NHTSA and FHWA receive the notification described in paragraph (a) of this section, the Secretary will:

(1) Transfer the reserved funds identified by the State for alcohol-impaired driving programs under paragraph (c) of this section to the apportionment of the State under 23 U.S.C. 402; and

(2) Release the reserved funds identified by the State for highway safety improvement program activities under paragraph (d) of this section to the State Department of Transportation.

(c) Any funds transferred under paragraph (b)(1) of this section shall be—

(1) Used for approved projects for alcohol-impaired driving countermeasures; or

(2) Directed to State and local law enforcement agencies for enforcement of laws prohibiting driving while intoxicated or driving under the influence and other related laws (including regulations), including the purchase of equipment, the training of officers, and the use of additional personnel for specific alcohol-impaired driving countermeasures, dedicated to enforcement of the laws (including regulations).

(d) Any funds released under paragraph (b)(2) of this section shall be used for highway safety improvement program activities eligible under 23 U.S.C. 148.

(e) Once the funds have been transferred or released under paragraph (b) of this section, the State may not revise the notification described in paragraph (a) of this section identifying how the funds will be programmed between alcohol-impaired driving programs and highway safety improvement program activities.

(f) The Federal share of the cost of any project carried out with the funds transferred or released under paragraph (b) of this section is 100 percent.

(g)(1) If any funds are transferred under paragraph (b)(1) of this section to the apportionment of a State under Section 402 for a fiscal year, the amount of obligation

authority determined under paragraph (g)(2) of this section shall be transferred for carrying out projects described in paragraph (c) of this section.

(2) The obligation authority referred to in paragraph (g)(1) of this section shall be transferred from the obligation authority distributed for the fiscal year to the State for Federal-aid highways and highway safety construction programs, and the amount shall be determined by multiplying:

(i) The amount of funds transferred under paragraph (b)(1) of this section to the apportionment of the State under Section 402 for the fiscal year; by

(ii) The ratio that:

(A) The amount of obligation authority distributed for the fiscal year to the State for Federal-aid highways and highway safety construction programs; bears to

(B) The total of the sums apportioned to the State for Federal-aid highways and highway safety construction programs (excluding sums not subject to any obligation limitation) for the fiscal year.

(h) Notwithstanding any other provision of law, no limitation on the total obligations for highway safety programs under Section 402 shall apply to funds transferred under paragraph (b)(1) of this section.

§ 1275.8 Procedures affecting States in noncompliance.

(a) Each fiscal year, each State determined to be in noncompliance with 23 U.S.C. 164 and this part will be advised of the funds reserved from apportionment under § 1275.6 in the notice of apportionments required under 23 U.S.C. 104(e), which normally occurs on October 1.

(b) Each State whose funds are reserved under § 1275.6 will be afforded 30 days from the date of issuance of the notice of apportionments described in paragraph (a) of this section to submit documentation showing why it is in compliance (which may include a “general practice” certification under § 1275.5). Documentation must be submitted to the appropriate NHTSA Regional Administrator. If such documentation is provided, a reservation will remain in place on the State’s affected funds while the agencies consider the information. If the agencies affirm the noncompliance determination, the State will be notified of the decision and the affected funds will be processed in accordance with the requests regarding the derivation and distribution of funds provided by the State as required by §§ 1275.6(b) and 1275.7(a).

§ 1275.9 State’ responsibilities regarding compliance.

(a) States are responsible for ensuring compliance with 23 U.S.C. 164 and this part.

(b) A State that has been determined to be in compliance with the requirements of 23 U.S.C. 164 and this part must promptly notify the appropriate NHTSA Regional Administrator in writing of any change or change in enforcement of the State’s repeat intoxicated driver law, identifying the specific change(s).

Dated: September 27, 2016,

under authority delegated in 49 CFR 1.95.

Mark R. Rosekind

Administrator, National Highway Traffic Safety Administration

Dated: September 27, 2016,

under authority delegated in 49 CFR 1.85.

Gregory G. Nadeau
Administrator, Federal Highway Administration

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