



elimination of diversion programs and hardship licenses. The IBT proposed in its comments that the FMCSA consider a mechanism addressing such hardships on a case-by-case waiver basis; however, that proposal was not addressed. Without any means to consider individual circumstances, Petitioners are concerned that the imposition of such severe mandatory penalties will have serious and unintended consequences. Moreover, the penalties imposed discriminate against U.S. drivers in favor of foreign drivers whose commercial licenses are not subject to suspension or revocation for the same offenses. The FMCSA recognized this discrepancy, but has not taken any action to correct the problem. Such failure to act is arbitrary and capricious and provides an additional reason why the Agency must give further consideration to how it can justly and fairly implement these rules.

(2) The Final Rule plainly exceeds FMCSA's statutory authority by providing for mandatory disqualification of drivers based on convictions of serious traffic offenses regardless of whether such convictions result in the suspension, cancellation or revocation of the driver's personal license. Such disqualification directly contradicts the plain language of the statute and must be corrected before the Final Rules can go into effect.

## **B. STATUTORY FRAMEWORK**

The Motor Carrier Safety Improvement Act (MCSIA), Public Law 106-159 (Dec. 9, 1999), among other things, directed the Agency to propose rules that would disqualify an individual from driving a commercial motor vehicle (CMV) based on convictions for certain offenses committed in a non-CMV. Specifically, the Act provided as follows:

(g) NONCOMMERCIAL MOTOR VEHICLE CONVICTIONS.—

(1) ISSUANCE OF REGULATIONS.—Not later than 1 year after the date of the enactment of this Act, the Secretary shall issue regulations providing for the disqualification by the Secretary from operating a commercial motor vehicle of an individual who holds a commercial driver’s license and who has been convicted of—

(A) a serious offense involving a motor vehicle (other than a commercial motor vehicle) that has resulted in the revocation, cancellation, or suspension of the individual’s license; or

(B) a drug or alcohol related offense involving a motor vehicle (other than a commercial motor vehicle).

(2) REQUIREMENTS FOR REGULATIONS.—Regulations issued under paragraph (1) shall establish the minimum periods for which the disqualifications shall be in effect, but in no case shall the time periods for disqualification for noncommercial motor vehicle violations be more stringent than those for offenses or violations involving a commercial motor vehicle. The Secretary shall determine such periods based on the seriousness of the offenses on which the convictions are based.

MCSIA § 201(g) (codified at 49 U.S.C. § 31310(g)). The MCSIA further prohibits States from: (i) issuing provisional licenses to individuals who are disqualified from operating a CMV or who have had their individual driver’s licenses revoked, suspended, or canceled, MCSIA § 202(d) (49 U.S.C. § 31311(a)(10)(B)); and (ii) allowing violations to be withheld or masked in any way from the driving record of an individual possessing a CDL. MCSIA § 202(g) (49 U.S.C. § 31311(a)(19)(B)).

The Final Rule implements these provisions by imposing mandatory periods of disqualification that are identical to those for violations committed in a CMV. In the case of conviction for driving under the influence or refusing to be tested, the Final Rule imposes a 1 year mandatory disqualification period for a first offense, and imposes a lifetime disqualification for a second offense (apparently no matter how far the second offense is removed from the first). The Final Rule also establishes mandatory periods of disqualification based on 2 or more convictions for serious traffic offenses committed within a 3 year period. Disqualification for such convictions applies regardless of whether the individual’s license was revoked, cancelled, or suspended.

**C. ARGUMENT**

1. *The Minimum Periods Of Disqualification for DUI Convictions in a Non-CMV are Excessive and Discriminatory.*

As indicated above, Congress did not establish the periods for disqualification based on violations committed in a non-CMV. Rather it directed the Secretary to establish minimum periods giving consideration to the seriousness of the offenses. The statute further provided that in no event should the periods of disqualification be greater than those for violations committed in a CMV.

The Agency imposed penalties equivalent to those for violations committed in a CMV, but failed to explain why such violations are considered to be of equal severity. In fact, there is no evidence to indicate that the FMCSA gave any consideration to the seriousness of the offenses in the Final Rule when determining the penalties to apply. Rather, the supplementary information in the Final Rule indicates that the FMCSA disregarded comments indicating that the periods should be reduced, not because of the seriousness of the violations involved, but in an effort to achieve uniformity. Petitioners believe the Agency's lack of consideration in this regard constitutes a significant error. While such penalties conceivably may be acceptable if the Agency were willing and able to promptly consider and grant exceptions on a case-by-case basis, in the absence of a mechanism allowing for such individual consideration, the penalties adopted by the Final Rules are excessive and can result in terribly unfair sanctions on drivers of CMVs who will be unable to work in the motor carrier industry, perhaps for a lifetime.

a. *The Penalties are Unduly Harsh*

Petitioners agree that drinking and driving is a serious offense that should be penalized regardless of the type of vehicle involved. Petitioners also support

disqualification of a driver's CDL privileges while the individual's license is suspended. However, the penalties prescribed by the FMCSA are excessive and will result in depriving the driver of his or her livelihood.<sup>1</sup> In no other profession are penalties for off duty conduct so harsh and absolute. The penalties are significantly more severe than those applicable in other regulated transportation industries. For example, under the FAA's DWI/DUI program, such convictions must be reported. However, a pilot's license will only be suspended if he or she has two convictions within a three year period. 14 C.F.R. § 61.15. If the pilot is determined to have a substance abuse problem, his or her medical certificate could be withdrawn. Two DWI convictions within a two year period is evidence of such a problem, 14 C.F.R. § 67.107, but will not necessarily result in permanent revocation. Likewise, the Coast Guard and the Federal Railroad Administration consider DUI convictions in their licensing and certification procedures. However, such convictions only serve as evidence of a substance dependency that could make the individual unfit. They do not require an automatic revocation or denial of a license. See 49 C.F.R. §§ 240.111, 240.115; 46 C.F.R. § 10.201(i). Thus, in all other modes of transportation, consideration is given to the individual circumstances and in no case is the penalty for driving a personal vehicle while intoxicated as severe as the penalty for operating a plane, train, or ship while intoxicated.

The penalties prescribed by the Final Rule are also significantly harsher than penalties currently in place by states. To our knowledge, the longest period of

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<sup>1</sup> The periods of CDL disqualification adopted by the FMCSA for driving a non-CMV under the influence of alcohol are 1 year for a first conviction and lifetime for a second conviction. 67 Fed. Reg. 49756. While an employer may be able to find alternative assignments for a driver for a period of 30 or 60 days, a one year disqualification would almost certainly result in a driver losing his or her job, while a lifetime disqualification obviously results in a driver losing his or her profession. We note that a lifetime disqualification may be remitted to 10 years upon successful completion of a voluntary treatment program. However, a 10 year suspension would in any event result in the driver having to find a new occupation.

suspension imposed by any state for a first offense is 6 months.<sup>2</sup> The Final Rule would double that with a one year mandatory disqualification. Further, Petitioners are not aware of any state that imposes an automatic lifetime revocation based on two violations committed any time during one's life. Indeed, the Transportation Equity Act for the 21<sup>st</sup> Century (TEA-21), only provides for states to suspend a driver's license for one year following a repeat conviction of driving while intoxicated. 23 U.S.C. § 164.

Among those parties commenting that periods should be reduced were a number of state motor vehicle and safety departments. Many states consider the proposed periods to be excessive and expressed concerns about their ability to enact legislation consistent with the Final Rule.<sup>3</sup> Although these parties have extensive

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<sup>2</sup> Note that Georgia has a one year suspension for first offenses; however, an individual may apply for reinstatement after 30 days upon completion of an approved DUI risk reduction program. See Ga. Code § 40-5-67.2. In fact, most states with lengthy suspension periods allow for restoration of at least limited driving privileges after a shorter period in cases of hardship. A comparison chart of the first offense penalties for all fifty states can be found on the Insurance Institute for Highway Safety's web site at: [http://www.hwysafety.org/safety\\_facts/state\\_laws/dui.htm](http://www.hwysafety.org/safety_facts/state_laws/dui.htm).

<sup>3</sup> See, e.g., Comments of Alabama Dep't of Public Safety (filed August 1, 2001) ("I foresee problems getting our legislature to go along with this. . . . Anytime a CDL holder has their driver license suspended, revoked, or cancelled, their CDL is automatically disqualified. It would seem this is sufficient to punish drivers that receive serious convictions in noncommercial vehicles."); Comments of Commonwealth of Virginia, Dep't of Motor Vehicles (filed Aug. 1, 2001) ("Virginia suggests that the better approach for alcohol and drug violations in a non-CMV is . . . imposing the same license sanction on CDL holders as on non-CDL holders and extending that sanction to the CDL as well as the regular driving privilege (and not allowing any restricted or provisional CDL). That is the scheme presently used in Virginia, and, presumably, many other states. It has already survived a constitutional challenge on equal protection grounds in Virginia, and would require little or no change in the laws of most states (while the NPRM proposal would require extensive changes everywhere)."); State of Connecticut, Dep't of Motor Vehicles (filed July 27, 2001) ("We believe that a non-CMV [breath test] failure should result in a six (6) month period of CDL disqualification, consistent with the current penalty structure."); Comments of State of New York, Dep't of Motor Vehicles (filed Aug. 1, 2001) (stating that the proposed disqualification period, combined with the elimination of hardship licenses is "a somewhat Draconian response to a situation not involving a commercial motor vehicle"); Comments of Wisconsin Dep't of Transportation (filed Aug. 1, 2001) ("Wisconsin would encourage FMCSA to 'return to the drawing board,' study which non-CMV offenses are reliable predictors of CMV crashes, and then carefully consider which alcohol offenses and what other offenses will result in CMV disqualification."); Comments of the State of Delaware, Dep't of Public Safety, Division of Motor Vehicles (filed July 30, 2001) ("[T]he federal government should refrain from this regulation until it is able to make strong factual arguments to support the assumption that non-CMV convictions are in fact indications of an

knowledge and experience regulating and enforcing traffic safety laws, the Agency inexplicably ignored these comments.

b. The Penalties are Discriminatory<sup>4</sup>

In its comments to the proposed rules (in both dockets) the IBT raised the question of how the rules would be enforced against foreign drivers operating in the United States. The FMCSA responded by stating that foreign drivers are subject to U.S. laws while operating in the U.S. and, therefore, will be subject to disqualification based on violations committed while operating non-CMV's in the United States. 67 Fed. Reg. 49,746. It further stated that the Department would enter into discussions with Mexico and Canada on the issue of addressing violations committed while in Canada or Mexico. While the FMCSA has recognized that requirements must be enforced against foreign drivers, it has not addressed the problem with any rule or sanction. In this regard, although the supplementary information does indicate that foreign drivers will be disqualified based on convictions committed in the U.S., the Final Rule provides no mechanism for this to be accomplished. Under current law, the U.S. is required to recognize the commercial licenses issued by either Canada or Mexico. There is no mechanism in place under which U.S. authorities may place a foreign driver out of service based on failure to comply with U.S. licensing requirements. Rather, it is left to authorities in Canada or Mexico to disqualify the

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unsafe CDL driver.”); Comments of the State of Florida, Dep’t of Highway Safety and Motor Vehicles (filed Aug. 2, 2001) (“We would not expect this to be a routine, non-controversial issue for our legislature. Some may object to the prospect of subjecting truck drivers’ livelihoods to greater jeopardy than motorists in other occupations, for the same offenses involving their personal transportation.”); Comments of Texas Dep’t of Public Safety (filed Sept. 4, 2001) (“To disqualify a CDL license holder – for a violation that occurred in a non-CMV, but which does not affect his non-CDL license – may be difficult to achieve.”).

<sup>4</sup> Although we focus on the drug and alcohol penalties because of the severity of their consequences, this argument applies to the Final Rule in its entirety. None of the penalties can be enforced against foreign drivers, so all are discriminatory.

drivers in the same way it is up to the states to disqualify drivers in the U.S.

Certainly, the FMCSA could create some other means to disqualify foreign drivers, but the Final Rule fails to do so.

In addition, addressing only violations that occur while the driver is operating a non-CMV in the U.S. is insufficient and in no way comparable to the treatment of U.S. drivers under the Final Rule. Foreign drivers will almost always be operating CMVs while in the U.S.; convictions in non-CMVs are thus likely to be rare. The Agency must, therefore, develop a mechanism to consider violations that occur while the foreign driver is operating a non-CMV in Canada or Mexico. Until this can be done, the rules unfairly discriminate against U.S. drivers in favor of foreign drivers. The FMCSA has expressed that its goal is to have one class of drivers operating on U.S. highways, all subject to the same high standards of safety. Yet this rule creates two classes of drivers, U.S. commercial drivers who are subject to a higher standard of care while operating their personal vehicles, and foreign drivers who are not subject to this heightened standard.<sup>5</sup>

Such discrimination is blatantly unjust and subjects U.S. drivers to potentially severe sanctions which are not applied to foreign drivers. The Agency should not go forward with a final rule that results in such unequal treatment.

c. Aggressively Penalizing Off Duty Behavior Is Not The Best Method Available To Reduce the Risk of Drivers Operating CMVs While Intoxicated

While Petitioners agree that some penalties are appropriate, imposition of excessively harsh penalties likely will not produce the desired safety results and will

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<sup>5</sup> It is also ironic that the Administration has been so concerned with treating Mexican drivers fairly, *see, e.g.*, White House Press Briefing, June 30, 2001; White House Press Briefing, June 30, 2001; Fact Sheet on Trucking, issued July 25, 2001; and now it is U.S. drivers that are being discriminated against.

serve to deter qualified drivers from pursuing commercial driving as a career. There are better means available for detecting and disqualifying drivers who pose a potential safety risk. If an individual is convicted of driving his or her personal vehicle while under the influence, such a conviction may be evidence that the driver will engage in similar behavior while operating a CMV. (For example, it may be indicative of a substance abuse problem or a lack of concern for the consequences of one's actions). However, it is not conclusive evidence. One conviction may be an isolated instance of poor judgment. Also how a person operates a personal vehicle is not necessarily indicative of how they would operate a commercial vehicle. Repeat convictions certainly provide stronger evidence of a potential risk, but still may not tell the whole story. This is particularly true if the incidents occur 10, 20, or 50 years apart.

Also, the regulations provide a bright line and do not take into consideration varying degrees of culpability. A 110 pound woman who has had one drink, and is barely over the legal limit (but able to operate a motor vehicle without any difficulty), will be treated the same as someone who is driving at twice the legal limit and is clearly non-functional. The regulations thus may be casting too wide a net in its effort to disqualify at risk drivers. In the same respect, many people with substance abuse problems who do present a risk may never be arrested for driving while intoxicated.

A better method for preventing individuals who are drug or alcohol dependent from operating CMVs may be through the Department's Drug and Alcohol Testing and Substance Abuse Programs. Subsequent to enactment of the MCSIA, improved Department-wide programs were implemented. The IBT has always supported drug and alcohol testing and believes that such programs, particularly in conjunction with

treatment programs, provide a better mechanism for combating the serious problems associated with drug and alcohol abuse.<sup>6</sup>

2. *The Disqualification Provisions Imposed for Serious Traffic Offenses are Contrary to Law*

As we pointed out in both sets of comments (and as numerous other interested parties pointed out), the standard set for disqualification based on serious traffic violations in non-CMV is contrary to law. The MCSIA provides for disqualification based on “a serious offense involving a motor vehicle (other than a commercial motor vehicle) that has resulted in the revocation, cancellation, or suspension of the individual’s license.” The FMCSA has interpreted “a serious offense” to mean the same thing as a “serious traffic violation.” Petitioners do not object to such a definition, however, because most such offenses do not necessarily result in the revocation, cancellation, or suspension of the individual’s license it is essential that this limiting language be included in the rule.

In response to comments by the IBT and others, the FMCSA acknowledged in the supplementary material that the limitation exists,<sup>7</sup> but it did not amend the rule to include the required language. As written the Final Rule requires disqualification based solely upon conviction of the enumerated offenses, regardless of whether such convictions result in any action being taken against the individual’s license. Section

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<sup>6</sup> Moreover, treatment is an essential element of any drug and alcohol program and successful completion of a treatment program should be given greater consideration than is done under the Final Rule. Giving greater consideration to treatment would be consistent with other agency programs. See, e.g., 14 C.F.R. § 67.107(a)(4)(allowing reinstatement of medical certificate upon recovery—evidenced by two years of sobriety); 49 C.F.R. § 240.115 (requiring referral to substance abuse professional for determination of whether DUI should affect engineer certification); 46 C.F.R. § 10.201(j) (allowing the Coast Guard to consider treatment in determining whether applicant is suitable to hold a license).

<sup>7</sup> The FMCSA states in reference to serious offenses that “the violation will not be disqualifying unless the State also finds that the circumstances of the offense warrant “revocation, cancellation, or suspension of the individual’s license.” 67 Fed. Reg. 49745.

383.51(c) states that the offenses listed in Table 2<sup>8</sup> must result in disqualification of the driver for the specified period. The language in the Table refers only to convictions of the various offenses. Further, sections 384.218 and 384.219 provide that a state must disqualify a person who is convicted of the violations set forth in Table 2. Nowhere in the rule is there anything to inform states or individuals that disqualification is not permitted unless the conviction resulted in suspension, revocation or cancellation of the driver's individual license. This is a significant departure from the statutory authority and must be corrected.

#### **D. RECOMMENDATIONS**

(1) The FMCSA must give further consideration to the periods of disqualification it has imposed for drug and alcohol related offenses. The rule should be revised so that it does not impose a single strict mandatory penalty applicable to every case no matter what the facts. Rather the rule should provide an appropriate minimum penalty for each type of offense as indicated by the MCSIA, and allow room for states to exercise discretion to impose more severe penalties in cases where such penalties are warranted. Petitioners believe that an individual who is convicted of driving under the influence should face suspension of his or her CDL privileges. Petitioners do not, however, believe that in every instance such a conviction should automatically result in the complete loss of the driver's livelihood. As with other transportation modes, every case must be considered on its facts, and substance abuse professionals should be consulted in determining whether the driver poses a genuine threat to safety.

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<sup>8</sup> Table 2 also contains a typographical error, omitting the word "vehicle" after "motor."

In determining appropriate penalties, the Agency should seek guidance from the states as they have expertise in implementing and enforcing DUI statutes. The Agency should either defer to the discretion of the states or, if uniformity is desired, determine the average penalties from existing state statutes. For example, a reasonable minimum disqualification for a first DUI conviction in a non-CMV might be 90 days. A 90 day suspension period is consistent with or more severe than most existing state laws.<sup>9</sup> Plus, states would be permitted to impose a longer period on a case-by-case basis or as needed to be consistent with already established penalties. Thus, by adopting such a minimum period the Agency would be imposing an added penalty on commercial drivers without unduly harming them.

For repeat offenders, a minimum period of three years upon conviction of two violations during a three year period would seem more reasonable and in line with state practice. By limiting the violations to a specified time frame, the FMCSA can be more confident that it is truly targeting the chronic offenders that pose a safety threat. Also the three year minimum disqualification period is consistent with the average state remedy for two convictions, and the period can be increased at the state's discretion for additional violations or in egregious cases.

(2) The effective date of the Final Rule should be delayed until it can be enforced in a non-discriminatory manner against all drivers operating on U.S. highways. It is contrary to principles of fundamental fairness and equal protection for U.S. drivers to be deprived of their livelihood, while foreign drivers are permitted to operate on our highways after committing identical offenses.

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<sup>9</sup> With the elimination of the hardship license, a 90 day suspension is in fact probably more severe than the majority of current state laws.

(3) The standard for disqualification based on a serious offense must be amended to include the limitation that the driver may only be disqualified if the offenses resulted in the revocation, cancellation, or suspension of the driver's individual license. Failure to do so will result in the rule being contrary to law.

**E. CONCLUSION**

For the above reasons, Petitioners respectfully request that the Agency reconsider the Final Rule and amend it as set forth herein. We request that the effective date of the Final Rule be postponed pending resolution of this petition. Delaying the effective date should not have negative consequences since many of the states have indicated that it will take substantial time to enact the legislative changes needed to implement the rules. The states have now been put on notice and can begin making preparations for this to be done. Delaying the effective date should, therefore, not affect the ultimate implementation date.

Respectfully submitted,

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