

■ b. Under Chapter 21, Subchapter B, by adding a new entry for Section 2123; ■ c. Under Chapter 21, Subchapter H, by adding a new entry for Section 2143. **§ 52.970 Identification of plan.**  
 The additions read as follows: (c) \* \* \*

**EPA APPROVED LOUISIANA REGULATIONS IN THE LOUISIANA SIP**

| State citation  | Title/subject  | State approval date | EPA approval date  | Comments  |
|---|--|---------------------|--|---|
| <b>LAC Title 33. Environmental Quality Part III. Air</b>    |  |                     |  |   |
| <b>Chapter 1—General Provisions</b>                         |  |                     |  |   |
| * Section 111   | * Definitions  | * 8/20/2010         | * 12/2/2011 [Insert FR page number where document begins]. | * Revisions to Section 111 approved in the Louisiana Register August 20, 2010 (LR 36:1773). |
| <b>Chapter 21—Control of Emissions of Organic Compounds</b> |  |                     |  |   |
| <b>Subchapter B—Organic Solvents</b>                        |  |                     |  |   |
| * Section 2123  | * Organic Solvents   | * 4/20/2011         | * 12/2/2011 [Insert FR page number where document begins]. | * Revisions to Section 2123 approved in the Louisiana Register April 20, 2011 (LR 37:1150). |
| <b>Subchapter H—Graphic Arts</b>                            |  |                     |  |   |
| * Section 2143  | * Graphic Arts (Printing) by Rotogravure and Flexographic Processes. Control Requirements. | * 6/20/2009         | * 12/2/2011 [Insert FR page number where document begins]. | * Revisions to Section 2143 approved in the Louisiana Register June 20, 2009 (LR 35:1101).  |

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**DEPARTMENT OF TRANSPORTATION**

**Pipeline and Hazardous Materials Safety Administration**

**49 CFR Part 177**

[Docket No. PHMSA-2010-0227(HM-256A)]

RIN 2126-AB29

**Federal Motor Carrier Safety Administration**

**49 CFR Parts 383, 384, 390, 391, and 392**

[Docket No. FMCSA-2010-0096]

RIN 2137-AE65

**Drivers of CMVs: Restricting the Use of Cellular Phones**

**AGENCIES:** Federal Motor Carrier Safety Administration (FMCSA) and Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

**ACTION:** Final rule.

**SUMMARY:** FMCSA and PHMSA are amending the Federal Motor Carrier Safety Regulations (FMCSRs) and the Hazardous Materials Regulations (HMR) to restrict the use of hand-held mobile telephones by drivers of commercial motor vehicles (CMVs). This rulemaking will improve safety on the Nation's highways by reducing the prevalence of distracted driving-related crashes, fatalities, and injuries involving drivers of CMVs. The Agencies also amend their regulations to implement new driver disqualification sanctions for drivers of CMVs who fail to comply with this Federal restriction and new driver disqualification sanctions for commercial driver's license (CDL) holders who have multiple convictions for violating a State or local law or ordinance on motor vehicle traffic control that restricts the use of hand-held mobile telephones. Additionally, motor carriers are prohibited from requiring or allowing drivers of CMVs to use hand-held mobile telephones.

**DATES:** This rule is effective January 3, 2012.

**ADDRESSES:** For access to the docket to read background documents, including those referenced in this document, or to read comments received, go to <http://www.regulations.gov> at any time and insert “FMCSA–2010–0096” or “PHMSA–2010–0227” in the “Keyword” box, and then click “Search.” You may also view the docket online by visiting the Docket Management Facility in Room W12–140, DOT Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., e.t. Monday through Friday, except Federal holidays.

Anyone is able to search the electronic form for 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 the U.S. Department of Transportation’s (DOT) complete Privacy Act Statement in the **Federal Register** published on January 17, 2008 (73 FR 3316), or you may visit <http://edocket.access.gpo.gov/2008/pdf/E8-785.pdf>.

**FOR FURTHER INFORMATION CONTACT:** If you have questions about this rule, contact Mr. Brian Routhier, Transportation Specialist, Federal Motor Carrier Safety Administration, Vehicle and Roadside Operation Division, at (202) 366–4325 or [FMCSA\\_MCPSV@dot.gov](mailto:FMCSA_MCPSV@dot.gov), or contact Ben Supko, Sr. Regulations Officer, Standards and Rulemaking Division, Pipeline and Hazardous Materials Safety Administration, at (202) 366–8553.

**SUPPLEMENTARY INFORMATION:**

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**I. Abbreviations**

ABA American Bus Association  
 Advocates Advocates for Highway and Auto Safety  
 AMSA American Moving and Storage Association  
 API American Petroleum Institute  
 ATA American Trucking Associations, Inc.  
 CDL Commercial Driver’s License  
 CMV Commercial Motor Vehicle  
 DOT United States Department of Transportation

EA Environmental Assessment  
 EIS Environmental Impact Statement  
 EOBR Electronic On-Board Recorder  
 FCC Federal Communications Commission  
 FMCSA Federal Motor Carrier Safety Administration  
 FMCSRs Federal Motor Carrier Safety Regulations  
 FONSI Finding of No Significant Impact  
 FR Federal Register  
 FRA Federal Railroad Administration  
 MCSAC Motor Carrier Safety Advisory Committee  
 MCSAP Motor Carrier Safety Assistance Program  
 NAICS North American Industry Classification System  
 NHTSA National Highway Traffic Safety Administration  
 NPRM Notice of Proposed Rulemaking  
 NSC National Safety Council  
 NTSB National Transportation Safety Board  
 OOIDA Owner-Operator Independent Drivers Association  
 OMB Office of Management and Budget  
 PAR Population Attributable Risk  
 PHMSA Pipeline and Hazardous Materials Safety Administration  
 PU Power Unit  
 UMA United Motorcoach Association  
 VTTI Virginia Tech Transportation Institute

**II. Background**

*FMCSA*—On December 21, 2010, FMCSA published a notice of proposed rulemaking (NPRM) in the **Federal Register** (75 FR 80014), proposing to restrict the use of hand-held mobile telephones by interstate CMV drivers. FMCSA received nearly 300 public comments to the NPRM. The Agency made changes to the proposed rule in response to these comments, which are described below in part IV, Discussion of the Rule.

*PHMSA*—On April 29, 2011, PHMSA published a NPRM in the **Federal Register** (76 FR 23923), proposing to restrict the use of hand-held mobile telephones by drivers of CMVs containing a quantity of hazardous materials requiring placarding under part 172 of 49 CFR or any quantity of a select agent or toxin listed in 42 CFR part 73. PHMSA received six public comments, which are also described below in part IV, Discussion of the Rule.

**A. Rationale for the Rule**

Driver distraction can be defined as the voluntary or involuntary diversion of attention from primary driving tasks due to an object, event, or person. Researchers classify distraction into

several categories: visual (taking one’s eyes off the road), manual (taking one’s hands off the wheel), cognitive (thinking about something other than the road/driving), and auditory (listening to the radio or someone talking). Research shows that using a hand-held mobile telephone while driving may pose a higher safety risk than other activities (*e.g.*, eating or adjusting an instrument) because it involves all four types of driver distraction. Both reaching for and dialing a hand-held mobile telephone are manual distractions and require visual distraction to complete the task; therefore, the driver may not be capable of safely operating the vehicle.

Using a hand-held mobile telephone may reduce a driver’s situational awareness, decision making, or performance; and it may result in a crash, near-crash, unintended lane departure by the driver, or other unsafe driving action. Indeed, research indicates that reaching for and dialing hand-held mobile telephones are sources of driver distraction that pose a specific safety risk. To address the risk associated with these activities, the Agencies restrict CMV drivers’ use of hand-held mobile telephones, which includes “using at least one hand to hold a mobile telephone to conduct a voice communication.” As discussed below, while operating a CMV, the driver may only use a compliant mobile telephone, such as a hands free mobile phone, to conduct a voice communication.

In an effort to understand and mitigate crashes associated with driver distraction, the U.S. Department of Transportation (DOT) conducted research concerning behavioral and vehicle safety countermeasures to driver distraction. Data from studies<sup>1</sup> indicate that both reaching for and dialing a mobile telephone increase the odds of a CMV driver’s involvement in a safety-critical event, such as a crash, near crash, or unintended lane departure.<sup>2</sup>

<sup>1</sup> Olson, R.L., Hanowski, R.J., Hickman, J.S., & Bocanegra, J. (2009). *Driver distraction in commercial vehicle operations*. (Document No. FMCSA–RRR–09–042) Washington, DC: Federal Motor Carrier Safety Administration. The study is in the docket at #FMCSA–2010–0096–0016. Hickman, J., Hanowski, R. & Bocanegra, J. (2010). *Distraction in commercial trucks and buses: assessing prevalence and risk in conjunction with crashes and near-crashes*, (Document No. FMCSA–RRR–10–049) Washington, DC: Federal Motor Carrier Safety Administration. The study is in the docket at #FMCSA–2010–0096–0004.

<sup>2</sup> In popular usage, mobile telephones are often referred to as “cell phones.” As explained later in the final rule, a variety of different technologies are licensed by the Federal Communications Commission (FCC) (47 CFR 20.3) to provide mobile telephone services; thus, the rule here would apply

The odds of being involved in a safety-critical event are three times greater when the driver is reaching for an object than when the driver is not reaching for an object. The odds of being involved in a safety-critical event are six times greater while the driver is dialing a cell phone than when the driver is not dialing a cell phone. These increases in risk are primarily attributable to the driver's eyes being off the forward roadway. Additionally, these activities have high population attributable risk (PAR) percentages. PAR percent is the percent of the drivers involved in a safety critical event that would not occur if performing the task while driving were eliminated. Tasks that are performed more frequently have a higher PAR percentage. The highest PAR percentage in the study was 7.6 percent—reaching for an object, including cell phones. Dialing a cell phone had a PAR of 2.5. Because of the data on distractions associated with the use of hand-held mobile telephones while driving<sup>3</sup>(*i.e.* reaching for and dialing a mobile telephone), FMCSA and PHMSA believe it is in the best interest of public safety to restrict a CMV driver's use of such devices.

The National Transportation Safety Board (NTSB) determined that one probable cause of a November 2004 bus crash was the use of a hands-free cell phone. This crash was the impetus for an NTSB investigation (NTSB/HAR-06/04 PB2007-916201) and a subsequent recommendation to FMCSA that the Agency prohibit cell phone use by all passenger-carrying CMVs.<sup>4</sup> FMCSA also received recommendations on cell phone use from its Motor Carrier Safety Advisory Committee (MCSAC). One of MCSAC's recommendations for the National Agenda for Motor Carrier Safety was that FMCSA initiate a rulemaking to ban a driver's use of hand-held and hands-free mobile telephones while operating a CMV.

to the range of technologies used to provide wireless telephone communications and the rule uses the broader term "mobile telephones." However, some of the materials discussed in this preamble use the popular term "cell phone," and the discussion continues that usage in such cases as appropriate.

<sup>3</sup> As discussed under part II.B, the legal authority supporting the two regulatory programs of FMCSA and PHMSA differs. FMCSA's authority to adopt the FMCSRs applies to CMV drivers who operate in interstate commerce. PHMSA's authority to adopt the HMRs extends to CMV drivers who operate in intrastate commerce as well.

<sup>4</sup> NTSB (2006). *Motorcoach collision with the Alexandria Avenue Bridge overpass, George Washington Memorial Parkway, Alexandria, Virginia, November 14, 2004* (Highway Accident Report NTSB/HAR-06/04; NTIS report number PB2007-916201). Retrieved May 16, 2011, from: <http://www.nts.gov/Publicctn/2006/HAR0604.pdf>.

It is not clear, however, if simply talking on a mobile telephone presents a significant risk while driving. For example, Olson, *et al.* (2009) detailed the risks of reaching for and dialing a phone while driving and found that "talking or listening to a hands-free phone" and "talking or listening to a hand-held phone" were relatively low-risk activities that involved only brief periods of eyes off the forward roadway. FMCSA and PHMSA determine that it is the action of taking one's eyes off the forward roadway to reach for and dial a hand-held mobile telephone<sup>5</sup> (two high PAR activities) that has the greatest risk. The Agencies address those risky behaviors by restricting holding mobile telephones while driving a CMV.

While no State has completely banned mobile telephone use, some States have gone further than this rule for certain categories of drivers. For example, 19 States and the District of Columbia prohibit the use of all mobile telephones while driving a school bus. Additionally, nine States and the District of Columbia have traffic laws prohibiting all motor vehicle drivers from using a hand-held mobile telephone while driving. Transit bus and motorcoach drivers are the focus of stricter mobile telephone rules in some States and local jurisdictions.<sup>6</sup> The restriction of hand-held mobile telephone use by all CMV drivers is based on available data and in line with existing regulations that hold CMV drivers to higher standards.<sup>7</sup>

#### Distracted Driving Summit

The information and feedback DOT received during its first Distracted Driving Summit, held September 30–October 1, 2009, in Washington, DC, highlighted the need for action and demonstrated widespread support for a ban against texting and mobile telephone use while driving. Summit participants, who included industry representatives, safety experts, elected officials, and law enforcement, gathered to address the safety risk posed by this growing problem across all modes of surface transportation. U.S.

<sup>5</sup> The concept of "holding" is included in our definition of "use a hand-held mobile telephone."

<sup>6</sup> Insurance Institute for Highway Safety list of cellphone laws. Retrieved June 20, 2011, from <http://www.iihs.org/laws/cellphonelaws.aspx>.

<sup>7</sup> See 49 CFR 392.2, Applicable operating rules, which states that every commercial motor vehicle must be operated in accordance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated. However, if a regulation of the Federal Motor Carrier Safety Administration imposes a higher standard of care than that law, ordinance or regulation, the Federal Motor Carrier Safety Administration regulation must be complied with.

Transportation Secretary Ray LaHood stated: "Keeping Americans safe is without question the Federal government's highest priority." The Secretary pledged to work with Congress to ensure that the issue of distracted driving would be appropriately addressed.<sup>8</sup> At the conclusion of the Summit, the Secretary announced a series of concrete actions that the Obama Administration and DOT would be taking to address distracted driving.

#### B. Legal Authority

##### FMCSA

The authority for this rule derives from the Motor Carrier Safety Act of 1984 (1984 Act), 49 U.S.C. chapter 311, and the Commercial Motor Vehicle Safety Act of 1986 (1986 Act), 49 U.S.C. chapter 313. The 1984 Act (Pub. L. 98-554, Title II, 98 Stat. 2832, Oct. 30, 1984) provides authority to regulate the safety of operations of CMV drivers, motor carriers, and vehicle equipment. It requires the Secretary of Transportation (Secretary) to "prescribe regulations on commercial motor vehicle safety. The regulations shall prescribe minimum safety standards for commercial motor vehicles." Although this authority is very broad, the 1984 Act also includes specific requirements in 49 U.S.C. 31136(a):

At a minimum, the regulations shall ensure that—(1) commercial motor vehicles are maintained, equipped, loaded, and operated safely; (2) the responsibilities imposed on operators of commercial motor vehicles do not impair their ability to operate the vehicles safely; (3) the physical condition of operators of commercial motor vehicles is adequate to enable them to operate the vehicles safely; and (4) the operation of commercial motor vehicles does not have a deleterious effect on the physical condition of the operators.

This rule is based primarily on 49 U.S.C. 31136(a)(1), which requires regulations that ensure that CMVs are operated safely, and secondarily on section 31136(a)(2), to the extent that drivers' use of hand-held mobile telephones impacts their ability to operate CMVs safely. It does not address the physical condition of drivers (49 U.S.C. 31136(a)(3)), nor does it impact any physical effects caused by operating CMVs (49 U.S.C. 31136(a)(4)).

The relevant provisions of the FMCSRs (49 CFR subtitle B, chapter III, subchapter B) apply to CMV drivers and employers operating CMVs included in

<sup>8</sup> DOT (Oct. 1, 2009). *U.S. Transportation Secretary Ray LaHood Announces Administration-Wide Effort to Combat Distracted Driving* (DOT 156-09). Retrieved May 16, 2011, from: <http://www.dot.gov/affairs/2009/dot15609.htm>.

the statutory authority of the 1984 Act. The 1984 Act defines a CMV as a self-propelled or towed vehicle used on the highways to transport persons or property in interstate commerce; and that either: (1) Has a gross vehicle weight/gross vehicle weight rating of 10,001 pounds or greater; (2) is designed or used to transport more than 8 passengers (including the driver) for compensation; (3) is designed or used to transport more than 15 passengers, not for compensation; or (4) is transporting any quantity of hazardous materials requiring placards to be displayed on the vehicle (49 U.S.C. 31132(1)). All drivers operating CMVs are subject to the FMCSRs, except those who are employed by Federal, State, or local governments (49 U.S.C. 31132(2)).

In addition to the statutory exemption for government employees, there are several regulatory exemptions in the FMCSRs that are authorized under the 1984 Act, including, among others, one for school bus operations and one for CMVs designed or used to transport between 9 and 15 passengers (including the driver) not for direct compensation (49 CFR 390.3(f)(1) and (6)). The school bus operations exemption only applies to interstate transportation of school children and/or school personnel between home and school. This particular exemption is not based on any statutory provisions, but is instead a discretionary rule promulgated by the Agency. Therefore, FMCSA has authority to modify the exemption. Modification of the school bus operations exemption requires the Agency to find that such action "is necessary for public safety, considering all laws of the United States and States applicable to school buses" (former 49 U.S.C. 31136(e)(1)).<sup>9</sup> FMCSA also has authority to modify the non-statutory exemption for small, passenger-carrying vehicles not for direct compensation, but is not required to comply with

former 49 U.S.C. 31136(e) in modifying that exemption.<sup>10</sup> FMCSA applies restrictions on hand-held mobile telephone use to both school bus operations by private operators in interstate commerce and small passenger-carrying vehicles not for direct compensation, although they will continue to be exempt from the rest of the FMCSRs. Other than transportation covered by statutory exemptions, FMCSA has authority to restrict the use of mobile telephones by drivers operating CMVs.

Any violation of this restriction may result in a civil penalty imposed on drivers in an amount up to \$2,750; a civil penalty may be imposed on employers, who fail to require their drivers to comply with FMCSRs, in an amount up to \$11,000 (49 U.S.C. 521(b)(2)(A), 49 CFR 386.81 and Appendix B, paragraphs (a)(3) and (4)). Disqualification of a CMV driver for violations of the Act and its regulations is also within the scope of the Agency's authority under the 1984 Act. Such disqualifications are specified by regulation for other violations (49 CFR 391.15), and were recently adopted by the Agency in its final rule prohibiting texting by CMV drivers while operating in interstate commerce (75 FR 59118, Sept. 27, 2010; 49 CFR 392.80). In summary, both a restriction on the use of hand-held mobile telephones and associated sanctions, including civil penalties and disqualifications, are authorized by statute and regulation for operators of CMVs, as defined above, in interstate commerce, with limited exceptions. But before prescribing any regulations under the 1984 Act, FMCSA must consider their costs and benefits (49 U.S.C. 31136(c)(2)(A)). See Part V, Regulatory Analysis.

The 1986 Act (Title XII of Pub. L. 99-570, 100 Stat. 3207-170, Oct. 27, 1986), which authorized creation of the CDL program, is the primary basis for licensing programs for certain large CMVs. There are several key distinctions between the authority conferred under the 1984 Act and that under the 1986 Act. First, the CMV for which a CDL is required is defined under the 1986 Act, in part, as a motor vehicle operating "in commerce," a term separately defined to cover broadly both interstate commerce and operations that "affect" interstate commerce (49 U.S.C. 31301(2) and (4)). Also under the 1986 Act, a CMV means

a motor vehicle used in commerce to transport passengers or property that: (1) Has a gross vehicle weight/gross vehicle weight rating of 26,001 pounds or greater; (2) is designed to transport 16 or more passengers including the driver; or (3) is used to transport certain quantities of "hazardous materials," as defined in 49 CFR 383.5 (49 U.S.C. 31301(4)). In addition, a provision in the FMCSRs implementing the 1986 Act recognizes that all school bus drivers (whether government employees or not) and other government employees operating vehicles requiring a CDL (*i.e.*, vehicles above 26,000 pounds, in most States, or designed to transport 16 or more passengers) are subject to the CDL standards set forth in 49 CFR 383.3(b).

There are several statutory and regulatory exceptions from the CDL requirements, which include the following individuals: military service members who operate a CMV for military purposes (a mandatory exemption for the States to follow) (49 CFR 383.3(c)); certain farmers; firefighters; CMV drivers employed by a unit of local government for the purpose of snow/ice removal; and persons operating a CMV for emergency response activities (all of which are permissive exemptions for the States to implement at their discretion) (49 CFR 383.3(d)). States may also issue certain restricted CDLs to other categories of drivers under 49 CFR 383.3(e)-(g). Drivers with restricted CDLs based on State programs may still be covered by a disqualification under the 1986 Act arising from the use of hand-held mobile telephones while operating CMVs.

The 1986 Act does not expressly authorize the Agency to adopt regulations governing the safety of CMVs operated by drivers required to obtain a CDL. Most of these drivers (those involved in interstate trade, traffic, or transportation) are subject to safety regulations under the 1984 Act, as described above. The 1986 Act, however, does authorize disqualification of CDL drivers by the Secretary. It contains specific authority to disqualify CDL drivers for various types of offenses, whether those offenses occur in interstate or intrastate commerce. This authority exists even if drivers are operating a CMV illegally because they did not obtain a CDL.

In general, the 1986 Act explicitly identifies several "serious traffic violations" as grounds for disqualification (49 U.S.C. 31301(12) and 31310). In addition to the specifically enumerated "serious traffic violations," the 1986 Act provides related authority that allows FMCSA to

<sup>9</sup> Former section 31136(e)(1) was amended by section 4007(c) of the Transportation Equity Act for the 21st Century, Pub. L. 105-178, 112 Stat. 107, 403 (June 9, 1998) (TEA-21). However, TEA-21 also provides that the amendments made by section 4007(c) "shall not apply to or otherwise affect a waiver, exemption, or pilot program in effect on the day before the date of enactment of [TEA-21] under \* \* \* section 31136(e) of title 49, United States Code." (Section 4007(d), TEA-21, 112 Stat. 404 (set out as a note under 49 U.S.C. 31136)). The exemption for school bus operations in 49 CFR 390.3(f)(1) became effective on November 15, 1988, and was adopted pursuant to section 206(f) of the 1984 Act, later codified as section 31136(e) (*Federal Motor Carrier Safety Regulations; General*, 53 FR 18042-18043, 18053 (May 19, 1988) and section 1(e), Public Law 103-272, 108 Stat 1003 (July 5, 1994)). Therefore, any action by FMCSA affecting the school bus operations exemption would require the Agency to comply with former section 31136(e)(1).

<sup>10</sup> The exemption in 49 CFR 390.3(f)(6) was not adopted until 2003, after the enactment of TEA-21, in a final rule titled, "*Safety Requirements for Operators of Small Passenger-Carrying Commercial Motor Vehicles Used In Interstate Commerce*" (68 FR 47860, Aug. 12, 2003).

designate additional serious traffic violations by rulemaking if the underlying offense is based on the CDL driver committing a violation of a "State or local law on motor vehicle traffic control" (49 U.S.C. 31301(12)(G)). The FMCSRs state, however, that unless and until a CDL driver is convicted of the requisite number of specified offenses within a certain time frame (described below), the required disqualification may not be applied (49 CFR 383.5 (defining "conviction" and "serious traffic violation") and 383.51(c)).

Under the statute, a driver who commits two serious traffic violations in a 3-year period while operating a CMV must be disqualified from operating a CMV that requires a CDL for at least 60 days (49 U.S.C. 31310(e)(1)). A driver who commits three or more serious traffic violations in a 3-year period while operating a CMV must be disqualified from operating a CMV that requires a CDL for at least 120 days (49 U.S.C. 31310(e)(2)). Because use of hand-held mobile telephones results in distracted driving and increases the risk of CMV crashes, fatalities, and injuries, FMCSA is now requiring that violations by a CDL driver of a State or local law or ordinance on motor vehicle traffic control that restricts the use of such mobile telephones while driving CMVs should result in a disqualification under this provision.

FMCSA is authorized to carry out these statutory provisions by delegation from the Secretary as provided in 49 CFR 1.73(e) and (g).

#### PHMSA

PHMSA's Office of Hazardous Materials Safety is the Federal safety authority for the transportation of hazardous materials by air, rail, highway, and water. Under the Federal hazardous materials transportation law (Federal hazmat law; 49 U.S.C. 5101 *et seq.*), the Secretary of Transportation is charged with protecting the nation against the risks to life, property, and the environment that are inherent in the commercial transportation of hazardous materials. The Hazardous Materials Regulations (HMR; 49 CFR parts 171–180) are promulgated under the mandate in Section 5103(b) of Federal hazardous materials transportation law (Federal hazmat law; 49 U.S.C. 5101 *et seq.*) that the Secretary of Transportation "prescribe regulations for the safe transportation, including security, of hazardous material in intrastate, interstate, and foreign commerce." Section 5103(b)(1)(B) provides that the HMR "shall govern safety aspects, including security, of the transportation of hazardous material the

Secretary considers appropriate." As such, PHMSA strives to reduce the risks inherent to the transportation of hazardous materials in both intrastate and interstate commerce. This final rule is being issued under the authority in 49 CFR part 106.

### III. Discussion of Comments

FMCSA received approximately 300 comments in response to the NPRM (75 FR 80014, Dec. 21, 2010). PHMSA received 6 comments in response to its NPRM (76 FR 23923, April 29, 2011). The commenters included associations representing trucking companies, motorcoach companies, school bus operations, public transportation, highway safety, utility providers, waste haulers, concrete manufacturers, and food suppliers. In addition, the agencies received comments from the legal and law enforcement communities, as well as representatives of State governments and driver unions. Commenters from the general public included motorists concerned about their safety when driving near CMV drivers who are using mobile telephones.

Overall, most commenters supported the proposal to restrict hand-held mobile telephone use because of the potential safety benefits for all vehicle and pedestrian traffic sharing the highway with CMVs. A few commenters stated that the proposal did not go far enough and that all mobile telephone use by CMV drivers should be prohibited. A few commenters opposed any restriction on the use of mobile phones. Below we summarize the comments submitted to FMCSA's NPRM at Docket FMCSA–2010–0096, followed by a summary of the comments submitted to PHMSA's NPRM at Docket PHMSA–2010–0227.

#### A. FMCSA Comments

##### Hand-Held Restriction

Some commenters believed that restricting hand-held mobile telephone use by drivers operating CMVs in interstate commerce would impede business and require many more stops for drivers.

*FMCSA Response.* Because drivers have other options available that do not require pulling over and stopping, FMCSA disagrees that this rule would impede business. Stops can be avoided by using technological solutions such as a hands-free mobile telephone with a speaker phone function or a wired or wireless earphone. Most mobile telephones have a speaker phone function and one-touch dialing and thus would be compliant with this rule. Additionally, the Agency estimated the

minimum cost of upgrading from a non-compliant mobile telephone to a compliant one to be as low as \$29.99.<sup>11</sup> Therefore, abiding by the final rule will not create a burden on, or hardship for, CMV drivers.

#### Complete Mobile Telephone Ban

A few commenters, including First Group America<sup>12</sup> and the Advocates for Highway and Auto Safety (Advocates), thought the Agency should ban both hand-held and hands-free mobile telephone use.

*FMCSA Response.* The Agency does not believe sufficient data exist to justify a ban of both hand-held and hands-free use of mobile telephones by drivers operating CMVs in interstate commerce. Based on available studies, FMCSA proposed restricting only hand-held mobile telephone use by CMV drivers. While some driving simulator-based studies found conversation to be risky, the Olson, *et al.* (2009) and Hickman, *et al.* (2010) studies found that "talking or listening to a hands-free phone" and "talking or listening to a hand-held phone" were relatively low-risk activities and had only brief periods when the drivers' eyes were off the forward roadway. It is not clear from available studies if simply talking on a mobile telephone while driving presents a significant risk. The use of a cell phone, however, involves a variety of sub-tasks, some increasing and some decreasing the odds of involvement in a safety-critical event. The Hickman, *et al.* (2010) study showed that reaching for a cell phone while driving increased these odds by 3.7 times. Dialing a cell phone while driving increased the odds by 3.5 times. Reaching for a headset/earpiece while driving increased the odds by 3.4 times. Talking or listening on a hands-free cell phone while driving decreased the odds by .7 times (*i.e.*, protective effect). Talking/listening on a hand-held cell phone (odds ratios = .9) had a non-significant odds ratio (*i.e.*, no increase or decrease in risk).

Although talking on the cell phone did not show an increased risk, a driver must take several risk-increasing steps, such as reaching for and dialing the cell phone, in order to use the electronic device for conversation. Based on these studies, FMCSA determined that it is the action of taking one's eyes off the

<sup>11</sup> Upgrading is defined as the purchase of a mobile telephone that has voice dialing and speaker phone capabilities. The average cost of the least costly compliant phone is \$29.99 (with a 2-year contract). See the Regulatory Evaluation accompanying this final rule for a full explanation of this cost.

<sup>12</sup> A North American surface transportation provider that includes school bus and transit services, as well as Greyhound Lines, Inc.

forward roadway to reach for and dial the mobile telephone that is the highly risky activity. Therefore, because the reaching and dialing tasks are necessary to use a hand-held mobile telephone, the Agency will only restrict hand-held mobile telephone use by CMV drivers while operating in interstate commerce in this final rule. Reaching for and dialing a mobile telephone are both visual and manual distractions and reduce a driver's situational awareness; adversely impact decision making or driving performance; and result in an increased risk of a crash, near-crash, unintended lane departure by the driver, or other unsafe driving action.<sup>13</sup> To address this risk, the Agency also restricts holding mobile telephones while driving a CMV.

FMCSA specifically asked commenters whether some CMV drivers (for example, drivers of passenger-carrying vehicles or those carrying hazardous materials) should be more restricted in their mobile telephone use than other CMV drivers. The Agency received a few responses on this issue and those commenters believed FMCSA should treat all CMV drivers equally.

#### Two-Way Radios and Push-to-Talk

Many commenters were concerned because the proposed rule prohibited the push-to-talk function of a mobile telephone. Some drivers use this function in lieu of a two-way radio. Commenters argued that the push-to-talk function is no different than that of a two-way or CB radio, neither of which were restricted by the proposed rule. One commenter stated that some school bus drivers need to use the push-to-talk function in lieu of actual two-way radio systems because it is their only means of communication. On the other hand, the National School Transportation Association commented that it supports allowing two-way radios, instead of the push-to-talk function, as two-way radios are commonly used in school bus operations.

Some specialized haulers commented that the Agency should provide a push-to-talk exception for specialized transports that use escorts in transporting certain loads (such as high weight or oversized items, often at low speed) because frequent communication is necessary between trucks and escort vehicles. The Maryland Motor Truck Association pointed out that Maryland passed a law on mobile telephone use with a push-to-talk exception.

*FMCSA Response.* In the NPRM, the Agency defined a mobile telephone as

“a mobile communication device that falls under or uses any commercial mobile radio service, as defined in regulations of the Federal Communications Commission (FCC), 47 CFR 20.3.” FMCSA used the FCC's definition for “mobile telephone” in order to ensure consistency between the terms used in the FCC and FMCSA rules and to address emerging technologies. Because the push-to-talk features use commercial mobile radio services to transmit and receive voice communications, the device is a mobile telephone; and it also requires the driver or user to hold it. Therefore, its use while driving a CMV is the same as that of a hand-held mobile telephone and is prohibited.

The push-to-talk feature of a mobile telephone can be replaced with the use of a compliant mobile telephone, two-way radios, or walkie-talkies for the short periods of time when communication is critical for utility providers, school bus operations, or specialty haulers. The use of CB and two-way radios and other electronic devices by CMV drivers for other functions is outside the scope of consideration in this rulemaking.

#### Dialing/Button Touches

A number of commenters objected to the way the Agency used the term “dial,” and offered alternative suggestions. Werner Enterprises stated that the word “dial” used in the definition was archaic, as it could include voice or speed dialing as it is currently written. Some commenters said the Agency should differentiate between dialing and a single button push to initiate or answer a call, either on the phone or the earpiece, or to enable voice-activated dialing. ATA commented that dialing should be defined as entering a 7 to 10 digit phone number because the rule should allow the driver to use 1 or 2 button pushes to initiate a conversation. Dart Transit stated that consideration should be given to allowing limited key strokes (fewer than four over a predetermined time frame) for technological interaction. The Maryland Motor Truck Association said that the current Maryland Motor Vehicle Law allows a driver to “initiate or terminate a wireless telephone call or to turn on or turn off the hand-held telephone.”

*FMCSA Response.* In the NPRM, the Agency used the word dial in a general sense to indicate the placement of a call. Although the word dial originated with rotary dial phones, FMCSA acknowledges there are very few phones that still actually have such a feature. Such devices generally do not work on

today's telecommunications network because they do not generate a digital tone for each number. The term “dial” is commonly used to mean “make a telephone call,” whether the task is accomplished by entering a 7 to 11 digit phone number or by voice activation or speed dialing. The Agency does not believe it is necessary to introduce another term or create a new term in place of the word “dial.” Thus, FMCSA will not use alternative terminology references for this definition.

If the Agency defined dial in a manner that permitted 3, 4, or even 10 touches or button presses, enforcement would be difficult. The amount of time the driver has his or her eyes off of the forward roadway is the fundamental issue, and the time required to identify and press any given number of buttons would vary from driver to driver. FMCSA, however, has added language to the regulatory text that allows the driver only minimal contact with the mobile telephone in order to conduct voice communication. A driver can initiate, answer, or terminate a call by touching a single button on a mobile telephone or on a headset. This action does not require the driver to take his or her eyes off of the forward roadway for an extended period—comparable to using vehicle controls or instrument panel functions, such as the radio or climate control system.

#### Using a Hand-Held Mobile Telephone/ Clarifying Reaching

Many commenters requested that the Agency clarify the term “reaching.” The Owner-Operator Independent Drivers Association (OOIDA) noted that truck drivers safely reach for and press buttons or turn knobs to operate various equipment, including windshield wipers, temperature controls, radios, and CD players. The Snack Food Association, Southern Company, and the State of New York Department of Motor Vehicles commented that prohibiting reaching was “too proscriptive” or broad. The Alliance of Automobile Manufacturers said that this “overly prescriptive” regulatory wording would inhibit development of innovative technologies for the commercial vehicle fleet. One commenter suggested that drivers should be fined for holding the phone to their ear in lieu of establishing the prohibition based on the reaching task because it would be difficult to differentiate between reaching for other items in the cab and reaching for a mobile telephone. The State of New York Department of Motor Vehicles noted that the New York State Vehicle Traffic Law states that “using (a phone)

<sup>13</sup> For further discussion, see the Research section of the NPRM (75 FR 80020).

shall mean holding a mobile telephone to, or in the immediate proximity of, the user's ear." The National Rural Electric Cooperative Association suggested allowing negligible movements to activate a hands-free mobile telephone. ATA recommended educating drivers to place hands-free devices within close proximity. A few commenters asked, why, if the radio, CB, and phone are all located within an easy arm's reach, the Agency is proposing to restrict only the use of hand-held mobile telephones.

*FMCSA Response.* FMCSA acknowledges commenters' concerns and revises the regulatory text to allow drivers to reach for the compliant mobile telephone (*i.e.*, hands-free) provided the device is within the driver's reach while he or she is in the normal seated position, with the seat belt fastened. This concept is a familiar one and found elsewhere in the FMCSRs. See, for example, 49 CFR 393.51 (certain CMVs must have an air pressure gauge "visible to a person seated in the normal driving position."). In addition, the Agency modeled its language on existing National Highway Traffic Safety Administration (NHTSA) rules. The NHTSA rules regarding the location of controls (49 CFR 571.101, S5.1.1) require certain controls, such as the hazard warning signal, windshield wiper, or climate control system, to be located so that they are operable by the driver when, "[t]he driver is restrained by the seat belts installed in accordance with 49 CFR 571.208 (Standard No. 208; Occupant crash protection) and adjusted in accordance with the vehicle manufacturers' instructions" (49 CFR 571.101, S5.6.2). These changes are reflected in the amended definition of "use a hand-held mobile telephone" in § 390.5.

If a compliant mobile telephone is close to the driver and operable while the driver is restrained by properly installed and adjusted seat belts, then the driver would not be considered to be reaching. Reaching for any mobile telephone on the passenger seat, under the driver's seat, or into the sleeper berth are not acceptable actions. To avoid committing a violation of this rule, the driver could use either a hands-free earpiece or the speaker function of a mobile telephone that is located close to the driver. Therefore, in order to comply with this rule, a driver must have his or her compliant mobile telephone located where the driver is able to initiate, answer, or terminate a call by touching a single button, for example, on the compliant mobile telephone or on a headset, when the driver is in the seated driving position and properly restrained by a seat belt.

While several commenters compared the use of hand-held mobile telephones to other electronic devices, arguing either for more comprehensive restrictions or against the regulation of hand-held mobile telephones, the use of other electronic devices by CMV drivers is outside the scope of this rulemaking.

#### Mounted or Stationary Mobile Telephones

Some drivers noted that they keep their phones in a bracket that allows them to answer and initiate calls without holding the mobile telephone. Some commenters questioned whether such mounted phones are acceptable.

*FMCSA Response.* Although the Agency did not address the option of mounting the mobile telephone in the NPRM, a compliant mobile telephone mounted close to the driver is an acceptable option, but it is not, however, required in order to be in compliance with the final rule. If a compliant mobile telephone is operated in accordance with this rule, mounted phones are no more distracting than operating the radio, climate control system, or other dash-mounted accessory in the vehicle.

#### Use of the Mobile Telephone While Idling

Some commenters, including the National Ready Mix Concrete Association, asked whether phone use would be allowed when the vehicle was parked, but with the engine running.

*FMCSA Response.* FMCSA removed the language "with or without the motor running." Now the Agency states that "driving" means operating a commercial motor vehicle on a highway, including while temporarily stationary because of traffic, a traffic control device, or other momentary delays. Driving does not include operating a commercial motor vehicle when the driver has moved the vehicle to the side of, or off, a highway and has halted in a location where the vehicle can safely remain stationary. The Agency also revised the regulatory text to clarify that the restriction against using a hand-held mobile telephone applies when a CMV is operated "on a highway." See 49 CFR 390.5 (definition of highway). The Agency believes this clarification addresses emerging technologies such as hybrid vehicles, which are operated at times without the motor running. Therefore, as long as the "driver has moved the vehicle to the side of, or off, a highway and has halted the vehicle in a location where it can safely remain stationary," use of the mobile telephone is allowed. Our new definition for "driving" is addressed in

§ 383.51 and explained in Part IV, Discussion of the Rule.

#### Uses of the Mobile Telephone for Other Than Voice Communication

Some commenters said they use their mobile telephones to enter the vehicle's odometer reading in the phone when crossing State lines and press the send button to create a time stamp. The American Moving and Storage Association (AMSA) and The Alliance of Automobile Manufacturers were concerned that the synchronizing of mobile telephones with other electronic devices would be affected by this rulemaking. Specifically, Alliance said that the definition of "texting" in § 383.5 should not be revised by removing the dialing exception in paragraph (2)(i). One commenter asked if text-to-voice and voice-to-text functions could be used under this rule.

*FMCSA Response.* Entering the vehicle odometer reading into a mobile telephone qualifies as texting (49 CFR 390.5) and, therefore, is already prohibited while driving (75 FR 59118, Sept. 27, 2010). Similarly, synchronizing EOBRs or other technologies with mobile telephones would require multiple steps that would result in a driver's eyes off forward roadway. This action should be accomplished when the vehicle is not moving, while safely parked off of the highway. If voice-to-text and text-to-voice functions can be initiated with a single button touch, such as is used to activate voice dialing, they are allowed.

In the definition of "texting" in §§ 383.5 and 390.5, the Agency included the exception for dialing in the texting rule to allow mobile telephone use until the time the Agency decided to address it through separate rulemaking concerning mobile telephones. Removing the dialing option in this rule limits the operator's ability to engage in unsafe, eyes-off-forward-roadway behavior.

The pairing of mobile telephones with in-vehicle technologies may be a violation of other restrictions or regulations. Regardless, the Agency believes a responsible driver would pair or link a mobile telephone to other technologies when the vehicle is stationary and not while he or she is operating a CMV on our Nation's highways.

#### Other Distractions

Many commenters, including OOIDA, questioned why other risky activities that may cause driver distraction were not addressed in this rule. Commenters asked if there would be future prohibitions on activities like reading,

operating radios and CBs, or eating. Some asked that global positioning systems (GPS) and dispatching devices be included in the prohibition. The National School Transportation Association cited its recommended policy that “Drivers may not use a cell phone or other personal portable device while operating a school bus or any other vehicle transporting students \* \* \*.” Advocates believed that the Agency should extend the proposal to include other types of electronic devices and technologies that cause driver distraction; otherwise Advocates argued that the Agency’s action is arbitrary and capricious.

**FMCSA Response.** Based on the data from the Olson, *et al.* (2009) study, the Agency is giving priority to addressing certain risky tasks. The Agency prohibited texting because it is associated with relatively high odds ratios and eyes-off-forward-roadway time. Similarly, both reaching for an object in the vehicle (such as a mobile telephone) and dialing a mobile telephone have significantly high odds ratios. Odds ratios are the odds of being involved in a safety critical event when performing a task compared to not performing that task. Although the OR for “reach for an object in vehicle,” is lower than the OR for “dialing,” the PAR for “reach for an object in vehicle” is the highest PAR in the study. The restriction of hand-held mobile telephone use, which the Agency is defining to include reaching for and dialing tasks, is a logical next step for the Agency in its efforts to prevent distracted driving because mobile telephones are increasingly popular. To address these risky activities, the Agency restricts the use of hand-held mobile telephones. FMCSA is considering an advance notice of proposed rulemaking to seek public comment on the extent to which regulatory action is needed to address other in-cab electronic devices that may result in distracted driving.

#### Constitutional Concerns

A few commenters raised constitutional concerns, namely whether the rule runs afoul of the Fourth or Fourteenth Amendment of the United States Constitution. Specifically, some commenters, including OOIDA, argued that FMCSA violated the Fourth Amendment because it failed to include an enforcement plan and procedural guidelines for its proposed cell phone rule. A professional driver argued that a regulation that restricts the use of hand-held cell phone devices by CMV drivers in interstate commerce violates the Equal Protection Clause of the

Fourteenth Amendment because CMV drivers involved in intrastate commerce are *not* covered by the same proposal. In the alternative, the commenter requested that the U.S. Department of State engage in treaty negotiations with foreign nations to impose similar restrictions and penalties on them when operating CMVs in the United States.

**FMCSA Response.** The Fourth Amendment concerns raised by OOIDA are without merit. The regulation of the use of a mobile phone while operating a CMV does not constitute a “search” or “seizure” to which the Fourth Amendment applies. A driver could not successfully claim that observance of this conduct would violate a reasonable expectation of privacy. Cf. *United States v. Knotts*, 460 U.S. 276 (1983). Nothing in the rule authorizes enforcement officers to require a driver to make a mobile telephone available so that the officer can review call history for purposes of enforcing this rule. It is the Agency’s view that the rule may be enforced without raising Fourth Amendment concerns. Assuming that a Fourth Amendment argument might be raised in connection with the enforcement of the rule, given the government’s interest in safety on public highways and the closely regulated nature of the commercial motor vehicle industry, it is FMCSA’s view that a Fourth Amendment challenge is unlikely to be successful. Cf. *New York v. Burger*, 482 U.S. 691 (1987). In any event, the acquisition of evidence in a particular case will be governed by the principles established in judicial precedents interpreting and applying the Fourth Amendment and relevant statutory provisions, such as the Electronic Communications Privacy Act of 1986, Pub. L. 99–508, 100 Stat. 1848 (1986).

The commenter’s Fourteenth Amendment argument is misplaced for several reasons. First, a classification distinguishing between interstate and intrastate commerce would be evaluated under a rational relationship test—a minimal level of scrutiny employed in equal protection analysis.

Second, as noted above, both the restriction on the use of hand-held mobile telephones and associated sanctions, including civil penalties and disqualifications, on operators of CMVs in interstate commerce are authorized by statute. While the commenter argued that FMCSA is “segregating and punishing” a certain group of people, Congress exercised its commerce clause powers under the Constitution in authorizing the Agency to regulate the safety of persons operating CMVs in interstate and foreign transportation.

Although Congress could have gone further and authorized FMCSA to regulate the safety of transportation that “affected” interstate commerce (generally all intrastate transportation), it has made a rational decision not to give FMCSA that authority, though the Agency’s MCSAP funding provides the FMCSA leverage to bring the States into conformity with FMCSA safety regulations. Clearly, Congress had a rational basis in the manner it prescribed the Agency’s regulatory authority. Thus, FMCSA believes the Fourteenth Amendment argument is without merit.

In response to the commenter’s alternative treaty negotiations argument, the Agency notes that Congress has given FMCSA authority to regulate the safety of foreign nationals operating CMVs within the territorial limits of the United States. See 49 U.S.C. 31132. The definition of “interstate commerce” in that statute covers transportation in the United States that is between a place in a State and “a place outside the United States” (49 U.S.C. 31132(4)). Accordingly, the rule would apply to CMV drivers from other countries who drive CMVs in the United States.

#### Fines/Driver Disqualification

Some commenters believed the civil penalties were too high. The United Transportation Union said there should be an appeals process for disqualifications.

**FMCSA Response.** The Agency rejects the view that the maximum penalties are too harsh. The applicable civil penalties for violations of this rule are provided by Congress and are consistent with current maximum penalties that can be assessed against an employer and driver for the violation of similar safety regulations. See 49 U.S.C. 521(b)(2); 49 CFR 386, Appendix B, paragraphs (a)(3) and (4). The actual penalty that might result in a proceeding under 49 CFR part 386 would take into account mitigating factors enumerated in 49 CFR 386.81. Driver and motor carrier fines (\$2,750 and \$11,000, respectively) in the rule are the recommended maximum that the Agency can assess on any violator. States, however, may choose to set the amount of a fine at or below those levels. Additionally, as noted above, civil penalties imposed under FMCSA regulations may be adjusted based on the circumstances of the violation.

In response to the United Transportation Union, FMCSA currently has an appeals process in place for disqualifications. If a driver obtains a “letter of disqualification” for violating the hand-held mobile telephone



restriction, he or she can either accept it or petition for review within 60 days after service of such action pursuant to 49 CFR 386.13. The petition must be submitted to FMCSA and must contain the following: (1) Identification of what action the petitioner wants overturned; (2) copies of all evidence upon which petitioner relies, in the form set out in § 386.49; (3) all legal and other arguments that the petitioner wishes to make in support of his/her position; (4) a request for oral hearing, if one is desired, which must set forth material factual issues believed to be in dispute; (5) certification that the reply has been filed in accordance with § 386.31; and (6) any other pertinent material.

#### Employer Liability

Some commenters stated that employers should not be held responsible for a driver's use of a hand-held mobile telephone. Others suggested that employers should be prohibited from calling drivers during work hours. Some commenters said that employers would be fined, instead of drivers, to increase revenue from a violation. The Snack Food Association commented that employer sanctions are inappropriate where an employer has a policy banning hand-held phone use already in place. ATA said that a motor carrier should not be deemed to have allowed hand-held phone use if they have taken good faith steps to ensure compliance. ATA, AMSA, and other commenters suggested the Agency add the word "knowingly" to § 392.82 so that it would read as follows: "No motor carrier shall knowingly allow or require its drivers to use a hand-held mobile telephone while driving a CMV."

**FMCSA Response.** FMCSA holds motor carriers accountable for the actions of their employees or drivers, especially when the employer allows or requires the prohibited action. In other words, the employer will generally be held accountable if the employee was doing his or her job, carrying out company business, or otherwise acting on the employer's behalf when the violation occurred.

FMCSA acknowledges the concern raised by industry representatives addressing employer liability for a driver's improper use of a hand-held mobile telephone. We recognize that there will be cases when a CMV driver uses a mobile telephone in violation of the employer's policy. The Agency, however, disagrees with the suggestion by some commenters that the word "knowingly" be added to the restriction in § 392.82(a)(2) that states "no motor carrier shall allow or require its drivers to use a hand-held mobile telephone

while driving a CMV." As noted above, a motor carrier should put in place or have company policies or practices that make it clear that a carrier does not allow or require hand-held mobile phone use while driving. A motor carrier is responsible for the actions of its drivers.

FMCSA reiterates that motor carriers and employers that allow or require their drivers to use a hand-held mobile telephone will be subject to civil penalties of up to \$11,000, as already provided in 49 U.S.C. 521(b)(2)(A), 49 CFR 386.81, and Appendix B to 49 CFR part 386, paragraph (a)(3). A motor carrier must require drivers to observe a duty or prohibition imposed under the FMCSRs. See 49 CFR 390.11.

#### Enforcement

Several commenters said that enforcement will be difficult and highlighted the lack of enforcement of existing distracted driving laws. Several commenters worried about the mechanics of enforcement. Commenters' concerns related to challenges in law enforcement officers' might have in observing a CMV driver holding the mobile telephone, unless the driver were holding it to his or her ear. AMSA believed that the officer should be required to actually see the driver holding and/or dialing the phone before taking enforcement action.

**FMCSA Response.** FMCSA does not believe it is necessary to prescribe enforcement procedures and methodology in the rulemaking. The Agency and its State partners, through CVSA and its Training Committee, will develop the procedures and methods to ensure uniform application of the rule. Questions about specific enforcement procedures are not a basis for not taking action to restrict CMV drivers from using hand-held mobile telephones while operating in interstate commerce. The Agency notes, however, that enforcement programs can be successful. Since our texting rule was implemented, FMCSA has had over 300 violations at roadside.

Additionally, NHTSA, as part of its continuing effort to combat distracted driving, sponsored a pilot program in Hartford, Connecticut, and Syracuse, New York, which tested whether increased law enforcement efforts lead distracted drivers to put down their cell phones and focus on the road. During a year long pilot program in Hartford, police cited 9,500 drivers for talking on mobile telephones or texting while driving. Similar results were noted in Syracuse. Enforcement of this rule will involve a period of familiarization with the requirements for both Federal and

State enforcement agencies. Therefore, FMCSA believes enforcement officials will be prepared to enforce the rule and be mindful of the factors needed to bring forward a case that would withstand legal challenges.

#### Research Methodology

Based on the available research, the United Motorcoach Association (UMA) felt that the Agency underestimated cognitive distraction and urged FMCSA to continue to study this issue.

Advocates, NTSB, and a few other commenters suggested that research supports extending the Agency's prohibition to the hands-free operation of mobile telephones, as well as other electronic devices and technologies capable of causing distraction while driving. Advocates commented that the data in the Hickman, *et al.* (2010) study came from more safety conscious fleets during a period of elevated focus on the issue of distracted driving. They, therefore, felt that this data should be viewed cautiously since it likely represents a "best case scenario" population for study of distracted driving and may not accurately reflect real-world experience among the majority of commercial drivers who engage in hands-free mobile telephone conversations.

**FMCSA Response.** The Agency reviewed research on cognitive distraction and determined that existing research results vary. FMCSA did not receive any significant new research reports from the commenters that would influence our decision on this rule.

Hickman, *et al.* (2010) is the largest and most relevant study on distraction related to CMV drivers. In response to Advocates' comment on whether the fleets in the study represent a "best case scenario" population, the safety consciousness of a fleet could certainly influence the prevalence of tertiary tasks, but it would not influence the risk in performing these tasks while driving. Thus, we disagree with Advocates. The results of the study represent an accurate assessment of the risks associated with distracted driving regardless of the population used.

#### Emergencies

Some commenters thought that the NPRM prohibited CMV drivers from making emergency calls. Commenters believed that calls could *not* be made to law enforcement to report vehicle accidents, drunk drivers, or other roadside emergencies.

UMA noted that its members have largely responded to its advisory on the inherent risks of using cellular phones, and have developed and enforced

policies that direct drivers to restrict their use of cellular phones to emergency and security purposes only.

*FMCSA Response.* The Agency agrees with the UMA and the many companies whose cell-phone policies continue to allow the use of mobile telephones to contact law enforcement in cases of emergency and for security purposes. The Agency, however, did not propose to prohibit CMV drivers from placing emergency calls. In the NPRM, the Agency said in § 392.82: “*Emergencies.* Using a hand-held mobile telephone is permissible by drivers of a CMV when necessary to communicate with law enforcement officials or other emergency services” (75 FR 80033, Dec. 21, 2010). This final rule allows a CMV driver to use either a hand-held or hands-free mobile telephone to contact law enforcement or other emergency services for such purposes as reporting an accident or drunk driver.

#### Exceptions to the Hand-Held Ban

Some industries requested that their drivers be given a blanket exception to the restriction on using hand-held mobile telephones while operating CMVs in interstate commerce. For example, the National Rural Electric Cooperative Association, Southern Company, and other utility companies requested that their business operations be classified as emergency services. Specialty and heavyweight hauling operations, utility companies, and associations representing them also requested exemptions for their respective industries. The Minnesota Department of Transportation requested an exemption for their non-urban area formula transportation providers to allow hand-held mobile telephone use when communicating with other vehicle operators nearby, as well as with dispatch services.

*FMCSA Response.* Previous Agency decisions support the premise that the CMV operations of utility companies cannot be classified as emergency services.<sup>14</sup> They are subject to varying degrees of regulation by Federal, State, and local authorities and do not specifically deal with the protection of life and property. Public utility employees operate large or hazardous-material-laden vehicles both day and night throughout the year, sometimes under the most adverse weather conditions. During declarations of emergency, drivers may be eligible for

exemptions from some regulations under 390.23.

Regarding the concerns of the Minnesota non-urban formula transportation program (which receives financial assistance under the Federal Transit Administration’s formula grant program for other than urbanized areas in accordance with 49 U.S.C. 5311), if such service providers are State-owned, then the Federal hand-held mobile telephone restriction will not apply to them; but if the providers are contracted private transportation companies, they will be covered by the restriction. Regardless of whether operators are government-owned or private, the operators may use hands-free mobile telephone communication, including speakerphone or earphone functions, and still abide by the restriction on use of a hand-held phone while operating CMVs.

Accordingly, FMCSA is unable to conclude that granting an exception or waiver to these groups is necessary at this time.

#### Outreach

The Agency received several comments regarding outreach. Commenters suggested that early driver education is needed because young CMV drivers are operating their vehicles and are using their phones as if they were driving a car (e.g., texting, dialing, etc.). Therefore, commenters recommended that the Agency require CDL schools to educate students on the dangers of cell phone use while driving CMVs.

*FMCSA Response.* The Agency agrees that enforcement and outreach efforts are essential to increase public awareness. Previous DOT campaigns, such as those addressing safety belt use and drinking and driving, have proven to reduce injuries and fatalities. DOT already has in place distracted driving campaigns to educate all vehicle drivers on distracted driving. The Agency believes that many of these efforts are reaching the CMV driver population, both experienced and new drivers. Platforms for sharing distracted driving information include the Web site, <http://www.Distracted.gov>, as well as outreach on radio and television, which have generally reduced unsafe driver behaviors and boosted compliance awareness.

For more information on research, outreach, and education, the reader may reference NHTSA’s Driver Distraction Program. This program is a plan to communicate NHTSA’s priorities to the public with regard to driver distraction safety challenges, focusing on the long-term goal of eliminating crashes that are

attributable to distraction. The complete overview can be found at [http://www.distracted.gov/files/dot/6835\\_DriverDistractionPlan\\_4-14\\_v6\\_tag.pdf](http://www.distracted.gov/files/dot/6835_DriverDistractionPlan_4-14_v6_tag.pdf). The Secretary considers preventing distracted driving a priority for the Department and has promoted funding for education, awareness, and outreach on this initiative.

#### Non-CMV Drivers

Many commenters suggested that a mobile telephone prohibition be applied to all vehicle drivers, including passenger car drivers, law enforcement, hazardous materials transporters, and government employees, among them publicly-employed school bus drivers.

*FMCSA Response.* The Agency does not have statutory authority to regulate non-CMV drivers. As noted above, other than transportation covered by statutory exemptions, FMCSA has authority to restrict the use of mobile telephones by drivers operating CMVs in interstate commerce.

#### Hand Off the Wheel

The New England Fuel Institute, Werner Enterprises, the Alliance of Automobile Manufacturers, and others commented on the language used in the NPRM preamble that stated: “The Agency is proposing to allow hands-free mobile telephone use as long as it does not require the driver to reach for, dial, or hold a mobile telephone, taking the driver’s eyes off the forward roadway and a hand off the wheel.” The commenters felt that the Agency’s use of the phrase “a hand off the wheel” was too restrictive and that it sounded as if FMCSA was implying that drivers maintain both hands on the wheel at all times.

*FMCSA Response.* The Agency understands that drivers often take a hand off the steering wheel to operate the many controls located in a CMV, including the many instrument panel functions, and to shift a manual transmission. It was not the intent of the Agency to prevent a driver from doing necessary tasks required to safely operate the vehicle. FMCSA has not repeated the referenced discussion in the final rule. This clarification will correct any misperception the previous discussion may have created.

#### Full Compliance

FMCSA received one comment regarding the analytical treatment of driver compliance in the Agency’s Preliminary Regulatory Evaluation. The commenter argued that the Agency’s assumption of 100 percent compliance overstates the potential benefits of the rule. The commenter further argued that

<sup>14</sup> See the Federal Highway Administration’s Notice of Final Disposition entitled, “Commercial Driver’s License Program: Waivers; Final Disposition,” at 53 FR 37313, Sept. 26, 1988.

monitoring and enforcing the rule would be problematic and imperfect, which would further make compliance inconsistent.

*FMCSA Response.* When FMCSA conducts regulatory evaluations for rulemakings, the Agency must establish a baseline for its analysis, which essentially describes the current state of the regulatory conditions involved. A baseline, according to the Office of Management and Budget (OMB) guidance, is “the best assessment of the way the world would look absent the proposed regulation.”<sup>15</sup>

The purpose of a regulatory evaluation is to provide decision makers with the estimated costs and benefits associated with the rule. Sometimes the goal of regulation is to correct a deficiency in existing rules manifested, for example, by excessive enforcement violations. In developing the regulatory evaluation, the Agency assumes complete compliance and attempts to show the impact of the provision once it is implemented. When estimating the costs and benefits of rules, the analysis must therefore assume complete (100%) compliance in its hypothetical depiction of various options. This approach creates an “all things equal” relationship between the multiple options within a given rule, as well as between the various rules.

Generally speaking, a reduction in compliance, theoretical or actual, reduces not only the associated benefits of a rule, but also the associated costs. Departures from the assumption of full compliance (an accounting of all costs and benefits) removes some costs and some benefits, and therefore, does not result in an overstatement of the potential benefits (or costs) of the rule.

#### Costs and Benefits

FMCSA received one comment concerning its estimation of costs and benefits in the Agency’s Preliminary Regulatory Evaluation. Advocates argued that the FMCSA’s cost/benefit analysis shows that the highest net benefit would result from adopting a cell phone restriction that applies to all commercial drivers and to both hand-held and hands-free use of cell phones. Advocates further stated that implementing the lower cost requirement in the final rule would be the better choice.

*FMCSA Response.* The FMCSA agrees with Advocates’ comment that the Agency’s cost/benefit analysis shows that the highest net benefit would result from adopting a complete cell phone

ban for all CMV drivers. The commenters, however, did not recognize the distinction between a cost/benefit analysis and a threshold analysis, which are both used in the Agency’s analysis for this rule. OMB recognizes that it will not always be possible to express in monetary units all of the important benefits and costs of rules. If the non-quantified benefits and costs are likely to be important, OMB guidance<sup>16</sup> requires that a threshold analysis be carried out in order to evaluate their significance. A threshold or a break-even analysis answers the question, “how small could the value of the non-quantified benefits be (or how large would the value of the non-quantified costs need to be) before the rule would yield zero net benefits?”

The Agency is not required to choose the regulatory option with the highest net benefit. In the NPRM, FMCSA offered its preference for Option Four (a restriction on the use of hand-held mobile telephones by all interstate CMV drivers) because it minimizes (for an entire CMV population) the costs of restricting mobile telephone use, including costs associated with inconvenience, disruption of patterns of business operations, and stifling technological innovations. Furthermore, it is not clear whether talking on a mobile telephone presents a significant risk while driving.

In the final Regulatory Evaluation, the Agency recalculated the estimated costs in order to incorporate a more recent price of diesel fuel. The recalculation affected Options Two (a restriction on the use of all mobile telephones while operating a CMV for all interstate drivers) and Three (a restriction on the use of all mobile telephones while operating a passenger carrying CMV for all interstate drivers). The revised estimated net benefits of Option Two are negative.

#### *B. PHMSA Comments*

##### Security Concerns

PHMSA received one comment from the Chemical Facility Security News concerning the reporting of security incidents. The commenter was concerned that a ban on the use of cell phones may prevent drivers from reporting potential security threats while en route to their destination. The commenter noted that over the road truck drivers were one of the first groups that the Department of Homeland Security (DHS) targeted in its “If You See Something, Say Something™” Campaign. DHS

recognized that truck drivers would be seeing many things in operation of their commercial vehicles that might be indicators of potential terrorist activities, including attempts at hijacking hazardous materials. The commenter recognizes that this rule would not stop those reports from being made, but would require the delay of those reports until the vehicle was parked off the roadway.

*PHMSA Response.* As noted above in the FMCSA response, this final rule allows a CMV driver to use either a hand-held or hands-free mobile telephone to contact law enforcement or other emergency services for such purposes as reporting potential terrorist activities, including attempts to hijack hazardous materials.

##### Complete Mobile Telephone Ban

A few commenters, including API, NTSB, and Advocates thought that PHMSA should ban both hand-held and hands-free mobile telephone use. The ATA strongly opposed banning of hands-free devices.

*PHMSA Response.* See FMCSA response above.

##### CB Radios

API also suggested that PHMSA ban the use of CB radios for drivers of CMVs. The commenter suggests adding regulatory language to include restricting the use of “CB radios or other headset devices.”

*PHMSA Response.* The use of CB radios by CMV drivers is outside the scope of this rulemaking.

##### Employer Liability

ATA stated that employers should not be held responsible for a driver’s use of a hand-held mobile telephone. ATA suggested the Agency add the word “knowingly” to § 392.82 so that it would read as follows: “No motor carrier shall knowingly allow or require its drivers to use a hand-held mobile telephone while driving a CMV.”

*PHMSA Response.* See FMCSA response above.

##### Law Enforcement

Robert Baldwin is concerned that state police and other law enforcement officials will not be held to the same standard as CMV drivers.

*PHMSA Response.* The use of mobile communications devices by law enforcement officials is outside the scope of this rulemaking.

#### IV. Discussion of the Rule

This rule amends regulations in 49 CFR parts 177, pertaining to carriage of hazardous materials by public highway;

<sup>15</sup> OMB Circular A–4, Regulatory Analysis (09/17/2003), p. 11.

<sup>16</sup> Office of Management and Budget Circular A–4, Sept. 17, 2003, p. 2.

parts 383 and 384, concerning the Agency's CDL regulations; part 390, general applicability of the FMCSRs; part 391, driver qualifications and disqualifications; and part 392, driving rules. In general, this rule reduces the risks of distracted driving by restricting hand-held mobile telephone use by drivers who operate CMVs.

This rulemaking restricts a CMV driver from holding a mobile telephone to conduct a voice communication, dialing a mobile telephone by pressing more than a single button, or reaching for a mobile phone in an unacceptable and unsafe manner (*e.g.* reaching for any mobile telephone on the passenger seat, under the driver's seat, or into the sleeper berth). Thus, a driver of a CMV who desires to use a mobile phone while driving will need to use a compliant mobile telephone (such as hands-free) located in close proximity to the driver that can be operated in compliance with this rule. Thus, the ease of "reach" or accessibility of the phone is relevant only when a driver chooses to have access to a mobile telephone while driving. Essentially, the CMV driver must be ready to conduct a voice communication on a compliant mobile telephone, before driving the vehicle. The rule includes definitions related to the hand-held mobile telephone restriction.

The rule adds a driver disqualification provision for: (1) Interstate CMV drivers convicted of using a hand-held mobile telephone, and (2) CDL holders convicted of two or more serious traffic violations of State or local laws or ordinances on motor vehicle traffic control, including using a hand-held mobile telephone. The rule also requires interstate motor carriers to ensure compliance by their drivers with the restrictions on use of a hand-held mobile telephone while driving a CMV. Finally, the rule prohibits motor carriers and employers from requiring or allowing a CMV driver to use a hand-held mobile telephone while operating in interstate commerce.

There is a limited exception to the hand-held mobile telephone restriction. This exception allows CMV drivers to use their hand-held mobile telephones if necessary to communicate with law enforcement officials or other emergency services.

This rulemaking also amends the authority citations for 49 CFR parts 177, 383, 384, 390, 391, and 392 to correct statutory references and eliminate references that are either erroneous or unnecessary.

#### Section 177.804

PHMSA adds a new paragraph (c) to prohibit the use of hand-held mobile telephones by any CMV driver transporting a quantity of hazardous materials requiring placarding under Part 172 of the 49 CFR or any quantity of a material listed as a select agent or toxin in 42 CFR Part 73. As such, motor carriers and drivers who engage in the transportation of covered materials must comply with the distracted driving requirements in § 392.82 of the FMCSRs. This ensures that the FMCSA restriction on a driver's use of hand-held mobile telephones applies to both intrastate and interstate motor carriers operating CMVs as defined in 49 CFR 390.5.

#### Section 383.5

FMCSA adds a new definition for the term "mobile telephone." The Agency adopts a definition of "mobile telephone" based on the FCC regulations to cover the multitude of devices that allow users to send or receive voice communication while driving. It identifies the type of activity that is restricted by this rule.

The definition of "mobile telephone" reflects the wide variety of radio telephone services, in addition to cell phone services, that are licensed by FCC and might be available for use in a CMV. "Mobile telephone" could include, for example, a satellite telephone service or a broadband radio service. Using such wireless communication services is just as distracting to a CMV driver as using a cell phone. FCC classifies these services as "commercial mobile radio services," which are incorporated into the definition of mobile telephone. The FCC definition for mobile telephone does not include two-way or Citizens Band radio services.

To be consistent and to address commenters' concerns, FMCSA modified the existing definition of "texting" in 49 CFR 390.5 to reflect the Agency's restriction on a driver's use of a hand-held mobile telephone in this rule. FMCSA eliminated the dialing exception, as it would now be considered texting. Under the provisions implemented in this rule, the driver can press a single button to initiate or terminate a call. The Agency also removed the proposed definition of "using a hand-held mobile telephone" from § 383.5. Part 383 establishes the disqualification of CDL drivers that is defined by State or local law or ordinance on motor vehicle traffic control that restricts or prohibits the use of hand-held mobile telephones. In contrast, the Federal disqualification

standards and definitions are contained in §§ 391.15 and 390.5.

#### Section 383.51

In Table 2 to 49 CFR 383.51, FMCSA adds a new serious traffic violation that would result in a CDL driver being disqualified. This serious traffic violation is a conviction for violating a State or local law or ordinance on motor vehicle traffic control restricting or prohibiting hand-held mobile telephone use while driving a CMV. The Agency modified the definition of "driving" in footnote 2, removing the phrase "with the motor running" and replacing it with "on the highway" (consistent with our definition of "highway" in 49 CFR 390.5), to clarify the scope of the restriction. The modified definition now reflects the use of hybrid vehicles on the highways, which can be operated without the motor running. Our definition for "driving" now reads as follows: "Driving, for the purpose of this disqualification, means operating a commercial motor vehicle on a highway, including while temporarily stationary because of traffic, a traffic control device, or other momentary delays. Driving does not include operating a commercial motor vehicle when the driver has moved the vehicle to the side of, or off, a highway and has halted in a location where the vehicle can safely remain stationary." The Agency's decision to change the definition of driving is consistent with the provisions of 49 U.S.C. 31310(e), which indicates the serious traffic violation must occur while the driver is operating a CMV that requires a CDL; the operative provisions in the revised table 2 of § 383.51(c) limit the types of violations that could result in a disqualification accordingly.

States must disqualify a CDL driver whenever that driver is convicted of the triggering number of violations while operating in any State where such conduct is restricted or prohibited by a State or local law or ordinance on motor vehicle traffic control.

#### Section 384.301

Due to intervening amendments (76 FR 39019, July 5, 2011; 76 FR 68332, November 4, 2011), FMCSA redesignates proposed paragraph (f) as paragraph (h). It requires all States that issue CDLs to implement the new provisions in part 383 that relate to disqualifying CDL drivers for violating the new serious traffic violation of using a hand-held mobile telephone while driving a CMV. States are required to implement these provisions as soon as practical, but not later than 3 years after this rule is effective.

### Section 390.3

FMCSA modifies several discretionary regulatory exemptions concerning the applicability of the existing FMCSRs, including one for school bus operations and one for CMVs designed or used to transport between 9 and 15 passengers (including the driver), not for direct compensation (49 CFR 390.3(f)(1) and (6)). The Agency finds that this action is necessary for public safety regarding school bus transportation by interstate motor carriers, a finding required by the applicable statutory provisions, as explained above in the legal authority section. In addition, the Agency determined that, in order to enhance public safety to the greatest extent possible, the rule will apply to the operation by drivers of small, passenger-carrying vehicles (designed to transport 9–15 passengers), not for direct compensation, who are otherwise exempt from most of the FMCSRs under 49 CFR 390.3(f)(6).

### Section 390.5

FMCSA amends 49 CFR 390.5 by adding new definitions for the terms “mobile telephone” and “use a hand-held mobile telephone,” for general application. In this rulemaking, FMCSA defines “use a hand-held mobile telephone” to clarify that certain uses of a hand-held mobile telephone are restricted, including holding, dialing, and reaching in a proscribed manner for the mobile telephone to conduct voice communication. (That is, if a compliant mobile telephone is close to the driver and operable by the driver while restrained by properly installed and adjusted seat belts, then the driver would not be considered to be reaching. Reaching for any mobile telephone on the passenger seat, under the driver’s seat, or into the sleeper berth are not acceptable actions.) As stated above in § 383.5, FMCSA also modified the definition of “texting.”

FMCSA recognizes that mobile telephones often have multi-functional capability and is not prohibiting the use of mobile telephones for other uses. Of course, other types of activities using a mobile telephone might be covered by other rules, such as those addressing texting while driving a CMV.

### Section 391.2

FMCSA amends 49 CFR 391.2, which provides certain exceptions to the requirements of part 391 for custom farm operations, apiarian industries, and specific farm vehicle drivers, to enable the Agency to make violations of the Federal mobile telephone restriction

a disqualifying offense for such drivers. While the explicit Federal restriction against hand-held mobile telephone use applies directly to these drivers, the disqualification provision in § 391.15(g) below would not apply without this amendment to the current exceptions under 49 CFR 391.2.

### Section 391.15

FMCSA adds a new paragraph (f) to 49 CFR 391.15 entitled, “Disqualification for violation of restriction on using a hand-held mobile telephone while driving a commercial motor vehicle.” This provision provides for the disqualification from operating a CMV in interstate commerce of any driver convicted of two or more violations within a 3-year period of the new hand-held mobile telephone use restriction while operating a CMV as set forth in § 392.82. For the driver’s first hand-held mobile telephone use conviction, the Agency could assess a civil penalty against the driver. If a driver is convicted of committing a second hand-held mobile telephone use violation within 3 years, he or she would be disqualified for 60 days, in addition to being subject to the applicable civil penalty. For three or more hand-held mobile telephone use convictions for violations committed within 3 years, a driver would be disqualified for 120 days, in addition to being subject to the applicable civil penalty.

This change to the disqualifying offenses for interstate drivers mirrors the Agency’s corresponding new provisions governing the disqualification offenses for CDL drivers in § 383.51(c). The required number of convictions to cause a disqualification by FMCSA and the period of disqualification is the same: 60 days for the second offense within 3 years and 120 days for three or more offenses within 3 years. In addition, the first and each subsequent violation of such a restriction or prohibition by a driver are subject to civil penalties imposed on such drivers, in an amount up to \$2,750 (49 U.S.C. 521(b)(2)(A), 49 CFR 386.81 and Appendix B, A(4)).

### Section 392.80

FMCSA eliminates the exception pertaining to school bus drivers as a necessary change in light of § 390.3(f)(1) and (6).

### Section 392.82

In § 392.82(a), FMCSA adds a new restriction on use of a hand-held mobile telephone while driving a CMV. This section also states that motor carriers must not allow or require CMV drivers

to use a hand-held mobile telephone while driving. Any violation by an employer would subject the employer to civil penalties in an amount up to \$11,000 (49 U.S.C. 521(b)(2)(A), 49 CFR 386.81 and part 386 Appendix B, paragraph (a)(3)).

In § 392.82(b), a definition of “driving a commercial motor vehicle” is incorporated into the restriction on use of a hand-held mobile telephone while driving, in order to confine the use of that term to the restriction and the related disqualification. We also seek to avoid limiting the scope of the same term as used in other provisions of the FMCSRs.

FMCSA has eliminated the exception pertaining to school bus drivers as a necessary change in light of § 390.3(f)(1) and (6).

FMCSA adds a limited exception to the hand-held mobile telephone restriction to allow CMV drivers to use their hand-held mobile telephones if necessary to communicate with law enforcement officials or other emergency services. Emergency services are not limited to traditional emergency responders. It may include those who provide security and protection in the special environments in which CMV drivers operate. CMV drivers are always encouraged to report incidents that may threaten national security in a manner consistent with safety.<sup>17</sup>

## V. Regulatory Analyses

The rule adopted here restricts the use of hand-held mobile telephones by drivers of CMVs. FMCSA adds new driver disqualification sanctions for: (1) Interstate drivers of CMVs who fail to comply with this Federal restriction and (2) CDL holders who have multiple convictions for violating a State or local law or ordinance on motor vehicle traffic control that restricts the use of hand-held mobile telephones. Additionally, motor carriers operating CMVs are prohibited from requiring or allowing a CMV driver to engage in the use of a hand-held mobile telephone. This rulemaking improves safety on the Nation’s highways by reducing the prevalence of distracted driving-related crashes, fatalities, and injuries involving

<sup>17</sup> The Department of Homeland Security (DHS) encourages everyone to report suspicious observations under the “See Something, Say Something™” brand to a regional or local number. The Transportation Security Administration (TSA) has ambitiously recruited active participation from the commercial motor carrier community for both its Highway Watch® and First Observer™ programs, encouraging commercial drivers to “observe, assess, and report” suspicious activity and to report such activity to a national call center ((888) 217-5902) in a manner consistent with safety.

drivers of CMVs. In addition, the rulemaking reduces the financial and environmental burden associated with these crashes and promotes the efficient movement of traffic and commerce on the Nation's highways. The National Highway Traffic Safety Administration reports that, in 2009, 5,474 people were killed on U.S. roadways in motor vehicle crashes that were reported to have involved distracted driving.<sup>18</sup>

These fatalities impose a considerable monetary cost to society estimated to be approximately \$32.8 billion.<sup>19</sup> In the regulatory evaluation (in the docket for this rule), FMCSA estimates the benefits and costs of implementing a restriction on the use of hand-held mobile telephones while driving a CMV.

FMCSA and PHMSA's threshold analysis for this rule shows that restricting hand-held mobile telephones

would lead to an estimated one-year cost of \$12.1 million. Current guidance from DOT's Office of the Secretary places the value of a statistical life at \$6.0 million. Consequently, this rule will need to eliminate any combination of crash types equivalent to two fatalities per year in order for the benefits of this rule to equal the costs. These results are summarized below in Table 1.

TABLE 1—THRESHOLD ANALYSIS RESULTS

|  | Total estimated annual costs * | Annual break-even number of fatalities prevented** |
|--|--------------------------------|--|
| Restriction on Use of Hand-Held Mobile Telephones—All CMV Drivers. | \$12.1 Million*** .....        | Approximately 2. Fatalities.                       |

\* This cost estimate does not include a one-time cost to the States of \$2.2 million.

\*\* A statistical life is valued at \$6 million.

\*\*\* This is a worst case annual cost as it would apply only if 100% of CMV drivers were theoretically replaced every year.

Because FMCSA and PHMSA are addressing two of the risky activities—reaching for and dialing on a hand-held mobile telephone—cited in the Olson, *et al.* (2009) study, restricting the use (including holding) of hand-held mobile telephones is expected to prevent more than two fatalities and the benefits to justify the cost.

*Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), and DOT Regulatory Policies and Procedures*

FMCSA and PHMSA have determined that this rulemaking action is a significant regulatory action under Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563 (76 FR 3821, Jan. 21, 2011), and that it is significant under DOT regulatory policies and procedures because of the substantial Congressional and public interest concerning the crash risks associated with distracted driving. However, the estimated economic costs do not exceed the \$100 million annual threshold.

*Regulatory Flexibility Act*

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601–612) requires Federal agencies to consider the effects of the regulatory action on small business and other small entities and to minimize any significant economic impact. The term “small entities” comprises small

businesses and not-for-profit organizations that are independently owned and operated and are not dominant in their fields and governmental jurisdictions with populations of less than 50,000. Accordingly, DOT policy requires an analysis of the impact of all regulations on small entities and mandates that agencies strive to lessen any adverse effects on these businesses.

*FMCSA*

Carriers are not required to report revenue to the Agency, but are required to provide the Agency with the number of power units (PUs) they operate when they register with the Agency and to update this figure biennially. Because FMCSA does not have direct revenue figures, PUs serve as a proxy to determine the carrier size that would qualify as a small business given the SBA's revenue threshold. In order to produce this estimate, it is necessary to determine the average revenue generated by a PU.

With regard to truck PUs, the Agency determined in the 2003 Hours-of-Service Rulemaking RIA<sup>20</sup> that a PU produces about \$172,000 in revenue annually (adjusted for inflation).<sup>21</sup> According to the SBA, motor carriers with annual revenue of \$25.5 million are considered small businesses.<sup>22</sup> This equates to 148 PUs (25,500,000/172,000). Thus, FMCSA considers motor carriers of property with 148 PUs or

fewer to be small businesses for purposes of this analysis. The Agency then looked at the number and percentage of property carriers with recent activity that would have 148 PUs or fewer. The results show that at least 99 percent of all interstate property carriers with recent activity have 148 PUs or fewer.<sup>23</sup> This amounts to 481,788 carriers. Therefore, the overwhelming majority of interstate carriers of property are considered small entities.

With regard to passenger carriers, the Agency conducted a preliminary analysis to estimate the average number of PUs for a small entity earning \$7 million annually, based on an assumption that a passenger-carrying PU generates annual revenues of \$150,000. This estimate compares reasonably to the estimated average annual revenue per PU for the trucking industry (\$172,000). The Agency used a lower estimate because passenger carriers generally do not accumulate as many vehicle miles traveled (VMT) per PU as carriers of property;<sup>24</sup> and it is assumed, therefore, that they would generate less revenue on average. The analysis concludes that passenger carriers with 47 PUs or fewer (\$7,000,000 divided by \$150,000/PU = 46.7 PU) are considered small entities. The Agency then looked at the number and percentage of passenger carriers registered with FMCSA that have 47 PUs or fewer. The results show that at least 96 percent of all interstate

<sup>18</sup> National Highway Traffic Safety Administration Traffic Safety Facts, Research Note, DOT HS 811 379, September 2010.

<sup>19</sup> This cost assumes a value of statistical life equal to \$6 million.

<sup>20</sup> FMCSA Regulatory Analysis, “Hours-of-Service of Drivers; Driver Rest and Sleep for Safe

Operations.” Final Rule (68 FR 22456, Apr. 23, 2003).

<sup>21</sup> The 2000 *TTS Blue Book of Trucking Companies*, number adjusted to 2008 dollars for inflation.

<sup>22</sup> U.S. Small Business Administration Table of Small Business Size Standards matched to North American Industry Classification (NAIC) System

codes, effective August 22, 2008. See NAIC subsector 484, Truck Transportation.

<sup>23</sup> Motor Carrier Management Information System (MCMIS) as of June 17, 2010.

<sup>24</sup> FMCSA Large Truck and Bus Crash Facts 2008, Tables 1 and 20; <http://fmcsa.dot.gov/facts-research/LTBCF2008/Index-2008>.

passenger carriers with recent activity have 47 PUs or fewer.<sup>25</sup> This amounts to 11,338 carriers. Therefore, the overwhelming majority of interstate passenger carriers are considered small entities.

In order to estimate the economic impact of the rule on small entities, FMCSA computed a total annual cost per carrier for each industry segment. First, FMCSA allocated the total cost<sup>26</sup> of the rule in the first year among property and passenger carriers according to their respective shares of total carrier population.<sup>27</sup> Interstate property carriers constitute 98 percent of the total of interstate carriers, whereas interstate passenger carriers constitute 2 percent. The total annual cost of the rule (\$12,095,948)<sup>28</sup> was thus weighted by 98 percent for property carriers, leading to a total cost of \$11,854,036, and by 2 percent for passenger carriers, leading to a total cost of \$241,919. Next, FMCSA divided the two weighted costs by their respective number of small carriers, as described above, arriving at a cost-per-carrier for each segment: \$11,854,029/481,788 = \$24.60 for property carriers; and \$241,919/11,338 = \$21.33 for passenger carriers, for a weighted average of \$24.50 per small entity.

While this rule clearly impacts a substantial number of small entities, the Agency does not consider a weighted average cost of approximately \$24.50 per entity per year to be economically significant in light of the estimated average annual revenue of \$172,000.<sup>29</sup><sup>30</sup>

#### PHMSA

Similarly, PHMSA has conducted an economic analysis of the impact of this rule on small entities. PHMSA's incorporation of the FMCSA restriction into the HMR may affect nearly 1,490 small entities; however, the direct costs of this rule that small entities may incur are only expected to be minimal. PHMSA relied on the cost estimates for property carriers identified by FMCSA above since these costs were higher than PHMSA found in its regulatory flexibility analysis conducted in support of its April 29, 2011 NPRM. While the

final rule will clearly impact a substantial number of small entities, the Agency did not consider an average annual cost of \$24.50 per entity to be economically significant.

Accordingly, FMCSA and PHMSA Administrators certify that a regulatory flexibility analysis is not necessary.

#### Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-121), FMCSA and PHMSA seek to assist small entities in their understanding of this rule so they can better evaluate its effects on them. If the rule affects your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please consult the FMCSA personnel listed in the **FOR FURTHER INFORMATION CONTACT** section of this rule. FMCSA will not retaliate against small entities that question or complain about this rule or any policy or action of the Agency.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of FMCSA, call 1-(888) REG-FAIR (1-(888) 734-3247).

#### Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or Tribal government, in the aggregate, or by the private sector, of \$ 143.1 million (which is the value of \$100 million in 2010 after adjusting for inflation) or more in any 1 year. Though this rule will not result in such expenditure, FMCSA and PHMSA discuss the effects of this rule elsewhere in this preamble.

#### Paperwork Reduction Act

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520).

#### Privacy Impact Assessment

FMCSA and PHMSA conducted a Privacy Threshold Analysis for the rule on restricting the use of hand-held

mobile telephones by drivers of CMVs and determined that it is not a privacy-sensitive rulemaking because the rule does not require any collection, maintenance, or dissemination of Personally Identifiable Information from or about members of the public.

#### Executive Order 13132 (Federalism)

A rule has implications for federalism under Executive Order 13132 entitled, "Federalism," if it has a substantial direct effect on State or local governments, on the relationship between the national government and the States, or on the distribution of powers and responsibilities among the various levels of government. FMCSA and PHMSA recognize that, as a practical matter, this rule may have some impact on the States. None of the State interests contacted by FMCSA, however, or any other commenter expressed concerns to the FMCSA or PHMSA dockets pertaining to the Federalism implications of this rulemaking initiative.

In the most general sense, under long-standing principles, the FMCSRs establish minimum safety regulations that may be supplemented by the States, as long as they are consistent with the regulations. The NPRM described the effect of the proposed rules in accordance with provisions already set forth in the FMCSRs, which establish the basis for the scope of any preemption (75 FR 16398, Apr. 1, 2010). Specifically, 49 CFR 390.9 states that except as otherwise specifically indicated, subchapter B of this chapter [III of Title 49, CFR] is not intended to preclude States or subdivisions thereof from establishing or enforcing State or local laws relating to safety, the compliance with which would not prevent full compliance with these regulations by the persons subject thereto.

This provision allows the States and their subdivisions to enforce their laws and regulations relating to safety, as long as that would not preclude persons subject to the FMCSRs from fully complying with them. This provision satisfies the requirements of 49 U.S.C. 31136(c)(2)(B) by minimizing unnecessary preemption and allowing the States to establish additional regulations that do not prevent full compliance with the FMCSRs. (See also 49 U.S.C. 31141(c)).

#### Executive Order 12630 (Taking of Private Property)

This rule will not effect a taking of private property or otherwise have taking implications under Executive Order 12630 entitled, "Governmental

<sup>25</sup> MCMIS, as of June 17, 2010.

<sup>26</sup> The total cost in this section does not include costs to the States.

<sup>27</sup> The actual cost burden may not necessarily be proportionate to the carrier segment's share in the industry. Absent information on this distribution, FMCSA applied the above assumption.

<sup>28</sup> Excluding costs to the States.

<sup>29</sup> Regulatory Analysis for: Hours-of-Service of Drivers; Driver Rest and Sleep for Safe Operations, Final Rule, FMCSA (68 FR 22456; Apr. 23, 2003).

<sup>30</sup> The 2000 TTS Blue Book of Trucking Companies, number adjusted to 2008 dollars for inflation.

Actions and Interference with Constitutionally Protected Property Rights.”

*Executive Order 12988 (Civil Justice Reform)*

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988 entitled, “Civil Justice Reform,” to minimize litigation, eliminate ambiguity, and reduce burden.

*Executive Order 13045 (Protection of Children)*

FMCSA and PHMSA analyzed this rule under Executive Order 13045 entitled, “Protection of Children from Environmental Health Risks and Safety Risks.” This rule is not an economically significant rule and will not create an environmental risk to health or risk to safety that might disproportionately affect children.

*Executive Order 13211 (Energy Supply, Distribution, or Use)*

FMCSA and PHMSA analyzed this rule under Executive Order 13211 entitled, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.” The agencies determined that it is not a “significant energy action” under that order. Though it is nonetheless a potentially “significant regulatory action” under Executive Order 12866, it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs, OMB, has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

*Technical Standards*

The National Technology Transfer and Advancement Act (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through OMB, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

FMCSA and PHMSA are not aware of any technical standards used to address mobile telephone use by CMV drivers

and, therefore, did not consider any such standards.

*National Environmental Policy Act*

FMCSA analyzed this rule for the purpose of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*), determined under our environmental procedures Order 5610.1, published March 1, 2004, in the **Federal Register** (69 FR 9680), and preliminarily assessed that this action requires an Environmental Assessment (EA) to determine if a more extensive Environmental Impact Statement (EIS) is required. The findings in the Final EA indicate there are no significant positive or negative impacts to the environment expected from the various options in the rule though there could be minor impacts on emissions, hazardous materials spills, solid waste, socioeconomics, and public health and safety. Thus, FMCSA, as the lead agency in this initiative, issues a Finding of No Significant Impact (FONSI) and will not perform an EIS.

PHMSA discussed NEPA requirements in its April 29, 2011 NPRA (76 FR 23929). Specifically, PHMSA indicated that it did not anticipate any significant positive or negative impacts on the environment expected to result from the rulemaking action. In the NPRM, PHMSA requested comments regarding safety and security measures that would provide greater benefit to the human environment or on alternative actions the agency could take that would provide beneficial impacts. PHMSA did not receive any comments on this matter.

In addition, the FMCSA prepared an Environmental Assessment for this rulemaking, and will sign a Finding of No Significant Impact (FONSI). As is noted in 40 CFR 1506.3, it is appropriate for an agency to accept an environmental document in part or in whole, as long as the actions covered by the original NEPA analysis are substantially the same. PHMSA hereby states that the rulemakings are substantially similar, and adopts the Final Environmental Assessment (FEA) as prepared by FMCSA, as well as the conclusions the FEA reaches. The FMCSA FEA has been used to support a FONSI, which has been prepared and signed by the appropriate decision maker within PHMSA. No further NEPA analysis will be performed.

FMCSA also analyzed this rule under the Clean Air Act, as amended (CAA), section 176(c), (42 U.S.C. 7401 *et seq.*) and implementing regulations promulgated by the Environmental Protection Agency. Approval of this action is exempt from the CAA’s general

conformity requirement since it will not result in any potential increase in emissions that are above the general conformity rule’s *de minimis* emission threshold levels (40 CFR 93.153(c)(2)). Moreover, based on our analysis, it is reasonably foreseeable that the rule will not significantly increase total CMV mileage, nor will it significantly change the routing of CMVs, how CMVs operate, or the CMV fleet-mix of motor carriers. The action merely establishes requirements to restrict a driver’s use of a hand-held mobile telephone while operating a CMV.

**List of Subjects**

*49 CFR Part 177*

Hazardous materials transportation, Motor carriers, Radioactive materials, Reporting and recordkeeping requirements.

*49 CFR Part 383*

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

*49 CFR Part 384*

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

*49 CFR Part 390*

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

*49 CFR Part 391*

Alcohol abuse, Drug abuse, Drug testing, Highway safety, Motor carriers, Reporting and recordkeeping requirements, Safety, Transportation.

*49 CFR Part 392*

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

For the reasons discussed in the preamble, FMCSA and PHMSA amend 49 CFR parts 177, 383, 384, 390, 391, and 392 as follows:

**PART 177—CARRIAGE BY PUBLIC HIGHWAY**

■ 1. The authority citation for part 177 continues to read as follows:

**Authority:** 49 U.S.C. 5101–5128; 49 CFR 1.53.

■ 2. Amend § 177.804 by adding a new paragraph (c) to read as follows:

**§ 177.804 Compliance with Federal Motor Carrier Safety Regulations.**

\* \* \* \* \*

(c) *Prohibition against the use of hand-held mobile telephones.* In accordance with § 392.82 of this



chapter, a person transporting a quantity of hazardous materials requiring placarding under Part 172 of this chapter or any quantity of a material listed as a select agent or toxin in 42 CFR part 73 may not engage in, allow, or require use of a hand-held mobile telephone while driving.

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

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

**Authority:** 49 U.S.C. 521, 31136, 31301 *et seq.*, and 31502; secs. 214 and 215, Pub. L. 106–159, 113 Stat. 1748, 1766, 1767; sec. 4140, Pub. L. 109–59, 119 Stat. 1144, 1746; and 49 CFR 1.73.

■ 4. Amend § 383.5 by adding the definition “mobile telephone” in alphabetical order and revising the

definition of “texting” to read as follows:

**§ 383.5 Definitions.**

\* \* \* \* \*

*Mobile telephone* means a mobile communication device that falls under or uses any commercial mobile radio service, as defined in regulations of the Federal Communications Commission, 47 CFR 20.3. It does not include two-way or Citizens Band Radio services.

\* \* \* \* \*

*Texting* means manually entering alphanumeric text into, or reading text from, an electronic device.

(1) This action includes, but is not limited to, short message service, emailing, instant messaging, a command or request to access a World Wide Web page, pressing more than a single button to initiate or terminate a voice communication using a mobile telephone, or engaging in any other form

of electronic text retrieval or entry, for present or future communication.

(2) Texting does not include:

- (i) Inputting, selecting, or reading information on a global positioning system or navigation system; or
- (ii) Pressing a single button to initiate or terminate a voice communication using a mobile telephone; or
- (iii) Using a device capable of performing multiple functions (*e.g.*, fleet management systems, dispatching devices, smart phones, citizens band radios, music players, *etc.*) for a purpose that is not otherwise prohibited in this part.

\* \* \* \* \*

■ 5. Amend § 383.51 by adding a new paragraph (c)(10) to Table 2 and revising footnote 2 to read as follows:

**§ 383.51 Disqualifications of drivers.**

\* \* \* \* \*

(c) \* \* \*

TABLE 2 TO § 383.51

|  |  |   |   |  |
|--|--|---|---|--|
| If the driver operates a motor vehicle and is convicted of:  | For a second conviction of any combination of offenses in this Table in a separate incident within a 3-year period while operating a CMV, a person required to have a CLP or CDL and a CLP or CDL holder must be disqualified from operating a CMV for . . . | For a second conviction of any combination of offenses in this Table in a separate incident within a 3-year period while operating a non-CMV, a CLP or CDL holder must be disqualified from operating a CMV, if the conviction results in the revocation, cancellation, or suspension of the CLP or CDL holder's license or non-CMV driving privileges, for . . . | For a third or subsequent conviction of any combination of offenses in this Table in a separate incident within a 3-year period while operating a CMV, a person required to have a CLP or CDL and a CLP or CDL holder must be disqualified from operating a CMV for . . . | For a third or subsequent conviction of any combination of offenses in this Table in a separate incident within a 3-year period while operating a non-CMV, a CLP or CDL holder must be disqualified from operating a CMV, if the conviction results in the revocation, cancellation, or suspension of the CLP or CDL holder's license or non-CMV driving privileges, for . . . |
| (10) Violating a State or local law or ordinance on motor vehicle traffic control restricting or prohibiting the use of a hand-held mobile telephone while driving a CMV. <sup>2</sup> | 60 days  | Not applicable  | 120 days  | Not applicable.  |

<sup>2</sup> *Driving, for the purpose of this disqualification*, means operating a commercial motor vehicle on a highway, including while temporarily stationary because of traffic, a traffic control device, or other momentary delays. Driving does not include operating a commercial motor vehicle when the driver has moved the vehicle to the side of, or off, a highway and has halted in a location where the vehicle can safely remain stationary.

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

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

**Authority:** 49 U.S.C. 31136, 31301, *et seq.*, and 31502; secs. 103 and 215, Pub. L. 106–159, 113 Stat. 1748, 1753, 1767; and 49 CFR 1.73.

■ 7. Amend § 384.301 by adding a new paragraph (h) to read as follows:

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

\* \* \* \* \*

(h) A State must come into substantial compliance with the requirements of subpart B of this part in effect as of January 3, 2012) as soon as practical, but not later than January 3, 2015.

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

■ 8. The authority citation for part 390 is revised to read as follows:

**Authority:** 49 U.S.C. 504, 508, 31132, 31133, 31136, 31144, 31151, and 31502; sec. 114, Pub. L. 103–311, 108 Stat. 1673, 1677–1678; secs. 212 and 217, Pub. L. 106–159, 113 Stat. 1748, 1766, 1767; sec. 229, Pub. L. 106–159 (as transferred by sec. 4115 and amended by secs. 4130–4132, Pub. L. 109–59, 119 Stat.

1144, 1726, 1743–1744); sec. 4136, Pub. L. 109–59, 119 Stat. 1144, 1745; and 49 CFR 1.73.

■ 9. Amend § 390.3 by revising paragraphs (f)(1) and (f)(6) to read as follows:

**§ 390.3 General applicability.**

\* \* \* \* \*

(f) \* \* \*

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

\* \* \* \* \*

(6) The operation of commercial motor vehicles designed or used to transport between 9 and 15 passengers (including the driver), not for direct compensation, provided the vehicle does not otherwise meet the definition of a commercial motor vehicle, except that motor carriers and drivers operating such vehicles are required to comply with §§ 390.15, 390.19, 390.21(a) and (b)(2), 391.15(f), 392.80 and 392.82 of this chapter.

\* \* \* \* \*

■ 10. Amend § 390.5 by adding the definitions “mobile telephone” and “use a hand-held mobile telephone” in alphabetical order and revising the definition of “texting” to read as follows:

**§ 390.5 Definitions.**

\* \* \* \* \*

*Mobile telephone* means a mobile communication device that falls under or uses any commercial mobile radio service, as defined in regulations of the Federal Communications Commission, 47 CFR 20.3. It does not include two-way or Citizens Band Radio services.

\* \* \* \* \*

*Texting* means manually entering alphanumeric text into, or reading text from, an electronic device.

(1) This action includes, but is not limited to, short message service, emailing, instant messaging, a command or request to access a World Wide Web page, pressing more than a single button to initiate or terminate a voice communication using a mobile telephone, or engaging in any other form of electronic text retrieval or entry, for present or future communication.

(2) Texting does not include:

(i) Inputting, selecting, or reading information on a global positioning system or navigation system; or

(ii) Pressing a single button to initiate or terminate a voice communication using a mobile telephone; or

(iii) Using a device capable of performing multiple functions (e.g., fleet management systems, dispatching

devices, smart phones, citizens band radios, music players, etc.) for a purpose that is not otherwise prohibited in this part.

\* \* \* \* \*

*Use a hand-held mobile telephone* means:

(1) Using at least one hand to hold a mobile telephone to conduct a voice communication;

(2) Dialing or answering a mobile telephone by pressing more than a single button, or

(3) Reaching for a mobile telephone in a manner that requires a driver to maneuver so that he or she is no longer in a seated driving position, restrained by a seat belt that is installed in accordance with 49 CFR 393.93 and adjusted in accordance with the vehicle manufacturer’s instructions.

**PART 391—QUALIFICATION OF DRIVERS AND LONGER COMBINATION VEHICLE (LCV) DRIVER INSTRUCTIONS**

■ 11. The authority citation for part 391 is revised to read as follows:

**Authority:** 49 U.S.C. 504, 508, 31133, 31136, and 31502; sec. 4007(b), Pub. L. 102–240, 105 Stat. 1914, 2152; sec. 114, Pub. L. 103–311, 108 Stat. 1673, 1677; sec. 215, Pub. L. 106–159, 113 Stat. 1748, 1767; and 49 CFR 1.73.

■ 12. Revise § 391.2 to read as follows:

**§ 391.2 General exceptions.**

(a) *Farm custom operation.* The rules in this part, except for § 391.15(e) and (g), do not apply to a driver who drives a commercial motor vehicle controlled and operated by a person engaged in custom-harvesting operations, if the commercial motor vehicle is used to—

(1) Transport farm machinery, supplies, or both, to or from a farm for custom-harvesting operations on a farm; or

(2) Transport custom-harvested crops to storage or market.

(b) *Apiarian industries.* The rules in this part, except for § 391.15(e) and (g), do not apply to a driver who is operating a commercial motor vehicle controlled and operated by a beekeeper engaged in the seasonal transportation of bees.

(c) *Certain farm vehicle drivers.* The rules in this part, except for § 391.15(e) and (g), do not apply to a farm vehicle driver except a farm vehicle driver who drives an articulated (combination) commercial motor vehicle, as defined in § 390.5 of this chapter. For limited exemptions for farm vehicle drivers of articulated commercial motor vehicles, see § 391.67.

■ 13. Amend § 391.15 by adding a new paragraph (f) to read as follows:

**§ 391.15 Disqualification of drivers.**

\* \* \* \* \*

(f) Disqualification for violation of a restriction on using a hand-held mobile telephone while driving a commercial motor vehicle—

(1) *General rule.* A driver who is convicted of violating the restriction on using a hand-held mobile telephone in § 392.82(a) of this chapter is disqualified from driving a commercial motor vehicle for the period of time specified in paragraph (g)(2) of this section.

(2) *Duration.* Disqualification for violation of a restriction on using a hand-held mobile telephone while driving a commercial motor vehicle—

(i) *Second violation.* A driver is disqualified for 60 days if the driver is convicted of two violations of § 392.82(a) of this chapter in separate incidents committed during any 3-year period.

(ii) *Third or subsequent violation.* A driver is disqualified for 120 days if the driver is convicted of three or more violations of § 392.82(a) of this chapter in separate incidents committed during any 3-year period.

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

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

**Authority:** 49 U.S.C. 504, 13902, 31136, 31151, 31502; and 49 CFR 1.73.

■ 15. Amend § 392.80 by revising paragraph (d) to read as follows:

**§ 392.80 Prohibitions against texting.**

\* \* \* \* \*

(d) *Emergency exception.* Texting while driving is permissible by drivers of a commercial motor vehicle when necessary to communicate with law enforcement officials or other emergency services.

■ 16. Amend part 392, subpart H, by adding a new § 392.82 to read as follows:

**§ 392.82 Using a hand-held mobile telephone.**

(a)(1) No driver shall use a hand-held mobile telephone while driving a CMV.

(2) No motor carrier shall allow or require its drivers to use a hand-held mobile telephone while driving a CMV.

(b) *Definitions.* For the purpose of this section only, *driving* means operating a commercial motor vehicle on a highway, including while temporarily stationary because of traffic, a traffic control device, or other momentary delays. Driving does not include

operating a commercial motor vehicle when the driver has moved the vehicle to the side of, or off, a highway and has halted in a location where the vehicle can safely remain stationary.

(c) *Emergency exception.* Using a hand-held mobile telephone is permissible by drivers of a CMV when necessary to communicate with law enforcement officials or other emergency services.

Issued on: November 22, 2011.

**William Bronrott,**

*Deputy Administrator, Federal Motor Carrier Safety Administration.*

**Cynthia L. Quarterman,**

*Administrator, Pipeline and Hazardous Materials Safety Administration.*

[FR Doc. 2011-30749 Filed 12-1-11; 8:45 am]

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Parts 622 and 640

[Docket No. 100305126-1576-04]

RIN 0648-AY72

#### Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Spiny Lobster Fishery of the Gulf of Mexico and South Atlantic; Amendment 10

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

**ACTION:** Final rule.

**SUMMARY:** NMFS issues this final rule to implement Amendment 10 to the Fishery Management Plan for the Spiny Lobster Fishery of the Gulf of Mexico and South Atlantic (FMP), as prepared and submitted by the Gulf of Mexico and South Atlantic Fishery Management Councils (Councils). This rule revises the lobster species contained within the fishery management unit; establishes an annual catch limit (ACL) for Caribbean spiny lobster; revises the Federal spiny lobster tail-separation permit requirements; revises the regulations specifying the condition of spiny lobster landed during a fishing trip; modifies the undersized attractant regulations; modifies the framework procedures and the protocol for cooperative management with Florida; and authorizes the removal of derelict traps in Federal waters off Florida through Florida's trap cleanup program. Additionally, this rule revises codified text to reflect updated contact

information for the state of Florida and regulatory references for the Florida Administrative Code. The intent of this final rule is to specify ACLs for spiny lobster while maintaining catch levels consistent with achieving optimum yield (OY) for the resource.

**DATES:** This rule is effective January 3, 2012. The incorporation by reference of certain publications listed in the rule is approved by the Director of the Federal Register as of January 3, 2012.

**ADDRESSES:** Electronic copies of the amendment, which includes an environmental impact statement, a regulatory impact review, and the initial regulatory flexibility analysis (IRFA), may be obtained from the Southeast Regional Office Web site at [http://sero.nmfs.noaa.gov/sf/pdfs/Spiny\\_Lobster\\_Amendment\\_10\\_August2011.pdf](http://sero.nmfs.noaa.gov/sf/pdfs/Spiny_Lobster_Amendment_10_August2011.pdf).

**FOR FURTHER INFORMATION CONTACT:** Susan Gerhart, telephone: (727) 824-5305, or email: [Susan.Gerhart@noaa.gov](mailto:Susan.Gerhart@noaa.gov).

**SUPPLEMENTARY INFORMATION:** The spiny lobster fishery of the Gulf of Mexico (Gulf) and the South Atlantic is managed under the FMP. The FMP was prepared by the Councils and implemented through regulations at 50 CFR parts 622 and 640 under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

On September 2, 2011, NMFS published a notice of availability for Amendment 10 and requested public comment (76 FR 54227). On September 23, 2011, NMFS published a proposed rule for Amendment 10 and requested public comment (76 FR 59102). The proposed rule and Amendment 10 outline the rationale for the actions contained in this final rule. A summary of the actions implemented by this final rule are provided below.

This final rule will remove all species from the FMP except the Caribbean spiny lobster (spiny lobster). The Councils and NMFS have determined the four other lobster species currently in the FMP are not in need of Federal management at this time. If landings or effort change for the lobster species being removed from the FMP and the Councils determine management at the Federal level is needed, these species could be added back into the FMP at a later date.

This rule will establish an ACL, an annual catch target (ACT) and an AM for spiny lobster. For the recreational and commercial spiny lobster sectors combined, the ACL is 7.32 million lb (3.32 million kg), whole weight. The combined ACT is 6.59 million lb, (2.99 million kg) whole weight. The ACT will

serve as the AM for the spiny lobster stock. If the ACT is exceeded in any year, the Councils will convene a scientific panel to review the ACL and ACT, and determine if additional AMs are needed.

This final rule revises the Federal spiny lobster tail-separation permit requirements to ensure permit issuance is limited to commercial fishermen. This rule requires applicants for a Federal spiny lobster tail-separation permit to possess either (1) a Federal spiny lobster permit or (2) a valid Florida Restricted Species Endorsement and a valid Crawfish Endorsement associated with a valid Florida Saltwater Products License.

This rule also requires lobster to be landed either all whole or all tailed during a single fishing trip to discourage selective tailing of potentially undersized lobsters and thereby aid the enforcement of the minimum size limit.

This rule revises Federal regulations specific to the use of undersized attractants to be consistent with current Florida regulations, which allow the retention of as many as 50 spiny lobsters less than the minimum size limit and one per trap.

To facilitate timely adjustments to harvest parameters and other management measures, this final rule revises the current framework procedures. This revision gives the Councils and NMFS greater flexibility to more promptly alter harvest parameters and other management measures as new scientific information becomes available.

An Endangered Species Act (ESA) biological opinion, completed on August 27, 2009, evaluated the impacts of the continued authorization of the spiny lobster fishery on ESA-listed species. The biological opinion required the consideration of alternatives to allow the public to remove trap-related marine debris in the exclusive economic zone (EEZ) off Florida. This rule authorizes the removal of traps in Federal waters off Florida through Florida's trap cleanup program, as provided in existing Florida regulations. Florida's trap cleanup program includes provisions for public participation.

Additionally, this rule includes new incorporations by reference and revises a number of references within the Federal regulations for spiny lobster. Specifically, this rule updates the spiny lobster regulations with the contact information for the state of Florida administrative offices and the relevant references within the Florida statutes and administrative code that are contained within the Federal regulations at 50 CFR parts 622 and 640.