State and location	Community No.	Effective date authorization/cancellation of sale of flood insurance in community	Current effective map date	Date certain Federal assistance no longer available in SFHAs
Spring City, City of, Sanpete County	490119	May 7, 1976, Emerg; August 5, 1980, Reg; May 2, 2012, Susp.	.....do	Do.
Sunnyside, City of, Carbon County	490205	June 16, 1975, Emerg; September 29, 1978, Reg; May 2, 2012, Susp.	.....do	Do.
Wellington, City of, Carbon County	490037	February 9, 1977, Emerg; February 2, 1984, Reg; May 2, 2012, Susp.	.....do	Do.

* do = Ditto.
Code for reading third column: Emerg.—Emergency; Reg.—Regular; Susp.—Suspension.

Dated: April 12, 2012.

David L. Miller,

Associate Administrator, Federal Insurance and Mitigation Administration, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. 2012–10001 Filed 4–25–12; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Part 386

[Docket No. FMCSA–2011–0259]

RIN 2126–AB38

Amendment to Agency Rules of Practice

AGENCY: Federal Motor Carrier Safety Administration, DOT.

ACTION: Final rule.

SUMMARY: The Federal Motor Carrier Safety Administration (FMCSA) amends its Rules of Practice for Motor Carrier, Intermodal Equipment Provider, Broker, Freight Forwarder, and Hazardous Materials proceedings. The Agency clarifies that paying the full proposed civil penalty in an enforcement proceeding, either in response to a Notice of Claim (NOC) or later in the proceeding, does not allow respondents to unilaterally avoid an admission of liability for the violations charged. Additionally, the Agency establishes procedures for issuing out-of-service orders to motor carriers, intermodal equipment providers, brokers, and freight forwarders it determines are reincarnations of other entities with a history of failing to comply with statutory or regulatory requirements; these procedures will provide for an administrative review before the out-of-service order takes effect. Finally, the Agency establishes a process for consolidating Agency records of reincarnated companies with their predecessor entities.

DATES: This rule is effective May 29, 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–2011–0259'' 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., ET 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.acces.gpo.gov/2008/pdf/E8-785.pdf.*

FOR FURTHER INFORMATION CONTACT: Sabrina Redd, Office of Chief Counsel, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE., Washington, DC 20590–0001, by telephone at (202) 366–6424 or via email at *sabrina.redd@dot.gov.* Office hours are from 9 a.m. to 5 p.m. ET, Monday through Friday, except Federal holidays. If you have questions on viewing or submitting material to the docket, contact Renee V. Wright, Program Manager, Docket Operations, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

Table of Contents for Preamble

I. Abbreviations
II. Legal Basis for the Rulemaking
III. Background
A. Section 386.18
B. Section 386.73
IV. Discussion of Comments
A. Comments to Section 386.18
B. Comments to Section 386.73
C. Small Business Impact
V. Discussion of Rule
VI. Regulatory Analyses

I. Abbreviations

Advocates Advocates for Highway and Auto Safety
AMSA American Moving and Storage Association
ATA American Trucking Associations, Inc.
HMSP Hazardous Materials Safety Permit Program
IME Institute of Makers of Explosives
NATC North American Transportation Consultants, Inc.
OOIDA Owner-Operator Independent Drivers Association
TIA Transportation Intermediaries Association

II. Legal Basis for the Rulemaking

Congress has delegated certain powers to regulate interstate commerce to DOT in numerous pieces of legislation, most notably in section 6 of the Department of Transportation Act (DOT Act) (Pub. L. 89–670, 80 Stat. 931 (1966)). Section 6(e)(6)(C) of the DOT Act transferred to DOT the authority of the Interstate Commerce Commission (ICC) to regulate the qualifications and maximum hours of service of motor carrier employees, the safety of operations, and the equipment of motor carriers in interstate commerce. This authority, first granted to the ICC in the Motor Carrier Act of 1935 (Pub. L. 74–255, 49 Stat. 543), now appears in chapter 315 of title 49 of the U.S. Code. The regulations issued under this authority became known as the Federal Motor Carrier Safety Regulations (FMCSRs), appearing generally at 49 CFR parts 350–399. The administrative powers to enforce chapter 315 were also transferred from the ICC to the DOT in 1966 and appear in chapter 5 of title 49 of the U.S. Code. The Secretary of DOT (Secretary) delegated oversight of these provisions

to the FHWA, the predecessor agency to FMCSA.

Between 1984 and 1999, a number of statutes added to FHWA's authority. Various statutes authorize the enforcement of the FMCSRs, the Hazardous Materials Regulations (HMRs), and the Federal Motor Carrier Commercial Regulations (FMCCRs) and provide both civil and criminal penalties for violations. These statutes include the Motor Carrier Safety Act of 1984 (Pub. L. 98–554, 98 Stat. 2832), codified at 49 U.S.C. Chapter 311, Subchapter III; the Commercial Motor Vehicle Safety Act of 1986 (Pub. L. 99–570, 100 Stat. 3207–170), codified at 49 U.S.C. Chapter 313; the Hazardous Materials Transportation Uniform Safety Act of 1990 (Pub. L. 101–615, 104 Stat. 3244), codified at 49 U.S.C. Chapter 51; and the ICC Termination Act of 1995 (Pub. L. 104–88, 109 Stat. 803), codified at 49 U.S.C. Chapters 135–149. Specifically, the Secretary is authorized to prescribe regulations ensuring that commercial motor vehicles (CMVs) are operated safely under 49 U.S.C. 31136 (a)(1), and to determine whether an owner or operator is fit to safely operate CMVs under 49 U.S.C 31144. In order to ensure that carriers are fit to safely operate, it is necessary to monitor the safety performance history of individual carriers. FMCSA needs to monitor the safety performance history of carriers who ''reincarnate'' as a new carrier when faced with enforcement action in order to focus Agency enforcement efforts. This rule will ensure that carriers who have a proven history of unsafe operations are not able to evade regulation by simply forming a new company or obtaining new registration.

III. Background

On December 13, 2011, FMCSA published a notice of proposed rulemaking (76 FR 77458), with the intent to amend its rules of practice for motor carrier, intermodal equipment provider, broker, freight forwarder, and hazardous materials proceedings. FMCSA received seven public comment submissions regarding the NPRM. These comments are discussed in part IV, Discussion of Comments.

A. Section 386.18

FMCSA published a comprehensive revision of its Rules of Practice on May 18, 2005. This revision can be found in 49 CFR part 386 (70 FR 28467). The revision was intended to increase the efficiency of Agency administrative enforcement procedures, enhance due process, improve public understanding of the Agency's procedures, and accommodate recent programmatic changes.

Under § 386.11(c) of the revised Rules of Practice, civil penalty enforcement proceedings are initiated through service of an NOC, which is usually issued by the FMCSA Division Administrator for the State in which the respondent maintains its principal place of business. The NOC, which is usually based on a compliance review or other type of investigation or enforcement intervention, sets forth the provisions of law allegedly violated by the respondent and the underlying facts pertinent to the alleged violations; proposes a civil penalty; and provides information regarding the time, form, and manner whereby the respondent could pay, contest, or otherwise seek resolution of the claim. Prior to 2005, the Rules of Practice were silent on whether payment of the proposed civil penalty in response to the NOC, or at a subsequent stage of the proceeding, constituted an admission of the violations alleged in the NOC.

The 2005 revision of the Rules of Practice added a new § 386.18 titled ''Payment of the claim.'' That section provided that payment of the full amount claimed may be made at any time before issuance of a Final Agency Order. After the issuance of a Final Agency Order, claims are subject to interest, penalties, and administrative charges in accordance with 31 U.S.C. 3717; 49 CFR part 89; and 31 CFR 901.9. If respondent elects to pay the full amount as its response to the Notice of Claim, payment must be served upon the Field Administrator at the Service Center designated in the Notice of Claim within 30 days following service of the Notice of Claim. No written reply is necessary if respondent elects the payment option during the 30-day reply period. Failure to serve full payment within 30 days of service of the Notice of Claim when this option has been chosen may constitute a default and may result in the Notice of Claim, including the civil penalty assessed by the Notice of Claim, becoming the Final Agency Order in the proceeding pursuant to § 386.14(c). Unless objected to in writing, submitted at the time of payment, payment of the full amount in response to the Notice of Claim constitutes an admission by the respondent of all facts alleged in the Notice of Claim. Payment waives respondent's opportunity to further contest the claim, and will result in the Notice of Claim becoming the Final Agency Order.

In a small number of enforcement proceedings, respondents paid the full amount of the claim with written objection, either in their reply to the NOC or at a later stage of the proceeding. In such cases, the respondents argued that payment with written objection terminated the proceeding without an admission of liability. The FMCSA Field Administrators, who were responsible for prosecuting enforcement proceedings before the Agency, contended that respondents could not unilaterally terminate an enforcement proceeding by making full payment without an admission of liability.

In a case decided on November 3, 2010, *In the Matter of Homax Oil Sales, Inc.,* Docket No. FMCSA–2006–26000, Order Denying Petition for Reconsideration (*Homax*), FMCSA's Assistant Administrator reasoned that allowing respondents to unilaterally terminate proceedings by paying the proposed penalty in full and lodging an objection under § 386.18(c) was inconsistent with the Agency's enforcement policy and section 222 of the Motor Carrier Safety Improvement Act (MCSIA), which requires that the Agency assess the maximum statutory penalty for each violation of law by any person ''who is found to have committed a pattern of violations of critical or acute regulations issued to carry out such a law or to have previously committed the same or related violation of critical or acute regulations issued to carry out such a law.'' The Assistant Administrator concluded that if a carrier was allowed to unilaterally terminate an enforcement proceeding without an admission, the case could not count as prior history for future civil penalty calculations under section 222 of MCSIA or under 49 U.S.C. 521(b)(2)(D), which requires the Agency to consider, among other things, a respondent's history of prior offenses. Allowing unilateral termination of a proceeding by a respondent without an admission would permit carriers with abundant financial resources to repeatedly violate the Agency's regulations without facing escalating civil penalties despite a history of noncompliance with the regulations. The Assistant Administrator acknowledged that the regulatory text of § 386.18(c) was less than clear regarding the consequences of full payment with written objection and recommended that the meaning of the paragraph be clarified through rulemaking.

As was noted in *Homax,* in an April 1996 Notice of Proposed Rulemaking (NPRM), FHWA proposed the following language with respect to the full payment issue: ''Unless otherwise provided in writing by mutual consent of the parties, payment and/or

compliance with the order constitutes an admission of all facts alleged in the notice of violation [called a Notice of Claim under the current Rules of Practice] and a waiver of the respondent's opportunity to contest the claim, and results in the notice of violation becoming the final agency order.'' (61 FR 18865, Apr. 29, 1996)

FHWA's reasoning for this language was that ''future agency enforcement actions may be based on, and certain consequences may flow from, prior and continued violations of the safety regulations.'' (61 FR 18875–76, Apr. 29, 1996)

FMCSA revised this proposal, renumbered as § 386.18(c), in an October 2004 Supplemental Notice of Proposed Rulemaking (SNPRM) (69 FR 61628, Oct. 20, 2004) to read as follows: ''Unless objected to in writing, payment of the full amount in its reply constitutes an admission by the respondent of all facts alleged in the notice of claim. Payment waives respondent's opportunity to further contest the claim, and will result in the notice of claim becoming the final agency order.''

This proposed change was intended to make ''it clear that, unless the parties otherwise agree in writing, respondent's payment of the full claim amount as its reply to the notice of claim constitutes an admission.'' (69 FR 61622)

The final rule published on May 18, 2005 (70 FR 28467), adopted that provision with little change. In the 2010 *Homax* Order, the Assistant Administrator concluded that, notwithstanding the removal of the language requiring mutual consent of the parties from the regulatory text, the preamble of the rule showed that the Agency intended to adopt the mutual consent requirement originally proposed in 1996.

In a subsequent case, *In the Matter of Associated Pipe Contractors, Inc.,* Docket No. FMCSA–2008–0159, Order Terminating Proceeding and Closing Docket, January 10, 2011, the Agency addressed the implications of full payment of the proposed civil penalty at any time before issuance of a Final Agency Order, in accordance with 49 CFR 386.18(a). In *Associated Pipe Contractors,* the carrier paid the full penalty with written objection several months after contesting the NOC and requesting administrative adjudication. Section 386.18(a), which applied to this situation rather than Section 386.18(c), was silent regarding whether a carrier could unilaterally terminate an enforcement proceeding without an admission of liability under those circumstances. The Agency concluded that the same concerns expressed in the *Homax* decision apply to such a payment and that § 386.18(a) should be clarified to be consistent with that decision.

To address these concerns, therefore, FMCSA proposed to revise its Rules of Practice by amending 49 CFR 386.18(a) and (c) to clarify that payment of the full amount of the proposed civil penalty constitutes an admission of all facts alleged in the NOC, unless otherwise agreed by the parties.

B. Section 386.73

FMCSA discovered that a number of motor carriers have submitted new applications for registration, often under a new name, in order to continue operating after having been placed out of service for safety-related reasons; to avoid paying civil penalties; to circumvent denial of applications for operating authority based on a determination that they were not fit, willing, or able to comply with the applicable statutes or regulations; or to otherwise avoid a negative compliance history. Other motor carriers attempt to avoid enforcement or other consequences associated with a negative compliance history by creating or using an affiliated company under common operational control. They then shift customers, vehicles, drivers, and other operational activities to that affiliated company when FMCSA places one of the commonly controlled companies out of service. The practice of ''reincarnating'' as a new carrier or of operating affiliated companies to circumvent Agency enforcement actions and avoid a negative compliance history or enforcement action has created an unacceptable risk of harm to the public because it results in the continued operation of at-risk carriers and thwarts FMCSA's ability to carry out its safety mission.

The danger posed by ''reincarnation'' became evident following a fatal bus crash in Sherman, Texas in 2008. Investigation revealed that the motor carrier involved did not have operating authority from FMCSA. Instead, it had an application for authority pending with the Agency, but was a reincarnation of another bus company that FMCSA had recently placed out of service. Following the Sherman, Texas bus crash, FMCSA began a vetting process that involves a comprehensive review of applications for passenger carrier and household goods operating authority to determine whether the applicants are reincarnations or affiliates of other motor carriers with negative compliance histories or are otherwise not fit, willing, and able to comply with the applicable regulations. Although the vetting program is a significant improvement to the operating authority review process, it is not a complete solution to the reincarnation problem. Accordingly, in this rule FMCSA establishes new procedures to prohibit reincarnated or affiliated carriers from successfully evading accountability for their compliance history.

FMCSA is authorized to suspend, amend, or revoke a motor carrier's registration for willful failure to comply with applicable safety regulations, an FMCSA order, or a condition of its registration pursuant to 49 U.S.C. 13905. Motor carriers that obtain registration by creating a new company or an affiliate company for the purpose of avoiding FMCSA orders, regulations, or enforcement actions procure the registration by fraud—by knowingly misrepresenting and/or withholding material information. FMCSA has authority to sanction these motor carriers, which have already demonstrated an unwillingness or inability to comply with applicable safety regulations, by suspending, amending, or revoking their registration and/or by imposing applicable civil penalties.

To address these challenges, FMCSA proposed to revise its Rules of Practice by adding new section 386.73. This section authorizes FMCSA to issue out-of-service orders to motor carriers, intermodal equipment providers, brokers, and, freight forwarders determined to be reincarnated or operating as affiliates to avoid enforcement action or a negative compliance history, and it would provide a mechanism for administrative review of such orders. The rule would also establish procedures to consolidate the compliance records of reincarnated or affiliated entities. These procedures more fully implement the Agency's current authority to prohibit unsafe entities from operating while, at the same time, providing due process for companies that seek to challenge a finding that they are reincarnated.

IV. Discussion of Comments

FMCSA received seven comments in response to the NPRM (76 FR 77458, Dec. 13, 2011). The commenters included a highway safety advocacy organization, a transportation consultant, and associations representing third party logistics professionals, moving and storage companies, explosives manufacturers and distributors, trucking companies, and independent owner operators.

Overall, most commenters supported FMCSA's objectives for changing its rules of practice. Several commenters expressed concerns with the Agency's proposal regarding the payment of claims. A couple of commenters strongly supported the proposed provisions for ''reincarnated carriers.'' These comments are discussed in greater detail below.

A. Comments to Section 386.18

Comments

The Agency received three comments in response to its proposal to amend 49 CFR 386.18(a) and (c) to clarify that full payment of a proposed civil penalty at any stage of an enforcement proceeding will be considered an admission of liability, unless the parties otherwise agree in writing. The Owner-Operator Independent Drivers Association (OOIDA) supported this proposal, stating that ''[t]he proposed modification shifts the focus back to safety, and does so while affording full due process to those responding to claims.'' OOIDA noted, however, that the elimination of a ''*nolo contendre* plea option (payment without admitting guilt)'' would likely increase the number of negotiated or litigated claims and require additional Agency resources to handle this increase.

The American Trucking Associations, Inc. (ATA) had reservations about, and the American Moving and Storage Association (AMSA) opposed, the proposed amendments to § 386.18. Although ATA stated that it generally agrees with the safety objectives underlying the proposal, it believes that the proposal would result in a ''reversal of the increased efficiency in enforcement procedures that [the] Rules of Practice were intended to achieve'' and divert FMCSA enforcement resources from high-risk carriers. ATA also urges that FMCSA establish a clear and reasonable policy directing Agency officials to agree to settlements of enforcement claims without admissions of guilt in appropriate cases where there is not likely to be a significantly deleterious effect on public safety. AMSA believes that the proposal, by eliminating the *nolo contendre* plea option, is unfair to innocent carriers that make a business decision to pay the penalty in order to resolve a case in the most cost-efficient manner. AMSA also believes that the proposal may result in an increased burden on FMCSA resources because carriers are less likely to settle cases where an admission of liability could result in civil litigation or personal injury suits arising out of the admitted violations.

FMCSA Response

The FMCSA is committed to the expeditious resolution of enforcement proceedings, and continues to believe that allowing unilateral termination of such proceedings without an admission of liability conflicts with important Agency policies and statutory mandates designed to hold carriers accountable for regulatory violations when calculating penalties in potential future enforcement cases. This is particularly important in the context of maximum civil penalty cases subject to section 222 of MCSIA. The Agency's policy statements regarding implementation of section 222 have stated that in order for maximum penalties to be assessed under that section based on previously closed enforcement cases, the violations in those cases must have been adjudicated or admitted.[1]

Thus, allowing a respondent to terminate a proceeding without either an adjudication or admission would permit a carrier with abundant financial resources to repeatedly violate the regulations without running the risk of being penalized as a repeat offender, either for purposes of applying section 222 of MCSIA or calculating the appropriate penalty under 49 U.S.C. 521(b)(2)(D), which requires the Agency to consider, among other things, the respondent's history of prior offenses. This not only impedes the Agency's ability to implement important statutory mandates, but also gives an unfair advantage to those carriers with greater financial resources, who may be tempted to treat civil penalties as merely a cost of doing business.

In 2011, the year following the *Homax* decision, the number of cases resolved through payment of the penalty in full increased more than 85% over the previous year.[2] In contrast, carriers have resisted admissions of liability by making full payment of the civil penalty with written objection in only a handful of cases. Consequently, we do not anticipate a significant increase in the number of contested cases coming before the Agency as a result of the modifications to § 386.18 and believe that ATA's and AMSA's concerns about diversion of agency resources from high-risk carriers are unwarranted. Even if these modifications result in a small increase in the Agency's enforcement case backlog, enhancing motor carrier safety by holding repeat offenders accountable is more important than maintaining a potentially slightly reduced docket of administrative adjudications.

The Agency disagrees with AMSA that the proposal adopts a ''bit of a guilty-until-proven innocent approach * * *.'' Innocent carriers will continue to have the opportunity to contest the allegations in the NOC in accordance with the procedures established in the Agency's Rules of Practice. The FMCSA enforcement program and counsel will continue to have the burden of proving any contested allegations. Although in some circumstances a motor carrier may decide it is less expensive to settle a case than to contest a NOC, that is a business decision, and the carrier's desire to avoid future consequences of the settlement should not take precedence over the need to protect the public against potentially unsafe carriers and to comply with statutory mandates.

In response to ATA's request that FMCSA establish clear and reasonable policies governing the circumstances under which the Agency will settle enforcement claims without requiring an admission of guilt, FMCSA may establish internal policies that will identify appropriate cases that may be settled without including an admission of liability in the Settlement Agreement.

B. Comments to Section 386.73 Carrier Intent

Comment

Advocates for Highway and Auto Safety (Advocates) disagrees with proposed § 386.73(c)(1), which requires FMCSA to consider whether the new or affiliated entity was created for the purpose of evading statutory, regulatory, or other legal requirements. Advocates propose that FMCSA consider only the results of the carrier's conduct without regard to the carrier's intent or motivation behind the conduct. Advocates believe that requiring consideration of motivation and intent could unreasonably burden the Agency's evaluation of the factors in § 386.73(c) because proving intent is difficult and the same activity can be ambiguous if intent must be considered. Advocates suggests, therefore, that the agency eliminate the wording ''for the purpose of'' from the language proposed for § 386.73(c)(1), and replace it with the phrase ''and has resulted in the evasion of'' in referencing the creation of an affiliate that was involved in evading the law.

ATA, on the other hand, supports FMCSA's inclusion of a motor carrier's

[1] *See* 69 FR 77828, 77829, Dec. 24, 2004; 74 FR 14184, 14185, Mar. 30, 2009.

[2] Enforcement data show that 3,237 civil penalty cases were resolved by payment in full without a settlement agreement in 2011, compared to 1,741 such cases in 2010. Approximately 400 more Notices of Claim were issued in 2011 than in 2010.

intent or motivation as a factor for FMCSA to consider when determining whether a motor carrier attempted to avoid a statutory or regulatory requirement. ATA requests, however, that FMCSA weight the factors listed in § 386.73(c), with the first factor concerning the motor carrier's intent being weighted the heaviest.

FMCSA Response

A motor carrier's intent behind a particular course of conduct should be relevant if it shows an attempt to avoid compliance with applicable regulations or the consequences of past violations. A motor carrier would not, however, be able to avoid liability merely by asserting it had some legitimate business purpose for the corporate transaction or affiliate structure. Under the final rule, FMCSA will evaluate the motor carrier's stated purpose in light of all the available evidence and by considering each of the 13 factors identified in § 386.73(c). If the totality of the available information demonstrates that the carrier's stated business purpose is consistent with the evidence, then the motor carrier would not be subject to an out-of-service order and/or record consolidation order. Conversely, if the totality of the available information demonstrates that the carrier's stated purpose is inconsistent with the evidence, then the motor carrier would be subject to an out-of-service order and/or record consolidation order.

FMCSA does not take lightly its authority to place a motor carrier's operations out of service, and the Agency recognizes that such orders pose a significant penalty. Accordingly, FMCSA intends to apply § 386.73 to those motor carriers that engage in egregious instances of noncompliance and evasion. Advocates' proposed modification (removing consideration of intent) is contrary to the intent of the rule, that is, to ensure that carriers that form a new company to purposely evade regulation are identified and put out of service. FMCSA is authorized to establish such a standard but declines to exert its regulatory authority in this manner. ATA's proposed modification (weighting the factors, with intent being weighted the heaviest) could result in a rigid application of the rule and require FMCSA to disregard relevant evidence that a motor carrier attempted to avoid a statutory or regulatory requirement. For these reasons, FMCSA declines to modify the § 386.73 as proposed by either Advocates or ATA.

Comment

IME expressed concerns over how the factors listed in § 386.73(c) and (d) will be applied. IME noted that some of its members operate multiple fleets that have common ownership, but are considered to be separate entities. IME further notes that these motor carriers may engage in one or even all of the activities described in § 386.73(c)(3) through (13). IME requests that FMCSA explain the circumstances under which the factors contained in § 386.73(c) and (d) will be applied.

FMCSA Response

A motor carrier would not be subject to an out-of-service order under § 386.73 unless the motor carrier created or attempted to create a new identity or affiliate relationship for the purpose of avoiding a statutory or regulatory requirement or FMCSA enforcement action. Motor carriers who change their operational model for a legitimate business purpose and not to avoid FMCSA regulation or enforcement would not be affected by this rule. Section 386.73(c) describes the factors FMCSA will evaluate to determine whether a motor carrier created or attempted to create a new identity or affiliate relationship to avoid FMCSA regulation or enforcement. Section 386.73(d) describes the potential sources of information FMCSA may use to make its determination. FMCSA's determination will be based on consideration of all relevant information, and one factor or potential source of evidence is not necessarily more significant than another. Where the greater weight of the evidence shows that a motor carrier created a new identity or shifted its operations to another, commonly owned and controlled, entity to avoid FMCSA authority or negative safety performance history, the motor carrier will be placed out of service and/or have its records consolidated with the records of the preexisting or affiliated entity.

FMCSA modified § 386.73(c)(13), now 386.73(c)(2), to clarify that the safety performance history FMCSA will consider to determine whether a motor carrier created a new identity or affiliate relationship to avoid FMCSA enforcement is the past safety performance history of the original motor carrier. FMCSA also modified § 386.73(d) to clarify that FMCSA will consider all information relevant to the motor carrier operations and the factors identified in § 386.73(c). The original rule text provided that FMCSA would consider information related to the motor carrier's operations, but did not reference information that might be relevant to the factors in § 386.73(c). FMCSA corrected this by clarifying that FMCSA will consider all information relevant to the motor carrier's operations and the factors in § 386.73(c).

Comment

The Transportation Intermediaries Association (TIA) supports FMCSA's efforts to target motor carriers who attempt to avoid statutory or regulatory requirements. TIA suggests, however, that FMCSA implement a timely administrative review process and place carriers in a probation status pending the administrative review.

FMCSA Response

Section 386.73(g) describes the administrative review procedures available to motor carriers served with an operations-out-of service or record consolidation order. In reviewing TIA's comment, FMCSA determined that administrative review procedure should be clarified by adding language to explain when an out-of-service order or record consolidation order is effective. FMCSA modified the rule accordingly. The administrative review procedure is explained below.

Under § 386.73(g), an order is effective 21 days after it is served, unless the motor carrier requests administrative review within 15 days of service of the order. If the motor carrier fails to request administrative review, or requests administrative review after the 15-day period, the motor carrier must cease operations and its records may be consolidated. If the motor carrier requests administrative review within 15 days, however, the order is automatically stayed and the motor carrier may continue operating and its records will not be consolidated during the period of administrative review. The Agency Official may file a motion with the Assistant Administrator to vacate the automatic stay. The motion must be served on the motor carrier who may respond in opposition the motion within 15 days. The Assistant Administrator may grant the motion only if he or she finds good cause to vacate the stay.

The administrative review procedures ensure motor carriers receive notice of FMCSA's intended action and have a fair opportunity to be heard. The procedures also ensure that FMCSA can efficiently and expeditiously address motor carriers that attempt to avoid FMCSA authority or enforcement action. Accordingly, FMCSA declines to establish a ''probation'' status for motor carriers who are permitted to operate

during the administrative review process.

Operating Authority

Comment

TIA recommends that every licensed company (broker, forwarder, and carrier) be required to re-register its operating authority annually and that failure to comply with this requirement should result in cancellation of the company's authority. The commenter asserts that Congress is considering legislation supported by TIA, ATA, and OOIDA that would tie continuation of authority to an existing requirement, either the Unified Carrier Registration Agreement or the Unified Registration System (URS).

FMCSA Response

TIA's suggested annual registration recommendation is beyond the scope of this rulemaking, which does not involve the DOT registration process. The Agency has a rulemaking proceeding in progress regarding the DOT registration process, under Docket No. FMCSA–97–2349, which proposes to replace certain existing DOT registration systems with a new URS. TIA submitted comments in that proceeding on December 20, 2011, in which it made similar recommendations. TIA's comments on this issue, therefore, will be addressed in the URS rulemaking proceeding.

Statutory Authority

Comment

ATA recommends that the Agency wait for more specific statutory authority before finalizing § 386.73.

FMCSA Response

FMCSA does not require additional statutory authority to establish this new section. As stated in the ''Legal Basis for the Rulemaking'' section of the rule, FMCSA has statutory authority to prescribe regulations ensuring that CMVs are operated safely and to determine whether an owner or operator is fit to operate a CMV safely. Section 386.73 of the Agency's Rules of Practice is issued under that rulemaking authority and lays out procedures for placing out of service and/or consolidating the safety records of carriers that avoid FMCSA's regulations.

Comment

Advocates suggests that FMCSA impose criminal sanctions on reincarnated motor carriers engaging in fraud and evading regulation as part of this regulatory initiative.

FMCSA Response

Advocates note that criminal sanctions against reincarnated carriers cannot be sought as part of an administrative proceeding. Because Part 386 applies only to administrative proceedings, this comment is outside the scope of this rulemaking. In any event, FMCSA does not currently have the statutory authority to independently seek criminal sanctions, but will continue to cooperate with both State and Federal law enforcement partners in seeking criminal penalties against unsafe carriers where appropriate.

Out of Scope

Comment

OOIDA requested that a subsection (6) be added to the proposed § 386.73(b), which describes when record consolidation is appropriate, to require consolidation when new or affiliated entities are registered primarily to ''[a]void paying liabilities owed to creditors, including but not limited to the parties actually providing transportation services.'' OOIDA requested that FMCSA add this subsection to protect its members from carriers that reincarnate to escape financial obligations to drivers. This change is outside the scope of the current rulemaking, which is focused on safety rather than financial regulation. Our current legal authority does not provide for determinations of the legal rights between third parties in payment disputes.

TIA suggests that FMCSA should apply § 386.73 to ''broker trust fund providers'' as well as motor carriers, intermodal equipment providers, brokers and freight forwarders. This comment is outside the scope of the current rulemaking, which is focused on safety rather than financial regulation. Moreover, FMCSA has no jurisdiction over broker trust fund providers.

IME suggests that FMCSA focus its efforts on correcting problems in existing programs, rather than proceeding with this rule. IME suggests FMCSA address its petition regarding the Hazardous Materials Safety Permit Program (HMSP), which it states is directly affected by the proposed rulemaking. This comment is outside the scope of the current rulemaking. But FMCSA is planning to address the HMSP in a future rulemaking, as stated in FMCSA's response to IME's petition in that matter.

OOIDA commented that FMCSA's DataQ dispute resolution process does not afford due process to carriers and drivers. DataQ's is the process by which carriers may challenge the accuracy of enforcement data uploaded into the Agency's information systems (e.g., does the report accurately identify the carrier, driver and vehicle and date and location of the intervention). OOIDA's comments regarding the DataQ dispute resolution process are outside the scope of this section of the rulemaking, which is limited to the notice of claim resolution process.

C. Small Business Impact

Comment

North American Transportation Consultants, Inc. (NATC) believes the analysis presented in the NPRM concerning the impact that all aspects of the rule would have on small businesses did not take into consideration the difficulties small businesses encounter in being able to afford legal counsel to provide protection of their rights.

FMCSA Response

First, as mentioned in the Regulatory Flexibility Act section, only six carriers paid a civil penalty with a written objection from 2008 thru 2011, indicating a minimal economic impact that would arise from changes to § 386.18 (a) and (c). Second, the regulatory changes adopted here do not significantly alter the position of small businesses. This is a procedural rule that would not affect entities already in compliance, or those that are out of compliance but do not attempt to avoid the consequences of non-compliance by reincarnating as a new or affiliated entity.

Although small businesses are entitled to retain legal representation during enforcement proceedings initiated under 49 CFR part 386, in most cases they choose to represent themselves. The changes do not increase the burden on motor carriers with respect to their options concerning legal representation.

V. Discussion of Rule

This rule amends regulations in 49 CFR part 386 pertaining to administrative practices and procedures and civil penalties. FMCSA adopts the language from the NPRM into the final rule with additional clarifying language to § 386.73(c) and (d).

FMCSA added language to § 386.73 (g)(8) to clarify the administrative review procedure regarding the Assistant Administrator's authority to vacate the automatic stay of any order issued under § 386.73.

VI. Regulatory Analyses

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

FMCSA has determined that this rule is not a significant regulatory action within the meaning of Executive Order (E.O.) 12866, as supplemented by E.O. 13563 (76 FR 3821, January 21, 2011), or within the meaning of DOT regulatory policies and procedures. The estimated cost of the rule is not expected to exceed the $100 million annual threshold for economic significance; any costs associated with the rule are expected to be minimal. Moreover, the Agency does not expect the rule to generate substantial congressional or public interest. The rule would not impose new requirements upon carriers and thus should result in minimal or no economic burdens. The revisions clarify existing rules and implement procedures that would not require a change in the business practices of already compliant motor carriers.

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'' includes 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.[3] Accordingly, the DOT policy titled, ''Proper Consideration of Small Entities in Agency Rulemaking'' 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.

Under the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121, 110 Stat. 857), this rule is not expected to have a significant economic impact on a substantial number of small entities. The rule's clarification of how payment of claims affects admissions of liability reflects current FMCSA policy, as discussed in the background section. Even before the current policy was enunciated through administrative adjudication, this portion of the rule did not have a significant impact. From 2008 through 2011, the Agency adjudicated only six cases in which the respondent motor carrier paid a civil penalty with written objection, which indicates the minimal impact the rule is expected to have.

FMCSA estimates that fewer than 50 carriers annually will be affected and placed out of service by the rule as it pertains to reincarnated or affiliated carriers, from data provided by the U.S. General Accountability Office (GAO) Engagement Report (June 2008–July 2011).[4] Therefore, this rule would not disproportionately impact small entities. Consequently, I certify that a regulatory flexibility analysis is not necessary.

Assistance for Small Entities

In accordance with section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996, FMCSA wants to assist small entities in understanding this rule so that 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 point of contact, Sabrina Redd, listed in the **FOR FURTHER INFORMATION CONTACT** section of this rule.

Small businesses may send comments on the actions of Federal employees who enforce or otherwise determine compliance with Federal regulations to the Small Business Administration's Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of FMCSA, call 1–888–REG–FAIR (1–888–734–3247). FMCSA will not retaliate against small entities that question or complain about this rule or any policy or action of the Agency.

Unfunded Mandates Reform Act

This rule will not impose an unfunded Federal mandate, as defined by the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1532 *et seq.*), that would result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $141.3 million (which is the value of $100 million in 2010 after adjusting for inflation) or more in any 1 year.

E.O. 13132 (Federalism)

A rule has implications for Federalism under Section 1(a) of E.O. 13132 if it has ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' FMCSA has determined that this rule will not have substantial direct effects on States, nor would it limit the policymaking discretion of States. Nothing in this document preempts any State law or regulation.

Indian Tribal Governments

This rule does not have tribal implications under E.O. 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct, sponsor, or require through regulations. FMCSA has determined that there is no new information collection requirement associated with this rule.

National Environmental Policy Act

FMCSA analyzed this rule for the purpose of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and determined this action is categorically excluded from further analysis and documentation in an environmental assessment or environmental impact statement under FMCSA Order 5610.1 (69 FR 9680, March 1, 2004), Appendix 2, paragraphs (6)(u)(1), (6)(u)(2), and (6)(y)(7). The Categorical Exclusion (CE) in paragraph (6)(u)(1) addresses rules concerning compliance with regulations; the CE in paragraph (6)(u)(2) addresses regulations concerning civil penalties; and the CE in paragraph (6)(y)(7) addresses rules for record keeping. The various changes in this rule are covered by one or a combination of these three CEs. Therefore, this action does not have any effect on the quality of the environment. The Categorical Exclusion determination is available for inspection or copying in the *Regulations.gov* Web site listed under **ADDRESSES.**

[3] Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) see National Archives at *http://www.archives.gov/federal-register/laws/regulatory-flexibility/601.html.*

[4] FMCSA Eastern Service Center/Division Field Enforcement Action—Reincarnated Carrier Cases—GAO Engagement 541079 July 1, 2011.

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 does not affect direct or indirect emissions of criteria pollutants.

E.O. 13211 (Energy Effects)

FMCSA analyzed this rule under E.O. 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. The Agency has determined that it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' under E.O. 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, no Statement of Energy Effects is required.

E.O. 13045 (Protection of Children)

E.O. 13045, Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, Apr. 23, 1997), requires agencies issuing ''economically significant'' rules, if the regulation also concerns an environmental health or safety risk that an agency has reason to believe may disproportionately affect children, to include an evaluation of the regulation's environmental health and safety effects on children. As discussed previously, this rule is not economically significant. Therefore, no analysis of the impacts on children is required. In any event, we do not anticipate that this regulatory action could in any respect present an environmental or safety risk that could disproportionately affect children.

E.O. 12988 (Civil Justice Reform)

This action meets applicable standards in sections 3(a) and 3(b)(2) of E.O. 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

E.O. 12630 (Taking of Private Property)

This rule would not effect a taking of private property or otherwise have taking implications under E.O. 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

National Technology Transfer and Advancement Act (Technical Standards)

The National Technology Transfer and Advancement Act (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through OMB, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards 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 is not aware of any technical standards used to address Agency rules of practice by motor carriers, intermodal equipment providers, brokers, freight forwarders, and handlers of hazardous materials and therefore, did not consider any such standards.

Privacy Impact Assessment

FMCSA conducted a privacy impact assessment of this rule as required by section 522(a)(5) of the FY 2005 Omnibus Appropriations Act, Public Law 108–447, 118 Stat. 3268 (Dec. 8, 2004) [set out as a note to 5 U.S.C. 552a]. The assessment considers any impacts of the rule on the privacy of information in an identifiable form and related matters. FMCSA has determined this rule would have no privacy impacts.

List of Subjects in 49 CFR Part 386

Administrative practice and procedure, Brokers, Freight forwarders, Hazardous materials transportation, Highway safety, Motor carriers, Motor vehicle safety penalties.

For the reasons discussed in the preamble, FMCSA amends 49 CFR part 386 as follows:

PART 386—RULES OF PRACTICE FOR MOTOR CARRIER, INTERMODAL EQUIPMENT PROVIDER, BROKER, FREIGHT FORWARDER, AND HAZARDOUS MATERIALS PROCEEDINGS

■ 1. The authority citation for part 386 continues to read as follows:

Authority: 49 U.S.C. 113, chapters 5, 51, 59, 131–141, 145–149, 311, 313, and 315; Sec. 204, Pub. L. 104–88, 109 Stat. 803, 941 (49 U.S.C. 701 note); Sec. 217, Pub. L. 105–159, 113 Stat. 1748, 1767; Sec. 206, Pub. L. 106–159, 113 Stat. 1763; subtitle B, title IV of Pub. L. 109–59; and 49 CFR 1.45 and 1.73.

■ 2. Amend § 386.18 by revising paragraphs (a) and (c) to read as follows:

§ 386.18 Payment of the claim.

(a) Payment of the full amount claimed may be made at any time before issuance of a Final Agency Order and will constitute an admission of liability by the respondent of all facts alleged in the Notice of Claim, unless the parties agree in writing that payment shall not be treated as an admission. After the issuance of a Final Agency Order, claims are subject to interest, penalties, and administrative charges, in accordance with 31 U.S.C. 3717; 49 CFR part 89; and 31 CFR 901.9.

* * * * *

(c) Unless otherwise agreed in writing by the parties, payment of the full amount in response to the Notice of Claim constitutes an admission of liability by the respondent of all facts alleged in the Notice of Claim. Payment waives respondent's opportunity to further contest the claim and will result in the Notice of Claim becoming the Final Agency Order.

■ 3. Add § 386.73 to subpart F to read as follows:

§ 386.73 Operations out of service and record consolidation proceedings (reincarnated carriers).

(a) *Out-of-service order.* An FMCSA Field Administrator or the Director of FMCSA's Office of Enforcement and Compliance (Director) may issue an out-of-service order to prohibit a motor carrier, intermodal equipment provider, broker, or freight forwarder from conducting operations subject to FMCSA jurisdiction upon a determination by the Field Administrator or Director that the motor carrier, intermodal equipment provider, broker, or freight forwarder or an officer, employee, agent, or authorized representative of such an entity, operated or attempted to operate a motor carrier, intermodal equipment provider, broker, or freight forwarder under a new identity or as an affiliated entity to:

(1) Avoid complying with an FMCSA order;

(2) Avoid complying with a statutory or regulatory requirement;

(3) Avoid paying a civil penalty;

(4) Avoid responding to an enforcement action; or

(5) Avoid being linked with a negative compliance history.

(b) *Record consolidation order.* In addition to, or in lieu of, an out-of-service order issued under this section, the Field Administrator or Director may issue an order consolidating the records maintained by FMCSA concerning the current motor carrier, intermodal equipment provider, broker, and freight forwarder and its affiliated motor carrier, intermodal equipment provider, broker, or freight forwarder or its previous incarnation, for all purposes, upon a determination that the motor carrier, intermodal equipment provider, broker, and freight forwarder or officer,

employee, agent, or authorized representative of the same, operated or attempted to operate a motor carrier, intermodal equipment provider, broker, or freight forwarder under a new identity or as an affiliated entity to:

(1) Avoid complying with an FMCSA order;

(2) Avoid complying with a statutory or regulatory requirement;

(3) Avoid paying a civil penalty;

(4) Avoid responding to an enforcement action; or

(5) Avoid being linked with a negative compliance history.

(c) *Standard.* The Field Administrator or Director may determine that a motor carrier, intermodal equipment provider, broker, or freight forwarder is reincarnated if there is substantial continuity between the entities such that one is merely a continuation of the other. The Field Administrator or Director may determine that a motor carrier, intermodal equipment provider, broker, or freight forwarder is an affiliate if the business operations are under common ownership and/or common control. In making this determination, the Field Administrator or Director may consider, among other things, the following factors:

(1) Whether the new or affiliated entity was created for the purpose of evading statutory or regulatory requirements, an FMCSA order, enforcement action, or negative compliance history. In weighing this factor, the Field Administrator or Director may consider the stated business purpose for the creation of the new or affiliated entity.

(2) The previous entity's safety performance history, including, among other things, safety violations and enforcement actions of the Secretary, if any;

(3) Consideration exchanged for assets purchased or transferred;

(4) Dates of company creation and dissolution or cessation of operations;

(5) Commonality of ownership between the current and former company or between current companies;

(6) Commonality of officers and management personnel;

(7) Identity of physical or mailing addresses, telephone, fax numbers, or email addresses;

(8) Identity of motor vehicle equipment;

(9) Continuity of liability insurance policies or commonality of coverage under such policies;

(10) Commonality of drivers and other employees;

(11) Continuation of carrier facilities and other physical assets;

(12) Continuity or commonality of nature and scope of operations, including customers for whom transportation is provided;

(13) Advertising, corporate name, or other acts through which the company holds itself out to the public;

(d) *Evaluating factors.* The Field Administrator or Director may examine, among other things, the company management structures, financial records, corporate filing records, asset purchase or transfer and title history, employee records, insurance records, and any other information related to the general operations of the entities involved and factors in paragraph (c) of this section.

(e) *Effective dates.* An order issued under this section becomes the Final Agency Order and is effective on the 21st day after it is served unless a request for administrative review is served and filed as set forth in paragraph (g) of this section. Any motor carrier, intermodal equipment provider, broker, or freight forwarder that fails to comply with any prohibition or requirement set forth in an order issued under this section is subject to the applicable penalty provisions for each instance of noncompliance.

(f) *Commencement of proceedings.* The Field Administrator or Director may commence proceedings under this section by issuing an order that:

(1) Provides notice of the factual and legal basis of the order;

(2) In the case of an out-of-service order, identifies the operations prohibited by the order;

(3) In the case of an order that consolidates records maintained by FMCSA, identifies the previous entity and current or affiliated motor carriers, intermodal equipment providers, brokers, or freight forwarders whose records will be consolidated;

(4) Provides notice that the order is effective upon the 21st day after service;

(5) Provides notice of the right to petition for administrative review of the order and that a timely petition will stay the effective date of the order unless the Assistant Administrator orders otherwise for good cause; and

(6) Provides notice that failure to timely request administrative review of the order constitutes waiver of the right to contest the order and will result in the order becoming a Final Agency Order 21 days after it is served.

(g) *Administrative review.* A motor carrier, intermodal equipment provider, broker, or freight forwarder issued an order under this section may petition for administrative review of the order. A petition for administrative review is limited to contesting factual or procedural errors in the issuance of the order under review and may not be submitted to demonstrate corrective action. A petition for administrative review that does not identify factual or procedural errors in the issuance of the order under review will be dismissed. Petitioners seeking to demonstrate corrective action may do so by submitting a Petition for Rescission under paragraph (h) of this section.

(1) A petition for administrative review must be in writing and served on the Assistant Administrator, Federal Motor Carrier Safety Administration, 1200 New Jersey Ave. SE., Washington, DC 20590–0001, Attention: Adjudications Counsel, or by electronic mail to *FMCSA.Adjudication@dot.gov*. A copy of the petition for administrative review must also be served on the Field Administrator or Director who issued the order, at the physical address or electronic mail account identified in the order.

(2) A petition for administrative review must be served within 15 days of the date the Field Administrator or Director served the order issued under this section. Failure to timely request administrative review waives the right to administrative review and constitutes an admission of the facts alleged in the order.

(3) A petition for administrative review must include:

(i) A copy of the order in dispute; and

(ii) A statement of all factual and procedural issues in dispute.

(4) If a petition for administrative review is timely served and filed, the petitioner may supplement the petition by serving documentary evidence and/or written argument that supports its position regarding the procedural or factual issues in dispute no later than 30 days from the date the disputed order was served. The supplementary documentary evidence or written argument may not expand the issues on review and need not address every issue identified in the petition. Failure to timely serve supplementary documentary evidence and/or written argument constitutes a waiver of the right to do so.

(5) The Field Administrator or Director must serve written argument and supporting documentary evidence, if any, in defense of the disputed order no later than 15 days following the period in which petitioner may serve supplemental documentary evidence and/or written argument in support of the petition for administrative review.

(6) The Assistant Administrator may ask the parties to submit additional information or attend a conference to facilitate administrative review.

(7) The Assistant Administrator will issue a written decision on the request

for administrative review within 30 days of the close of the time period for the Field Administrator or the Director to serve written argument and supporting documentary evidence in defense of the order, or the actual filing of such written argument and documentary evidence, whichever is earlier.

(8) If a petition for administrative review is timely served in accordance with this subsection, the disputed order is stayed, pending the Assistant Administrator's review. The Assistant Administrator may enter an order vacating the automatic stay in accordance with the following procedures:

(i) The Agency Official may file a motion to vacate the automatic stay demonstrating good cause why the order should not be stayed. The Agency Official's motion must be in writing, state the factual and legal basis for the motion, be accompanied by affidavits or other evidence relied on, and be served on the petitioner and Assistant Administrator.

(ii) The petitioner may file an answer in opposition, accompanied by affidavits or other evidence relied on. The answer must be served within 10 days of service of the motion.

(iii) The Assistant Administrator will issue a decision on the motion to vacate the automatic stay within 10 days of the close of the time period for serving the answer to the motion. The 30-day period for review of the petition for administrative review in paragraph (g)(5) of this section is tolled from the time the Agency Official's motion to lift a stay is served until the Assistant Administrator issues a decision on the motion.

(9) The Assistant Administrator's decision on a petition for administrative review of an order issued under this section constitutes the Final Agency Order.

(h) *Petition for rescission.* A motor carrier, intermodal equipment provider, broker, or freight forwarder may petition to rescind an order issued under this section if action has been taken to correct the deficiencies that resulted in the order.

(1) A petition for rescission must be made in writing to the Field Administrator or Director who issued the order.

(2) A petition for rescission must include a copy of the order requested to be rescinded, a factual statement identifying all corrective action taken, and copies of supporting documentation.

(3) Upon request and for good cause shown, the Field Administrator or Director may grant the petitioner additional time, not to exceed 45 days, to complete corrective action initiated at the time the petition for rescission was filed.

(4) The Field Administrator or Director will issue a written decision on the petition for rescission within 60 days of service of the petition. The written decision will include the factual and legal basis for the determination.

(5) If the Field Administrator or Director grants the request for rescission, the written decision is the Final Agency Order.

(6) If the Field Administrator or Director denies the request for rescission, the petitioner may file a petition for administrative review of the denial with the Assistant Administrator, Federal Motor Carrier Safety Administration, 1200 New Jersey Ave. SE., Washington, DC 20590–0001, Attention: Adjudication Counsel or by electronic mail to *FMCSA.Adjudication@dot.gov*. The petition for administrative review of the denial must be served and filed within 15 days of the service of the decision denying the request for recession. The petition for administrative review must identify the disputed factual or procedural issues with respect to the denial of the petition for rescission. The petition may not, however, challenge the underlying basis of the order for which rescission was sought.

(7) The Assistant Administrator will issue a written decision on the petition for administrative review of the denial of the petition for rescission within 60 days. The Assistant Administrator's decision constitutes the Final Agency Order.

(i) *Other orders unaffected.* If a motor carrier, intermodal equipment provider, broker, or freight forwarder subject to an order issued under this section is or becomes subject to any other order, prohibition, or requirement of the FMCSA, an order issued under this section is in addition to, and does not amend or supersede such other order, prohibition, or requirement. A motor carrier, intermodal equipment provider, broker, or freight forwarder subject to an order issued under this section remains subject to the suspension and revocation provisions of 49 U.S.C. 13905 for violations of regulations governing their operations.

(j) *Inapplicability of subparts.* Subparts B, C, D, and E of this part, except § 386.67, do not apply to this section.

■ 4. Amend Appendix A to part 386, section IV, by redesignating paragraph h. as paragraph i. and adding a new paragraph h. to read as follows:

Appendix A to Part 386—Penalty Schedule; Violations of Notices and Orders

* * * * *

IV. * * *

h. Violation — Operating in violation of an order issued under § 386.73. Penalty—Up to $16,000 per day the operation continues after the effective date and time of the out-of-service order.

* * * * *

Issued on: April 18, 2012.

Anne S. Ferro,

Administrator.

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