

DEPARTMENT OF TRANSPORTATION**Federal Motor Carrier Safety Administration****Civil Penalty Calculation Methodology**

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice.

SUMMARY: FMCSA is currently evaluating its civil penalty methodology. Part of this evaluation includes a forthcoming explanation of the Uniform Fine Assessment (UFA) algorithm, which FMCSA currently uses for calculation of civil penalties. UFA takes into account the statutory penalty factors under 49 U.S.C. 521(b)(2)(D). The evaluation will also consider penalties for small businesses, including the effect of the Small Business Regulatory Enforcement Fairness Act (SBREFA) on those penalties. The purpose of this notice is to clarify the FMCSA methodology for calculation of certain civil penalties. To induce compliance with federal regulations, FMCSA will impose a minimum civil penalty that is calculated by UFA. In many cases involving small businesses, the penalty will be lower than a large business under similar circumstances.

DATES: This clarification of penalty methodology is effective for all Notices of Claim issued on or after November 17, 2011.

FOR FURTHER INFORMATION CONTACT: Charles Fromm, Office of Chief Counsel, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE., Washington, DC 20590-0001, by telephone at (202) 366-3551 or via email at charles.fromm@dot.gov. Office hours are from 9 a.m. to 5 p.m. ET, Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION: In determining the amount of civil penalties for violations of the Federal regulations it administers, FMCSA must take into account "the nature, circumstances, extent, and gravity of the violation committed and, with respect to the violator, the degree of culpability, history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice and public safety may require." 49 U.S.C. 521(b)(2)(D). Significantly, overlaying the nine factors, section 521(b)(2)(D) also requires that the assessed penalty be "calculated to induce further compliance." *Id.* The Agency may consider certain additional factors, pursuant to the SBREFA, Public Law 104-121, § 201 (Mar. 29, 1996).

To take into account the nine statutory factors under § 521(b)(2)(D) in a manner that results in penalties consistent between carriers of similar circumstances, FMCSA uses an automated policy tool called the UFA. The UFA policy has been in effect since 1994. Under a long line of administrative rulings, starting with *Alfred Chew & Martha Chew, dba Alfred & Martha Chew Trucking*, FHWA-1996-5323 (Final Order, Feb. 7 1996), FMCSA and its predecessor agency have held that UFA "is presumed to comply with the requirement of 49 U.S.C. 521."

One feature of the UFA program, which takes into account ability to pay and ability to continue to do business, is the Gross Revenue Cap. The Gross Revenue Cap is determined by multiplying the motor carrier's adjusted gross revenue by a statutory criteria adjustment score. This score is based on the Agency assessment of the violations and the statutory factors.

In *Paul Michels dba Paul Michels Trucking*, (Jan. 27, 2001), the Acting Chief Safety Officer took official notice of UFA. In the Final Order on reconsideration in *Paul Michels*, the Acting Chief Safety Officer found that UFA considered SBREFA by virtue of the Gross Revenue Cap. In a recent administrative review of a proposed civil penalty, the FMCSA Assistant Administrator held that the calculated penalty for a small business in that case, \$1,980, could not exceed the Gross Revenue Cap calculated by UFA, which was \$490. *Pioneer Drum & Bugle Corps & Color Guard, Inc.*, FMCSA-2008-0012 (Final Order Oct. 4, 2011).

UFA is not, and never was, intended for use where the total proposed penalty is less than \$2,000, however. In such cases, the UFA algorithm may generate a gross revenue cap that is too low to effectively induce compliance with the Federal Motor Carrier Safety Regulations, Federal Hazardous Materials Regulations, and the Federal Motor Carrier Commercial Regulations. Moreover, the administrative burden on the Agency of issuing, settling or adjudicating, and monitoring payment of such low penalty amounts renders this activity contrary to the public interest.

FMCSA therefore will issue a penalty that is equal to the UFA-calculated penalty in all civil enforcement actions when the Gross Revenue cap is \$2,000 or less, even if the Gross Revenue Cap is lower than the calculated penalty. So more precisely, if the UFA per-count calculated penalty and the Gross Revenue Cap are both less than \$2,000, then the penalty will be the lower of (a) \$2,000, or (b) the total of all the per-

count penalties. In addition, UFA provides a range within which enforcement personnel may exercise discretion over the penalty to be issued, taking into account the statutory factors.

In recognition of SBREFA, FMCSA will impose a penalty that is 20 percent higher against for-hire motor carriers of property with annual gross revenue equal to or greater than \$25.5 million, which is the Small Business Administration's current threshold for small businesses in the trucking industry. FMCSA may continue to reduce the calculated penalty, in its discretion, pursuant to the requirement in section 521(b)(2)(D) that it take into consideration the violator's ability to pay and effect of the penalty on the violator's ability to continue to do business.

If the Gross Revenue Cap is greater than \$2,000 and the calculated penalty is greater than the Gross Revenue Cap, the penalty will continue to be limited to the Gross Revenue Cap, subject to the possible adjustment above and any discretionary reduction based on the motor carrier's ability to pay and ability to continue to do business. For cases where the Gross Revenue Cap is at or above \$2,000, UFA appropriately takes SBREFA into account, and the Gross Revenue Cap will apply. In addition to the above, in all cases, FMCSA may increase or decrease the calculated penalty based on other matters as justice and public safety may require, which is consistent with 49 U.S.C. 521(b)(2)(D).

SBREFA generally requires agencies to provide for the reduction or waiver of civil penalties for violations of a statutory or regulatory requirement by a small business. SBREFA includes several exceptions to such reductions or waivers, including where the small business has been subject to multiple enforcement actions, where there has been willful or criminal conduct or in cases where the violations pose a serious health, safety, or environmental threat. SBREFA provides agencies with the flexibility to determine how it will reduce or waive penalties for small businesses. FMCSA believes that a 20 percent difference in penalties between large and small businesses of similar circumstances is a reasonable exercise of the Agency's discretion and balances the principles of SBREFA with the requirement of 49 U.S.C. 521 to calculate penalties that are designed to induce further compliance with federal laws and regulations. FMCSA also notes that, pursuant to 49 U.S.C. 113(b), safety must be the Agency's highest priority, and FMCSA's mission to reduce highway deaths and injuries will often require it to refrain from reducing

penalties for small businesses where one of the exceptions to SBREFA applies. Consistent with past practice and the Agency's position in *Paul Michels* regarding SBREFA, FMCSA will continue to limit penalties to the UFA-generated Gross Revenue Cap where that cap exceeds \$2,000. In no case will an assessed penalty exceed a statutory maximum.

Issued on: November 10, 2011.

Anne S. Ferro,
Administrator.

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DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA-2011-0001-N-18]

Proposed Agency Information Collection Activities; Comment Request

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 and its implementing regulations, the Federal Railroad Administration (FRA) hereby announces that it is seeking renewal of the following currently approved information collection activities. Before submitting these information collection requirements for clearance by the Office of Management and Budget (OMB), FRA is soliciting public comment on specific aspects of the activities identified below.

DATES: Comments must be received no later than January 17, 2012.

ADDRESSES: Submit written comments on any or all of the following proposed activities by mail to either: Mr. Robert Brogan, Office of Safety, Planning and Evaluation Division, RRS-21, Federal Railroad Administration, 1200 New Jersey Ave. SE., Mail Stop 17, Washington, DC 20590, or Ms. Kimberly Toone, Office of Information Technology, RAD-20, Federal Railroad Administration, 1200 New Jersey Ave. SE., Mail Stop 35, Washington, DC

20590. Commenters requesting FRA to acknowledge receipt of their respective comments must include a self-addressed stamped postcard stating, "Comments on OMB control number 2130-0526." Alternatively, comments may be transmitted via facsimile to (202) 493-6216 or (202) 493-6497, or via email to Mr. Brogan at *robert.brogan@dot.gov*, or to Ms. Toone at *kimberly.toone@dot.gov*. Please refer to the assigned OMB control number in any correspondence submitted. FRA will summarize comments received in response to this notice in a subsequent notice and include them in its information collection submission to OMB for approval.

FOR FURTHER INFORMATION CONTACT: Mr. Robert Brogan, Office of Planning and Evaluation Division, RRS-21, Federal Railroad Administration, 1200 New Jersey Ave. SE., Mail Stop 17, Washington, DC 20590 (telephone: (202) 493-6292) or Ms. Kimberly Toone, Office of Information Technology, RAD-20, Federal Railroad Administration, 1200 New Jersey Ave. SE., Mail Stop 35, Washington, DC 20590 (telephone: (202) 493-6132). (These telephone numbers are not toll-free.)

SUPPLEMENTARY INFORMATION: The Paperwork Reduction Act of 1995 (PRA), Public Law 104-13, § 2, 109 Stat. 163 (1995) (codified as revised at 44 U.S.C. 3501-3520), and its implementing regulations, 5 CFR Part 1320, require Federal agencies to provide 60-days notice to the public for comment on information collection activities before seeking approval for reinstatement or renewal by OMB. 44 U.S.C. 3506(c)(2)(A); 5 CFR 1320.8(d)(1), 1320.10(e)(1), 1320.12(a). Specifically, FRA invites interested respondents to comment on the following summary of proposed information collection activities regarding (i) Whether the information collection activities are necessary for FRA to properly execute its functions, including whether the activities will have practical utility; (ii) the accuracy of FRA's estimates of the burden of the information collection activities, including the validity of the methodology and assumptions used to determine the estimates; (iii) ways for

FRA to enhance the quality, utility, and clarity of the information being collected; and (iv) ways for FRA to minimize the burden of information collection activities on the public by automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (e.g., permitting electronic submission of responses). See 44 U.S.C. 3506(c)(2)(A)(i)-(iv); 5 CFR 1320.8(d)(1)(i)-(iv). FRA believes that soliciting public comment will promote its efforts to reduce the administrative and paperwork burdens associated with the collection of information mandated by Federal regulations. In summary, FRA reasons that comments received will advance three objectives: (i) Reduce reporting burdens; (ii) ensure that it organizes information collection requirements in a "user friendly" format to improve the use of such information; and (iii) accurately assess the resources expended to retrieve and produce information requested. See 44 U.S.C. 3501.

Below is a brief summary of the currently approved information collection activities that FRA will submit for clearance by OMB as required under the PRA:

Title: Control of Alcohol and Drug Use in Railroad Operations.

OMB Control Number: 2130-0526.

Abstract: The information collection requirements contained in pre-employment and "for cause" testing regulations are intended to ensure a sense of fairness and accuracy for railroads and their employees. The principal information—evidence of unauthorized alcohol or drug use—is used to prevent accidents by screening personnel who perform safety-sensitive service. FRA uses the information to measure the level of compliance with regulations governing the use of alcohol or controlled substances. Elimination of this problem is necessary to prevent accidents, injuries, and fatalities of the nature already experienced and further reduce the risk of a truly catastrophic accident.

Form Number(s): FRA F 6180.73; FRA F 6180.74.

Affected Public: Businesses.

CFR section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
219.7—Waivers	100,000 employees	2 letters	2 hours	4
219.9(b)(2)—Responsibility for compliance	450 railroads	2 requests	1 hour	2
219.9(c)—Responsibility for compliance	450 railroads	10 contracts/docs	2 hours	20
219.11(d)—General conditions for chemical tests.	450 railroads	30 forms	2 minutes	1
219.11(g) Training—Alcohol and Drug —Programs: New Railroads.	5 railroads	5 programs	3 hours	15