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DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Part 385

[Docket No. FMCSA-2012-0262]

RIN 2126-AB55

Rescission of 10-Day Agency Discretionary Period in Assigning Unsatisfactory Safety Ratings

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

ACTION: Final rule.

SUMMARY: The FMCSA amends the Federal Motor Carrier Safety Regulations to remove the provision indicating that the Agency will consider a 10-day extension of the 45-day period after which passenger and hazardous materials carriers must cease operation after receiving a proposed unsatisfactory safety rating. The Agency previously discontinued this practice as a matter of policy and now amends the regulation to be consistent with the policy and the statutory language concerning this matter. Although FMCSA will continue to review requests for upgrades of proposed unsatisfactory safety rating for such carriers, the Agency will no longer grant extensions to the 45-day period.

DATES: Effective [INSERT DATE 30 DAYS FROM THE DATE OF PUBLICATION IN THE FEDERAL REGISTER]

ADDRESSES: For access to the docket to read background documents, including those referenced in this document, go to: Regulations.gov, <http://www.regulations.gov>, at any time and insert FMCSA-2012-0262 in the “Keyword” box, and then click “Search.”

Docket Management Facility, Room W12-140, DOT Building, 1200 New Jersey Avenue, SE., Washington, DC 20590. You may view the docket online by visiting the facility between 9 a.m. and 5 p.m. e.t., Monday through Friday except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Mr. David Mancl, Enforcement Division, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE., Washington, DC 20590; telephone (202) 493-0442.

SUPPLEMENTARY INFORMATION

Background Information and Discussion of this Final Rule

Background Information

Statutory History

The Motor Carrier Safety Act of 1990 (1990 Act) (section 15 of the Sanitary Food Transportation Act of 1990, Pub. L. 101-500, 104 Stat. 1218) amended the Hazardous Materials Transportation Act to prohibit motor carriers that receive unsatisfactory safety ratings from operating CMVs, as defined in section 204(1) of the Motor Carrier Safety Act of 1984, to transport (1) quantities of hazardous materials for which vehicle placarding is required. Because of subsequent amendments to section 204(1) – codified at 49 U.S.C. 31132(1) – the prohibition also applies to CMVs transporting (2) 9-15 passengers, including the driver, for direct compensation, and (3) more than 15 passengers, including the driver, but not for direct compensation. The 1990 Act established a period of 45 days during which these motor carriers could take necessary corrective action to improve their safety rating to conditional or satisfactory. The statute required the FHWA (FMCSA’s predecessor agency) to review a motor carrier’s corrective actions within 30 days after the date of a safety rating upgrade request.

Section 4009 of the Transportation Equity Act for the 21st Century (Pub. L. 105-178, 112 Stat. 107, June 9, 1998), revised 49 U.S.C. 31144 to apply to all owners and operators of CMVs, not just those transporting passengers or hazardous materials in quantities requiring placarding. It expressly authorized the Agency to allow owners and operators not transporting passengers or hazardous materials in quantities requiring placarding up to an additional 60 days to continue to operate if they were making a good faith effort to become fit.

Current Regulations

The Agency's regulations in 49 CFR 385.17 outline the procedures that FMCSA and affected motor carriers¹ must follow to upgrade a safety rating based on corrective action. A motor carrier transporting passengers or hazardous materials in quantities requiring placarding may request an upgrade of a proposed or final conditional or unsatisfactory safety rating at any time based on corrective action it has taken. If the Agency proposes an unsatisfactory safety rating, the 45-day period in which the motor carrier must make improvements begins on the day written notice of the proposed rating is given by FMCSA. If the corrective action is determined to be insufficient, the proposed unsatisfactory rating becomes effective and the motor carrier must cease transportation of passengers or hazardous materials in quantities requiring placarding immediately, which would be the 46th day from the date of written notice of the proposed unsatisfactory rating. FMCSA makes its determination expeditiously because a final unsatisfactory safety rating will preclude any further operation of CMVs by the motor carrier. If the motor carrier has submitted evidence that corrective action has been taken

¹ Although 49 U.S.C. 31144 uses the term "owner or operator," Agency regulations implementing the statute use the term "motor carrier."

and FMCSA is unable to make its determination within the 45-day review period, the current provisions of 49 CFR 385.17(f) indicates the Agency may extend the 45-day review period by up to 10 additional days.

This provision allowing an extension of the effective date in order for the Agency to review a motor carrier's corrective action has been part of the regulations since 1991.² Current Agency policy³, however, does not allow for extensions of the effective date of a proposed unsatisfactory safety rating for motor carriers transporting passengers or hazardous materials in quantities requiring placarding.

Legal Basis for Rulemaking

The legal basis for this final rule is found in 49 U.S.C. 31144(b) and (c). The statute directs the Secretary to maintain by regulation a procedure for determining the safety fitness of an owner or operator of a commercial motor vehicle (CMV). Section 31144(b)(3) requires the regulations to include specific time frames for such determinations. Section 31144(c)(1) requires that an owner or operator determined to be unfit is generally prohibited from operating CMVs, as defined in 49 U.S.C. 31132, in interstate commerce on the 61st day after the determination. Under sections 31144(c)(2) and (c)(3), however, owners or operators transporting either passengers or hazardous materials in quantities requiring placarding on the vehicle are prohibited from operating

² See Safety Fitness procedures; Safety Ratings, 56 FR 40801, 40802, 40806 (Aug. 18, 1991) (FHWA final rule).

³ <http://www.nts.gov/doclib/reports/2012/HAR1202.pdf>, cited in Highway Accident report HAR-12/02, footnote 48, page 27, published July 21, 2012.

CMVs, as defined in 49 U.S.C. 31132,⁴ in interstate commerce on the 46th day after the determination of unfitness is made.

Section 31144(c)(4) gives the Secretary the discretion to allow an owner or operator to operate for an additional 60 days after the 61st day following the fitness determination “if the Secretary determines that such owner or operator is making a good faith effort to become fit.” But this provision specifically excludes from this discretionary authority owners or operators transporting either passengers or hazardous materials in quantities requiring placarding. Therefore, such owners or operators are not allowed an additional period of operation following the 45th day after the unfitness determination is made. Authority to carry out these provisions has been delegated by the Secretary to the Administrator of FMCSA under 49 CFR 1.87(f).

Administrative Procedure Act

Although the Administrative Procedure Act (APA) generally allows agencies to promulgate final rules only after notice of proposed rulemaking and an opportunity for public comment, agencies need not do so when notice and comment would be “unnecessary” under the good cause exception, 5 U.S.C. 553(b)(3)(B). FMCSA finds that notice and comment are unnecessary in this case, and not otherwise required by law, because the Agency is performing a nondiscretionary administrative act to conform its regulations to 49 U.S.C. 31144.

Discussion of this Final Rule

⁴ Under 49 CFR 390.3(f)(6), operators of CMVs designed or used to transport between 9-15 passengers, not for direct compensation, are not subject to the safety rating process.

The purpose of this final rule is to bring 49 CFR 385.17(f) into conformity with § 31144(c)(4) by removing the provision allowing a 10-day extension of the effective date of a proposed unsatisfactory rating for motor carriers transporting passengers or hazardous materials in quantities requiring placarding. No change is being made to 49 CFR 385.17(g) which allows, in accordance with 49 U.S.C. 31144(c)(4), for motor carriers not transporting passengers or hazardous materials in quantities requiring placarding to continue to operate for up to an additional 60 days at the Agency's discretion. FMCSA has updated the terminology used for motor carriers transporting hazardous materials to be consistent with terminology used elsewhere in this part.

If the Agency issues a proposed unsatisfactory safety fitness rating, the carrier should submit its evidence of corrective actions within 15 days thereafter in order to ensure adequate time for review. Otherwise, the motor carrier risks a final safety fitness rating of "unsatisfactory" or "unfit" and being placed out of service. FMCSA acknowledges that some motor carriers in this category have waited until late into the corrective action period provided by 49 CFR 385.17 to submit evidence of corrective action, leaving Agency officials little or no time for review. However, § 385.17 indicates the Agency will complete its review within 30 days of the carrier's submission of a request for a change in the safety fitness rating. In order to allow 30 days for the Agency to complete its review within the 45-day, non-extendable window from the issuance of the proposed unfit rating, the carrier must submit evidence *demonstrating* corrective action within 15 days.

Providing FMCSA receives evidence of corrective action within 15 days of the date of the proposed safety fitness rating, Agency officials will review and make a

decision on whether it is acceptable before the end of the 45-day period. Should evidence of corrective action be received more than 15 days after the date of the proposed unsatisfactory safety fitness rating, the Agency will not guarantee that the evidence will be considered prior to the end of the 45-day, non-extendable window. If the corrective action period expires before the Agency makes a determination, the proposed rating will become the final rating and the carrier will be prohibited from operating commercial motor vehicles. This policy is consistent with the Agency's August 16, 2012, notice concerning the timely submission of corrective action plans by new entrant carriers (77 FR 49384). If the FMCSA subsequently determines that the corrective action plan is acceptable, the carrier may be reinstated consistent with the Agency's fit, willing, and able policy published on August 2, 2012 (77 FR 46147).

Statutory and Regulatory Reviews.

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

FMCSA has determined that this action does not meet the criteria for a "significant regulatory action" as specified in Executive Order 12866, as supplemented by Executive Order 13563, or within the meaning of the Department of Transportation regulatory policies and procedures (44 FR 11034, Feb. 26, 1979). As explained above, this final rule is strictly ministerial in that it incorporates a nondiscretionary statutory requirement and includes administrative and technical corrections. These changes are necessary to make FMCSA's regulations consistent with 49 U.S.C. 31144.

Under 49 CFR 385.17(f), the decision of whether to grant a carrier an extension of the date on which a proposed unsatisfactory rating becomes final has always been at the Agency's discretion. The Agency can deny requests for extensions. The Agency's current policy is to deny an extension to any motor carrier transporting passengers or hazardous materials in quantities requiring placarding; thus, no such extensions are currently being granted. As a result, incorporating this policy into the Agency's regulations would have no practical effect on the industry.

The only potential impact of this regulatory change would be to eliminate the provision that would allow motor carriers transporting either passengers or hazardous materials in quantities requiring placarding to continue operating for an additional 10 days pending a final determination of their safety fitness. However, current Agency policy is to deny these extensions. The rule would have no economic impact on the motor carrier industry, or significant safety impacts. Therefore, a full regulatory impact analysis has not been conducted, nor has there been a review by the Office of Information and Regulatory Affairs under this executive order.

Regulatory Flexibility Act

FMCSA is not required to prepare a regulatory flexibility analysis for this final rule under the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 601, et seq., because the Agency has not issued a Notice of Proposed Rulemaking prior to this action and, therefore, is not required in that case to prepare such an analysis, 5 U.S.C. 604(a). This final rule also complies with the President's memorandum of January 18, 2011, entitled Regulatory Flexibility, Small Business, and Job Creation (76 FR 3827). As addressed above, promulgation of

this final rule is strictly ministerial in that it incorporates in FMCSA regulations a nondiscretionary statutory requirement currently in place and includes administrative and technical corrections.

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 this Act addresses actions that may result in the expenditure by a State, local, or tribal governments, in the aggregate, or by the private sector of \$143.1 million (which is the calendar year 2010 value used in lieu of the \$100 million threshold included in the 1995 statute, after adjusting for inflation) or more in any one year. This final rule will not result in such an expenditure.

Paperwork Reduction Act

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

National Environmental Policy Act and Clean Air Act

FMCSA analyzed this final rule for the purpose of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and determined under our environmental procedures Order 5610.1, issued March 1, 2004 (69 FR 9680), that this action does not have any effect on the quality of the environment. Therefore, this final rule is categorically excluded from further analysis and documentation in an environmental assessment or environmental impact statement under FMCSA Order 5610.1, paragraph 6(u) of Appendix 2. This categorical exclusion covers regulations affecting the process for issuing orders to comply with the regulations or issuing a civil penalty. A Categorical

Exclusion determination is available for inspection or copying in the [Regulations.gov](https://www.regulations.gov) Web site listed under **ADDRESSES**.

FMCSA also analyzed this action under section 176(c) of the Clean Air Act (CAA), as amended (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 would result in no emissions increase or an increase in emissions that is clearly de minimis.

Executive Order 12372 (Intergovernmental Review of Federal Programs)

The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this action.

Executive Order 12630 (Constitutionally Protected Property Rights)

This final rule does not effect a taking of private property or otherwise have implications under Executive Order 12630.

Executive Order 12898 (Environmental Justice)

This final rule raises no environmental justice issues nor is there any collective environmental impact resulting from its promulgation.

Executive Order 12988 (Civil Justice Reform)

This final rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988 to minimize litigation, eliminate ambiguity, and reduce burden.

Executive Order 13045 (Protection of Children)

This final rule does not pose an environmental risk to health or safety that may disproportionately affect children.

Executive Order 13132 (Federalism)

A rulemaking has implications for Federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on State or local governments. FMCSA analyzed this action in accordance with Executive Order 13132. This final rule does not preempt or modify any provision of State law, impose substantial direct unreimbursed compliance costs on any State, or diminish the power of any State to enforce its own laws. Accordingly, this rulemaking does not have Federalism implications warranting the application of Executive Order 13132.

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

FMCSA analyzed this action under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. FMCSA determined that it is not a “significant energy action” under that Executive Order because it is not economically significant and is not likely to have an adverse effect on the supply, distribution, or use of energy.

List of Subjects in 49 CFR Part 385

Administrative practice and procedure, Highway safety, Motor carriers, Motor vehicle safety, Reporting and recordkeeping.

For the reasons discussed in the preamble, FMCSA amends 49 CFR part 385 as set forth below:

PART 385 – SAFETY FITNESS PROCEDURES

1. The authority citation for part 385 is revised to read as follows:

Authority: 49 U.S.C. 113, 504, 521(b), 5105(e), 5109, 13901-13905, 31133, 31135, 31136, 31137(a), 31144, 31148, and 31502; Sec. 113(a),

Pub. L. 103-311; Sec. 408, Pub. L. 104-88; Sec. 350 of Pub. L. 107-87;
and 49 CFR 1.87.

2. Revise § 385.17(f) to read as follows:

§ 385.17 Change to safety rating based upon corrective actions.

* * * * *

(f) The filing of a request for change to a proposed or final safety rating under this section does not stay the 45-day period specified in §385.13(a)(1) for motor carriers transporting passengers or hazardous materials in quantities requiring placarding.

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Issued on: October 15, 2012

Anne S. Ferro

Administrator

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