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DEPARTMENT OF TRANSPORTATION

4910-EX-P

Federal Motor Carrier Safety Administration

49 CFR Parts 385 and 386

[Docket No. FMCSA-2011-0321]

RIN 2126-AB42

Patterns of Safety Violations by Motor Carrier Management

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

ACTION: Final Rule.

SUMMARY: FMCSA amends its regulations to enable the Agency to suspend or revoke the operating authority registration of for-hire motor carriers that show egregious disregard for safety compliance, permit persons who have shown egregious disregard for safety compliance to exercise controlling influence over their operations, or operate multiple entities under common control to conceal noncompliance with safety regulations. These amendments implement section 4113 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), as amended by section 32112 of the Moving Ahead for Progress in the 21st Century Act (MAP-21), and are designed to enhance the safety of commercial motor vehicle (CMV) operations on our nation's highways.

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

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or e-mail Juan Moya, Transportation Specialist, Enforcement Division, Federal Motor Carrier Safety Administration, telephone: 202-366-4844; e-mail: juan.moya@dot.gov. If you have questions on the docket, call Ms. Barbara Hairston, Docket Operations, telephone 202-366-3024.

SUPPLEMENTARY INFORMATION:

Abbreviations/Acronyms

Advocates for Highway and Auto Safety	Advocates
American Trucking Associations	ATA
Amalgamated Transit Union	ATU
Commercial Motor Vehicle	CMV
FedEx Corporation	FedEx
Federal Motor Carrier Safety Administration	FMCSA
Hazardous Materials Safety Permits	HMSF
International Brotherhood of Teamsters	IBT
Interstate Commerce Commission	ICC
Institute of Makers of Explosives	IME
Moving Ahead for Progress in the 21 st Century Act	MAP-21
Motor Carrier Safety Advisory Committee	MCSAC
Motor Carrier State Assistance Program	MCSAP
National Ground Water Association	NGWA
Notice of Proposed Rulemaking	NPRM
North American Transportation Consultants, Inc.	NATC
Owner-Operator Independent Drivers Association, Inc.	OOIDA
Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users	SAFETEA-LU
Secretary of Transportation	Secretary
Transportation Intermediaries Association	TIA
Truck Safety Coalition	TSC
Transportation Trades Department, AFL-CIO	TTD
United Motorcoach Association	UMA
Werner Enterprises, Inc.	Werner

Executive Summary

Purpose and Summary of the Major Provisions

This rule enables FMCSA to suspend or revoke the operating authority registration of for-hire motor carriers that show egregious disregard for safety compliance, permit persons who have shown egregious disregard for safety compliance to exercise controlling influence over their operations, or operate multiple entities under common control to conceal noncompliance with safety regulations. Congress directed the Agency to implement this rule because it recognized the danger that carriers seeking to evade compliance with FMCSA's regulation pose

to the motoring public. The rule establishes a two-part framework under which the Agency first determines whether a motor carrier has failed to comply with FMCSA's safety regulations or has attempted to conceal such noncompliance. If a motor carrier meets this initial threshold, the Agency then evaluates the motor carrier's conduct to determine whether the motor carrier has engaged in a pattern or practice of safety violations or is using other entities under common control to avoid compliance or mask the noncompliance. The rule establishes factors for the Agency to consider when making these determinations and provides for administrative review. If the Agency ultimately determines that the motor carrier has engaged in such conduct, the carrier may have its operating authority registration suspended or revoked and may be subject to civil or criminal penalties.

Benefits and Costs

FMCSA assessed the potential costs associated with this rule. These costs were found to be economically insignificant. Further discussion of this topic is covered in the Rulemaking Analyses section of this final rule.

Background

Implementation of this rule enables the Agency to suspend or revoke the operating authority registration of motor carriers that show egregious disregard for safety compliance, permit persons who have shown egregious disregard for safety compliance to exercise controlling influence over their operations or operate multiple entities under common control to conceal noncompliance with safety regulations. Motor carriers that engage in such conduct may face suspension or revocation of their operating authority registration. FMCSA acknowledges that loss of operating authority registration is a significant penalty. This rule is necessary and appropriate, however, to address motor carriers that engage in a pattern or practice of willfully

violating safety regulations or forming new entities or affiliate relationships to avoid compliance or mask or otherwise conceal noncompliance.

FMCSA has determined that each year a small number of motor carriers have attempted to avoid regulatory compliance or mask or otherwise conceal noncompliance by submitting new applications for registration, often under a different name, to continue operations after being placed out of service or to avoid other negative consequences of non-compliant behavior including a poor safety history. Motor carriers and individuals do this for a variety of reasons that include avoiding payment of civil penalties, circumventing denial of operating authority registration based on a determination that they are not willing or able to comply with the applicable statutes or regulations, or avoiding a negative compliance history. Other motor carriers attempt to avoid compliance, or mask or otherwise conceal noncompliance, by creating or using an affiliated company under common operational control. They shift customers, vehicles, drivers, and other operational activities to one of the affiliated companies when FMCSA places one of the other commonly controlled companies out of service.

On August 8, 2008, a fatal bus crash occurred in Sherman, Texas, highlighting the danger posed by motor carriers and other persons who avoid regulatory compliance or mask or otherwise conceal noncompliance. Seventeen motorcoach passengers died, and the driver and 38 other passengers received minor-to-serious injuries. The investigations conducted by FMCSA and the National Transportation Safety Board revealed that the motor carrier was operating without authority, was a reincarnation of another bus company that had been recently placed out of service for safety violations, and that both companies were under the control of the same person. FMCSA determined that the companies' flagrant disregard for safety under this person's control demonstrated a hazard to the safety of the motoring public.

Based on these findings, FMCSA instituted a vetting process for for-hire passenger and household goods carriers that involves a comprehensive review of registration applications to determine whether the applicants are reincarnations or affiliates of other motor carriers with negative compliance histories or are otherwise not willing and able to comply with the applicable regulations. Although the vetting process was a significant improvement to the previous registration review and regulatory compliance process, it is not a complete solution to the problem of regulatory avoidance because it does not impose sanctions, and, therefore, deter, the motor carriers or individuals who engage in or condone egregious disregard for safety compliance.

The Sherman crash is but one example that demonstrates how the practice of avoiding compliance or masking or otherwise concealing noncompliance to circumvent Agency enforcement action or to avoid a negative safety compliance history creates an unacceptable risk of harm to the public, resulting in the continued operation of at-risk carriers and impeding FMCSA's ability to execute its safety mission. This rule will help address these problems by providing a significant enforcement tool that allows the Agency to suspend or revoke the operating authority registration of motor carriers that show egregious disregard for safety compliance, permit persons who have shown egregious disregard for safety compliance to exercise controlling influence over their operations or operate multiple entities under common control to conceal noncompliance with safety regulations.

Section 31135 of title 49, United States Code, originally enacted as § 4113 of SAFETEA-LU (Pub. L. 109-59, 119 Stat. 1144), and subsequently amended by § 32112 of MAP-21 (Pub. L. 112-141, 126 Stat. 405), authorizes FMCSA to withhold, suspend, amend, or revoke the operating authority registration of a motor carrier if it or any person has engaged in a pattern or

practice of avoiding compliance, or concealing noncompliance with regulations governing CMV safety prescribed under 49 U.S.C., Chapter 311, subchapter III. That section, as amended, also permits FMCSA to revoke the individual operating authority registration of any officer of a motor carrier that engages in or has engaged in a pattern or practice of, or assisted in avoiding compliance, or masking or otherwise concealing noncompliance while serving as an officer of a motor carrier. FMCSA is required to issue standards to implement the authority granted in § 31135.

To assist the Agency in developing those standards, FMCSA tasked the Motor Carrier Safety Advisory Committee (MCSAC) with identifying concepts that FMCSA should consider. On June 21, 2011, the MCSAC issued a number of recommendations, some of which formed the foundation for this rule. These recommendations include the concepts that a pattern is both widespread and continuing over time, involves more than isolated violations, and does not require a specific number of violations. The Agency also embraced the idea that FMCSA would have to exercise discretion to identify those motor carriers whose officers have shown egregious disregard for safety compliance.

Legal Basis for the Rulemaking

The FMCSA has authority, delegated by the Secretary of Transportation (Secretary) under 49 CFR 1.87, to establish the minimum safety standards governing the operation and equipment of a motor carrier operating in interstate commerce (49 U.S.C. 31136(a) and 31502(b)). Also, as amended by section 4114 of SAFETEA-LU, 49 U.S.C. 31144(a) requires that the Secretary determine whether an owner or operator is fit to safely operate CMVs; periodically update the safety determinations of motor carriers; and prescribe, by regulation, penalties for violations of applicable commercial safety fitness requirements.

Section 31135 of title 49, United States Code, was originally enacted as part the 1994 Recodification Act (Public Law 103-272, 108 Stat. 745). It was subsequently amended as a part of § 4113 of SAFETEA-LU, and then again by § 32112 of MAP-21. Section 31135, as amended, requires employers and employees to comply with FMCSA's safety regulations that apply to the employees' and the employers' conduct. It prohibits motor carriers from using common ownership, common management, common control or common familial relationships to avoid compliance or mask or otherwise conceal noncompliance, or a history of noncompliance. It also authorizes FMCSA to withhold,¹ suspend, amend, or revoke the operating authority registration of a motor carrier if it or any person has engaged in a pattern or practice of avoiding compliance, or concealing noncompliance with regulations governing CMV safety prescribed under 49 U.S.C., Chapter 311, subchapter III. FMCSA may suspend, amend, or revoke the individual registration of an officer of a motor carrier who has engaged in a pattern or practice of, or assisted in, avoiding compliance or masking or otherwise concealing noncompliance while serving as an officer of such motor carrier. FMCSA was required to establish standards implementing § 31135 through rulemaking.

FMCSA relies on 49 U.S.C. §§ 13902, 13905, 31134, and 31135 for the authority and procedures to suspend and revoke operating authority registration in this rule. The Motor Carrier Act of 1935 (Pub. L. 74-255, 49 Stat. 543) authorized the Interstate Commerce Commission (ICC) to issue operating authority registration to motor carriers, brokers, and freight forwarders subject to its jurisdiction and to suspend or revoke such operating authority registration for willful failure to comply with applicable statutes and regulations. The ICC Termination Act of

¹ Although MAP-21 includes authority for FMCSA to withhold operating authority registration under § 31135, FMCSA has elected not to incorporate that authority into this rule. The Agency has existing authority to withhold operating authority registration and will continue to exercise this authority under its current registration process.

1995 (Pub. L. 104-88, 109 Stat. 803) transferred this authority to the Secretary by enacting 49 U.S.C. 13902 (establishing standards for issuing operating authority registration) and 13905 (establishing standards and procedures for suspending and revoking operating authority registration). Section 4113 of SAFETEA-LU amended 49 U.S.C. 13902 to authorize FMCSA to deny an application for operating authority registration of a for-hire motor carrier if the motor carrier is not willing and able to comply with the duties of employers and employees established under 49 U.S.C. 31135. In addition, § 32105 of MAP-21 created new 49 U.S.C. 31134 establishing requirements for motor carriers seeking to obtain operating authority registration and USDOT numbers. This new section authorizes FMCSA to withhold, suspend, or revoke operating authority registration for failing to disclose, among other things, common management or control with any other person or applicant for operating authority registration or any other person or applicant for operating authority registration that has been determined to be unfit, unwilling or unable to comply with the requirements for registration. The changes enacted as a part of MAP-21 were effective October 1, 2012.

Discussion of Comments

FMCSA published a notice of proposed rulemaking (NPRM) on November 13, 2012 (77 FR 67613) and received 24 comments in response. The commenters included: Advocates for Highway and Auto Safety (Advocates), American Trucking Associations (ATA), Amalgamated Transit Union (ATU), FedEx Corporation (FedEx), GG Regulatory Consulting (GGRC), International Brotherhood of Teamsters (IBT), Institute of Makers of Explosives (IME), National Ground Water Association (NGWA), New York State Department of Motor Vehicles (NY DMV), North American Transportation Consultants, Inc. (NATC), Owner-Operator Independent Drivers Association (OOIDA), Transportation Intermediaries Association (TIA), Truck Safety

Coalition (TSC), Transportation Trades Department AFL-CIO (TTD), United Motorcoach Association (UMA), Werner Enterprises, Inc. (Werner) and seven individuals.

Several commenters fully supported the proposal, while others stated that they agreed with the general goals of the proposal, but not with the methods of accomplishing those goals. A majority of the commenters requested clarifications to make the rule easier to understand and implement. Several commenters stated that the Agency went too far in some aspects of the rule, and that the rule would have a broader application than they believe FMCSA intended. Still others questioned how the new rule would fit within FMCSA's existing enforcement programs. FMCSA responds to those comments, organized by subject, below.

General Comments

The New York State Department of Motor Vehicles (NY DMV) and five individuals expressed general support for the rule while one individual expressed general opposition. GG Regulatory Consulting (GGRC) expressed support for North American Transportation Consultants, Inc.'s (NATC) comments and adopted them as its own.

Comment Period

NATC requested that the Agency either extend the comment period or withdraw the rule so that FMCSA can address the commenters' issues and improve the rule.

FMCSA Response. The Agency will not extend the comment period or withdraw the NPRM. The Agency provided a 60-day comment period during which it received 24 comments from interested members of the public. NATC did not identify any information suggesting that interested would-be commenters were unable to submit comments during this time frame or explaining why this rule in particular should have had a longer comment period than the standard 60 days. Moreover, the purpose of notice and comment rulemaking is to provide an opportunity

for interested members of the public to submit their views on the proposed Agency action and for the Agency to make adjustments, if warranted, in response to those comments. As a part of this process, FMCSA carefully considered all comments received, including those submitted by NATC, and made appropriate adjustments, as described below.

Applicability/Targeted Population

Comment. NATC commented that the rule creates a new class of people subject to regulation by including the conduct of “any person” as a trigger and that this exceeds the Agency’s authority. But NATC also commented that 49 CFR § 390.13 already regulates the same conduct, rendering this rule redundant and in violation of an unspecified executive order. In addition, NATC commented that the rule should be changed to “increase the specific action which should be taken against both the carrier and individual manage/ownership personnel who violate existing regulations.”

FMCSA Response. Congress charged FMCSA with regulating the conduct of motor carriers to include the conduct of “any person, however designated, exercising controlling influence over the operations of a motor carrier” (49 U.S.C. 31135(d)(2)). By using the conduct of “any person” with controlling influence to trigger enforcement action against motor carriers, FMCSA implements that authority Congress specifically authorized – and directed – the Agency to exercise.

FMCSA disagrees with NATC’s comment that this final rule is redundant or that the substance is covered by existing § 390.13. Section 390.13 provides that “No person shall aid, abet, encourage or require a motor carrier or its employees to violate the rules of this chapter.” Unlike today’s final rule, § 390.13 places a direct prohibition on individual conduct. Moreover,

it does not address Congress's mandate that the Agency penalize motor carriers for individual conduct that rises to the level of a pattern or practice of safety violations.

Although NATC objected to creating a new class of people subject to FMCSA's jurisdiction, it nonetheless suggested that the Agency target that same class of people with enhanced penalties for violations of existing regulations. But the final rule is based on a specific congressional mandate: the Agency is directed to revoke or suspend the registration of motor carriers, not take action against individuals, except where those individuals are registered motor carriers. As a result, FMCSA did not make NATC's suggested changes.

Because NATC did not identify the Executive Order it alleged the Agency to be in violation of and why, FMCSA cannot respond.

Comment. NATC commented that 49 U.S.C. 31134 was established to screen motor carriers attempting to obtain operating authority, and that FMCSA is incorrectly attempting to apply that standard to carriers holding existing authority.

FMCSA Response. FMCSA disagrees that Congress intended for this rule to apply only prospectively to motor carriers seeking new operating authority. Although § 31134 contains provisions authorizing the Agency to withhold, revoke or suspend registrations, neither that section nor § 31135, which specifically authorizes FMCSA to revoke or suspend registration based on patterns or practices of safety violations, limits FMCSA's authority to take action against existing registrants.

Comment. Werner Enterprises, Inc. (Werner) commented that carriers with an excellent record and culture of safety and compliance could be targeted for hiring an officer with a history of noncompliance. Werner further commented that a carrier could be punished without having done anything to affect its safety rating negatively.

FMCSA Response. This rule will target only the worst actors in the industry. As a practical matter, FMCSA finds it highly unlikely that a motor carrier with an excellent safety compliance record would place someone with a history of egregious disregard for safety compliance in a position of controlling influence over operations. But, in accordance with Congress's direction, the Agency has determined that it is appropriate to revoke or suspend the registration of motor carriers that permit such individuals to exercise control over operations. In discharging its mission to reduce crashes, injuries and fatalities, the Agency believes that it is not appropriate to wait until a crash or other adverse safety event occurs before taking action. To the contrary, the intent of this rule, as mandated by Congress, is to prevent non-compliant actors from circumventing their negative safety compliance records, and thus preventing crashes, injuries and fatalities from occurring in the first place.

In the event that a motor carrier innocently places such a person in a position of controlling influence, the rule provides safeguards for the carrier. This rule requires that the Agency provide notice to the carrier of the Agency's intent to suspend or revoke and gives the carrier an opportunity to respond, which could include, among other things, submission of mitigating information showing that the person is not a safety risk, did not engage in the suspected conduct or has been removed from a position of controlling influence. But this does not mean that submission of mitigating information about a particular officer would necessarily be dispositive. If a motor carrier's safety management controls were so inadequate that placing the officer in a position of controlling influence would be just a symptom of a pattern or practice of safety violations, submitting mitigating information about a particular officer might not be sufficient.

Comment. The International Brotherhood of Teamsters (IBT) commented in support of the rule and suggested expanding the Agency's vetting process to include property-carrying and hazardous materials motor carriers. NATC recommended extending the Agency's vetting program to all motor carriers requesting operating authority registration and suggested that all registrants be re-vetted every 5-10 years.

FMCSA Response. FMCSA considers its vetting program to be an important tool in discharging its safety mission. The Agency does not believe that this rule is the appropriate vehicle for the expansion of that program. FMCSA will, however, take these comments under advisement and consider them in future vetting initiatives.

Comment. IBT suggested that the Agency take enforcement action against drivers in the port/drayage sector of the motor carrier industry.

FMCSA Response. Members of the industry in the port/drayage sector, including drivers, could be subject to enforcement if they meet the criteria established under this rule.

Comment. Transportation Intermediaries Association (TIA) suggested expanding the scope of the rule to include those entities that engage in unlawful brokerage activities. Similarly, Owner-Operator Independent Drivers Association, Inc. (OOIDA) suggested expanding the rule to reach brokers and freight forwarders that reincarnate or use affiliated entities to avoid safety compliance.

FMCSA Response. In accordance with Congress's mandate, this rule is limited to patterns or practices of safety violations. See 49 U.S.C. 31135(a), (b)(1) and (b)(2). The commercial regulations at 49 CFR parts 360 and 366-379, including provisions applicable to brokers and freight forwarders, are not based on FMCSA's safety jurisdiction (49 U.S.C., Chapter 311, subchapter III and 49 CFR parts 380-387 and 390-398) and, as a result, those

regulations are outside the scope of this rulemaking. Brokers and freight forwarders that also operate CMVs, however, do fall under FMCSA's safety jurisdiction, and if such entities reincarnate or use affiliated entities to avoid compliance with safety regulations, then they too are covered under this rule.

Comment. NATC asked whether a person not required to register under FMCSA's regulations constitutes a motor carrier for the purposes of this rule.

FMCSA Response. Any entity registered under 49 U.S.C. 13902, 49 CFR part 365, and 49 CFR part 368 is a motor carrier for the purposes of this rule. To eliminate any confusion over the applicability of this rule, FMCSA amended the regulatory text to state explicitly that any entity registered or required to register is subject to this rule.

Comment. United Motorcoach Association (UMA) commented that FMCSA should establish a "venue" for motor carriers to disclose when they are acquiring assets of a company placed out of service so that they are not considered to be reincarnating.

FMCSA Response. Carriers currently may report these transactions to FMCSA and should file an updated MCS-150, as appropriate. It is important to note, however, that this rule does not prohibit legitimate business transactions involving the sale and purchase of assets. It applies to carriers who attempt to avoid regulatory requirements or enforcement action by creating a new identity or affiliate relationship to mask the true nature of their identity. If a carrier is placed out of service and elects to sell its assets rather than take the corrective action necessary to resume operation, and there is no common ownership or operational control between the out of service carrier and the purchasing carrier, then this rule would not apply. FMCSA recently initiated a separate regulatory initiative on the related issue of the lease and interchange of passenger-carrying CMVs. *See Lease and Interchange of Vehicles; Motor*

Carriers of Passengers, Notice of Proposed Rulemaking, Docket No. FMCSA-2012-0103, 78 FR 57822 (Sept. 20, 2013).

Regulatory Noncompliance

Comment. OOIDA and Transportation Trades Department, AFL-CIO (TTD) commented in support of the four categories of actions the Agency identified in § 385.907 that would trigger liability under this rule. NATC commented that the Agency did not define “avoid compliance” and did not identify a standard for complying with statutory or regulatory safety requirements. Similarly, National Ground Water Association (NGWA) and OOIDA requested that FMCSA clarify the terms “avoiding noncompliance,” “avoiding regulatory compliance,” and “concealing regulatory noncompliance.” Several commenters requested a definition or clarification of what type of conduct constitutes “masking or otherwise concealing noncompliance.”

FMCSA Response. Section 385.907 identifies avoiding regulatory compliance as failure or concealing failure to 1) comply with statutory or regulatory requirements prescribed under 49 U.S.C. Chapter 311, subchapter III, 2) comply with State or Federal orders issued to redress violations of those requirements, 3) pay a civil penalty for violating those requirements, or 4) respond to an enforcement action for a violation of those requirements. Any of these four types of conduct constitutes noncompliance, and anyone who has engaged in such conduct has avoided compliance. Anyone who attempts to hide, or evade the consequences of, such noncompliance has engaged in masking or otherwise concealing noncompliance.

Comment. OOIDA sought clarification of “...failure or concealing failure to...2) comply with State or Federal orders issued to redress violations of those requirements,” by asking what types of orders trigger enforcement.

FMCSA Response. Failing to comply with any order issued by FMCSA or a State to enforce safety regulations issued under the authority of 49 U.S.C. Chapter 311, subchapter III could trigger enforcement of this rule. These orders could include, but are not limited to, operations out-of-service orders, orders directing payment of civil penalties, orders directing compliance, orders revoking or suspending operating authority registration and orders directing a safety audit or other investigation.

Comment. NATC asked what constitutes “a history of non-compliance.”

FMCSA Response. A motor carrier that has engaged in one or more of the four types of conduct identified in § 385.907 has a history of noncompliance.

Comment. NATC commented that the Agency did not define “failure to respond” as used in § 385.907 and asked whether a partial response would constitute failure to respond.

FMCSA Response. Failure to respond means not taking action in response to, or not participating in, enforcement actions arising out of violations of safety requirements. Examples include, but are not limited to, failing to: submit proof of corrective action as directed by the Agency; produce information as directed by the Agency in furtherance of an audit or investigation; or pay a civil penalty as required by a final order imposing the penalty. Whether a partial response constitutes failure to respond is a highly fact-specific question that cannot be generalized prospectively but would be the subject of focused consideration in an action under this rule.

Comment. OOIDA asked to what extent FMCSA will be focused on finding patterns or practices of safety violations that involve concealment and whether a single act of concealment could trigger enforcement.

FMCSA Response. The Agency intends to pursue egregious conduct under this rule irrespective of whether it constitutes avoiding compliance or concealing noncompliance. One act of concealment could be sufficient to establish a pattern or practice; however, that determination is fact-specific and must be considered within the context of the officer or motor carrier's conduct and the factors set forth in § 385.909.

Comment. UMA commented that when a motor carrier that is placed out of service makes arrangements to fulfill its contractual obligations, that carrier should not automatically be considered to be reincarnating, or masking or avoiding a negative compliance history. UMA further commented that it would be better for FMCSA to monitor the continued operations of an out-of-service carrier while that carrier seeks reinstatement, citing financial obligations such as payroll and lease payments.

FMCSA Response. The fact that a motor carrier contracts with another company after being placed out of service does not necessarily establish reincarnation. The Agency's orders may permit carriers to contract with other entities or to resume operations after receiving an out-of-service order under certain circumstances. How a motor carrier handles its contractual obligations may be one factor the Agency considers when determining whether a motor carrier has reincarnated, but it would not necessarily be dispositive. Each case is fact specific and would be evaluated in accordance with the factors in § 385.1007.

Carriers must work with the appropriate enforcement personnel to ensure that they remain in compliance with all regulatory requirements. A carrier that operates within the parameters of existing regulations and orders is not, by definition, avoiding compliance or masking or concealing noncompliance. Although FMCSA regulations require a passenger carrier to make arrangements to transport stranded passengers to the next destination in the event

a vehicle or driver is placed out-of-service, that carrier would not normally be permitted to resume regular operations through the use of a third party.

Comment. Institute of Makers of Explosives (IME) requested that FMCSA clarify that holders of hazardous materials safety permits (HMSP) would not be subject to liability under the proposed rule if they transferred assets to other related HMSP carriers while waiting to “age out” of an out-of-service disqualification, as long as this arrangement was disclosed to the Agency and the assets transferred were not the cause of the disqualification.

FMCSA Response. A carrier that transfers assets to an affiliated carrier to avoid being placed out of service or losing its HMSP engages in conduct that is designed to avoid regulatory compliance. Whether the conduct would then rise to the level of a pattern or practice of avoiding, masking or concealing would depend on the facts of the particular case.

Comment. OOIDA commented that violations of 49 U.S.C. 31105, motor carrier employee whistleblower protection provisions, should also be included in § 385.907.

FMCSA Response. The Agency did not incorporate OOIDA’s suggestion that whistleblower protection provisions be included in § 385.907. Congress limited the Agency’s authority to suspend or revoke a motor carrier’s registration for a pattern or practice of regulatory noncompliance involving violations of safety statutes at 49 U.S.C., Chapter 311, subchapter III (49 U.S.C. sections 31131-31151) and accompanying regulations (49 CFR parts 380-387 and 390-398). The motor carrier employee whistleblower protection provisions at 49 U.S.C. 31105 are outside the scope of FMCSA’s statutory authority for the purposes of this rule. Individuals seeking protection under § 31105 can seek redress through the U.S. Department of Labor or by pursuing their rights in Federal court. Regardless, if the conduct that gave rise to the

whistleblower claims involved violations of FMCSA's safety statutes, they could form the basis for enforcement under this rule.

Officer

Comment. UMA, American Trucking Associations (ATA) and FedEx Corporation (FedEx) all commented that the Agency's interpretation of the statutory definition of "officer" is overly expansive and should not include contractors and consultants. OOIDA took the opposite position, commenting that the definition should include contractors and consultants.

FMCSA Response. Including contractors and consultants in the definition of "officer" is consistent with Congress's intent. The statutory definition specifically includes "any person, however designated, exercising controlling influence over the operations of a motor carrier." Nothing indicates that Congress intended to limit the concept of "any person" to something less than the plain meaning of the words "any person." To the contrary, all evidence suggests that Congress sought to target bad actors based on their conduct and the influence they wield over motor carrier operations, regardless of their position, title or employment status.

Comment. ATA commented that motor carriers rarely grant controlling influence to contractors and that defining "officer" to include contractors would have a chilling effect on motor carriers seeking outside help to improve safety practices. NATC also commented that contractors rarely have direct control over motor carrier compliance and could suffer unfairly from association with disreputable motor carriers.

FMCSA Response. Contractors, agents or consultants who exercise controlling influence over motor carrier operations in an effort to reverse a culture of noncompliance or otherwise improve compliance would not be the subject of enforcement under this rule. That said, FMCSA has observed instances in which consultants have exercised controlling influence over operations

to help motor carriers avoid compliance or evade the consequences of previous instances of noncompliance. Although these consultants are not technically employees, their influence is both palpable and detrimental to safety. The Agency intends for this final rule to have a deterrent effect on persons such as contractors, agents or consultants who exercise a controlling influence and advise motor carriers on how to circumvent FMCSA's safety regulations.

Comment. FedEx commented that the rule should define "contractor" to exclude independent businesses operating pursuant to the Part 376 leasing regulations.

FMCSA Response. The Agency does not believe it is appropriate to define contractor because the term is not used in the regulatory text. Regardless, FMCSA does not believe that any classification of contractor should be categorically excluded from this rule, for the reasons stated above.

Controlling Influence

Comment. Werner, ATA and FedEx commented that the Agency should define "controlling influence."

FMCSA Response. In response to comments, the Agency added a definition of "controlling influence." FMCSA describes this change in the Section-by-Section Analysis portion of this final rule.

Comment. OOIDA asked whether owner-operators are intended to be one of the subjects of the rulemaking when they do not meet the definition of "officer."

FMCSA Response. This rule covers any person who exercises controlling influence over a motor carrier's operations. An owner-operator can be subject to this rulemaking either as a motor carrier or as an officer, depending on the capacity in which he or she is acting. For example, an owner-operator who engages in a pattern or practice of safety violations in his or her

capacity as a motor carrier, operating under his or her own registration, could be subject to enforcement under this rule. An owner-operator who acts as an officer, exercising controlling influence over another motor carrier's operations and engaging in a pattern or practice of safety violations, could also be the subject of enforcement action. In accordance with congressional intent, an owner-operator who engages in a pattern or practice of safety violations while working under another motor carrier's registration risks having his or her own individual registration suspended or revoked. However, an owner-operator who neither acts as a motor carrier nor an officer would not be subject to this rule.

Pattern or Practice

Comment. TTD commented in support of the factors the Agency set forth in § 385.909 to determine whether a pattern or practice exists. ATA, NATC, FedEx and OOIDA requested that the Agency define "pattern of noncompliance" or otherwise establish objective factors for "pattern or practice."

FMCSA Response. Congress charged the Agency with rooting out those bad actors that have engaged in a pattern or practice of avoiding regulatory compliance. That charge does not lend itself to the establishment of rigid factors or a single definition. Each case must be assessed based on the facts specific to that situation; no two acts of noncompliance or avoidance are exactly the same. As such, the Agency must have the flexibility to tailor its enforcement actions to the facts of the specific cases. The factors in § 385.909 are designed to provide a framework for identifying objective information the Agency can evaluate when determining whether a violation occurred. Moreover, the factors provide the Agency the necessary flexibility to balance a suspected violation against potentially mitigating circumstances.

Comment. OOIDA commented that without a more exact formula for determining what is a pattern or practice, enforcement officials would not be able to ensure uniform application of the rule and motor carriers could be subject to inconsistent enforcement actions. Similarly, FedEx commented that the Agency could develop significant regional differences in the application without more specific guidelines.

FMCSA Response. The Agency is not persuaded that enforcement rules require a formulaic approach in order to avoid inconsistent application or result. To the contrary, the Agency believes enforcement is best served when there is room for discretion, explanation, and consideration of the unique circumstances of each individual and carrier. Regardless, the administrative review procedure in the rule mitigates the potential for inconsistency because one person – the Assistant Administrator – is responsible for administrative review in all cases.

Comment. FedEx recommended establishing predicate acts that must occur prior to the Agency determining that a pattern or practice exists.

FMCSA Response. In order for FMCSA to determine that a motor carrier or officer has engaged in a pattern or practice of avoiding compliance or concealing noncompliance, the Agency must first determine that the motor carrier or officer has engaged in one or more acts of regulatory noncompliance as described in § 385.907. Those acts that fall within one of the four prongs in § 385.907 are themselves the predicate acts that must occur prior to the Agency making a determination that a motor carrier or officer engaged in a pattern or practice of avoiding regulatory compliance or concealing noncompliance.

Comment. OOIDA asked the Agency to clarify what types of data it would rely on in enforcing this rule. OOIDA specifically asked whether the Agency would use violations identified in inspection reports from Motor Carrier State Assistance Program (MCSAP) partners

and during safety audits. OOIDA commented that it believes the inspection data FMCSA collects is inaccurate and unreliable and would undermine the lawfulness and utility of enforcement actions. NATC asked whether the Agency has established standards to ensure uniform investigations and whether there is a process for reviewing the investigation results before they are used as a basis for action under this rule.

FMCSA Response. To enforce this rule, FMCSA will use the same data gathered in accordance with the same investigative procedures that it currently uses in enforcement actions. In fact, data gathered in previous investigations in accordance with those procedures may be used to inform the Agency Official's action under the rule. For example, the Agency intends to use information obtained from compliance reviews, safety audits, roadside inspections and other investigations concerning safety performance. FMCSA's investigative standards and policies, including those of its MCSAP partners, will generally apply to proceedings arising under this rule, just as they would to any other Agency enforcement proceeding.

Comment. FedEx commented that information gathered in accordance with pending enforcement actions should not be one of the factors in § 385.909, suggesting that only those enforcement actions that constitute final agency actions should be taken into consideration.

FMCSA Response. This rule is designed to deter motor carriers and individuals from attempting to avoid enforcement action by masking or concealing noncompliance or creating new identities or affiliate relationships. This rule is necessary because, in many cases, motor carriers attempt to avoid detection by concealing evidence of noncompliance or creating new identities when they believe enforcement action has or will be initiated due to a poor safety performance history. The Agency has observed that some motor carriers engage in evasive conduct to avoid even the threat of scrutiny. These carriers constantly shift their assets, hoping

that the Agency cannot keep up with them. In some cases, motor carriers may disappear and pop up elsewhere before the Agency can issue an order or a notice of claim.

The Agency will look at all aspects of a motor carrier's safety performance history, as it does in any other type of investigation. The motor carrier's safety performance history provides critical information about the carrier, irrespective of whether that information culminated in a formal investigation or closed enforcement case. The fact that pending or unresolved enforcement actions exist, however, are often an indicator that, especially in the context of reincarnated carriers, a motor carrier may be taking evasive action to avoid a negative safety compliance history. But the fact that there is a pending or unresolved enforcement action associated with a motor carrier is not in and of itself dispositive; the Agency will consider and evaluate the facts associated with the underlying conduct that gave rise to the enforcement action. As in any other type of enforcement action, the motor carrier is given the opportunity, in accordance with principles of due process, to rebut the Agency's claims and submit its own evidence.

Regardless, the Agency understands FedEx's concerns with the language as proposed. To address this concern, FMCSA changed proposed § 385.909(e) to clarify that the purpose of considering pending and closed enforcement actions is to evaluate a carrier's safety performance history. As such, that factor now reads: "(e) Safety performance history, including pending or closed enforcement actions, if any... ."

Comment. NATC commented that the rule does not incorporate the MCSAC recommendation that "a pattern is both widespread and continuing over time, and does not require a specific number of violations." Similarly, Werner commented that the rule did not distinguish between conduct that occurred recently or in the distant past.

FMCSA Response. The Agency disagrees that the rule does not incorporate the MCSAC recommendation or does not distinguish between current and past conduct. To the contrary, the factors in § 385.909 were designed to do just that. For example, the first factor, “the frequency, remoteness in time, or continuing nature of the conduct,” allows the Agency Official to consider how often or enduring the conduct is, including whether it was confined to the past or continues currently. Moreover, the rule does not require the Agency to identify a specific number of violations. As explained in the NPRM, as few as one violation identified in § 385.907 is sufficient to trigger enforcement of the rule.

Common Ownership, Management, Control or Familial Relationship

Comment. TTD commented in support of the factors in proposed § 385.911 to determine whether there is common ownership, management, control or familial relationship. NATC requested that the Agency change the language in that section from “the Agency Official may consider, among other things, the following factors,” (emphasis added) to “the Agency Official must consider, among other things, the following factors.” NATC also asked the Agency to identify the other factors that the Agency Official could consider under proposed § 385.911. FedEx and NATC commented that the Agency did not define or set standards to determine “common familial relationship.” ATA suggested that the rule specify that a single factor may not be sufficient to establish common ownership, management, control or familial relationship, so as not to capture carriers with operations that resemble another carrier’s operations because of a legitimate purchase of that other carrier’s business. NATC recommended establishing a minimum number of factors that must be present to establish common ownership, management, control or familial relationship.

FMCSA Response. The substance of proposed § 385.911 now appears as § 385.1007 in new Subpart L as a part of the non-substantive restructuring described below. As with identifying a pattern or practice of noncompliance, identifying common ownership, management, control or familial relationships does not lend itself to a rigid formula. Chameleon carriers exploit the facts of their particular circumstances and the limitations of existing Agency regulations and resources to evade detection. There are myriad ways a motor carrier can structure and restructure operations in an attempt to avoid the consequences of noncompliance. As such, the Agency must have the flexibility to evaluate motor carrier operations from a common sense approach, looking at the facts of each situation as they arise. The factors are designed to root out chameleon carriers by evaluating the individual characteristics of their actions.

To preserve its flexibility, the Agency declines to establish a finite set of factors or establish a minimum number of factors that must be present. It may be that common ownership is evident by considering only a few of the factors on the list. The Agency does not believe that it is the best use of its resources to require the Agency Official to engage in analyses that would not affect the outcome of his or her decision. Similarly, if evidence related to one of the factors clearly indicates common ownership, there is no reason that the Agency must find evidence supporting other factors. Finally, the Agency does not believe that it is prudent to prohibit the Agency Official from evaluating any relevant and admissible evidence that might prove – or disprove – such relationships simply because the evidence does not directly relate to one of the factors. Therefore, FMCSA did not make NATC’s suggested language change.

Comment. ATA recommended that FMCSA change the language proposed in § 385.905(a)(3) to read: “If two or more motor carriers use common ownership, common

management, common control or common familial relationship with the intent to permit any or all such motor carriers to avoid compliance... .”

FMCSA Response. As a part of the restructuring of new Subpart L, FMCSA moved the text of § 385.905(a)(3) to § 385.1005 and modified the text slightly to make it conform to the statutory language. That text now reads: “Two or more motor carriers shall not use common ownership, common management, common control, or common familial relationship to enable any or all such motor carriers to avoid compliance, or mask or otherwise conceal non-compliance, or a history of non-compliance, with statutory or regulatory requirements prescribed under 49 U.S.C. Chapter 311, subchapter III, or with or an order issued under such requirements.” ATA’s suggested language deviates from the statute and, as such, Agency did not make that change.

Egregious disregard

Comment. OOIDA commented that the Agency did not define “egregious.” Similarly, NGWA requested that the Agency clarify “egregious disregard.”

FMCSA Response. The Agency does not believe it is necessary to define “egregious” because this term does not appear in the regulatory text. For purposes of the final rule preamble, the word takes its ordinary meaning: extraordinarily bad. The final rule thus targets the small number of carriers whose acts of noncompliance involve more than isolated instances of noncompliance resulting from simple negligence. The rule targets carriers whose conduct demonstrates a willful, and possibly repeated, attempt to avoid compliance or shield noncompliance. This conduct, when viewed in light of the factors contained in the rule, shows a disregard for the Agency’s safety requirements and therefore presents an unacceptable increased risk to safety warranting application of the rule.

Relationship to Other Agency Programs or Enforcement Activities

Comment. OOIDA asked FMCSA to explain the relationship between today's final rule and existing rules and to explain whether today's final rule was intended to create an entirely new enforcement process. OOIDA also asked that the Agency explain how the procedures in 49 CFR parts 385 and 386 are different from today's final rule.

FMCSA Response. In response to OOIDA's comment, FMCSA carefully considered the differences and similarities between the proposed rule and the Agency's existing enforcement procedures under 49 CFR parts 385 and 386 as well as the suspension and revocation practices conducted under the authority of 49 U.S.C. 13905. Although today's final rule promulgates new causes of action, the Agency believes that it is more efficient and effective for these rules to fit seamlessly within the structure of existing enforcement procedures. As a result, the Agency decided to make a number of changes to the structure of today's final rule to eliminate confusion and more closely align it with existing Agency enforcement practices.

First, instead of combining the pattern or practice and common ownership elements of this rule, FMCSA separated them by creating a new 49 CFR part 385, subpart L titled "Reincarnated carriers." FMCSA did this because there are inherent differences between an enforcement proceeding evaluating a pattern or practice and one evaluating reincarnation or affiliation. For example, there might be an intervening person in a pattern or practice proceeding, but there will never be one in a reincarnation proceeding. In addition, the factors for evaluating the two different types of cases are very different. The revised structure simplifies the rule and makes it easier to understand which procedures apply to the two different types of enforcement actions.

Second, FMCSA aligned the factors for evaluating reincarnated carriers under today's final rule with the existing procedures at 49 CFR 386.73 for evaluating reincarnated and affiliated carriers. Both rules have the same objective: determining whether the commonalities between entities rise to the level of reincarnation or affiliation. The only substantive difference is that § 386.73 authorizes the Agency to issue an out-of-service order or record consolidation order, while today's final rule authorizes the Agency to suspend or revoke registration. In light of those similarities, the Agency decided against having two separate sets of factors – which could evolve into two separate standards for evaluating the same conduct. As a result, the factors previously set forth at § 386.73 also apply to FMCSA's evaluation of common ownership, management, control or familial relationship under today's final rule.

Third, to align this rule with existing suspension and revocation proceedings initiated under the authority of 49 U.S.C. 13905, FMCSA eliminated the requirement that the Agency must first suspend a carrier's registration prior to initiating a revocation proceeding. This change conforms today's final rule to current Agency suspension and revocation practices, as described in FMCSA Policy on Granting, Withholding, Suspending, Amending or Revoking Operating Authority Registration, 77 FR 46147, Aug. 2, 2012.

Comment. Advocates for Highway and Auto Safety (Advocates) commented that under § 385.915, a revocation proceeding can only take place after a suspension proceeding and that the Agency should streamline the process so that a carrier's registration could be revoked after only one proceeding. Advocates reasoned that the compliance orders the motor carrier failed to comply with that triggered enforcement under this rule can serve as the predicate for initiating revocation proceedings.

FMCSA Response. Taking into account this comment, as well as current enforcement procedures, FMCSA agrees that it is not necessary to require a suspension proceeding prior to a revocation proceeding and has therefore decided to eliminate this requirement, as discussed above. Regardless, revocation proceedings must comply with the requirements of 49 U.S.C 13905. Under section 13905, FMCSA may revoke registration only after FMCSA has issued an order to the carrier directing compliance and the carrier has willfully failed to comply for 30 days. An order that triggers enforcement could be one that was issued before the revocation proceeding was initiated or one that was issued during the revocation proceeding. In either scenario, §§ 385.913 and 385.1011 provide 30 days for the motor carrier to show cause why its registration should not be revoked.

Comment. OOIDA commented that the enforcement procedures in 49 CFR part 385 make distinctions between acute and critical violations and requests this level of specificity for this rule.

FMCSA Response. The existing safety fitness determination procedures at part 385 subpart A serve a different purpose, making the need for distinguishing between acute and critical violations unnecessary for this rule. Congress has determined that those carriers engaging in a pattern or practice of safety violations present a risk to the public that goes beyond what the Agency can address through a safety fitness determination. A safety fitness determination is critical to ensuring that only qualified carriers operate on the nation's highways. But this rule identifies conduct – a pattern or practice of safety violations – that goes beyond what can be routinely detected in an investigation or isolated inspection. A pattern relates to conduct that is widespread and continuing over time, involves more than isolated violations, and does not require a specific number of violations. A practice is an organization's policy, whether

written or not, that informs its conduct and operational management; the practice could be evidenced by one or more instances of conduct. Thus, under this rule, the Agency considers a carrier's safety compliance, not just in terms of individual instances of noncompliance, but in the greater context of how the carrier deals with that noncompliance. Accumulating a series of safety violations could affect a carrier's safety rating, but would not necessarily trigger enforcement under this rule if that carrier took corrective action and otherwise managed those violations responsibly. Conversely, carriers that seek to avoid the consequences of accumulating those violations, or that perpetuate a culture of avoiding compliance with safety regulations, would be candidates for enforcement under this rule even in cases where the particular violations discovered in the most recent review or inspection did not in themselves warrant an unsatisfactory safety fitness determination.

Comment. OOIDA commented that the public could assist FMCSA with its enforcement efforts if it would make the FMCSA Register more accessible and informative. With more information, members of the public could help FMCSA identify new applicants with histories of noncompliance.

FMCSA Response. FMCSA appreciates OOIDA's comments on how to improve the FMCSA Register. Although it is not appropriate to codify changes to the FMCSA Register as a part of this rulemaking, FMCSA will take OOIDA's comments under advisement.

Comment. OOIDA requested that FMCSA explain the Agency's standard for denying applications for operating authority based on failure to disclose affiliations with other motor carriers.

FMCSA Response. The focus of this rule is on the suspension or revocation of existing operating authority registration. Although FMCSA has the authority to deny registration

applications for failure to disclose relationships with other registrants, that authority is beyond the scope of today's rule. For additional information on FMCSA's policies governing the grant or denial of operating authority registration applications, see FMCSA's Policy on Granting, Withholding, Suspending, Amending or Revoking Operating Authority Registration (77 FR 46147, August 2, 2012).

Comment. TIA commented that another way to achieve the objectives of today's rule is to require motor carriers to re-register every year and to link the Agency's Unified Carrier Registration requirements with operating authority. TIA also suggested that the Agency consolidate its out-of-service processes as well as develop links between a number of FMCSA's enforcement programs.

FMCSA Response. FMCSA appreciates TIA's comments on how to improve its enforcement program, but does not believe that TIA's suggestion would fulfill Congress's directive to take action against patterns or practices of safety violations.

Comment. TIA recommended that FMCSA should prohibit the sale of operating authority numbers.

FMCSA Response. TIA's recommendation is beyond the scope of this proceeding; however, it is the subject of a separate Agency rule. See Unified Registration System, 78 FR 52608, August 23, 2013.

Comment. Some commenters recommended that FMCSA train and work with State and local partners and provide information to industry stakeholders in an effort to eliminate the noncompliance today's rule targets.

FMCSA Response. FMCSA works with the State and local enforcement partners through the MCSAP, as well as the Agency's outreach and education programs. As part of this

collaborative effort, FMCSA provides grants, training, and guidance to State and local agencies regarding policies, procedures, implementation, and administration of CMV programs. These cooperative efforts, although not specifically the focus of today's final rule, will continue to ensure that information shared with industry stakeholders is responsive to correcting noncompliance in areas relevant to this rule.

Information about some of FMCSA's outreach programs can be accessed at www.nafmp.org (North American Fatigue Management Program) and www.tsi.dot.gov (Transportation Safety Institute). Additional information for drivers, motor carriers and law enforcement partners can be found on FMCSA's website: www.fmcsa.dot.gov.

Comment. Some commenters recommended implementation of more stringent processes to oversee, monitor, and verify ownership of operating authorities and to deactivate USDOT numbers that have been inactive for long periods of time.

FMCSA Response. FMCSA will take this suggestion under advisement. FMCSA is continually implementing new methods to detect motor carriers attempting to circumvent the regulations by creating new entities. This rule provides another tool to prevent this from happening. For more information on the deactivation of DOT numbers, see Unified Registration System, 78 FR 52608, August 23, 2013.

Comment. NATC commented that the NPRM did not address how FMCSA would handle those who operate without authority after being identified as unfit to safely manage carrier operations.

FMCSA Response. NATC is correct that the NPRM did not expressly address these issues. Any motor carrier that operates without authority is currently subject to enforcement based on that lack of authority. See 49 CFR 392.9a. Nothing in this rulemaking changes that.

Regardless, the Agency would consider a motor carrier's history of operating without authority when determining whether to pursue enforcement under this rule.

Comment. Amalgamated Transit Union (ATU) and TTD commented that they support the rule, but caution the Agency not to overlook other important safety issues such as driver fatigue. An anonymous commenter stated that FMCSA should prohibit the use of loose-leaf record of duty status log books because it leads to violations of hours-of-service rules.

FMCSA Response. While issues such as driver fatigue and limitations on driving time are beyond the scope of this rulemaking, the Agency recognizes their importance. They are the subjects of other on-going Agency regulatory and enforcement initiatives. Information about the North American Fatigue Management Program is available at www.nafmp.org.

Regulating the Conduct of Individuals

Comment. NATC expressed concern that penalties under the rule are applied to the carrier and not the individual determined to have engaged in conduct constituting egregious disregard for safety compliance. NATC recommends that FMCSA change the rule to include or increase the potential penalties against an individual person, rather than focus on the motor carrier that employs the individual. Werner recommended targeting the person who engaged in the conduct (committed the "pattern") and not the hiring motor carrier.

FMCSA Response. Section 31135 authorized FMCSA to take enforcement action only against registered individuals and motor carriers. That means that under this rule, individuals holding their own operating authority registration are subject to enforcement if they engage in a pattern or practice of safety violations while working as an officer for another motor carrier. MAP-21 authorizes FMCSA to suspend or revoke the registration of any person who engages in a pattern or practice of avoiding compliance, or masking or otherwise concealing

noncompliance. As such, if an individual who exercises a controlling influence over a motor carrier's operations also possesses his or her own operating authority registration, FMCSA may suspend or revoke that registration in addition to the carrier's registration. Section 385.919 (which was § 385.921 before being re-numbered in the final rule) provides that individuals holding operating authority registration are also subject to civil or criminal penalties.

Civil and Criminal Remedies

Comment. NATC commented that if FMCSA pursued criminal prosecution and the presently available enforcement remedies more vigorously, the deterrent effect would render the rule unnecessary.

FMCSA Response. FMCSA agrees that the possibility of criminal prosecution can act as a deterrent to the kind of conduct contemplated by the rule. It is not, however, the only or most effective deterrent, because FMCSA does not have direct authority to prosecute criminal violations. Once FMCSA identifies the potential need for criminal prosecution, it must refer the case to the Department of Justice with recommendations on disposition. Congress, in recognition of this limitation on FMCSA's authority, empowered the Agency through MAP-21 to take appropriate enforcement action in areas for which the Agency has direct and exclusive authority: all matters concerning operating authority registration and imposition of civil penalties for violation of safety regulations. Consistent with past practice, FMCSA will continue to recommend criminal prosecution in appropriate cases. Any action by FMCSA to suspend or revoke a motor carrier's operating authority registration or impose a civil penalty would not preclude pursuit of criminal penalties.

Comment. UMA commented that a motor carrier should be placed out of service only to protect the public and not as punishment; fines and criminal prosecution should be the only penalties for violations.

FMCSA Response. Underlying UMA's comment is the premise that out-of-service orders and civil or criminal penalties address different conduct; FMCSA rejects this distinction. This final rule targets those motor carriers that engage in willful noncompliance with safety regulations. Willful noncompliance with safety regulations is the clearest indication that a registered entity presents a risk to the motoring public. While civil and criminal penalties may have a deterrent effect, they do not in and of themselves ensure public safety. Shutting down a motor carrier that refuses to comply with safety requirements or follow FMCSA orders does.

Comment. IBT recommended that civil and criminal penalties be used against motor carriers that repeatedly violate FMCSA's safety regulations, regardless of whether the Agency suspends or revokes registration.

FMCSA Response. FMCSA will continue to pursue civil and criminal penalties against motor carriers that violate the Agency's regulations. The procedures in today's final rule provide the Agency with additional enforcement tools. To make clear that today's final rule is not the exclusive remedy for unlawful conduct, the Agency amended proposed § 385.921, now § 385.919, to state that nothing in this rule precludes FMCSA from taking action against a motor carrier for other unlawful conduct.

Due Process

Comment. NATC, UMA, and Werner expressed concern that the rule does not afford due process.

FMCSA Response. FMCSA is aware of the potential impact any determination under the rule could have on a motor carrier and the person whose conduct gives rise to an enforcement action. Accordingly, FMCSA deliberately included a procedural due process mechanism that grants motor carriers and individuals the right to notice of the proceeding and an opportunity to be heard. As with any action FMCSA takes, the Agency is keenly aware that it must act judiciously and fairly.

Sections 385.911 and 385.913 (which were proposed as §§ 385.913 and 385.915 before being re-numbered in the final rule) require FMCSA to provide written notice to the motor carrier and person who are alleged to have engaged in the conduct that resulted in the suspension or revocation proceeding. This notice must inform the motor carrier and person of the factual and legal basis for the determination and notify the person of his or her right to intervene in the proceeding. By intervening, the person is able to present argument and evidence, independently of the motor carrier, in defense or extenuation of the allegations. The procedures provide the motor carrier and intervening person the right to request administrative review of the Agency Official's decision. Additionally, under § 385.915 (which was proposed as § 385.917 before being re-numbered in the final rule), motor carriers and intervening persons have the right, at a later date, to request FMCSA to rescind an order the Agency issued under the rule. Collectively, these procedures ensure that the rights of motor carriers and individuals who may be affected by the rule are protected.

Regardless, FMCSA acknowledges the concerns that commenters expressed about protecting the rights of motor carriers and individuals. To eliminate any confusion over the rights and responsibilities of the parties to a suspension or revocation proceeding, § 385.911(e) makes clear that when administrative review is requested, the Agency Official must respond with

evidence supporting each issue in dispute. The Agency Official's determination may be supported by either direct or circumstantial evidence. If the evidence is circumstantial, the Agency Official's determination may also be supported by the reasonable inferences drawn from the evidence. Finally, the Assistant Administrator may request additional evidence, but his review is limited to those issues identified in the petition for review.

Comment. NATC was concerned that implementation of the rule would result in a taking without due process.

FMCSA Response. Application of the rule will not result in a taking without due process of law. The procedures contained in §§ 385.911, 385.913, and 385.915 ensure both motor carriers and officers receive notice and an opportunity to be heard concerning any allegation that either engaged in a pattern or practice of safety violations or created a new entity or affiliate relationship to avoid regulatory requirements. The Agency's determination is made in context of these procedures, which provide due process and protect the carrier's and individual's interests.

Comment. NATC commented that the revocation procedures do not require the Agency to show a willful failure to comply.

FMCSA Response. Sections 385.913 and 385.1011 state that the Agency Official may revoke a motor carrier's registration only if the motor carrier willfully violated an order for at least 30 days.

Due Diligence/Hiring Concerns

Comment. NATC commented that existing databases and websites do not have adequate information about individuals for an employer to make a determination on a prospective officer's history of noncompliance. NATC commented that contractors would suffer guilt by association even if they had not themselves been noncompliant or exercised controlling influence over motor

carrier operations. UMA commented that there is no formal mechanism for carriers to disclose hiring decisions. UMA went on to suggest that FMCSA is creating an informal blacklist, the contents of which carriers would have to guess. UMA commented that this would bar certain people from the industry without due process and would be shifting responsibility for regulating to motor carriers.

Werner commented that an innocent carrier could be held responsible for the conduct of an employee, even though the carrier was not aware of the employee's conduct. Werner is particularly troubled that a carrier could face enforcement action when the employee's conduct occurred before the carrier hired the employee. Werner and ATA commented that carriers do not have reliable access to background information on prospective hires and that checking references does not always yield the necessary information because many employers are unwilling to provide information other than the dates of hire and termination. ATA commented that publicly available safety data for motor carriers is generally available only for three years, and that prospective employers might reject qualified applicants because of their inability to confirm the compliance history of previous employers.

Werner and ATA stated that carriers will be put in the position of having to make a decision as to whether the perspective employee was in a position to exercise "controlling influence" without having adequate information. Werner commented that this would create a presumption against hiring people where information is not readily available, and could result in a person's lifetime ban from the industry if they were associated in any way with a questionable carrier. ATA commented that the rule would penalize innocent employees who happened to work for companies with poor safety cultures. ATA recommended that the Agency limit a motor carrier's liability for an officer's conduct with a previous employer.

FedEx commented that there are no fixed standards for determining whether a carrier has exercised due diligence in hiring. FedEx stated that checking the history of previous motor carrier employers without additional scrutiny into the applicant's role with previous employers could result in a blanket refusal to hire an individual even if that individual had no involvement in noncompliance. FedEx further commented that the evaluations the rule requires are overly burdensome and will create a significant amount of administrative work for employers.

FMCSA Response. Motor carriers are responsible for the people they hire to act on their behalf. This concept is not unique; motor carriers, like all other employers, conduct due diligence to avoid negligent hiring claims under existing law. The concept of negligent hiring is a long-standing legal principle and myriad employers have navigated the due diligence requirements to protect themselves from liability. As a result, FMCSA believes that most companies already have procedures or policies for investigating prospective employees. The Agency finds it difficult to believe that any responsible motor carrier would engage someone to exert controlling influence over its operations without engaging in a level of due diligence sufficient to understand the person's qualifications and prior work experience in the industry. The requirements of this rule are thus consistent with standard business practices, and, as a result, the Agency believes that motor carrier employers should not face additional burdens with respect to conducting the requisite due diligence in hiring. Placing limits on liability would discourage motor carriers from engaging in due diligence, and, accordingly, the Agency declines to adopt this suggestion.

That said, the Agency acknowledges that there are limitations to what an employer can discover and that applicants can misrepresent their work experiences. But as the Agency stated in the NPRM, this rule targets only the worst motor carriers. The Agency must present evidence

demonstrating willful conduct before it may issue an order to suspend or revoke operating authority registration. The Agency would not be able to sustain an order suspending or revoking registration merely on evidence that a person previously worked for a motor carrier that had a history of noncompliance or even that the person exercised controlling influence over a noncompliant motor carrier's operations. FMCSA could only suspend or revoke the registration on competent evidence that the person exercised controlling influence and was personally involved, either by act or omission, in a pattern or practice of avoiding compliance, or masking or otherwise concealing noncompliance. The Agency must therefore establish that the officer engaged in willful conduct to avoid compliance or hide noncompliance.

Comment. NATC suggested that FMCSA create a database of individuals unqualified to work in the motor carrier industry. If FMCSA does not do that, NATC commented, it will place an unreasonable burden on motor carriers and will force the industry to develop its own standards and blacklists without due process. Werner and ATA suggested that the best solution is for FMCSA to maintain a list or clearinghouse of individuals who have engaged in a pattern or practice of avoiding compliance.

FMCSA Response. The Agency acknowledges the commenters' interests in creating a clearinghouse for the purposes of identifying officers who have engaged in a pattern or practice of safety violations, but it declines to make this information available in the form of a list or clearinghouse. A clearinghouse or list would not take into account all of the factors the Agency might take under consideration such as remoteness in time and whether the individual continues to present a risk to safety or has rehabilitated him or herself. The Agency intends for this rule to address non-compliance in the context of the point in time and circumstances raised in the Agency Official's order. A list of the type the commenters suggested could have the effect of

unfairly excluding individuals from the motor carrier industry. That said, FMCSA's enforcement decisions under this rule will be available to the public. Although those decisions will identify the individual officers who have engaged in a pattern or practice of safety violations, they will also provide the context and circumstances giving rise to the Agency Official's decision.

Comment. UMA suggested that FMCSA should register individuals responsible for safety compliance and revoke that registration if the Agency can show noncompliance with safety regulations.

FMCSA Response. Section 31135 authorized the Agency to suspend or revoke motor carrier registration for permitting an officer who engages in or has engaged in a pattern or practice of safety violations to act on the motor carrier's behalf. It did not authorize FMCSA to create a new registration scheme for those individuals who are employed by motor carriers to manage for safety compliance. To the contrary, in section 31135, Congress authorized FMCSA to use its existing tools – suspension or revocation of a motor carrier's operating authority registration – to address patterns and practices of safety violations. FMCSA has never registered individuals who are not operating as motor carriers, brokers or freight forwarders; it need not do so now to effectuate Congress's intent.

Timing of Suspension or Revocation

Comment. Truck Safety Coalition (TSC), IBT, and TIA each generally supported the rule. Each commenter expressed concern, however, that revocation and suspension orders issued under the rule do not take effect immediately and requested that FMCSA either make the orders immediately effective or dramatically reduce the time in which carriers have to respond to the action under §§ 385.913 and 385.915.

FMCSA Response: FMCSA appreciates these and other comments expressing concern that the suspension and revocation process would take too long or be unnecessarily cumbersome. In response to these comments, FMCSA decided to make changes to the suspension and revocation procedures in this rule, as described below. That said, MAP-21, and in particular 49 U.S.C. 13905, requires that registered entities be given notice and an opportunity for a proceeding before FMCSA suspends or revokes operating authority registration. FMCSA does not have statutory authority, therefore, to issue a suspension or revocation order under 49 U.S.C. 31135 that becomes immediately effective and for which procedural due process is provided after the fact.

Moreover, FMCSA carefully considered the timeframes and has determined that they are not only consistent with other Agency enforcement procedures, but also provide both a fair opportunity for the registered entity to be heard and an efficient process to stop carriers who flagrantly disregard requirements from operating. But we emphasize that this rule was not meant to address situations with carriers that the Agency considers an immediate threat to public safety; FMCSA has authority under 49 U.S.C. 521(b)(5) to issue an imminent hazard operations out-of-service order, which is immediately effective. FMCSA issues these orders when it determines that a carrier's operation substantially increases the likelihood of serious injury or death if not discontinued immediately. If the facts warrant, FMCSA could issue an order under today's rule, as well as an imminent hazard operations out-of-service order.

Comment. FedEx suggested that the Agency amend proposed § 385.913(e) (§ 385.911(e) in the final rule) so that any suspension order is automatically stayed until after the Assistant Administrator conducts his review. Conversely, TSC commented that a motor carrier should not

be able to continue operating for an additional 60 days after the Agency concludes that its registration should be suspended or revoked.

FMCSA Response. FMCSA acknowledges the desire of TSC and others for swift resolution in an enforcement action while at the same time acknowledging FedEx's concern that carriers not be prematurely shut down. Loss of registration is a significant sanction; as such, FMCSA carefully balanced the public safety interest in suspending or revoking an unsafe motor carrier's registration with the need to protect the due process rights of motor carriers and individuals that are the subject of enforcement proceedings. One of those safeguards includes providing adequate opportunity for the carrier or individual to be heard before registration is suspended or revoked. In addition, this rule was not meant to replace other FMCSA enforcement tools to prevent carriers from operating when their operations present an immediate risk of harm, such as imminent hazard procedures at 49 U.S.C. 521 and 49 CFR 386.72.

Comment. NATC commented that there are no time requirements by which the Agency must respond to a petition for administrative review. Similarly, TSC commented that the Agency does not have a fixed time within which to respond to a carrier's submission. Advocates recommended that proposed §§ 385.913 and 385.915 establish a time within which the Assistant Administrator must render a decision on whether to suspend or revoke a motor carrier's registration.

FMCSA Response. The rule provides for specific timeframes within which the Agency must act in response to a petition for administrative review of suspension or revocation proceedings. With respect to suspension proceedings, § 385.911(e)(3) (proposed as § 385.913(e)(3)) requires FMCSA, through the Agency Official, to serve a response to the petition no later than 15 days following the service of the petition. Recognizing the Assistant

Administrator's limited resources, FMCSA changed § 385.911(e)(5) (proposed as § 385.913(e)(5)) to require the Assistant Administrator to issue a written decision within 60 days instead of 30 days. Section 385.913(e) applies the same time frame to administrative review procedures for revocation proceedings.

Section 385.915 (proposed as § 385.917) requires the Agency Official to act on a petition for rescission within 60 days. NATC is correct, however that the proposed rule did not establish a time frame for the Agency Official to respond to a request for administrative review of a denial of a petition for rescission under § 385.915. To correct this omission, the Agency added a new paragraph (g) granting the Agency Official 15 days to respond to a petition for review of the order denying the petition for rescission. New paragraph (h) grants the Assistant Administrator 60 days from service of either the petition for review or the Agency Official's timely-served response to serve a decision to act on the petition.

Privacy Analysis

Comment. NATC commented that it disagreed with the Agency's privacy impact analysis because the rule fails to address the rights of the individuals who will be refused work, and that a determination without an impartial Federal judge directly impacts the privacy of the individuals involved.

FMCSA Response. The Agency's privacy impact analysis explains how FMCSA will safeguard the personally identifying information the Agency collects or uses in connection with the rule. NATC's comment about the rights of individuals relates to the process the Agency has developed to protect individual rights. The Agency addresses those comments in the section entitled "Due Process," above.

Economic Analysis

Comment. NATC commented that the proposed rule would have a major impact on the motor carrier industry and stated that FMCSA had not documented the number of carriers that would be impacted by this rule, the economic impact of their loss of operating authority, or the fact that the impact will be smaller than \$100 million. Furthermore, NATC commented that the rule would impose costs on carriers by requiring them to conduct background checks on new employees. Finally, NATC said that small entities will be adversely affected by the loss of individuals deemed unfit by the FMCSA.

FMCSA Response. In the NPRM, the Agency estimated the cost of suspension or revocation of a company's operating authority. The use of the proposed rule against a typical carrier would require the State-level re-licensing and re-registering of an average of 10 CMVs, which would cost at most \$32,000. We estimate that the rule would have been applied six times in the year preceding this final rule, which would have created total societal costs of \$192,000. The costs of this rule would remain well below the \$100 million threshold for economic significance even if the Agency were to apply it to a much larger number of carriers each year; therefore, no detailed analysis is necessary. FMCSA has indicated that this rule would be used only in egregious circumstances. It is therefore unlikely to have a "significant economic impact on a substantial number of small entities" (SEISNOSE). The small number of companies affected by this rulemaking allows FMCSA to certify that it will not have a SEISNOSE. With regard to background checks, employers vet new employees already as part of good business practices. Vetting for the purposes of ensuring compliance with this rule is consistent with established business practices and therefore does not impose additional costs on carriers.

Changes from the NPRM

This final rule makes the following changes to the NPRM in response to comments.

FMCSA separated the rule into two subparts: Subpart K governing patterns or practices of safety violations and Subpart L governing reincarnated carriers. As a result of this change, FMCSA eliminated proposed § 385.911 and renumbered proposed §§ 385.913 – 385.923 as §§ 385.911 – 385.921. FMCSA changed the regulatory text in § 385.901 to make clear that this rule applies to all entities required to be registered under 49 U.S.C. § 13902. In § 385.903, FMCSA added a definition of “controlling influence” to clarify what types of conduct would trigger enforcement under this rule. In § 385.909, FMCSA changed the title to “Pattern or practice,” to eliminate confusion and made a change to the factors that the Agency Official considers in determining whether a motor carrier or a person acting on its behalf has engaged in a pattern or practice of safety violations. The factor that previously considered the existence of pending or closed enforcement cases was changed to clarify that the Agency would be considering safety compliance history, including pending or closed enforcement cases. FMCSA changed the regulatory text in proposed § 385.913(b) (now § 385.911(b)) to make clear that the motor carrier’s or intervening person’s response to the show cause order must state the factual or legal basis for the response. FMCSA also changed the regulatory text in proposed § 385.913(e) (now § 385.911(e)) to make clear the parties rights and responsibilities on administrative review. In proposed § 385.915, now § 385.913, FMCSA made changes that mirror the changes to § 385.911(e) and also eliminated the requirement that the Agency must first obtain a suspension order prior to initiating a revocation proceeding. In proposed § 385.917 (now § 385.915), FMCSA changed the rule to give the Agency Official 15 days to respond to a petition for review of a denial of a petition for rescission. FMCSA amended proposed § 385.921, now § 385.919, to make clear that nothing in this rule precludes the Agency from taking action against a carrier for other

violations.

New Subpart L consists of §§ 385.1001 – 385.1019. Sections 385.1001 – 385.1003 establish the applicability and defined terms relevant to reincarnated carriers under Subpart L. Sections 385.1005 and 385.1007 establish the prohibition against reincarnation and the factors for evaluating a violation. They are substantively the same as what was proposed, with minor changes to conform to the statutory language and § 386.73. Sections 385.1009 – 385.1019 contain the procedures for suspension and revocation, administrative review, rescission and penalties that are substantially the same as §§ 385.911 – 385.921. Subpart L is described in more detail in section-by-section explanation below.

Several other conforming changes were made throughout the document to update the regulatory text as a result of the renumbering of sections in Subpart K and the movement of other sections to Subpart L.

Section-by-Section Analysis

FMCSA amends 49 CFR parts 385 and 386 in the following ways.

Subpart K – Pattern or Practice of Safety Violations by Motor Carrier Management

Section 385.901

Section 385.901 remains primarily as proposed with one minor modification. FMCSA changed the regulatory text in § 385.901 to make clear that this rule applies to all entities registered or required to be registered under 49 U.S.C. § 13902. The explanatory text in the NPRM made clear that all entities required to register are subject to this rule; these changes are designed to eliminate any ambiguity.

Section 385.903

The definitions of the terms Agency Official and officer remain as proposed. The term “Agency Official” is the Director of FMCSA’s Office of Enforcement and Compliance or his or her designee. The term “officer” is identical to the statutory definition codified at 49 U.S.C. 31135. In response to comments requesting that the Agency define “controlling influence,” the Agency added the following definition to § 385.903: “Controlling influence” means having or exercising authority, whether by act or omission, to direct some or all of a motor carrier’s operational policy and/or safety management controls.”

Whether an officer exercises controlling influence is fact-specific. For example, controlling influence could be authority or responsibility over day-to-day vehicle maintenance, or it could be about implementing or failing to implement operational safety policies. Someone exercising controlling influence could be directing others working on the company’s behalf regarding compliance with safety management controls. That person could be an employee or an outside consultant engaged to oversee safety management controls or the workers that manage such controls. The degree to which a person exercises controlling influence is the degree to which his or her conduct affects the carrier’s operation and safety performance. To determine whether, and to what degree, a person exercises controlling influence, the Agency will consider the individual’s role in the company, irrespective of title, in the context of all available information about the company’s operations.

To eliminate any potential confusion between the operating authority registration required under 49 U.S.C. 13902, which is subject to revocation under this rule, and USDOT registration required under 49 U.S.C. 31134, which is not subject to revocation under this rule, the Agency added the following definition of “registration” applicable to Subpart K:

“Registration means the registration required under 49 U.S.C. 13902, 49 CFR part 365, and 49 CFR part 368.”

Section 385.905

Section 385.905(a)(1) and (2) remain substantively as proposed. These paragraphs describe the conduct that could trigger suspension or revocation of a motor carrier’s operating authority registration. The only non-substantive change substitutes the words “49 U.S.C. Chapter 311, subchapter III” for “subchapter” to make more clear that the safety regulations that could trigger the application of this rule are those promulgated under the authority of 49 U.S.C. Chapter 311, subchapter III. Section 385.905(b)(1) remains substantively as proposed, with one minor language change to make clear that the Agency Official may issue an order requiring compliance with FMSCA’s safety requirements as a part of a suspension or revocation proceeding. Section 385.905(b)(2) remains as proposed. These paragraphs describe how the Agency would determine whether that conduct occurred.

Paragraph (a)(1) sets forth the Agency’s authority to suspend or revoke the motor carrier’s operating authority registration if it engages or has engaged in a pattern or practice of avoiding regulatory compliance or masking noncompliance. Paragraph (a)(2) sets forth the Agency’s authority to suspend or revoke a motor carrier’s operating authority registration if it permits any person to exercise controlling influence over the motor carrier’s operations if that person engages or has engaged in a pattern or practice of avoiding regulatory compliance or masking noncompliance while acting on behalf of any motor carrier. For purposes of this rule, a person acts on behalf of a motor carrier when the person exercises controlling influence over part or all of the motor carrier’s operations. Paragraph (b) authorizes FMCSA’s Director of the

Office of Enforcement and Compliance or his or her designee (the Agency Official) to exercise the authorities established in paragraph (a).

For purposes of clarity, the Agency deleted the substance of the reincarnated and affiliate carrier provisions that were proposed at § 385.905(a)(3) and (b)(3), and moved them to §§ 385.1005 and 385.1007.

Section 385.907

Section 385.907 remains as proposed. Under this section, the Agency Official determines whether a motor carrier or person acting on its behalf has avoided regulatory compliance or masked or otherwise concealed regulatory noncompliance based on the results of an investigation by FMCSA, State, or local enforcement personnel. This conduct includes failure to or concealing failure to: (1) comply with statutory or regulatory safety requirements; (2) comply with FMCSA, State, or local orders intended to redress violations of Federal regulatory safety requirements; (3) pay civil penalties for violations of regulatory safety requirements; or (4) respond to enforcement actions arising out of violations of regulatory safety requirements. Regulatory safety requirements include statutory or regulatory requirements prescribed under 49 U.S.C. Chapter 311, subchapter III, which include 49 U.S.C. sections 31131-31151 and 49 CFR parts 380-387 and 390-398.

Section 385.909

The majority of this section remains as proposed. If the Agency Official concludes that the motor carrier or person acting on its behalf has failed, or concealed failure, to do one or more of the actions described in § 385.907, the Agency Official determines whether such conduct constitutes a pattern or practice of noncompliance or masking noncompliance by considering the factors set forth in this section. In response to comments, FMCSA clarifies the meaning of the

factor in paragraph (e) by changing the regulatory text to state “Safety compliance history, including pending or closed enforcement actions, if any.” This change clarifies that the purpose of this factor is to evaluate a carrier’s safety performance history. In addition, the Agency amended the title of this section to read “Pattern or practice,” to streamline the organization of Subpart K.

Section 385.911

For purposes of clarity, the Agency deleted the substance of proposed § 385.911, which set forth the factors for evaluating reincarnated and affiliate motor carriers, and moved it to § 385.1007. As a result of this change, FMCSA re-numbered proposed § 385.913 to § 385.911. This section authorizes the Agency Official to issue an order suspending the motor carrier’s registration and establishes the procedures FMCSA will follow to suspend a motor carrier’s registration, including administrative review. With the following exceptions, the substance of that section remains as proposed.

FMCSA changed the regulatory text in paragraph (a)(2) to make clear that any order triggering a revocation proceeding would have to be one directing compliance with safety requirements. FMCSA changed the regulatory text in paragraph (b)(4) to make clear that motor carriers (and by extension intervening persons) must state the factual or legal basis for their responses to an order to show cause issued under this section. Accordingly, and like safety rating proceedings under 49 CFR part 385, a motor carrier or intervening person who alleges that the show cause order was issued in error has the burden of proof to demonstrate error. This paragraph is also consistent with the Agency’s current practice under 49 U.S.C. 13905, which governs suspension and revocation proceedings.

FMCSA also changed the regulatory text in paragraph (d)(2)(i) to require that the Agency Official's suspension order include information on how to submit a petition for administrative review, which is described in paragraph (e) of this section. In addition, FMCSA amended the language of paragraph (e) (introductory paragraph) to include specific instructions on how to petition the Assistant Administrator for review of the Agency Official's order.

FMCSA changed the regulatory text in paragraph (e)(3) to make clear that the Agency Official must respond with legal argument or evidence to support issues a petitioner raises on review. The changes also make clear that the Agency Official may base his or her decision on direct or circumstantial evidence, including the reasonable inferences drawn from that evidence, in addition to other types of documents and testimony. Paragraph (e)(4) makes clear that the Assistant Administrator's review is limited to those issues identified in the petition for review. The Assistant Administrator may, however, require the parties to produce additional evidence. If the petitioner does not provide the additional evidence requested, this paragraph authorizes the Assistant Administrator to dismiss the petition for review. This provision is consistent with the procedures for safety rating cases in 49 CFR part 385.

Changes to paragraph (e)(5) extend the Assistant Administrator's decision making period from 30 to 60 days. The Agency made this change acknowledging the heavy case load the Assistant Administrator carries as well as his or her limited resources.

Section 385.913

This section was proposed as § 385.915, but was renumbered to § 385.913. It establishes the procedures for revoking a motor carrier's operating authority registration for failure to comply with an order issued under Subpart K. To conform to existing Agency practices, this section was amended to eliminate the requirement that the Agency first obtain a suspension order

prior to seeking revocation of a motor carrier's operating authority registration. This section now requires that the Agency determine that a motor carrier has willfully violated an order directing compliance for a period of at least 30 days before revoking operating authority registration, but that order is no longer required to be a suspension order issued under § 385.911, or even an order issued under part 385, subpart K. Changes to this section make clear that any order directing compliance with FMCSA's safety regulations and in effect for more than 30 days could form the basis for revocation under this section. Finally, FMCSA made changes to paragraph (b)(4) that are identical to the changes made at § 385.911(b)(4) and changes to paragraph (d)(2)(i) that are identical to the changes made at § 385.911(d)(2)(i).

The rest of the substance of this section remains as proposed.

Section 385.915

This section was proposed as § 385.917, but was renumbered to § 385.915. This section establishes the procedures for motor carriers and intervening persons to file petitions for rescission of an order issued under this rule. The Agency added a provision stating that a motor carrier is permitted to resume operations, so long as it is otherwise in compliance with FMCSA's requirements, as soon as a suspension order is rescinded. Although this was implied in the text as proposed, the Agency decided to change the regulatory text to make this clear. The Agency also made minor changes to make clear that a motor carrier that applies for and is granted registration after rescission of a revocation order would be subject to the new entrant requirements at 49 CFR part 385. The Agency made changes to paragraph (f), describing how to file a petition for review, that are identical to the changes made at § 385.911(e). Finally, the Agency added a new paragraph (g) (renumbering old paragraph (g) as paragraph (h)) that sets a time limit of 15 days for the Agency Official to respond to a petition for review. Previously, no

time limit was set. New paragraph (h) allows the Assistant Administrator 60 days from service of the petition or a timely-filed response, whichever is later, to act on the petition.

Section 385.917

This section was proposed as § 385.919, but was renumbered to § 385.917. This section states that orders issued under the rule would not amend or supersede existing FMCSA orders, prohibitions, or requirements. The Agency amended this section to state, in addition, that suspension or revocation under this rule is not the exclusive remedy for FMCSA to pursue against motor carriers that violate the FMCSRs. It also states that nothing precludes FMCSA from taking enforcement action against a motor carrier's operating authority registration or USDOT registration for other conduct violating applicable statutes, regulations or FMCSA orders. FMCSA could take that action as a part of a separate proceeding, or in combination with a proceeding instituted under this rule.

Section 385.919

This section was proposed as §385.921, but was renumbered to § 385.919. This section states that existing statutory civil and criminal penalties and sanctions could apply to motor carriers subject to enforcement under this rule. For example, among other things, FMCSA could also seek revocation of a motor carrier's USDOT number registration pursuant to its authority under 49 U.S.C. 31134(c).

Section 385.921

This section was proposed as § 385.923, but was renumbered to § 385.921. This section states that the regulations governing the service of documents and the computation of time at 49 CFR §§ 386.6 and 386.8 would apply to proceedings under this rule, except as otherwise

provided. The Agency made one minor change to this section. It now states that all documents served under subpart K must include a certificate of service.

Subpart L – Reincarnated and Affiliated Motor Carriers

Section 385.1001

This section establishes that Subpart L – Reincarnated and Affiliated Motor Carriers -- applies to for-hire motor carriers holding or required to hold operating authority registration.

Section 385.1003

This section defines Agency Official, using the same definition that was proposed in § 385.903. It also defines a reincarnated or affiliated carrier as one with common ownership, common management, common control or common familial relationship. To eliminate any potential confusion between the operating authority registration required under 49 U.S.C. 13902, which is subject to revocation under this rule, and USDOT registration required under 49 U.S.C. 31134, which is not subject to revocation under this rule, the Agency added the following definition of “registration” applicable to Subpart L: “Registration means the registration required under 49 U.S.C. 13902, 49 CFR part 365, and 49 CFR part 368.”

Section 385.1005

This section prohibits carriers from reincarnating or using affiliates to avoid compliance with safety requirements.

Section 385.1007

Section 385.1007 sets forth the factors the Agency Official evaluates to determine whether a carrier or carriers have violated the prohibition on reincarnating or using affiliates to avoid compliance with safety requirements. Paragraph (a) establishes that the Agency Official may issue an order to suspend or revoke one or more motor carriers’ operating authority

registration for violations of § 385.1005. Paragraph (b) establishes that the Agency Official must use the factors set forth at § 386.73 to determine whether a motor carrier has reincarnated or whether two or more motor carriers are affiliates. These factors are substantively the same as those that were in proposed § 385.911.

FMCSA recognizes that motor carriers may have legitimate business purposes for affiliating or changing their business identity and that this conduct is not per se unlawful. This rule is triggered only when one or more carriers reincarnate or affiliate for the purpose of avoiding compliance or masking or concealing regulatory noncompliance or a history of noncompliance. Paragraph (c) identifies conduct that constitutes avoiding or concealing regulatory noncompliance or a history of noncompliance. The conduct in paragraph (c) is substantively similar to that which was proposed in § 385.907. The Agency made minor changes to the wording of the four proposed types of conduct and added a fifth type of conduct: avoiding being linked with a negative compliance history. These changes conform this rule to statutory language at 49 U.S.C. 31135(b)(1), which, in addition to prohibiting motor carriers from reincarnating or affiliating to avoid compliance, or mask or otherwise conceal non-compliance, also prohibits motor carriers from concealing a history of non-compliance. This change also aligns today's final rule with the pre-existing regulatory scheme at § 386.73, which uses identical language.

Section 385.1009

This section sets forth procedures for suspending a motor carrier's operating authority registration. These procedures are substantively the same as those in § 385.911, which apply to suspensions based on patterns or practices of safety violations. The only difference is that, because of the differences between engaging in pattern or practice of safety violations and

reincarnating or affiliating to avoid regulatory compliance, there are no provisions for intervening persons.

Section 385.1011

This section sets forth procedures for revoking a motor carrier's operating authority registration. These procedures are substantively the same as those in § 385.913, which apply to suspensions based on patterns or practices of safety violations. The only difference is that this section does not contain a provision for intervening persons because there would not be an intervening person in a reincarnated or affiliated carrier case.

Section 385.1013

This section establishes motor carriers seeking to file petitions for rescission of an order issued under this rule should follow the procedures in § 385.915.

Section 385.1015

This section, which is identical to § 385.917, states that orders issued under the rule would not amend or supersede existing FMCSA orders, prohibitions, or requirements. In addition, suspension or revocation of operating authority under this rule is not the exclusive remedy for FMCSA to pursue against motor carriers that violate the FMCSRs. For example, among other things, FMCSA could also seek revocation of a motor carrier's USDOT number registration pursuant to its authority under 49 U.S.C. 31134(c).

Section 385.1017

This section establishes that motor carriers that violate 49 CFR part 385, subpart L are subject to civil or criminal penalties.

Section 385.1019

This section states that the regulations governing the service of documents and the computation of time at 49 CFR 386.6 and 386.8 would apply to proceedings under this rule. The Agency made one minor change to this section. It now states that all documents served under subpart L must include a certificate of service.

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

The substance of this section remains as proposed, with minor changes caused by the renumbering of sections in Subpart K and movement of others to Subpart L. This section establishes the penalty for operating in violation of an order suspending or revoking operating authority registration under this rule.

Rulemaking Analyses

Executive Order 12866 (Regulatory Planning and Review) as Supplemented by E.O. 13563 and DOT Regulatory Policies and Procedures

This action does not meet the criteria for a significant regulatory action, either as specified in Executive Order 12866, as supplemented by Executive Order 13563 (76 FR 3821, January 18, 2011) or within the meaning of the DOT regulatory policies and procedures (44 FR 1103, February 26, 1979). The estimated economic costs of the rule do not exceed the \$100 million annual threshold nor does the Agency expect the rule to have substantial Congressional or public interest. Therefore, this rule has not been formally reviewed by the Office of Management and Budget.

FMCSA assessed the potential costs associated with this rule. While there should be no cost associated with this rule, there could potentially be cost associated with the transfer to other firms of assets from motor carriers that have had their operating authority registration suspended or revoked. These State-level license and registration fees can total \$3,200 per

CMV, depending on weight. For an average carrier with 10 vehicles, the cost of re-registering the vehicles and returning them to operation for a different carrier would be an estimated \$32,000. We estimate that the rule would have been applied six times in the year preceding this final rule, which would have created total societal costs of \$192,000. Therefore, the costs of this rule will remain below the \$100 million threshold for economic significance even if the Agency were to apply it to a much larger number of carriers each year. These costs will not reach the level of economic significance unless an unexpectedly large number of carriers is suspended which, as previously noted, is highly unlikely due to the egregious nature of the circumstances that would provoke action under this rule. As a result, these costs were found to be economically insignificant. Moreover, any transfer costs incurred could have been avoided by complying with the FMCSRs or declining to mask or otherwise conceal evidence of noncompliance with the FMCSRs. Motor carriers that have their operating authority registration suspended or revoked would lose revenue, but this revenue would be reallocated to other firms.

Additionally, FMCSA evaluated the effects of this final rule in accordance with Executive Order 12898 and determined that there are no environmental justice issues associated with its provisions nor any collective environmental impacts resulting from its promulgation. Environmental justice issues would be raised if there were “disproportionate” and “high and adverse impact” on minority or low-income populations. This NPRM is exempt from analysis under the National Environmental Policy Act due to a categorical exclusion (see below).

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) requires Federal agencies to consider the effects of the regulatory action on small business and other small entities and to

minimize any significant economic impact. The term “small entities” comprises small businesses and not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with a population of less than 50,000.²

Accordingly, DOT policy requires an analysis of the impact of all regulations on small entities, and mandates that agencies strive to lessen any adverse effects on these businesses. Under the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121, 110 Stat. 857), the rule is not expected to have a significant economic impact on a substantial number of small entities. Consequently, I certify the action would not have a significant economic impact on a substantial number of small entities.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104-121), FMCSA wants to assist small entities in understanding this rule so that they can better evaluate its effects on them. If the rule would affect 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, Juan Moya, 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 and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory

² Regulatory Flexibility Act (5 U.S.C. 601 et seq.) see National Archives at <http://www.archives.gov/federal-register/laws/regulaotry-flexibility/601.html>

Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of FMCSA, call 1-888-REG-FAIR (1-888-734-3247).

Unfunded Mandates Reform Act of 1995

This rule would 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 \$150.7 million (which is the value of \$100 million in 2012 after adjusting for inflation) or more in any 1 year.

National Environmental Policy Act and Clean Air Act

FMCSA analyzed this Final Rule for the purpose of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 et seq.) and determined under its environmental procedures Order 5610.1, published February 24, 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. The Categorical Exclusion under paragraph 6(u) relates to regulations implementing rules of practice for proceedings before the Assistant Administrator and to determine whether a motor carrier has failed to comply with applicable statutes and regulation and to issue an appropriate order to compel compliance, which is the focus of this rulemaking. A Categorical Exclusion determination is available for inspection or copying in the regulations.gov Web site listed under

ADDRESSES.

In addition to the NEPA requirements to examine impacts on air quality, the Clean Air Act (CAA) as amended (42 U.S.C. 7401 et seq.) also requires FMCSA to analyze the potential

impact of its actions on air quality and to ensure that FMCSA actions conform to State and local air quality implementation plans. No additional contributions to air emissions are expected from this rule and FMCSA expects the rule to not be subject to the Environmental Protection Agency's General Conformity Rule (40 CFR parts 51 and 93).

Paperwork Reduction Act

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

Executive Order 12630 (Taking of Private Property)

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

Executive Order 12988 (Civil Justice Reform)

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

Executive Order 13045 (Protection of Children)

Executive Order 13045, "Protection of Children from Environmental Health Risks and Safety Risks" (April 23, 1997, 62 FR 19885), requires that agencies issuing economically significant rules, which also concern an environmental health or safety risk that an Agency has reason to believe may disproportionately affect children, must include an evaluation of the environmental health and safety effects of the regulation on children. Section 5 of Executive Order 13045 directs an Agency to submit for a covered regulatory action an evaluation of its environmental health or safety effects on children. The FMCSA has determined that this rule is not a covered regulatory action as defined under Executive Order 13045. This determination is

based on the fact that this rule is not economically significant under Executive Order 12866, because the changes in this rule would not have an impact of \$100 million or more in any given year. In addition, this rule does not constitute an environmental health risk or safety risk that would disproportionately affect children.

Executive Order 13132 (Federalism)

A rule 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 States or localities. FMCSA has analyzed this rule under that Order and has determined that it does not have implications for federalism.

Executive Order 12372 (Intergovernmental Review)

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

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

The FMCSA has analyzed this rule under Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.” This rule is not a significant energy action within the meaning of section 4(b) of the Executive Order. This rule is a procedural action, is not economically significant, and would not have a significant adverse effect on the supply, distribution, or use of energy.

Privacy Impact Analysis

FMCSA conducted a Privacy Threshold Analysis for the Final Rule and determined that the rulemaking has privacy implications that will be addressed by modifying the following two documentations: FMCSA Enforcement Management Information System, Privacy Impact Assessment and DOT/FMCSA 002 System of Records Notice for Motor Carrier Safety Proposed

Civil and Criminal Enforcement Cases. These documents have been placed in the docket.

List of Subjects

49 CFR Part 385

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

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 stated in the preamble, FMCSA amends title 49 CFR, Code of Federal Regulations, chapter III, as follows:

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, 14701, 31133, 31135, 31136, 31137(a), 31144, 31148, and 31502; Sec. 113(a), Pub. L. 103–311; Sec. 408, Pub. L. 104–88; Sec. 350, Pub. L. 107–87; and 49 CFR 1.87.

2. Add a new subpart K, consisting of §§ 385.901 through 385.921, to read as follows:

Subpart K—Pattern or Practice of Safety Violations by Motor Carrier Management

- 385.901 Applicability.
- 385.903 Definitions.
- 385.905 Suspension or revocation of registration.
- 385.907 Regulatory noncompliance.
- 385.909 Pattern or practice.
- 385.911 Suspension proceedings.
- 385.913 Revocation proceedings.
- 385.915 Petitions for rescission.
- 385.917 Other orders unaffected; not exclusive remedy.
- 385.919 Penalties.
- 385.921 Service and computation of time.

Subpart K—Pattern or Practice of Safety Violations by Motor Carrier Management

§ 385.901 Applicability.

The requirements in this subpart apply to for-hire motor carriers, employers, officers and persons registered or required to be registered under 49 U.S.C. 13902, 49 CFR part 365, and 49 CFR part 368. When used in this subpart, the term “motor carrier” includes all for-hire motor carriers, employers, officers and other persons, however designated, that are registered or required to be registered under 49 U.S.C. 13902, 49 CFR part 365, and 49 CFR part 368.

§ 385.903 Definitions.

As used in this subpart:

Agency Official means the Director of FMCSA’s Office of Enforcement and Compliance or his or her designee.

Controlling Influence means having or exercising authority, whether by act or omission, to direct some or all of a motor carrier’s operational policy and/or safety management controls.

Officer means an owner, director, chief executive officer, chief operating officer, chief financial officer, safety director, vehicle maintenance supervisor, and driver supervisor of a motor carrier, regardless of the title attached to those functions, and any person, however designated, exercising controlling influence over the operations of a motor carrier.

Registration means the registration required under 49 U.S.C. 13902, 49 CFR part 365, and 49 CFR part 368.

§ 385.905 Suspension or revocation of registration.

(a) General. (1) If a motor carrier engages or has engaged in a pattern or practice of avoiding compliance, or masking or otherwise concealing noncompliance, with regulations on commercial motor vehicle safety under 49 U.S.C. Chapter 311, subchapter III, FMCSA may suspend or revoke the motor carrier’s registration.

(2) If a motor carrier permits any person to exercise controlling influence over the motor carrier's operations and that person engages in or has engaged in a pattern or practice of avoiding compliance, or masking or otherwise concealing noncompliance, with regulations on commercial motor vehicle safety 49 U.S.C. Chapter 311, subchapter III while acting on behalf of any motor carrier, FMCSA may suspend or revoke the motor carrier's registration.

(b) Determination. (1) The Agency Official may issue an order to revoke or suspend a motor carrier's registration, or require compliance with an order issued to redress violations of a statutory or regulatory requirement prescribed under 49 U.S.C. Chapter 311, subchapter III, upon a determination that the motor carrier engages or has engaged in a pattern or practice of avoiding regulatory compliance or masking or otherwise concealing regulatory noncompliance.

(2) The Agency Official may issue an order to revoke or suspend a motor carrier's registration, or require compliance with an order issued to redress violations of a statutory or regulatory requirement prescribed under 49 U.S.C. Chapter 311, subchapter III, upon a determination that the motor carrier permitted a person to exercise controlling influence over the motor carrier's operations if that person engages in or has engaged in a pattern or practice of avoiding regulatory compliance or masking or otherwise concealing regulatory noncompliance.

§ 385.907 Regulatory noncompliance.

A motor carrier or person acting on behalf of a motor carrier avoids regulatory compliance or masks or otherwise conceals regulatory noncompliance by, independently or on behalf of another motor carrier, failing to or concealing failure to:

(a) Comply with statutory or regulatory requirements prescribed under 49 U.S.C., Chapter 311, subchapter III;

(b) Comply with an FMCSA or State order issued to redress violations of a statutory or regulatory requirement prescribed under 49 U.S.C., Chapter 311, subchapter III;

(c) Pay a civil penalty assessed for a violation of a statutory or regulatory requirement prescribed under 49 U.S.C., Chapter 311, subchapter III; or

(d) Respond to an enforcement action for a violation of a statutory or regulatory requirement prescribed under 49 U.S.C., Chapter 311, subchapter III.

§ 385.909 Pattern or practice.

The Agency Official may determine that a motor carrier or person acting on behalf of a motor carrier engages or has engaged in a pattern or practice of avoiding regulatory compliance, or masking or otherwise concealing regulatory noncompliance for purposes of this subpart, by considering, among other things, the following factors, which, in the case of persons acting on behalf of a motor carrier, may be related to conduct undertaken on behalf of any motor carrier:

(a) The frequency, remoteness in time, or continuing nature of the conduct;

(b) The extent to which the regulatory violations caused by the conduct create a risk to safety;

(c) The degree to which the conduct has affected the safety of operations, including taking into account any crashes, deaths, or injuries associated with the conduct;

(d) Whether the motor carrier or person acting on a motor carrier's behalf knew or should have known that the conduct violated applicable statutory or regulatory requirements;

(e) Safety performance history, including pending or closed enforcement actions, if any;

(f) Whether the motor carrier or person acting on a motor carrier's behalf engaged in the conduct for the purpose of avoiding compliance or masking or otherwise concealing noncompliance; and

(g) In the case of a person acting on a motor carrier's behalf, the extent to which the person exercises a controlling influence on the motor carrier's operations.

§ 385.911 Suspension proceedings.

(a) General. The Agency Official may issue an order to suspend a motor carrier's registration based on a determination made in accordance with § 385.905(b).

(b) Commencement of proceedings. The Agency Official commences a proceeding under this section by serving an order to show cause to the motor carrier and, if the proceeding is based on the conduct of another person, by also serving a copy on the person alleged to have engaged in the pattern or practice that resulted in a proceeding instituted under this section, which:

(1) Provides notice that the Agency is considering whether to suspend the motor carrier's registration;

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

(3) Directs the motor carrier to show good cause within 30 days of service of the order to show cause why its registration should not be suspended;

(4) Informs the motor carrier that its response to the order to show cause must be in writing, state the factual and legal basis for its response, and include all documentation, if any, the motor carrier wants considered;

(5) Informs the motor carrier of the address and name of the person to whom the response should be directed and served;

(6) Provides notice to the person(s) alleged to have engaged in the pattern or practice that resulted in the proceeding instituted under this section, if any, of their right to intervene in the proceeding; and

(7) Informs the motor carrier that its registration will be suspended on the 35th day after service of the order, if the motor carrier or an intervening person does not respond to the order.

(c) Right of individual person(s) to intervene. A person(s) alleged to have engaged in the pattern or practice that resulted in a proceeding under this section may intervene in the proceeding. The person(s) may—but are not required to—serve a separate response and supporting documentation to an order served under paragraph (b) of this section, within 30 days of being served with the order. Failure to timely serve a response constitutes waiver of the right to intervene.

(d) Review of response. The Agency Official will review the responses to the order to show cause and determine whether the motor carrier's registration should be suspended.

(1) The Agency Official may take the following actions:

(i) If the Agency Official determines that the motor carrier's registration should be suspended, he or she will enter an order suspending the registration;

(ii) If the Agency Official determines that it is not appropriate to suspend the motor carrier's registration, he or she may enter an order directing the motor carrier to correct compliance deficiencies; or

(iii) If the Agency Official determines the motor carrier's registration should not be suspended and a compliance order is not warranted, he or she will enter an order terminating the proceeding.

(2) If the Agency Official issues an order to suspend the motor carrier's registration, the order will:

(i) Provide notice to the motor carrier and any intervening person(s) of the right to petition for administrative review of the order within 15 days of service of the order suspending registration, and provide notice of the procedures in paragraph (e) of this section;

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

(iii) Provide notice that failure to timely serve a petition for administrative review constitutes waiver of the right to contest the order suspending the registration and will result in the order becoming a Final Agency Order 20 days after it is served.

(e) Administrative review. The motor carrier or the intervening person(s) may petition the Assistant Administrator for review of an order issued under paragraph (d)(1)(i) of this section. The petition must be in writing and served on the Assistant Administrator. Service on the Assistant Administrator is effected by delivering a copy to USDOT Dockets, Docket Operations, 1200 New Jersey Avenue, West Building Ground Floor, Room 12-140, SE., Washington, DC 20590-0001 or by submitting the documents electronically to www.regulations.gov. The petition must also be served on all parties to the proceedings and on Adjudications Counsel, Federal Motor Carrier Safety Administration, 1200 New Jersey Ave., SE., Washington, DC 20590-0001.

(1) A petition for review must be served within 15 days of the service date of the order for which review is requested. Failure to timely serve a request for review waives the right to request review.

(2) A petition for review must include:

(i) A copy of the order in dispute;

(ii) A copy of the petitioner's response to the order in dispute, with supporting documents if any;

(iii) A statement of all legal, factual and procedural issues in dispute; and

(iv) Written argument in support of the petitioner's position regarding the legal, factual or procedural issues in dispute.

(3) The Agency Official must serve a response to the petition for review no later than 15 days following receipt of the petition. The Agency Official must address each assignment of error by producing evidence or legal argument which supports the Agency Official's determination on that issue. The Agency Official's determination may be supported by circumstantial or direct evidence and the reasonable inferences drawn therefrom.

(4) The Assistant Administrator's review is limited to the legal, factual and procedural issues identified in the petition for review. The Assistant Administrator may, however, ask the parties to submit additional information. If the petitioner does not provide the information requested, the Assistant Administrator may dismiss the petition for review.

(5) The Assistant Administrator will serve a written decision on the petition for review within 60 days of the close of the time period for serving a response to the petition for review or the date of service of the response served under paragraph (e)(3), whichever is later.

(6) If a petition for review is timely served in accordance with this section, 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 all parties.

(ii) Within 10 days of service of the motion to vacate the automatic stay, the petitioner may serve an answer in opposition, accompanied by affidavits or other evidence relied on.

(iii) The Assistant Administrator will issue a decision on the motion to vacate within 10 days of the close of the time period for serving the answer to the motion. The 60-day period for a decision on the petition for review in paragraph (e)(5) of this section does not begin until the Assistant Administrator issues a decision on the motion to vacate the stay.

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

§ 385.913 Revocation proceedings.

(a) General. The Agency Official may issue an order to revoke a motor carrier's registration, if he or she:

(1) Makes a determination in accordance with § 385.905(b), and

(2) Determines that the motor carrier has willfully violated any order directing compliance with any statutory or regulatory requirement prescribed under 49 U.S.C., Chapter 311, subchapter III for a period of at least 30 days.

(b) Commencement of proceedings. The Agency Official commences a proceeding under this section by serving an order to show cause to the motor carrier and, if the proceeding is based on the conduct of another person, by also serving a copy on the person alleged to have engaged in the pattern or practice that resulted in a proceeding instituted under this section, which:

(1) Provides notice that the Agency is considering whether to revoke the motor carrier's registration;

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

(3) Directs the motor carrier to comply with a statute, regulation or condition of its registration;

(4) Informs the motor carrier that the response to the order to show cause must be in writing, state the factual and legal basis for its response and include all documentation, if any, the motor carrier wants considered;

(5) Informs the motor carrier of the address and name of the person to whom the response should be directed and served;

(6) Provides notice to the person, if any, of his or her right to intervene in the proceeding within 30 days of service of the order; and

(7) Informs the motor carrier that its registration may be revoked on the 35th day after service of the order issued under this section if the motor carrier or intervening person has not demonstrated, in writing, compliance with the order, or otherwise shown good cause why compliance is not required or the registration should not be revoked.

(c) Right of individual person(s) to intervene. A person(s) alleged to have engaged in the pattern or practice that resulted in a proceeding instituted under this section may intervene in the proceeding. The person(s) may—but are not required to—serve a separate response and supporting documentation to an order served under paragraph (b) of this section, within 30 days of being served with the order. Failure to timely serve a response constitutes waiver of the right to intervene. If the Agency Official previously issued an order under § 385.911 based on the same conduct, a person who was given the opportunity to but did not intervene under § 385.911(c) may not intervene under this section.

(d) Review of response. The Agency Official will review the response(s) to the order and determine whether the motor carrier's registration should be revoked.

(1) The Agency Official will take one of the following actions:

(i) If the Agency Official determines the motor carrier's registration should be revoked, he or she will enter an order revoking the motor carrier's registration; or

(ii) If the Agency Official determines the motor carrier's registration should not be revoked, he or she will enter an order terminating the proceeding.

(2) If the Agency Official issues an order to revoke the motor carrier's registration, the order will:

(i) Provide notice to the motor carrier and any intervening person(s) of the right to petition for administrative review of the order within 15 days of service of the order revoking the motor carrier's registration, and provide notice of the procedures in § 385.911(e);

(ii) Provide notice that a timely petition for review will stay the effective date of the order unless the Assistant Administrator orders otherwise for good cause; and

(iii) Provide notice that failure to timely serve a petition for review constitutes waiver of the right to contest the order revoking the motor carrier's registration and will result in the order becoming a Final Agency Order 20 days after it is served.

(iv) Provide notice that a Final Agency Order revoking the motor carrier's registration will remain in effect and bar approval of any subsequent application for registration until rescinded by the Agency Official pursuant to § 385.915.

(e) Administrative review. The motor carrier or intervening person may petition the Assistant Administrator for review of an order issued under paragraph (d)(1)(i) of this section by following the procedures set forth in § 385.911(e).

§ 385.915 Petitions for rescission.

(a) A motor carrier or intervening person may submit a petition for rescission of an order suspending or revoking registration under this subpart based on action taken to correct the deficiencies that resulted in the suspension or revocation.

(b) A petition for rescission must be made in writing to the Agency Official.

(c) A petition for rescission must include a copy of the order suspending or revoking the motor carrier's registration, a factual statement identifying all corrective action taken, and copies of supporting documentation.

(d) The Agency Official will issue a written decision on the petition within 60 days of service of the petition. The decision will state the factual and legal basis for the decision.

(e) If the Agency Official grants the petition, the written decision under paragraph (d) is the Final Agency Order. Rescinding an order suspending a motor carrier's registration permits that motor carrier to resume operations so long as it is in compliance with all other statutory and regulatory requirements. Rescinding an order revoking a motor carrier's registration does not have the effect of reinstating the revoked registration. In order to resume operations in interstate commerce, the motor carrier whose registration was revoked must reapply for registration. If registration is granted, the motor carrier would also become subject to the new entrant regulations at 49 CFR part 385.

(f) If the Agency Official denies the petition, the petitioner may petition the Assistant Administrator for review of the denial. The petition must be in writing and served on the Assistant Administrator. Service on the Assistant Administrator is effected by delivering a copy to USDOT Dockets, Docket Operations, 1200 New Jersey Avenue, West Building Ground Floor, Room 12-140, SE., Washington, DC 20590-0001 or by submitting the documents electronically

to www.regulations.gov. The petition must also be served on all parties to the proceedings and on Adjudications Counsel, Federal Motor Carrier Safety Administration, 1200 New Jersey Ave., SE., Washington, DC 20590-0001. The petition for review of the denial must be served within 15 days of the service of the decision denying the petition for rescission. The petition for review must identify the legal, factual or procedural issues in dispute with respect to the denial of the petition for rescission. The petition for review may not, however, challenge the basis of the underlying suspension or revocation order.

(g) The Agency Official may file a written response within 15 days of receipt of the petition for review.

(h) The Assistant Administrator will issue a written decision on the petition for review within 60 days of service of the petition for review or a timely served response, whichever is later. The Assistant Administrator's decision constitutes the Final Agency Order.

§ 385.917 Other orders unaffected; not exclusive remedy.

If a motor carrier subject to an order issued under this subpart is or becomes subject to any other order, prohibition, or requirement of the FMCSA, an order issued under this subpart is in addition to, and does not amend or supersede the other order, prohibition, or requirement.

Nothing in this subpart precludes FMCSA from taking action against any motor carrier under 49 U.S.C. 13905 or 49 U.S.C. 31134 for other conduct amounting to willful failure to comply with an applicable statute, regulation or FMCSA order.

§ 385.919 Penalties.

(a) Any motor carrier that the Agency determines engages or has engaged in a pattern or practice of avoiding regulatory compliance or masking noncompliance or violates an order

issued under this subpart shall be subject to the civil or criminal penalty provisions of 49 U.S.C. 521(b) and applicable regulations.

(b) Any motor carrier who permits the exercise of controlling influence over its operations by any person that the Agency determines, under this subpart, engages in or has engaged in a pattern or practice of avoiding regulatory compliance or masking noncompliance while acting on behalf of any motor carrier, shall be subject to the civil or criminal penalty provisions of 49 U.S.C. 521(b) and applicable regulations.

§ 385.921 Service and computation of time.

Service of documents and computations of time will be made in accordance with §§ 386.6 and 386.8 of this subchapter. All documents that are required to be served or filed must be served or filed with a certificate of service.

3. Add a new subpart L consisting of §§ 385.1001 through 385.1019, to read as follows:

Subpart L—Reincarnated Carriers

385.1001 Applicability.
385.1003 Definitions.
385.1005 Prohibition.
385.1007 Determination of violation.
385.1009 Suspension proceedings.
385.1011 Revocation proceedings.
385.1013 Petitions for rescission.
385.1015 Other orders unaffected; not exclusive remedy.
385.1017 Penalties.
385.1019 Service and computation of time.

Subpart L—Reincarnated Carriers

§ 385.1001 Applicability.

The requirements in this subpart apply to for-hire motor carriers registered or required to be registered under 49 U.S.C. 13902, 49 CFR part 365, and 49 CFR part 368.

§ 385.1003 Definitions.

As used in this subpart:

Agency Official means the Director of FMCSA's Office of Enforcement and Compliance or his or her designee.

Registration means the registration required under 49 U.S.C. 13902, 49 CFR part 365, and 49 CFR part 368.

Reincarnated or affiliated motor carriers means motor carriers with common ownership, common management, common control or common familial relationship.

§ 385.1005 Prohibition.

Two or more motor carriers shall not use common ownership, common management, common control, or common familial relationship to enable any or all such motor carriers to avoid compliance, or mask or otherwise conceal non-compliance, or a history of non-compliance, with statutory or regulatory requirements prescribed under 49 U.S.C. Chapter 311, subchapter III, or with an order issued under such requirements.

§ 385.1007 Determination of violation.

(a) General. The Agency Official may issue an order to suspend or revoke the registration of one or more motor carriers if he or she determines that the motor carrier or motor carriers have reincarnated or affiliated to avoid regulatory compliance or mask or otherwise conceal regulatory noncompliance, or a history of noncompliance.

(b) Reincarnation or affiliation. The Agency Official may determine that one or more motor carriers are reincarnated if there is substantial continuity between entities such that one is merely a continuation of the other. The Agency Official may determine that motor carriers are affiliates if business operations are under common ownership, common management, common control or common familial relationship. To make these determinations, the Agency Official

may consider, among other things, the factors in 49 CFR 386.73(c) and examine, among other things, the records identified in 49 CFR 386.73(d).

(c) Regulatory noncompliance. The Agency Official may determine that a motor carrier or its officer, employee, agent, or authorized representative, avoids regulatory compliance or masks or otherwise conceals regulatory noncompliance, or a history of noncompliance by operating or attempting to operate a motor carrier as a reincarnated or 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.

§ 385.1009 Suspension proceedings.

(a) General. The Agency Official may issue an order to suspend a motor carrier's registration based on a determination made in accordance with § 385.1007.

(b) Commencement of proceedings. The Agency Official may commence a proceeding under this section by serving an order to one or more motor carriers which:

- (1) Provides notice that the Agency is considering whether to suspend the motor carrier's registration;
- (2) Provides notice of the factual and legal basis for the order;
- (3) Directs the motor carrier to comply with a regulation or condition of its registration;
- (4) Informs the motor carrier that the response to the order must be in writing, state the factual or legal basis for its response, and include all documentation, if any, the motor carrier wants considered;

(5) Informs the motor carrier of the address and name of the person to whom the response should be directed and served;

(6) Informs the motor carrier that its registration may be suspended on the 35th day after service of the order issued under this section if the motor carrier has not demonstrated, in writing, compliance with any compliance directive issued, or otherwise shown good cause why compliance is not required or the registration should not be suspended.

(c) Review of response. The Agency Official will review the responses to the order and determine whether the motor carrier's registration should be suspended.

(1) The Agency Official will take one of the following actions:

(i) If the Agency Official determines the motor carrier's registration should be suspended, he or she will enter an order suspending the motor carrier's registration; or

(ii) If the Agency Official determines the motor carrier's registration should not be suspended, he or she will enter an order terminating the proceeding.

(2) If the Agency Official issues an order to suspend the motor carrier's registration, the order will:

(i) Provide notice to the motor carrier of the right to petition the Assistant Administrator for review of the order within 15 days of service of the order suspending the registration, and provide notice of the procedures in § 385.911(e);

(ii) Provide notice that a timely petition for review will stay the effective date of the order unless the Assistant Administrator orders otherwise for good cause; and

(iii) Provide notice that failure to timely serve a petition for review constitutes waiver of the right to contest the order suspending the motor carrier's registration and will result in the order becoming a Final Agency Order 20 days after it is served.

(iv) Provide notice that a Final Agency Order suspending the motor carrier's registration will remain in effect and bar approval of any subsequent application for registration until rescinded by the Agency Official pursuant to § 385.1013.

(d) Administrative Review. The motor carrier may petition the Assistant Administrator for review of an order issued under paragraph (c)(1)(i) of this section by following the procedures set forth in § 385.911(e).

§ 385.1011 Revocation proceedings.

(a) General. The Agency Official may issue an order to revoke a motor carrier's registration, if he or she:

(1) Makes a determination in accordance with § 385.1007, and

(2) Determines that the motor carrier has willfully violated an order directing compliance for a period of at least 30 days.

(b) Commencement of proceedings. The Agency Official commences a proceeding under this section by serving an order to one or more motor carriers, which:

(1) Provides notice that the Agency is considering whether to revoke the motor carrier's registration;

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

(3) Directs the motor carrier to comply with a statute, regulation or condition of its registration;

(4) Informs the motor carrier that the response to the show cause order must be in writing, state the factual or legal basis for its response, and include all documentation, if any, the motor carrier wants considered;

(5) Informs the motor carrier of the address and name of the person to whom the response should be directed and served; and

(6) Informs the motor carrier that its registration may be revoked on the 35th day after service of the order issued under this section if the motor carrier has not demonstrated, in writing, compliance with any order directing compliance, or otherwise shown good cause why compliance is not required or the registration should not be revoked.

(c) Review of response. The Agency Official will review the response(s) to the order and determine whether the motor carrier's registration should be revoked.

(1) The Agency Official will take one of the following actions:

(i) If the Agency Official determines the motor carrier's registration should be revoked, he or she will enter an order revoking the motor carrier's registration; or

(ii) If the Agency Official determines the motor carrier's registration should not be revoked, he or she will enter an order terminating the proceeding.

(2) If the Agency Official issues an order to revoke the motor carrier's registration, the order will:

(i) Provide notice to the motor carrier and any intervening person(s) of the right to petition the Assistant Administrator for review of the order within 15 days of service of the order revoking the motor carrier's registration, and provide notice of the procedures in § 385.911(e);

(ii) Provide notice that a timely petition for review will stay the effective date of the order unless the Assistant Administrator orders otherwise for good cause; and

(iii) Provide notice that failure to timely serve a petition for review constitutes waiver of the right to contest the order revoking the motor carrier's registration and will result in the order becoming a Final Agency Order 20 days after it is served.

(iv) Provide notice that a Final Agency Order revoking the motor carrier's registration will remain in effect and bar approval of any subsequent application for registration until rescinded by the Agency Official pursuant to § 385.1013.

(d) Administrative review. The motor carrier or intervening person may petition the Assistant Administrator for review of an order issued under paragraph (c)(1)(i) of this section by following the procedures set forth in § 385.911(e).

§ 385.1013 Petitions for rescission.

A motor carrier may submit a petition for rescission of an order suspending or revoking registration under this subpart by following the procedures set forth in § 385.915.

§ 385.1015 Other orders unaffected; not exclusive remedy.

If a motor carrier subject to an order issued under this subpart is or becomes subject to any other order, prohibition, or requirement of the FMCSA, an order issued under this subpart is in addition to, and does not amend or supersede the other order, prohibition, or requirement. Nothing in this subpart precludes FMCSA from taking action against any motor carrier under 49 U.S.C. 13905 for other conduct amounting to willful failure to comply with an applicable statute, regulation or FMCSA order.

§ 385.1017 Penalties.

Any motor carrier that the Agency determines to be in violation of this subpart shall be subject to the civil or criminal penalty provisions of 49 U.S.C. 521(b) and applicable regulations.

§ 385.1019 Service and computation of time.

Service of documents and computations of time will be made in accordance with §§ 386.6 and 386.8 of this subchapter. All documents that are required to be served or filed must be served or filed with a certificate of service.

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

4. 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 1.81 and 1.87.

5. In Appendix A to Part 386, add a new paragraph IV.j. to read as follows:

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

* * * * *

IV. * * *

j. Violation—Conducting operations during a period of suspension or revocation under §§ 385.911, 385.913, 385.1009 or 385.1011.

Penalty—Up to \$11,000 for each day that operations are conducted during the suspension or revocation period.

Issued under the authority of delegation in 49 CFR 1.87.

Anne S. Ferro
Administrator

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