



## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

#### 49 CFR Part 395

[Docket No. FMCSA-2018-0348]

RIN 2126-AC24

#### Hours of Service of Drivers; Definition of Agricultural Commodity

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

**ACTION:** Interim final rule with request for comment

**SUMMARY:** FMCSA clarifies the definition of the terms “any agricultural commodity,” “livestock,” and “non-processed food,” as the terms are used in the definition of “agricultural commodity” for the purposes of the Agency’s “Hours of Service (HOS) of Drivers” regulations. Under current regulations, drivers transporting agricultural commodities, including livestock, from the source of the commodities to a location within 150 air miles of the source, during harvest and planting seasons as defined by each State, are exempt from the HOS requirements. Furthermore, the HOS requirement for a 30-minute rest break does not apply to drivers transporting livestock in interstate commerce while the livestock are on the commercial motor vehicle. This interim final rule (IFR) clarifies the meaning of these existing definitional terms to ensure that the HOS exemptions are utilized as Congress intended.

**DATES:** This IFR is effective [Insert date 15 days after date of publication in the FEDERAL REGISTER]. You must submit comments on or before [Insert date 30 days after date of publication in the FEDERAL REGISTER].

Petitions for Reconsideration of this IFR must be submitted to the FMCSA Administrator no later than [Insert date 30 days after date of publication in the FEDERAL REGISTER].

**ADDRESSES:** You may submit comments identified by docket number FMCSA-2018-0348 using any one of the following methods:

- Federal eRulemaking Portal: Go to <http://www.regulations.gov/#!docketDetail;D=FMCSA-2018-0348>. Follow the online instructions for submitting comments.
- Fax: (202) 493-2251.
- Mail: Dockets Operations, U.S. Department of Transportation, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590-0001.
- Hand delivery: Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Mr. Richard Clemente, Driver and Carrier Operations Division, FMCSA, 1200 New Jersey Avenue, SE, Washington, DC 20590-0001, (202) 366-4325, [MCPSD@dot.gov](mailto:MCPSD@dot.gov). If you have questions on viewing or submitting material to the docket, contact Dockets Operations, (202) 366-9826.

**SUPPLEMENTARY INFORMATION:**

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## **I. PUBLIC PARTICIPATION AND REQUEST FOR COMMENTS**

### **A. Submitting Comments**

If you submit a comment, please include the docket number for this IFR (FMCSA-2018-0348), indicate the specific section of this document to which your comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so that FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to:

<http://www.regulations.gov/#!docketDetail;D=FMCSA-2018-0348>, click on the “Comment Now!” button, and type your comment into the text box on the following screen. Choose whether you are submitting your comment as an individual or on behalf of a third party and then submit.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they have reached the facility, please enclose a stamped, self-addressed postcard or envelope.

FMCSA will consider all comments and material received during the comment period and may change this IFR based on your comments. FMCSA may issue a final rule at any time after the close of the comment period.

Confidential Business Information

Confidential Business Information (CBI) is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA, 5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this IFR contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this IFR, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission that constitutes CBI as “PROPIN” to indicate it contains proprietary information. FMCSA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this IFR. Submissions containing CBI should be sent to Mr. Brian Dahlin, Chief, Regulatory Analysis Division, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE, Washington DC 20590. Any comments that FMCSA receives which are not specifically designated as CBI will be placed in the public docket for this rulemaking.

**B. Viewing Comments and Documents**

To view comments, as well as any documents mentioned in this preamble as being available in the docket, go to <http://www.regulations.gov/#!docketDetail;D=FMCSA-2018-0348> and choose the document to review. If you do not have access to the internet, you may view the docket online by visiting Dockets Operations in Room W12-140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue, SE, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366-9317 or (202) 366-9826 before visiting Dockets Operations.

**C. Privacy Act**

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including

any personal information the commenter provides, to [www.regulations.gov](http://www.regulations.gov), as described in the system of records notice DOT/ALL-14 FDMS, which can be reviewed at <https://www.transportation.gov/privacy>.

## **II. EXECUTIVE SUMMARY**

### Purpose of the Regulatory Action

Congress defined “agricultural commodity” as “any agricultural commodity, non-processed food, feed, fiber, or livestock (including livestock as defined in [7 U.S.C. 1471] and insects.)” The existing regulatory text in 49 CFR 395.2 adopts, without substantive change, the statutory definition of “agricultural commodity.” Currently, under Federal statute and regulation, commercial motor vehicle (CMV) drivers transporting agricultural commodities from the source of the commodities to a location within 150 air miles of the source, during harvest and planting seasons as defined by each State, are exempt from the HOS requirements (49 CFR 395.1(k)(1)). Furthermore, § 395.1(v) exempts drivers transporting livestock in interstate commerce from the 30-minute rest break requirement while the livestock are on the CMV. The definition of “livestock” in § 395.2 restates the definition in sec. 602 of the Emergency Livestock Feed Assistance Act of 1988 (the 1988 Act), as amended in 7 U.S.C. 1471.

In July 2019, FMCSA published an Advance Notice of Proposed Rulemaking (ANPRM) requesting assistance from stakeholders in determining whether, and to what extent, the Agency should clarify key terms used in the definition of “agricultural commodity” in § 395.2 (84 FR 36559 (July 29, 2019)). The Agency, noted, for example, that broad terms such as “any agricultural commodity” are subject to multiple interpretations, and have led to inconsistent application of the HOS exemption in § 395.1(k)(1). Based on comments to the ANPRM, discussed further below, as well as ongoing inquiries from the State enforcement partners, FMCSA codifies its interpretation of the meaning of the following terms in § 395.2: “any agricultural commodity,” “non-

processed food,” and “livestock.” The purpose of the definitional clarifications is to ensure that the HOS exemptions in §§ 395.1(k)(1) and 395.1(v) are consistently understood and enforced. The definitional clarifications may affect the extent to which the HOS exemptions apply to transporters of certain agricultural commodities, including livestock. For reasons identified below, FMCSA currently does not have sufficient information to estimate the quantitative impact of these clarifications on carriers or drivers who use the exemptions or on the vehicle miles traveled (VMT). As discussed further below, the Agency asks stakeholders to address these issues when commenting on the impact of the IFR on their operations.

### Benefits and Costs

The ambiguity associated with the definitions of the exemptions in §§ 395.1(k)(1) and 395.1(v) currently may be hindering consistent enforcement practices, thereby impacting business-related decisions for the hauling of agricultural commodities and livestock, resulting in unnecessary costs and disbenefits. By clarifying the definitions of “agricultural commodity,” “non-processed food,” and “livestock,” the IFR will create a common understanding between FMCSA, motor carriers, drivers, and enforcement officials.

While this rule merely clarifies an ambiguous definition without changing any substantive requirements, some regulated entities and enforcement officials may change their behavior in response to this rule. In theory, there are two groups of CMV drivers whose behavior may be impacted by this IFR: (1) those to whom the definitions of “agricultural commodity,” “non-processed food,” and “livestock” apply but who currently do not use an exemption due to the existing definitional ambiguity, and (2) those who currently use an exemption in §§ 395.1(k)(1) or 395.1(v), and may no longer do so as a result of the clarifications. Drivers who use these exemptions as a result of the

clarification provided in this interpretative rule may potentially realize cost savings, and those who no longer use an exemption as a result of this clarification may incur costs.

The Agency does not collect information on the number of drivers currently using the agricultural commodity or livestock exemptions, nor do we know the extent to which State-based enforcement practices vary due to definitional ambiguity. There is uncertainty surrounding the number of drivers who are currently not utilizing an exemption due to definitional ambiguity and may therefore realize the associated cost savings as a result of this rule. The Agency does not, therefore, estimate quantitative impacts associated with this IFR, opting instead for a qualitative analysis. Specifically, FMCSA expects any increase in the number of exemptions used will be by transporters of perishable horticultural commodities, non-processed food, or livestock, including aquatic animals.

### **III. LEGAL BASIS FOR THE RULEMAKING**

Section 204(a) of the Motor Carrier Act of 1935 (Pub. L. 74–255, 49 Stat. 543, 546, August 9, 1935), as codified at 49 U.S.C. 31502(b), authorizes the Secretary of Transportation (Secretary) to “prescribe requirements for — (1) qualifications and maximum hours of service of employees of, and safety of operation and equipment of, a motor carrier; and (2) qualifications and maximum hours of service of employees of, and standards of equipment of, a motor private carrier, when needed to promote safety of operation.” This IFR pertains to the maximum HOS of drivers transporting agricultural commodities by CMV.

The Motor Carrier Safety Act of 1984 provides concurrent authority to regulate drivers, motor carriers, CMVs, and vehicle equipment. Section 206(a) of the Act (98 Stat. 2834), codified at 49 U.S.C. 31136(a), grants the Secretary broad authority to issue regulations “on commercial motor vehicle safety.” The regulations must ensure that “(1) commercial motor vehicles are maintained, equipped, loaded, and operated safely;

(2) the responsibilities imposed on operators of commercial motor vehicles do not impair their ability to operate the vehicles safely; (3) the physical condition of operators of commercial motor vehicles is adequate to enable them to operate the vehicles safely...; (4) the operation of commercial motor vehicles does not have a deleterious effect on the physical condition of the operators; and (5) an operator of a commercial motor vehicle is not coerced by a motor carrier, shipper, receiver, or transportation intermediary to operate a commercial motor vehicle in violation of a regulation promulgated under this section, or chapter 51 or chapter 313 of this title.” (49 U.S.C. 31136(a)(1)-(5)).

This IFR primarily addresses the safety of the vehicle and driver (49 U.S.C. 31136(a)(1)-(2)), and secondarily, the health of the driver (section 31136(a)(4)). This IFR does not directly address medical standards for drivers (section 31136(a)(3)). FMCSA does not anticipate that drivers would be coerced as a result of the proposed clarifying changes (section 31136(a)(5)).

More specifically, this IFR is based on a statutory exemption from HOS requirements for CMV drivers transporting “agricultural commodities ... during planting and harvesting periods, as determined by each State.” The exemption was initially enacted as Sec. 345(a)(1) of the National Highway System (NHS) Designation Act of 1995 (Pub. L. 104-59, 109 Stat. 568, 613, November 28, 1995).

Section 4115 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU, Pub. L. 109-59, 119 Stat. 1144, 1726, August 10, 2005) retroactively amended the Motor Carrier Safety Improvement Act of 1999 (MCSIA, Pub. L. 106-159, 113 Stat. 1748, December 9, 1999) by transferring Sec. 345 to new Sec. 229 of MCSIA (113 Stat. 1773). Section 4130 of SAFETEA-LU then revised section 229, as transferred by section 4115, mainly by adding definitions of “agricultural commodity” and “farm supplies for agricultural purposes” (119 Stat. 1743), as discussed further below. These definitions are codified at 49 CFR 395.2. Section

32101(d) of the Moving Ahead for Progress in the 21<sup>st</sup> Century Act (MAP-21, Pub. L. 112-141, 126 Stat. 405, 778, July 6, 2012) revised section 229 again, mainly by expanding the 100 air-mile radius of the exemption to 150 air miles.

The IFR is also based on a statutory exemption from the HOS requirement for a 30-minute rest break for CMV drivers transporting livestock in interstate commerce, set forth in section 5206(b)(1)(C) of the Fixing America's Surface Transportation Act (FAST Act, Pub. L. 114-94, 129 Stat. 1312, 1537, December 4, 2015).

Before prescribing any regulations, FMCSA must also consider the “costs and benefits” of its proposal (49 U.S.C. 31136(c)(2)(A) and 31502(d)).

This IFR is consistent with DOT's regulations on rulemaking procedures set forth at 5 CFR part 5, subpart B. Specifically, the IFR embodies the regulatory policies that regulations should be straightforward and clear (49 CFR 5.5(d)) and that “[o]nce issued, regulations and other agency actions should be reviewed periodically and revised to ensure that they continue to meet the needs they were designed to address and remain cost-effective and cost-justified” (49 CFR 5.5(h)). This IFR also complies with the requirements that final rules shall be written in plain and understandable English (49 CFR 5.13(k)(3)(i)) and based on a reasonable and well-founded interpretation of relevant statutory text (49 CFR 5.13(k)(3)(ii)).

The Administrator of FMCSA is delegated authority under 49 CFR 1.87(f) and (i) to carry out the functions vested in the Secretary by 49 U.S.C. chapters 311 and 315, respectively, as they relate to CMV operators, programs, and safety.

#### Prior Notice and Comment Not Required for Interpretative Rule

The Administrative Procedure Act (APA) (Pub. L. 79-404, 60 Stat. 237), codified at 5 U.S.C. 553, provides that notice and public comment procedures are not applicable to “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice” (5 U.S.C. 553(b)(A)). Furthermore, DOT's rulemaking

procedures provide that prior notice and an opportunity for comment are not required for rules of interpretation (49 CFR 5.13(j)(1)(i)). The APA defines “rule” as “the whole or part of an agency statement of general or particular applicability and future effect designed to implement, *interpret*, or prescribe law or policy” (5 U.S.C. 551(4)) (emphasis added). The Attorney General’s Manual on the Administrative Procedure Act further defines interpretative rules as “rules or statements issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers.”<sup>1</sup> Because this IFR is an interpretative rule within the meaning of the APA, prior notice and public comment are not required.

In determining whether a rule is “legislative” (and thus generally subject to the APA’s notice and comment requirements) rather than “interpretative,” among the factors courts consider are whether, in the absence of a legislative rule, an agency has adequate basis for enforcement action; whether the rule leaves the agency with any discretion; and whether the rule repudiates or is irreconcilable with a prior legislative rule. Each of these factors is addressed briefly below.

As explained below in Section V. Discussion of Interim Final Rule, the IFR clarifies the terms “any agricultural commodity,” “non-processed food,” and “livestock,” currently included in the definition of “agricultural commodity” in 49 CFR 395.2. The IFR does not establish any new terms not already included in the existing statutory and regulatory definitions of “agricultural commodity,” and does not create any new rights or impose new regulatory burdens.<sup>2</sup> Nor does the IFR expand the Agency’s existing

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<sup>1</sup> Attorney General’s Manual on the Administrative Procedure Act (1947), at 30, n.3.

<sup>2</sup> “An interpretative rule simply states what the administrative agency thinks the [underlying] statute means, and only “reminds” affected parties of existing duties.” On the other hand, if by its action the agency intends to create new law, rights or duties, the rule is properly considered to be a legislative rule.” *General Motors Corp. v. Ruckelshaus*, 742 F. 2d 1561, 1565 (D.C. Cir. 1984) (final rule amending CFR by interpreting Clean Air Act provision authorizing recall of all members of a non-conforming class was an interpretative rule not subject to prior notice and comment), quoting *Citizens to Save Spencer County v. U.S. Environmental Protection Agency*, et al., 600 F. 2d 844, 876 n. 153 (D.C. Cir. 1979) (final rule by which EPA amended the CFR by incorporating and explaining the immediately effective “prevention of significant deterioration” requirements identified in the Clean Air Act was an interpretative not a legislative rule; notice and comment not required), quoting *Pesikoff v. Secretary of Labor*, 501 F. 2d 757, 763, n. 12 (D.C. Cir. 1974).

authority to enforce the exemptions set forth in 49 CFR 395.1(k) and (v); as noted in the Legal Basis discussion above, FMCSA currently has delegated authority to determine and enforce compliance with the exemptions.<sup>3</sup> FMCSA codifies these definitional clarifications to promote more consistent understanding of existing terms so the exemptions are utilized and applied consistently. Because this IFR amends the regulatory text in 49 CFR 395.2, the IFR has “binding effect” in the same sense that the existing definitions have binding effect. The Agency notes, however, the clarifications set forth in the IFR are inclusive rather than exclusive, and therefore permit the Agency continued discretion to determine whether the exemptions apply in specific circumstances<sup>4</sup> as discussed further below in Section V. Lastly, the IFR does not contradict a prior legislative rule simply by clarifying the meaning of current definitional terms.<sup>5</sup>

This IFR includes a 30-day post-publication comment period, and the Agency seeks input on specified issues. FMCSA will consider and address submitted comments in the final rule that will follow this IFR and may make changes to the rule in response to comments received.

In accordance with 5 U.S.C. 553(d)(2), this IFR will become effective less than 30 days after publication. As noted above, the effective date is [Insert date 15 days after date of publication in the FEDERAL REGISTER].

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<sup>3</sup> For example, on August 5, 2020 (85 FR 47565), FMCSA denied as moot the application of Turfgrass Producers International to extend the HOS exemption in 49 CFR 395.1(k) to CMV drivers transporting turfgrass sod. The Agency determined that, because sod falls within the current definition of “agricultural commodity” in 49 CFR 395.2, transporters of sod are already eligible for the exemption.

<sup>4</sup> “[A]n action is not a [legislative] rule if it leaves the agency and its decision-makers free to exercise discretion.” *Patriot, Inc. v. U.S. Dept. of Housing and Urban Development*, 963 F. Supp. 1, 4 (D.D.C. 1997), citing *American Bus Association v. United States*, 627 F. 2d 525, 529 (D.C. Cir. 1980).

<sup>5</sup> “A rule does not...become an amendment [to a prior legislative rule] merely because it supplies crisper and more detailed lines than the authority being interpreted.” *American Min. Congress v. Mine Safety & Health Admin.*, 995 F. 2d 1106, 1112 (D.C. Cir. 1993).

#### **IV. BACKGROUND**

##### *A. HOS Regulations*

The HOS regulations, as set forth in 49 CFR part 395, limit property-carrying CMV drivers to 11 hours of driving time within a 14-hour period after coming on duty following 10 consecutive hours off duty. On June 1, 2020, the FMCSA published a final rule updating the HOS regulations for CMV drivers [85 FR 33396]. The rule, effective on September 29, 2020, revises the HOS requirements to provide greater flexibility for drivers without adversely affecting safety. The Agency expanded the short-haul exception to 150 air-miles and allows a 14-hour work shift to take place as part of the exception.

Under the HOS regulations, drivers may not drive after accumulating 60 hours of on-duty time in any 7 consecutive days, or 70 hours in any 8 consecutive days. Generally, drivers of property-carrying CMVs may restart the 60- or 70-hour clock by taking 34 consecutive hours off duty. As discussed further below, the time spent transporting an agricultural commodity within the 150 air-mile radius from the source does not count against the limits on maximum driving. On-duty time does not apply during harvest and planting periods, as determined by each State, to drivers transporting agricultural commodities (and farm supplies for agricultural purposes) from the source of the commodities to a location within a 150 air-mile radius of the source. In addition, the 30-minute rest break requirement does not apply, even outside of the 150-air-mile radius, to CMV drivers transporting livestock while the livestock are on the vehicle.

##### *B. June 2018 Regulatory Guidance – Application of the 150 Air-Mile HOS Exemption*

On June 7, 2018, FMCSA issued regulatory guidance on the transportation of agricultural commodities as defined in § 395.2 (83 FR 26374). The guidance addressed various issues related to the statutory term “source of the commodities,” but it did not

directly address the scope or meaning of the term “agricultural commodity.” Specifically, the June 2018 guidance addressed: drivers operating unladen CMVs en route to pick up an agricultural commodity or returning from a delivery point; drivers engaged in trips beyond the 150 air miles of the source of the commodity; determining the “source” of agricultural commodities for purposes of the exemption; and how the exemption applies when agricultural commodities are loaded at multiple sources during a trip.

*C. Statutory/Regulatory Definitions of “Agricultural Commodity” and “Livestock”*

As noted above in Section III. Legal Basis for the Rulemaking, Congress initially adopted the HOS exemption for the transportation of agricultural commodities, during harvesting and planting seasons as defined by each State, in 1995 as part of the NHS Designation Act. Congress did not, however, define the term “agricultural commodities” at that time. The Agency added, verbatim, the statutory exemption to its HOS regulations (61 FR 14677, April 3, 1996). In 2005, as part of SAFETEA-LU, Congress adopted the current definition of agricultural commodity: “The term ‘*agricultural commodity*’ means any agricultural commodity, food, feed, fiber, or livestock (including livestock as defined in sec. 602 of the Emergency Livestock Feed Assistance Act of 1988 [7 U.S.C. 1471] and insects), and any product thereof.”

The Agency subsequently added this statutory definition of “agricultural commodity,” verbatim, to § 395.2 (72 FR 36760, July 5, 2007). At that time, section 602 of the 1988 Act, cross-referenced in the SAFETEA-LU definition of “agricultural commodity,” defined “livestock” as “cattle, elk, reindeer, bison, horses, deer, sheep, goats, swine, poultry (including egg-producing poultry), fish used for food, and other animals designated by the Secretary of Agriculture that are part of a foundation herd (including dairy producing cattle) or offspring; or are purchased as part of a normal operation and not to obtain additional benefits under the 1988 Act, as amended.”

On July 22, 2016, the Agency amended § 395.2 by adding a free-standing definition for the term “livestock,” which restated, without substantive change, the definition of livestock set forth in the 1988 Act, referenced above (81 FR 47721). The addition of a separate definition of the term “livestock” to § 395.2 was part of FMCSA’s final rule implementing certain requirements of the FAST Act. Section 5206(b)(1)(C) of the FAST Act made permanent a regulatory exemption<sup>6</sup> from the 30-minute rest break required under the HOS regulations (§ 395.3(a)(3)(ii)), for drivers transporting livestock. The 2016 final rule implemented this FAST Act requirement by adding new § 395.1(v).

In section 12104 of the Agricultural Improvement Act of 2018 (2018 farm bill, Pub. L. 115-334, 132 Stat. 4490, December 20, 2018), Congress amended the definition of “livestock” in the 1988 Act by removing the term “fish used for food” and adding “llamas, alpacas, live fish, crawfish, and other animals that” to the phrase “are part of a foundation herd (including dairy producing cattle) or offspring; or are purchased as part of a normal operation and not to obtain additional benefits [under the Act of 1988].” The 2018 farm bill also removed the Secretary of Agriculture’s discretion to designate animals as livestock in addition to those specifically listed in the statute. On September 30, 2019, FMCSA conformed the text of the definition of “livestock” in § 395.2 to the change made to the 1988 Act by the 2018 farm bill (84 FR 51427, 51430). The Agency’s conforming change added llamas, alpacas, live fish and crawfish, and deleted the term “fish used for food,” and removed the reference to the Secretary of Agriculture’s discretion to designate additional animals.

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<sup>6</sup> On June 12, 2015, FMCSA renewed an exemption, granted to the Agricultural and Food Transporters Conference of the American Trucking Associations, from the 30-minute rest break provision of the HOS regulations for CMV drivers transporting livestock (80 FR 33584). The Agency granted and renewed the exemption to protect the health and safety of livestock during interstate transportation by CMV. The exemption applied only during the transportation of livestock, as defined in the 1988 Act, and did not cover the operation of the CMV after livestock are unloaded from the vehicle.

*D. 2019 ANPRM Regarding Definitions of “Agricultural Commodity” and “Livestock”*

As noted above, in July 2019, FMCSA issued an ANPRM requesting input from stakeholders in determining how the Agency could clarify the definitions of the terms “agricultural commodity” or “livestock” in the HOS regulations, while remaining consistent with the underlying statutory requirement for a limited exemption from the HOS requirements for CMV drivers transporting these commodities. The ANPRM posed questions specifically addressing the need for FMCSA to clarify the current definitions of the terms “agricultural commodity” or “livestock” in § 395.2, and the benefits and costs of clarifying or revising these definitions, including related impacts on highway safety. Additionally, FMCSA requested comment on the extent to which the current definitions (as understood or applied) conflict, or are otherwise inconsistent, with regulations administered by the U.S. Department of Agriculture (USDA), such as the Perishable Agricultural Commodities Act (PACA) (7 U.S.C. 449a(1)).

The Agency received 140 comments in response to the ANPRM.<sup>7</sup> Commenters represented the following industries/organizational types: 12 commenters represented State agricultural bureaus; six from State agricultural trade associations; eight represented haulers of sod; 10 represented private-sector agricultural trade associations; two were from trucking associations; one from a trade safety organization; another represented a private company; and 100 others responded as individual commenters.

In the ANPRM, FMCSA asked how specific commodities, such as sod or other types of horticulture, fit within the definition of the term “any agricultural commodity.”

Nearly half of the comments addressed Question 1, which asked whether specific products, such as sod or other types of horticulture, should be included in the definition of “agricultural commodity.” Commenters stated that various forms of horticulture, such

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<sup>7</sup> The comments may be accessed at <https://www.regulations.gov/docket?D=FMCSA-2018-0348>.

as flowers, shrubs, sod, and Christmas trees, are agricultural commodities and that, due to the risk of perishability in transit, drivers transporting these products should be eligible for the HOS exemption in § 395.1(k)(1). Most commenters opposed including a finite list of types of agricultural commodities as part of the definition in § 395.2, though some favored cross-referencing the list of “perishable” commodities recognized by USDA under the PACA regulations.

The Agency received no information concerning the average and maximum length of trip for specific agricultural commodities, as requested in Question 5. Question 5 also asked whether the definition of “livestock” should include specific animals in addition to those already identified in the 1988 Act (including those added by the 2018 farm bill). While some commenters supported the idea of including a finite list of animals in the definition of “livestock” (in addition to the species already identified in the 1988 Act, as amended), most who addressed this issue said that FMCSA should interpret the term comprehensively to include all living animals. The Agency received limited response to question 10, concerning a motor carrier’s exposure to financial liability resulting directly from a driver’s compliance with the HOS regulations.

Several commenters noted that confusion caused by the current definition of “agricultural commodity” impacts safety by undermining uniformity of enforcement and the underlying safety benefits of the HOS regulations. One commenter suggested that FMCSA adopt a more specific definition of the term, but not in a way that could adversely impact safety by increasing the number of drivers eligible for the HOS exemption in § 395.1(k)(1). FMCSA notes that additional comments to the ANPRM, addressing specific aspects of the terms the Agency clarifies, are discussed below.

## **V. DISCUSSION OF INTERIM FINAL RULE**

Based on issues raised by commenters to the ANPRM, summarized above, as well as ongoing inquiries from FMCSA’s State partners who enforce State HOS requirements

compatible with the Federal rules, the Agency concludes that the definitions of “agricultural commodity” and “livestock,” as used in § 395.2, are not uniformly understood among stakeholders. To facilitate more consistent understanding of these terms, and therefore more consistent enforcement of the HOS exemption in § 395.1(k)(1) and the 30-minute rest break exemption in § 395.1(v), FMCSA codifies its interpretation of their meaning. The Agency notes that the current regulatory definitions of “agricultural commodity” and “livestock,” restate, without substantive change, the text of the underlying statutes identified above. The Agency’s interpretation of these terms does not fundamentally alter that statutory framework.

As noted above, Congress adopted the current definition of “agricultural commodity” in 2005, as currently restated in § 395.2: “*Agricultural commodity* means any agricultural commodity, non-processed food, feed, fiber, or livestock (including livestock as defined in sec. 602 of the Emergency Livestock Feed Assistance Act of 1988 [7 U.S.C. 1471] and insects).” The Agency notes that, in setting forth this statutory definition, Congress drew from existing references in Title 7 (Agriculture) of the United States Code (U.S.C.): (1) the Agricultural Trade Act of 1978 (7 U.S.C. 5602);<sup>8</sup> and (2) the Act of 1988 (7 U.S.C. 1471(2)). In seeking to clarify the meaning of three key terms used in the definition of “agricultural commodity,” FMCSA also looks to Title 7 for guidance, as discussed below.

*A. “Any agricultural commodity”*

In § 395.2, “agricultural commodity” is defined, in part, as “any agricultural commodity.” As noted in the ANPRM, this definition is ambiguous. On one hand, the term “any agricultural commodity” is broad. On the other hand, the term must be

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<sup>8</sup> The Agricultural Trade Act of 1978 defines “agricultural commodity” as “any agricultural commodity, food, feed, fiber, or livestock (including livestock as it is defined in [the Act of 1988]) *and any product thereof*” (emphasis added). Congress, when adopting the definition of “agricultural commodity” in 2005 (119 Stat. 1743), to be used in applying the HOS exemption, inserted the phrase “non-processed” before “food,” and did not include the phrase “and any product thereof.”

understood and interpreted within the context of the HOS requirements, which are intended to prevent CMV-involved crashes caused by driver fatigue due to working long hours. The exemption in § 395.1(k)(1), which allows additional driving and working hours for drivers transporting agricultural commodities, is intended to facilitate timely delivery of agricultural commodities during State-defined harvest and planting seasons. Because the statute includes the term “any agricultural commodity,” in the definition of “agricultural commodity,” the most direct reading of the statute is that the definition also covers agricultural products *not* otherwise considered to be “non-processed food, feed, fiber, or livestock.”<sup>9</sup> The IFR therefore clarifies the meaning of “any agricultural commodity” when determining whether a driver is eligible for the HOS exemption in § 395.1(k)(1).

In the ANPRM, FMCSA asked how specific commodities, such as sod or other types of horticulture, fit within the definition of the term “any agricultural commodity.” Most commenters addressing this question urged FMCSA to clarify that perishable horticultural products are included in the definition of “any agricultural commodity.” A number of commenters provided documentation that horticultural products not used for food or feed, and not sources of fiber, are nevertheless defined or considered as agricultural commodities in various statutes and programs administered by USDA, as well as by other Federal agencies (e.g., the Internal Revenue Service, the Environmental Protection Agency). The New Jersey Department of Agriculture stated, for example, that “sod is defined as an agricultural product by State Departments of Agriculture across the country, including the New Jersey Department of Agriculture.”

In addition, some commenters provided information, as requested in the ANPRM, addressing the perishability, or degradation in quality, of certain horticultural products

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<sup>9</sup> A well-established canon of construction favors an interpretation that avoids rendering any statutory phrase or clause as “surplusage.” See *Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 636 (2012).

during transport by CMV. They explained the impact of post-harvest transportation on factors that determine plant health, such as temperature, exposure to light, and humidity levels. Industry groups noted that plant health largely dictates the commercial value of these products. According to the University of Georgia's College of Agriculture & Environmental Science, Department of Horticulture (the University), although certain horticultural products, such as ornamental plants, are typically transported in a refrigerated environment, reducing the temperature in the cargo container does not prevent damage to plant tissue caused by the release of ethylene, it merely slows that process. The University concluded that "[l]ive plants must be transported as quickly as possible from the producer to the consumer to mitigate damage." The Agency also heard from industry groups documenting the importance of transporting and laying sod within 24 hours of harvest to ensure "quality establishment."

The IFR clarifies that horticultural products subject to perishability or significant degradation in product quality during transport by CMV fall within the meaning of "any agricultural commodity," as the term is used in the definition of "agricultural commodity" in § 395.2. For example, the Agency considers plants, including sod, flowers, ornamentals, seedlings, shrubs, live trees, and Christmas trees, within the scope of the definition. The definition does not include those horticultural products which are not sensitive to temperature and climate and do not risk perishability while in transit, such as timber harvested for lumber, or wood pulp or related products. FMCSA invites comment on whether this clarification, i.e., "horticultural products subject to perishability or significant degradation in product quality during transport by CMV," sufficiently delineates which products fall within the definition of "any agricultural commodity" for purposes of the exemption in § 395.1(k)(1).

Additionally, the Agency requests assistance in determining the number of CMV drivers transporting perishable horticultural commodities who currently use the

exemption in § 395.1(k); the extent to which that number would be higher or lower as a result of the clarification; and the average and maximum times CMV drivers travel when transporting specific perishable horticultural commodities, as described above.

*B. “Non-processed food”*

The ANPRM requested comment on how the term “non-processed” as used in the definition of “agricultural commodity” in § 395.2, is currently understood and applied. All commenters who addressed this issue stated or implied that, in their understanding, “non-processed” modifies only the term “food” and does not modify “feed, fiber, or livestock.” The Agency agrees with this interpretation, and with commenters who noted that, as a matter of grammatical construction, the placement of a comma after “non-processed food” separates it from the other items listed.

The ANPRM also asked commenters to address the distinction between “processed” and “non-processed,” and requested specific examples of “non-processed” products. In response, some commenters noted confusion and inconsistency among State enforcement personnel concerning the extent to which certain types of “processing” render a food commodity to be considered “processed” instead of “non-processed.” For example, in some areas fresh fruits or vegetables are considered “processed” if they are bagged or cut (e.g., cut and bagged lettuce) while in other locations, commodities subject to this type of minimal processing are deemed “non-processed” for the purpose of applying the HOS exemption.

In the ANPRM, FMCSA noted that USDA statutes and regulations define “agricultural commodity” in a variety of ways, depending on the underlying statutory framework. We asked whether transporters subject to both the HOS and USDA regulations, such as PACA,<sup>10</sup> are impacted by not having consistent definitions of the

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<sup>10</sup> The Perishable Agricultural Commodities Act (“PACA”), 7 U.S.C. §§ 499a-499t, was enacted in 1930 to regulate the marketing of fresh and frozen fruits and vegetables by establishing and enforcing a code of fair business practices and by helping companies resolve business disputes. The primary purposes of the PACA are to prevent unfair and fraudulent conduct in the marketing and selling of these commodities in interstate and foreign commerce. The PACA

term “agricultural commodity.” FMCSA also asked whether specific food commodities, such as fresh fruits and vegetables (in non-frozen form) individually identified in the PACA regulations, should be added to the definition of “agricultural commodity” in § 395.2. Most commenters who responded to these questions believed FMCSA should identify the categories of non-processed food included in the definition, rather than adopt, or incorporate by reference, a specific list of fruits and vegetables and other non-processed food commodities.

When considering this issue, FMCSA relied on the relevant statutory limitations: to use the HOS exemption in § 395.1(k)(1), the CMV driver must be transporting *non-processed* food products; and the transportation must occur within planting and harvesting seasons, as defined by each State. Harvest denotes the time of year that a crop is ripe, ready, and needs to be gathered or reaped, to avoid losses in quality and commercial value; the exemption is thus intended to accommodate the transportation of “harvested” food commodities. In keeping with the statutory parameters noted above, the Agency clarifies that “non-processed food” means food commodities in a raw or natural state and not subjected to significant post-harvest changes to enhance shelf life. For definitional purposes, it is difficult to determine precisely the point at which food commodities are no longer “non-processed” within the meaning of the exemption; indeed, that point may vary depending on the nature of the food product. Therefore, some degree of enforcement discretion must be expected in determining whether the exemption applies to CMV drivers transporting these products.

The guiding principle here is whether the product has been processed to the point that it loses its original post-harvest identity and becomes a different item. Accordingly, FMCSA clarifies that “non-processed food,” as the term is used in § 395.2, includes

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regulations, set forth in 7 CFR part 46, are administered by the Agricultural Marketing Service, an agency within USDA.

fruits, vegetables, and cereal and oilseed crops which have been minimally processed by cleaning, cooling, trimming, cutting, shucking, chopping, bagging, or packaging to facilitate transport by CMV. Products subject to post-harvest changes, such as jarring, canning, drying, or freezing, are not “non-processed food.” This clarification is consistent with FMCSA’s regulatory guidance addressing application of the 150 air-mile exemption in § 395.1(k)(1), in which the Agency noted that a “source” of the commodity may be an intermediate storage or handling location away from the farm or field, “*provided the commodity retains its original form and is not significantly changed by any processing or packing.*”<sup>11</sup>

The Agency’s interpretation of the term “non-processed food” is also generally consistent with the definition of fresh fruits and vegetables in the PACA regulations, except that frozen fruits and vegetables do not fall within the definition of “non-processed food”<sup>12</sup> described above. Accordingly, drivers transporting non-frozen fresh fruits and vegetables subject to the PACA regulations in 7 CFR part 46 are eligible for the exemption in § 395.1(k)(1), as long as the fruits and vegetables are “non-processed food” within the meaning of § 395.2.

The Agency requests comment on whether the clarification will result in more consistent application of the HOS exemption for drivers transporting “non-processed food.” If not, how could the meaning of the term be further clarified? FMCSA also seeks qualitative and quantitative data to determine whether the clarification will affect the number of CMV drivers transporting “non-processed food” who would use the HOS exemption in § 395.1(k)(1), and the average and maximum travel times when transporting “non-processed food,” as described above.

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<sup>11</sup> 83 FR 26374, 26376 (June 7, 2018) (emphasis added).

<sup>12</sup> The PACA regulations define fresh fruits and vegetables, in part, as “all produce in fresh form generally considered as perishable fruits and vegetables, whether or not packed in ice or held in common or cold storage, but does not include those perishable fruits and vegetables which have been manufactured into articles of food of a different kind or character.” (7 CFR 46.2(u).) As FMCSA noted in the ANPRM, “because frozen fruits and vegetables are processed and packaged, Congress did not intend to include frozen commodities within the scope of the definition [of ‘agricultural commodity’] as codified in § 395.2” (84 FR 36559, 36562, July 29, 2019).

C. *“Livestock”*

As previously discussed, the definition of “livestock” in § 395.2 restates, without substantive change the current definition of the term in Sec. 602 of the 1988 Act, as amended by the 2018 farm bill: “Livestock means cattle, elk, reindeer, bison, horses, deer, sheep, goats, swine, poultry (including egg-producing poultry), llamas, alpacas, live fish, crawfish, and other animals that are part of a foundation herd (including dairy producing cattle) or offspring; or are purchased as part of a normal operation and not to obtain additional benefits under the Emergency Livestock Feed Assistance Act of 1988, as amended.”

In the ANPRM, FMCSA noted that the definition of the term “livestock,” as used in the statutory definition of “agricultural commodity” and restated in § 395.2, includes, but is not limited to, the animals identified in the 1988 Act. In other words, when Congress adopted the statutory definition of “agricultural commodity” in 2005, it set a definitional floor for the term “livestock” by including the animals identified in the 1988 Act but did not limit the term only to those animals. Accordingly, FMCSA asked whether other animals, including aquatic animals, should be included within the definition of “livestock” in § 395.2. Most commenters who responded to this question supported the inclusion of aquatic animals, and rather than recommending additional species, suggested that all living animals be included in the definition of “livestock.”

The Agency notes the HOS exemptions in § 395.1(k)(1) and the 30-minute rest break exemption in § 395.1(v) recognize that live animals being transported in a CMV are a unique form of cargo, subject to distinct health and safety risks while in transit. Considering the expansive list of animals included in the definition of “livestock” in the 1988 Act, and the inclusive use of the term “livestock” in the statutory definition of “agricultural commodity,” codified in § 395.2, the most direct reading of the statute is that the exemptions be broadly applied when livestock are being transported. The Agency

therefore interprets the term to include all living animals cultivated, grown, or raised for commercial purposes, including aquatic animals, in addition to those animals already identified in the 1988 Act, and amends the definition “livestock” in § 395.2 accordingly. Because the current list of animals in the 1988 Act already includes most animals likely to be transported by CMV, FMCSA anticipates that the revised definition will only minimally increase the number of CMV drivers using the exemptions, if at all. The Agency requests comment on this issue, particularly regarding the number of drivers transporting aquatic animals, including live shellfish, and as previously noted “crawfish,” and their average and maximum travel times.

## **VI. QUESTIONS**

When submitting comments, the Agency requests that commenters number their responses to correspond with the questions as stated below.

1. Will the clarifications of the terms “any agricultural commodity,” “non-processed food,” and “livestock” result in more consistent application of the HOS exemptions in §§ 395.1(k)(1) and 395.1(v)? Why or why not? Please address each term separately when answering this question.
2. Will the clarifications impact the number of drivers who would use the exemptions in § 395.1(k)(1) or 395.1(v)? If so, how and to what extent? For example, how, if at all, will including all living animals cultivated, grown, or raised for commercial purposes, including aquatic animals, within the definition of “livestock” impact the number of drivers? Please provide data to support your answer.
3. Will any of the clarifications result in higher or lower costs for the transportation of agricultural commodities and livestock? Please provide data to support your answer.
4. Will any of the clarifications result in other benefits to stakeholders, including consumers and State enforcement personnel? Please explain your answer by providing specific examples.

## **VII. INTERNATIONAL IMPACTS**

The FMCSRs, and any exceptions to the FMCSRs, apply only within the United States (and, in some cases, United States territories). Motor carriers and drivers are subject to the laws and regulations of the countries in which they operate, unless an international agreement states otherwise. Drivers and carriers should be aware of the regulatory differences among nations in which they operate. Canada- and Mexico-domiciled drivers must ensure compliance with U.S. HOS requirements while they are driving in the U.S.

A driver domiciled in the United States may comply with the Canadian hours of service regulations while driving in Canada. Upon re-entering the United States, however, the driver is subject to all the requirements of Part 395, including the 11- and 14-hour rules, and the 60-or 70-hour rules applicable to the previous 7 or 8 consecutive days. In other words, a driver who takes full advantage of Canadian requirements may have to stop driving for a time immediately after returning to the U.S. to restore compliance with Part 395. Despite its possible effect on decisions a U.S. driver must make while in Canada, this interpretation does not involve an exercise of extraterritorial jurisdiction (62 FR 16379, 16424 (Apr. 4, 1997)).

Currently, under Federal statute and regulation, CMV drivers transporting agricultural commodities from the source of the commodities to a location within 150 air miles of the source, during harvest and planting seasons as defined by each State, are exempt from the HOS requirements (49 CFR 395.1(k)(1)). Furthermore, § 395.1(v) exempts drivers transporting livestock in interstate commerce from the required 30-minute rest break requirement while the livestock are on the CMV.

## **VIII. SECTION-BY-SECTION ANALYSIS**

FMCSA amends 49 CFR part 395 by revising the definition of “agricultural commodity” in § 395.2 by: (1) deleting the parenthetical phrase after the word

“livestock” and adding in its place the following: “as defined in this section.”; and  
(2) adding to the end of the definition of “agricultural commodity” the following: “As used in this definition, the term ‘any agricultural commodity’ means horticultural products at risk of perishing, or degrading in quality, during transport by commercial motor vehicle, including plants, sod, flowers, shrubs, ornamentals, seedlings, live trees, and Christmas trees.”

FMCSA amends the definition of “livestock” in § 395.2 by deleting all text that appears after “livestock means” and adding in its place the following: “livestock as defined in sec. 602 of the Emergency Livestock Feed Assistance Act of 1988 [7 U.S.C. 1471], as amended, insects, and all other living animals cultivated, grown, or raised for commercial purposes, including aquatic animals.”

FMCSA adds the term “non-processed food” to § 395.2, to be defined as follows: “*Non-processed food* means food commodities in a raw or natural state and not subjected to significant post-harvest changes to enhance shelf life, such as canning, jarring, freezing, or drying. The term ‘non-processed food’ includes fresh fruits and vegetables, and cereal and oilseed crops which have been minimally processed by cleaning, cooling, trimming, cutting, chopping, shucking, bagging, or packaging to facilitate transport by commercial motor vehicle.”

## **IX. REGULATORY ANALYSES**

### **A. Executive Order (E.O). 12866 (Regulatory Planning and Review), E.O. 13563 (Improving Regulation and Regulatory Review), and DOT Regulations**

OIRA has determined this rulemaking is a significant regulatory action under E.O. 12866 (58 FR 51735, Oct. 4, 1993), Regulatory Planning and Review, as supplemented by E.O. 13563 (76 FR 3821, Jan. 21, 2011), Improving Regulation and Regulatory Review. This IFR is also significant within the meaning of DOT regulations

(49 CFR 5.13(a)) because of the substantial Congressional and public interest concerning the transportation of agricultural commodities, including livestock.

Agriculture, food, and related industries contributed \$1.053 trillion to U.S. gross domestic product (GDP) in 2017, a 5.4 percent share. Output from farms contributed \$132.8 billion of this sum—about 1 percent of GDP. The overall contribution of the agriculture sector to GDP is larger than this because sectors related to agriculture—forestry, fishing, and related activities; food, beverages, textiles, and leather products; food and beverage stores; and food service—rely on agricultural inputs in order to contribute added value to the economy.<sup>13</sup> Truck transportation is an integral component of the supply chain for agricultural commodities and livestock, constituting the sole mode of transportation for 66.2 percent (715.9 million tons) of the 1,080.7 million tons of agricultural commodities and livestock transported annually as of 2012.<sup>14</sup>

This IFR clarifies the definition of “agricultural commodity” to ensure carriers are aware that drivers transporting perishable horticultural commodities, non-processed food, or livestock, including aquatic animals, are eligible for the HOS exemptions in §§ 395.1(k)(1) and 395.1(v). The exemption in § 395.1(k)(1), which allows additional driving and working hours for drivers transporting agricultural commodities, is intended to facilitate timely delivery of such commodities during State-defined harvest and planting seasons. Section 395.1(v), which exempts drivers transporting livestock in interstate commerce from the 30-minute rest break requirement, is intended to protect the health and welfare of live animals.

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<sup>13</sup> USDA Economic Research Service. “Ag and Food Statistics: Charting the Essentials, Ag and Food Sectors and the Economy.” <https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/ag-and-food-sectors-and-the-economy/#:~:text=Agriculture%2C%20food%2C%20and%20related%20industries,about%201%20percent%20of%20GDP.> (accessed June 12, 2020).

<sup>14</sup> Based on data from the 2012 Commodity Flow Survey (CFS), which is the most recent publication of the CFS for which data specific to mode of transportation by commodity are available. Available at: <https://www.census.gov/library/publications/2015/econ/ec12tcf-us.html> (accessed July 14, 2020).

This rule will help ensure that all affected entities understand how FMCSA interprets the terms “agricultural commodity” and “livestock,” and how the Agency applies the exemptions when these commodities are transported by CMV. The clarifications could provide additional flexibility to transporters of certain commodities.

Currently, during harvesting and planting seasons as determined by each State, drivers transporting agricultural commodities are exempt from the HOS requirements from the source of the commodities to a location within a 150 air-mile radius from the source. As noted above, the current definition in § 395.2 states that an “Agricultural commodity means any agricultural commodity, non-processed food, feed, fiber, or livestock....” Commenters to the ANPRM confirmed that broad terms such as “any agricultural commodity” are not consistently understood or applied. Differences in interpretation between regulated entities and enforcement officials may be hindering consistent enforcement practices, thereby impacting business-related decisions for the hauling of agricultural commodities and livestock. The IFR will create a common understanding between FMCSA, motor carriers, drivers, and enforcement officials.

In theory, there are two groups of CMV drivers whose behavior will be affected by this IFR: (1) those to whom the definitions of “agricultural commodity” and “livestock” apply, but who currently do not use an exemption due to the existing definitional ambiguity; and (2) those who currently use an exemption in §§ 395.1(k)(1) or 395.1(v), and may no longer do so as a result of the definitional clarifications. There is uncertainty surrounding the number of drivers who are, or are not, currently utilizing an exemption due to the current definitional ambiguity, as FMCSA does not collect quantitative data on the use of these exemptions. The Agency does not, therefore, estimate quantitative impacts associated with this IFR, opting instead for a qualitative analysis. FMCSA relies on the Motor Carrier Management Information System (MCMIS) database to obtain information on commercial motor carriers subject to the

FMCSRs. While MCMIS does contain data on certain cargo classifications, it does not track individual cargo carried or hours traveled, nor whether cargo is transported during State-defined planting and harvesting seasons. Consequently, the Agency knows neither the degree to which CMV drivers are currently using the exemptions, nor the magnitude of the population that will be affected by this IFR. However, as noted above, the IFR clarifies that transporters of non-perishable horticultural commodities are not eligible for the exemption in § 395.1(k)(1). FMCSA is aware that at least one State includes “wood chips” within its definition of agricultural commodity, and several States categorize timber as an agricultural product. If these States currently permit transporters of those products to use the HOS exemption, they will no longer be permitted to do so under the IFR.

The Agency assumes that drivers will elect to utilize an agricultural commodity exemption only if the cost impact to them is less than or equal to zero. Moreover, these changes will not require new forms of training for enforcement personnel, as the HOS exemptions for agricultural commodities and livestock currently exist. The Agency expects that the definitional clarifications set forth in this IFR will be communicated to FMCSA personnel and the Agency’s State-based enforcement partners through existing means, such as policy updates and ongoing training.

Though requested in the ANPRM, FMCSA did not receive relevant data related to average and maximum transportation times of specific commodities, nor did the Agency receive relevant information addressing financial liability resulting from HOS compliance. In Section VI. Questions, the Agency requests data on the number of drivers impacted by the clarifications.

The rule could conceivably impact the number of drivers utilizing the exemptions; however, as noted above, the Agency does not collect data regarding the use of these exemptions, nor can we predict whether the number of drivers using the exemption would

increase or decrease as a result of the clarifications. FMCSA requests information on this issue in Section VI.

Congress, when enacting both exemptions, implicitly recognized the trade-off between the purpose of the HOS regulations—CMV safety—and other economic costs of transporting agricultural commodities and livestock by truck. On the one hand, the HOS requirements are intended to improve safety by preventing driver fatigue. On the other hand, there are certain circumstances, such as hauling live animals or transporting agricultural commodities during planting and harvesting seasons, where those requirements may pose significant additional costs. Congress determined that the exemptions, set forth in §§ 395.1(k)(1) and 395.1(v), are justified in these situations.

The rule may provide consumers with access to agricultural commodities of higher quality. For example, as discussed above in Section V. Discussion of Interim Final Rule, some commenters described perishability, or degradation in quality, of certain horticultural products during transport by CMV. The effects of post-harvest transportation such as exposure to changes in temperature, light, and humidity levels can impact plant health. Plant health significantly affects the commercial value of these products, and reduced time in transit from the producer to the consumer helps to mitigate damage. The Agency sought input from the USDA regarding these potential benefits. USDA does not have a model with which to quantify these impacts, but, in informal discussions with FMCSA, USDA confirmed that incrementally shorter transit times generally improve the freshness, quality, nutrition, and safety of food, reduce weight loss for livestock, and enhance animal welfare. If producers choose to adjust their behavior based on reduced travel times resulting from this IFR, there may be benefits to consumers from having access to higher quality products on the market; there may also be disbenefits from additional usage of the exemption due to possible longer drive times or limited breaks.

**B. E.O. 13771 (Reducing Regulation and Controlling Regulatory Costs)**

This IFR is neither a regulatory nor deregulatory action under E.O. 13771.

**C. Congressional Review Act**

Pursuant to the Congressional Review Act (5 U.S.C. 801 et seq.), OIRA designated this rule as not a “major rule,” as defined by 5 U.S.C. 804(2).<sup>15</sup>

**D. Regulatory Flexibility Act (Small Entities)**

The Regulatory Flexibility Act (RFA) of 1980, Pub. L. 96-354, 94 Stat. 1164 (5 U.S.C. 601-612), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121, 110 Stat. 857, March 29, 1996) and the Small Business Jobs Act of 2010 (Pub. L. 111-240, 124 Stat. 2504 September 27, 2010), requires Federal agencies to consider the effects of the regulatory action on small business and other small entities and to minimize any significant economic impact. The term “small entities” comprises small businesses and not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of fewer than 50,000. In addition, the DOT policy requires an analysis of the impact of all regulations on small entities, and mandates that agencies strive to lessen any adverse effects on these businesses.

FMCSA is not required to complete a regulatory flexibility analysis, because, as discussed earlier in Section III. Legal Basis, this IFR is an interpretative rule not subject to prior notice and comment under section 553(b)(A) of the APA.

**E. Assistance for Small Entities**

In accordance with section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996, FMCSA wants to assist small entities in understanding this IFR so

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<sup>15</sup> A “major rule” means any rule that the Administrator of Office of Information and Regulatory Affairs at the Office of Management and Budget finds has resulted in or is likely to result in (a) an annual effect on the economy of \$100 million or more; (b) a major increase in costs or prices for consumers, individual industries, Federal agencies, State agencies, local government agencies, or geographic regions; or (c) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets (5 U.S.C. 804(2)).

that they can better evaluate its effects on themselves and participate in the rulemaking initiative. If the IFR will affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance; please consult the person listed under FOR FURTHER INFORMATION CONTACT.

Small businesses may send comments on the actions of Federal employees who enforce or otherwise determine compliance with Federal regulations to the Small Business Administration's Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of FMCSA, call 1-888-REG-FAIR (1-888-734-3247). DOT has a policy regarding the rights of small entities to regulatory enforcement fairness and an explicit policy against retaliation for exercising these rights.

**F. Unfunded Mandates Reform Act of 1995**

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of \$168 million (which is the value equivalent of \$100,000,000 in 1995, adjusted for inflation to 2019 levels) or more in any one year. Though this IFR will not result in such an expenditure, the Agency does discuss the effects of this rule elsewhere in this preamble.

**G. Paperwork Reduction Act**

This IFR does not call for any new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520). Part 395 of the Federal Motor Carrier Safety Regulations, "Hours of Service of Drivers," requires drivers and motor carriers to collect, transmit and maintain information about driver daily activities. The part 395 ICR

is assigned OMB Control Number 2126-0001. On July 31, 2019, OMB approved the Agency's estimate of 99.5 million burden hours as the annual IC burden of part 395. As explained earlier, there are two groups of CMV drivers whose behavior may change as a result of this IFR: (1) those to whom the definitions of "agricultural commodity" and "livestock" apply, but who currently do not use an exemption due to the existing definitional ambiguity; and (2) those who currently use an exemption in §§ 395.1(k)(1) or 395.1(v), and may no longer do so as a result of the definitional clarifications. Those in the former group could see a reduction in their paperwork burden under this IFR, and those in the latter group could see an increase in their paperwork burden. As FMCSA does not have data on the number of drivers using the exemptions, or the extent to which their behavior will change as a result of this IFR, the Agency is not estimating any changes to the paperwork burden at this time. FMCSA will be in a better position to estimate the use of these exemptions when the currently approved collection is renewed in 2022.

#### **H. E. O. 13132 (Federalism)**

A rule has implications for federalism under section 1(a) of E.O. 13132 if it has "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." FMCSA determined that this IFR does not have substantial direct costs on or for States, nor would it limit the policymaking discretion of States. Nothing in this document preempts any State law or regulation; the HOS requirements do not have preemptive effect. As set forth in 49 U.S.C. 31102, States and other political jurisdictions are eligible to participate in the Motor Carrier Safety Assistance Program, by, among other things, adopting and enforcing State regulations, that are compatible with Federal regulations on CMV safety, including the HOS requirements in part 395, and the safe transportation of hazardous materials. Therefore,

this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Impact Statement.

## **I. Privacy**

The Consolidated Appropriations Act, 2005,<sup>16</sup> requires the Agency to conduct a privacy impact assessment (PIA) of a regulation that will affect the privacy of individuals.

The Privacy Act (5 U.S.C. 552a) applies only to Federal agencies and any non-Federal agency which receives records contained in a system of records from a Federal agency for use in a matching program.

The E-Government Act of 2002<sup>17</sup> requires Federal agencies to conduct a PIA for new or substantially changed technology that collects, maintains, or disseminates information in an identifiable form.

No new or substantially changed technology would collect, maintain, or disseminate information as a result of this rule. Accordingly, FMCSA has not conducted a PIA.

In addition, the Agency submitted a Privacy Threshold Assessment to evaluate the risks and effects the IFR might have on collecting, storing, and sharing personally identifiable information. The DOT Privacy Office has determined that this rulemaking does not create privacy risk.

## **J. E.O. 13175 (Indian Tribal Governments)**

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

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<sup>16</sup> Pub. L. 108-447, 118 Stat. 2809, 3268, note following 5 U.S.C. 552a (Dec. 4, 2014).

<sup>17</sup> Pub. L. 107-347, sec. 208, 116 Stat. 2899, 2921 (Dec. 17, 2002).

government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

## **K. Environment**

FMCSA analyzed this IFR consistent with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and determined this action is categorically excluded from further analysis and documentation in an environmental assessment or environmental impact statement under FMCSA Order 5610.1 (69 FR 9680, March 1, 2004)), Appendix 2, paragraph (6)(b). The Categorical Exclusion (CE) in paragraph (6)(b) relates to regulations which are editorial or procedural, such as those updating addresses or establishing application procedures, and procedures for acting on petitions for waivers, exemptions and reconsiderations, including technical or other minor amendments to existing FMCSA regulations. The requirements in this rule are covered by this CE, there are no extraordinary circumstances present, and this action does not have the potential to affect the quality of the environment significantly. The CE determination is available from the person listed under FOR FURTHER INFORMATION CONTACT.

### **List of Subjects**

#### **49 CFR Part 395**

Highway safety, Motor carriers, Reporting and recordkeeping requirements.

FMCSA amends 49 CFR chapter 3, part 395 as follows:

#### **PART 395—HOURS OF SERVICE OF DRIVERS**

1. The authority citation for part 395 continues to read as follows:

Authority: 49 U.S.C. 504, 31133, 31136, 31137, 31502; sec. 113, Pub. L. 103-311, 108 Stat. 1673, 1676; sec. 229, Pub. L. 106-159 (as added and transferred by sec. 4115 and amended by secs. 4130-4132, Pub. L. 109-59, 119 Stat. 1144, 1726, 1743, 1744); sec. 4133, Pub. L. 109-59, 119 Stat. 1144, 1744; sec. 108, Pub. L. 110-432, 122 Stat. 4860-4866; sec. 32934, Pub. L. 112-141, 126 Stat. 405, 830; sec. 5206(b), Pub. L. 114-94, 129 Stat. 1312, 1537; and 49 CFR 1.87.

2. Amending § 395.2 by:

- a. Revising the definitions of the terms “Agricultural commodity” and “Livestock” and
- b. Adding, in alphabetical order, a definition of “Non-processed food.”

The addition and revisions read as follows:

**§ 395.2 Definitions.**

\* \* \* \* \*

*Agricultural commodity* means:

(1) Any agricultural commodity, non-processed food, feed, fiber, or livestock as defined in this section.

(2) As used in this definition, the term “any agricultural commodity” means horticultural products at risk of perishing, or degrading in quality, during transport by commercial motor vehicle, including plants, sod, flowers, shrubs, ornamentals, seedlings, live trees, and Christmas trees.

\* \* \* \* \*

*Livestock* means livestock as defined in sec. 602 of the Emergency Livestock Feed Assistance Act of 1988 [7 U.S.C. 1471], as amended, insects, and all other living animals cultivated, grown, or raised for commercial purposes, including aquatic animals.

\* \* \* \* \*

*Non-processed* food means food commodities in a raw or natural state and not subjected to significant post-harvest changes to enhance shelf life, such as canning, jarring, freezing, or drying. The term “non-processed food” includes fresh fruits and vegetables, and cereal and oilseed crops which have been minimally processed by cleaning, cooling, trimming, cutting, chopping, shucking, bagging, or packaging to facilitate transport by commercial motor vehicle.

\* \* \* \* \*

Issued under authority delegated in 49 CFR 1.87.

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James W. Deck,  
Deputy Administrator.

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