

in a separate memorandum<sup>25</sup> included in the docket of this rulemaking.

## VI. Proposed Action and Request for Public Comment

Under CAA section 110(k)(3), and for the reasons set forth above, EPA is proposing to approve NDEP's submittal dated April 11, 2011 of Clark County's *Ozone Redesignation Request and Maintenance Plan* (March 2011) ("Clark County Ozone Maintenance Plan") as a revision to the Nevada state implementation plan (SIP). In connection with the Clark County Ozone Maintenance Plan, EPA finds that the maintenance demonstration showing how the area will continue to attain the 1997 8-hour ozone NAAQS for 10 years beyond redesignation (*i.e.*, through 2022) and the contingency provisions describing the actions that Clark County will take in the event of a future monitored violation meet all applicable requirements for maintenance plans and related contingency provisions in CAA section 175A. EPA is also proposing to approve the motor vehicle emissions budgets (MVEBs) in the Clark County Ozone Maintenance Plan (shown in table 4 of this document) because we find they meet the applicable transportation conformity requirements under 40 CFR 93.118(e).

Second, under CAA section 107(d)(3)(D), we are proposing to approve NDEP's request, which accompanied the submitted of the maintenance plan, to redesignate the Clark County 8-hour ozone nonattainment area to attainment for the 1997 8-hour ozone NAAQS. We are doing so based on our conclusion that the area has met the five criteria for redesignation under CAA section 107(d)(3)(E). Our conclusion in this regard is in turn based on our proposed determination that the area has attained the 1997 8-hour ozone NAAQS, that relevant portions of the Nevada SIP are fully approved, that the improvement in air quality is due to permanent and enforceable reductions in emissions, that Nevada has met all requirements applicable to the Clark County 8-hour ozone nonattainment area with respect to section 110 and part D of the CAA, and based on our proposed approval as part of this action of the Clark County Ozone Maintenance Plan.

EPA is soliciting public comments on the issues discussed in this document or on other relevant matters. We will

accept comments from the public on this proposal for the next 30 days. We will consider these comments before taking final action.

## VII. Statutory and Executive Order Reviews

Under the CAA, redesignation of an area to attainment and the accompanying approval of a maintenance plan under section 107(d)(3)(E) are actions that affect the status of a geographical area and do not impose any additional regulatory requirements on sources beyond those imposed by State law. Redesignation to attainment does not in and of itself create any new requirements, but rather results in the applicability of requirements contained in the CAA for areas that have been redesignated to attainment. Moreover, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve State choices, provided that they meet the criteria of the Clean Air Act. Accordingly, these actions merely propose to approve a State plan and redesignation request as meeting Federal requirements and do not impose additional requirements beyond those by State law. For these reasons, these proposed actions:

- Are not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Do not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Are certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Do not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);
- Do not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Are not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Are not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Are not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement

Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and

- Do not provide EPA with the discretionary authority to address disproportionate human health or environmental effects with practical, appropriate, and legally permissible methods under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this proposed rule does not have Tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on Tribal governments or preempt Tribal law. Nonetheless, EPA has discussed the proposed action with the one Tribe, the Las Vegas Paiute Tribe, located within the Clark County 8-hour ozone nonattainment area.

## List of Subjects

### 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

### 40 CFR Part 81

Environmental protection, Air pollution control, National parks, Wilderness areas.

Dated: November 2, 2012.

**Jared Blumenfeld,**

*Regional Administrator, Region IX.*

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## DEPARTMENT OF TRANSPORTATION

### 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:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** FMCSA proposes amendments to its regulations that would enable the Agency to suspend or revoke the operating authority registration of motor carriers that have

<sup>25</sup> See EPA memorandum dated October 15, 2012 titled, "Adequacy Documentation for Motor Vehicle Emission Budgets in April 2011 Clark County Ozone Maintenance State Implementation Plan."

shown egregious disregard for safety compliance or that permit persons who have shown egregious disregard for safety compliance to act on their behalf. These amendments would 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:** You must submit comments on or before January 14, 2013.

**ADDRESSES:** You may submit comments identified by docket number FMCSA-2011-0321 using any one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>.
- *Fax:* 202-493-2251.
- *Mail:* Docket Management Facility (M-30), 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., e.t., Monday through Friday, except Federal holidays. The telephone number is 202-366-9329.

To avoid duplication, please use only one of these four methods. See the "Public Participation and Request for Comments" heading under the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this proposed rule, call or email Juan Moya, Transportation Specialist, Enforcement Division, Federal Motor Carrier Safety Administration, telephone: 202-366-4844; email: [juan.moya@dot.gov](mailto:juan.moya@dot.gov). If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202-366-9826.

**SUPPLEMENTARY INFORMATION:**

**Public Participation and Request for Comments**

FMCSA encourages you to participate in this rulemaking by submitting comments and related materials.

*Submitting Comments*

If you submit a comment, please include the docket number for this rulemaking (FMCSA-2011-0321), indicate the specific section of this document to which each 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 the Agency can contact you if it has questions regarding your submission.

To submit your comment online, go to <http://www.regulations.gov> and click on the "Submit a Comment" box, which will then become highlighted in blue. In the "Document Type" drop down menu, select "Rules," insert "FMCSA-2011-0321" in the "Keyword" box, and click "Search." When the new screen appears, click on "Submit a Comment" in the "Actions" column. 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 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 proposed rule based on your comments.

*Viewing Comments and Documents*

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to <http://www.regulations.gov> and click on the "Read Comments" box in the upper right hand side of the screen. Then, in the "Keyword" box, insert "FMCSA-2011-0321" and click "Search." Next, click "Open Docket Folder" in the "Actions" column. Finally, in the "Title" column, click on the document you would like to review. If you do not have access to the Internet, you may view the docket online by visiting the Docket Management Facility 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., e.t., Monday through Friday, except Federal holidays.

*Privacy Act*

All comments received will be posted without change to <http://www.regulations.gov> and will include any personal information you have provided. Anyone is able to search the electronic form for all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register**

published on January 17, 2008 (73 FR 3316), or you may visit <http://edocket.access.gpo.gov/2008/pdf/E8-785.pdf>.

**Background**

Implementation of this proposed rule would enable the Agency to suspend or revoke the operating authority registration of motor carriers that have shown 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, but the Agency believes this rule is necessary and appropriate for the small number of motor carriers that engage in the most egregious instances of 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. 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 and 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 would 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 have shown egregious disregard for safety compliance, permit persons who have shown egregious disregard for safety compliance to exercise controlling influence on 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 such 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 ideas and concepts that FMCSA should consider. On June 21, 2011, the MCSAC issued a number of recommendations, some of which formed the foundation for this proposed rule described below. 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 the Agency 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 shall 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 of § 4113 of SAFETEA-LU and was subsequently amended by § 32112 of MAP-21. Section 31135 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,<sup>1</sup> 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 is 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 proposed 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 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, section 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

<sup>1</sup> Although MAP-21 includes authority for FMCSA to withhold operating authority registration under § 31135, FMCSA has elected not to incorporate that authority into this proposed rule.

The Agency has existing authority to withhold operating authority registration and will continue to exercise this authority under its current registration process.

unable to comply with the requirements for registration. The changes enacted as a part of MAP-21 are effective October 1, 2012.

### Section-by-Section Analysis

FMCSA proposes to amend 49 CFR parts 385 and 386 in the following ways.

#### Section 385.901

The proposed rule would apply to for-hire motor carriers, employers, officers, or other persons subject to FMCSA's safety jurisdiction that are also required to register (have operating authority) under 49 U.S.C. 13902. This would include for-hire motor carriers that transport passengers and/or property, including household goods carriers and hazardous materials carriers. The rule would not apply to private motor carriers and for-hire motor carriers that are exempt from registering with the Agency under section 13902 because of the commodities they haul or the nature of the services they provide.

#### Section 385.903

FMCSA proposes to add new § 385.903, which would define the terms "Agency Official" and "officer."

The term "Agency Official" would mean the Director of FMCSA's Office of Enforcement and Compliance or his or her designee. The Agency Official is the person within FMCSA authorized to initiate suspension (§ 385.913) or revocation proceedings (§ 385.915) and rule on petitions for rescission (§ 385.917) on behalf of the Agency, as described below.

The term "officer" would identify those individuals whose conduct would trigger the proposed rule's suspension and revocation procedures. The definition is identical to the statutory definition codified at 49 U.S.C. 31135. It would make clear that a person may be an officer not only because of the title or position that person holds, but also because of the functions he or she performs or the control the person exercises over the operations of the motor carrier. This could extend beyond just direct employees of the company, including, but not limited to, contractors and consultants.

The term "motor carrier" when used in this proposed rule would mean any motor carrier, employer, officer or other person, however characterized, required to register under 49 U.S.C. 13902.

#### Section 385.905

Section 385.905 describes the conduct that could trigger suspension or revocation of a motor carrier's operating authority registration and how the Agency would determine whether that

conduct occurred. Paragraph (a)(1) would set 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. This paragraph would apply to any motor carrier that holds operating authority registration and has engaged in a pattern or practice of avoiding regulatory compliance or masking noncompliance.

Paragraph (a)(2) would set 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. This would include conduct the person engaged in on behalf of a previous or current motor carrier. A person exercising controlling influence could be an employee, contractor, consultant or other advisor acting on behalf the motor carrier, and the conduct triggering enforcement could have been undertaken by an employee, contractor, consultant or advisor acting on behalf of another motor carrier.

A motor carrier would not necessarily avoid liability under the rule by asserting it was not aware that the person had previously engaged in a pattern or practice of avoiding compliance or masking noncompliance on behalf of another motor carrier. Motor carriers are responsible for evaluating the qualifications of people who act on their behalf or plan to engage to act on their behalf. They can do this by, among other things, reviewing the person's application, resume or work proposal, checking references, if any, and reviewing the person's history working in or with the motor carrier industry. If a person previously worked for or on behalf of motor carriers subject to FMCSA jurisdiction, it is possible to review previous motor carriers' safety performance history and registration status during the time the person was employed by or engaged to act on behalf of these previous motor carriers by accessing FMCSA's publically available information systems located at the Agency Web site <http://www.fmcsa.dot.gov>. Using these and other available resources may provide valuable information to help determine whether motor carriers should permit a person to exercise controlling influence over their operations.

Paragraph (a)(3) would set forth the Agency's authority to suspend or revoke the operating authority registration of two or more motor carriers that use common ownership, common control, or common familial relationships to avoid regulatory compliance, or mask or otherwise conceal noncompliance. Under this subparagraph, motor carriers that use or create other motor carriers in an effort to avoid the consequences of regulatory noncompliance would be subject to suspension or revocation.

Paragraph (b) would authorize 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).

#### Section 385.907

The Agency Official would determine 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. A motor carrier or person acting on its behalf engages in this conduct when he, she or it, either individually or on behalf of another motor carrier, fails to or conceals 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. Failure to respond to an enforcement action includes, but is not limited to, failure to: Respond to a Notice of Claim, participate in binding arbitration, respond to a demand for records, or respond to FMCSA correspondence if required. 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

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 would determine whether such conduct constitutes a pattern or practice of noncompliance or masking noncompliance by considering certain factors. These factors would include, but are not limited to, the frequency, remoteness in time or continuing nature

of the conduct; the extent to which the regulatory violations caused by the conduct create a risk to safety; the effect the conduct had on safety performance, taking into account crashes, deaths and injuries, if any; whether the motor carrier or person acting on its behalf knew or should have known the conduct violated regulatory requirements; existing or closed enforcement actions; whether the motor carrier or person acting on its behalf engaged in the conduct for the purpose of avoiding compliance; and the extent to which the person exercises a controlling influence on the motor carrier's operations, if applicable. Inadvertent, isolated, or sporadic violations of FMCSA's regulations generally would not rise to the level of a pattern or practice. To establish a pattern or practice, the Agency would look for evidence of knowledge, conduct, or intent that shows egregious disregard for FMCSA's safety regulations.

#### *Section 385.911*

To determine whether two or more motor carriers have common ownership, common management, common control or common familial relationships, the Agency Official must determine whether there is substantial continuity between the motor carrier that has engaged in regulatory noncompliance and another motor carrier so as to conclude that one is merely the continuation of another. In making that determination, the Agency Official may consider, among other things, the following factors: (1) Whether there is a new or affiliated motor carrier that was used for the purpose of avoiding regulatory compliance or masking or otherwise concealing noncompliance; (2) the motor carriers' safety performance histories; (3) consideration exchanged for assets sold or transferred between motor carriers; (4) dates the motor carriers were created, dissolved or ceased operations; (5) whether and to what extent the motor carriers have shareholders, investors, officers, managers and employees in common; (6) whether and to what extent relationships exist between the motor carriers' shareholders, investors, officers, managers, employees or other persons; (7) whether and to what extent the motor carriers share or have proximity of physical or mailing addresses, telephone, fax numbers, or email addresses; (8) whether and to what extent the motor carriers share or have motor vehicle equipment in common; (9) whether and to what extent the motor carriers share or have continuity of liability insurance policies

or coverage under such policies; (10) whether and to what extent the motor carriers use, share or take over each other's facilities and other physical assets; (11) continuity or commonality of nature and scope of operations, including customers for whom transportation is provided; and (12) advertising, corporate name, or other acts through which the motor carriers hold themselves out to the public. The Agency does not consider any one of these factors to be dispositive, and the proof of all twelve would not be required to indicate substantial continuity. When considered collectively, however, they would show whether two or more motor carriers are operationally the same.

#### *Section 385.913*

If the Agency Official makes a determination in accordance with § 385.905, § 385.913(a) would authorize the Agency Official to issue an order suspending the motor carrier's registration. Paragraphs (b) through (e) would establish the procedures FMCSA would follow to suspend an motor carrier's registration.

Under paragraph (b), the Agency Official would initiate a suspension proceeding by issuing an order directing the motor carrier to show good cause, within 30 days of service of the order, why its operating authority registration should not be suspended. The order would provide the motor carrier with notice of the alleged conduct and would explain how to respond to the order. If the proceeding is based on the conduct of another person, the Agency Official would be required to serve a copy on the person alleged to have engaged in the conduct giving rise to the order, and to inform the person that he or she may—but is not required to—intervene by filing a response in the proceeding in accordance with the procedures in paragraph (c). Finally, the order would state that it would be effective on the 35th day after it was served, if the motor carrier or an intervening person does not respond appropriately.

Paragraph (c) would establish an independent right for the person on whose conduct the proceeding is based to intervene in the suspension proceeding. This provision would give the person an opportunity to respond to allegations about his or her conduct to protect his or her interests, which may diverge from the interests of the motor carrier. If the person does not respond within 30 days of being served with the order, he or she would waive the right to participate in the proceeding. By declining to intervene at this stage, he or she would also waive the right to

participate in any future proceedings that arise out of the initial show cause order, such as revocation, administrative review, or rescission proceedings under this proposed rule. When the motor carrier is a sole proprietor or other corporate structure under which the interests of the company and the person in question are one and the same, the person may want to specify that he or she is responding both as the motor carrier and the intervening person to preserve his or her right to participate in a proceeding at a later date as an intervening person in the event that the motor carrier's ownership structure changes.

Under paragraph (d), the Agency Official who issued the order would review all responses to the order. In reviewing the responses, the Agency Official would consider, among other things, the factors described in proposed §§ 385.907, 385.909 and/or 385.911. After reviewing the response, the Agency Official would take one of three actions. First, he or she could enter an order suspending the motor carrier's operating authority registration. Second, he or she could enter an order directing the motor carrier to come into compliance with this proposed rule. Based on the motor carrier's response and the factors described in proposed §§ 385.907, 385.909 and/or 385.911, an order directing compliance might be more appropriate than suspension. Third, the Agency Official could determine that neither suspension nor an order directing compliance is appropriate. In this case, the Agency Official would enter an order terminating the proceeding. The Agency Official could enter a termination order in a number of different circumstances. The Agency Official could terminate the proceeding after determining that the motor carrier or person acting on its behalf did not engage in the alleged conduct. Alternatively, the Agency Official could determine that although the motor carrier or person acting on its behalf had engaged in the alleged conduct, the motor carrier had already taken the appropriate remedial action, rendering an order unnecessary. In this example, the motor carrier might not be subject to an order under § 385.905 but it could nonetheless remain subject to civil or criminal penalties under § 385.921.

If the Agency Official issues an order under paragraph (d) of this section, the motor carrier or the intervening person may submit a petition for administrative review with FMCSA's Assistant Administrator within 15 days of service of that order. The effective date of the order would be stayed, if either the

motor carrier or the intervening person seeks administrative review within the required timeframe, unless the Assistant Administrator finds good cause not to stay the order. Should neither the motor carrier nor the intervening person seek administrative review, the order would become a Final Agency Order 20 days after being served. Failure to submit a petition for administrative review would constitute a waiver of the right to contest the order.

Paragraph (e) would establish the procedures for motor carriers and intervening persons to petition for administrative review of an order issued under this section. If a person did not intervene under paragraph (c), he or she would have waived the right to seek administrative review under this section. Any party seeking administrative review under this section would be limited to challenging errors of fact and/or law. The Assistant Administrator would review the petition(s), and his or her decision regarding the petition(s) would become the Final Agency Order.

#### *Section 385.915*

The Agency Official would be able to initiate a proceeding to revoke the motor carrier's operating authority registration for failure to comply with a suspension or compliance order issued under § 385.913. FMCSA's ability to revoke a motor carrier's operating authority registration is limited to specific circumstances. Under FMCSA's current statutory authority, the Agency may revoke a motor carrier's operating authority registration only after: (1) Issuing an order to the registrant requiring compliance with the statute, an FMCSA regulation, or a condition of the operating authority registration; and (2) the registrant willfully does not comply with the order for a period of 30 days (49 U.S.C. 13905(d)). That means that, under this proposed rule, the Agency Official could only seek revocation if he or she determined that the motor carrier willfully failed to comply with the suspension or compliance order issued under § 385.913 for at least 30 days. For that reason, there must be a separate procedure under which the Agency Official could issue a suspension or compliance order prior to initiating a revocation proceeding under § 385.915.

The procedure for commencing a revocation proceeding under § 385.915 would be similar to the procedure for commencing a suspension proceeding under § 385.913. Under paragraph (b), the Agency Official would issue an order to the motor carrier directing it to show good cause within 30 days of

service of the order why its operating authority registration should not be revoked for failure to comply with an order issued under § 385.913. The order would provide the motor carrier with notice of the alleged violation and would explain how to respond to the order. The order would inform any person who intervened in the initial proceeding that he or she may—but is not required to—intervene under paragraph (c) of this section. Any person who did not intervene in the initial proceeding in accordance with § 385.913(c) would have waived the right to participate under this section and would not be entitled to submit an independent response. Finally, the order would inform the motor carrier that the order would be effective on the 35th day after it was served if the motor carrier or an intervening person does not respond.

Paragraph (c) would establish an independent right for the person to intervene in the revocation proceeding, provided he or she intervened in the initial proceeding under § 385.913(c). If the person does not respond within 30 days of being served with the order, he or she waives the right to participate in the proceeding and any future proceedings that may arise out of the show cause order. This would include administrative review or rescission proceedings under this proposed rule.

Under paragraph (d), the Agency Official who issued the order would review all responses. After reviewing the responses, the Agency Official would either enter an order revoking the motor carrier's operating authority registration or terminating the proceeding. If the Agency Official issues an order revoking operating authority registration, the motor carrier and the intervening person would within 15 days of service have the right to seek administrative review of the order by the Assistant Administrator of the order. The effective date of the order would be stayed if either the motor carrier or intervening person seeks review, unless the Assistant Administrator finds good cause not to stay the order. If neither the motor carrier nor the intervening person seeks review, the order would become a Final Agency Order 20 days after being served. Failure to submit a petition for review would constitute a waiver of the right to contest the order. An order revoking registration under this section would remain in effect and prevent the motor carrier from obtaining new registration until that order is rescinded in accordance with § 385.917. Paragraph (e) would provide that any party seeking review under this section must follow the procedures set forth in § 385.913(e).

#### *Section 385.917*

Section 385.917 would permit the motor carriers as well as intervening persons to file petitions for rescission of an order issued under this proposed rule suspending or revoking the motor carrier's operating authority registration. Rescission would be appropriate when a motor carrier or intervening person has taken action to correct the deficiencies that resulted in the suspension or revocation. Motor carriers or intervening persons could seek rescission of an order in addition to, or in lieu of, seeking administrative review. However, any person who does not intervene under §§ 385.913(c) and/or 385.915(c) would have waived the right to petition for rescission.

Paragraph (b) would require that the petition be made in writing to the Agency Official who suspended or revoked the operating authority registration. Paragraph (c) would require the petitioning motor carrier or intervening person to include a copy of the order suspending or revoking the registration, a statement identifying the corrective action taken, and supporting documentation. Paragraph (d) would give the Agency Official 60 days in which to issue a written decision that includes the factual and legal basis for that decision.

Paragraph (e) provides that, if the Agency Official grants the petition, the order rescinding the suspension or revocation would be a Final Agency Order. A motor carrier that obtains an order rescinding an order of suspension could resume operations without seeking additional authorization, as long as it was otherwise eligible under FMCSA's regulations. A motor carrier whose order of revocation is rescinded, however, must reapply for and receive operating authority registration as a new entrant under 49 CFR part 385 before resuming operations.

Paragraph (f) would provide that if the Agency Official denied the petition for rescission, the motor carrier or intervening person could petition the Assistant Administrator for administrative review of this decision. Motor carriers or intervening persons would be required to serve a petition for review with the Assistant Administrator within 15 days after service of the order denying the petition for rescission. The petitioner would be required to identify the disputed factual or procedural issues relevant to the denial of the petition for rescission and would not be permitted to challenge the underlying suspension or revocation order. Paragraph (g) would give the Assistant Administrator 60 days to issue a written

decision, which would become the Final Agency Order.

#### Section 385.919

Section 385.919 would clarify that orders issued under the proposed rule would not amend or supersede existing FMCSA orders, prohibitions, or requirements. Orders issued under the new rule would be separate from and in addition to existing orders, prohibitions, or requirements. Rescission of an order suspending or revoking operating authority registration under this proposed rule would not affect other suspension or revocation orders either pending or in effect at the time of rescission. Once an order is rescinded, a motor carrier would not be able to resume operations unless it was otherwise eligible under FMCSA's regulations and was in compliance with any other orders issued by the Agency.

#### Section 385.921

Section 385.921 would clarify that existing statutory civil and criminal penalties and sanctions could apply to motor carriers subject to enforcement under this proposed rule. These motor carriers could be subject to civil and criminal penalties, regardless of whether the Agency Official determines that suspension, revocation, or other remedial action is appropriate. A motor carrier that takes corrective action after receiving notice of a show cause order, but before a final order is entered, would not necessarily avoid civil or criminal penalties. An intervening person or any other person whose conduct precipitates an enforcement action would not be subject to civil or criminal penalties under this section, if that person does not hold operating authority registration. Currently, maximum civil penalties for violations of Subchapter III of Title 49, United States Code (which includes section 31135) are \$11,000 per violation. The criminal penalties for knowingly and willfully violating Subchapter III include up to one year's imprisonment and a fine not to exceed \$25,000.

#### Section 385.923

Section 385.923 would provide 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 proposed rule.

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

This proposed rule would add a new paragraph (i) to Appendix A to Part 386, establishing a penalty of up to \$11,000

for each day that a motor carrier operated in violation of an order suspending or revoking operating authority registration under this proposed rule based on 49 U.S.C. 521(b)(2)(A), as adjusted for inflation by the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996.

#### 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 FR1103, 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 proposed 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, but found these costs to be insignificant. Moreover, these transfer costs 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.

##### *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.<sup>2</sup>

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 proposed rule is not expected to have a significant economic impact on a substantial number of small entities. Consequently, I certify the proposed action would not have a significant economic impact on a substantial number of small entities. FMCSA invites comment from members of the public who believe there will be a significant impact either on small businesses or on governmental jurisdictions with a population of less than 50,000.

##### *Assistance for Small Entities*

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), FMCSA wants to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking initiative. If the proposed 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 proposed 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 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*

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

<sup>2</sup>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>.

\$143.1 million (which is the value of \$100 million in 2010 after adjusting for inflation) or more in any 1 year. Though this proposed rule would not result in such expenditure, FMCSA discusses the effects of this rule elsewhere in this preamble.

*National Environmental Policy Act and Clean Air Act*

FMCSA analyzed this NPRM 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 proposed action does not have any effect on the quality of the environment. Therefore, this NPRM 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 "Motor carrier identification and registration reports \* \* \*", 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).

FMCSA seeks comment on these determinations.

*Paperwork Reduction Act*

This proposed 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 proposed 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 proposed 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 preliminarily determined that this proposed rule is not a covered regulatory action as defined under Executive Order 13045. This determination is based upon the fact that this proposed rule is not economically significant under Executive Order 12866, because the changes proposed in this rule would not have an impact of \$100 million or more in any given year. In addition, this proposal would 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 proposed 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 proposed rule under Executive Order

13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use." This proposal is not a significant energy action within the meaning of section 4(b) of the Executive Order. This proposal 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 NPRM and determined that the rulemaking has privacy implications that will be addressed by modifying the following two documentations: FMCSA Enforcement Management Information System (EMIS), Privacy Impact Assessment (PIA) and DOT/FMCSA 002 System of Records Notice (SORN) 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 proposes to amend title 49 CFR, Code of Federal Regulations, chapter III, to read 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 1.86.

2. Add a new subpart K, consisting of §§ 385.901 through 385.923, 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 of avoiding, masking, or concealing.
- 385.911 Common ownership, management, control or familial relationship.
- 385.913 Suspension proceedings.
- 385.915 Revocation proceedings.
- 385.917 Petitions for rescission.
- 385.919 Other orders unaffected.
- 385.921 Penalties.
- 385.923 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 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 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.

*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.

#### § 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 this subchapter, 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 under this subchapter while acting on behalf of any motor carrier, FMCSA may suspend or revoke the motor carrier’s registration.

(3) If two or more motor carriers 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 noncompliance with regulations under this subchapter, FMCSA may suspend or revoke the motor carriers’ registrations.

(b) *Determination.* (1) The Agency Official may issue an order to revoke or suspend a motor carrier’s registration, or require compliance with this subpart, 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 this subpart, 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.

(3) The Agency Official may issue an order to revoke or suspend two or more motor carriers’ registrations, or require compliance with this subpart, upon a determination that the motor carriers use or have used common ownership, common management, common control, or common familial relationships to enable any or all such motor carriers to avoid compliance, or to mask or otherwise conceal noncompliance with regulations under this subchapter.

#### § 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 of avoiding, masking or concealing.

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) 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 Common ownership, management, control or familial relationship.

(a) The Agency Official may determine that two or more motor carriers have common ownership, common management, common control or common familial relationship if there is substantial continuity between the motor carriers such that one is merely a continuation of the other.

(b) In making the determination in paragraph (a) of this section, the Agency Official may consider, among other things, the following factors:

(1) Whether a new or affiliated motor carrier was used for the purpose of avoiding compliance or masking or otherwise concealing noncompliance with the regulations prescribed under 49 U.S.C., Chapter 311, subchapter III.

In weighing this factor, the Agency Official may consider the stated business purpose for the creation of the new or affiliated motor carrier;

(2) The motor carriers' safety performance histories, including, among other things, safety violations and enforcement actions, if any;

(3) Consideration exchanged for assets sold or transferred between motor carriers;

(4) Dates the motor carriers were created, dissolved or ceased operations;

(5) Commonality of shareholders, investors, officers, managers and employees;

(6) The relationships, if any, between the motor carriers' shareholders, investors, officers, managers, employees or other persons;

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

(8) Identity of motor vehicle equipment;

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

(10) Continuation of facilities and other physical assets;

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

(12) Continuation or commonality of advertising, corporate name, or other acts through which the motor carriers hold themselves out to the public.

### § 385.913 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) *Commencement of proceedings.* The Agency Official commences a proceeding under this section by issuing an order, 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 why its registration should not be suspended;

(4) Informs the motor carrier that its response to the show cause order must be in writing 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) who are 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 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.

(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 the 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 the Assistant Administrator for administrative review of the order within 15 days of service of the order suspending registration;

(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 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 this section. The petition must be in writing and served on the Assistant Administrator, Federal Motor Carrier Safety Administration, 1200 New Jersey Ave. SE., Washington, DC 20590-0001, Attention: Adjudications Counsel or by electronic mail to [FMCSA.Adjudication@dot.gov](mailto:FMCSA.Adjudication@dot.gov). A copy of the petition must also be served on the Agency Official.

(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 request review waives the right to 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 factual and procedural issues in dispute; and

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

(3) The Agency Official may serve a response to the petition for review no later than 15 days following service of the petition.

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

(5) The Assistant Administrator will issue a written decision on the petition for review within 30 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, whichever is earlier.

(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 the petitioner and Assistant Administrator.

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

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

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

#### **§ 385.915 Revocation proceedings.**

(a) *General.* The Agency Official may issue an order to revoke a motor carrier's registration, if he or she determines that the motor carrier has willfully violated an order issued under § 385.913(d)(1)(i) or (ii), for a period of at least 30 days.

(b) *Commencement of proceedings.* The Agency Official may commence a proceeding under this section by issuing an order to the motor carrier and serving a copy on the person(s), if any, who intervened under § 385.913(c). The order must:

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

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

(3) Direct the motor carrier to show good cause within 30 days why registration should not be revoked;

(4) Inform the motor carrier that the response to the show cause order must be in writing and include all documentation, if any, the motor carrier wants considered;

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

(6) Provide notice to the person(s), if any, who have intervened under § 385.913(c) of their right to intervene in the proceeding; and

(7) Inform the motor carrier that its registration will be revoked 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.* The person(s) who exercised their right to intervene under § 385.913(c) 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. A person who did not

intervene under § 385.913(c) may not intervene under this section.

(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 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;

(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 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 § 385.917.

(e) *Administrative review.* The motor carrier or an intervening person may petition the Assistant Administrator for review of an order issued under this section by following the procedures set forth in § 385.913(e).

#### **§ 385.917 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 is the Final Agency Order. 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 as a new entrant under 49 CFR part 385 and comply with all applicable new entrant requirements.

(f) If the Agency Official denies the petition, the petitioner may submit a petition for review of the denial with the Assistant Administrator, Federal Motor Carrier Safety Administration, 1200 New Jersey Ave. SE., Washington, DC 20590-0001, Attention: Adjudication Counsel, or by electronic mail to [FMCSA.Adjudication@dot.gov](mailto:FMCSA.Adjudication@dot.gov). 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 disputed factual or procedural issues 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 Assistant Administrator will issue a written decision on the petition for review within 60 days. The Assistant Administrator's decision constitutes the Final Agency Order.

#### **§ 385.919 Other orders unaffected.**

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. A motor carrier subject to an order issued under this subpart remains subject to the suspension and revocation provisions of 49 U.S.C. 13905 for violations of regulations governing their operations.

#### **§ 385.921 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.

(c) Any two or more motor carriers that the Agency determines, under this subpart, use or have used common ownership, common management, common control, or common familial relationships to enable such motor carriers to avoid compliance, or mask or otherwise conceal noncompliance, shall be subject to the civil or criminal penalty provisions of 49 U.S.C. 521(b) and applicable regulations.

#### **§ 385.923 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.

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

3. The authority citation for part 386 is revised 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; 49 CFR 1.86 and 1.87; and Sec. 32112, Pub. L. 112–141.

4. 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 §§ 385.913 or 385.915.

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

Issued on: October 31, 2012.

**Anne S. Ferro,**  
Administrator.

[FR Doc. 2012–27569 Filed 11–9–12; 8:45 am]

**BILLING CODE 4910–EX–P**

#### **DEPARTMENT OF COMMERCE**

#### **National Oceanic and Atmospheric Administration**

#### **50 CFR Part 648**

[Docket No. 121022572–2572–01]

RIN 0648–XC318

#### **Fisheries of the Northeastern United States; Atlantic Herring Fishery; Adjustment to 2013 Annual Catch Limits**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Proposed rule; request for comments.

**SUMMARY:** Through this action NMFS proposes to reduce the 2013 annual catch limits (ACLs) for the Atlantic herring (herring) fishery to account for catch overages in 2011 and to prevent overfishing.

**DATES:** Public comments must be received no later than 5 p.m., Eastern Standard Time, on December 13, 2012.

**ADDRESSES:** Copies of supporting documents, the 2010–2012 Herring Specifications and Amendment 4 to the Herring Fishery Management Plan (FMP) are available from: Paul J. Howard, Executive Director, New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950, telephone (978) 465–0492. These documents are also accessible via the Internet at <http://www.nero.nmfs.gov>.

You may submit comments, identified by NOAA–NMFS–2012–0197, by any one of the following methods:

- **Electronic Submission:** Submit all electronic public comments via the Federal e-Rulemaking Portal [www.regulations.gov](http://www.regulations.gov). To submit comments via the e-Rulemaking Portal, first click the “submit a comment” icon, then enter NOAA–NMFS–2012–0197 in the keyword search. Locate the document you wish to comment on from the resulting list and click on the “Submit a Comment” icon on the right of that line.

- **Mail:** NMFS, Northeast Regional Office, 55 Great Republic Drive, Gloucester, MA 01930. Mark the outside of the envelope “Comments on Adjustment to 2013 Herring Catch Limits.”

- **Fax:** (978) 281–9135, Attn: Lindsey Feldman.

**Instructions:** Comments must be submitted by one of the above methods to ensure that the comments are

received, documented, and considered by NMFS. Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and will generally be posted for public viewing on [www.regulations.gov](http://www.regulations.gov) without change. All personal identifying information (e.g., name, address) submitted voluntarily by the sender will be publicly accessible. Do not submit confidential business information, or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter “N/A” in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word or Excel, WordPerfect, or Adobe PDF formats only.

**FOR FURTHER INFORMATION CONTACT:** Lindsey Feldman, Fishery Management Specialist, 978–675–2179, fax 978–281–9135.

#### **SUPPLEMENTARY INFORMATION:**

#### **Background**

The New England Fishery Management Council (Council) developed herring specifications for 2010–2012, which were approved by NMFS on August 12, 2010 (75 FR 48874). The stock-wide herring ACL (91,200 mt) is divided among three management areas, one of which has two sub-areas. Area 1 is located in the Gulf of Maine (GOM) and is divided into an inshore section (Area 1A) and an offshore section (Area 1B). Area 2 is located in the coastal waters between Massachusetts and North Carolina, and Area 3 is on Georges Bank (GB). The herring stock complex is considered to be a single stock, but there are inshore (GOM) and offshore (GB) stock components. The GOM and GB stock components segregate during spawning and mix during feeding and migration. Each management area has its own sub-ACL to allow greater control of the fishing mortality on each stock component. The management area sub-ACLs established for 2010–2012 were: 26,546 mt for Area 1A, 4,362 mt for Area 1B, 22,146 mt for Area 2, and 38,146 mt for Area 3.

Amendment 4 to the Herring FMP (Amendment 4) (76 FR 11373, March 2, 2011) revised the specification-setting process, bringing the Herring FMP into compliance with ACL and accountability measure (AM) requirements of the Magnuson-Stevens Fishery Conservation and Management Act (MSA). Under the FMP, if NMFS determines catch will reach 95 percent