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49 CFR Part 390

Federal Motor Carrier Safety Regulations; Definition of Commercial Motor Vehicle; Interim Final Rule

Federal Motor Carrier Safety Regulations; Requirements for Operators of Small Passenger-Carrying Commercial Motor Vehicles; Proposed Rule

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

49 CFR Part 390

[FHWA Docket No. FHWA–97–2858]

RIN 2125–AE22

Federal Motor Carrier Safety Regulations; Definition of Commercial Motor Vehicle

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Interim final rule; request for comments.

SUMMARY: The FHWA is amending the Federal Motor Carrier Safety Regulations (FMCSRs) to adopt the statutory definition of a commercial motor vehicle (CMV) found at 49 U.S.C. 31132. This action is in response to the Transportation Equity Act for the 21st Century (TEA–21). Section 4008(a) of TEA–21 amended the definition of the term ''commercial motor vehicle'' to cover vehicles ''designed or used to transport more than 8 passengers (including the driver) for compensation.'' The FHWA is revising its regulatory definition of CMV to be consistent with the statute, but is exempting the operation of these small passenger-carrying vehicles from all of the FMCSRs for six months to allow time for the completion of a separate rulemaking action published elsewhere in today's **Federal Register**. As a result of this action, the applicability of the FMCSRs will be the same as before the enactment of TEA–21 until March 3, 2000. Therefore, entities that were not subject to the FMCSRs prior to the enactment of TEA–21 are not required to make any changes in their operations until that date.

DATES: This rule is effective on September 3, 1999. Comments must be received on or before November 2, 1999.

ADDRESSES: Submit written, signed comments to FHWA Docket No. FHWA–97–2858, the Docket Clerk, U.S. DOT Dockets, Room PL–401, 400 Seventh Street, SW., Washington, DC 20590–0001. All comments received will be available for examination at the above address from 9 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays. Those desiring notification of receipt of comments must include a self-addressed, stamped envelope or postcard.

FOR FURTHER INFORMATION CONTACT: Mr. Larry W. Minor, Office of Motor Carrier Research and Standards, HMCS–10, (202) 366–4009; or Mr. Charles E. Medalen, Office of the Chief Counsel, HCC–20, (202) 366–1354, Federal Highway Administration, 400 Seventh Street, SW., Washington, D.C. 20590–0001. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

Internet users can access all comments that were submitted to the Docket Clerk, U.S. DOT Dockets, Room PL–401, 400 Seventh Street, SW., Washington, DC 20590–001, in response to previous rulemaking notices concerning the docket referenced at the beginning of this notice by using the universal resource locator (URL): http://dms.dot.gov. It is available 24 hours each day, 365 days each year. Please follow the instructions online for more information and help.

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Background

Section 204 of the Motor Carrier Safety Act of 1984 (MCSA) (Pub. L. 98–554, Title II, 98 Stat. 2832, at 2833) defined a ''commercial motor vehicle'' as one having a gross vehicle weight rating (GVWR) of 10,001 pounds or more; designed to transport more than 15 passengers, including the driver; or transporting hazardous materials in quantities requiring the vehicle to be placarded. This definition, codified at 49 U.S.C. 31132(1), was the basis for the regulatory definition of a CMV in 49 CFR 390.5, which determines the jurisdictional limits and applicability of most of the FMCSRs. The Senate Committee on Commerce, Science and Transportation, in a report which accompanied the MCSA stated: ''The 10,000-pound limit, which is in the current BMCS (Bureau of Motor Carrier Safety, now the FHWA's Office of Motor Carrier and Highway Safety) regulations, is proposed to focus enforcement efforts and because small vans and pickup trucks are more analogous to automobiles than to medium and heavy commercial vehicles, and can best be regulated under State automobile licensing, inspection, and traffic surveillance procedures.'' S. Rep. No. 98–424, at 6–7 (1984), reprinted in 1984 U.S.C.C.A.N. 4785, 4790–91.

Although the MCSA demonstrated congressional intent to focus the applicability of the FMCSRs on larger vehicles, Congress did not repeal section 204 of the Motor Carrier Act of 1935 (Chapter 498, 49 Stat. 543, 546). This statute, now codified at 49 U.S.C. 31502, authorizes the FHWA to regulate the safety of all for-hire motor carriers of passengers and property, and private carriers of property without respect to the weight or passenger capacity of the vehicles they operate.

When the Congress enacted the Commercial Motor Vehicle Safety Act of 1986 (CMVSA) (Pub. L. 99–570, Title XII, 100 Stat. 3207–170) to require implementation of a single, classified commercial driver's license program, it also limited the motor vehicles subject to the program to those designed to transport more than 15 passengers, including the driver (now codified at 49 U.S.C. 31301(4)(B) with slightly different wording). This, too, revealed the congressional policy of applying available Federal motor carrier safety resources to larger vehicles.

The ICC Termination Act of 1995 (ICCTA) (Pub. L. 104–88, 109 Stat. 803, 919) changed the MCSA's definition of a commercial motor vehicle. As amended, section 31132(1) defined a commercial motor vehicle, in part, as a vehicle that is ''designed or used to transport passengers for compensation, but exclud(es) vehicles providing taxicab service and having a capacity of not more than 6 passengers and not operated on a regular route or between specified places; (or) is designed or used to transport more than 15 passengers, including the driver, and is not used to transport passengers for compensation.'' The ICCTA authorized, but did not require, the FHWA to change the FMCSRs accordingly; the agency did not incorporate the amended language into the CMV definition in § 390.5. The agency notes that the ICCTA included the phrase ''designed or used'' in specifying the passenger-carrying threshold for the FMCSRs. This change will make the FMCSRs applicable based upon the number of passengers in the vehicle or the number of designated seating positions, whichever is greater. In other words, a bus designed to carry 13 people but actually carrying 18 would be subject to the FMCSRs.

Section 4008(a)(2) of TEA–21 (Pub. L. 105–178, 112 Stat. 107, June 9, 1998) again amended the passenger-vehicle component of the CMV definition in 49 U.S.C. 31132(1). Section 4008 also changed the weight threshold in the CMV definition by adding ''gross vehicle weight'' (GVW) to the previous ''gross vehicle weight rating'' (GVWR).

The agency may now exercise jurisdiction based on the GVW or GVWR, whichever is greater. A vehicle with a GVWR of 9,500 pounds that was loaded to 10,500 pounds GVW would therefore be subject to the FMCSRs if it was operating in interstate commerce. Commercial motor vehicle is now defined (in 49 U.S.C 31132) to mean a self-propelled or towed vehicle used on the highways in interstate commerce to transport passengers or property, if the vehicle—

(A) Has a gross vehicle weight rating or gross vehicle weight of at least 10,001 pounds, whichever is greater;

(B) Is designed or used to transport more than 8 passengers (including the driver) for compensation;

(C) Is designed or used to transport more than 15 passengers, including the driver, and is not used to transport passengers for compensation; or

(D) Is used in transporting material found by the Secretary of Transportation to be hazardous under section 5103 of this title and transported in a quantity requiring placarding under regulations prescribed by the Secretary under section 5103.

Under section 4008(b), operators of the CMVs defined by section 31132(1)(B) will automatically become subject to the FMCSRs one year after the date of enactment of TEA–21, if they are not already covered, ''except to the extent that the Secretary [of Transportation] determines, through a rulemaking proceeding, that it is appropriate to exempt such operators of commercial motor vehicles from the application of those regulations.''

The FHWA views section 4008 of TEA–21 as a mandate either to impose the FMCSRs on previously unregulated smaller capacity vehicles, or to exempt through a rulemaking proceeding some or all of the operators of such vehicles. Although the House Conference Report (H.R. Conf. Rep. No. 104–422 (1995)) on the ICCTA definitional change directed the agency not to impose on the States (as grant conditions under the Motor Carrier Safety Assistance Program (MCSAP)) the burden of regulating a new population of carriers covered by the definition, no such restriction is included in TEA–21 or its legislative history. The mandate of TEA–21 is thus stricter than that of the ICCTA. Still, the FHWA is authorized to undertake rulemaking to exempt some of these passenger vehicles from the FMCSRs.

FHWA's Advance Notice of Proposed Rulemaking

On August 5, 1998 (63 FR 41766), the FHWA published an advance notice of proposed rulemaking (ANPRM) to announce that the agency was considering amending the FMCSRs in response to section 4008(a) of the TEA–21, to seek information about the potential impact of the TEA–21 definition, and to request public comment on the question whether any class of vehicles should be exempted. The agency also requested comment on whether the term ''for compensation'' may be interpreted to distinguish among the types of van services currently in existence.

Discussion of Comments to the ANPRM

The FHWA received 733 comments in response to the ANPRM. The commenters included State and local government agencies, transit authorities, vanpool organizations, vanpool members, universities, trade associations, and members of Congress, as well as private citizens. Most (more than 720) of the commenters were opposed to making the FMCSRs applicable to the operation of small passenger-carrying CMVs. However, several commenters believed it is necessary to regulate these vehicles and, in certain cases, identified what they believe are the specific safety issues section 4008(a) was intended to resolve.

Comments Opposed to Making the FMCSRs Applicable to Small CMVs

The majority of the commenters opposed to the rulemaking were organizers and members of vanpools, and State and local agencies and vanpool associations that believe implementing section 4008(a) of TEA–21 would adversely impact vanpool participation by imposing more stringent standards on drivers of these vehicles. Some of the commenters argued there was no data to support imposing the FMCSRs on the operators of small CMVs while others emphasized the adverse impacts the rulemaking could have on transportation providers for elderly and disabled citizens.

Commenting on the issue of commuter transportation, the Southern California Association of Governments stated:

> The proposed expanded regulation would reduce the current number of commuters willing to volunteer to serve as vanpool drivers and back-up drivers. Members of a vanpool agree to the obligation on a volunteer basis within the commuting group. Currently, a free or partially subsidized commute and personal use of the vanpool vehicles on evenings and weekends is still not enough of an attraction for a large number of commuters. The proposed additional requirements, which include minimum driver training, written testing, behind-the-wheel testing, medical qualifications, drug and alcohol testing, imposed by the FHWA will result in volunteer vanpool driving to become extremely burdensome.

The Florida Department of Transportation, commenting about the impacts the rulemaking would have on transportation providers for the elderly and disabled, stated:

> The proposed amendment to the Federal Motor Carrier Safety Regulations (FMCSR) would have a significant impact to certain Florida rural transportation providers. These primarily include those operators that are located along or near the state border. These operators provide transportation services for disadvantaged persons needing transportation to and from certain medical and rehabilitation facilities. These transportation entities are either public or private-non-profit senior citizen or mental health facilities and designated as community transportation coordinators by Florida Statutes. [Their] operational areas are primarily rural and it is often necessary for these operators to transport passengers needing special care or treatment across state lines to facilities located in bordering states. These transportation operators receive funding and compensation for their services from local, state and federal funds and have been considered as ''eligible transit operators'' by the FHWA pursuant to the ICC Termination Act of 1995. Vehicles operated by these providers mainly consist of 15 passenger vans. These operators are currently exempted from the FMCSR since the 15 passenger vehicles operated do not meet the definition of a ''commercial motor vehicle'' in 49 U.S.C. Section 31132 . These operators are also exempted from the FHWA insurance requirements for interstate motor vehicles by [49 U.S.C. 31138(e)(4)].

The Iowa Department of Transportation expressed concerns that regulating small passenger-carrying CMVs would adversely impact motor carrier safety programs by using limited enforcement resources to regulate the entities operating these vehicles. The agency stated:

> State and local enforcement agencies have numerous enforcement demands on the regulation of straight trucks, truck tractors, tractors with semi-trailers, double bottoms, buses, and vehicles transporting hazardous materials. Expanding the motor carriers safety requirements to passenger carrying vehicles will be costly and a strain on inspector availability for what appears to be little public benefit.
>
> In a period when zero-based regulations are/have been developed and implemented, is it logical to expand the definition of a commercial motor vehicle to include 8-passenger vehicles? If 8-passenger vehicles are included, why not 6-passenger vehicles? Are we beginning to over-regulate? Safety is a major issue in conducting inspections. En-route inspections are kept to a minimum for buses. To protect passengers during an inspection requires special considerations and planning. Adding 8-passenger vehicles will continue to complicate inspection procedures with risks to passengers.

The Oregon Department of Transportation, Motor Carrier Transportation Branch, also expressed opposition to adopting the new definition of CMV. The Motor Carrier Transportation Branch (MCTB) stated:

The MCTB does not understand why the definition of commercial motor vehicle was amended in the [TEA–21] to include vehicles designed or used to transport more than eight passengers (including the driver) for compensation. Further, the MCTB questions whether including these smaller vehicles will improve highway safety.

[I]t is not apparent that these smaller vehicles represent a significant danger. In fact, this move to regulate smaller vehicles contradicts the current Motor Carrier Regulatory Relief and Safety Demonstration Project. Little, if any, safety benefit may result in including these smaller vehicles under the jurisdiction of the motor carrier safety regulations. As stated in the advanced notice of proposed rulemaking: request for comment, ''vans and pickup trucks are more analogous to automobiles than to medium and heavy commercial vehicles, and can be best regulated under State licensing, inspection, and traffic surveillance procedures.

The International Taxicab and Livery Association (ITLA) opposed adopting the new definition of CMV and provided estimates of the number of businesses that would be affected by the rulemaking, as well as the number of vehicles and drivers that would be subject to Federal safety requirements if the FHWA implemented section 4008 of the TEA–21. The ITLA stated:

According to information available to ITLA, there are approximately 50,000 limousines in use that would be affected by the definitional change. It should be noted that there are over 9000 limousine operators nationwide (also operating premium sedan services), and that the median fleet size is less than 5. In addition, the average annual miles operated by limousines is approximately 23,000 miles.

ITLA estimates that there are approximately 74,000 vans nationwide '' the breakdown between ''mini-vans'' and those affected by the proposed definition is not available. Van fleets average less than 10 vans, with an approximate annual mileage of 40,000 per vehicle, and an average trip length of less than 8 miles lasting significantly less than 1 hour.

In September of 1998, the American Business Information (a mailing list sales company) released a sales catalog that reports the following information:

SIC code	Type of service	Number of U.S. companies
4111–01	Airport Transportation	4,752
4119–01	Handicapped Transportation	1,302
4119–03	Limousine Transportation	9,482
4121–01	Taxicab Transportation	7,348
	Total	22,884

The ITLA indicated that if the FHWA decides to make the FMCSRs applicable to the operation of small passenger-carrying vehicles, approximately 14,000 companies, 125,000 vehicles, and 165,000 drivers would be covered.

Comments in Support of Making the FMCSRs Applicable to Small CMVs

Of the 733 comments submitted in response to the agency's ANPRM, only a few (less than 13) expressed support for implementing section 4008(a). The reasons for supporting the adoption of the revised definition of a CMV varied from the belief that highway safety would be improved if the commercial driver's license and controlled substances and alcohol testing rules were applicable to drivers of small passenger-carrying vehicles, to the belief that applying the safety regulations to these vehicles would improve school bus transportation. None of the commenters in support of regulating small passenger-carrying vehicles believed implementing section 4008(a) of the TEA–21 would result in adverse impacts to those businesses.

The United Motor Coach Association (UMA) stated:

UMA's reason for pursuing a legislative change stemmed from the rising tide of uninsured and/or unsafe carriers operating from or through commercial zones (as defined in 49 CFR Part 372), particularly in Texas and the southwestern states. In fact, the problem was so severe in Texas that McAllen City officials petitioned the ICC to severely restrict the motor carrier commercial zone surrounding that city.

Subsequent research by UMA and its operator member companies indicate that the problem is not simply a southern border issue. It is a growing problem that is National in scope. Exempted passenger carriers recognize that municipal commercial zones provide a safe haven from federal safety regulations. These protected and unregulated interstate bus operators perform identical service to that of the regulated companies that provide bus service using larger vehicles. The unregulated carriers are very aware of their current exempt status. They have generally used large vans or mini-buses with a seating capacity of fewer than 15 passengers to escape compliance to Federal Motor Carrier Safety Regulations (FMCSRs). (Manufacturers of these small buses routinely market the vehicles by highlighting their regulation exempt status in their promotions.) In the majority of instances, unregulated service providers operate out of urban locations that fall within the commercial zone classification. UMA does not consider this exemption to be fair or equitable and believes that passenger safety is compromised.

Consolidated Safety Services stated:

During ten years of reviewing the level of compliance with applicable regulations by companies offering passenger travel, we have seen regulatory standards for non-CMV vehicle operations that range from comprehensive to non-existent. We routinely see companies who restrict equipment inventory for the sole purpose of avoiding the costs and efforts associated with compliance with the FMCSRs. Attitudes displayed towards safety in these instances are generally very casual in nature and cause considerable concern. It should be noted that we also see non-CMV carriers whose efforts to provide safe transportation should be commended since they apply the standards published in the FMCSRs even though not required.

Greyhound stated:

Commercial van interstate service has grown dramatically in recent years. It is difficult to document the precise size of the population of commercial vans or their growth because the federal government historically has not regulated them and thus has not kept statistics on them. However, reports of Greyhound managers throughout the country have made it clear that commercial van interstate service has grown significantly.

In 1995, Greyhound documented that growth with a report focusing on one city, Houston. That report, which was shared with DOT and Congress, showed that there were literally dozens of operators performing van and bus service from points in Mexico to destinations throughout the United States. Some of the bus service was licensed as ''charter and tour'' service and thus was regulated, but none of the van service was, or is, subject to any federal safety regulation.

With regard to the impacts section 4008(a) of TEA–21 would have on student transportation, the National School Transportation Association (NSTA) stated:

NSTA supports the proposal to revise the definition of ''commercial motor vehicle'' to include vehicles designed to transport more than 8 passengers. NSTA has long held the position that all school-age children deserve the highest standard of safety, regardless of who owns the vehicle, who operates the vehicle, or how many passengers the vehicle will seat. This proposal will bring all vehicles operating in similar capacity under the same regulations.

Among the State agencies that support the TEA–21 provision, the Colorado Highway Patrol indicated there are safety benefits to regulating smaller vehicles. The Colorado Highway Patrol stated:

The Colorado State Patrol supports the revision which would require a ''Commercial vehicle designed or used to transport more than 8 passengers (including the driver) for compensation'' to be subject to the FMCSR's with qualifications identified below. Most of these vehicles were subject to regulation under the ICC prior to its termination in 1995. Why should passenger carriers, subject to prior regulation by the ICC, be released from regulatory requirements under FHWA? In Colorado the Public Utilities Commission (COPUC) already regulates for-hire passenger carriers (including taxi cabs). This rule should not apply to private motor carrier of passengers (PMCP), business and non-business, (as defined in 390.5).

FHWA Response to Comments

The FHWA has considered all of the comments received in response to the ANPRM and determined there is insufficient data concerning the safety performance of motor carriers operating CMVs designed or used to transport 9 to 15 passengers (including the driver) for compensation, to justify making the FMCSRs applicable to them at this time. Commenters to the docket have expressed opinions for and against regulating operators of passenger-carrying vehicles designed to transport 9 to 15 passengers (including the driver) but none of the commenters have presented safety data that could be useful in deciding whether to regulate such motor carriers. While the FHWA acknowledges that there may be safety benefits to extending the applicability of the FMCSRs to the operation of small passenger-carrying CMVs for compensation, a mere assumption does not satisfy the agency's obligation to quantify the benefits of rulemaking and to prove that the benefits exceed the costs to the relevant segment of the industry and U.S. consumers.

Safety Performance Data

The FHWA is not aware of any accident databases that would enable the agency to estimate the annual accident involvement of small passenger-carrying vehicles, operated for compensation in interstate commerce. The absence of such data makes it difficult to determine whether the accident involvement of these vehicles warrants Federal regulation. For example, the agency is unable to determine whether the number of accidents for this population of CMVs suggests these vehicles are over represented in crashes involving fatalities, injuries, or disabling damage to one or more vehicles (i.e., whether the number of accidents is greater than one would expect given the population of vehicles), which in turn may be an indicator of problems with the safety management controls for the motor carriers operating the vehicles. Also, the FHWA does not have information that would enable the agency to examine the causes of or contributing factors to accidents these motor carriers are typically involved in to determine which, if any, of the FMCSRs could have made a difference in the outcome.

The FHWA has reviewed information from the National Highway Traffic Safety Administration's (NHTSA) Fatality Analysis Reporting System (FARS) and General Estimates System (GES) and determined that there is information concerning the accident involvement of the class of vehicles covered by section 4008 of the TEA–21, but no practical means to distinguish between accidents involving interstate motor carriers of passengers (either private or for-hire) and those involving intrastate motor carriers, or those involving commuter vanpools operated by individuals and not in the furtherance of a commercial enterprise.

The FHWA also searched for information from the National Transportation Safety Board (NTSB) and the Customs Service—because some commenters made reference to the operational safety of motor carriers transporting passengers to and from Mexico—to better understand safety issues concerning the operation of small passenger-carrying vehicles. The NTSB has no published studies indicating a safety problem with this population of motor carriers. The Customs Service, while maintaining records on the number of vehicles crossing the border, does not have information on either the actual number of Mexican-owned CMVs that enter the U.S., or on how many of each type of CMV enter the country. The Customs Service does not record information on each vehicle, or whether the vehicle is operated by a U.S. or foreign motor carrier. To further complicate matters, many vehicles used in cross-border operations may go through customs more than once a day. Also, the Customs Service does not collect CMV accident statistics.

The FHWA believes it is inappropriate to make the FMCSRs applicable to the operation of small passenger-carrying vehicles unless there is data to suggest operational safety problems.

Estimating the Population of Motor Carriers, Drivers, and Vehicles

In addition to difficulties in evaluating the safety performance of motor carriers operating small passenger-carrying vehicles, the FHWA has limited information on the number of vehicles and drivers that would be covered by the FMCSRs. The FHWA has reviewed its database of for-hire motor carriers of passengers who have interstate operating authority.

Although TEA–21 did not define the term ''for compensation'' as used in the amended definition of CMV, the FHWA has, for the purpose of this rulemaking and analysis, focused on for-hire motor carriers of passengers operating vehicles designed to transport less than 16 passengers, including the driver. These carriers are currently required to obtain operating authority from the FHWA (49 CFR 365).

As of April 1999, there are 1,636 for-hire motor carriers of passengers with active authority. Each of these carriers has on file with the FHWA proof of financial responsibility at the minimum level required for the operation of vehicles designed to transport less than 16 passengers. This number does not include pending applications for operating authority, passenger carriers shown as inactive because their authority was revoked for failure to maintain evidence of the required minimum levels of financial responsibility, or private motor carriers of passengers. There is no indication that Congress intended the FHWA to consider regulating private motor carriers of passengers (as defined in 49 CFR 390.5) operating vehicles designed to transport less than 16 passengers so the agency has not made an effort to estimate the number of such carriers.

The FHWA has information on the number of for-hire motor carriers of passengers who have complied with the operating authority requirements, but the agency does not have data on the number of drivers employed by these motor carriers. The FHWA cannot determine what percentage of these drivers would meet the applicable requirements of part 391 on driver qualifications or how their typical work schedules would be disrupted by having to comply with part 395 concerning hours of service for drivers. Therefore,

the FHWA can estimate neither the costs nor the benefits of applying the driver-related requirements of the FMCSRs to the vehicle operators based on the information currently in its databases.

In short, the FHWA believes the ITLA's estimates of the number of small passenger-carrying vehicles (or their drivers) operating in interstate commerce for compensation should be considered, but cannot confirm the accuracy of those estimates. The FHWA cannot estimate with certainty the regulatory burden associated with making parts 391, 395, or 393 applicable to these drivers and CMVs. However, in a separate rulemaking action published elsewhere in today's **Federal Register**, the agency is proposing certain requirements to improve its ability to gather data about the operators of small passenger-carrying vehicles.

Commercial Driver's License and Controlled Substances and Alcohol Testing

Many of the commenters, both for and against extending the applicability of the FMCSRs to small passenger-carrying CMVs, misconstrued section 4008 as mandating application of the CDL and controlled substances and alcohol testing rules (parts 383 and 382, respectively) to the drivers of such vehicles. Section 4008 does not amend the CMV definition used for those programs (49 U.S.C. 31301). Therefore, the potential benefits that some commenters argued would be associated with imposing the CDL and controlled substances and alcohol regulations can not be achieved. Conversely, commenters who argued against adopting the amended CMV definition on the assumption that it would make parts 382 and 383 applicable, thereby making it more difficult to find vanpool drivers, were also mistaken. Furthermore, since section 4008 is targeted at the operation of passenger-carrying vehicles for compensation, vanpools would generally remain unregulated, as explained below.

Applicability of Section 4008 to Vanpools

The FHWA agrees with commenters that the agency should not make the FMCSRs applicable to vanpools. The agency recognizes the importance of vanpools in reducing traffic congestion and air pollution caused by automobile emissions and agrees that having to comply with the FMCSRs would increase the costs of operating vanpools and could make it more difficult to get people to volunteer to drive vans. The FHWA does not believe Congress intended the agency to regulate commuter vanpools. The use of the phrase ''for compensation'' in section 4008 of TEA–21 suggests that the implementing regulations be limited to vans operated in the furtherance of a commercial enterprise, which is generally not the case for commuter vanpools. Certain vanpool services may, depending on whether the FHWA regulates the operation of small passenger-carrying vehicles and how the agency interprets or defines ''for compensation,'' be subject to the safety regulations. However, the agency does not intend to regulate commuter vanpools that are not operated in the furtherance of a commercial enterprise.

The FHWA considers the phrase ''for compensation'' to be synonymous with ''for hire.'' On April 4, 1997 (62 FR 16370), the FHWA published Regulatory Guidance for the Federal Motor Carrier Safety Regulations. Page 16407 of that notice includes an interpretation of ''for-hire motor carrier.'' The guidance states:

> The FHWA has determined that any *business* (emphasis added) entity that assesses a fee, monetary or otherwise, directly or indirectly for the transportation of passengers is operating as a for-hire carrier. Thus, the transportation for compensation in interstate commerce of passengers by motor vehicles (except in six-passenger taxicabs operating on fixed routes) in the following operations would typically be subject to all parts of the FMCSRs, including part 387: whitewater river rafters; hotel/motel shuttle transporters; rental car shuttle services, etc. These are examples of for-hire carriage because some fee is charged, usually indirectly in a total package charge or other assessment for transportation performed.

The reference to six-passenger taxicabs operating on fixed routes was included in the guidance because of the ICC Termination Act of 1995 (ICCTA) (Pub. L. 104–88, 109 Stat. 803, 919). The ICCTA amended the statutory definition of a CMV prior to TEA–21, adding ''designed or used to transport passengers for compensation, but exclud(es) vehicles providing taxicab service and having a capacity of not more than 6 passengers and not operated on a regular route or between specified places.'' The TEA–21 resulted in the removal of this clause from the definition of CMV.

The FHWA understands that passengers in many vanpools pay a monthly fee to an individual, who either owns or leases the van. The FHWA does not believe this is a business. The individual uses this money not as a source of income or in the furtherance of a commercial enterprise, but to pay for the van, insurance premiums, and maintenance. There may be surplus funds each month that are put in reserve to cover unexpected costs or losses of revenue during periods in which vanpool membership decreases. The FHWA, however, does not believe that this type of arrangement should be considered ''for compensation'' and does not intend to regulate such operations. The agency requests comments on the nature of these operations.

Minimum Levels of Driver Training and Testing

Although numerous commenters argued against adopting the TEA–21 definition of CMV because they believe the FMCSRs require a minimum of 8 hours of driver training, a written test, and a road test, these arguments are based upon a misunderstanding of the current safety regulations, and an assumption that all driver-related FMCSRs would be applicable to drivers of small passenger-carrying CMVs.

If the FHWA made the FMCSRs applicable to drivers of small passenger-carrying CMVs, the drivers of such vehicles would, unless an exception were provided, be required to comply with all of the provisions of part 391, Qualifications of Drivers. However, part 391 does not require that drivers of CMVs have 8 hours of training. Section 391.11 requires that drivers be capable of operating safely the CMV they are assigned, and have a valid operator's license issued by only one State or jurisdiction. The determination of the driver's ability may be based upon experience, training, or both. The regulations do not specify a minimum amount of training or experience.

Section 391.11(b)(8) requires drivers to successfully complete a road test, or present an operator's license (or a certificate of road test) to the motor carrier for acceptance as equivalent to a road test. Section 391.33, Equivalent of road test, allows motor carriers to accept a CDL in lieu of administering a road test if the driver was required to successfully complete a road test to obtain the license. If the FHWA required drivers of small passenger-carrying vehicles to comply with all the requirements of part 391, the agency could consider allowing motor carriers to accept a license other than a CDL if that license required a road test. Even if the agency required drivers to take road tests, the regulatory burden would be minimal. The operating characteristics of vehicles designed or used to transport 9 to 15 passengers, including the driver, are similar to vehicles most drivers are capable of driving (i.e., vans, full-sized sport utility vehicles, commuter vans), and the amount of time and effort needed to conduct the road test (as

specified in § 391.31) would not be unreasonable.

With regard to a written test, the FHWA does not require that non-CDL drivers be subjected to a written test. The FHWA rescinded the written examination requirements of part 391 on November 23, 1994 (59 FR 60319).

Transportation of Children

In response to commenters that believe the adoption of section 4008 would either enhance or reduce the transportation safety of school children, the FHWA notes that the FMCSRs include exceptions for all school bus operations (as defined in § 390.5), and transportation performed by the Federal government, a State, or any political subdivision of a State (§ 390.3(f)(2)). School bus operation means the use of a school bus to transport school children and/or school personnel from home to school and from school to home. School bus is defined (§ 390.5) as a passenger motor vehicle designed to carry more than 10 passengers in addition to the driver, and used primarily for school bus operations. School bus operations are not regulated by the FHWA, even when such operations are conducted by a for-hire motor carrier of passengers. Irrespective of the decision the FHWA ultimately makes concerning the applicability of the TEA–21 definition to small passenger CMVs, vans used to transport children to and from school would not be regulated as a result of that rulemaking.

Applicability of Financial Responsibility and Operating Authority Regulations

In response to commenters who believe the FHWA should make the financial responsibility (49 CFR 387) and operating authority (49 CFR 365) requirements applicable to the operators of small passenger-carrying vehicles, it should be noted that these requirements are already applicable to for-hire motor carriers of passengers operating vehicles designed to transport less than 16 passengers, with certain exceptions. The financial responsibility exceptions, however, cover many of the operations of interest to commenters, e.g., school bus operations and most vanpools (see § 387.27(b)(1), (3) and (4)). Since these exceptions are statutory (see 49 U.S.C. 31138(e)(1) and (3)), the FHWA has no discretion to rescind them. Subpart B of part 387 requires a minimum of $1.5 million in public liability for the operation of vehicles with a seating capacity of 15 passengers or less, unless the vehicles fall into one of the exempt categories. Part 365 requires for-hire motor carriers to obtain operating authority and subpart C of part 387 requires them to file proof of financial responsibility.

FHWA Decision

Given the statutory deadline of June 9, 1999, for deciding whether to exempt the operation of small passenger-carrying CMVs from the FMCSRs, the FHWA has decided that it is in the public interest temporarily to limit the applicability of the FMCSRs to the motor carrier operations covered prior to the enactment of TEA–21. The FHWA has no useful data on the relative safety of small passenger CMVs. In the absence of such data, the agency has no rational basis for extending the FMCSRs to this class of vehicles.

However, the FHWA believes that action must be taken to learn more about the operational safety of motor carriers operating small passenger vehicles for compensation. In a notice of proposed rulemaking published elsewhere in today's **Federal Register**, the agency is proposing that these motor carriers be required to complete a motor carrier identification report (49 CFR 385.21), and comply with the FHWA's CMV marking requirement (49 CFR 390.21) which would include displaying a USDOT motor carrier identification number on all vehicles designed to transport 9 to 15 passengers for compensation in interstate commerce. The agency would also require that these motor carriers be required to maintain an accident register (49 CFR 390.15).

Discussion of the Interim Final Rule

The FHWA is amending the FMCSRs to adopt the revised statutory definition of CMV provided by section 4008 of TEA–21. The FHWA is revising its definition of CMV found at § 390.5 and adding a new paragraph (f)(6) to § 390.3 giving operators of CMVs designed or used to transport 9 to 15 passengers a six-month exemption from all of the FMCSRs. The FHWA is exempting until March 6, 2000 the operation of small passenger-carrying vehicles from all of the FMCSRs to allow time for the completion of a separate rulemaking action published elsewhere in today's **Federal Register**. As a result of this action, the applicability of the FMCSRs will be the same as before the enactment of TEA–21 until that date. Therefore, entities that were not subject to the FMCSRs prior to the enactment of TEA–21 are not required to make changes in their operations to comply with the safety regulations.

The FHWA, however, is adopting the statutory changes to the definition of CMV concerning the use of ''gross vehicle weight'' in addition to ''gross vehicle weight rating,'' and ''designed or used'' to transport passengers instead of ''designed'' to transport passengers.

Rulemaking Analysis and Notices

Under the Administrative Procedure Act (APA) (5 U.S.C. 553(b)), an agency may waive the normal notice and comment requirements if it finds, for good cause, that they are impracticable, unnecessary, or contrary to the public interest.

In this case, notice and comment are unnecessary. The rule adopts the statutory definition of a ''commercial motor vehicle'' and an exemption for passenger vehicles with a capacity of 9 to 15, including the driver, that are operated for compensation in interstate commerce. Because this rule makes the applicability of the FMCSRs the same as before the enactment of TEA–21, and codifies two minor TEA–21 amendments that eliminate jurisdictional loopholes from the CMV definition, the FHWA finds good cause to waive prior notice and comment. The current regulations were adopted through notice and comment rulemaking and do not require further procedural review. Nonetheless, the agency's August 5, 1998 ANPRM (63 FR 41766) sought information from operators of small passenger vehicles and other interested parties; the FHWA received more than 700 responses. As explained in the preamble, the commenters were overwhelmingly opposed to the application of the FMCSRs to these vehicles. The most significant conclusion drawn from those comments, and from every other source the agency consulted, is that accident data which would allow the FHWA to determine the relative safety of small passenger CMVs, and thus to perform an analysis of the costs and benefits of subjecting them to the FMCSRs, is not currently available. The FHWA has therefore decided that it could not, consistent with the requirements of the APA and other laws, impose on small passenger CMVs the burdens of complying with the FMCSRs. Because this final rule establishes an exception to make the applicability of the FMCSRs the same as before the enactment of TEA–21, and will remain in effect only for 6 months while the agency solicits and evaluates comments on the companion NPRM published elsewhere in today's issue of the **Federal Register**, the FHWA finds that there is no need to publish this temporary measure for notice and comment.

As explained above, however, the FHWA also believes that operators of these vehicles should be required to

keep accident registers and display a USDOT number. Since these changes are substantive, the agency is publishing an NPRM on that subject elsewhere in this issue of the **Federal Register**. Those proposals, if adopted, would enable the agency to collect safety information specific to small passenger CMVs. If the data demonstrate that a serious safety problem exists, the FHWA could then propose to apply some or all of the FMCSRs to passenger vehicles with a capacity of 9 to 15.

Accordingly, the FHWA finds that there is good cause to waive prior notice and comment for the limited reasons described above. For the same reasons, the FHWA finds, pursuant to 5 U.S.C. 553(d)(3), that there is good cause for making the interim final rule effective upon publication. Comments received will be considered in evaluating whether any changes to this interim final rule are required. All comments received before the close of business on the comment closing date indicated above will be considered and will be available for examination in the docket at the above address. Comments received after the comment closing date will be filed in the docket and will be considered to the extent practicable. In addition to late comments, the FHWA will also continue to file relevant information in the docket as it becomes available after the comment period closing date, and interested persons should continue to examine the docket for new material.

Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

The FHWA has determined that this action is a significant regulatory action within the meaning of Executive Order 12866 and significant within the meaning of Department of Transportation regulatory policies and procedures because of the substantial public interest concerning the possible extension of the applicability of the FMCSRs to a larger population of motor carrier operations. This interim final rule exempts temporarily from the FMCSRs the operation of vehicles designed or used to carry between 9 and 15 passengers (including the driver), for compensation in interstate commerce. As a result of this action, the applicability of the FMCSRs is changed to be the same as before the enactment of section 4008. The FHWA is simply establishing an exception until the agency has better information upon which to make a determination of the costs and benefits. The agency is not making any estimate of either the costs or benefits of either using the statutory definition or exempting all, or some, of these operations.

Regulatory Flexibility Act

The FHWA has considered the effects of this regulatory action on small entities and determined that this rule will not affect a substantial number of small entities. The FHWA is revising its regulatory definition of CMV, at 49 CFR 390.5, to be consistent with the statute, but exempting temporarily the operation of small passenger-carrying vehicles from all of the FMCSRs for six months to allow the agency to complete a separate rulemaking action published elsewhere in today's **Federal Register**. As a result of this action, the applicability of the FMCSRs will be the same as before the enactment of TEA–21. Entities that were not subject to the FMCSRs prior to the enactment of TEA–21 are not required to make changes in their operations to comply with the safety regulations. The FHWA, in compliance with the Regulatory Flexibility Act (5 U.S.C. 601–612), has considered the economic impacts of this rulemaking on small entities and certifies that this rule will not have a significant economic impact on a substantial number of small entities. The FHWA will reexamine this certification after reviewing the comments to this rule and the companion NPRM.

Executive Order 12612 (Federalism Assessment)

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that this rulemaking does not have sufficient Federalism implications to warrant the preparation of a Federalism assessment. Nothing in this document preempts any State law or regulation.

Executive Order 12372 (Intergovernmental Review)

Catalog of Federal Domestic Assistance Program Number 20.217, Motor Carrier Safety. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this program.

Paperwork Reduction Act

This action does not contain a collection of information requirement for the purposes of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

National Environmental Policy Act

The agency has analyzed this rulemaking for the purpose of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and has determined that this action does not have any effect on the quality of the environment.

Unfunded Mandates Reform Act

This rule does not impose an unfunded Federal mandate, as defined by the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1532 *et seq.*), that will result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year.

Regulation Identification Number

A regulatory identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

List of Subjects in 49 CFR Part 390

Highway safety, Motor carriers, Motor vehicle identification and marking, Reporting and record keeping requirements.

Issued on: August 30, 1999.

Kenneth R. Wykle,

Federal Highway Administrator.

In consideration of the foregoing, the FHWA amends title 49, Code of Federal Regulations, chapter III, as follows:

PART 390—[AMENDED]

1. The authority citation for part 390 continues to read as follows:

Authority: 49 U.S.C. 13301, 13902, 31132, 31133, 31136, 31502, and 31504; sec. 204, Pub. L. 104–88, 109 Stat. 803, 941 (49 U.S.C. 701 note); and 49 CFR 1.48.

2. Amend § 390.3 to revise paragraph (f)(5) by replacing the period with a semicolon, and add paragraph (f)(6) to read as follows:

§ 390.3 General applicability.

* * * * *

(f) *Exceptions.*

* * * * *

(6) The operation of commercial motor vehicles designed to transport less than 16 passengers (including the driver) until March 6, 2000.

2. Amend § 390.5 to revise the definition of ''commercial motor vehicle'' to read as follows:

§ 390.5 Definitions.

* * * * *

Commercial motor vehicle means any self-propelled or towed motor vehicle

used on a highway in interstate commerce to transport passengers or property when the vehicle—

(1) Has a gross vehicle weight rating or gross combination weight rating, or gross vehicle weight or gross combination weight, of 4,536 kg (10,001 pounds) or more, whichever is greater; or

(2) Is designed or used to transport more than 8 passengers (including the driver) for compensation; or

(3) Is designed or used to transport more than 15 passengers, including the driver, and is not used to transport passengers for compensation; or

(4) Is used in transporting material found by the Secretary of Transportation to be hazardous under 49 U.S.C. 5103 and transported in a quantity requiring placarding under regulations prescribed by the Secretary under 49 CFR, subtitle B, chapter I, subchapter C.

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