

DEPARTMENT OF TRANSPORTATION**Federal Highway Administration**

49 CFR Parts 361, 362, 363, 364, 385, 386 and 391

[FHWA Docket No. MC-96-18]

RIN 2125-AD64

Rules of Practice for Motor Carrier Proceedings; Investigations; Disqualifications and Penalties

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of proposed rulemaking (NPRM); request for comments.

SUMMARY: The FHWA proposes to amend its rules of practice for motor carrier safety, hazardous materials, and other enforcement proceedings, motor carrier safety rating procedures, driver qualification proceedings, and its schedule of penalties for violations of the Federal Motor Carrier Safety Regulations and the Hazardous Materials Regulations. The FHWA further proposes to add provisions on investigative authority and procedures and general motor carrier responsibilities. These rules would increase the efficiency of the practices, consolidate existing administrative review procedures, enhance due process and the awareness of the public and regulated community, and accommodate recent programmatic changes. The rules would apply to all motor carriers, other business entities, and individuals involved in motor carrier safety and hazardous materials administrative actions and proceedings with the FHWA after the effective date of the final rule.

DATES: Comments must be received on or before July 29, 1996.

ADDRESSES: Submit written, signed comments to FHWA Docket No. MC-96-18, FHWA, Office of the Chief Counsel, HCC-10, Room 4232, 400 Seventh Street SW., Washington, DC 20590. All comments received will be available for examination at the above address from 8:30 a.m. to 3:30 p.m., e.t., Monday through Friday, except Federal holidays. Those desiring notification of receipt of comments must include a self-addressed, stamped postcard/envelope.

FOR FURTHER INFORMATION CONTACT: Paul Brennan, Office of the Chief Counsel, (202) 366-0834, Federal Highway Administration, 400 Seventh Street SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:**Introduction**

This rulemaking includes the first comprehensive rewrite of the FHWA's rules of practice for motor carrier administrative proceedings since 1985. It is the forerunner of a comprehensive revision of the Federal Motor Carrier Safety Regulations (FMCSR) anticipated to follow the completion of a zero-based review of those regulations presently underway in the agency. These proposed regulations would appear in previously unused chapters of that portion of the Code of Federal Regulations reserved for the FMCSR, thus leaving ample room for the future revisions. The current rules of practice for safety enforcement and driver qualification proceedings, found in 49 CFR part 386 and in § 391.47, would be replaced by new part 363. New part 361 restates, explains and expands upon statutory authority, administrative enforcement powers, and general responsibilities. New part 364 is the first general treatment of penalties for violations of safety rules provided in regulatory form. The amendments embodied in these three proposed parts are based on the FHWA's experience enforcing the motor carrier safety regulations through part 386. It is intended that the new procedures would make administrative actions and proceedings more efficient while enhancing the guarantee of due process to carriers, individuals, and other entities by substantially increasing awareness of the consequences of noncompliance with commercial motor vehicle safety and hazardous materials regulations.

New part 362 would replace current part 385, which provides administrative review procedures within the safety ratings process. Safety ratings continue to gain in relative importance in the entire safety program in response to legislative mandate, as a part of agency programmatic changes, and in the significance attached to the ratings by the industry itself. Updated procedures will allow for better accommodation of these interests. Parts 385 and 386 would be deleted and reserved for future use.

This rulemaking preamble will first briefly discuss the current statutory background. Each proposed part is then analyzed by describing some of the antecedents of any corresponding current procedures, followed by a section-by-section analysis of the proposed rules. Finally, the proposed rules themselves appear.

Statutory Background

Congress has delegated certain powers to regulate interstate commerce to the Department of Transportation in numerous pieces of legislation, most notably in the Department of Transportation Act (DOT Act), section 6, Pub. L. 85-670, 80 Stat. 931 (1966). Section 55 of the DOT Act transferred the authority of the Interstate Commerce Commission (ICC) to regulate the qualifications and maximum hours of service of employees, the safety of operations, and the equipment of motor carriers in interstate commerce to the Federal Highway Administration (the agency), an operating administration of the DOT. 49 U.S.C. 104. This authority, first granted to the ICC in the Motor Carrier Act of 1935, Pub. L. 74-255, 49 Stat. 543, now appears in 49 U.S.C. Chapter 315. The regulations issued under this authority became known as the Federal Motor Carrier Safety Regulations (FMCSRs), appearing generally at 49 CFR parts 390-399. The administrative powers to enforce Chapter 315 were also transferred from the ICC to the DOT in 1966, and appear in 49 U.S.C. Chapter 5.

The Motor Carrier Safety Act of 1984 (1984 Act), Pub. L. 98-554, 98 Stat. 2832, restated, for the first time, the interstate safety authority in terms of particular classes of commercial motor vehicles (CMV). These statutory classes coincided identically with the definition of CMV adopted by the agency in the existing FMCSRs issued under the Motor Carrier Act of 1935. The 1984 Act is codified at 49 U.S.C. Chapter 311, Subchapter III. These two largely overlapping statutes, i.e., Chapters 311 and 315, serve as parallel and complementary authorities for issuance of safety regulations for motor carriers and commercial motor vehicles operating in interstate commerce.

It should be noted that both chapters define interstate commerce as trade, traffic, or transportation in the United States which is between a place in a state and a place outside of such state or is between two places in the same state through another state or place outside the state. The DOT and the ICC interpret as within this jurisdiction transportation wholly within a state which is part of a continuing through movement of property or passengers across state lines. This "crossing state lines" definition represents a delegation of less than the full power possessed by Congress to regulate interstate commerce. A more complete delegation is found in other laws in which all trade, traffic, and transportation affecting interstate commerce is deemed

interstate commerce regardless of its direct connection with a movement of goods across state lines.

For example, the Commercial Motor Vehicle Safety Act of 1986 (CMVSA), Pub. L. 99-570, 100 Stat. 3 207-170, 49 U.S.C. chapter 313) applies to trade, traffic, and transportation on public highways wholly within a state as affecting interstate commerce because such trade, traffic and transportation intermingles with cross-border movements and therefore affects interstate commerce. The CMVSA established a national commercial driver's license program (CDL) for all drivers of CMVs, which were defined to exclude certain smaller vehicles covered under the 1984 Act and longstanding FHWA regulations, unless the agency determined that it was appropriate to include them. The FHWA did restrict the CDL program to larger vehicles. At the same time, the CMVSA extended jurisdictional coverage to drivers in commerce that had previously been considered entirely intrastate and thus beyond the jurisdictional reaches of the earlier acts. This was a major departure from the traditional, ICC-inherited zone of jurisdiction based on the origin and destination of the cargo being transported. The distinction can be seen most readily in drug testing requirements, which were initially issued by DOT 1989 under its parallel general safety authority in sections 31502 and 31136. Congress enacted specific drug and alcohol testing statutory requirements in 1991 by amending the CMVSA (49 U.S.C. 31306). This action had the effect of expanding the reach of testing from drivers of vehicles carrying interstate cargo to drivers of any vehicles meeting the definition of "commercial motor vehicle" provided in the CMVSA, which, by their very nature, affect interstate commerce.

The Hazardous Materials Transportation Uniform Safety Act of 1990 (HMTUSA) Pub. L. 101-615, 104 Stat. 3244, replacing the Hazardous Materials Transportation Act (HMTA), Pub. L. 93-633, 88 Stat. 2156 (1975) required the DOT to issue regulations for the safe transportation of hazardous materials in inter- and intrastate commerce. 49 U.S.C. Chapter 51. The Research and Special Programs Administration (RSPA) of DOT issues the Hazardous Materials Regulations (HMR), which provide standards on the classification, packaging, handling, and registration of hazardous materials. The FHWA enforces the HMR in relation to the transportation of hazardous materials by highway.

The Motor Carrier Act of 1980, Pub. L. 96-296, 94 Stat. 793, and the Bus Regulatory Reform Act of 1982, Pub. L. 97-261, 96 Stat. 1121, established requirements for minimum levels of insurance for for-hire interstate motor carriers and all carriers of certain hazardous materials in inter- and intrastate commerce. 49 U.S.C. 31138-31139.

The Intermodal Safe Container Act of 1992, Pub.L. 102-548, 106 Stat. 3646, established weight certification requirements for tenderors and carriers of intermodal containers. 49 U.S.C. Chapter 59.

The various acts authorize the enforcement of the FMCSRs and HMRs and provide both civil and criminal penalties for violations. In practice, when circumstances dictate that an enforcement action be instituted, civil penalties are more commonly sought than criminal sanctions. The administrative rules proposed in this rulemaking apply, among other things, to the administrative adjudication of civil penalties assessed for violations of the FMCSR and the HMR.

Analysis

Part 361: Administrative

As proposed, this part sets forth the authority granted to the agency to enforce the commercial motor vehicle safety regulations—the FMCSRs and HMRs. It also describes the practices followed by the agency in exercising this authority and prescribes certain responsibilities imposed by these authorities upon motor carriers and others subject to these acts.

Background

Except for a somewhat obscure provision in appendix B to chapter III, subchapter B of the CFR, the authority for the agency's inspection and other administrative powers appears only in statute (see, e.g., 49 U.S.C. 501-525, 31133, and 5121). Standards and practices for the agency's training materials, policy guidance, and internal manuals which are available to the public, but only upon request. Including these standards and practices in the regulations would provide one convenient and authoritative reference source for all regulatees and put them on notice of what may be expected from Federal enforcement officials as well as what is expected of the regulated community.

Detailed intra-agency delegations of motor carrier safety-related functions at one time appeared in 49 CFR 301.60, but were removed in 1988 following a significant reorganization of the motor

carrier safety functions and anticipated republication of the regulations under new authority. 53 FR 2035 (January 26, 1988). Specific delegations of authority from the Administrator to the Office of Motor Carriers now appear only in FHWA organizational documents.

Section-by-Section Analysis

Section 361.101 Purpose

This part would spell out the authority and procedures used by the FHWA to conduct investigations and other enforcement activities related to commercial motor vehicle safety, and the corresponding obligations of the regulated industry. Its purpose is to inform the public of the agency's role, to increase awareness of and compliance with the safety regulations, and to facilitate public contact with FHWA officials enforcing the regulations.

361.102 Authority and Delegations

The first sentence of paragraph (a) would list the chapters of title 49, U.S. Code, in which Congress has conferred on the Secretary of Transportation the authority to regulate commercial motor vehicle safety. Many sections of these chapters are cited throughout this document. One statutory provision which is not mentioned again is 42 U.S.C. 4917, which gives the Secretary the authority to enforce Environmental Protection Agency standards for the limitation of noise emissions resulting from the operation of motor carriers engaged in interstate commerce. The regulations implementing this provision appear in part 325, and would not be amended in this rulemaking.

The second sentence of paragraph (a) would specify the administrative powers the FHWA may employ in carrying out its regulatory authority. The intention of this sentence would be to allow application of all of these powers in the enforcement of each relevant regulatory chapter (i.e., 49 U.S.C. chs. 51, 59, 311, 313, and 315). The powers specified are virtually identical to those listed in title 49 U.S.C. 5121 and 31133, which are to be used in the enforcement of chapters 51 and 311, respectively. The administrative powers to enforce chapter 315 are provided in chapter 5 (see 49 U.S.C. 501(b)). Because the jurisdiction of chapters 311 and 315 are identical as applied by the FHWA, with 49 U.S.C. 31136 and 31502 routinely cited as parallel authority for safety regulations, the administrative powers available to enforce chapter 315 may also be said to be coextensive with those under chapter 311.

The authority to investigate violations of chapter 313, the commercial driver's license program, including drug and alcohol testing, appears in 49 U.S.C. 322 and 31317. (See 12018(a) of the CMVSA of 1986, in which the FHWA is granted the power to issue such regulations as may be necessary to carry out the chapter). It is under this authority that the administrative powers in 49 U.S.C. 31133 and chapter 5 would be applied in this rule to enforcement of chapter 313. Similar authority to enforce chapter 59 may be found in 49 U.S.C. 5907.

Paragraphs (b) and (c) would restate the delegation of these authorities within the Department of Transportation from the Secretary to FHWA officials in the field who routinely contact motor carriers. The delegations are broad in order to allow flexibility. The term "agency" is used wherever possible when referring to FHWA officials. The exact delegations from the Secretary of Transportation which have been made to the Federal Highway Administration appear in 49 CFR 1.48. Further delegations within the FHWA appear in FHWA organizational documents (generally FHWA Order 1-1) available for review at FHWA regional offices. See 49 CFR part 301. All of these subdelegations of powers delegated to the Secretary of Transportation are within the agency's discretion and are carefully designed to comport with principles of fairness, due process, and efficiency.

Paragraph (d) would restate the delegation of authority to the States which is provided in 49 U.S.C. 31134. Because States are partners with the Federal Government in enforcing motor carrier safety laws, it is important to reemphasize that nothing in this part would preempt States from enforcing State law. Other parts of the regulations do, however, provide standards for the preemption of State laws. See 49 CFR part 355; part 397, subpart E; and § 382.109.

Section 361.103 Inspection and Investigation

With the exception of paragraph (e), this section would detail the scope of the FHWA power to conduct on-site inspections or, as they are more commonly called, compliance reviews, one of the administrative powers listed in the previous section. It would be reemphasized in paragraph (a) that this power applies in carrying out all of the listed commercial motor vehicle safety chapters of the U.S. Code. The language on the conduct of on-site inspection and copying of records and equipment is taken from 49 U.S.C. 504(c) and 5121(c), with the added proviso that such

inspections take place at reasonable times, a fundamental requirement of the law relating to administrative searches. Reasonable times would be further explained in paragraph (c) as the regular working hours of the carrier and certain other times in particular circumstances.

Consistent with 49 U.S.C. 504, the on-site inspection powers would apply only to motor carriers and other regulated entities, such as hazardous materials shippers and tenderors of intermodal containers. The term "motor carrier" is broadly defined in 49 CFR 390.5 as including a carrier's agents, officers, and representatives. In contrast, the other investigatory administrative powers, such as the power to issue subpoenas, require production of records, and take depositions, would apply to any entity so long as the administrative action is related to an authorized safety investigation. Thus, an entity perhaps not directly regulated by the FHWA, such as a trucking service company, a non-hazardous materials shipper, or a medical examiner, which possesses information related to an investigation of a violation of the safety regulations by a motor carrier would be required to produce records of that information upon request, enforceable through administrative subpoena and subsequent court order.

No distinction among regulated and other entities in application of any of the administrative powers, including on-site inspections, appears in 49 U.S.C. 31133(a). The proposed regulatory approach, however, is consistent with 49 U.S.C. 502 and 504 and the long-standing practice of the FHWA.

Proposed paragraph (b) restates two general principles of administrative law regarding the scope of investigations, questions about which have arisen in the past during the course of inspections. First, any records related to an investigation may be inspected, regardless of whether or not the FHWA requires the records to be maintained under its regulatory authority. Second, as part of an inspection and investigation, FHWA officials may question carrier officials and employees.

The last sentence of paragraph (b) would incorporate the carrier's right of accompaniment during an inspection, as provided in 49 U.S.C. 31133(b). This means the carrier or its representative must be given the opportunity to accompany the investigator during the inspection of records and equipment. The invitation does not have to be accepted, but it must be offered. Paragraph (d) is modeled on provisions in other agencies' regulations. It is proposed that an employer's consent to allow entry on its business premises of

an agency official for purposes of conducting an investigation may not be conditioned on the outcome of the investigation or any resulting enforcement actions.

An agency official denied entry by an employer would not attempt to force entry. The right of access for inspection of records and equipment and administrative subpoenas are enforceable through a civil action in U.S. District Court for an appropriate order and such other relief as may be necessary and proper under the circumstances pursuant to proposed § 304.302 (derived from 49 U.S.C. 507).

Paragraph (e) would restate 49 U.S.C. 505(a) and would be included because it is related to the scope of investigations. Given the fluid nature of the motor carrier industry, reviewing lease arrangements may be essential in determining legal responsibility for compliance with the safety regulations. Paragraph (f) would detail the confidentiality of investigatory reports.

Section 361.104 Definitions

To avoid repetition, the definitions provided in § 390.5 are also applicable to this rule. The few additional definitions necessary for this rule are provided.

Section 361.105 Employer Obligations

Paragraph (a) would simply restate the responsibility of motor carriers and other persons to comply with applicable safety regulations. 49 U.S.C. 31135. Paragraph (b) would establish the duty of persons to post notices of violations when required by the FHWA. See 49 U.S.C. 521(b)(3). In addition, reasonable standards for posting such notices are proposed. Paragraph (c) would inform the public that safety regulations published in the Federal Register are available for review in FHWA offices.

Paragraph (c) also proposes to require that employers maintain a copy of applicable safety regulations and make it available to employees upon request. It has long been a requirement that employers assure compliance by their employees of the safety regulations (see 49 CFR 390.11). This obligation could not be met without ready access to the governing regulations. 49 U.S.C. 31502 authorizes the Secretary to prescribe requirements for the "safety of operation and the equipment" of motor carriers and the practical mandate to maintain an accessible source of knowledge of the requirements is clearly within this authority. The FHWA does not consider this an increased paperwork burden because printed copies of the regulations are readily available from a number of sources in addition to the

Government Printing Office at little or no cost.

Paragraphs (d) through (e) would reiterate the on-site inspection process from the point of view of the person being investigated.

Section 361.106 Vehicle Inspection

Although the FHWA does not generally focus its enforcement efforts on safety equipment inspections of CMVs on the roadside, this section would mirror 49 U.S.C. 31142, which provides the authority to conduct such inspections. Vehicles may also be inspected at a motor carrier's terminal. See 49 U.S.C. 504(c).

Section 361.107 Complaints

Little in this proposed section goes beyond the statutory language. Paragraphs (a) through (e) would be a mixture of 49 U.S.C. 506(b) and 31143(a), which set forth the FHWA's procedure and obligations in responding to complaints of violations of the safety regulations lodged by members of the public. The only addition to the statutes is the second sentence of paragraph (b), which would clarify what constitutes a nonfrivolous complaint. Proposed paragraphs (f) through (g) repeat the prohibitions in 49 U.S.C. 31105(a) on retaliation against employees who file complaints alleging violations of the safety regulations. Because of the numerous questions which the FHWA regularly receives in this area, paragraph (h) would inform the public that the prohibitions are enforced by the Department of Labor and cites the relevant regulations.

Section 361.108 Administrative Subpoenas

The administrative subpoena power would be elaborated, as authorized in 49 U.S.C. 502(d).

Section 361.109 Depositions and Production of Records

Two more administrative powers would be elaborated, as authorized in 49 U.S.C. 502 (e) and (f).

Part 362: Safety Ratings

This part would set forth the standards and procedures applicable to the determination of a motor carrier's safety fitness and the issuance of a safety rating by the FHWA.

Background

Section 215 of the 1984 Act, enacted on October 30, 1984 (now codified at 49 U.S.C. 31144), required the Secretary of Transportation to establish a procedure to determine the safety fitness of owners and operators of commercial motor

vehicles in interstate commerce. Even before the statutory mandate, the FHWA had been providing safety fitness information to the Interstate Commerce Commission since 1967, and had developed a rating system for motor carriers. Following the 1984 Act, the FHWA published an NPRM on June 25, 1986 (51 FR 23088), and issued a final rule on December 19, 1988, with an effective date of January 18, 1989 (53 FR 50961). The regulations are codified at 49 CFR part 385. The regulations were amended by the interim final rule published on August 16, 1991 (56 FR 40801) to implement the provisions of the Motor Carrier Safety Act of 1990 (MCSA of 1990) (section 15 of the Sanitary Food Transportation Act of 1990, Pub. L. 101-500, 104 Stat. 1218) which prohibits a motor carrier that receives an "unsatisfactory" safety rating from operating commercial motor vehicles to transport certain hazardous materials or more than 15 passengers.

The regulations established a "safety fitness standard" which the FHWA uses for assigning motor carrier safety ratings of "satisfactory," "conditional," or "unsatisfactory." The safety ratings are used to prioritize motor carriers for review and focus enforcement resources on carriers with the most serious compliance problems. The safety ratings had routinely been made available to the ICC for consideration of operating authority applications and self-insurance, and have been available to the Department of Defense in the selection of carriers to transport hazardous materials and passengers, to other governmental and private industry shippers for carrier selection purposes, to insurance companies to assist in risk determinations and to the public upon request.

The current rule also prescribes procedures for administrative review of the rating based on factual disputes, and for requested changes in safety ratings based upon evidence that corrective actions have been taken to bring the motor carrier into compliance with the safety fitness standard.

Since the adoption of the safety rating regulations, the process has been the subject of occasional dispute. To some, the method used in determining a safety rating is abstract and confusing, especially when determined at the same time as, but not necessarily in conjunction with, the decision whether or not to initiate enforcement actions. The existence of both "unsatisfactory" and "conditional" ratings, moreover, has resulted in unintended significance being given to the "conditional" rating. Since it is less than a "satisfactory" rating, some shippers and others

comparing the performance of various carriers may give the "conditional" ratings an overlay negative connotation not intended by the agency. Some motor carriers, on the other hand, equate the satisfactory rating with a level of excellence unintended by the agency and inconsistent with the general meaning of the term "satisfactory," i.e., adequate.

Other motor carriers have argued that a rating may be based on alleged violations of the regulations discovered during on-site audits but not fully documented. It may then become difficult to contest these violations in an administrative proceeding challenging the rating. In practice, the FHWA has addressed this concern by taking a second investigative look at disputed violations.

Although the FHWA believes that current procedures satisfy the due process provisions of the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, there is room for improvement and greater efficiency. The situation took on added significance with the enactment of the Motor Carrier Safety Act of 1990 and its requirement that motor carriers that receive an "unsatisfactory" safety rating be prohibited from operating commercial motor vehicles to transport hazardous materials and passengers. This prohibition, which becomes effective 45 days after receipt of an "unsatisfactory" safety rating, would clearly affect a motor carrier's ability to stay in business. In light of these concerns, and to improve the objectivity of the information on which ratings are based, the FHWA has already made several adjustments to the safety rating methodology and has heightened its responsiveness to carriers exposed to serious consequences following ratings.

Full compliance with all of the safety and hazardous materials regulations should certainly be the objective of all responsible motor carriers. At a minimum, however, a motor carrier must have managerial control over the critical functions of its operations that reflect on safety, i.e., it must have an effective system to assure compliance with the regulations. A negative rating is, of course avoided through full compliance. It is also avoided by adopting reliable measures to assure that the motor carrier's employees know what is required by the regulations, have the opportunity to achieve full compliance, and do not violate those regulations.

In reviewing a motor carrier's operations for rating purposes, the FHWA places more emphasis on compliance with those regulations that have the greatest immediate and direct

impact on safety. In evaluating the several factors that comprise the rating, violations of those regulations will have a greater effect on the overall rating. The FHWA has been using the concepts of "acute" and "critical" regulations to carry out this purpose. The term "acute" refers to regulatory requirements the violations of which would create an immediate risk to persons or property, e.g., using a driver after he has tested positive for alcohol. The term critical refers to those regulatory requirements the violation of which, if occurring in patterns, would indicate a breakdown in effective control over essential safety functions, e.g., using drivers beyond their allowable driving or duty hours. These concepts would now be codified if this proposal becomes final.

It is also being proposed that the safety ratings be reduced to only one category, eliminating both the "satisfactory" and "conditional" safety rating categories. Conditions may be attached to the avoidance of an "unsatisfactory" rating, but they would not place the motor carrier in a rating category from which negative assumptions may be drawn. This raises some additional questions to be resolved in the final rule, e.g., whether and how best to describe those carriers which are not rated "unsatisfactory" and what should be done with the ratings of those carriers currently rated "conditional."

The FHWA believes that Congress has expressed its will in the MCSA of 1990 (49 U.S.C. 5113) and in subsequent oversight reports that severe consequences should attach to an "unsatisfactory" rating. Although the language in that provision employs the terms "satisfactory" and "conditional," no particular significance is attributed to those terms other than they are an improvement from the "unsatisfactory" classification. This proposal reflects the FHWA's continuing intention to focus on the "unsatisfactory" category and assure that before carriers are assigned such a rating, it is indeed a reflection of demonstrably poor compliance or performance. If the unsatisfactory safety rating is to be considered tantamount to a determination that the carrier assigned such a rating should not be operating commercial motor vehicles in interstate commerce without appropriate corrective measures, then such a carrier should be well below average and the percentage of carriers earning such a rating ought to be relatively small. The information used to assign such a rating should be put to a more strenuous test before consequences attach.

The FHWA is, therefore, also proposing to give motor carriers

advance notice of unsatisfactory ratings so that any challenges to the ratings can be resolved before the rating takes effect. In addition, expedited procedures for the review of unsatisfactory ratings are proposed for carriers when their ability to stay in business might be affected by such a rating. Finally, the FHWA is also proposing to recognize a practice that has been evolving over the last few years by affording some discretionary relief to motor carriers adversely affected by ratings that are able to demonstrate a willingness to comply and accept conditions designed to improve their safety management systems and practices.

It must be recognized that the FHWA will never be able to complete an individual on-premises compliance review of every motor carrier in existence. More and more, the information obtained from State accident reports and reports generated by the 2 million roadside inspections conducted each year is being used to identify carriers that may be experiencing safety or compliance problems and therefore pose potential safety risks. (As prescribed in current regulations, this information is also factored into a carrier's rating.) Complaints are also indications of the possible existence of compliance problems, and there is a statutory duty to investigate nonfrivolous complaints. As the amount and reliability of external information grows, the absence of negative indicators becomes a more reliable premise for refraining from individual, on-site compliance reviews. Moreover, a "satisfactory" rating produced by a compliance review is only a current assessment of a motor carrier's level of compliance, and its significance obviously diminishes with time.

In a one-category rating system, therefore, an "unsatisfactory" rating is definitely a negative finding, which is likely to have adverse impacts on the motor carrier's business opportunities. The remaining group of carriers that are not rated "unsatisfactory" would be comprised of those carriers with existing "satisfactory" or "conditional" ratings (which may be dated) and other carriers that are not rated (this would be the largest group). The latter subgroup of unrated carriers would be comprised both of carriers that survive future compliance reviews without receiving an "unsatisfactory" rating and those that have not been subject to on-premises compliance reviews. In this proposal, we would not use any terminology to describe carriers that are not rated "unsatisfactory," so that no connotation, positive or negative, would attach. If

readers are particularly opposed to this approach, the FHWA is interested in receiving comments on the use of categories and the proper terminology to be applied to them.

In this proposal, the FHWA would be prescribing the immediate termination of "satisfactory" and "conditional" ratings. This would have no impact on carriers presently holding such ratings as they would not be grouped in the unsatisfactory category. The FHWA is also particularly interested in comments on this issue.

In recent times, the FHWA has considered programs that would provide incentives to those carriers that demonstrate exceptional performance and compliance. Nothing in this proposal should be interpreted to mean that we have abandoned such concepts. The agency will continue to work with other organizations and associations, such as the Commercial Vehicle Safety Alliance, to develop the potential of using positive incentives to promote compliance.

Finally, the safety rating is only one means of promoting compliance with the safety regulations. The FHWA will continue to employ selective compliance and enforcement measures in the form of inspections, investigations, civil penalty assessments and criminal prosecutions. These will be driven, for the most part, by performance indicators and complaints. We will also continue to rely heavily on the partnership developed with State safety enforcement agencies through the Motor Carrier Safety Assistance Program. Enforcement actions are considered an effective tool to promote compliance and penalties will be imposed for violations of the safety regulations when circumstances warrant, regardless of the carrier's rating. This recognizes that many otherwise satisfactory motor carriers will tolerate violations of the regulations from time to time, or will get careless in their management practices designed to detect and eliminate violations. Enforcement is appropriate in such situations without necessarily affecting a carrier's overall rating.

This following section-by-section analysis explains these changes in more detail.

Section-by-Section Analysis

Section 362.101 Purpose

This section would identify the scope and purpose of the part. The definitions section of part 385 would be removed as unnecessary.

Section 362.102 Motor Carrier Identification Report

This requirement is presently found at § 385.21, and provides that interstate and foreign carriers must file a Motor Carrier Identification Report, Form MCS-150 (copy provided in the appendix), within 90 days of beginning operations. This is essential to an accurate motor carrier census and relates to the assignment of a DOT identification number. It also assists the FHWA in scheduling reviews of unrated motor carriers. Since this is a continuing requirement, the provision in the current rule requiring the filing of the report within 90 days of the effective date of the rule has been eliminated.

Section 362.103 Safety Fitness—Standard and Factors

The safety fitness standard in the current § 385.5 and the factors in § 385.7 would be clarified, simplified and combined into one section. This proposal also elaborates on the factors used to determine the rating and codifies the practice of placing special emphasis on compliance with “acute” and “critical” regulations.

Section 362.104 Determination of Safety Fitness—Safety Ratings

The current 49 CFR 385.9 would be amended to define the one safety rating that may be issued by the FHWA (“unsatisfactory”), and to describe what constitutes such rating. For example, a carrier would be issued an unsatisfactory rating if it is determined that the carrier does not have adequate safety management controls in place to ensure compliance with the safety fitness standards and factors prescribed in proposed § 362.103, and which has resulted in one or more of the specific occurrences listed in § 362.103(b)(1) (i) through (x). In addition, this section provides that an “unsatisfactory” safety rating may be avoided based on conditions, such as compliance with specific provisions of the safety or hazardous materials regulations, the requirements of a compliance order or settlement agreement, or notices to abate, which may be imposed at the time the proposed safety rating is issued.

This requirement is not intended to replace the current “conditional” safety rating. Rather, it is intended to provide the agency with flexibility to promote compliance with the regulations by obtaining the correction of deficiencies in specific areas of a carrier’s operations without calling the motor carrier’s entire safety fitness into question. The conditions upon which it would avoid

“unsatisfactory” would be known by the motor carrier and the agency. No separate status would attach to the rating, nor would the existence or the nature of the conditions be routinely available to the public under § 362.110. The motor carrier could correct deficiencies without having its ability to stay in business negatively affected, as is generally the case with the current “conditional” safety rating.

Section 362.105 Unsatisfactory Rated Motor Carriers—Prohibition on Transportation of Hazardous Materials and Passengers; Ineligibility for Federal Contracts

This section would incorporate and clarify the existing prohibitions and penalties listed in section 49 CFR 385.13 that are applicable to motor carriers that receive a safety rating of unsatisfactory. The listing of applicable penalty statutes would be replaced with a reference to the penalty provisions listed in appendix A to part 386 of this chapter (Part 364 in this proposal). Finally, the references to the 45-day period during which a motor carrier must improve the safety rating would be removed and incorporated into the procedures for obtaining review of the rating (new § 362.108, see description below).

Section 362.106 Notification of a Safety Rating

This section would clarify and incorporate the rating notification requirements of the current § 385.11, and establish the concept of a proposed safety rating of unsatisfactory. A proposed safety rating of unsatisfactory would become the motor carrier’s final safety rating 45 days after the date the notice of proposed safety rating is received by the motor carrier, unless the carrier petitions for a review or obtains relief pursuant to proposed § 362.108 (see below). This proposed rating incorporates the requirement in the MCSA of 1990 that a motor carrier receiving an unsatisfactory safety rating be given 45 days to improve its rating before the Act’s prohibition of hazardous materials and passengers transportation takes effect. It would also eliminate a distinction between carriers based on type of operation by applying the concept of the proposed rating to all unsatisfactory findings and would afford all carriers the opportunity to be heard during that period and to improve the rating before consequences attach. This section also would provide that a proposed safety rating would not be made routinely available to the public until it becomes final. This would ensure that a proposed safety rating of

unsatisfactory will not affect a motor carrier’s business before the carrier is given the opportunity to improve or challenge its proposed rating.

The FHWA recognizes that the assignment of a negative safety rating often has graver consequences for the rated motor carrier than any civil penalties that might be sought for individual violations considered in the compilation of the rating. Several prohibitions attach to the assignment of an unsatisfactory rating and decisions are made daily by shippers and insurers on the basis of safety ratings. This is a primary purpose of the rating as conceived by Congress and implemented by the agency. For this reason, the agency treats the rating as a valuable compliance and enforcement measure and provides an administrative proceeding to afford the ratee with the opportunity to be heard before the rating is made known. The FHWA believes that withholding information about a proposed rating from the public is consistent with the Freedom of Information Act, which provides an exemption from required release of information compiled for law enforcement purposes (Exemption 7). The exemption applies because (a) a law enforcement proceeding would be pending, i.e. the determination of the motor carrier’s safety fitness; and (b) the premature release of a proposed rating could reasonably be expected to cause harm in that the consequences would attach before a final decision was made. Since the purpose of providing the administrative proceeding is to prevent unintended consequences from inchoate determinations, release of proposed ratings to shippers and insurers who may very well act on the information could easily frustrate that purpose. It could also increase demand for expedited adjudication which could adversely impact an orderly consideration of all relevant issues. Moreover, the length of time between a proposed rating and a final rating is finite and would rarely exceed 45 days. The FHWA also recognizes that release of a proposed rating may be unavoidable under some circumstances, but it would be the agency’s intent that routine release under § 362.110 would not occur.

Section 362.107 Change to Safety Rating Based on Corrective Actions

This section would continue the remedy presently available in § 385.17 by allowing for a change in an unsatisfactory rating to be requested both within the 45 days the rating remains in a proposed status and at any time after the rating becomes final. The

filing of a petition for change of a proposed rating would not stay this 45-day period, but if the FHWA cannot make a determination within the 45-day period and the motor carrier has submitted evidence that corrective actions have been taken, the period may be extended for up to an additional 10 days. This would allow the agency to prioritize requests based on the consequences a particular carrier may face from an adverse rating. This section would also provide for a higher level agency review of a denial of a request for a rating change. In cases where the resulting unsatisfactory rating causes an out-of-service order to be issued, an expedited review by the Associate Administrator would also be available.

Section 362.108 Administrative Review

This section would consolidate, clarify, and revise the existing procedures in §§ 385.15 and 385.17 dealing with petitions for review of safety ratings. The section would establish a single procedure applicable to reviews of proposed safety ratings of unsatisfactory and of denials of requests for changes in ratings under § 362.106. Petitions for reviews of safety ratings of unsatisfactory under this section would be similar to the procedures in the present § 385.15 applicable to reviews by the Director, Office of Motor Carrier Field Operations, in cases where there are factual or procedural disputes to be resolved. A motor carrier receiving notice of a proposed safety rating of unsatisfactory would still have the option of requesting a change in the rating based on corrective actions taken. This section would provide a carrier selecting that action with the additional opportunity to petition for review if it believes the rating or the denial of a change was based on errors of procedure or fact.

The existing 90-day filing deadline for petitions under this section would be reduced to 45 days for consistency and finality. When the procedure applies to proposed safety ratings of unsatisfactory, the request for review must be submitted during the 45-day period before the proposed rating becomes final. This section would maintain the current statutory requirement that the FHWA complete the review within 30 days in cases where the petition is filed by a motor carrier subject to the hazardous materials and passenger prohibition in § 362.105.

The petitioner would be required to submit with its petition all arguments and information it desires to be considered on review. In most cases, the

Director, Office of Field Operations, will complete the review and render a decision on the basis of the written submission. The Director would have the discretion to request additional information or to call a conference. If it is determined that the motor carrier operations still fail to meet the safety fitness standard, the motor carrier would be provided with written notification that its petition has been denied and that the proposed safety rating of unsatisfactory is final. Except as provided below, the decision of the Director, Office of Motor Carrier Field Operations, would become the final agency action. Because the unsatisfactory rating generates an out-of-service order for a passenger or hazardous materials carrier, such motor carrier would have the right to an expedited administrative review of this decision by the Associate Administrator for Motor Carriers in accordance with 5 U.S.C. 554 and corresponding procedures are proposed in part 363. This is a new review procedure proposed to better guarantee due process of law. The expedited review, if timely requested, would be provided within 10 days from the date of the notice of denial of the initial review petition. The Associate Administrator may refer the petition for review for a hearing before an Administrator Law Judge (ALJ). The Associate Administrator or ALJ may stay any safety rating during the pendency of the expedited administrative review.

Section 362.109 Temporary Relief From Rating

This section would provide a means to grant temporary relief to a motor carrier from dire consequences of an unsatisfactory rating upon a showing of willingness to adopt necessary changes in safety management policies and practices and to make good faith efforts to improve safety performance. The temporary relief would be entirely discretionary on the part of the Regional Director, in the case of a petition for change in the rating, and the Director of the Office of Field Operations, in the case of an initial administrative review. The exercise of discretion by these officials is not reviewable as every carrier affected by a proposed rating or final rating is provided with ample opportunity for administrative review in this Part. This provision merely institutionalizes a practice that has been growing in the recent past whereby a rating is "conditionally rescinded," to allow a motor carrier to demonstrate its improved practices in order to earn a better rating. If a motor carrier is forced to cease operating because of an

unsatisfactory rating, it presumably would be unable to gather any experience with improved systems that would convince a reviewer that it had indeed committed itself to safety compliance. The proposed procedure would require the motor carrier to operate under a consent order for a period not to exceed 60 days at the conclusion of which a final rating would be assigned.

Section 362.110 Safety Fitness Information

This section would incorporate the requirements of the current § 385.19. The section has been clarified to make clear that the information would also be made available to State agencies.

Part 363: Enforcement Proceedings

The goal of this proposal is to improve the current rules of procedure for motor carrier enforcement proceedings. Mindful that this must also have been the goal each of the numerous times the rules have been amended since their inception in 1969, the task has been approached deliberately. To open the process to new ideas, various external sources have been consulted, notably the Model Adjudication Rules of the Administrative Conference of the United States (December 1993) and various procedural rules of other Federal agencies. On the other hand, in recognition of the importance of the historical context of the rules, the predecessors of the current rules, and their extensive amendments, were reviewed in hopes of identifying shortcomings and determining the underlying rationale for certain provisions which may now seem unnecessary, unclear, or unavailing.

This review reveals that even the first incarnation of motor carrier procedural rules by the FHWA, spare though they may have been, were not created in a vacuum, but were largely based on practices and procedures of the Interstate Commerce Commission from whence the FHWA inherited its motor carrier safety functions. Each subsequent amendment was believed to be necessary to address programmatic or statutory changes or to increase efficiency and fairness. And each amendment or wholesale revision was built on the foundation of previous rules. This effort is no different, notwithstanding the recourse to model rules.

Because of the importance of past practice in understanding both the current system and needed changes, and because such a history has not been compiled elsewhere, a fairly extensive examination of previous rules is offered.

The proposed rules will then be explained in this context.

Background

The current rules are the legacy of two distinct strains of administrative procedures of the ICC. Until 1966, the ICC had the sole responsibility on the Federal level for regulating motor carrier safety. In addition to its pervasive regulation of interstate routes, rates and services through a comprehensive system of certificates of authority to operate, the ICC also established standards for the safety of operation of motor carriers. Interstate Commerce Act, sec. 104, 24 Stat. 379, (1887); added ch. 498, 49 Stat. 546 (1935). Most of the safety standards were enforced through a rather onerous process involving numerous formal steps—opening an investigation, investigation, record production and depositions, proceedings before the full Commission, compliance orders, and, if it came to that, the withdrawal of operating authority.

In addition, the ICC had limited authority under section 222(h) of the Interstate Commerce Act to levy civil, monetary penalties against carriers for failure to keep records, file reports, or respond to questions posed by the ICC, so-called recordkeeping violations. Acts of fraud, misrepresentation, false statements, and intentional violations of nonrecordkeeping requirements in the FMCSRs were punishable solely as criminal offenses in Federal court, or through the formal process relating to operating authority. The section 222(h) recordkeeping violations subject to monetary penalties were enforced by the ICC in civil actions in the United States District Courts in the event informal administrative procedures to resolve such actions were unsuccessful.

The two separate enforcement tracks were carried over to the FHWA after the ICC's safety functions were transferred to DOT. In 1969, the FHWA issued rules of practice for motor carrier proceedings which crystallized the dichotomy. 34 FR 936 (January 22, 1969). Part 385 of title 49 CFR was entitled "Collection and Compromise of Claims for Forfeiture under Section 222(h) of the Interstate Commerce Act." Part 386 provided "The Rules of Practice for Motor Carrier Safety Proceedings under section 204(c) of the Interstate Commerce Act."

Part 385 was very brief, providing requirements for claim notices and settlement agreements. Respondents were instructed that they should respond to the claim and should state whether they wished to discuss payment. A response was not mandatory. Section 222(h) claims that

did not result in a settlement or to which there was no response were enforced through litigation in U.S. District Court. Mirroring the ICC situation, no administrative procedure was provided to resolve the claims.

As the FHWA's version of the ICC's formal process, part 386 was considerably more involved than part 385 and established the framework for the current rules of procedures.

All proceedings under part 386 alleging safety violations began with issuance of a notice of investigation (NOI) to a motor carrier, a procedural relic of the cumbersome ICC process. Under 49 U.S.C. 506, an order to compel compliance could not be issued without an NOI and an "opportunity for a proceeding." The Federal Highway Administrator assigned to a hearing examiner all NOIs properly contested by the carrier in the form provided in the rule. After a hearing, the hearing examiner issued an order disposing of the proceedings, which was reviewable by the Administrator on his/her own motion or that of a party. The proceedings could also be disposed of by issuance of a consent order pursuant to the agreement of the parties. Improperly contested or unanswered NOIs could result in unilateral issuance of a final order by the Administrator. For the most part, the orders directed the carrier to comply with the safety regulations it was already duty bound to follow.

For enforcement of orders against regulated carriers, the FHWA had to petition the ICC to open its own investigation into the carrier's operating authority, thus bringing the matter back to that cumbersome process. Moreover, a revocation proceeding by the ICC would generally not be commenced without a showing that an FHWA order had been violated.

In 1977, the FHWA made the first extensive revisions to these procedural rules. 42 FR 18076 (April 5, 1977). Part 385 was repealed and its settlement procedures incorporated into part 386. The respondent's statement of desire to discuss payment of the amount of the claim became mandatory and an occasional source of confusion or, at least, an excuse not to file a proper response. It is not difficult to see that a statement expressing a willingness to settle could be seen by the uninitiated as a quasi admission of culpability at odds with a statement contesting the allegations of the claim. Some respondents merely stated they wished to discuss settlement and failed to file a reply consistent with the rules, thereby risking waiver of the right to contest the claim, waiver of the right to

a hearing, or worse, default. This situation was exacerbated by regulatory changes in action taken by the FHWA upon a failure to reply.

In the interest of uniformity, the scope of Part 386 was expanded in 1977 to include monetary penalty actions arising under section 222(h) of the ICC Act (formerly processed under part 385) and the HMTA and to include driver qualification determinations. Unfortunately for uniformity, the standards for these proceedings varied in particulars. For example, the commencement of proceedings was trifurcated into issuances of claim letters for civil penalties, letters of disqualification or determinations for driver qualifications, and NOIs for violations of other safety rules. Significantly, monetary penalty assessments were now, for the first time, subject to an extensive administrative process.

In terms of procedures, no longer would all properly contested matters result in a hearing. Instead, "to expedite the decisionmaking process and to reduce the number of unnecessary hearings," the Associate Administrator (AA) for Safety, rather than the Federal Highway Administrator, would only assign matters with material factual issues in dispute to a hearing officer. If no hearing was requested in the reply, the AA could simply issue a final order based on the evidence and arguments submitted.

When no reply was received at all, the outcome varied by the type of proceeding. If a driver failed to reply in accordance with the rules to a letter or determination of disqualification in a driver qualification proceeding, the letter or determination automatically became the final order of the Associate Administrator 30 days later. In contrast, no such automatic procedure existed when no reply at all was made to claim letters or NOIs. The AA still had to issue a final order, although it could be done *sua sponte*.

Also added to part 386 were pre-trial procedures on discovery and motion practice designed to expedite the proceedings and clarify procedural points which had arisen under the 1969 rules.

Minor revisions were made to the rules later in 1977, based on comments received from the public and six months of practice. 42 FR 53965 (October 4, 1977). Most significant among the changes, a motion by a party was required before the AA could issue a final order where no reply was made to the NOI or claim letter. In addition, discovery and amendment of pleadings were expanded to situations in which a

matter was not assigned for a hearing but decided by the AA based on the pleadings. Finally, for matters under the HMTA only, an option was added whereby a respondent could reply to a claim or NOI with a notice to submit evidence, rather than request a hearing, and then submit the evidence at a later date.

In 1985, the rules were again comprehensively amended. 50 FR 40304 (October 2, 1985). The precipitating factors were again statutory changes and internal reorganization. Pursuant to the Motor Carrier Safety Act of 1984 and amendments to the HMTA, the rule contained provisions for the FHWA to seek to enjoin in U.S. District Court carrier actions in violation of the FMCSRs and HMRs and to order out-of-service all carrier operations constituting an imminent hazard to safety.

A section on judicial appeal of final orders was also added to the rule consistent with the 1984 Act. This became important because the 1984 Act authorized the FHWA, for the first time, to assess civil, monetary penalties for non-recordkeeping violations of the FMCSRs. Prior to the 1984 Act, monetary penalties could only be assessed for violations of the HMRs and recordkeeping requirements in section 222(h) of the ICC Act and the FMCSR. The 1984 Act expressly made all penalty assessments subject to the notice and hearing requirements of the Administrative Procedure Act. Thus, the reach and depth of the FHWA's civil penalty authority was greatly expanded, and the procedural rules were amended to reflect this new authority and responsibility.

In terms of procedure, however, the basic trichotomy of the 1977 rules was continued—driver qualification, civil penalty, and NOI proceedings. Despite the sudden predominance of civil penalties in terms of the safety program generally, and, specifically, of the relative number of administrative proceedings, the civil penalty procedures were little changed from the 1977 rules, which, in turn, were largely based on the old ICC NOI procedures. Although these procedures met the requirement in the 1984 Act to comply with the Administrative Procedure Act, they perhaps did not offer the clearest and most efficient method of resolving the new influx of cases.

The civil penalty procedures were amended, however, in several minor ways relevant to this discussion. First, similar to the earlier provisions for driver qualification proceedings, the failure to reply to a claim letter automatically resulted in the letter

becoming the final order of the Associate Administrator for the newly organized Office of Motor Carriers (AA) without a separate order having to be issued upon the motion of a party. Unlike the qualification section, however, this seemingly applied only to a complete failure to reply, and not merely a failure to reply in the form provided in the rule. For NOIs, nothing changed in this regard. Final orders continued to be issued by the AA only upon motion of a party. Second, the procedure for notice of intent to submit evidence without a hearing was extended from hazardous materials cases to all civil penalty proceedings. Third, Administrative Law Judges formally replaced hearing officers as arbiters, although this had been the practice for some time. Fourth, the discovery and hearing procedure sections were made more detailed to closer approximate the Federal Rules of Civil Procedure (title 28, U.S.C.).

The important results of the 1985 amendments were the expansion of civil penalty authority and the addition of out-of-service order authority. These two developments further marginalized the venerable NOI process. In practice, civil penalty proceedings came to greatly overshadow the cumbersome NOI proceedings. Instead of having to endure a long administrative process possibly resulting in an order to comply with regulations with which a carrier was already bound to comply, and which could only be enforced through intervention in ICC proceedings, another long process, direct administrative action could be taken against the carrier in the form of financial penalty. If a carrier persisted in a state of noncompliance, it could now be directly ordered out of service as an imminent hazard. An NOI-based order to comply with the regulations paled in comparison with these new powers.

The next revision of the rules made only technical amendments. 53 FR 2035 (January 26, 1988). Added to the authorities and scope sections in part 386 were references to the CMVSA of 1986 (49 U.S.C. Chapter 313), in order to implement the CMVSA-based civil and criminal penalties added to 49 U.S.C. 521(b). The Administrative Law Judge's power to dismiss matters referred by the AA for a hearing was made explicit. And the rather detailed delegations of authority from the Administrator to various positions within the Office of Motor Carriers were removed from the regulations and placed in the FHWA Organization

Manual,¹ consistent with an agency-wide trend to maximize flexibility.

A small change was made to the rules on December 19, 1988 (53 FR 50961). The FHWA clarified that an out-of-service order designed to eliminate an imminent hazard applied immediately, pending an opportunity for review within 10 days.

More extensive amendments were made in 1991. 56 FR 10183 (March 11, 1991); NPRM, 55 FR 11224 (March 27, 1990). A new subpart G spelled out the statutory civil penalty assessment criteria and specified the four types of FHWA orders the violation of which could lead to additional penalties. The four types of orders were notice to abate, notice to post, final order, and out-of-service order. New appendix A to part 386 established a penalty schedule ranging from \$500 to \$10,000 for violations of such orders. These amendments implemented a provision of the 1984 Act (49 U.S.C. 521(b)(7)).

Another 1991 amendment added a "new" order to the AA's enforcement arsenal—the compliance order, last heard from in ICC proceedings predating the formation of the DOT. See § 386.21. The compliance order attempted to give meaning to the largely moribund NOI process, the procedures for which nevertheless remained in the regulations. The compliance order became the name of the final order issued by the AA in an NOI proceeding in which a consent order could not be achieved. A compliance order could go beyond the NOI in that it could direct a carrier to "take reasonable measures beyond the requirements of the regulations, in the time and manner specified, to assure future compliance." The order warned that failure to take those measures would constitute a violation of a final order of the AA, subjecting the carrier to the additional penalties of appendix A and an out-of-service order if the carrier's operations constituted an imminent hazard to safety. In practice, it is not common for a compliance order to be issued directing a carrier to take compliance measures beyond those required in the safety regulations, but such measures may be dictated by the circumstances. The rule allows challenges to the reasonableness of these measures. In order to expedite the use of NOIs, the NOI and civil penalty procedures were merged into § 386.14, though the differences in default standards, discussed above, remained. The combination of NOIs and civil penalty

¹ FHWA Orders 1-1, Part I, Chapter 7, Motor Carrier Safety, is available for inspection and copying as provided at 49 CFR part 7, appendix D.

claims into a single administrative proceeding has been permitted since the 1985 rules.

In practice, it is common for NOIs and notices of claims to be both combined or issued separately at the same time in parallel proceedings, on those occasions when NOIs are used. The primary use of the NOI is as a warning that further violations of the same regulations could constitute an imminent hazard and lead to an out-of-service order, as provided in § 386.21(c).

The 1991 rulemaking made two further amendments worth mentioning. First, settlement agreements were amended to require a statement that failure to pay in accordance with the agreement resulted in the original claim amount becoming due and payable immediately. Second, a provision was added to the out-of-service procedure allowing a vehicle in transit at the time it is ordered out of service to proceed to its immediate destination. Both of these concepts are incorporated in the proposed rules.

Section-by-Section Analysis

Subpart A—Civil Penalty Proceedings

Section 363.101 Nature of Proceeding

Civil penalty proceedings would be defined broadly as administrative proceedings in which the FHWA seeks payment of a fine or orders a motor carrier, individual, or other regulated entity, the "respondent," to take some action. Civil penalty proceedings are based on violations of the FMCSRs or HMRs, which must be established administratively by final order of the agency. Civil penalty proceedings would include all motor carrier safety, hazardous materials and intermodal container administrative enforcement proceedings by the FHWA, other than those involving driver qualification and safety ratings. For example, proceedings resulting from issuance of an out-of-service order are civil penalty proceedings.

Driver qualification procedures are proposed in subpart B of this part. Safety ratings are issued and may generally be contested in accordance with proposed part 302. However, when the safety rating has the effect of placing a carrier out of service, the carrier is offered the same opportunity for an expedited hearing as is available to a carrier subject to a direct out-of-service order.

The notice of investigation (NOI) procedure, the resurfaced, ICC-originated process which allows for a finding of violations but provides no penalties, would finally be laid to rest. Any orders, findings, notices, or

warnings the NOI procedure may have allowed would be incorporated into the civil penalty process. The use of one set of procedures for all claims arising from a single set of violations should result in clearer standards and greater efficiency, and would eliminate parallel proceedings arising from an NOI and a monetary claim based on a single set of violations.

The procedures are designed to comport with the Administrative Procedure Act and principles of due process. The proposed rules ensure that persons are adequately notified of the violations they are alleged to have committed and of their right to the opportunity to be heard by the agency, and, in the appropriate circumstances, to a hearing before an Administrative Law Judge.

Section 363.102 Notice of Violation (Complaint)

A Notice of Violation setting forth the allegations of the claim of the agency against the respondent would begin a proceeding. Paragraphs (a) and (b) propose the minimum information to be included in the notice. The only item which is not a restatement of part 386 is the reply form at paragraph (a)(5), which will be discussed below. To ensure that respondents are notified of the agency's claim, paragraph (c) would specify as the form of service to be used in issuing the notice one which utilizes a return receipt. This requirement is consistent with current practice.

Section 363.103 Form Reply to Notice of Violation

It is proposed to include with each notice of violation a reply form on which the respondent is asked to check off its intended response to the claim. The respondent may check only one option on the reply form. The choices are to: (1) Pay the penalty, (2) discuss settlement, and (3) contest the claim. If (2) is chosen, respondent retains the right to contest the claim or pay the penalty at a later date, as detailed below. For the first time, replies may be sent by telefax, although respondent retains the burden to prove it has made a timely reply. If no reply form (or payment or answer to the claim) is served on the agency within 15 days, the notice of violation becomes the final order, the violations are established as alleged, and the respondent waives the right to contest the claim.

The intent of these provisions is to increase the efficiency of the notice of claim process currently provided in part 386. Providing one or two time periods in which to respond to claims and disqualification determinations would

be simpler than the 3 or 4 periods currently provided in part 386. Though it adds a step, the reply form is designed to provide a clear starting point to the process and to obtain a clear and simple statement from the respondent of its intentions with regard to the claim. Cases involving respondents that do not reply can be processed expeditiously.

On the other hand, the reply form would add flexibility. The agency can easily amend the claim to reflect any changed circumstances discovered as a result of settlement negotiations. Respondents would avoid generating perhaps lengthy and involved replies on the record, only to resolve the matter later outside formal channels.

Because of the immediate severity of an out-of-service order, and the consequent reduction in the time period to resolve contested issues, no reply form is sent along with an out-of-service order. See § 363.110.

Section 363.104 Special Procedures for Out-of-Service Orders

This section is largely a restatement of what presently appears in § 386.72(b)(1), but would add a requirement for personal service, a reference to the penalty for noncompliance, and a provision for expedited adjudication under proposed § 363.110. The authority summarily to order a motor carrier to cease all or parts of its operations because violations of the FMCS are creating an imminent hazard is found at 49 U.S.C. 521(b)(5)(A).

Section 363.105 Payment of the Claim

This is the first, and obviously simplest, resolution to a notice of violation assessing a monetary penalty. Because payment terminates the proceeding, it may be made with or without filing the reply form. However, if payment is chosen on the reply form, but is not made to the agency within the time to reply, the notice becomes the final agency order as if the respondent failed to reply. Paragraph (a) would provide that payment may be made at any time in the course of the proceeding before issuance of a final order. If it takes the form of a settlement agreement, however, it must be done in accordance with § 363.106. Of course, payment of the monetary claim might not terminate the proceeding if some other order is also being sought.

Paragraph (c) makes it clear that payment of the claim is tantamount to a final order finding the facts of the violations as alleged in the notice, unless the parties expressly agree in writing to treat the violations otherwise. This is important because certain future agency enforcement actions may be

based on, and certain consequences may flow from, prior and continued violations of the safety regulations.

Section 363.106 Settlement of Civil Penalty Claims; Generally

Settlement may occur at any time in the process including after the termination of negotiations under § 363.107 and during a hearing. Settlement procedures have been a key feature of the FHWA civil penalty process since their inception in 1969. Settlement of alleged violations before resort to a final formal adjudication is efficient and promotes the partnership of the FHWA and its regulated entities directed toward safer commercial motor vehicle transportation.

The content of settlement agreements would not be substantively altered from that required in part 386. As civil penalty proceedings are not limited in this proposed rule to monetary claims, so may settlement agreements resolve the terms of other orders sought against respondent by the agency. Thus, the consent order procedure in part 386, which provided for issuance by the agency of such other orders, and which could include settlement agreements resolving monetary claims anyway, is no longer necessary.

It should be noted that settlement agreements will contain a finding that certain violations did, in fact, occur. Settlement agreements should not be necessary in cases in which full payment of the claim is made and no other orders are sought or terms placed on respondent. Full payment automatically results in a finding of the violations as alleged in the notice.

Paragraph (d) involves the situation in which partial payment is made by a respondent, with or without an accompanying unilateral expression of the respondent's intent in offering the payment. The FHWA's acceptance of partial payment, as indicated by cashing a check, for instance, in no way should be interpreted as settlement of the claim or as forgiving the remainder of the claim. All settlement agreements must be in the form provided in paragraph (b).

Paragraph (e) would allow execution of settlement agreement during the course of administrative proceedings, upon the consent of parties and without the approval of the AA.

Section 363.107 Settlement Negotiations

In contrast to the general requirements in the preceding section applying in all instances of settlements, this section would establish procedures when the settlement negotiations option

is chosen by the respondent on the form reply. Respondents would retain the opportunity to convert the proceeding into a contested claim at any point in the negotiation process. They could do this by requesting an administrative adjudication and filing an answer to the notice of violation. For its part, the agency could discontinue negotiations if it feels are not proving fruitful by sending the respondent a final notice of violation.

Paragraph (d) proposes a 90-day limit on this initial negotiation process. If a settlement agreement is not reached within 90 days, the agency may issue a final notice of violation to the respondent. The purpose of this provision is to keep the administrative case moving toward resolution. As justice delayed is justice denied, so does a delayed penalty reduce its effectiveness. Under current practice, some cases in which a respondent has indicated a willingness to settle have a tendency to languish when agreement cannot be readily reached. This provision should help to avoid consequent case backlogs and should actually promote settlement as it pushes the case along the track toward resolution. In accordance with § 363.106, a settlement may be reached at any point in the civil penalty process, including in contested claims being administratively adjudicated.

Paragraph (e) would establish the procedures when a final notice of violation is sent to a respondent after negotiations have been expressly terminated by one of the parties or 90 days have passed without settlement. For flexibility, the final notice may simply incorporate the original notice of violation. For efficiency, if the negotiations have revealed, for example, that one of the claimed violations did not occur, the final notice may be amended deleting that charge. The procedures for replying to the final notice similarly would incorporate those for immediately contesting the original claim. At this point, after negotiations have indicated that the parties cannot agree on resolution of the claim and that it is indeed contested, the respondent would have no choice but to answer the notice in writing.

Section 363.108 Request for an Administrative Adjudication

This section proposes procedures for contested claims. The procedures would apply when the "contest the claim" option is chosen on the reply form or when the settlement option is chosen but settlement is not reached. A contested claim would be resolved in an administrative proceeding adjudicated

by a neutral third party provided by the agency. Depending on the choice of the respondent and the existence of material factual issues in dispute, the third party may be the Associate Administrator (AA) or an Administrative Law Judge (ALJ). The AA would decide whether or not a case will be referred to an ALJ.

Paragraph (a) would provide a respondent 28 days from receipt of the notice of violation to serve a written answer on the agency contesting the claim. If the answer is responding to an original notice of violation this means that the respondent would be required to send the agency the reply form in 15 days and the written answer within another 13 days after that. Of course, respondent may choose to file an answer within 15 days of the notice of violation, in which case a reply form would be unnecessary. As with the reply form, the answer may be served on the agency by telefax.

The content of the answer in paragraph (c) would be similar to that currently required in replies under Part 386. Paragraph (c)(3) would clarify that referral to an ALJ may not be available in all instances where it is requested, but only where there are factual issues in dispute. Part 386 presently states this concept in terms of an oral hearing, i.e., an oral hearing is only available for cases with factual issues. Questions sometimes arise when contested claims without factual issues are decided by the AA without referral to an ALJ, much less an oral hearing, even though a hearing was requested. Though § 386.16(b) clearly gives the AA this power, as provided by the 1977 amendments, the section on content of replies does not reflect it. The proposed rule clearly states the agency's intent that the opportunity for a hearing does not mean that all contested matters are referred to an ALJ for a hearing. Finally, consistent with the standard in Part 386, failure to request referral to an ALJ would result in a waiver of the right to opportunity for it.

The provision in part 386 allowing the respondent to file a notice of intent to submit evidence without an oral hearing, with its own array of deadlines, would be eliminated as unnecessary. Paragraph (c)(3) would simply give the respondent the option of requesting referral to an ALJ or not. For tactical or efficiency reasons, a respondent may very well wish the AA, instead of an ALJ, to resolve its contested claim, even where factual issues are present. (See, however, discussion under § 363.109).

If the respondent fails to answer the claim, paragraph (d) would provide that the notice of violation becomes the final agency order in the same manner as

when the reply form was not served on the agency. Moreover, merely choosing an administrative adjudication on the reply form without filing an answer would also be deemed a failure to answer.

If the notice is answered, but not in the form provided in this section, the respondent may be found in default in the discretion of the AA or ALJ. Default would have the same effect as a failure to answer. In both situations, the ALJ or AA would issue a final order without inquiry as to the charged violations.

These provisions would clearly assign the power to determine the adequacy of the answer in various situations. Findings of default and failure to answer, and resulting Final Order finding of the violations as alleged, would support any subsequent collection actions taken by the agency.

Section 363.109 Procedures in Administrative Adjudications

All contested claims would be transmitted to the AA to either decide or refer to an ALJ for decision. Only the AA could determine whether or not there are factual issues in dispute and assign an ALJ to resolve a contested claim, unless the AA expressly requests the ALJ to make that determination. Assigning to an ALJ only those cases with apparent or potential factual issues has been a feature of the rules since 1977, and has been upheld in litigation on numerous occasions as complying both with the Administrative Procedure Act and due process principles. Issues of efficiency and adjudicative economy dictate that this standard continue in effect.

The first sentence of subsection (b) proposes that if there are facts in dispute and respondent has requested referral, the AA must refer the matter to an ALJ. Subsection (c) proposes to provide the AA with the discretion to decide the matter in two circumstances: (1) Where referral is requested but there are no factual issues, and (2) where referral is not requested.

There may be another situation between these two poles, however. If respondent has not requested referral, but the AA nevertheless believes referral would be beneficial to resolve a factual or other issue, should the AA have such discretion? May respondents be required to participate in possibly costly adjudication even though respondent is comfortable with potentially "lesser" process? The second sentence of subsection (b) would allow referral in those instances in the discretion of the AA. The FHWA requests comments on this issue.

Subsections (d) and (e) would accomplish in two short statements and one reference what the procedures have attempted over the years to do by detail. The Federal Rules of Civil Procedure, the approximation of which served as justification for the ever expanding standards in part 386 on discovery and motion practice, are incorporated into the civil penalty process, thereby eliminating the need for virtually all of subpart D to part 386. The AA and ALJ may suspend or adapt the Federal rules as appropriate, in conformance with the Administrative Procedure Act.

Subsections (f) and (g) would authorize the ALJ to employ appropriate process, including alternative dispute resolution. Subsection (h) would set minimal standards for appearance of representatives of respondents in administrative proceedings.

Subsection (i) would provide that the parties in an administrative adjudication may withdraw the matter under certain circumstances. Withdrawal by a party, or by the consent of the parties, would terminate the jurisdiction of the ALJ.

Section 363.110 Expedited Review by Associate Administrator

This section proposes expedited procedures for administrative review of out-of-service orders or unsatisfactory safety ratings after review by the Director of the Office of Field Operations. Subsection (c) would reduce the time to conduct an entire administrative adjudication to 10 days because subsection (b) provides that the out-of-service order shall remain in effect pending resolution of the contested claim. This last provision has been a part of the regulations since the 1985 amendments added the out-of-service procedure. The FHWA believes that it complies with intent of Congress in the 1984 Act. The rest of subsection (b) would restate the "immediate destination" exception which was added to part 386 in the 1991 amendments. In the interest of uniformity, subsection (d) would incorporate the procedures in § 363.109.

Sections 363.111 Through 363.116

With few exceptions, these sections would incorporate the provisions of subpart E of part 386, on decisions and appeals, into the new rule without substantive change. Section 386.66, which set a one year period before considering motions for modification of orders, would not be carried over. There would be no minimum time for an order to be in effect before it may be rescinded or modified by order of the AA or ALJ.

Any such motions may be made pursuant to § 363.109(e).

For the sake of clarity, § 363.114 would add a sentence to what is now in § 386.67, liberally interpreting 49 U.S.C. 521(b)(8) to allow judicial review for contested claims resulting in a final agency order, but not for those claims that are resolved through settlement agreement or in which respondent failed to answer or defaulted. The statute provides that judicial review is only available after a hearing. The FHWA believes its interpretation is appropriate because these proposed rules provide for resolution of contested claims in an administrative adjudication without a formal reply. Of course, ultimately the courts must interpret the statute to determine their scope of review.

The grounds for review of an ALJ's decision by the Associate Administrator would be explained in somewhat greater detail in 49 CFR 363.111(b) than current 49 CFR 386.62.

Subpart B—Driver Qualification Proceedings

Section 363.201 Nature of the Proceeding

Driver qualification (DQ) proceedings are the means by which the agency adjudicates challenges to its determinations concerning a driver's qualifications to operate a CMW.

Section 363.202 Commencement of Proceedings

DQ proceedings would begin with a notice of determination or letter of disqualification, which may be sent to a driver unilaterally by the agency, in resolution of a conflict of medical evaluations under § 363.204 (formerly § 391.47), or to notify the driver of the consequences of a conviction for certain driving offenses.

Section 363.203 Answer

The content of an answer is proposed. A failure to answer would result in the notice of determination or letter of disqualification becoming the final order of the agency automatically in the same manner as a failure to answer a notice of violation in a civil penalty proceeding. Thus, the three different standards for failure to reply under Part 386 are condensed into one under this proposed rule.

Section 363.204 Special Proceeding for Resolution of Conflicts of Medical Evaluation

This section, because it is entirely procedural in nature, would be moved from its present location in § 391.47 and remain relatively unchanged. A change is proposed as to the status of drivers

during the pendency of this special proceeding and is discussed under § 363.205, below.

Section 363.205 Driver's Qualification Status Pending Proceedings

Two different statuses are possible under current provisions. A driver is either physically qualified or unqualified. This section would clarify the driver's status during proceedings based on the circumstances that brought about the proceedings. It would also change current § 391.47, which requires that a driver be considered unqualified while any conflict of medical opinion is being resolved. Although the agency operated in the past on a presumption that, in the interest of safety, the driver was unqualified, such a result is not required in all cases. It is likely, moreover, that this presumption inhibited drivers from seeking resolution through the FHWA, which has primary authority to make qualification determinations for drivers in interstate commerce.

After consultations with the Department of Labor and the Equal Employment Opportunity Commission, which have responsibilities for implementing the anti-discrimination provisions of the Rehabilitation Act, 29 U.S.C. 701 *et seq.*, and the Americans with Disabilities Act, 42 U.S.C. 12101 *et seq.*, respectively, the change in status is being proposed. The changes would allow the driver's status, supported by at least one medical opinion, to remain qualified during the pendency of driver qualification proceedings with respect to the driver's employer if the conflict arose during the term of employment. However, if a driver involved in a conflict is not currently employed, e.g., an applicant, the driver, would be deemed unqualified with respect to a potential employer with which the driver's status is in conflict.

Section 363.206 Administrative Adjudication

The procedures for agency action on answers to notices of determination would track those for administrative adjudication of contested civil penalty claims. The civil penalty administrative procedures would be incorporated by reference.

Subpart C—General Provisions

Section 363.301 Applicability

These general provisions would apply to this part and part 362 on safety ratings.

Section 363.302 Computation of Time

The time computation standards would be largely unchanged from

§ 386.32 (a) and (b). Those provisions in that section which currently allow the addition of five days to specified time periods to account for use of the U.S. Postal Service in serving documents, § 386.32(c) (1) and (3), would not be carried over to the proposed rule. Instead, the proposed rule would provide that service is complete upon mailing so that the date of the postmark would control.

Section 363.303 Service

A general definition of service would be added to the regulations. A certificate of service would be required to accompany all documents served in an administrative proceeding, except the agency's notice and the respondent's form reply, which occur before a matter is contested. A service list will be provided in the agency's notice, which will establish the persons who must be served with documents. Whereas § 386.31 states these certificate and list requirements in terms of pleadings and motions, this section would make it clear that service requirements apply early in administrative proceedings, before any assignment of an ALJ.

Section 363.304 Extension of Time

This section would be carried over from part 386, with the added provision that an extension of time may be effected pursuant to mutual consent of the parties.

Section 363.305 Administrative Law Judge

This section would enumerate the powers of the ALJs, as well as the limitations on that power. It would also provide for the disqualification of ALJs. The provisions on limitations and disqualification are modeled after the procedural regulations of the Federal Aviation Administration. See 14 CFR 13.205 (b) and (c).

Section 363.306 Certification of Documents

This section would provide good faith standards for the filing of documents in administrative proceedings. Sanctions are also proposed for the ALJ or AA to impose if the standards are not met. This section is based on 14 CFR 13.207.

Section 363.307 Interlocutory Appeals

This section, based on 14 CFR 13.219, would provide standards and procedures for interlocutory appeals to the AA of matters before the ALJ.

Part 364: Violations, Penalties, and Collections

Background

Much of the penalty information in this part appears in the U.S. Code and, until now, has not appeared in published regulations. One exception is appendix A to part 386 on penalties for violations of agency notices and orders, which was published in 1991. Other exceptions are the driver disqualification periods in 49 CFR 383.51 and 391.15 and the special penalties for violations of out-of-service orders in § 383.53, all of which were required to be published by the CMVSA of 1986 and subsequent amendments.

Section-by-Section Analysis

Subpart A—General

Section 364.101 Purpose

The purpose of this proposed subpart is to inform the public of the standards for assessment and collection of penalties for violations of the FMCSRs and HMRs.

Section 364.102 Policy

This section would serve as a general summary of the part. Subsection (a) would state the general policy that penalties serve as a tool to obtain compliance with the regulations. Generally, the enforcement program is but a part, albeit significant, of the mission of the Office of Motor Carriers to reduce highway accidents and injuries by increasing compliance with safety regulations. Most carriers, drivers, and other entities choose to comply with the regulations willingly. Various educational and other compliance programs are available to assist them. For those carriers who intentionally refuse to comply with or carelessly ignore the regulations, however, enforcement may become necessary.

Subsection (b) would list the statutory penalty criteria used by the FHWA to assess penalty amounts. These factors would be explained in depth in § 364.104. The last sentence would inform respondents that information developed in an administrative adjudication may affect the amount of penalty ultimately ordered. Subsection (c) would express the notion that good faith efforts to achieve compliance will be taken into account in assessing penalties or settling claims. Subsection (e) would apply concepts of comity and resource allocation in stating that it is within the discretion of the agency not to act to enforce violations of the safety regulations when another governmental entity has already imposed appropriate penalties for the same violations.

*Subpart B—Civil Penalties**Section 364.201 Types of Violation and Maximum Monetary Penalties*

The penalty amounts in this section would be listed by the type of violation and would track the structures of the relevant statutes.

Subsection (a) would refer to violations of parts 382 and 390–399 of the FMCSRs and is based on the penalty structure in 49 U.S.C. 521(b)(2)(A), part of the 1984 Act. The penalty structure is incorporated into the enforcement scheme for violations of Part 382 drug and alcohol testing requirements in 49 CFR 382.507, as authorized by 49 U.S.C. 31306, 31317, and 322(a).

The statutory description of violation types would be augmented in places by language from the legislative history of the 1984 Act, especially the description in proposed § 364.201(a)(2) of what constitutes a serious pattern of violations. See S. Rep. No. 424, 98th Cong., 2d Sess. 10–13 (1984). The definition of a serious pattern would be further elucidated by the agency's interpretation. The interpretation in § 364.201(a)(1) of a "knowing" recordkeeping violation as including violations occurring where the means to verify the incorrect records existed is based on published decisions of ALJs in civil penalty proceedings. See *In the Matter of Trinity Transportation, Inc.*, 55 FR 43291 (October 26, 1990); for other decisions, see Federal Register notices beginning at 55 FR 43264; 55 FR 2924 (January 29, 1990); 57 FR 29710 (June 26, 1992); 58 FR 16916 (March 31, 1993); 58 FR 62450 (November 26, 1993). Various examples of types of violations are also proposed in the section.

Subsection (b) would list violations and amounts pertaining to commercial driver's licenses and is based on 49 U.S.C. 521(b)(2)(B).

Paragraph (1) of subsection (c), on the penalty amount for failing to maintain minimum levels of financial responsibility, is based on 49 U.S.C. 31138–31139. Paragraph (2) would state the rebuttable presumption that lack of proof of insurance indicates lack of insurance. It also states the current enforcement practice which allows rebuttal of that presumption upon presentation of proof within 10 days. Though the statute makes no distinction in penalties, allowing a \$10,000 maximum for all violations, paragraph (3) would provide that mere failure to present proof of insurance, where the insurance actually exists, is a separate recordkeeping offense, subject to a much smaller penalty than the failure to have the insurance.

Proposed subsection (d), on violations of the HMRs, is based on 49 U.S.C. 5123. Subsection (e) would represent the current appendix A to part 386, on violations of notices and orders.

Section 364.202 Civil Penalty Assessment Factors

This section would further explain the penalty assessment criteria listed in § 364.102(b). The criteria are statutory and found in 49 U.S.C. 5123(c) and 521(b)(2)(C). The criteria would be categorized as involving either the violation or the violator. The proposed explanation of each factor is based on the agency's reasonable interpretation of the statute in light of current agency practice. Particular attention should be paid to the factor proposed in paragraph (2) of subsection (b), history of prior offenses, which may be used by the agency to determine if a carrier's operations constitute an imminent hazard to safety subject to an out-of-service order. Proposed subsection (c) is a reminder that the application of the factors in a particular case may be used in a decision to pursue means of enforcement other than monetary penalties.

*Subpart C—Criminal Penalties and Other Sanctions**Section 364.301 Criminal Penalties*

Criminal penalties are rarely pursued by the Federal government of violations of commercial motor vehicle safety regulations. Since passage of the 1984 Act, the object of the great majority of safety enforcement cases has been compliance with the regulations through the assessment of monetary penalties. Other civil penalties, such as out-of-service orders, have also gained in importance since 1984. The commercial motor vehicle safety program is administrative in the first instance. Generally, commercial motor vehicle transportation is a highly regulated industry, with safety as an important part of the overall regulatory scheme. *International Brotherhood of Teamsters v. U.S. DOT*, 932 F.2d 1292, 1300 (9th Cir. 1991). The FHWA's regulatory program is not converted into a criminal law enforcement scheme merely because the government also retains certain parallel criminal penalty authority.

The advantage to this structure is that the agency can take direct administrative action against violators, when necessary, supported by the authority to enforce agency orders in court. Before the 1984 Act, the agency had only limited civil and criminal penalty authority which could not be

enforced directly by the agency in Federal court. In practice, these cases generally did not receive very high priority in the hierarchy of demands placed upon many United States Attorneys and the courts. This regrettable situation was largely ameliorated with the expanded civil penalty authority of the 1984 Act. This section would serve as notice, however, that the criminal penalty authority still exists. In fact it was enhanced in the 1984 Act. Subsection (e) would notify the public that willful violations may be referred to the Department of Justice for possible criminal enforcement.

Section 364.302 Injunctions

This proposed section is intended to notify the public of the authority of the FHWA to bring civil actions in U.S. District Court to enforce many of its safety regulations and orders, and, in the case of the transportation of hazardous materials, to eliminate an imminent hazard to safety. It is based on 49 U.S.C. 507 and 5122. In practice, the form of relief sought is usually injunctive, typically an order to a motor carrier to cease operations, although the statutes allow all appropriate or necessary relief, including punitive damages.

It is important to note that the regulations and orders which may be enforced in this way are somewhat limited, and do not include all of the safety regulations which have been discussed in this document. Hazardous materials regulations and orders may be enforced, and imminent hazards eliminated, pursuant to 49 U.S.C. 5122. For most, but not all, CMV safety violations not involving hazardous materials, 49 U.S.C. 507 authorizes enforcement actions. But 49 U.S.C. 507 specifically excepts violations of the financial responsibility requirements for motor carriers, found in 49 U.S.C. 31138 and 31139, from the authority to enforce directly through civil action. This is unlike the statutory section authorizing the use of administrative powers (49 U.S.C. 31133), which contains no such exclusion and thus does apply to enforcement of financial responsibility requirements.

Neither chapter 313, on the CDL program, nor chapter 59, on Intermodal Safe Container Transportation, contain any express provisions for injunctive relief, nor are those chapters mentioned at all in 49 U.S.C. 507. Therefore, those chapters are not included in this section articulating the statutory authority for injunctive relief.

Finally, the authority to seek an injunction directly in court (49 U.S.C. 507) should be distinguished from the

authority to administratively order a vehicle, employee, or employer to cease operations which pose an imminent hazard to safety (49 U.S.C. 521(b)(5)(A)). The latter process contemplates an administrative proceeding before any attempts at enforcement in court. This "out-of-service order" procedure is discussed in subsections (c) and (d), and may be used to enforce CDL and intermodal container violations.

Section 364.303 Driver Disqualifications

This section would be a restatement of disqualification periods applicable to drivers who commit certain violations. These disqualification sanctions also appear in §§ 383.51 and 391.15. Drivers are also unqualified for any period in which they fail to meet the qualification requirements of part 391.

Subpart D—Monetary Penalty Collections

Section 364.401 Payment

Payment is demanded upon issuance of a final order imposing a monetary penalty and generally due and payable within 30 days thereafter. Unless judicial review is sought, the penalty amount is subject to the accrual of interest after the date specified in the final order.

Section 364.402 Collections

This section would provide that monies due and payable will be collected pursuant to the Federal debt collection regulations. If administrative actions fail to result in payment, the matter will be referred to the Department of Justice for collection in a civil action filed in U.S. District Court. 49 U.S.C. 521(b)(4), 5123(d), 31138(d)(4), 31139(f)(4).

Removal of Parts 385 and 386

Because this rulemaking is a comprehensive revision of safety ratings and enforcement case procedures, it is proposed to remove and reserve parts 385 and 386 from the Code of Federal Regulations.

Removal and Reservation of Section 391.47

Because the procedure for resolution of medical conflicts would be revised and relocated in subpart B of part 303, it is proposed to remove and reserve § 391.47 of 49 CFR part 391.

Rulemaking Analyses and Notices

Executive Order 12866 (Federal Regulation) and DOT Regulatory Policies and Procedures

FHWA has determined that this action is not a significant regulatory

action within the meaning of Executive Order 12866 or significant within the meaning of Department of Transportation regulatory policies and procedures. The proposals contained in this document would not result in an annual effect on the economy of \$100 million or more, or lead to a major increase in costs or prices, or have significant adverse effects on the United States economy. This proposal would augment, replace or amend existing procedures and practices. Any economic consequences flowing from the procedures in the proposal are primarily mandated by statute. A regulatory evaluation is not required because of the ministerial nature of this action.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the agency has evaluated the effects of this NPRM on small entities. No economic impacts of this rulemaking are foreseen as the rule would impose no additional substantive burdens that are not already required by the regulations to which these procedural rules would serve as the adjective law. Therefore, the FHWA certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities.

Executive Order 12612 (Federalism Assessment)

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 12612. The rules proposed herein in no way preempt State authority or jurisdiction, nor do they establish any conflicts with existing State role in the regulation and enforcement of commercial motor vehicle safety. It has therefore been determined that the NPRM does not have sufficient federalism implications to warrant the preparation of a federalism assessment.

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 of Federal programs and activities apply to this program.

Paperwork Reduction Act

This proposed rule does not contain a collection of information requirement for purposes of the Paperwork Reduction Act of 1980. 44 U.S.C. 3501 *et seq.*

National Environmental Policy Act

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

Regulation Identification Number

A regulation 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 Parts 361, 362, 363, 364, 385, 386, and 391

Administrative procedures, Commercial motor vehicle safety, Highways and roads, Highway safety, Motor carriers.

Issued on: April 18, 1996.

Rodney E. Slater,

Federal Highway Administrator.

In consideration of the foregoing, the FHWA proposes to amend title 49, CFR, subtitle B, chapter III, by removing and reserving parts 385 and 386, and by adding parts 361, 362, 363, and 364 as set forth below:

1. Chapter III is amended by adding parts 361, 362, 363, and 364 to read as follows:

PART 361—ADMINISTRATIVE ENFORCEMENT

Sec.

- 361.101 Purpose.
- 361.102 Authority and delegation.
- 361.103 Inspection and investigation.
- 361.104 Definitions.
- 361.105 Employer obligations.
- 361.106 Vehicle/driver inspection.
- 361.107 Complaints.
- 361.108 Administrative subpoenas.
- 361.109 Depositions and production of records.

Authority: 49 U.S.C. 104, 307, chapters 5, 51, 59, 311, 313, and 315.

§ 361.101 Purpose.

This part:

(a) Restates the authority of the Department of Transportation (DOT) to regulate and investigate persons, property, equipment, and records relating to commercial motor vehicle transportation, intermodal safe container transportation, and the highway transportation of hazardous materials;

(b) Describes certain obligations and rights of motor carriers and other entities subject to DOT regulations; and

(c) Identifies the DOT officials authorized to enforce motor carrier and hazardous materials regulations.

§ 361.102 Authority and delegation.

(a) The authority of the Secretary of Transportation to regulate and investigate commercial motor vehicle safety, including motor carriers, commercial motor vehicles and drivers, and the highway transportation of hazardous materials, is codified in 49 U.S.C. Chapters 5, 51, 59, 311, 313, and 315, and 42 U.S.C. 4917. In carrying out the provisions of these chapters, the Secretary may conduct inspections and investigations, compile statistics, make reports, issue subpoenas, require the production of records and property, take depositions, hold hearings, prescribe recordkeeping and reporting requirements, conduct or make contracts for studies, development, testing evaluation and training, and perform other acts the Secretary considers appropriate.

(b) The authority of the Secretary listed in paragraph (a) of this section has been delegated to the Federal Highway Administrator (49 U.S.C. 104(c); 49 CFR 1.48), and is codified in 49 CFR part 325 (Noise Control), the Federal Motor Carrier Safety Regulations (FMCSRs) (49 CFR Parts 350–399) and relevant portions of the Hazardous Materials Regulations (HMRs) (primarily 49 CFR Parts 171–173, 177–178, and 180). The Federal Highway Administrator has delegated the authority to enforce the FMCSRs and the HMRs to the Associate Administrator for Motor Carriers.

(c) The Associate Administrator for Motor Carriers has retained the authority to approve operating procedures for investigations under this part, including inspections, and has delegated to subordinate managers, supervisors, and field personnel, hereinafter “special agents,” the authority to perform such investigations.

(d) The Administrator may delegate to a State which is receiving a grant under 49 U.S.C. 31102 such functions respecting the enforcement (including investigations) of the provisions of this subchapter and regulations issued herein as the Administrator determines appropriate. Nothing in this part shall preempt the authority of any State to conduct investigations, initiate enforcement proceedings, or otherwise implement applicable provisions of State law with respect to motor carrier safety.

§ 361.103 Inspection and investigation.

The FHWA may begin an investigation on its own initiative or on a complaint.

(a) Upon a display of official DOT credentials, special agents may enter without delay at reasonable times any place of business, property, equipment, or commercial motor vehicle of a person subject to the provisions of 49 U.S.C. Chapters 5, 51, 59, 311, 313, and 315, and 42 U.S.C. 4917. Special agents may take the following actions:

(1) Inspect the equipment and property of a motor carrier or other person on the premises of the motor carrier, or the equipment of the motor carrier at any other location, and inspect any commercial motor vehicle of the motor carrier whether or not in operation; and

(2) Inspect and copy any record of—
(i) A carrier, lessor, association, or other person subject to the provisions of 49 U.S.C. Chapters 5, 51, 59, 311, 313, and 315, and 42 U.S.C. 4917; and

(ii) A person controlling, controlled by, or under common control with a carrier, if the agent considers inspection relevant to that person's relation to, or transaction with, that carrier.

(3) Inspect and copy records, property, and equipment related to manufacturing, fabricating, marking, maintaining, reconditioning, repairing, testing, or distributing a package or a container for use by a person transporting hazardous material by commercial motor vehicle, and to the highway transportation of hazardous materials.

(b) Special agents may inspect and copy any record related to an investigation, whether or not it is required to be maintained by Federal Highway Administration (FHWA) regulations or orders. Special agents may ask any employer, owner, operator, agent, employee, or other person for information necessary to carry out their statutory and regulatory functions. Special agents shall offer the employer or other person subject to the investigation a right of accompaniment during an inspection and shall notify the person of the general purpose for which the information is sought.

(c) Reasonable times for inspections are the regular working hours of the motor carrier or other person, or other times agreed to by the carrier or other person, required by exigent circumstances, or authorized by any court of the United States. If the person operates twenty-four hours per day, reasonable time means whenever authorized agents can obtain access to records necessary to conduct an inspection, and a representative of the

person can exercise the right of accompaniment.

(d) The right of a special agent to enter upon the premises of any person, inspect vehicles, examine records, or interview any person shall not imply or be conditioned upon a waiver of any cause of action, claim, order or penalty.

(e) The Associate Administrator may require a motor carrier to file with the FHWA a copy of any lease agreement or other business arrangement that is related to transportation safety.

(f) Information received in an investigation, including the identity of the person investigated and any other person who provides information during the investigation, may be kept confidential under the investigatory file exception, or other appropriate requirements of 5 U.S.C. 552.

§ 361.104 Definitions.

Words or phrases defined in 49 CFR 383.5 and 390.5 of this subchapter apply in parts 361–364. In addition—

Abate or abatement means to discontinue regulatory violations by refraining from or taking actions, identified in a notice, to correct noncompliance.

Administrative law judge means an administrative law judge appointed pursuant to the provisions of 5 U.S.C. 3105.

Associate Administrator means the Associate Administrator for Motor Carriers or an authorized delegate of that official.

Federal Motor Carrier Safety Regulations (FMCSRs) means safety regulations issued by the Federal Highway Administration under the authority provided in 49 U.S.C. 104(c) or delegated by the Secretary of Transportation in 49 CFR 1.48, and set forth in subchapter B of this chapter.

Hazardous Materials Regulations (HMR) means safety regulations issued by the Research and Special Programs Administration under authority delegated by the Secretary of Transportation in 49 CFR 1.53, and set forth in subchapter C of chapter I of this title.

Respondent means a party against whom relief is sought or claim is made.

Special agent means an individual employed by the Federal Highway Administration and empowered by the Secretary through delegations of authority to perform the activities referred to in § 361.103.

§ 361.105 Employer obligations.

(a) An employer, employee, and other person shall comply with applicable commercial motor vehicle safety regulations.

(b) A violator shall post all notices of violation which have become final, as required by any notice issued by a special agent. Such notices shall be posted by the employer in each motor carrier's places of employment in a conspicuous place or places where notices to employees are customarily posted. Each employer shall insure that such notices are not altered, defaced, or covered by other materials.

(c) All regulations on commercial motor vehicle safety and hazardous materials safety are published in the Federal Register, codified in the Code of Federal Regulations, and available for review and copying at the Regional Offices of the Federal Highway Administration. An employer shall maintain current copies of applicable regulations, and shall make them available for inspection to any employee upon request.

(d) After proper identification of a special agent through the display of credentials, and an explanation of the purpose of the investigation, a person shall, upon the request of the special agent, provide access to:

- (1) The records requested to be reviewed;
- (2) Employees of the person to be interviewed; and
- (3) Any equipment or property used in the transportation of persons or property or to ensure compliance with the Federal Motor Carrier Safety Regulations and the Hazardous Materials Regulations.

(e) The request for the production of records or access to employees or equipment may be made at the initiation of the investigation or at any time thereafter.

§ 361.106 Vehicle/driver inspection.

Upon the instruction of a duly authorized Federal, State or local enforcement official, each commercial motor vehicle used in interstate commerce shall be subject to an inspection of all safety equipment and operating conditions required under the Federal Motor Carrier Safety Regulations and Hazardous Materials Regulations. Each driver of such vehicle shall also be subject to an inspection by such enforcement officials of all documents required to be maintained by that driver under those regulations.

§ 361.107 Complaints.

(a) A person, including a governmental authority, may file with the Associate Administrator a complaint concerning an alleged violation of this chapter. The complaint must state the facts that are alleged to constitute a violation. Any office of the FHWA's

Office of Motor Carriers will accept a written complaint. For a listing of FHWA Regional Offices see § 390.27 of this subchapter. There are also Office of Motor Carrier facilities located in each State and listed in local telephone directories.

(b) The Associate Administrator shall timely investigate any nonfrivolous written complaint alleging that a substantial violation of any regulation issued under this chapter is occurring or has occurred within the preceding 60 days. Nonfrivolous written complaints are allegations of violations of applicable safety regulations containing sufficient descriptive detail and knowledge of events to create a reasonable suspicion that the violations occurred or are occurring. Substantial violation in this context means the same as a pattern of serious violations or a substantial health and safety violation, as those terms are defined in part 364 of this subchapter, or patterns of record falsification that evidences an intent to avoid detection of such violations.

(c) The Associate Administrator may dismiss a complaint determined not to state reasonable grounds for investigation and need not conduct separate investigations of duplicative complaints.

(d) The complainant shall be timely notified of findings resulting from an investigation or of dismissal of a complaint.

(e) The agency shall not disclose the identity of complainants without their consent unless it is determined that such disclosure is necessary to prosecute a violation. If disclosure becomes necessary, the Associate Administrator shall take every practical measure within his authority to assure that the complainant is not subject to harassment, intimidation, disciplinary action, discrimination, or financial loss as a result of such disclosure.

(f) No motor carrier or other employer subject to the regulations in this chapter shall discharge, discipline, or in any manner discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because such employee (or any person acting pursuant to a request of such employee) has filed any complaint or instituted or caused to be instituted any proceeding relating to a violation of a commercial motor vehicle safety rule, regulation, standard, or order, or has testified or is about to testify in any such proceeding.

(g) No motor carrier or other employer subject to the regulations in this chapter shall discharge, discipline, or in any manner discriminate against an

employee with respect to the employee's compensation, terms, conditions, or privileges of employment for refusing to operate a vehicle when such operation constitutes a violation of any Federal rules, regulations, standards, or orders applicable to commercial motor vehicle safety or health, or because of the employee's reasonable apprehension of serious injury to himself or the public due to the unsafe condition of such equipment. The unsafe conditions causing the employee's apprehension of injury must be of such nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a bona fide danger of an accident, injury, or serious impairment of health, resulting from the unsafe condition. In order to qualify for protection under this section, the employee must have sought from his employer, and have been unable to obtain, correction of the unsafe condition.

(h) Violations of paragraphs (f) and (g) of this section are subject to enforcement by the Occupational Safety and Health Administration (OSHA) of the Department of Labor. The proper steps for an employee to follow when pursuing their rights under these paragraphs are found in 49 U.S.C. 31105(b) and 29 CFR part 1978.

§ 361.108 Administrative subpoenas.

(a) The Associate Administrator may subpoena witnesses and records related to a proceeding or investigation from a place in the United States to the designated place of the proceeding or investigation.

(b) If a person fails to comply with a subpoena, the Associate Administrator may file a civil action in the district court of the United States in which the proceeding or investigation is being conducted to enforce the subpoena. The court may punish a refusal to obey an order of the court to comply with a subpoena.

(c) A motor carrier not complying with a subpoena of the Associate Administrator to appear, testify, or produce records is subject to a fine of at least \$100 but not more than \$5,000, and imprisonment of not more than one year.

§ 361.109 Depositions and production of records.

(a) In any proceeding, compliance review, or investigation, the Associate Administrator may take testimony of a witness by deposition and may order the witness to produce records. If a witness refuses to be deposed or to produce records under this section, the

Associate Administrator may subpoena the witness to appear for a deposition, produce the records, or both.

(b) A deposition may be taken before a judge of a court of the United States, a United States magistrate, a clerk of a district court, or a chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court, or court of common pleas of any State, or a notary public who is not counsel or attorney of a party or interested in the proceeding or investigation.

(c) Notice must be given in writing to the person being deposed in accordance with the Federal Rules of Civil Procedure. The notice shall state the name of the witness and the time and place of taking the deposition.

(d) The testimony of a person deposed under this section shall be taken under oath. The person taking the deposition shall prepare, or cause to be prepared, a transcript of the testimony taken. The transcript shall be subscribed by the deponent, unless signature is waived.

(e) The testimony of a witness who is in a foreign country may be taken by deposition before an officer or person designated by the Associate Administrator or agreed on by the parties by written stipulation filed with the Associate Administrator. The deposition shall be promptly filed with the Associate Administrator.

(f) Each witness summoned before the Associate Administrator or whose deposition is taken under this section and the individual taking the deposition are entitled to the same fees and mileage paid for those services in the courts of the United States.

PART 362—SAFETY RATINGS

Sec.	
362.101	Purpose.
362.102	Motor Carrier Identification Report.
362.103	Safety fitness—standards and factors.
362.104	Determination of safety fitness—safety ratings.
362.105	Unsatisfactory rated motor carrier—prohibition on transportation of hazardous materials and passengers; ineligibility for Federal contracts.
362.106	Notification of a safety rating.
362.107	Change to safety rating based on corrective actions.
362.108	Administrative review.
362.109	Temporary relief from rating.
362.110	Safety fitness information.

Appendix to Part 362—Form MCS-150, Motor Carrier Identification Report

Authority: 49 U.S.C. 104, 504, 521(b)(5)(A), 31144, and 31502; 49 CFR 1.48.

§ 362.101 Purpose.

(a) This part establishes standards and procedures applicable to motor carrier

identification, the determination of a motor carrier's safety fitness and the issuance of a safety rating by the FHWA. This part also notes the restrictions applicable to unsatisfactory rated motor carriers, provides for availability of safety fitness information, and includes procedures for administrative review of safety ratings.

(b) The procedures set forth in 49 CFR part 363, subpart C also apply to this part.

§ 362.102 Motor Carrier Identification Report.

(a) All motor carriers currently conducting operations in interstate or foreign commerce shall file a Motor Carrier Identification Report, Form MCS-150 (see appendix to this part), within 90 days after beginning operations.

(b) The Motor Carrier Identification Report, Form MCS-150, is available from all FHWA region and division motor carrier safety offices nationwide and from the FHWA Office of Motor Carrier Information and Analysis, 400 Seventh Street, SW., Washington, DC 20590.

(c) The completed Motor Carrier Identification Report, Form MCS-150, shall be filed with the FHWA, Office of Information and Analysis, 400 Seventh Street, SW., Washington, DC 20590.

§ 362.103 Safety fitness—standards and factors.

(a) To meet safety fitness standards, a motor carrier must demonstrate through its performance that it has adequate safety management controls in place to ensure compliance with applicable safety and hazardous materials regulations and to facilitate the safe movement of property and passengers by highway.

(b) The information obtained from reviews, investigations, roadside inspections, and other available performance data is used to assess a motor carrier's safety fitness in the context of the following factors:

(1) The adequacy of safety management controls. Safety management controls are those systems, programs, practices and procedures implemented by a motor carrier to ensure regulatory compliance and reduce the safety risks associated with:

(i) Commercial driver's license violations (49 CFR part 383), including controlled substances and alcohol testing violations (49 CFR part 382);

(ii) Inadequate levels of financial responsibility (49 CFR part 387);

(iii) The failure to record and track accidents and incidents. (49 CFR part 390).

(iv) The use of unqualified drivers (49 CFR part 391);

(v) Improper use and driving of motor vehicles (49 CFR part 392);

(vi) Unsafe vehicles operating on the highways (49 CFR part 393);

(vii) The use of fatigued drivers (49 CFR part 395);

(viii) Inadequate inspection, repair, and maintenance of vehicles (49 CFR part 396);

(ix) Transportation and routing of hazardous materials (49 CFR part 397); and

(x) Violations of hazardous materials regulations (49 CFR parts 107-177, 180).

(2) Frequency and severity of violations of applicable safety and hazardous materials regulations and orders, including violations of compatible state regulations and orders.

(3) Number and frequency of driver/vehicle violations resulting in driver/vehicle being placed out of service.

(4) Frequency of accidents and hazardous materials incidents, including: The recordable accident rate per million miles; the recordable preventable accident rate per million miles; other accident indicators; and whether these accident and incident indicators have improved or deteriorated over time.

(c) In considering violations referred to in paragraph (b)(2) of this section, particular attention is given to violations of regulations that are *critical* or *acute*. These terms as used in this paragraph to denote the seriousness of regulatory requirements are defined as follows:

(1) Critical regulation—violations of which, if occurring in patterns, reflect a breakdown of management control directly related to essential safety functions. A pattern is evident when violations are occurring at a rate in excess of 10 percent. Examples of violations of critical regulations are using drivers to operate commercial motor vehicles after they have exceeded the allowable driving time or on-duty time.

(2) Acute regulation—violations of which are so severe as to require immediate correction, and by themselves reflect negatively on the motor carrier's ability to manage safety compliance, regardless of its overall safety posture. An example of a violation of an acute regulation is allowing a driver to operate after the drivers has tested positive for alcohol have exceeded the allowable driving time or on-duty time.

§ 362.104 Determination of safety fitness—safety ratings.

(a) Following a review of a motor carrier, the degree to which the

operations of the motor carrier are consistent with the safety fitness standards and factors set forth in § 362.103 determines whether the following rating will be assigned:

(1) Unsatisfactory—an unsatisfactory safety rating means a failure by a motor carrier to have adequate safety management controls in place to prevent involvement in crashes by its vehicles and drivers, evidenced by higher than normal accident rates, or to ensure compliance with the applicable safety standards, regulations and orders, as evidenced by inordinate ratios of violations detected in on-site reviews or roadside inspections associated with the factors listed in § 362.103(b).

(2) [Reserved]

(b) An otherwise unsatisfactory safety rating may be deferred, suspended or otherwise avoided if conditions imposed as a result of a review of a motor carrier's operation and performance are met, which would include compliance with specific provisions of the safety or hazardous materials regulations, the requirements of an order or notices to abate, or other commitments to improve compliance and performance. The conditions may be imposed in lieu of an unsatisfactory rating, and failure of the conditions may result in the immediate assignment of an unsatisfactory rating.

§ 362.105 Unsatisfactory rated motor carriers—prohibition on transportation of hazardous materials and passengers; ineligibility for Federal contracts.

(a) A motor carrier rated unsatisfactory is prohibited from operating a commercial motor vehicle to transport—

(1) Hazardous materials for which vehicle placarding is required pursuant to part 172 of Chapter I of this title; or

(2) More than 15 passengers, including the driver.

(b) A motor carrier subject to the provisions of paragraph (a) of this section is ineligible to contract or subcontract with any Federal agency for transportation of the property or passengers referred to in paragraphs (a)(1) and (a)(2) of this section.

(c) Penalties. When it is known that the carrier transports the property or passengers referred to in paragraphs (a)(1) and (a)(2) of this section, an order will be issued placing those operations out of service. Any motor carrier that operates commercial motor vehicles in violation of this section will be subject to the penalty provisions listed in part 364 of this chapter.

§ 362.106 Notification of a safety rating.

(a) Written notification of the safety rating will be provided to a motor

carrier as soon as practicable after assignment of the rating.

(b) Before a safety rating of unsatisfactory is assigned to any motor carrier, the FHWA will issue a notice of proposed safety rating. The notice of proposed safety rating will list the deficiencies discovered during the review of the motor carrier's operations, for which corrective actions must be taken.

(c) A notice of a proposed safety rating of unsatisfactory will indicate that, if the unsatisfactory rating becomes final, the motor carrier will be subject to the provisions of § 362.105, which prohibit motor carriers rated unsatisfactory from transporting hazardous materials or passengers, and other consequences that may result from such rating.

(d) A proposed safety rating will not be made available to the public under § 362.110.

(e) Except as provided in § 362.107, a proposed safety rating issued pursuant to paragraph (b) of this section will become the motor carrier's final safety rating 45 days after the date the notice of proposed safety rating is received by the motor carrier.

§ 362.107 Change to safety rating based on corrective actions.

(a) Within the 45-day period specified in § 362.106(e), or at any time after a rating has become final, a motor carrier may request a change to a proposed or final safety rating based on evidence that corrective actions have been taken and that its operations currently meet the safety standards and factors specified in § 362.102.

(b) A request for a change to a safety rating must be made, in writing, to the Regional Director, Office of Motor Carriers, for the FHWA Region in which the carrier maintains its principal place of business, and must include a written description of corrective actions taken and other documentation that may be relied upon as a basis for the requested change to the proposed rating.

(c) The final determination on the request for change will be based upon the documentation submitted and any additional investigation deemed necessary.

(d) The filing of a request for change to a proposed rating under this section does not stay the 45-day period established in § 362.106(e), after which a proposed safety rating becomes final. If the motor carrier has submitted evidence that corrective actions have been taken pursuant to this section and a final determination cannot be made within the 45-day period, the period of the proposed safety rating may be

extended for up to 10 days at the discretion of the Regional Director.

(e) If it is determined that the motor carrier has taken the corrective actions required and that its operations currently meet the safety standards and factors specified in § 362.103, the motor carrier will be provided with written notification that the proposed unsatisfactory rating will not be assigned, or, if already assigned, rescinded.

(f) If it is determined that the motor carrier has not taken all the corrective actions required or that its operations still fail to meet the safety standards and factors specified in § 362.103, the motor carrier shall be provided with written notification that its request has been denied and that the proposed safety rating of unsatisfactory will become final pursuant to § 362.106(e), or that an unsatisfactory safety rating currently in effect will not be change.

(g) Any motor carrier whose request for change is denied pursuant to paragraph (f) of this section may petition for administrative review pursuant to § 362.108 within 45 days of the denial of the request for rating change. If the unsatisfactory rating has become final, it shall remain in effect during the period of any administrative review unless stayed by the reviewing official.

§ 362.108 Administrative review.

(a) Within the 45-day notice period provided in § 362.106(e), or within 45 days after denial of a request for a change in rating as provided in § 362.107(g), the motor carrier may petition the FHWA for administrative review of a proposed or final safety rating by submitting a written request to the Director, Office of Motor Carrier Field Operations, 400 Seventh Street, SW., Washington, DC 20590.

(b) The petition must state why the proposed safety rating is believed to be in error and list all factual and procedural issues in dispute. The petition may be accompanied by any information or documents the motor carrier is relying upon as the basis for its petition.

(c) The Director, Office of Motor Carrier Field Operations, may request the petitioner to submit additional data and attend a conference to discuss the safety rating. Failure to provide the information requested or attend the conference may result in dismissal of the petition.

(d) The petitioner shall be notified in writing of the decision on administrative review. The notification will occur within 30 days after receipt

of a petition from a hazardous materials or passenger motor carrier.

(e) If the decision on administrative review results in a final rating of unsatisfactory for a hazardous materials or passenger motor carrier, the decision shall be accompanied by an appropriate out-of-service order and provide for an expedited agency appeal of such decision pursuant to §§ 363.108 and 363.110 of this subchapter.

(f) All other decisions on administrative review of ratings constitute final agency action. Thereafter, improvement in the rating may be obtained under § 362.107.

§ 362.109 Temporary relief from rating.

(a) *Proposed rating.* At any time before a proposed unsatisfactory rating becomes final, the Regional Director in the region wherein the motor carrier maintains its principal place of business for safety purposes may temporarily suspend the proposed rating for a period up to 60 days; *provided:* the motor carrier consents in writing to an order directing compliance with conditions designed to assure that the safety fitness

standard will be met and satisfactory performance will be achieved. The temporary suspension is discretionary with the Regional Director after consideration of circumstances satisfying that official that a good faith effort by the motor carrier will be made and that this effort is reasonably certain to bring about compliance. The consent order must contain a provision that the temporary recision will be withdrawn and the proposed unsatisfactory rating will become final upon a failure of one or more of the conditions in the order. If a satisfactory level of compliance is achieved after the period covered by the consent order, the Regional Director may withdraw the proposed unsatisfactory rating, which action may or may not be subject to prescribed conditions.

(b) *Final rating.* The Director of the Office of Field Operations, or other official designated by the Associate Administrator, may temporarily suspend a final rating of unsatisfactory under the same conditions set forth in paragraph (a) of this section.

§ 363.110 Safety fitness information.

(a) Final ratings will be made available to other Federal and State agencies in writing, telephonically or by remote computer access.

(b) The final safety rating assigned to a motor carrier will be made available to the public upon request. Any person requesting the assigned rating of a motor carrier shall provide the FHWA with the motor carrier's name, principal office address, and, if known, the DOT number or the ICC docket number, if any.

(c) Requests shall be addressed to the Office of Motor Carrier Information Management and Analysis, HIA-1, Federal Highway Administration, 400 Seventh Street, SW., Washington, DC 20590.

(d) Oral requests by telephone will be given an oral response.

Appendix to Part 362—Form MCS-150. Motor Carrier Identification Report (Approved by OMB under control number 2125-0544)

BILLING CODE 4910-22-M

Notice

The Form MCS-150, Motor Carrier Identification Report, must be filed by all motor carriers operating in interstate or foreign commerce. A new motor carrier must file Form MCS-150 within 90 days after beginning operations. Exception: A motor carrier that has received written notification of a safety rating from the Federal Highway Administration (FHWA) need not file the report. To mail, fold the completed report so that the self-addressed postage paid panel is on the outside. This report is required by 49 CFR Part 385 and authorized by 49 U.S.C. 504 (1982 & Supp. III 1985).

The public reporting burden for this collection of information on the Form MCS-150 is estimated by the FHWA to average 20 minutes. If you wish to comment on the accuracy of the estimate or make suggestions for reducing this burden, please direct your comments to the Office of Management and Budget and the FHWA at the following addresses:

Office of Management and Budget,
Paperwork Reduction Project, Washington,
DC 20503

and

Federal Highway Administration, OMC Field
Operations, HFO-10, 400 7th Street, SW.,
Washington, DC 20590

Instructions for Completing the Motor
Carrier Identification Report (MCS-150)

(Please Print or Type All Information)

1. Enter the legal name of the business entity (i.e., corporation, partnership, or individual) that owns/controls the motor carrier/shipper operation.
2. If the business entity is operating under a name other than that in Block 1, (i.e., "trade name") enter that name. Otherwise, leave blank.
3. Enter the principal place of business street address (where all safety records are maintained).
4. Enter mailing address if different from the physical address, otherwise leave blank. Also, applies to #7, #8, #12-#14.
5. Enter the city where the principal place of business is located.
6. If a Mexican motor carrier or shipper, enter the Mexican neighborhood or barrio where the principal place of business is located.
7. Enter the city corresponding with the mailing address.
8. If a Mexican motor carrier or shipper, enter the Mexican neighborhood or barrio corresponding with the mailing address.
9. Enter the name of the county in which the principal place of business is located.
10. Enter the two-letter postal abbreviation for the State, or the name of the Canadian Province or Mexican State, in which the principal place of business is located.
11. Enter the zip code number corresponding with the street address.
12. Enter the name of the county corresponding with the mailing address.
13. Enter the two-letter postal abbreviation for the State, or the name of the Canadian Province or Mexican State, corresponding with the mailing address.

14. Enter the ZIP code number corresponding with the mailing address.

15. Enter the telephone number, including area code, of the principal place of business.

16. Enter the identification number assigned to your motor carrier operation by the U.S. Department of Transportation, if known. Otherwise, enter "N/A."

17. Enter the motor carrier "MC" or "MX" number under which the Interstate Commerce Commission (ICC) issued your operating authority, if appropriate. Otherwise, enter "N/A."

18. Enter the employer identification number (EIN #) or social security number (SSN #) assigned to your motor carrier operation by the Internal Revenue Service.

19. Circle the appropriate type of carrier operation.

- A. Interstate.
- B. Intrastate, transporting hazardous materials (49 CFR 100-180).
- C. Intrastate, NOT transporting hazardous materials.

Interstate—transportation of persons or property across State lines, including international boundaries, or wholly within one State as part of a through movement that originates or terminates in another State or country.

Intrastate—transportation of persons or property wholly within one State.

20. Circle the appropriate type of shipper operation.

- A. Interstate
 - B. Intrastate
- Interstate & Intrastate—See #19 above.

21. Enter the carrier's total mileage for the past calendar year.

22. Circle appropriate classification. Circle all that apply. If "L. Other" is circled, enter the type of operation in the space provided.

- A. Authorized For Hire
- B. Exempt For Hire
- C. Private (Property)
- D. Private Passengers (Business)
- E. Private Passengers (Non-Business)
- F. Migrant
- G. U.S. Mail
- H. Federal Government
- I. State Government
- J. Local Government
- K. Indian Tribe
- L. Other

Authorized For Hire—transportation for compensation as a common or contract carrier of property, owned by others, or passengers under the provisions of the ICC.

Exempt For Hire—transportation for compensation of property or passengers exempt from the economic regulation by the ICC.

Private (Property)—means a person who provides transportation of property by commercial motor vehicle and is not a for-hire motor carrier.

Private Passengers (Business)—a private motor carrier engaged in the interstate transportation of passengers which is provided in the furtherance of a commercial enterprise and is not available to the public at large (e.g., bands).

Private Passengers (Non-Business)—a private motor carrier involved in the interstate transportation of passengers that

does not otherwise meet the definition of a private motor carrier of passengers (business) (e.g., church buses).

Migrant—interstate transportation, including a contract carrier, but not a common carrier of 3 or more migrant workers to or from their employment by any motor vehicle other than a passenger automobile or station wagon.

U.S. Mail—transportation of U.S. Mail under contract with the U.S. Postal Service.

Federal Government—transportation of property or passengers by a U.S. Federal Government agency.

State Government—transportation of property or passengers by a U.S. State Government agency.

Local Government—transportation of property or passengers by a local municipality.

Indian Tribe—transportation of property or passengers by a Indian tribal government.

Other—transportation of property or passengers by some other operation classification not described by any of the above.

23. Circle all the letters of the types of cargo you usually transport. If "Z. Other" is circled, enter the name of the commodity in the space provided.

24. Circle all the letters of the types of hazardous materials (HM) you transport/ship. In the columns before the HM types, either circle C for carrier of HM or S for a shipper of HM. In the columns following the HM types, either circle T if the HM is transported in cargo tanks or P if the HM is transported in other packages (49 CFR 173.2).

25. Enter the total number of vehicles owned, term leased and trip leased, that are, or can be, operational the day this form is completed.

Motorcoach—a vehicle designed for long distance transportation of passengers, usually equipped with storage racks above the seats and a baggage hold beneath the cabin.

School Bus—a vehicle designed and/or equipped mainly to carry primary and secondary students to and from school, usually built on a medium or large truck chassis.

Mini-bus/Van—a multi-purpose passenger vehicle with a capacity of 10-24 people, typically built on a small truck chassis.

Limousine—a passenger vehicle usually built on a lengthened automobile chassis.

26. Enter the number of interstate/intrastate drivers used on an average work day. Part-time, casual, term leased, trip leased and company drivers are to be included. Also, enter the total number of drivers and the total number of drivers who have a Commercial Drivers License (CDL).

Interstate—driver transports people or property across State lines, including international boundaries, or wholly within one State as part of a through movement that originates or terminates in another State or country.

Intrastate—driver transports people or property wholly within one State.

100-mile radius driver—driver operates only within a 100 air-mile radius of the normal work reporting location.

27. Print or type the name, in the space provided, of the individual authorized to sign

documents on behalf of the entity listed in Block 1. That individual must sign, date, and show his or her title in the spaces provided (Certification Statement, see 49 CFR 385.21 and 385.23).

PART 363—ENFORCEMENT PROCEEDINGS

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Subpart A—Civil Penalty Proceedings

§ 363.101 Nature of proceeding.

Civil penalty proceedings are proceedings pursuant to 5 U.S.C. 554 in which the agency makes a monetary claim or seeks an order against the respondent, based on violation of the FMCSRs or HMRs. Final agency orders that may result from civil penalty proceedings include one or more of the following:

- (a) Monetary penalty;
- (b) Settlement agreement;
- (c) Out-of-service order;

- (d) Notice to post;
- (e) Notice of abate; and
- (f) Any other order within the authority of the agency.

§ 363.102 Notice of violation (complaint).

(a) Civil penalty proceedings are commenced by the issuance of a notice of violation, which serves as the complaint in subsequent proceedings and represents the claim of the agency against respondent. Each notice shall contain the following:

- (1) The provisions of law and regulation alleged to have been violated;
- (2) A recitation, separately stated and numbered, of each alleged violation, including a brief statement of the material facts constituting each violation.

(3) The amount being claimed and the maximum amount authorized to be claimed under the statute, and the contents of any order sought to be imposed;

(4) A statement that failure to answer the notice within the prescribed time will constitute a waiver of the opportunity to contest the claim;

(5) A reply form to be completed and returned to the agency, except in the case of an out-of-service order; and

(6) The address and telefax number to which the reply form and/or full payment of the amount claimed may be sent, and the telephone number to call to discuss settlement.

(b) A notice may contain such other matters as the FHWA deems appropriate, including a notice to abate.

(c) A notice of violation is transmitted by the agency to the respondent using a method of delivery with a return receipt, such as, but not limited to, certified mail and personal delivery evidenced by a certificate of service.

§ 363.103 Form reply to notice of violation.

(a) *Time for reply.* The reply form included in the notice of violation must be served on the agency by the respondent within 15 days of respondent's receipt of the notice. The form reply may be sent to the agency by mail, personal delivery, or telefax. Although a return receipt is not required, the burden is on the respondent to prove it has made a timely answer.

(b) *Contents of reply form.* The respondent must provide the information requested on the reply form, and indicate, by checking the appropriate box, its response to the Notice of Violation. Respondent may select only one option on the reply form. The response options are:

- (1) Pay the full amount claimed in the Notice of Violation (check included),

and/or agree to comply with the order by signing where indicated;

(2) Enter into settlement negotiations (while preserving the right to contest the claim at a later date); and

(3) Contest the claim immediately through the institution of administrative adjudication.

(c) *Failure to reply.* If a completed reply on the form provided, or in a form containing the same information, is not served on the agency within 15 days of the respondent's receipt of the notice of violation, the notice of violation becomes the final agency order in the proceeding. Respondent's failure to reply constitutes an admission of all facts alleged in the notice of violation and a waiver of the respondent's opportunity to contest the claim.

§ 363.104 Special procedures for out-of-service orders.

(a) Whenever it is determined that a violation of the FMCSRs poses an imminent hazard to safety, the agency may order a vehicle or employee operating such vehicle out of service, or order a motor carrier to cease all or part of the employer's commercial motor vehicle operations. In making any such order, no restrictions shall be imposed on any employee or motor carrier beyond that required to abate the hazard.

(b) An out-of-service order must be personally served on the driver when a driver or vehicle is being placed out of service, and on a responsible representative of the motor carrier at its principal place of business or other location to which the order applies when all or part of a motor carrier's commercial motor vehicle operations are being placed out of service.

(c) A motor carrier or employee shall comply with the out-of-service order immediately upon its issuance. The penalty for violating an out-of-service order shall be specifically noted in the order. An out-of-service order shall not prevent vehicles of the motor carrier in transit at the time the order is served from proceeding to their immediate destinations, unless any such vehicles or drivers are specifically ordered out of service effective immediately. Vehicles and drivers proceeding to their immediate destination shall be subject to compliance with the order upon arrival.

(d) If the out-of-service order is contested, an administrative adjudication shall be made available on an expedited basis under procedures provided in § 363.110.

(e) For purposes of this section, the term *immediate destination* means the next scheduled stop of the vehicle

already in transit where the cargo on board can be safely secured, and the term *imminent hazard* means any condition of vehicle, employee, or commercial motor vehicle operations which is likely to result in serious injury of death if not discontinued immediately.

§ 363.105 Payment of the claim.

(a) Payment of the full amount claimed may be made at any time before issuance of a final order, with or without the reply form. After the issuance of a final order, claims are subject to interest, penalties, and administrative charges in accordance with 4 CFR part 103.

(b) If the full payment option is selected by the respondent on the reply form, but payment is not made on the agency within 15 days of the respondent's receipt of the notice of violation, the notice of violation becomes the final agency order in the proceeding.

(c) Unless otherwise provided in writing by the mutual consent of the parties, payment and/or compliance with the order constitutes an admission of all facts alleged in the notice of violation and a waiver of the respondent's opportunity to contest the claim, and results in the notice of violation becoming the final agency order.

§ 363.106 Settlement of civil penalty claims; generally.

(a) Settlement of disputed civil penalty claims may occur at any time before the issuance of a final order.

(b) Content of settlement agreements. When agreement is reached to resolve the claim, a settlement agreement constituting the final disposition of the proceeding shall be signed by the parties. The settlement agreement shall contain the following:

- (1) The legal basis of the claim, including an admission of all jurisdictional facts;
- (2) Unless otherwise provided, a finding of the facts constituting the violations committed;
- (3) The amount due the FHWA and the terms of payment, and/or the terms of the order;
- (4) An express waiver of the right to further procedural steps and of all rights to judicial review;
- (5) A statement that the agreement is not binding on the agency until executed by the agency's authorized representative; and
- (6) A statement that failure to pay other otherwise perform in accordance with the terms of the agreement will result in the notice of violation

becoming the final agency order, and the amount claimed in the notice of violation becoming due and payable immediately.

(c) An executed settlement agreement is binding on the parties according to its terms. The respondent's signed, written consent to a settlement agreement may only be withdrawn, in writing, if the agency has not executed the agreement within 28 days after execution by respondent.

(d) The agency's acceptance of partial payment of a claim tendered unilaterally by a respondent does not constitute a settlement agreement. All settlement agreements must be in the form specified in paragraph (b) of this section.

(e) Settlement agreements reached during the course of an administrative adjudication need not be approved by the Administrative Law Judge or Associated Administrator unless specifically directed by those officials.

§ 363.107 Settlement negotiations.

This section establishes procedures when the settlement negotiations option is selected on the reply form.

(a) The parties should enter into negotiations expeditiously and in good faith, using all reasonable means.

(b) Opportunity for an administrative adjudication. Respondents electing on the reply form to engage in settlement negotiations retain the opportunity to contest the claim through an administrative adjudication if the negotiations do not result in a settlement agreement.

(c) Discontinuance of negotiations within 90 days. The agency may discontinue negotiations within 90 days of the notice of violation by sending the respondent a final notice of violation. The respondent may discontinue negotiations within the same period by requesting an administrative adjudication and sending the agency a written answer to the notice of violation.

(d) Failure to reach agreement after 90 days. If the parties do not reach a settlement agreement within 90 days, a final notice of violation shall be issued by the agency to the respondent.

(e) Final Notice of Violation. The final notice of violation represents the agency's final claim against the respondent. The final notice of violation may incorporate the notice of violation by reference, amend the notice of violation to reflect the settlement negotiations, or include some combination of both.

(1) A final notice of violation shall be transmitted to the respondent using a method of delivery within a return

receipt, such as, but not limited to, certified mail and personal delivery evidenced by a certificate of service.

(2) The reply to the final notice of violation shall be completed in conformance with the requirements of § 363.108(c).

§ 363.108 Request for administrative adjudication.

The respondent may contest the claim by requesting an administrative adjudication and sending a written answer to the agency. An administrative adjudication is a process to resolve contested claims before the Associate Administrator or an Administrative Law Judge. Unless settled, the Associate Administrator shall decide the matter or refer it to an Administrative Law Judge expeditiously.

(a) *Time for answer.* Respondents who select administrative adjudication on the reply form to the notice of violation, or who receive a final notice of violation, must serve a written answer on the agency within 28 days of receipt of the applicable notice.

(b) *Form of answer.* The answer may be sent to the agency by mail, personal delivery, or telefax. Though a return receipt is not required, the burden is on the respondent to prove it has made a timely answer.

(c) *Contents of answer.* Generally, the answer must state the grounds for contesting the claim and any affirmative defenses that the respondent intends to assert. Specifically, the answer:

(1) Must admit or deny each separately stated and numbered allegation of violation in the claim. A statement that the person is without sufficient knowledge or information to admit or deny will have the effect of a denial. Any allegation in the claim that is not specifically denied in the answer is deemed admitted. A general denial of the claim is grounds for a finding of default;

(2) Must include all affirmative defenses, including those relating to jurisdiction, limitations, and procedure;

(3) Must request referral to an Administrative Law Judge, if desired. Referral to an Administrative Law Judge is generally available only to resolve material issues of fact. Failure to request it results in a waiver of the right to an opportunity for referral; and

(4) May include a motion to dismiss, but a motion to dismiss is not a substitute for an answer.

(d) *Failure to answer.* If a written answer meeting the requirements of this section is not served on the agency by the respondent or representative of the respondent within 28 days, the notice of violation or final notice of violation,

whichever is applicable, becomes the final agency order in the proceeding. Merely selecting the adjudication option on the reply form, without submitting a written answer in accordance with this section, also results in the notice of violation becoming the final agency order in the proceeding. Respondent's failure to answer constitutes an admission of all facts alleged in the notice of violation and a waiver of the respondent's opportunity to contest the claim.

(e) *Default.* If an answer is not in the form required by paragraph (c) of this section the respondent may be found in default by the Associate Administrator or Administrative Law Judge and a final agency order issued in the proceeding. Default by respondent constitutes an admission of all facts alleged in the notice of violation and a waiver of the respondent's opportunity to contest the claim, and results in the Notice of Violation becoming the final agency order in the proceeding.

§ 363.109 Procedures in administrative adjudications.

(a) Associate Administrator. Contested claims shall be transmitted to the Associate Administrator for resolution by final order or for assignment to an Administrative Law Judge. The Associate Administrator determines if there are material factual issues in dispute, but may refer the matter to an administrative law judge to make the determination.

(b) Referral to an Administrative Law Judge. If there are material factual issues in dispute and respondent has requested referral to an Administrative Law Judge, the Associate Administrator shall assign the matter to an Administrative Law Judge. The Associate Administrator may, in his or her discretion, refer other matters to an Administrative Law Judge.

(c) Decision. If there are no material factual issues in dispute or the matter has not been referred to an Administrative Law Judge, the Associate Administrator may resolve the Matter and issue a final order.

(d) Except as otherwise provided in these rules, in the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, or by the Associate Administrator or Administrative Law Judge, the Federal Rules of Civil Procedure and the Federal Rules of Evidence shall apply in all administrative adjudications.

(e) Motions. An application for an order or ruling in an administrative adjudication shall be by motion. Unless made during an oral hearing, motions shall be made in writing, shall state with particularity the grounds for relief sought, and shall be accompanied by

any relevant affidavits or other evidence. Any party may file a response to a written motion within 7 days, or within such other time provided by the Associate Administrator or the Administrative Law Judge. Failure to respond to a motion may constitute grounds for granting it. Oral argument or briefs on a motion may be ordered by the Administrative Law Judge or by the Associate Administrator.

(f) The Associate Administrator and the Administrative Law Judge have the discretion to conduct an oral hearing on the record, decide the matter on the pleadings, or employ any other appropriate process.

(g) The Associate Administrator and the Administrative Law Judge may conduct or permit forms of alternative dispute resolution upon the consent of the parties.

(h) Appearance. Any party to an administrative proceeding may appear personally and be represented by an attorney or other person. A representative must serve a notice of appearance on all parties, including the name of the respondent or title of the matter, as well as the representative's name, address, and telephone number, before participating in the proceeding.

(i) Withdrawal. At any time after a request for an administrative adjudication, but prior to the issuance of a decision by the Administrative Law Judge or Associate Administrator, any party may, in writing, withdraw a request for an administrative adjudication or the agency may withdraw the notice of violation. If a proceeding before an Administrative Law Judge is so withdrawn, the assignment of the Administrative Law Judge is terminated and the Administrative Law Judge shall dismiss the proceeding with prejudice. A withdrawal by the respondent constitutes an irrevocable waiver of the respondent's right to an administrative adjudication on the matter presented in the notice of violation.

§ 363.110 Expedited review by the Associate Administrator.

(a) Decisions to order a motor carrier's operations out of service is whole or in part are subject to review by the Associate Administrator in accordance with 5 U.S.C. 554, except that such review must be provided within 10 days from the date of the out-of-service order; provided a written request for review is received by the Associate Administrator within 5 days from the date of the notice. Written requests received after the 5th day but within 10 days of the effective date of the out-of-service order or final unsatisfactory rating resulting in

an out-of-service order will be reviewed within 10 days from the date of the request.

(b) Any petition for review received more than 10 days after the date of an out-of-service order will be treated as a request for administrative adjudication under § 363.108 of this part, unless the Associate Administrator, in his or her discretion, provides otherwise.

(c) Any requests for review submitted pursuant to this section must be in writing and particularly address the matters which are disputed, the grounds for the dispute, and the reasons why expedited review is required.

(d) The Associate Administrator may refer the matter for a hearing before and Administrative Law Judge within the same time prescribed for expedited review. The procedures in § 363.109, except for time periods, shall apply to the hearing.

(e) The Associate Administrator or Administrative Law Judge may stay any order or safety rating during the pendency of the expedited review. Thereafter, the matter may be administered pursuant to § 363.109.

(f) Unless a stay is granted under paragraph (e) of this section or the period extended by mutual consent of the parties, the decision on an expedited review shall be issued within the time prescribed for such expedited review.

(g) The decision of the Administrative Law Judge on referral from the Associate Administrator shall become the final agency order after 24 hours unless amended or vacated by the Associate Administrator.

§ 363.111 Administrative Law Judge decision.

(a) After considering the evidence and arguments of the parties, the Administrative Law Judge shall issue a decision. The decision shall be sent to the parties and to the Associate Administrator. The Administrative Law Judge may issue an oral decision in the presence of the parties, which will be entered in the record of the proceedings.

(b) Finality. Except for expedited review under § 363.110, the decision of the Administrative Law Judge becomes the final decision of the agency 45 days after it is issued, unless a petition for review is filed under § 363.112 within that period, or the Associate Administrator, on his own motion, reviews or vacates the decision.

§ 363.112 Review of Administrative Law Judge decision.

(a) All petitions to review administrative adjudication decisions of the Administrative Law Judge must be accompanied by a statement of the

grounds for review. Each petition must set out in detail objections to the decision and refer to any evidence in the record which is relied upon to support the petition. It shall also state the relief requested. Failure to object to any error in the decision constitutes a waiver of the right to allege such error in subsequent proceedings.

(b) A party may petition for review of a decision of the Administrative Law Judge on only the following three grounds:

(1) A finding of fact is not supported by substantial evidence;

(2) A conclusion of law is not made in accordance with applicable law, precedent, or public policy; and

(3) The Administrative Law Judge committed prejudicial error in applying the governing procedural rules.

(c) Reply briefs may be filed within 35 days after the petition for review is filed. Further pleadings may be filed by a party only if expressly allowed by the Associate Administrator.

(d) Copies of the petition for review and all motions and briefs must be served on all parties.

(e) Oral argument will be permitted only if expressly allowed by the Associate Administrator.

§ 363.113 Decision on review.

(a) The Associate Administrator may adopt, modify, or reverse the Administrative Law Judge's decision and may make any necessary findings of law or fact. The Associate Administrator may also remand the matter to the Administrative Law Judge with instructions for further proceedings. If the matter is not remanded, the Associate Administrator shall issue a final order disposing of the proceedings and serve it on all parties.

(b) Finality. Unless otherwise stated, an order of the Associate Administrator on review becomes the final order of the agency upon issuance.

§ 363.114 Reconsideration.

Within 21 days of a decision by the Associate Administrator, any party may petition for reconsideration. The filing of a petition for reconsideration does not stay the effectiveness of a final order unless so ordered by the Associate Administrator.

§ 363.115 Judicial review.

(a) Any aggrieved person, who, after an administrative adjudication, is adversely affected by a final order issued may, within 30 days, petition for review of the order in the United States Court of Appeals in the circuit wherein the violation is alleged to have occurred, or where the violator has its principal

place of business or residence, or in the United States Court of Appeals for the District of Columbia Circuit.

(b) Judicial review shall be based on a determination of whether or not the findings and conclusions in the final order were supported by substantial evidence or otherwise in accordance with law. No objection that has not been urged before the agency must be considered by the court, unless reasonable grounds existed for failure or neglect to do so. The commencement of proceedings under this section shall not, unless ordered by the court, operate as a stay of the final order of the agency.

§ 363.116 Failure to comply with final order.

If, within 30 days of receipt of a final agency order issued under this part, the respondent does not pay a civil penalty assessed, take any other action required by the order, or file a petition under §§ 363.114 or 363.115, the case may be referred to the Attorney General with a request that an action be brought in the appropriate United States District Court to enforce the terms of the order or collect the civil penalty.

Subpart B—Driver Qualification Proceedings

§ 363.201 Nature of proceeding.

Driver qualification proceedings are the means by which the agency resolves challenges to or disputes involving a determination of a driver's medical qualification to operate a commercial motor vehicle or challenges to disqualification by the Federal Highway Administration of a driver following convictions for certain driving offenses.

§ 363.202 Commencement of proceedings.

(a) Driver qualification proceedings are commenced by the issuance to a driver or motor carrier of:

(1) A notice of determination by the agency (the determination may be issued unilaterally by the agency or in resolution of a conflict of medical evaluations pursuant to § 363.204); or

(2) A letter of disqualification issued by the agency, based upon a conviction for a disqualifying offense or other cause listed in § 383.51 or 391.15 of this subchapter.

(b) Each notice of determination or letter of disqualification shall contain the following:

(1) A statement of the provisions of the regulations under which the action is being taken;

(2) A copy of all documentary evidence relied on or considered in taking such action, or, in the case of voluminous evidence, a summary of such evidence;

(3) Notice that the determination or disqualification may be contested, and that failure to answer will constitute a waiver of the opportunity to contest the determination or disqualification; and

(4) Notice that the burden of proof will be on the applicant in cases arising under § 363.204.

(c) In a medical qualification proceeding, the notice of determination must be transmitted to the driver involved. In cases arising under § 363.204, the notice of determination shall also be transmitted to the motor carrier and any other parties involved in the resolution of a conflict of medical evaluations. Any party may respond. In a disqualification proceeding, the letter of disqualification must be transmitted both to the driver and to the employing motor carrier, if the latter is known.

(d) The notice or letter commencing the proceeding is transmitted by the agency to any respondent or necessary party using a method of delivery with a return receipt, such as, but not limited to, certified mail and personal delivery evidenced by a certificate of service.

§ 363.203 Answer to medical qualification determination or letter of disqualification.

(a) *Time to answer.* An answer to the notice of determination or letter of disqualification must be completed by the respondent and served on the agency within 2 months of respondent's receipt of the notice of determination. The answer may be sent to the agency by mail or telefax. Though a return receipt is not required, the burden is on the respondent to prove it has made a timely answer.

(b) *Contents of the answer.* The answer must contain the following:

(1) The grounds for contesting the determination;

(2) Copies of all evidence upon which petitioner relies.

(3) A request for referral to an Administrative Law Judge, if one is desired, which must set forth material factual issues believed to be in dispute.

(c) *Supporting evidence.* All written evidence shall be submitted in the following forms:

(1) An affidavit of a person having personal knowledge of the facts alleged;

(2) Documentary evidence in the form of exhibits attached to an affidavit identifying the exhibit and giving its source;

(3) A medical report (or reports) prepared by a medical examiner or authorized representative of a medical institution; and

(4) An official record of a government agency.

(d) *Failure to answer.* If a written answer contesting the notice or letter is

not received by the agency within 2 months, the notice of determination or letter of disqualification becomes the final agency order in the proceeding. Respondent's failure to answer constitutes and admission of all facts alleged in the letter or notice and a waiver of the respondent's opportunity to contest the determination of disqualification.

(e) *Letter of Disqualification.* In proceedings based on convictions for disqualifying offenses, the only relevant defenses are that:

(1) The respondent driver was not convicted as alleged;

(2) The alleged conviction was overturned, vacated, remanded, or otherwise voided on appeal;

(3) The violation for which the conviction was entered is not a disqualifying offense; or

(4) The term of the disqualification period has already been served in whole or in part because of State action.

§ 363.204 Special procedures for resolution of conflicts of medical evaluation.

(a) *Applications.* An application for determination of a driver's medical qualifications under standards in part 391 of this chapter will only be accepted if they conform to the requirements of this section.

(b) *Conditions.* Each applicant must meet the following conditions.

(1) The application must be in writing and contain the name and address of the driver, motor carrier, and all physicians involved in the conflict.

(2) The applicant must provide documentary evidence that there is disagreement between the physician for the driver and the physician for the motor carrier concerning the driver's medical qualifications.

(3) The applicant must submit a written opinion and report from an independent medical specialist in the field in which the conflict arose, together with the results of all tests performed by that independent specialist. The independent medical specialist should be one agreed to by the motor carrier and the driver.

(4) If no agreement to select an independent specialist can be reached, the applicant must demonstrate it agreed and the other party refused to submit the matter to a specialist. If possible, the applicant must then submit the report of an independent specialist selected by the applicant. The report should be based on personal examination or, if that is not possible, on an evaluation of the reports of the two examining physicians in conflict.

(5) The independent medical specialist must be provided with a copy

of the regulations in part 391 of this subchapter, and this part, a medical history of the driver, and a detailed statement of the work the driver performs or is to perform, which must be noted in the specialist's report.

(6) The applicant must submit all medical records, statements and reports of all physicians known to have provided opinions as to the driver's qualifications.

(7) The applicant must submit any other documentary evidence which may reflect on the driver's qualifications.

(8) The application must allege that the driver intends to drive or is intended to be used as driver in interstate commerce.

(9) The application and all supporting documents must be submitted in triplicate to the Director, Office of Motor Carrier Research and Standards, Federal Highway Administration, Washington DC 20590.

(c) *Initiation.* Upon receipt of a satisfactory application, the Director will issue a notice to all parties that an application for resolution of a medical conflict has been received with respect to the identified driver, and may require additional information from the parties.

(d) *Reply.* Any party may submit a reply to the notice within 30 days after service. The reply must be accompanied by all evidence the party desires to be considered by the Director in making a determination.

(e) *Parties.* For purposes of this section, the parties are the driver, the motor carrier, and any other person whom the Director designates as such.

(f) *Determination.* After considering all the medical evidence submitted by the parties and the opinions of medical experts to whom any matter under consideration may have been referred, the Director shall issue a Determination of Qualification deciding whether the driver is qualified under part 391 of this subchapter.

(g) *Petitions for review.* A driver or motor carrier adversely affected by the Director's determination may within 60 days petition for review to the Associate Administrator under this part.

§ 363.205 Driver's qualification status pending determinations and proceedings.

(a) In proceedings which are unilaterally commenced by the agency, the driver shall be deemed qualified unless and until a final order is issued disqualifying the driver.

(b) In proceedings arising under § 363.204:

(1) If the driver is not yet employed by the motor carrier with which the conflict of medical qualification arises, the driver shall be deemed unqualified

as a driver only with respect to that motor carrier.

(2) If the conflict arises from a biennial or other medical examination conducted after the driver was previously found qualified and employed as a driver by the motor carrier with which the conflict exists, the driver shall be deemed qualified only with respect to that motor carrier unless and until a final determination by the Director, Office of Motor Standards is issued finding the driver unqualified, or unless the Associate Administrator otherwise provides.

(c) During the pendency of a proceeding on a petition for review of the Determination of Qualification issued by the Director under § 363.204, the driver's status will remain as decided in that Determination, unless otherwise provided by the Associate Administrator.

§ 363.206 Administrative adjudication.

(a) *Referral to an Administrative Law Judge.* If there are material factual issues in dispute and respondent has requested referral to an Administrative Law Judge, the Associate Administrator may assign the matter to an Administrative Law Judge.

(b) *Decision.* If there are not material factual issues in dispute or respondent has not requested referral, the Associate Administrator may resolve the matter and issue a final order.

(c) *Procedures.* Administrative adjudication and any agency review are conducted in accordance with §§ 363.109 and 363.111–363.115.

Subpart C—General Provisions

§ 363.301 Applicability.

The general provisions in this subpart apply to part 362 of this subchapter and this part 363.

§ 363.302 Computation of time.

(a) Generally, in computing any time period set out in these rules or in an order issued hereunder, the time computation begins with the day following the act, event, or default. The last day of the period is included unless it is a Saturday, Sunday, or legal Federal holiday, in which case the time period shall run to the end of the next day that is not a Saturday, Sunday, or legal Federal holiday. All Saturdays, Sundays, and legal Federal holidays except those falling on the last day of the period shall be counted.

(b) Date of entry of orders. In computing any period of time involving the date of the entry of an order, the date of entry shall be the date the order is served.

§ 363.303 Service.*(a) Definition.*

Service means the delivery of documents to necessary entities in the context of an administrative proceeding. Service by mail is complete upon mailing.

(b) Certificate of service. A certificate of service shall accompany all documents served in an administrative proceeding, except the notice of violation in § 363.102, the reply form in § 363.103, and the notice of determination and letter of disqualification in § 363.202. It shall consist of a certificate of personal delivery or a certificate of mailing, executed by the person making the personal delivery or mailing the document.

(c) Service list. The initial notice or other document of the agency in an administrative proceeding shall have attached a list of persons to be served. This service list shall be updated by the agency as necessary. Copies of all documents must be served on the persons, and in the number of copies, indicated on the service list.

(d) Form of delivery. All service required by these rules shall be made by mail or personal delivery, unless otherwise prescribed.

§ 363.304 Extension of time.

(a) Unless directed otherwise by the Associate Administrator or Administrative Law Judge before whom a matter is pending, the parties may stipulate to reasonable extensions of time by filing such stipulation in the official docket and serving copies on all parties on the service list.

(b) All requests for extensions of time shall be filed with the office in the agency to which the answer is to be sent, or, if the matter is an administrative adjudication, with the Administrative Law Judge or the Associate Administrator, whichever is appropriate. All requests must state the reasons for the request. Only those requests showing good cause or upon the mutual consent of the parties may be granted by the appropriate official. No motion for continuance or postponement of a hearing date filed within 7 days of the date set for a hearing will be granted unless it is accompanied by an affidavit showing that extraordinary circumstances warrant a continuance.

§ 363.305 Administrative Law Judge.

(a) Powers of an Administrative Law Judge. In accordance with the rules in this subchapter, an Administrative Law Judge may:

- (1) Give notice of and hold prehearing conferences and hearings;
- (2) Administer oaths and affirmations;
- (3) Issue subpoenas authorized by law
- (4) Rule on offers of proof;
- (5) Receive relevant and material evidence;
- (6) Regulate the course of the administrative adjudication in accordance with the rules of this subchapter;
- (7) Hold conferences to settle or simplify the issues by the consent of the parties;
- (8) Dispose of procedural motions and requests;
- (9) Make findings of fact and conclusions of law, and issue decisions.

(b) Limitations on the power of the Administrative Law Judge. The Administrative Law Judge is bound by the procedural requirements of this part and the precedent opinions of the agency as recorded in written opinions of the Associate Administrator or in opinions adopted by the Associate Administrator. If the Administrative Law Judge imposes any sanction not specified in this subchapter, a party may file an interlocutory appeal of right with the Associate Administrator pursuant to § 363.307. This section does not preclude an Administrative Law Judge from barring a person from a specific proceeding based on a finding of obstreperous or disruptive behavior in that proceeding.

(c) Disqualification. The Administrative Law Judge may disqualify himself or herself at any time, either at the request of any party or upon his or her own initiative. Assignments of Administrative Law Judges are made by the Chief Administrative Law Judge upon the request of the Associate Administrator. Any request for a change in such assignment, including disqualification, will be considered only for good cause which would unduly prejudice the proceeding.

§ 363.306 Certification of documents.

(a) Signature required. The attorney of record, the party, or the party's representative shall sign each document tendered for filing with the hearing docket clerk, the Administrative Law Judge, the Associate Administrator, or served on a party.

(b) Effect of signing a document. By signing a document, the attorney of record, the party, or the party's representative certifies that the attorney, the party, or the party's representative has read the document and, based on reasonable inquiry and to the best of that person's knowledge, information, and belief, the document is—

- (1) Consistent with these rules;
- (2) Warranted by existing law or that a good faith argument exists for extension, modification, or reversal of existing law; and
- (3) Not unreasonable or unduly burdensome or expensive, not made to harass any person, not made to cause unnecessary delay, not made to cause needless increase in the cost of the proceedings, or for any other improper purpose.

(c) Sanctions. If the attorney of record, the party, or the party's representative signs a document in violation of this section, the Administrative Law Judge or the Associate Administrator may:

(1) Strike the pleading signed in violation of this section;

(2) Strike the request for discovery or the discovery response signed in violation of this section and preclude further discovery by the party;

(3) Deny the motion or request signed in violation of this section;

(4) Exclude the document signed in violation of this section from the record;

(5) Dismiss the interlocutory appeal and preclude further appeal on that issue by the party who filed the appeal until an initial decision has been entered on the record; or

(6) Dismiss the petition for review of the Administrative Law Judge's decision to the Associate Administrator.

§ 363.307 Interlocutory appeals.

(a) General. Unless otherwise provided in this subpart, a party may not appeal a ruling or decision of the Administrative Law Judge to the Associate Administrator until the Administrative Law Judge's decision has been entered on the record. A decision or order of the Associate Administrator on the interlocutory appeal does not constitute a final order for the purposes of judicial review under § 363.115.

(b) Interlocutory appeal for cause. If a party files a written request for an interlocutory appeal for cause with the Administrative Law Judge, or orally requests an interlocutory appeal for cause, the proceedings are stayed until the Administrative Law Judge issues a decision on the request. If the Administrative Law Judge grants the request, the proceedings are stayed until the Associate Administrator issues a decision on the interlocutory appeal. The Administrative Law Judge shall grant an interlocutory appeal for cause if a party shows that delay of the appeal would be detrimental to the public interest or would result in undue prejudice to any party.

(c) Interlocutory appeals of right. If a party notifies the Administrative Law

Judge of an interlocutory appeal of right, the proceedings shall be stayed until the Associate Administrator issues a decision on the interlocutory appeal. A party may file an interlocutory appeal with the Associate Administrator, without the consent of the Administrative Law Judge, before the Administrative Law Judge has made a decision, in the following situations:

- (1) A ruling or order by the Administrative Law Judge barring a person from the proceedings;
- (2) Failure of the Administrative Law Judge to dismiss the proceedings in accordance with § 363.109(i);
- (3) A ruling or order by the Administrative Law Judge in violation of § 363.305(b); and
- (4) Denial by the Administrative Law Judge of a motion to disqualify under § 363.305(c).

(d) Procedure. A party must file a notice of interlocutory appeal, with any supporting documents, with the Associate Administrator, and serve copies on each party and the Administrative Law Judge, not later than 10 days after the Administrative Law Judge's decision forming the basis of an interlocutory appeal of right or not later than 10 days after the Administrative Law Judge's decision granting an interlocutory appeal for cause, whichever is appropriate. A party must file a reply brief, if any, with the Associate Administrator and serve a copy of the reply brief on each party, not later than 10 days after service of the appeal brief. The Associate Administrator shall render a decision on the interlocutory appeal, on the record and as a part of the decision in the proceedings, within a reasonable time after receipt of the interlocutory appeal.

(e) The Associate Administrator may reject frivolous, repetitive, or dilatory appeals, and may issue an order precluding one or more parties from making further interlocutory appeals in a proceeding in which there have been frivolous, repetitive, or dilatory interlocutory appeals.

PART 364—VIOLATIONS, PENALTIES, AND COLLECTIONS

Subpart A—General

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364.101 Purpose.
364.102 Policy.

Subpart B—Civil Penalties

- 364.201 Types of violations and maximum monetary penalties.
364.202 Civil penalty assessment factors.

Subpart C—Criminal Penalties and Other Sanctions

- 364.301 Criminal penalties.
364.302 Injunctions.
364.303 Disqualifications.

Subpart D—Monetary Penalty Collection

- 364.401 Payment.
364.402 Collections.
Authority: 49 U.S.C. Chapters 5, 51, 311, 313 and 315.

Subpart A—General

§ 364.101 Purpose.

The purposes of this part are to define the various types of violations of the Federal Motor Carrier Safety Regulations (FMCSRs) and Hazardous Materials Regulations (HMRs), and orders authorized to be issued thereunder; to describe the range of penalties that may be imposed for such violations and how those penalties are assessed; and to identify the means that may be employed to collect those penalties once it has been finally decided by the agency that they are due.

§ 364.102 Policy.

(a) Penalties are assessed administratively by the agency for violations of the FMCSRs, HMRs, and administrative orders at levels sufficient to bring about satisfactory compliance. Criminal penalties are also authorized to be sought in U.S. District Court under certain circumstances.

(b) The maximum amounts of civil penalties that can be assessed for regulatory violations subject to the proceedings in this subchapter are established in the statutes granting enforcement powers. The determination of the actual civil penalties assessed in each proceeding is based on those defined limits and consideration of information available at the time the claim is made concerning the nature, circumstances, extent and gravity of the violation and, with respect to the violator, the degree of culpability, history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice and public safety may require. In adjudicating the claims and orders under the administrative procedures in this subchapter, additional information may be developed regarding these factors that may affect the final amount of the claim.

(c) When assessing penalties for violations of notices and orders or settling claims based on these assessments, consideration will be given to good faith efforts to achieve compliance with the terms of the notices and orders.

(d) Criminal penalties may be sought against a motor carrier, its officers or agents, a driver, or other persons when it can be established that violations were deliberate or resulted from a willful disregard for the regulations. Criminal penalties may be sought against an employee only when a causative link can be established between a knowing and willful violation and an accident or hazardous materials incident or the risk thereof.

(e) If a State, political subdivision of a State, foreign nation, or other governmental entity imposes any civil or criminal penalty for acts constituting violations of the regulations covered by this part, and those penalties are determined by the Associate Administrator to be appropriate for such violations, no further penalties will be assessed by the Federal Highway Administration.

Subpart B—Civil Penalties

§ 364.201 Types of violations and maximum monetary penalties.

(a) Violations of parts 350–399 of the FMCS are divided into three categories, each of which carries a maximum penalty as noted below. Unless otherwise noted, a separate violation occurs for each day the violation continues:

(1) Recordkeeping—violations which involve knowing failure to prepare or maintain a record required by the regulations, or knowing preparation or maintenance of a required record which is incomplete, inaccurate or false. Maximum penalty: \$500 per violation, which may be increased by \$500 for each day the violation continues up to \$2,500. Actual or constructive possession of the means with which to verify the existence or accuracy of the record is presumptive evidence that the person responsible for maintaining such record committed a knowing violation when such record is incomplete, inaccurate, or false.

(2) Serious pattern of safety violations—no civil penalties are assessed for isolated violations of non-recordkeeping provisions of the regulations. The term "serious patterns of violations" describes a middle range of violations between those of recordkeeping noncompliance and willful disregard of the regulations. These types of violations are not the isolated human errors, but are tolerated patterns of equipment violations or operating conduct that any responsible business entity could detect and correct if it wanted to meet its full safety responsibility to the public. A pattern may be established by single violations

of more than one regulation, as well as by multiple violations of a single regulation. No set number of acts are required. All that is needed is a basis to infer that the acts are not isolated or sporadic. More than one pattern may be alleged in a single claim. For example, in one notice of violations, patterns of hours-of-service violations, use of unsafe equipment, and employment of unqualified drivers may be alleged and supported with separately counted violations in each category. The area of noncompliance may be further broken down if patterns are discernible to that extent. In the same notice, for instance, it may be alleged that each driver used by a carrier constitutes a separate pattern and further that each such driver may account for separate patterns of violations of the 10-hour driving rule (49 CFR 395.3(a)(1)), the 15-hour on-duty rule (§ 395.3(a)(2)), and the 70-hours in 8 days on-duty rule (§ 395.3(b)(2)), each of which presents a separate pattern. When serious patterns of violation are detected, civil penalties not to exceed \$1,000 for each violation within a pattern up to a maximum of \$10,000 for each pattern may be assessed.

(3) Substantial Health and Safety Violations. This category applies to violations which could reasonably lead to, or have resulted in, serious personal injury or death. These are violations that are serious in their nature and have been allowed to occur or continue by the motor carrier who knew or should have known of their existence. Illustrative of such violations are vehicles that are dispatched or continued in a condition which would result in an out-of-service order; drivers who are dispatched or continued in use when they are unqualified, disqualified, or have tested positive for drugs; and drivers who are dispatched or continue in an unsafe or fatigued condition. Penalties up to \$10,000 may be assessed for each violation.

(4) Limitation on employee non-recordkeeping violations. Except for recordkeeping violations, no civil penalty may be assessed against an employee of a motor carrier unless it is determined that the employee's actions amounted to gross negligence or reckless disregard for safety. When that can be shown, the maximum civil penalty is \$1,000.

(i) Owner operators. For purposes of this section, an owner-operator while in the course of personally operating a commercial motor vehicle is considered an employee. When that same owner-operator is not acting in a driving capacity, he or she shall be treated as a motor carrier or employer.

(ii) Gross negligence is an act or omission of an aggravated nature regarding a legal duty, as opposed to a mere failure to exercise ordinary care. It amounts to indifference to or utter disregard of a legal duty so far as other persons may be affected. Reckless disregard for safety is conduct evincing indifference to consequences under circumstances involving danger to life or safety of others even though no harm was intended.

(b) Violations pertaining to commercial drivers licenses (CDL). Violations with respect to the operations of commercial motor vehicles (CMV) for which a CDL is required under part 383 of this chapter are subject to civil penalties up to a maximum of \$2,500 per violation. These violations include the operation of a CMV by a driver who has not obtained a CDL or has more than one driver's license; failure to make required notifications of traffic violations, license suspensions or previous employment; and operating a CMV after the driver or the CMV was placed out-of-service by a duly authorized enforcement official.

(c) Violations pertaining to minimum levels of Financial Responsibility.

(1) Failure by a motor carrier to maintain the prescribed levels of financial responsibility pursuant to Part 387 of this chapter constitutes a violation for which a civil penalty of up to \$10,000 may be assessed for each violation. Each time a motor carrier dispatches a commercial motor vehicle without the required level of Financial Responsibility may be counted as a separate violation with no overall limitation.

(2) Failure to produce the required proof of Financial Responsibility (MCS-90 or MCS-82) is presumptive evidence of failure to maintain the required levels of Financial Responsibility. The presumption may be rebutted by presentation of the required proof of Financial Responsibility covering the applicable period of time within 10 days of demand.

(3) Failure to maintain the required proof of Financial Responsibility upon demand is a separate offense for which a civil penalty of up to \$500 may be assessed. A separate civil penalty of \$500 may be assessed for each day such record is not produced after demand has been made.

(d) Violations of the Hazardous Materials Regulations. The violations in this subsection apply to motor carriers, drivers, and shippers when the transportation is by highway in commercial motor vehicles.

(1) All violations of the Hazardous Materials Transportation Act (HMTA),

as amended, or orders or regulations issued under the authority of that Act applicable to the transporting of hazardous materials by highway or the causing of them to be transported by highway are subject to a civil penalty of not more than \$25,000 and not less than \$250 for each violation. When the violation is a continuing one, each day of the violation constitutes a separate offense.

(2) All violations of the HMTA, as amended, or orders, regulations, or exemptions issued under the authority of that Act applicable to the manufacture, fabrication, marking, maintenance, reconditioning, repair or testing of a packaging or container which is represented, marked, certified or sold as being qualified for use in the transportation of hazardous materials by highway are subject to a civil penalty of not more than \$25,000 and not less than \$250 for each violation.

(3) Whenever regulations issued under the authority of the HMTA, as amended, require compliance with another set of regulations, e.g., the Federal Motor Carrier Safety Regulations, while transporting hazardous materials, any such violation of the latter regulations will be considered a violation of the HMR and subject to a civil penalty of not more than \$25,000 and not less than \$250.

(4) Transporting hazardous materials requiring the display of placards or transporting more than 15 passengers by a motor carrier during any period in which such motor carrier has a final safety rating of unsatisfactory is considered a violation of the HMTA and subject to a civil penalty of not more than \$25,000 and not less than \$250, and each transportation movement by such carrier is considered a separate violation.

(e) Violations of Notices and Orders. Additional civil penalties pursuant to 49 U.S.C. 521(b) are chargeable for violations of notices and orders which are issued in proceedings under part 306, as follows:

(1) Notice to Abate.

(i) Failure to cease violations of the safety regulations in the time prescribed in the notice may subject the motor carrier to reinstatement of any deferred assessment or payment of a penalty or portion thereof. (The time within which to comply with a notice to abate shall not begin with respect to contested violations until such time as the violations are established.)

(ii) Failure to comply with specific actions prescribed in an order (other than to cease violations of the regulations), which were determined to be essential to abatement of future

violations is subject to a civil penalty of \$1,000 per violation per day up to a maximum of \$10,000 per violation.

(2) Notice to Post. Failure to post the notice of violation as directed is subject to a civil penalty of \$500 for each such failure.

(3) Final Order. Failure to pay the penalty assessed in a final order within the time prescribed in the order will result in an automatic waiver of any reduction in the original claim found to be valid and immediate restoration to the full amount assessed in the notice of violation.

(4) Out-of-Service Order.

(i) Operation of a commercial motor vehicle by a driver during the period the driver was placed out of service subjects the driver to a civil penalty of \$1,000 to \$2,500 per violation. (For purposes of this violation, the term "driver" includes an independent contractor who, while in the course of operating a commercial motor vehicle, is employed or used by another person.)

(ii) Requiring or Permitting a driver to operate a commercial motor vehicle during the period the driver was placed out of service subjects the motor carrier to a civil penalty of \$2,500 to \$10,000 per violation.

(iii) Operation of a commercial motor vehicle by a driver after the vehicle was placed out of service and before the required repairs are made subjects the driver to a civil penalty of \$1,000 to \$2,500 each time the vehicle is so operated. (This violation applies to drivers as defined in paragraph (e)(4)(i) of this section.)

(iv) Requiring or Permitting the operation of a commercial motor vehicle after the vehicle was placed out of service and before the required repairs were made subjects the motor carrier to a civil penalty of \$2,500 to \$10,000 each time the vehicle is so operated after notice of the defect is received. (This violation applies to motor carriers, including independent contractors who are not "drivers" as defined in paragraph (e)(4)(i) of this section.)

(v) Failure to return written certification of correction as required by the out-of-service order is subject to a civil penalty of up to \$500 per violation.

(vi) Knowingly falsifying written certification of correction required by the out-of-service order is considered the same as operating or requiring or permitting a driver to operate an out-of-service vehicle and is subject to the same civil penalties provided in paragraph (e)(4)(iii) and (iv) of this section. Falsification of certification may also result in criminal prosecution under 18 U.S.C. 1001.

(vii) Operating or causing to operate in violation of an order to cease all or part of the motor carrier's commercial motor vehicle operations, i.e., failure to cease operations as ordered, is subject to a civil penalty of up to \$10,000 per day after the effective date and time of the order to cease.

§ 364.202 Civil penalty assessment factors.

(a) The nature, circumstances, extent, and gravity of the violations listed in § 364.201 may serve as mitigating or aggravating factors affecting the amount of the penalty assessed. These factors relate to the violations per se, i.e., their magnitude, blatancy, frequency and potential for immediate consequences. They could be determinative in charging substantial health and safety violations or patterns of safety violations, as well as assessing a high, medium, or low penalty. In evaluating a motor carrier's safety fitness, the terms acute and critical are used in reference to particular regulations of which violations are noted. Violations of these regulations, therefore, are by their nature serious, and this will be considered in assessing penalties. Similarly, when the circumstances in which violations occur are so obvious that any responsible motor carrier could easily correct them, the continuation of such violations is an aggravating factor to be considered in assessing the level of civil penalty. When violations are so numerous, frequent or longstanding as to indicate habitual noncompliance, the extent of the violations is a consideration. Finally, the gravity of the violation relates to the likelihood of immediate and harmful consequences. When violations have resulted in death or serious injuries, the level of civil penalty is likely to be higher. Similarly, the occurrence of death or serious injury in other instances resulting from the same type of violation increases the gravity of the offense.

(b) Violator factors. The following factors relate to the disposition or conduct of the violator for consideration in the assessment of civil penalties.

(1) Degree of culpability. This factor requires an evaluation of blameworthiness on the part of the violator. It will range from the low end, where a motor carrier may have had various knowledge of violations but little actual involvement, to the high end, where the motor carrier had actual knowledge and disregarded or even promoted noncompliance.

(2) History of prior offenses. Persistent noncompliance reflects a disregard for safety which, in turn, increases the prospect for imminently hazardous

conditions leading to accidents. Timely correction of violation patterns should prevent imminent hazards from developing and reduce the likelihood of accidents. Consequently, this factor is a major indicator of a motor carrier's knowledge of its responsibility and disposition toward compliance.

Evaluation of this factor will range from a low end, where there is no history of previous violation, to a history of previous noncompliance with the regulations generally, to prior violations of similar regulations, to recent violations of the same regulations, to the high end of repeated and persistent violations of the same regulations.

(3) Ability to pay. The violator's size, gross revenues, resources, and the standards in 4 CFR part 103 (Standards for Compromise of Claims: Inability to Pay) should be taken into consideration in making a determination whether to charge the total potential assessment. This consideration may affect the decision as to the number of violations to cite as well as the level of the penalty to be assessed for each violation. The violator may submit evidence of its ability to pay at any time, and it will be considered in mitigation of the amount claimed. However, this evidence may not be given much weight when the other factors in this paragraph (b) indicate a high assessment is warranted.

(4) Effect on ability to continue to do business. Insofar as this factor is distinguishable from paragraph (b)(3) of this section, it relates to the timeliness of payment and abatement of violations. Evidence that immediate payment of even a mitigated civil penalty will effectively terminate a motor carrier's or shipper's business will be considered in determining whether to defer payment or to allow installment payments of the civil penalty assessed.

(5) Other matters as justice and public safety may require. Matters other than those specifically included in the factors listed in this section may also be either aggravating or mitigating in the interest of justice or public safety. These may include such factors as cooperation or lack thereof; general attitude toward compliance; institution or revision of a safety program; hiring or assignment of personnel with specifically defined safety responsibilities; comprehensiveness of corrective actions; and effectiveness and speed of compliance.

(c) The preponderance of aggravating factors may also indicate the need for more intensive enforcement in the form of other orders, revocations of operating authority, out-of-service, injunctions, or criminal prosecutions.

Subpart C—Criminal Penalties and Other Sanctions

§ 364.301 Criminal penalties.

(a) Except as provided in paragraph (b) of this section, any person who knowingly and willfully violates any provision of the FMCS shall, upon conviction, be subject for each offense to a fine not to exceed \$25,000 or imprisonment for a term not to exceed one year, or both, except that, if such violator is an employee, the violator shall only be subject to penalty if, while operating a commercial motor vehicle, the violator's activities have led to or could have led to death or serious injury, in which case the violator shall be liable upon conviction, for a fine not to exceed \$2,500.

(b) Any person who knowingly and willfully violates sections 12002, 12003, 12004, 12005(b), or 12008(d)(2) of the Commercial Motor Vehicle Safety Act of 1986 (49 U.S.C. 31302, 31303, 31304, 31305(b), or 31310(g)(2)), or regulations issued under such sections, shall, upon conviction, be subject for each offense to a fine not to exceed \$5,000 or imprisonment for a term not to exceed 90 days, or both.

(c) Any person who knowingly violates 49 U.S.C. 5104(b), or any person who knowingly and willfully violates any provision of the HMTA, as amended, or any regulation issued thereunder, shall be fined under title 18 of the United States Code, imprisoned for 5 years, or both.

(d) Additional criminal penalties appear in 49 U.S.C. 522–526.

(e) If the agency becomes aware of any willful act for which a criminal penalty may be imposed as noted in this section, the facts and circumstances of such violation may be reported to the Department of Justice for criminal prosecution of the offender.

§ 364.302 Injunctions.

(a) The Associate Administrator may file a civil action to enforce or redress a violation of a commercial motor vehicle safety regulation or order of the FHWA under 49 U.S.C. chapters 5, 51, 311 (except sections 31138 and 31139), and 315, in an appropriate district court of the United States. The court may grant such relief as is necessary or appropriate, including injunctive and equitable relief and punitive damages.

(b) Imminent Hazard—Hazardous Materials Regulations. The Associate Administrator may file a civil action to suspend or restrict the transportation of hazardous material responsible for an imminent hazard or to eliminate or ameliorate such a hazard, in an appropriate district court of the United

States. The court may grant such relief as is necessary or appropriate, including injunctive and equitable relief and punitive damages. "Imminent hazard" means that there is substantial likelihood that death, serious illness, or severe personal injury will result from the transportation by motor vehicle of a particular hazardous material before an administrative proceeding to abate the risk of harm can be completed.

(c) Imminent Hazard—Federal Motor Carrier Safety Regulations. Whenever it is determined that a violation of the FMCS poses an imminent hazard, the Associate Administrator or the authorized delegate of that official shall order a commercial motor vehicle or the operator of a commercial motor vehicle out of service, or order an employer to cease all or part of its commercial motor vehicle operations until such time as the violations creating the imminently hazardous condition are satisfactorily abated. "Imminent hazard" means any condition of commercial motor vehicle, driver or commercial motor vehicle operations which is likely to result in serious personal injury or death if not discontinued immediately.

(d) The employer or driver shall comply immediately upon the issuance of an order under paragraph (c) of this section. Opportunity for review shall be provided in accordance with § 363.110 of this subchapter. An order to an employer to cease all or part of its operations shall not prevent vehicles in transit at the time the order is served from proceeding to their immediate destinations, unless any such vehicle or its driver is specifically ordered out of service forthwith. Vehicles and drivers proceeding to their immediate destinations shall be subject to full compliance with the order upon arrival.

(e) For purposes of paragraph (d), the term *immediate destination* means the next scheduled stop of the vehicle already in motion where the cargo on board can be safely secured.

§ 364.303 Disqualifications.

In addition to any civil or criminal penalties provided for in this part, operators of commercial motor vehicles who are convicted of certain offenses may also be disqualified for periods from 60 days to lifetime, as follows:

(a) Serious traffic violations.

(1) Two serious traffic violations in a 3-year period—sixty days.

(2) Three serious traffic violations in a 3-year period—one hundred twenty days.

(b) Violations of out-of-service orders.

(1) First violation of operating a commercial motor vehicle during the period that the operator, operation, or

vehicle are placed out of service—ninety days.

(2) Second violation in a ten-year period of operating a commercial motor vehicle during the period that the operator, operation, or vehicle are placed out of service—one to five years.

(3) Third violation or more in a ten-year period of operating a commercial motor vehicle during the period that the operator, operation, or vehicle are placed out of service—three to five years.

(4) First violation of operating a commercial motor vehicle transporting hazardous materials or passengers during the period that the operator, operation, or vehicle are placed out of service—180 days.

(5) Second violation or more of operating a commercial motor vehicle transporting hazardous materials or passengers during the period that the operator, operation, or vehicle are placed out of service—three to five years.

(c) First violation of driving a commercial motor vehicle under the influence of alcohol or a controlled substance—at least one year.

(d) First violation of leaving the scene of an accident involving a commercial motor vehicle operated by the violator—at least one year.

(e) Using a commercial motor vehicle in the commission of a felony (except a felony described in paragraph (i) of this section—at least one year.

(f) Second or further violations described in paragraphs (c) and (d) of this section—lifetime.

(g) Using a commercial motor vehicle in the commission of more than one felony arising out of different criminal episodes—lifetime.

(h) Any combination of violations described in paragraphs (c) through (f) of this section—lifetime.

(i) Using a commercial motor vehicle in the commission of a felony involving manufacturing, distributing, or dispensing a controlled substance, or possession in a commercial motor vehicle with intent to manufacture, distribute, or dispense a controlled substance—lifetime.

Subpart D—Monetary Penalty Collection

§ 364.401 Payment.

All monetary penalties are due and payable as provided in the final agency order or settlement agreement disposing of the notice of violation or claim. Interest will accrue from the date payment was due and payable after issuance of a final order, and will be added to all outstanding balances not timely paid.

§ 364.402 Collections.

Unpaid monetary penalties or balances will be pursued aggressively under the Federal Standards for the Administrative Collection of Claims at 4 CFR part 102, as adopted by the Department of Transportation and delegated to the Federal Highway Administration in 49 CFR part 89. Penalties may be recovered in an action on behalf of the United States in the appropriate U.S. District Court.

**PARTS 385 AND 386 AND § 391.47—
[REMOVED AND RESERVED]**

2. Chapter III of title 49, CFR, is amended by removing and reserving parts 385 and 386 and § 391.47.

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