

River within a 240-yard radius of the fireworks barge in approximate position 40°45'56.2"N 074°00'21.6"W (NAD 1983), about 300 yards west of Pier 84, Manhattan.

(b) *Effective period.* This section is effective from 8:30 p.m. (e.s.t.) until 10 p.m. (e.s.t.) on August 27, 2000. If the event is cancelled due to inclement weather, then this section is effective from 8:30 p.m. (e.s.t.) until 10 p.m. (e.s.t.) on August 28, 2000.

(c) *Regulations.* (1) The general regulations contained in 33 CFR 165.23 apply.

(2) All persons and vessels shall comply with the instructions of the Coast Guard Captain of the Port or the designated on-scene-patrol personnel. These personnel comprise commissioned, warrant, and petty officers of the Coast Guard. Upon being hailed by a U. S. Coast Guard vessel by siren, radio, flashing light, or other means, the operator of a vessel shall proceed as directed.

Dated: August 11, 2000.

**R.E. Bennis,**

*Captain, U. S. Coast Guard, Captain of the Port, New York*

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## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

#### 49 CFR Part 385

[Docket No. FMCSA-99-5467 (Formerly Docket No. FHWA-99-5467)]

RIN 2126-AA42 (Formerly RIN 2125-AE56)

#### Safety Fitness Procedures

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

**ACTION:** Final rule.

**SUMMARY:** The FMCSA is implementing section 4009 of the Transportation Equity Act for the 21st Century (TEA-21) by amending the safety fitness procedures of the Federal Motor Carrier Safety Regulations. This action prohibits all motor carriers found to be unfit from operating commercial motor vehicles (CMVs) in interstate commerce. The FMCSA will treat an unsatisfactory safety rating as a determination of unfitness.

**EFFECTIVE DATE:** This rule is effective on November 20, 2000.

**FOR FURTHER INFORMATION CONTACT:** Ms. Deborah M. Freund, Vehicle and Roadside Operations Division, Office of

Policy and Program Development, FMCSA, or Mr. William C. Hill, Regulatory Development Division, Office of Policy and Program Development, FMCSA, (202) 366-4009; or Mr. Charles E. Medalen, Office of the Chief Counsel, (202) 366-1354, Federal Highway Administration, 400 Seventh Street, SW., Washington, DC 20590-0001. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

#### SUPPLEMENTARY INFORMATION:

##### Electronic Access

Internet users may access all comments received by the U.S. DOT Dockets, Room PL-401, by using the universal resource locator (URL): <http://dms.dot.gov>. It is available 24 hours each day, 365 days each year. Please follow the instructions online for more information and help.

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##### Creation of New Agency

On December 9, 1999, the President signed the Motor Carrier Safety Improvement Act of 1999 (MCSIA) (Public Law 106-159, 113 Stat. 1748). The new statute established the Federal Motor Carrier Safety Administration in the Department of Transportation. On January 4, 2000, the Secretary rescinded the authority previously delegated to the Office of Motor Carrier Safety (OMCS) (65 FR 220). This authority is now delegated to the FMCSA.

The motor carrier functions of the OMCS' Resource Centers and Division (*i.e.*, State) Offices have been transferred to FMCSA Service Centers and FMCSA Division Offices, respectively. Rulemaking, enforcement, and other activities of the Office of Motor Carrier Safety while part of the FHWA, and while operating independently of the FHWA, will be continued by the FMCSA. The redelegation will cause no changes in the motor carrier functions and operations previously handled by the FHWA or OMCS. For the time being, all phone numbers and addresses are unchanged.

##### Background

Section 4009 of TEA-21 (Public Law 105-178, 112 Stat. 107, at 405, June 9, 1998) amends 49 U.S.C. 31144 which

requires the Secretary of Transportation to maintain, by regulation, a procedure for determining the safety fitness of an owner or operator of commercial motor vehicles (CMVs). Section 31144 was originally enacted by section 215 of the Motor Carrier Safety Act (MCSA) of 1984 (Public Law 98-554, 98 Stat. 2832). The FMCSA regulations at 49 CFR parts 385 and 386 already include most of the requirements of section 4009.

Section 4009 transferred the prohibitions in 49 U.S.C. 5113 to section 31144. Section 5113 was enacted by section 15(b) of the MCSA of 1990 (Public Law 101-500, 104 Stat. 1213, 1218, November 3, 1990) and prohibited motor carriers rated "unsatisfactory" from using CMVs to transport, in interstate commerce, starting on the 46th day after the rating was issued, more than 15 passengers (including the driver) or hazardous materials (HM) in quantities requiring placarding. It also prohibited Federal agencies from using "unsatisfactory" rated motor carriers to transport more than 15 passengers and placardable quantities of HM. The regulation implementing section 5113 has been in effect since 1991 (49 CFR 385.13).

Section 4009 added a prohibition applicable to all owners and operators of CMVs not previously subject to 49 U.S.C. 5113—that is, those not transporting HM in quantities requiring placarding or passengers—from using those vehicles in interstate commerce starting on the 61st day after being found "unfit." It also prohibits Federal agencies from using those owners and operators to provide interstate transportation of non-HM freight.

Because 49 U.S.C. 31144(b), as amended by section 4009, provides that "[t]he Secretary *shall maintain, by regulation*, a procedure for determining the safety fitness of an owner or operator" [emphasis added], the FMCSA concludes that Congress authorized the continued use of the safety fitness rating regulation in effect on June 9, 1998, the date of enactment of TEA-21, until a rule to implement section 4009 is adopted and made effective.

The similarity between the current 49 U.S.C. 31144 and the previous 49 U.S.C. 31144 also convinces the FMCSA that Congress intended section 4009 to authorize the application of the principles embodied in section 15(b) of the MCSA of 1990 to the entire range of motor carriers that operate CMVs in interstate commerce. The only difference mandated by section 4009 is that carriers of general freight would have 60 days after the agency makes a determination of "unfitness," while

passenger and HM carriers have 45 days, in which to improve the safety of their operations or cease operating in interstate commerce. Because the MCSA of 1990 explicitly referred to the three-part rating scheme used by the FHWA (*satisfactory, conditional, unsatisfactory*) and directed the agency to prohibit *unsatisfactory* rated motor carriers from transporting passengers and HM after the 45 day period, the FMCSA concludes that the functionally equivalent, though not identical, requirements of section 4009 authorize, but do not require, the FMCSA to continue using its current safety fitness rating standards and methodology. The FMCSA will use an *unsatisfactory* rating assigned under the Safety Fitness Rating Methodology (SFRM) in part 385 as a determination of "unfitness." This policy is congruent with that of section 15(b) of the MCSA of 1990. There is nothing in the legislative history concerning section 4009 of TEA-21 that suggests the FMCSA should implement a different approach.

#### Docket Comments to the NPRM

On August 16, 1999 (64 FR 44460), the FHWA proposed amending §§ 385.1, 385.11, 385.13, 385.15, and 385.17 of the FMCSRs to prohibit all motor carriers found by the Secretary to be unfit from operating CMVs in interstate commerce.

Comments were received from the following:

Five motor carrier industry associations: American Bus Association (ABA); American Moving and Storage Association (AMSA); American Trucking Associations (ATA); National Association of Small Trucking Companies (NASTC); National Private Truck Council (NPTC);

Four motor carriers: Boyle Transportation (Boyle); Crete Carrier Corporation and its affiliates Sunflower Carriers, Shaffer Trucking, Inc., and HTL Truck Lines (Crete); Greyhound Lines (Greyhound); Werner Enterprises, Inc. (Werner);

Two labor organizations: Amalgamated Transit Union (ATU) and International Brotherhood of Teamsters (IBT);

One organization representing shippers: National Industrial Transportation League (NITL);

Two safety advocacy organizations: the Insurance Institute for Highway Safety (IIHS) and Parents Against Tired Truckers (PATT);

Two State departments of transportation: Oregon Department of Transportation and Iowa Department of Transportation.

#### General Comments

The ATA supported the FMCSA's new authority to require all unsafe motor carriers to cease their operations in interstate commerce, saying "[t]he highway is our workplace and we continue to pursue ways to make our workplace safer." Nevertheless, the ATA believes the path the FMCSA has chosen reflects a choice for expediency. The ATA took issue with the agency's interpretation of congressional intent and with what it views as the agency's inconsistent approach towards the adoption of performance-based safety indicators and enforcement outcomes. These comments are discussed under the topic headings below.

Werner agreed with and supported the ATA's position on the NPRM. However, it disagreed that an unsatisfactory safety rating should be considered a determination of safety fitness, and argued that there is little relationship between recordkeeping violations and the motor carrier's accident rate or overall safety. Werner also expressed concern with the methods currently used to perform compliance reviews and assign safety ratings.

The NASTC generally supported the goal of statutes, regulations, and enforcement actions to ensure CMV safety. It questioned the FMCSA's proposal to link an unsatisfactory safety rating with a determination of unfitness, as well as the suitability of the time periods proposed between the FMCSA's notification to a motor carrier of its proposed unsatisfactory safety rating and the agency's final determination.

The NPTC generally supported the FMCSA's proposal as providing a means to require motor carriers with documented poor safety performance to cease operations in interstate commerce. However, the NPTC expressed concern over three issues: the FMCSA's failure to propose a revised performance-based SFRM; the appropriateness of equating unfitness with an unsatisfactory safety rating without revising the SFRM; and the enforcement of shutdown provisions. These comments are discussed under the topic headings below.

The National Industrial Transportation League (NITL) "supports the proposed regulations as an appropriate exercise of the agency's regulatory authority in the critically important area of truck safety. Indeed the League commends the FHWA for its thoughtful approach in implementing the requirements of TEA-21." The NITL believed that the agency correctly interpreted the nexus between a motor

carrier's unsatisfactory safety rating and the determination of "unfitness." Although the NITL agreed with the FMCSA's assertion that TEA-21 does not require the agency to implement a new safety fitness standard, it believes that the agency should continue to evaluate and refine the current system. The NITL offered several recommendations related to public access to safety ratings, revised rating categories, and re-rating of motor carriers currently holding unsatisfactory safety ratings. These comments are discussed under the topic headings below.

Parents Against Tired Truckers supported the FMCSA's proposal and urged the DOT and the FMCSA to provide sufficient funding and personnel to successfully implement the new regulation. The Insurance Institute for Highway Safety also supported the proposal and hopes the regulation will deter violations of Federal motor carrier safety regulations.

Other commenters, including the two States, labor organizations, and some of the industry associations, discussed specific provisions of the NPRM and issues related to motor carrier safety compliance review and enforcement processes. We address their comments under the appropriate subject headings.

#### Relationship Between "Unfit" Safety Determination and "Unsatisfactory" Safety Rating

The ATA contended that Congress' use of the term "is not fit" in section 4009 of TEA-21 was deliberate, and that the FMCSA "misconstrued the legislative history of [49 U.S.C.] section 31144 when it said 'First, [Congress] transferred the substance of 49 U.S.C. 5113 to section 31144.'" The ATA believes that Congress "rejected much of the substance of Section 5113 and replaced it with Section 31144." Werner also does not support the notion of an unsatisfactory rating as a determination of unfitness. Crete holds that the wording of section 4009 indicates that Congress intended the "safety fitness compliance determination" and a "determination of fitness to operate" (emphasis in original) to be two distinct processes.

The AMSA asserted that the FMCSA has misinterpreted section 15(b) of the MCSA of 1990 and section 4009 of TEA-21 in drawing an equivalence between a declaration of unfitness and a safety rating of unsatisfactory. The AMSA stated that, "[s]ince Congress did not explicitly direct the Secretary of Transportation to maintain the same safety fitness procedures for household goods carriers as for carriers of

hazardous materials," that the FMCSA should not do so. The AMSA also cited the MCSA of 1990 to support its belief that, "Except for intentional bad acts (e.g., falsification of records of duty status or drivers' medical certificates), Congress did not intend for record keeping violations to require enforcement actions as severe as ceasing operations." The AMSA also provided statistics prepared by its Safety Management Council on 1998 fourth-quarter accidents experienced by 17 companies, as well as industry accident statistics covering the period 1989-1998 to support its point of view. For those years, between 15 and 20 companies reported total miles traveled, numbers of accidents in several categories (total accidents, DOT recordable, preventable DOT recordable, total preventable, and fatal) and the corresponding accident rates per million vehicle miles. Their DOT recordable accident rates ranged from 0.921 (in 1989) to 0.644 (in 1998), fatalities ranged from 0.082 (in 1989) to 0.031 (in 1998).

*FMCSA Response*

The FMCSA continues to differ with the ATA's reading of the legislative history of 49 U.S.C. 5113 and 31144. The agency's NPRM (64 FR 44460, at 44461) addressed this issue and responded to the ATA's comment to the ANPRM on the same subject (at 44464).

The agency developed the NPRM to respond to congressional direction

contained in TEA-21 and predecessor legislation. Responding to the AMSA's second comment, Congress did explicitly direct the Secretary to prohibit the operation in interstate commerce by motor carriers determined to be unfit. In doing so, Congress extended the earlier prohibition applicable to motor carriers of HM to motor carriers of non-HM freight. A fair reading of section 4009 of TEA-21 supports the action adopted in this final rule. Given the enactment of 49 U.S.C. 31144 in the Motor Carrier Safety Act of 1984 and the FHWA's implementation of that section in 49 CFR Part 385, and the enactment of 49 U.S.C. 5113 in the Hazardous Materials Uniform Safety Act of 1990 and the FHWA's implementation of that section in 49 CFR 385.13, the only substantive change made in section 4009 is the extension of the prohibition against operations after unsatisfactory ratings are received to all motor carriers of property. The 1984 Act required the Secretary to "prescribe regulations" to determine the safety fitness of owners and operators of commercial motor vehicles. The FHWA prescribed such regulations in Part 385, employing a rating system, consisting of satisfactory, conditional and unsatisfactory ratings.

In 1990, the Congress recognized this process by prohibiting transportation by motor carriers transporting hazardous materials or passengers after receiving

an "unsatisfactory" rating. In section 4009 of TEA-21, Congress directed the Secretary to "maintain by regulation a procedure for determining the safety fitness of an owner or operator," again a recognition by Congress that a procedure was already in place. Congress did not require a new procedure or the use of a new nomenclature. The former section 5113, which used the term "unsatisfactory" from the regulations as the determinant for when a carrier is no longer fit to operate, is in substance incorporated into the new 49 U.S.C. 31144, which speaks only in terms of fitness to operate. But the new section 31144 applies the section 5113 prohibitions to all motor carriers under a common procedure for determining safety fitness that it requires the Secretary to "maintain."

The agency does not read the "maintain" provision to mean that we must continue to use the same nomenclature, nor even the same factors in making the determination, but it certainly does not prohibit it. As the agency has stated publicly and throughout these notices, the fitness determination factors are under review, and we intend to address that entire issue in a subsequent rulemaking.

The table below compares the AMSA crash rates (per 100 million vehicle miles traveled) to FMCSA rates for fatal and recordable crashes.

	FMCSA fatality rate, comb. trucks	AMSA fatality rate	FMCSA recordable crash rate	AMSA recordable crash rate
1989 .....	4.6	8.2	na	92.1
1990 .....	4.4	4.1	na	77.2
1991 .....	3.7	6.1	na	77.2
1992 .....	3.4	1.8	na	79.1
1993 .....	3.6	3.1	80.1	72.6
1994 .....	3.5	2.5	78.6	77.7
1995 .....	3.2	3.2	64.5	77.0
1996 .....	3.3	4.4	76.6	83.0
1997 .....	3.3	3.1	76.7	87.0
1998 .....	3.2	3.1	70.2	64.4

Both fatal and recordable accident rates provided by the AMSA for the moving industry fluctuated significantly from year to year. Fatal crash rates have been generally comparable to the FMCSA rates. AMSA's figures on recordable crash rates were lower than the FMCSA national rates in 1993, 1994, and 1998, but higher in 1995, 1996, and 1997. Because the AMSA crash data are drawn from a far smaller population than the FMCSA data, they are subject to significantly higher fluctuations. Taking the record as a whole, however,

the FMCSA believes that the safety performance illustrated by these statistics does not support the AMSA's contention that household goods carriers are uniquely safe and should therefore be given regulatory relief.

**Performance Basis of Rating**

The ATA argued that the approach of the NPRM is not consistent with the FMCSA's progress in shifting toward performance-based indicators and outcomes. It pointed out that the FMCSA has devoted considerable

resources to developing two performance-based safety tools: Safestat, which prioritizes motor carriers for safety review based primarily upon performance indicators, and the Motor Carrier Safety Improvement Process (MCSIP) to trigger State-based CMV registration sanctions against unsafe motor carriers.

The ATA claimed that the current safety rating process is "seriously flawed" because it "provides a measure of compliance, not safety, by its very design." The ATA contended that the

FMCSA “has been reluctant to consider the rating as a measure of safety.” The organization expressed disappointment with the FMCSA’s failure to implement a “more performance-based” rating process, but it then took the agency to task for alleged inconsistencies in its treatment of motor carriers’ performance and regulatory compliance. As an example, the ATA criticized the FMCSA’s weighting of hours-of-service violations in the SFRM: “[FMCSA] does not make the connection through data or research that fatigue is the cause of driver error.” Crete also criticized the agency’s “exceptional emphasis given in the current regulations to compliance with the FMCSA’s outmoded hours of service regulations.”

The ATA contended that the FMCSA’s research, specifically the “New Entrant Safety Research: Final Report,” April 1998, makes the case that there is “no linear relationship between compliance and safety.” The ATA focused on the report’s finding that a motor carrier’s regulatory compliance improves with its experience, but that the relationship between experience and crashes was not directly related.

The ATA exhorted the FMCSA: “If the agency is permanently married to the shut down procedures it has proposed, we urge an immediate correction to the rating system.” The ATA recommended that the FMCSA give additional weight to the “accident” factor, reduce the weight for hours-of-service violations, and consider only accidents deemed the “fault” of the CMV driver when calculating a motor carrier’s accident rate.

Werner contended that there is a “lack of uniformity between various regions and the method of sampling used during a compliance review.” Werner also argued that the potential outcome of a proposed unsatisfactory rating is serious in the extreme, given the “large number of motor carriers subject to review and the random aspect of enforcement.”

The ABA stated that it has continued concerns with the FMCSA’s current safety rating process, and urged the agency to move forward with procedures that are performance-based as opposed to recordkeeping-oriented.

Crete recommended that the FMCSA use the national “average” recordable accident rate as an initial baseline performance standard for a motor carrier’s operational safety fitness. A motor carrier whose rate was more than double the national average might be considered to have demonstrated unsatisfactory compliance with the compliance review (CR) accident factor

and could be deemed unfit to continue to operate in interstate commerce.

The NPTC echoed this viewpoint. It would support a rating system that is based upon a motor carrier’s “crash history, driver behavior, vehicle condition, and safety management systems.” The NPTC called for the FMCSA to develop a procedure that is “unambiguous, not subject to interpretation, and have standards to assure [the process to require an unfit motor carrier to cease its interstate operations is] applied equitably.” The organization was very concerned that the FMCSA had proposed to continue to use its current SFRM. The NPTC believed “this action minimizes the agency’s commitment to review and develop a rating system based more on safety performance, and less on paperwork compliance.”

The NPTC recommended that the FMCSA issue an interim final rule “with a time certain deadline” to implement the revisions proposed. The NPTC reasoned that this would allow the agency to quickly implement the provisions of section 4009, but would still provide an opportunity for the FMCSA to review its outcomes to ensure that the regulation was being applied properly.

#### *FMCSA Response*

The FMCSA already places considerable reliance on the performance criteria in the SFRM, *e.g.*, vehicle and driver violations and accident rates. The FMCSA also uses performance data to set priorities for CRs of motor carriers: A motor carrier that has accident and vehicle out-of-service experience below a statistical threshold, and that has not generated substantive complaints concerning its operational safety, is not likely to face a CR. The safety rating assigned after the CR reflects a measure of both a motor carrier’s safety performance and its compliance with safety regulations. Those regulations exist because of their nexus to safety of operations. An NPRM soon to be published will address the issue of what the ATA—and the FMCSA—view as a misinterpretation of safety ratings.

The FMCSA has for several years been considering the feasibility of a more performance-based method of evaluating the safety of motor carriers. In a 1997 final rule amending 49 CFR part 385 (62 FR 60035, November 6, 1997), the agency announced that an ANPRM would be published to solicit advice and data on such a rating system. The ANPRM was published on July 20, 1998 (63 FR 38788). The agency has since decided to separate the short-term

rulemaking implementing section 4009 of TEA-21 from the longer-range effort to create performance-based rules. The SafeStat algorithm, which incorporates performance measures—accidents and roadside out-of-service rates—has become a more integral part of the FMCSA program for selecting motor carriers for CRs. The agency is also strengthening its focus on motor carriers that have demonstrated continuing unwillingness or inability to address safety performance problems. Under the PRISM<sup>1</sup> program, these motor carriers may ultimately face the suspension of their CMV registration privileges.

Nevertheless, databases sufficiently reliable and populated to support a truly comprehensive performance-based rating system are still under development. Since the congressional mandate embodied in section 4009 cannot be delayed indefinitely pending their full deployment, the FMCSA has concluded that the best alternative is to adopt the proposal set forth in the NPRM. An interim final rule incorporating changes to the SFRM that were not published for notice and comment, as required by the Administrative Procedure Act, would add a new element of legal uncertainty—the very thing that the NPTC wishes to avoid. The regulatory requirements that several commenters sought to trivialize as “paperwork compliance” in fact deal with critical matters, such as monitoring drivers’ hours of service and checking to verify that their CDLs have not been suspended.

Concerning the ATA’s comment that the “[FMCSA] does not make the connection through data or research that fatigue is the cause of driver error,” we refer the ATA to the extensive research literature the agency reviewed on the subject of fatigue and loss of alertness. [See DOT Docket FMCSA-97-2350]. Although the data are not available to statistically determine the incidence of fatigue, it is noteworthy that driver fatigue was identified by a broad spectrum of over 200 motor carrier and highway safety experts participating in the Department’s 1995 Truck and Bus Safety Summit as the top issue needing to be addressed to improve motor carrier safety. The FMCSA believes that the statistics of police-reported large-truck fatal crashes do not adequately reflect the *contributing* role that fatigue may play in crashes. Fatigue increases the likelihood that a driver will not pay

<sup>1</sup> Performance and Registration Information Systems Management, a program which links State commercial motor vehicle registration to the safety fitness of motor carriers.

sufficient attention to driving or commit other mental errors. In-depth studies of crashes have found that inattention and other mental lapses contribute to as much as 50 percent of all crashes. While fatigue may not be involved in all these crashes, it clearly contributes to some of them.

Addressing the ATA's comment on the report, "New Entrant Safety Research: Final Report," the FMCSA agrees that the ATA's explanation of the relationship between regulatory compliance and crash rates may be one possibility. However, the study sought to *separately* confirm the existence of a safety performance (*i.e.*, crash rate) learning curve and the existence of a safety regulation compliance learning curve. It did not involve determining the relationship between compliance and safety, as the ATA's comment suggests.

As for the ATA's recommendation to count only those accidents where the CMV driver was determined to be at fault, the FMCSA believes it reflects a continued misinterpretation of the distinction between "contributing factor" and legally culpable "fault." Some motor carriers properly list in their accident register the details of accidents that their drivers were powerless to avoid (such as a legally stopped CMV that is struck in the rear by another vehicle). For other types of accidents where the driver of another vehicle was cited on a police accident report, the issue of "preventability" on the part of the CMV driver is often far more complex. The FHWA addressed this issue in the final rule concerning the safety fitness procedure (62 FR 60035, at 60037).

The FMCSA disagrees with Crete's recommendation that a motor carrier's accident experience be the sole factor considered in determining safety fitness. In the words of Professor James Reason of the University of Manchester, who spoke out at the National Transportation Safety Board's (NTSB) April 24 and 25, 1997, symposium, "Corporate Culture and Transportation Safety:"

In the absence of bad outcomes, the best way—perhaps the only way—to sustain a state of intelligent and respectful wariness is to gather the right kinds of data. This means creating a safety information system that collects, analyses, and disseminates information from incidents and near misses, as well as from regular proactive checks on the system's vital signs. All of these activities can be said to make up an *informed culture*—one in which those who manage and operate the system have current knowledge about the human, technical, organizational, and environmental factors that determine the safety of the system as a whole. In most

important respects, an informed culture *is* a safety culture.

The FMCSA, like the FHWA and the ICC for the last 60 years, rejects the assertion that there exists no relationship between a motor carrier's safety of operations and the completeness and accuracy of records that document compliance with the FMCSRs and, if applicable, the hazardous materials regulations (HMRs).

The FMCSA disputes the ATA's view that motor carriers continue to suffer consequences of what it views as an unjust method of assigning safety fitness determinations. The FMCSA's statistics presented in the August 16, 1999, NPRM indicate that in the years 1994 through 1998, between 80 and 95 percent of motor carriers of non-HM property starting a calendar year with an unsatisfactory safety rating were able to improve that rating before the end of that year—and they were not constrained from continuing their interstate operations.

In reference to Werner's and Crete's comments concerning review of motor carriers' records, the FMCSA's method of selecting records during the course of a compliance review has withstood a judicial challenge, *American Trucking Associations v. Department of Transportation*, 166 F.3d 374 (D.C. Cir. 1999). The fact is that there is a very large population of motor carriers in interstate commerce—nearly 500,000—and the agency is responsible for their safety and compliance with the FMCSRs, and, if applicable, the HMRs. Werner did not provide details concerning what it terms a lack of uniformity in the FMCSA's compliance reviews. As for Crete's comments concerning the hours-of-service regulations, the FMCSA recently published a proposed revision to those regulations. However, this does not excuse motor carriers from complying with, and the FMCSA from enforcing, the current regulations.

#### Records and Ratings

The ATA contended that the FMCSA's procedures proposed in the NPRM are "illogical and contrary to Congress' intent \* \* \* [because] the safety rating provides a measure of compliance, not safety." In support of its argument, the ATA described two hypothetical examples. In the first, a motor carrier had a low recordable accident rate of 0.35 crashes per million vehicle miles traveled and has been cited during an FMCSA compliance review for four critical violations: failing to preserve supporting documents for records of duty status, failing to maintain required proof of financial

responsibility, failing to maintain inquiries into a driver's driving record, and failure to require drivers to prepare driver vehicle inspection reports. The motor carrier was rated "unsatisfactory." In the second, a motor carrier has experienced 1.8 accidents per million [vehicle] miles, "more than twice the national average." The ATA maintained that this motor carrier could receive a satisfactory safety rating "if its operation were otherwise in complete compliance." The ATA said that a "recent, high profile magazine article" cited an example of a California motor carrier involved in a fatal crash had received a satisfactory safety rating from the FMCSA five months before, despite having a vehicle out-of-service rate "nearly twice the national average." Werner echoed the ATA's view on this issue. Crete's objection was similar. It argued that the proposal "confuses an assessment of the ability of a motor carrier to achieve compliance with a series of regulatory requirements with how safely the carrier's vehicles are actually being operated on the nation's highways" and that the proposal "would continue to elevate form over substance."

The AMSA contended that the NPRM "accomplishes nothing substantively to minimize accidents and fatalities." It characterized the proposal as one that would shut down motor carriers for poor recordkeeping practices but would potentially allow those with poor safety performance to continue to operate. The AMSA suggested a weighted assessment method that would base a safety fitness rating on roadside inspections, DOT accident ratio, driver qualifications record compliance, random drug and alcohol tests, a vehicle inspection and maintenance program, and hours-of-service compliance. The association would recommend that a motor carrier that did not have a "passing grade" of 60 percent or higher in any of these categories be declared unfit and unsatisfactory. However, the AMSA went on to state that the seasonal nature of the household goods moving industry would cause them to benefit less than other motor carrier industry segments when it comes to correcting safety deficiencies within a 60-day period. The association also contended the focus of these motor carriers' during the moving season "is almost exclusively on safe transportation of shipments, not necessarily safety compliance record keeping."

The NPTC asserted that, by drawing an equivalence between a determination of unfitness and an unsatisfactory safety rating, the FMCSA is attaching the consequences set forth in TEA-21 to

what it considers a flawed method of determining a safety fitness rating. The NPTC noted that it has supported the FMCSA's plans to amend the SFRM. It believed the current methodology "places too much reliance on paperwork compliance and that greater reliance should be placed on performance measurement to determine safety fitness."

The NASTC was concerned that the proposed rule would generate particularly severe outcomes for small motor carriers that do not have the safety-department resources common to larger motor carriers. Even though they do not encourage or condone unsafe operations, they may experience regulatory violations that could place them in danger of receiving an unsatisfactory safety rating, and may not be able to cure the underlying conditions in 60 days.

#### *FMCSA Response*

The FMCSA is concerned that Crete and the ATA appear to believe there is a complete disconnection between a motor carrier's compliance with the FMCSRs and the safety of its operations. As demonstrated by the NTSB's April 1997 symposium, adverse events, such as crashes and HM incidents, do not occur without warning. Rather, they are the final outcome of a chain of events made up of weak and inadequate safety links. For this reason, the FMCSA reads with grave concern Crete's and the ATA's comments expressing their belief that recordkeeping violations do not reflect gaps and deficiencies in safety of operations. The ATA's first hypothetical example did not go into details concerning the patterns or extent of the missing records. More important, the ATA did not explain how a motor carrier can demonstrate that it has complied with safety regulations concerning drivers' hours-of-service, financial responsibility, driver qualifications, or proper CMV operation and maintenance in the absence of these records. The ATA's second hypothetical was simply incorrect. As indicated in the final rule adopting Appendix B to Part 385, "[a]n urban carrier (a carrier operating entirely within the 100 air mile radius) with a recordable accident rate over 1.7 (approximately twice the 1994-96 average of 0.839) will receive an *unsatisfactory* safety rating. All other carriers with a recordable accident rate greater than 1.5 (approximately double the 1994-96 average of 0.747) will receive an *unsatisfactory* safety rating" (62 FR 60037, November 6, 1997). Therefore, a carrier with an accident rate of 1.8 per million vehicle miles would receive an unsatisfactory rating

for Factor 6 (Accident Factor = Recordable Rate) of the Safety Fitness Rating Methodology. Even if this hypothetical motor carrier were otherwise in compliance with the FMCSRs, its factor rating for accidents would make the overall safety rating conditional (see "Motor Carrier Safety Rating Table" in Section III.A of Appendix B to 49 CFR 385).

The FMCSA notes that, according to Crete, the "recordable accident" rate (as defined in 49 CFR 390.5) of Crete and its three affiliates is significantly less than one-half of the national average and reflects their commitment to highway safety." This is an admirable outcome reflecting good safety management practices, of which good recordkeeping practices and use of the information contained in the records kept are probably key features.

All of the items in the assessment method suggested by the NPTC and the AMSA depend upon the motor carrier maintaining records in order to establish compliance with the applicable safety regulations. The AMSA's suggestion that recordkeeping is completely disconnected from safety compliance is disingenuous. The agency reminds commenters that the NPRM included a provision to extend the initial 60-day period for up to an additional 60 days if the agency believes the motor carrier is making a concerted effort to improve the safety of its operations. Finally, the peak moving season requires household goods movers to use drivers and vehicles that are not part of their regular fleets. They might well give these temporary resources more scrutiny in order to ensure that the safety and quality of their operations are maintained.

Addressing the NASTC's concern, the agency has worked, and will continue to work, closely with motor carriers with proposed unsatisfactory ratings to help them improve the safety of their operations. Section 4009 states that the Secretary of Transportation may allow unfit motor carriers making good-faith efforts to improve their safety of operations to operate a grace period of up to 120 days (by law, this extended period is not available to motor carriers that transport passengers or HM freight in quantities requiring placarding.) The FMCSA's statistics on motor carriers' follow-up safety ratings indicate that the vast majority do improve their ratings and can continue or recommence their operations. Tables 2 and 3 of the NPRM provided calendar year summaries of the number of motor carriers of property initially rated unsatisfactory, and motor carriers holding an unsatisfactory rating at the beginning and the end of the year.

The figures were broken down by the number of drivers used by the motor carrier. Small (under 20 drivers) motor carriers' figures are comparable to the national averages of those motor carriers improving their ratings (Table 3), and some subsets of them actually have slightly better outcomes than motor carriers in the 50-99 driver category.

#### **Review of Proposed Safety Ratings**

The NASTC requested the FMCSA to begin the 60-day period on the date the agency officially notifies the motor carrier of the proposed rating, rather than the day the CR is completed. The FMCSA proposed to do exactly that, and to provide official information no later than 30 days after the completion of the review in a letter issued from the agency's headquarters. These procedures are being adopted in § 385.11 of the final rule.

The NASTC indicated that some of its members have been subjected to out-of-date controlled substance and alcohol testing regulations during the course of their reviews. The FMCSA is very concerned about this and requests the NASTC or the motor carriers involved to contact the FMCSA with specifics of this situation so we can correct it.

The ATA supported the FMCSA's proposal to review a motor carrier's proposed unsatisfactory safety rating within a specific time frame, and the proposal to offer a motor carrier of non-HM freight up to an additional 60 days to demonstrate improvements in the safety of its operations. The ATA maintained that this longer time gives motor carriers an extra incentive and allows them to make positive changes to their operations and to improve their compliance with safety regulations. The ATA also asked the FMCSA to consider re-reviewing all motor carriers with proposed conditional safety ratings.

#### *FMCSA Response*

The FMCSA is pleased that the ATA recognizes the agency's desire to assist motor carriers in improving the safety of their operations, and to avoid issuing a final unsatisfactory safety rating if the motor carrier is able to successfully demonstrate its safety fitness. However, we must clarify two issues that might have arisen from a misreading of the NPRM. First, the motor carrier must *request* the FMCSA to perform an administrative review or a review based upon its corrective actions. Second, the FMCSA must perform those reviews within 30 days of a request from a passenger or HM motor carrier, and within 45 days of a request from any other motor carrier. With respect to reviewing proposed conditional safety

ratings, the FMCSA must deploy its resources where the safety needs are greatest, and where the potential threats to a motor carrier's continued operations are the most severe. Because the new rule applies prospectively, motor carriers of non-HM freight receiving a proposed unsatisfactory safety rating on or after the effective date of this rule are subject to new and serious operational consequences if their proposed ratings become final. The FMCSA believes it must, therefore, give priority to these motor carriers' requests for administrative reviews.

#### Exemption for Small Passenger Vehicles

Greyhound Lines, Inc. (Greyhound) supported the FMCSA's overall proposal, but strongly objected to the proposed exemption for for-hire passenger CMVs designed to transport fewer than 16 passengers, including the driver. Greyhound asserted that § 385.1(b) of the FMCSA's NPRM provides a "permanent exemption" to operators of these smaller vehicles, notwithstanding the FMCSA's interim final rule on this subject (Docket FHWA-97-2858, 64 FR 48510, September 3, 1999). "Greyhound urges [the FMCSA] to remove the proposed exemption for commercial van operators and to start actively reviewing the operations of commercial van operators in order to remove from the road those that are unfit to operate."

Greyhound provided to this docket a copy of the cover letter from its comment to Docket FHWA-97-2858, dealing with the definition of CMVs. Greyhound had compiled a list of nationwide media reports of commercial van accidents and estimated that over 250 deaths per year occurred among the 74,000 commercial vans in operation. The latter number was based on information from the International Taxicab and Livery Association and included minivans with a passenger capacity of less than 9. Greyhound calculated a fatality rate of 1 per 296 commercial vans operated (74,000/250). Greyhound then compared NHTSA fatality data and a DOT Bureau of Transportation Statistics estimate of the number of intercity buses (4 occupant deaths for 25,700 buses) to compute a rate of 1 fatality per 6425 intercity buses operated. It provided a caveat to the comparison, stating that "the estimated van population is inflated by minivan numbers and because data is not available on the number of non-bus occupants killed in bus accidents."

The Amalgamated Transit Union (ATU) also supports the FMCSA's proposal and states that it agrees with

Greyhound on this subject. The ATU also provided what it termed a "selected summary of van accidents, injuries, and fatalities."

The comments of the American Bus Association (ABA) on this subject were similar to those of Greyhound. The Association stated that the FMCSA's lack of action to amend the FMCSRs to include smaller for-hire passenger vehicles after the passage of the ICC Termination Act of 1995 (Public Law 104-88, 109 Stat. 803) led the ABA to request Congress to again direct the FMCSA to regulate operators of these vehicles in section 4008 of TEA-21. The ABA also took the FMCSA to task for proposing to exempt these operators in § 385.1(b) of the August 16, 1999, NPRM.

#### FMCSA Response

Concerning the assertion by Greyhound and the ABA, that § 385.1(b) ignored the provisions of the FMCSA's other rulemakings on the applicability of the FMCSRs to for-hire operators of small passenger vehicles, the apparent inconsistency arises from the publication dates. The FHWA's NPRM on safety fitness procedures could not cite the provisions of those other rulemakings because they were not published in the **Federal Register** until 18 days later. On September 3, 1999 (64 FR 48510) the FHWA published an interim final rule exempting for six months the operation of these small passenger-carrying vehicles from all of the FMCSRs. This was done to allow time for the completion of a rulemaking proposal published the same day (64 FR 48518) that would require motor carriers operating these vehicles to file a motor carrier identification report, mark their CMVs with a USDOT identification number and certain other information (*i.e.*, name or trade name and address of the principal place of business), and maintain an accident register. Because the September 3 NPRM is still in progress, this final rule continues to exempt non-business private motor carriers of passengers and motor carriers conducting for-hire operations of passenger CMVs with a capacity of fewer than 16 persons, including the driver.

The FMCSA believes that there are two basic reasons that it cannot make a realistic comparison of fatality rates of small van and intercity bus operations. First, the number of minivans included in the "commercial van" total is not known. Greyhound provided this caveat to its own submitted statistical summary. Second, there appear to be no readily-available data to compare accident involvement on a true

exposure basis (vehicle miles traveled, or VMT). The ATU's summary of accidents certainly points to the personal tragedies of the people involved and their families, but it does not provide a statistically representative assessment of the operations of these vehicles. After considering various rulemaking options, the FMCSA proposed three requirements in its September 3, 1999, NPRM (64 FR 48518). These motor carriers would be required to complete a motor carrier identification report, to mark their vehicles with a USDOT number and certain other identifying information, and to maintain an accident register. The agency believes that these proposed changes would enable it to monitor the safety performance of these passenger carriers. The agency will be responding in a separate rulemaking to the congressional direction contained in section 212 of the Motor Carrier Safety Improvement Act of 1999, concerning rulemaking on the application of the FMCSRs to small passenger van operations.

#### Public Availability of Proposed Ratings

The International Brotherhood of Teamsters (IBT) supported the substance of the FMCSA's proposal. However, it disagreed with the FMCSA's proposal not to release proposed unsatisfactory safety ratings. The IBT took issue with the FMCSA's statement that the proposed unsatisfactory and conditional safety ratings are not releasable under the Freedom of Information Act (FOIA) because they do not constitute the agency's final decision. The IBT asserted that "FOIA is not the statute governing public availability of safety fitness ratings. Rather, 49 U.S.C. § 31144(a)(3) expressly provides that the 'Secretary shall \* \* \* make such final safety fitness determinations readily available to the public; \* \* \*'" The IBT questioned how the FMCSA could reconcile the determination of unfitness that is "at once final enough to trigger the beginning of the grace period but not sufficiently final to trigger public disclosure." The IBT also questioned why the FMCSA would wish to withhold the proposed ratings of a small number of motor carriers. It quoted the NPRM as indicating "only a relatively small percentage (2 percent) of all general freight carriers receive an "unsatisfactory" rating." Finally, the IBT suggested that "the possibility of public disclosure of their condition will encourage improvement before, rather than after, the Secretary determines their level of fitness."

The NITL also believed the FMCSA should immediately make available a motor carrier's proposed unsatisfactory safety rating and should take steps to more widely publicize the SAFER Internet address and the toll-free 800 number for public inquiries about safety ratings. The NITL maintained that " \* \* \* the actual occurrences [commenter's emphasis] of such directly safety-related violations justifies the public's access to the proposed "unsatisfactory" rating immediately," and that the shipping public should be provided the most current information so they can make their own decisions on whether or not to continue a relationship with such a motor carrier. The NITL echoed the IBT's view that this approach would have a strong deterrent effect. In contrast, the NITL believed the FMCSA should not make a proposed "conditional" safety rating publicly available because the less severe nature of the safety deficiencies that caused that proposed rating to be issued.

The ABA supported the FMCSA's proposal to continue its practice of not making public proposed unsatisfactory safety ratings. The ABA agreed that posting a proposed rating before a motor carrier has the opportunity to assess its operations, provide the FMCSA additional information, and request a reconsideration of the proposed rating "could in fact deal a death blow to a company without full benefit of due process."

The NITL argued that if a motor carrier had not taken effective corrective action during the 45 to 60 day period after it received a proposed unsatisfactory safety rating, it must be required to cease its operations at the end of that period. No extensions should be permitted.

The AMSA was concerned that motor carriers of household goods would suffer irreparable harm if proposed unsatisfactory safety ratings were made publicly available. The AMSA stated that the unique and close relationship that movers have with end-user consumers is largely based upon the public's confidence that the mover will transport their household goods in a safe and sound manner. "Thus, even public disclosure of a 'proposed' unsatisfactory rating of a household goods carrier would have a most chilling effect on [its] personal and professional reputation. Such an effect could not be repaired easily, notwithstanding either possible error by [a FMCSA] safety specialist or in the instances where there are safety compliance violations, immediate

remedial corrective action by the household goods carrier."

The ATA interpreted the FMCSA's question about publication of a proposed safety rating as a request for comment on whether the FMCSA should require a motor carrier to cease interstate operations at the time the proposed rating is issued, or when the final rating is issued. The ATA requested the FMCSA set this date at 45 or 60 days "after the final rating is issued." The ATA reasoned that motor carriers need this additional period to dispute the FMCSA's assessment of the situation or situations that led it to make its determination of unfitness, especially if accident preventability was at issue. The ATA went on to say:

We suspect that the agency believes carriers should begin preparing for a shut down order immediately upon notice of a proposed rating of "unsatisfactory." However, it is unrealistic to expect a for-hire carrier to notify its shippers of an impending "unsatisfactory" safety rating if that rating may not ultimately be assigned. A carrier who were to do that would be subjecting itself to harsh consequences both to its business and its image that may not be deserved.

#### *FMCSA Response*

The FMCSA proposed to retain the concept of the "proposed" safety rating, which it adopted in 1997. The time frames for motor carriers to cease operations after receiving an unsatisfactory rating or a determination of unfitness were set forth in both the Motor Carrier Safety Act of 1990 and in TEA-21. As the agency explained in the NPRM (64 FR 44460, at 44462), the goal of the proposal was basic fairness toward motor carriers. The agency is still of that same mind.

The FMCSA wants to clarify for the IBT that the proposed safety rating does not constitute a "final safety fitness determination." The 60-day (or 45-day) grace period that begins with the FMCSA's issuance of a letter to the motor carrier is expressly designed to provide motor carriers the opportunity to take (or at least to begin to take) the corrective actions needed to improve the safety of their operations, or to question the FMCSA's assessment of their operations.

Concerning the estimated number of affected motor carriers, the IBT appears to have misunderstood the agency's statement from the regulatory analysis section of the preamble to the NPRM. Although the agency did state that, as of December 31, 1998, 2 percent of *all* motor carriers of non-HM property listed in the Motor Carrier Management Information System (MCMIS) had an unsatisfactory safety rating, the

beginning of the sentence stated that the 8,999 motor carriers with unsatisfactory ratings represented 8.8 percent of the *rated* motor carriers (64 FR 44460, at 44465) in that category.

Although publicly available adverse information may indeed serve as a deterrent, the FMCSA agrees with the statements of the ABA, the NITL, and the AMSA. The agency does not believe that the benefits of this deterrent effect outweigh the requirements for the agency to provide these motor carriers the opportunity (1) to challenge the FMCSA's findings and allow the agency to address and correct errors it may have made in assigning the proposed ratings and (2) to improve the safety of their operations. The NITL incorrectly characterized the conditional safety rating, however, because it cited only the definitions in 49 CFR 385.3. The safety fitness rating methodology itself, in appendix B to part 385, describes the degree of regulatory noncompliance and negative performance (vehicle out-of-service and accidents) considered in the assignment of a conditional or an unsatisfactory rating. A motor carrier assigned a conditional safety rating is very likely to have demonstrated regulatory noncompliance, but not to such an extent as to warrant an unsatisfactory safety rating.

Although the NITL opposed the notion of an extension to the 45-to 60-day period during which a motor carrier may operate with a proposed unsatisfactory safety rating, the FMCSA is authorized by statute to provide additional time to motor carriers (that do not transport passengers or HM) making good faith efforts to improve their safety fitness (proposed § 385.13(a)(2)). The agency appreciates the NITL's plan to publish the SAFER Internet address and the FMCSA's toll-free phone number in its newsletter.

The ATA seems to have misunderstood the process and the time frames the agency uses in assessing a motor carrier's safety of operations and issuing a proposed and final safety rating. In the August NPRM (64 FR 44460, at 44462), the agency set forth this process under the heading "Proposed Ratings; Effective Date of Final Rating."

To reiterate, if the FMCSA is performing an initial CR in response to a safety complaint, a SAFESTAT listing, or a motor carrier's request, the FMCSA will advise a motor carrier of its proposed safety rating at the conclusion of the CR that generates the rating. (If the CR is a follow-up, the FMCSA will advise a motor carrier of its proposed safety rating at the conclusion of that CR only if the rating is other than



unsatisfactory.) The FMCSA will officially notify the motor carrier of its proposed safety rating by letter from FMCSA headquarters. The information provided a motor carrier is relatively detailed as to the agency's assessment of specific non-compliance with safety regulations. The motor carrier is, thus, made aware of the circumstances leading to a proposed rating before the FMCSA officially issues the proposed rating via a letter from its headquarters office in Washington, DC. The 45- or 60-day period begins on the date the FMCSA issues the official notice. If a motor carrier wishes to contest facts, such as accident circumstances and contributing factors, it can and should do so as early as possible, even before the proposed rating is issued. In any event, a motor carrier that requests an administrative review should make its request quickly because even an expedited proceeding takes time. During such a review, the adjudicator (the Chief Safety Officer of the Federal Motor Carrier Safety Administration) may grant relief while the proceeding is pending. A motor carrier may request a rating change based upon its corrective actions at any time. The FMCSA must respond to motor carriers' requests for administrative and corrective-action reviews within time frames specified in this rulemaking.

Contrary to the ATA's comment, the FMCSA does not view a proposed unsatisfactory safety rating as directing a motor carrier to prepare to cease its operations. The agency's mission is to promote safe, efficient, and effective transportation of people and goods. However, if a motor carrier has demonstrated that it is unwilling or unable to accomplish its transportation mission safely, it must not be allowed to place the safety of its drivers or of other highway users in jeopardy.

#### **Retroactive Application of New Regulation**

The IBT stated that it opposes the FMCSA's proposal to apply the revised regulation prospectively, *i.e.*, to impose the prohibition only upon motor carriers receiving an unsatisfactory safety rating on or after the effective date of the final rule. Citing *Landgraf v. USI Film Products* (114 S. Ct. 1483, 1499), the IBT argued that:

A statute does not operate "retroactively" merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law. Rather the court must ask whether the new provision attached new legal consequences to events completed before its enactment \* \* \* Statutes generally considered to have unlawful retroactive

effect are those which take away or impair vested rights acquired under existing laws, create new obligation, impose new duties, or attach new disabilities with respect to transactions or considerations already past.

The IBT went on to argue there is no rationale for the FMCSA to permit motor carriers "known to be unsafe" to operate indefinitely, and that this would be clearly against congressional intent. The IBT asked the FMCSA to consider inserting a provision in the final rule that would require non-HM freight carriers currently holding unsatisfactory ratings to request the FMCSA to reevaluate them within 60 days of the effective date of the rule. If the motor carrier did not request such a review, it would be prohibited from operating in interstate commerce on the 61st day after the final rule is effective. However, if the motor carrier did make the request, the FMCSA would be required to conduct the review within 60 days.

The NITL did not oppose the FMCSA's proposal to apply the rule prospectively, but it wanted the agency to commit enough resources to re-rate all motor carriers with a current unsatisfactory rating "within a short and defined period." The NITL contended that this effort would serve two purposes: it would remove from the highways motor carriers that continue to operate in an unsafe manner, and it would ensure that previously-unsatisfactory motor carriers would not continue to be "wrongly "tarred" with the consequences of their past rating."

#### *FMCSA Response*

The IBT's assertion that the FMCSA would contravene congressional intent if it failed to apply the shut-down requirements of section 4009 to non-HM freight carriers rated unsatisfactory before that statute was enacted, is patently incorrect. The discussion of retroactive and prospective application of laws in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), is carefully nuanced. Although the Supreme Court acknowledged that retroactive application of laws is sometimes required, especially in "procedural" and "prospective-relief" cases," it also noted that "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly \* \* \*" *Id.*, at 265, 276. The court's description of the proper analytical method upon judicial review leaves no doubt that unsatisfactory

safety ratings cannot be applied retroactively. The court said:

When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would \* \* \* increase a party's liability for past conduct \* \* \* If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result. *Id.*, at 280.

Using this method, we find that section 4009 includes no "express command" to shut down non-HM freight carriers based on unsatisfactory ratings issued before the provision was enacted. The presumption against retroactive application of laws therefore applies.

The FMCSA agrees with the IBT and the NITL that a motor carrier with an unsatisfactory safety rating has demonstrated an unacceptably low level of operational safety. However, the FMCSA has not made a practice of re-rating motor carriers unless new information on their safety performance became available. Some of these motor carriers have held these ratings for substantial periods of time, but have not come to the FMCSA's attention because their accident involvement and/or out-of-service rates have been below national averages. The agency's resources must be allocated over a very large, expanding and diverse group of motor carriers operating in interstate commerce. With nearly 9,000 motor carriers of non-HM freight holding unsatisfactory ratings as of December 31, 1998, the task of re-rating this group over a short period of time would be substantial. As the agency stated in the NPRM (64 FR 44460, at 44463):

the [FMCSA] will give priority to reviews of motor carriers with proposed or final *unsatisfactory* safety ratings because of the prohibition against operating in interstate commerce with such safety ratings \* \* \* if a motor carrier of non-HM freight that held an *unsatisfactory* safety rating issued prior to the effective date of a final rule were to receive a follow-up proposed *unsatisfactory* rating after the effective date of a final rule, the [FMCSA] would provide those motor carriers the same priority handling as motor carriers receiving a proposed *unsatisfactory* safety rating for the first time.

The issue of performing assessments of the safety and regulatory compliance of the large number of motor carriers operating in interstate commerce is a daunting one. This rulemaking

addresses vigorously the operation of those motor carriers whose safety fitness is determined to be unsatisfactory, and who must either improve their operations or face being prohibited from operating in interstate commerce. Other rulemakings will follow, dealing with the rating methodology itself, certification of safety auditors (required by section 211 of the MCSIA of 1999), and other matters.

Addressing the NITL's second comment, the FMCSA has, and will continue to have, a process in place under § 385.17 for motor carriers to request a change in their safety rating based upon corrective action.

### Rating Categories

The NITL suggested that the FMCSA develop an "excellent" safety rating category. The NITL stated that "An 'excellent' safety rating would provide a quality benchmark to both shippers and carriers, and provide information to shippers on the carriers who take their responsibility for safe operation most seriously \* \* \* [it] would assist shippers in making a choice among competing carriers, thus encouraging excellence in safe operation, and will ensure that the carriers with the best safety record reap the benefits in the market."

Boyle Transportation (Boyle) believes that motor carriers that transport placardable quantities of high-risk hazardous materials, such as explosives and radioactive materials, should be held to a higher safety standard than motor carriers that transport other types of freight. Boyle provided a list of 23 motor carriers that it stated were approved by the Department of Defense (DOD) to transport Division 1.1, 1.2, and 1.3 explosives; it included three other motor carriers with large nationwide fleets for comparative purposes. The list included the motor carriers' name; USDOT or MC number; out-of-service rates for driver, vehicle, and hazardous materials roadside inspections; and fatal, injury, and "tow" accidents. Boyle pointed out that some of these motor carriers hold satisfactory safety ratings from the FMCSA, even though they have substantial proportions of violations resulting in the driver or vehicle being placed out-of-service. "If a motor carrier that transports high risk hazardous materials and receives 'out of service' violations on 20–67 percent of their roadside inspections can maintain the same safety rating as carriers with fewer than 10 percent, there is no incentive for that carrier to more safely operate its commercial motor vehicles. The 'satisfactory' safety rating confers the same right to do business with the

DOD as other shippers." Boyle concluded its comments by noting that ICC operating authority to transport explosives was effective only for five years and that the motor carrier had to obtain "satisfactory results of a DOT compliance review" in order to renew it. Boyle recommended that the DOT consider suspending the operating authority of motor carriers transporting explosives if the motor carrier did not lower its vehicle out-of-service rate below 15 percent.

### FMCSA Response

The FMCSA's system of assigning safety ratings does not differentiate among specific classes of commodities, other than whether or not they include placardable quantities of hazardous materials. Although the vehicle out-of-service rates for some of the motor carriers listed in Boyle's submission do exceed the national average, the chart did not include information on fleet size: a small fleet might accumulate a high vehicle out-of-service rate over a short period of time with a small number of violations. The rate could dip equally quickly if a few problem areas were corrected.

The FMCSA believes that it must devote its limited resources to addressing critical concerns in motor carrier and highway safety. A rating category such as the NITL envisions could be awarded by an independent organization that develops its criteria in accordance with best industry safety practices to meet the needs of its clients and partners. We encourage NITL, and other motor carrier industry organizations, to move forward with such an effort.

### Federal Government Agency Use of Unsatisfactory Rated Motor Carriers

The AMSA believes that the FMCSA's proposal would have severe adverse impacts upon household goods motor carriers that provide contract transportation services to the U.S. government through the Department of Defense (DOD), the General Services Administration (GSA), and other agencies. According to the AMSA, approximately 1,200 household goods carriers, their agents, and their owner operators transport DOD domestic personal property shipments, and that approximately 120 household goods carriers and their agents participate in the GSA's Household Goods Traffic Management Program. The AMSA contends that "several household goods carriers would be devastated, if not completely put out of business" based upon the proposal.

### FMCSA Response

Some household goods movers that are heavily dependent upon U.S. government contracts would suffer adverse effects from a final safety rating of unsatisfactory. That, of course, must be understood as Congress' purpose in adding this provision. Moreover, the AMSA had noted in another part of its docket comment that there is a unique relationship between a household goods mover and its clients. Therefore, it would seem to be particularly important that household goods movers avoid such serious deficiencies in the safety of their operations that the FMCSA would declare them to be unfit. The safety of the operations of a household goods mover—or any other motor carrier—should not be held to a lower standard for some clients than for others. Indeed, this is not the case. The Program for Qualifying DOD Freight Motor Carriers, Exempt Surface Freight Forwarders, and Shipper Agents, at 32 CFR part 619, addresses safety ratings for motor carriers of non-hazardous and non-sensitive types of shipments as follows:

§ 619.2(a) Carrier will not have an "unsatisfactory" rating with the Federal Highway Administration, Department of Transportation and if it is an Intrastate Motor Carrier, with the appropriate State agency. § 619.2(b) Carriers with "conditional" or "insufficient information" ratings may be used to transport DOD general commodities provided that such carriers certify in writing that they are now in full compliance with Department of Transportation safety requirements.

In any case, the AMSA's concern that a large number of household goods movers would be affected by the regulation seems overstated. As of September 1, 1999, the MCMIS showed 15,781 active interstate motor carriers transporting household goods. These motor carriers operate a total of 142,794 power units (trucks and truck tractors). As of that date, 209 motor carriers (1.3 percent) held unsatisfactory safety ratings; these motor carriers operated 1,083 (0.76 percent) of the power units.

### Enforcement of New Regulations

The NPTC was concerned that the NPRM did not describe how the FMCSA planned to enforce its proposal—that motor carriers determined to be unfit actually cease their interstate operations. The NPTC acknowledged that the FMCSA has stated that it is planning to expand the PRISM program, but questioned how many States are currently capable of enforcing the proposed regulation. The organization also urged the FMCSA to develop and publicize its plans to monitor the operations of motor carriers that it has

directed to cease interstate operations, including prohibiting those motor carriers from operating their CMVs, and to announce penalties it would assess against motor carrier officials and employees found to be violating these orders.

The Motor Carrier Transportation Division of the Oregon Department of Transportation (Oregon), a participant in the FMCSA's Performance and Registration Information Systems Management (PRISM) program, supported the proposal, but encouraged the FMCSA to improve its compliance assessment and enforcement tools. Specifically, Oregon recommended that the FMCSA implement the SafeStat algorithm "to determine the safety fitness of all motor carriers in the United States." Oregon also asked the FMCSA to consider alternatives that would provide effective enforcement tools to States, such as prohibiting unfit motor carriers from registering their vehicles.

The Iowa Department of Transportation, another participant in the PRISM program, stated its support for a performance-based system to determine the safety fitness of motor carriers. Both Iowa and Oregon referred to their earlier comments to the agency's July 20, 1998, ANPRM.

#### *FMCSA Response*

The FMCSA will continue to issue an out-of-service order to each motor carrier that receives a final unsatisfactory safety rating. The FMCSA has procedures for its own personnel, and that of its MCSAP partners, to ensure that motor carriers prohibited from operating CMVs in interstate commerce do not do so.

Concerning the safety fitness of "all motor carriers," the FMCSA is constrained by law to provide safety oversight of motor carriers operating in interstate commerce. States may develop their own methods for assessing the safety fitness of their intrastate motor carriers. They may base their methods upon 49 CFR part 385, but they are not required to do so as a condition for receiving Motor Carrier Safety Assistance Program (MCSAP) grants.

#### **Proposed Revision to the Rating Criteria**

In the preamble of the 1997 final rule amending 49 CFR part 385 (62 FR 60035), the agency announced that it intended to review the entire rating system. On July 20, 1998, the agency published an advance notice of proposed rulemaking (ANPRM) which, among other things, began the process of creating a more performance-based

means of determining the safety fitness of motor carriers (63 FR 38788). The FMCSA anticipates publishing an NPRM in the near future that proposes a more performance-based safety fitness methodology. For the present, however, the FMCSA will continue using the current SFRM included in appendix B to part 385.

#### **Related Rating Issues**

The FMCSA does not currently issue safety ratings to two categories of motor carriers of passengers: (1) Non-business private motor carriers of passengers, such as, churches or social groups, and (2) owners and operators of vehicles designed to transport fewer than 16 passengers, including the driver, for compensation. As to the first category, the FMCSA does not believe that Congress intended the agency to include this group, because the occasional nature of the transportation these motor carriers provide does not readily lend itself to safety fitness evaluation. These motor carriers are not required to maintain most of the records otherwise mandated by the FMCSRs. However, they are still subject to many of the substantive regulations and to safety enforcement at roadside. No comments to the NPRM docket addressed this issue. The FMCSA will continue its practice of not issuing a safety fitness determination to this type of motor carrier.

The second category of passenger motor carrier is comprised mainly of limousine and van owners and operators. These entities are currently required to obtain operating authority from the FMCSA, but have not been subject to most provisions of the FMCSRs because their vehicles did not qualify as "commercial motor vehicles" under 49 CFR 390.5. Section 4008 of TEA-21 changed the statutory definition of "commercial motor vehicle" to include those vehicles designed or used to transport "more than 8 passengers (including the driver) for compensation" (49 U.S.C. 31132(1)(B)). However, it also authorized the agency to exempt some or all of these vehicles from some or all of the FMCSRs.

On September 3, 1999, the agency published (1) an interim final rule that amends its regulatory definition of a CMV to include vehicles designed or used to transport between 9 and 15 passengers (including the driver) for compensation, but temporarily exempts the operators of such vehicles from the FMCSRs; and (2) an NPRM that proposes to learn more about the operational safety of small passenger-carrying CMVs by requiring operators of

these vehicles to file a motor carrier identification report, mark their CMVs with a USDOT identification number, and maintain an accident register. The temporary exemption from the FMCSRs of small passenger-carrying vehicles also temporarily precludes the application of the safety fitness procedures to for-hire motor carriers operating these vehicles.

Several commenters to this docket disagreed with this provision of the FMCSA's proposal. The fact remains that, until the FMCSA completes its rulemaking concerning the applicability of the various parts of the FMCSRs to these passenger motor carriers, there is little upon which the agency could base a safety rating. The FMCSA will first clarify which operations must be included in the newly regulated class, and then determine which regulations should apply. The agency will also be responding in a separate rulemaking to the congressional direction contained in section 212 of the MCSIA, concerning rulemaking on the application of the FMCSRs to small passenger van operations.

#### *Is The Rule Applicable to Railroads and Steamship Lines?*

On February 17, 1999, in response to a petition from the ATA, the FHWA published an ANPRM dealing with the inspection, repair and maintenance of intermodal chassis and trailers (64 FR 7849). The petition asked for rulemaking that would require parties providing intermodal chassis and trailers to motor carriers (mainly railroads and steamship lines) to share with truckers the responsibility for maintaining that equipment at a level that complies with the FMCSRs. The FHWA discussed its jurisdiction over railroads and steamship lines as follows:

The FHWA [now the FMCSA] has jurisdiction over "commercial motor vehicles" (CMVs), "employees" and "employers," as defined in 49 U.S.C. 31132(1), (2) and (3), respectively. The vast majority of intermodal trailers and chassis-and-container combinations meet the definition of a CMV—a towed vehicle used on the highways in interstate commerce to transport \* \* \* property [which] has a gross vehicle weight rating or gross vehicle weight of at least 10,001 pounds \* \* \* An employer is "a person engaged in a business affecting interstate commerce that owns or leases a commercial motor vehicle in connection with that business, or assigns an employee to operate it." An employee is "an operator of a commercial motor vehicle (including an independent contractor when operating a commercial motor vehicle), a mechanic, a freight handler, or an individual not an employer, who (A) directly affects commercial motor vehicle safety in the course of employment \* \* \*"

Railroads, steamship lines, pier operators, or other parties that own or lease intermodal CMVs are thus "employers" subject to the jurisdiction of the FHWA. Any employee of such a business who is responsible for intermodal CMVs "directly affects commercial motor vehicle safety" through the inspection and maintenance program he or she manages and is thus an "employee" subject to the jurisdiction of the FHWA [FMCSA].

64 FR 7850, February 17, 1999.

In the course of public listening sessions held by the Department to explore the issues raised by the intermodal equipment ANPRM, the question arose whether the FMCSA could find railroads and steamship lines, as owners or operators of commercial motor vehicles, to be "unsatisfactory," thus forcing them to stop tendering or accepting intermodal trailers and container-chassis combinations, nearly all of which are in interstate commerce.

The FMCSRs treat the terms "employer" and "employee" in 49 U.S.C. 31132 as essentially equivalent to "motor carrier" and "driver," respectively. While the statutory definitions can be applied more broadly to railroads and steamship lines that own or operate intermodal equipment, as outlined in the February 17 ANPRM, neither the FHWA nor the FMCSA has done so. The FMCSA does not issue safety ratings to railroads or steamship lines simply because they own or operate (i.e., interchange with truckers) intermodal containers, chassis or trailers. This rule does not expand the reach of the previous safety rating rule to railroads, steamship lines or other intermodal entities merely because some of the equipment they operate meets the definition of a "commercial motor vehicle." Although ratings may be issued to motor carrier divisions or branches of, or subsidiaries owned by, such companies, railroads and steamship lines as such will not be rated by the FMCSA under this rule, and in the absence of a rating, will not be subject to the requirement to cease operations in interstate commerce.

#### Discussion of Final Rule

The regulatory language published in the NPRM is being adopted today, with minor revisions:

(1) The authority citation for part 385 has been revised to incorporate the legislative citations of the Motor Carrier Safety Improvement Act of 1999.

(2) All references to the FHWA have been replaced with references to the FMCSA and the appropriate officials of that agency.

(3) The effective date of the final rule is now 90 (instead of 30) day after the date of publication.

(4) The last phrase of paragraph (b) of § 385.1 has been revised to read "capacity of fewer than 16 persons, including the driver" from the previous "capacity of 8–15 persons, including the driver"—this revised language is consistent with the interim final rule of September 3, 1999 (64 FR 48510).

(5) The text of the first sentence of paragraph (a) of § 385.11 has been revised to add the word "safety" before the first use of the word "rating" and to revise the phrase "safety fitness review" to read "compliance review." This revised language is consistent with the useage in the remainder of the rule.

(6) The text of § 385.13, describing the time period when motor carriers are required to cease their operations, is now consistent with the text of § 385.11: the prohibition begins on the 46th day (for passenger and HM carriers) and on the 61st day (for all other motor carriers) after the date of the FMCSA's notice of proposed "unsatisfactory" safety rating. In § 385.13 of the NPRM, the time period was described as commencing after the motor carrier had received the agency's notice. There is likely to be more time between the completion of a CR and the issuance of the notice, than the time between issuance of the notice in Washington, DC, and its delivery to the motor carrier. This change makes it clear that all motor carriers will have at least 45 or 60 days (as appropriate, depending upon whether the motor carrier transports passengers, HM, or non-HM freight) between the time they are advised of a proposed rating and the time the rating becomes final (assuming the motor carrier does not contest it and does not take action to improve its safety performance and request a stay of the proposed rating). A corresponding revision has been made to the text of the last sentence of § 385.17(g).

(7) In § 385.13(a), the word "Generally" has been added to the beginning of the sentence. This revision is necessary to clearly differentiate those motor carriers of non-HM freight that had received their ratings prior to the effective date of this rule. Those motor carriers may still operate in interstate commerce because this rule is not retroactive. An error in the text of § 385.13(a)(2) has been corrected: the section now reads "rated on or after \* \* \*" An error in the text of § 385.13(c) has been corrected: The date that the rating would become effective would be on or after the effective date of the rule, plus 61 days, resulting in a date 151 days after the date of publication in the **Federal Register**.

(8) A paragraph, Penalties, has been inserted at § 385.13(d) to address the FMCSA's issuance of an operations out-of-service order to motor carriers rated unsatisfactory; it corresponds to § 385.13(c) of the current regulation. The NPRM erroneously omitted this paragraph.

(9) A typographical error was corrected at § 385.17(c): It now reads "safety standard and factors."

(10) The listing of FMCSA Service Centers was published on June 2, 2000 as part of the final rule concerning CMV marking (65 FR 35287, at 35297) and therefore will not be repeated here.

The final rule is a straightforward implementation of the amendments to 49 U.S.C. 31144 made by section 4009 of TEA-21. The regulatory changes, like the statutory amendments, simply expand a prohibition on interstate operations, which had previously applied only to HM and passenger carriers, to all other motor carriers.

As mentioned above, the FMCSA is undertaking a separate rulemaking action (see RIN 2125-AE37) to make the safety fitness determination process more performance-based.

#### Effective Date of Final Rule

The FMCSA has determined it is appropriate for the effective date of this final rule to be November 20, 2000, or 90 days from today. First, the new consequences attached to an unsatisfactory safety rating are particularly severe for motor carriers of non-HM freight. Unless these motor carriers are able to demonstrate to the FMCSA that they have addressed deficiencies in the safety of their operations, they will be prohibited from operating in interstate commerce beginning on the 61st day after the FMCSA notifies them of a proposed unsatisfactory rating. The FMCSA wants to allow motor carriers a period of time to assess their situations, and begin to correct safety problems that they may have. Second, the agency requires the additional time to make necessary changes to its information systems and correspondence procedures so the communications between the agency and motor carriers are handled in a timely and efficient manner.

#### Prospective Application

The prohibition on the operation of CMVs by unfit motor carriers will not be applied retroactively. Passenger and HM carriers rated unsatisfactory have either improved their ratings since 1991 or ceased operating in interstate commerce. However, there were significant numbers of general freight carriers that held unsatisfactory ratings

at the time TEA-21 was enacted; their operations were not illegal. In the absence of statutory direction to the contrary, the prohibition on unfit/unsatisfactory general freight carriers in section 4009 must be understood as applying only to those rated unsatisfactory by the FMCSA after the effective date of this final rule. However, if a motor carrier that was rated unsatisfactory prior to the effective date of the final rule receives another unsatisfactory rating after the effective date of this rule as a result of another CR, the new provisions will apply—the motor carrier will be required to cease its operations in interstate commerce beginning on the 61st day after the date of the FMCSA's notice.

#### *Effect of Rating*

Since 1991, motor carriers receiving an unsatisfactory safety rating have been prohibited from using CMVs to transport more than 15 passengers, including the driver, or placardable quantities of HM, in interstate commerce. Furthermore, those motor carriers cannot be used by Federal agencies for those purposes. These prohibitions and the procedures for applying them are contained in 49 CFR 385.13, which implemented section 15(b) of the Motor Carrier Safety Act of 1990. The TEA-21 provision expands the same prohibition, under virtually identical conditions, to all other motor carriers, irrespective of their cargo, which are found by the FMCSA to be unfit. These owners and operators may not operate CMVs in interstate commerce beginning on the 61st day after such fitness determination.

#### *Proposed Ratings; Effective Date of Final Rating*

One of the changes to 49 CFR part 385 made in the November 6, 1997, final rule was the adoption of a "proposed" safety rating. Upon completion of a CR, each HM and passenger motor carriers is now given a written description of the deficiencies found, along with a verbal (and sometimes written) notification of its proposed safety rating. Written confirmation of the proposed rating is issued by the Washington, DC office as soon as possible thereafter, but in any case within 30 days after completion of the CR. If the proposed rating is unsatisfactory, the 45-day period in which to make improvements begins on the day after the verbal (and/or written) notice is given by the FMCSA safety investigator at the end of the CR [see 49 CFR 386.32(a)]. If no improvements are forthcoming, the carrier must halt transportation of passengers or HM on the 46th day.

This final rule retains "proposed ratings," but it changes the event that starts the 45-day, or the new 60-day, period in which unsatisfactory-rated carriers must make improvements. Although FMCSA safety investigators will continue to give verbal (and/or written) notice of the motor carrier's proposed safety rating at the end of each CR, that will not start the statutory grace period. The 45- or 60-day period in which to make improvements will begin on the date the formal written notice of the proposed safety rating is issued by the Washington, DC office. This notice will be issued as soon as practicable, but not later than 30 days after the end of the CR. In other words, the grace period starts as soon as the agency issues the written notice and delivers it to the Postal Service. While the transit time between Washington and the recipient means that motor carriers will have less than 45 or 60 days after delivery of the notice to improve their operations, they will already have received actual notice of the proposed rating at the end of the CR. Because a number of days will be required after completion of the CR to electronically upload the safety investigator's report to Washington, prior to issuing the formal notification of the proposed safety rating, motor carriers will routinely have somewhat more than the statutory 45- or 60-day grace period in which to improve their operations.

If an unsatisfactory-rated motor carrier has not made the necessary improvements by the end of the grace period, it must cease operations on the 46th or 61st day; at the same time, the carrier's final rating will be posted on the agency's Safety and Fitness Electronic Records System (SAFER) website [<http://www.safersys.org>] and made available through telephone inquiries at (800) 832-5660.

While section 4009 requires motor carriers to cease interstate operations 45 or 60 days (depending upon the type of operation) after receiving an unsatisfactory rating or determination of unfitness, the FMCSA believes the "proposed" safety rating followed by a 45- or 60-day grace period achieves the same purpose as, and is entirely consistent with, section 4009. As explained earlier in the preamble, the agency has concluded that basic fairness to motor carriers requires this procedure.

#### *Time Periods for FMCSA To Perform Follow-Up Compliance Reviews*

Section 4009 also requires specific time periods for the FMCSA to perform a CR requested by an unfit (*i.e.*, unsatisfactory) rated motor carrier.

Section 3114(d) specifies the time limits for the FMCSA to review motor carriers' compliance with regulatory provisions that contributed to the fitness determination. For unsatisfactory carriers of passengers and HM, the follow-up compliance review must be completed within 30 days of the carrier's request; for all other carriers rated unsatisfactory, the follow-up review must be completed within 45 days after the carrier's request.

In the preamble to the August 16, 1991, interim final rule that implemented the provisions of the MCSA of 1990 (56 FR 40801, at 40802), the FHWA said it would "make its determination expeditiously because the 'unsatisfactory' safety rating may well affect a motor carrier's ability to continue in business. In the event the FHWA is unable to make its determination within the 45-day period, the agency may conditionally suspend any 'unsatisfactory' safety rating and rescind any related administrative order for a period of up to 10 additional calendar days." The current regulation, at 49 CFR 385.17(d), continues to allow for this additional time: "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 before the proposed safety rating becomes effective may be extended for up to 10 days at the discretion of the Regional Director." The final rule retains this provision (as § 385.17(f)) because there may be circumstances under which competing demands for FMCSA staff time would make it impossible to complete a review within the time limit specified by the statute. The agency does not expect that to happen often, but it does not wish to penalize motor carriers for delays not of their own making. The extension will be allowed at the discretion of the FMCSA Service Center for the appropriate geographic area. The list of Service Centers appears in § 390.27.

#### *Time Periods for FMCSA To Perform Administrative Reviews*

Under this rule, the FMCSA will continue to perform administrative reviews under § 385.15 and corrective-action reviews under § 385.17 for motor carriers with a proposed conditional or unsatisfactory safety rating, but will give priority to those with proposed unsatisfactory ratings. The current § 385.15(d) states that the FHWA (now FMCSA) will notify a petitioning motor carrier of the agency's decision on administrative review within 30 days after the agency receives a petition. The current § 385.17 does not specify a time

limit for the agency to perform a review based upon a motor carrier's request to change a safety rating because of its corrective actions, but it does allow the agency to extend for up to 10 days the period before a proposed safety rating becomes effective (§ 385.17(d)). The agency is revising its regulations and procedures, now codified at §§ 385.15(c) and 385.17(e), to give priority to reviews of motor carriers with a proposed or final unsatisfactory safety rating because of the prohibition against operating in interstate commerce with such a safety rating.

Because the regulation is not retroactive, this priority handling will not extend to non-passenger and non-HM motor carriers with unsatisfactory safety ratings that became final before the effective date of the final rule. Although the FMCSA will continue to review proposed and final conditional safety ratings, the agency needs to place a higher priority on the proposed and final unsatisfactory safety ratings because of the severe operational consequences for the affected motor carriers. However, as explained above, if a motor carrier of non-HM freight that held an unsatisfactory safety rating issued prior to the effective date of a final rule receives a follow-up proposed unsatisfactory rating after the effective date of a final rule, the FMCSA will provide those motor carriers the same priority handling as motor carriers receiving a proposed unsatisfactory safety rating for the first time.

While preparing the final rule, the FMCSA discovered a discrepancy between §§ 385.15 and .17, as published in the NPRM, in the time period allowed for requesting an administrative review. In the former section, the time period for requesting an administrative review was 90 days, while the latter reference was to 45 days. No comments were received on the issue. The FMCSA has adopted the 90 day period for both sections in the final rule. Additional editorial changes were made as well to clarify the operation of the administrative review process.

#### *Potential Extension of Initial 60-Day Grace Period for Motor Carriers That Do Not Transport Passengers or HM*

Subsection (c) of 49 U.S.C. 31144 also provides discretionary power to the agency to allow unsatisfactory-rated motor carriers that do not transport passengers or HM to operate for an additional 60 days, if the agency determines the motor carrier is making a good faith effort to improve its safety fitness. As noted above, the FMCSA will not make a final determination of unfitness in its initial notification—the

final determination will occur at the end of the 60-day period or any extensions of that period, up to a maximum of 120 days.

#### *Federal Government Agency Use of Unsatisfactory Rated Motor Carriers*

Since 1991, any department, agency, or instrumentality of the United States Government has been prohibited from using a motor carrier with an unsatisfactory safety rating to transport passengers or HM. Section 4009 of TEA-21 extends this prohibition to cover all motor carriers found to be unfit. As written, the prohibition applies to the Federal agency and not to the motor carrier.

The FMCSA will continue to advise a motor carrier of its proposed safety rating as soon as possible after the FMCSA's compliance review, but not later than 30 days afterwards. At the end of the 45- or 60-day period (or longer, if extended), the proposed rating will become the motor carrier's final safety rating if the FMCSA has no basis to change it. On the effective date of a final unsatisfactory safety rating, Federal government agencies will be precluded from using, or continuing to use, these motor carriers' transportation services.

One commenter, the AMSA, disagreed with this element of the proposal. The AMSA contends that "several household goods carriers would be devastated, if not completely put out of business," if they were prohibited from doing business with the Federal government. No other commenters addressed this issue. Since the requirement is statutory, the agency adopts the provision as proposed in the NPRM.

#### *FMCSA Organizational Structure*

Decisions regarding safety fitness are made by the Chief Safety Officer of the FMCSA. The NPRM had referred to the Program Manager, Office of Motor Carrier Safety, FHWA. The title used in the final rule reflects the agency's reorganization. No commenters addressed this element of the NPRM.

We have revised the appropriate sections of part 385 to reflect changes in organizational structure and titles.

#### **Rulemaking Analyses and Notices**

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

We have determined that this document contains a significant regulatory action under Executive Order 12866 and under the DOT's policies and procedures because this action has substantial public interest. This action

was reviewed by the Office of Management and Budget.

This rule requires any motor carrier in interstate commerce that the FMCSA rates unsatisfactory to cease providing CMV transportation after a grace period of 45 days (for HM and passenger operations) or 60 days (for all other motor carriers). A motor carrier will be allowed to commence those operations again only if the FMCSA determines its safety rating is no longer unsatisfactory. Although these requirements have been in place since 1991 for passenger and HM motor carriers, this is the first time they are being applied to other motor carriers.

Motor carriers of passengers and of placardable quantities of HM are not subject to new sanctions for noncompliance as a result of this regulatory action. Under the new regulations, the FMCSA must respond to any requests for a follow-up review of an unsatisfactory safety rating within 30 days—the prior regulation had required this to be accomplished within 45 days. This revision is required by 49 U.S.C. 31144(d)(2) and (3).

As of December 31, 1998, the agency's MCMIS listed 477,486 motor carriers as active. The FMCSA has provided safety ratings to approximately 25 percent of these motor carriers. The number of motor carriers with unsatisfactory safety ratings was a small fraction of all the rated motor carriers in MCMIS, and a minute fraction of the motor carriers of passengers and of HM. The summary in the NPRM, and the detailed statistics in Supplemental Item of the docket, provided a recent history of follow-up CRs the agency had performed. No commenters addressed these statistics. In fiscal year 1998, the large majority of re-rated motor carriers of property that had received an initial unsatisfactory safety rating received a conditional or satisfactory safety rating after follow-up reviews performed during the year.

To the extent there are any costs associated with this rule, they are a result of noncompliance with an existing rule; it is assumed that those costs are less than the cost of complying with the existing rule or the entities involved would take steps to achieve compliance with the lower cost alternative. With respect to the costs of complying with the existing rule, it should be noted that, generally, when DOT agencies analyze the costs of a new rule, they assume 100 percent compliance. Since 1979, DOT Policies and Procedures have required the analysis of costs and benefits of all rules issued by the Department. This rule merely rates carriers based on their compliance with existing safety

standards and requires more unfit carriers to cease operations. Any costs and benefits associated with complying with underlying safety rules adopted since that date would have been considered when those rules were adopted.

The FMCSA anticipates that this rulemaking will have minimal economic impact on the interstate motor carrier industry. Based upon the statistics on follow-up CRs conducted during calendar years 1994 through 1998, the FMCSA expects that between 50 and 100 motor carriers might not improve an initial proposed unsatisfactory safety rating during the grace period allowed. These motor carriers would be required to cease their operations in interstate commerce until they could demonstrate to the FMCSA that they had improved the safety and regulatory compliance of their operations.

Based upon its analysis of statistical information concerning motor carriers' improvement in their safety ratings, the FMCSA believes that the vast majority of motor carriers interested in continuing their operations would be able to do so. Any adverse economic impact to the relatively few motor carriers who are unwilling or unable to demonstrate an improvement in the safety of their operations within the 45 to 120 day period specified in TEA-21 is entirely consistent with the intent of the statute. Obviously, requiring an unfit motor carrier to cease its interstate operations would have an economic impact on that motor carrier and its employees. However, motor carriers have the responsibility of conducting their operations in a safe manner, and in compliance with the FMCSRs. Therefore, the cessation of a motor carrier's interstate operations, as a result of its receiving an unsatisfactory safety rating, should not be attributed as a cost of this rulemaking.

The FMCSA believes the traveling public will derive a safety benefit from the removal from the Nation's highways of CMVs operated by those few motor carriers found to be unfit to operate them safely. In addition, shippers of non-HM freight will derive direct and indirect economic gains through the improved safety and corresponding efficiency of their commercial motor freight transportation.

This rule will only affect the operations of the small number of motor carriers determined to be unfit to operate CMVs based on the frequency and severity of their regulatory violations, poor outcomes of roadside inspections, and accident experience. The number of motor carriers of non-HM freight that do not improve their

safety rating from unsatisfactory is expected to continue to be small—fewer than 100 per year. This is much smaller than the number of motor carriers that ceases operations as a result of normal economic fluctuations. There are no new costs associated with this rulemaking and the overall adverse economic effects will be minimal.

This rulemaking will provide the FMCSA the authority to require that unsatisfactory-rated motor carriers cease their operations in interstate commerce. Removing these motor carriers from the public highways will provide a very important, although unquantifiable, safety benefit. These motor carriers pose a significant safety risk to the traveling public because of their demonstrated refusal, or inability, to comply with the FMCSRs. This rule provides the FMCSA with an essential tool to take prompt and effective action against these motor carriers.

This rulemaking will not result in inconsistency or interference with another agency's actions or plans. It will, however, implement several specific congressional directives, including one prohibiting Federal agencies from using any motor carrier with an unsatisfactory safety rating to provide "any transportation service." Therefore, all Federal agencies that contract for motor carrier passenger or freight transportation in CMVs must review the safety ratings of these contractors.

The rights and obligations of recipients of Federal grants will not be materially affected by this regulatory action.

#### *Regulatory Flexibility Act*

In compliance with the Regulatory Flexibility Act (5 U.S.C. 601-612) the FMCSA has evaluated the effects of this rulemaking on small entities. Economically impacted by this rulemaking will be motor carriers of non-HM freight that receive an unsatisfactory safety rating on or after the effective date of this rule, and fail to take appropriate actions to improve their rating. As of March 1999, some 79 percent of the 483,385 active motor carriers in MCMIS were in the "very small" or "small" category (less than 21 power units). The FMCSA's statistical information contained in MCMIS indicates that relatively few small motor carriers of passengers or HM have received unsatisfactory safety ratings since 1994, the earliest date for which information is readily available, and fewer still did not improve their safety ratings based upon the FMCSA's follow-up CRs.

Tables 2 and 3 in the NPRM provided statistics on follow-up CRs of motor carriers of property (non-HM) for calendar years 1994 through 1998. As before, the large majority of these motor carriers that began a calendar year with an unsatisfactory safety rating had improved it by the end of the calendar year. As long as a motor carrier holds, or is able to improve to, a conditional or satisfactory rating, § 385.13 of this rule will not affect its ability to operate in interstate commerce. This rule does not impose new costs on motor carriers, however, it increases penalties for those that fail to take appropriate actions to improve the safety of their operations and their resulting safety rating. The FMCSA notes that no commenters to the NPRM addressed the data in the Regulatory Flexibility Act section. That data presented statistics on motor carriers of property initially rated unsatisfactory (NPRM Table 2) and the number of motor carriers starting and ending a calendar year with an unsatisfactory safety rating (NPRM Table 3).

Accordingly, the FMCSA certifies that this regulatory action will not have a significant economic impact on a substantial number of small entities.

#### *Unfunded Mandates Reform Act of 1995*

This rule does not impose a Federal mandate resulting in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. (2 U.S.C. 1531 *et seq.*)

#### *Executive Order 12988 (Civil Justice Reform)*

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

#### *Executive Order 13045 (Protection of Children)*

We have analyzed this rule under E.O. 13045, "Protection of Children from Environmental Health Risks and Safety Risks." This rule is not economically significant and does not concern an environmental risk to health or safety that would disproportionately affect children.

#### *Executive Order 12630 (Taking of Private Property)*

This rule implements a statutory mandate to prohibit interstate motor carrier operations found to be unsafe and therefore unfit. Motor carriers can avoid all of the implications of an unsatisfactory safety rating simply by

complying with the FMCSRs. Furthermore, motor carriers with a proposed unsatisfactory safety rating will have at least 45 or 60 days, depending on the type of operation, to correct deficiencies identified by the FMCSA before halting operations in interstate commerce. Finally, even if a motor carrier were to suspend its operations, it can resume operations by correcting its deficiencies, coming into compliance with the FMCSRs, and demonstrating these improvements to the FMCSA.

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

#### *Executive Order 13132 (Federalism)*

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 dated August 4, 1999, and it has been determined this action does not have a substantial direct effect or sufficient federalism implications on States that would limit the policymaking discretion of the States. Nothing in this document directly preempts any State law or regulation. It will not impose additional costs or burdens on the States. Although section 4009 of TEA-21 requires the FMCSA to revise part 385 of the FMCSRs, States are not required to adopt part 385 as a condition for receiving Motor Carrier Safety Assistance Program (MCSAP) grants. Also, this action will not have a significant effect on the States' ability to execute traditional State governmental functions.

#### *Executive Order 12372 (Intergovernmental Review)*

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

#### *Paperwork Reduction Act*

This action does not involve an information collection that is subject to the requirements of the Paperwork Reduction Act of 1995, 44 U.S.C. 3501-3520.

#### *National Environmental Policy Act*

The agency has analyzed this rulemaking for the purpose of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and has determined that this action will not

have any effect on the quality of the environment.

#### *Regulatory 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 Part 385**

Highway safety, Motor carriers.

Issued on: August 11, 2000.

**Clyde J. Hart, Jr.,**

*Acting Deputy Administrator.*

In consideration of the foregoing, the FMCSA is amending title 49, Code of Federal Regulations, chapter III, part 385 as follows:

#### **PART 385—SAFETY FITNESS PROCEDURES**

1. Revise the authority citation for part 385 to read as follows:

**Authority:** 49 U.S.C. 113, 504, 521(b), 5113, 31136, 31144, and 31502; and 49 CFR 1.73.

2. Revise § 385.1 to read as follows:

##### **§ 385.1 Purpose and scope.**

(a) This part establishes the FMCSA's procedures to determine the safety fitness of motor carriers, to assign safety ratings, to direct motor carriers to take remedial action when required, and to prohibit motor carriers receiving a safety rating of "unsatisfactory" from operating a CMV.

(b) The provisions of this part apply to all motor carriers subject to the requirements of this subchapter, except non-business private motor carriers of passengers and motor carriers conducting for-hire operations of passenger CMVs with a capacity of fewer than 16 persons, including the driver.

3. Revise § 385.11 to read as follows:

##### **§ 385.11 Notification of safety fitness determination.**

(a) The FMCSA will provide a motor carrier written notice of any safety rating resulting from a compliance review as soon as practicable, but not later than 30 days after the review. The notice will take the form of a letter issued from the FMCSA's headquarters office and will include a list of FMCSR and HMR compliance deficiencies which the motor carrier must correct.

(b) If the safety rating is "satisfactory" or improves a previous "unsatisfactory"

safety rating, it is final and becomes effective on the date of the notice.

(c) In all other cases, a notice of a proposed safety rating will be issued. It becomes the final safety rating after the following time periods:

(1) For motor carriers transporting hazardous materials in quantities requiring placarding or transporting passengers by CMV—45 days after the date of the notice.

(2) For all other motor carriers operating CMVs—60 days after the date of the notice.

(d) A proposed safety rating of "unsatisfactory" is a notice to the motor carrier that the FMCSA has made a preliminary determination that the motor carrier is "unfit" to continue operating in interstate commerce, and that the prohibitions in § 385.13 will be imposed after 45 or 60 days if necessary safety improvements are not made.

(e) A motor carrier may request the FMCSA to perform an administrative review of a proposed or final safety rating. The process and the time limits are described in § 385.15.

(f) A motor carrier may request a change to a proposed or final safety rating based upon its corrective actions. The process and the time limits are described in § 385.17.

4. Revise § 385.13 to read as follows:

##### **§ 385.13 Unsatisfactory rated motor carriers; prohibition on transportation; ineligibility for Federal contracts.**

(a) Generally, a motor carrier rated "unsatisfactory" is prohibited from operating a CMV. Information on motor carriers, including their most current safety rating, is available from the FMCSA on the Internet at <http://www.safersys.org>, or by telephone at (800) 832-5660.

(1) Motor carriers transporting hazardous materials in quantities requiring placarding, and motor carriers transporting passengers in a CMV, are prohibited from operating a CMV beginning on the 46th day after the date of the FMCSA's notice of proposed "unsatisfactory" rating.

(2) All other motor carriers rated from reviews completed on or after November 20, 2000 are prohibited from operating a CMV beginning on the 61st day after the date of the FMCSA's notice of proposed "unsatisfactory" rating. If the FMCSA determines the motor carrier is making a good-faith effort to improve its safety fitness, the FMCSA may allow the motor carrier to operate for up to 60 additional days.

(b) A Federal agency must not use a motor carrier that holds an "unsatisfactory" rating to transport passengers in a CMV or to transport



hazardous materials in quantities requiring placarding.

(c) A Federal agency must not use a motor carrier for other CMV transportation if that carrier holds an "unsatisfactory" rating which became effective on or after January 22, 2001.

(d) *Penalties.* If a proposed "unsatisfactory" safety rating becomes final, the FMCSA will issue an order placing its interstate operations out of service. Any motor carrier that operates CMVs in violation of this section will be subject to the penalty provisions listed in 49 U.S.C. 521(b).

5. Revise § 385.15 to read as follows:

**§ 385.15 Administrative review.**

(a) A motor carrier may request the FMCSA to conduct an administrative review if it believes the FMCSA has committed an error in assigning its proposed safety rating in accordance with § 385.15(c) or its final safety rating in accordance with § 385.11(b).

(b) The motor carrier's request must explain the error it believes the FMCSA committed in issuing the safety rating. The motor carrier must include a list of all factual and procedural issues in dispute, and any information or documents that support its argument.

(c) The motor carrier must submit its request in writing to the Chief Safety Officer, Federal Motor Carrier Safety Administration, 400 Seventh Street, SW., Washington DC 20590.

(1) If a motor carrier has received a notice of a proposed "unsatisfactory" safety rating, it should submit its request within 15 days from the date of the notice. This time frame will allow the FMCSA to issue a written decision before the prohibitions outlined in § 385.13 (a)(1) and (2) take effect. Failure to petition within this 15-day period may prevent the FMCSA from issuing a final decision before such prohibitions take effect.

(2) A motor carrier must make a request for an administrative review within 90 days of the date of the proposed safety rating issued under § 385.11 (c) or a final safety rating issued under § 385.11 (b), or within 90 days after denial of a request for a change in rating under § 385.17(i).

(d) The FMCSA may ask the motor carrier to submit additional data and attend a conference to discuss the safety rating. If the motor carrier does not provide the information requested, or does not attend the conference, the FMCSA may dismiss its request for review.

(e) The FMCSA will notify the motor carrier in writing of its decision following the administrative review. The FMCSA will complete its review:

(1) Within 30 days after receiving a request from a hazardous materials or passenger motor carrier that has received a proposed or final "unsatisfactory" safety rating.

(2) Within 45 days after receiving a request from any other motor carrier that has received a proposed or final "unsatisfactory" safety rating.

(f) The decision constitutes final agency action.

(g) Any motor carrier may request a rating change under the provisions of § 385.17.

6. Revise § 385.17 to read as follows:

**§ 385.17 Change to safety rating based upon corrective actions.**

(a) A motor carrier that has taken action to correct the deficiencies that resulted in a proposed or final rating of "conditional" or "unsatisfactory" may request a rating change at any time.

(b) A motor carrier must make this request in writing to the FMCSA Service Center for the geographic area where the carrier maintains its principal place of business. The addresses and geographical boundaries of the Service Centers are listed in § 390.27 of this chapter.

(c) The motor carrier must base its request upon evidence that it has taken corrective actions and that its operations currently meet the safety standard and factors specified in §§ 385.5 and 385.7. The request must include a written description of corrective actions taken, and other documentation the carrier wishes the FMCSA to consider.

(d) The FMCSA will make a final determination on the request for change based upon the documentation the motor carrier submits, and any additional relevant information.

(e) The FMCSA will perform reviews of requests made by motor carriers with a proposed or final "unsatisfactory" safety rating in the following time periods after the motor carrier's request:

(1) Within 30 days for motor carriers transporting passengers in CMVs or placardable quantities of hazardous materials.

(2) Within 45 days for all other motor carriers.

(f) The filing of a request for change to a proposed or final safety rating under this section does not stay the 45-day period specified in § 385.13(a)(1) for motor carriers transporting passengers or hazardous materials. If the motor carrier has submitted evidence that corrective actions have been taken pursuant to this section and the FMCSA cannot make a final determination within the 45-day period, the period before the proposed safety rating becomes final may be extended for up

to 10 days at the discretion of the FMCSA.

(g) The FMCSA may allow a motor carrier with a proposed rating of "unsatisfactory" (except those transporting passengers in CMVs or placardable quantities of hazardous materials) to continue to operate in interstate commerce for up to 60 days beyond the 60 days specified in the proposed rating, if the FMCSA determines that the motor carrier is making a good faith effort to improve its safety status. This additional period would begin on the 61st day after the date of the notice of the proposed "unsatisfactory" rating.

(h) If the FMCSA determines that the motor carrier has taken the corrective actions required and that its operations currently meet the safety standard and factors specified in §§ 385.5 and 385.7, the agency will notify the motor carrier in writing of its upgraded safety rating.

(i) If the FMCSA determines that the motor carrier has not taken all the corrective actions required, or that its operations still fail to meet the safety standard and factors specified in §§ 385.5 and 385.7, the agency will notify the motor carrier in writing.

(j) Any motor carrier whose request for change is denied in accordance with paragraph (i) of this section may request administrative review under the procedures of § 385.15. The motor carrier must make the request within 90 days of the denial of the request for a rating change. If the proposed rating has become final, it shall remain in effect during the period of any administrative review.

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**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 679**

[Docket No. 991228352-0012-02; I.D. 081800B]

**Fisheries of the Exclusive Economic Zone Off Alaska; Pollock in Statistical Areas 620 and 630 in the Gulf of Alaska**

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

**ACTION:** Modification of a closure.

**SUMMARY:** NMFS is opening directed fishing for pollock by catcher vessels that are non-exempt under the