

was issued. Accordingly, BG Packaging, Inc. is shown as the facility owner on the original permit.)

(29) Jefferson Smurfit Corporation (U.S.), OP 46-0041, issued 04/18/1997, except for the expiration date, Conditions 3, 4, 5, 15(B), 16, 17, 18, 19, 20, 21, and 22 and the record keeping and monitoring requirements of Condition No. 15(A) associated with Condition 4.

(30) Jefferson Smurfit Corporation, OP 46-0062, issued 07/15/1996, except for the expiration date and Conditions 3 and 5(F).

(31) Lonza, Inc., OP 46-0025, issued 04/22/1997, as revised on 06/16/1998, except for the expiration date, Conditions 3, 6, 7, 8, 9, 10, 11, 12, 13(B), 13(D) and 13(E).

(32) Markel Corporation, OP 46-0081, issued 04/09/1999, except for the expiration date and Conditions 3, 4, 5, 11, 19, 20, 21, 22, 23, 24, 25, 26, and 27.

(33) McCorquodale Security Cards, Inc., OP 15-0037, issued 09/03/1996, except for the expiration date and Conditions 3, 4, 5, 6, 7, 8, 9, 11, 15, 16, and 17.

(34) Mike-Rich, Inc., OP 09-0021, issued 12/20/1996, except for the expiration date, Conditions 3, 4, 5, 7, and the general conditions listed in Condition 8.

(35) Minnesota Mining and Manufacturing Co. (3M), CP 09-0005, issued 08/08/1996, except for the expiration date and Conditions 4, 5, 6, 7, 8, 9, 10, 11(C), 12 (C), 12(D), 13(A), 13(C), 13(D), 14, 15, 16, 17, 18, 19, 20, 21, and 22.

(36) MM Biogas Power LLC, OP 46-0067, issued 10/31/1997, except for the expiration date and Conditions 3, 4, 7, 9 (as it pertains to the Superior engine), 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21.

(37) Norwood Industries, Inc., OP 15-0014A, issued 12/20/1996, as revised on 12/02/1999, except for the expiration date, Conditions 3, 4, 5, 6(A), 6(B), 6(C), 6(D)1, 6(D)2, 6(D)3, 6(D)5, 6(E), 6(F)1, 6(F)2, 6(F)3, 6(F)5, 6(F)6, 6(G), 7, 8(A), 8(C), 8(D), 8(F), 8(G), 8(H), 8(I), and 9.

(38) NVF Company, OP 15-0030, issued 04/13/1999, except for the expiration date and Conditions 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, and 27.

(39) Occidental Chemical Corporation, OP 46-0015, issued 11/07/1996, except for the expiration date and Conditions 4, 5, 6(A), the capacity factor in 6(B), 6(E), 7, 8(A), 8(C), 8(D)1, 8(D)2a, 8(D)2b, 8(D)2c, 8(D)2d, 8(D)5, 8(E), 9, 10, 11(B), 12.

(40) Philadelphia Newspapers, Incorporated, OP 46-0012, issued 08/30/1996, as revised on 03/15/2000,

except for the expiration date, and Conditions 3, 4(A), 5, 9, and 11.

(41) Procter & Gamble Paper Products Company, OP 66-0001, issued 04/04/1997, except for the expiration date, and Conditions 3, 4, 6, 7, 8, 9, 10, 11, 14, 15, 17, 18, 19, 20, 21, and 22.

(42) Quebecor Printing Atglen, Inc., OP 15-0002, issued 12/10/1996 except for the expiration date and Conditions 3, 4(A) except as it relates to cleaning solvents, 4(B), 4(C), 5, 6, 7, 8(A), 8(B) and 8(D).

(43) Sartomer Company, Inc., OP 15-0015, issued 01/17/1996, as revised on 03/25/1998, except for the expiration date and Conditions 3, 4, 5, 8, 13, 14, 15(A), and 16.

(44) Silberline Manufacturing Company, Inc., OP 54-0041, issued 04/19/1999, except for the expiration date and Conditions 3, 4, 5, 6, 9, 12, 13, 14, 15, 16, 17, 18, 19, 20, and 21.

(45) SmithKline Beecham Research Company, OP 46-0031, issued 10/31/1997, as revised on 05/01/1998, except for the expiration date and Conditions 3, 4, 5(a) as it pertains to the Cleaver Brooks boiler rated at 31.4 MMbtu/hr., 6(b), and 6(c).

(46) Sullivan Graphics, Inc., OP 67-2023, issued 08/22/1995, except for the expiration date and Conditions 4, 5, 9(c), 9(d), 10, 19, 20, and 24.

(47) Sun Company, Inc. (R&M), OP 23-0010, issued 10/31/1996, except for the expiration date and Conditions 3, 4, 6, 7, 8 and 10.

(48) Sun Company, Inc. (R&M), OP 23-0011, issued 10/31/1996, except for the expiration date and Conditions 3, 4, 6 and 8.

(49) Universal Packaging Corporation, OP 46-0156, issued 04/08/1999, except for the expiration date, and Conditions 3, 4, 5, 9 and 11.

(50) Zenith Products Corporation, OP 23-0008, issued 04/07/1997, except for the expiration date, and Conditions 4, 6, 7, 8(A), 8(B), 9(B), 10, 11, and 12.

(51) Budd Company, PLID 51-1564, effective 12/28/1995, except for Conditions 7, 8 and 9.

(52) Bellevue Cogeneration Plant, PLID 06513, effective 4/10/1995, except for Conditions 1.A(2), 2.B, 4.B, 7, 8 and 9.

(53) MSC Pre Finish Metals, Inc., OP-09-0030, issued 11/7/1996, as revised on 03/31/1998, except for the expiration date and Conditions 3, 4, 5, 6.A, 6.B.1, 6.B.5, 6.B.9, 6.C, 6.D.1 (a, b, and e), 8.A, 8.B, 9, 10.E, and 11.

(54) Temple University, Health Sciences Center, PLID 8906, effective 5/27/1995, excluding Conditions 1.A(2), 2.B, 6, 7, and 8.

(55) Trigen—Schuylkill Station, PLID 04942, effective 5/29/1995, except for

Conditions related to low NO<sub>x</sub> burners found at 1.B(1) and 2(A), the provision in Condition 3.A(1) limiting NO<sub>x</sub> emissions to 1646 tons per year, 4 (B), 7, 8, and 9.

(56) Trigen—Edison Station, PLID 4902, effective 5/29/1995, excluding portions of Condition 3.A.(1) limiting NO<sub>x</sub> emissions in tons per year and Conditions 7, 8, and 9.

(C) Letters from the Pennsylvania Department of Environmental Protection, dated 09/21/2000, and 10/20/2000, in which Pennsylvania provided supplementary information regarding many of the permits listed in i(B) above, and in which Pennsylvania specified the permit conditions, listed in i(B) above, which it did not wish to have incorporated into the Pennsylvania State Implementation Plan.

[FR Doc. 00-31463 Filed 12-14-00; 8:45 am]

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## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

#### 49 CFR Parts 385 and 386

[Docket No. FMCSA-00-7332]

RIN 2126-AA54

#### Sanctions Against Motor Carriers, Brokers, and Freight Forwarders for Failure To Pay Civil Penalties

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

**ACTION:** Final rule.

**SUMMARY:** The FMCSA implements section 206 of the Motor Carrier Safety Improvement Act of 1999 (MCSIA) by amending the penalty provisions of the rules of practice of the Federal Motor Carrier Safety Regulations (FMCSRs). This action prohibits a motor carrier that does not pay civil penalties assessed by the FMCSA, or that does not arrange and abide by its payment agreements, from operating in interstate commerce. The rule also suspends the registration of a broker, freight forwarder or for-hire motor carrier that has not paid a civil penalty, or arranged and abided by a payment plan. The prohibition or suspension begins on the 91st day after the payment date specified in the final agency order or on the 91st day after the due date of a missed payment arranged in a payment plan. A party that continues to operate in violation of a prohibition or suspension may be subject to additional penalties. However, it will not apply to anyone who is unable to pay a civil

penalty because the person is a debtor in a case under chapter 11 of the Bankruptcy Code.

**DATES:** This final rule is effective on April 16, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Deborah M. Freund, Office of Bus and Truck Standards and Operations, (202) 366-4009, or Mr. Charles Medalen, Office of Chief Counsel, (202) 366-1354, Federal Motor Carrier Safety 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:**

**Background**

This rulemaking implements section 206 of the Motor Carrier Safety Improvement Act of 1999 (MCSIA) (Public Law 106-159, 113 Stat. 1748, at 1763). Section 206 addresses two issues related to delinquent payment of penalties. Section 206(a) amends 49 U.S.C. 13905(c) by authorizing the Secretary of Transportation (Secretary) to suspend, amend, or revoke any part of the registration of a motor carrier, broker, or freight forwarder if that entity has not paid a civil penalty within 90 days of the time specified by official order for payment, or has not arranged and abided by a payment plan.

However, the Secretary may not revoke the registration of a person unable to pay penalties because the person is a debtor in a case under chapter 11 of the Bankruptcy Code (11 U.S.C. 362 *et seq.*). The term "registration" applies to a for-hire motor carrier, freight forwarder, and broker that registers with the FMCSA to provide transportation under 49 U.S.C chapter 139. This includes an entity that held operating authority from the Interstate Commerce Commission as of the effective date of the ICC Termination Act of 1995 (ICCTA) (Public Law 104-88, 109 Stat. 803), as well as an entity registered by the Federal Highway Administration (FHWA) between January 1, 1996, and December 31, 1999, and by the FMCSA on or after January 1, 2000.

Section 206(b) amends 49 U.S.C. 521(b) to prohibit operations in interstate commerce by an owner or operator of a commercial motor vehicle (CMV) who fails to pay a civil penalty, or to arrange and abide by an acceptable payment plan. A CMV owner or operator must cease its interstate operations if it has not paid its fine within 90 days of the time specified by the Secretary's order for payment, or has not arranged and abided by a payment plan. Similar to the exception contained

in section 206(a), the Secretary may not apply this prohibition to anyone unable to pay penalties because the person is a debtor in a case under chapter 11 of the Bankruptcy Code.

The rules of practice for motor carrier proceedings are codified in 49 CFR part 386. The most recent amendments (65 FR 7753, February 16, 2000) added proceedings concerning violations of the commercial regulations that were formerly implemented and administered by the Interstate Commerce Commission.

The FMCSA described in the preamble to the NPRM (65 FR 56521, September 19, 2000) how its current enforcement procedures would be affected by Section 206. Briefly, a compliance review may be conducted in response to a request to change a safety rating, or to investigate potential violations of regulations and complaints. If the compliance review results in the initiation of an enforcement action, the official document used to notify a broker, freight forwarder, or motor carrier is a Notice of Claim (NOC). If the broker, freight forwarder, or motor carrier does not respond, the NOC becomes the final agency order by default 25 days after it was served, and the party is so notified. If the broker, freight forwarder, or motor carrier timely responds and challenges the NOC, the FMCSA's Chief Safety Officer opens an administrative proceeding. If the NOC is upheld, a final agency order (FAO) is issued which usually directs the broker, freight forwarder, or motor carrier, to pay a civil penalty.

The respondent must pay the fine within 30 days of receipt of the FAO. The respondent may petition the FMCSA for reconsideration of the FAO within 20 days after it is served. If the broker, freight forwarder, or motor carrier has not paid its fine in full, or if it has not executed an agreement with the appropriate FMCSA Service Center for a payment schedule for its fine, the agency issues an accounts receivable memorandum to the FHWA Finance Division which will pursue collection through administrative channels. (The FHWA is providing certain administrative support for the FMCSA under an interagency agreement until the FMCSA is authorized to fully staff its administrative offices.) If the agency has not received payment 30 days after the FAO is served on a broker, freight forwarder, or motor carrier, the FHWA will send a letter to the broker, freight forwarder, or motor carrier by certified mail, return receipt requested. The FHWA sends additional letters if it has still not received payment by 60 days

and 90 days after service of the order. After 180 days, the FHWA refers the case to the Department of Treasury for collection of the fine in accordance with the Debt Collection Improvement Act of 1996, Pub. L. 104-134, 110 Stat. 1321-358.

Under this final rule implementing section 206, the owner or operator of a commercial motor vehicle that fails to pay its fine (or, if the agency agreed to accept installment payments, part of its fine) within 90 days of the date specified for payment will be barred from operating in interstate commerce on the 91st day and may not resume operating until it has paid the entire fine in full. In addition, the registration of a broker, freight forwarder, or for-hire motor carrier that fails to pay fines (or, in case of installment payments, part of a fine) within 90 days of the date specified for payment will be suspended, after notice and opportunity for a proceeding, on the 91st day. The respondent may not operate in interstate commerce until the entire fine has been paid in full and its registration restored.

**Docket Comments to the NPRM**

The agency received comments from: the American Trucking Associations (ATA), the National Private Truck Council (NPTC), Advocates for Highway and Auto Safety (AHAS), Larry R. Davidson on behalf of the National Association of Transportation Safety Professionals (NATSP), the Transportation Lawyers Association (TLA), the National Association of Small Trucking Companies (NASTC), and Mr. Robert M. Hunziker, an individual.

*Definitions and Delegation*

The ATA asks the FMCSA to revise the definition of Assistant Administrator to state that " \* \* \* the decision of the Assistant Administrator \* \* \* shall be administratively final." The NPRM had stated "the Assistant Administrator is \* \* \* the final agency decisionmaker \* \* \*" The ATA reasons that "finality in proceedings should refer to the finality of the decision—not the finality of the decisionmaker." The ATA further points to the citation in the statute that delegates powers to the Administrator, 49 U.S.C. 113(h), uses the term "administratively final."

The ATA also requests the FMCSA to use the term "owner or operator of a commercial motor vehicle" rather than "motor carrier" in § 386.83. The ATA commented that 49 U.S.C. 521(b)(8) does not use the term "motor carrier" and asserted that the meaning of the term in that law is different from the

meaning under 49 U.S.C. 13102(12) and (13) and 49 U.S.C. 31501.

#### *Agency's Response*

The FMCSA believes that both of ATA's comments have merit. The agency has, therefore, changed the definition of "Assistant Administrator" in the manner suggested by ATA, and amended § 386.83 to refer to "a CMV owner or operator."

The agency addressed the use of the terms "motor carrier" and "owner or operator" in the NPRM concerning safety fitness procedures (64 FR 44460, at 44462, August 16, 1999). Although the FMCSRs have long treated owners and operators of CMVs as "motor carriers" (see 49 CFR 390.5), section 206(b) is clear. It applies specifically to "the owner or operator of a commercial motor vehicle against whom a civil penalty is assessed \* \* \*" [49 U.S.C. 521(b)(8)]. The Congress could have used the term "motor carrier" as it did in section 521(b)(2)(B), but obviously decided not to do so in the MCSIA. In the interest of clarity, the FMCSA has therefore replaced the term "motor carrier" with a slight variant of the statutory language.

#### *Notice of Claim*

The TLA and the NASTC submitted similar comments. Both organizations contend that the FMCSA's procedures concerning the transformation of a Notice of Claim into a Final Agency Order in case of a failure to comply with the requirements for a response, constitute rulemaking without notice-and-comment. In the words of the NASTC, "The FMCSA fails to describe the manner in which a Notice of Claim defaults into a Final Agency Order, even when a motor carrier timely contests the alleged infractions." The NASTC contends that "FMCSA utilizes this procedure, particularly in situations where a motor carrier has no legal representation, which is the situation in which most NASTC members find themselves." The TLA asserts that the preamble to the September 19, 2000 NPRM "provided an incomplete presentation of how the new penalties fit within the existing procedures."

A motor carrier or other regulated entity that contests a Notice of Claim must provide a response in writing that complies with 49 CFR 386.14(b). Section 386.14(b)(1) requires "[a]n admission or denial of each allegation of the claim or notice and a concise statement of facts constituting each defense." Section 386.14(b)(3) requires "[a] statement of whether the respondent wishes to negotiate the terms of payment or settlement of the

amount claimed, or the terms and conditions of the order." These requirements have been in the FMCSRs since 1985 (50 FR 40306, October 2, 1985). Section 386.14(e) provides that "[i]f the respondent does not reply to a Claim Letter within the time prescribed in this section, the Claim letter becomes the final agency order in the proceeding 25 days after it is served."

The TLA and NASTC cited the same administrative cases in support of their views (*In the Matter of Robert D. Bennett*, Docket No. FHWA-98-4779 (December 10, 1998) and *In the Matter of Bergerson-Caswell, Inc.*, Docket No. OMCS-99-6497 (November 29, 1999)). In *Bennett*, the Associate Administrator for Motor Carriers said that "the Regional Director [a position since eliminated] or Resource Center Operations Manager may issue to the respondent a declaration that the Notice of Claim has become the final agency order pursuant to 49 CFR 386.14(e) because a 'reply,' in accordance with 49 CFR 386.14(b), had not been submitted" (p. 3). The TLA asserts that "the existing regulations contain no indication that a Field Administrator is empowered to determine the carrier's timely NOC response is legally insufficient."

#### *Agency's Response*

The NPRM summarized the penalty procedures in part 386 as an aid to readers who might not be familiar with them. The summary was not meant to be a complete statement of the agency's procedures. The comments submitted by the TLA and NASTC amount to collateral attacks on the *Bennett* and *Bergerson-Caswell* decisions and are thus beyond the scope of this rulemaking. A brief discussion of those cases may be useful, however. *Bennett* requires the Resource Center Operations Manager, when issuing a declaration of default, to "include a notice that the respondent has an opportunity to petition the Associate Administrator [now Chief Safety Officer] for review of the declaration. If no petition is submitted, the Notice of Claim is both the final order and the final agency order" (p. 3). *Bennett* therefore gives the respondent actual notice of the default and an opportunity to contest the declaration of default. Under the Administrative Procedure Act (APA), notice and comment rulemaking is not required if a person subject to a rule has been personally served or otherwise has actual notice of the rule (49 U.S.C. 553(b)). Furthermore, the opportunity to contest a default created by *Bennett* and reaffirmed by *Bergerson-Caswell* is not specifically provided for in Part 386. These two cases therefore enhanced the

rights of respondents, and did so in a manner entirely consistent with the APA.

#### *Notice and Opportunity for Proceeding*

The ATA and the NATSP expressed concern that § 386.84 of the NPRM does not provide for prior notice and opportunity for a proceeding before the suspension or revocation of registration, as required by section 206. The NATSP also believes that the agency should give similar procedural rights under § 386.83, although that is not required by statute.

#### *Agency's Response*

The proposal in the NPRM to give respondents written notice 45 days after the date a penalty was due (§§ 386.83(b) and 386.84(b)), was intended to meet the statutory requirement for "notice and an opportunity for a proceeding" (49 U.S.C. 13905(c)(1)) and to extend that right to a driver and private motor carrier as well. The FMCSA has amended the sections in question to make those rights more explicit. In order to comply with section 206, however, the show cause proceeding included in the final rule is necessarily limited in nature. A respondent's operations in interstate commerce will be prohibited, or its registration suspended, on the 91st day after payment was due unless it can show that it has paid in full or filed for bankruptcy under chapter 11. There are no other defenses.

#### *Protest Procedure*

Mr. Hunziker believes it would not be appropriate to prohibit a motor carrier from operating if the motor carrier was protesting or appealing the assessment of a civil penalty.

#### *Agency's Response*

The FMCSA's rules of practice provide a motor carrier several opportunities to contest the agency's findings in enforcement actions. These are described in 49 CFR part 386 and were summarized in the NPRM (65 FR 56521, at 56523-4). Section 206 does not give the agency discretion to hold the statutory penalties in abeyance when the respondent is more than 90 days overdue in making payment, even if a legal challenge has been filed. That principle is stated in §§ 386.83(b)(3) and 386.84(b)(3). Both the NPRM and the final rule, however, recognize that a Federal Circuit Court of Appeals might issue a stay.

#### *Effective Presentation of Warning Text*

AHAS and the ATA recommend that the FMCSA's letters to motor carriers

whose payments are delinquent contain language presented in a format and typeface that emphasizes the requirement for the motor carrier to cease its operations in interstate commerce if it does not pay its fine by the specified date. The ATA offered specific language for a "Legal Warning."

#### *Agency's Response*

The FMCSA will revise the text and format of the letters it sends to motor carriers to emphasize this requirement.

#### *Enforcement of Cease-Operations Sanction*

Citing the discussion of current fine-collection procedures in the NPRM, AHAS noted that because section 206 imposes more serious penalties than previous law—prohibition on operation or suspension of registration—the FMCSA should "put forward a plan to enforce this sanction and the law on a much more aggressive time schedule than for mere collection of unpaid fines."

#### *Agency's Response*

The FMCSA is developing procedures to vigorously enforce the cessation-of-operations provisions of the statute and implementing regulations. The procedures will include methods to provide rapid and effective notification to FMCSA field staff and State motor carrier safety and vehicle licensing agencies.

#### *Economic Impacts*

AHAS agrees with the FMCSA's determination that this rulemaking would have minimal economic impact on the motor carrier industry. No other commenters addressed this aspect of the NPRM.

#### *Penalty Assessment Process*

The NATSP charged that the agency's method of determining penalties creates a "due process problem." The NATSP apparently believes the FMCSA should negotiate an "appropriate penalty" with a motor carrier (or other respondent) before issuing a Notice of Claim. In addition to not involving a motor carrier directly "in the determination of the amount of the penalty," the FMCSA refuses to allow independent evaluation of its method of applying the statutory factors for setting penalties. The NATSP believes that the FMCSA imposes fines at arbitrary levels that are impossible for a small or medium-sized motor carrier to pay, and that these firms would thus be forced out of business. The NATSP suggests "referring penalty assessment to an independent Administrative Law

Judge, or to the Department of Treasury, or the Department of Justice."

#### *Agency's Response*

These comments are outside the scope of this rulemaking. In preparing a Notice of Claim, the FMCSA does not consult with a motor carrier about the proper amount of the penalty, nor should it. The responsibility of choosing penalties that will induce future compliance with the FMCSRs rests with the agency alone. If the respondent believes the penalty assessed is too high, it can try to negotiate a lower amount with the agency's enforcement staff. Alternatively, it could file a motion for reduction with the Chief Safety Officer. That official may or may not agree to lower the penalty originally assessed; both courses of action are reflected in proceedings decided over the past decade. The final outcome will depend on the facts of the particular case.

The Justice or Treasury Departments cannot decide what penalties should be assessed against motor carriers in Notices of Claim; Congress has assigned that authority exclusively to the Department of Transportation. An Administrative Law Judge (ALJ), though certainly unbiased, is not independent of the FMCSA. ALJs hear cases at the request of the Chief Safety Officer, and their initial findings may be overruled by that Officer. The FMCSA's enforcement proceedings comply with all legal and constitutional requirements.

Even on the purely factual level, the NATSP's comments are incorrect. There is no evidence that any substantial number of motor carriers has been forced out of business as a result of paying fines levied by this agency.

#### *General Comments*

The NPTC stated that it supported the NPRM provisions. It cautioned the agency to use its enforcement authority wisely and to ensure that fines and other penalties were set at levels appropriate to the nature of the violations found.

The AHAS also support the NPRM and believe that the new regulations should provide a "powerful deterrent" to improve safety.

#### *Agency's Response*

The FMCSA and its predecessor agencies did not have the authority to suspend or revoke operating authority solely on the basis of non-payment of fines. Section 206 of the MCSIA provided that authority for the first time.

#### **Discussion of Final Rule**

The revisions to 49 CFR part 386 are a straightforward implementation of the amendments to 49 U.S.C. 521(b) and 49 U.S.C. 13905(c) made by section 206 of the MCSIA. The regulatory language published in the NPRM is being adopted today with only a few changes.

#### *Terms of Prohibition*

A CMV owner or operator that fails to pay a civil penalty in full within 90 days after the date specified in the FMCSA's FAO must cease operating CMVs in interstate commerce starting the next day (that is, on day 91). The CMV owner or operator will not be allowed to operate in interstate commerce until the FMCSA has received full payment of the penalty.

If the CMV owner or operator fails to make an installment payment on schedule, the payment plan is void and the entire debt is payable immediately. A CMV owner or operator that fails to pay the full outstanding balance of its civil penalty within 90 days after the date of the missed installment payment, is prohibited from operating in interstate commerce on the next (*i.e.*, the 91st) day. The CMV owner or operator will not be allowed to operate in interstate commerce until the FMCSA has received full payment of the entire penalty.

The rule will apply prospectively. It will only apply to FAOs issued on or after the effective date of the final rule. FAOs issued before that date are not subject to the provisions of the rule.

The rule does not apply to a broker, freight forwarder, CMV owner and operator, or other person who is unable to pay because the person is a debtor in a case under chapter 11, title 11, United States Code.

If the FMCSA has not received payment 45 days after service of the FAO, the agency will send the broker, freight forwarder, or CMV owner or operator a notice by certified mail, return receipt requested. This notice provides the motor carrier, broker, or freight forwarder one additional notice and an opportunity to show cause why its operations in interstate commerce should not be forbidden, or its registration suspended, on the 91st day after service of the FAO. If the broker, freight forwarder, or motor carrier can prove that the FMCSA has received timely payment in full, or that it has filed bankruptcy proceedings under chapter 11 of the Bankruptcy Code, it must notify the FMCSA immediately, and the prohibition or suspension will be reversed.

The FMCSA will be taking necessary actions on the 91st day to notify its State

partner agencies that a particular broker, freight forwarder, or motor carrier is forbidden to operate in interstate commerce. Immediately notifying FMCSA that full payment or a bankruptcy filing has been made will prevent a motor carrier's CMVs from being needlessly detained at ports of entry and weigh stations.

#### *Effective Date of Final Rule*

The effective date of this final rule is April 16, 2001, or 120 days from today. First, the new consequences of non-payment of a penalty are severe. The FMCSA wants to provide sufficient time for motor carriers to become aware of this new rule. 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 brokers, freight forwarders, and motor carriers are handled in a timely and efficient manner.

#### *Technical Amendment Modifying Title of Part 386*

The FMCSA is modifying the title of Part 386 to show that brokers, freight forwarders, and hazardous material transportation are also subject to these proceedings.

#### **Rulemaking Analyses And Notices**

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

The FMCSA has determined that this regulatory action is not significant within the meaning of Executive Order 12866 nor under the regulatory policies and procedures of the DOT (44 FR 11034, February 26, 1979). This rule will prohibit any broker, freight forwarder, or motor carrier or driver in interstate commerce that has not paid a penalty assessed by the FMCSA within 90 days of the final agency order, or has not abided by a payment plan that it had arranged with the FMCSA, from operating in interstate commerce.

Based upon the data presented in the NPRM, the FMCSA anticipates that this rulemaking will have minimal economic impact on the interstate motor carrier industry. Statistics on enforcement actions taken during each of Federal fiscal years 1996 through 1999 indicate that approximately 300 to 500 motor carriers per year did not pay their assessed penalties within 90 days after receiving a final agency order. Under this regulation, these motor carriers will be required to cease their operations in interstate commerce until they have paid their penalties. That sanction may induce most such motor carriers to pay

the civil penalty within 90 days or to abide by their agreed-upon payment plans. It is assumed that the costs of paying the fines, which have historically averaged between \$3,500 and \$5,500, would be less than the potential significantly higher cost of not paying, and facing the shutdown of interstate operations. Thus, the entities involved would take steps to achieve compliance with the lower cost alternative. For the purpose of this analysis, the FMCSA estimates that between 50 and 75 percent of these motor carriers would pay their fines within 90 days rather than face additional sanctions. Therefore, approximately 75 to 250 motor carriers annually might not pay their assessed fines and would face the penalties attached to this rule. This estimate is conservative because it does not account for those motor carriers in chapter 11 bankruptcy proceedings that are not subject to this rule.

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. The adverse impact of this rule on those few motor carriers not involved in bankruptcy proceedings which fail to pay their penalties in a timely manner, is exactly the effect intended by Congress.

This rule will only affect the operations of the small number of motor carriers that do not pay civil penalties assessed as part of enforcement actions. The number of motor carriers involved is expected to continue to be extremely small—fewer than one-tenth of one percent of motor carriers per year listed as active in the MCMIS. The FMCSA believes the number of motor carriers potentially subject to this level of impact is much smaller than the number of motor carriers that cease operations every year as a result of normal economic fluctuations. This rulemaking reinforces the importance of complying with the safety regulations by putting into place a mechanism to require motor carriers to pay penalties assessed, unless they are unable to pay because they are debtors in chapter 11 bankruptcy proceedings.

This rule imposes no new costs upon motor carriers, brokers, and freight forwarders. Those entities should see no change to their operations, provided they pay assessed monetary penalties within the time frames that they arrange with the FMCSA. Based upon the extremely small number of motor carriers projected to be affected, the agency believes that the overall adverse

economic effects of this rulemaking will be minimal. This rule will allow the FMCSA to require those very few motor carriers that do not pay civil penalties, or abide by payment agreements, to cease their operations in interstate commerce. A broker, freight forwarder, or for-hire motor carrier operating in interstate commerce may also lose its operating authority until it pays its overdue civil penalties. This rule provides the FMCSA with an essential tool to take prompt and effective action against these motor carriers.

#### *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. The only motor carriers economically impacted by this rule will be those who do not pay their civil penalties by the 90th day after the FMCSA's final agency order or that have failed to arrange and abide by a payment plan.

Motor carriers can avoid the consequences of this rule simply by paying their civil penalties. The FMCSA does not assess fines at a level that would cause a motor carrier to shortchange its safety and soundness of operations in order to pay its fine. In determining the level of penalties, the FMCSA takes into account, among other things, a motor carrier's ability to pay. The FMCSA also allows motor carriers to arrange a payment plan with the agency. Both of these considerations are tailored to the financial needs of small motor carriers and are part of the agency's current procedures. Therefore, the FMCSA hereby 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, or 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 action under Executive Order 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 motor carriers that do not pay assessed penalties from operating in interstate commerce. Motor carriers can avoid all of the implications of this mandate by complying with the FMCSRs, thereby avoiding adverse enforcement actions. Failing that, the motor carrier can avoid the new sanctions under this rule by paying penalties assessed within 90 days of the final agency order. If the motor carrier has arranged a payment plan with the FMCSA, it can avoid the new sanctions by abiding by its payment plan. The FMCSA therefore certifies that this rule has no takings implications under the Fifth Amendment or 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. The FMCSA has determined this rule does not have a substantial direct effect on, or sufficient federalism implications for, the States, nor will it 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 the FMCSA is revising part 386 of the FMCSRs, States are not required to adopt part 386 as a condition for receiving Motor Carrier Safety Assistance Program 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 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 action for the purpose of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and has determined under DOT Order 5610.1C (September 18, 1979) that this action does not require any environmental assessment.

**List of Subjects**

*49 CFR Part 385*

Highway safety, Motor carriers.

*49 CFR Part 386*

Highway safety, Motor carriers, Rules of practice.

In consideration of the foregoing, the FMCSA amends title 49, Code of Federal Regulations, Chapter III, parts 385 and 386 as set forth below:

**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)(5)(A) and (b)(8), 5113, 31136, 31144, 31502; and 49 CFR 1.73.

2. Add § 385.14 to read as follows:

**§ 385.14 Motor carriers, brokers, and freight forwarders delinquent in paying civil penalties: prohibition on transportation.**

(a) A CMV owner or operator that has failed to pay civil penalties imposed by the FMCSA, or has failed to abide by a payment plan, may be prohibited from operating CMVs in interstate commerce under 49 CFR 386.83.

(b) A broker, freight forwarder, or for-hire motor carrier that has failed to pay civil penalties imposed by the FMCSA, or has failed to abide by a payment plan, may be prohibited from operating in interstate commerce, and its registration may be suspended under the provisions of 49 CFR 386.84.

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

3. Revise the authority citation for part 386 to read as follows:

**Authority:** 49 U.S.C. 113, chapters 5, 51, 59, 131–141, 145–149, 311, 313, and 315; sec. 206, Pub. L. 106–159, 113 Stat. 1763; and 49 CFR 1.45 and 1.73.

4. Revise the heading of part 386 to read as set forth above.

5. Revise § 386.1 to read as follows:

**§ 386.1 Scope of rules in this part.**

The rules in this part govern proceedings before the Assistant Administrator, who also acts as the Chief Safety Officer of the Federal Motor Carrier Safety Administration (FMCSA), under applicable provisions of the Federal Motor Carrier Safety Regulations (49 CFR parts 350–399), including the commercial regulations (49 CFR parts 360–379) and the Hazardous Materials Regulations (49 CFR parts 171–180). The purpose of the proceedings is to enable the Assistant Administrator to determine whether a motor carrier, property broker, freight forwarder, or its agents, employees, or any other person subject to the jurisdiction of the FMCSA, has failed to comply with the provisions or requirements of applicable statutes and the corresponding regulations and, if such violations are found, to issue an appropriate order to compel compliance with the statute or regulation, assess a civil penalty, or both.

6. In § 386.2, remove "Federal Highway Administration" and add "Federal Motor Carrier Safety Administration" each place it appears; and add the new definitions of *Assistant Administrator*, *Broker*, *Final agency order*, and *Freight forwarder*, in alphabetical order, to read as follows:

**§ 386.2 Definitions.**

\* \* \* \* \*

*Assistant Administrator* means the Assistant Administrator of the Federal Motor Carrier Safety Administration. The Assistant Administrator is the Chief Safety Officer of the agency pursuant to 49 U.S.C. 113(d). Decisions of the Assistant Administrator in motor carrier, broker, freight forwarder, and hazardous materials proceedings under this part are administratively final.

\* \* \* \* \*

*Broker* means a person who, for compensation, arranges or offers to arrange the transportation of property by an authorized motor carrier. A motor carrier, or person who is an employee or bona fide agent of a carrier, is not a broker within the meaning of this section when it arranges or offers to arrange the transportation of shipments which it is authorized to transport and which it has accepted and legally bound itself to transport.

\* \* \* \* \*

*Final agency order* means a notice of final agency action issued pursuant to this part by either the appropriate FMCSA Field Administrator (for default judgments under § 386.14(e)), the FMCSA Chief Safety Officer, or an Administrative Law Judge (ALJ).

typically requiring payment of a civil penalty by a broker, freight forwarder, driver, or motor carrier.

*Freight forwarder* means a person holding itself out to the general public (other than as an express, pipeline, rail, sleeping car, motor, or water carrier) to provide transportation of property for compensation in interstate commerce, and in the ordinary course of its business:

(1) Performs or provides for assembling, consolidating, break-bulk, and distribution of shipments;

(2) Assumes responsibility for transportation from place of receipt to destination; and

(3) Uses for any part of the transportation a carrier subject to FMCSA jurisdiction.

\* \* \* \* \*

7. Add §§ 386.83 and 386.84 to read as follows:

**§ 386.83 Sanction for failure to pay civil penalties or abide by payment plan; operation in interstate commerce prohibited.**

(a)(1) *General rule.* A CMV owner or operator that fails to pay a civil penalty in full within 90 days after the date specified for payment by the FMCSA's final agency order is prohibited from operating in interstate commerce starting on the next (*i.e.*, the 91st) day. The prohibition continues until the FMCSA has received full payment of the penalty.

(2) *Civil penalties paid in installments.* The FMCSA Service Center may allow a CMV owner or operator to pay a civil penalty in installments. If the CMV owner or operator fails to make an installment payment on schedule, the payment plan is void and the entire debt is payable immediately. A CMV owner or operator that fails to pay the full outstanding balance of its civil penalty within 90 days after the date of the missed installment payment, is prohibited from operating in interstate commerce on the next (*i.e.*, the 91st) day. The prohibition continues until the FMCSA has received full payment of the entire penalty.

(3) *Appeals to Federal Court.* If the CMV owner or operator appeals the final agency order to a Federal Circuit Court of Appeals, the terms and payment due date of the final agency order are not stayed unless the Court so directs.

(b) *Show Cause Proceeding.* (1) The FMCSA will notify a CMV owner or operator in writing if it has not received payment within 45 days after the date specified for payment by the final agency order or the date of a missed installment payment. The notice will

include a warning that failure to pay the entire penalty within 90 days after payment was due, will result in the CMV owner or operator being prohibited from operating in interstate commerce.

(2) The notice will order the CMV owner or operator to show cause why it should not be prohibited from operating in interstate commerce on the 91st day after the date specified for payment. The prohibition may be avoided only by submitting to the Chief Safety Officer:

(i) Evidence that the respondent has paid the entire amount due; or

(ii) Evidence that the respondent has filed for bankruptcy under chapter 11, title 11, United States Code.

Respondents in bankruptcy must also submit the information required by paragraph (d) of this section.

(3) The notice will be delivered by certified mail or commercial express service. If a CMV owner's or operator's principal place of business is in a foreign country, the notice will be delivered to the CMV owner's or operator's designated agent.

(c) A CMV owner or operator that continues to operate in interstate commerce in violation of this section may be subject to additional sanctions under paragraph IV (h) of appendix A to part 386.

(d) This section does not apply to any person who is unable to pay a civil penalty because the person is a debtor in a case under chapter 11, title 11, United States Code. CMV owners or operators in bankruptcy proceedings under chapter 11 must provide the following information in their response to the FMCSA:

(1) The chapter of the Bankruptcy Code under which the bankruptcy proceeding is filed (*i.e.*, chapter 7 or 11);

(2) The bankruptcy case number;

(3) The court in which the bankruptcy proceeding was filed; and

(4) Any other information requested by the agency to determine a debtor's bankruptcy status.

**§ 386.84 Sanction for failure to pay civil penalties or abide by payment plan; suspension or revocation of registration.**

(a)(1) *General rule.* The registration of a broker, freight forwarder, or for-hire motor carrier that fails to pay a civil penalty in full within 90 days after the date specified for payment by the FMCSA's final agency order, will be suspended starting on the next (*i.e.*, the 91st) day. The suspension continues until the FMCSA has received full payment of the penalty.

(2) *Civil penalties paid in installments.* The FMCSA Service Center may allow a respondent broker,

freight forwarder, or for-hire motor carrier to pay a civil penalty in installments. If the respondent fails to make an installment payment on schedule, the payment plan is void and the entire debt is payable immediately. The registration of a respondent that fails to pay the remainder of its civil penalty in full within 90 days after the date of the missed installment payment, is suspended on the next (*i.e.*, the 91st) day. The suspension continues until the FMCSA has received full payment of entire penalty.

(3) *Appeals to Federal Court.* If the respondent broker, freight forwarder, or for-hire motor carrier appeals the final agency order to a Federal Circuit Court of Appeals, the terms and payment due date of the final agency order are not stayed unless the Court so directs.

(b) *Show Cause Proceeding.* (1) The FMCSA will notify a respondent broker, freight forwarder, or for-hire motor carrier in writing if it has not received payment within 45 days after the date specified for payment by the final agency order or the date of a missed installment payment. The notice will include a warning that failure to pay the entire penalty within 90 days after payment was due, will result in the suspension of the respondent's registration.

(2) The notice will order the respondent to show cause why its registration should not be suspended on the 91st day after the date specified for payment. The prohibition may be avoided only by submitting to the Chief Safety Officer:

(i) Evidence that the respondent has paid the entire amount due; or

(ii) Evidence that the respondent has filed for bankruptcy under chapter 11, title 11, United States Code.

Respondents in bankruptcy must also submit the information required by paragraph (d) of this section.

(3) The notice will be delivered by certified mail or commercial express service. If a respondent's principal place of business is in a foreign country, it will be delivered to the respondent's designated agent.

(c) The registration of a broker, freight forwarder or for-hire motor carrier that continues to operate in interstate commerce in violation of this section after its registration has been suspended may be revoked after an additional notice and opportunity for a proceeding in accordance with 49 U.S.C. 13905(c). Additional sanctions may be imposed under paragraph IV (h) of appendix A to part 386.

(d) This section does not apply to any person who is unable to pay a civil penalty because the person is a debtor

in a case under chapter 11, title 11, United States Code. Brokers, freight forwarders, or for-hire motor carriers in bankruptcy proceedings under chapter 11 must provide the following information in their response to the FMCSA:

- (1) The chapter of the Bankruptcy Code under which the bankruptcy proceeding is filed (*i.e.*, chapter 7 or 11);
- (2) The bankruptcy case number;
- (3) The court in which the bankruptcy proceeding was filed; and

(4) Any other information requested by the agency to determine a debtor's bankruptcy status.

8. Add paragraph h to part IV of Appendix A to part 386 to read as follows:

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

\* \* \* \* \*

IV. \* \* \*

h. *Violation*—Conducting operations during a period of suspension under §§ 386.83 or 386.84 for failure to pay penalties.

*Penalty*—Up to \$10,000 for each day that operations are conducted during the suspension period.

Issued on: December 7, 2000.

**Brian M. McLaughlin,**

*Acting Assistant Administrator.*

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