

**DEPARTMENT OF TRANSPORTATION****Federal Motor Carrier Safety Administration****49 CFR Parts 350 and 385**

[Docket No. FMCSA-2001-11060]

RIN 2126-AA64

**Certification of Safety Auditors, Safety Investigators, and Safety Inspectors****AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.**ACTION:** Interim final rule; request for comments.

**SUMMARY:** The FMCSA is amending the Federal Motor Carrier Safety Regulations (FMCSRs) by designating the current safety fitness regulations and adding Certification of Safety Auditors, Safety Investigators, and Safety Inspectors regulations. Section 211 of the Motor Carrier Safety Improvement Act of 1999 (MCSIA) requires that a certified motor carrier safety auditor perform any safety audit or compliance review conducted after December 31, 2002. This rule establishes procedures to certify and maintain certification for auditors and investigators. In addition, it requires certification for State or local government Motor Carrier Safety Assistance Program (MCSAP) employees performing driver/vehicle roadside inspections.

**DATES:** This rule is effective June 17, 2002. We must receive your comments by May 20, 2002.

**ADDRESSES:** You can mail, fax, hand deliver or electronically submit written comments to the Docket Management Facility, U.S. Department of Transportation, Dockets Management Facility, Room PL-401, 400 Seventh Street, SW., Washington, DC 20590-0001. The fax number is (202) 493-2251. Comments to the web site (<http://dmses.dot.gov/submit>) may be typed on-line. You must include the docket number that appears at the heading of this document in your comments. You may examine and copy all comments at the above address from 9 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays. You may also review the docket on the Internet at <http://dms.dot.gov>. If you want notification of receipt of comments, please include a self-addressed, stamped envelope or postcard, or after submitting comments electronically, print the acknowledgement page.

**FOR FURTHER INFORMATION CONTACT:** Mr. William C. Hill, Office of Bus & Truck Standards and Operations, (202) 366-4001, Federal Motor Carrier Safety

Administration, 400 Seventh Street, SW., Room 8301, Washington, DC 20590-0001. Office hours are from 7:45 a.m. to 4:15 p.m. EST, Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:** All comments received before the close of business on the comment closing date indicated above will be considered and will be available for examination using the docket number appearing at the top of this document in the docket room at the above address. The FMCSA will file comments received after the comment closing date in the docket and will consider late comments to the extent practicable. The FMCSA may, however, issue a final rule at any time after the close of the comment period.

**Background**

On December 9, 1999, the President signed the Motor Carrier Safety Improvement Act of 1999 (MCSIA) (Pub. L. 106-159). Section 211 of the MCSIA requires the Secretary of Transportation to complete a rulemaking to improve training and provide for the certification of motor carrier safety auditors to conduct safety inspection audits and reviews. The legislation also gives the Secretary oversight responsibility for the motor carrier auditors and investigators it certifies, including the authority to decertify them. As enacted by Section 211(a), 49 U.S.C. 31148(b) and (c) read as follows:

(b) *Certified Inspection Audit Requirement.*—Not later than 1 year after completion of the Rulemaking required by subsection (a), any safety inspection audit or review required by, or based on the authority of, this chapter or chapter 5, 313, or 315 of this title and performed after December 31, 2002, shall be conducted by—

- (1) A motor carrier safety auditor certified under subsection (a); or
- (2) A Federal or State employee who, on the date of the enactment of this section, was qualified to perform such an audit or review.

(c) *Extension.*—If the Secretary determines that subsection (b) cannot be implemented within the 1-year period established by that subsection and notifies the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives of the determination and the reasons therefor, the Secretary may extend the deadline for compliance with subsection (b) by not more than 12 months.

**Certification of Safety Auditors, Safety Investigators, and Safety Inspectors**

The FMCSA is implementing Section 211 by establishing three types of certification: (1) Certification to conduct safety audits, (2) certification to conduct compliance reviews, and (3) certification to conduct roadside inspections. FMCSA or State or local government MCSAP employees qualified to perform compliance reviews on December 9, 1999, are grandfathered by 49 U.S.C. 31148(b)(2) and are not required to be certified under this rule.

The FMCSA is also grandfathering Federal, or State or local MCSAP, employees who had not been hired, or had not yet completed their normal training on December 9, 1999, but were fully trained and performing compliance reviews or roadside inspections before June 17, 2002, when we are closing the grandfather period.

We believe this complies with congressional intent, since these employees received the same kind of training as those statutorily grandfathered on December 9, 1999. Moreover, requiring these employees to repeat such training would impose unnecessary costs on their agencies and burdensome time constraints on the employees themselves, keeping them from performing their important, safety-related functions.

Grandfathered employees are treated as though they had been certified through the procedures described in this rule. As such, they are also required to maintain their virtual certification by completing the required training updates.

The FMCSA is augmenting its procedures for assessing the safety performance of motor carriers by adding a new tool, a safety audit. The agency is treating the term "safety inspection audit or review" used in Section 211 as equivalent to the "safety review" of new entrants into the motor carrier industry which is mandated by Sec. 210 of the MCSIA. The two provisions are closely related. Under Section 210, the Secretary is required to "establish the elements of the safety review," which implies that it may be something less than a full compliance review pursuant to Part 385. The safety review is to be phased in "in a manner that takes into account the availability of certified motor carrier safety auditors" (49 U.S.C. 31144(c)(3), enacted by Section 210). Section 211 contemplates the use of certified auditors to perform the "safety inspection audits and reviews" that are "required by, or based on the authority of (chapter 311) or chapter 5, 313, or 315 of" title 49, United States Code. FMCSA

expects that such audits will be performed by FMCSA employees or by State inspectors. The language of section 211 authorizes non-government personnel to conduct the safety review required of new entrants. FMCSA seeks comments on the advisability of certifying non-government employees that meet all training and experience criteria to conduct safety reviews as provided in the IFR. In the interest of simplicity, the FMCSA will use the single term "safety audit" in the remainder of this document, and in a subsequent rulemaking to implement Section 210.

The term "safety audit" avoids any possible confusion with the safety reviews previously conducted by the agency, which were discontinued on September 30, 1994. A safety audit will provide educational and technical assistance to new entrant motor carriers and gather critical safety data needed to make an assessment of these carriers' safety performance and basic safety management controls. It will only be used to review carriers identified as new entrants, i.e., those registering for a USDOT identification number.

Currently, the FMCSA relies on the compliance review, an in-depth review, to assess a carrier's safety performance and compliance with the FMCSRs and applicable hazardous materials regulations (HMRs). They are typically performed only on motor carriers with poor performance, high accident rates, high vehicle or driver out-of-service rates, past poor compliance, or those against which non-frivolous complaints have been lodged. A compliance review performed on a motor carrier's operations usually results in a determination whether the carrier meets FMCSA's safety fitness standard.

Compliance reviews are performed on shippers of hazardous materials, but do not result in a safety rating, as shippers of hazardous materials are not subject to the FMCSRs.

The compliance review also provides recommendations to assist the carrier or hazardous materials shipper to attain full compliance with the regulations. Approximately 30% of compliance reviews result in enforcement actions.

The compliance review will retain its current procedures, report format, and purpose—to evaluate a motor carrier's safety fitness—and may trigger enforcement action. The FMCSA or the State MCSAP agency will certify Federal or State personnel to conduct compliance reviews and safety audits.

All individuals who conduct safety audits, compliance reviews, or driver/vehicle roadside inspections will be required to maintain their certification

by performing a specific number of safety audits, compliance reviews, or inspections annually, with acceptable quality, and by successfully completing any required training. Failing to successfully complete training, or to demonstrate proficiency in conducting audits, reviews, or inspections, requires the individual to repeat the requirements established by the FMCSA for conducting safety audits, compliance reviews, or inspections.

The FMCSA is amending the MCSAP regulations to require that each State or local government participating in MCSAP certify that its employees performing safety audits, compliance reviews, and driver/vehicle roadside inspections meet minimum Federal training, experience, and proficiency standards (see 49 CFR 350.211(17)). These standards will be posted on the FMCSA website ([www.fmcsa.dot.gov](http://www.fmcsa.dot.gov)). This certification process is appropriate in that participating MCSAP States and local agencies already determine if their employees are qualified based on Federal standards. It also relieves them of the potential burden of requiring State or local government employees to travel out of state to be trained or to maintain their certifications to perform compliance reviews, safety audits, or roadside inspections.

The FMCSA is not including specific training requirements in this regulation. The agency needs flexibility to modify course content quickly to match changes in the FMCSRs and HMRs, or to adapt other elements of the training process to changed circumstances. Codification would make the program inflexible and difficult to manage.

The certification requirements, however, will be posted on the FMCSA website ([www.fmcsa.dot.gov](http://www.fmcsa.dot.gov)) and available in hard copy at its Washington, DC, headquarters. These requirements will include the successful completion of a training course covering the FMCSRs and HMRs. Certification and maintenance requirements will be updated as necessary to reflect changes in the safety regulations. The training course will thus remain current. FMCSA will work with the States and other stakeholders as we consider and develop any amendments to the training requirements.

This interim final rule is effective on June 17, 2002. Under the fiscal year 2002 DOT Appropriations Act (Public Law 107-87; December 18, 2001), Congress directed that as a precondition to processing applications of Mexico-domiciled carriers for authority to operate beyond the commercial zone, FMCSA must issue an interim final rule on this statutory requirement. This

regulation only imposes a requirement to be certified as provided for in the Motor Carrier Safety Improvement Act of 1999 (MCSIA)(Pub. L. 106-159). Certification of Federal safety investigators and State or local government employees participating in MCSAP who perform compliance reviews or driver/vehicle roadside inspections, means that these officials have successfully completed certain training programs. These training requirements have been in effect for a number of years, and the rule imposes no new burdens on such officials. The rule also creates a new kind of review—the "safety audit"—and a corresponding certification, but the training required to be certified as a safety auditor is simply a less comprehensive version of that required to conduct compliance reviews and driver/vehicle roadside inspections. Because of Congress' direction and the limited impact of the regulations, FMCSA finds that there is good cause that notice and comment are contrary to the public interest under 5 U.S.C. 553(b)(3)(B).

#### Rulemaking Analysis and Notices

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

The FMCSA has determined that this action is a significant regulatory action within the meaning of Executive Order 12866, and is significant within the meaning of Department of Transportation regulatory policies and procedures (44 FR 11034, February 26, 1979). It has been reviewed by the Office of Management and Budget. The subject of requirements for certification of safety auditors, investigators and inspectors will likely generate considerable public interest within the meaning of Executive Order 12866. We have classified the rule as significant because of the high level of public and congressional interest in the program.

The IFR establishes the safety certification process for persons who conduct safety audits, compliance reviews, and safety inspections. This IFR will have minimal or no economic impact. The FMCSA has developed training material and requirements for the three types of certifications to ensure uniform implementation with respect to all persons who must comply with the rule. To maintain certification, individuals must conduct a minimum number of safety activities (i.e., audits, reviews, or inspections) per year. The FMCSA may develop other specific standards regarding initial certification or maintaining certification. However, Federal and State employees who

currently conduct compliance reviews and safety inspections will not have to undergo any additional training to comply with this rule. They would only be required to meet the new standards regarding maintenance of certification. States will be required to certify that their employees meet minimal Federal standards as part of their continued participation in the Motor Carrier Safety Assistance Program (MCSAP).

Currently, Federal employees who perform compliance reviews (CRs) or roadside inspections undergo an extensive training program, such as a six-week academy training class for safety investigators and a variety of refresher courses for those performing CRs. State employees who conduct these reviews or inspections under the Motor Carrier Safety Assistance Program have training requirements that are comparable to, or as effective as, the Federal program. The agency believes that the training required for initial certification of new Federal or State employees assigned to conduct safety activities will be similar to the training that these individuals currently undergo. While there may be some additional training material developed and taught due to regulatory or program changes, it is unlikely that there will be any measurable increase in the amount of time trainees must spend in class. Any extra material would most likely be offset by reduction in the amount of time spent on topics that require less classroom instruction to master the concepts. Accordingly, we do not believe that this rule will impose any new costs on Federal or State employees who undergo training. If there are costs imposed on State agencies, those expenses are eligible expenses under the MCSAP program and as such would be paid through the program as opposed to being paid by the States.

Although the benefits of this IFR cannot be quantified at this time, we believe this rulemaking will ensure greater uniformity and consistency in the quality of safety audits, compliance reviews, and roadside inspections, than would otherwise exist. Under the IFR, Federal or State employees will have to complete a minimum number of safety activities (safety audits, compliance reviews, roadside inspections) to maintain their certifications. This should ensure consistency in the quality of the reviews and inspections, and thereby increase the likelihood that enforcement officials identify unsafe motor carriers, drivers, and vehicles during safety activities. The ultimate result should be a reduction in crashes, injuries and fatalities. (See OMCHS Safety Program Performance Measures:

Assessment of Initial Models and Plans for Second Generation Models, 1999, for an analysis of the safety impact of compliance reviews. A copy of this analysis is available in the docket described above under **ADDRESSES**).

#### **Regulatory Flexibility Act**

In compliance with the Regulatory Flexibility Act (5 U.S.C. 601–612), the FMCSA has considered the effects of this regulatory action on small entities. This rule is directed at certifying federal and state safety auditors, investigators, and inspectors. Federal and State employees who currently conduct compliance reviews and safety inspections will not have to undergo any additional training to comply with this rule. Therefore, we have determined that there would be minimal or no economic impact on motor carriers, including small entities. We therefore certify that it would not have a significant impact on a substantial number of small entities.

#### **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 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 that this action does not have substantial direct Federalism implications 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. 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**

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget for each collection of information they conduct, sponsor, or require through regulations. The FMCSA has determined that this proposal does not contain new collection of information requirements for the purpose of the PRA.

#### **National Environmental Policy Act**

The Federal Motor Carrier Safety Administration (FMCSA) is a new administration within the Department of Transportation (DOT). The FMCSA is currently developing an agency order that will comply with all statutory and regulatory policies under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.). We expect the draft FMCSA Order to appear in the **Federal Register** for public comment in the near future. The framework of the FMCSA Order is consistent with and reflects the procedures for considering environmental impacts under DOT Order 5610.1C. The FMCSA analyzed this rule under the NEPA and DOT Order 5610.1C. We believe it would be among the type of regulations that would be categorically excluded from any environmental assessment.

#### **Energy Effects**

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a “significant energy action” under Executive Order 13211 because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy because it sets standards for personnel who want to serve as safety auditors and has no direct relation to energy consumption. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a

Statement of Energy Effects under Executive Order 13211.

#### List of Subjects

##### 49 CFR Part 350

Highway safety, Motor carriers, and Commercial Motor Carrier Safety Assistance Program.

##### 49 CFR Part 385

Highway safety, Motor carriers, and Safety fitness procedures.

In consideration of the foregoing, Title 49, Code of Federal Regulations, Chapter III, part 350 is amended as set forth below:

1. The authority citation for Part 350 is revised to read as follows:

**Authority:** 49 U.S.C. 31100–31104, 31108, 31136, 31140–31141, 31144, 31148, 31161, 31310–31311, 31502; and 49 CFR 1.73.

2. Amend § 350.211 by adding (17).

#### § 350.211 What is the format of the certification required by § 350.209?

(17) The State or a local recipient of MCSAP funds will certify that it meets the minimum Federal standards set forth in 49 CFR part 385, Subpart C, for training and experience of employees performing safety audits, compliance reviews, or driver/vehicle roadside inspections.

In consideration of the foregoing, Title 49, Code of Federal Regulations, Chapter III, part 385 is amended as set forth below:

#### PART 385—SAFETY FITNESS PROCEDURES

3. The authority citation for Part 385 is revised to read as follows:

**Authority:** 49 U.S.C. 113, 504, 521(b), 5113, 13901–13905, 31136, 31144, 31148, and 31502; Section 350 of Public Law 107–87; and 49 CFR 1.73.

4. Amend paragraph 2 in the definition of *Reviews* in § 385.3 to read as follows:

#### § 385.3 Definitions.

*Reviews.* For the purposes of this part:

\* \* \* \* \*

(2) *Safety Audit* means an examination of a motor carrier's operations to provide educational and technical assistance on safety and the operational requirements of the FMCSRs and applicable HMRs and to gather critical safety data needed to make an assessment of the carrier's safety performance and basic safety management controls. Safety audits do not result in safety ratings.

6. Part 385 is amended by adding a new Subpart C to read as follows:

#### Subpart C—Certification of Safety Auditors, Safety Investigators, and Safety Inspectors

385.201 Who is qualified to perform a review of a motor carrier?

385.203 What are the requirements to obtain and maintain certification?

385.205 How can a person who has lost his or her certification be re-certified?

#### § 385.201 Who is qualified to perform a review of a motor carrier?

(a) An FMCSA employee, or a State or local government employee funded through MCSAP, who was qualified to perform a compliance review before June 17, 2002, may perform a compliance review, safety audit or roadside inspection if he or she complies with § 385.203(b).

(b) A person who was not qualified to perform a compliance review before June 17, 2002, may perform a compliance review, safety audit or roadside inspection after complying with the requirements of § 385.203(a).

#### § 385.203 What are the requirements to obtain and maintain certification?

(a) After June 17, 2002, a person who is not qualified under § 385.201(a) may not perform a compliance review, safety audit, or roadside inspection unless he or she has been certified by FMCSA or

a State or local agency applying the FMCSA standards after successfully completing classroom training and examinations on the FMCSRs and HMRs as described in detail on the FMCSA website ([www.fmcsa.dot.gov](http://www.fmcsa.dot.gov)). These employees must also comply with the maintenance of certification/qualification requirements of paragraph (b) of this section.

(b) *Maintenance of certification/qualification.* A person may not perform a compliance review, safety audit, or roadside inspection unless he or she meets the quality-control and periodic re-training requirements adopted by the FMCSA to ensure the maintenance of high standards and familiarity with amendments to the FMCSRs and HMRs. These maintenance of certification/qualification requirements are described in detail on the FMCSA website ([www.fmcsa.dot.gov](http://www.fmcsa.dot.gov)).

(c) The requirements of paragraphs (a) and (b) of this section for training, performance and maintenance of certification/qualification, which are described on the FMCSA website ([www.fmcsa.dot.gov](http://www.fmcsa.dot.gov)), are also available in hard copy from the Office of Professional Development and Training, FMCSA, 400 7th Street, SW., Washington, DC 20590.

#### § 385.205 How can a person who has lost his or her certification be re-certified?

He or she must successfully complete the requirements of § 385.203(a) and (b).

Issued on: March 7, 2002.

**Joseph M. Clapp,**

*Administrator.*

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