(1) On any frequency removed from the assigned frequency between 0–45% of the authorized bandwidth (BW): 0 dB.

(2) On any frequency removed from the assigned frequency between 45–50% of the authorized bandwidth: 568 log (% of (BW)/45) dB.

(3) On any frequency removed from the assigned frequency between 50–55% of the authorized bandwidth: 26 + 145 log (% of BW/50) dB.

(4) On any frequency removed from the assigned frequency between 55–100% of the authorized bandwidth: 32 + 31 log (% of (BW)/55) dB.

(5) On any frequency removed from the assigned frequency between 100–150% of the authorized bandwidth: 40 + 57 log (% of (BW)/100) dB.

(6) On any frequency removed from the assigned frequency between above 150% of the authorized bandwidth: 50 dB or 55 + 10 log (P) dB, whichever is the lesser attenuation.

(7) The zero dB reference is measured relative to the highest average power of the fundamental emission measured across the designated channel bandwidth using a resolution bandwidth of at least one percent of the occupied bandwidth of the fundamental emission and a video bandwidth of 30 kHz. The power spectral density is the power measured within the resolution bandwidth of the measurement device divided by the resolution bandwidth of the measurement device. Emission levels are also based on the use of measurement instrumentation employing a resolution bandwidth of at least one percent of the occupied bandwidth.

Note to paragraph m: Low power devices may as an option, comply with paragraph (m).

* * * * *

■ 3. Section 90.1215 is revised to read as follows:

§ 90.1215 Power limits.

The transmitting power of stations operating in the 4940–4990 MHz band must not exceed the maximum limits in this section.

(a) The peak transmit power should not exceed:

Channel bandwidth (MHz)	Low power peak transmitter power (dBm)	High power peak transmitter power (dBm)
1	7	20
5	14	27
10	17	30
15	18.8	31.8
20	20	33

High power devices are also limited to a peak power spectral density of 21 dBm per one MHz. High power devices using channel bandwidths other than those listed above are permitted; however, they are limited to a peak power spectral density of 21 dBm/MHz. If transmitting antennas of directional gain greater than 9 dBi are used, both the peak transmit power and the peak power spectral density should be reduced by the amount in decibels that the directional gain of the antenna exceeds 9 dBi. However, high power point-to-point or point-to-multipoint operation (both fixed and temporary-fixed rapid deployment) may employ transmitting antennas with directional gain up to 26 dBi without any corresponding reduction in the transmitter power or spectral density. Corresponding reduction in the peak transmit power and peak power spectral density should be the amount in decibels that the directional gain of the antenna exceeds 26 dBi.

(b) Low power devices are also limited to a peak power spectral density of 8 dBm per one MHz. Low power devices using channel bandwidths other than those listed above are permitted; however, they are limited to a peak power spectral density of 8 dBm/MHz. If transmitting antennas of directional gain greater than 9 dBi are used, both the peak transmit power and the peak power spectral density should be reduced by the amount in decibels that the directional gain of the antenna exceeds 9 dBi.

(c) The peak transmit power is measured as a conducted emission over any interval of continuous transmission calibrated in terms of an RMS-equivalent voltage. If the device cannot be connected directly, alternative techniques acceptable to the Commission may be used. The measurement results shall be properly adjusted for any instrument limitations, such as detector response times, limited resolution bandwidth capability when compared to the emission bandwidth, sensitivity, etc., so as to obtain a true peak measurement conforming to the definitions in this paragraph for the emission in question.

(d) The peak power spectral density is measured as conducted emission by direct connection of a calibrated test instrument to the equipment under test. If the device cannot be connected directly, alternative techniques acceptable to the Commission may be used. Measurements are made over a bandwidth of one MHz or the 26 dB emission bandwidth of the device, whichever is less. A resolution bandwidth less than the measurement bandwidth can be used, provided that the measured power is integrated to show total power over the measurement bandwidth. If the resolution bandwidth is approximately equal to the measurement bandwidth, and much less than the emission bandwidth of the equipment under test, the measured results shall be corrected to account for any difference between the resolution bandwidth of the test instrument and its actual noise bandwidth.

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DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Part 386

[FMCSA Docket No. FMCSA–1997–2299]

RIN 2126–AA15

Rules of Practice

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: FMCSA amends its Rules of Practice for Motor Carrier, Broker, Freight Forwarder, and Hazardous Materials Proceedings. These rules increase the efficiency of the procedures, enhance due process and awareness of the public and regulated community, and accommodate recent programmatic changes. The changes in these rules apply to all motor carriers, other business entities, and individuals involved in motor carrier safety and hazardous materials administrative actions and proceedings with FMCSA.

DATES: Effective Date: November 14, 2005. *Petitions for Reconsideration* must be received by the Agency no later than June 17, 2005. *Docket:* Background documents or comments received on the proposed rules may be accessed electronically at *http://dms.dot.gov* at any time or in person at Room PL–401 on the Plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

FOR FURTHER INFORMATION CONTACT: Jackie K. Cho, Office of Chief Counsel, (202) 366–0834, Federal Motor Carrier Safety Administration, 400 Seventh Street SW., Washington, DC 20590. Office hours are from 8 a.m. to 5:30 p.m., E.T., Monday through Friday, except Federal holidays. *Privacy Act:*

Anyone is able to search the electronic form of all comments received into any of DOT's dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477). This statement is also available at *http://dms.dot.gov*. FMCSA may not post copyrighted material on the electronic docket absent express permission by the copyright holder. All such material will be made part of the official docket and is accessible in person as outlined above. Anyone submitting comments to the docket is responsible for ensuring compliance with all applicable copyright laws.

SUPPLEMENTARY INFORMATION:

Legal Basis for the Rulemaking

Congress delegated certain powers to regulate interstate commerce to DOT in numerous pieces of legislation, most notably in section 6 of the Department of Transportation Act (DOT Act) (Pub. L. 85–670, 80 Stat. 931 (1966)). Section 55 of the DOT Act transferred to DOT the authority of the Interstate Commerce Commission (ICC) to regulate the qualifications and maximum hours-of-service of employees, the safety of operations, and the equipment of motor carriers in interstate commerce. *See* 49 U.S.C. 104 (1983). This authority, first granted to the ICC in the Motor Carrier Act of 1935 (Pub. L. 74–255, 49 Stat. 543), now appears in chapter 315 of title 49 of the U.S. Code. The regulations issued under this authority became known as the Federal Motor Carrier Safety Regulations (FMCSRs), appearing generally at 49 CFR parts 390–99, including the Federal Motor Carrier Commercial Regulations (FMCCRs) (49 CFR parts 360–379) and the Hazardous Materials Regulations (HMRs) (49 CFR parts 171–180). The administrative powers to enforce chapter 315 were also transferred from the ICC to the DOT in 1966, and appear in chapter 5 of title 49 of the U.S. Code. The Secretary of DOT delegated oversight of these provisions to the Federal Highway Administration (FHWA), the predecessor Agency to FMCSA.

Between 1966 and 1999, a number of statutes were added to FHWA's authority. For a more detailed statutory background, see the preamble to the 1996 Notice of Proposed Rule Making (1996 NPRM) (61 FR 18866–67 (April 26, 1996)). The various statutes authorize the enforcement of the FMCSRs and HMRs and provide both civil and criminal penalties for violations. In practice, when circumstances dictate an enforcement action be instituted, civil penalties are more commonly sought than criminal sanctions. The administrative rules in this rulemaking apply, among other things, to the administrative adjudication of civil penalties assessed for violations of the FMCSRs, FMCCRs and HMRs.

The Motor Carrier Safety Improvement Act of 1999 (MCSIA) (Pub. L. 106–159, 113 Stat. 1748) established FMCSA as a new operating administration within DOT, effective January 1, 2000. The staff and responsibilities previously assigned to FHWA, and reassigned to a new Office of Motor Carrier Safety within the Department, are now assigned to FMCSA.

On April 29, 1996, FHWA published the 1996 NPRM for Rules of Practice for Motor Carrier Proceedings; Investigations; Disqualifications and Penalties (61 FR 18865). In the 1996 NPRM, FHWA proposed eliminating the rules of practice contained in part 386 and replacing them with new rules of practice in a new part 363.

The 1996 NPRM was the first effort by FHWA to rewrite comprehensively its rules of practice for motor carrier administrative proceedings since 1985. The 1996 NPRM was intended to be the forerunner of a revision of the FMCSRs following the completion of a zero-based review of those regulations then underway in the Agency. The proposal would have placed the new regulations in previously unused parts of chapter III of title 49 of the Code of Federal Regulations (CFR) reserved for the FMCSRs. The proposed rulemaking was intended to make administrative actions and proceedings more efficient while enhancing the guarantee of due process to carriers, individuals, and other entities by substantially increasing awareness of the consequences of noncompliance with commercial motor vehicle safety and hazardous materials regulations.

On October 21, 1996, FHWA published a Supplemental Notice of Proposed Rulemaking (SNPRM) (61 FR 54601) to broaden the scope of the 1996 NPRM to include proceedings arising under section 103 of the Interstate Commerce Commission Termination Act of 1995 (ICCTA) (Pub. L. 104–88, 109 Stat. 803, 852). In the SNPRM, FHWA proposed to adopt the term ''Commercial Regulations'' to refer to requirements transferred from the former ICC. The SNPRM also extended the comment period of the previous 1996 NPRM to November 20, 1996. FHWA received 127 comments in response to the 1996 NPRM. No comments were received in response to the SNPRM. Comments relevant to those portions of the 1996 NPRM addressed in the recent SNPRM were considered in the Discussion of Comments in FMCSA's October 29, 2004 SNPRM (October 2004 SNPRM).

On February 16, 2000, FMCSA issued technical amendments to part 386 and incorporated enforcement proceedings for Commercial Regulations into part 386 (65 FR 7753). This final rule was intended to ensure all civil forfeiture and investigation proceedings instituted by FMCSA were governed by consistent procedures. In addition, FMCSA adopted some technical amendments which reflected organizational changes, removed obsolete statutory citations, and incorporated statutory changes which affected the civil penalty schedule.

On October 20, 2004, FMCSA published a SNPRM requesting comments proposed to further revise the rules of practice (69 FR 61617). The effective date of this final rule is 180 days following the date of publication in the **Federal Register**. Therefore, the revised rules of practice will apply to all matters where a Notice of Claim or Notice of Violation is served on or after the effective date.

Discussion of Public Comments

In response to the October 20, 2004 SNPRM, five comments were submitted to the docket. Commenting were James P. Lamb (Mr. Lamb), a non-attorney practitioner representing motor carriers; the American Trucking Associations (ATA); Mary Helen Delgado (Ms. Delgado), an attorney practicing motor carrier law; the Association for Transportation Law, Logistics and Policy (ATLLP); and the Scapellato Group, Inc. (SGI), a law firm practicing motor carrier law. The comments are addressed below, together with FMCSA's responses on the issues addressed.

Section 386.3—Separation of Functions

Ms. Delgado questioned whether attorneys in the Office of Chief Counsel act as both enforcement counsel and advisory counsel to the Agency decisionmaker. SGI commented that because the Assistant Administrator also serves as the Chief Safety Officer, serious questions arise regarding whether the Assistant Administrator can render an impartial decision over issues arising from the very policy and standards the Chief Safety Officer has established.

FMCSA Response. We have added § 386.3 to clarify how functions are separated within the Agency, as well as within the Office of Chief Counsel. This added text makes the Agency's current practice more transparent as to how the Agency complies with the Administrative Procedure Act (APA) regarding the separation of functions. The new text states that prosecutorial functions are performed by attorneys in the Enforcement and Litigation Division under oversight of the Assistant Chief Counsel of the Division and the Deputy Chief Counsel. These attorneys do not advise Agency decisionmakers. Rather, the Chief Counsel and the Chief Counsel's immediate staff, including Agency Adjudications Counsel, advise the Assistant Administrator in enforcement actions. This separation of functions is consistent with the APA and mirrors practices in effect at other federal agencies.

The Agency decisionmaker determines whether the Agency is fairly and impartially carrying out the policies and procedures established. As such, knowledge of those procedures and policies is well served. Since all field enforcement personnel report to the Associate Administrator for Enforcement and the Assistant Administrator is not involved in the enforcement process directly, the arrangement preserves the integrity of the proceeding and complies with the APA. Additionally, parties may always raise case-specific conflict issues.

Section 386.4 Appearances and Rights of Witnesses—an FMCSA ''Bar''

Both Mr. Lamb and ATLLP recommended that FMCSA adopt standards for non-attorney practitioners and certify individuals who meet those standards. Mr. Lamb commented that doing so would ''protect the public from unqualified representation, spare FMCSA unnecessary administrative problems, and protect the interests of qualified professionals who are operating in the industry.''

ATLLP commented that all respondents should be represented in all formal proceedings by an attorney or FMCSA practitioner. Thus, ATLLP continued, certification of motor carrier safety practitioners would assure the industry it is receiving advice from a knowledgeable source, which will also foster efficient prosecution of enforcement actions within the standards of due process. To implement such a recommendation, ATLLP offered its resources to set up and administer a program for the certification and continuing education of FMCSA practitioners.

FMCSA Response. Carriers may select the representative of their choice in FMCSA proceedings. Creating an FMCSA practitioner ''bar'' would limit a carrier's option and perhaps impose additional economic expense. The Agency believes the potential benefit to the carrier or Agency does not currently justify the resources and expenses associated with developing and managing such a system.

Proposed § 386.6(b)—Service

The ATA commented that the Agency should include e-mail as an acceptable form of service.

FMCSA Response. Although the Agency notes the wider acceptability of e-mail, after consulting with information technology staff, it has been determined that the infrastructure necessary to ensure an adequate level of security measures and technical support are not currently available. Moreover, the costs associated with implementing such a system currently outweigh the potential benefits. As technological capabilities evolve, the issue may be revisited.

Section 386.14(c)—Reply

Ms. Delgado commented on the lack of clarity in this provision, especially with regard to when a default is found and a Notice of Final Agency Order is issued for failure to file a timely reply.

FMCSA Response. This provision has been revised to clearly convey the effect of a default and when a Final Agency Order will be issued as a result of a respondent's failure to reply to the Notice of Claim. Please see the detailed discussion in the Section-by-Section Analysis for § 386.14.

Section 386.14(c)(1)—Default

Ms. Delgado commented that the regulation states the Assistant Administrator can review a default only where the respondent first demonstrates excusable neglect, a meritorious defense, or due diligence. This procedure permits the Agency to default a respondent, then decide whether the default may be reviewed. Ms. Delgado expressed concern this would allow Agency Counsel to have both prosecutorial and decision-making functions and that the lifting of the default should be separated from the initial decision as to whether the default should be reviewed. Instead, Ms. Delgado suggested where there is excusable neglect, a meritorious defense, or due diligence, the Assistant Administrator should be able to review a default under any circumstances, and the default will be vacated only where a respondent can show excusable neglect, a meritorious defense, or due diligence.

FMCSA Response. The section has been revised to clarify the original intent of the Agency which is in fact to allow, upon petition, the review of default by the Assistant Administrator under any circumstances and only those demonstrating excusable neglect, a meritorious defense, or due diligence will be vacated.

Informal Hearings—Proposed § 386.16

The ATA commented that the Agency should appoint a neutral third-party mediator to preside over informal hearings and delete the waiver of formal hearing requirement when a carrier opts for informal hearing.

FMCSA Response. The purpose of the informal hearing option is to provide respondents with an opportunity to contest alleged violations in an efficient, often less costly proceeding. The use of a neutral third party mediator in an informal hearing would not serve this purpose effectively. While a mediator may facilitate negotiations in a matter, the goal of an informal hearing is to more quickly resolve a matter based on the arguments submitted in person by both parties.

As to ATA's comment regarding the waiver of a formal hearing, please see the detailed discussion in the Section-by-Section Analysis for § 386.16. The Agency believes the option for requesting an informal hearing versus a formal hearing is best left to the discretion of individual respondents based upon which option best suits their needs.

Proposed § 386.16(c)(4)(i)(B)—Informal Hearing Denied

Ms. Delgado commented that the section is confusing and needs to be clarified, citing the difficulty in tracking the time periods for response and differentiating which document is due at what time.

FMCSA Response. In response to comments, the Agency has revised this provision, finalized as § 386.16(b)(4)(A)(i), to clarify the procedural requirements of all parties in the event an informal hearing is denied. Please see the detailed discussion of § 386.16 in the Section-by-Section Analysis.

Section 386.31 Service—Official Notice

Ms. Delgado commented that there is no provision for the Agency decisionmaker to notify the parties that she/he intends to take official notice.

FMCSA Response. The provision has been re-inserted into the final rule.

Section 386.37—Discovery

SGI recommended that § 386.46 (Depositions) be revised to require the Agency to designate a headquarters official to testify on behalf of the Agency on matters regarding FMCSA policies, procedures, practices, and other relevant matters similar to the designation provided in Rule 30(b)(6) of the Federal Rules of Civil Procedure. This commenter also recommended FMCSA institute administrative procedures to enforce subpoenas or resolve other discovery requests.

FMCSA Response. Given FMCSA is a large agency with almost 1,200 employees, coupled with the acknowledgement that the facts and issues in each case differ, no single Agency official could possibly have the knowledge to address every possible policy, procedure, and practice issue which might arise in enforcement actions. The Agency therefore believes the better practice is to let parties seek the testimony of Agency officials as appropriate based upon the issues involved in the matter.

With regard to SGI's suggestions for delineating procedures for resolving discovery disputes, including enforcement of subpoenas, the Agency does not believe it appropriate for inclusion in the rules of practice. Because discovery does not begin until a matter is pending before the Assistant Administrator or referred to the Office of Hearings, the resolution of discovery disputes are within the discretion of the presiding decisionmaker and thus, a mechanism to resolve discovery disputes is at all times available to the parties.

Section 386.42—Written Interrogatories to Parties and § 386.43—Production of Documents and Other Evidence

SGI recommended the Agency create a legal ombudsman position to resolve costly issues of discovery. This individual should be given full power and authority to effectively resolve delay.

FMCSA Response. Creating such provisions in the regulations is not appropriate, as each civil penalty proceeding is different. SGI's recommendations are essentially seeking intervention and oversight by a Court Master. As stated in the previous response, discovery disputes are within the purview of the presiding decisionmaker and the level of detail that SGI seeks in the regulations lie beyond the scope of the rules of practice.

Section 386.42(c)—Written Interrogatories to Parties

Ms. Delgado commented the following provision needed clarification, as it appears to state the Agency will serve written interrogatories with the notice of claim: ''The party to whom the interrogatories are directed shall serve the answers and any objections within 30 days after the service of the interrogatories, except that a respondent may serve upon claimant its answers or objections within 45 days after service of the notice of claim.''

FMCSA Response. The Agency agrees and the phrase ''except that a respondent may serve upon claimant its answers or objections within 45 days after service of the notice of claim'' has been eliminated from the final rule.

Section 386.46—Depositions

Ms. Delgado commented that limiting discovery to commence upon referral of the matter to the Office of Hearings misinterprets 49 U.S.C. § 502(e)(1), as it provides, ''In a proceeding or investigation, the Secretary may take testimony of a witness by deposition and may order the witness to produce records. A party to a proceeding or investigation pending before the Secretary may take the testimony of a witness by deposition and may require the witness to produce records at any time after a proceeding or investigation is at issue on petition and answer.'' Ms. Delgado posits that civil penalty proceedings are commenced by the issuance of a notice of claim and parties must be allowed to take a deposition of a witness ''at any time'' after the issuance of the notice of claim, and not subsequent to the appointment of an Administrative Law Judge.

FMCSA Response. The Agency interprets the language of § 502(e)(1), ''at any time after a proceeding or investigation *is at issue* on petition and answer,'' (emphasis added) to mean that discovery commences after issuance of a Notice of Claim, service of the reply, and when the matter is pending before the Assistant Administrator or referred to the Office of Hearings. The issuance of a Notice of Claim alone is premature for the commencement of discovery, and cannot constitute a period of petition and answer, as there has been no opportunity for a respondent to answer the Notice of Claim. The term ''at issue'' is generally accepted in the legal community to be the point in litigation where initial and responsive pleadings such as claims and responses thereto have been served.

Section 386.54—Administrative Law Judge

Ms. Delgado commented on the changes proposed in this section, especially the deletion of language in current § 386.54(b). Ms. Delgado suggested the regulation provide an Administrative Law Judge with the powers provided under the APA to regulate the conduct of the proceedings.

FMCSA Response. The substance of the provision has been reinserted into the final rule. For a detailed discussion, please refer to the Section-by-Analysis under § 386.54, *infra.*

Section 386.64—Petitions for Reconsideration

ATA commented the Agency should permit a complete stay of a Final Agency Order while a petition for reconsideration is pending.

FMCSA Response. This change has been incorporated into the final rule.

Section-by-Section Analysis

The majority of the proposed changes to this SNPRM are discussed in detail in the Section-by-Section Analysis portion of this preamble. Minor revisions have been made throughout the final rule for clarity, readability, or consistency, and such changes will not be discussed.

This Section-by-Section Analysis describes the changes to current Part 386 as implemented by this final rule, and provides justification for the changes made.

Subpart A—Scope of Rules; Definitions and General Provisions

The title of Subpart A is revised to Scope of Rules; Definitions, and General Provisions to reflect the inclusion of several preliminary procedural rules.

Section 386.1 Scope of Rules in This Part

FMCSA makes no changes to the language in current § 386.1.

Section 386.2 Definitions

Based on internal Agency considerations, and to provide clarity in the use of terms throughout this Part, FMCSA finalizes § 386.2 with the following revisions. The term *Civil forfeiture proceedings* is revised as *Civil penalty proceedings* to make the use of the term consistent throughout revised Part 386. In addition, the statutory citations provided in the definition of *Civil penalty proceedings* have been removed, thus avoiding administrative updates to Part 386 each time new legislation is passed. The term *Dockets* has been added to this section because it is used throughout this Part, and the definition reads as all documents filed

before an Agency decisionmaker must be submitted to the Department's docket management system. The term *Commercial regulations* has been revised to *Federal Motor Carrier Commercial Regulations (FMCCRs)* to conform to usage in other parts of the regulations. The definitions of *Interstate commerce* and *State* were removed from this section as unnecessary because the terms are not used in Part 386.

The revised definition of *Default* now accurately reflects all possible instances in which a default may occur. The SNPRM proposed definition only provided for a failure to reply or provide an adequate reply in the time required; however, a default can also be found where a carrier has omitted or failed to perform a legal duty within a specified period. Whether or not a reply is adequate is a determination for the Assistant Administrator, and thus, a default issued by the service centers will not be based on an evaluation of the adequacy of a reply.

The definition of *Field Administrator* is added to this section because the Field Administrator of each regional service center is responsible for prosecuting civil penalty proceedings before the Agency decisionmaker.

The revised definition of *Final agency order* now more accurately provides for all possible instances in which a final agency order would apply. The final agency order is a crucial benchmark in administrative adjudication, as it constitutes the final agency action of which a petitioner may seek review. The existing definition in current § 386.2 does not fully capture the situations in which a final agency order will result. Moreover, the definition of final agency order is updated to reflect revisions to other sections in this Part.

The substantive definition of *Formal hearing* has not changed; however, the language was reworked for greater readability. The definition of *Informal hearing* is revised to include more specificity to the process. For example, discovery is not permitted and the informal hearing will not have a transcribed record. The Hearing Officer's written report and recommendations will serve as the record of the proceedings. Therefore, the revised definition highlights the procedural difference in informal hearings.

The definition of *Notice of Claim* (NOC) was modified to reflect that it is the initial document issued by the Agency to propose a civil penalty for alleged violations. The Agency wanted to emphasize the stage in the proceedings in which an NOC is issued and fine-tune the language to reflect the revisions made throughout this Part.

The definition of *Notice of Violation* was revised to reflect the current reference to the FMCCRs. The definition of Service was removed because its definition is implicit in § 386.6 and need not be defined separately in this section.

The definition of *Submission of written evidence without hearing* was modified to reflect the change in terminology from ''formal oral hearing'' and ''informal oral hearing'' as proposed in the October 2004 SNPRM, in favor of ''formal hearing'' and ''informal hearing.'' The definition was also revised to read as a submission, rather than as a ''right of a respondent to present,'' because both the Field Administrator and the respondent may submit written evidence without a hearing.

Section 386.3 Separation of Functions

FMCSA adds § 386.3 to delineate the separation of functions within the Office of Chief Counsel. Attorneys in the Enforcement and Litigation Division serve as enforcement counsel in the prosecution of all cases brought under Part 386, and report to the Assistant Chief Counsel for Enforcement and Litigation and the Deputy Chief Counsel. Attorneys serving as Adjudications Counsel as well as the Special Counsel to the Chief Counsel, advise the Agency decisionmaker regarding cases brought under Part 386, and report to the Chief Counsel. The inclusion of such a provision in the regulations ensures fairness to the motor carrier, by clearly defining the relevant functions of the divisions within the Office of Chief Counsel. By separating the attorneys prosecuting enforcement actions from the attorneys advising the Agency decisionmaker, a motor carrier is assured that those who prosecute civil penalty cases are separate from those who advise the Agency decisionmaker. References to the ''staff of the Chief Counsel'' are deleted as vague, and more specific terms for the separation of functions by division were added to clarify § 386.3(c) and (d).

Section 386.4 Appearances and Rights of Parties

FMCSA adds § 386.4, which incorporates part of existing § 386.50(a) in its entirety and the additional procedural requirement for representatives to file a notice of appearance in the action before participating in the proceedings. Including such a requirement will promote administrative efficiency, as all parties will be uniformly notified of representation, and thus ensure that all documents are served on the correct parties in a timely fashion. In addition, an attorney or representative must file a timely notice of all changes in contact information, as outdated information prevents the proper service of all documents, including Orders, in a proceeding.

A new paragraph (c) has been added to this section. It is an administrative provision to clarify that a separate notice of appearance must be filed in each case, thus preventing a representative from filing a single appearance to apply to numerous cases.

Section 386.5 Form of Filings and Extensions of Time

FMCSA adds § 386.5, which incorporates current § 386.33, Extension of time, and also establishes length and content limits, and other administrative requirements for filing documents. Based on internal Agency feedback, and in an effort to facilitate the processing of all documents filed, a new paragraph (a) is added to specify all filings must be typed or legibly handwritten.

A new paragraph (b) is added, requiring a short factual statement and the relief requested in each document filed. This provision will also enable the Agency to process enforcement cases more efficiently because the issues involved and the relief sought will be known from the outset, thus less time will be spent managing documents lacking clarification. This paragraph also places parties on notice that all documents filed in the proceedings will be publicly available in the Docket, unless otherwise ordered.

Paragraph (f) has been modified for greater readability and clarity, and now includes a reference requiring all documents be filed and served in accordance with §§ 386.6 and 386.7, with a copy served on the presiding decisionmaker over the proceeding at the time of the filing. A general reference to the presiding decisionmaker conveys the intent of the regulation, without need to specify in separate paragraphs, every procedural scenario before each Agency decisionmaker in which a copy of motion for extension of time must be provided.

Section 386.6 Service

FMCSA adds § 386.6 as proposed in the October 2004 SNPRM, with minor revisions. Paragraph (a) has been revised to reflect more accurate terminology by replacing ''registered agent'' with ''designated agent for service of process,'' because the term registered agent carries independent legal

significance which does not apply to these rules. Therefore, the term ''designated agent for service of process'' was inserted in order to describe a party's attorney of record or representative as reflected in a § 386.4 filing or a BOC–3 licensing filing to receive service. Section 386.6 incorporates the substance of § 386.31(b), and adds the following elements: (1) Specifies that the Agency must ensure service of the notice of claim; (2) includes commercial delivery services and facsimile (with consent of the parties) as additional options for effecting service; and (3) specifies other administrative provisions regarding service.

Section 386.7 Filing of Documents

FMCSA adds § 386.7 as proposed in the October 2004 SNPRM, with some minor revisions. After internal Agency consideration, the need to specify clearly when and how to tender a document for filing with U.S. DOT Dockets was recognized for inclusion in the final rule. It is also important to distinguish the difference between filing and serving a document. To be recognized on the record, and officially filed before the Agency decisionmaker, a document must be filed with the Docket Management System. The same document must then be sent to all parties listed on the certificate of service, which constitutes service.

Section 386.8 Computation of Time

FMCSA adds § 386.8 as proposed in the October 2004 SNPRM. The provision contains current § 386.32 in its entirety, which has been moved to Subpart A to locate it with other preliminary procedural requirements.

Section 386.11 Commencement of Proceedings

FMCSA adds § 386.11 as proposed in the October 2004 SNPRM with one minor revision and one clarification. Driver qualification proceedings under § 386.11(a) remain unchanged. The Notice of Investigation has been eliminated, and paragraph (b) now adopts the Notice of Violation (NOV). FMCSA will use the NOV as a means of notifying any person subject to the rules in this part that the Agency has received information indicating violations of the FMCSRs, HMRs, or FMCCRs, without initiating a civil penalty proceeding. This information may come from investigations, audits, complaints, or any other source of information.

The NOV will not be used to propose civil penalties. Rather, the goal of utilizing the NOV, in keeping with the overall mission of the Agency, is to gain compliance. The NOV offers a motor carrier an opportunity to take corrective action or cure other alleged violations before the Notice of Claim (NOC) stage is reached. If such deficiencies have not been addressed to the satisfaction of the Agency, then the matter may proceed to the issuance of a NOC. In the final provision the Agency clarified that a NOV is not a prerequisite to the issuance of a NOC. The use of the NOV is solely within the discretion of the Agency. Therefore, a NOV need not be issued prior to a NOC.

The content of current § 386.11(b) is redesignated as paragraph (c) of this section. Minor revisions have been made for simplicity and clarity. Instead of the term ''amount being claimed,'' of existing 386.11(b)(1)(iii), has been rephrased as ''proposed civil penalty'' in 386.11(c)(1)(iii) to more accurately capture the legal status of a civil penalty when referenced in a NOC.

Section 386.12 Complaint

FMCSA removes paragraphs (a) and (b) of the existing section, and redesignates paragraphs (c)–(e) as (a)–(c). This change is adopted to make it consistent with the elimination of the notice of investigation of § 386.11. With the elimination of the notice of investigation, existing § 386.12(a) and (b) are no longer necessary, as they govern the process for initiating and acting on a notice of investigation. With this change, the newly redesignated paragraph (b) was updated to reflect the correct internal citations. An existing error in the spelling of ''frivolous'' in paragraph (b) was also corrected for the final version of this section.

Section 386.13 Petition to Review and Request for Hearing: Driver Qualification Proceedings

FMCSA makes no changes to the language in current § 386.13.

Section 386.14 Reply

The title of this section is revised to Reply. This section is finalized with some revisions. The title of paragraph (b), which provides the choices for action once a motor carrier is served with a NOC, is now called ''Options for reply'' as opposed to ''Contents of reply,'' because this is a more accurate description of the provision.

FMCSA is finalizing § 386.14(a) which changes the time period for a reply from 15 days to 30 days, as proposed in the October 2004 SNPRM. Comment was sought from the public regarding this departure in the interpretation of 49 U.S.C. § 521(b)(1)(A), which states: ''The notice shall indicate that the violator may, within 15 days of service, notify the Secretary of the violator's intention to contest the matter.'' No comments in response to this request were received.

Upon re-examination of this section for the October 2004 SNPRM, the Agency determined the permissive nature of the word ''may'' in the statute allows the Agency to expand the time period for a respondent to contest a claim, and therefore, the 15-day period may be expanded to 30 days to allow for sufficient time to reply.

Paragraph (b) provides the contents of a reply to a NOC. Respondent may choose to pay the civil penalty, request administrative adjudication, or seek binding arbitration. The notable revision in this paragraph since the proposal is the removal of settlement negotiations as a formal option to a reply to the NOC. Settlement may occur at any time during the civil penalty proceeding at the discretion of the parties. Moreover, because negotiations may be conducted simultaneously with the other options for a reply, it was decided the stand-alone option to proceed was not necessary. Should settlement negotiations reach a stalemate, it is vital to the efficiency of the proceeding to utilize other options for contesting the claim during the same period so as not to delay the resolution of a NOC.

Paragraph (c) provides for what occurs in the event of a respondent's failure to reply within the 30-day period. In such a case, the Field Administrator may issue a document called a ''Notice of Default and Final Agency Order.'' The introduction of the Notice of Default and Final Agency Order is a new revision in the final rule. Upon consideration of how best to notify respondents of their failure to reply, in conjunction with the administrative need to note a default for subsequent stages of a civil penalty proceeding, FMCSA has devised the Notice of Default and Final Agency Order to specify when a NOC will become the Final Agency Order. The date on which a Final Agency Order is effective dictates the timing of subsequent action by both the Agency and the respondent. Therefore, § 386.14(c)(1) specifies that in the event of a default, the Final Agency Order becomes effective five days after the service of the Notice of Default and Final Agency Order. This document conveys the legal effect of a failure to reply clearly to the respondent, and provides a date certain from which a petition for reconsideration or an appeal of final agency action may be tracked.

In the past, often when a respondent failed to reply, the NOC became the Final Agency Order, but the respondent

then filed a petition for reconsideration under § 386.64. As a result, the substantive reply is submitted for the first time as a basis for reconsideration. Paragraph (c)(2), and § 386.64(b) clearly define what may be considered in a petition for reconsideration when a respondent has failed to reply to the NOC in the time allotted. This provision puts respondents on notice that if they fail to reply during the 30-day period, a petition for reconsideration does not serve as a second opportunity to respond to the alleged violations.

Lastly, under § 386.14(c), paragraph (c)(3) notifies respondents that failure to pay the civil penalty as directed in the Final Agency Order will trigger an additional civil penalty under Subpart G of Part 386.

FMCSA is finalizing § 386.14(d), Request for administrative adjudication, with some minor modifications from the proposed language. A request for administrative adjudication is the means by which a respondent may contest the alleged violations in a NOC. The final provision now includes a statement clarifying that once an administrative adjudication option is elected, it is binding on the respondent to promote the efficiency and predictability of the enforcement process. We also included a requirement that the reply be in writing. This change was made to prevent respondents from assuming that oral communications with the service centers or other FMCSA staff constitute a reply within the meaning of the regulation. In order to avoid a default, a respondent must submit a timely written reply stating the grounds for disputing the claim.

A reply must contain certain elements. The first requirement for a reply requesting administrative adjudication is a statement in which respondent must admit or deny each and every allegation in the NOC. Any allegation that is not specifically denied will be considered admitted. A one-sentence denial in response to all allegations, *e.g.*, ''I deny all allegations'' or ''I am not guilty,'' or other blanket denial of the NOC, without addressing each of the alleged violations one by one will not be accepted as a proper reply, and may be considered a default by the Assistant Administrator if the Field Administrator makes such a motion. For clarity, the term ''Claimant,'' as proposed in the October 2004 SNPRM, is replaced throughout the final rule with the term ''Field Administrator,'' because claimant is a confusing term in the regulation.

The second requirement for a reply requesting administrative adjudication is a statement of all known affirmative defenses, under § 386.14(d)(1)(ii). Affirmative defenses are different from admitting or denying the truth of the alleged violation. Rather, affirmative defenses are responses attacking the legal right of the Agency to bring the civil penalty proceeding. Therefore, attacks on the jurisdiction, limitations, or procedure of the civil penalty proceedings are affirmative defenses. Any such defenses must be stated at the outset in the reply.

The last requirement for a reply requesting administrative adjudication, § 386.14(d)(1)(iii), has been revised from the proposed provision to clarify that respondents may choose only one of the three administrative adjudications options provided. Thus, a sufficient reply requesting administrative adjudication must offer three basic points of information: (1) Admit or deny the substance of the allegations; (2) list any known affirmative defenses; and (3) choose between an informal hearing, formal hearing, or proceed on the papers and submit written evidence.

Section 386.16 Action on Replies to the Notice of Claim

The title of this section is revised from ''Action on petitions or replies'' to ''Action on replies to the notice of claim.'' Upon further consideration of the functionality of this provision, certain portions of this provision have been revised from the proposed version to provide all parties with sufficient time to respond.

As discussed in the analysis of § 386.14, the stand-alone option of settlement negotiations has been eliminated from the reply process. Although parties are free to discuss settlement throughout a civil penalty proceeding, a separate time period in which only settlement negotiations will occur will no longer serve as an option for a reply. Accordingly, the procedures set forth in proposed § 386.16(a) are deleted.

Submission of written evidence without a hearing: First, in requests to submit written evidence without a hearing, now under finalized § 386.16(a), Agency Counsel is given 60 days to serve all written evidence following service of the respondent's reply, as opposed to the proposed 40 days. The period for submission of evidence has been extended to accommodate the variety of complexity in civil penalty proceedings, thus ensuring all submissions have sufficient time to be thoroughly researched, investigated, and prepared. This extra time also allows for settlement negotiations to continue should the parties choose. Accordingly, § 386.16(b) extends the period for respondent's submission of written evidence and argument to 45 days, instead of the proposed 30 days. Parties are also reminded all written evidence must be served on the Assistant Administrator in accordance with §§ 386.6 and 386.7. Agency Counsel will then have 20 days to reply to respondent's submission, an extension from the proposed 15-day time period.

Requests for hearing: The final version of § 386.16(b) provides for hearings generally. The Assistant Administrator will determine whether a dispute of material fact is at issue in the matter, and if so, the matter will be referred to the Office of Hearings. If a dispute of a material fact is not at issue, the Assistant Administrator may issue a decision based on the written record.

The final version of § 386.16(b)(2) changes the time period for the Field Administrator to consent or object to a hearing request from the proposed 20-day period to 60 days. In addition, the Field Administrator must either consent or object with basis to a hearing request. An objection with basis means an objection qualified by a simple summary of the basis of the objection. Thus, the time period in which to respond to a hearing request has been extended to allow sufficient time to provide a basis of objection. Also included in the final § 386.16(b)(2) is a provision notifying the parties that failure to serve an objection within the 60-day period may result in automatic referral to the Office of Hearings. This provision was included to provide all parties with a reliable indicator of timely proceedings, and prevent cases from falling through the cracks due to lags in procedural responses.

Requests for formal hearing: Specific provisions governing requests for a formal hearing, or referral to the Office of Hearings for assignment to an administrative law judge, have been modified to simplify the process, The proposed version of 386.16(b)(2) and (3) had provided 20 days for the Field Administrator to serve a notice of consent or objection, in effect a yes-no response, and then an additional 60 days to file a motion for final agency order. Respondent was then given 30 days to respond to the motion. In the finalized version of § 386.16(b)(3), the 60-day period for the Field Administrator to file a motion for final agency order is removed. The Agency believes the introduction of an objection with basis will serve as a reasonable indicator of the Agency's relevant issues in the matter, and thus, the need for the imposition of a strict time period to file such a motion is not warranted.

Moreover, if a motion for final agency order is delayed for an inordinate amount of time after service of the objection with basis, respondent may file an appropriate motion before the Assistant Administrator.

Requests for informal hearing: FMCSA adds § 386.16(b)(4) with some revisions for clarity, and another change in time periods. An informal hearing may serve as a speedier alternative to the formal hearing process, as it requires less in the way of written submissions independent of the NOC and the respondent's reply. Section 386.16(b)(4)(A) is finalized as proposed, with the exception of redesignating § 386.16(b)(4)(i) to § 386.16(b)(4)(A)(i) for clerical consistency. In this streamlined process, a Field Administrator may object to a request for an informal hearing by serving an objection with basis, the NOC, and respondent's reply on the Assistant Administrator, who will grant or deny the request.

As provided in finalized § 386.16(b)(4)(A)(i), if an informal hearing request is granted, a hearing officer will be assigned to the matter. No discovery will be conducted, nor will further motions be considered. All parties may present written and oral evidence, and the hearing officer will issue a report of the findings of fact and a recommended disposition in the case to the Assistant Administrator. The report will serve as the sole written record of the hearing. After consideration of the hearing officer's report, the Assistant Administrator will issue a Final Agency Order or other such order as deemed appropriate. Although participating in an informal hearing waives a respondent's right to a formal hearing, this option may serve the needs and interests of respondents to participate in an adversarial process that may offer a quicker resolution, a minimum of additional written submissions, in an informal, simplified proceeding. Respondents are not obligated to choose the informal hearing; the availability of such an option, however, may be beneficial to a respondent's interest.

In the event an informal hearing is denied, the Field Administrator must serve a motion for final agency order, unless otherwise directed. As finalized, § 386.16(b)(4)(A)(ii) differs from the proposed version by eliminating the period during which the Field Administrator must file a motion for final agency order. However, once the Field Administrator files such a motion, respondent's response period has been increased to 45 days. The time periods were revised to bring uniformity to the time periods established throughout this part. Moreover, the mere fact that an informal hearing is denied does not indicate the complexity of a particular case, and pleadings in such cases should not be given less preparation time.

The finalized § 386.16(b)(4)(A)(iii), which remains unchanged from the proposed version, provides the Assistant Administrator with the discretion to refer any matter for formal or informal hearing, even in cases where respondent may seek only an informal hearing. This provision is important because it allows flexibility of procedures for the agency decisionmaker to resolve a matter based on the changing needs of each case.

Section 386.17 Intervention

FMCSA makes no changes to the language in current § 386.17.

Section 386.18 Payment of the Claim

Current part 386 does not specifically address payment of claims. Therefore, FMCSA is finalizing § 386.18 with a few important clarifications which were not present in the proposed provision.

As per § 386.18(a), payment of the full amount proposed before a Final Agency Order is issued will resolve the claim. The agency has clarified § 386.18(b) in order to reflect no written reply is necessary if a respondent chooses to pay the full amount proposed within the 30-day period for replies. The finalized provision also specifies that payment must be served on the Field Administrator, *i.e.*, by any of the means listed in § 386.6, and not ''postmarked.'' If, however, a respondent has submitted in writing that it intends to pay the civil penalty, but fails to do so within the 30-day period, failure to serve payment will constitute a default and may result in the NOC becoming the Final Agency Order.

Finally, because payment is presumed to constitute admission, respondents have an opportunity to note their objections for the record. Therefore, § 386.18(c) has been revised since proposed, to specify that if a respondent objects to the admission of all facts alleged in the NOC upon payment, such objection must be submitted at the time of payment, or is otherwise waived.

Section 386.18(c) is also important because future Agency enforcement actions may be based on, and certain consequences may flow from, prior and continued violations of the safety regulations. Therefore, compliance with paragraph (c) will identify the implications of prior enforcement actions as related to maximum civil penalty cases under section 222 of the MCSIA. *See* 49 U.S.C. 521, note.

Subpart C—Consent Orders

The title of Subpart C is revised to Settlement Agreements.

Section 386.21 Compliance Order

Current § 386.21 is deleted in its entirety, as it pertains to the notice of investigation, which has been eliminated from the regulation.

Section 386.22 Settlement Agreements and Their Contents

The title of this section is revised to ''Settlement agreements and their contents'' because it is a more accurate description of the provision. This provision is finalized with revisions from the proposed version. The parties to a settlement agreement are the respondent motor carrier, and the Field Administrator of the service center from which the NOC originated. Therefore, § 386.22(a)(1) has been corrected to reflect that the Field Administrator or his/her designee is the proper Agency representative to execute settlement agreements. The contents of a settlement agreement are set forth in § 386.22(1)(i)–(vii), with the revision of § 386.22(a)(1)(vi) to include a provision regarding non-monetary terms of an agreement, such as holding a civil penalty in abeyance while compliance is achieved, or maintaining a satisfactory rating for a specified period of time. If a respondent fails to pay or comply with the terms of the agreement, the civil penalty may be reinstated and any deductions in the original amount proposed will become due immediately. Finally, the Agency finalizes § 386.22(a)(1)(vii) as proposed, and the settlement agreement becomes the Final Agency Order in the proceeding.

As noted above, settlement agreement may also contain conditions, actions or provisions to redress the violations alleged in the NOC. Therefore, the parties are free to include any such terms in the agreement. Accordingly, § 386.22(a)(2) is finalized as proposed. Section 386.22(a)(3) is finalized with revisions to clarify that settlement agreements must be approved by the Agency decisionmaker, and thereafter, the settlement agreement becomes a Final Agency Order. To preserve the integrity of an agreement while pending approval by a decisionmaker, this provision also includes that consent to a settlement agreement may not be withdrawn for a 30-day period.

Section 386.22(b) through (e) are all finalized with the same revision from the proposed version which specifies when a settlement agreement becomes

the Final Agency Order. The date on which a Final Agency Order becomes effective is important in subsequent proceedings, such as tracking due dates for payment, instituting out-of-service orders, and filing petitions for reconsideration. Thus, in proceedings not before an Agency decisionmaker, i.e., still handled at the service center, a settlement agreement becomes the Final Agency Order upon the date of execution by the Field Administrator or his/her designee. In proceedings before an Agency decisionmaker, a settlement agreement becomes the Final Agency Order as of the date the decisionmaker enters an order accepting the agreement.

Section 386.23 Content of Consent Order

This section is deleted in its entirety, as it pertains to the notice of investigation, which has been eliminated from the regulation.

Subpart D—General Rules and Hearings

Section 386.31 Service

This section is deleted in its entirety as superseded by § 386.6.

Section 386.32 Computation of Time

This section is deleted in its entirety as superseded by § 386.8.

Section 386.33 Extension of Time

This section is deleted in its entirety as superseded by § 386.5.

Section 386.31 Official Notice

This section has been revised since proposed to properly capture the procedure for when an Agency decisionmaker takes official notice of both facts and documents. The proposed provision did not require notice to all parties when a decisionmaker takes official notice. Such a provision has now been added, as well as the inclusion of a 10-day period for objections.

The Agency has also modified the language to state that if a Final Agency Order has been issued, and the decision rests on a material fact of which the Agency decisionmaker took official notice, a party may challenge the official notice under § 386.64 petitions for reconsideration. This revision prevents the disruption of proceedings before an Administrative Law Judge or Assistant Administrator for taking of official notice. A party must be able to assert that the decision rests on a material and disputable fact of which the Agency decisionmaker has taken official notice.

Section 386.34 Motions

Current § 386.35 is redesignated § 386.34, and finalized as proposed. Parties are now given 20 days, rather than seven days, for a reply to a motion that is applying for an order or ruling not otherwise covered in Part 386, *i.e.*, not a motion for Final Agency Order under § 386.36, a motion for rehearing or modification under § 386.66. This is to allow sufficient time for all replies to motion, as seven days appeared too short in light of the revised time periods for other filings.

Section 386.35 Motions To Dismiss and Motions for a More Definite Statement

This section is redesignated as § 386.35.

Section 386.36 Motions for Final Agency Order

The Agency finalizes § 386.36 Motions for final agency order, which has been revised since proposed. This provision governs all aspects of a motion for final agency order, including who may file, what must be included, and the period for an answer. Any party may file a motion for final agency order. If the matter is still handled in the service center, then the filing of a motion for final agency order will trigger the transfer of the case to the Agency decisionmaker because motions for final order cannot be decided on by the Field Administrator, as s/he is a party to the proceeding. The form and content provision which were previously proposed under § 386.36(a) have been moved to § 386.36(b), and requires a motion and memorandum of law, and all responsive pleadings and documents in the case. The agency also requires all motions for final agency order be accompanied by written evidence under § 386.49. Respondents have often overlooked the written evidence requirement, or otherwise failed to include an affidavit stating personal knowledge of the facts alleged, or exhibits with an affidavit identifying the exhibits and providing its source. Therefore, the reference to § 386.49 was included to ensure all parties are on notice to submit written evidence.

Analogous to a summary judgment standard, the Agency decisionmaker may issue a Final Agency Order if after reviewing the record in the light most favorable to the non-moving party, there are no genuine issues of material fact. Lastly, a non-moving party is given 45 days, as opposed to 30 days as proposed, to serve a response to the motion for final agency order. The time period was extended to 45 days to make most time periods consistent and predictable throughout this Part.

Section 386.37 Discovery

The title of this section is revised to ''Discovery.'' This provision incorporates the discovery methods listed in existing § 386.37: depositions, interrogatories, production of documents or other evidence for inspection, physical and mental examinations and requests for admissions. The Agency added a new provision since the regulation was proposed, § 386.37(b), which states discovery may commence only when a matter is pending before the Assistant Administrator or referred to the Office of Hearings.

The idea of discovery commencing after a matter has been referred to the Office of Hearings was introduced in the October 2004 SNPRM, under § 386.46 for depositions. It has now been added to the general discovery provision of this section. By allowing discovery to commence only after the matter is before the Assistant Administrator or an Administrative Law Judge, any discovery dispute may be resolved properly by the decisionmaker, and thus prevent further delay of the proceedings. If discovery begins immediately upon issuance of the NOC, discovery disputes may arise while a matter is still pending in the service center, and thus delay or unduly complicate the proceeding with premature discovery issues. Moreover, the case it technically not at issue until the initial pleadings, including the notice and any response have been served.

Finally, upon re-examination, a revised 386.37(c) now states that where a procedural matter is not addressed in the Agency's rules, the Federal Rules of Civil Procedure may serve as guidance for the decisionmaker, not the Federal Rules of Evidence as previously proposed. The prior text incorrectly referred to the Federal Rules of Evidence when it should have cited the Federal Rules of Civil Procedure.

Section 386.38 Scope of Discovery

FMCSA makes no changes to the language in current § 386.38.

Section 386.39 Protective Orders

FMCSA makes no changes to the language in current § 386.39.

Section 386.40 Supplementation of Responses

FMCSA makes no changes to the language in current § 386.40.

Section 386.41 Stipulations Regarding Discovery

FMCSA makes no changes to the language in current § 386.41.

Section 386.42 Written Interrogatories to Parties

FMCSA is finalizing this section, which has been revised since proposed. The substance of current § 386.42 is incorporated into the section, while adding page limits and time periods in which to exchange interrogatories. Consistent with the definition of commencement of discovery to begin when a matter is pending before the Assistant Administrator or Administrative Law Judge, § 386.42(a) has been so modified.

Section 386.42(e) had proposed a copy of interrogatories, answers and related pleadings be served on the Assistant Administrator or Administrative Law Judge. However, upon reconsideration, the Agency has decided to eliminate this requirement, as it could unnecessarily increase the volume of documents to be included in the docket. Accordingly, a simple procedure has been created to state for the record the parties have commenced discovery. As per revised § 386.42(e), all parties must file a notice of discovery, and are obligated to serve a copy of interrogatories, answers, and pleading to all parties in the proceeding. This provision will advise the decisionmaker as to the procedural status of the matter without unduly burdening the administrative record, and the parties' obligations, while facilitating discovery.

Section 386.43 Production of Documents and Other Evidence

FMCSA makes no changes to the language in current § 386.43.

Section 386.44 Request for Admissions

FMCSA makes no changes to the language in current § 386.44.

Section 386.45 Motion to Compel Discovery

FMCSA makes no changes to the language in current § 386.45.

Section 386.46 Depositions

FMCSA finalizes this section to provide procedures for depositions. Three notable provisions have been added to facilitate the process: § 386.46(a)(3) through (5) give the parties discretion to take depositions by telephone or other remote methods; provides that a notice of deposition may include a subpoena duces tecum, which should specify materials to be produced at the deposition; and if depositions are to be taken by videotape or audiotape, the method of recording must be so noticed.

As noted in previous discussions, discovery commences once a matter is pending before the Assistant Administrator or an Administrative Law Judge. Prior to this stage, under § 386.46(c), which is finalized as proposed, either party may petition the Assistant Administrator to conduct depositions on a showing of good cause.

Based on further consideration to improve the discovery process, paragraph (d) has been removed and a new paragraph (d) has been added to the final rule, which provides for written depositions. A notice and written questions may be served to a deponent. Within 14 days, cross-questions may be served on all other parties. Seven days after service of cross-questions, redirect questions may be served, followed by re-cross within seven days. The written deposition is an alternative to an oral deposition, which may save parties costs incurred discovery. The remainder of this section is finalized as proposed, with minor edits for accuracy.

Section 386.47 Use of Deposition at Hearings

FMCSA makes no changes to the language in current § 386.47.

Section 386.48 Medical Records and Physicians' Reports

FMCSA makes no changes to the language in current § 386.48.

Section 386.49 Form of Written Evidence

Although this revision was not proposed in the October 2004 SNPRM, the Agency believed it necessary to modify this section to reflect the practical implications of the written evidence requirement. Instead of requiring an affidavit, a written statement must now accompany all written evidence. A written statement is a more accurate assessment of the submissions typically provided by respondents, and while an affidavit holds legal significance, such significance would serve no further purpose. The written statement is less a matter of verification than that of identification and description. With that in mind, it is sufficient for parties to provide a written statement and thus, a requirement of form over substance is not essential to this provision.

Section 386.50 Appearances and Rights of Witnesses

This section is deleted in its entirety as superseded by § 386.4.

Section 386.51 Amendment and Withdrawal of Proceedings

FMCSA is finalizing § 386.51(b), which has been revised since proposed. A party may withdraw his or her pleadings more than 15 days prior to the scheduled hearing without the approval of the Assistant Administrator or the Administrative Law Judge. Withdrawal within the 15 days prior to the scheduled hearing would still require approval of the decisionmaker. Withdrawal of pleadings will be granted absent a finding that the withdrawal will result in injustice, prejudice, irreparable harm, or is otherwise contrary to the public interest. The public interest exception is the only revision to this section and was included to ensure full consideration before a pleading is withdrawn.

Section 386.52 Appeals From Interlocutory Rulings

After determining that the existing provision for interlocutory appeals did not sufficiently address the issues that may arise, the Agency proposed a more detailed provision for interlocutory appeals in the October 2004 SNPRM. Upon further consideration, and with the aid of feedback received internally, proposed § 386.52(c) was removed as unnecessary, as § 386.52(b) sufficiently covers interlocutory appeals. Moreover, it is possible that a party may use interlocutory appeal of right as a stalling tactic. While § 386.52(e) gives the Assistant Administrator the discretion to reject frivolous, repetitive, or dilatory appeals, a separate enumeration of interlocutory appeals of right may be excessive. Given that the overarching mission of the Agency, and the underlying goal of a civil penalty proceeding is safety, unnecessarily long delays will only postpone compliance.

Section 386.53 Subpoena, Witness Fees

FMCSA makes no changes to the language in current § 386.53.

Section 386.54 Administrative Law Judges

Upon reconsideration of this section as proposed, the Agency revised the provision to accurately reflect the powers of an Administrative Law Judge. Similar to the language in existing § 386.54, the Agency revised § 386.54(a) and inserted § 386.54(a)(11) to reincorporate the catch-all provision regarding the powers of an Administrative Law Judge, whereby s/he may take all necessary actions to ensure a fair and impartial hearing. Consistent with this goal, the APA was added to § 386.54(a)(6) as a reference to regulate the course of an administrative adjudication.

References to interlocutory appeals of right have been deleted from § 386.54(b). Aside from these changes,

the remaining provisions of § 386.54 are finalized as proposed.

Section 386.55 Prehearing Conferences

FMCSA makes no changes to the language in current § 386.55.

Section 386.56 Hearings

FMCSA makes no changes to the language in current § 386.56.

Section 386.57 Proposed Findings of Fact, Conclusions of Law

FMCSA makes no changes to the language in current § 386.57.

Section 386.58 Burden of Proof

FMCSA makes no changes to the language in current § 386.58.

Section 386.61 Decision

This provision is modified to make it consistent with the introduction of the Hearing Officer and his/her role in the decision-making process. Therefore, the Agency added § 386.61(b), which provides a Hearing Officer will submit a report of findings of fact and recommended disposition to the Assistant Administrator within 45 days after the conclusion of an informal hearing. The Assistant Administrator will then issue a Final Agency Order adopting the report or make other such determinations as appropriate. It is important to note this procedure differs from an Administrative Law Judge's decision. An Administrative Law Judge's decision becomes the decision of the Assistant Administrator 45 days after it is served if the parties do not seek review of the decision. Upon review of a decision, the Assistant Administrator may adopt, modify, or set aside the Administrative Law Judge's findings of fact and conclusions of law, remand the proceedings with instructions, or issue a Final Agency Order disposing of the proceedings. In contrast, a Hearing Officer's report and recommendation are advisory, and does not constitute final agency action until the Assistant Administrator issues a Final Agency Order at the conclusion of the proceedings.

Section 386.62 Review of Administrative Law Judge's Decision

FMCSA makes no changes to the language in current § 386.62.

Section 386.63 Decision on Review

FMCSA makes no changes to the language in current § 386.63.

Section 386.64 Reconsideration

FMCSA is finalizing this provision, which has been revised since first proposed, to reflect changes consistent with other sections of this Part. Section 386.64(a) now provides a petition for reconsideration must be filed 20 days following service, as opposed to issuance, of the Final Agency Order.

After further consideration of whether to stay only the civil penalty once a petition for reconsideration has been filed, the Agency decided that staying the civil penalty in effect stays the entire case. Because out-of-service orders in civil penalty proceedings are issued for failure to pay, no other action may be taken on a case if the civil penalty is stayed. Therefore, this change has been applied to the final version of the section.

Section 386.64(b) clarifies that the only issue to be considered under the petition for reconsideration of a final agency order based on default is whether a default occurred. Therefore, in a petition for reconsideration in defaults issued under § 386.14(c), a Final Agency Order may only be vacated where a respondent demonstrates excusable neglect, a meritorious defense, and due diligence in seeking relief. Having this information in the regulations should relieve parties, as well as the decisionmaker, of the burden of addressing other issues in these petitions for reconsideration. Newly adopted paragraphs (c)–(e) provide timelines for serving answers and when a decision must be made by the Assistant Administrator.

Section 386.65 Failure To Comply With Final Agency Order

FMCSA makes no changes to the language in current § 386.65.

Section 386.66 Motions for Rehearing or for Modification

It was proposed that this section be removed from the regulation. Upon further consideration, it was decided to re-insert the provision as it appears in existing § 386.66. The Agency had suggested its removal because it was assumed all motions would be governed by § 386.34. Internal comments have brought this matter to the Agency's attention, as motions for rehearing or for modification are instrumental in the enforcement of settlement agreements. Settlement agreements may often contain terms requiring more than a year to conclude. This section provides a mechanism for Agency Counsel to seek rehearing or modification where respondents have failed to comply with the Final Agency Order.

Section 386.67 Appeal

The title of this section is changed from ''Appeal'' to ''Judicial review.'' FMCSA finalizes this section as proposed, with two revisions for consistency. Current § 386.67 is divided into two paragraphs, (a) and (b). The word ''hearings'' is replaced with ''administrative adjudication'' because a respondent may seek judicial review once there has been final agency action, which may or may not include a hearing. The effect of this change is to liberally interpret 49 U.S.C. § 521(b)(8) to allow judicial review for contested claims resulting in a final agency order, but not for those claims resolved through settlement agreement or in which respondent failed to timely reply. The statute provides that judicial review is only available after a hearing. FMCSA believes, however, its interpretation is appropriate in this instance because these rules provide for resolution of contested claims in an administrative adjudication without formal hearing.

Lastly, a mistake in the standard of review in proposed § 386.67(b) has been corrected, and should now read: ''whether the findings and conclusions in the Final Agency Order were supported by substantial evidence or otherwise not in accordance with law.''

Subpart F—Injunctions and Imminent Hazards

FMCSA makes no changes to the language in current §§ 386.71–386.72.

Subpart G—Penalties

FMCSA makes no changes to the language in current §§ 386.81–386.84.

Appendices

FMCSA makes administrative changes to the language in current Appendix A or Appendix B.

Rulemaking Analyses and Notices

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

FMCSA has determined this action is not a significant regulatory action within the meaning of Executive Order 12866 or significant within the meaning of Department of Transportation regulatory policies and procedures. The proposals contained in this document would not result in an annual effect on the economy of $100 million or more, or lead to a major increase in costs or prices, or have significant adverse effects on the United States economy. This proposal would augment, replace, or amend existing procedures and practices. Moreover, the Agency's inclusion of an informal hearing process would add flexibility and less expense for smaller businesses. Any economic consequences flowing from the procedures in the proposal are primarily

mandated by statute. A regulatory evaluation is not required because of the ministerial nature of this action.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Agency has evaluated the effects of this final rule on small entities. No economic impacts of this rulemaking are foreseen, as the rule would impose no additional substantive burdens that are not already required by the regulations to which these procedural rules would serve.

These administrative changes impose no costs in most situations and can impose no costs in equilibrium. The benefits are administrative ease, scheduling flexibility, and improved industry-agency relations. These benefits are not related to safety and are not easily quantifiable. Nonetheless, the presence of some benefits and essentially no costs leads to the conclusion the rule is cost-beneficial but cannot be considered economically significant and therefore, FMCSA certifies that this final rule would not have a significant economic impact on a substantial number of small entities.

Executive Order 13132 (Federalism Assessment)

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132. The rules proposed do not preempt State authority or jurisdiction, nor do they establish any conflicts with existing State role in the regulation and enforcement of commercial motor vehicle safety. It has therefore been determined that the SNPRM does not have sufficient federalism implications to warrant the preparation of a federalism assessment.

Unfunded Mandates Reform Act of 1995

This final rule would 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.

National Environmental Policy Act

This rulemaking is categorically excluded from environmental studies under paragraph 6.u. of FMCSA Environmental Order 5610.1C.

Executive Order 13211 (Energy Supply, Distribution, or Use)

This action is not a significant energy action within the meaning of section 4(b) of the Executive Order because as a procedural action it is not economically significant and will not have a significant adverse effect on the supply, distribution, or use of energy.

Executive Order 13045 (Protection of Children)

This proposed action is not economically significant and does not concern an environmental risk to health or safety that would disproportionately affect children. The Agency has determined this rule is not a ''covered regulatory action'' as defined under Executive Order 13045. First, this rule is not economically significant under Executive Order 12866 because FMCSA has determined the changes in this rulemaking would not have an impact of $100 million or more in any one year. Second, the Agency has no reason to believe that the rule would result in an environmental health risk or safety risk that would disproportionately affect children.

Executive Order 12630 (Taking of Private Property)

This proposed rule would 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 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 12372 (Intergovernmental Review)

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

Paperwork Reduction Act

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

Regulation Identification Number

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

List of Subjects in 49 CFR Part 386

Administrative practice and procedure, Brokers, Freight forwarders, Hazardous materials transportation, Highway safety, Motor carriers, Motor vehicle safety, Penalties.

■ In consideration of the foregoing, FMCSA amends 49 CFR part 386 as follows:

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

■ 1. The authority citation for part 386 continues to read as follows:

Authority: 49 U.S.C. 13301, 13902, 31132–31133, 31136, 31502, 31504; sec. 204, Pub. L. 104–88, 109 Stat. 803, 941 (49 U.S.C. 701 note); sec. 217, Pub. L. 105–159, 113 Stat. 1748, 1767; and 49 CFR 1.73.

■ 2. Revise the heading of subpart A to read as follows:

Subpart A—Scope of Rules; Definitions and General Provisions

■ 3. Amend § 386.2 by removing the definitions for *Compliance Order* and *Consent Order* in their entirety.

■ 4. Amend § 386.2 by revising terms or definitions for *Civil penalty proceedings* and *Final agency order*; and by adding definitions for *Administrative adjudication, Agency, Agency Counsel, Decisionmaker, Default, Department, Dockets, Field Administrator, FMCSRs, Formal hearing, Hearing officer, HMRs, Informal hearing, Mail, Notice of Claim, Notice of Violation, Person, Reply, Secretary*, and *Submission of written evidence without hearing* to read as follows:

§ 386.2 Definitions.

* * * * *

Administrative adjudication means a process or proceeding to resolve contested claims in conformity with the Administrative Procedure Act, 5 U.S.C. 554–558.

Agency means the Federal Motor Carrier Safety Administration.

Agency Counsel means the attorney who prosecutes a civil penalty matter on behalf of the Field Administrator.

* * * * *

Civil penalty proceedings means proceedings to collect civil penalties for violations of regulations and statutes within the jurisdiction of FMCSA.

* * * * *

Decisionmaker means the Assistant Administrator of FMCSA, acting in the capacity of the decisionmaker or any

person to whom the Assistant Administrator has delegated his/her authority in a civil penalty proceeding. As used in this subpart, the Agency decisionmaker is the official authorized to issue a final decision and order of the Agency in a civil penalty proceeding.

Default means an omission or failure to perform a legal duty within the time specified for action, failure to reply to a Notice of Claim within the time required, or failure to submit a reply in accordance with the requirements of this part. A default may result in issuance of a Final Agency Order or additional penalties against the defaulting party.

Department means the U.S. Department of Transportation.

Dockets means the U.S. Department of Transportation's docket management system, which is the central repository for original copies of all documents filed before the agency decisionmaker.

Federal Motor Carrier Commercial Regulations (FMCCRs) means statutes and regulations applying to persons providing or arranging transportation for compensation subject to the Secretary's jurisdiction under 49 U.S.C. Chapter 135. The statutes are codified in Part B of Subtitle IV, Title 49 U.S.C. (49 U.S.C. 13101 through 14913). The regulations include those issued by FMCSA or its predecessors under authority provided in 49 U.S.C. 13301 or a predecessor statute.

* * * * *

Field Administrator means the head of an FMCSA Service Center who has been delegated authority to initiate compliance and enforcement actions on behalf of FMCSA.

Final Agency Order means the final action by FMCSA issued pursuant to this part by the appropriate Field Administrator (for default judgments under § 386.14) or the Assistant Administrator, or settlement agreements which become the Final Agency Order pursuant to 386.22, or decisions of the Administrative Law Judge, which become the Final Agency Order pursuant to 386.61 or binding arbitration awards. A person who fails to perform the actions directed in the Final Agency Order commits a violation of that order and is subject to an additional penalty as prescribed in Subpart G of this part.

FMCSRs means the Federal Motor Carrier Safety Regulations.

Formal hearing means an evidentiary hearing on the record in which parties have the opportunity to conduct discovery, present relevant evidence, and cross-examine witnesses.

Hearing officer means a neutral Agency employee designated by the Assistant Administrator to preside over an informal hearing.

HMRs means Hazardous Materials Regulations.

Informal hearing means a hearing in which the parties have the opportunity to present relevant evidence to a neutral Hearing Officer, who will prepare findings of fact and recommendations for the Agency decisionmaker. The informal hearing will not be on the transcribed record and discovery will not be allowed. Parties will have the opportunity to discuss their case and present testimony and evidence before the Hearing Officer without the formality of a formal hearing.

* * * * *

Mail means U.S. first class mail, U.S. registered or certified mail, or use of a commercial delivery service.

* * * * *

Notice of Claim (NOC) means the initial document issued by FMCSA to assert a civil penalty for alleged violations of the FMCSRs, HMRs, or FMCCRs.

Notice of Violation (NOV) means a document alleging a violation of the FMCSRs, HMRs, or FMCCRs, for which corrective action, other than payment of a civil penalty, is recommended.

Person means any individual, partnership, association, corporation, business trust, or any other organized group of individuals.

Reply means a written response to a Notice of Claim, admitting or denying the allegations contained within the Notice of Claim. In addition, the reply provides the mechanism for determining whether the respondent seeks to pay, settle, contest, or seek binding arbitration of the claim. *See* § 386.14. If contesting the allegations, the reply must also set forth all known affirmative defenses and factors in mitigation of the claim.

* * * * *

Secretary means the Secretary of Transportation.

Submission of written evidence without hearing means the submission of written evidence and legal argument to the Agency decisionmaker, or his/her representative, in lieu of a formal or informal hearing.

■ 5. Add § 386.3 to subpart A to read as follows:

§ 386.3 Separation of functions.

(a) Civil penalty proceedings will be prosecuted by Agency Counsel who represent the Field Administrator. In Notices of Violation, the Field Administrator will be represented by Agency Counsel.

(b) An Agency employee, including those listed in paragraph (c) of this section, engaged in the performance of investigative or prosecutorial functions in a civil penalty proceeding may not, in that case or a factually related case, discuss or communicate the facts or issues involved with the Agency decisionmaker, Administrative Law Judge, Hearing Officer or others listed in paragraph (d) of this section, except as counsel or a witness in the public proceedings. This prohibition also includes the staff of those covered by this section.

(c) The Deputy Chief Counsel, Assistant Chief Counsel for Enforcement and Litigation, and attorneys in the Enforcement and Litigation Division serve as enforcement counsel in the prosecution of all cases brought under this part.

(d) The Chief Counsel, the Special Counsel to the Chief Counsel, and attorneys serving as Adjudications Counsel advise the Agency decisionmaker regarding all cases brought under this Part.

(e) Nothing in this part shall preclude agency decisionmakers or anyone advising an agency decisionmaker from taking part in a determination to launch an investigation or issue a complaint, or similar preliminary decision.

■ 6. Add § 386.4 to subpart A to read as follows:

§ 386.4 Appearances and rights of parties.

(a) A party may appear in person, by counsel, or by other representative, as the party elects, in a proceeding under this subpart.

(b) A person representing a party must file a notice of appearance in the proceeding, in the manner provided in § 386.7 of this subpart. The notice of appearance must list the name, address, telephone number, and facsimile number of the person designated to represent the party. A copy of the notice of appearance must be served on each party, in the manner provided in § 386.6 of this subpart. The notice of appearance must be filed and served before the representative can participate in the proceeding. Any changes in an attorney or representative's contact information must be served and filed according to §§ 386.6 and 386.7 in a timely manner.

(c) A separate notice of appearance must be filed by a representative in each case. Blanket appearances on behalf of a party will not be accepted.

■ 7. Add § 386.5 to subpart A to read as follows:

§ 386.5 Form of filings and extensions of time.

(a) *Form.* Each document must be typewritten or legibly handwritten.

(b) *Contents.* Unless otherwise specified in this part, each document must contain a short, plain statement of the facts on which the person's case rests and a brief statement of the action requested in the document. Except by prior order, all contents will be made publicly available.

(c) *Length.* Except for the Notice of Claim and reply, motions, briefs, and other filings may not exceed 20 pages except as permitted by Order following a motion to exceed the page limitation based upon good cause shown. Exhibits or attachments in support of the relevant filing are not included in the page limit.

(d) *Paper and margins.* Filed documents must be printed on 8½″ by 11″ paper with a one-inch margin on all four sides of text, to include pagination and footnotes.

(e) *Spacing, and font size for typewritten documents.* Typewritten documents will use the following line format: single-spacing for the caption and footnotes, and double-spacing for the main text. All printed matter must appear in at least 12-point font, including footnotes.

(f) *Extensions of time.* Only those requests showing good cause will be granted. No motion for continuance or postponement of a hearing date filed within 15 days of the date set for a hearing will be granted unless accompanied by an affidavit showing extraordinary circumstances warrant a continuance. Unless directed otherwise by the Agency decisionmaker before whom a matter is pending, the parties may stipulate to reasonable extensions of time by filing the stipulation in the official docket and serving copies on all parties on the certificate of service. Motions for extensions of time must be filed in accordance with § 386.6 and served in accordance with § 386.7. A copy must also be served upon the person presiding over the proceeding at the time of the filing.

■ 8. Add § 386.6 to subpart A to read as follows:

§ 386.6 Service.

(a) *General.* All documents must be served upon the party or the party's designated agent for service of process. If a notice of appearance has been filed in the specific case in question in accordance with § 386.4, service is to be made on the party's attorney of record or its designated representative.

(b) *Type of service.* A person may serve documents by personal delivery utilizing governmental or commercial entities, U.S. mail, commercial mail delivery, and upon prior written consent of the parties, facsimile. Written consent for facsimile service must specify the facsimile number where service will be accepted. When service is made by facsimile, a copy will also be served by any other method permitted by this section. Facsimile service occurs when transmission is complete.

(c) *Certificate of service.* A certificate of service will accompany all documents served in a proceeding under this Part. The certificate must show the date and manner of service, be signed by the person making service, and list the persons served in accordance with § 386.7.

(d) *Date of service.* A document will be considered served on the date of personal delivery; or if mailed, the mailing date shown on the certificate of service, the date shown on the postmark if there is no certificate of service, or other mailing date shown by other evidence if there is no certificate of service or postmark.

(e) *Valid service.* A properly addressed document, sent in accordance with this subpart, which was returned, unclaimed, or refused, is deemed to have been served in accordance with this subpart. The service will be considered valid as of the date and the time the document was mailed, or the date personal delivery of the document was refused. Service by delivery after 5 p.m. in the time zone in which the recipient will receive delivery is deemed to have been made on the next day that is not a Saturday, Sunday, or legal holiday.

(f) *Presumption of service.* There shall be a presumption of service if the document is served where a party or a person customarily receives mail or at the address designated in the entry of appearance. If an entry of appearance has been filed on behalf of the party, service is effective upon service of a document to its representative.

■ 9. Add § 386.7 to subpart A to read as follows:

§ 386.7 Filing of documents.

(a) *Address and method of filing.* A person serving or tendering a document for filing must personally deliver or mail one copy of each document to all parties and counsel or their designated representative of record if represented. A signed original and one copy of each document submitted for the consideration of the Assistant Administrator, an Administrative Law Judge, or Hearing Officer must be personally delivered or mailed to: U.S. DOT Dockets 400 7th Street, SW., Room PL–401, Washington, DC 20590. A person will serve a copy of each document on each party in accordance with § 386.6 of this subpart.

■ 10. Add 386.8 to subpart A to read as follows:

§ 386.8 Computation of time.

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

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

(c) *Computation of time for delivery by mail.*

(1) Service of all documents is deemed effected at the time of mailing.

(2) Documents are not deemed filed until received by Dockets.

(3) Whenever a party has a right or a duty to act or to make any response within a prescribed period after service by mail, or on a date certain after service by mail, 5 days will be added to the prescribed period.

■ 11. Amend § 386.11 by revising paragraphs (b) and (c) to read as follows:

§ 386.11 Commencement of proceedings.

* * * * *

(b) *Notice of Violation.* The Agency may issue a Notice of Violation as a means of notifying any person subject to the rules in this part that it has received information (*i.e.*, from an investigation, audit, or any other source) wherein it has been alleged the person has violated provisions of the FMCSRs, HMRs, or FMCCRs. The notice of violation serves as an informal mechanism to address compliance deficiencies. If the alleged deficiency is not addressed to the satisfaction of the Agency, formal enforcement action may be taken in accordance with paragraph (c) of this section. A notice of violation is not a prerequisite to the issuance of a Notice of Claim. The notice of violation will address the following issues, as appropriate:

(1) The specific alleged violations.

(2) Any specific actions the Agency determines are appropriate to remedy the identified problems.

(3) The means by which the notified person can inform the Agency that it has received the notice of violation and

either has addressed the alleged violation or does not agree with the Agency's assertions in the notice of violation.

(4) Any other relevant information.

(c) *Civil penalty proceedings.* These proceedings are commenced by the issuance of a Notice of Claim.

(1) Each Notice of Claim must contain the following:

(i) A statement setting forth the facts alleged.

(ii) A statement of the provisions of law allegedly violated by the respondent.

(iii) The proposed civil penalty and notice of the maximum amount authorized to be claimed under statute.

(iv) The time, form, and manner whereby the respondent may pay, contest, or otherwise seek resolution of the claim.

(2) In addition to the information required by paragraph (c)(1) of this section, the Notice of Claim may contain such other matters as the Agency deems appropriate.

(3) In proceedings for collection of civil penalties for violations of the motor carrier safety regulations under the Motor Carrier Safety Act of 1984, the Agency may require the respondent to post a copy of the Notice of Claim in such place or places and for such duration as the Agency may determine appropriate to aid in the enforcement of the law and regulations.

■ 12. Remove § 386.12(a) and (b) in their entirety and redesignate § 386.12 (c) through (e) as § 386.12 (a) through (c), respectively and revise newly redesignated (b) to read as follows:

§ 386.12 Complaint.

* * * * *

(b) *Action on complaint of substantial violation.* Upon the filing of a complaint of a substantial violation under paragraph (a) of this section, the Assistant Administrator shall determine whether it is nonfrivolous and meets the requirements of paragraph (a) of this section. If the Assistant Administrator determines the complaint is nonfrivolous and meets the requirements of paragraph (a), he/she shall investigate the complaint. The complainant shall be timely notified of findings resulting from such investigation. The Assistant Administrator shall not be required to conduct separate investigations of duplicative complaints. If the Assistant Administrator determines the complaint is frivolous or does not meet the requirements of the paragraph (a), he/she shall dismiss the complaint and notify the complainant in writing of the reasons for such dismissal.

* * * * *

■ 13. Revise § 386.14 to read as follows:

§ 386.14 Reply.

(a) *Time for reply to the Notice of Claim.* Respondent must serve a reply to the Notice of Claim in writing within 30 days following service of the Notice of Claim. The reply is to be served in accordance with § 386.6 upon the Service Center indicated in the Notice of Claim.

(b) *Options for reply.* The respondent must reply to the Notice of Claim within the time allotted by choosing one of the following:

(1) Paying the full amount asserted in the Notice of Claim in accordance with § 386.18 of this part;

(2) Contesting the claim by requesting administrative adjudication pursuant to paragraph (d) of this section; or

(3) Seeking binding arbitration in accordance with the Agency's program. Although the amount of the proposed penalty may be disputed, referral to binding arbitration is contingent upon an admission of liability that the violations occurred.

(c) *Failure to answer the Notice of Claim.* (1) Respondent's failure to answer the Notice of Claim in accordance with paragraph (a) may result in the issuance of a Notice of Default and Final Agency Order by the Field Administrator. The Notice of Default and Final Agency Order will declare respondent to be in default and further declare the Notice of Claim, including the civil penalty proposed in the Notice of Claim, to be the Final Agency Order in the proceeding. The Final Agency Order will be effective five days following service of the Notice of Default and Final Agency Order.

(2) The default constitutes an admission of all facts alleged in the Notice of Claim and a waiver of respondent's opportunity to contest the claim. The default will be reviewed by the Assistant Administrator in accordance with § 386.64(b), and the Final Agency Order may be vacated where a respondent demonstrates excusable neglect, a meritorious defense, or due diligence in seeking relief.

(3) Failure to pay the civil penalty as directed in a Final Agency Order constitutes a violation of that order, subjecting the respondent to an additional penalty as prescribed in Subpart G of this part.

(d) *Request for administrative adjudication.* The respondent may contest the claim and request administrative adjudication pursuant to paragraph (b)(2) of this section. An administrative adjudication is a process to resolve contested claims before the Assistant Administrator, Administrative Law Judge, or Hearing Officer. Once an administrative adjudication option is elected, it is binding on the respondent.

(1) *Contents.* In addition to the general requirements of this section, the reply must be in writing and state the grounds for contesting the claim and must raise any affirmative defenses the respondent intends to assert. Specifically, the reply:

(i) Must admit or deny each separately stated and numbered allegation of violation in the claim. A statement that the person is without sufficient knowledge or information to admit or deny will have the effect of a denial. Any allegation in the claim not specifically denied in the reply is deemed admitted. A mere general denial of the claim is insufficient and may result in a default being entered by the Agency decisionmaker upon motion by the Field Administrator.

(ii) Must include all known affirmative defenses, including those relating to jurisdiction, limitations, and procedure.

(iii) Must state which one of the following options respondent seeks:

(A) To submit written evidence without hearing; or

(B) An informal hearing; or

(C) A formal hearing.

(2) [Reserved].

■ 14. Revise § 386.16 to read as follows:

§ 386.16 Action on replies to the Notice of Claim.

(a) *Requests to submit written evidence without a hearing.* Where respondent has elected to submit written evidence in accordance with § 386.14(d)(1)(iii)(A):

(1) Agency Counsel must serve all written evidence and argument in support of the Notice of Claim no later than 60 days following service of respondent's reply. The written evidence and argument must be served on the Assistant Administrator in accordance with §§ 386.6 and 386.7. The submission must include all pleadings, notices, and other filings in the case to date.

(2) Respondent will, not later than 45 days following service of Agency Counsel's written evidence and argument, serve its written evidence and argument on the Assistant Administrator in accordance with §§ 386.6 and 386.7.

(3) Agency Counsel may file a written response to respondent's submission. Any such submission must be filed

within 20 days of service of respondent's submission.

(4) All written evidence submitted by the parties must conform to the requirements of § 386.49.

(5) Following submission of evidence and argument as outlined in this section, the Assistant Administrator may issue a Final Agency Order and order based on the evidence and arguments submitted, or may issue any other order as may be necessary to adjudicate the matter.

(b) *Requests for hearing.* (1) If a request for a formal or informal hearing has been filed, the Assistant Administrator will determine whether there exists a dispute of a material fact at issue in the matter. If so, the matter will be set for hearing in accordance with respondent's reply. If it is determined that there does not exist a dispute of a material fact at issue in the matter, the Assistant Administrator may issue a decision based on the written record, or may request the submission of further evidence or argument.

(2) If a respondent requests a formal or informal hearing in its reply, the Field Administrator must serve upon the Assistant Administrator and respondent a notice of consent or objection with a basis to the request within 60 days of service of respondent's reply. Failure to serve an objection within the time allotted may result in referral of the matter to hearing.

(3) *Requests for formal hearing.* Following the filing of an objection with basis, the Field Administrator must serve a motion for Final Agency Order pursuant to § 386.36 unless otherwise ordered by the Assistant Administrator. The motion must set forth the reasons why the Field Administrator is entitled to judgment as a matter of law. Respondent must, within 45 days of service of the motion for Final Agency Order, submit and serve a response to the Field Administrator's motion. After reviewing the record, the Assistant Administrator will either set the matter for hearing by referral to the Office of Hearings or issue a Final Agency Order based upon the submissions.

(4) *Requests for informal hearing.*

(i) If the Field Administrator objects with basis to a request for an informal hearing, he/she must serve the objection, a copy of the Notice of Claim, and a copy of respondent's reply, on the respondent and Assistant Administrator, pursuant to paragraph (b)(2) of this section. Based upon the Notice of Claim, the reply, and the objection with basis, the Assistant Administrator will issue an order granting or denying the request for informal hearing.

(A) *Informal hearing granted.* If the request for informal hearing is granted by the Assistant Administrator, a Hearing Officer will be assigned to hear the matter and will set forth the date, time and location for hearing. No further motions will be entertained, and no discovery will be allowed. At hearing, all parties may present evidence, written and oral, to the Hearing Officer, following which the Hearing Officer will issue a report to the Assistant Administrator containing findings of fact and recommending a disposition of the matter. The report will serve as the sole record of the proceedings. The Assistant Administrator may issue a Final Agency Order adopting the report, or issue other such orders as he/she may deem appropriate. By participating in an informal hearing, respondent waives its right to a formal hearing.

(B) *Informal hearing denied.* If the request for informal hearing is denied, the Field Administrator must serve a motion for Final Agency Order pursuant to § 386.36, unless otherwise directed by the Assistant Administrator. The motion must set forth the reasons why the Field Administrator is entitled to judgment as a matter of law. Respondent must, within 45 days of service of the motion for Final Agency Order, submit and serve a response to the Field Administrator's motion. After reviewing the record, the Assistant Administrator will set the matter for formal hearing by referral to the Office of Hearings, or will issue a Final Agency Order based upon the submissions.

(C) Nothing in this section shall limit the Assistant Administrator's authority to refer any matter for formal hearing, even in instances where respondent seeks only an informal hearing.

■ 15. Add § 386.18 to subpart B to read as follows:

§ 386.18 Payment of the claim.

(a) Payment of the full amount claimed may be made at any time before issuance of a Final Agency Order. After the issuance of a Final Agency Order, claims are subject to interest, penalties, and administrative charges in accordance with 31 U.S.C. 3717; 49 CFR part 89; and 31 CFR 901.9.

(b) If respondent elects to pay the full amount as its response to the Notice of Claim, payment must be served upon the Field Administrator at the Service Center designated in the Notice of Claim within 30 days following service of the Notice of Claim. No written reply is necessary if respondent elects the payment option during the 30-day reply period. Failure to serve full payment within 30 days of service of the Notice of Claim when this option has been chosen may constitute a default and may result in the Notice of Claim, including the civil penalty assessed by the Notice of Claim, becoming the Final Agency Order in the proceeding pursuant to § 386.14(c).

(c) Unless objected to in writing, submitted at the time of payment, payment of the full amount in response to the Notice of Claim constitutes an admission by the respondent of all facts alleged in the Notice of Claim. Payment waives respondent's opportunity to further contest the claim, and will result in the Notice of Claim becoming the Final Agency Order.

■ 16. Revise the heading of subpart C to read as follows:

Subpart C—Settlement Agreements

§ 386.21 [Removed]

■ 17. Remove § 386.21.

■ 18. Revise § 386.22 to read as follows:

§ 386.22 Settlement agreements and their contents.

(a) *Settlement agreements.* (1) When negotiations produce an agreement as to the amount or terms of payment of a civil penalty or the terms and conditions of an order, a settlement agreement shall be drawn and signed by the respondent and the Field Administrator or his/her designee. Such settlement agreement must contain the following:

(i) The statutory basis of the claim;

(ii) A brief statement of the violations;

(iii) The amount claimed and the amount paid;

(iv) The date, time, and place and form of payment;

(v) A statement that the agreement is not binding on the Agency until executed by the Field Administrator or his/her designee;

(vi) A statement that failure to pay in accordance with the terms of the agreement or to comply with the terms of the agreement may result in the reinstatement of any penalties held in abeyance and may also result in the loss of any reductions in civil penalties asserted in the Notice of Claim, in which case the original amount asserted will be due immediately; and

(vii) A statement that the agreement is the Final Agency Order.

(2) A settlement agreement may contain any conditions, actions, or provisions agreed by the parties to redress the violations cited in the Notice of Claim or notice of violation.

(3) A settlement agreement accepted and approved by the Assistant Administrator or Administrative Law

Judge is a Final Agency Order which is binding on all parties according to its terms. Consent to a settlement agreement which has not yet been approved by the Assistant Administrator or Administrative Law Judge may not be withdrawn for a period of 30 days.

(b) *Civil Penalty Proceedings not before Agency Decisionmaker.* When the parties have agreed to a settlement at any time prior to the case coming before the Agency decisionmaker, the parties may execute an appropriate agreement for disposing of the case. The agreement does not require approval by the Agency decisionmaker. The agreement becomes the Final Agency Order upon execution by the Field Administrator or his/her designee.

(c) *Civil Penalty Proceedings before Agency Decisionmaker.* When a respondent has agreed to a settlement of a civil penalty before a Final Agency Order has been issued, the parties may execute an appropriate agreement for disposal of the case by consent for the consideration of the Assistant Administrator. The agreement is filed with the Assistant Administrator, who may accept it, reject it and direct that proceedings in the case continue, or take such other action as he/she deems appropriate. If the Assistant Administrator accepts the agreement, he/she shall enter an order in accordance with its terms. The settlement agreement becomes the Final Agency Order as of the date the Assistant Administrator enters an order accepting the settlement agreement.

(d) *Civil Penalty Proceedings before Administrative Law Judge (ALJ).* When a respondent has agreed to a settlement of a civil penalty before the hearing is concluded, the parties may execute an appropriate agreement for disposing of the case by consent for the consideration of the ALJ. The agreement is filed with the ALJ who may accept it, reject it, and direct that proceedings in the case continue, or take such other action as he/she deems appropriate. If the ALJ accepts the agreement, he/she shall enter an order in accordance with its terms. The settlement agreement becomes the Final Agency Order as per § 386.61.

(e) *Civil Penalty Proceedings before Hearing Officer.* When a respondent has agreed to a settlement of a civil penalty before the hearing is concluded, the parties may execute an appropriate agreement for disposal of the case for the consideration of the Hearing Officer. The agreement is filed with the Hearing Officer, who, within 20 days of receipt, will make a report and recommendation to the Assistant Administrator who may accept it, reject it, and direct that proceedings in the case continue, or take such other action as he/she deems appropriate. If the Assistant Administrator accepts the agreement, he/she will enter an order in accordance with its terms. The settlement agreement becomes the Final Agency Order as of the date the Assistant Administrator enters an order accepting the settlement agreement.

§ 386.23 [Removed]

■ 19. Remove § 386.23.

■ 20. Revise § 386.31 to read as follows:

§ 386.31 Official notice.

Upon notification to all parties, the Assistant Administrator or Administrative Law Judge may take official notice of any fact or document not appearing in evidence in the record. Any party objecting to the official notice must file an objection within 10 days after service of the notice. If a Final Agency Order has been issued, and the decision rests on a material and disputable fact of which the Agency decisionmaker has taken official notice, a party may challenge the action of official notice in accordance with § 386.64 of this part.

§ 386.32 [Removed]

■ 21. Remove § 386.32.

§ 386.33 [Removed]

■ 22. Remove § 386.33.

§ 386.34 [Removed]

■ 23. Remove § 386.34.

§ 386.35 [Redesignated and Amended]

■ 24. Redesignate § 386.35 as § 386.34 and amend paragraph (c) by removing the number ''7'' and adding, in its place, the number ''20.''

§ 386.36 [Redesignated]

■ 25. Redesignate § 386.36 as § 386.35.

■ 26. Add a new § 386.36 to read as follows:

§ 386.36 Motions for final agency order.

(a) *Generally.* Unless otherwise provided in this section, the motion and answer will be governed by § 386.34. Either party may file a motion for final order. The motion must be served in accordance with §§ 386.6 and 386.7. If the matter is still pending before the service center, upon filing, the matter is officially transferred from the service center to the Agency decisionmaker, who will then preside over the matter.

(b) *Form and content.*

(1) Movant's filing must contain a motion and memorandum of law, which may be separate or combined and must include all responsive pleadings, notices, and other filings in the case to date.

(2) The motion for final order must be accompanied by written evidence in accordance with § 386.49.

(3) The motion will state with particularity the grounds upon which it is based and the substantial matters of law to be argued. A Final Agency Order may be issued if, after reviewing the record in a light most favorable to the non-moving party, the Agency decisionmaker determines no genuine issue exists as to any material fact.

(c) *Answer to Motion.* The non-moving party will, within 45 days of service of the motion for final order, submit and serve a response to rebut movant's motion.

■ 27. Revise § 386.37 to read as follows:

§ 386.37 Discovery.

(a) Parties may obtain discovery by one or more of the following methods: Depositions upon oral examination or written questions; written interrogatories; request for production of documents or other evidence for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) Discovery may not commence until the matter is pending before the Assistant Administrator or referred to the Office of Hearings.

(c) Except as otherwise provided in these rules, in the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, or by the Assistant Administrator or Administrative Law Judge, in the absence of specific Agency provisions or regulations, the Federal Rules of Civil Procedure may serve as guidance in administrative adjudications.

■ 28. Revise § 386.42 to read as follows:

§ 386.42 Written interrogatories to parties.

(a) Without leave, any party may serve upon any other party written interrogatories to be answered by the party to whom the interrogatories are directed; or, if that party is a public or private corporation or partnership or association or governmental agency, by any officer or agent, who will furnish the information available to that party.

(b) The maximum number of interrogatories served will not exceed 30, including all subparts, unless the Assistant Administrator or Administrative Law Judge permits a larger number on motion and for good cause shown. Other interrogatories may be added without leave, so long as the total number of approved and additional interrogatories does not exceed 30.

(c) Each interrogatory shall be answered separately and fully in writing

under oath unless it is objected to, in which event the grounds for objection shall be stated and signed by the party, or counsel for the party, if represented, making the response. The party to whom the interrogatories are directed shall serve the answers and any objections within 30 days after the service of the interrogatories, or within such shortened or longer period as the Assistant Administrator or the Administrative Law Judge may allow.

(d) Motions to compel may be made in accordance with § 386.45.

(e) A notice of discovery must be served on the Assistant Administrator or, in cases that have been referred to the Office of Hearings, on the Administrative Law Judge. A copy of the interrogatories, answers, and all related pleadings must be served on all parties to the proceeding.

(f) An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the Assistant Administrator or Administrative Law Judge may order that such an interrogatory need not be answered until after designated discovery has been completed or until a prehearing conference or other later time.

■ 29. Revise § 386.46 to read as follows:

§ 386.46 Depositions.

(a) *When, how, and by whom taken.*

(1) The deposition of any witness may be taken at reasonable times subsequent to the appointment of an Administrative Law Judge. Prior to referral to the Office of Hearings, a party may petition the Assistant Administrator, in accordance with § 386.37, for leave to conduct a deposition based on good cause shown.

(2) Depositions may be taken by oral examination or upon written interrogatories before any person having power to administer oaths.

(3) The parties may stipulate in writing or the Administrative Law Judge may upon motion order that a deposition be taken by telephone or other remote electronic means.

(4) If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to, or included in, the notice.

(5) If the deposition is to be recorded by videotape or audiotape, the notice shall specify the method of recording.

(b) *Application.* Any party desiring to take the deposition of a witness must indicate to the witness and all other parties the time when, the place where, and the name and post office address of the person before whom the deposition is to be taken; the name and address of each witness; and the subject matter concerning which each such witness is expected to testify.

(c) *Notice.* A party desiring to take a deposition must give notice to the witness and all other parties. Notice must be in writing. Notice of the deposition must be given not less than 20 days from when the deposition is to be taken if the deposition is to be held within the continental United States and not less than 30 days from when the deposition is to be taken if the deposition is to be held elsewhere, unless a shorter time is agreed to by the parties or by leave of the Assistant Administrator or Administrative Law Judge by motion for good cause shown.

(d) *Depositions upon written questions.* Within 14 days after the notice and written questions are served, a party may serve cross-questions upon all other parties. Within 7 days after being served with cross-questions, a party may serve redirect questions upon all other parties. Within 7 days after being served with redirect questions, a party may serve recross questions upon all other parties. The Assistant Administrator or Administrative Law Judge may enlarge or shorten the time for cause shown.

(e) *Taking and receiving in evidence.* Each witness testifying upon deposition must be sworn, and any other party must be given the right to cross-examine. The questions propounded and the answers to them, together with all objections made, must be reduced to writing; read by or to, and subscribed by the witness; and certified by the person administering the oath. The person who took the deposition must seal the deposition transcript in an envelope and file it in accordance with § 386.7. Subject to objections to the questions and answers as were noted at the time of taking the deposition and which would have been valid if the witness were personally present and testifying, the deposition may be read and offered in evidence by the party taking it as against any party who was present or represented at the taking of the deposition or who had due notice of it.

(f) *Witness Limit.* No party may seek deposition testimony of more than five witnesses without leave of the Agency decisionmaker for good cause shown. Individual depositions are not to exceed 8 hours for any one witness.

(g) *Motion to terminate or limit examination.* During the taking of a deposition, a party or deponent may request suspension of the deposition on grounds of bad faith in the conduct of the examination, oppression of a deponent or party or improper questions propounded. The deposition will then be adjourned. The objecting party or deponent must, however, immediately move for a ruling on his or her objections to the deposition conduct or proceedings before the Assistant Administrator or Administrative Law Judge, who then may limit the scope or manner of the taking of the deposition.

■ 30. Revise § 386.49 to read as follows:

§ 386.49 Form of written evidence.

All written evidence should be submitted in the following forms:

(a) A written statement of a person having personal knowledge of the facts alleged, or

(b) Documentary evidence in the form of exhibits attached to a written statement identifying the exhibit and giving its source.

§ 386.50 [Removed]

■ 31. Remove § 386.50.

■ 32. Amend § 386.51 by revising paragraph (b) to read as follows:

§ 386.51 Amendment and withdrawal of pleadings.

* * * * *

(b) A party may withdraw his/her pleading any time more than 15 days prior to the hearing by serving a notice of withdrawal on the Assistant Administrator or the Administrative Law Judge. Within 15 days prior to the hearing a withdrawal may be made only at the discretion of the Assistant Administrator or the Administrative Law Judge. The withdrawal will be granted absent a finding that the withdrawal will result in injustice, prejudice, or irreparable harm to the non-moving party, or is otherwise contrary to the public interest.

■ 33. Revise § 386.52 to read as follows:

§ 386.52 Appeals from interlocutory rulings.

(a) *General.* Unless otherwise provided in this subpart, a party may not appeal a ruling or decision of the Administrative Law Judge to the Assistant Administrator until the Administrative Law Judge's decision has been entered on the record. A decision or order of the Assistant Administrator on the interlocutory appeal does not constitute a Final Agency Order for the purposes of judicial review under § 386.67.

(b) *Interlocutory appeal for cause.* If a party files a written request for an interlocutory appeal for cause with the Administrative Law Judge, or orally requests an interlocutory appeal for cause, the proceedings are stayed until the Administrative Law Judge issues a

decision on the request. If the Administrative Law Judge grants the request, the proceedings are stayed until the Assistant Administrator issues a decision on the interlocutory appeal. The Administrative Law Judge must grant an interlocutory appeal for cause if a party shows that delay of the appeal would be detrimental to the public interest or would result in undue prejudice to any party.

(d) *Procedure.* A party must file a notice of interlocutory appeal, with any supporting documents, with the Assistant Administrator, and serve copies on each party and the Administrative Law Judge, not later than 10 days after the Administrative Law Judge's oral decision has been issued, or a written decision has been served. A party must file a reply brief, if any, with the Assistant Administrator and serve a copy of the reply brief on each party, not later than 10 days after service of the appeal brief. The Assistant Administrator will render a decision on the interlocutory appeal, within a reasonable time after receipt of the interlocutory appeal.

(e) The Assistant Administrator may reject frivolous, repetitive, or dilatory appeals, and may issue an order precluding one or more parties from making further interlocutory appeals, and may order such further relief as required.

■ 34. Revise § 386.54 to read as follows:

§ 386.54 Administrative Law Judge.

(a) *Powers of an Administrative Law Judge.* The Administrative Law Judge may take any action and may prescribe all necessary rules and regulations to govern the conduct of the proceedings to ensure a fair and impartial hearing, and to avoid delay in the disposition of the proceedings. In accordance with the rules in this subchapter, an Administrative Law Judge may do the following:

(1) Give notice of and hold prehearing conferences and hearings.

(2) Administer oaths and affirmations.

(3) Issue subpoenas authorized by law.

(4) Rule on offers of proof.

(5) Receive relevant and material evidence.

(6) Regulate the course of the administrative adjudication in accordance with the rules of this subchapter and the Administrative Procedure Act.

(7) Hold conferences to settle or simplify the issues by consent of the parties.

(8) Dispose of procedural motions and requests, except motions that under this part are made directly to the Assistant Administrator.

(9) Issue orders permitting inspection and examination of lands, buildings, equipment, and any other physical thing and the copying of any document.

(10) Make findings of fact and conclusions of law, and issue decisions.

(11) To take any other action authorized by these rules and permitted by law.

(b) *Limitations on the power of the Administrative Law Judge.* The Administrative Law Judge is bound by the procedural requirements of this part and the precedent opinions of the Agency. This section does not preclude an Administrative Law Judge from barring a person from a specific proceeding based on a finding of obstreperous or disruptive behavior in that proceeding.

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

■ 35. Amend § 386.61 by designating the existing paragraph as paragraph (a) and adding a new introductory heading and adding paragraph (b), to read as follows.

§ 386.61 Decision.

(a) *Administrative Law Judge.* * * *

(b) *Hearing Officer.* The Hearing Officer will prepare a report to the Assistant Administrator containing findings of fact and recommended disposition of the matter within 45 days after the conclusion of the hearing. The Assistant Administrator will issue a Final Agency Order adopting the report, or may make other such determinations as appropriate. The Assistant Administrator's decision to adopt a Hearing Officer's report may be reviewed in accordance with § 386.64.

■ 36. Revise § 386.64 to read as follows:

§ 386.64 Reconsideration.

(a) Within 20 days following service of the Final Agency Order, any party may petition the Assistant Administrator for reconsideration of the order. If a civil penalty was imposed, the filing of a petition for reconsideration stays the entire action, unless the Assistant Administrator orders otherwise.

(b) In the event a Notice of Default and Final Agency Order is issued by the Field Administrator as a result of the respondent's failure to reply in accordance with § 386.14(a), the only issue that will be considered upon reconsideration is whether a default has occurred under § 386.14(c). The Final Agency Order may be vacated where a respondent can demonstrate excusable neglect, a meritorious defense, or due diligence in seeking relief.

(c) Either party may serve an answer to a petition for reconsideration within 30 days of the service date of the petition.

(d) Following the close of the 30-day period, the Assistant Administrator will rule on the petition.

(e) The ruling on the petition will be the Final Agency Order. A petition for reconsideration of the Assistant Administrator's ruling will not be permitted.

■ 37. Revise § 386.67 to read as follows:

§ 386.67 Judicial review.

(a) Any party to the underlying proceeding, who, after an administrative adjudication, is adversely affected by a Final Agency Order issued under 49 U.S.C. 521 may, within 30 days of service of the Final Agency Order, petition for review of the order in the United States Court of Appeals in the circuit where the violation is alleged to have occurred, or where the violator has its principal place of business or residence, or in the United States Court of Appeals for the District of Columbia Circuit.

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

■ 38. Revise § 386.71 to read as follows:

§ 386.71 Injunctions.

Whenever it is determined that a person has engaged, or is about to engage, in any act or practice constituting a violation of section 31502 of title 49, United States Code; of the Motor Carrier Safety Act of 1984; the Hazardous Materials Transportation Act; or any regulation or order issued under that section or those Acts for which the Federal Motor Carrier Safety

Administrator exercises enforcement responsibility, the Chief Counsel may request the United States Attorney General to bring an action in the appropriate United States District Court for such relief as is necessary or appropriate, including mandatory or prohibitive injunctive relief, interim equitable relief, and punitive damages, as provided by section 213(c) of the Motor Carrier Safety Act of 1984 and section 111(a) of the Hazardous Materials Transportation Act (49 U.S.C. 507(c) 5122).

■ 39. Revise § 386.82(a)(3) to read as follows:

§ 386.82 Civil penalties for violations of notices and orders.

(a) Additional civil penalties are chargeable for violations of notices and orders which are issued under civil forfeiture proceedings pursuant to 49 U.S.C. 521(b). These notices and orders are as follows:

* * * * *

(3) Final order—§ 386.14, § 386.17, § 386.22, and § 386.61; and

* * * * *

■ 40. Amend Appendix A to Part 386 by revising section I, removing and reserving section II, and revising section III to read as follows:

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

I. Notice to Abate

Violation—Failure to cease violations of the regulations in the time prescribed in the notice. (The time within to comply with a notice to abate shall not begin to run with respect to contested violations, *i.e.*, where there are material issues in dispute under § 386.14, until such time as the violation has been established.)

Penalty reinstatement of any deferred assessment or payment of a penalty or portion thereof.

* * * * *

III. Final Order

Violation—Failure to comply with Final Agency Order.

Penalty—Automatic reinstatement of any penalty previously reduced or held in abeyance and restoration of the full amount assessed in the Notice of Claim less any payments previously made.

* * * * *

■ 41. Amend Appendix B to Part 386 by revising the heading and paragraphs (a)(1) through (4) to read as follows:

Appendix B to Part 386—Penalty Schedule; Violations and Maximum Civil Penalties

* * * * *

(a) Violations of the Federal Motor Carrier Safety Regulations (FMCSRs):

(1) *Recordkeeping.* A person or entity that fails to prepare or maintain a record required by parts 40, 382, 385, and 390–99 of this subchapter, or prepares or maintains a required record that is incomplete, inaccurate, or false, is subject to a maximum civil penalty of $550 for each day the violation continues, up to $5,500.

(2) *Knowing falsification of records.* A person or entity that knowingly falsifies, destroys, mutilates, or changes a report or record required by parts 382, 385, and 390–99 of this subchapter, knowingly makes or causes to be made a false or incomplete record about an operation or business fact or transaction, or knowingly makes, prepares, or preserves a record in violation of a regulation or order of the Secretary is subject to a maximum civil penalty of $5,500 if such action misrepresents a fact that constitutes a violation other than a reporting or recordkeeping violation.

(3) *Non-recordkeeping violations.* A person or entity that violates parts 382, 385, or 390–99 of this subchapter, except a recordkeeping requirement, is subject to a civil penalty not to exceed $11,000 for each violation.

(4) *Non-recordkeeping violations by drivers.* A driver who violates parts 382, 385, and 390–99 of this subchapter, except a recordkeeping violation, is subject to a civil penalty not to exceed $2,750.

* * * * *

Issued on: May 12, 2005.

Annette M. Sandberg,

Administrator.

[FR Doc. 05–9898 Filed 5–17–05; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 041126332–5039–02; I.D. 051105C]

Fisheries of the Exclusive Economic Zone Off Alaska; Reallocation of Pacific Cod in the Bering Sea and Aleutian Islands Management Area

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

ACTION: Reallocation.

SUMMARY: NMFS is reallocating the projected unused amount of Pacific cod from vessels using jig gear to catcher vessels less than 60 feet (18.3 meters (m)) length overall (LOA) using pot or hook-and-line gear in the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary to allow the 2005 A season total allowable catch (TAC) of Pacific cod to be harvested.

DATES: Effective May 17, 2005, through 2400 hrs, Alaska local time (A.l.t.), December 31, 2005.

FOR FURTHER INFORMATION CONTACT: Josh Keaton, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the BSAI according to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The 2005 A season allowance of the Pacific cod TAC specified for vessels using jig gear in the BSAI is 374 metric tons (mt) as established by the 2005 and 2006 final harvest specifications for groundfish in the BSAI (70 FR 8979, February 24, 2005) and the reallocation on April 13, 2005 (70 FR 19708, April 14, 2005), for the period 1200 hrs, A.l.t., January 1, 2005, through 1200 hrs, A.l.t., April 30, 2005. See §§ 679.20 (a)(7)(i)(C)(*1*), (c)(3)(iii), and (c)(5).

The Administrator, Alaska Region, NMFS, has determined that jig vessels will not be able to harvest 350 mt of the A season apportionment of Pacific cod allocated to those vessels under §§ 679.20(a)(7)(i)(A) and (a)(7)(iii)(A). Therefore, in accordance with § 679.20(a)(7)(ii)(C)(*1*), NMFS apportions 350 mt of Pacific cod from the A season apportionment of jig gear to catcher vessels less than 60 feet (18.3 m) LOA using pot or hook-and-line gear.

The harvest specifications for Pacific cod included in the harvest specifications for groundfish in the BSAI (70 FR 8979, February 24, 2005) are revised as follows: 24 mt to the A season apportionment for vessels using jig gear and 2,854 mt to catcher vessels less than 60 feet (18.3 m) LOA using pot or hook-and-line gear.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the reallocation of Pacific cod specified for jig vessels to catcher vessels less than 60 feet (18.3 m) LOA