

**DEPARTMENT OF TRANSPORTATION****Federal Motor Carrier Safety Administration****49 CFR Parts 365, 385, 387, and 390**

[Docket No. FMCSA-2001-11061]

RIN 2126-AA59

**New Entrant Safety Assurance Process****AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.**ACTION:** Final rule.

**SUMMARY:** FMCSA amends the New Entrant Safety Assurance Program regulations to raise the standard of compliance for passing the new entrant safety audit. The Agency identifies 16 regulations that are essential elements of basic safety management controls necessary to operate in interstate commerce and makes a carrier's failure to comply with any one of the 16 regulations an automatic failure of the safety audit. Additionally, if certain violations are discovered during a roadside inspection, the new entrant now will be subject to expedited actions to correct these deficiencies. The Agency now will also check compliance with the Americans with Disabilities Act and certain household goods-related requirements in the new entrant safety audit, if they apply to the new entrant's operation. Failure to comply with either of these requirements will not affect the outcome of the safety audit; however, the Agency will take appropriate actions to improve compliance. FMCSA clarifies changes to some of the existing new entrant regulations and establishes a separate new entrant application procedure and safety oversight program for non-North America-domiciled motor carriers.

Finally, the Agency has enhanced the quality and availability of its educational and technical assistance (ETA) materials to ensure applicants are knowledgeable about applicable Federal motor carrier safety standards. Because the Agency believes Form MCS-150A—Safety Certification for Application for USDOT Number is not an effective instrument for establishing knowledgeability, it is eliminating that form.

FMCSA believes this rule will improve the Agency's ability to identify at-risk new entrant carriers and ensure deficiencies in basic safety management controls are corrected before the new entrant is granted permanent registration. These changes do not impose additional regulatory requirements on any new entrant carrier

because these carriers are already required to comply with all applicable rules.

**DATES:** *Effective:* This rule is effective: February 17, 2009. *Compliance:* Compliance with this rule is required beginning December 16, 2009.

**FOR FURTHER INFORMATION CONTACT:** Ms. Stephanie Haller, New Entrant Program Manager, Enforcement and Compliance Division. (202) 366-0178, *Stephanie.Haller@dot.gov*. Business hours are from 8 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:****Privacy Act**

Anyone is able to search the electronic form for all comments received into any of our dockets by the name of the individual submitting the comment (or signing a 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 (Volume 65, Number 70; Page 19476).

*The preamble is organized as follows:*

- I. Legal Basis for the Rulemaking
- II. Regulatory History
  - A. Interim Final Rule
  - B. Notice of Proposed Rulemaking
- III. Discussion of Comments to the NPRM and Section-by-Section Analysis of the Final Rule
- IV. Rulemaking Analyses

**I. Legal Basis for the Rulemaking**

Title 49 U.S.C. 31144 authorizes the Secretary of Transportation (Secretary) to determine whether an owner or operator is fit to operate safely. Section 210(a) of the Motor Carrier Safety Improvement Act of 1999 [Pub. L. 106-159, 113 Stat. 1764, December 9, 1999] (MCSIA) added section 31144(g)<sup>1</sup> directing the Secretary to establish regulations to require each motor carrier owner and operator granted new operating authority to undergo a safety review within 18 months of starting operations. In issuing these regulations, the Secretary was required to: (1) Establish the elements of the safety review, including basic safety management controls; (2) consider their effects on small businesses; and (3) consider establishing alternate locations

<sup>1</sup> MCSIA originally codified sec. 31144(g) as sec. 31144(c) and directed that it be added at the end of 49 U.S.C. 31144 following preexisting subsections (c), (d), and (e). Section 4114(c)(1) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (Pub. L. 109-59, 119 Stat. 1144, August 10, 2005) (SAFETEA-LU) recodified this provision as sec. 31144(g).

where such reviews may be conducted for the convenience of small businesses. The Secretary was also required to phase in the new entrant safety review requirements in a manner that takes into account the availability of certified motor carrier safety auditors. Congress mandated increased oversight of new entrants because studies indicated these operators had a much higher rate of non-compliance with basic safety management requirements and were subject to less oversight than established operators. The authority to establish such regulations has been delegated to the Federal Motor Carrier Safety Administration (FMCSA). 49 CFR 1.73(g).

Section 210(b) of MCSIA (codified as a note to 49 U.S.C. 31144) required the Secretary to initiate a rulemaking to establish minimum requirements for applicant motor carriers seeking Federal interstate operating authority to ensure such applicants are knowledgeable about applicable Federal motor carrier safety standards. The Secretary was directed to consider establishment of a proficiency examination, as well as other requirements, to ensure applicant knowledgeability.

In addition to expanding the Secretary's authority under section 31144, section 210 of MCSIA was a specific statutory directive consistent with the more general pre-existing legal authority provided by the Motor Carrier Safety Act of 1984 (the 1984 Act) [49 U.S.C. App. 2505 (1988), recodified at 49 U.S.C. 31136(a)], which requires the Secretary to prescribe regulations on commercial motor vehicle safety. The regulations required by the 1984 Act must prescribe minimum safety standards for commercial motor vehicles (CMVs). At a minimum, the regulations shall ensure: (1) CMVs are maintained, equipped, loaded, and operated safely; (2) the responsibilities imposed on operators of CMVs do not impair their ability to operate the vehicles safely; (3) the physical condition of operators of CMVs is adequate to enable them to operate the vehicles safely; and (4) the operation of CMVs does not have a deleterious effect on the physical condition of the operators.

The rule changes the New Entrant Safety Assurance Program to improve the Agency's ability to identify at-risk new entrant motor carriers and ensures deficiencies are corrected before granting them permanent registration. It also ensures that applicants will become knowledgeable about Federal safety regulations before they commence interstate operations. As such, it implements the section 31136(a)(1)

mandate that FMCSA regulations ensure CMVs are maintained and operated safely. It does not add any new operational responsibilities on drivers pursuant to sections 31136(a)(2)–(a)(4).

## II. Regulatory History

### A. Interim Final Rule

In response to the statutory mandate in MCSIA, FMCSA published an interim final rule (IFR) titled *New Entrant Safety Assurance Process* (67 FR 31978) on May 13, 2002, which became effective January 1, 2003. All domestic and Canada-domiciled new entrants are subject to the New Entrant Safety Assurance Process. Mexico-domiciled new entrants are covered under a separate application process and safety monitoring system (see 67 FR 12652, 67 FR 12701, and 67 FR 12757 published March 19, 2002).

Under the existing New Entrant Safety Assurance Program, a motor carrier seeking to register as a new entrant is directed to the FMCSA Internet Web site to either obtain an application by mail or complete the application package online. The application package includes: (1) Form MCS–150—The Motor Carrier Identification Report; (2) Form MCS–150A—Safety Certification for Application for USDOT Number, and (3) application forms to obtain operating authority under 49 CFR part 365, if appropriate. See 49 CFR 385.305. Form MCS–150A requires the applicant to self-certify its knowledge of relevant regulations and to self-certify that basic safety management controls are in place. FMCSA also provides educational and technical assistance materials, upon request. If the application is approved, FMCSA grants new entrant registration through issuance of a United States Department of Transportation (USDOT) Number and an 18-month safety monitoring period for the new entrant begins.

A for-hire motor carrier, unless providing transportation exempt from registration requirements in the ICC Termination Act of 1995 [Pub. L. 104–88, 109 Stat. 888, December 29, 1995], also is required to obtain FMCSA operating authority under 49 U.S.C. 13902, prior to commencing covered operations. Generally, for-hire motor carriers must: (1) Complete the appropriate OP–1 application form for operating authority; (2) file a process agent designation with the Agency using Form BOC–3—Designation of Agents, Motor Carriers, Brokers and Freight Forwarders; and (3) comply with certain insurance filing requirements prior to being granted operating authority.

To maintain its new entrant registration, a carrier must demonstrate sufficient compliance with applicable Federal Motor Carrier Safety Regulations (FMCSRs) and Hazardous Materials Regulations (HMRs). Within the first 18 months of a new entrant's operation, FMCSA conducts a safety audit of the carrier's operations to educate the carrier on compliance with the FMCSRs and HMRs and to determine if the carrier is exercising basic safety management controls as defined in 49 CFR 385.3. The Agency schedules the safety audit after the carrier has been operating for at least 3 months to ensure sufficient data are on hand to adequately assess the carrier's operations. The Agency conducts the safety audit according to the scoring methodology set forth in Appendix A to part 385.

If the new entrant passes the safety audit, it retains the new entrant registration and remains subject to the new entrant safety monitoring system for the remainder of the 18-month period. FMCSA will grant permanent registration only if the new entrant successfully completes the monitoring period. If the new entrant fails the safety audit, the new entrant must provide FMCSA evidence of corrective action within a specified time period. Carriers operating vehicles designed or used to transport 16 or more passengers and hazardous materials carriers must submit evidence within 45 days; passenger carriers operating vehicles designed or used to transport between 9 and 15 passengers and non-hazardous materials property carriers must do so within 60 days. FMCSA may extend these compliance periods if it determines the new entrant is making a good faith effort to remedy the problems. If within 45 or 60 days, as applicable, the new entrant fails to respond to the notice or fails to correct the deficiencies, FMCSA issues an out-of-service order prohibiting further operations in interstate commerce and revokes the new entrant registration.

A new entrant may appeal the Agency's determination by requesting an administrative review. The decision rendered by the administrative review process is final. A new entrant that fails to make corrections following the safety audit or whose new entrant registration is revoked for failure to submit to a safety audit must wait at least 30 days to reapply for new entrant registration.

Section 210(b) of MCSIA directed that the implementing regulations ensure applicant carriers are knowledgeable about applicable Federal safety requirements before receiving new entrant registration. As part of this

rulemaking, the Secretary was directed to consider a proficiency examination, as well as other requirements to ensure applicants understand applicable safety requirements before being granted new entrant registration.

In developing the May 2002 IFR, the Agency considered, but decided against requiring a proficiency examination as the means of ensuring a new motor carrier applicant's knowledge about applicable safety regulations. Instead, the Agency established procedures in the IFR to: (1) Require the new entrant to certify to being knowledgeable about applicable requirements and to certify procedures are in place for basic safety management controls as a condition for receiving new entrant registration; (2) provide the applicant with materials explaining the Federal safety requirements to ensure that a knowledgeability foundation is available to all new entrants; (3) confirm the new entrant's knowledge of safety requirements during the safety audit; and (4) grant permanent registration only to new entrants that successfully complete the safety audit and 18-month safety monitoring system.

### B. Notice of Proposed Rulemaking

The Agency received numerous comments to the IFR from industry and public interest groups regarding the self-certification requirement and the effectiveness of the safety audit. These comments indicated that the safety audit is not effective in identifying new entrant motor carriers lacking basic safety management controls. FMCSA field staff also recommends enhancing the New Entrant Safety Assurance Program, based upon its experience in program implementation and administration. In response, the Agency convened a working group to review and improve the program. The Agency proposed enhancements to the New Entrant Safety Assurance Program in a notice of proposed rulemaking (NPRM) titled *New Entrant Safety Assurance Process* (71 FR 76730) on December 21, 2006.

The Agency sought to enhance the new entrant program through the following regulatory proposals and certain non-regulatory actions described in the NPRM:

*Automatic failure of the safety audit.* Discovery of any one of 11 specific regulatory violations during the safety audit would result in automatic failure. The Agency proposed that these 11 regulatory requirements were essential to demonstrating that basic safety management controls are in place.

*Triggers for expedited action.* Discovery of any one of seven triggering

incidents, generally determined during a roadside inspection, would result in FMCSA taking some form of expedited action against the new entrant. Expedited actions could include a written demand for corrective action, an expedited safety audit (if the new entrant had not yet received one) or an expedited compliance review.

*Elimination of Form MCS-150A.* The Agency proposed to eliminate the self-certification of carrier knowledge about applicable Federal requirements. Many carriers were discovered to have falsely certified having such knowledge, and commenters urged the Agency to remove this requirement. The Agency concluded that enhanced educational and technical assistance materials would provide most carriers with sufficient knowledge of applicable regulations and of how to comply with such regulations, as required by section 210(b) of MCSIA.

*Americans with Disabilities Act (ADA) and household goods (HHG) compliance.*

The Agency proposed to review and include questions regarding a carrier's compliance with ADA and HHG compliance in the safety audit. While responses to these questions would not be a factor in determining the outcome of the safety audit, the Agency would refer violations of the ADA to the U.S. Department of Justice for further investigation and may take enforcement actions for violations of HHG regulations.

*Educational and Technical Assistance (ETA) materials.* The Agency indicated that it intended to improve and update ETA materials and provide an interactive CD to enhance carrier knowledge of applicable Federal safety requirements. As discussed in the next section, the Agency has made enhancements to the ETA materials.

*Corrective action and administrative review processes.* The Agency proposed regulatory changes to clarify procedures relating to the corrective action and administrative review processes.

*Non-North America-domiciled motor carriers.* The Agency proposed a new application process and safety monitoring system for motor carriers domiciled outside of the United States, Canada and Mexico (NNA-domiciled motor carriers). These carriers are currently not covered by a safety monitoring system.

### III. Discussion of Comments to the NPRM and Section-by-Section Analysis of the Final Rule

In response to the December 2006 NPRM, FMCSA received 17 comments from 21 entities. The commenters

included nine State enforcement agencies; one individual commenter; one motor carrier—Greyhound Lines, Inc., seven motor carrier industry associations and consultants, including the American Trucking Associations (ATA), the Owner-Operator Independent Drivers Association (OOIDA), and the Canadian Trucking Alliance (CTA); one safety enforcement organization—the Commercial Vehicle Safety Alliance (CVSA), one union, the Amalgamated Transit Union and one safety advocacy group, Advocates for Highway and Auto Safety (Advocates).

Based on public comments and the Agency's review of the December 2006 proposal, FMCSA has made changes in the final rule to the proposed revisions to part 385.

#### A. "Chameleon" Carriers—§ 385.306

FMCSA described the term "chameleon carrier" as a carrier that attempts to register as a new entrant and operate as a different entity under a new USDOT Number in an effort to evade enforcement action and/or out-of-service orders issued against it by the Agency. FMCSA proposed under § 385.305 that such carriers would be subject to revocation of registration and may be subject to civil and/or criminal penalties. All of the comments received on this issue supported FMCSA's efforts in identifying chameleon carriers. However, some stated that the Agency did not include details on how it will detect chameleon carriers. They recommended revising the new entrant application to request more "related company" information. CVSA recommended the Agency coordinate efforts regarding various information systems and projects—including the Creating Opportunities, Methods, Practices, and Securing Safety System (COMPASS), the Licensing & Insurance (L&I) System, the Comprehensive Safety Analysis 2010 (CSA 2010) Initiative, the Commercial Vehicle Information Systems and Networks (CVISN), Unified Carrier Registration (UCR) System, and the Commercial Driver's License Information System (CDLIS) modernization project—to better detect chameleon carriers. OOIDA urged the Agency to look at "chameleon" freight brokers.

#### FMCSA Response:

*Actions regarding chameleon carriers.* New § 385.306 states that a carrier that provides false or misleading information, or that conceals material information in connection with the application process is subject to revocation of its new entrant registration and civil and/or criminal penalties. The Agency is committed to ensuring that

only safe carriers are permitted to continue operating on our Nation's highway. FMCSA has the inherent authority to correct, modify, or revoke new entrant registration issued inadvertently, or obtained by fraud, misrepresentation or other wrongful means.

If FMCSA determines the reapplying motor carrier is not subject to an outstanding order to cease operations under a previous USDOT Number, the Agency will link the history of the old and new companies by identifying the new USDOT Number as the primary active number. The old USDOT Number would be listed in the Agency database as one under which the carrier has also done business, and its safety history, including enforcement actions against the motor carrier, would be linked to records on the new entity.

When a carrier applies for a USDOT Number, the system checks the application against existing motor carrier Census database records to identify possible duplicate records in an effort to prevent assignment of multiple USDOT Numbers to a single motor carrier. The Agency currently is reviewing its information systems to identify ways to enhance its ability to detect chameleon carriers during the application process. FMCSA also plans to address the chameleon carrier issue under a separate rulemaking in response to SAFETEA-LU section 4113 regarding patterns of safety violations by motor carrier management and will reassess the need for additional revisions to its information systems in support of that effort. Finally, under the Unified Registration System rulemaking, the Agency is streamlining its registration process so that we can more efficiently track all FMCSA regulated motor carriers, freight forwarders and brokers.

#### B. Triggers for Expedited Action—§ 385.308

ATA asked the Agency to clarify what the term "hazardous materials incident" means and to identify which hazardous materials incidents could result in an expedited action. Advocates requested more information regarding the rationale for including the violation which involves driver or vehicle out-of-service rates (item 7 on the list under proposed § 385.308). Another commenter asked if the wording of proposed § 385.308 means the Agency will take expedited action whenever one of these violations or incidents is discovered.

#### FMCSA Response:

*Clarification of the term "hazardous materials incident."* The Agency agrees that the description of a hazardous

materials incident under §§ 385.308(a) and (b) is unclear. In response, the Agency revises § 385.308 (a)(3) to make a hazardous materials incident criteria consistent with the criteria for a reportable hazardous materials incident under 49 CFR 171.15 and 171.16 of the HMRs with regard to a single incident involving: (1) A highway route-controlled quantity of certain radioactive materials (Class 7); (2) any quantity of certain explosives (Class 1, Division 1.1, 1.2, or 1.3; or (3) any quantity of certain poison inhalation hazard materials (Zone A or B). The Agency revises 49 CFR 385.308(a)(4) to cross reference 49 CFR 171.15 and 171.16 for two or more hazardous materials incidents involving hazardous materials other than those listed in paragraph (a)(3) under § 385.308.

*Driver or vehicle out-of-service rates.* Under existing § 385.307(a), the Agency may take expedited action against a motor carrier if it were discovered to have an “accident rate or driver or vehicle violation rate that is higher than the industry average for similar motor carrier operations.” The Agency expands the list of actions that could trigger expedited actions and specifically replaces existing § 385.307(a) with § 385.308(a)(7), “having a driver or vehicle out-of-service rate of 50 percent or more based upon at least three inspections occurring within a consecutive 90-day period.” From an operational standpoint, the “50 percent or more” threshold will provide for more effective and efficient monitoring of new entrant performance because it is a non-subjective and easily measured rate.

*Requirement to take expedited action.* The regulatory text of § 385.308 provides that the Agency may, but is not required to, initiate expedited action following discovery of a triggering action or violation. However, the section heading used the word “will” instead of “may.” The final rule changes the section heading so that it is consistent with the regulatory text.

#### *C. Corrective Action and Administrative Review Processes—§§ 385.319, 385.323, 385.325, and 385.327*

Several commenters supported reducing the timeframes for the corrective action and administrative review processes. Commenters also complained that a paper-based system is an inadequate means of ensuring corrective action for detected deficiencies. Other comments recommended verification be conducted on-site at the carrier’s place of business.

#### *FMCSA Response:*

*Corrective action and administrative review timeframes.* FMCSA believes the existing timeframes for corrective action and administrative review should be retained because they reflect a balanced consideration of the due process rights of motor carriers as well as demands on the Agency related to processing corrective action submissions and administrative review requests. Comments on this issue did not provide compelling reasons for shortening the timeframes for the corrective action or administrative review processes.

Depending on the nature and severity of identified violations, the Agency may take expeditious enforcement action against the new entrant without using the corrective action procedures. FMCSA has authority to immediately shut down operations of a motor carrier deemed to be an imminent hazard to highway safety. At all times during which a new entrant is subject to the safety monitoring system in 49 CFR part 385, subpart D, it is also subject to the general safety fitness procedures established in subpart A and to compliance and enforcement procedures applicable to all carriers regulated by FMCSA. Section 385.335, for example, expressly recognizes the Agency’s authority to conduct a compliance review instead of a safety audit when circumstances warrant more intensive scrutiny of a new entrant’s safety compliance.

The final rule amends § 385.319, which concerns a new entrant’s responsibilities for correcting deficient safety management practices discovered during the safety audit, by adding passenger carriers operating vehicles designed or used to transport between 9 and 15 passengers for compensation to the group of carriers that must remedy deficiencies within 45 days of notification by FMCSA. This change achieves consistency with 49 CFR 385.11, which provides a 45-day corrective action period for “unfit” motor carriers transporting passengers by CMV. The Agency also amends § 385.319(c), as well as §§ 385.323, 385.325, and 385.327, to make them consistent with timeframes relating to notification of motor carriers of passengers under § 385.11. Section 385.319 is rewritten to cross reference the definition of CMV relating to hazardous materials carriers in 49 CFR 390.5 for purposes of consistency.

The administrative review provisions in § 385.327 were ambiguous with respect to the time during which a carrier was allowed to file a request for administrative review and when it had to file a request for administrative review, if it wanted the review to be

completed before its registration was revoked. Accordingly, FMCSA revises § 385.327 to clarify timeframes for requesting administrative review of determinations regarding the safety audit. A new entrant must file the request within 90 days of the date of the notice of audit failure or within 90 days of the date of notice of insufficient corrective action. However, if a new entrant wants a decision before the revocation takes effect, the new entrant must file a request for review within 15 days of the date of the notice of audit failure. Requests filed after the 15th day will be considered, but it is possible the revocation would take effect before the administrative review process is completed, if the carrier waits until after the 15th day.

*On-site verification of corrective action.* Regarding on-site verification of evidence of corrective action, in most instances written documentation is sufficient to substantiate correction of deficiencies, and an on-site visit is not required. The Agency believes its proposed corrective action process is adequate and is an efficient use of resources.

#### *D. Automatic Failure of the Safety Audit—§ 385.321(b)*

Some commenters to the NPRM raised concerns regarding the list of regulatory violations that were proposed to result in automatic failure of the safety audit. Advocates stated that the proposed list is too short and should include more hours-of-service-based violations. ATA stated that regulatory violations which are based on a single driver or a single CMV would unfairly disadvantage larger carriers. Some asked why certain regulatory violations, if discovered during the safety audit, would cause an automatic failure but would not result in expedited action if discovered during a roadside inspection.

*FMCSA Response:* Under § 385.321(b), the Agency increases from 11 to 16 the number of regulatory violations that will result in automatic failure of the safety audit. The Agency will develop appropriate enforcement guidelines regarding how the Agency will address egregious safety violations found during the safety audit if such violations are not part of the automatic failure violation list and do not result in failure of the safety audit under the evaluation guidelines in Appendix A to part 385. For example, the guidance will provide instructions to document all deficiencies regardless of whether they cause failure of the safety audit, and to include them in the Motor Carrier Management Information System (MCMIS).

*Automatic failure determination.* violations will result in automatic failure of the safety audit in accordance with guidelines in the table to § 385.321(b).  
 Committing any one of the following 16

Table to § 385.321(b)

Violations that will result in automatic failure of the new entrant safety audit	
Violation	Guidelines for determining automatic failure of the safety audit
1. § 382.115(a)/§ 382.115(b)—Failing to implement an alcohol and/or controlled substances testing program (domestic and foreign motor carriers, respectively).	Single occurrence.
2. § 382.201—Using a driver known to have an alcohol content of 0.04 or greater to perform a safety-sensitive function.	Single occurrence.
3. § 382.211—Using a driver who has refused to submit to an alcohol or controlled substances test required under part 382.	Single occurrence.
4. § 382.215—Using a driver known to have tested positive for a controlled substance .....	Single occurrence.
5. § 382.305—Failing to implement a random controlled substances and/or alcohol testing program.	Single occurrence.
6. § 383.3(a)/§ 383.23(a)—Knowingly using a driver who does not possess a valid CDL .....	Single occurrence.
7. § 383.37(a)—Knowingly allowing, requiring, permitting, or authorizing an employee with a commercial driver's license which is suspended, revoked, or canceled by a State or who is disqualified to operate a commercial motor vehicle.	Single occurrence.
8. § 383.51(a)—Knowingly allowing, requiring, permitting, or authorizing a driver to drive who is disqualified to drive a commercial motor vehicle.	Single occurrence. This violation refers to a driver operating a CMV as defined under § 383.5.
9. § 387.7(a)—Operating a motor vehicle without having in effect the required minimum levels of financial responsibility coverage.	Single occurrence.
10. § 387.31(a)—Operating a passenger carrying vehicle without having in effect the required minimum levels of financial responsibility.	Single occurrence.
11. § 391.15(a)—Knowingly using a disqualified driver .....	Single occurrence.
12. § 391.11(b)(4)—Knowingly using a physically unqualified driver .....	Single occurrence. This violation refers to a driver operating a CMV as defined under § 390.5.
13. § 395.8(a)—Failing to require a driver to make a record of duty status .....	Requires a violation threshold (51% or more of examined records) to trigger automatic failure.
14. § 396.9(c)(2)—Requiring or permitting the operation of a commercial motor vehicle declared "out-of-service" before repairs are made.	Single occurrence.
15. § 396.11(c)—Failing to correct out-of-service defects listed by driver in a driver vehicle inspection report before the vehicle is operated again.	Single occurrence.
16. § 396.17(a)—Using a commercial motor vehicle not periodically inspected .....	Requires a violation threshold (51% or more of examined records) to trigger automatic failure.

In response to comments stating that violations based on a single driver or a single CMV unfairly disadvantage larger carriers, the Agency has made adjustments to its approach for the automatic failure determination. Although 14 of the 16 regulatory violations (numbers 1–12, 14 and 15 in the table to § 385.321(b)) would trigger automatic failure of the safety audit based on a single occurrence of the violation, two of the violations will include thresholds. FMCSA continues to believe the severity of 14 of these violations warrants the single-occurrence trigger. However, in the case of §§ 395.8(a) and 396.17(a), the Agency will require a violation threshold of 51% to cause automatic failure of the safety audit. (Both of the threshold violations were included in the December 2006 NPRM). FMCSA has determined that the appropriate standard is preponderance of the evidence, often called the "51% rule." In other words, if the driver did not

prepare a record of duty status in more than half of the trips examined, or the carrier failed to perform periodic inspections on more than half of the fleet vehicles examined during the safety audit, there exists a violation threshold indicative of breakdowns in the carrier's management controls which will result in automatic failure of the new entrant safety audit. Violation rates of 50% or less will be taken into consideration in the overall assessment of the carrier's compliance with applicable regulations, and the Agency may use other means to improve the carrier's performance, including assessment of civil penalties following a compliance review of the new entrant.

*Discussion of additional regulatory violations.* Violation two (§ 382.201) corrects an inadvertent omission from the December 2006 NPRM. While the Agency proposed that a violation of the prohibition against carriers using a driver who tests positive for controlled substances would result in automatic

failure of the safety audit, it omitted the corresponding violation regarding the prohibition against carriers knowingly using a driver who has an alcohol concentration of 0.04 or greater.

Violation five (§ 382.305) involves failure to implement random controlled substances and/or alcohol testing, a crucial element of any effective drug and alcohol testing program. The Agency believes implementation of such random testing is essential to deterring use of controlled substances or abuse of alcohol by CMV drivers.

Violation six (§§ 383.3/383.23) is added to close a gap in the list of automatic failure regulatory violations relating to CDL drivers. The NPRM only addressed a carrier that uses a driver with a suspended, revoked or cancelled CDL or a driver who was disqualified to operate a CMV. Using a driver who does not obtain a CDL when one is required is an equally serious safety violation.

Violation 10 (§ 387.31(a)) complements regulatory violation

number nine (§ 387.7) by including financial responsibility requirements for passenger-carrying motor carriers in addition to property carriers. The December 2006 NPRM inadvertently omitted financial responsibility requirements for passenger carriers.

Violation 15 (§ 396.11(c)), failing to correct out-of-service defects listed by the driver, complements violation 14 (§ 396.9(c)(2)), requiring or permitting the operation of a commercial motor vehicle declared out-of-service before repairs are made. Section 396.9(c)(2) relates specifically to a vehicle declared out-of-service as the result of an inspection performed at roadside. Inclusion of § 396.11(c) will ensure that all documented out-of-service defects are corrected before the vehicle is operated again, inasmuch as continued operation of the vehicle could present an imminent hazard to the public.

*Distinctions in the lists of regulatory violations (automatic failure vs. expedited actions).* Generally, the regulatory violations that would trigger automatic failure of the safety audit are more readily discernible at the carrier's place of business. The regulatory violations that would trigger an expedited action are detectable at the roadside or away from the carrier's place of business. New entrant motor carriers discovered with these violations could be identified during a roadside inspection or by any other means even if the Agency had not yet conducted a safety audit.

*E. Elimination of Form MCS—150A—Multiple Conforming Amendments (§§ 385.305, 385.405 and 385.421)*

Conforming amendments are made throughout part 385 to eliminate the requirement to complete Form MCS—150A. The purpose of the MCS—150A was for an authorized official of the new entrant to certify to his/her familiarity with relevant regulations and to having a system in place to ensure compliance with the FMCSRs and applicable HMRs. However, based on the safety audits conducted to date, FMCSA has found that self-certification has not been an accurate indicator of knowledgeability. Therefore, FMCSA eliminates the self-certification registration requirement and corresponding Form MCS—150A.

*F. Enhanced ETA Materials*

The Agency has updated, significantly enhanced and expanded accessibility of its ETA materials. The ETA materials pre-date the New Entrant Safety Assurance Program and were originally intended to help motor carriers prepare for a compliance review. In response to comments regarding the quality of the

ETA materials, the Agency has incorporated new information helpful to new entrants seeking knowledge about how to comply with applicable Federal safety standards and preparing for the new entrant safety audit. The new document retains the title "Educational and Technical Assistance Program—A Motor Carrier's Guide to Improving Highway Safety" and includes the following enhancements:

- *Updated regulatory requirements.* The regulatory information has been updated to include new requirements imposed since 2001.
- *Revamped Design.* Regulatory information is presented in the same order in which it appears in the Federal Motor Carrier Safety Regulations (49 CFR parts 300–399). In addition to a table of contents, two Quick Reference Guides are added to the front of the document to help readers quickly identify all regulatory requirements relevant to drivers and employers, respectively. The reference guides are written in question-and-answer format with topical subheadings. The regulatory information is attractively presented and easy to understand. We believe these improvements will motivate new entrants to make more effective use of the materials to become familiar with applicable Federal safety standards.

○ *Expanded coverage of the New Entrant Safety Assurance Program.* The section on Part 385—Safety Fitness Procedures—includes a clearer discussion of the New Entrant Safety Assurance Program and the Hazardous Materials Safety Permitting Program. Because the ETA enhancement project was completed in July 2008, prior to publication of this final rule, the section on part 385 reflects new entrant program requirements in effect as of that date and not the new requirements set forth in this final rule; changes made by this final rule will be included in the next revision to the ETA materials.

- *More Accessible.* The ETA materials are available electronically on, and may be downloaded from, the FMCSA Web site. The electronic version includes links directly to desired content from the Driver or Employer Quick-Reference Guides.

The Agency also will publish a separate notice soliciting public comment on other ways to improve carrier knowledgeability of applicable Federal safety standards.

*G. The Application Process for Non-North America-Domiciled Motor Carriers—Part 385, Subpart H*

*General.* Subpart H to part 385 adopts without change proposals set forth in

the December 2006 NPRM governing the new application process for non-North America-domiciled motor carriers seeking to operate within the United States beyond U.S. municipalities and commercial zones on the U.S.-Mexico international border.

*Acceptable licensing for CMV operators used by NNA-domiciled motor carriers.* Advocates commented that only a U.S. or Canadian CDL should be acceptable.

*FMCSA Response:* In November 1991 under the terms of an international agreement, the Administrator of the Federal Highway Administration (FMCSA's predecessor agency) determined that Mexican commercial driver's licenses (Licencias Federal de Conductor) are equivalent to U.S. CDLs. This determination was upheld on judicial review. For this reason, § 385.605(a) continues to require an NNA-domiciled motor carrier to use only drivers who possess a valid CMV driver's license. Included on the list of valid CMV driver's licenses are the CDL, Canadian Commercial Driver's License and Mexican Licencia de Federal de Conductor.

*H. Form—OP–1(NNA) for Non-North America-Domiciled Motor Carriers Requesting New Entrant Registration*

Advocates strongly opposed reliance on narrative responses to Section V of the OP–1(NNA) and self-certification responses to proposed Sections VIII and IX.

*FMCSA Response:* FMCSA does not adopt Advocates' recommendations for modifying the Form OP–1(NNA) because the Agency verifies applicant responses during the pre-authorization safety audit (PASA) and prior to granting new entrant registration to them. Instead, Form OP–1(NNA)—Application for U.S. Department of Transportation (USDOT) Registration by Non-North America-Domiciled Motor Carriers, is adopted as proposed in the December 2006 NPRM. The Agency corrected the form's instructions: (1) To reflect the Agency's new Headquarters location; and (2) to conform to a technical correction to part 387 concerning the CMV weight threshold.

*I. Proposed Safety Monitoring System for Non-North America-Domiciled Motor Carriers—Part 385, Subpart I*

The final rule adopts all provisions regarding the safety monitoring system for NNA-domiciled motor carriers as set forth in the December 2006 NPRM without change.

*J. Modification of Safety Audit Guidelines Under Appendix A to Part 385*

**ADA compliance.** Commenters suggested that the new entrant program should include more of a focus on ensuring passenger carriers' compliance with the ADA by including compliance with ADA requirements in the pass/fail determination of the safety audit. Other commenters also claimed that the Agency's position on ADA enforcement is contradicted by case law [*Peter Pan Bus Lines, Inc. v. Federal Motor Carrier Safety Administration* (471 F. 3d 1350 (DC Cir. 2006))].

Congress addressed the issues raised in the *Peter Pan Bus Lines* case by enacting the Over-the-Road Bus Accessibility Act of 2007 [Pub. L. 110–291, 122 Stat. 2915, July 30, 2008]. This law requires FMCSA to consider compliance with DOT's ADA regulations as an element of an over-the-road bus company's fitness for receiving new operating authority. It also authorizes the Agency to suspend, amend, or revoke a motor carrier's registration in the event of a willful failure to comply with DOT's ADA regulations.

Inasmuch as ADA compliance is not indicative of a passenger carrier's ability to operate its vehicles safely, a finding of potential ADA noncompliance will not affect the results of the new entrant safety audit. However, to assist in ensuring ADA compliance, FMCSA will take the following additional steps:

- Begin training enforcement officials to detect ADA compliance violations. Such training will not be included as an auditor certification requirement under 49 CFR Part 385, subpart C.
- Include a question regarding ADA compliance in the safety audit.
- If ADA noncompliance is discovered in the course of a new entrant safety audit or compliance review, FMCSA will forward the information to the U.S. Department of Justice (DOJ), and appropriate action by DOJ and/or DOT will be taken, pursuant to the memorandum of understanding to be established between DOJ and DOT as directed by Public Law 110–291.
- Refer any non-compliant motor carrier that is also a recipient of DOT financial assistance to the Federal Transit Administration (FTA) for administrative enforcement action, as appropriate. FTA administers a program that provides financial assistance to some over-the-road bus carriers and, consistent with section 504 of the Rehabilitation Act of 1973 and DOT rules implementing it (49 CFR Part 27), cannot provide such assistance to

carriers who are out of compliance with their ADA obligations.

- When appropriate, initiate action to amend, suspend, or revoke a carrier's new entrant registration based on willful noncompliance with DOT's ADA regulations (49 CFR Part 37, Subpart H).

*K. Conforming Amendments to Part 387*

The Agency adopts the December 2006 NPRM proposal to amend part 387 by requiring all non-North America-domiciled motor carriers to file evidence of financial responsibility with the Agency as a condition for registration. Sections 387.3(c)(1) and 387.9 are also revised to make a technical correction to the threshold weights pertaining to CMVs to read "over 10,001 pounds" and "less than 10,001 pounds," as appropriate.

*L. Discussion of Remaining Comments That Will Not Warrant a Regulatory Change*

1. Proficiency Examination. Three commenters urged the Agency to include a proficiency examination as part of the new entrant program to ensure applicants are knowledgeable about the applicable regulatory safety requirements.

**FMCSA Response:** The Agency is sensitive to concerns expressed by commenters that there may be additional mechanisms of ensuring applicant knowledgeability. FMCSA will respond to these concerns by publishing a notice inviting the public to provide information to assist the Agency in evaluating the feasibility of alternative requirements or additional enhancements to the current process for ensuring applicant knowledgeability, including proficiency examinations. However, FMCSA believes this final rule fully complies with section 210(b) of MCSIA, which requires the Agency to consider a proficiency examination. The Agency has considered the option of requiring a proficiency examination and has decided not to impose such a requirement at this time. Commenters to the Agency's notice regarding the applicant knowledgeability issue will have the opportunity to address the feasibility of potential alternatives for improving applicant knowledgeability, including proficiency examinations.

2. PASA and compliance review requirement for all new entrants. Advocates believe domestic and Canada-domiciled motor carriers, like NNA-domiciled motor carriers, should be subject to a PASA to obtain new entrant registration and a compliance review to receive permanent registration.

Some comments recommended the Agency require a new entrant whose registration was revoked to successfully undergo a PASA before being re-issued new entrant registration.

**FMCSA Response:** The Agency's limited resources are insufficient to provide for conducting a PASA and compliance review for the 40,000–50,000 new entrants annually that obtain USDOT Numbers. Section 210 of MCSIA does not require PASAs or compliance reviews for new entrant carriers. FMCSA disagrees with the Advocates' and other commenters' statements about the necessity of conducting PASAs on all new motor carriers. The Agency continues to believe that its safety monitoring program and the safety audit, accompanied by expedited actions, will help to ensure safety given current resources.

Today's final rule does not require reapplying new entrants to successfully complete a PASA as a condition of obtaining new entrant registration. If the carrier's new entrant registration was revoked because the carrier refused to submit to a safety audit, it would be re-prioritized for an expedited safety audit as soon as practicable upon reentering the new entrant program. A reapplying carrier is prohibited from operating in interstate commerce until its new application is approved. A new 18-month monitoring period would start upon approval of the new application.

A carrier whose new entrant registration was revoked for failing the safety audit would have to submit an updated Form MCS–150 application and provide evidence that it has corrected the deficiencies that resulted in revocation of its registration. The Agency will not grant new entrant registration, and a carrier may not conduct interstate operations, unless FMCSA approves the new application and corrective action plan. Additionally, the carrier will be subject to a new 18-month safety monitoring period.

To retain historical information on a revoked new entrant's past performance, FMCSA will require the new entrant to retain the same USDOT Number when reapplying for registration. This is consistent with what FMCSA has done in the past and is currently doing whenever a carrier is placed out-of-service and subsequently remedies whatever deficiencies resulted in the out-of-service order.

3. Impact of rule on Federal/State resources. Several State enforcement agencies requested that FMCSA disclose who would be responsible for handling the increased number of corrective

actions anticipated due to the higher failure rate likely to occur as a result of modifications to the new entrant program.

*FMCSA Response:* States are not responsible for managing corrective action procedures and administrative review requests. FMCSA handles these actions, and the Agency will continue to manage these due process provisions in the new entrant program at this time.

4. Implementation issues/questions. The Public Utilities Commission of Ohio (PUCO) requested that the Agency address its concerns regarding implementation of the new entrant program:

- *Reclassified motor carriers and the new entrant safety monitoring system.* According to PUCO, some motor carriers enter the new entrant program and later reclassify to an operational status not subject to new entrant program requirements (such as a PRISM registrant [an entity that is required by the State but not FMCSA to obtain a USDOT Number under the Performance and Registration Information System Management (PRISM) program] or intrastate motor carrier). If the carrier later reclassifies as a new entrant, PUCO believes the Agency should disregard time operating outside of the new entrant program when computing the new entrant's 18-month safety monitoring period.

- *Treatment of relocated new entrant motor carriers.* PUCO asks the Agency to ensure, in instances where a new entrant transfers its operations to a new State, there is sufficient time provided to the new jurisdiction to be able to schedule and conduct the safety audit prior to the end of the 18-month period.

- *Treatment of new entrant motor carriers that change operational status to evade the safety audit.* PUCO recommends the Agency track motor carriers that continually change their status in an effort to avoid a safety audit to ensure that they undergo a safety audit or compliance review within a specified time period.

- *Implementation date for the new entrant rule.* PUCO requests the Agency provide sufficient time for it to make staffing changes and conduct training when establishing the final rule compliance date.

*FMCSA Response:*

*Reclassified motor carriers and the new entrant safety monitoring system.* The Agency agrees that time spent operating as a motor carrier outside of FMCSA jurisdiction should not count toward completion of the 18-month new entrant safety monitoring process. For example, if a motor carrier completes 6 months of the safety monitoring period

before converting to a status that is not subject to the new entrant program then upon re-entering the new entrant program the clock would resume from 6 months onward. Time operating as a non-new entrant would not be credited toward the new entrant safety monitoring period.

*Treatment of relocated new entrant motor carriers.* Existing regulations under § 385.333(d) permit a carrier to continue operations as a new entrant if a safety audit or compliance review has not been performed by the end of the 18-month monitoring period through no fault of the motor carrier. The carrier may continue operating until FMCSA conducts a safety audit or compliance review and makes a final determination regarding the adequacy of its safety management controls. This provision gives FMCSA the flexibility to extend the safety monitoring period for any new entrant that relocates from one State to another before completion of the safety audit. A new entrant motor carrier that relocates would continue to be subject to the new entrant program. FMCSA information systems would continue to monitor the new entrant's status through completion of the safety audit and the 18-month safety-monitoring period.

*Treatment of new entrant motor carriers that change operational status to evade the safety audit.* A motor carrier may voluntarily revoke its new entrant registration at any time. Nonetheless, the Agency is aware that there may be instances in which a motor carrier may use this option to evade the new entrant safety audit. Because MCMIS reveals that an extremely small number of motor carriers may be manipulating operational status in this way, the Agency does not believe a regulatory change is warranted. The Agency analyzed data from MCMIS regarding changes in status for the period from January 2003 through October 2007. MCMIS records the initial issuance of new entrant registration as the first change and subsequent changes are tracked as change 2, 3, etc. For example, a carrier that receives new entrant registration in May 2007, changes its operations solely to intrastate nonhazardous materials transportation in May 2008, and then resumes interstate operations and re-enters the new entrant program in August 2008, is considered as having three changes. For purposes of the report, the Agency considered four or more changes as frequent and found that of 200,000 new entrants, only 130 indicated frequent changes. Instead of a regulatory change, the Agency will

address this issue operationally by altering the audit prioritization formula.

Besides the prioritization algorithm under the Safety Status Measurement System (SAFESTAT), several means exist to trigger a compliance review of a motor carrier. The Agency will consider the frequency of changes in operating status as a reason for conducting a compliance review on a motor carrier. There may be instances where a motor carrier may legitimately request frequent changes in operational status. However, the Agency believes it is appropriate to prioritize carriers for a compliance review if there are frequent changes in status. Existing §§ 385.333 and 385.335 indicate that a new entrant may be subject to a compliance review during the 18-month safety-monitoring period and that the Agency may take such action at its discretion.

*Implementation date for the new entrant rule.* In establishing a 1-year compliance date for this final rule, the Agency has taken into consideration and provided time for staffing changes, information system modifications, and training.

5. New entrant related notifications to other jurisdictions. Missouri DOT claimed that a more aggressive new entrant program will cause a dramatic increase in the failure rate of motor carriers. It recommended development of a real-time database for notification of State enforcement personnel. CVSA also recommended that the notification take place in several different media types and formats, both electronic and print. This issue was not directly addressed in the 2002 IFR or the 2006 NPRM.

*FMCSA Response:* The Agency already provides the States with Web-based access to information about motor carriers, including new entrants. If an enforcement officer has Web access, the officer can check new entrant status in "real-time" through FMCSA's enforcement query system designed to dramatically increase access to motor carrier safety information for State and Federal law enforcement personnel.

6. Reciprocity agreement with Canada concerning provincial audits. CTA requested FMCSA exempt Canada-domiciled new entrants that had undergone a provincial facility audit during the 18-month monitoring period from the requirement to pass a safety audit under the New Entrant Safety Assurance Process. CTA reiterated that provincial audits suffice for purposes of FMCSA's New Entrant Safety Assurance Process. CVSA recommended developing reciprocity agreements for safety audits with Canada and Mexico.

*FMCSA Response:* The Agency acknowledges CTA's concerns but the

Agency cannot exempt Canada-based carriers from the new entrant program required by 49 U.S.C. 31144(g)(1). Section 31144(g)(1) does not provide FMCSA authority to exempt new entrants from the safety audit requirement. FMCSA is currently working with Canadian officials to examine the feasibility of establishing a reciprocity agreement concerning compliance reviews conducted on motor carriers in their respective country of domicile. The Agency will consider working with Canadian officials on reciprocity of new entrant safety audits.

7. Group audits and audits conducted at alternate locations. In comments to the NPRM, CVSA questioned whether group audits provide a proper environment for the safety audits.

*FMCSA Response:* The Agency will continue conducting group audits and conducting audits at alternate locations, as appropriate. Congress directed the Agency under section 210(a) of MCSIA to consider alternate locations where safety audits may be conducted for the convenience of small businesses. We believe conducting audits at alternate locations can be beneficial for both motor carriers and the Agency. Group audits can be an efficient means of simultaneously educating and auditing larger groups of motor carriers than are covered during single-carrier audits. Typically, Federal or State enforcement personnel determine a date to convene the group audit and contact several new entrants by telephone to schedule them to attend. After all carriers are scheduled by phone, the enforcement official sends a confirmation letter with the appointment date, time and location and instructions on specific records and information to bring to the audit.

Group audits take place away from the respective carriers' principal places of business, generally in a large conference room either at the State agency or at a local hotel. The audit commences with an educational presentation for the entire group, including a question-and-answer period and educational materials. After the presentation, several individual safety audits are conducted simultaneously throughout the room. The room is configured with tables spaced sufficiently to provide adequate privacy for the carrier official and safety auditor. A safety auditor conducts a one-on-one interview with the carrier official and examines the carrier's safety records. In some instances, enforcement personnel have been able to conduct multiple sessions, auditing as many as 48 carriers in a single day. At the conclusion of the audit, the carrier is provided with a

written notice of determination and information on corrective actions for any detected deficiencies. A carrier that fails the safety audit is subject to revocation of registration if corrective action is not completed.

Nonetheless, we recognize that group audits only are beneficial in select situations, depending on many factors including, but not limited to, the number of new entrants within the given geographical area. For this reason, the Agency conducts group audits only in those areas where practicable. Safety auditors are also careful to judiciously separate the educational and auditing functions in such a way as to maintain carrier privacy.

8. Program assessment. CVSA recommends that FMCSA conduct a thorough program assessment to examine the impact of the safety audit.

*FMCSA Response:* We agree, but will defer until the enhancements made by this final rule have been fully implemented and sufficient time has elapsed to enable evaluation of program changes.

9. Comments beyond the scope of the rule. Advocates criticized the Agency for what it calls use of SafeStat and the roster of acute and critical regulations as the guideposts for determining which carriers pose increased safety risks. OOIDA stated it believes the report titled "Analysis of New Entrant Motor Carrier Safety Performance and Compliance Using SafeStat" is "scientifically challenged" and should not be the basis for FMCSA to impute an increase in the safety risks associated with new entrant motor carriers. The report is in the docket for this rule.

*FMCSA Response:* Discussions of SafeStat for identifying at-risk carriers and prioritizing them for compliance reviews are beyond the scope of the New Entrant Safety Assurance Process final rule. Moreover, SafeStat itself has no bearing on the implementation of the new entrant program since Congress has mandated that all new entrants submit to the safety audit before receiving permanent registration, nor does it have any bearing on the analysis of its effectiveness.

#### IV. Rulemaking Analyses

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

FMCSA has determined that this final rule is a significant regulatory action within the meaning of Executive Order 12866 and the U.S. Department of Transportation's regulatory policies and procedures (DOT Order 2100.5 dated May 22, 1980; 44 FR 11034, February

26, 1979). FMCSA has analyzed the costs and benefits, as discussed below, and has determined this rule will be economically significant. The benefits of this rule will exceed the \$100 million annual threshold as defined in Executive Order 12866. A full Regulatory Evaluation is included in the docket for this rule. This rule has been reviewed by the Office of Management and Budget (OMB).

##### *Overview of Analysis*

This rule imposes costs on all new entrants. Although the costs associated with existing regulations were counted when these measures were first promulgated, OMB guidance on regulatory analysis suggests that unless full compliance with these rules and regulations was already being achieved, the compliance costs associated with this rule should be counted.<sup>2</sup> All new entrants will face costs associated with the time their staff spends reviewing ETA materials and participating in the safety audit. These would be the only costs borne by new entrants that are found to comply with the applicable FMCSRs and HMRs. New entrants not in compliance with safety regulations will have additional costs associated with actions taken by them to achieve higher levels of compliance to pass the safety audit or to properly correct deficiencies after failing it. FMCSA will place out-of-service any new entrant that opts not to incur the higher compliance costs implicit with this more rigid enforcement scheme. The discussion of costs is followed by a discussion of safety benefits.

OMB guidance also states that an Agency's analyses should "focus on benefits and costs that accrue to citizens and residents of the United States."<sup>3</sup> The Agency estimates that only about 3.5 percent of new entrants are based outside of the U.S.<sup>4</sup> This analysis reports the total costs to all new entrants and separately the small fraction of costs borne by non-U.S. entities. However, the estimates of benefits include all carriers because all safety benefits from this rule occur within the United States.

##### *Number of New Entrants*

FMCSA estimates that this final rule will affect about 40,000 motor carriers

<sup>2</sup> Circular A-4 (September 2003).

<sup>3</sup> Ibid.

<sup>4</sup> Derived using data from 1995 through 2002 contained in the Motor Carrier Management Information System (MCMIS). Approximately 96.5 percent of new entrants are based in the U.S., 3.3 percent are based in Canada, 0.2 percent are based in Mexico, and a minor fraction are based in other countries.

annually. Although about 68,700 MCS-150A forms are filed each year, data on the number of safety audits that have been performed each year indicate that about 40 percent of these carriers do not remain in the new entrant program through the safety audit phase. Because this final rule imposes new criteria for passing the safety audit, the number of new entrant carriers actually audited is most relevant for the economic analysis of this rule.

#### Costs

New entrants will bear costs for time spent reviewing ETA materials, time spent with a safety auditor during the safety audit, and compliance costs to rectify any deficiencies found during the safety audit. FMCSA also assumes that some new entrants, when confronted with a safety audit failure, will choose to end interstate operations. The Agency assumes that these exiting firms will leave a gap to be filled by replacement new entrants, and that these replacement firms will bear some costs to setting up operations and acquiring the equipment of exiting firms. All of these costs are discussed in detail below.

#### Paperwork Costs

All new entrants will bear a cost of reviewing the ETA materials. FMCSA assumed that it would take 3 hours for the chief safety officer of each new carrier to study the new materials. In the NPRM, the Agency assumed that reading this material would take just 1 hour, but after having reconsidered the content of the ETA package, FMCSA reasoned that carriers would be better served by spending considerably more time studying it.

Labor costs should account for both average hourly wages and average benefits of motor carrier employees. The Bureau of Labor Statistics' (BLS) National Compensation Survey (NCS) provides estimates of wages, salaries, and benefits for several industries. According to the December 2006 NCS, employer hourly costs for benefits are equal to 52.9 percent of hourly wages in the transportation and warehousing industries.<sup>5</sup> May 2006 wage data from the BLS Occupational Employment Statistics (OES) survey indicate that the median hourly wage for managers in the trucking industry was \$34.35.<sup>6</sup> Adding

benefits equal to 52.9 percent of that wage yields compensation of \$52.52 per hour. The total cost to all new entrants is approximately \$6.3 million annually (\$52.52 per hour × 3 hours × 40,000 new entrants).

This rule eliminates the Form MCS-150A, Safety Certification for Applications for USDOT Number, which was implemented in the IFR. This form takes 9 minutes to complete. According to May 2006 OES data, the base hourly general clerical wage for the trucking industry<sup>7</sup> is \$11.12, and adding benefits equal to 52.9 percent of that wage yields \$17 per hour. Although about 40,000 new entrants continue interstate operations through the safety audit, about 68,700 file this form annually. Eliminating this form avoids a \$0.2 million annual cost to all new entrants.

#### Costs of Safety Audit

In 2007, FMCSA commissioned a study on the cost to the Agency and carriers of conducting safety audits.<sup>8</sup> This study estimated that the cost to motor carriers consists entirely of the cost of employee time spent with the auditor during the safety audit. A motor carrier manager<sup>9</sup> is assumed to be involved in the safety audit for 4 hours, 1 hour during the pre-visit telephone interview and 3 hours during the onsite portion of the safety audit. Based on May 2005 wages estimates, the total cost is estimated to be \$216.68; using May 2006 wages, the Agency estimates the cost to be \$220.60. FMCSA and its State partners conduct on average about 40,000 safety audits per year, at a total annual cost to new entrants of \$8.8 million dollars.

#### Compliance and Out-of-Service (OOS) Costs

This final rule imposes additional costs on those new entrants who will fail the stricter safety audits established by this rule. FMCSA divides these carriers into two categories, those that take required action and come into compliance, and those that do not and are placed out of service. Although the normal costs of remedial action for an individual carrier are likely to be small and would seemingly not discourage compliance, the Agency assumes that

there will be a substantial number of carriers in both categories.

FMCSA calculated the safety audit failure rate under the provisions of this final rule over a period running from January 2003 through September 2007 and estimated that 69,551 of the 145,246 safety audits performed over this period would have been failures. This translates into a failure rate of 47.9 percent, and applying this failure rate to the 40,000 safety audits conducted each year, the Agency estimates that 19,154 new entrants will fail safety audits annually. These carriers will be required to take the appropriate actions to come into compliance with the applicable regulations and to demonstrate to the Agency that they have remedied deficiencies by submitting corrective action plans.

One would not necessarily expect such a high failure rate to persist after the rule is implemented. Upon implementation of this rule, many carriers will take the appropriate action to pass the stricter new entrant safety audit, and the actual failure rate will be significantly lower than 47.9 percent.<sup>10</sup> Nevertheless, this high failure rate will be used in this analysis because it represents that fraction of carriers who will have to bear additional costs to come into compliance with the rule, whether they do so before or after their safety audit occurs.

New entrants may also be subject to expedited actions in addition to safety audits that would require them to take steps to demonstrate that they have taken appropriate actions to come into compliance with applicable FMCSRs. Based on FMCSA's experience with Mexico-domiciled border zone carriers subject to similar expedited action procedures, the Agency estimates that 15 percent of new entrants will incur costs in responding to expedited action requests that are similar to those they would incur to remedy deficiencies found during a safety audit.

The cost of coming into compliance would vary according to many factors. These include the size of the new entrant, the specific violations, and the severity of the violation. For example, provided that all vehicle repairs are undertaken eventually, the remedial action for a one-time violation of § 396.9(c), "operating a CMV after it has been declared out of service, and before repairs have been made," aside from any business exigency that might

similar wages, including them had essentially no effect on our wage assumption.

<sup>5</sup> SOC 43-9061, NAICS 484000.

<sup>6</sup> "Safety Audit Cost Estimation". <http://www.fmcsa.dot.gov/facts-research/research-technology/report/Safety-Audit-Cost-Estimation-Oct2007.pdf>.

<sup>7</sup> NAICS 484000, 11-1021 General and Operations Managers in the Truck Transportation Industry.

<sup>10</sup> In "Crime and Punishment: An Economic Approach" (1968), economist Gary Becker showed that raising the expected value of punishments serves as a deterrent to potential offenders. The expected value includes both the likelihood of being caught and the severity of the punishment.

<sup>5</sup> <http://stats.bls.gov/ncs/ebs/home.htm>.

<sup>6</sup> [http://www.bls.gov/oes/oes\\_dl.htm](http://www.bls.gov/oes/oes_dl.htm). Standard Occupational Classification (SOC) 11-0000, North American Industry Classification System (NAICS) 48400, Truck Transportation. Because, passenger carriers (NAICS 485200, Interurban Bus Transportation) account for just 1.5 percent of new entrants, and managers for these entities earn

motivate non-compliance, has very little cost; a carrier would simply be required to undertake repairs in a timely manner rather than put them off. A small new entrant without a drug and alcohol testing program could join a testing consortium for no more than \$1,000 annually. However, a large carrier could spend several thousand dollars to establish a system to periodically inspect its CMVs. After considering the small size of most new entrants and the low cost of complying with most of these violations, the Agency assumes that, if all corrective action scenarios were ranked by cost, the example of the small new entrant joining a drug testing program would be representative of the median cost incurred to correct a deficiency that resulted in a safety audit failure. FMCSA estimated in the NPRM a \$1,000 cost for compliance costs and, after having received no comment on it, continues to believe that it is a reasonable estimate on which to base its cost calculations.

In addition to compliance costs, a motor carrier will bear some small costs for preparing and submitting to FMCSA a corrective action plan that shows that the motor carrier has remedied deficiencies that were found during the safety audit. Although some carriers will come into compliance before the safety audit occurs, for simplicity the Agency calculated these notification costs for all carriers that will face additional compliance costs. Notifying FMCSA that the appropriate actions have been taken will use about \$2.00 in materials (e.g., an envelope, postage, and copies of documents that show what actions the carrier has taken). Assembling this information should take little time, but the motor carrier may have additional contact with FMCSA, so the Agency has assumed that on average a manager at the motor carrier will spend no more than an hour preparing and submitting the corrective action plan. The manager's wage calculated above shows a cost of about \$53 per hour of this employee's time. The total cost of submitting a corrective action plan will be \$55 per carrier. Total compliance costs are \$1,055 per carrier.

Although compliance costs are low, many new entrants may nevertheless not take the steps to avoid being placed out of service. These carriers would be able to recover the costs of their equipment and facilities by selling them to new owners, but some other smaller costs, listed in Table 4 of the regulatory evaluation, are unrecoverable, or "sunk," regardless of whether or not the carrier continues operations. Although exit from the industry is economically costless to an individual carrier, these

sunk costs would be borne by the new entrants that replace exiting motor carriers. In this way, carriers placed out of service will increase costs borne by the motor carrier industry as a whole.

Carriers entering the interstate trucking business to replace exiting new entrants will bear several costs. These include application, licensing, and registration fees; and advertising, training, and asset transfer costs. Several third-party firms offer to complete all the administrative requirements for a fee of \$500, and the market price for these services is used in this analysis. Advertising costs vary widely among motor carriers, depending upon their location, market, personal taste, and other factors. According to the Census Bureau's Business Expense Survey, an average of \$3,900 was spent on advertising in 2002 per trucking establishment.<sup>11</sup> Many new entrants may rely on freight brokers, and therefore spend little or nothing on advertising. Rather than attempt to calculate a precise average based on the composition of the new entrant group, the Agency chose an estimate for advertising in the middle of the range, \$2,000. Average transactions cost for transferring assets are assumed to be about \$200 each. Costs for training are highly variable and depend on many factors, such as the size and type of the motor carrier and the experience of its staff. FMCSA assumes that this will on average take 40 labor-hours to accomplish. The median wage in the trucking industry for all employees was \$16.95 per hour, and adding 52.9 percent for benefits yields about \$26 per hour. This labor rate multiplied by 40 hours yields an estimate of learning costs that is slightly over \$1,000 dollars. Included is another \$300 to account for any other small start-up costs. Total costs are \$4,000 per replacement carrier, and are presented in Table 4 of the regulatory evaluation, which is reproduced here. The assumption of \$4,000 was presented in the NPRM and, after having received no comment on it, the Agency continues to believe that it is a reasonable estimate on which to base cost calculations.

TABLE 4—ESTIMATED INDUSTRY ENTRY COSTS PER NEW ENTRANT

Application Fee, License Fee, Registration Fee .....	\$500
License Fee .....	

<sup>11</sup> <http://www.census.gov/csd/bes/07/part3.htm>. Advertising costs were \$437 million for the 112,642 trucking establishments (NAICS code 484000) included in the 2002 Economic Census. See <http://www.census.gov/econ/census02/> for Economic Census data.

TABLE 4—ESTIMATED INDUSTRY ENTRY COSTS PER NEW ENTRANT—Continued

Advertising .....	2,000
Transactions Cost to Transfer Assets .....	200
Training and Other Costs .....	1,300
<b>Total .....</b>	<b>4,000</b>

For the sake of simplicity, the Agency has assumed that every new entrant that ceases interstate operations will be replaced by another (albeit safer) new entrant. Obviously, the dynamics of entry into and exit from the interstate motor carrier industry are more complex. Many new entrants are not wholly new entities, but carriers who were engaged in intrastate operations; these carriers, upon surrendering interstate authority, may return to intrastate-only operations. Some existing firms will absorb firms placed out of service, and will bear only a portion of these costs. Consequently, the total cost estimated to replace an exiting new entrant likely represents an upper bound.

The estimates of total costs require assumptions on the number of carriers that will remedy deficiencies after having failed a safety audit or received an expedited action letter, and the number that will exit the industry to avoid compliance costs. Fifteen percent of carriers (6,000) will be required to take the appropriate actions to achieve compliance after receiving an expedited action letter. FMCSA assumes that 50 percent (9,577) of the carriers that would fail the stricter safety audits will take the appropriate actions to achieve compliance, and that the other 50 percent of carriers (9,577) will exit the industry. According to Agency research, the normal motor carrier attrition rate is around 5 percent per year, so this analysis accounts for this fraction of motor carriers that would have exited the industry regardless of whether or not they were placed out of service after failing a safety audit.<sup>12</sup> Reducing the estimated number of OOS carriers by 5 percent left 9,098 new entrants that would be replaced as a result of the final rule. Annual costs to complying carriers are estimated to be \$16.4 million ((6,000 + 9,577) × \$1,055), and annual costs associated with new entrants exiting the

<sup>12</sup> FMCSA calculated the average annual attrition rate using MCMIS and SafeStat data on the numbers of new entrants and active motor carriers over sample periods from five to ten years. The results fell into a range of 3 to 6 percent.

industry are estimated to be \$36.4 million (9,098 × \$4,000).

*Summary of Costs*

Costs are summarized in Table 5 of the regulatory evaluation, which is reproduced here. Total annual costs are estimated to be \$67.9 million, and are identical in all years. Costs discounted over 10 years at a 7 percent rate will be \$477.2 million. The 3.5 percent of carriers not based in the U.S. would bear just \$16.7 million of these costs; because this small amount does not materially impact the results, it will not be discussed further.

TABLE 5—SUMMARY OF ESTIMATED COSTS  
[Millions]

Annual Costs .....	\$67.9
Paperwork .....	6.3
Safety Audits .....	8.8
Compliance Costs .....	16.4
OOS Costs .....	36.4
Costs over 10 Years, Discounted at 7% .....	477.2
Paperwork .....	44.3
Safety Audits .....	62.0
Compliance Costs .....	115.3
OOS Costs .....	255.6

*Safety Benefits*

FMCSA expects substantial safety benefits from stricter enforcement of FMCSRs during new entrant safety audits. Research from the Volpe National Transportation Systems Center (Volpe Center) demonstrates that new entrant driver and carrier violations of regulations are positively correlated with crash rates.<sup>13</sup> As noted earlier, the Agency believes that safety audits could be more effective in identifying motor carriers that are noncompliant with the FMCSRs. The implementation of this rule will allow safety auditors to better flag noncompliant new entrants, and, because the ultimate goal of this rule is to improve motor carrier safety, the Agency believes that reducing violations of the FMCSRs will consequently lead to reductions in crash rates.

The motor carrier crash rate from MCMIS is 0.75 crashes per million vehicle miles traveled (MVMT), and the new entrant crash rate is 25 percent higher, 0.94 per MVMT.<sup>14</sup> FMCSA assumes that the new entrants placed out of service are less-safe than typical new entrants and crash 1.13 times per MVMT, a 50 percent higher rate than that of established motor carriers. This distribution of crash rates is consistent

with recent MCMIS data: For all motor carriers, the crash rate of the worst 25th percentile is 50 to 70 percent higher than the overall rate. According to MCMIS, new entrants average 0.4

*Safety Benefits of the Safety Audit*

The effectiveness of stricter safety audits in reducing crash rates cannot be determined until several years after this rule goes into effect. However, one can make inferences from studies that demonstrate the effectiveness of compliance reviews (CRs) at reducing crash rates. The “Compliance Review Effectiveness Model” (June 2006),<sup>15</sup> created by the Volpe Center, compared the crash rates of motor carriers before and after CRs conducted in years 2000 through 2003. The model shows that motor carriers subject to compliance reviews in 2003 experienced a 17.5 percent reduction in their crash rates relative to the rate from an un-reviewed control group one year after the review, and projects extended benefits averaging about 17.5 percent below the control group’s crash rate for the subsequent three years.

Safety audits are less comprehensive than CRs, and safety issues that may be found during a CR might not be observed in a safety audit. Safety audits may be less successful than CRs at discovering, and mandating corrections to, behavior that leads to crashes. The effectiveness of the safety audit at improving carrier safety will also be enhanced by improved compliance in response to expedited action letters. The Agency cannot predict whether all carriers subject to expedited actions would have failed the safety audit, but it assumes this to be the case.

Consequently, the Agency did not separately estimate safety improvements from expedited actions, but assumed that these effects will be contained within the impact of the overall safety audit. Bounded by no effect and the effectiveness of a CR, the Agency assumes that the safety audits implemented under this rule fall in the middle, and will be half as effective as CRs, that is, they hold crash rates 8.75 percent below the baseline rate for 4 years after they have been conducted. An 8.75 percent reduction of the crash rate from the 0.94 rate, multiplied by the number of new entrants that take remedial actions to comply with the FMCSRs, multiplied by the annual new entrant MVMT (0.082 × 9,577 × 0.4) results in the rule having avoided 316 crashes each year in year one. In years two through four, the baseline crash rate

will fall slightly as accumulated experience “teaches” new entrants to be safer carriers, so the crash reduction attributed to the safety audit is reduced somewhat. New entrants entering in the second year will experience the same reductions, which will overlap the crash reductions from the first year carriers. About 619 crashes will be avoided in the second year, 928 crashes in the third, and 1,238 crashes the fourth through tenth years. Cumulative over 10 years, 10,529 crashes will have been avoided.

*Safety Benefits From Exiting Carriers*

FMCSA assumes new entrants that replace exiting carriers will have an overall crash rate that is the same as the average rate for all new entrants, 0.94 crashes per MVMT. There would be no characteristics of these replacement carriers that would cause them to have an overall crash rate on average any better or worse than that of the new entrant population as a whole. As research presented in the Volpe Center’s “Background to New Entrant Safety Fitness Assurance Process” (March 2000) shows, carriers improve their safety performance as they gain more years of experience. The worst carriers would be improving their safety performance at approximately the same rate as average new entrants.

Nevertheless, the difference in the crash rates of these two groups will decline over time: Poor-performing carriers will experience larger declines in their crash rates by virtue of their crash rates having started at a higher level. Over 10 years, the average difference in crash rates would be about 0.17 crashes per MVMT.

As the worst-performing new entrants continually terminate interstate operations, the number of crashes avoided by their exiting the industry will accumulate. As stated, the carriers that replace them will have on average 0.17 fewer crashes per MVMT, and multiplying that difference times the number of replaced carriers and overall new entrant MVMT (0.17 × 9,098 × 0.4) yields 619 crashes in the first year. This group of new entrants will be pared down by 5 percent due to normal attrition in each subsequent year, as would the number of crashes avoided that can be attributed to their exit. New entrants arriving in subsequent years will repeat this pattern for crashes avoided, and these patterns will overlap those of all preceding years. Over 10 years, about 29,400 crashes will be avoided.

*Summary of Safety Benefits*

<sup>13</sup> Volpe Center (April 1998). “New Entrant Safety Research, Final Report.”

<sup>14</sup> All crash rates are average crash rates weighted by MVMT.

<sup>15</sup> [http://ai.volpe.dot.gov/CarrierResearchResults/PDFs/ProgramEffectiveness/CREM\\_O6.pdf](http://ai.volpe.dot.gov/CarrierResearchResults/PDFs/ProgramEffectiveness/CREM_O6.pdf).

Table 6 of the regulatory evaluation, which is reproduced here, highlights estimates of the number of crashes avoided in several example years.

TABLE 6—CRASHES AVOIDED IN INDIVIDUAL YEARS

	Year 1	Year 2	Year 5	Year 10	10-Year total
Continuing Carriers .....	316	619	1,238	1,238	10,529
Closed Carriers .....	619	1,206	2,799	4,965	29,400
Total .....	935	1,826	4,037	6,203	39,929

FMCSA estimates that about 39,929 crashes will be avoided over 10 years. The average cost of a motor-carrier-involved crash is \$146,410.<sup>16</sup> This includes both direct costs such as medical, emergency services, and property damage, and indirect costs such as lost productivity and diminished quality of life. By deterring 39,929 crashes, this rule will yield a 10-year benefit, discounted at a 7 percent rate, of \$3,778.0 million.

*Summary of Costs and Benefits*

This rule ensures better compliance with FMCSRs. The costs and benefits over 10 years, discounted at a 7 percent rate, will be \$477.2 million and \$3,778.0 million, respectively. Net benefits will be \$3,300.8 million, and the benefit/cost ratio will be 7.9. FMCSA estimates that 39,929 crashes will be avoided over 10 years. Eliminating these crashes will avoid 487 fatalities.<sup>17</sup> The 10-year discounted cost per life saved will be \$1.0 million.

*Alternative Assumptions on Improvements in Carrier Safety*

Benefits estimates are sensitive to assumptions about the reduction in the crash rates that the implementation of this final rule will achieve. The above estimates indicate that 464 crashes would have to be avoided each year for this rule to yield positive net benefits. Even if safety audits do nothing to improve safety and decrease crash rates, some risky carriers will still end interstate operations as a result of the rule. Positive net benefits would still occur if this rule did nothing but prompt the worst 5.7 percent (about 2,300 carriers per year) of new entrants to exit the industry. Conversely, if all new entrants remained in the industry and took the appropriate corrective actions, safety audits would need to be just 7.1 percent as effective as compliance reviews in reducing crash rates for the rule to yield positive net benefits. The reduction in crash rates needed to produce positive net benefits

would be just 1.3 percent of the average new entrant crash rate of 0.94 per MVMT; the safety audit would have to prevent about 0.01 crashes per MVMT.

*Alternate Discount Rate and Crash Costs*

The Agency also computed costs and benefits using a 3 percent discount rate over a 10-year horizon. Because costs are constant and benefits increase over the time, the ratio of benefits to costs improves as a result of using this lower discount rate. Using a 7 percent discount rate, FMCSA computed benefits using alternate values of a large truck crash cost which incorporate different economic values of statistical life (VSL). The baseline VSL was \$5.8 million; here values of \$3.2 million and \$8.4 million are also used. Even the lowest VSL still results in strong positive net benefits. Table 7 of the regulatory evaluation, which is reproduced here, shows the results of these analyses.

TABLE 7—ALTERNATE DISCOUNT RATE AND CRASH COSTS

Discount rate	Value of statistical life (millions)	Average crash cost	Costs (millions)	Safety benefits (millions)	B/C ratio
3% .....	\$5.8	\$146,410	\$579.6	\$4,813.0	8.3
	5.8	46,410	.....	3,778.0	7.9
7% .....	3.2	91,582	477.2	2,363.2	5.0
	8.4	201,237	.....	5,192.8	10.9

*Paperwork Reduction Act*

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, *et seq.*), Federal agencies must obtain approval from OMB for each collection of information they conduct, sponsor, or require through regulations. FMCSA has determined there are three currently

approved information collections that will be affected by this final rule: (1) OMB Control No. 2126–0013 titled “Motor Carrier Identification Report” (FMCSA Forms MCS–150, MCS–150A, and MCS–150B), approved at 119,270 burden hours through March 31, 2011; (2) OMB Control No. 2126–0015 titled

“Designation of Agents, Motor Carriers, Brokers and Freight Forwarders (FMCSA Form BOC–3) approved at 14,833 burden hours through June 30, 2011; and (3) OMB Control No. 2126–0016 titled “Licensing Applications for Motor Carrier Operating Authority” (FMCSA Forms OP–1, OP–1 (FF), OP–

<sup>16</sup> Zaloshnja, Eduard and Ted Miller (December 2006). “Unit Costs of Medium and Heavy Truck Crashes.” Figures in this report are for 2005: We adjusted the \$91,112 cost for a large truck crash and the \$3,604,518 cost for a fatal crash to 2006 dollars using the annual percent change in the gross

domestic product deflator (<http://www.bea.gov/national/index.htm#gdp>). Zaloshnja and Miller use a \$3.0 million value of a statistical life (VSL) for their estimates; the Agency has recomputed these figures using a \$5.8 million VSL, in accordance with DOT guidance on the treatment of the

economic value of a statistical life in Departmental analyses issued February 5, 2008 (<http://ostpxweb.dot.gov/policy/reports/080205.htm>).  
<sup>17</sup> FMCSA’s *Large Truck Crash Facts, 2005* indicates that 1 percent of crashes involve fatalities, claiming 1.15 lives per fatal crash.

1 (MX), and OP-1 (P), approved at 2008, (pending revision at OMB). The future burden hours associated with the information collections.

TABLE—CURRENT AND FUTURE INFORMATION COLLECTION BURDENS

OMB approval No.	Annual burden hours currently approved	Future annual burden hours	Change
2126-0013 .....	119,270	108,969	- 10,301
13 MCS-150 .....	108,825	108,829	4
13 MCS-150A .....	10,305	0	- 10,305
13 MCS-150B .....	140	140	0
2126-0015 .....	14,833	14,835	2
2126-0016 .....	55,738	55,786	48
Net Change .....			- 10,251

The following is an explanation of how each of the information collections shown above will be affected by this final rule.

**OMB Control No. 2126-0013.** This final rule will eliminate the requirement for new entrants to complete the Form MCS-150A (Safety Certification for Applications for USDOT Number) because it does not provide the results intended. Amendments to 49 CFR part 385, subpart E—Hazardous Materials Safety Permits will remove references to the MCS-150A and will not impact the MCS-150B in any way. The estimated annual paperwork burden for this information collection will be 108,969 hours [119,270 currently approved annual burden hours - 10,305 (68,700 respondents × 9 minutes/60 minutes to complete the MCS-150A form) + 4 (12 non-North America-domiciled motor carriers × 20 minutes/60 minutes to complete the Form MCS-150) = 108,969].

**OMB Control No. 2126-0015.** Non-North America-domiciled motor carriers will also be required to notify the Agency regarding designation of process agents by either: (1) Submission in the application package of Form BOC-3 (Designation of Agents, Motor Carriers, Brokers and Freight Forwarders), or (2) a letter stating that the applicant will use a process agent that will submit the Form BOC-3 electronically. The estimated annual paperwork burden for this information collection will be 14,835 hours [14,833 currently approved annual burden hours + 2 hours (12 new entrant non-North America-domiciled motor carriers × 10 minutes/60 minutes to complete Form BOC-3) = 14,835 hours].

**OMB Control No. 2126-0016.** The final rule will create a new Form OP-1 (NNA) titled "Application for U.S. Department of Transportation (USDOT) Registration by Non-North America-Domiciled Motor Carriers." A non-North America-domiciled motor carrier is one whose principal place of business is

located in a country other than the United States, Canada or Mexico. These entities would use the OP-1 (NNA) when requesting either a USDOT new entrant registration as a private or exempt for-hire carrier or operating authority as a non-exempt for-hire carrier. The estimated annual paperwork burden for this information collection would be 55,786 hours [55,738 currently approved annual burden hours + 48 hours (12 new entrant non-North America-domiciled motor carriers × 4 hours to complete Form OP-1 (NNA)) = 55,786 hours].

The changes in this final rule, affecting three currently-approved information collections, would result in a net decrease of 10,251 burden hours in the Agency's information collection budget.

#### Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601-612) (the Act) requires Federal agencies to consider the effects of their regulatory actions on small businesses and other small entities and to minimize any undue disproportionate burden. To achieve this, the Act requires that agencies describe how they have addressed these concerns by including a Final Regulatory Flexibility Analysis (FRFA) with each final rule. The Agency has prepared the FRFA set forth below. The full version of this FRFA is included in the Regulatory Evaluation that has been placed in the docket for this rule.

(1) *Objectives of, and need for, the final rule.* The objective of this final rule is to improve the compliance of new interstate carriers (known in this rule as new entrants) with the existing FMCSRs and HMRs and thereby reduce the number and severity of crashes in which these carriers are involved. In response to concerns about the safety of new entrant motor carriers, Congress enacted section 210 of MCSIA. Section 210(a) directed the Secretary to require that each motor carrier granted operating

authority undergo a safety audit within the first 18 months of operation. Section 210(b) required the Secretary to establish regulations specifying minimum knowledgeability requirements for motor carriers applying to obtain interstate operating authority. Congress mandated increased oversight of new entrants because studies indicated these operators had a much higher rate of non-compliance with basic safety management requirements and were subject to less oversight than established operators.

To implement this mandate, FMCSA published an IFR on May 13, 2002 (67 FR 31978), which became effective January 1, 2003 titled "New Entrant Safety Assurance Process." New entrants are granted provisional operating authority and subjected to an 18-month safety monitoring period. When a new entrant registers for a USDOT Number, it must complete Form MCS-150A—Safety Certification for Applications for USDOT Number to certify understanding of applicable safety regulations and receives ETA materials, upon request. Additionally, during the initial 18-month period of operations, FMCSA evaluates the new entrant's safety management practices by monitoring the carrier's on-road performance prior to granting the carrier permanent registration and by conducting an on-site review of its operations called a safety audit.

In response to comments on the IFR indicating new entrants lacking basic safety management controls were passing the safety audit, and after having collected additional data, FMCSA published an NPRM titled "New Entrant Safety Assurance Process" on December 21, 2006 (71 FR 76730). The NPRM proposed enhancements to strengthen and clarify the new entrant program. Notably, the Agency proposed eliminating Form MCS-150A because this form was deemed ineffective at assessing carrier familiarity with safety regulations. To

meet the requirements of section 210(b), the Agency will continue to rely on ETA materials to provide an effective foundation for knowledge of safety regulations, and has enhanced the currency and availability of these materials to further their support of the knowledgeability provision. In addition, the Agency will confirm knowledge of applicable regulations during the safety audit. The NPRM also proposed to revise the grading criteria for the safety audit so carriers would automatically fail if a violation was found in any one of 11 regulations.

This final rule adopts the following NPRM proposals with consideration to additional public comments. The final rule:

- Eliminates Form MCS-150A. To promote carrier knowledgeability of safety regulations, the Agency has enhanced the currency of ETA materials, provides online access to these materials, and distributes paper copies to motor carriers.
- Adds new § 385.308 to identify violations that will result in expedited action.
- Revises § 385.327 to clarify the process for administrative review.
- Revises § 385.329(b) to clarify how a new entrant whose authority has been revoked can reapply.
- Revises § 385.337(a) to clarify that refusal to submit to a safety audit may subject a new entrant to civil penalties.
- Revises § 385.306 to clarify actions that may be taken against a carrier who provides incomplete or untruthful information on the Form MCS-150.
- Establishes a new safety monitoring system and application process for NNA-domiciled motor carriers, who were not covered by the IFR.
- Establishes a list of 16 regulatory violations that would result in automatic failure of the safety audit, five more than were proposed by the NPRM.

Many of the originally-proposed provisions were clarified, and two of them were adjusted to require a pattern of violations rather than a single occurrence of non-compliance to result in automatic failure of the safety audit.

(2) *Summary of the public comments on the initial RFA (IRFA), and Agency response.* The comment period for the NPRM ended on February 20, 2007. FMCSA received a total of 17 comments in response to the NPRM, representing 21 entities. No comments addressed the IRFA directly. However, one commenter, OOIDA, submitted a comment relevant to the FRFA. Specifically, OOIDA stated that the FMCSA proposal will increase the small business failure rate and is “reactive” and “punitive” to small businesses.

FMCSA is mandated under section 210 of MCSIA to establish regulations specifying minimum knowledgeability requirements for motor carriers applying to obtain interstate operating authority, and furthermore to require new entrants to undergo a safety audit within the first 18 months of operation. Failure of the safety audit will occur when a carrier fails to comply with safety regulations that the Agency has determined to be essential in demonstrating effective safety management controls.

It is worth noting that no matter how the new entrant program could have been structured, for it to be effective as envisioned by Congress some new entrants would have to change their behavior to come into compliance with existing FMCSRs. The Agency’s analysis of past safety audits indicates that the majority of new entrants already demonstrate adequate safety management controls, even under the more stringent safety audit standards imposed by this rule. New entrants have many opportunities to educate themselves on and come into compliance with the existing FMCSRs. Nevertheless, FMCSA expects that some new entrants will still surrender interstate operating authority rather than comply with the safety regulations (although they would not necessarily be precluded from engaging in intrastate-only operations). The only way for the Agency to eliminate all adverse business impacts on small carriers would be to allow non-compliance by a small subset of carriers. This is not in the public’s interest and the interest of other motor carriers, small and large.

(3) *Description and an estimate of the number of small entities to which the rule will apply.* New entrants tend to be the smallest firms in the industry. FMCSA estimates that on average 68,700 motor carriers apply for interstate authority each year, as evidenced by a count of filings of Form MCS-150A. About 40,000 of these carriers remain in the new entrant program through the safety audit phase. The Small Business Administration (SBA) regulations (13 CFR Part 121) specify the small business size standard for the motor carrier industry as not more than \$23.5 million in average annual receipts per firm. Revenue data for most carriers are not available, but motor carriers are required to report to the Agency on Form MCS-150 the number of power units they own. A survey by OOIDA indicates that revenue per tractor is about \$120,539,<sup>18</sup> and

using this amount, FMCSA assumes that firms possessing fewer than 195 power units would fall below the \$23.5 million revenue threshold for small business designation. Data from MCMIS indicate that about 99.8 percent of new entrants—effectively all of them—are small businesses.

(4) *Projected reporting, recordkeeping, and other compliance requirements of the final rule.* This rule improves the efficacy of the new entrant safety audits in identifying instances of poor compliance and directing new entrants to correct their business practices. Although FMCSA estimates that non-compliant carriers could spend on average \$1,000 to come into compliance with safety regulations, these costs are associated with requirements of existing regulations, and are borne by the majority of motor carriers who already comply with the FMCSRs. This rule imposes no new substantive requirements on any motor carrier. It is also important to note that the safety audit is not a compliance intervention, *i.e.*, no civil penalties for non-compliance are imposed.

The rule does impose some small administrative and paperwork requirements. FMCSA will continue to provide online access to and distribute hard copies of ETA materials, which all new entrants should spend time reviewing. The Agency estimates that a manager or company official at each carrier will spend about 3 hours with the enhanced materials, at a labor cost of about \$157. The cost of a carrier’s time spent during the safety audit is estimated to be \$220.60. In total, the new entrant program imposes total one-time expense of \$377.60 on each new entrant. A new entrant that fails its safety audit or receives an expedited action demand letter will also be required to submit a corrective action plan, proof that it has remedied deficiencies in key areas of regulatory compliance. This will also be handled by a manager or company official, and FMCSA estimates that the total cost of submitting a corrective action plan is \$55, including materials and labor. With average revenue per tractor estimated to be \$120,539, the maximum cost the smallest new entrant, a carrier with just one power unit, would incur costs equal to about 0.3 percent of a single year’s revenue. In most cases, these new costs would be borne only once. Consequently, FMCSA does not judge the cost of this rule to be significant.

(5) *Steps the Agency has taken to minimize the significant adverse*

<sup>18</sup> OOIDA 2003 Cost of Operations Survey. [http://www.ooida.com/Documents/2003\\_Cost\\_Ops.pdf](http://www.ooida.com/Documents/2003_Cost_Ops.pdf). Survey is \$110,527 per tractor;

FMCSA adjusted this to 2006 prices using the GDP deflator.

*economic impact on small entities.*

Because an interim final rule has been in effect for several years before this final rule, FMCSA has been able to implement the best policies based on several years of experience.

The safety audit received perhaps the greatest amount of consideration. The purpose of the safety audit is to educate the carrier about the applicable safety regulations and to assess the adequacy of its basic safety management controls. If a carrier's safety management controls are deemed inadequate, the Agency also requires corrective actions by the carrier before granting permanent operating authority. When the new entrant program was implemented in 2003, FMCSA established a safety audit that, while educational, had such lenient assessment criteria—the pass rate was greater than 99 percent—that it did very little to compel carriers who lacked basic safety management controls to improve. The Agency did not believe that education alone was enough to encourage voluntary compliance. Analysis of recent crash data indicates that the crash rate of new entrants is still significantly higher than that of the overall carrier population. Because improved safety is the ultimate goal of the new entrant program, a stricter safety audit seemed absolutely necessary. However, in adopting 16 automatic failure criteria, FMCSA has been careful to implement standards that are designed to flag substantial deficiencies in the new entrant's basic safety management controls. Even then, FMCSA will provide guidance to carriers as they make the required corrective actions.

FMCSA has also made other changes to better educate carriers on safety regulations before their safety audits. To enhance the content and availability of the ETA materials, FMCSA has improved the information content. In addition, the Agency has published the ETA materials online and will also mail ETA materials to new entrants. FMCSA will keep the ETA materials up to date. FMCSA is eliminating the requirement to self-certify knowledge of Federal safety requirements during the application process (Form MCS-150A—Safety Certification for Applications for USDOT Number) because the Agency believes it fails to demonstrate that carriers have the requisite familiarity with motor carrier safety regulations. The Agency anticipates that the educational focus at the beginning of the new entrant program resulting from the improved, updated, and more accessible ETA materials will increase the likelihood that carriers will begin their operations with adequate safety

management controls, which, in addition to reducing safety audit failures, could also help avert costly mistakes later, such as crashes and violations caught at roadside inspections.

Pursuant to section 210(a) of MCSIA, FMCSA considered alternate locations where safety audits may be conducted (other than on-site at the carrier's principle place of business) for the convenience of small businesses. FMCSA will conduct group audits in areas where practicable, while being careful to maintain carrier privacy. FMCSA believes conducting audits at alternate locations is beneficial, practical, and cost effective for both the Federal Government and the carriers, given the right circumstances.

*Privacy Impact Analysis*

FMCSA conducted a privacy impact assessment of this rule as required by section 522(a)(5) of division H of the FY 2005 Omnibus Appropriations Act, Public Law 108-447, 118 Stat. 3268 (Dec. 8, 2004) [set out as a note to 5 U.S.C. 552a]. The assessment considers any impacts of the final rule on the privacy of information in an identifiable form and related matters. This rule would neither enlarge the scope of personally identifiable information collected nor change the sharing of that information. The entire privacy impact assessment is available in the docket for this rule.

*Unfunded Mandates Reform Act of 1995*

The Unfunded Mandates Reform Act of 1995 requires that agencies prepare analyses of rules that would result in the expenditure by State, local, and tribal governments, or by the private sector, of \$100 million or more in any one year. Department of Transportation guidance requires the use of a revised threshold figure of \$136.1 million, which is the value of \$100 million in 2008 after adjusting for inflation. FMCSA has determined that the impact of this rulemaking will not be that large in any projected year.

*National Environmental Policy Act*

FMCSA has analyzed this final rule for the purpose of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321, *et seq.*) and has determined under the Agency's National Environmental Policy Act Implementing Procedures, FMCSA Order 5610.1C (published at 69 FR 9680, March 1, 2004, with an effective date of March 30, 2004) this action is categorically excluded under Appendix 2, paragraph 6.f of the Order from further environmental documentation. That

categorical exclusion relates to establishing regulations implementing the following activities, whether performed by FMCSA or by States pursuant to the Motor Carrier Safety Assistance Program (MCSAP), which provides financial assistance to States to reduce the number and severity of crashes and hazardous materials incidents involving commercial motor vehicles: (1) Driver/vehicle inspections; (2) traffic enforcement; (3) safety audits; (4) compliance reviews; (5) public education and awareness; and (6) data collection; and provides reimbursement for the expenses listed under paragraphs 6.f.(6)(C)(i) through 6.f.(6)(C)(v). This action amends the New Entrant Safety Assurance Process for carriers newly registering to operate in interstate commerce. The Agency believes this action will include no extraordinary circumstances having any effect on the quality of the environment.

FMCSA has also analyzed this action under section 176(c) of the Clean Air Act (CAA), as amended (42 U.S.C. 7401 *et seq.*), and implementing regulations promulgated by the Environmental Protection Agency. We performed a conformity analysis of the CAA according to the procedures outlined in Appendix 14 of FMCSA Order 5610.C. This rule will not result in any emissions increase, nor would it have any potential to result in emissions above the general conformity rule's *de minimis* emission threshold levels. Moreover, it is reasonably foreseeable the proposed rule change would not increase total CMV mileage, change the routing of CMVs, change how CMVs operate, or change the CMV fleet-mix of motor carriers. This action will revise the program for assuring the safety of new entrant motor carriers.

*Executive Order 12898 (Environmental Justice)*

FMCSA will evaluate the environmental effects of any action implemented in subsequent phases of this proceeding in accordance with Executive Order 12898 and DOT Order 5610.2 on addressing Environmental Justice in Minority Populations and Low-Income Populations (published at 62 FR 18377, April 15, 1997) to determine if there are environmental justice issues associated with its provisions or any collective environmental impact resulting from its promulgation. Environmental justice issues would be raised if there were "disproportionate" and "high and adverse impact" on minority or low-income populations.

*Executive Order 12988 (Civil Justice Reform)*

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

*Executive Order 13045 (Protection of Children)*

We have analyzed this rule under Executive Order 13045, "Protection of Children from Environmental Health Risks and Safety Risks." This rule does not concern a risk to environmental health or safety that would disproportionately affect children.

*Executive Order 12630 (Taking of Private Property)*

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

*Executive Order 13132 (Federalism)*

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, dated August 4, 1999, and it has been determined this action will not have a substantial direct effect or sufficient federalism implications on States by limiting the policymaking discretion of the States. Nothing in this document will directly preempt any State law or regulation. It will not impose additional costs or burdens on the States. This action will not have a significant effect on the States' ability to execute traditional State governmental functions. To the extent that States incur costs for conducting these safety audits, they will be reimbursed 100 percent with Federal funds under MCSAP.

*Executive Order 12372 (Intergovernmental Review)*

The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this program.

*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 it is not economically significant and is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

**List of Subjects***49 CFR Part 365*

Administrative practice and procedure, Brokers, Buses, Freight forwarders, Motor carriers, Moving of household goods, Reporting and recordkeeping requirements.

*49 CFR Part 385*

Administrative practices and procedure, Highway safety, Motor carriers, Motor vehicle safety, Reporting and recordkeeping requirements.

*49 CFR Part 387*

Buses, Freight, Freight forwarders, Hazardous materials transportation, Highway safety, Insurance, Intergovernmental relations, Motor carriers, Motor vehicle safety, Moving of household goods, Penalties, Reporting and recordkeeping requirements, Surety bonds.

*49 CFR Part 390*

Highway safety, Intermodal transportation, Motor carriers, Motor vehicle safety, reporting and recordkeeping requirements.

■ In consideration of the foregoing, FMCSA amends parts 365, 385, 387, and 390 of title 49, Code of Federal Regulations as follows:

**PART 365—RULE GOVERNING APPLICATIONS FOR OPERATING AUTHORITY**

■ 1. The authority citation for part 365 continues to read as follows:

**Authority:** 5 U.S.C. 553 and 559; 16 U.S.C. 1456; 49 U.S.C. 13101, 13301, 13901–13906, 14708, 31138, and 31144; 49 CFR 1.73.

■ 2. Amend § 365.101 by adding a new paragraph (i) to read as follows:

**§ 365.101 Applications governed by these rules.**

\* \* \* \* \*

(i) Applications for non-North America-domiciled motor carriers to operate in foreign commerce as for-hire motor carriers of property and passengers within the United States.

■ 3. Amend § 365.105 by revising paragraph (a) to read as follows:

**§ 365.105 Starting the application process: Form OP–1.**

(a) Each applicant must file the appropriate form in the OP–1 series. Form OP–1 must be filed when requesting authority to operate as a motor property carrier, a broker of general freight, or a broker of household goods; Form OP–1(P) must be filed when requesting authority to operate as a motor passenger carrier; Form OP–

1(FF) must be filed when requesting authority to operate as a freight forwarder; Form OP–1(MX) must be filed by a Mexico-domiciled motor property, including household goods, carrier, or a motor passenger carrier requesting authority to operate within the United States; and effective December 16, 2009.

Form OP–1(NNA) must be filed by a non-North America-domiciled motor property, including household goods, carrier or a motor passenger carrier requesting authority to operate within the United States. A separate filing fee in the amount set forth at 49 CFR 360.3(f)(1) is required for each type of authority sought.

\* \* \* \* \*

**PART 385—SAFETY FITNESS PROCEDURES**

■ 4. The authority citation for part 385 continues to read as follows:

**Authority:** 49 U.S.C. 113, 504, 521(b), 5105(e), 5109, 5113, 13901–13905, 31136, 31144, 31148, and 31502; sec. 350 of Public Law 107–87; and 49 CFR 1.73.

**§ 385.305 [Amended]**

■ 5. Amend § 385.305 to remove paragraph (b)(3) and to redesignate paragraph (b)(4) as (b)(3).

■ 6. Add § 385.306 to subpart D to read as follows:

**§ 385.306 What are the consequences of furnishing misleading information or making a false statement in connection with the registration process?**

A carrier that furnishes false or misleading information, or conceals material information in connection with the registration process, is subject to the following actions:

- (a) Revocation of registration.
- (b) Assessment of the civil and/or criminal penalties prescribed in 49 U.S.C. 521 and 49 U.S.C. chapter 149.

■ 7. Amend § 385.307 to revise paragraph (a) to read as follows:

**§ 385.307 What happens after a motor carrier begins operations as a new entrant?**

\* \* \* \* \*

(a) The new entrant's roadside safety performance will be closely monitored to ensure the new entrant has basic safety management controls that are operating effectively.

\* \* \* \* \*

■ 8. Add § 385.308 to subpart D to read as follows:

**§ 385.308 What may cause an expedited action?**

(a) A new entrant that commits any of the following actions, identified through

roadside inspections or by any other means, may be subjected to an expedited safety audit or a compliance review or may be required to submit a written response demonstrating corrective action:

(1) Using a driver not possessing a valid commercial driver's license to operate a commercial vehicle as defined under § 383.5 of this chapter. An invalid commercial driver's license includes one that is falsified, revoked, expired, or missing a required endorsement.

(2) Operating a vehicle placed out of service for violations of the Federal Motor Carrier Safety Regulations or compatible State laws and regulations without taking necessary corrective action.

(3) Being involved in, through action or omission, a hazardous materials reportable incident, as described under 49 CFR 171.15 or 171.16, involving—

(i) A highway route controlled quantity of certain radioactive materials (Class 7).

(ii) Any quantity of certain explosives (Class 1, Division 1.1, 1.2, or 1.3).

(iii) Any quantity of certain poison inhalation hazard materials (Zone A or B).

(4) Being involved in, through action or omission, two or more hazardous materials reportable incidents as described under 49 CFR 171.15 or 171.16, involving hazardous materials other than those listed above.

(5) Using a driver who tests positive for controlled substances or alcohol or who refuses to submit to required controlled substances or alcohol tests.

(6) Operating a commercial motor vehicle without the levels of financial responsibility required under part 387 of this subchapter.

(7) Having a driver or vehicle out-of-service rate of 50 percent or more based upon at least three inspections occurring within a consecutive 90-day period.

(b) If a new entrant that commits any of the actions listed in paragraph (a) of this section:

(1) Has not had a safety audit or compliance review, FMCSA will schedule the new entrant for a safety audit as soon as practicable.

(2) Has had a safety audit or compliance review, FMCSA will send the new entrant a notice advising it to submit evidence of corrective action within 30 days of the service date of the notice.

(c) FMCSA may schedule a compliance review of a new entrant that commits any of the actions listed in paragraph (a) of this section at any time if it determines the violation warrants a thorough review of the new entrant's operation.

(d) Failure to respond within 30 days of the notice to an Agency demand for a written response demonstrating corrective action will result in the revocation of the new entrant's registration.

■ 9. Revise § 385.319 to read as follows:

**§ 385.319 What happens after completion of the safety audit?**

(a) Upon completion of the safety audit, the auditor will review the findings with the new entrant.

(b) *Pass.* If FMCSA determines the safety audit discloses the new entrant has adequate basic safety management controls, the Agency will provide the new entrant written notice as soon as practicable, but not later than 45 days after completion of the safety audit, that it has adequate basic safety management controls. The new entrant's safety performance will continue to be closely monitored for the remainder of the 18-month period of new entrant registration.

(c) *Fail.* If FMCSA determines the safety audit discloses the new entrant's basic safety management controls are inadequate, the Agency will provide the new entrant written notice, as soon as practicable, but not later than 45 days after the completion of the safety audit, that its USDOT new entrant registration will be revoked and its operations

placed out-of-service unless it takes the actions specified in the notice to remedy its safety management practices.

(1) *60-day corrective action requirement.* All new entrants, except those specified in paragraph (c)(2) of this section, must take the specified actions to remedy inadequate safety management practices within 60 days of the date of the notice.

(2) *45-day corrective action requirement.* The new entrants listed below must take the specified actions to remedy inadequate safety management practices within 45 days of the date of the notice:

(i) A new entrant that transports passengers in a CMV designed or used to transport between 9 and 15 passengers (including the driver) for direct compensation.

(ii) A new entrant that transports passengers in a CMV designed or used to transport more than 15 passengers (including the driver).

(iii) A new entrant that transports hazardous materials in a CMV as defined in paragraph (4) of the definition of a "Commercial Motor Vehicle" in § 390.5 of this subchapter.

■ 10. Revise § 385.321 to read as follows:

**§ 385.321 What failures of safety management practices disclosed by the safety audit will result in a notice to a new entrant that its USDOT new entrant registration will be revoked?**

(a) *General.* The failures of safety management practices consist of a lack of basic safety management controls as described in Appendix A of this part or failure to comply with one or more of the regulations set forth in paragraph (b) of this section and will result in a notice to a new entrant that its USDOT new entrant registration will be revoked.

(b) *Automatic failure of the audit.* A new entrant will automatically fail a safety audit if found in violation of any one of the following 16 regulations:

TABLE TO § 385.321—VIOLATIONS THAT WILL RESULT IN AUTOMATIC FAILURE OF THE NEW ENTRANT SAFETY AUDIT

Violation	Guidelines for determining automatic failure of the safety audit
1. § 382.115(a)/§ 382.115(b)—Failing to implement an alcohol and/or controlled substances testing program (domestic and foreign motor carriers, respectively).	Single occurrence.
2. § 382.201—Using a driver known to have an alcohol content of 0.04 or greater to perform a safety-sensitive function.	Single occurrence.
3. § 382.211—Using a driver who has refused to submit to an alcohol or controlled substances test required under part 382.	Single occurrence.
4. § 382.215—Using a driver known to have tested positive for a controlled substance.	Single occurrence.
5. § 382.305—Failing to implement a random controlled substances and/or alcohol testing program.	Single occurrence.
6. § 383.3(a)/§ 383.23(a)—Knowingly using a driver who does not possess a valid CDL.	Single occurrence.

TABLE TO § 385.321—VIOLATIONS THAT WILL RESULT IN AUTOMATIC FAILURE OF THE NEW ENTRANT SAFETY AUDIT—Continued

Violation	Guidelines for determining automatic failure of the safety audit
7. § 383.37(a)—Knowingly allowing, requiring, permitting, or authorizing an employee with a commercial driver's license which is suspended, revoked, or canceled by a State or who is disqualified to operate a commercial motor vehicle.	Single occurrence.
8. § 383.51(a)—Knowingly allowing, requiring, permitting, or authorizing a driver to drive who is disqualified to drive a commercial motor vehicle.	Single occurrence. This violation refers to a driver operating a CMV as defined under § 383.5.
9. § 387.7(a)—Operating a motor vehicle without having in effect the required minimum levels of financial responsibility coverage.	Single occurrence.
10. § 387.31(a)—Operating a passenger carrying vehicle without having in effect the required minimum levels of financial responsibility.	Single occurrence.
11. § 391.15(a)—Knowingly using a disqualified driver .....	Single occurrence.
12. § 391.11(b)(4)—Knowingly using a physically unqualified driver .....	Single occurrence. This violation refers to a driver operating a CMV as defined under § 390.5.
13. § 395.8(a)—Failing to require a driver to make a record of duty status .....	Requires a violation threshold (51% or more of examined records) to trigger automatic failure.
14. § 396.9(c)(2)—Requiring or permitting the operation of a commercial motor vehicle declared "out-of-service" before repairs are made.	Single occurrence.
15. § 396.11(c)—Failing to correct out-of-service defects listed by driver in a driver vehicle inspection report before the vehicle is operated again.	Single occurrence.
16. § 396.17(a)—Using a commercial motor vehicle not periodically inspected .....	Requires a violation threshold (51% or more of examined records) to trigger automatic failure.

■ 11. Revise § 385.323 to read as follows:

**§ 385.323 May FMCSA extend the period under § 385.319(c) for a new entrant to take corrective action to remedy its safety management practices?**

(a) FMCSA may extend the 60-day period in § 385.319(c)(1) for up to an additional 60 days provided FMCSA determines the new entrant is making a good faith effort to remedy its safety management practices.

(b) FMCSA may extend the 45-day period in § 385.319(c)(2) for up to an additional 10 days if the new entrant has submitted evidence that corrective actions have been taken pursuant to § 385.319(c) and the Agency needs additional time to determine the adequacy of the corrective action.

■ 12. Amend § 385.325 to revise paragraph (b) to read as follows:

**§ 385.325 What happens after a new entrant has been notified under § 385.319(c) to take corrective action to remedy its safety management practices?**

\* \* \* \* \*

(b) If a new entrant, after being notified that it is required to take corrective action to improve its safety management practices, fails to submit a written response demonstrating corrective action acceptable to FMCSA within the time specified in § 385.319, and any extension of that period authorized under § 385.323, FMCSA will revoke its new entrant registration and issue an out-of-service order effective on:

(1) Day 61 from the notice date for new entrants subject to § 385.319(c)(1).

(2) Day 46 from the notice date for new entrants subject to § 385.319(c)(2).

(3) If an extension has been granted under § 385.323, the day following the expiration of the extension date.

\* \* \* \* \*

■ 13. Revise § 385.327 to read as follows:

**§ 385.327 May a new entrant request an administrative review of a determination of a failed safety audit?**

(a) If a new entrant receives a notice under § 385.319(c) that its new entrant registration will be revoked, it may request FMCSA to conduct an administrative review if it believes FMCSA has committed an error in determining that its basic safety management controls are inadequate. The request must:

(1) Be made to the Field Administrator of the appropriate FMCSA Service Center.

(2) Explain the error the new entrant believes FMCSA committed in its determination.

(3) Include a list of all factual and procedural issues in dispute and any information or documents that support the new entrant's argument.

(b) FMCSA may request that the new entrant submit additional data and attend a conference to discuss the issue(s) in dispute. If the new entrant does not attend the conference or does not submit the requested data, FMCSA may dismiss the new entrant's request for review.

(c) A new entrant must submit a request for an administrative review within one of the following time periods:

(1) If it does not submit evidence of corrective action under § 385.319(c), within 90 days after the date it is notified that its basic safety management controls are inadequate.

(2) If it submits evidence of corrective action under § 385.319(c), within 90 days after the date it is notified that its corrective action is insufficient and its basic safety management controls remain inadequate.

(d) If a new entrant wants to assure that FMCSA will be able to issue a final written decision before the prohibitions outlined in § 385.325(c) take effect, the new entrant must submit its request no later than 15 days from the date of the notice that its basic safety management controls are inadequate. Failure to submit the request within this 15-day period may result in revocation of new entrant registration and issuance of an out-of-service order before completion of administrative review.

(e) FMCSA will complete its review and notify the new entrant in writing of its decision within:

(1) 45 days after receiving a request for review from a new entrant that is subject to § 385.319(c)(1).

(2) 30 days after receiving a request for review from a new entrant that is subject to § 385.319(c)(2).

(f) The Field Administrator's decision constitutes the final Agency action.

(g) Notwithstanding this subpart, a new entrant is subject to the suspension and revocation provisions of 49 U.S.C. 13905 for violations of DOT regulations governing motor carrier operations.

■ 14. Revise § 385.329 to read as follows:

**§ 385.329 May a new entrant that has had its USDOT new entrant registration revoked and its operations placed out of service reapply?**

(a) A new entrant whose USDOT new entrant registration has been revoked, and whose operations have been placed out of service by FMCSA, may reapply for new entrant registration no sooner than 30 days after the date of revocation.

(b) If the USDOT new entrant registration was revoked because of a failed safety audit, the new entrant must do all of the following:

(1) Submit an updated MCS-150.

(2) Submit evidence that it has corrected the deficiencies that resulted in revocation of its registration and will otherwise ensure that it will have basic safety management controls in effect.

(3) Begin the 18-month new entrant monitoring cycle again as of the date the re-filed application is approved.

(c) If the USDOT new entrant registration was revoked because FMCSA found that the new entrant had failed to submit to a safety audit, it must do all of the following:

(1) Submit an updated MCS-150.

(2) Begin the 18-month new entrant monitoring cycle again as of the date the re-filed application is approved.

(3) Submit to a safety audit.

(d) If the new entrant is a for-hire carrier subject to the registration provisions under 49 U.S.C. 13901 and also has had its operating authority revoked, it must re-apply for operating authority as set forth in part 365 of this chapter.

■ 15. Revise § 385.331 to read as follows:

**§ 385.331 What happens if a new entrant operates a CMV after having been issued an order placing its interstate operations out of service?**

A new entrant that operates a CMV in violation of an out-of-service order is subject to the penalty provisions in 49 U.S.C. 521(b)(2)(A) for each offense as adjusted for inflation by 49 CFR part 386, Appendix B.

■ 16. Amend § 385.337 to revise paragraph (a) to read as follows:

**§ 385.337 What happens if a new entrant refuses to permit a safety audit to be performed on its operations?**

(a) If a new entrant refuses to permit a safety audit to be performed on its operations, FMCSA will provide the carrier with written notice that its registration will be revoked and its operations placed out of service unless the new entrant agrees in writing, within 10 days from the service date of the notice, to permit the safety audit to be performed. The refusal to permit a

safety audit to be performed may subject the new entrant to the penalty provisions of 49 U.S.C. 521(b)(2)(A), as adjusted for inflation by 49 CFR part 386, Appendix B.

\* \* \* \* \*

■ 17. Amend § 385.405 to revise paragraph (a) to read as follows:

**§ 385.405 How does a motor carrier apply for a safety permit?**

(a) *Application form(s)*. (1) To apply for a new safety permit or renewal of the safety permit, a motor carrier must complete and submit Form MCS-150B, Combined Motor Carrier Identification Report and HM Permit Application.

(2) The Form MCS-150B will also satisfy the requirements for obtaining and renewing a USDOT Number; there is no need to complete Form MCS-150, Motor Carrier Identification Report.

\* \* \* \* \*

■ 18. Amend § 385.421 by revising paragraph (a)(2) to read as follows:

**§ 385.421 Under what circumstances will a safety permit be subject to revocation or suspension by FMCSA?**

(a) \* \* \*

(2) A motor carrier provides any false or misleading information on its application (Form MCS-150B) or as part of updated information it is providing on Form MCS-150B (see § 385.405(d)).

\* \* \* \* \*

■ 19. Amend part 385 by adding and reserving subparts F and G, and by adding a new subpart H consisting of new §§ 385.601 through 385.609 and an Appendix to subpart H to read as follows:

**Subpart H—Special Rules for New Entrant Non-North America-Domiciled Carriers**

Sec.

385.601 Scope of rules.

385.603 Application.

385.605 New entrant registration driver's license and drug and alcohol testing requirements.

385.607 FMCSA action on the application.

385.609 Requirement to notify FMCSA of change in applicant information.

Appendix to Subpart H of Part 385—  
Explanation of Pre-Authorization Safety Audit Evaluation Criteria for Non-North America-Domiciled Motor Carriers

**Subpart H—Special Rules for New Entrant Non-North America-Domiciled Carriers**

**§ 385.601 Scope of rules.**

The rules in this subpart govern the application by a non-North America-domiciled motor carrier to provide transportation of property and passengers in interstate commerce in the United States.

**§ 385.603 Application.**

(a) Each applicant applying under this subpart must submit an application that consists of:

(1) Form OP-1(NNA)—Application for U.S. Department of Transportation (USDOT) Registration by Non-North America-Domiciled Motor Carriers;

(2) Form MCS-150—Motor Carrier Identification Report; and

(3) A notification of the means used to designate process agents, either by submission in the application package of Form BOC-3—Designation of Agents—Motor Carriers, Brokers and Freight Forwarders or a letter stating that the applicant will use a process agent service that will submit the Form BOC-3 electronically.

(b) FMCSA will only process an application if it meets the following conditions:

(1) The application must be completed in English;

(2) The information supplied must be accurate, complete, and include all required supporting documents and applicable certifications in accordance with the instructions to Form OP-1(NNA), Form MCS-150 and Form BOC-3;

(3) The application must include the filing fee payable to the FMCSA in the amount set forth at 49 CFR 360.3(f)(1); and

(4) The application must be signed by the applicant.

(c) An applicant must submit the application to the address provided in Form OP-1(NNA).

(d) An applicant may obtain the application forms from any FMCSA Division Office or download them from the FMCSA Web site at: <http://www.fmcsa.dot.gov/forms/forms.htm>.

**§ 385.605 New entrant registration driver's license and drug and alcohol testing requirements.**

(a) A non-North America-domiciled motor carrier must use only drivers who possess a valid commercial driver's license—a CDL, Canadian Commercial Driver's License, or Mexican Licencia de Federal de Conductor—to operate its vehicles in the United States.

(b) A non-North America-domiciled motor carrier must subject each of the drivers described in paragraph (a) of this section to drug and alcohol testing as prescribed under part 382 of this subchapter.

**§ 385.607 FMCSA action on the application.**

(a) FMCSA will review and act on each application submitted under this subpart in accordance with the procedures set out in this part.

(b) FMCSA will validate the accuracy of information and certifications provided in the application by checking, to the extent available, data maintained in databases of the governments of the country where the carrier's principal place of business is located and the United States.

(c) *Pre-authorization safety audit.* Every non-North America-domiciled motor carrier that applies under this part must satisfactorily complete an FMCSA-administered safety audit before FMCSA will grant new entrant registration to operate in the United States. The safety audit is a review by FMCSA of the carrier's written procedures and records to validate the accuracy of information and certifications provided in the application and determine whether the carrier has established or exercises the basic safety management controls necessary to ensure safe operations. FMCSA will evaluate the results of the safety audit using the criteria in the Appendix to this subpart.

(d) An application of a non-North America-domiciled motor carrier requesting for-hire operating authority under part 365 of this subchapter may be protested under § 365.109(b). Such a carrier will be granted new entrant registration after successful completion of the pre-authorization safety audit and the expiration of the protest period, provided the application is not protested. If a protest to the application is filed with FMCSA, new entrant registration will be granted only if FMCSA denies or rejects the protest.

(e) If FMCSA grants new entrant registration to the applicant, it will assign a distinctive USDOT Number that identifies the motor carrier as authorized to operate in the United States. In order to initiate operations in the United States, a non-North America-domiciled motor carrier with new entrant registration must:

(1) Have its surety or insurance provider file proof of financial responsibility in the form of certificates of insurance, surety bonds, and endorsements, as required by § 387.7(e)(2), § 387.31(e)(2), and § 387.301 of this subchapter, as applicable; and

(2) File a hard copy of, or have its process agent(s) electronically submit, Form BOC-3—Designation of Agents—Motor Carriers, Brokers and Freight Forwarders, as required by part 366 of this subchapter.

(f) A non-North America-domiciled motor carrier must comply with all provisions of the safety monitoring system in part 385, subpart I of this subchapter, including successfully

passing North American Standard commercial motor vehicle inspections at least every 90 days and having safety decals affixed to each commercial motor vehicle operated in the United States as required by § 385.703(c) of this subchapter.

(g) FMCSA may not re-designate a non-North America-domiciled carrier's registration from new entrant to permanent prior to 18 months after the date its USDOT Number is issued and subject to successful completion of the safety monitoring system for non-North America-domiciled carriers set out in part 385, subpart I of this subchapter. Successful completion includes obtaining a Satisfactory safety rating as the result of a compliance review.

#### **§ 385.609 Requirement to notify FMCSA of change in applicant information.**

(a)(1) A motor carrier subject to this subpart must notify FMCSA of any changes or corrections to the information the Form BOC-3—Designation of Agents—Motor Carriers, Brokers and Freight Forwarders that occur during the application process or after having been granted new entrant registration.

(2) A motor carrier subject to this subpart must notify FMCSA of any changes or corrections to the information in Section I, IA or II of Form OP-1(NNA)—Application for U.S. Department of Transportation (USDOT) Registration by Non-North America-Domiciled Motor Carriers that occurs during the application process or after having been granted new entrant registration.

(3) A motor carrier must notify FMCSA in writing within 45 days of the change or correction to information under paragraphs (a)(1) or (a)(2) of this section.

(b) If a motor carrier fails to comply with paragraph (a) of this section, FMCSA may suspend or revoke its new entrant registration until it meets those requirements.

#### **Appendix to Subpart H of Part 385—Explanation of Pre-Authorization Safety Audit Evaluation Criteria for Non-North America-Domiciled Motor Carriers**

##### **I. General**

(a) FMCSA will perform a safety audit of each non-North America-domiciled motor carrier before granting the carrier new entrant registration to operate within the United States.

(b) FMCSA will conduct the safety audit at a location specified by the FMCSA. All records and documents must be made available for examination within 48 hours after a request is made. Saturdays, Sundays, and Federal holidays are excluded from the computation of the 48-hour period.

(c) The safety audit will include:

(1) Verification of available performance data and safety management programs;

(2) Verification of a controlled substances and alcohol testing program consistent with part 40 of this title;

(3) Verification of the carrier's system of compliance with hours-of-service rules in part 395 of this subchapter, including recordkeeping and retention;

(4) Verification of proof of financial responsibility;

(5) Review of available data concerning the carrier's safety history, and other information necessary to determine the carrier's preparedness to comply with the Federal Motor Carrier Safety Regulations, parts 382 through 399 of this subchapter, and the Federal Hazardous Material Regulations, parts 171 through 180 of this title;

(6) Inspection of available commercial motor vehicles to be used under new entrant registration, if any of these vehicles have not received a decal required by § 385.703(c) of this subchapter;

(7) Evaluation of the carrier's safety inspection, maintenance, and repair facilities or management systems, including verification of records of periodic vehicle inspections;

(8) Verification of drivers' qualifications, including confirmation of the validity of the CDL, Canadian Commercial Driver's License, or Mexican Licencia de Federal de Conductor, as applicable, of each driver the carrier intends to assign to operate under its new entrant registration; and

(9) An interview of carrier officials to review safety management controls and evaluate any written safety oversight policies and practices.

(d) To successfully complete the safety audit, a non-North America-domiciled motor carrier must demonstrate to FMCSA that it has the required elements in paragraphs I (c)(2), (3), (4), (7), and (8) of this appendix and other basic safety management controls in place which function adequately to ensure minimum acceptable compliance with the applicable safety requirements. FMCSA developed "safety audit evaluation criteria," which uses data from the safety audit and roadside inspections to determine that each applicant for new entrant registration has basic safety management controls in place.

(e) The safety audit evaluation process developed by FMCSA is used to:

(1) Evaluate basic safety management controls and determine if each non-North America-domiciled carrier and each driver is able to operate safely in the United States; and

(2) Identify motor carriers and drivers who are having safety problems and need improvement in their compliance with the FMCSRs and the HMRs, before FMCSA issues new entrant registration to operate within the United States.

##### **II. Source of the Data for the Safety Audit Evaluation Criteria**

(a) The FMCSA's evaluation criteria are built upon the operational tool known as the safety audit. FMCSA developed this tool to assist auditors, inspectors, and investigators in assessing the adequacy of a non-North

America-domiciled carrier's basic safety management controls.

(b) The safety audit is a review of a non-North America-domiciled motor carrier's operation and is used to:

(1) Determine if a carrier has the basic safety management controls required by 49 U.S.C. 31144; and

(2) In the event that a carrier is found not to be in compliance with applicable FMCSRs and HMRs, educate the carrier on how to comply with U.S. safety rules.

(c) Documents such as those contained in driver qualification files, records of duty status, vehicle maintenance records, drug and alcohol testing records, and other records are reviewed for compliance with the FMCSRs and HMRs. Violations are cited on the safety audit. Performance-based information, when available, is utilized to evaluate the carrier's compliance with the vehicle regulations. Recordable accident information is also collected.

### III. Overall Determination of the Carrier's Basic Safety Management Controls

(a) The carrier will not receive new entrant registration if FMCSA cannot:

(1) Verify a controlled substances and alcohol testing program consistent with part 40 of this title;

(2) Verify a system of compliance with the hours-of-service rules of this subchapter, including recordkeeping and retention;

(3) Verify proof of financial responsibility;

(4) Verify records of periodic vehicle inspections; and

(5) Verify the qualifications of each driver the carrier intends to assign to operate commercial motor vehicles in the United States, as required by parts 383 and 391 of this subchapter, including confirming the validity of each driver's CDL, Canadian Commercial Driver's License, or Mexican Licencia de Federal de Conductor, as appropriate.

(b) If FMCSA confirms each item under paragraphs III (a)(1) through (5) of this appendix, the carrier will receive new entrant registration, unless FMCSA finds the carrier has inadequate basic safety management controls in at least three separate factors described in part IV of this appendix. If FMCSA makes such a determination, the carrier's application for new entrant registration will be denied.

### IV. Evaluation of Regulatory Compliance

(a) During the safety audit, FMCSA gathers information by reviewing a motor carrier's compliance with "acute" and "critical" regulations of the FMCSRs and HMRs.

(b) Acute regulations are those where noncompliance is so severe as to require immediate corrective actions by a motor carrier regardless of the overall basic safety management controls of the motor carrier.

(c) Critical regulations are those where noncompliance relates to management and/or operational controls. These are indicative of breakdowns in a carrier's management controls.

(d) The list of the acute and critical regulations, which are used in determining if a carrier has basic safety management controls in place, is included in Appendix B,

VII, List of Acute and Critical Regulations to part 385 of this subchapter.

(e) Noncompliance with acute and critical regulations are indicators of inadequate safety management controls and usually higher than average accident rates.

(f) Parts of the FMCSRs and the HMRs having similar characteristics are combined together into six regulatory areas called "factors." The regulatory factors, evaluated on the adequacy of the carrier's safety management controls, are:

(1) Factor 1—General: Parts 387 and 390;

(2) Factor 2—Driver: Parts 382, 383, and 391;

(3) Factor 3—Operational: Parts 392 and 395;

(4) Factor 4—Vehicle: Parts 393, 396 and inspection data for the last 12 months;

(5) Factor 5—Hazardous Materials: Parts 171, 177, 180 and 397; and

(6) Factor 6—Accident: Recordable Accident Rate per Million Miles.

(g) For each instance of noncompliance with an acute regulation, 1.5 points will be assessed.

(h) For each instance of noncompliance with a critical regulation, 1 point will be assessed.

(i) Vehicle Factor. (1) When at least three vehicle inspections are recorded in the Motor Carrier Management Information System (MCMIS) during the twelve months before the safety audit or performed at the time of the review, the Vehicle Factor (part 396) will be evaluated on the basis of the Out-of-Service (OOS) rates and noncompliance with acute and critical regulations. The results of the review of the OOS rate will affect the Vehicle Factor as follows:

(i) If the motor carrier has had at least three roadside inspections in the twelve months before the safety audit, and the vehicle OOS rate is 34 percent or higher, one point will be assessed against the carrier. That point will be added to any other points assessed for discovered noncompliance with acute and critical regulations of part 396 of this chapter to determine the carrier's level of safety management control for that factor.

(ii) If the motor carrier's vehicle OOS rate is less than 34 percent, or if there are less than three inspections, the determination of the carrier's level of safety management controls will only be based on discovered noncompliance with the acute and critical regulations of part 396 of this chapter.

(2) Roadside inspection information is retained in the MCMIS and is integral to evaluating a motor carrier's ability to successfully maintain its vehicles, thus preventing being placed OOS during a roadside inspection. Each safety audit will continue to have the requirements of part 396 of this chapter, Inspection, Repair, and Maintenance, reviewed as indicated by the above explanation.

(j) Accident Factor. (1) In addition to the five regulatory factors, a sixth factor is included in the process to address the accident history of the motor carrier. This factor is the recordable accident rate, which the carrier has experienced during the past 12 months. Recordable accident, as defined in 49 CFR 390.5, means an accident involving a commercial motor vehicle

operating on a public road in interstate or intrastate commerce which results in a fatality; a bodily injury to a person who, as a result of the injury, immediately receives medical treatment away from the scene of the accident; or one or more motor vehicles incurring disabling damage as a result of the accident requiring the motor vehicle to be transported away from the scene by a tow truck or other motor vehicle.

(2) [Reserved]

(3) The recordable accident rate will be used in determining the carrier's basic safety management controls in Factor 6, Accident. It will be used only when a carrier incurs two or more recordable accidents within the 12 months before the safety audit. An urban carrier (a carrier operating entirely within a radius of 100 air miles) with a recordable rate per million miles greater than 1.7 will be deemed to have inadequate basic safety management controls for the accident factor. All other carriers with a recordable accident rate per million miles greater than 1.5 will be deemed to have inadequate basic safety management controls for the accident factor. The rates are the result of roughly doubling the United States national average accident rate in Fiscal Years 1994, 1995, and 1996.

(4) FMCSA will continue to consider preventability when a new entrant contests the evaluation of the accident factor by presenting compelling evidence that the recordable rate is not a fair means of evaluating its accident factor. Preventability will be determined according to the following standard: "If a driver, who exercises normal judgment and foresight, could have foreseen the possibility of the accident that in fact occurred, and avoided it by taking steps within his/her control which would not have risked causing another kind of mishap, the accident was preventable."

(k) Factor Ratings. (1) The following table shows the five regulatory factors, parts of the FMCSRs and HMRs associated with each factor, and the accident factor. Each carrier's level of basic safety management controls with each factor is determined as follows:

(i) Factor 1—General: Parts 390 and 387;

(ii) Factor 2—Driver: Parts 382, 383, and 391;

(iii) Factor 3—Operational: Parts 392 and 395;

(iv) Factor 4—Vehicle: Parts 393, 396 and the Out of Service Rate;

(v) Factor 5—Hazardous Materials: Part 171, 177, 180 and 397; and

(vi) Factor 6—Accident: Recordable Accident Rate per Million Miles;

(2) For paragraphs IV (k)(1)(i) through (v) of this appendix (Factors 1 through 5), if the combined violations of acute and/or critical regulations for each factor is equal to three or more points, the carrier is determined not to have basic safety management controls for that individual factor.

(3) For paragraph IV (k)(1)(vi) of this appendix, if the recordable accident rate is greater than 1.7 recordable accidents per million miles for an urban carrier (1.5 for all other carriers), the carrier is determined to have inadequate basic safety management controls.

(l) Notwithstanding FMCSA verification of the items listed in paragraphs III (a)(1)

through (5) of this appendix, if the safety audit determines the carrier has inadequate basic safety management controls in at least three separate factors described in paragraph III of this appendix, the carrier's application for new entrant registration will be denied. For example, FMCSA evaluates a carrier finding:

- (1) One instance of noncompliance with a critical regulation in part 387 scoring one point for Factor 1;
- (2) Two instances of noncompliance with acute regulations in part 382 scoring three points for Factor 2;
- (3) Three instances of noncompliance with critical regulations in part 396 scoring three points for Factor 4; and
- (4) Three instances of noncompliance with acute regulations in parts 171 and 397 scoring four and one-half (4.5) points for Factor 5.

Under this example, the carrier will not receive new entrant registration because it scored three or more points for Factors 2, 4, and 5 and FMCSA determined the carrier had inadequate basic safety management controls in at least three separate factors.

■ 20. Amend part 385 by adding a new Subpart I consisting of new §§ 385.701 through 385.717 to read as follows:

**Subpart I—Safety Monitoring System for Non-North America-Domiciled Carriers**

Sec.

- 385.701 Definitions.
- 385.703 Safety monitoring system.
- 385.705 Expedited action.
- 385.707 The compliance review.
- 385.709 Suspension and revocation of non-North America-domiciled carrier registration.
- 385.711 Administrative review.
- 385.713 Reapplying for new entrant registration.
- 385.715 Duration of safety monitoring system.
- 385.717 Applicability of safety fitness and enforcement procedures.

**Subpart I—Safety Monitoring System for Non-North American Carriers**

**§ 385.701 Definitions.**

The following definitions apply to this subpart:

*Compliance review* means a compliance review as defined in § 385.3 of this part.

*New entrant registration* means the provisional registration under subpart H of this part that FMCSA grants to a non-North America-domiciled motor carrier to provide interstate transportation within the United States. It will be revoked if the registrant is not assigned a Satisfactory safety rating following a compliance review conducted during the safety monitoring period established in this subpart.

*Non-North America-domiciled motor carrier* means a motor carrier of property or passengers whose principal place of business is located in a country

other than the United States, Canada or Mexico.

**§ 385.703 Safety monitoring system.**

(a) *General.* Each non-North America-domiciled carrier new entrant will be subject to an oversight program to monitor its compliance with applicable Federal Motor Carrier Safety Regulations (FMCSRs), Federal Motor Vehicle Safety Standards (FMVSSs), and Hazardous Materials Regulations (HMRs).

(b) *Roadside monitoring.* Each non-North America-domiciled carrier new entrant will be subject to intensified monitoring through frequent roadside inspections.

(c) *Safety decal.* Each non-North America-domiciled carrier must have on every commercial motor vehicle it operates in the United States a current decal attesting to a satisfactory North American Standard Commercial Vehicle inspection by a certified FMCSA or State inspector pursuant to 49 CFR 350.201(k). This requirement applies during the new entrant operating period and for three years after the carrier's registration becomes permanent following removal of its new entrant designation.

(d) *Compliance review.* FMCSA will conduct a compliance review on a non-North America-domiciled carrier within 18 months after FMCSA issues the carrier a USDOT Number.

**§ 385.705 Expedited action.**

(a) A non-North America-domiciled motor carrier committing any of the following actions identified through roadside inspections, or by any other means, may be subjected to an expedited compliance review, or may be required to submit a written response demonstrating corrective action:

(1) Using a driver not possessing, or operating without, a valid CDL, Canadian Commercial Driver's License, or Mexican Licencia Federal de Conductor. An invalid commercial driver's license includes one that is falsified, revoked, expired, or missing a required endorsement.

(2) Operating a vehicle placed out of service for violations of the Federal Motor Carrier Safety Regulations without taking the necessary corrective action.

(3) Being involved in, through action or omission, a hazardous materials reportable incident, as described under 49 CFR 171.15 or 171.16, within the United States involving—

(i) A highway route controlled quantity of certain radioactive materials (Class 7).

(ii) Any quantity of certain explosives (Class 1, Division 1.1, 1.2, or 1.3).

(iii) Any quantity of certain poison inhalation hazard materials (Zone A or B).

(4) Being involved in, through action or omission, two or more hazardous materials reportable incidents, as described under 49 CFR 171.15 or 171.16, occurring within the United States and involving any hazardous material not listed in paragraph (a)(3) of this section.

(5) Using a driver who tests positive for controlled substances or alcohol or who refuses to submit to required controlled substances or alcohol tests.

(6) Operating within the United States a commercial motor vehicle without the levels of financial responsibility required under part 387 of this subchapter.

(7) Having a driver or vehicle out-of-service rate of 50 percent or more based upon at least three inspections occurring within a consecutive 90-day period.

(b) Failure to respond to an Agency demand for a written response demonstrating corrective action within 30 days will result in the suspension of the carrier's new entrant registration until the required showing of corrective action is submitted to the FMCSA.

(c) A satisfactory response to a written demand for corrective action does not excuse a carrier from the requirement that it undergo a compliance review during the new entrant registration period.

**§ 385.707 The compliance review.**

(a) The criteria used in a compliance review to determine whether a non-North America-domiciled new entrant exercises the necessary basic safety management controls are specified in Appendix B to this part.

(b) *Satisfactory Rating.* If FMCSA assigns a non-North America-domiciled carrier a Satisfactory rating following a compliance review conducted under this subpart, FMCSA will provide the carrier written notice as soon as practicable, but not later than 45 days after the completion of the compliance review. The carrier's registration will remain in provisional status and its on-highway performance will continue to be closely monitored for the remainder of the 18-month new entrant registration period.

(c) *Conditional Rating.* If FMCSA assigns a non-North America-domiciled carrier a Conditional rating following a compliance review conducted under this subpart, it will initiate a revocation proceeding in accordance with § 385.709 of this subpart. The carrier's

new entrant registration will not be suspended prior to the conclusion of the revocation proceeding.

(d) *Unsatisfactory Rating.* If FMCSA assigns a non-North America-domiciled carrier an Unsatisfactory rating following a compliance review conducted under this subpart, it will initiate a suspension and revocation proceeding in accordance with § 385.709 of this subpart.

**§ 385.709 Suspension and revocation of non-North America-domiciled carrier registration.**

(a) If a carrier is assigned an "Unsatisfactory" safety rating following a compliance review conducted under this subpart, FMCSA will provide the carrier written notice, as soon as practicable, that its registration will be suspended effective 15 days from the service date of the notice unless the carrier demonstrates, within 10 days of the service date of the notice, that the compliance review contains material error.

(b) For purposes of this section, material error is a mistake or series of mistakes that resulted in an erroneous safety rating.

(c) If the carrier demonstrates that the compliance review contained material error, its new entrant registration will not be suspended. If the carrier fails to show a material error in the compliance review, FMCSA will issue an Order:

(1) Suspending the carrier's new entrant registration and requiring it to immediately cease all further operations in the United States; and

(2) Notifying the carrier that its new entrant registration will be revoked unless it presents evidence of necessary corrective action within 30 days from the service date of the Order.

(d) If a carrier is assigned a "Conditional" rating following a compliance review conducted under this subpart, the provisions of paragraphs (a) through (c) of this section will apply, except that its new entrant registration will not be suspended under paragraph (c)(1) of this section.

(e) If a carrier subject to this subpart fails to provide the necessary documents for a compliance review upon reasonable request, or fails to submit evidence of the necessary corrective action as required by § 385.705 of this subpart, FMCSA will provide the carrier with written notice, as soon as practicable, that its new entrant registration will be suspended 15 days from the service date of the notice unless it provides all necessary documents or information. This suspension will remain in effect until

the necessary documents or information is produced and:

(1) The carrier is rated Satisfactory after a compliance review; or

(2) FMCSA determines, following review of the carrier's response to a demand for corrective action under § 385.705, that the carrier has taken the necessary corrective action.

(f) If a carrier commits any of the actions specified in § 385.705(a) of this subpart after the removal of a suspension issued under this section, the suspension will be automatically reinstated. FMCSA will issue an Order requiring the carrier to cease further operations in the United States and demonstrate, within 15 days from the service date of the Order, that it did not commit the alleged action(s). If the carrier fails to demonstrate that it did not commit the action(s), FMCSA will issue an Order revoking its new entrant registration.

(g) If FMCSA receives credible evidence that a carrier has operated in violation of a suspension order issued under this section, it will issue an Order requiring the carrier to show cause, within 10 days of the service date of the Order, why its new entrant registration should not be revoked. If the carrier fails to make the necessary showing, FMCSA will revoke its registration.

(h) If a non-North America-domiciled motor carrier operates a commercial motor vehicle in violation of a suspension or out-of-service order, it is subject to the penalty provisions in 49 U.S.C. 521(b)(2)(A), as adjusted by inflation, not to exceed amounts for each offense under part 386, Appendix B of this subchapter.

(i) Notwithstanding any provision of this subpart, a carrier subject to this subpart is also subject to the suspension and revocation provisions of 49 U.S.C. 13905 for repeated violations of DOT regulations governing its motor carrier operations.

**§ 385.711 Administrative review.**

(a) A non-North America-domiciled motor carrier may request FMCSA to conduct an administrative review if it believes FMCSA has committed an error in assigning a safety rating or suspending or revoking the carrier's new entrant registration under this subpart.

(b) The carrier must submit its request in writing, in English, to the Associate Administrator for Enforcement and Program Delivery, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue, SE., Washington DC 20590.

(c) The carrier's request must explain the error it believes FMCSA committed in assigning the safety rating or

suspending or revoking the carrier's new entrant registration and include any information or documents that support its argument.

(d) FMCSA will complete its administrative review no later than 10 days after the carrier submits its request for review. The Associate Administrator's decision will constitute the final Agency action.

**§ 385.713 Reapplying for new entrant registration.**

(a) A non-North America-domiciled motor carrier whose provisional new entrant registration has been revoked may reapply for new entrant registration no sooner than 30 days after the date of revocation.

(b) If the provisional new entrant registration was revoked because the new entrant failed to receive a Satisfactory rating after undergoing a compliance review, the new entrant must do all of the following:

(1) Submit an updated MCS-150.  
(2) Submit evidence that it has corrected the deficiencies that resulted in revocation of its registration and will otherwise ensure that it will have basic safety management controls in effect.

(3) Successfully complete a pre-authorization safety audit in accordance with § 385.607(c) of this part.

(4) Begin the 18-month new entrant monitoring cycle again as of the date the re-filed application is approved.

(c) If the provisional new entrant registration was revoked because FMCSA found that the new entrant had failed to submit to a compliance review, it must do all of the following:

(1) Submit an updated MCS-150.  
(2) Successfully complete a pre-authorization safety audit in accordance with § 385.607(c) of this Part.

(3) Begin the 18-month new entrant monitoring cycle again as of the date the re-filed application is approved.

(4) Submit to a compliance review upon request.

(d) If the new entrant is a for-hire carrier subject to the registration provisions under 49 U.S.C. 13901 and also has had its operating authority revoked, it must re-apply for operating authority as set forth in part 365 of this subchapter.

**§ 385.715 Duration of safety monitoring system.**

(a) Each non-North America-domiciled carrier subject to this subpart will remain in the safety monitoring system for at least 18 months from the date FMCSA issues its new entrant registration, except as provided in paragraphs (c) and (d) of this section.

(b) If, at the end of this 18-month period, the carrier's most recent safety

rating was Satisfactory and no additional enforcement or safety improvement actions are pending under this subpart, the non-North America-domiciled carrier's new entrant registration will become permanent.

(c) If, at the end of this 18-month period, FMCSA has not been able to conduct a compliance review, the carrier will remain in the safety monitoring system until a compliance review is conducted. If the results of the compliance review are satisfactory, the carrier's new entrant registration will become permanent.

(d) If, at the end of this 18-month period, the carrier's new entrant registration is suspended under § 385.709(a) of this subpart, the carrier will remain in the safety monitoring system until FMCSA either:

- (1) Determines that the carrier has taken corrective action; or
- (2) Completes measures to revoke the carrier's new entrant registration under § 385.709(c) of this subpart.

**§ 385.717 Applicability of safety fitness and enforcement procedures.**

At all times during which a non-North America-domiciled motor carrier is subject to the safety monitoring system in this subpart, it is also subject to the general safety fitness procedures established in subpart A of this part and to compliance and enforcement procedures applicable to all carriers regulated by the FMCSA.

■ 21. Amend Appendix A to part 385, section III to add new paragraph (i) to read as follows:

**Appendix A to Part 385—Explanation of Safety Audit Evaluation Criteria**

\* \* \* \* \*

**III. Determining if the Carrier Has Basic Safety Management Controls**

\* \* \* \* \*

(i) FMCSA also gathers information on compliance with applicable household goods and Americans with Disabilities Act of 1990 requirements, but failure to comply with these requirements does not affect the determination of the adequacy of basic safety management controls.

\* \* \* \* \*

**PART 387—MINIMUM LEVELS OF FINANCIAL RESPONSIBILITY FOR MOTOR CARRIERS**

■ 22. The authority citation for part 387 is revised to read as follows:

**Authority:** 49 U.S.C. 13101, 13301, 13906, 14701, 31138, 31139, and 31144; and 49 CFR 1.73.

■ 23. Amend § 387.3 by revising paragraph (c)(1) to read as follows:

**§ 387.3 Applicability.**

\* \* \* \* \*

(c) *Exception.* (1) The rules in this part do not apply to a motor vehicle that has a gross vehicle weight rating (GVWR) of less than 10,001 pounds. This exception does not apply if the

vehicle is used to transport any quantity of a Division 1.1, 1.2, or 1.3 material, any quantity of a Division 2.3, Hazard Zone A, or Division 6.1, Packing Group I, Hazard Zone A, or to a highway route controlled quantity of a Class 7 material as it is defined in 49 CFR 173.403, in interstate or foreign commerce.

\* \* \* \* \*

■ 24. Amend § 387.7 by revising paragraph (e) to read as follows:

**§ 387.7 Financial responsibility required.**

\* \* \* \* \*

(e)(1) The proof of minimum levels of financial responsibility required by this section shall be considered public information and be produced for review upon reasonable request by a member of the public.

(2) In addition to maintaining proof of financial responsibility as required by paragraph (d) of this section, non-North America-domiciled private and for-hire motor carriers shall file evidence of financial responsibility with FMCSA in accordance with the requirements of subpart C of this part.

\* \* \* \* \*

■ 25. Revise § 387.9 to read as follows:

**§ 387.9 Financial responsibility, minimum levels.**

The minimum levels of financial responsibility referred to in § 387.7 of this subpart are hereby prescribed as follows:

**SCHEDULE OF LIMITS—PUBLIC LIABILITY**

Type of carriage	Commodity transported	January 1, 1985
(1) For-hire (In interstate or foreign commerce, with a gross vehicle weight rating of 10,001 or more pounds).	Property (nonhazardous) .....	\$750,000
(2) For-hire and Private (In interstate, foreign, or intrastate commerce, with a gross vehicle weight rating of 10,001 or more pounds).	Hazardous substances, as defined in 49 CFR 171.8, transported in cargo tanks, portable tanks, or hopper-type vehicles with capacities in excess of 3,500 water gallons; or in bulk Division 1.1, 1.2 and 1.3 materials. Division 2.3, Hazard Zone A, or Division 6.1, Packing Group I, Hazard Zone A material; in bulk Division 2.1 or 2.2; or highway route controlled quantities of a Class 7 material, as defined in 49 CFR 173.403.	5,000,000
(3) For-hire and Private (In interstate or foreign commerce, in any quantity; or in intrastate commerce, in bulk only; with a gross vehicle weight rating of 10,001 or more pounds).	Oil listed in 49 CFR 172.101; hazardous waste, hazardous materials, and hazardous substances defined in 49 CFR 171.8 and listed in 49 CFR 172.101, but not mentioned in (2) above or (4) below.	1,000,000
(4) For-hire and Private (In interstate or foreign commerce, with a gross vehicle weight rating of less than 10,001 pounds).	Any quantity of Division 1.1, 1.2, or 1.3 material; any quantity of a Division 2.3, Hazard Zone A, or Division 6.1, Packing Group I, Hazard Zone A material; or highway route controlled quantities of a Class 7 material as defined in 49 CFR 173.403.	5,000,000

■ 26. Amend § 387.31 by revising paragraph (e) to read as follows:

**§ 387.31 Financial responsibility required.**

\* \* \* \* \*

(e)(1) The proof of minimum levels of financial responsibility required by this

section shall be considered public information and be produced for review upon reasonable request by a member of the public.

(2) In addition to maintaining proof of financial responsibility as required by

paragraph (d) of this section, non-North America-domiciled private and for-hire motor carriers shall file evidence of financial responsibility with FMCSA in

accordance with the requirements of subpart C of this part.

\* \* \* \* \*

**PART 390—FEDERAL MOTOR CARRIER SAFETY REGULATIONS; GENERAL**

■ 27. The authority citation for part 390 is revised to read as follows:

**Authority:** 49 U.S.C. 508, 13301, 13902, 31133, 31136, 31144, 31502, 31504, and sec. 204, Public Law 104–88, 109 Stat. 803, 941 (49 U.S.C. 701 note); sec. 114, Public Law 103–311, 108 Stat. 1673, 1677; sec. 217, Public Law 106–159, 113 Stat. 1748, 1767; and 49 CFR 1.73.

■ 28. Revise § 390.19 to read as follows:

**§ 390.19 Motor carrier identification report.**

(a) *Applicability.* Each motor carrier must file the Form MCS–150 or Form MCS–150B with FMCSA as follows:

(1) A U.S., Canada-, Mexico-, or non-North America-domiciled motor carrier conducting operations in interstate commerce must file a Motor Carrier Identification Report, Form MCS–150.

(2) A motor carrier conducting operations in intrastate commerce and requiring a Safety Permit under 49 CFR part 385, subpart E of this chapter must file the Combined Motor Carrier Identification Report and HM Permit Application, Form MCS–150B.

(b) *Filing schedule.* Each motor carrier must file the appropriate form under paragraph (a) of this section at the following times:

- (1) Before it begins operations; and
- (2) Every 24 months, according to the following schedule:

USDOT No. ending in	Must file by last day of
1 .....	January.
2 .....	February.
3 .....	March.
4 .....	April.
5 .....	May.
6 .....	June.
7 .....	July.
8 .....	August.
9 .....	September.
0 .....	October.

(3) If the next-to-last digit of its USDOT Number is odd, the motor carrier shall file its update in every odd-numbered calendar year. If the next-to-last digit of the USDOT Number is even, the motor carrier shall file its update in every even-numbered calendar year.

(c) *Availability of forms.* The forms described under paragraph (a) of this section and complete instructions are available from the FMCSA Web site at <http://www.fmcsa.dot.gov> (Keyword “MCS–150,” or “MCS–150B”); from all FMCSA Service Centers and Division offices nationwide; or by calling 1–800–832–5660.

(d) *Where to file.* The required form under paragraph (a) of this section must be filed with FMCSA Office of Information Management. The form may be filed electronically according to the instructions at the Agency’s Web site, or it may be sent to Federal Motor Carrier Safety Administration, Office of Information Management, MC–RIO, 1200 New Jersey Avenue, SE., Washington, DC 20590.

(e) *Special instructions for for-hire motor carriers.* A for-hire motor carrier should submit the Form MCS–150, or Form MCS–150B, along with its application for operating authority (Form OP–1, OP–1(MX), OP–1(NNA) or OP–2), to the appropriate address referenced on that form, or may submit it electronically or by mail separately to the address mentioned in paragraph (d) of this section.

(f) Only the legal name or a single trade name of the motor carrier may be used on the forms under paragraph (a) of this section (Form MCS–150 or MCS–150B).

(g) A motor carrier that fails to file the form required under paragraph (a) of this section, or furnishes misleading information or makes false statements upon the form, is subject to the penalties prescribed in 49 U.S.C. 521(b)(2)(B).

(h)(1) Upon receipt and processing of the form described in paragraph (a) of this section, FMCSA will issue the motor carrier an identification number (USDOT Number).

(2) The following applicants must additionally pass a pre-authorization safety audit as described below before being issued a USDOT Number:

(i) A Mexico-domiciled motor carrier seeking to provide transportation of property or passengers in interstate commerce between Mexico and points in the United States beyond the municipalities and commercial zones along the United States-Mexico international border must pass the pre-authorization safety audit under § 365.507 of this subchapter. The Agency will not issue a USDOT Number until expiration of the protest period provided in § 365.115 of this subchapter or—if a protest is received—after FMCSA denies or rejects the protest.

(ii) A non-North America-domiciled motor carrier seeking to provide transportation of property or passengers in interstate commerce within the United States must pass the pre-authorization safety audit under § 385.607(c) of this subchapter. The Agency will not issue a USDOT Number until expiration of the protest period provided in § 365.115 of this subchapter or—if a protest is received—after FMCSA denies or rejects the protest.

(3) The motor carrier must display the number on each self-propelled CMV, as defined in § 390.5, along with the additional information required by § 390.21.

(i) A motor carrier that registers its vehicles in a State that participates in the Performance and Registration Information Systems Management (PRISM) program (authorized under section 4004 of the Transportation Equity Act for the 21st Century [(Public Law 105–178, 112 Stat. 107)]) is exempt from the requirements of this section, provided it files all the required information with the appropriate State office.

Issued on: December 4, 2008.

**John H. Hill,**  
*Administrator.*

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