

significant impact of a rule on small entities. Because this proposed rule simply adjusts the maximum amount of a CMP, and because the adjustment is required by the Inflation Adjustment Act, the Department certifies that the rule will not have a significant economic impact on a substantial number of small entities.

Section 202(a) of the Unfunded Mandates Reform Act of 1995 requires that agencies prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing "any rule that includes any Federal mandate that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any one year." The current threshold after adjustment for inflation is \$133 million, using the most current (2008) Implicit Price Deflator for the Gross Domestic Product.<sup>3</sup> The Department does not expect this proposed rule to result in any 1-year expenditure that would meet or exceed this amount.

#### List of Subjects in 42 CFR Part 3

Administrative practice and procedure, Civil money penalty, Confidentiality, Conflict of interests, Courts, Freedom of information, Health, Health care, Health facilities, Health insurance, Health professions, Health records, Hospitals, Investigations, Law enforcement, Medical research, Organization and functions, Patient, Patient safety, Privacy, Privilege, Public health, Reporting and recordkeeping requirements, Safety, State and local governments, Technical assistance.

For the reasons stated in the preamble, HHS proposes to amend part 3 of title 42 of the Code of Federal Register as follows:

#### PART 3—PATIENT SAFETY ORGANIZATIONS AND PATIENT SAFETY WORK PRODUCT

1. The authority citation for part 3 continues to read:

**Authority:** 42 U.S.C. 216, 299b–21 through 299b–26; 42 U.S.C. 299c–6.

2. Amend § 3.404 by revising paragraph (b) to read as follows:

#### § 3.404 Amount of a civil money penalty.

\* \* \* \* \*

(b) The Secretary may impose a civil money penalty in the amount of not more than \$11,000.

Dated: August 18, 2009.

**Kathleen Sebelius,**  
Secretary.

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## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

#### 49 CFR Part 385

[Docket No. FMCSA–2001–11061]

RIN 2126–AB17

#### New Entrant Safety Assurance Process: Implementation of Section 210(b) of the Motor Carrier Safety Improvement Act of 1999

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

**ACTION:** Advance notice of proposed rulemaking (ANPRM); request for comments.

**SUMMARY:** The Federal Motor Carrier Safety Administration (FMCSA) requests comment on the methods the Agency should consider implementing to provide further assurance that a new applicant carrier is knowledgeable about the applicable safety requirements before being granted New Entrant authority. We are considering whether to implement a proficiency examination as part of our revised New Entrant Safety Assurance Process and seek information concerning issues that should be considered in the development and use of such an examination. In addition, the Agency requests comments on other alternatives to a proficiency examination to complement the assurances already in place that new entrant carriers are knowledgeable about applicable safety requirements. This notice responds to issues raised by Advocates for Highway and Auto Safety (Advocates) regarding new entrant applicant knowledgeability. **DATES:** Send your comments on or before October 26, 2009.

**ADDRESSES:** You may submit comments identified by FDMS Docket ID Number FMCSA–2001–11061 by any of the following methods:

- **Federal eRulemaking Portal:** Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.

- **Mail:** Docket Management Facility: U.S. Department of Transportation, 1200

New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.

- **Hand Delivery or Courier:** West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.

- **Fax:** 202–493–2251.

**Instructions:** For detailed instructions on submitting comments and additional information on the rulemaking process, see the Public Participation heading under the **SUPPLEMENTARY INFORMATION** caption of this document. Note that all comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided. Please see the Privacy Act heading below.

**Privacy Act:** Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477) or you may visit <http://DocketInfo.dot.gov>.

**Docket:** For access to the docket to read background documents or comments received, go to <http://www.regulations.gov> or the street address listed above. Follow the online instructions for accessing the dockets.

**FOR FURTHER INFORMATION CONTACT:** Mr. Richard Johnson, New Entrant Program Specialist, (202) 366–0476, [richard.johnson@dot.gov](mailto:richard.johnson@dot.gov). Business hours are from 8 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

#### SUPPLEMENTARY INFORMATION:

##### Public Participation

The Federal eRulemaking Portal (<http://www.regulations.gov>) is available 24 hours each day, 365 days each year. You can get electronic submission and retrieval help and guidelines under the "How to Use This Site" menu option.

Comments received after the comment closing date will be included in the docket, and we will consider late comments to the extent practicable.

##### Legal Basis for the Rulemaking

Under 49 U.S.C. 31144, the Secretary of Transportation (Secretary) is required to determine whether a new motor vehicle 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

<sup>3</sup> According to the U.S. Department of Commerce, Bureau of Economic Analysis, the implicit price deflator for gross domestic product was indexed at 92.106 in 1995 (the year of the Unfunded Mandates Reform Act) and 122.422 in 2008. See <http://www.bea.gov/national/nipaweb/> (Table 1.1.9).

sec. 31144(g)<sup>1</sup> directing the Secretary to establish regulations to require each owner and operator granted New Entrant authority to undergo a safety review within 18 months of starting covered 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 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. The authority to establish such regulations has been delegated to FMCSA (49 CFR 1.73(g)).

Section 210(b) of MCSIA directed the Secretary to ensure applicants for New Entrant authority are knowledgeable about applicable Federal safety requirements before receiving operating authority. The Secretary was required to consider a proficiency examination, as well as other requirements, to ensure applicants understand applicable safety requirements before being granted operating authority.<sup>2</sup>

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.

In addition to expanding the Secretary's authority under sec. 31144, sec. 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) which requires the Secretary to prescribe regulations on commercial motor vehicle safety [Pub. L. 98-554, 98 Stat. 2834, October 30, 1984]. 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 (49 U.S.C. 31136(a)).

This ANPRM solicits information on how the Agency might further ensure that an applicant for the new entrant program is knowledgeable about applicable safety requirements before being granted New Entrant authority. As such, it responds to the sec. 31136(a)(1) mandate that FMCSA regulations ensure CMVs are maintained and operated safely. It does not propose any new operational responsibilities on drivers pursuant to sections 31136(a)(2)-(4).

### Background

As discussed above, sec. 210 of MCSIA took a two-pronged approach to improving the safety performance of new entrant motor carriers. First, sec. 210(a) amended 49 U.S.C. 31144 to require new entrant motor carriers to undergo a safety audit within the first 18 months after beginning operations in interstate commerce. Second, sec. 210(b) directed the Secretary to initiate a rulemaking to establish minimum requirements for applicant motor carriers seeking new entrant registration to ensure applicant carriers are knowledgeable about applicable Federal motor carrier safety standards before being granted registration. The Secretary is required to "consider the establishment of a proficiency examination for applicant motor carriers, as well as other requirements," to ensure applicant knowledgeability.

### 2002 Interim Final Rule

In response to the statutory mandate in MCSIA, on May 13, 2002, FMCSA published an interim final rule (IFR) titled "New Entrant Safety Assurance Process" (67 FR 31978), which became effective January 1, 2003. The Agency established a new application process for all new entrant motor carriers under its jurisdiction and domiciled in the United States and Canada. To receive permanent registration, these carriers must successfully complete an 18-month safety monitoring program, including a safety audit.

In the IFR, the Agency did not require a proficiency examination as a method of ensuring that new entrant carriers were knowledgeable of the applicable safety requirements. Instead, FMCSA required applicants to certify, on Form MCS-150A—Safety Certification for Application for USDOT Number, that they were knowledgeable of the Federal

Motor Carrier Safety Regulations (FMCSRs) and Hazardous Materials Regulations (HMRs) and attest that they had procedures in place to achieve compliance with specified regulatory requirements, including driver qualifications, hours of service, drug and alcohol testing, and vehicle condition. The IFR also provided for an application package containing educational and technical assistance (ETA) materials regarding the applicable safety requirements. FMCSA decided not to require a proficiency examination because it believed that the ETA materials provided to prospective new entrants and the safety certifications on the required application forms would demonstrate that the new entrants understood applicable safety regulations. Further, the Agency noted its ability to confirm carrier knowledge of applicable regulations during the safety audit required by sec. 210(a) of MCSIA.

### 2006 Notice of Proposed Rulemaking (NPRM)

In an effort to make the New Entrant Safety Assurance Process more effective, the Agency convened a working group charged with reviewing and making specific recommendations for improving the process. To implement the working group's recommendations, the Agency published an NPRM titled "New Entrant Safety Assurance Process" (71 FR 76730) on December 21, 2006. In this NPRM, the Agency addressed compliance with the new entrant applicant knowledge requirements of sec. 210(b) of MCSIA with the following proposals: (1) Updating the ETA materials to better inform new entrants about applicable regulatory requirements and how to fully comply with these requirements; and (2) raising the standard of compliance for passing the new entrant safety audit. The Agency identified 11 regulations that are essential elements of basic safety management control necessary to operate in interstate commerce and proposed that failure to comply with any one of the 11 regulations would result in automatic failure of the audit. The current safety audit evaluation criteria in Appendix A of 49 CFR part 385 would apply if there are no automatic failure violations. The Agency proposed to eliminate the Form MCS-150A requirement as ineffective. After careful consideration the Agency, based on the enhanced ETA materials and more stringent audit standards, concluded that a proficiency exam would not be necessary to achieve sufficient new entrant knowledgeability

<sup>1</sup> MCSIA originally codified section 31144(g) as § 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 § 31144(g).

<sup>2</sup> Section 210(b) is codified as a note to 49 U.S.C. 31144.

of the applicable regulatory requirements.

#### 2008 Final Rule

The Agency published a final rule on December 16, 2008 (73 FR 76472). FMCSA raised the standard of compliance for passing the new entrant safety audit as follows:

- Adopted an automatic failure component for the safety audit. If a new entrant was found to have a single occurrence of any one of 16 identified regulatory violations which the Agency deems as essential elements of basic safety management controls necessary to operate in interstate commerce, it would automatically fail the safety audit.
- Strengthened the safety monitoring element of the program by identifying seven incidents or regulatory violations which, if discovered during a roadside inspection or by any other means than the safety audit, would trigger expedited action against the new entrant by the Agency.
- Eliminated the requirement to self-certify to pre-operational knowledge of the Federal safety standards and discontinued the associated Form MCS-150A.
- Proposed a new application process and safety monitoring system for motor carriers that are not domiciled in North America (the U.S., Canada, or Mexico).

The final rule became effective on February 17, 2009 with a compliance date of December 16, 2009.

#### 2009 Petition for Reconsideration

Advocates for Highway and Auto Safety (Advocates) filed a petition for reconsideration on January 15, 2009, alleging, in part, that the Agency failed to adequately address sec. 210(b). The Agency granted the portion of the petition related to sec. 210(b) and agreed to initiate a rulemaking to assess whether additional means are available to further ensure new entrant knowledgeability. A copy of the petition decision has been placed in the docket for this rulemaking. The Agency continues to review the other aspects of the petition. This notice responds to issues raised by Advocates regarding new entrant applicant knowledgeability. In addition, through this notice, the Agency demonstrates its commitment to obtaining data and comments from the public to facilitate a thorough and expeditious review intended to inform future regulatory decisions regarding sec. 210(b).

#### Request for Information and Comments

FMCSA publishes this notice to enable the Agency to continue to carefully explore the costs and benefits

of proficiency examinations or other alternatives to address the statutory mandate of ensuring that new applicants are knowledgeable about applicable safety requirements. The Agency considered issuing a Supplemental Notice of Proposed Rulemaking (SNPRM) to further address the proficiency examination issue, but concluded that an SNPRM would delay implementation of enhancements to the safety audit component of the New Entrant Safety Assurance Process necessary to achieve greater motor carrier safety. We believe the public interest is better served by implementing these audit changes through the December 16, 2008, final rule and through this ANPRM will continue to give careful consideration to pre-operational carrier knowledgeability requirement in order to determine whether additional or alternative means are available to ensure new entrant knowledge.

Therefore, FMCSA requests responses to the following issues and questions. Whenever possible, commenters should provide data in support of their responses. FMCSA recognizes that an individual commenter may choose to respond to all of the issues or only a subset, based on his or her area of expertise.

#### 1. Use of a Proficiency Examination

a. Information on the feasibility of establishing a proficiency examination as a component of the New Entrant Safety Assurance Process;

b. Information about analogous types of examinations used in the motor carrier or other industries that could serve as models for a New Entrant proficiency examination;

c. Recommendations on preferred testing protocols;

d. Recommendations on how the Agency should administer a proficiency examination for applicants for New Entrant authority;

e. Recommendations on which motor carrier employees the Agency should require to take a proficiency exam, and the feasibility of motor carriers retaining those employees through the duration of the New Entrant Safety Assurance Program;

f. Information on the costs involved to develop, maintain, implement and administer a proficiency examination;

g. Information on anticipated impacts on new entrants if the Agency requires a proficiency examination as a condition to receiving new entrant authority and beginning operations;

h. Information on how, and to what degree, a proficiency examination

would increase carrier knowledge of applicable regulations;

i. Information on whether, and if so, how the increase in knowledge of applicable regulations brought about by the proficiency exam itself would lead to improved motor carrier safety;

j. Other general comments related to establishing a proficiency examination as a component of the New Entrant Safety Assurance Process; and

k. Information regarding the particular needs of small entities in establishing an assurance process.

#### 2. Other Recommended Alternatives

a. Ideas on how the Agency can ensure an applicant carrier is knowledgeable about the applicable safety requirements before being granted New Entrant authority and beginning operations other than through a proficiency examination;

b. Information on estimated costs to create, maintain, and administer the recommended alternative to ensure applicant knowledge;

c. Information on alternative approaches to the regulation that would reduce the impact on small entities;

d. Information on anticipated impacts to new entrants if the Agency recommends the alternative; and

e. Other general comments on the recommended alternatives.

All comments received before the close of business on the comment closing date indicated at the beginning of this notice will be considered and will be available for examination in the docket at the location listed under the **ADDRESSES** caption of this notice. Comments received after the comment closing date will be included in the docket, and we will consider late comments to the extent practicable. In addition to late comments, FMCSA will also continue to file, in the public docket, relevant information that becomes available after the comment closing date. Interested persons should continue to examine the public docket for new material.

#### Regulatory Analyses and Notices

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

In this ANPRM, FMCSA is soliciting information on what methods the Agency might implement, as alternatives or in addition to those already in place, to further ensure that a new applicant carrier is knowledgeable about the applicable safety requirements before being granted New Entrant authority. FMCSA has preliminarily determined this ANPRM

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 believes that a notice relating to new entrant motor carrier requirements may generate considerable public interest and therefore is significant. This notice requests comments on a narrow set of issues and is a highly preliminary part of a continuing process to inform future regulatory decisions concerning carrier knowledgeability under the New Entrant Safety Assurance Process. The potential economic impact of actions FMCSA may implement as a result of this ANPRM is not known at this time. Therefore, a full regulatory evaluation has not yet been prepared. The Agency intends to use the information collected from comments to this docket to determine whether a notice of proposed rulemaking should be developed, and, if necessary, a full regulatory evaluation is appropriate.

#### *Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) requires federal agencies to assess the potential impacts of their regulatory proposals on small entities and to consider less burdensome alternatives. However, because this rulemaking is still at a preliminary stage, the RFA does not yet apply. However, FMCSA is still interested in understanding how the potential regulatory changes could impact small entities. Accordingly, FMCSA solicits comments, information, and data on how these potential changes would impact small entities and what alternative approaches would minimize any significant impacts to small entities.

#### *Privacy Impact Analysis*

Due to the preliminary nature of this document and the fact that it proposes no regulatory changes, FMCSA is unable at this time to complete a privacy impact assessment as required by Section 522(a)(5) of the FY 2005 Omnibus Appropriations Act, Public Law 108-447, div. H, 118 Stat. 2809, 3268 (Dec. 8, 2004) [set out as a note to 5 U.S.C. 552a].

If FMCSA proposes regulatory changes as a result of this ANPRM, the Agency would complete the required analyses.

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

FMCSA will analyze any action implemented in subsequent phases of this proceeding to determine whether it would result in the expenditure by

State, local, and tribal governments, in the aggregate, or by the private sector, of \$141.3 million or more in any one year, as required by the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1532).

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

FMCSA will analyze any action implemented in subsequent phases of this proceeding to determine whether it would meet 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)*

FMCSA will analyze any action implemented in subsequent phases of this proceeding to determine whether it would concern an environmental risk to health or safety that may disproportionately affect children under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks.

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

FMCSA will analyze any action implemented in subsequent phases of this proceeding to determine whether it would 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)*

FMCSA asks for comments from State and local officials about the issues in this ANPRM. FMCSA will analyze any action implemented in subsequent phases of this proceeding using the principles and criteria contained in Executive Order 13132.

#### *Paperwork Reduction Act*

Under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520), FMCSA must obtain approval from the Office of Management and Budget (OMB) for each collection of information it conducts, sponsors, or requires through regulations.

The Agency is not yet in a position to analyze fully any potential action it may initiate that may fall within the scope of the Paperwork Reduction Act. If FMCSA proposes any information collection requirements as a result of this ANPRM, the Agency would seek the necessary approval from OMB.

#### *National Environmental Policy Act*

FMCSA will analyze any action implemented in subsequent phases of this proceeding for the purposes of the National Environmental Policy Act of 1969 (42 U.S.C. 4321, *et seq.*) to determine whether the action would affect the quality of the environment.

FMCSA will analyze any action implemented in subsequent phases of this proceeding under the Clean Air Act, as amended (CAA), section 176(c) (42 U.S.C. 7401 *et seq.*), and implementing regulations promulgated by the Environmental Protection Agency.

#### *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 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 13211 (Energy Effects)*

FMCSA will analyze any action implemented in subsequent phases of this proceeding under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use, to determine whether the action would be a "significant energy action" under that Executive Order.

#### **List of Subjects in 49 CFR Part 385**

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

Issued on: August 19, 2009.

**Rose A. McMurray,**

*Acting Deputy Administrator.*

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