

a particular hazardous material, the Chief Counsel or Deputy Chief Counsel of the FMCSA may bring, or request the United States Attorney General to bring, an action in the appropriate United States District Court for an order suspending or restricting the transportation by motor vehicle of the hazardous material or for such other order as is necessary to eliminate or ameliorate the imminent hazard, as provided by 49 U.S.C. 5122. In this paragraph, “imminent hazard” means the existence of a condition that presents a substantial likelihood that death, serious illness, severe personal injury, or a substantial endangerment to health, property, or the environment may occur before a notice of investigation proceeding, or other administrative hearing or formal proceeding, to abate the risk of harm can be completed.

(b)(1) Whenever it is determined that a violation of 49 U.S.C. 31502 or the Motor Carrier Safety Act of 1984, as amended, or the Commercial Motor Vehicle Safety Act of 1986, as amended, or a regulation issued under such section or Acts, or a combination of such violations, poses an imminent hazard to safety, FMCSA, shall order:

(i) A commercial motor vehicle or employee operating such vehicle out-of-service, or order an employer to cease all or part of the employer’s commercial motor vehicle operations, as provided by 49 U.S.C. 521(b)(5);

(ii) An intermodal equipment provider’s specific vehicle or equipment out-of-service, or order an intermodal equipment provider to cease all or part of its operations, as provided by 49 U.S.C. 521(b)(5) and 49 U.S.C. 31151(a)(3)(I).

(2) In making any such order, no restrictions shall be imposed on any vehicle, terminal or facility, employee, employer or intermodal equipment provider beyond that required to abate the hazard.

(3) In this paragraph (b), *imminent hazard* means any condition of vehicle, intermodal equipment, employee, or commercial motor vehicle operations that substantially increases the likelihood of serious injury or death if not discontinued immediately.

(4) Upon the issuance of an order under paragraph (b)(1) of this section,

the motor carrier employer, intermodal equipment provider or driver employee shall comply immediately with such order. Opportunity for review shall be provided in accordance with 5 U.S.C. 554, except that such review shall occur not later than 10 days after issuance of such order, as provided by section 213(b) of the Motor Carrier Safety Act of 1984 (49 U.S.C. 521(b)(5)). An order to an employer or intermodal equipment provider to cease all or part of its operations shall not prevent vehicles in transit at the time the order is served from proceeding to their immediate destinations, unless any such vehicle or its driver is specifically ordered out-of-service forthwith. However, vehicles and drivers proceeding to their immediate destination shall be subject to compliance upon arrival.

(5) For purposes of this section, the term *immediate destination* is the next scheduled stop of the vehicle already in motion where the cargo on board can be safely secured.

(6) Failure to comply immediately with an order issued under this section shall subject the motor carrier employer, intermodal equipment provider, or driver to penalties prescribed in subpart G of this part.

[50 FR 40306, Oct. 2, 1985, as amended at 53 FR 2036, Jan. 26, 1988; 53 FR 50970, Dec. 19, 1988; 56 FR 10184, Mar. 11, 1991; 65 FR 7756, Feb. 16, 2000; 65 FR 58664, Oct. 2, 2000; 73 FR 76819, Dec. 17, 2008; 78 FR 58481, Sept. 24, 2013; 86 FR 57071, Oct. 14, 2021]

§ 386.73 Operations out of service and record consolidation proceedings (reincarnated carriers).

(a) *Out-of-service order.* FMCSA may issue an out-of-service order to prohibit a motor carrier, intermodal equipment provider, broker, or freight forwarder from conducting operations subject to FMCSA jurisdiction upon a determination by FMCSA that the motor carrier, intermodal equipment provider, broker, or freight forwarder or an officer, employee, agent, or authorized representative of such an entity, operated or attempted to operate a motor carrier, intermodal equipment provider, broker, or freight forwarder under a new identity or as an affiliated entity to:

(1) Avoid complying with an FMCSA order;

(2) Avoid complying with a statutory or regulatory requirement;

(3) Avoid paying a civil penalty;

(4) Avoid responding to an enforcement action; or

(5) Avoid being linked with a negative compliance history.

(b) *Record consolidation order.* In addition to, or in lieu of, an out-of-service order issued under this section, FMCSA may issue an order consolidating the records maintained by FMCSA concerning the current motor carrier, intermodal equipment provider, broker, and freight forwarder and its affiliated motor carrier, intermodal equipment provider, broker, or freight forwarder or its previous incarnation, for all purposes, upon a determination that the motor carrier, intermodal equipment provider, broker, and freight forwarder or officer, employee, agent, or authorized representative of the same, operated or attempted to operate a motor carrier, intermodal equipment provider, broker, or freight forwarder under a new identity or as an affiliated entity to:

(1) Avoid complying with an FMCSA order;

(2) Avoid complying with a statutory or regulatory requirement;

(3) Avoid paying a civil penalty;

(4) Avoid responding to an enforcement action; or

(5) Avoid being linked with a negative compliance history.

(c) *Standard.* FMCSA may determine that a motor carrier, intermodal equipment provider, broker, or freight forwarder is reincarnated if there is substantial continuity between the entities such that one is merely a continuation of the other. FMCSA may determine that a motor carrier, intermodal equipment provider, broker, or freight forwarder is an affiliate if the business operations are under common ownership and/or common control. In making this determination, FMCSA may consider, among other things, the following factors:

(1) Whether the new or affiliated entity was created for the purpose of evading statutory or regulatory requirements, an FMCSA order, enforcement action, or negative compliance

history. In weighing this factor, FMCSA may consider the stated business purpose for the creation of the new or affiliated entity.

(2) The previous entity's safety performance history, including, among other things, safety violations and enforcement actions of the Secretary, if any;

(3) Consideration exchanged for assets purchased or transferred;

(4) Dates of company creation and dissolution or cessation of operations;

(5) Commonality of ownership between the current and former company or between current companies;

(6) Commonality of officers and management personnel;

(7) Identity of physical or mailing addresses, telephone, fax numbers, or email addresses;

(8) Identity of motor vehicle equipment;

(9) Continuity of liability insurance policies or commonality of coverage under such policies;

(10) Commonality of drivers and other employees;

(11) Continuation of carrier facilities and other physical assets;

(12) Continuity or commonality of nature and scope of operations, including customers for whom transportation is provided;

(13) Advertising, corporate name, or other acts through which the company holds itself out to the public;

(d) *Evaluating factors.* FMCSA may examine, among other things, the company management structures, financial records, corporate filing records, asset purchase or transfer and title history, employee records, insurance records, and any other information related to the general operations of the entities involved and factors in paragraph (c) of this section.

(e) *Effective dates.* An order issued under this section becomes the Final Agency Order and is effective on the 21st day after it is served unless a request for administrative review is served and filed as set forth in paragraph (g) of this section. Any motor carrier, intermodal equipment provider, broker, or freight forwarder that fails to comply with any prohibition or requirement set forth in an order issued under this section is subject to

the applicable penalty provisions for each instance of noncompliance.

(f) *Commencement of proceedings.* FMCSA may commence proceedings under this section by issuing an order that:

(1) Provides notice of the factual and legal basis of the order;

(2) In the case of an out-of-service order, identifies the operations prohibited by the order;

(3) In the case of an order that consolidates records maintained by FMCSA, identifies the previous entity and current or affiliated motor carriers, intermodal equipment providers, brokers, or freight forwarders whose records will be consolidated;

(4) Provides notice that the order is effective upon the 21st day after service;

(5) Provides notice of the right to petition for administrative review of the order and that a timely petition will stay the effective date of the order unless the Assistant Administrator orders otherwise for good cause; and

(6) Provides notice that failure to timely request administrative review of the order constitutes waiver of the right to contest the order and will result in the order becoming a Final Agency Order 21 days after it is served.

(g) *Administrative review.* A motor carrier, intermodal equipment provider, broker, or freight forwarder issued an order under this section may petition for administrative review of the order. A petition for administrative review is limited to contesting factual or procedural errors in the issuance of the order under review and may not be submitted to demonstrate corrective action. A petition for administrative review that does not identify factual or procedural errors in the issuance of the order under review will be dismissed. Petitioners seeking to demonstrate corrective action may do so by submitting a Petition for Rescission under paragraph (h) of this section.

(1) A petition for administrative review must be in writing and served on the Assistant Administrator, Federal Motor Carrier Safety Administration, 1200 New Jersey Ave. SE., Washington, DC 20590–0001, Attention: Adjudications Counsel, or by electronic mail to *FMCSA.Adjudication@dot.gov*. A copy of

the petition for administrative review must also be served on the FMCSA official who issued the order, at the physical address or electronic mail account identified in the order.

(2) A petition for administrative review must be served within 15 days of the date FMCSA served the order issued under this section. Failure to timely request administrative review waives the right to administrative review and constitutes an admission of the facts alleged in the order.

(3) A petition for administrative review must include:

(i) A copy of the order in dispute; and

(ii) A statement of all factual and procedural issues in dispute.

(4) If a petition for administrative review is timely served and filed, the petitioner may supplement the petition by serving documentary evidence and/or written argument that supports its position regarding the procedural or factual issues in dispute no later than 30 days from the date the disputed order was served. The supplementary documentary evidence or written argument may not expand the issues on review and need not address every issue identified in the petition. Failure to timely serve supplementary documentary evidence and/or written argument constitutes a waiver of the right to do so.

(5) FMCSA must serve written argument and supporting documentary evidence, if any, in defense of the disputed order no later than 15 days following the period in which petitioner may serve supplemental documentary evidence and/or written argument in support of the petition for administrative review.

(6) The Assistant Administrator may ask the parties to submit additional information or attend a conference to facilitate administrative review.

(7) The Assistant Administrator will issue a written decision on the request for administrative review within 30 days of the close of the time period for FMCSA to serve written argument and supporting documentary evidence in defense of the order, or the actual filing of such written argument and documentary evidence, whichever is earlier.

(8) If a petition for administrative review is timely served in accordance

with this subsection, the disputed order is stayed, pending the Assistant Administrator's review. The Assistant Administrator may enter an order vacating the automatic stay in accordance with the following procedures:

(i) The Agency Official may file a motion to vacate the automatic stay demonstrating good cause why the order should not be stayed. The Agency Official's motion must be in writing, state the factual and legal basis for the motion, be accompanied by affidavits or other evidence relied on, and be served on the petitioner and Assistant Administrator.

(ii) The petitioner may file an answer in opposition, accompanied by affidavits or other evidence relied on. The answer must be served within 10 days of service of the motion.

(iii) The Assistant Administrator will issue a decision on the motion to vacate the automatic stay within 10 days of the close of the time period for serving the answer to the motion. The 30-day period for review of the petition for administrative review in paragraph (g)(7) of this section is tolled from the time the Agency Official's motion to lift a stay is served until the Assistant Administrator issues a decision on the motion.

(9) The Assistant Administrator's decision on a petition for administrative review of an order issued under this section constitutes the Final Agency Order.

(h) *Petition for rescission.* A motor carrier, intermodal equipment provider, broker, or freight forwarder may petition to rescind an order issued under this section if action has been taken to correct the deficiencies that resulted in the order.

(1) A petition for rescission must be made in writing to the FMCSA official who issued the order.

(2) A petition for rescission must include a copy of the order requested to be rescinded, a factual statement identifying all corrective action taken, and copies of supporting documentation.

(3) Upon request and for good cause shown, FMCSA may grant the petitioner additional time, not to exceed 45 days, to complete corrective action initiated at the time the petition for rescission was filed.

(4) FMCSA will issue a written decision on the petition for rescission within 60 days of service of the petition. The written decision will include the factual and legal basis for the determination.

(5) If FMCSA grants the request for rescission, the written decision is the Final Agency Order.

(6) If FMCSA denies the request for rescission, the petitioner may file a petition for administrative review of the denial with the Assistant Administrator, Federal Motor Carrier Safety Administration, 1200 New Jersey Ave. SE., Washington, DC 20590-0001, Attention: Adjudication Counsel or by electronic mail to FMCSA.Adjudication@dot.gov. The petition for administrative review of the denial must be served and filed within 15 days of the service of the decision denying the request for rescission. The petition for administrative review must identify the disputed factual or procedural issues with respect to the denial of the petition for rescission. The petition may not, however, challenge the underlying basis of the order for which rescission was sought.

(7) The Assistant Administrator will issue a written decision on the petition for administrative review of the denial of the petition for rescission within 60 days. The Assistant Administrator's decision constitutes the Final Agency Order.

(i) *Other orders unaffected.* If a motor carrier, intermodal equipment provider, broker, or freight forwarder subject to an order issued under this section is or becomes subject to any other order, prohibition, or requirement of the FMCSA, an order issued under this section is in addition to, and does not amend or supersede such other order, prohibition, or requirement. A motor carrier, intermodal equipment provider, broker, or freight forwarder subject to an order issued under this section remains subject to the suspension and revocation provisions of 49 U.S.C. 13905 for violations of regulations governing their operations.

§ 386.81

(j) *Inapplicability of subparts.* Subparts B, C, D, and E of this part, except § 386.67, do not apply to this section.

[77 FR 24870, Apr. 26, 2012, as amended at 78 FR 58481, Sept. 24, 2013; 86 FR 57071, Oct. 14, 2021]

Subpart G—Penalties

SOURCE: 56 FR 10184, Mar. 11, 1991, unless otherwise noted.

§ 386.81 General.

(a) The amounts of civil penalties that can be assessed for regulatory violations subject to the proceedings in this subchapter are established in the statutes granting enforcement powers. The determination of the actual civil penalties assessed in each proceeding is based on those defined limits or minimums and consideration of information available at the time the claim is made concerning the nature, gravity of the violation and, with respect to the violator, the degree of culpability, history of prior offenses, effect on ability to continue to do business, and such other matters as justice and public safety may require. In addition to these factors, a civil penalty assessed under 49 U.S.C. 14901(a) and (d) concerning household goods is also based on the degree of harm caused to a shipper and whether the shipper has been adequately compensated before institution of the civil penalty proceeding. In adjudicating the claims and orders under the administrative procedures herein, additional information may be developed regarding these factors that may affect the final amount of the claim.

(b) When assessing penalties for violations of notices and orders or settling claims based on these assessments, consideration will be given to good faith efforts to achieve compliance with the terms of the notices and orders.

[56 FR 10184, Mar. 11, 1991, as amended at 65 FR 7756, Feb. 16, 2000; 78 FR 60232, Oct. 1, 2013]

§ 386.82 Civil penalties for violations of notices and orders.

(a) Additional civil penalties are chargeable for violations of notices and orders which are issued under civil for-

49 CFR Ch. III (10–1–23 Edition)

feiture proceedings pursuant to 49 U.S.C. 521(b). These notices and orders are as follows:

(1) Notice to abate—§ 386.11 (b)(2) and (c)(1)(iv);

(2) Notice to post—§ 386.11(c)(3);

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

(4) Out-of-service order—§ 386.72(b)(1).

(b) A schedule of these additional penalties is provided in the appendix A to this part. All the penalties are maximums, and discretion will be retained to meet special circumstances by setting penalties for violations of notices and orders, in some cases, at less than the maximum.

(c) Claims for penalties provided in this section and in the appendix A to this part shall be made through the civil forfeiture proceedings contained in this part. The issues to be decided in such proceedings will be limited to whether violations of notices and orders occurred as claimed and the appropriate penalty for such violations. Nothing contained herein shall be construed to authorize the reopening of a matter already finally adjudicated under this part.

[56 FR 10184, Mar. 11, 1991, as amended at 67 FR 61821, Oct. 2, 2002; 70 FR 28486, May 18, 2005; 77 FR 59826, Oct. 1, 2012]

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

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

(ii) An intermodal equipment provider that fails to pay a civil penalty in full within 90 days after the date specified for payment by FMCSA's final agency order, is prohibited from tendering intermodal equipment to motor carriers for operation in interstate commerce starting on the next (i.e., the 91st) day. The prohibition continues until the FMCSA has received full payment of the penalty.