



This document is scheduled to be published in the Federal Register on 05/14/2012 and available online at <http://federalregister.gov/a/2012-11437>, and on FDsys.gov

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Parts 350, 385, 395, and 396

[Docket no. FMCSA-2012-0006]

RIN 2126-AB45

Electronic On-Board Recorders for Hours-of-Service Compliance; Removal of Final Rule Vacated By Court

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

ACTION: Final Rule

SUMMARY: This final rule rescinds the final rule published on April 5, 2010, entitled “Electronic On-Board Recorders for Hours-of-Service Compliance” and amended by a September 13, 2010, technical amendment. This action responds to a decision of the Court of Appeals for the Seventh Circuit that vacated the April 2010 final rule.

DATES: Effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]

ADDRESSES: For access to the docket to read background documents, including those referenced in this document, go to:

- Regulations.gov, <http://www.regulations.gov>, at any time and insert FMCSA-2012-0006 in the “Keyword” box, and then click “Search.”
- Docket Management Facility, Room W12-140, DOT Building, 1200 New Jersey Avenue, SE, Washington, DC 20590. You may view the docket online by visiting the facility between 9 a.m. and 5 p.m. e.t., Monday through Friday except Federal holidays. For documents related to the April 2010 final rule, see docket number FMCSA-2004-

18940.

FOR FURTHER INFORMATION CONTACT: Mr. William Varga, Office of Chief Counsel, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE., Washington, DC 20590; telephone (202) 493-0349. If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202-366-9826.

SUPPLEMENTARY INFORMATION

I. Legal Basis for Rulemaking

The legal basis for the April 2010 final rule is fully addressed in the rule and available at 75 FR 17209 – 17210. However, this final rulemaking is made necessary by the Court of Appeals for the Seventh Circuit’s vacatur of the April 2010 rulemaking.

While the Administrative Procedure Act (APA) normally requires issuance of a notice of proposed rulemaking (NPRM) and an opportunity for public comment, the APA provides an exception when an agency “for good cause finds ... that notice and public procedure ... are impracticable, unnecessary, or contrary to the public interest.” 5 U.S.C. 553(b)(B). Because this rule only makes changes that are necessary in light of the court’s decision vacating the April 2010 rulemaking and has no substantive effect on the public, FMCSA finds that notice and opportunity for public comment is unnecessary and contrary to the public interest under the APA.

Similarly, given that the changes included in this rulemaking reflect the regulatory requirements currently in place as a result of the court’s decision, FMCSA finds that the normal 30-day minimum delayed effective date following publication of a final rule under the APA does not apply. 5 U.S.C. 553(d)(3). The 30-day delay would serve no

purpose other than continue the inconsistency between the regulations reflected in the CFR system and regulations actually in effect.

II. Background Information

On April 5, 2010, FMCSA published a final rule entitled “Electronic On-Board Recorders for Hours-of-Service Compliance” (EOBRs). See 75 FR 17208, as amended by 75 FR 55488 (September 13, 2010). Among other changes, the April 2010 final rule: (1) prescribed new performance standards for EOBRs installed in commercial motor vehicles (CMVs) manufactured on or after June 4, 2012; (2) provided for the issuance of remedial directives to carriers that demonstrated noncompliance with Hours of Service rules at a prescribed level during the course of compliance reviews, requiring such carriers to use EOBRs for a 2-year period; (3) altered the Agency’s safety fitness standard to take into account issuance of a remedial directive when determining a carrier’s fitness; and (4) modified supporting document requirements and compliance review procedures for those carriers that voluntarily chose to use EOBRs. The final rule took effect on June 4, 2010.¹

On June 3, 2010, the Owner-Operator Independent Drivers Association, Inc., filed a petition in the United States Court of Appeals for the Seventh Circuit challenging the April 2010 final rule. Owner-Operator Indep. Drivers Ass’n v. Federal Motor Carrier Safety Admin., 656 F.3d 580 (7th Cir. 2011). The court found that FMCSA’s failure to address the issue of harassment as part of the rulemaking — a factor the Agency was required to address under 49 U.S.C. 31137(a) — rendered the rulemaking arbitrary and capricious. 656 F.3d at 582, 589. Although the court’s opinion focused on the remedial

¹ The September 13, 2010 rulemaking, referenced above, made technical changes to the April 2010 rule, including changes to the temperature range in which EOBRs must be able to operate and the connector type specified for the Universal Serial Bus interface.

directive for carriers that demonstrated noncompliance with hours of service rules, the court vacated the entire rule. 656 F.3d at 584, 589.

On October 7, 2011, FMCSA announced in a Federal Register notice that it would not appeal the court's decision. 76 FR 62496.

III. Impact of Seventh Circuit Decision

The effect of the court's decision was to void the changes to Title 49 of the CFR that were part of the April 2010 final rule.² Stated otherwise, the provisions of Title 49 affected by the rulemaking were modified as a result of the court's action so as to return the regulatory text to its posture on June 3, 2010, immediately before the effective date of the rule vacated by the court.

This final rule takes the administrative steps necessary to remove language from the Code of Federal Regulations (CFR) that was added by the April 2010 final rule and to reinstate prior regulatory language, consistent with the court's decision.

IV. Statutory and Regulatory Reviews.

Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), and DOT Regulatory Policies and Procedures

FMCSA has determined that this action does not meet the criteria for a "significant regulatory action" as specified in Executive Order 12866, as supplemented

² The court's decision did not affect carriers that voluntarily elect to use EOBRs that satisfy preexisting regulatory requirements to track compliance with Hours of Service regulations. See 49 CFR 395.15, as modified by this rulemaking. Nor did the court's decision affect carriers that agree to use electronic monitors that go beyond the minimal requirements of 49 CFR 395.15 under settlement agreements entered as part of the Agency's enforcement proceedings. The court's decision eliminated the supporting document relief adopted as part of the April 2010 final rule and reflected in 49 CFR 395.11, but it did not affect an Agency policy encouraging carriers to employ qualifying electronic mobile communication/tracking technology by reducing the type of supporting documents the carrier must maintain. See 75 FR 32984 (June 10, 2010).

by Executive Order 13563, or within the meaning of the Department of Transportation regulatory policies and procedures (44 FR 11034, Feb. 26, 1979). While the April 2010 final rule was an economically significant regulatory action, as explained above, this final rule is made necessary by the court's decision vacating the April 2010 rulemaking. The rule simply codifies in Title 49 of the CFR the effect of the court's decision.

Regulatory Flexibility Act

FMCSA is not required to prepare a final regulatory flexibility analysis for this final rule under the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 601, et seq., because the Agency has not issued an NPRM prior to this action. This final rule also complies with the President's memorandum of January 18, 2011, entitled Regulatory Flexibility, Small Business, and Job Creation (76 FR 3827). As addressed above, promulgation of this final rule is required as a result of the court's decision. Additionally, the rule was vacated before it took effect, so neither costs nor benefits were ever realized.

Unfunded Mandates Reform Act of 1995

FMCSA is not required to prepare an assessment under the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1531, et seq., evaluating a discretionary regulatory action because the Agency has not issued an NPRM prior to this action. Further, as addressed above, promulgation of this final rule is required as a result of the court's decision.

Paperwork Reduction Act

In the April 2010 final rule, FMCSA estimated a reduced annual burden for purposes of the Paperwork Reduction Act, 44 U.S.C. 3501, et seq., of 3,110,000 hours for FMCSA's information collection OMB Control Number 2126-0001, based on the

remedial provisions of the final rule. On August 20, 2010, OMB approved FMCSA's most recent calculation of the paperwork burden of the Hours of Service rule. As a result of the court's action, FMCSA removed the reduction contemplated in the April 2010 final rule in its most recent application for an extension of this information collection. OMB approved the application on December 11, 2011.

National Environmental Policy Act and Clean Air Act

FMCSA analyzed this final rule for the purpose of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and determined under our environmental procedures Order 5610.1, issued March 1, 2004 (69 FR 9680), that this action does not have any effect on the quality of the environment. Therefore, this final rule is categorically excluded from further analysis and documentation in an environmental assessment or environmental impact statement under FMCSA Order 5610.1, paragraph 6(b) of Appendix 2. This categorical exclusion covers editorial and procedural regulations. A Categorical Exclusion determination is available for inspection or copying in the Regulations.gov Web site listed under **ADDRESSES**.

FMCSA 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. Approval of this action is exempt from the CAA's general conformity requirement since it would result in no emissions increase or an increase in emissions that is clearly de minimis.

Executive Order 12372 (Intergovernmental Review of Federal Programs)

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

Executive Order 12630 (Constitutionally Protected Property Rights)

This final rule does not effect a taking of private property or otherwise have implications under Executive Order 12630.

Executive Order 12898 (Environmental Justice)

This final rule raises no environmental justice issues, nor is there any collective environmental impact resulting from its promulgation.

Executive Order 12988 (Civil Justice Reform)

This final rule meets applicable standards in section 3(a) and 3(b)(2) of Executive Order 12988 to minimize litigation, eliminate ambiguity, and reduce burden.

Executive Order 13045 (Protection of Children)

This final rule does not pose an environmental risk to health or safety that may disproportionately affect children.

Executive Order 13132 (Federalism)

A rulemaking has implications for Federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on State or local governments. FMCSA analyzed this action in accordance with Executive Order 13132. This final rule does not preempt or modify any provision of State law, impose substantial direct unreimbursed compliance costs on any State, or diminish the power of any State to enforce its own laws. Accordingly, this rulemaking does not have Federalism

implications warranting the application of Executive Order 13132.

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

FMCSA analyzed this action under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. FMCSA determined that it is not a “significant energy action” under that Executive Order because it is not economically significant and is not likely to have an adverse effect on the supply, distribution, or use of energy.

List of Subjects

49 CFR Part 350

Grant programs-transportation, Highway safety, Motor carriers, Motor vehicle safety, Reporting and recordkeeping requirements.

49 CFR Part 385

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

49 CFR Part 395

Highway safety, Motor carriers, Reporting and recordkeeping.

49 CFR Part 396

Highways and roads, Motor carriers, Motor vehicle equipment, Motor vehicle safety.

For the reasons discussed in the preamble, FMCSA amends 49 CFR chapter III as set forth below:

PART 350 – COMMERCIAL MOTOR CARRIER SAFETY ASSISTANCE PROGRAM

1. The authority citation for part 350 continues to read as follows:

Authority: 49 U.S.C. 13902, 31101-31104, 31108, 31136, 31140-31141, 31161, 31310-31311, 31502; and 49 CFR 1.73.

2. Amend § 350.201 by revising the introductory text and removing paragraph (z)

to read as follows:

§ 350.201 What conditions must a State meet to qualify for Basic Program Funds?

Each State must meet the following twenty-two conditions:

* * * * *

PART 385 – SAFETY FITNESS PROCEDURES

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

Authority: 49 U.S.C. 113, 504, 521(b), 5105(e), 5109, 13901-13905, 31133, 31135, 31136, 31137(a), 31144, 31148, and 31502; Sec. 113(a), Pub. L. 103-311; Sec. 408, Pub. L. 104-88; Sec. 350 of Pub. L. 107-87; and 49 CFR 1.73.

4. Amend § 385.1 by revising paragraph (a) to read as follows:

§ 385.1 Purpose and scope.

(a) This part establishes the FMCSA’s procedures to determine the safety fitness of motor carriers, to assign safety ratings, to direct motor carriers to take remedial action when required, and to prohibit motor carriers receiving a safety rating of “unsatisfactory” from operating a CMV.

* * * * *

5. Amend § 385.3 by removing the definitions of the terms “safety fitness determination” and “safety rating or ratings” and by adding a definition for the term “safety ratings,” in alphabetical order, to read as follows:

§ 385.3 Definitions and acronyms.

* * * * *

Safety ratings. (1) Satisfactory safety rating means that a motor carrier has in place and functioning adequate safety management controls to meet the safety fitness standard prescribed in § 385.5. Safety management controls are adequate if they are appropriate for the size and type of operation of the particular motor carrier.

(2) Conditional safety rating means a motor carrier does not have adequate safety management controls in place to ensure compliance with the safety fitness standard that could result in occurrences listed in § 385.5 (a) through (k).

(3) Unsatisfactory safety rating means a motor carrier does not have adequate safety management controls in place to ensure compliance with the safety fitness standard which has resulted in occurrences listed in § 385.5 (a) through (k).

(4) Unrated carrier means that a safety rating has not been assigned to the motor carrier by the FMCSA.

* * * * *

6. Revise § 385.5 to read as follows:

§ 385.5 Safety fitness standard.

The Satisfactory safety rating is based on the degree of compliance with the safety fitness standard for motor carriers. For intrastate motor carriers subject to the hazardous materials safety permit requirements of subpart E of this part, the motor carrier must meet the equivalent State requirements. To meet the safety fitness standard, the motor carrier must demonstrate it has adequate safety management controls in place, which function effectively to ensure acceptable compliance with applicable safety requirements to reduce the risk associated with:

- (a) Commercial driver's license standard violations (part 383),

- (b) Inadequate levels of financial responsibility (part 387),
- (c) The use of unqualified drivers (part 391),
- (d) Improper use and driving of motor vehicles (part 392),
- (e) Unsafe vehicles operating on the highways (part 393),
- (f) Failure to maintain accident registers and copies of accident reports (part 390),
- (g) The use of fatigued drivers (part 395),
- (h) Inadequate inspection, repair, and maintenance of vehicles (part 396),
- (i) Transportation of hazardous materials, driving and parking rule violations (part 397),
- (j) Violation of hazardous materials regulations (parts 170 through 177), and
- (k) Motor vehicle accidents and hazardous materials incidents.

7. Amend § 385.9 by revising paragraph (a) to read as follows:

§ 385.9 Determination of a safety rating.

(a) Following a compliance review of a motor carrier operation, the FMCSA, using the factors prescribed in § 385.7 as computed under the Safety Fitness Rating Methodology set forth in appendix B of this part, shall determine whether the present operations of the motor carrier are consistent with the safety fitness standard set forth in § 385.5, and assign a safety rating accordingly.

* * * * *

8. Amend § 385.11 by revising the section heading to read as set forth below, and by removing paragraph (g).

§ 385.11 Notification of safety fitness determination.

* * * * *

§ 385.13 [Amended]

9. Amend § 385.13 by removing paragraph (e).

10. Amend § 385.15 by revising paragraph (a) to read as follows:

§ 385.15 Administrative review.

(a) A motor carrier may request the FMCSA to conduct an administrative review if it believes the FMCSA has committed an error in assigning its proposed safety rating in accordance with § 385.15(c) or its final safety rating in accordance with § 385.11(b).

* * * * *

§ 385.17 [Amended]

11. Amend § 385.17 by removing paragraphs (k) and (l).

12. Amend § 385.19 by revising paragraphs (a) and (b) to read as follows:

§ 385.19 Safety fitness information.

(a) Final ratings will be made available to other Federal and State agencies in writing, telephonically or by remote computer access.

(b) The final safety rating assigned to a motor carrier will be made available to the public upon request. Any person requesting the assigned rating of a motor carrier shall provide the FMCSA with the motor carrier's name, principal office address, and, if known, the USDOT number or the ICCMC docket number, if any.

* * * * *

13. Amend § 385.407 by revising paragraph (a) to read as follows:

§ 385.407 What conditions must a motor carrier satisfy for FMCSA to issue a safety permit?

(a) Motor carrier safety performance. (1) The motor carrier must have a “Satisfactory” safety rating assigned by either FMCSA, pursuant to the Safety Fitness Procedures of this part, or the State in which the motor carrier has its principal place of business, if the State has adopted and implemented safety fitness procedures that are equivalent to the procedures in subpart A of this part; and

(2) FMCSA will not issue a safety permit to a motor carrier that:

(i) Does not certify that it has a satisfactory security program as required in § 385.407(b);

(ii) Has a crash rate in the top 30 percent of the national average as indicated in the FMCSA Motor Carrier Management Information System (MCMIS); or

(iii) Has a driver, vehicle, hazardous materials, or total out-of-service rate in the top 30 percent of the national average as indicated in the MCMIS.

* * * * *

Subpart J [Removed]

14. Remove and reserve Subpart J to part 385, consisting of § 385.801 through § 385.819.

15. Amend Appendix B to part 385 by revising paragraphs (b), (c), and (d) and section VI, paragraph (a), to read follows:

Appendix B to Part 385 – Explanation of Safety Rating Process

* * * * *

(b) As directed, FMCSA promulgated a safety fitness regulation, entitled “Safety Fitness Procedures,” which established a procedure to determine the safety fitness of

motor carriers through the assignment of safety ratings and established a “safety fitness standard” which a motor carrier must meet to obtain a satisfactory safety rating.

(c) Critical regulations are those identified as such where noncompliance relates to management and/or operational controls. These are indicative of breakdowns in a carrier’s management controls. An example of a critical regulation is § 395.3(a)(1), requiring or permitting a property-carrying commercial motor vehicle driver to drive more than 11 hours.

(d) The safety rating process developed by FMCSA is used to:

1. Evaluate safety fitness and assign one of three safety ratings (satisfactory, conditional or unsatisfactory) to motor carriers operating in interstate commerce. This process conforms to 49 CFR 385.5, Safety fitness standard, and § 385.7, Factors to be considered in determining a safety rating.

2. Identify motor carriers needing improvement in their compliance with the Federal Motor Carrier Safety Regulations (FMCSRs) and applicable Hazardous Material Regulations (HMRs). These are carriers rated unsatisfactory or conditional.

* * * * *

VI. Conclusion

(a) The FMCSA believes this “safety fitness rating methodology” is a reasonable approach for assigning a safety rating which best describes the current safety fitness posture of a motor carrier as required by the safety fitness regulations (§ 385.9). This methodology has the capability to incorporate regulatory changes as they occur.

* * * * *

Appendix C to Part 385 [Removed]

16. Remove Appendix C to part 385.

PART 395 – HOURS OF SERVICE OF DRIVERS

17. The authority citation for part 395 continues to read as follows:

Authority: 49 U.S.C. 504, 31133, 31136, 31137, and 31502; sec. 113, Pub. L. 103-311, 108 Stat. 1673, 1676; sec. 229, Pub. L. 106-159 (as transferred by sec. 4115 and amended by secs. 4130-4132, Pub. L. 109-59, 119 Stat. 1144, 1726, 1743, 1744); sec. 4133, Pub. L. 109-59, 119 Stat. 1144, 1744; sec. 108, Pub. L. 110-432, 122 Stat. 4860-4866; and 49 CFR 1.73.

§ 395.2 [Amended]

18. Amend 395.2 by removing the definitions of “CD-RW,” “CMRS,” “802.11,” “Electronic on-board recording device (EOBR),” “Integrally synchronized,” “USB,” and “UTC.”

19. Amend § 395.8 by revising paragraphs (a)(2) and (e) to read as follows:

§ 395.8 Driver’s record of duty status.

(a)* * *

(2) Every driver who operates a commercial motor vehicle shall record his/her duty status by using an automatic on-board recording device that meets the requirements of § 395.15 of this part. The requirements of § 395.8 shall not apply, except paragraphs (e) and (k)(1) and (2) of this section.

* * * * *

(e) Failure to complete the record of duty activities of this section or § 395.15, failure to preserve a record of such duty activities, or making of false reports in connection with such duty activities shall make the driver and/or the carrier liable to prosecution.

* * * * *

§ 395.11 [Removed and Reserved]

20. Remove and reserve § 395.11.

21. Amend § 395.13 by revising paragraph (b)(2) to read as set forth below and removing paragraph (b)(4).

§ 395.13 Drivers declared out of service.

* * * * *

(b) * * *

(2) No driver required to maintain a record of duty status under § 395.8 or § 395.15 of this part shall fail to have a record of duty status current on the day of examination and for the prior seven consecutive days.

* * * * *

22. Amend § 395.15 by revising the heading of paragraph (a) and paragraph (a)(1) to read as follows:

§ 395.15 Automatic on-board recording devices.

(a) Authority to use automatic on-board recording device. (1) A motor carrier may require a driver to use an automatic on-board recording device to record the driver's hours of service in lieu of complying with the requirements of § 395.8 of this part.

* * * * *

§ 395.16 [Removed]

23. Remove § 395.16.

§ 395.18 [Removed]

24. Remove § 395.18.

Appendix A to Part 395 [Removed]

25. Remove Appendix A to part 395.

PART 396 – INSPECTION, REPAIR AND MAINTENANCE

26. The authority citation for part 396 continues to read as follows:

Authority: 49 U.S.C. 31133, 31136, 31151, and 31502; and 49 CFR 1.73.

27. Amend § 396.9 by revising the section heading, the heading of paragraph (c), and paragraph (c)(1) to read as follows:

§ 396.9 Inspection of motor vehicles and intermodal equipment in operation.

* * * * *

(c) Motor vehicles and intermodal equipment declared “out-of-service.” (1)

Authorized personnel shall declare and mark “out-of-service” any motor vehicle or intermodal equipment which by reason of its mechanical condition or loading would likely cause an accident or a breakdown. An “out-of-Service Vehicle” sticker shall be used to mark vehicles and intermodal equipment “out-of-service.”

* * * * *

Issued on: May 1, 2012

Anne S. Ferro
Administrator

[FR Doc. 2012-11437 Filed 05/11/2012 at 8:45 am; Publication Date: 05/14/2012]