



DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Parts 350, 385, and 395

[Docket no. FMCSA-2012-0049]

RIN 2126-AB50

**Unsatisfactory Safety Rating; Revocation of Operating Authority Registration;
Technical Amendments**

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

ACTION: Final Rule.

SUMMARY: This final rule repromulgates in the Code of Federal Regulations a statutory requirement that FMCSA revoke the operating authority registration of a for-hire motor carrier for failure to comply with safety fitness requirements; if the Agency determines that a motor carrier is “Unfit” based on its Safety Fitness Determination procedures, the Agency must revoke the carrier’s operating authority registration. Unfit motor carriers are prohibited from operating in interstate commerce, and the Secretary of Transportation is required by statute to revoke their operating authority registration. This final rule also repromulgates several technical provisions and makes non-substantive administrative changes. These changes, initially adopted as part of the April 5, 2010, final rule entitled “Electronic On-Board Recorders for Hours-of-Service Compliance,” are necessary because, for reasons unrelated to this final rule, the United States Court of Appeals for the Seventh Circuit invalidated the previous 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-2012-0049 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 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.

SUPPLEMENTARY INFORMATION

I. Legal Basis for Rulemaking

The legal basis for the repromulgation of 49 CFR 385.13(e) is section 4104 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. 109-59, 119 Stat. 1144, 1716-1717 (Aug. 10, 2005), which requires the Secretary of Transportation to revoke the operating authority registration of a motor carrier that has been prohibited from operating in interstate commerce for failure to comply with safety fitness requirements. See 49 U.S.C. 13905(f)(1)(B) and (3). The implementing regulations for the safety fitness requirements are codified under 49 CFR Part 385. Under these requirements, motor carriers determined to be “Unfit” are prohibited from operating commercial motor vehicles in interstate commerce. Implementation of 49 U.S.C. 13905(f)(1)(B) and (3) has been delegated to the Administrator of FMCSA. 49 CFR 1.73(a)(5). FMCSA has no policy discretion in the

implementation of this statutory mandate. See 49 U.S.C. 13905(f)(1)(B). This provision was not the focus of the Seventh Circuit Court of Appeals' August 26, 2011 vacature, nor is it related to electronic on-board records (EOBRs), which were the subject of that litigation.

The additional administrative and technical corrections described below, although not related to the use of EOBRs, are nevertheless supported by several broad grants of statutory authority that were fully addressed in the April 2010 rulemaking's Legal Basis discussion, available at 75 FR 17209 – 17210.

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). The repromulgation of 49 CFR 385.13(e) conforms FMCSA's regulations with a statutory requirement for revocation of operating authority under prescribed circumstances. The APA exception is appropriate because FMCSA lacks any policy discretion in implementing this mandate. Furthermore, the additional amendments are administrative and technical changes that do not result in any substantive modifications in the CFR. For these reasons, FMCSA finds that the opportunity for notice and public comment is unnecessary and contrary to the public interest under the APA.

Similarly, 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). Because the repromulgation of 49 CFR 385.13(e) simply codifies a statutory requirement that the Agency is currently required to follow, a 30-day delay would serve no purpose

other than to postpone conforming the regulation with current Agency practice consistent with the statutory requirements. The additional administrative and technical changes do not result in any substantive modifications. None of the changes requires the regulated industry to prepare for implementation. For these reasons, FMCSA finds good cause as to why the normal delayed effective date under the APA is not required and the rules adopted here should become effective on the date of publication.

II. Background Information and Discussion of this Final Rule

Background Information

On April 5, 2010, FMCSA published a final rule titled “Electronic On-Board Recorders for Hours-of-Service Compliance.” See 75 FR 17208, as amended by 75 FR 55488 (Sept. 13, 2010).¹ As part of that rulemaking, FMCSA set forth in regulation a statutory requirement enacted in SAFETEA-LU § 4104. Subject to certain procedural provisions, FMCSA is required under this statute to revoke the operating authority registration of a motor carrier that has failed to comply with safety fitness requirements under 49 U.S.C. 31144. See 49 U.S.C. 13905(f)(1)(B) and (3). The EOBR final rule took effect on June 4, 2010.

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. The court found that FMCSA’s failure to address the issue of harassment through the use of electronic monitoring devices as part of the rulemaking, as required under 49 U.S.C. 31137(a), rendered the rulemaking arbitrary and capricious.

Owner-Operator Indep. Drivers Ass’n, Inc. v. Federal Motor Carrier Safety Admin., 656

¹ The September 13, 2010, rulemaking 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.

F.3d 580, 582, 589 (7th Cir. 2011). Although the court had focused on a remedial program under the rule that would have required carriers that demonstrated noncompliance with hours of service rules to install and use EOBRs, the court vacated the entire rule, including, sub silentio, the provision on revocation of operating authority registration. 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.

In a separate final rule published in today's **Federal Register**, titled Electronic On-Board Recorders for Hours-of-Service Compliance; Removal of Final Rule Vacated By Court, (see the Final Rules section of this **Federal Register**), FMCSA restores the regulatory text to its posture on June 3, 2010, immediately before the effective date of the rule the court vacated.

Discussion of this Final Rule

This final rule does two things. First, it repromulgates 49 CFR 385.13(e), codifying in the CFR the statutory requirement that FMCSA revoke the operating authority registration of a motor carrier that is prohibited from operating in interstate commerce for failure to comply with the safety fitness requirements, subject to certain statutory procedural requirements.

Second, this final rule also repromulgates certain technical corrections in regulatory text that were included for administrative convenience as part of the April 2010 rulemaking, but that are not related to EOBR devices. The administrative and technical corrections include: (1) in 49 CFR 350.201, correcting a reference to the number of factors listed for Basic Program Funds under the Motor Carrier Safety Assistance Program; (2) in 49 CFR 385.5, clarifying cross-references to other provisions

of Title 49 of the CFR; (3) in 49 CFR 385.15(a), correcting and clarifying a cross-reference relating to administrative review; (4) in 49 CFR part 385, Appendix B, (d)2, making a grammatical correction so that the singular word “Material” is plural; and (5) in 49 CFR 395.8(a)(2), clarifying an internal reference to that section.

III. 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 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, that assessment was based on the costs and benefits of requiring certain motor carriers to use EOBRs. As explained above, this final rule is strictly technical in that it repromulgates a nondiscretionary statutory requirement and includes administrative and technical corrections not related to EOBRs. However, these changes were made necessary by the court’s decision vacating the entire April 2010 rule.

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 strictly technical in that it repromulgates in FMCSA regulations a nondiscretionary statutory requirement currently in place and includes administrative and technical corrections.

Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular this Act addresses actions that may result in the expenditure by a State, local, or tribal governments, in the aggregate, or by the private sector of \$100,000,000 or more in any one year. This final rule will not result in such an expenditure.

Paperwork Reduction Act

This final rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520).

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](https://www.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.

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 to read as follows:

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

Each State must meet the following 25 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. 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 of this chapter),
- (b) Inadequate levels of financial responsibility (part 387 of this chapter),
- (c) The use of unqualified drivers (part 391 of this chapter),
- (d) Improper use and driving of motor vehicles (part 392 of this chapter),
- (e) Unsafe vehicles operating on the highways (part 393 of this chapter),
- (f) Failure to maintain accident registers and copies of accident reports (part 390 of this chapter),
- (g) The use of fatigued drivers (part 395 of this chapter),
- (h) Inadequate inspection, repair, and maintenance of vehicles (part 396 of this chapter),
- (i) Transportation of hazardous materials, driving and parking rule violations (part 397 of this chapter),
- (j) Violation of hazardous materials regulations (parts 170 -177 of this title), and
- (k) Motor vehicle accidents and hazardous materials incidents.

5. Amend § 385.13 by adding paragraph (e) to read as follows:

385.13 Unsatisfactory rated motor carriers; prohibition on transportation; ineligibility for Federal contracts.

* * * * *

(e) Revocation of operating authority. If a proposed “unsatisfactory” safety rating or a proposed determination of unfitness becomes final, FMCSA will, following notice, issue an order revoking the operating authority of the owner or operator. For purposes of

this section, the term “operating authority” means the registration required under 49 U.S.C. 13902 and §392.9a of this subchapter. Any motor carrier that operates CMVs after revocation of its operating authority will be subject to the penalty provisions listed in 49 U.S.C. 14901.

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

385.15 Administrative review.

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

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Appendix B to Part 385 – Explanation of Safety Rating Process

7. Amend Appendix B to part 385 by revising paragraph (d)2 to read as follows:

* * * * *

(d) * * *

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

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PART 395 – HOURS OF SERVICE OF DRIVERS

8. 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.

9. Amend § 395.8 by revising paragraph (a)(2) 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 this section shall not apply, except paragraphs (e) and (k)(1) and (2) of this section.

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Issued on: May 1, 2012

Anne S. Ferro
Administrator

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