



**DEPARTMENT OF TRANSPORTATION**

**[4910-EX-P]**

**Federal Motor Carrier Safety Administration**

**49 CFR Parts 386 and 390**

**[Docket No. FMCSA-2012-0377]**

**RIN 2126-AB57**

**Prohibiting Coercion of Commercial Motor Vehicle Drivers**

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

**ACTION:** Final rule.

**SUMMARY:** FMCSA adopts regulations that prohibit motor carriers, shippers, receivers, or transportation intermediaries from coercing drivers to operate commercial motor vehicles (CMVs) in violation of certain provisions of the Federal Motor Carrier Safety Regulations (FMCSRs) – including drivers’ hours-of-service limits; the commercial driver’s license (CDL) regulations; drug and alcohol testing rules; and the Hazardous Materials Regulations (HMRs). In addition, the rule prohibits anyone who operates a CMV in interstate commerce from coercing a driver to violate the commercial regulations. This rule includes procedures for drivers to report incidents of coercion to FMCSA, establishes rules of practice that the Agency will follow in response to reports of coercion, and describes penalties that may be imposed on entities found to have coerced drivers. This rulemaking is authorized by section 32911 of the Moving Ahead for Progress in the 21<sup>st</sup> Century Act (MAP-21) and the Motor Carrier Safety Act of 1984 (MCSA), as amended.

**DATES:** This final rule is effective **[INSERT DATE 60 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

Petitions for Reconsideration of this final rule must be submitted to FMCSA Administrator no later than **[INSERT DATE 30 DAYS FROM THE DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:**

Availability of Rulemaking Documents

For access to docket FMCSA-2012-0377 to read background documents and comments received, go to <http://www.regulations.gov> at any time, or to Docket Services at U.S. Department of Transportation, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy Act

In accordance with 5 USC 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to [www.regulations.gov](http://www.regulations.gov), as described in the system of records notice (DOT/ALL-14 FDMS), which can be reviewed at [www.dot.gov/privacy](http://www.dot.gov/privacy).

**FOR FURTHER INFORMATION CONTACT:** Mr. Charles Medalen, Regulatory Affairs Division, Office of Chief Counsel, (202) 493-0349. FMCSA office hours are from 9 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

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**I. Abbreviations and Acronyms**

CDL	Commercial Driver’s License
CMV	Commercial Motor Vehicle
DOT	Department of Transportation
FMCSA	Federal Motor Carrier Safety Administration
FMCSRs	Federal Motor Carrier Safety Regulations
HOS	Hours of Service
HMRs	Hazardous Materials Regulations
ICC	Interstate Commerce Commission
MAP-21	Moving Ahead for Progress in the 21 <sup>st</sup> Century Act
MCSA or 1984 Act	Motor Carrier Safety Act of 1984
NAICS	North American Industry Classification System
OIG	Office of Inspector General
OSHA	Occupational Safety and Health Administration
SBA	Small Business Administration
STAA	Surface Transportation Assistance Act of 1982

**II. Executive Summary**

Purpose and Summary of the Major Provisions

Congress required FMCSA to ensure that the regulations adopted pursuant to the MCSA, as amended by MAP-21, do not result in coercion of drivers by motor carriers, shippers, receivers, or transportation intermediaries to operate CMVs in violation of certain provisions of the FMCSRs and the HMRs.

The major provisions of this rule include prohibitions of coercion, procedures for drivers to report incidents of coercion to FMCSA, and rules of practice that the Agency will follow in response to reports of coercion.

Benefits and Costs

The FMCSA believes that this rule will not have an economically significant impact. The motor carriers, shippers, receivers, freight forwarders, brokers and transportation intermediaries that previously engaged in acts of coercion against truck or

bus drivers will incur compliance costs to operate in accordance with the regulations, and they will lose whatever economic benefit coercion provided; however, the cost of compliance with existing regulations has already been captured in the analysis supporting the implementation of those regulations, so we do not consider them here. There will be safety benefits from increased compliance with the regulations and driver health benefits if HOS violations decrease. In the absence of coercion, the drivers will conduct their safety-sensitive work in a manner consistent with the applicable Federal regulations. During the four-year period from 2009 through 2012, OSHA determined that 253 whistleblower complaints from CMV drivers had merit. In the same period, FMCSA validated 20 allegations of motor carrier coercion of drivers that were filed with DOT's OIG. This is an average of 68.25 acts of coercion per year during the four-year period. The Agency estimates that the cost of eliminating this level of coercion would be less than the \$100 million threshold required for economic significance under E.O. 12866.

### **III. Legal Basis for this Rulemaking**

This rule is based on the authority of MCSA [49 U.S.C. 31136(a)], as amended by MAP-21 [Pub. L. 112-141, section 32911, 126 Stat. 405, 818, July 6, 2012] and on 49 U.S.C. 13301(a), as amended by the ICC Termination Act of 1995 [Pub. L. 104-88, 109 Stat. 803, December 29, 1995].

The 1984 Act confers on DOT authority to regulate drivers, motor carriers, and vehicle equipment. The 1984 Act stated that at a minimum, the regulations shall ensure that — (1) commercial motor vehicles are maintained, equipped, loaded, and operated safely; (2) the responsibilities imposed on operators of commercial motor vehicles do not impair their ability to operate the vehicles safely; (3) the physical condition of operators

of commercial motor vehicles is adequate to enable them to operate the vehicles safely; and (4) the operation of commercial motor vehicles does not have a deleterious effect on the physical condition of the operators [49 U.S.C. 31136(a)].

Section 32911 of MAP-21 enacted a fifth requirement, i.e., that the regulations ensure that “(5) an operator of a commercial motor vehicle is not coerced by a motor carrier, shipper, receiver, or transportation intermediary to operate a commercial motor vehicle in violation of a regulation promulgated under this section, or chapter 51 or chapter 313 of this title” [49 U.S.C. 31136(a)(5)].

The 1984 Act also includes more general authority to “(10) perform other acts the Secretary considers appropriate” [49 U.S.C. 31133(a)(10)].

This rule includes two separate prohibitions. One prohibits motor carriers, shippers, receivers, or transportation intermediaries from coercing drivers to violate regulations based on section 31136 (which is the authority for many parts of the FMCSRs), 49 U.S.C. chapter 313 (the authority for the commercial driver’s license (CDL) and drug and alcohol regulations), and 49 U.S.C. chapter 51 (the authority for the HMRs). This is required by 49 U.S.C. 31136(a)(5).

A second provision prohibits entities that operate CMVs in interstate commerce from coercing drivers to violate the commercial regulations. As explained more fully below, this provision is based on the broad general authority of 49 U.S.C. 31136(a)(1)-(4), especially paragraphs (a)(1) and (2). Banning coercion to violate the safety-related commercial regulations is well within the scope of section 31136(a)(1)-(4). Applying the same ban to commercial provisions that are not immediately related to safety is nonetheless consistent with the goals of section 31136 and will help to inhibit the growth

of a culture of indifference to regulatory compliance, a culture known to contribute to unsafe CMV operations. Banning coercion to violate the commercial regulations is also within the broad authority transferred from the former ICC to prescribe regulations to carry out Part B of Subtitle IV of Title 49, United States Code (49 U.S.C. 13301(a)). This prohibition applies to operators of CMVs, which are mainly motor carriers, but not to shippers, receivers, or transportation intermediaries, since they are not subject to section 31136(a)(1)-(4) or section 13301.

Together, these two provisions cover most kinds of coercion drivers might encounter.

This rule also adopts procedures for drivers to report coercion and rules of practice the Agency will follow in addressing such reports.

FMCSA believes the reduction of regulatory violations caused by coercion will prove conducive to improved driver health and well-being, consistent with the objectives of section 31136(a)(2)-(4).

Before prescribing any regulations, FMCSA must consider their “costs and benefits” [49 U.S.C. 31136(c)(2)(A) and 31502(d)]. Those factors are discussed in this rule.

#### **IV. Background**

Section 32911 of MAP-21 is the most recent example of Congress’ recognition of the important role the public plays in highway safety. In the 1980s, Congress implemented new financial responsibility requirements for motor carriers of property and passengers to encourage the insurance industry to exercise greater scrutiny over the operations of motor carriers as one method to improve safety oversight (section 30 of the

Motor Carrier Act of 1980 (Pub. L. 96-296) and section 18 of the Bus Regulatory Reform Act of 1982 (Pub. L. 97-261)).

Section 32911 of MAP-21 represents a similar congressional decision to expand the reach of motor carrier safety regulations from the supply side (the drivers and carriers traditionally regulated by the Federal government) to the demand side—the shippers, receivers, brokers, freight forwarders, travel groups and others that hire motor carriers to provide transportation and whose actions have an impact on CMV safety.

Economic pressure in the motor carrier industry affects commercial drivers in ways that can adversely affect safety. For years, drivers have voiced concerns that other parties in the logistics chain are frequently indifferent to the operational limits imposed on them by the FMCSRs. Allegations of coercion were submitted in the docket for the Agency's 2010-2011 HOS rulemaking.<sup>1</sup> Also, drivers and others who testified at FMCSA listening sessions and before Congress said that some motor carriers, shippers, receivers, tour guides, and brokers insist that a driver deliver a load or passengers on a schedule that would be impossible to meet without violating the HOS or other regulations. Drivers may also be pressured to operate vehicles with mechanical deficiencies, despite the restrictions imposed by the safety regulations. Drivers who object that they must comply with the FMCSRs are sometimes told to get the job done despite the restrictions imposed by the safety regulations. The consequences of their refusal to do so are either stated explicitly or implied in unmistakable terms: loss of a job, denial of subsequent loads, reduced payment, denied access to the best trips, etc.

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<sup>1</sup> See 76 FR 81162

Although sec. 32911 of MAP-21 amended 49 U.S.C. 31136(a), it did not amend the jurisdictional definitions in 49 U.S.C. 31132, which specify the reach of FMCSA's authority to regulate motor carriers, drivers, and CMVs. Thus, it appears that Congress did not intend to apply all of the FMCSRs to shippers, receivers, and transportation intermediaries that are not now subject to those requirements. (Motor carriers, of course, have always been subject to the FMCSRs.) Instead, sec. 32911 prohibited these entities from coercing drivers to violate most of the FMCSRs. This necessarily confers upon FMCSA the jurisdiction over shippers, receivers, and transportation intermediaries necessary to enforce that prohibition.

Although MAP-21 did not address coercion to violate the commercial regulations that the Agency inherited in the ICC Termination Act of 1995, FMCSA is adopting a rule in order to ensure that there is no significant gap in the applicability of the coercion prohibition. As discussed above in the Legal Basis section, the MCSA gives the Agency broad authority to ensure that CMVs are maintained, equipped, loaded, and operated safely, and that the responsibilities imposed on drivers do not impair their ability to operate CMVs safely [49 U.S.C. 31136(a)(1)-(2)]. Some of the commercial regulations have effects related to safety. Designation of a process agent under 49 CFR part 366 ensures that parties injured in a CMV crash can easily serve legal documents on the carrier operating the CMV, wherever the location of its corporate offices. Registration as a for-hire motor carrier under 49 CFR part 365, or as a broker under 49 CFR part 371, ensures that an applicant has met the minimum standards for safe and responsible operations. Coercion of drivers to violate requirements such as these could have an effect on their ability to operate CMVs safely, e.g., requiring a driver to operate a vehicle in

interstate commerce when the owner had neither obtained operating authority registration from FMCSA nor filed proof of insurance.

The minimum requirement to obtain FMCSA authority to operate as a for-hire motor carrier, freight forwarder, or broker under 49 U.S.C. 13902, 13903, or 13904, respectively, is willingness and ability to comply with “this part and the applicable regulations of the Secretary . . . .” Among those “applicable regulations” are this rule’s ban on coercing drivers to violate the commercial regulations. For-hire motor carriers are subject to an even more explicit requirement to observe “any safety regulations imposed by the Secretary” [49 U.S.C. 13902(a)(1)(B)(i)], including § 390.6(a)(2). Moreover, independent of MAP-21, FMCSA has statutory authority under 49 U.S.C. 13301(a), formerly vested in the ICC, to prescribe regulations to carry out chapter 139 and the rest of Part B of Subtitle IV of Title 49. The prohibition on coercing drivers to violate the commercial regulations is within the scope of this authority.

Because both of the coercion prohibitions described above are based on 49 U.S.C. 31136(a), codified in subchapter III of chapter 311, violations of those rules would be subject to the civil penalties in 49 U.S.C. 521(b)(2)(A), which provides that any person who is determined by the Secretary, after notice and opportunity for a hearing, to have committed an act that is a violation of the regulations issued by the Secretary under subchapter III of chapter 311 (except sections 31138 and 31139<sup>2</sup>) or section 31502 of this title shall be liable to the United States for a civil penalty in an amount not to exceed \$10,000 for each offense.

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<sup>2</sup> Sections 31138 and 31139 prescribe minimum financial responsibility standards for the transportation of passengers and property, respectively.

However, pursuant to the Debt Collection Improvement Act of 1996 [Pub. L. 104-134, title III, chapter 10, sec. 31001(s), 110 Stat. 1321-373], the maximum inflation-adjusted civil penalty per offense is \$16,000 (49 CFR part 386, App. B, Paragraph (a)(3)).

## **V. Discussion of Comments**

### Overview

On May 13, 2014, the Agency published a notice of proposed rulemaking (NPRM) (79 FR 27265) to implement the MAP-21 prohibition of coercion.

Between May 13 and September 4, 2014, 94 submissions were posted to the docket. One of the submissions was a duplicate,<sup>3</sup> and three were non-responsive,<sup>4</sup> leaving 90 submissions from the following:

- One Federal agency: OSHA.
- Six motor carriers: Kimberly Arnold, Louisiana Transport, Inc., Mason/Dixon Lines, Inc., Schneider National, Inc., Wayne Yoder, one anonymous company, and the Motor Carrier Coalition comprised of 12 additional motor carriers.
- Ten industry associations: American Trucking Associations (ATA), Association of Independent Property Brokers & Agents (AIPBA), Institute of Makers of Explosives (IME), National Customs Brokers and Forwarders Association of America, Inc.(NCBFAA), National Grain and Feed Association (NGFA), National Industrial Transportation League (NIT League), National Shippers Strategic Transportation Council, Inc.

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<sup>3</sup> Submission number 0080 is a duplicate of number 0089.

<sup>4</sup> Submission numbers 0010, 0015, and 0016.

(NASSTRAC), Owner-Operator Independent Drivers Association, Inc. (OOIDA), Snack Food Association, and Transportation Intermediaries Association (TIA).

- Two advocacy organizations: Advocates for Highway and Auto Safety (Advocates) and Road Safe America.
- One labor union: Transportation Trades Department, AFL-CIO (TTD).
- One transportation intermediary: Armada.
- One commercial carrier consultant: Richard Young; and
- 67 individuals including 15 who self-identified as drivers and 2 owner operators.

#### Comments Supporting the Rulemaking

Fifteen commenters, including two safety advocacy groups, two trade associations, a driver, an owner-operator, a union, OSHA, and seven individuals, expressed their general support for the proposed rule. Road Safe America and Advocates support the Agency's efforts to end the practice of coercion, but Advocates recommended that FMCSA take additional steps, such as investigating all reported incidents of coercion, and exercise its authority to suspend the registration of those that engage in documented instances of coercion. ATA and AIPBA support prohibiting coercion, but expressed reservations about the potential impact the proposed rule would have on commercial relations between motor carriers and shippers, receivers, and intermediaries. OSHA, which is responsible for enforcing the whistleblower protection provisions of the Surface Transportation Assistance Act of 1981 (STAA) and 21 other statutes, supports the proposal and offered suggestions to make it more effective. TTD, a driver, an owner-

operator, and seven individuals expressed strong support for the NPRM. Many of these commenters stated that the rule would finally make shippers, receivers and transportation intermediaries accountable for their actions.

#### Comments in Opposition to the Rulemaking

Eighteen commenters, including nine individuals, seven trade associations and two drivers expressed their general disapproval of the NPRM. Many of these commenters stated that they agree with FMCSA that CMV drivers should not be coerced into violating any laws or regulations; however, they believe the requirements proposed in the NPRM will lead to unintended consequences. Several commenters stated there is no need for this regulation because existing regulations already prohibit coercion. Three trade associations contend that the NPRM misapplies the legal doctrine of respondeat superior<sup>5</sup> in attempting to hold shippers and receivers legally responsible for drivers that they do not hire, direct or manage. NASSTRAC stated the proposed rules are “arbitrary and capricious, contrary to law, impracticable and certain to do more harm than good.” Another commenter argued that the Agency has not accurately assessed the cost of these requirements, and expressed concern that the complaint reporting process is highly subjective. Two drivers wrote that new regulations are not necessary; instead drivers need to stand up to anyone trying to coerce them into violating the rules. Two individuals commented that this NPRM does not impose any new requirements on shippers or receivers that will prevent them from detaining a driver for hours and then requiring the driver to leave the property even if the driver is out of hours.

#### FMCSA Response

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<sup>5</sup> ‘Respondeat superior’ is a legal concept meaning that an employer is responsible for the wrongful acts of its employees or agents who are acting within the scope of their employment or agency.

These comments are discussed in detail below under the appropriate subject heading.

#### Definition of Coercion

OSHA commented that “coercion is broader than just threats related to loss of work, future business, or other economic opportunities. Coercion and coercive tactics may also include threats of violence, demotion, reduction of pay, and withdrawal or reduction of benefits, or any action that is capable of dissuading a reasonable employee from engaging in whistleblowing activity.” OSHA therefore recommended that the proposed definition of coercion, which referred to “a threat . . . to withhold, or the actual withholding of, current or future business, employment, or work opportunities from a driver . . .” be amended to refer to “a threat . . . to take or permit any adverse employment action against a driver . . .”

NCBFAA pointed out that if a shipper, receiver, or transportation intermediary discovered an “HOS issue – which would likely only be the case because the driver happened to say something about it – any decision to refuse to tender the shipment could be construed as violating the proposed regulation. For then, it would be knowingly ‘withholding . . . work opportunities from a driver’ when it ‘knew’ the driver was unable to lawfully handle the load. In that case, because the motor carrier elected to dispatch a driver that could not lawfully handle the load, the cargo would not be able to move until such time as the driver in question was again able to operate the equipment.” “The NCBFAA believes that where a shipper or transportation intermediary learns that a driver may not haul a load because he/she does not have the available hours, it should be able to freely advise the trucker of the situation so it can provide another driver who does have

available hours to complete the haul in a timely manner. Alternatively, the shipper/transportation intermediary should be able to use another carrier entirely, particularly one that is sufficiently responsible and knowledgeable about the status of its drivers.”

TIA made the same point. “Read literally, the definition would now make it a violation for a shipper or transportation intermediary to refuse a load to a driver if it ‘knew or should have known’ that the driver was about to exceed or already had exceeded the HOS regulations. Yet, the shipper or transportation intermediary could not properly request that the driver perform the transportation, as it would then be both ‘coercing’ the driver and aiding and abetting the HOS violation. So, if a driver assigned by a motor carrier shows up to pick up a load and advises the shipper or transportation intermediary that he or she cannot lawfully handle the load due to HOS or other concerns, the shipper or transportation intermediary would not be able to contact the carrier and request that they replace the driver. Instead the load would just sit. This is a catch 22 . . .”

NIT League offered a similar comment. “If a shipper attempts to confirm a delivery appointment with the driver, does that equate to directing ‘a driver to complete a run in a certain time’? It may not in the mind of the shipper but what if the driver has a different interpretation? If the driver objects to meeting that appointment due to HOS rules and the shipper gives the load to another carrier who can timely make the delivery, does that loss of business equate to coercion? What if the driver associates the selection of an alternative carrier with its objection but the shipper simply needed to meet its delivery requirements? The answers to these questions are far from clear. . . . [T]he League suggests that FMCSA modify its proposal to require the driver to inform the shipper of

the potential safety violation at the time he/she lodges the objection and to promptly record the alleged coercion event. Specifically, the League suggests that FMCSA require a driver who is concerned about violating a safety rule to take the following steps *before* accepting the load: (1) clearly articulate the objection to the allegedly coercing party and such objection must identify the specific FMCSA regulation that will be violated; and (2) record in a contemporaneous writing his/her objection and the facts and circumstances associated with the alleged coercion incident.”

ATA also recommended “that the rule require a driver alleging coercion to make the objection at a time contemporaneous with the incident in a writing that identifies the regulation(s) that would be violated if the driver operated the CMV.”

#### FMCSA Response

FMCSA has revised and clarified the NPRM’s definition of “coercion.” Readers may find it helpful to keep in mind the new definition (see § 390.5) as they review the Agency’s response to specific comments.

Although the language proposed by OSHA is similar to that used in the NPRM, FMCSA agrees that OSHA’s recommendation would clarify the intended scope of the definition. The Agency has therefore included the phrase “take or permit any adverse employment action,” which has the added benefit of resolving other concerns about the definition.

The NCBFAA, TIA, and NIT League comments correctly identified an unintended consequence of the proposed definition of “coercion.” Obviously, a shipper or transportation intermediary should not be liable for withholding a load from a driver who has stated that he or she could not make the trip without violating the FMCSRs. In that

situation, both the driver and the shipper or transportation intermediary are acting appropriately. The Agency has therefore amended the reference to the withholding of “current or future business, employment, or work opportunities” by striking the reference to “current or future” business and adding the phrase “take or permit any adverse employment action.” The revised definition thus allows the shipper or transportation intermediary to take either of the actions that NCBFAA proposed without violating the rule, i.e., to call the motor carrier and request another driver or to give the load to a different motor carrier. Neither action would attempt to force a driver to violate the FMCSRs, nor would it involve a threat to take other adverse employment action against the driver.

The removal of the word “current” resolves most of the TIA’s and NIT League’s concerns. There is no coercion to violate the FMCSRs when a shipper gives a load to another carrier after the original driver states that he or she cannot meet the requested delivery schedule without an HOS or other violation. On the contrary; that change of carriers is an attempt to ensure that no such regulatory violation occurs.

The Agency has also revised the definition of “coercion” to require the driver to identify “at least generally” the rules that he or she would have to violate in the course of the delivery. FMCSA is not requiring drivers to “identify the specific FMCSA regulation that will be violated,” as the NIT League and ATA requested. The FMCSRs are complex and drivers cannot be expected to have full command of regulatory citations. Nonetheless, the driver must be able to identify the problem clearly enough to enable FMCSA personnel to determine that it falls within a requirement or prohibition of the Agency’s regulations. It will be sufficient, for example, if the driver indicates that he or

she objects to a particular trip because of an HOS problem (“they told me to keep driving even when I hit 11 hours”), a maintenance issue (“the last inspection certificate was 3 years old”), or bad tires (“there was no tread on the front tires; I could see the ply in a couple of places”).

Similarly, the Agency will not require the driver to record his objection in “a contemporaneous writing.” On the other hand, if the shipper or transportation intermediary attempts to coerce the driver to take the load after hearing the objection, it would be in the driver’s best interests to document that attempt as soon as practicable.

#### Additional Burdens Created by Rule

Many of the commenters believe shippers would have to adopt extensive and burdensome procedures to comply with the proposed rule. NASSTRAC wrote that “[t]he aspect of the proposed rules that will cost the most (far more than the zero dollars FMCSA projects), and which is most contrary to established law, is the ‘duty to inquire.’ . . . It remains the case that every shipper would have to discuss HOS status for every scheduled shipment with every driver.”

The TIA commented that “[t]he NPRM would place the shipper and transportation intermediary into the role of employee management having to ask about hours of service availability.”

NGFA noted that “[i]n current operations, a shipper or receiver . . . does not check a driver’s hours-of-service (HOS) log or inspect the driver’s commercial motor vehicle – and it could be argued that the shipper or receiver does not have a duty or even a right to do so – if the driver is employed by another company. . . . Even if drivers and their

employers are fully cooperative in this respect, the resulting burden and added costs for shippers and receivers would be tremendous.”

The NIT League objected to “FMCSA’s apparent intent to impose a duty on the shipper or receiver to inquire as to a for-hire driver’s compliance with the HOS rules.”

Schneider National, on the other hand, wrote that “[i]f we understand FMCSA’s proposal correctly, exposure for a claim of coercion is triggered by an *objection* from a driver under circumstances which the intermediary ‘knew or should have known’ would require the driver to violate the safety regulations. Thus, it would appear that absent a driver’s objection, there is no obligation on the part of those other than the motor carrier to whom the driver is directly employed or leased to independently assure compliance with the hours of service or other regulations.” IME also interpreted the language of the NPRM as requiring the driver to object before a finding of coercion could be made.

#### FMCSA Response

Schneider National and IME are correct. This final rule does not require shippers, receivers, and transportation intermediaries (unlike motor carriers) to monitor a driver’s compliance with the HOS rules or other regulations. As the preamble to the NPRM stated, a shipper, receiver, or transportation intermediary “may commit coercion if it fails to heed a driver’s objection that the request would require him/her to break the rules” (79 FR 27267, emphasis added). There would be no requirement or even occasion to inquire into the driver’s available hours unless the driver had raised an objection to the delivery schedule; and an inquiry would not be necessary if the shipper or transportation intermediary agreed to change the delivery schedule to match the driver’s available hours or arranged with the motor carrier to have a different driver take the load.

Nevertheless, because many shippers, receivers, and transportation intermediaries believe that, in order to avoid potential liability, they must inquire about HOS compliance, and perhaps document all of their interactions with drivers, the Agency has amended the definition of “coercion” to make clear that the driver has an affirmative obligation to inform the motor carrier, shipper, receiver, or transportation intermediary when he or she cannot make the requested trip without violating one or more of the regulations listed in the definition. Motor carriers, shippers, receivers, and transportation intermediaries cannot commit coercion under the final rule unless and until they have been put on notice by the driver that he or she cannot meet the proposed delivery schedule without violating the HOS limits or other regulatory requirements. The purpose of that notice is, of course, to ensure that the driver is not coerced to commit such violations.

#### Agents, Officers, or Representatives

The NPRM proposed to apply the prohibition on coercion not only to principals, but also to “their respective agents, officers or representatives.” Many commenters focused on this issue. A coalition of 12 motor carriers<sup>6</sup> (hereafter Coalition) described a hypothetical situation where ABC Transportation, Inc. hires John Doe Trucking, an independent owner-operator, which coerces one of its drivers to violate the HOS rules without the knowledge or approval of ABC Transportation. The Coalition asked “[a]gainst which entity in this scenario and under the proposed regulation would FMCSA take enforcement action? One would expect John Doe Trucking. After all, it is the entity responsible for the coercive behavior. But if John Doe Trucking is considered an ‘agent,

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<sup>6</sup> C.R. England, Inc.; CRST International, Inc.; Central Refrigerated Service, Inc.; Cowan Systems, LLC; Dart Transit Company; Greatwide Truckload Management; Liquid Transport Corp.; National Carriers, Inc.; Oakley Trucking, Inc.; PGT Trucking, Inc.; Roadrunner Transportation Systems, Inc.; and Schneider National, Inc.

officer, or representative' of ABC Transportation, Inc., ABC could, in fact, be on the hook. . . . In order to avoid the inequitable situation described above, the FMCSA . . . should consider narrowly defining the terms 'agents,' 'officers,' and 'representatives' to specifically exclude independent contractors with whom motor carriers contract to haul freight and who are not specifically authorized to act on their behalf.”

ATA agreed with the Coalition's comments and urged the Agency “to clarify that, for purposes of the definition of ‘coercion’ and proposed section 390.6, a motor carrier's agents, officers or representatives only include anyone who is authorized to act on behalf of a motor carrier. In the instance where an independent contracting entity engaged in the act of coercion against one of its drivers, only that entity should be liable under proposed section 390.6 – not the motor carrier to whom the equipment and driver are leased.”

Schneider National commented that it “utilizes the services of approximately 2,000 independent contractors including a number of fleet owners. As such, Schneider shares the concerns raised in such comments relative to the use of terms ‘agents,’ ‘officers’ and ‘representatives’ used in conjunction with the term ‘motor carrier’ in § 390.6(a)(2), and adopts their comments as filed. . . . [S]imilar issues may arise in the context of brokerage operations. Consider, for example, a motor carrier contracted by a broker with respect to a particular shipment. In the normal circumstance, the broker would arrange for the transportation on a schedule which can be accomplished consistent with the hours of service regulations, provided the involved motor carrier has an available driver with appropriate ‘hours’. The broker would not normally be privy to the motor carrier's driver/load assignment process. Under this circumstance, is the motor carrier, by virtue of the typical broker/carrier arrangement, an ‘agent’ or ‘representative’ of the

broker such that the broker would be liable under the proposed rule for any motor carrier violation? The use of the terms ‘agent’, ‘officers’ and ‘representatives’ might suggest that liability in the foregoing circumstances could be attributed to the broker. Such a result would be inequitable.”

#### FMCSA Response

The issues raised by these comments were resolved by Congress in the MCSA of 1984. The prohibition on coercion is codified in the amended version of that statute at 49 U.S.C. 31136(a)(5). For purposes of the MCSA, “‘employee’ means an operator of a commercial motor vehicle (including an independent contractor when operating a commercial motor vehicle), a mechanic, a freight handler, or an individual not an employer, who – (A) directly affects commercial motor vehicle safety in the course of employment; and (B) is not an employee of the United States Government, a State, or a political subdivision of a State acting in the course of the employment by the Government, a State, or a political subdivision of a State” [49 U.S.C. 31132(2)].

Independent owner operators employed by a motor carrier are statutorily defined as employees of that carrier for purpose of the FMCSRs, including this final rule. In the hypothetical situation described by the Coalition, the independent owner operator who owns John Doe Trucking is an employee of ABC Transportation. Any attempt by John Doe Trucking to coerce one of its drivers is therefore an attempt by ABC Transportation, through one of its employees, to coerce one of its drivers.

FMCSA published regulatory guidance on this issue on April 4, 1997 [62 FR 16370, 16407]:

Question 17: May a motor carrier that employs owner-operators who have their own operating authority issued by the ICC or the Surface Transportation

Board [authority that is now issued by FMCSA] transfer the responsibility for compliance with the FMCSRs to the owner-operators?

Guidance: No. The term “employee,” as defined in § 390.5, specifically includes an independent contractor employed by a motor carrier. The existence of operating authority has no bearing upon the issue. The motor carrier is, therefore, responsible for compliance with the FMCSRs by its driver employees, including those who are owner-operators.

Brokers, however, are not employees of a motor carrier, nor are motor carriers agents or representatives of brokers. In a normal arms-length transaction, the broker deals with a motor carrier, not an individual driver. The motor carrier has an obligation to comply with the FMCSRs and thus to assign a driver who has sufficient hours to complete the trip on the schedule outlined by the broker and to provide equipment that meets applicable standards. Any coercion that occurred would typically be committed by the motor carrier that employed the driver. However, as TIA pointed out, a State court has held that where a broker contracted with a motor carrier but in fact exercised direct control over the driver, that broker was liable for a tort committed by the driver [Sperl v. C. H. Robinson Worldwide, Inc., 946 N.E.2d 463 (2011)]. A broker could be found liable for coercion if it interacted directly with a driver, instead of with the carrier, and attempted to force the driver to make a delivery on a schedule that would require a violation of the FMCSRs. The Agency has no information about how often direct interactions between transportation intermediaries and drivers may occur.

#### Respondeat Superior

Many commenters objected to the NPRM’s assertion that the “knew or should have known” standard in the definition of coercion “is essentially a restatement of the common law principle of ‘respondeat superior,’ which holds the ‘master’ (employer) liable for the acts of his ‘servant’ (employee).” Schneider National offered a brief critique

that captures the general reaction: “FMCSA should retract its discussion on respondeat superior and make clear that it is basing the rulemaking on MAP-21. At the very least, it need[s to] make clear that its regulations are limited to dealing with the issue of possible driver coercion and such regulations or any enforcement actions thereunder are not a re-characterization of the employment relationship generally. Absent this, those against whom an enforcement action is brought may have greatly enhanced incentive to fully litigate every citation, unduly burdening FMCSA’s enforcement effectiveness.”

#### FMCSA Response

FMCSA agrees with Schneider National’s comment. This final rule is based on the authority of 49 U.S.C. 31136(a)(5). The discussion of “respondeat superior” in the NPRM was not intended to make shippers, receivers, and transportation intermediaries vicariously liable, because Congress made them directly liable through section 32911 of MAP-21. FMCSA emphasizes that any evidence gathered in response to a written complaint by a driver would point to specific individuals and that persons at higher levels in the organization would not necessarily be implicated.

In any case, the revised definition of coercion adopted in this final rule eliminates the “knew or should have known” standard by emphasizing more strongly the driver’s duty to object as a predicate for any subsequent allegation of coercion.

#### Coercion That Fails

NASSTRAC objected to FMCSA’s intent to “penalize unsuccessful coercion, i.e., customer requests that a driver ignores.” NASSTRAC argued that “[p]enalizing coercion resulting in violations better addresses the conduct Congress wanted to discourage. FMCSA has cited no analogous regulatory program that would penalize millions of

Americans' words or requests even if they produce no actions. The Foreign Corrupt Practices Act and similar anti-bribery laws penalize inducements to violate laws, but they generally require some direct or indirect payment in addition to an oral or written request. In addition, penalizing shippers, receivers and intermediaries for words that produce no actions, let alone violations, implicates First Amendment considerations, as well as concerns about overkill.”

### FMCSA Response

Drivers of CMVs are required to comply with all applicable regulatory standards. Those who resist coercion do not lose the benefit of this rule. The act of coercion is complete when the attempt is made; it does not require success. If Congress had wished to impose limits on the common understanding of coercion, it would have said so in 49 U.S.C. 31136(a)(5). Coercion does, however, require some kind of threat; merely asking a driver to make a trip that would violate a regulation would not constitute coercion. If the driver refused to make such a trip, a further discussion of his or her response and related issues might or might not cross the line into coercion. The answer would depend on the substance of the conversation and the existence of a threat, explicit or implied, to make the driver pay an economic price for refusing to violate an FMCSA regulation.

### Burden of Proof

Two trade associations, ATA and NITL, Advocates, Mr. Wayne Yoder, who is a carrier, and four anonymous individuals commented on who should bear the burden to prove coercion. Among these commenters, ATA and two individuals argued that the

driver should bear the burden of proof in coercion cases. The individuals said it must be the driver's responsibility because only the driver controls the information on his logs.

On the other hand, Advocates stated that "once a complaint is determined by FMCSA to meet the substantive criteria outlined in Section 386.12(e) of the NPRM a prima facie showing of coercion has been made under the proposed regulations. As such, the burden of proof should shift to the alleged offender to demonstrate that there was a valid reason for the actions in dispute as is the current legal framework applied in cases alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964."

A carrier and three individuals (Mr. Nick Scarabello and two anonymous people) noted the driver is not well positioned to provide evidence of coercion. The carrier responding to the NPRM stated that a motor carrier is better able to provide evidence by way of rate agreements, contracts, orders, or bills of lading from the customer, but the driver has no way of printing or saving messages sent via company-owned and installed communication devices. An anonymous individual suggested that trucking companies should be required to record all phone conversations with drivers as a way to prevent or provide evidence of coercion. A commenter stated after a driver files a report of an incident, FMCSA should request written transcripts of the conversation and supporting documents. An anonymous commenter wrote that "if you don't put the burden of proof on the carrier or dispatcher[,] then it's the driver[']s word against the company and the driver still ends up being punished."

OOIDA stated that FMCSA places the enforcement burden on drivers to prove a violation of the law that results in the issuance of penalties and fines for the government.

OOIDA argued FMCSA should take the lead in coercion enforcement activities instead of placing the responsibility to initiate and prove incidents of coercion upon those least able to deal with the problem directly, the target of the coercion.

ATA and the NIT League recommended that the Agency adopt a standard of “clear and convincing evidence,” rather than “preponderance of the evidence.” The NIT League argued that this standard is appropriate because of the significant consequences associated with a violation of the coercion prohibition, which include potential monetary penalties and suspension or revocation of the registration of an offender. Conversely, OOIDA stated FMCSA should not weaken the rule by adopting an evidentiary standard that exceeds the standard for determining other safety violations.

#### FMCSA Response

When imposing a civil penalty for coercion, the government has the burden of proof. The driver, however, is typically the only person in a position to provide the critical evidence needed to sustain the action against a carrier, shipper, receiver, or transportation intermediary. The NPRM simply acknowledged this reality. While it may sometimes be difficult for the driver to provide relevant evidence, as OOIDA and others argued, there is no realistic alternative. The Agency will not require motor carriers to record all phone conversations and other communications with drivers, a far-reaching requirement which was not proposed for public comment in the NPRM. FMCSA will investigate timely complaints that meet the standards outlined in § 386.12 and may be able to locate or generate additional information, but the driver must supply the essential facts.

There is no good reason to adopt a “clear and convincing” evidentiary standard for coercion cases when the “preponderance” standard is used for all other motor carrier

enforcement actions. The potential penalties applicable to a violation of 49 U.S.C. 31136(a)(5) and this rule's implementing regulations are the same as those applicable to a violation of 49 U.S.C. 31136(a)(1)-(4) and the implementing FMCSRs.

Title VII of the Civil Rights Act of 1964 prohibits certain employers from discriminating against employees on the basis of race, color, religion, sex, or national origin. There is nothing in MAP-21 to indicate that Congress intended to make CMV drivers who are subject to coercion a protected class in the same sense as individuals subject to racial, religious, sexual, or other discrimination. The shifting of the burden of proof under Title VII is therefore not indicative of a similar legislative intent to shift the burden to carriers, shippers, receivers or transportation intermediaries after a driver files a non-frivolous coercion complaint. The burden of proof in coercion cases remains with FMCSA.

#### Application to Governmental Entities

NASSTRAC commented that "FMCSA has asserted that state and local governments would be unaffected, as would Indian Tribal Governments. However, Indian Tribal Governments, and state and local governments (and federal government entities) are shippers and receivers of freight transported by CMVs. The Department of Defense ships and receives large volumes every year. All of these shippers would apparently have a duty to inquire as to HOS and other compliance by every driver, even though many probably have no idea that HOS rules even exist."

TIA provided a similar comment: "TIA urges the Agency . . . to clearly define the scope of this rule to include the Department of Defense (DOD), the General Services Administration (GSA), Port Terminal Operators, and all other applicable entities that

contract with motor carriers to haul their specific goods along the transportation supply-chain.”

#### FMCSA Response

The MAP-21 prohibition on coercion amended 49 U.S.C. 31136(a), a provision originally enacted by the MCSA. Under the MCSA, the term “employer” “(A) means a person engaged in a business affecting interstate commerce that owns or leases a commercial motor vehicle in connection with that business, or assigns an employee to operate it; but (B) does not include the [Federal] Government, a State, or a political subdivision of a State.” [49 U.S.C. 31132(3) (emphasis added)]. MAP-21 subjected motor carriers, shippers, receivers, and transportation intermediaries to the prohibition on coercion [§ 31136(a)(5)], but it did not limit the governmental exemption in § 31132(3). FMCSA has no authority to apply this final rule to Federal, State or local governmental entities. Whether a terminal operator qualifies as a political subdivision of a State will require a case-by-case evaluation.

#### Deadline to File Coercion Complaints

OSHA recommended that the proposed 60-day filing deadline be extended to 180 days. “The 60-day filing period for the anti-coercion rule would greatly limit the ability of DOT to act on valid complaints of coercive activity that drivers have timely filed under the STAA [i.e., 49 U.S.C. 31105, enacted by the Surface Transportation Assistance Act of 1982 (STAA)]. Consequently, the short period decreases the effectiveness of the statute and weakens its overall deterrence value. The Department of Labor/OSHA has found that by providing workers with a filing period of 180 days [as authorized by 49 U.S.C. 31105], it is able to pursue a greater number of meritorious complaints and more fully fulfill its

mandate under STAA.” An individual, Lisa Pate, also noted the inconsistency between FMCSA’s proposed 60-day deadline and OSHA’s 180-day deadline.

OSHA recommended “tolling of the filing deadline, in case there are delays in transferring the allegation to the appropriate Division Administration.” Similarly, the Advocates wrote that “[v]ictims of coercion should not be time-barred from seeking an appropriate remedy under the law for the failure of FMCSA to promptly request further information or transfer the complaint to the appropriate Division Administrator.”

The NIT League, on the other hand, wrote that “because the allegations of coercion will often involve verbal communications at freight pick-up locations, . . . it will be critical for complaints to be filed promptly and for the accused party to be provided with prompt notice of the complaint. This would help ensure that any internal investigation of the driver’s allegations either by the driver’s employer or the alleged coercer can be conducted expeditiously, any relevant evidence can be preserved, and witnesses can be interviewed before memories fade. Thus, the NIT League suggests that the time period for drivers to file complaints be reduced to 30 days and that any party accused of coercion be served with the complaint upon its filing with FMCSA.”

#### FMCSA Response

OSHA regulations (29 CFR 1978.100 *et seq.*) and the underlying statute (49 U.S.C. 31105) protect employees who are discharged, disciplined, or discriminated against under certain circumstances. Those actions are likely to generate records that can be reviewed months later. Coercion, on the other hand, may occur without leaving clear documentary evidence. FMCSA continues to believe that a deadline shorter than 180 days is appropriate to ensure that a complaint is filed while the recollections of both the driver

and the alleged coercer are fresh. However, the Agency considers the 30-day deadline proposed by the NIT League to be unfair to drivers, some of whom are on the road for weeks at a time and may not be in a position to file a complaint that quickly. In order to ensure that drivers have sufficient time to prepare and submit a coercion complaint, the final rule extends the 60-day period proposed in the NPRM to 90 days.

#### Criteria to Evaluate Coercion Claims

OSHA commented that “the proposed requirement that the complaint be ‘non-frivolous’ is overly vague and should be eliminated. The current proposed requirement of ‘non-frivolity’ would allow for enormous amounts of discretion across FMCSA Divisions. Gross discretion will undoubtedly lead to regional disparities in the enforcement of the provision and severely limit the overall effectiveness of the provision.”

The NIT League suggested that the Agency clarify the criteria that will be used in evaluating reported incidents of coercion. IME expressed concern over the burden imposed on carriers, shippers, receivers, and transportation intermediaries to defend against driver complaints. IME argued that the proposed rule is, “by its very nature, . . . fraught with subjectivity. In order to avoid or defend against complaints of coercion, carriers, shippers and receivers will be compelled to memorialize every significant interaction they have with drivers.”

#### FMCSA Response

The MCSA includes the following: “(a) Investigating complaints.—The Secretary of Transportation shall conduct a timely investigation of a nonfrivolous written complaint alleging that a substantial violation of a regulation prescribed under this subchapter is

occurring or has occurred within the prior 60 days” [49 U.S.C. 31143(a)]. The “nonfrivolous” standard has been used in 49 CFR 386.12(b) for many years without the adverse consequences OSHA predicted, and the Agency believes its use in 49 CFR 386.12(e)(2) will be comparably straightforward and effective.

FMCSA does not agree with commenters’ assessment of the burden involved in defending against driver complaints. The “subjectivity” that IME feared has been virtually eliminated by the revised definition adopted in this final rule, which requires the driver to state explicitly that he or she cannot deliver the load without violating the applicable regulations, and why that is the case. There can be no coercion unless the shipper, receiver, or transportation intermediary responds with an equally explicit threat to force the driver to make the delivery despite the regulatory violation it would entail. While groundless allegations of coercion are possible, such accusations are also possible under OSHA’s whistleblower rules, yet they appear to be a relatively minor problem and are readily dismissed for want of evidence.

### Penalties

Advocates argued that the Agency should suspend the operating authority of motor carriers found to have committed coercion, rather than just issue “meaningless fines.” Coercion involving private carriers should be reported to the relevant States “so that the state licensing authority may take the appropriate action as well as have a complete record of the entities they are responsible for monitoring.” Advocates noted that an \$11,000 fine (since increased to \$16,000) “pales in comparison to the \$250,000 punitive fine that can be levied against a company by the Department of Labor under the Surface Transportation

Assistance Act (STAA) after a finding that a driver was dismissed for refusing to compromise a health or safety standard.”

An individual commenter, Jim Duvall, wrote that “Any fine or monetary penalty should directly benefit the driver(s) harmed in the action.”

Three commenters stated that the final rule should impose penalties against drivers who make false claims of coercion. One commenter said there should be a penalty for drivers who make false accusations because they either refuse to take responsibility for their own failure to properly calculate their hours or knowingly violate the HOS rules because they do not want to “miss the load.” Two other individuals stated that there should be penalties for drivers who are disgruntled and file baseless coercion complaints to get back at their employer. AIPBA noted that the imposition of significant penalties against drivers who are found to have falsely accused a broker will deter “such improper and fraudulent conduct by unscrupulous drivers.”

#### FMCSA Response

FMCSA will take aggressive action when a violation of the prohibition against coercion can be substantiated. This action will include civil penalties consistent with the regulations, and may include initiation of a proceeding to revoke the operating authority of a for-hire motor carrier. Under 49 U.S.C. 13905, a carrier that engages in willful non-compliance with an Agency regulation or order may have its operating authority revoked. FMCSA’s policy on revocation was set forth in a notice published on August 2, 2012 (77 FR 46147). The Agency agrees that coercion is the type of violation that may fall into this category.

Some commenters appear to regard a coercion allegation that cannot be substantiated as a false accusation. That is not necessarily true. Despite its best efforts, FMCSA may not be able adequately to document some allegations that are in fact correct. In any case, neither section 32911 of MAP-21 nor the Agency's general civil penalty statute authorizes penalties against drivers who make false accusations of coercion.

As for Mr. Duvall's recommendation, "All penalties and fines collected under this section shall be deposited into the Highway Trust Fund (other than the Mass Transit Account)" in the U.S. Treasury [49 U.S.C. 521(b)(10)]. The Agency cannot pay drivers the civil penalties it collects for incidents of coercion. And unlike OSHA, FMCSA has no authority to require the violator to compensate the driver for injuries he or she has suffered.

#### Coercion as an Acute Violation

ATA argued that a violation of proposed § 390.6, which prohibits coercion, should not necessarily be classified as an acute violation in Appendix B, section VII of Part 385, as proposed in the NPRM. Instead, coercion should be acute, critical, or neither, depending on the classification of the regulation the driver was coerced to violate.

#### FMCSA Response

FMCSA agrees that a carrier's safety fitness should be determined on the basis of the regulations it violates or coerces a driver to violate. In other words, coercion itself should not be treated as acute (or critical). The final rule therefore eliminates the NPRM's proposed amendments to Appendix B of 49 CFR part 385. This is consistent with the Agency's practice of limiting acute and critical classifications to regulations which, if violated, are likely to increase the risk of crashes. Because FMCSA currently

has no data showing a link between coercion and crashes, it seems appropriate not to classify coercion as acute. If new data or further analysis shows such a link, the Agency may revisit this decision. As indicated above, however, FMCSA will impose significant penalties when reports of coercion can be proved.

#### Coercion of Carriers

NASSTRAC described a hypothetical situation where Shipper A hires Carrier B to deliver a load on a reasonable schedule. However, when Carrier B's driver arrives to pick up the load, he tells Shipper A that he has to go off duty in a few hours under the HOS regulations, making it impossible to meet Shipper A's delivery schedule. "Shipper A says in frustration, 'That's the last time I use Carrier B.' Is Shipper A subject to a penalty of up to \$11,000 just for saying those words, even if no safety violation occurs? How many penalties could Shipper A face if it makes no more use of Carrier B?"

ATA urged "FMCSA to consider amending the proposed definition in section 390.5 to cover not only the driver as the target of withholding or coercion, respectively, but also his/her employer."

#### FMCSA Response

NASSTRAC has described a normal and completely legal business response to inadequate service. Shipper A has not coerced the driver to violate the HOS rules, nor has it coerced Carrier B to put pressure on the driver to violate the rules. It has simply decided not to use a carrier that does not dispatch drivers who can meet the agreed upon delivery schedule.

Section 32911 of MAP-21 applies only to the coercion of drivers, not to the coercion of motor carriers. Under 49 U.S.C. 31136(a)(5), the Agency's regulations must

ensure that “(5) an *operator* of a commercial motor vehicle is not coerced by a *motor carrier*, shipper, receiver, or transportation intermediary . . .” (emphasis added). Because an “operator” is distinct from a “motor carrier,” the term “operator” necessarily refers only to drivers. While shippers may sometimes coerce motor carriers to pressure their drivers to violate the FMCSRs, the coercion of motor carriers is not covered by MAP-21 or this rule.

#### Miscellaneous Comments

Driver Confidentiality. OOIDA argued that FMCSA must have whistleblower protections in place. “This includes a guarantee of a certain amount of confidentiality in driver communications with the agency, and procedures at the agency to take action against parties who retaliate against drivers who submit good faith allegation[s] of coercion to the agency.”

#### FMCSA Response.

FMCSA is required by 49 U.S.C. 31143(b) to keep the identity of a complainant confidential unless “disclosure is necessary to prosecute a violation.” Because a party accused of coercion cannot defend itself without knowing the name of the accuser, and when and where the alleged incident occurred, the driver’s identity cannot be confidential. Retaliation for reporting incidents that, for whatever reason cannot be substantiated, is not covered by this rule. OSHA, however, may be able to provide relief.

Communications with Drivers. “OOIDA suggests that FMCSA require all parties providing drivers with instructions, rules, or other conditions on the transportation to maintain all such communications as they do supporting documents under the HOS rules. OOIDA is aware that many motor carriers, brokers and third parties already retain such communication, and so this requirement should not be a significant burden. Such records

should be regularly reviewed during safety audits and compliance reviews. The potential safety benefits of motor carriers knowing that these records will be available to enforcement would outweigh any added burden.”

FMCSA Response.

The Agency could not act on such a far-reaching and controversial proposal without first publishing it for notice and comment. The NPRM proposed no such requirement, and it is not included in this final rule.

Notifying Carriers and Consumer Reporting Agencies. OOIDA commented that, “One form of coercion and retaliation against drivers is the reporting of negative information about a driver in an employment history submitted to a consumer reporting agency. Other motor carriers purchase that employment history from the consumer reporting agency to fulfill their FMCSR hiring requirements, and they often make negative hiring decisions based on those reports. On their face, some of the information reported appears performance related, such as ‘late pick-up/delivery.’ But there is nothing to protect drivers from being tagged with a negative mark on their employment history if the late pickup or delivery resulted from conditions or circumstances that caused the driver to run out of legal hours to make the delivery on time. Resistance to coercion (i.e., the driver objections proposed by the Notice) may be reported as ‘refused dispatch’ or ‘insubordination.’ These employment records can effectively disqualify a driver from being considered for employment by motor carriers or make it much harder for the driver to find employment. The result is that safety-conscious drivers who do the right thing and resist coercion get bad employment reports and are driven out of the industry. Other drivers who capitulate to demands to violate the rules and save their jobs can keep fairly clean employment records

and stay in the industry. . . . FMCSA should impose penalties upon motor carriers who submit such information to consumer reporting agencies and who refuse to remove such information after it is submitted.”

FMCSA Response.

Negative reports about a driver by a motor carrier could constitute “adverse employment actions” prohibited by this final rule. However, there would be significant evidentiary obstacles to making a coercion case in these situations. A late pickup or delivery may not have been caused by unrealistic demands the driver was coerced to meet. Bad planning on the part of the driver or carrier, unexpected traffic congestion, or other factors could also explain some delays. Tracing reports of “insubordination” back to the driver’s refusal to be coerced would inevitably involve a detailed examination of one or more incidents and conflicting accounts of the reason for the alleged insubordination. While FMCSA will review all reported incidents, the Agency cannot take action against a carrier for coercion unless there is evidence that an unfavorable report on a driver was motivated by a desire to punish the driver for refusal to be coerced.

The Rule Should Govern the Demands of Receivers. OOIDA argued that “[t]he most powerful tool that receivers have over drivers is the withholding of a signature or receipt from the driver acknowledging receipt of the freight – a document the driver needs as a condition for being compensated by their carrier or third-party and that the driver must obtain before driving away to get rest or new business. Withholding such receipt is commonly used by receivers to coerce drivers to [1] accept the receiver’s schedule to unload a vehicle (no matter when the driver arrived at the docks, when the driver’s next scheduled pickup or delivery may be, or what the driver’s Hours of Service status may

be); . . . [3] require the driver to break down pallets and sort and stack freight.” OOIDA also described situations where drivers are held at a receiver’s dock past the 14<sup>th</sup> hour after coming on duty, and then forced to drive away from the receiver’s facility in violation of § 395.3(a)(2).

#### FMCSA Response.

While the situation OOIDA described involving a signature or receipt was not discussed in the NPRM, withholding a delivery receipt might be used to coerce a driver to violate the FMCSRs. A receiver that forces a driver to leave its premises is not threatening the driver with an adverse employment action; it is asserting its right as a property owner to control access to the property.

#### Comments on Issues Outside the Scope of this Rulemaking

Fourteen commenters raised issues beyond the scope of this rulemaking, involving lack of adequate parking; detention time and detention pay; and various HOS provisions. Because none of these issues was related to coercion of drivers to violate FMCSA regulations, the Agency will not comment on them in this document.

### **VI. Section-by-Section Description**

#### **A. Part 386**

Section 386.1, “Scope of the rules in this part,” is amended by adding a new paragraph (c) referring to the filing and handling of coercion complaints under new § 386.12(e).

The NPRM’s § 386.12(e) is called “Complaint of coercion.” The procedures to file and handle coercion complaints outlined in the NPRM have been revised. The complaint must be filed within 90 days after the event with the Agency’s on-line National

Consumer Complaint Database (<http://nccdb.fmcsa.dot.gov>), or with the Division Administrator where the driver is employed. FMCSA may reassign the complaint to the Division Administrator best situated to investigate it. In addition, the final rule removes a sentence included in the NPRM stating that the Division Administrator may issue a Notice of Claim or Notice of Violation when appropriate. Because that statement could be read as a limitation on the Agency's enforcement options, it has been deleted.

## **B. Part 390**

Section 390.3(a) is amended to include a reference to the coercion provisions in § 386.12(e) and § 390.6, and describe the applicability of those provisions.

Section 390.5 is amended to add definitions of “Coerce or coercion,” “Receiver or consignee,” “Shipper,” and “Transportation intermediary.” The definitions of “Receiver or consignee,” “Shipper,” and “Transportation intermediary” make these entities subject to the prohibition on coercion in § 390.6 only when shipping, receiving or arranging transportation of property (and in the case of “transportation intermediaries,” passengers) in interstate commerce. Although the term “transportation intermediary” is commonly associated with brokers and freight forwarders, it also includes travel agents and similar entities that arrange group tours or trips and contract with motorcoach operators for transportation services. Such intermediaries and their agents are subject to the prohibition on coercion. Because the HMRs apply to transportation in intrastate commerce, the definitions make clear that the prohibition on coercion applies to parties that ship, receive, or arrange transportation of hazardous materials in interstate or intrastate commerce. The NPRM's definition of “coerce or coercion” has been amended (1) by removing the reference to “current or future” business; (2) adding a prohibition on “any

adverse employment action against a driver,” and (3) deleting references to violations of §§ 385.105(b), 385.111(a), (c)(1), or (g), which were erroneously included.

Section 390.6(a)(1) is added to prohibit motor carriers, shippers, receivers, or transportation intermediaries, or the agents, officers, or representatives of such entities, from coercing drivers to operate CMVs in violation of 49 CFR parts 171-173, 177-180, 380-383, or 390-399, or §§ 385.415 or 385.421. These parts correspond to the statutory language in 49 U.S.C. 31136(a)(5). Parts 171-173 and 177-180 are the HMRs applicable to highway transportation promulgated under 49 U.S.C. chapter 51. Parts 382-383 are the commercial driver’s license (CDL) and drug and alcohol testing regulations promulgated under 49 U.S.C. chapter 313. Parts 390-399 are those portions of the FMCSRs promulgated under the authority (partial or complete) of 49 U.S.C. 31136(a). The other parts or sections listed are based on one or more of the statutes referenced in 49 U.S.C. 31136(a)(5).

Section 390.6(a)(2) is added to prohibit operators of CMVs or their agents, officers, or representatives, from coercing drivers to violate 49 CFR parts 356, 360, or 365-379. This subsection is based on the authority of 49 U.S.C. 31136(a)(1)-(4) and 49 U.S.C. 13301(a).

Section 390.6(b) describes the procedures for a driver to file a complaint of coercion with FMCSA.

## **VII. Regulatory Analyses**

### **A. Regulatory Planning and Review and DOT Regulatory Policies (E.O. 12866) and Procedures as Supplemented by E.O. 13563)**

FMCSA has determined that this rule is a significant regulatory action under E. O. 12866 (58 FR 51735, October 4, 1993), as supplemented by E. O. 13563 (76 FR 3821,

January 21, 2011), and significant within the meaning of the DOT regulatory policies and procedures (44 FR 11034, February 26, 1979). The estimated economic costs of the rule will not exceed the \$100 million annual threshold (as explained below).

#### Extent of Economic Impact

The 1982 STAA includes whistleblower protections for motor carrier employees (49 U.S.C. 31105). OSHA, which administers the complaint process created by section 31105, received 1,158 complaints from CMV drivers between FY 2009 and FY 2012.<sup>7</sup> OSHA found that 253 of them (22 percent) had merit.<sup>8</sup> Between FY 2009 and FY 2012, the OIG hotline received 91 complaints alleging that motor carriers had coerced or retaliated against drivers. FMCSA determined that 20 of these complaints had merit.<sup>9</sup> The average number of verified complaints for that 4-year period was therefore 68.25 per year [(253 + 20) / 4 = 68.25].

Some unknown portion of the 253 complaints filed with OSHA during that period almost certainly dealt with coercion or similar actions. Even if all of them were coercion-related, this number – combined with the 20 substantiated complaints filed with the OIG – remains small compared to the total population of CMV drivers. Section 31105, however, applies only to employers (basically motor carriers) while this rule will also cover shippers, receivers, and transportation intermediaries. The Agency is unable to estimate the number of coercion allegations it may receive, whether triggered by actions of motor carriers or other entities made subject to this rule by MAP-21.

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<sup>7</sup>U.S. Department of Labor, Occupational Safety & Health Administration (OSHA), Whistleblower Protection Program: Investigative Data Fact Sheets. Available at [http://www.whistleblowers.gov/wb\\_data\\_FY05-12.pdf](http://www.whistleblowers.gov/wb_data_FY05-12.pdf)

<sup>8</sup> Ibid., Footnote 3

<sup>9</sup> U.S. Department of Transportation, Office of the Inspector General (OIG). This averaged 23 complaints per year, (with 44 in 2010), which the OIG referred to FMCSA. FMCSA substantiated 20 complaints (22 percent) of violations of acute and critical regulations due to driver allegations of unlawful discrimination or discipline (*See* 29 CFR 1978.100 *et seq.*). Available at <http://www.oig.dot.gov/Hotline>

In view of the small number of coercion-related complaints filed with OSHA and DOT's OIG, the aggregate economic value to motor carriers of these coercion-related incidents is likely to be low. Therefore, the cost to carriers of eliminating those incidents – assuming the rule has that effect – and incurring the higher costs of compliance, would also be low; however, the cost of compliance with existing regulations has already been captured in the analysis supporting the implementation of those regulations, so we do not consider them here. We believe that the application of this rule to shippers, receivers, brokers, freight forwarders, and other transportation intermediaries will not significantly increase the number of coercion complaints, since drivers generally have more frequent and direct contacts with their employers than with these other parties. In addition, even though the rule applies to a larger population, FMCSA also notes that the rule should have a deterrent effect on entities considering coercion.

The roughly 68 annual complaints noted above is the only available estimate of coercion in the trucking industry now. This rule would be expected to reduce the amount of coercion that takes place, but there is no available measure of the effectiveness of the rule. The relatively low number of complaints suggests that the overall economic impact will be less than the \$100 million threshold of economic significance under E.O. 12866.

### Benefits

If coercion creates situations where CMVs are operated in an unsafe manner, then there are consequences for safety and driver health risks. By forcing drivers to operate mechanically unsafe CMVs or drive beyond their allowed hours, coercion increases the risk of crashes. Reduction of these behaviors because of this rule would generate a safety benefit. Additionally, the operation of CMVs beyond HOS limits has been shown to have

negative consequences for driver health. A reduction of this practice would create an improvement in driver health. The Agency lacks data to quantify the safety or health benefits attributable to the rule.

### Costs

This rule, as an enforcement measure, would impose compliance costs on carriers and on other business entities utilizing the motor carrier industry. If drivers now operate CMVs in violation of HOS rules, or if coercion had caused drivers to operate their CMV even though there were mechanical defects, carriers would potentially have to reorganize their schedules or hire new drivers to operate in compliance. Maintenance costs might also accelerate as a result of this rule, as the industry improves compliance with the existing safety standards resulting from increased risk of enforcement action.

Additionally, the entities that practice coercion would lose the economic benefit of that coercion. This economic benefit could be time-related (if drivers are coerced into driving when they should stop and rest, stop and wait for CMV maintenance, or drive a vehicle they are not qualified to operate rather than wait for a qualified driver).

Drivers alleging coercion will have to provide a written statement describing the incident along with evidence to support their charges. This total paperwork burden is difficult to estimate but is not likely to be very large. Similarly the Agency believes that the investigation of those reports will not have a large cost.

### Summary

The Agency does not believe that the benefits and costs of this rule would create a large economic impact. The safety benefits and compliance costs are likely to be very

small based on the small number of expected cases each year. Therefore, the Agency believes that the rule will not be economically significant.

## **B. Regulatory Flexibility Act**

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) requires Federal agencies to consider the effects of their regulatory actions on small business and other small entities and to minimize any significant economic impact. The term “small entities” comprises small businesses and not-for-profit organizations that are independently owned and operated and are not dominant in their fields, as well as governmental jurisdictions with populations of less than 50,000.<sup>10</sup> Accordingly, DOT policy requires an analysis of the impact of all regulations on small entities and mandates that agencies strive to lessen any adverse effects on these businesses.

Under the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121, 110 Stat. 857), the rule is not expected to have a significant economic impact on a substantial number of small entities. As indicated above, OSHA found merit in only 253 complaints filed by CMV drivers over a 4-year period, or about 63 per year. Even if all of the complaints were classified as coercion-related, that number would be very small when compared to the size of the driver population and motor carrier industry.

The Small Business Administration (SBA) classifies businesses according to the average annual receipts. The SBA defines a “small entity” in the motor carrier industry [i.e., general freight truck transportation, subsector 484 of the North American Industry Classification System (NAICS)] as having revenues of less than \$27.5 million per firm.

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<sup>10</sup> Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) see National Archives at <http://www.archives.gov/federal-register/laws/regulatory-flexibility/601.html>.

Likewise, transportation intermediaries (i.e., subsector 488 of NAICS) which include brokers and freight forwarders, are classified as small if their annual revenue is under \$15 million.<sup>11</sup>

Table 1 presents a breakdown of FMCSA’s revenue estimates for the populations in various categories. By SBA standards, the vast majority of all businesses in the motor carrier and related industries are “small entities.” Although general freight transportation arrangement firms fall under the \$15 million threshold, there is an exception for “non-vessel household goods forwarders.”<sup>12</sup> This exception stipulates that the revenue threshold, for this sub-set of freight forwarders in the trucking industry is \$27.5 million. As indicated above, fewer than 70 coercion complaints per year have been filed with OSHA and FMCSA in the past few years. We have no reason to believe that number will increase significantly under the rule. In fact, the potential penalty for coercing a driver should have a deterrent effect. Even if the penalty assessed might have a “significant economic impact,” the limited number of recent coercion complaints suggests that the penalty would not affect “a substantial number of small entities,” given that there are nearly 500,000 firms in the industry that qualify as small entities.

This rule does not affect industry productivity by requiring new documentation, affecting labor productivity or availability, or increasing expenditures on maintenance or new equipment. The fines, which are the only impact (unless the carrier’s operating

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<sup>11</sup> U.S. Small Business Administration Table of Small Business Size Standards matched to North American Industry Classification System Codes (NAICS), See NAIC subsector 484 (Truck Transportation) and 488 Support Activities for Transportation).effective July, 2012. The Small Business Size Standards used in the Initial Regulatory Flexibility Act analysis (IRFA) were released by the Small Business Administration in January 2012. The SBA issued revised Small Business Standards in July 2014. See downloadable PDF file at <https://www.sba.gov/content/small-business-size-standards>

<sup>12</sup> According to the 2007 Economic Census data, 2,221 establishments were classified as non-vessel common carriers. These establishments accounted for 10.2 percent of the number of, and 5.2 percent of the annual revenue for, the total number of establishments classified under NAICS Code 488510-Freight Transportation Arrangement. In 2007, the average revenue for all entities classified to NAICS Code 488510 was \$1.8 million. Therefore, the results of the analysis are the same regardless of whether the Small Business Standard is \$15 million or \$27.5 million.

authority is suspended or revoked), can be avoided by not coercing drivers into violating existing regulations. Furthermore, by regulation, the Agency’s fines are usually subject to a maximum financial penalty limit of 2 percent of a firm’s gross revenue. For the vast majority of small firms, a fine at this level would not be “significant” in the sense that it would jeopardize the viability of the firm.

The table below excludes shippers and receivers subject to the prohibition on coercion, a group which is a large portion of the entire U.S. population, because anyone who sends or receives a package would be considered a shipper or receiver. However, compliance with the prohibition on coercion of drivers is not expected to have significant economic impact on many of them. Consequently, because they are not expected to be in a position to coerce a driver, I certify that the action will not have a significant economic impact on a substantial number of small entities.

<b>Type of Entity</b>	<b>Number</b>	<b>Determination</b>
Motor carriers (property)	523,239 <sup>13</sup>	99% below 27.5 million <sup>14</sup>
Motor carriers (passenger)	12,184	99% below \$15 million <sup>15</sup>
Freight forwarders	14,319 <sup>16</sup>	97% below \$27.5 million
Property brokers	21,565	99% below \$27.5 million

Source: Motor carrier (passenger), and property broker numbers is updated from the Initial Regulatory Flexibility Act analysis (IRFA) to reflect revisions reported in “2014 Pocket Guide to Large Truck and Bus Statistics,” Federal Motor Carrier Administration, October 2014. The 2014 Pocket Guide is available at <http://www.fmcsa.dot.gov/safety/data-and-statistics/commercial-motor-vehicle-facts>.

<sup>13</sup> Includes interstate motor carriers and intrastate hazardous materials motor carriers.

<sup>14</sup> The results show that 99 percent of all motor carriers (property) with recent activity have 148 PUs or fewer.

<sup>15</sup> The methodology used to determine the percentage of motor carriers (property and passenger) is the same methodology described in detail at pages 31 through 34 of the September 2014 Initial RFA prepared for the proposed rule on Motor Carrier Safety Fitness Determination.

<sup>16</sup> The number of freight forwarders reported (21,809) in the IFRA was obtained from the U.S Census Bureau 2007 Economic Census. The 21,809 entities are the number of establishments, not the number of firms that operated for all or part of 2007. An establishment is a place of business. A firm may operate out of more than one establishment. Hence, the number of firms is a subset of the number of establishment. In the 2007 Economic Census, 15,180 firms were classified to NAICS Code 488510-Freight Transportation Arrangement. The number of firms that operated for all or part of the year accounted for 69.6 percent of establishments (15,180 ÷ 21,809). The product of 69.9 percent and 20,573 establishments reported the 2012 Economic Census yielded an estimated 14,319 firms in 2012. These data are available on the Census Bureau American Fact Finder web site at <http://factfinder.census.gov/faces/nav/jsf/pages/searchresults.xhtml?refresh=t>.

### **C. Assistance for Small Entities**

In accordance with section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996, FMCSA wants to assist small entities in understanding this rule so that they can better evaluate its effects on themselves and participate in the rulemaking initiative. If the rule affects your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please consult the FMCSA point of contact, Mr. Charles Medalen, listed in the **For Further Information Contact** section of this rule.

Small businesses may send comments on the actions of Federal employees who enforce or otherwise determine compliance with Federal regulations to the SBA's Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of FMCSA, call 1-888-REG-FAIR (1-888-734-3247). DOT has a policy ensuring the rights of small entities to regulatory enforcement fairness and an explicit policy against retaliation for exercising these rights.

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

This rule will not impose an unfunded Federal mandate, as defined by the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1532, et seq.), that will result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$155 million (which is the value of \$100 million in 2015 after adjusting for inflation) or more in any 1 year.

#### **E. Federalism (E.O. 13132)**

A rulemaking has implications for Federalism under section 1(a) of E.O. 13132 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 E.O. 13132. This 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. FMCSA has determined that this rule will not have substantial direct costs on or for States nor will it limit the policymaking discretion of States. Accordingly, this rulemaking does not have Federalism implications.

#### **F. Civil Justice Reform (E.O. 12988)**

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

#### **G. Protection of Children (E.O. 13045)**

E.O. 13045, Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, Apr. 23, 1997), requires agencies issuing "economically significant" rules, if the regulation also concerns an environmental health or safety risk that an agency has reason to believe may disproportionately affect children, to include an evaluation of the regulation's environmental health and safety effects on children. The Agency determined this rule is not economically significant. Therefore, no analysis of the impacts on children is required. In any event, the Agency does not anticipate that this regulatory action could in any respect present an environmental or safety risk that could disproportionately affect children.

## **H. Taking of Private Property (E.O. 12630)**

FMCSA reviewed this rule in accordance with E.O. 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, and has determined it will not effect a taking of private property or otherwise have takings implications.

## **I. Privacy Impact Assessment**

FMCSA conducted a privacy impact assessment (PIA) of this rule as required by section 522(a)(5) of division H of the FY 2005 Omnibus Appropriations Act, Public Law 108-447, 118 Stat. 3268 (Dec. 8, 2004). The assessment considered impacts of the final rule on the privacy of information in an identifiable form and related matters. The final rule will impact the handling of personally identifiable information (PII). FMCSA has evaluated the risks and effects the rulemaking might have on collecting, storing, and sharing PII and has evaluated protections and alternative information handling processes in developing the final rule in order to mitigate potential privacy risks.

For the purposes of both transparency and efficiency, the privacy analysis conforms to the DOT standard Privacy Impact Assessment (PIA) and will be published on the DOT website at [www.dot.gov/privacy](http://www.dot.gov/privacy) concurrently with the publication of the rule. The PIA addresses the rulemaking, associated business processes contemplated in the rule and any information known about the systems or existing systems to be implemented in support of the final rulemaking. A PIA for the Coercion NPRM was previously developed and is currently available to the public on the DOT website at [www.dot.gov/privacy](http://www.dot.gov/privacy). The PIA has been reviewed, and revised as appropriate, to reflect the final rule and will be published not later than the date on which the Department

initiates any of the activities contemplated in the Final Rule determined to have an impact on individuals' privacy and not later than the date on which the system (if any) supporting implementation of the Final Rule is updated.

As required by the Privacy Act, FMCSA and the Department will publish, with request for comment, a revised system of records notice (SORN) that will cover the collection of information that is affected by this final rule. Since coercion complaints will be stored in the National Consumer Complaint Database (NCCDB), the SORN for the NCCDB (DOT/FMCSA 004 – National Consumer Complaint Database (NCCDB) – 75 FR 27051 – May 13, 2010) will be revised to reflect the new collection of information and published in the Federal Register not less than 30 days before the Agency is authorized to collect or use PII retrieved by unique identifier. Additionally, FMCSA will revise the PIA for NCCDB (formally the Safety Violations and Household Goods Consumer Complaint Hotline Database) posted on June 6, 2006 and an updated PIA will be available to the public on the DOT website at [www.dot.gov/privacy](http://www.dot.gov/privacy).

The privacy risks and effects associated with the cases resulting from this rule are not unique and have previously been addressed by the enforcement case file storage requirements in the Electronic Document Management System (EDMS) PIA posted on June 6, 2006 and the DOT/FMCSA 005 – Electronic Document Management System SORN (71 FR 35727) published on June 21, 2006.

#### **J. Intergovernmental Review (E.O. 12372)**

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

#### **K. Paperwork Reduction Act**

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 et seq.), Federal agencies must obtain approval from the OMB for each collection of information they conduct, sponsor, or require through regulations. Information submitted by drivers alleging coercion is exempt from PRA requirements because it is collected pursuant to “an administrative action or investigation involving an agency against specific individuals or entities” [44 U.S.C. 3518(c)(1)(B)(ii)].

#### **L. National Environmental Policy Act and Clean Air Act**

FMCSA analyzed this rule in accordance with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 et seq.). FMCSA conducted an environmental assessment and determined that the rule has the potential for minor environmental impacts. Based on the limited data FMCSA has concerning the extent of the affected CMV driver population, these impacts would be very small and FMCSA does not expect any significant impacts to the environment from this rule. The environmental assessment has been placed in the rulemaking docket.

In addition to the NEPA requirements to examine impacts on air quality, the Clean Air Act (CAA) as amended (42 U.S.C. 7401 et seq.) also requires FMCSA to analyze the potential impact of its actions on air quality and to ensure that FMCSA actions conform to State and local air quality implementation plans. The additional contributions to air emissions from any of the alternatives are expected to fall below the CAA de minimis thresholds as per 40 CFR 93.153 and are, therefore, not expected to be subject to the Environmental Protection Agency’s General Conformity Rule (40 CFR parts 51 and 93).

#### **M. Environmental Justice (E.O. 12898)**

FMCSA evaluated the environmental effects of this rule in accordance with Executive Order 12898 and determined that there are no environmental justice issues associated with its provisions nor is there any collective environmental impact resulting from its promulgation. Environmental justice issues would be raised if there were a “disproportionate” and “high and adverse impact” on minority or low-income populations. None of the alternatives analyzed in the Agency’s EA, discussed under National Environmental Policy Act, would result in high and adverse environmental impacts.

**N. Energy Supply, Distribution, or Use (E.O. 13211)**

FMCSA has analyzed this rule under E.O. 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. The Agency has determined that it is not a “significant energy action” under that order because it is not a “significant regulatory action” likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, it does not require a Statement of Energy Effects under E.O. 13211.

**O. Indian Tribal Governments (E.O. 13175)**

This rule does not have tribal implications under E.O. 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

**P. National Technology Transfer and Advancement Act (Technical Standards)**

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through OMB, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) are standards that are developed or adopted by voluntary consensus standards bodies. This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

### **List of Subjects**

#### **49 CFR Part 386**

Administrative practice and procedures, Brokers, Freight forwarders, Hazardous materials transportation, Highway safety, Motor carriers, Motor vehicle safety, Penalties.

#### **49 CFR Part 390**

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

For the reasons stated in the preamble, FMCSA amends parts 386 and 390 in 49 CFR chapter III, subchapter B, as follows:

### **PART 386—RULES OF PRACTICE FOR FMCSA PROCEEDINGS**

1. The authority citation for part 386 continues to read as follows:

**AUTHORITY:** 49 U.S.C. 113, chapters 5, 51, 59, 131-141, 145-149, 311, 313, and 315; Sec. 204, Pub. L. 104-88, 109 Stat. 803, 941 (49 U.S.C. 701 note); Sec. 217, Pub. L. 105-159, 113 Stat. 1748, 1767; Sec. 206, Pub. L. 106-159, 113 Stat.1763; subtitle B, title IV of Pub. L. 109-59; and 49 CFR 1.81 and 1.87.

2. Revise the heading of part 386 as set forth above.

3. Amend § 386.1 by revising paragraph (a) and adding paragraph (c) to read as follows:

**§ 386.1 Scope of the rules in this part.**

(a) Except as indicated in paragraph (c) of this section, the rules in this part govern proceedings before the Assistant Administrator, who also acts as the Chief Safety Officer of the Federal Motor Carrier Safety Administration (FMCSA), under applicable provisions of the Federal Motor Carrier Safety Regulations (FMCSRs) (49 CFR parts 350-399), including the commercial regulations (49 CFR parts 360-379), and the Hazardous Materials Regulations (49 CFR parts 171-180).

\* \* \* \* \*

(c) The rules in § 386.12(e) govern the filing by a driver and the handling by the appropriate Division Administrator of complaints of coercion in violation of § 390.6 of this subchapter.

4. Amend § 386.12 as follows:

- a. Revise the section heading;
- b. Add and reserve paragraph (d); and
- c. Add paragraph (e).

**§ 386.12 Complaints.**

\* \* \* \* \*

(d) [Reserved]

(e) Complaint of coercion. (1) A driver alleging a violation of § 390.6(a)(1) or (2) of this subchapter must file a written complaint with FMCSA stating the substance of the alleged coercion no later than 90 days after the event. The written complaint, including

the information described below, must be filed with the National Consumer Complaint Database at <http://nccdb.fmcsa.dot.gov> or the FMCSA Division Administrator for the State where the driver is employed. The Agency may refer a complaint to another Division Administrator who the Agency believes is best able to handle the complaint. Information on filing a written complaint may be obtained by calling 1-800-DOT-SAFT (1-800-368-7238). Each complaint must be signed by the driver and must contain:

(i) The driver's name, address, and telephone number;

(ii) The name and address of the person allegedly coercing the driver;

(iii) The provisions of the regulations that the driver alleges he or she was coerced to violate; and

(iv) A concise but complete statement of the facts relied upon to substantiate each allegation of coercion, including the date of each alleged violation.

(2) Action on complaint of coercion. Upon the filing of a complaint of coercion under paragraph (e)(1) of this section, the appropriate Division Administrator shall determine whether the complaint is non-frivolous and meets the requirements of paragraph (e)(1).

(i) If the Division Administrator determines that the complaint is non-frivolous and meets the requirements of paragraph (e)(1) of this section, he/she shall investigate the complaint. The complaining driver shall be timely notified of findings resulting from such investigation. The Division Administrator shall not be required to conduct separate investigations of duplicative complaints.

(ii) If the Division Administrator determines the complaint is frivolous or does not meet the requirements of paragraph (e)(1) of this section, he/she shall dismiss the complaint and notify the driver in writing of the reasons for such dismissal.

(3) Protection of complainants. Because prosecution of coercion in violation of § 390.6 of this subchapter will require disclosure of the driver's identity, the Agency shall take every practical means within its authority to ensure that the driver is not subject to harassment, intimidation, disciplinary action, discrimination, or financial loss as a result of such disclosure. This will include notification that 49 U.S.C. 31105 includes broad employee protections and that retaliation for filing a coercion complaint may subject the alleged coercer to enforcement action by the Occupational Safety and Health Administration.

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

### **GENERAL**

5. Revise the authority citation for part 390 to read as follows:

**AUTHORITY:** 49 U.S.C. 504, 508, 31132, 31133, 31136, 31144, 31151, 31502; sec. 114, Pub. L. 103-311, 108 Stat. 1673, 1677-1678; sec. 212, 217, 229, Pub. L. 106-159, 113 Stat. 1748, 1766, 1767; sec. 229, Pub. L. 106-159 (as transferred by sec. 4114 and amended by secs. 4130-4132, Pub. L. 109-59, 119 Stat. 1144, 1726, 1743-1744), sec. 4136, Pub. L. 109-59, 119 Stat. 1144, 1745; and 49 CFR 1.81, 1.81a and 1.87.

6. Revise § 390.3(a) to read as follows:

#### **§ 390.3 General applicability.**

(a)(1) The rules in subchapter B of this chapter are applicable to all employers, employees, and commercial motor vehicles that transport property or passengers in interstate commerce.

(2) The rules in 49 CFR 386.12(e) and 390.6 prohibiting the coercion of drivers of commercial motor vehicles operating in interstate commerce:

(i) To violate certain safety regulations are applicable to all motor carriers, shippers, receivers, and transportation intermediaries; and

(ii) To violate certain commercial regulations are applicable to all operators of commercial motor vehicles.

\* \* \* \* \*

7. Amend § 390.5 by adding definitions of “Coerce or Coercion,” “Receiver or consignee,” “Shipper,” and “Transportation intermediary,” in alphabetical order, to read as follows:

**§ 390.5 Definitions.**

\* \* \* \* \*

Coerce or Coercion means either—

(1) A threat by a motor carrier, shipper, receiver, or transportation intermediary, or their respective agents, officers or representatives, to withhold business, employment or work opportunities from, or to take or permit any adverse employment action against, a driver in order to induce the driver to operate a commercial motor vehicle under conditions which the driver stated would require him or her to violate one or more of the regulations, which the driver identified at least generally, that are codified at 49 CFR parts 171-173, 177-180, 380-383, or 390-399, or §§ 385.415 or 385.421, or the actual withholding of business, employment, or work opportunities or the actual taking or permitting of any adverse employment action to punish a driver for having refused to engage in such operation of a commercial motor vehicle; or

(2) A threat by a motor carrier, or its agents, officers or representatives, to withhold business, employment or work opportunities or to take or permit any adverse employment action against a driver in order to induce the driver to operate a commercial motor vehicle under conditions which the driver stated would require a violation of one or more of the regulations, which the driver identified at least generally, that are codified at 49 CFR parts 356, 360, or 365-379, or the actual withholding of business, employment or work opportunities or the actual taking or permitting of any adverse employment action to punish a driver for refusing to engage in such operation of a commercial motor vehicle.

\* \* \* \* \*

Receiver or consignee means a person who takes delivery from a motor carrier or driver of a commercial motor vehicle of property transported in interstate commerce or hazardous materials transported in interstate or intrastate commerce.

\* \* \* \* \*

Shipper means a person who tenders property to a motor carrier or driver of a commercial motor vehicle for transportation in interstate commerce, or who tenders hazardous materials to a motor carrier or driver of a commercial motor vehicle for transportation in interstate or intrastate commerce.

\* \* \* \* \*

Transportation intermediary means a person who arranges the transportation of property or passengers by commercial motor vehicle in interstate commerce, or who arranges the transportation of hazardous materials by commercial motor vehicle in

interstate or intrastate commerce, including but not limited to brokers and freight forwarders.

\* \* \* \* \*

8. Add § 390.6 to read as follows:

**§ 390.6 Coercion prohibited.**

(a) Prohibition. (1) A motor carrier, shipper, receiver, or transportation intermediary, including their respective agents, officers, or representatives, may not coerce a driver of a commercial motor vehicle to operate such vehicle in violation of 49 CFR parts 171-173, 177-180, 380-383 or 390-399, or §§ 385.415 or 385.421;

(2) A motor carrier or its agents, officers, or representatives, may not coerce a driver of a commercial motor vehicle to operate such vehicle in violation of 49 CFR parts 356, 360, or 365-379.

(b) Complaint process. (1) A driver who believes he or she was coerced to violate a regulation described in paragraph (a)(1) or (2) of this section may file a written complaint under § 386.12(e) of this subchapter.

(2) A complaint under paragraph (b)(1) of this section shall describe the action that the driver claims constitutes coercion and identify the regulation the driver was coerced to violate.

(3) A complaint under paragraph (b)(1) of this section may include any supporting evidence that will assist the Division Administrator in determining the merits of the complaint.

Issued under the authority of delegation in 49 CFR 1.87 on: November 23, 2015

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T. F. Scott Darling, III  
Acting Administrator

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