DEPARTMENT OF TRANSPORTATION **[4910-EX-P]**

Federal Motor Carrier Safety Administration

49 CFR Part 395

[Docket No. FMCSA-2004-19608]

RIN 2126-AC30

Hours of Service of Drivers — Restart provisions

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

ACTION: Final Rule.

SUMMARY: FMCSA amends its hours-of-service (HOS) requirements applicable to drivers of property-carrying commercial motor vehicles (CMVs) to remove provisions requiring that a 34-hour restart include two periods between 1 a.m. and 5 a.m. and limiting use of a restart to once every 168 hours — provisions that were promulgated in December 2011. In a series of Appropriations Acts, Congress suspended these provisions, pending completion of a naturalistic study comparing the effects of the restart provisions in effect under the 2011 rule versus provisions in effect prior to the 2011 rule's compliance date. The 2017 naturalistic study found no statistically significant benefits from the restart rule. Pursuant to a 2017 Appropriations Act, the 2011 restart rules are therefore void by operation of law. Although not in effect, the provisions remain in the Code of Federal Regulations (CFR), which could cause confusion for some stakeholders.

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

FOR FURTHER INFORMATION CONTACT: Mr. Richard Clemente, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue, SE, Washington, DC 20590-0001, by telephone at (202) 366-4325, or email at MCPSD@dot.gov.

SUPPLEMENTARY INFORMATION:

This Final Rule is organized as follows:

I. ABBREVIATIONS AND ACRONYMS

APA	Administrative Procedure Act
CFR	Code of Federal Regulations
CMV	Commercial motor vehicle
DOT	Department of Transportation
E.O.	Executive Order

FMCSA	Federal Motor Carrier Safety Administration
FMCSRs	Federal Motor Carrier Safety Regulations
FR	Federal Register
HOS	Hours of service
NEPA	National Environmental Policy Act
OMB	Office of Management and Budget
§	Section
U.S.C.	United States Code

II. LEGAL BASIS FOR THE RULEMAKING

This rulemaking is based on authority derived from the Motor Carrier Act of 1935 (1935 Act) and the Motor Carrier Safety Act of 1984 (1984 Act), as well as a series of appropriations acts that ultimately invalidated certain HOS provisions.

The 1935 Act, as amended, provides that "The Secretary of Transportation may prescribe requirements for— (1) qualifications and maximum hours of service of employees of, and safety of operation and equipment of, a motor carrier; and (2) qualifications and maximum hours of service of employees of, and standards of equipment of, a motor private carrier, when needed to promote safety of operation" (49 U.S.C. 31502(b)(1), (2)). The HOS regulations concern the "maximum hours of service of employees" of both motor carriers and motor private carriers, as authorized by the 1935 Act.

The 1984 Act, as amended, provides broad concurrent authority to regulate drivers, motor carriers, and vehicle equipment. It requires the Secretary of Transportation to "prescribe regulations on commercial motor vehicle safety. The regulations shall prescribe minimum safety standards for commercial motor vehicles." (49 U.S.C. 31136(a)). The 1984 Act also requires 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…; (4) the operation of commercial motor vehicles does not have a deleterious effect on the physical condition of the operators; and (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…" (49 U.S.C. 31136(a)(1)-(5)).

This final rule is a non-discretionary ministerial act to conform certain sections of the Agency's HOS rules governing the restart of a driver's 60- or 70-hour limit to a prior version of those limits restored by operation of law, as discussed below. Thus, there is no practical impact in any area identified under 49 U.S.C. 31136(a).

In 2014, Congress suspended two provisions of the 2011 restart rule (the requirement for 2 off-duty periods from 1:00 to 5:00 a.m. and the limitation of the restart to once a week) and prohibited the use of appropriated funds to enforce them unless and until a naturalistic study required by the statute, and described in detail, found that the 2011 restart rule provided greater net operational, safety, health and fatigue benefits than the pre-2011 restart rule. In the meantime, the pre-2011 restart rule was restored to full effect (Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. 113-235, Div. K, Title I, sec. 133, 128 Stat. 2130, 2711-2713 (Dec. 16, 2014)). The statute required both the Secretary of Transportation (whose authority in this area has been delegated to FMCSA) and the Inspector General (IG) to review and report to Congress the results of the study. Congress then extended the suspension and funding prohibition through fiscal year 2016 (Consolidated Appropriations Act, 2016, Pub. L. 114-113, Div. L, Title I, sec.

133, 129 Stat. 2242, 2850 (Dec. 18, 2015)). This Act also expanded the factors that would need to be evaluated, requiring FMCSA and the IG to determine whether the naturalistic study showed that drivers operating under the 2011 restart rule achieved "statistically significant improvement in all outcomes related to safety, operator fatigue, driver health and longevity, and work schedules, in comparison to commercial motor vehicle drivers who operated under" the pre-2011 restart rule. *Id.*

This provision then was further amended to make clear that, if the study did not demonstrate such statistically significant improvements, "the 34-hour restart rule in operational effect on June 30, 2013 [i.e., the pre-2011 rule] shall be restored to full force and effect on the date that the Secretary submits the final report to the Committees on Appropriations of the House of Representatives and the Senate, and funds appropriated or otherwise made available by this Act or any other Act shall be available to implement, administer, or enforce the rule" (Further Continuing and Security Assistance Appropriations Act, 2017, Pub. L. 114-254, Div. A, sec. 180, 130 Stat. 1005, 1016-1017 (Dec. 10, 2016)).

In January 2017, the final report required by the 2015 Appropriations Act was submitted for review to the IG, as required by statute. After reviewing the IG's findings, FMCSA's Deputy Administrator reported to the Senate and House Appropriations Committees that drivers using the 2011 restart rule experienced safety outcomes not significantly different from those using the pre-2011 restart rule.[1] On March 2, 2017, the IG confirmed this conclusion to Congress. Because the 2011 restart rule generated no

[1] *Commercial Motor Vehicle Driver Restart Study Report to Congress; Pursuant to Section 133 of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235)*, March 2017, See https://www.fmcsa.dot.gov/mission/policy/commercial-motor-vehicle-driver-restart-study-report-congress. A copy has been placed in the docket.

statistically significant improvements in safety, it became void by operation of law and the pre-2011 restart rule was restored to full force and effect. Today's rule adopts the pre-2011 version of 49 CFR 395.3(c), conforming the language of the regulation to the statutory requirement.[2]

The Administrative Procedure Act (APA) specifically provides exceptions to its notice and comment rulemaking procedures when an agency finds there is good cause to dispense with them and incorporates "the finding and a brief statement of reasons therefor in the rules issued." (5 U.S.C. 553(b)(B)). Generally, good cause exists when an agency determines that notice and public comment procedures are impractical, unnecessary, or contrary to the public interest (*id*.). Here, FMCSA finds that it is unnecessary to provide notice and public comment procedures because, as explained above, this final rule is a non-discretionary ministerial act to implement a statutory requirement. Therefore, in accordance with the APA, good cause exists for not providing notice and comment rulemaking procedures on this final rule.

Additionally, the APA allows agencies to make rules effective immediately with good cause (5 U.S.C. 553(d)(3)), instead of requiring publication at least 30 days prior to the effective date. For the reasons given above, FMCSA finds good cause to make this rule effective immediately.

III. BACKGROUND

Among the provisions included as part of the 2011 HOS rule were restrictions on the use of the 34-hour restart provision, limiting its use to once every 168 hours and requiring that a restart include two periods between the hours of 1 a.m. and 5 a.m. These

[2] Because the study failed to establish a statistically significant improvement in the initial factors required by Congress, evaluation of the additional factors added by Congress became moot.

restrictions proved problematic for many drivers and carriers, adversely affecting their operations and generating significant controversy. As noted above, Congress suspended these restrictions, subject to a study of the effectiveness of the new rule. Specifically, Congress required the Secretary to initiate a "naturalistic study of the operational, safety, health and fatigue impacts of the restart provisions"; the law addressed the methodology of the study in detail and made clear that the 2011 HOS restart provisions would have no effect unless the study showed that those provisions had a greater net benefit compared to the pre-2011 HOS restart rule.[3] Subsequent legislation made clear that the study would need to show a statistically significant improvement in multiple factors enumerated in the legislation. The effectiveness study[4] and the March 2017 report to Congress[5] confirmed the finding that no statistically significant benefits accrued from the 2011 HOS restart rule. See discussion under II Legal Basis for this Rulemaking, above.

Thus, the limitation on use of the restart option to once every 168 hours and the requirement that a restart include the two periods from 1 a.m. to 5 a.m. are no longer in effect; however, the fact that they still appear in the Code of Federal Regulations (CFR) causes confusion for stakeholders. Today's rule makes technical amendments to § 395.3, removing the two phrases in paragraph (c)(1) and (2) relating to the 1 a.m. to 5 a.m.

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[3] Shortly after the initial suspension, FMCSA issued a notice of the suspension of enforcement of these restrictions and announced that the restart provisions in place on June 30, 2013 (the day before the applicable compliance date under the 2011 rule), would govern (79 FR 76241 (December 22, 2014)). Today's rule would align the applicable provisions in 49 CFR 395.3 with the provisions in effect at that time, consistent with the governing legislation. After reviewing the IG's findings, FMCSA's Deputy Administrator reported to the Senate and House Appropriations Committees that drivers using the 2011 restart rule did not experience a "greater net benefit" in safety outcomes compared to those using the pre-2011 restart rule.

[4] Dinges, et.al., *Commercial Motor Vehicle (CMV) Driver Restart Study: Final Report*, FMCSA-RRR-15-011, Dec. 2015, See https://www.fmcsa.dot.gov/safety/research-and-analysis/cmv-driver-restart-study-final-report. A copy has been placed in the docket.

[5] See footnote 1, above.

requirement and removing paragraph (d) relating to the 168-hour limitation, consistent with the HOS rules concerning the 34-hour restart option currently in effect. Because the changes in this rule are ministerial, they will have no adverse effect on safety.

IV. INTERNATIONAL IMPACTS

The FMCSRs, and any exceptions to the FMCSRs, apply only within the United States (and, in some cases, United States territories). Motor carriers and drivers are subject to the laws and regulations of the countries in which they operate, unless an international agreement states otherwise. Drivers and carriers should be aware of the regulatory differences among nations.

V. SECTION-BY-SECTION ANALYSIS

Section 395.3 Maximum Driving Time for Property-Carrying Vehicles

This action removes from § 395.3(c) both instances of the phrase "that includes two periods from 1 a.m. to 5 a.m." and restores the rule text of paragraph (c) to the Oct. 1, 2011, text. The change is ministerial and technical only and has no legal effect.

In addition, paragraph (d) is removed completely. It currently provides that "a driver may not take an off-duty period allowed by paragraph (c) of this section to restart the calculation of 60 hours in 7 consecutive days or 70 hours in 8 consecutive days until 168 or more consecutive hours have passed since the beginning of the last such off-duty period. When a driver takes more than one off-duty period of 34 or more consecutive hours within a period of 168 consecutive hours, he or she must indicate in the Remarks section of the record of duty status which such off-duty period is being used to restart the calculation of 60 hours in 7 consecutive days or 70 hours in 8 consecutive days." The change also is ministerial and technical only and has no legal effect.

VI. REGULATORY ANALYSES

A. E.O. 12866 (Regulatory Planning and Review), E.O. 13563 (Improving Regulation and Regulatory Review), and DOT Regulatory Policies and Procedures

FMCSA performed an analysis of the impacts of this final rule and determined it is not a significant regulatory action under section 3(f) of E.O. 12866 (58 FR 51735, October 4, 1993), Regulatory Planning and Review, as supplemented by E.O. 13563 (76 FR 3821, January 21, 2011), Improving Regulation and Regulatory Review. Accordingly, the Office of Management and Budget (OMB) has not reviewed it under these Orders. It is also not significant within the meaning of DOT regulatory policies and procedures (DOT Order 2100.6 dated Dec. 20, 2018). This rule conforms 49 CFR 395.3 to statutory requirements and current practice by removing provisions that are not in effect, thus, not enforced, and does not result in costs or benefits to any regulated entity.

B. E.O. 13771 (Reducing Regulation and Controlling Regulatory Costs)

This rule has been designated as a deregulatory action under Executive Order (E.O.) 13771 by the Office of Information and Regulatory Affairs because it updates obsolete regulatory text.

C. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801, et seq.), the Office of Information and Regulatory Affairs designated this rule as not a "major rule," as defined by 5 U.S.C. 804(2).

D. Regulatory Flexibility Act

Under the Regulatory Flexibility Act of 1980 (5 U.S.C. 601-612), FMCSA is not required to complete a regulatory flexibility analysis because, as discussed earlier in the

Legal Basis for the Rulemaking section, this action is not subject to notice and public comment under section 553(b) of the APA.

E. Assistance for Small Entities

In accordance with section 213(a) of the Small Business Regulatory Enforcement Fairness Act, 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 will affect 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, Richard Clemente, 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 Small Business Administration'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 regarding the rights of small entities to regulatory enforcement fairness and an explicit policy against retaliation for exercising these rights.

F. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local,

or tribal government, in the aggregate, or by the private sector, of $165 million (which is the value equivalent of $100,000,000 in 1995, adjusted for inflation to 2018 levels) or more in any 1 year. Because this rule will not result in such an expenditure, a written statement is not required.

G. Paperwork Reduction Act

This rule does not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520). Nor does this rule modify the existing approved collection of information (OMB Control Number 2126-0001, HOS of Drivers Regulations, approved Jun. 13, 2016, through Jun. 30, 2019).

H. E.O. 13132 (Federalism)

A rule has implications for federalism under section 1(a) of E.O.13132 if it has "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." FMCSA determined that this rule does not have substantial direct costs on or for States, nor does it limit the policymaking discretion of States. Nothing in this rule preempts any State law or regulation. Therefore, this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Impact Statement.

I. E.O. 12988 (Civil Justice Reform)

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.

J. E.O. 13045 (Protection of Children)

E.O. 13045, Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 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 and does not anticipate that this regulatory action could in any respect present an environmental or safety risk that could disproportionately affect children.

K. E.O. 12630 (Taking of Private Property)

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

L. Privacy

Section 522 of title I of division H of the Consolidated Appropriations Act, 2005, enacted December 8, 2004 (Pub. L. 108-447, 118 Stat. 2809, 3268, note following 5 U.S.C. 552a), requires the Agency to conduct a Privacy Impact Assessment of a regulation that will affect the privacy of individuals. The assessment considers impacts of the rule on the privacy of information in an identifiable form and related matters. The FMCSA Privacy Officer has evaluated the risks and effects the rulemaking might have on collecting, storing, and sharing personally identifiable information and has evaluated protections and alternative information handling processes in developing the rule to

mitigate potential privacy risks. FMCSA determined that this rule does not require the collection of individual personally identifiable information.

The DOT Privacy Office has determined that this rulemaking does not create privacy risk.

The E-Government Act of 2002, Pub. L. 107-347, sec. 208, 116 Stat. 2899, 2921 (Dec. 17, 2002), requires Federal agencies to conduct a Privacy Impact Assessment for new or substantially changed technology that collects, maintains, or disseminates information in an identifiable form. No new or substantially changed technology will collect, maintain, or disseminate information because of this rule.

M. E.O. 12372 (Intergovernmental Review)

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

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

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. E.O. 13783 (Promoting Energy Independence and Economic Growth)

E.O. 13783 directs executive departments and agencies to review existing regulations that potentially burden the development or use of domestically produced energy resources, and to appropriately suspend, revise, or rescind those that unduly

burden the development of domestic energy resources. In accordance with E.O. 13783, DOT prepared and submitted a report to the Director of OMB that provides specific recommendations that, to the extent permitted by law, could alleviate or eliminate aspects of agency action that burden domestic energy production. This rule has not been identified by DOT under E.O. 13783 as potentially alleviating unnecessary burdens on domestic energy production.

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

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.

Q. National Technology Transfer and Advancement Act (Technical Standards)

The National Technology Transfer and Advancement Act (note following 15 U.S.C. 272) 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 will 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, FMCSA did not consider the use of voluntary consensus standards.

R. Environment (NEPA)

FMCSA analyzed this rule for the purpose of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and determined this action is categorically excluded from further analysis and documentation in an environmental assessment or environmental impact statement under FMCSA Order 5610.1 (69 FR 9680, Mar. 1, 2004), Appendix 2, paragraph 6.b. This Categorical Exclusion addresses minor corrections such as those found in this rulemaking; therefore, preparation of an environmental assessment or environmental impact statement is not necessary. The Categorical Exclusion determination is available for inspection or copying in docket FMCSA-2004-19608.

S. Fixing America's Surface Transportation Act (FAST Act)

Under 49 U.S.C. 31136(g), FMCSA is required to publish an advance notice of proposed rulemaking, unless the Agency finds good cause that an ANPRM is impracticable, unnecessary, or contrary to the public interest, or conduct a negotiated rulemaking when it engages in certain rulemakings. These requirements pertain to a proposed rulemaking likely to result in a "major rule."[6] Because this rulemaking does not involve issuance of a proposed rule, and today's final rule is not a "major rule," these requirements are not applicable.

List of Subjects for 49 CFR Part 395

Highway safety, Motor carriers, Reporting and recordkeeping requirements.

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[6] In enacting this provision, Congress did not define "major rule." See section 5202 of the FAST Act, Pub. L. No. 114-94, 129 Stat. 1312, 1534-1535 (December 4, 2015). However, Congress used the term in enacting another statute addressing Agency rulemaking, popularly referred to as the Congressional Review Act, which includes a definition of the term "major rule." See 5 U.S.C. 804(2). The Agency relies on this definition in evaluating the application of 49 U.S.C. 31136(g).

In consideration of the foregoing, FMCSA amends 49 CFR part 395 to read as follows.

PART 395—HOURS OF SERVICE OF DRIVERS

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

Authority: 49 U.S.C. 504, 31133, 31136, 31137, 31502; sec. 113, Pub. L. 103-311, 108 Stat. 1673, 1676; sec. 229, Pub. L. 106-159 (as added and transferred by sec. 4115 and amended by secs. 4130-4132, Pub. L. 109-59, 119 Stat. 1144, 1726, 1743, 1744); sec. 4133, Pub. L. 109-59, 119 Stat. 1144, 1744; sec. 108, Pub. L. 110-432, 122 Stat. 4860-4866; sec. 32934, Pub. L. 112-141, 126 Stat. 405, 830; sec. 5206(b), Pub. L. 114-94, 129 Stat. 1312, 1537; and 49 CFR 1.87.

2. In § 395.3, revise paragraph (c) and remove paragraph (d) to read as follows:

§ 395.3 Maximum driving time for property-carrying vehicles.

* * * * *

(c)(1) Any period of 7 consecutive days may end with the beginning of an off-duty period of 34 or more consecutive hours.

(2) Any period of 8 consecutive days may end with the beginning of an off-duty period of 34 or more consecutive hours.

Issued under authority delegated in 49 CFR 1.87.

Dated: September 5, 2019.

Raymond P. Martinez,
Administrator.

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