

amended by adding Channel \*237A and by removing Channel 237A at Dillsboro.

■ 6. Section 73.202(b), the Table of FM Allotments under North Dakota, is amended by adding Channel \*264C and by removing Channel 264C at Berthold.

■ 7. Section 73.202(b), the Table of FM Allotments under New York, is amended by adding Channel \*221A and by removing Channel 221A at Amherst.

■ 8. Section 73.202(b), the Table of FM Allotments under Oklahoma, is amended by adding Channel \*229A and by removing Channel 229A at Cordell; by adding Channel \*286A and by removing Channel 286A at Weatherford; by adding Channel \*283A and by removing Channel 283A at Wynnewood.

■ 9. Section 73.202(b), the Table of FM Allotments under Oregon, is amended by adding Channel \*251C1 and by removing Channel 251C1 at Madras.

Federal Communications Commission.

**John A. Karousos,**

*Assistant Chief, Audio Division, Media Bureau.*

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## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

#### 49 CFR Part 381

[Docket No. FMCSA-98-4145]

RIN 2126-AA41

### Federal Motor Carrier Safety Regulations; Waivers, Exemptions, and Pilot Programs

**AGENCY:** Federal Motor Carrier Safety Administration, DOT.

**ACTION:** Final rule.

**SUMMARY:** The Federal Motor Carrier Safety Administration (FMCSA) adopts as final its interim regulations at 49 CFR part 381, consistent with section 4007 of the Transportation Equity Act for the 21st Century. The final rule establishes procedures applicants must follow to request waivers and apply for exemptions from the Federal Motor Carrier Safety Regulations and Commercial Driver's License requirements, and procedures to propose and manage pilot programs. In addition, it establishes procedures which govern how FMCSA will review, grant, or deny requests for waivers, applications for exemptions, and proposals for pilot programs. It also establishes requirements for publishing notice of exemption applications or

proposals for pilot programs through the **Federal Register** and affording the public an opportunity for comment. As no revisions are necessary, the interim regulations at part 381 are adopted without change.

**DATES:** Effective September 20, 2004.

*Petitions for Reconsideration* must be received by the agency not later than September 20, 2004.

**FOR FURTHER INFORMATION CONTACT:** Larry W. Minor, Chief, Vehicle and Roadside Operations Division (MC-PSV), Federal Motor Carrier Safety Administration, 400 Seventh Street, SW., Washington, DC 20590. Telephone (202) 366-4009.

#### SUPPLEMENTARY INFORMATION:

#### Copies of This Document and Other Related Information

- *Docket:* For access to the public docket, Internet users may access the U.S. DOT Docket Management System (DMS) facility to view or download comments received or background documents, by using the universal resource locator (URL) <http://dms.dot.gov> and typing the last four digits of the docket number of this rulemaking (FMCSA-98-4145); or go to the DMS facility, 400 Seventh Street, SW., (on the Plaza Level), Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday (except Federal holidays).

- You can also get an electronic copy of this document by accessing FMCSA's "Rules and Regulations" Web page at <http://www.fmcsa.dot.gov>; or accessing today's **Federal Register** from the Government Printing Office (GPO) Web page at <http://www.gpoaccess.gov>.

#### Privacy Act Statement

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477-78) or you may visit <http://dms.dot.gov>.

#### Small Entity Assistance

The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) requires each agency to respond to small entity requests for information or advice about compliance with statutes and regulations within its jurisdiction.

FMCSA's emphasis on small business assistance extends to all of its

headquarters and division offices. Therefore, any small business, organization, or governmental jurisdiction that has a question concerning this document may contact an FMCSA Division office in its State, or an FMCSA ServiceCenter for its geographic area. For addresses and phone number, go to <http://www.fmcsa.dot.gov/aboutus/fieldoffs>; call our toll free number at 1-800-832-5660, or send a FAX to (202) 366-8842.

#### Background

#### Discussion of Interim Final Rule

On June 9, 1998, the Transportation Equity Act for the 21st Century (TEA-21) (Pub. L. 105-178, 112 Stat. 107) was enacted. Section 4007 of TEA-21 amended 49 U.S.C. 31315 and 31136(e) concerning authority to grant waivers from the Federal Motor Carrier Safety Regulations (FMCSRs) to a person(s) seeking regulatory relief. Under sections 31315 and 31136(e), FMCSA may grant a waiver or exemption relieving a person from complying in whole or in part with a regulation, if the agency determines it is in the public interest and would likely achieve a level of safety equivalent to, or greater than, the level that would be achieved by complying with the safety regulation. TEA-21 also permits FMCSA to conduct pilot programs to evaluate alternatives relating to its motor carrier, commercial motor vehicle (CMV), and driver safety regulations. The use of exemptions in pilot programs is administered under strict controls, to enable collection and analysis of data and preparation of a report to Congress. TEA-21 also made a clear distinction between "waivers" and "exemptions" and specified requirements for pilot programs.

#### Waivers

TEA-21 authorizes FMCSA to grant short-term waivers for special situations without requesting public comment, and without providing public notice. Waivers require a "public interest" finding in addition to a finding of safety. Individual waivers may only be granted to a person for a specific unique, non-emergency event, for a period up to three months.

#### Exemptions

TEA-21 directs the agency to publish notice of an exemption request in the **Federal Register**, announcing that a request has been filed and justification as to why the exemption is required. We must also afford the public a comment period and an opportunity to inspect the safety analysis and other relevant information. Before granting an exemption, we must publish a notice in

the **Federal Register** and provide the name of the person or class of persons who will receive the exemption, the specific regulations from which person(s) will be exempted and the time period, and all terms and conditions of the exemption. The agency's terms and conditions must ensure that the exemption will likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved by complying with the regulation.

In addition, the agency must monitor the implementation of each exemption to ensure compliance with its terms and conditions.

Alternatively, if FMCSA denies a request for exemption, we must publish a notice in the **Federal Register** identifying the person who was denied the exemption and the reasons for the denial. TEA-21 permits the option of publishing a notice for each denial of an exemption, or periodically publishing notices of all denials within a given period.

The specific time limitation of an exemption is two years from the date of approval, but may be renewed.

The agency is required to immediately revoke an exemption if—

(1) The person fails to comply with the terms and conditions of the exemption;

(2) The exemption has resulted in a lower level of safety than was maintained before the exemption was granted; or

(3) Continuation of the exemption would not be consistent with the goals and objectives of the regulations issued under the authority of 49 U.S.C. chapter 313, or 49 U.S.C. 31136.

#### *Pilot Programs*

TEA-21 authorizes the agency to conduct pilot programs to evaluate alternatives to regulations relating to motor carrier, CMV, and driver safety. These programs may include exemptions from one or more regulations. FMCSA must provide detailed information regarding a pilot program through the publication of a notice in the **Federal Register**, including exemptions being considered, and asking for comments before the effective date of the pilot program. We must ensure that safety measures in the pilot programs are designed to achieve a level of safety that is equivalent to, or greater than, the level of safety that would be achieved through compliance with the safety regulations. Each pilot program is limited to three years from the starting date.

If a motor carrier, CMV, or driver fails to comply with the terms and conditions of the pilot program, FMCSA

must immediately revoke participation by a carrier, CMV, or driver in the program. Likewise, if continuation of a pilot program is inconsistent with the safety goals and objectives of 49 U.S.C. chapter 313, or 49 U.S.C. 31136, we must immediately terminate that pilot program.

At the conclusion of a pilot program, the agency must report its findings, conclusions, and recommendations to Congress, including suggested amendments to laws and regulations that would enhance motor carrier, CMV, and driver safety and improve compliance with the FMCSRs.

#### *Public Meeting*

On August 20, 1998, a public meeting was held at DOT headquarters to discuss various issues related to implementing section 4007 of TEA-21. By **Federal Register** notice, members of the public were notified of the meeting and also invited to submit written comments to the docket (63 FR 40387, July 29, 1998).

#### *Interim Final Rule (IFR)*

On December 8, 1998, the agency published an IFR adding Part 381 to the FMCSRs to implement section 4007 of TEA-21 (63 FR 67600). The IFR explained procedures that a person must follow when requesting a waiver and applying for an exemption to the FMCSRs. The IFR also described steps to be taken by the agency when it processes requests for waivers and applications for exemptions, and considers proposals for pilot programs. The public was afforded a 60-day comment period.

#### *Comments on IFR and Agency Responses*

We received 20 comments on the IFR. The commenters are: Advocates for Highway and Auto Safety (Advocates); American Association of Motor Vehicle Administrators (AAMVA); American Automobile Association (AAA); District of Columbia Metropolitan Police Department (Metropolitan Police); Georgetown University Law Center, Institute for Public Representation (Georgetown); Insurance Institute for Highway Safety (IIHS); International Brotherhood of Teamsters (IBT); Iowa Department of Transportation (Iowa); J. B. Hunt Transport, Inc. (J.B. Hunt); Massachusetts Department of State Police (Massachusetts); Michigan Department of State (Michigan); New Jersey Department of Transportation, Division of Motor Vehicles (New Jersey); New York State Department of Motor Vehicles (New York DMV); New York State Department

of Transportation (New York DOT); Ohio Department of Public Safety (Ohio); Owner-Operator Independent Drivers Association, Inc. (OOIDA); West Virginia Department of Transportation, Division of Motor Vehicles (West Virginia); U.S. Equal Employment Opportunity Commission (EEOC); Vermont Agency of Transportation, Department of Motor Vehicles (Vermont); and, the Wisconsin Department of Transportation (Wisconsin).

The commenters were generally favorable to having regulations in the FMCSRs that concern waivers and exemptions, and pilot programs within FMCSA. However, most commenters had concerns about particular aspects of the IFR. We will discuss the comments by subject matter, followed by FMCSA's response.

#### **Implementation of Section 4007 of TEA-21 by IFR**

Advocates argue the IFR was procedurally inadequate. They disagree with the agency's assertions that it was impracticable to publish a Notice of Proposed Rulemaking (NPRM), review the public comments, and issue a final rule prior to the statutory deadline. In essence, Advocates disagrees with the agency's reliance on the practice and procedure elements of the IFR as justification for its immediate adoption.

*FMCSA Response:* We believe that the agency demonstrated compelling reasons, and exercised an appropriate use of authority under the Administrative Procedure Act (APA), 5 U.S.C. 553(b), in promulgating 49 CFR Part 381. The APA permits an agency to waive the normal notice and comment requirements if the agency finds, for good cause, that it would be impracticable, unnecessary, or contrary to the public interest. Section 4007 of TEA-21 required the agency to implement regulations regarding the procedures for requesting an exemption, not later than 180 days after the date of TEA-21's enactment on June 9, 1998. Therefore, the agency determined it was impracticable to publish a NPRM, review the comments received, and publish a final rule by the statutory deadline (December 9, 1998).

Although an NPRM could have been published within the 180-day period, the agency believed it was unrealistic to assume that the rulemaking could have been completed by the statutory deadline, regardless of the number and nature of the comments. The solicitation of information through the public meeting held on August 20, 1998 was an appropriate alternative to issuing a NPRM, given the statutory deadline and

the administrative nature of the rulemaking. We considered remarks by meeting participants and written comments to the docket. Therefore, considering the statutory deadline, FMCSA did provide the public a 60-day comment period in which to offer comments and suggestions on how the procedural rules should be developed to implement section 4007 of TEA-21.

Consistent with section 4007 of TEA-21, the IFR established requirements for receiving and processing waivers and exemptions, and initiating and managing pilot programs. FMCSA believes the requirements are administrative in nature and only reflect agency practice and procedure, because the IFR did not establish pass-fail criteria such as crash rates, safety ratings, compliance review results, or driving records for persons requesting waivers or applying for exemptions. For these reasons, we believe there was good cause to waive notice and comment through a NPRM.

Furthermore, FMCSA stands by a previous determination that there was good cause under 5 U.S.C. 553(d)(3) to make the IFR immediately effective upon publication. Since the IFR was published prior to the statutory deadline, delaying the effective date would have been inconsistent with implementing the statute by the deadline, or as soon as possible thereafter.

#### Hours of Service Rules

IBT argues that FMCSA does not have statutory authority to grant waivers and exemptions from the hours of service rules under 49 U.S.C. 31502 (Requirements for Qualifications, Hours of Service, Safety, and Equipment Standards). IBT believes that authority to issue waivers and exemptions and initiate pilot programs under 49 U.S.C. Chapter 313 (CMV Operators) or 49 U.S.C. 31136 is limited.

*FMCSA Response:* Although the hours-of-service (HOS) regulations in 49 CFR part 395 were originally promulgated under § 204 of the Motor Carrier Act of 1935 (MCA) (now codified, in relevant part, at 49 U.S.C. 31502), these regulations were reissued by law under the Motor Carrier Safety Act of 1984 (MCSA) (now codified at 49 U.S.C. 31136). The HOS rules are therefore eligible for waivers and exemptions.

Section 206(a) of the MCSA required DOT to issue regulations ensuring, among other things, that “(2) the responsibilities imposed upon operators of CMVs do not impair their ability to operate such vehicles safely; (3) the physical condition of operators of CMVs

is adequate to enable them to operate such vehicles safely; and (4) the operation of CMVs does not have deleterious effects on the physical condition of such operators” (codified, in slightly revised terms, at 49 U.S.C. 31136(A)(2)–(4)). These provisions authorize the agency to adopt HOS regulations to prevent excess on-duty and driving time from degrading drivers’ ability to operate large vehicles safely.

Although DOT was generally required to complete all necessary rulemaking within 18 months after MCSA’s date of enactment, § 206(e) as recodified in 1994, provides that “[i]f the Secretary does not issue regulations on CMV safety under this section, regulations on CMV safety prescribed by the Secretary before October 30, 1984, and in effect on October 30, 1984, shall be deemed in this subchapter to be regulations prescribed by the Secretary under this section” (49 U.S.C. 31136(d)).

When the FHWA, FMCSA’s predecessor agency, prepared to implement § 206 of MCSA, it decided that significant changes to the HOS rules were not then required. FHWA published a final rule on May 19, 1988 (53 FR 18042) making only minor revisions to 49 CFR part 395. Because that rule was issued considerably after the 18-month deadline in section 206(e), the existing HOS rules, as amended by the May 19 rule, were and are deemed—by law pursuant to 49 U.S.C. 31136(d)—to be issued under 49 U.S.C. 31136. Recognizing this fact, the May 19 rule amended the authority citation for Part 395 to refer to the MCSA (then codified as 49 U.S.C. App. 2505,” now as 49 U.S.C. 31136) as well as the MCA (then “49 U.S.C.3102,” now 49 U.S.C. 31502).

Therefore, IBT’s argument is incorrect. Because 49 U.S.C. 31315 allows waivers or exemptions of rules issued under 49 U.S.C. 31136 (or 49 U.S.C. chapter 313) and the HOS rules are issued under section 31136, FMCSA has statutory authority to grant waivers and exemptions from the HOS rules.

#### Regulations Ineligible for Waiver and Exemption

Many commenters identified regulations for which waivers and exemptions should not be considered. For example, Advocates requests that Parts 383 (CDL Standards), 391 (Qualifications of Drivers), 392 (Driving of CMVs), 393(Parts and Accessories Necessary For Safe Operation), 395 (Hours of Service of Drivers), 396 (Inspection, Repair, And Maintenance), and 399 (Step, Handhold, and Deck Requirements for CMVs) be removed from the list. Additionally, Advocates

believes that § 390.19 (Motor carrier identification report) and § 390.21 (Marking of CMVs) should be removed as well.

OOIDA, AAMVA, Illinois, Michigan, and Ohio oppose exemptions, waivers, and pilot programs concerning Part 382 (Controlled Substances and Alcohol Use and Testing). Alternatively, OOIDA believes the agency should exclude only those sections of part 382 that provide privacy and protection for drivers required to participate in controlled substances and alcohol testing.

Illinois and Michigan oppose waivers, exemptions, or pilot programs concerning part 391 (Qualifications of Drivers). IIHS opposes inclusion of the hours-of-service rules, and West Virginia is opposed to precluding the requirements of § 390.21.

#### FMCSA Response

FMCSA recognizes the commenters’ safety concerns. However, there is no apparent safety-related reason to change the list of regulations for which waivers and exemptions may be granted. The list of regulations in §§ 381.200, 381.300, and 381.400 is an indication that the agency will accept requests for waivers and exemptions and should not be construed as an indicator that the agency will grant waivers or exemptions which fail to satisfy the statutory requirements of TEA-21. FMCSA will review each request and waiver to ensure, to the greatest extent practicable, that they satisfy the statutory requirements. FMCSA believes it would be inappropriate to exclude safety regulations issued pursuant to 49 U.S.C. Chapter 313 and 31136 from consideration under 49 CFR Part 381. FMCSA believes doing so would suggest the agency had predetermined that it is unlikely a person could develop an alternative means of achieving the safety outcomes provided by full compliance with specific regulations. Innovation is possible, and the regulations concerning waivers, exemptions, and pilot programs should not be so limited as to preclude consideration of alternative approaches to achieving or even improving motor carrier safety.

Section 4007 of TEA-21 requires that the terms and conditions for all waivers and exemptions achieve a level of safety equivalent to or greater than what would be achieved by complying with the safety regulations. To satisfy this statutory test, persons requesting waivers or applying for exemptions must present a credible alternative to the regulation and explain how that alternative would achieve an equivalent or greater level of safety. If the request or exemption were effectively less

stringent than the applicable regulation, it would be difficult to demonstrate compliance with the statutory test. If there is insufficient information or data for FMCSA to conclude that the waiver or exemption would satisfy the statutory test, the agency must not grant the waiver or exemption.

We continue to exclude the accident register requirements (§ 390.15) from the list of regulations eligible for a waiver or exemption. The agency believes it has a responsibility to monitor the crash involvement of entities operating under the terms of a waiver.

We continue to retain the Motor Carrier Identification Report (Form MCS-150) requirement under § 390.19 as one of the regulations that could be waived. The agency believes using that report to gather information on entities that have not previously operated CMVs in interstate commerce, and do not intend to do so after the waiver period expires, is of no apparent benefit.

Information from Form MCS-150 will be used to create a file in the Motor Carrier Management Information System (MCMIS), a database containing safety information on interstate motor carrier compliance reviews and roadside inspection results, and CMV crashes. Entities benefiting from this action could be certain intrastate motor carriers that are not subject to State requirements to complete the MCS-150 form, and businesses or groups that rarely (except for unique, non-emergency events) operate CMVs.

Several States now require their intrastate motor carriers to complete Form MCS-150 and to obtain a USDOT identification number. These motor carriers are listed in MCMIS as intrastate-only carriers. The addition of these motor carriers to MCMIS enables States and the FMCSA to work together in determining the number of active motor carriers operating in the U.S., and to monitor their safety performance. The intrastate motor carriers subject to State requirements for completing Form MCS-150 should already have completed a Form MCS-150 prior to applying for a waiver to conduct a short-term operation in interstate commerce. At the end of the waiver period, the intrastate motor carriers would continue to be subject to State requirements. Further, since the agency will be able to identify these entities from information submitted as part of the waiver application, the submission of Form MCS-150 would be redundant.

As for exemptions, FMCSA requires intrastate motor carriers and non-motor carrier entities to complete Form MCS-150 and, under § 390.21, to mark all CMVs. We believe an entity that chooses

to operate a CMV in interstate commerce for more than 3 months should be treated as an interstate motor carrier for purposes of MCMIS. Since exemptions provide regulatory relief for up to two years, and may be renewed, it is important that all CMVs operating in interstate commerce under the terms of the exemption be marked.

For exemptions granted as part of a pilot program, FMCSA uses the same list of regulations provided in § 381.300. What is an exemption? We use the same list because there is no apparent reason that participants in a pilot program for up to three years should be treated differently from interstate motor carriers required to complete Form MCS-150 and to mark their CMVs.

#### *Define the Term "Equivalent"*

West Virginia believes the agency needs to define "equivalent." As West Virginia stated:

When we discuss safety issues on the nation's highways, government, industry, and any associated party should have an established baseline for which the discussion is to be based upon in order to make fair comparisons. The establishing of any such baseline or definition of equivalent terms can be developed in the rulemaking process. This baseline or definition of equivalent should be one that can be uniformly applied in most if not all safety regulations.

EEOC believes the legislative history suggests the term "equivalent" is intended to "describe a reasonable expectation that safety not be compromised." EEOC urged the agency to adopt a regulatory definition that reflects congressional intent.

Advocates disagree with the agency's use of language in the IFR preamble to describe the "equivalent or greater safety" standard. Advocates argue the agency is precluded from granting waivers and exemptions, and conducting pilot programs on the basis of an unspecified, free-floating or ad hoc characterization of equivalent or greater safety.

*FMCSA Response:* We do not believe it is necessary to include a definition of "equivalent" in order to effectively implement section 4007 of TEA-21. Moreover, we agree with EEOC that the legislative history suggests the term "equivalent" is intended to describe a reasonable expectation that safety not be compromised. However, we do not believe that persons who intend to request waivers, apply for exemptions, or propose pilot programs need a regulatory definition to understand that the agency will not grant any of the above if there is reason to believe that safety will be compromised. A definition of "equivalent" would not

serve as a substitute for an analysis of the potential safety impacts of a given request for a waiver, application for an exemption, or proposal for a pilot program. Furthermore, FMCSA believes that adopting a definition for "equivalent" would not increase the likelihood there will be agreement among the agency, persons seeking waivers, exemptions, or pilot programs, or interested parties as to whether the terms and conditions of a request would compromise safety. The agency is solely responsible for making the final determination based on all available information.

The interim regulations have been in effect for five years. During that time, the agency has effectively applied the standard for a reasonable expectation that waivers, exemptions, and pilot programs would not compromise safety. FMCSA believes a regulatory definition of the term "equivalent" would not provide a quantitative standard which could be used to assess all waivers, exemptions, or pilot programs. FMCSA continues to adhere to congressional intent that there is a reasonable expectation that safety would not be compromised.

#### **Role of States**

Most of the State agencies and AAMVA expressed concern about the role of the States in the waiver and exemption process. As AAMVA stated:

Of most concern to the motor vehicle and law enforcement community is receiving ample notification of a proposed waiver or exemption prior to approval. It is critical to have advance notice, preferably not less than 90 days, to allow affected agencies at the State level to share information with their traffic stop or inspection officials. Michigan is concerned that the Federal rule preempts any State laws which may conflict with the waiver or exemption granted by FMCSA. Michigan believes Federal rules undercut State authority and ability to enforce its own requirements, which may be stricter than the Federal mandates. Michigan also believes it is unrealistic to expect the States will be able to "disengage" their existing regulations whenever an exception or waiver is granted.

Michigan believes the FMCSA system of notification, as described in the IFR preamble, would not ensure that all interested parties, particularly licensing, registering, and enforcing States, are kept informed and have opportunity to comment on the applicant's safety performance and specific exemption being sought. Michigan argues States need to know details about when, why, and how waivers, exemptions, and pilot programs will be implemented.

West Virginia emphasized the importance of communication between FMCSA and the States. West Virginia

believes open and timely communication provides an opportunity for "fair and adequate consideration of all partners' ideas and concepts."

New Jersey, Vermont, and New York DOT and DMV also expressed concern that States have an opportunity to learn of any proposal prior to FMCSA approval, so that they have an opportunity to understand, comment, and react appropriately.

**FMCSA Response:** FMCSA is committed to its safety partnership with State agencies. State agencies play a vital role ensuring the safe operation of CMVs in the U.S. However, the agency does not plan to provide States with pre-notification of its decisions on waiver requests, exemption applications, pilot program proposals, nor engage in discussions or deliberations with State agencies about these matters, in a forum that is not open to public participation. Such actions would be inconsistent with the principles of the Administrative Procedure Act (5 U.S.C. 551 *et. seq.*). Discussions or deliberations between agency personnel and third parties that are intended to influence agency decisions, should be transparent. Limiting opportunity for comment to certain parties, while intentionally excluding all other interested parties, would be inappropriate.

FMCSA continues to work with State agencies to ensure adequate notification of its decisions when the information is first made available to the general public. We continue to seek public comment on applications for exemptions and proposals for pilot programs through notice in the **Federal Register**. The notice-and-comment procedure is in the public interest, so that all interested parties have an equal opportunity to comment.

FMCSA does not expect State agencies to bear responsibility for implementing section 4007 of TEA-21. We welcome State participation, to the extent States have resources to assist FMCSA in monitoring the safety performance of persons who are granted waivers or exemptions, or are allowed to participate in pilot programs.

As for FMCSA decisions to grant waivers and exemptions, or initiate pilot programs, the agency neither requires nor requests States to adopt compatible regulations, or to abandon more stringent safety regulations. First, the scope of waivers, exemptions and pilot programs is usually very limited in terms of the specific requirements for which alternative approaches to achieving safety are being considered. Second, the population of motor carriers and drivers is limited, usually through

eligibility criteria for exemptions and pilot programs. In the case of waivers, the statutory requirement that waivers be issued only for non-emergency and unique events, and be limited in scope and circumstances, suggests that there will not be a large population of drivers or carriers covered by waivers at any given time. Given the statutory constraints, it is unlikely the agency would grant a waiver or exemption, or initiate a pilot program so broad in scope that States would be forced to amend or revise laws or regulations to accommodate those carriers and drivers covered by the waiver, exemption, or pilot program.

As 49 U.S.C. 31315(d) provides, no State shall enforce any law or regulation that conflicts with or is inconsistent with a waiver, exemption, or pilot program while the waiver, exemption or pilot program is in effect. Therefore, preemption of State rules applies only with respect to persons operating under a waiver or exemption, or participating in a pilot program. This means all motor carriers and drivers not operating under a waiver or exemption, or participating in a pilot program, must continue complying with all applicable State laws and regulations. Amending or revising State laws or regulations would be impractical, since such amendment or revision would be limited to drivers or carriers operating under waiver, exemption, or pilot programs only. To amend or revise State motor carrier safety laws or regulations that result in less stringent requirements than the applicable FMCSRs would be inconsistent with the Motor Carrier Safety Assistance Program (MCSAP) regulations, and, in some cases, would subject such rules to preemption pursuant to 49 U.S.C. 31141(c)(3). The agency's MCSAP regulations (49 CFR Part 350) concern eligibility for Federal funding to support State motor carrier safety programs.

#### **Documentation of Waiver or Exemption Onboard CMVs**

Iowa believes the regulations should explicitly require that persons granted a waiver must carry documentation issued by the FMCSA and provide the documentation to State officials during any traffic stop or roadside inspection. Vermont requests that paperwork concerning the waiver or exemption be with the driver or carrier and available for review during roadside inspections. OOIDA believes it is important to adopt procedures and generate documentation for each waiver, exemption, or pilot program granted, so that carriers and drivers can be expeditiously identified to Federal and State enforcement

officials as participants in a Federal program that exempts them from Federal and conflicting State motor carrier safety regulations.

**FMCSA Response:** FMCSA agrees with the commenters. We usually require persons operating under the terms and conditions of waivers, exemptions, or pilot programs to carry copies of FMCSA-issued documents to identify them as such. The only exceptions to date have been exemptions granted to motor carriers operating certain vehicles manufactured by the Ford Motor Company (Ford) and General Motors Corporation (GM), concerning fuel tank fill rates and certification labels on fuel tanks.<sup>1</sup> In those cases, the agency published information about the make, model and vehicle identification numbers (VINs) of the vehicles covered by the exemption. Since the vehicle manufacturers applied for the exemption on behalf of the customers operating the vehicles, developing a list of all vehicles and motor carriers operating these vehicles was unnecessary, given the nature of the exemption. FMCSA concluded that use of the make, model, and range of VINs was sufficient for enforcement personnel to determine whether a given vehicle was covered by the exemption.

#### **Driver Physical Qualifications**

Several commenters discussed the use of exemptions and pilot programs for driver physical qualifications. As EEOC stated:

It is encouraging that the waiver and exemption provisions of section 4007 and [FMCSA's] interim implementing regulations require individualized assessment of the safety-related qualifications of persons who otherwise would be denied employment opportunities pursuant to blanket categorical exclusions under the FMCSRs. Individualized assessment of qualifications is one of the hallmarks of the Americans with Disabilities Act [ADA]. Indeed, the ADA's purposes include ensuring that qualified individuals with disabilities are not denied equal employment opportunity by virtue of exclusionary qualification standards.

J.B. Hunt recommends that pilot programs should be initiated to allow motor carriers to investigate whether more stringent medical standards could improve public safety.

Georgetown believes several of the physical standards, in particular hearing and vision, are discriminatory and violate the government's obligations

<sup>1</sup> The exemption concerning fuel tank fill rates and certification labels for vehicles manufactured by Ford was published on December 20, 1999 (64 FR 71184). The exemption concerning fuel tank fill rates and certification labels on vehicles manufactured by GM was published on April 26, 2000 (65 FR 24531).

under section 504 of the Rehabilitation Act. Georgetown recommends the agency should continue to reexamine those standards and revise them based on data concerning the safety of drivers who are monocular or whose hearing does not meet existing standards.

Additionally, Georgetown believes that the waivers, exemptions, and pilot program regulations do not provide adequate guidance for a driver with a disability, who seeks to establish he or she meets the requirements for an exemption. Georgetown argues that an individual driver seeking an exemption from part 391 will have no idea what to provide the agency. Georgetown also argues that the procedures in Part 381 are inappropriate, since detailed procedures for persons seeking exemptions from the vision standard has been established. Georgetown believes the agency should fully disclose the vision exemption process.

*FMCSA Response:* We believe part 381 provides adequate guidance for motor carriers and drivers who are interested in pursuing a waiver, exemption, or pilot program concerning physical qualifications for drivers. Since the physical qualifications rules concern medical issues that require an individualized assessment by qualified medical professionals, developing a one-size-fits-all set of procedures for the range of medical conditions which a waiver, exemption, or pilot program may be requested would be impractical.

As to whether generic guidance for specific categories of physical qualifications issues can be developed, the agency has initiated programs to accommodate persons with conditions covered by those categories. For example, the agency has a vision exemption program for drivers with an eye that fails to meet current vision standards. Interested persons need only contact the agency for detailed guidance on how to apply for an exemption. On September 3, 2003 (68 FR 52441), FMCSA published a notice of final determination to begin an exemption program for insulin dependant diabetic drivers. The notice provides the eligibility criteria for drivers who intend to apply for a diabetes exemption. The notice also provides instructions on how to obtain additional information needed to apply for the exemption. The physical qualifications process is intended to ensure that each driver is given individual attention and guidance based on his or her medical circumstances. FMCSA believes this is the most effective manner to assist drivers, and to ensure that each exemption granted achieves a level of safety equivalent to, or greater than, the

level of safety that would be achieved through full compliance with the physical qualifications rules under part 391.

J.B. Hunt commented on employers having the opportunity to explore more stringent physical qualifications as a means of improving safety. The FMCSRs do not prohibit motor carriers from establishing policies that are more stringent than the safety regulations (49 CFR 390.3(d)). Therefore, employers wanting to establish more stringent medical examination procedures and pass-fail criteria may do so without requesting a waiver, applying for an exemption, or proposing a pilot program.

#### Public Notification of Waivers

According to Advocates, the agency's procedures for administering waivers are insufficient to ensure both public awareness and safety. Advocates argues the agency has a responsibility to notify the public when a waiver from specific parts of the FMCSRs has been awarded, identify the carriers or drivers awarded the waiver, the waiver period, the public interest finding by the agency, and the finding that the waiver is likely to achieve a level of safety that is equivalent to, or greater than, the level of safety that would be obtained in the absence of the waiver.

IBT noted the public should be informed of the agency's disposition of waiver requests promptly after a decision is made.

AAA also believes it is important for the agency to communicate with the public about waivers, including publishing a notice in the **Federal Register** for waivers that have been granted or denied.

*FMCSA Response:* FMCSA understands commenters' intent to make information about waivers readily available to the public. Nevertheless, we believe there would not be much public benefit associated with the effort. FMCSA receives a small number of requests for waivers each year, and only a few of those have been granted. There is no discernible public benefit to using limited agency resources to manage a public docket on requests for waivers which, if granted, are limited to no more than three months in duration. Depending on the specific event, waivers may cover a period as short as a few hours. Also, the scope of each waiver is likely to be unique and cover a small number of drivers or motor carriers.

Given the statutory constraints for granting waivers, the specific nature of waivers, and the relatively small

number granted, FMCSA does not plan to publish decisions on waivers.

#### Compliance Monitoring of Persons Granted Waivers or Exemptions

Advocates disagrees with the agency's decision to avoid additional roadside inspections and compliance reviews of carriers or commercial drivers receiving waivers or exemptions. As Advocates stated:

Simply awarding exemptions and establishing initial conditions under which they shall operate is insufficient oversight and monitoring to ensure that the legislative goal of providing adequate safety countermeasures has been met. [FMCSA] cannot award exemptions and simply wait for their statutory time limit to expire. The agency has an affirmative obligation to oversee the operation of exemptions. A presumption that drivers and carriers will receive no more oversight through compliance reviews or roadside inspections to ensure that safety has not been compromised, despite approved, selective non-compliance with specific parts of the FMCSRs, is neither a responsible approach to the heavy safety duties generally imposed upon the agency by the statute, nor is it adequate conformity to the legislative direction provided by the statute.

*FMCSA Response:* FMCSA agrees with Advocates that granting exemptions with terms and conditions would not, by itself, satisfy the agency's obligations to monitor the safety performance of persons granted exemptions or allowed to participate in pilot programs. However, Advocates characterization of the agency's oversight of waivers, exemptions, and pilot programs does not accurately portray how the agency handles its responsibilities. FMCSA provides an appropriate level of safety oversight for all exemptions granted, which includes the Home Heating Oil Pilot Program (July 13, 2001; 66 FR 36823),<sup>2</sup> the only pilot program initiated since implementation of section 4007 of TEA-21. Oversight consists of reviewing roadside inspection and crash data, driving records for participating drivers, and all information that exemption grantees and pilot program participants are required to submit to the agency during the period the exemption or pilot program is in effect. FMCSA may

<sup>2</sup> FMCSA announced the initiation of a pilot program to grant an exemption from the weekly hours-of-service restrictions for drivers of CMVs making home heating oil deliveries that occur within a 100 air-mile radius of a central terminal or distribution point, during winter months. During the pilot program, which ended recently, participating motor carriers were allowed to "restart" calculations for the 60-or 70-hour rule, whichever applies, after the driver has an off-duty period encompassing two consecutive nights off-duty that include the period of midnight to 6 a.m.

exercise its statutory authority under 49 U.S.C. 506 to begin an investigation any time there is reason to believe there are violations of the safety regulations, or of the terms and conditions of a waiver, exemption, or pilot program.

Furthermore, 49 U.S.C. 31315(b)(2) requires FMCSA to immediately revoke an exemption if: (1) The person fails to comply with the terms and conditions of the exemption, (2) the exemption has resulted in a lower level of safety than was maintained before the exemption was granted, or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. Chapter 313 or 49 U.S.C. 31136. Section 31315(c)(3) provides similar authority for revocation of participation of a motor carrier, commercial motor vehicle, or driver for failure to comply with the terms and conditions of the pilot program, or if continued participation would not be consistent with the goals and objectives of 49 U.S.C. Chapter 313 or 49 U.S.C. 31136.

FMCSA has granted 910 vision exemptions since 1998. As a result of the agency's on-going monitoring activities, 19 exemptions were revoked for bad driving (the drivers contributed to accidents, had their licenses suspended or revoked, or received an excessive number of moving violations), and 11 were canceled for failure to submit required information. In addition, 20 drivers were denied renewals after the first two-year period because their driving records did not meet the safety level required by the statute (equivalent to, or better than, the level of safety that would be achieved by complying with the regulations).

FMCSA believes it has the tools to effectively monitor persons operating under the terms and conditions of a waiver or exemption, or participating in a pilot program, and to take appropriate action for failure to comply with the requirements of the program. However, FMCSA does not believe motor carriers, CMVs, or drivers should be subjected to additional inspections or audits solely because a waiver or exemption has been granted, or participation in a pilot program has been approved. We believe the incentives for implementing innovative approaches to achieving safety performance goals would be overshadowed if the flexibility provided by the waiver, exemption or pilot program were coupled with more rigorous or frequent enforcement activities. We believe using Federal and State resources to conduct more frequent inspections and audits could adversely impact enforcement programs intended to identify and remove from service unsafe CMVs and drivers, as

well as the resources used to target motor carriers that have demonstrated poor safety performance. Enforcement resources should be targeted at those motor carriers, drivers and vehicles that are most likely to pose a safety risk, not at potentially discouraging private-sector efforts to explore innovative approaches to achieving safety performance goals.

#### Adoption of Interim Regulations

FMCSA has not made any changes to its interim regulations based on the comments. On October 1, 2001, FMCSA made technical amendments to the interim regulations in Part 381 to remove references to the Federal Highway Administration, the Office of Motor Carrier and Highway Safety, and the Office of Motor Carrier Research and Standards (66 FR 4986, 49872). Part 381 remains divided into six subparts:

*Subpart A—General* describes the purpose and applicability of part 381, and defines certain terms used throughout the part;

*Subpart B—Procedures for Requesting Waivers* provides a plain-language description of waivers, the procedures for requesting a waiver and the process FMCSA will use to review waiver requests;

*Subpart C—Procedures for Applying for Exemptions* provides a plain-language description of exemptions, the procedures for applying for an exemption, the process FMCSA will use to review exemption applications, and the conditions under which FMCSA will revoke an exemption;

*Subpart D—Initiation of Pilot Programs* explains how pilot programs operate, and how a pilot program can be initiated (which includes a detailed list of information FMCSA requests from individuals who would like to recommend that the agency start a pilot program);

*Subpart E—Administration of Pilot Programs* codifies in the FMCSRs a plain-language version of the statutory requirements concerning FMCSA's administration of pilot programs so that all interested parties will have a convenient reference; and

*Subpart F—Preemption of State Rules* codifies in the FMCSRs a plain-language version of the Federal preemption of any State law and regulation that conflicts with or is inconsistent with respect to a person operating under a waiver, exemption, or pilot program.

#### Regulations for Waiver and Exemption

In accordance with section 4007 of TEA-21, FMCSA is authorized to grant waivers and exemptions from any FMCSRs under statutory authority of 49

U.S.C. 31136 and chapter 313. However, section 4007 of TEA-21 does not authorize FMCSA to grant waivers and exemptions from regulations issued under other statutes. For example, the financial responsibility regulations at 49 CFR part 387, which were issued under 49 U.S.C. 31138 and 31139, pertain to transportation of passengers and property, respectively. FMCSA also does not have authority to grant waivers and exemptions from other requirements such as surety bonds and policies of insurance for motor carriers and property brokers, and surety bonds and policies of insurance for freight forwarders. These requirements, which were transferred from the former ICC, are now codified at 49 CFR part 387. These requirements are based on statutory authority at 49 U.S.C. 13101, 13301, 13906, and 14701.

In another example, FMCSA does not have authority to grant a waiver or exemption from 49 CFR 396.25, Qualifications of Brake Inspectors. This regulation establishes minimum qualifications for motor carrier employees responsible for the inspection, repair, and maintenance of CMV brake systems, and was required by the Truck and Bus Safety and Regulatory Reform Act of 1988 (49 U.S.C. 31137(b)).

To assist the motor carrier industry and the general public in identifying the requirements for which waivers and exemptions may be granted, FMCSA is retaining the list in §§ 381.200, 381.300, and 381.400 which define a waiver, exemption, and pilot program, respectively. The list of regulations for which a waiver or exemption could be granted includes:

- (1) Part 382 Controlled Substances and Alcohol Use and Testing;
- (2) Part 383 Commercial Driver's License Standards; Requirements and Penalties;
- (3) § 390.19 Motor Carrier Identification Report;
- (4) § 390.21 Marking of Commercial Motor Vehicles;
- (5) Part 391 Qualifications of Drivers;
- (6) Part 392 Driving of Commercial Motor Vehicles;
- (7) Part 393 Parts and Accessories Necessary for Safe Operation;
- (8) Part 395 Hours of Service of Drivers;
- (9) Part 396 Inspection, Repair, and Maintenance (except § 396.25); and
- (10) Part 399 Step, Handhold, and Deck Requirements.

FMCSA excluded the accident register requirements, 49 CFR 390.15, from the list of regulations eligible for a waiver or exemption because the agency believes it has a responsibility to

monitor the crash involvement of entities operating under the terms of a waiver.

FMCSA retains the motor carrier identification report (Form MCS-150) requirement at 49 CFR 390.19 as one of the rules that may be waived. We continue to believe there is no apparent benefit to gathering information on entities that have not previously operated CMVs in interstate commerce and do not intend to do so after the term of the waiver expires.

For exemptions, FMCSA requires intrastate motor carriers and non-motor carrier entities to complete Form MCS-150 (§ 390.19), and to mark all CMVs (§ 390.21) operating in interstate commerce under the terms of the exemption because exemptions provide regulatory relief for up to two years, and may be renewed.

#### *Summary of Procedures and Requirements*

Requests for a waiver or applications for exemption should be addressed or hand-carried to the Administrator of the FMCSA. Such requests or applications need not be in any particular form, but should be typed or clearly hand-printed and include basic information, such as the identity of the person to be covered by the waiver or exemption, the name of the motor carrier or other entity responsible for using or operating CMVs during the waiver or exemption time period, and the motor carrier or other entity's principal place of business. The request or application should include a statement of: The event or CMV operation for which the waiver or exemption will be used; justification as to why the waiver or exemption is required; the regulation from which the applicant is requesting relief; estimates of the total number of drivers and CMVs that will be operated under the terms and conditions of the waiver or exemption; and an explanation of how the recipient of the waiver or exemption would ensure that a level of safety would be achieved that is equivalent to, or greater than, the level of safety that would be obtained by complying with the regulation. As for exemption applications, the written request must also include an assessment of the safety impacts the exemption may have, such as the impacts that would be experienced if the exemption is not granted, and include a copy of all research reports, technical papers, and other publications and documents referenced in the application.

The complete list of information to be included in the requests for waivers and applications for exemptions is provided in § 381.210, How do I request a

waiver?, and § 381.310, How do I apply for an exemption?. These requirements are consistent with the statutory language in TEA-21.

#### *Review of Waiver Requests*

The Office of Policy and Program Development is responsible for reviewing waiver requests and making recommendations to the Administrator. A copy of the decision signed by the Administrator will be sent to the applicant. It will include the terms and conditions of the waiver, or the reason(s) for denial of the waiver.

#### *Review of Exemption Applications*

The review process for exemption applications differs because of the requirements in section 4007 of TEA-21. The Office of Policy and Program Development reviews exemption applications. After FMCSA reviews an application for completeness, we will publish a notice in the **Federal Register** requesting public comments regarding the application. After the comments are reviewed, the Office of Policy and Program Development will make a recommendation to the Administrator. Thereafter, FMCSA will publish a final notice of determination in the **Federal Register**.

#### *Initiation and Management of Pilot Programs*

Although TEA-21 does not require FMCSA to develop regulations concerning pilot programs, we are retaining, in subparts D and E of part 381, information describing how to propose a pilot program, and statutory requirements for managing a pilot program. FMCSA believes that including information about pilot programs in the FMCSRs provides a more convenient reference to the motor carrier industry and the general public than does Title 49 of the United States Code. The regulations indicate that FMCSA has authority to initiate pilot programs after publishing notice and providing opportunity for public comment. They also indicate the types of information that interested parties should submit to the agency, if they would like to recommend a pilot program. The information presented in subpart E of part 381 is intended to be a plain-language version of the statutory requirements for the administration of pilot programs.

#### *Preemption of State Rules*

Section 4007(d) of TEA-21 indicates that during the time period that a waiver, exemption, or pilot program is in effect, no State shall enforce a law or regulation that conflicts with or is

inconsistent with the waiver, exemption, or pilot program. FMCSA is retaining the preemption language in part 381, and will also include the language in the waiver documents and **Federal Register** notices concerning exemptions and pilot programs. The agency continues to believe this approach will ensure that State officials are notified about the Federal preemption authority. Including such language in the waiver, and in the exemption and pilot program notices, will enable motor carriers to present inspectors with one document which informs them of the terms and conditions of the waiver, exemption, or pilot program. This document will also advise the inspectors that State laws and regulations that conflict with the waiver, exemption or pilot program are automatically preempted, and the duration of the preemption.

#### **Rulemaking Analyses and Notices**

##### *Executive Order 12866 (Regulatory Planning and Review) and U.S. DOT Regulatory Policies and Procedures*

This action is not a significant regulatory action within the meaning of Executive Order 12866, or significant within the meaning of the U.S. Department of Transportation's regulatory policies and procedures. This action adopts as final, interim regulations contained in 49 CFR part 381, concerning rules and procedures for handling requests for waivers and applications for exemptions, and the initiation and administration of pilot programs. These rules will help promote increased cooperation between the private sector and the government by providing a mechanism for exploring alternatives to certain safety regulations, while ensuring a level of safety equivalent to, or greater than, the level obtained through compliance with the regulations. We believe adopting the interim regulations at part 381 will result in incremental, although not substantial, economic benefits in cases where the alternatives provide a more cost-effective approach to ensuring motor carrier safety. FMCSA believes the economic impact of this final rule to be minimal. Comments were requested on this subject in the IFR, but none were received. Therefore, a full regulatory evaluation is not required.

##### *Regulatory Flexibility Act*

In compliance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), we evaluated the effects of this final rule on small entities



and determined that it does not have a significant economic impact on a substantial number of small entities. As discussed in the section above, this rule adopts interim regulations concerning requests for waivers, applications for exemptions from the FMCSRs, and the initiation and administration of pilot programs. The provisions concerning waivers and exemptions will be especially beneficial to small entities, since these entities may be more in need of regulatory relief than larger companies. The regulations were written in question-and-answer format using plain language to help ensure that small entities understand how to request a waiver and apply for an exemption, and how the agency will handle such requests and applications. The provisions concerning pilot programs are likely to be less beneficial to small entities. Pilot programs would generally require a large number of participating motor carriers and drivers willing to operate under identical terms and conditions. By contrast, waivers and exemptions may be carrier- or driver-specific and therefore better suited to the needs of small entities. As with the IFR, this final rule does not require small entities to take any actions unless they request a waiver, apply for an exemption, or participate in a pilot program. The information that would be required for a waiver or an exemption has been kept to a minimum. For this reason, FMCSA certifies this final action will not have a significant economic impact on a substantial number of small entities.

#### *Paperwork Reduction Act*

The Paperwork Reduction Act of 1995 [44 U.S.C. 3501 *et seq.*] does not apply, because this final rule does not contain information collection requirements subject to Office of Management and Budget (OMB) approval. However, waivers, exemptions, and pilot programs include certain information collection requirements as part of the terms and conditions for the regulatory relief granted. In addition, the agency is required by section 4007 of TEA-21 to monitor the implementation of exemptions to ensure compliance with the terms and conditions, and to ensure sufficient recordkeeping by participants in pilot programs to facilitate the collection and analysis of data. Therefore, FMCSA will consider the information collection requirements for any special recordkeeping requirements associated with the waiver, exemption, or pilot program, and, if necessary, request approval from OMB.

#### *National Environmental Policy Act (NEPA)*

The agency has analyzed this action for the purpose of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*). We have determined under our environmental procedures Order 5610.1, published on March 1, 2004, that this action is categorically excluded (CE) under Appendix 2, paragraph 6(b.) of the Order from further environmental documentation. This CE relates to regulations describing FMCSA's procedures that persons applying for a waiver, requesting an exemption, and proposing a pilot program must follow. The regulations also explain what procedures FMCSA will use to evaluate the waiver application, exemption request, or proposed pilot program, including notifying the public, for the purpose of ensuring transportation safety. In addition, the agency has determined that the action includes no extraordinary circumstances that would have any effect on the quality of the environment. Thus, the action does not require an environmental impact statement.

We have also analyzed this action under the Clean Air Act, as amended (CAA) section 176(c), (42 U.S.C. 7401 *et seq.*) and implementing regulations promulgated by the Environmental Protection Agency. We have determined that approval of this action is exempt from the CAA's General Conformity requirement since it pertains only to requirements persons must follow to request waivers and exemptions from the FMCSRs, and sets forth procedures the FMCSA will use to process these requests for waivers, applications for exemptions and those to initiate pilot programs. We also determined that this action will not result in any emissions increase, nor will it have any potential to result in emissions that are above the general conformity rule's minimum emission threshold levels. Moreover, it is reasonably foreseeable that the rule will not increase total commercial motor vehicle mileage, change the routing of commercial motor vehicles, how commercial motor vehicles operate or the commercial motor vehicle fleet-mix of motor carriers.

#### *Energy Supply, Distribution, or Use*

The FMCSA has analyzed this action under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a "significant energy action," because it is not a significant regulatory action under

Executive Order 12866, and it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

#### *Unfunded Mandates Reform Act*

Title II of the Unfunded Mandates Reform Act of 1995 requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final rule that may result in an expenditure of \$100 million or more (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector. This final rule does not contain such a mandate, and the requirements of Title II do not apply.

#### *Civil Justice Reform*

We reviewed this rule under Executive Order 12988, Civil Justice Reform, and determined it meets applicable standards to minimize litigation, eliminate ambiguity, and reduce burden.

#### *Protection of Children*

We analyzed this rule under Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks. This rule is not economically significant and does not concern an environmental risk to the health or safety of children.

#### *Taking of Private Property*

FMCSA certifies that this rule will not affect a taking of private property or otherwise involve taking implications, under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

#### *Intergovernmental Review of Federal Programs*

Catalog of Federal Domestic Assistance Program Number 20.217, Motor Carrier Safety. Regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this program.

#### *Federalism*

FMCSA has analyzed this final rule in accordance with the principles and criteria contained in Executive Order 13132 (Federalism). We have determined that this rule does not have a substantial direct effect on States, nor would it limit the policymaking discretion of the States. Nothing in this document preempts any State law or regulation.

Although the rule itself does not preempt State and local laws and

regulations, the waivers and exemptions that could be granted under the authority of 49 U.S.C. 31136(e) and 31315 would preempt such laws or regulations, if they conflict with or are inconsistent with the terms and conditions of the waivers or exemptions. Also, exemptions granted as part of a pilot program would preempt State and local laws and regulations which conflict with or are inconsistent with the terms and conditions of the pilot program.

FMCSA will consider the preemptive effect of each waiver prior to granting the waiver. With regard to exemptions and pilot programs, State and local governments will have the opportunity to respond to the **Federal Register** notices required by section 4007 of TEA-21 and inform FMCSA of concerns about preemption during the time period that an exemption or pilot program would be in effect.

#### List of Subjects in 49 CFR Part 381

Motor carriers.

#### Final Rule

■ The interim regulations published December 8, 1998 at 63 FR 67600, as amended on October 1, 2001 at 66 FR 49867, Part 381 of Subchapter B, Chapter III of Title 49 of the Code of Federal Regulations, are adopted without further revision.

Issued on: August 17, 2004.

**Warren E. Hoemann,**

*Deputy Administrator.*

[FR Doc. 04-19155 Filed 8-19-04; 8:45 am]

BILLING CODE 4910-EX-P

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

#### 49 CFR Part 571

[Docket No. NHTSA-2004-18905]

RIN 2127-AJ42

#### Federal Motor Vehicle Safety Standards; Occupant Crash Protection

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), DOT.

**ACTION:** Final rule; response to petitions for reconsideration.

**SUMMARY:** This document responds, in part, to petitions for reconsideration of the amendments we made in November 2003 to the advanced air bag provisions in the occupant crash protection standard. Because of time constraints faced by vehicle manufacturers in certifying vehicles under procedures

established in the November 2003 final rule, we bifurcated our response. This document is the second of two documents responding to the petitions. It addresses those issues raised by petitioners regarding positioning of the 5th percentile adult female, six-year-old and three-year-old test dummies; determination of target points during low risk deployment tests; specifications for child restraint systems for automatic suppression system tests; and clarification of seat adjustment procedures.

**DATES:** *Effective date:* The amendments made in this rule are effective September 1, 2004.

*Petitions:* Petitions for reconsideration must be received by October 4, 2004 and should refer to this docket and the notice number of this document and be submitted to: Administrator, National Highway Traffic Safety Administration, 400 Seventh St., SW., Washington, DC 20590.

Note that all petitions received will be posted without change to <http://dms.dot.gov> including any personal information provided. Please see the Privacy Act heading under Rulemaking Analysis and Notices.

*Docket:* For access to the docket to read background documents or comments received, go to <http://dms.dot.gov> at any time or to Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** For non-legal issues, you may contact Louis Molino, Office of Crashworthiness Standards, at (202) 366-2264, and fax him at (202) 493-2739.

For legal issues, you may contact Christopher Calamita, Office of Chief Counsel, at (202) 366-2992, and fax him at (202) 366-3820.

You may send mail to these officials at the National Highway Traffic Safety Administration, 400 Seventh St., SW., Washington, DC 20590.

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#### I. Background

Federal Motor Vehicle Safety Standard (FMVSS) No. 208, *Occupant crash protection*, specifies performance requirements for the protection of vehicle occupants in crashes (49 CFR 571.208). On May 12, 2000, we published an interim final rule that amended FMVSS No. 208 to require advanced air bags (65 FR 30680; Docket No. NHTSA 00-7013; Notice 1) (Advanced Air Bag Rule). Among other things, the rule addressed the risk of serious air bag-induced injuries, particularly for small women and young children, and amended FMVSS No. 208 to require that future air bags be designed to minimize such risk. The Advanced Air Bag Rule established a rigid barrier crash test with a 5th percentile adult female test dummy, as well as several low risk deployment and out-of-position tests using a range of dummy sizes.

The agency received multiple petitions for reconsideration to the Advanced Air Bag Rule. Petitioners raised a large number of concerns about the various test procedures in their written submissions. To address these issues adequately, the agency held a technical workshop so that we could better understand the specific concerns and better determine if the test procedures needed refinement.<sup>1</sup> The agency then addressed each petition in a **Federal Register** notice published on December 18, 2001 and made several changes to the Advanced Air Bag Rule (66 FR 65376; Docket No. NHTSA 01-11110). These changes included a number of refinements to the test dummy positioning procedures in the barrier tests and the low risk deployment tests. The December 2001 final rule also amended the list of child restraint systems in Appendix A for use in certain compliance tests through the removal of child restraints no longer in production and the addition of other child restraints.

On November 19, 2003, the agency published a final rule that responded, in part, to petitions for reconsideration of the amendments made in the December

<sup>1</sup> The workshop was held on December 6, 2000, at NHTSA's Vehicle Research and Test Center in East Liberty, Ohio. Representatives of 18 vehicle manufacturers and 13 seat, sensor, and dummy manufacturers attended the workshop. Five different vehicles were used as test vehicles. Some of the five had been provided by manufacturers because they were experiencing particular problems with following the existing test procedures in these vehicles.