

**DEPARTMENT OF TRANSPORTATION****Federal Motor Carrier Safety Administration****49 CFR Part 385****[Docket No. FMCSA-98-3299]****RIN 2126-AA35****Safety Monitoring System and Compliance Initiative for Mexico-Domiciled Motor Carriers Operating in the United States****AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), (DOT).**ACTION:** Interim final rule (IFR); request for comments.

**SUMMARY:** The FMCSA implements a safety monitoring system and compliance initiative designed to evaluate the continuing safety fitness of all Mexico-domiciled motor carriers within 18 months after receiving a provisional Certificate of Registration or provisional authority to operate in the United States. This rule includes requirements that were not proposed in the NPRM, but which are necessary to comply with the Fiscal Year 2002 DOT Appropriations Act enacted into law in December 2001. The rule also establishes suspension and revocation procedures for provisional Certificates of Registration and operating authority and incorporates criteria to be used by FMCSA in evaluating whether Mexico-domiciled carriers exercise basic safety management controls. Therefore, the FMCSA is publishing this action as an interim final rule and is delaying the effective date in order to consider additional public comments regarding the safety monitoring system for Mexico-domiciled carriers. The revisions in this action are part of FMCSA's efforts to ensure the safe operation of Mexico-domiciled motor carriers in the United States.

**DATES:** This interim final rule is effective May 3, 2002. We must receive comments by April 18, 2002.

**ADDRESSES:** You can mail, fax, hand deliver or electronically submit written comments to the Docket Management Facility, United States Department of Transportation, Dockets Management Facility, Room PL-401, 400 Seventh Street, SW., Washington, DC 20590-0001 FAX (202) 493-2251, on-line at <http://dmses.dot.gov/submit>. You must include the docket number that appears in the heading of this document in your comment. You can examine and copy all comments at the above address from 9 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays. You

can also view all comments or download an electronic copy of this document from the DOT Docket Management System (DMS) at <http://dms.dot.gov/search.htm> and typing the last four digits of the docket number appearing at the heading of this document. The DMS is available 24 hours each day, 365 days each year. You can get electronic submission and retrieval help and guidelines under the "help" section of the web site. If you want us to notify you that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Comments received after the comment closing date will be included in the docket and we will consider late comments to the extent practicable.

**FOR FURTHER INFORMATION CONTACT:** Mr. Michael Lamm, (202) 366-9699, FMCSA, 400 Seventh Street, SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., p.t., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:****Background**

FMCSA published the notice of proposed rulemaking (NPRM) for this action on May 3, 2001 (66 FR 22415) along with two related NPRMs proposing changes to the forms and procedures for Mexico-domiciled motor carriers to apply to operate in the United States. FMCSA is publishing one interim final rule and one final rule for those two NPRMs concurrently with this action. The preambles to those rules set out the background and history of the NAFTA issues and are not repeated here.

On December 18, 2001, the President signed into law the Fiscal Year 2002 DOT Appropriations Act, Public Law 107-87 (the Act). Section 350 of the Act prohibits the expenditure of appropriated funds for reviewing or processing applications by Mexico-domiciled carriers to operate beyond the commercial zones of municipalities in the United States located on the Mexican border (Mexico-domiciled long-haul carriers) until FMCSA and DOT take several specified actions. These actions include conducting pre-authorization safety examinations on Mexico-domiciled long-haul carriers, and complying with certain inspection, staffing, rulemaking and reporting requirements. As pertinent to this rulemaking proceeding, Section 350(a)(2) of the Act requires that FMCSA conduct a full safety

compliance review on Mexico-domiciled long-haul carriers within 18 months after the carrier is granted provisional operating authority. Section 350(a)(5) requires mandatory inspection of Mexico-domiciled long-haul commercial vehicles that do not display a valid Commercial Vehicle Safety Alliance (CVSA) decal, unless the carrier has been granted permanent operating authority for three consecutive years. Accordingly, we are revising the proposed rule to implement the compliance review requirement. We are also imposing a requirement that all long-haul Mexico-domiciled carriers entering the United States display a valid CVSA sticker on their vehicles while operating under provisional status.

**Summary of Parties Submitting Comments**

The agency received over 200 comments. Many comments were submitted to one or all three dockets for the May 3 NPRMs. The following discussion addresses substantive comments relevant to the safety monitoring and oversight system.

The commenters may be categorized as follows:

(1) Ten United States Senators: Senators Max Baucus, Evan Bayh, Jeff Bingaman, Thomas A. Daschle, Richard J. Durbin, Tom Harkin, Edward M. Kennedy, John F. Kerry, John Kyl, and Ron Wyden, submitted one unified set of comments to the President, who forwarded their comments to the docket.

(2) More than 180 private citizens. One hundred sixteen of these citizens submitted an "Urgent Action Alert" form letter compiled and distributed by Citizens for Reliable and Safe Highways (CRASH) or alluded to recommendations in the form letter. The CRASH suggestions are discussed later in this document. Comments were also received from 20 Tucson/Green Valley, Arizona citizens.

(3) Four Mexican associations: the Asociacion Nacional De Transporte Privado (a national private motor carrier association), Camara Nacional Del Autotransporte De Carga A.C. (CANACAR) (a national trucking association), Asociacion De Agentes Aduanales De Nuevo Laredo (a customs broker association), and Central de Servicios de Carga de Nuevo Laredo (CenSeCar) (a local trucking association of Nuevo Laredo).

(4) Four labor organizations: the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), the Amalgamated Transit Union (ATU), the International Brotherhood of Teamsters (Teamsters),

and the AFL-CIO's Transportation Trades Department representing 33 unions (TTD). The TTD submitted separate comments from the AFL-CIO, its parent organization.

(5) Four motor carrier associations: the American Bus Association (ABA), American Trucking Associations, Inc., (ATA), the California Trucking Associations (CTA), and the Owner-Operator Independent Drivers Association (OOIDA).

(6) Three Texas transportation associations: the San Antonio Free Trade Alliance, Association of Laredo Freight Forwarding Agents, and Laredo Transportation Association.

(7) Four safety advocacy groups: CRASH, Public Citizen, the American Automobile Association (AAA), and Advocates for Highway and Auto Safety (AHAS).

(8) Four environmental groups that submitted one unified response: Friends of the Earth, the Sierra Club, the Natural Resources Defense Council and the Center for International Environmental Law.

(9) Three law enforcement agencies: the California Attorney General, the California Highway Patrol, and the Arizona Department of Public Safety.

(10) Two associations representing State enforcement and licensing agencies: the Commercial Vehicle Safety Alliance (CVSA) and the American Association of Motor Vehicle Administrators (AAMVA).

(11) Three motor carriers: United Parcel Service (UPS), Greyhound Lines and Transportes Quintanilla S.A. de C.V.

(12) The Transportation Lawyers of America, Air Courier Conference of America, Transportation Consumer Protection Council, the Laredo Chamber of Commerce, the National Association of Independent Insurers (NAII), and the American Insurance Association (AIA) each submitted one comment.

#### Discussion of Comments to the NPRM

The municipalities adjacent to Mexico in Texas, New Mexico, Arizona, and California and the commercial zones of such municipalities will be referred to as "border zones" for the purposes of this document.

#### United States Senators

Senators Baucus, Bayh, Bingaman, Daschle, Durbin, Harkin, Kennedy, Kerry, Kyl and Wyden believe that the Mexican government does not have a domestic truck safety system equivalent to that provided under U.S. law. They state that Mexico does not have hours-of-service laws and has only recently proposed the use of logbooks to record

driving history. Therefore, they believe that cross-border truckers could easily enter U.S. highways fatigued. They note the DOT Inspector General has stated repeatedly that "fatigue is a major factor in commercial vehicle crashes."

The Senators believe that a "lack of sufficient inspection resources at the border and the proposed 18-month delay between the approval of general cross-border trucking applications and actual safety enforcement means that trucks may easily enter the United States over federal weight and size limits, a condition both inherently more dangerous to travelers and more stressful to our roadways."

The Senators urged the President to not grant operating certificates until the administration completes onsite compliance reviews and ensures the safety of the American traveler.

#### CRASH "Urgent Action Alert" Form Letter and Excerpts

One hundred sixteen individuals submitted comments repeating one or more of three standard phrases suggested by CRASH's "Urgent Action Alert". These phrases are as follows:

(1) Allowing Mexican carriers to operate for up to 18 months before a safety audit is done by U.S. officials is totally unacceptable. Safety audits must be done before Mexican carriers are allowed to enter the U.S.

(2) Application forms and processes are important and necessary but as a member of CRASH and a concerned highway safety advocate, the U.S./Mexico border should remain closed to increased NAFTA cross-border trucking until meaningful safety standards and significantly increased compliance oversight are in place on both sides of the border.

(3) Not one human life should be sacrificed on the alter [sic] of NAFTA cross-border trucking.

#### Individuals

Al Feuer wrote that the border should be opened to truck traffic. He also believes safety inspections/audits should not be required before allowing Mexican trucks into the United States. Mr. Feuer reasoned that advance auditing would be unfair and statistically impractical because many Mexican drivers would be unable to read road signs and markings printed in English. He believes "it would be unfair to make Mexican truck drivers meet the same safety standards as American truck drivers—who can read English." Mr. Feuer believes advance auditing would not be cost effective, but it would be more cost effective to allow Mexico-domiciled motor carriers onto our highways for 18-months and then audit the results. Mr. Feuer writes "FMCSA could easily glean accident investigation

data by tapping into computers at various local and State law enforcement agencies. Then it would simply be a matter of adding the number of Americans killed and injured by unsafe Mexican truck drivers. Those who caused more deaths and injuries than United States truck drivers could be banned from United States highways; those who caused fewer deaths and injuries than United States truck drivers could continue driving in the United States. There's your audit."

Mark Pizenche, a Land Line magazine reader, believes the requirements are good, if they can be enforced. He suggests having a sign in clear sight identifying Mexican trucks, such as a flag on a plate.

#### Green Valley, Arizona Residents

Elmer Silaghi, a Green Valley resident, is concerned about the safety of highway conditions along Interstate 19 near Green Valley, a retirement community located between Nogales and Tucson, Arizona. He believes that implementation of the NAFTA access provisions will exacerbate the community's existing commercial vehicle traffic congestion. The docket also received 19 comments from Tucson and Green Valley residents referring to Mr. Silaghi's letter or stating identical concerns.

#### Mexican Associations

Camara Nacional Del Autotransporte De Carga A.C. (CANACAR) (a Mexican Trucking Association representing the Mexican trucking industry) opposes the proposal. It believes the proposed entrance requirements are too difficult. It states that "consciously or unconsciously, all three of FMCSA's proposals unfortunately are permeated with anti-Mexican sentiments \* \* \* disguised in the form of concern for highway safety \* \* \* based on false assumptions." CANACAR believes Mexican trucks are safer than those operated by the U.S. trucking industry. To support this position, CANACAR stated that the out-of-service rate for U.S. and Mexican drayage companies are not very different.

Asociacion De Agentes Aduanales De Nuevo Laredo and Central de Servicios de Carga de Nuevo Laredo (CenSeCar) had similar comments. Each believes imposing inspections on short-haul carriers at the border would impact the efficient flow of traffic as well as be an unfair practice compared with the northern border. The two borders are different, they assert, and a single cookie cutter approach should not be applied. They are also concerned that all government agencies on the border

are grossly understaffed. They believe that imposing unfunded mandates and new procedures without regard to staffing is categorically wrong and shortsighted.

#### *Labor Organizations*

The AFL-CIO, ATU, TTD, and the Teamsters argued that opening the border is premature because of deficiencies in Mexico's internal safety standards for motor vehicles, and that a stronger implementation plan approved by the DOT Office of Inspector General is needed. The ATU fully supports and agrees with comments submitted by the AFL-CIO. It also concurs in Greyhound's comments, with one minor exception: ATU opposes the proposal to allow up to 18 months before a safety audit is conducted on a Mexico-domiciled carrier. The common viewpoints of ATU and Greyhound are outlined as follows:

(1) Mexican buses should not be authorized to operate in the United States absent reciprocal treatment of U.S. buses by Mexico.

(2) Mexican buses must be certified as safe before the first day they are authorized to operate in the United States.

(3) FMCSA must develop and implement an effective enforcement plan before opening the border.

(4) U.S. subsidiaries of Mexican companies must be subject to the same standards and reviews as their Mexican parent companies.

(5) Application and oversight rules must be applied to small passenger carrying vehicle operations (9 to 15 passengers), as well as cross-border bus operations.

(6) Application forms must require detailed explanations of compliance measures to ensure a full understanding of the applicable laws.

#### *Motor Carrier Associations*

##### *American Bus Association (ABA)*

The American Bus Association believes there is too little inspection of buses at the border and that FMCSA should do more border inspections. It believes FMCSA should enforce compliance with the Federal Motor Vehicle Safety Standards (FMVSS) maintained and enforced by the National Highway Traffic Safety Administration.

The ABA believes a final rule imposing the Federal Motor Carrier Safety Regulations (FMCSR) on 9-to 15-passenger vans is necessary, alleging that the poor safety record of these small passenger carrying vehicle operations must be a part of FMCSA's enforcement plan.

ABA argues that the proposed safety monitoring system is inadequate to protect passengers because the rule would only apply to operators providing cross border services. It believes FMCSA should provide the same scrutiny to Mexican-owned, U.S.-domiciled carriers as it does to Mexican-owned, Mexico-domiciled carriers. ABA contends that these Mexican-owned companies providing domestic service in the United States will probably have a greater impact in the United States than any other type of service. ABA believes that it is critical for these operations to be included in the safety evaluation process. Although such operations are subject to the FMCSRs, they are not subject to the safety monitoring system described in this action or the two NAFTA-related rulemakings published elsewhere in today's **Federal Register**. ABA believes that the NAFTA Arbitral Panel provided FMCSA with the discretion to apply a heightened level of scrutiny and enforcement measures toward Mexican companies operating within the United States—regardless of whether they are based in Mexico or in the United States. According to ABA, “the rules and oversight for Mexican-owned companies providing domestic U.S. service should be at least as stringent as the rules for Mexican companies providing international service.” Accordingly, ABA believes that FMCSA must expedite a rulemaking that would put into place a procedure that ensures the safety of new entrants to the U.S. market, regardless of whether they are based in the United States or Mexico, and whether or not they are Mexico-or U.S.-owned.

ABA believes that conducting an onsite review of a motorcoach company before the issuance of operating authority would be beneficial, notwithstanding the lack of complete U.S. compliance data. ABA suggests there are several items that could be checked during an initial review, including the Mexican driver's compliance with licensing and medical certification procedures. Vehicles could also be checked to ensure that they comply with the FMVSS. ABA believes that, given the lack of safety data and history for Mexican carriers, FMCSA should consider establishing procedures that include an expeditious and comprehensive onsite review of each applicant's safety program. ABA argues that an expedited safety review procedure conducted by Federal or State enforcement personnel would do far more to ensure safety than a simple review of submitted information and the monitoring of data generated by

roadside inspections that may or may not occur. ABA suggests that the educational “Safety Review” procedure established during the late 1980s could be used as a template for trucking operations, as it afforded an opportunity for motor carrier personnel to interact directly with enforcement personnel to explain regulatory requirements, and answer questions. However, ABA does not believe that this procedure will adequately ensure the safety of passengers.

ABA contends that our rulemaking will do nothing to ensure that the cross-border provisions of NAFTA are implemented in a reciprocal manner. It argues the proposed rule outlined how Mexican operators and drivers will be treated while in the United States, but gave no assurance that the Mexican government would implement identical policies. For example, ABA argues the Mexican government has taken the position that it will grant cross-border service authority for U.S. carriers to serve only one point in Mexico, and that it will not allow U.S. carriers to own or operate bus terminals in Mexico. ABA also states that the Mexican government has indicated that it will not authorize U.S. carriers to provide incidental package service as part of their cross-border trips. ABA believes that finalizing the cross-border access proposal without assurances of reciprocal treatment of U.S. companies by Mexico would result in unequal treatment in clear violation of both the letter and spirit of NAFTA.

American Trucking Associations, Inc. (ATA)

The ATA recommended that FMCSA provide specific guidelines for establishing safety monitoring systems, including defining a “poorly performing driver”. The ATA recommends that FMCSA investigate the possibility that Mexico may consider the proposed safety review program an “extraterritorial application of United States law.” In light of that possibility, the ATA recommends that FMCSA work jointly with the Secretaria de Comunicaciones y Transportes (SCT) to establish a joint safety review program for Mexico-domiciled motor carriers.

Owner Operator Independent Drivers Association (OOIDA)

OOIDA believes there is a lack of Mexican infrastructure, resources, and the will to promulgate and enforce compatible safety regulations in Mexico. It contends there is no true equivalent to the 49 CFR Part 383 commercial drivers licensing regulations in Mexico.

OOIDA cites the DOT OIG report that there is a link between Mexican truck condition and the level of inspection resources. OOIDA believes FMCSA must have a minimum of 80 new safety inspectors to do border crossing inspections and 40 safety investigators to conduct compliance reviews before granting authority. OOIDA believes the FMCSA goal of more inspectors is correct, but the plans do not include enough personnel.

OOIDA believes FMCSA's proposal to review Mexico-domiciled carriers within 18 months after granting them authority is unrealistic and dangerous. It recommends that FMCSA conduct onsite reviews in Mexico and verify whether a Mexico-domiciled motor carrier has been placed out-of-service in Mexico, has had hazardous material incidents in Mexico, has a drug and alcohol testing program, and maintains valid proof of financial responsibility.

#### California Trucking Association (CTA)

CTA supports the rules as "well-thought [out] applications and safety entry standards for Mexico-domiciled motor carriers," but sees a need for more resources to accomplish FMCSA goals. CTA believes the safety monitoring period should be shorter than 18 months and the program should include State and local law enforcement agencies in the review teams. It recommends involving FMCSA field offices in safety reviews because it believes the field offices know their local carriers. It also recommends promulgating review standards before the initial review period. CTA predicates its support of the three NAFTA rulemakings upon four conditions, including establishing "a level playing field for all motor carriers through the application of the same laws and regulations."

#### Safety Advocacy Groups

The safety advocacy groups believe FMCSA should conduct a safety audit before it allows a Mexico-domiciled motor carrier to operate in the United States and that FMCSA must have more U.S. inspection sites and more safety inspectors.

#### American Automobile Association (AAA)

The AAA's comments are generally representative of the safety groups. The AAA believes FMCSA must:

(1) Conduct safety audits *before* Mexico-domiciled trucks cross the border.

(2) Follow California's incentive to Mexico-domiciled motor carriers to display a valid CVSA decal on their

trucks entering the United States. If one is not apparent, FMCSA should, like California, conduct the most rigorous CVSA, or equivalent, inspection at the border.

(3) Work closely with AAMVA to see that proper licensing procedures are in place and enforceable.

(4) Weigh trucks at the border.

(5) Demand proof of financial responsibility for every vehicle in every fleet at the border. Drivers should have to carry an insurance document unique to their particular vehicle.

(6) Ensure that every one of the 27 U.S.-Mexico border crossing points has resources to monitor compliance with the FMCSRs.

#### Public Citizen

Public Citizen contends the proposed rule fails to acknowledge the inadequacy of the existing enforcement structure and will not protect the public from unsafe trucks crossing into the United States. It believes unsafe trucks will inevitably escape detection and travel freely throughout the United States, endangering motorists and risking a trade-related debacle.

Public Citizen contends the penalties for Mexico-domiciled carriers under the safety monitoring program would be weaker than those currently applicable to U.S.-domiciled carriers. It argues that the serious infractions listed in proposed § 385.23 would only result in a carrier receiving a safety review—a review to which it would have to submit anyway—or a deficiency letter instructing the carrier to notify FMCSA that the problem has been corrected.

Public Citizen argues that the consequences of such violations for U.S. carriers are considerably more severe, including civil and criminal fines or even jail time. It believes allowing Mexican carriers to receive weak penalties for serious violations fails to communicate the seriousness of these violations to carriers and will not prepare them to comply with these regulations at the end of the safety oversight program.

Public Citizen also believes FMCSA omitted some serious violations from the list of violations that would trigger an expedited safety review or deficiency letter. Under the proposal, an accident resulting in a hazardous materials incident prompts the expedited safety review or deficiency letter process, but an accident resulting in death, or a violation of the hours-of-service limit, does not. Public Citizen believes potential hours-of-service violations are of particular concern because Mexican carriers require their workers to drive for much longer periods than the U.S.

hours-of-service limit, and Mexican laws do not include hours-of-service rules. It believes we should add hours-of-service infractions to the list in proposed § 385.23 and publish a plan for enforcing hours-of-service limits for drivers crossing the border who are not subject to any time controls while in Mexico.

Public Citizen notes the NPRM does not specify a time limit for carriers to respond to deficiency letters before their provisional registration is suspended. Public Citizen believes it is also unclear how soon an expedited safety review would take place after a serious violation is discovered and how long a carrier can be suspended without taking corrective action before its registration is revoked. It contends that without time limits, an unsafe carrier could operate indefinitely before any limitations are placed on it. It believes we must revise the NPRM to provide definite time restrictions to ensure that non-compliant carriers do not slip through the cracks.

Public Citizen also believes that FMCSA suspension or revocation of provisional registration will not change a carrier's ability to send trucks across the border. It cites a November 1999 DOT Inspector General report finding that carriers were able to retain their certificates of registration in their vehicles and continue operating across the border even after these certificates were revoked. It believes no information would be available to inspectors to verify that a certificate of registration is valid, or to verify that a driver has a certificate of registration if he or she is not able to present it upon request.

#### Environmental Groups

Friends of the Earth, the Natural Resources Defense Council, the Sierra Club and The Center for International Law commented that FMCSA is required to perform additional analysis to meet the requirements of the National Environmental Policy Act (NEPA) and Executive Order 13045, concerning the protection of children.

The Attorney General for the State of California submitted a comment in which he asserted that the FMCSA would be required to perform a "conformity determination" pursuant to the Clean Air Act (CAA), before finalizing these rulemakings. Under the CAA, Federal agencies are prohibited from supporting in any way, any activity that does not conform to an approved State Implementation Plan (SIP), (42 U.S.C. 7006). EPA regulations implementing this provision require Federal agencies to determine whether an action would conform with the SIP

(a “conformity determination”), before taking the action (40 CFR 93.150). The Attorney General asserts that the FMCSA must make a conformity determination before taking final action to implement regulations that would allow Mexican trucks to operate beyond the border. The Attorney General provided technical information to support his assertion that allowing Mexican trucks to operate beyond the border would likely not be in conformity with California’s SIP.

#### *Commercial Vehicle Safety Alliance (CVSA)*

CVSA believes the rules will not sufficiently reassure the public. It makes eight recommendations for strengthening the monitoring program as key to its support of this rulemaking. CVSA’s recommendations include:

(1) Perform “case studies” on Mexico-domiciled motor carriers. Case studies would facilitate a collaborative safety culture and provide objective, uniform and quantitative data upon which to base policy decisions. They would be similar to the proposed safety review, except case studies would: (a) Be completed before granting operating authority; (b) be conducted at the motor carrier’s place of business; (c) include both regulatory evaluation and educational components; (d) include a representative sample of CVSA Level V inspections; and (e) adopt a collaborative approach that includes U.S., Canadian and Mexican officials. CVSA believes these case studies should initially be conducted on all carriers applying for authority to operate beyond the border zones, then on a sampling of carriers who wish to operate solely within the border zones.

(2) Require all motor carriers and drivers to renew their valid Licencia Federal de Conductor and be entered into the Mexican commercial drivers’ licensing database before being granted operating authority in the United States.

(3) Work with CVSA and the States to develop the necessary legislative and policy changes for providing States the ability to enforce operating authority requirements.

(4) Investigate the equipment manufacturing standards in Mexico and report how they differ from those required in the United States, specifically with respect to compliance with the FMVSS. CVSA thinks this is particularly important to the roadside inspection program and weight enforcement.

(5) Provide clear policy direction on how to address the language issue in the field. CVSA wants us to apply a reasonable standard to determine

whether a driver “can read and speak the English language sufficiently to converse with the general public, understand highway traffic signs and signals in the English language, to respond to official inquiries and to make entries on reports and records.”

(6) Coordinate outreach and training programs that are delivered to Mexican motor carriers, drivers, and enforcement personnel. CVSA believes a clear and consistent message is important to the education and learning process.

(7) Make sure appropriate modifications are made to software and information systems in a timely manner and adequate time and resources are provided for training enforcement officials for all changes that are promulgated in the final rule.

(8) Explore multiple technology options (hardware, software, and communications), conduct the necessary due diligence and pilot test potential solutions for facilitating throughput at the borders and performing safety assessments on motor carriers. CVSA wants us to consider various types of incentives for safe operators and to encourage technology adoption.

#### *American Association of Motor Vehicle Administrators (AAMVA)*

AAMVA believes that Mexico-domiciled motor vehicles should be inspected for conformance to Federal motor carrier safety regulations before they are allowed to operate in the United States. Specifically, it supports periodic motor vehicle safety inspections similar to the CVSA inspections.

It also suggests conducting complete safety audits of carriers in Mexico before approving applications for operating authority. It believes a safety audit and inspection of vehicles before approval of operating authority will ensure that any vehicle entering the United States from Mexico comports with applicable safety standards and does not pose undue risk to citizens on the nation’s roadways.

#### *Transportation Consumer Protection Council*

The Transportation Consumer Protection Council, representing 500 shippers and receivers of freight, believes FMCSA should require truck inspections before carriers are allowed into the United States.

#### *National Association of Independent Insurers (NAII)*

The NAII believes DOT was unable to do much to prepare for the beginning of true cross-border trucking during the previous administration. It believes that

preparations must be our top priority and that we need more people and resources to handle the workload than were requested for fiscal year 2002. It believes the most pressing need to keep American roads safe when the border opens is for us to have a detailed plan showing who will do what and where.

#### *American Insurance Association (AIA)*

The AIA alleges that the proposed rules fail to provide for safety and are inconsistent with law, citing 49 U.S.C. 113(a) as providing for safety as the “highest priority.” It believes follow-up inspections should be done earlier than 18 months. The AIA also believes conducting compliance reviews under § 385.13(a) that apply the criteria for evaluating safety management controls described in § 385.7 would not be sufficient. It recommends requiring safety reviews to occur on the Mexico-domiciled motor carrier’s premises.

The AIA states that different procedures are expressly permissible under NAFTA and believes FMCSA could have proposed more stringent motor carrier safety procedures on Mexican carriers.

#### **FMCSA Response to Comments**

##### *The DOT Appropriations Act*

The most common recommendation made in the comments was that Mexico-domiciled carriers undergo a safety review by FMCSA before being allowed to operate in the United States. This concern was addressed in § 350(a)(1) of the DOT Appropriations Act. The FMCSA’s companion rule amending our part 365 application procedures will require that Mexico-domiciled long-haul carriers receive a safety audit before receiving provisional operating authority. This pre-authorization safety audit will include verification of performance data, safety management programs (including hours-of-service compliance, vehicle inspection and maintenance and drug and alcohol testing programs) and financial responsibility. The audit will also entail vehicle inspections, verification of driver qualifications and an interview with carrier officials to review safety management controls and evaluate written safety oversight policies and practices.

FMCSA intends to provide all Mexico-domiciled carriers educational and technical assistance when they apply for provisional operating authority or a provisional Certificate of Registration. The education and technical assistance package will consist of material designed to assist the Mexico-domiciled applicant in

complying with the FMCSRs and Hazardous Materials Regulations (HMRs) and establishing good safety management practices. It will include information on driver qualifications; controlled substances and alcohol use testing; commercial drivers licenses; minimum levels of financial responsibility; accident reports; requirements applicable to the driving of motor vehicles; vehicle inspection, repair and maintenance; hours of service and records of duty status of drivers; and requirements applicable to the transportation of hazardous materials. These materials will help long-haul carriers prepare for the pre-authorization safety audit.

We are not extending the pre-authorization audit requirement to carriers seeking to operate solely within the border zones under Certificates of Registration. Border zone operations have been permitted for nearly 20 years without a pre-authorization audit requirement. The most serious safety concerns, as evidenced by the provisions of § 350 of the Act and reflected in the comments to the NPRM, involve Mexico-domiciled carriers who will be operating vehicles beyond the border zones in long-haul service. We believe that the informational and certification requirements added to the revised OP-2 form in our companion rule and the post-operational audit required by this rule will be sufficient to protect public safety in the border zones.

Section 350(a)(2) of the Act requires FMCSA to conduct a full compliance review of Mexico-domiciled long-haul carriers within 18 months after issuance of provisional operating authority. This review will be consistent with our existing safety fitness evaluation procedures set forth in subpart A of part 385 and will result in the assignment of a safety rating. As required by section 350(a)(2), the compliance review must result in a "Satisfactory" safety rating before the carrier is granted permanent operating authority to operate beyond the border zones. We have incorporated these requirements into this interim final rule. In accordance with section 350(a)(2), at least 50 percent of these compliance reviews will be conducted onsite, including any compliance review conducted on a Mexico-domiciled carrier with four or more commercial vehicles that did not undergo an on-site safety audit before receiving provisional authority.

This rule also addresses the section 350(a)(5) requirement that any Mexico-domiciled vehicle operated in the United States beyond the border zones receive a Level 1 inspection if it does

not display a valid CVSA inspection decal, unless the carrier has held permanent authority for at least three consecutive years. In order to reduce the burden on State and Federal inspection officials, at least during the 18-month provisional operating period covered by this rule, we will require all commercial vehicles operated by Mexico-domiciled long-haul carriers to display a valid CVSA inspection decal when entering the United States.

#### *Vehicle Size and Weight Issues*

In response to the Senators' concern about oversize and overweight vehicles, section 350(a)(7)(A) of the DOT Appropriations Act requires FMCSA to:

(1) Equip all United States-Mexico commercial border crossings with scales suitable for enforcement action;

(2) Equip five of the ten highest volume commercial vehicle traffic crossings with weigh-in-motion systems before reviewing or processing applications by Mexico-domiciled carriers to operate beyond the border zones;

(3) Equip the remaining five of the ten highest volume crossings with weigh-in-motion systems within 12 months; and

(4) Require inspectors to verify the weight of each Mexico-domiciled carrier's commercial vehicle entering the United States at each weigh-in-motion equipped high volume border crossing.

The FMCSA will comply with these requirements and work with the Federal Highway Administration and States to assure the effective use of the weigh-in-motion equipment as part of an effective enforcement program. Enforcement of size and weight requirements is a State function, under the oversight of the Federal Highway Administration.

#### *Driver Hours-of-Service*

In response to the Senators' comments regarding Mexican hours-of-service laws (also discussed by Public Citizen), we note that the use of the record of duty status, commonly known as a logbook, is the tool the FMCSA uses for enforcing compliance with U.S. hours-of-service requirements. Upon entering the United States, each driver must either: (a) Have in his/her possession a record of duty status current on the day of the examination showing the total hours worked for the prior seven consecutive days, including time spent outside the United States; or, (b) demonstrate that he/she is operating as a "100 air-mile (161 air-kilometer) radius driver" under § 395.1(e).

In addition, section 350(a)(9) of the DOT Appropriations Act requires Mexico-domiciled carriers to only enter

the United States at commercial border crossings: (1) Where and when a certified motor carrier safety inspector is on duty; and (2) where adequate capacity exists to conduct a sufficient number of meaningful vehicle safety inspections and to accommodate vehicles placed out-of-service as a result of these meaningful safety inspections. The examination of drivers resulting from the section 350(a)(9) vehicle inspection requirements would allow inspection of each Mexico-domiciled carrier's drivers upon entry and would allow certified motor carrier safety inspectors to review the driver's logbooks and discover whether hours-of-service violations have occurred.

#### *Similarity of Regulatory Treatment*

In response to the comments of the Mexican trade associations, FMCSA believes the regulatory requirements imposed in this rule are within the standards set out in the NAFTA Arbitral Panel Report, a copy of which is in the docket. The Panel noted that:

(1) The United States is not required to treat applications from Mexico-domiciled trucking firms in exactly the same manner as applications from U.S. or Canadian firms, as long as they are reviewed on a case by case basis; and

(2) Given the different enforcement mechanisms in place in the United States and Mexico, it may not be unreasonable for the United States to address legitimate safety concerns. Similarly, the Panel found it might be reasonable for the United States to implement different procedures with respect to service providers from another NAFTA country if necessary to ensure compliance with its own local standards by these service providers. Although CANACAR believes Mexican trucks are safer based on out-of-service rates for U.S. and Mexican drayage companies, the fact remains that Mexico's motor carrier safety regulatory system lacks several of the components that are central to the U.S. system. As the Panel found, the United States is responsible for the safe operation of motor carriers within U.S. territory, regardless of the carriers' country of origin, and FMCSA believes we must ensure each carrier is safe to protect U.S. highway users. This rule, in conjunction with the other rules pertaining to Mexican motor carriers published elsewhere in today's **Federal Register**, will provide FMCSA with the necessary level of assurance, in a manner consistent with the Panel's findings, that Mexican motor carriers seeking U.S. operating authority are capable of complying with the U.S. safety regulatory regime.

ABA, AHAS, and other commenters cite language from the NAFTA Arbitral Panel's Final Report to support their comments favoring more stringent safety measures with regard to Mexico-domiciled carriers. The Panel stated, among other things, that to the extent that Mexican licensing and inspection requirements may differ from U.S. requirements, the United States might be justified in using methods to ensure Mexico-domiciled carrier compliance with the U.S. regulatory regime that differ from those used for U.S. and Canadian carriers, provided that those methods are used in good faith to address legitimate safety concerns and fully conform with all relevant NAFTA provisions. FMCSA believes that the more stringent measures in the rules published today fulfill its statutory obligation to ensure the safe operation of motor carriers in the United States in a manner that is consistent with the Panel's construction of NAFTA.

#### *Reciprocal Treatment*

ABA urged us not to publish final rules permitting Mexico-domiciled carriers to operate beyond the border zones until the government of Mexico guarantees that U.S. carriers operating in Mexico will receive the same regulatory treatment afforded to Mexican carriers operating in that country. These regulations are intended to establish procedures to ensure that Mexico-domiciled carriers operate safely while traveling in the United States, not to police compliance with the terms of NAFTA. The NAFTA contains specific procedures designed to resolve disputes over whether the parties are fulfilling their obligations under the agreement.

#### *Mexican-Owned, U.S.-Domiciled Motor Carriers*

In response to comments by ABA, ATU, and Greyhound urging us to subject Mexican-owned, U.S.-domiciled passenger carriers to the same procedures applicable to Mexican-owned, Mexico-domiciled passenger carriers, we note that President Bush, in June 2001, issued a Memorandum that, among other things, allows a Mexican citizen to establish a U.S.-based passenger carrier to provide point-to-point transportation within the United States under the same procedures applicable to U.S.-owned, U.S.-domiciled passenger carriers. Mexican nationals may establish a passenger carrier operation in the United States by either purchasing an existing motor carrier or establishing a new motor carrier. Such carriers, as Greyhound itself points out, must use U.S. citizens

or resident aliens to provide passenger service in the United States. The drivers they employ must possess a Commercial Drivers License issued in the United States. In addition, these carriers are subject to the same safety requirements, inspection procedures, enforcement mechanisms, and fines and out-of-service orders that apply to any other U.S. carrier. Thus, there is no basis to treat these carriers any differently from U.S.-owned, U.S.-domiciled carriers based solely on the owner's nationality. All U.S.-domiciled carriers, regardless of the owner's nationality, will be subject to an interim final rule establishing application procedures and safety monitoring requirements for new entrant carriers, which we expect to publish in the near future.

#### *Small Passenger Carrying Vehicle Operations*

With respect to the small passenger carrying vehicle issues raised by the ABA, the FMCSA published a Notice of Proposed Rulemaking on January 11, 2001 (66 FR 2767) that proposed to apply most of the FMCSRs (except for CDL and drug and alcohol testing requirements) to certain passenger carriers operating vehicles designed or used to transport between 9 and 15 passengers. The FMCSA's final small passenger carrying vehicle rule, which will be published in the near future, will address the safety issues regarding this type of operation.

#### *Environmental Issues*

Friends of the Earth, the Natural Resources Defense Council, the Sierra Club and The Center for International Law commented that FMCSA is required to perform additional analysis to meet the requirements of the National Environmental Policy Act (NEPA) and Executive Order 13045, concerning the protection of children from environmental health and safety risks. FMCSA is preparing an agency order to meet the requirements of DOT Order 5610.1C (that establishes the Department of Transportation's policy for compliance with NEPA by the Department's administrations). FMCSA has conducted a programmatic environmental assessment (PEA) of the three NAFTA-related rulemakings in accordance with the DOT Order and the regulations of the Council on Environmental Quality. A discussion of the PEA and its findings is presented later in the preamble under "Regulatory Analyses and Notices." A copy of the PEA is in the docket to this rulemaking. Executive Order 13045 is addressed in the Regulatory Analyses and Notices section of this preamble.

We have reviewed our obligations under the CAA, and believe that we are in compliance with the general conformity requirements as implemented by the U.S. Environmental Protection Agency (EPA). EPA's implementing regulations exempt certain actions from the general conformity determination requirements. Actions which would result in no increase in emissions or clearly a de minimis increase, such as rulemaking (40 CFR 93.153(c)(iii)), are exempt from requiring a conformity determination. In addition, actions which do not exceed certain threshold emissions rates set forth in 40 CFR 93.153(b) are also exempt from the conformity determination requirements. The FMCSA rulemakings meet both of these exemption standards. First, as noted elsewhere in this preamble to this rule, the actions being taken by the FMCSA are rulemaking actions to improve FMCSA's regulatory oversight, not an action to modify the moratorium and allow Mexican trucks to operate beyond the border. Second, the air quality impacts from each of the FMCSA's rules neither individually nor collectively exceed the threshold emissions rates established by EPA (see Appendix C of the Environmental Assessment accompanying these rulemakings for a more detailed discussion of air quality impacts). As a result, we believe that FMCSA's rulemaking actions comply with the CAA requirements, and that no conformity determination is required.

#### *Penalties*

We believe Public Citizen did not understand the full range of penalties available to FMCSA when it made its comments that the penalties for Mexico-domiciled carriers under the safety monitoring program would be weaker than those that currently apply to U.S.-domiciled carriers. In addition to the procedures established by this rule, Mexico-domiciled carriers are fully subject to the full range of enforcement actions and sanctions faced by U.S. and Canadian carriers, including civil and criminal fines and jail time.

#### *Expedited Action Criteria*

Although violations of the hours-of-service limits are not specifically included in the list of violations prompting an expedited safety or compliance review or demand for corrective action, hours-of-service violations will be taken into account as part of a carrier's out-of-service rate, which is a triggering factor for expedited action under § 385.105(a)(7).

Although a fatal accident is not included on the list of violations that

would trigger an expedited safety audit or compliance review or a demand for corrective action, Mexico-domiciled motor carriers will be subject to existing FMCSA policy regarding crashes. Under this policy, FMCSA conducts a basic Crash Inquiry on any motor carrier having a crash involving two or more fatalities, two or more injuries, or a combination of fatalities and injuries. This review policy also includes any crash that may result in the agency acquiring detailed knowledge that would be beneficial for any unusual post-crash public interest. The Crash Inquiry would include crashes involving motor coaches, unqualified drivers, explosions, and substantial fire.

FMCSA policy automatically expands the basic Crash Inquiry into a full compliance review as soon as practicable when the motor carrier is not in good standing with FMCSA. A motor carrier is not in good standing with FMCSA when it does not have a safety rating (which would generally be the case for new entrant Mexico-domiciled carriers prior to the performance of a compliance review), the safety rating is less than satisfactory, or the carrier is on FMCSA's Safety Status Measurement System (SafeStat) with a SafeStat category of A, B, C, or D. For more information about SafeStat, see the FMCSA web page at: <http://www.fmcsa.dot.gov/factsfigs/safestat.htm>.

The Mexico-domiciled motor carrier's application will create a new record attached to its new USDOT identification number without any safety rating attached to it. The lack of a safety rating for a Mexico-domiciled motor carrier coupled with a multiple fatality or injury crash will result in the Mexico-domiciled motor carrier being subject to a full compliance review as soon as practicable. This procedure is identical to the current treatment of new entrant U.S.-or Canada-domiciled motor carriers lacking a safety rating.

#### *Procedural Time Limits*

In response to Public Citizen's concern that the rule did not propose specific time limits for carriers to address identified problems and respond to letters demanding corrective action, we have added a provision that failure to respond within 30 days will result in the suspension of the carrier's provisional registration. Public Citizen also raised a question concerning the status of an uninsured carrier operating while the agency performs a safety review or processes a demand for corrective action. FMCSA has authority, under 49 CFR 387.31(g), to deny entry to any Mexico-domiciled carrier not

carrying the required evidence of financial responsibility in its vehicles. The agency also has authority, under 49 U.S.C. 14702, to obtain a court order enjoining a carrier from operating without insurance independent of the safety monitoring process. Finally, Mexico-domiciled carriers operating beyond the border zones will be required to file evidence of insurance with FMCSA as a condition for retaining their provisional operating authority. As is the case for U.S. and Canada-domiciled carriers, failure to have a current insurance filing will result in revocation of authority under existing FMCSA procedures.

Public Citizen's concerns about the timeliness of an expedited safety review are valid. The agency will strive to conduct the review as soon as possible and will give priority in assigning resources to conduct these reviews. We believe § 385.111 of the final rule adequately addresses Public Citizen's concerns about the length of time a carrier can be suspended without taking corrective action before its registration is revoked. An agency suspension of any carrier's authority to operate means the carrier cannot operate legally until it corrects its deficiencies and has received written notice from FMCSA allowing it to resume operating. The suspension order will provide for revocation of the provisional registration if necessary corrective action is not taken within 30 days.

The violations requiring expedited action are warning signs that a carrier may not have the necessary basic safety management controls in place, thus generating an immediate response in the form of a corrective action demand letter, safety audit or compliance review. FMCSA will take these violations seriously, but they do not necessarily establish that the carrier is unfit to operate. If the carrier demonstrates that it has taken steps to correct the identified problems and that it is otherwise exercising the necessary basic safety management controls, it does not present a danger to public safety and should be allowed to continue to operate.

FMCSA is developing a database that will indicate whether a carrier has had its authority suspended or revoked. Unregistered carriers and carriers whose registration has been suspended or revoked will be denied entry into the United States. Use of this data will also help to ensure that enforcement personnel can place out-of-service at the roadside those carriers that continue to operate commercial motor vehicles within the United States after

registration has been suspended or revoked.

#### *Compliance With Federal Motor Vehicle Safety Standards (FMVSS)*

FMCSA and its State partners will continue to enforce the FMVSS through roadside inspections, including inspections at the border. Roadside inspections provide a means of ensuring that vehicles meet the applicable FMVSS in effect on the date the vehicle was manufactured.

Part 393 of the FMCSRs currently includes cross-references to most of the FMVSS applicable to heavy trucks and buses. The rules require that motor carriers operating in the United States, including Mexico-domiciled carriers, must maintain the specified safety equipment and features that the National Highway Traffic Safety Administration (NHTSA) requires vehicle manufacturers to install. Failure to maintain these safety devices or features is a violation of the FMCSRs. If the violations are discovered during a roadside inspection, and they are serious enough to meet the current out-of-service criteria used in roadside inspections (i.e., the condition of the vehicle is likely to cause an accident or a mechanical breakdown), the vehicle would be placed out of service until the necessary repairs are made. Any FMVSS violations that involve noncompliance with the standards presently incorporated into part 393 could subject motor carriers to a maximum civil penalty of \$10,000 per violation. If FMCSA determines that Mexico-domiciled carriers are operating vehicles that do not comply with the applicable FMVSS, we could also take appropriate enforcement action for making a false certification on Form OP-1(MX) or OP-2.

To further strengthen FMVSS enforcement, FMCSA and NHTSA are initiating several regulatory actions in today's **Federal Register** to ensure that all commercial vehicles operated in the United States, including those operated by Mexican and Canadian carriers, display a NHTSA-required label certifying compliance with the FMVSS. FMCSA is publishing a Notice of Proposed Rulemaking proposing to incorporate the labeling requirement into part 393 and NHTSA is publishing two NPRMs and one policy statement relating to the certification label.

Many commercial motor vehicles owned by Mexican and Canadian carriers may comply with the FMVSS in effect at the time of their manufacture. However, because these vehicles were not originally manufactured for use in the United

States, they are not likely to have FMVSS certification labels. The NHTSA policy statement permits a vehicle manufacturer to retroactively apply a label to a commercial motor vehicle certifying, if it has sufficient basis for doing so, that the vehicle complied with all applicable FMVSS in effect at the time it was originally manufactured. In connection with this policy statement, NHTSA is proposing recordkeeping requirements for foreign manufacturers that choose to retroactively certify vehicles.

In the third NHTSA document published in today's **Federal Register**, NHTSA is proposing to codify, in 49 CFR part 591, its longstanding interpretation of the term "import" as including bringing commercial vehicles into the United States for the purpose of transporting cargo or passengers.

#### *Staffing Issues*

Several parties expressed concern about whether there are adequate resources available to conduct the necessary inspections and safety reviews. Section 350(a)(9) of the Act prohibits Mexico-domiciled motor carriers from entering the United States at any border crossing where a certified motor carrier inspector is not on duty or where there is not adequate capacity to conduct either a sufficient number of meaningful vehicle safety inspections or accommodate vehicles placed out-of-service as a result of safety inspections. Congress has appropriated \$57.8 million for FMCSA to handle its responsibilities in connection with implementing the NAFTA access provisions for Mexico-domiciled carriers. FMCSA intends to hire over 200 people for this purpose, most of whom will be conducting vehicle inspections, pre-authorization safety audits and 18-month safety audits. We believe this significant augmentation of our existing staff at the southern border will enable us to fully comply with our safety monitoring responsibilities.

#### *Responses to Other Comments*

The individuals who submitted form comments provided by CRASH did not elaborate on what they considered to be "meaningful safety standards and significantly increased compliance oversight." We have addressed those concerns in this and the companion rulemakings published elsewhere in today's **Federal Register**.

We recognize the concerns of the Green Valley, Arizona residents along Interstate 19, but any increase in traffic along this route will not result from the implementation of this rule and its two companion rules. These rules do not

open the border to Mexico-domiciled trucks, they impose safety certification and monitoring requirements on Mexico-domiciled motor carriers operating in the United States under the provisions of NAFTA.

In response to Mr. Pizenche's comments, 49 CFR 390.21 currently requires that all motor vehicles, including foreign vehicles, must have the carrier's name and USDOT number on each side of the power unit, and must be readable from 50 feet. In addition, our companion rule establishing application requirements for Mexico-domiciled long-haul carriers published elsewhere in today's **Federal Register**, requires that FMCSA issue a new USDOT identification number to each Mexico-domiciled motor carrier applicant intending to operate beyond the United States-Mexico border zones. This new USDOT identification number will have a suffix that will denote the type of authority held by the Mexico-domiciled motor carrier and allow FMCSA to monitor the carrier's performance by inspecting crash and roadside inspection reports.

#### **Section-by-Section Summary**

We have changed the section numbers as they appeared in the NPRM. The sections are now numbered 385.101 through 385.119.

##### *Section 385.101*

This section contains the definitions of terms used in new subpart B. These include:

- (1) Provisional certificate of registration, the registration issued to Mexico-domiciled border zone carriers;
- (2) Provisional operating authority, the registration issued to Mexico-domiciled long-haul carriers; and
- (3) Safety audit, the review conducted by FMCSA on a border zone carrier during the 18-month provisional period to determine whether the carrier exercises basic safety management controls. Because we will be conducting compliance reviews on Mexico-domiciled long-haul carriers during the 18-month provisional period, we have also added a reference to the existing definition of compliance review in § 385.3.

##### *Section 385.103*

This section describes the elements of the safety monitoring system, which include roadside monitoring, safety audits for border zone carriers and compliance reviews for long-haul carriers. FMCSA has added a requirement that all Mexico-domiciled motor vehicles operating beyond the border zones display a valid CVSA

inspection decal throughout the 18-month provisional operating authority period. A CVSA inspection is only valid for three months from the date of inspection. Consequently, Mexico-domiciled long-haul carriers will need to get a CVSA inspection for their vehicles every three months. FMCSA will work with CVSA to ensure that this requirement is operational when the President lifts the moratorium on granting operating authority to Mexico-domiciled motor carriers.

##### *Section 385.105*

Section 385.105(a) lists the serious violations or infractions that will result in an expedited safety audit or compliance review or, in the alternative, a demand that the carrier demonstrate in writing that it has taken immediate corrective action. The infractions listed are essentially identical to those proposed in the NPRM. We have added clarifying language regarding what constitutes a valid Licencia Federal. The type of action taken by FMCSA in response to the violations will depend upon the specific circumstances of the violations.

Sections 385.105(b) provides that failure to respond to a request for a written response demonstrating corrective action within 30 days will result in suspension of provisional registration until the required showing of corrective action is made.

Section 385.105(c) clarifies that a carrier that successfully responds to a demand for corrective action still must undergo a safety audit or compliance review during the provisional period if it has not already done so.

##### *Section 385.107*

This section describes the safety audit and what follow-up action will be taken by the agency. Safety audits on Mexico-domiciled carriers operating only in the border zones under provisional Certificates of Registration will be conducted by an FMCSA safety specialist, usually onsite, although FMCSA reserves the right to conduct the audit at an alternate site. The safety audit will assess the adequacy of the carrier's basic safety management controls in accordance with the criteria established in new Appendix A. Appendix A does not specifically reference Mexico-domiciled motor carriers because we are considering adopting it eventually for all new entrants, except for Mexico-domiciled long-haul carriers, who must undergo compliance reviews.

The audit will consist of a review of the Mexico-domiciled carrier's safety data, a review of requested motor carrier

documents, and an interview session with the Mexico-domiciled carrier by the FMCSA safety specialist. The objective of the safety audit is both to educate the carrier on compliance with the FMCSRs and HMRs and to determine areas where the carrier might be deficient in terms of compliance. Areas covered include: financial responsibility; commercial driver's license standards; qualification of drivers; controlled substances and alcohol use and testing; transporting and marking hazardous materials; requirements applicable to driving a motor vehicle; hours of service; and vehicle inspection, repair, and maintenance. A safety audit is different than a compliance review in that it focuses on providing safety management and technical assistance and is not intended to result in a safety fitness determination. However, if the audit demonstrates that the carrier fails to establish and/or exercise basic safety management controls, FMCSA will ensure that the necessary corrective action is taken or else the carrier will not be allowed to continue operating in the United States.

FMCSA Division Administrators or State Directors will make the initial determination about the adequacy of a Mexico-domiciled carrier's basic safety management controls and whether necessary corrective action has been taken.

If the safety audit demonstrates that the carrier is exercising the necessary basic safety management controls, the carrier will retain its provisional status and will continue to be closely monitored until the expiration of the 18-month safety monitoring period. At that time, the provisional designation will be removed from its registration, provided its safety record remains in good standing.

FMCSA anticipates that the basic safety management practices of the large majority of Mexico-domiciled carriers will prove to be adequate based on the combined effect of:

- (1) Providing educational material to the carrier in the application process;
- (2) Requiring the carrier to certify how it will comply with the FMCSRs;
- (3) Requiring long-haul carriers to successfully complete a pre-authority safety audit; and
- (4) Providing notice to the carrier of what items will be covered in the safety audit or compliance review conducted during the provisional registration period.

If the safety audit reveals that the Mexico-domiciled carrier's basic safety management practices are inadequate, FMCSA will initiate a suspension and

revocation proceeding. The carrier will be required to remedy the deficiencies or else its provisional Certificate of Registration will be revoked.

#### *Section 385.109*

Section 350(a)(2) of the Act requires the compliance review of Mexico-domiciled long-haul operations to be conducted consistent with our existing safety fitness evaluation procedures in part 385 and that the carrier receive a Satisfactory safety rating before receiving permanent operating authority. Therefore, an FMCSA safety specialist will conduct compliance reviews of Mexico-domiciled long-haul carriers applying the evaluation criteria in Appendix B to part 385, the same criteria now in use for U.S and Canadian carriers. These criteria provide for the assignment of one of three proposed safety ratings upon completion of a compliance review: Satisfactory, Conditional, or Unsatisfactory.

A carrier receiving a Satisfactory rating will continue to operate under provisional status until the expiration of the 18-month safety monitoring period. At that time, the provisional designation will be removed from its registration, provided its safety record remains in good standing.

The consequences of an Unsatisfactory rating are similar to those attached to a safety audit in which it is determined that a carrier does not have adequate safety management controls. The carrier's provisional operating authority will be suspended and the FMCSA will notify the carrier that it is required to take action to improve its practices. Failure to make the necessary changes to remedy inadequate basic safety management controls will result in revocation of a carrier's provisional operating authority.

A Conditional rating is indicative of deficiencies in a carrier's safety management controls which raise concerns about its ability to operate safely but are not of sufficient magnitude to declare the carrier unfit. Because the Act requires Mexico-domiciled long-haul carriers to achieve a Satisfactory rating in order to retain their provisional operating authority, a revocation proceeding will be initiated following the assignment of a Conditional rating. However, because our existing safety rating procedures do not equate a conditional rating with unfitness and permit conditional-rated carriers to continue operating, provisional operating authority will not be suspended at the time a revocation proceeding is initiated.

#### *Section 385.111*

In response to comments, we have added procedures incorporating specific time frames for suspension and revocation of provisional operating authority and Certificates of Registration. These procedures are designed to balance the need to protect the public from potentially unsafe carriers while preserving the carrier's due process rights.

Mexico-domiciled carriers will have 10 days following notification of an Unsatisfactory rating or an unsuccessful safety audit to demonstrate that the FMCSA committed material error. If they fail to do so, the FMCSA will suspend the carrier's provisional operating authority or provisional Certificate of Registration on the 15th day, thus placing it out of service. If the carrier fails to demonstrate that it has taken necessary corrective action within 30 days from the date of suspension, FMCSA will revoke the carrier's provisional operating authority or provisional Certificate of Registration.

Carriers assigned a Conditional rating will not have their provisional operating authority suspended, but will still need to demonstrate that necessary corrective action has been taken to prevent their authority from being revoked.

Section 385.111(e) provides for suspension of provisional registration when the carrier does not provide documents necessary for the completion of a safety audit or compliance review or does not submit sufficient evidence of corrective action in response to a written demand under § 385.105. The suspension will remain in effect until the necessary documents are produced and the carrier:

- (1) Successfully completes the safety audit;
- (2) Receives a Satisfactory or Conditional safety rating; or
- (3) Demonstrates that it has taken the necessary corrective action in response to a § 385.105 demand. Although the assignment of a Conditional rating will be sufficient to lift the suspension, the carrier will still need to upgrade its rating to Satisfactory in order to keep its provisional operating authority.

Section 385.111(f) is intended to address the problem of recidivism, i.e., carriers who, after taking corrective action resulting in the lifting of a suspension during the provisional operating or registration period, commit one of the serious safety infractions listed in § 385.105(a). In these circumstances, the suspension will be automatically reinstated and the carrier's provisional operating authority or Certificate of Registration will be

revoked unless it demonstrates it did not commit the infraction.

In a similar vein, § 385.111(g) provides for the initiation of a revocation proceeding upon receipt of credible evidence that a carrier operated in violation of a suspension order, even if that suspension order was eventually lifted. A Mexico-domiciled motor carrier that operates a commercial motor vehicle in violation of a suspension or out-of-service order will also be subject to the penalties provided in 49 U.S.C. 521(b)(2)(A), not to exceed \$10,000 for each offense.

#### Section 385.113

Under this section, a Mexico-domiciled carrier may request FMCSA to conduct an administrative review if it believes the agency has committed an error in assigning a safety rating or determining that its basic safety management controls are inadequate. The carrier's request must explain the error it believes FMCSA committed and include a list of all factual and procedural issues in dispute. In addition, the carrier must include any information or documents that support its argument. Following the administrative review, which will be conducted by the FMCSA's Associate Administrator for Enforcement, the agency will notify the carrier of its decision, which will constitute the final action of the agency. Administrative review under this section will be completed in no more than 10 days after the request is received.

#### Section 385.115

This section prohibits a Mexico-domiciled carrier whose registration has been revoked from reapplying for provisional operating authority or a Certificate of Registration for at least 30 days after the date of revocation. A Mexico-domiciled carrier reapplying for provisional registration will have to demonstrate to FMCSA's satisfaction that it has corrected the deficiencies that resulted in revocation of its registration and that it otherwise has effectively functioning basic safety management systems in place. Long-haul carriers will again be required to undergo a pre-authorization safety audit. FMCSA is obtaining information regarding revocations by inserting appropriate questions on the application forms developed in the companion rules amending parts 365 and 368 published elsewhere in today's **Federal Register**.

#### Section 385.117

This section provides that at the end of the 18-month period, the Mexico-domiciled carrier will receive

permanent DOT operating authority or a Certificate of Registration if it has successfully met the requirements of the most recent safety audit or has received a Satisfactory rating, and is not currently under a notice from FMCSA to remedy its basic safety management practices. Thereafter, it will be treated like any other non-new-entrant motor carrier. If the Mexico-domiciled carrier is under a notice to remedy its basic safety management practices, its provisional designation will continue until FMCSA determines the carrier is complying with the Federal safety regulations or revokes its registration under § 385.111.

If a compliance review or safety audit has not been conducted on a Mexico-domiciled carrier within the 18-month oversight period, the provisional designation will continue until such time as FMCSA completes and evaluates a review or audit.

Compliance reviews and safety audits will normally begin within 90 to 120 days after the grant of provisional operating authority or a provisional Certificate of Registration, so that sufficient records will be available to review. FMCSA will work to ensure that all Mexico-domiciled carriers will be scheduled for an audit or compliance review within the 18-month period.

#### Section 385.119

This section clarifies that although FMCSA's NAFTA implementation rules will include a pre-authorization safety audit for long-haul Mexico-domiciled carriers and at least one post-operational compliance review or safety audit, this is not the exclusive safety oversight that FMCSA will apply to Mexico-domiciled carriers. FMCSA will also apply the full range of oversight and enforcement actions currently applicable to all non-new-entrant motor carriers, including civil penalties and the suspension and revocation of registration or operating authority due to persistent violations of DOT regulations governing motor carrier operations in interstate commerce.

#### Appendix A to Part 385

Appendix A is being added to inform Mexico-domiciled motor carriers what the evaluation criteria will be that FMCSA will use during a safety audit to rate a carrier's compliance with the FMCSRs and applicable HMRs, assess its operational safety, and assess its basic management safety management controls. The safety audit evaluation criteria are similar to the current safety rating methodology. The safety audit evaluation criteria looks at the same list of critical and acute violations as in the safety rating methodology and both use

the same six factors: (1) *General*: Parts 387 and 390; (2) *Driver*: Parts 382, 383, and 391; (3) *Operational*: Parts 392 and 395; (4) *Vehicle*: Parts 393, 396, and inspection data for the last 12 months; (5) *Hazardous Materials*: Parts 171, 177, 180 and 397; and (6) Recordable Accident Rate per Million Miles. All Mexico-domiciled motor carriers who have a provisional Certificate of Registration will receive a safety audit. These carrier's safety audits will be subject to the safety audit evaluation criteria in Appendix A to part 385. All Mexico-domiciled motor carriers who receive a compliance review will be subject to the safety rating methodology detailed in Appendix B to part 385.

The safety audit evaluation criteria are based on 49 CFR 385.5 (Safety fitness standard) and § 385.7 (Factors to be considered in determining a safety rating). The FMCSA will use the evaluation process to ensure that Mexico-domiciled motor carriers have basic safety management controls in place. The evaluation process will also enable the FMCSA to focus its limited resources on examining the operations of carriers needing improvement in their compliance with the FMCSRs and the applicable HMRs.

#### Rulemaking Analyses and Notices

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

The FMCSA has determined that this action is a significant regulatory action within the meaning of Executive Order 12866, and is significant within the meaning of Department of Transportation regulatory policies and procedures (44 FR 11034, February 26, 1979) because of public interest. It has been reviewed by the Office of Management and Budget. However, it is anticipated that the economic impact of the revisions in this rulemaking will be minimal.

Nevertheless, the subject of safe operations by Mexico-domiciled carriers in the United States will likely generate considerable public interest within the meaning of Executive Order 12866. The manner in which FMCSA carries out its safety oversight responsibilities with respect to this cross-border motor carrier transportation may be of substantial interest to the domestic motor carrier industry, the Congress, and the public at large.

The Regulatory Evaluation analyzes the costs and benefits of this rule and the two companion NAFTA-related rules published elsewhere in today's **Federal Register**. Because these rules are so closely interrelated, we did not

attempt to prepare separate analyses for each rule.

The evaluation estimated costs and benefits based on three different scenarios, with a high, low and medium number of Mexico-domiciled carriers assumed covered by the rules. The costs of these rules are minimal under all three scenarios. Over 10 years, the costs range from \$53 million for the low scenario to approximately \$76 million for the high scenario. Forty percent of these costs are borne by the FMCSA, while the remaining costs are paid by Mexico-domiciled carriers. The largest costs are those associated with conducting pre-authorization safety audits, safety audits within 18 months of a carrier's receiving provisional Certificate of Registration, compliance reviews within 18 months of a carrier's receiving provisional operating authority, and the loss of a carrier's ability to operate in the United States.

The FMCSA used the cost effectiveness approach to determine the benefits of these rules. This approach involves estimating the number of crashes that would have to be deterred in order for the proposals to be cost effective. Over ten years, the low scenario would have to deter 640 forecast crashes to be cost beneficial, the medium scenario would have to deter 838, and the high scenario would have to deter 929. While the overall number of crashes to be avoided under the medium and high scenario is fairly high, the number falls rapidly over the 10-year analysis period and beyond. The tenth year deterrence rate is one-quarter to one-sixth the size of the first year's rate.

A copy of the Regulatory Evaluation is in the docket for this rulemaking.

### Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA)(Pub. L. 96-354, 5 U.S.C. 601-612), as amended by the Small Business Regulatory Enforcement and Fairness Act (Pub. L. 104-121), requires Federal agencies to analyze the impact of rulemakings on small entities, unless the Agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.

The United States did not have in place a special system to ensure the safety of Mexico-domiciled carriers operating in the United States. Mexico-domiciled carriers will be subject to all the same safety regulations as domestic carriers. However, FMCSA's enforcement of the FMCSRs has become increasingly data dependent in the last several years. Several programs have been put in place to continually analyze

crash rates, out-of-service (OOS) rates, compliance review records, and other data sources to allow the agency to focus on high-risk carriers. This strategy is only effective if FMCSA has adequate data on carriers' size, operations, and history. Thus, a key component of FMCSA's three companion NAFTA-related rules is the requirement that Mexico-domiciled carriers operating in the United States complete a Form MCS-150 -Motor Carrier Identification Report, and update the information submitted in the appropriate application form (OP-1(MX) or OP-2) when key information changes. This will allow FMCSA to better monitor these carriers and to quickly determine whether their safety or OOS record changes.

The more stringent oversight procedures will also allow FMCSA to respond more quickly when safety problems emerge. The safety audits, compliance reviews and CVSA inspections will provide FMCSA with more detailed information about Mexico-domiciled carriers, and allow FMCSA to act appropriately upon discovering safety problems.

The objective of these rules is to enhance the safety of Mexico-domiciled carriers operating in the United States. The rules describe what additional information Mexico-domiciled carriers will have to submit, and outline the procedure for dealing with possible safety problems.

The safety monitoring system, combined with the safety certifications and other information to be submitted in the OP-1(MX) and OP-2 applications and the pre-authorization safety audit of Mexico-domiciled carriers seeking to operate beyond the border zones, are a means of ensuring that:

(1) Mexico-domiciled applicants are sufficiently knowledgeable about safety requirements before commencing operations (a prerequisite to being able to comply);

(2) Mexico-domiciled applicants conduct operations in the United States in accordance with their application certifications and the conditions of their registrations; and

(3) The safety performance of Mexico-domiciled applicants is at least equal to that of United States and Canadian carriers operating in the United States.

These rules will primarily affect Mexico-domiciled small motor carriers who wish to operate in the United States. The amount of information these carriers will have to supply to FMCSA has been increased, and we estimate that they will spend two additional hours gathering data for the OP-1(MX) and OP-2 application forms. Mexico-domiciled carriers will also have to

undergo safety audits, an increased number of CVSA roadside inspections and compliance reviews, if they operate beyond the border zones. We presented three growth scenarios in the regulatory evaluation: a high option, with 11,787 Mexico-domiciled carriers in the baseline; a medium scenario, with 9,500 Mexico-domiciled carriers in the baseline; and a low scenario, with 4,500 Mexico-domiciled carriers in the baseline. Under all three options, the FMCSA believes that the number of applicants will match approximately that observed in the last few years before this publication date, approximately 1,365 applicants per year.

A review of the Motor Carrier Management Information System (MCMIS) census file reveals that the vast majority of Mexico-domiciled carriers are small, with 75 percent having three or fewer vehicles. Carriers at the 95th percentile carrier had only 15 trucks or buses.

These rules should not have any impact on small United States based motor carriers.

FMCSA did not establish any different requirements or timetables for small entities. As noted above, we do not believe these requirements are onerous. Most covered carriers will be required to spend two extra hours to complete the relevant forms, undergo at least one safety audit at four hours each, have their trucks inspected more frequently and, if they obtain long-haul authority, undergo a compliance review taking six hours. This part 385 interim final rule would not achieve its purposes if small entities were exempt. In order to ensure the safety of Mexico-domiciled carriers, the rule must have a consistent procedure for addressing safety problems. Exempting small motor carriers (which, as was noted above, are the vast majority or Mexico-domiciled carriers who would operate in the United States) would defeat the purpose of these rules.

FMCSA did not consolidate or simplify the compliance and reporting requirements for small carriers. Small United States carriers already have to comply with the paperwork requirements in part 365. There is no evidence that domestic carriers find these provisions confusing or particularly burdensome. Apropos the part 385 provisions, FMCSA believes the requirements are fairly straightforward, and it would not be possible to simplify them. A simplification of any substance would make the rule ineffectual. Given the compelling interest in assuring the safety of Mexico-domiciled carriers

operating in the United States, and the fact that the majority of these carriers are small entities, no special changes were made.

The part 385 requirements include performance standards. A Mexico-domiciled carrier will need to complete a safety improvement plan if its performance demonstrates that it is not operating safely, either through a high OOS rate or other problems.

Therefore, FMCSA certifies that this rule will not have a significant impact on a substantial number of small entities.

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

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4; 2 U.S.C. 1532) requires each agency to assess the effects of its regulatory actions on State, local, and tribal governments and the private sector. Any agency promulgating a final rule likely to result in a Federal mandate requiring expenditures by a State, local, or tribal government or by the private sector of \$100 million or more in any one year must prepare a written statement incorporating various assessments, estimates, and descriptions that are delineated in the Act. FMCSA has determined that the changes proposed in this rulemaking would not have an impact of \$100 million or more in any one year.

#### **Executive Order 12988 (Civil Justice Reform)**

This action 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.

#### **Executive Order 13045 (Protection of Children)**

Executive Order 13045, "Protection of Children from Environmental Health Risks and Safety Risks" (April 23, 1997, 62 FR 19885), requires that agencies issuing "economically significant" rules that also concern an environmental health or safety risk that an agency has reason to believe may disproportionately affect children must include an evaluation of the environmental health and safety effects of the regulation on children. Section 5 of Executive Order 13045 directs an agency to submit for a "covered regulatory action" an evaluation of its environmental health or safety effects on children. The agency has determined that this rule is not a "covered regulatory action" as defined under Executive Order 13045.

This rule is not economically significant under Executive Order 12866

because the FMCSA has determined that the changes in this rulemaking would not have an impact of \$100 million or more in any one year. The costs range from \$53 to \$76 million over 10 years. This rule also does not concern an environmental health risk or safety risk that would disproportionately affect children. Mexico-domiciled motor carriers who intend to operate commercial motor vehicles anywhere in the United States must comply with current U.S. Environmental Protection Agency regulations and other United States environmental laws under this rule and others being published elsewhere in today's **Federal Register**. Nonetheless, the agency has conducted a programmatic environmental assessment as discussed later in this preamble.

#### **Executive Order 12630 (Taking of Private Property)**

This final rule would not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

#### **Executive Order 13132 (Federalism Assessment)**

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, dated August 4, 1999 (64 FR 43255, August 10, 1999). FMCSA has determined that this action would not have significant Federalism implications or limit the policymaking discretion of the States.

#### **Executive Order 12372 (Intergovernmental Review)**

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

#### **Paperwork Reduction Act**

Under the Paperwork Reduction Act of 1995 (PRA) [44 U.S.C. 3501-3520], Federal agencies must determine whether requirements contained in rulemakings are subject to information collection provisions of the PRA and, if they are, obtain approval from the Office of Management and Budget for each collection of information they conduct, sponsor or require through regulations. FMCSA has determined that this regulation does not constitute an information collection with the scope or meaning of the PRA.

FMCSA performs safety compliance assessments and enforcement activities as required by statutes and the FMCSRs. Implementation of this proposal would create no additional paperwork burden on Mexico-domiciled carriers that comply with the FMCSRs. Any safety data that FMCSA solicits from individual motor carriers regarding deficiency and/or non-compliance is not considered a collection of information because this type of response is required of such carriers as part of the usual and customary compliance and enforcement practice under the FMCSRs. Accordingly, FMCSA has determined that this action would not affect any requirements under the PRA.

#### **National Environmental Policy Act**

FMCSA is a new administration within the Department of Transportation (DOT). FMCSA is currently developing an agency order that will comply with all statutory and regulatory policies under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*). FMCSA expects the draft Order to appear in the **Federal Register** for public comment in the near future. The framework of the FMCSA Order will be consistent with and reflect the procedures for considering environmental impacts under DOT Order 5610.1C. FMCSA has analyzed this rule under the NEPA and DOT Order 5610.1C, and has issued a Finding Of No Significant Impact (FONSI). The FONSI and the environmental assessment are in the docket to this rule.

FMCSA invites comments on the programmatic environmental assessment.

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

We have analyzed this action under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. This action is not a significant energy action within the meaning of section 4(b) of the Executive Order because as a procedural action it is not economically significant and will not have a significant adverse effect on the supply, distribution, or use of energy.

#### **List of Subjects in 49 CFR Part 385**

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

For the reasons stated in the preamble, the FMCSA amends 49 CFR part 385 as set forth below:

## PART 385—SAFETY FITNESS PROCEDURES

1. The authority citation for part 385 is revised to read as follows:

**Authority:** 49 U.S.C. 113, 504, 521(b), 5113, 13901–13905, 31136, 31144, 31148, and 31502; Section 350 of Public Law 107–87; and 49 CFR 1.73.

2. Sections 385.1 through 385.19 are designated as Subpart A-General, and a new Subpart B is added consisting of new §§ 385.101 through 385.119 to read as follows:

### Subpart B—Safety Monitoring System for Mexico-Domiciled Carriers

Sec.

- 385.101 Definitions.
- 385.103 Safety monitoring system.
- 385.105 Expedited action.
- 385.107 The safety audit.
- 385.109 The compliance review.
- 385.111 Suspension and revocation of Mexico-domiciled carrier registration.
- 385.113 Administrative review.
- 385.115 Reapplying for provisional registration.
- 385.117 Duration of safety monitoring system.
- 385.119 Applicability of safety fitness and enforcement procedures.

### Subpart B—Safety Monitoring System for Mexico-Domiciled Carriers

#### § 385.101 Definitions

*Compliance Review* means a compliance review as defined in § 385.3 of this part.

*Provisional certificate of registration* means the registration under § 368.6 of this subchapter that the FMCSA grants to a Mexico-domiciled motor carrier to provide interstate transportation of property within the United States solely within the municipalities along the United States-Mexico border and the commercial zones of such municipalities. It is provisional because it will be revoked if the registrant does not demonstrate that it is exercising basic safety management controls during the safety monitoring period established in this subpart.

*Provisional operating authority* means the registration under § 365.507 of this subchapter that the FMCSA grants to a Mexico-domiciled motor carrier to provide interstate transportation within the United States beyond the municipalities along the United States-Mexico border and the commercial zones of such municipalities. It is provisional because it will be revoked if the registrant is not assigned a Satisfactory safety rating following a compliance review conducted during the safety monitoring period established in this subpart.

*Safety audit* means an examination of a motor carrier's operations to provide educational and technical assistance on safety and the operational requirements of the FMCSRs and applicable HMRS and to gather critical safety data needed to make an assessment of the carrier's safety performance and basic safety management controls. Safety audits do not result in safety ratings.

#### § 385.103 Safety monitoring system.

(a) *General.* Each Mexico-domiciled carrier operating in the United States will be subject to an oversight program to monitor its compliance with applicable Federal Motor Carrier Safety Regulations (FMCSRs), Federal Motor Vehicle Safety Standards (FMVSSs), and Hazardous Materials Regulations (HMRs).

(b) *Roadside monitoring.* Each Mexico-domiciled carrier that receives provisional operating authority or a provisional Certificate of Registration will be subject to intensified monitoring through frequent roadside inspections.

(c) *CVSA decal.* Each Mexico-domiciled carrier granted provisional operating authority under part 365 of this subchapter must have on every commercial motor vehicle it operates in the United States a current decal attesting to a satisfactory inspection by a Commercial Vehicle Safety Alliance (CVSA) inspector.

(d) *Safety audit.* The FMCSA will conduct a safety audit on a Mexico-domiciled carrier within 18 months after the FMCSA issues the carrier a provisional Certificate of Registration under part 368 of this subchapter.

(e) *Compliance review.* The FMCSA will conduct a compliance review on a Mexico-domiciled carrier within 18 months after the FMCSA issues the carrier provisional operating authority under part 365 of this subchapter.

#### § 385.105 Expedited action.

(a) A Mexico-domiciled motor carrier committing any of the following violations identified through roadside inspections, or by any other means, may be subjected to an expedited safety audit or compliance review, or may be required to submit a written response demonstrating corrective action:

(1) Using drivers not possessing, or operating without, a valid Licencia Federal de Conductor. An invalid Licencia Federal de Conductor includes one that is falsified, revoked, expired, or missing a required endorsement.

(2) Operating vehicles that have been placed out of service for violations of the Commercial Vehicle Safety Alliance (CVSA) North American Standard Out-

of-Service Criteria, without making the required repairs.

(3) Involvement in, due to carrier act or omission, a hazardous materials incident within the United States involving:

(i) A highway route controlled quantity of a Class 7 (radioactive) material as defined in § 173.403 of this title;

(ii) Any quantity of a Class 1, Division 1.1, 1.2, or 1.3 explosive as defined in § 173.50 of this title; or

(iii) Any quantity of a poison inhalation hazard Zone A or B material as defined in §§ 173.115, 173.132, or 173.133 of this title.

(4) Involvement in, due to carrier act or omission, two or more hazardous material incidents occurring within the United States and involving any hazardous material not listed in paragraph (a)(3) of this section and defined in chapter I of this title.

(5) Using a driver who tests positive for controlled substances or alcohol or who refuses to submit to required controlled substances or alcohol tests.

(6) Operating within the United States a motor vehicle that is not insured as required by part 387 of this chapter.

(7) Having a driver or vehicle out-of-service rate of 50 percent or more based upon at least three inspections occurring within a consecutive 90-day period.

(b) Failure to respond to an agency demand for a written response demonstrating corrective action within 30 days will result in the suspension of the carrier's provisional operating authority or provisional Certificate of Registration until the required showing of corrective action is submitted to the FMCSA.

(c) A satisfactory response to a written demand for corrective action does not excuse a carrier from the requirement that it undergo a safety audit or compliance review, as appropriate, during the provisional registration period.

#### § 385.107 The safety audit.

(a) The criteria used in a safety audit to determine whether a Mexico-domiciled carrier exercises the necessary basic safety management controls are specified in Appendix A to this part.

(b) If the FMCSA determines, based on the safety audit, that the Mexico-domiciled carrier has adequate basic safety management controls, the FMCSA will provide the carrier written notice of this finding as soon as practicable, but not later than 45 days after the completion of the safety audit. The carrier's Certificate of Registration will

remain provisional and the carrier's on-highway performance will continue to be closely monitored for the remainder of the 18-month provisional registration period.

(c) If the FMCSA determines, based on the safety audit, that the Mexico-domiciled carrier's basic safety management controls are inadequate, it will initiate a suspension and revocation proceeding in accordance with § 385.111 of this subpart.

(d) The safety audit is also used to assess the basic safety management controls of Mexico-domiciled applicants for provisional operating authority to operate beyond United States municipalities and commercial zones on the United States-Mexico border under § 365.507 of this subchapter.

**§ 385.109 The compliance review.**

(a) The criteria used in a compliance review to determine whether a Mexico-domiciled carrier granted provisional operating authority under § 365.507 of this subchapter exercises the necessary basic safety management controls are specified in Appendix B to this part.

(b) *Satisfactory Rating.* If the FMCSA assigns a Mexico-domiciled carrier a Satisfactory rating following a compliance review conducted under this subpart, the FMCSA will provide the carrier written notice as soon as practicable, but not later than 45 days after the completion of the compliance review. The carrier's operating authority will remain in provisional status and its on-highway performance will continue to be closely monitored for the remainder of the 18-month provisional registration period.

(c) *Conditional Rating.* If the FMCSA assigns a Mexico-domiciled carrier a Conditional rating following a compliance review conducted under this subpart, it will initiate a revocation proceeding in accordance with § 385.111 of this subpart. The carrier's provisional operating authority will not be suspended prior to the conclusion of the revocation proceeding.

(d) *Unsatisfactory Rating.* If the FMCSA assigns a Mexico-domiciled carrier an Unsatisfactory rating following a compliance review conducted under this subpart, it will initiate a suspension and revocation proceeding in accordance with § 385.111 of this subpart.

**§ 385.111 Suspension and revocation of Mexico-domiciled carrier registration.**

(a) If a carrier is assigned an "Unsatisfactory" safety rating following a compliance review conducted under this subpart, or a safety audit conducted under this subpart determines that a

carrier does not exercise the basic safety management controls necessary to ensure safe operations, the FMCSA will provide the carrier written notice, as soon as practicable, that its registration will be suspended effective 15 days from the service date of the notice unless the carrier demonstrates, within 10 days of the service date of the notice, that the compliance review or safety audit contains material error.

(b) For purposes of this section, material error is a mistake or series of mistakes that resulted in an erroneous safety rating or an erroneous determination that the carrier does not exercise the necessary basic safety management controls.

(c) If the carrier demonstrates that the compliance review or safety audit contained material error, its registration will not be suspended. If the carrier fails to show a material error in the safety audit, the FMCSA will issue an Order:

(1) Suspending the carrier's provisional operating authority or provisional Certificate of Registration and requiring it to immediately cease all further operations in the United States; and

(2) Notifying the carrier that its provisional operating authority or provisional Certificate of Registration will be revoked unless it presents evidence of necessary corrective action within 30 days from the service date of the Order.

(d) If a carrier is assigned a "Conditional" rating following a compliance review conducted under this subpart, the provisions of subparagraphs (a) through (c) of this section will apply, except that its provisional registration will not be suspended under paragraph (c)(1) of this section.

(e) If a carrier subject to this subpart fails to provide the necessary documents for a safety audit or compliance review upon reasonable request, or fails to submit evidence of the necessary corrective action as required by § 385.105 of this subpart, the FMCSA will provide the carrier with written notice, as soon as practicable, that its registration will be suspended 15 days from the service date of the notice unless it provides all necessary documents or information. This suspension will remain in effect until the necessary documents or information are produced and:

(1) A safety audit determines that the carrier exercises basic safety management controls necessary for safe operations;

(2) The carrier is rated Satisfactory or Conditional after a compliance review; or

(3) The FMCSA determines, following review of the carrier's response to a demand for corrective action under § 385.105, that the carrier has taken the necessary corrective action.

(f) If a carrier commits any of the violations specified in § 385.105(a) of this subpart after the removal of a suspension issued under this section, the suspension will be automatically reinstated. The FMCSA will issue an Order requiring the carrier to cease further operations in the United States and demonstrate, within 15 days from the service date of the Order, that it did not commit the alleged violation(s). If the carrier fails to demonstrate that it did not commit the violation(s), the FMCSA will issue an Order revoking its provisional operating authority or provisional Certificate of Registration.

(g) If the FMCSA receives credible evidence that a carrier has operated in violation of a suspension order issued under this section, it will issue an Order requiring the carrier to show cause, within 10 days of the service date of the Order, why its provisional operating authority or provisional Certificate of Registration should not be revoked. If the carrier fails to make the necessary showing, the FMCSA will revoke its registration.

(h) If a Mexico-domiciled motor carrier operates a commercial motor vehicle in violation of a suspension or out-of-service order, it is subject to the penalty provisions in 49 U.S.C. 521(b)(2)(A), not to exceed \$10,000 for each offense.

(i) Notwithstanding any provision of this subpart, a carrier subject to this subpart is also subject to the suspension and revocation provisions of 49 U.S.C. 13905 for repeated violations of DOT regulations governing its motor carrier operations.

**§ 385.113 Administrative review.**

(a) A Mexico-domiciled motor carrier may request the FMCSA to conduct an administrative review if it believes the FMCSA has committed an error in assigning a safety rating or suspending or revoking the carrier's provisional operating authority or provisional Certificate of Registration under this subpart.

(b) The carrier must submit its request in writing, in English, to the Associate Administrator for Enforcement, Federal Motor Carrier Safety Administration, 400 Seventh Street, SW., Washington DC 20590.

(c) The carrier's request must explain the error it believes the FMCSA committed in assigning the safety rating or suspending or revoking the carrier's provisional operating authority or

provisional Certificate of Registration and include any information or documents that support its argument.

(d) The FMCSA will complete its administrative review no later than 10 days after the carrier submits its request for review. The Associate Administrator's decision will constitute the final agency action.

#### **§ 385.115 Reapplying for provisional registration.**

(a) A Mexico-domiciled motor carrier whose provisional operating authority or provisional Certificate of Registration has been revoked may reapply under part 365 or 368 of this subchapter, as appropriate, no sooner than 30 days after the date of revocation.

(b) The Mexico-domiciled motor carrier will be required to initiate the application process from the beginning. The carrier will be required to demonstrate how it has corrected the deficiencies that resulted in revocation of its registration and how it will ensure that it will have adequate basic safety management controls. It will also have to undergo a pre-authorization safety audit if it applies for provisional operating authority under part 365 of this subchapter.

#### **§ 385.117 Duration of safety monitoring system.**

(a) Each Mexico-domiciled carrier subject to this subpart will remain in the safety monitoring system for at least 18 months from the date FMCSA issues its provisional Certificate of Registration or provisional operating authority, except as provided in paragraphs (c) and (d) of this section.

(b) If, at the end of this 18-month period, the carrier's most recent safety audit or safety rating was Satisfactory and no additional enforcement or safety improvement actions are pending under this subpart, the Mexico-domiciled carrier's provisional operating authority or provisional Certificate of Registration will become permanent.

(c) If, at the end of this 18-month period, the FMCSA has not been able to conduct a safety audit or compliance review, the carrier will remain in the safety monitoring system until a safety audit or compliance review is conducted. If the results of the safety audit or compliance review are satisfactory, the carrier's provisional operating authority or provisional Certificate of Registration will become permanent.

(d) If, at the end of this 18-month period, the carrier's provisional operating authority or provisional Certificate of Registration is suspended under § 385.111(a) of this subpart, the

carrier will remain in the safety monitoring system until the FMCSA either:

(1) Determines that the carrier has taken corrective action; or

(2) Completes measures to revoke the carrier's provisional operating authority or provisional Certificate of Registration under § 385.111(c) of this subpart.

#### **§ 385.119 Applicability of safety fitness and enforcement procedures.**

At all times during which a Mexico-domiciled motor carrier is subject to the safety monitoring system in this subpart, it is also subject to the general safety fitness procedures established in subpart A of this part and to compliance and enforcement procedures applicable to all carriers regulated by the FMCSA.

3. Part 385 is amended by adding a new Appendix A to read as follows:

#### **Appendix A to Part 385—Explanation of Safety Audit Evaluation Criteria**

##### **I. General**

(a) Section 210 of the Motor Carrier Safety Improvement Act (49 U.S.C. 31144) directed the Secretary to establish a procedure whereby each owner and each operator granted new authority must undergo a safety review within 18 months after the owner or operator begins operations. The Secretary was also required to establish the elements of this safety review, including basic safety management controls. The Secretary, in turn, delegated this to the FMCSA.

(b) To meet the safety standard, a motor carrier must demonstrate to the FMCSA that it has basic safety management controls in place which function adequately to ensure minimum acceptable compliance with the applicable safety requirements. A "safety audit evaluation criteria" was developed by the FMCSA, which uses data from the safety audit and roadside inspections to determine that each owner and each operator applicant for a provisional operating authority or provisional Certificate of Registration has basic safety management controls in place. The term "safety audit" is the equivalent to the "safety review" required by Sec. 210. Using "safety audit" avoids any possible confusion with the safety reviews previously conducted by the agency that were discontinued on September 30, 1994.

(c) The safety audit evaluation process developed by the FMCSA is used to:

1. Evaluate basic safety management controls and determine if each owner and each operator is able to operate safely in interstate commerce; and

2. Identify owners and operators who are having safety problems and need improvement in their compliance with the FMCSRs and the HMRs, before they are granted permanent registration.

##### **II. Source of the Data for the Safety Audit Evaluation Criteria**

(a) The FMCSA's evaluation criteria are built upon the operational tool known as the safety audit. This tool was developed to

assist auditors and investigators in assessing the adequacy of a new entrant's basic safety management controls.

(b) The safety audit is a review of a Mexico-domiciled motor carrier's operation and is used to:

1. Determine if a carrier has the basic safety management controls required by 49 U.S.C. 31144;

2. Meet the requirements of Section 350 of the DOT Appropriations Act; and

3. In the event that a carrier is found not to be in compliance with applicable FMCSRs and HMRs, the safety audit can be used to educate the carrier on how to comply with U.S. safety rules.

(c) Documents such as those contained in the driver qualification files, records of duty status, vehicle maintenance records, and other records are reviewed for compliance with the FMCSRs and HMRs. Violations are cited on the safety audit. Performance-based information, when available, is utilized to evaluate the carrier's compliance with the vehicle regulations. Recordable accident information is also collected.

##### **III. Determining if the Carrier Has Basic Safety Management Controls**

(a) During the safety audit, the FMCSA gathers information by reviewing a motor carrier's compliance with "acute" and "critical" regulations of the FMCSRs and HMRs.

(b) Acute regulations are those where noncompliance is so severe as to require immediate corrective actions by a motor carrier regardless of the overall basic safety management controls of the motor carrier.

(c) Critical regulations are those where noncompliance relates to management and/or operational controls. These are indicative of breakdowns in a carrier's management controls.

(d) The list of the acute and critical regulations, which are used in determining if a carrier has basic safety management controls in place, is included in Appendix B, VII. List of Acute and Critical Regulations.

(e) Noncompliance with acute and critical regulations are indicators of inadequate safety management controls and usually higher than average accident rates.

(f) Parts of the FMCSRs and the HMRs having similar characteristics are combined together into six regulatory areas called "factors." The regulatory factors, evaluated on the basis of the adequacy of the carrier's safety management controls, are:

1. Factor 1—General: Parts 387 and 390;
2. Factor 2—Driver: Parts 382, 383 and 391;
3. Factor 3—Operational: Parts 392 and 395;
4. Factor 4—Vehicle: Part 393, 396 and inspection data for the last 12 months;
5. Factor 5—Hazardous Materials: Parts 171, 177, 180 and 397; and
6. Factor 6—Accident: Recordable Accident Rate per Million Miles.

(g) For each instance of noncompliance with an acute regulation, 1.5 points will be assessed.

(h) For each instance of noncompliance with a critical regulation, 1 point will be assessed.

#### A. Vehicle Factor

(a) When at least three vehicle inspections are recorded in the Motor Carrier Management Information System (MCMIS) during the twelve months before the safety audit or performed at the time of the review, the Vehicle Factor (Part 396) will be evaluated on the basis of the Out-of-Service (OOS) rates and noncompliance with acute and critical regulations. The results of the review of the OOS rate will affect the Vehicle Factor as follows:

1. If the motor carrier has had at least three roadside inspections in the twelve months before the safety audit, and the vehicle OOS rate is 34 percent or higher, one point will be assessed against the carrier. That point will be added to any other points assessed for discovered noncompliance with acute and critical regulations of part 396 to determine the carrier's level of safety management control for that factor; and

2. If the motor carrier's vehicle OOS rate is less than 34 percent, or if there are less than three inspections, the determination of the carrier's level of safety management controls will only be based on discovered noncompliance with the acute and critical regulations of part 396.

(b) Over two million inspections occur on the roadside each year. This vehicle inspection information is retained in the MCMIS and is integral to evaluating motor carriers' ability to successfully maintain their vehicles, thus preventing them from being placed OOS during roadside inspections. Each safety audit will continue to have the requirements of part 396, Inspection, Repair, and Maintenance, reviewed as indicated by the above explanation.

#### B. The Accident Factor

(a) In addition to the five regulatory factors, a sixth factor is included in the process to address the accident history of the motor carrier. This factor is the recordable accident rate, which the carrier has experienced during the past 12 months. Recordable accident, as defined in 49 CFR 390.5, means an accident involving a commercial motor vehicle operating on a public road in interstate or intrastate commerce which

results in a fatality; a bodily injury to a person who, as a result of the injury, immediately receives medical treatment away from the scene of the accident; or one or more motor vehicles incurring disabling damage as a result of the accident requiring the motor vehicle to be transported away from the scene by a tow truck or other motor vehicle.

(b) Experience has shown that urban carriers, those motor carriers operating entirely within a radius of less than 100 air miles (normally urban areas), have a higher exposure to accident situations because of their environment and normally have higher accident rates.

(c) The recordable accident rate will be used in determining the carrier's basic safety management controls in Factor 6, Accident. It will be used only when a carrier incurs two or more recordable accidents within the 12 months before the safety audit. An urban carrier (a carrier operating entirely within a radius of 100 air miles) with a recordable rate per million miles greater than 1.7 will be deemed to have inadequate basic safety management controls for the accident factor. All other carriers with a recordable accident rate per million miles greater than 1.5 will be deemed to have inadequate basic safety management controls for the accident factor. The rates are the result of roughly doubling the national average accident rate in Fiscal Years 1994, 1995, and 1996.

(d) The FMCSA will continue to consider preventability when a new entrant contests the evaluation of the accident factor by presenting compelling evidence that the recordable rate is not a fair means of evaluating its accident factor. Preventability will be determined according to the following standard: "If a driver, who exercises normal judgment and foresight, could have foreseen the possibility of the accident that in fact occurred, and avoided it by taking steps within his/her control which would not have risked causing another kind of mishap, the accident was preventable."

#### C. Factor Ratings

For Factors 1 through 5, if the combined violations of acute and or critical regulations for each factor is equal to three or more

points, the carrier is determined not to have basic safety management controls for that individual factor.

If the recordable accident rate is greater than 1.7 recordable accidents per million miles for an urban carrier (1.5 for all other carriers), the carrier is determined to have inadequate basic safety management controls.

#### IV. Overall Determination of the Carrier's Basic Safety Management Controls

If the carrier is evaluated as having inadequate basic safety management controls in at least three separate factors, the carrier will be considered to have inadequate safety management controls in place and corrective action will be necessary in order to avoid having its provisional operating authority or provisional Certificate of Registration revoked.

For example, FMCSA evaluates a carrier finding:

(1) One instance of noncompliance with a critical regulation in part 387 scoring one point for Factor 1;

(2) Two instances of noncompliance with acute regulations in part 382 scoring three points for Factor 2;

(3) Three instances of noncompliance with critical regulations in part 396 scoring three points for Factor 4; and

(4) Three instances of noncompliance with acute regulations in parts 171 and 397 scoring four and one-half (4.5) points for Factor 5.

In this example, the carrier scored three or more points for Factors 2, 4, and 5 and FMCSA determined the carrier had inadequate basic safety management controls in at least three separate factors. FMCSA will require corrective action in order to avoid having the carrier's provisional operating authority or provisional Certificate of Registration suspended and possibly revoked.

Issued on: March 7, 2002.

**Joseph M. Clapp,**

*Administrator.*

[FR Doc. 02-5892 Filed 3-14-02; 8:45 am]

**BILLING CODE 4910-EX-P**