

*Automatic failure determination.* violations will result in automatic failure of the safety audit in accordance with guidelines in the table to § 385.321(b).  
 Committing any one of the following 16

Table to § 385.321(b)

Violations that will result in automatic failure of the new entrant safety audit	
Violation	Guidelines for determining automatic failure of the safety audit
1. § 382.115(a)/§ 382.115(b)—Failing to implement an alcohol and/or controlled substances testing program (domestic and foreign motor carriers, respectively).	Single occurrence.
2. § 382.201—Using a driver known to have an alcohol content of 0.04 or greater to perform a safety-sensitive function.	Single occurrence.
3. § 382.211—Using a driver who has refused to submit to an alcohol or controlled substances test required under part 382.	Single occurrence.
4. § 382.215—Using a driver known to have tested positive for a controlled substance	Single occurrence.
5. § 382.305—Failing to implement a random controlled substances and/or alcohol testing program.	Single occurrence.
6. § 383.3(a)/§ 383.23(a)—Knowingly using a driver who does not possess a valid CDL	Single occurrence.
7. § 383.37(a)—Knowingly allowing, requiring, permitting, or authorizing an employee with a commercial driver's license which is suspended, revoked, or canceled by a State or who is disqualified to operate a commercial motor vehicle.	Single occurrence.
8. § 383.51(a)—Knowingly allowing, requiring, permitting, or authorizing a driver to drive who is disqualified to drive a commercial motor vehicle.	Single occurrence. This violation refers to a driver operating a CMV as defined under § 383.5.
9. § 387.7(a)—Operating a motor vehicle without having in effect the required minimum levels of financial responsibility coverage.	Single occurrence.
10. § 387.31(a)—Operating a passenger carrying vehicle without having in effect the required minimum levels of financial responsibility.	Single occurrence.
11. § 391.15(a)—Knowingly using a disqualified driver	Single occurrence.
12. § 391.11(b)(4)—Knowingly using a physically unqualified driver	Single occurrence. This violation refers to a driver operating a CMV as defined under § 390.5.
13. § 395.8(a)—Failing to require a driver to make a record of duty status	Requires a violation threshold (51% or more of examined records) to trigger automatic failure.
14. § 396.9(c)(2)—Requiring or permitting the operation of a commercial motor vehicle declared "out-of-service" before repairs are made.	Single occurrence.
15. § 396.11(c)—Failing to correct out-of-service defects listed by driver in a driver vehicle inspection report before the vehicle is operated again.	Single occurrence.
16. § 396.17(a)—Using a commercial motor vehicle not periodically inspected	Requires a violation threshold (51% or more of examined records) to trigger automatic failure.

In response to comments stating that violations based on a single driver or a single CMV unfairly disadvantage larger carriers, the Agency has made adjustments to its approach for the automatic failure determination. Although 14 of the 16 regulatory violations (numbers 1–12, 14 and 15 in the table to § 385.321(b)) would trigger automatic failure of the safety audit based on a single occurrence of the violation, two of the violations will include thresholds. FMCSA continues to believe the severity of 14 of these violations warrants the single-occurrence trigger. However, in the case of §§ 395.8(a) and 396.17(a), the Agency will require a violation threshold of 51% to cause automatic failure of the safety audit. (Both of the threshold violations were included in the December 2006 NPRM). FMCSA has determined that the appropriate standard is preponderance of the evidence, often called the "51% rule." In other words, if the driver did not

prepare a record of duty status in more than half of the trips examined, or the carrier failed to perform periodic inspections on more than half of the fleet vehicles examined during the safety audit, there exists a violation threshold indicative of breakdowns in the carrier's management controls which will result in automatic failure of the new entrant safety audit. Violation rates of 50% or less will be taken into consideration in the overall assessment of the carrier's compliance with applicable regulations, and the Agency may use other means to improve the carrier's performance, including assessment of civil penalties following a compliance review of the new entrant.

*Discussion of additional regulatory violations.* Violation two (§ 382.201) corrects an inadvertent omission from the December 2006 NPRM. While the Agency proposed that a violation of the prohibition against carriers using a driver who tests positive for controlled substances would result in automatic

failure of the safety audit, it omitted the corresponding violation regarding the prohibition against carriers knowingly using a driver who has an alcohol concentration of 0.04 or greater.

Violation five (§ 382.305) involves failure to implement random controlled substances and/or alcohol testing, a crucial element of any effective drug and alcohol testing program. The Agency believes implementation of such random testing is essential to deterring use of controlled substances or abuse of alcohol by CMV drivers.

Violation six (§§ 383.3/383.23) is added to close a gap in the list of automatic failure regulatory violations relating to CDL drivers. The NPRM only addressed a carrier that uses a driver with a suspended, revoked or cancelled CDL or a driver who was disqualified to operate a CMV. Using a driver who does not obtain a CDL when one is required is an equally serious safety violation.

Violation 10 (§ 387.31(a)) complements regulatory violation

**DEPARTMENT OF TRANSPORTATION****Federal Motor Carrier Safety Administration****49 CFR Parts 365, 385, 387, and 390**

[Docket No. FMCSA-2001-11061]

RIN 2126-AA59

**New Entrant Safety Assurance Process****AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.**ACTION:** Final rule.

**SUMMARY:** FMCSA amends the New Entrant Safety Assurance Program regulations to raise the standard of compliance for passing the new entrant safety audit. The Agency identifies 16 regulations that are essential elements of basic safety management controls necessary to operate in interstate commerce and makes a carrier's failure to comply with any one of the 16 regulations an automatic failure of the safety audit. Additionally, if certain violations are discovered during a roadside inspection, the new entrant now will be subject to expedited actions to correct these deficiencies. The Agency now will also check compliance with the Americans with Disabilities Act and certain household goods-related requirements in the new entrant safety audit, if they apply to the new entrant's operation. Failure to comply with either of these requirements will not affect the outcome of the safety audit; however, the Agency will take appropriate actions to improve compliance. FMCSA clarifies changes to some of the existing new entrant regulations and establishes a separate new entrant application procedure and safety oversight program for non-North America-domiciled motor carriers.

Finally, the Agency has enhanced the quality and availability of its educational and technical assistance (ETA) materials to ensure applicants are knowledgeable about applicable Federal motor carrier safety standards. Because the Agency believes Form MCS-150A—Safety Certification for Application for USDOT Number is not an effective instrument for establishing knowledgeability, it is eliminating that form.

FMCSA believes this rule will improve the Agency's ability to identify at-risk new entrant carriers and ensure deficiencies in basic safety management controls are corrected before the new entrant is granted permanent registration. These changes do not impose additional regulatory requirements on any new entrant carrier

because these carriers are already required to comply with all applicable rules.

**DATES:** *Effective:* This rule is effective: February 17, 2009. *Compliance:* Compliance with this rule is required beginning December 16, 2009.

**FOR FURTHER INFORMATION CONTACT:** Ms. Stephanie Haller, New Entrant Program Manager, Enforcement and Compliance Division. (202) 366-0178, *Stephanie.Haller@dot.gov*. Business hours are from 8 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:****Privacy Act**

Anyone is able to search the electronic form for all comments received into any of our dockets by the name of the individual submitting the comment (or signing a comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Page 19476).

*The preamble is organized as follows:*

- I. Legal Basis for the Rulemaking
- II. Regulatory History
  - A. Interim Final Rule
  - B. Notice of Proposed Rulemaking
- III. Discussion of Comments to the NPRM and Section-by-Section Analysis of the Final Rule
- IV. Rulemaking Analyses

**I. Legal Basis for the Rulemaking**

Title 49 U.S.C. 31144 authorizes the Secretary of Transportation (Secretary) to determine whether an owner or operator is fit to operate safely. Section 210(a) of the Motor Carrier Safety Improvement Act of 1999 [Pub. L. 106-159, 113 Stat. 1764, December 9, 1999] (MCSIA) added section 31144(g)<sup>1</sup> directing the Secretary to establish regulations to require each motor carrier owner and operator granted new operating authority to undergo a safety review within 18 months of starting operations. In issuing these regulations, the Secretary was required to: (1) Establish the elements of the safety review, including basic safety management controls; (2) consider their effects on small businesses; and (3) consider establishing alternate locations

<sup>1</sup> MCSIA originally codified sec. 31144(g) as sec. 31144(c) and directed that it be added at the end of 49 U.S.C. 31144 following preexisting subsections (c), (d), and (e). Section 4114(c)(1) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (Pub. L. 109-59, 119 Stat. 1144, August 10, 2005) (SAFETEA-LU) recodified this provision as sec. 31144(g).

where such reviews may be conducted for the convenience of small businesses. The Secretary was also required to phase in the new entrant safety review requirements in a manner that takes into account the availability of certified motor carrier safety auditors. Congress mandated increased oversight of new entrants because studies indicated these operators had a much higher rate of non-compliance with basic safety management requirements and were subject to less oversight than established operators. The authority to establish such regulations has been delegated to the Federal Motor Carrier Safety Administration (FMCSA). 49 CFR 1.73(g).

Section 210(b) of MCSIA (codified as a note to 49 U.S.C. 31144) required the Secretary to initiate a rulemaking to establish minimum requirements for applicant motor carriers seeking Federal interstate operating authority to ensure such applicants are knowledgeable about applicable Federal motor carrier safety standards. The Secretary was directed to consider establishment of a proficiency examination, as well as other requirements, to ensure applicant knowledgeability.

In addition to expanding the Secretary's authority under section 31144, section 210 of MCSIA was a specific statutory directive consistent with the more general pre-existing legal authority provided by the Motor Carrier Safety Act of 1984 (the 1984 Act) [49 U.S.C. App. 2505 (1988), recodified at 49 U.S.C. 31136(a)], which requires the Secretary to prescribe regulations on commercial motor vehicle safety. The regulations required by the 1984 Act must prescribe minimum safety standards for commercial motor vehicles (CMVs). At a minimum, the regulations shall ensure: (1) CMVs are maintained, equipped, loaded, and operated safely; (2) the responsibilities imposed on operators of CMVs do not impair their ability to operate the vehicles safely; (3) the physical condition of operators of CMVs is adequate to enable them to operate the vehicles safely; and (4) the operation of CMVs does not have a deleterious effect on the physical condition of the operators.

The rule changes the New Entrant Safety Assurance Program to improve the Agency's ability to identify at-risk new entrant motor carriers and ensures deficiencies are corrected before granting them permanent registration. It also ensures that applicants will become knowledgeable about Federal safety regulations before they commence interstate operations. As such, it implements the section 31136(a)(1)