

purposes of the Regulatory Flexibility Act. The Department makes these statements on the basis that by extending the implementation date of the new form, this rule will not impose any significant costs on anyone. The costs of the underlying Part 40 final rule were analyzed in connection with its issuance in December 2000. Therefore, it has not been necessary for the Department to conduct a regulatory evaluation or Regulatory Flexibility Analysis for this proposed rule. The alcohol testing form complies with the Paperwork Reduction Act. It has no Federalism impacts that would warrant a Federalism assessment.

#### List of Subjects in 49 CFR Part 40

Administrative practice and procedures, Alcohol abuse, Alcohol testing, Drug abuse, Drug testing, Laboratories, Reporting and recordkeeping requirements, Safety, Transportation.

Issued June 25, 2010, at Washington DC.

**Jim L. Swart,**

*Director.*

■ For reasons discussed in the preamble, the Department of Transportation is amending 49 CFR part 40, Code of Federal Regulations, as follows:

#### PART 40—PROCEDURES FOR TRANSPORTATION WORKPLACE DRUG AND ALCOHOL TESTING PROGRAMS

■ 1. The authority citation for 49 CFR part 40 continues to read as follows:

*Authority:* 49 U.S.C. 102, 301, 322, 5331, 20140, 31306, and 45101 *et seq.*

■ 2. In Appendix G to Part 40—Alcohol Testing Form, the paragraph is amended by removing the text “August 1, 2010” and adding in its place “January 1, 2011.”

[FR Doc. 2010–16159 Filed 7–1–10; 8:45 am]

BILLING CODE 4910–9X–P

### DEPARTMENT OF TRANSPORTATION

#### Federal Motor Carrier Safety Administration

#### 49 CFR Part 387

[Docket No. FMCSA–2006–26262]

RIN 2126–AB05

#### Minimum Levels of Financial Responsibility for Motor Carriers

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

**ACTION:** Final rule.

**SUMMARY:** The FMCSA amends its regulations concerning minimum levels of financial responsibility for motor carriers to allow Canada-domiciled motor carriers and freight forwarders to maintain, as acceptable evidence of financial responsibility, insurance policies issued by Canadian insurance companies legally authorized to issue such policies in the Canadian Province or Territory where the motor carrier or freight forwarder has its principal place of business. This final rule does not change the required minimum levels of financial liability coverage that all motor carriers and freight forwarders must maintain under the existing regulations. This final rule responds to a petition for rulemaking filed by the Government of Canada.

**DATES:** *Effective Date:* The effective date of the amendments made by this final rule is August 2, 2010.

**ADDRESSES:** Internet users may download and print this final rule from today’s edition of the Federal Register’s online system at: <http://www.gpoaccess.gov/fr/index.html>. You may access this final rule and all related documents and material from the Federal eRulemaking Portal through the Federal Docket Management System (FDMS) at <http://www.regulations.gov>, by searching Docket ID number FMCSA–2006–26262. The FDMS is available 24 hours each day, 365 days each year. For persons who do not have access to the Internet, all documents in the docket may be examined, and/or copied for a fee, at the U.S. Department of Transportation’s Dockets Room, 1200 New Jersey Avenue, SE., on the ground floor in Room W12–140, Washington, DC, between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Ms. Dorothea Grymes, Commercial Enforcement Division (MC–ECC), Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590, or telephone (202) 385–2400.

#### SUPPLEMENTARY INFORMATION:

#### Acronyms and Abbreviated References

ANPRM—Advance Notice of Proposed Rulemaking  
ATA—American Trucking Associations, Inc  
AIA—American Insurance Association  
Canada—Government of Canada  
CCIR—Canadian Council of Insurance Regulators  
CFR—Code of Federal Regulations  
CMV—Commercial Motor Vehicle  
FMCSA—Federal Motor Carrier Safety Administration  
FMCSRs—Federal Motor Carrier Safety Regulations

IBC—Insurance Bureau of Canada  
Leaders—President of the United States, Prime Minister of Canada, and the President of Mexico  
L&I—Licensing and Insurance Database  
MCMIS—Motor Carrier Management Information System  
NAFTA—North American Free Trade Agreement  
NAIC—National Association of Insurance Commissioners  
NIIC—National Interstate Insurance Company  
NPRM—Notice of Proposed Rulemaking  
OSFI—Office of the Superintendent of Financial Institutions  
PAU—Power of Attorney and Undertaking  
PACICC—Property and Casualty Insurance Compensation Corporation  
PCI—Property Casualty Insurers Association of America  
RIA—Regulatory Impact Analysis  
SPP—The Security and Prosperity Partnership of North America

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#### I. Background

##### Legal Basis for the Rulemaking

Section 30 of the Motor Carrier Act of 1980 (1980 Act) (Pub. L. 96–296, 94 Stat. 793, 820, July 1, 1980) authorized the Secretary of Transportation (Secretary) to prescribe regulations establishing minimum levels of financial responsibility covering public liability, property damage, and environmental restoration for the transportation of property for compensation by motor vehicles in interstate or foreign commerce. Section 30(c) of the 1980 Act provided that motor carrier financial responsibility may be established by evidence of one or a combination of the following if acceptable to the Secretary: (1) Insurance; (2) a guarantor; (3) a surety bond issued by a bonding company authorized to do business in the United States; and (4) qualification as a self-

insurer (49 U.S.C. 31139(f)(1)). Section 30(c) required the Secretary to establish, by regulation, methods and procedures to ensure compliance with these requirements.

In June 1981, the Secretary issued regulations implementing Section 30, which are codified at 49 CFR part 387, subpart A. The implementing regulations provide that for-hire motor carriers operating motor vehicles transporting property in interstate or foreign commerce or transporting hazardous materials in intrastate, interstate, or foreign commerce, must obtain and have in effect minimum levels of financial responsibility through, as applicable here, an insurance policy or a surety bond. The regulations further provide the specific forms for an endorsement to the insurance policy and for the surety bond. These forms, entitled Form MCS-90 "Endorsement for Motor Carrier Policies of Insurance for Public Liability under Sections 29 and 30 of the Motor Carrier Act of 1980," and Form MCS-82, "Motor Carrier Surety Bond for Public Liability under Section 30 of the Motor Carrier Act of 1980," were required to be maintained at the motor carrier's principal place of business as proof that it satisfied the financial responsibility requirement. (See 49 CFR 387.7 and 387.15.)

Section 18 of the Bus Regulatory Reform Act of 1982 (Bus Act) (Pub. L. 97-261, 96 Stat. 1102, 1120, September 20, 1982), codified at 49 U.S.C. 31138, directed the Secretary to prescribe regulations establishing the minimum levels of financial responsibility covering public liability and property damage for the transportation of passengers for compensation by motor vehicle in interstate or foreign commerce. Section 18(d) of the Bus Act provided that such motor carrier financial responsibility may be established by evidence of one or a combination of the following if acceptable to the Secretary: (1) Insurance, including high self-retention; (2) a guarantee; and (3) a surety bond issued by a bonding company authorized to do business in the United States (49 U.S.C. 31138(c)(1)). Section 18(d) required the Secretary to establish, by regulation, methods and procedures to ensure compliance with these requirements.

In November 1983, the Secretary issued regulations implementing section 18 of the Bus Act. The regulations implementing that law are found at 49 CFR part 387, subpart B, and contain the same requirements found in Subpart A for an insurance policy, as applicable here, with Form MCS-90B endorsement

or a surety bond per MCS-82B. (See 49 CFR 387.39.)

This final rule is based on the Secretary's authority to establish methods and procedures to ensure that certain motor carriers of property and passengers maintain the minimum financial responsibility liability coverage mandated by 49 U.S.C. 31138(c)(1) and 31139(f)(1). This authority was delegated to FMCSA by the Secretary pursuant to 49 CFR 1.73(f).

#### *The Government of Canada (Canada) Petition for Rulemaking*

On September 29, 2005, Canada submitted a petition for rulemaking to amend 49 CFR part 387. Canada specifically requested that FMCSA amend § 387.11, which provides that a policy of insurance or surety bond does not satisfy FMCSA's financial responsibility requirements unless the insurer or surety furnishing the policy or bond is—

(a) Legally authorized to issue such policies or bonds in each State in which the motor carrier operates; or

(b) Legally authorized to issue such policies or bonds in the State in which the motor carrier has its principal place of business or domicile, and is willing to designate a person upon whom process, issued by or under the authority of any court having jurisdiction of the subject matter, may be served in any proceeding at law or equity brought in any State in which the motor carrier operates; or

(c) Legally authorized to issue such policies or bonds in any State of the United States and eligible as an excess or surplus lines insurer in any State in which business is written, and is willing to designate a person upon whom process, issued by or under the authority of any court having jurisdiction of the subject matter, may be served in any proceeding at law or equity brought in any State in which the motor carrier operates.

Canada asked FMCSA to consider amending this provision to permit insurance companies, licensed either provincially or territorially in Canada, to write motor vehicle liability insurance policies for Canada-domiciled motor carriers of property operating in the United States and to issue the Form MCS-90 endorsement for public liability to meet FMCSA's financial responsibility requirements. Form MCS-90 is the endorsement for motor carrier policies of insurance for public liability, which for-hire motor carriers of property must maintain at their principal place of business. Under 49 CFR 387.7(f), motor carriers domiciled in Canada and Mexico must also carry a copy of the Form MCS-90 on board each vehicle operated in the United States.

*The combined effects of §§ 387.7 and 387.11 required Canada-domiciled motor carriers operating in the United States to either:* (1) Obtain insurance through a Canada-licensed insurer, which enters into a "fronting agreement" with a U.S.-licensed insurer, whereby the U.S. insurer permits the Canadian insurer to sign the Form MCS-90 as its agent, and the entire risk is contractually "reinsured" back to the Canadian insurer by the U.S. insurer; or (2) obtain two separate insurance policies, one valid in Canada written by a Canadian insurer and one valid in the United States written by a U.S. insurer. Canada indicated that the first option is by far the most common. Canada contended that the results of these requirements posed an additional administrative burden, inconvenience, and cost not faced by U.S.-domiciled motor carriers operating in Canada. As Canada stated, U.S. motor carriers and their insurers do not face these additional costs in transporting goods into Canada. FMCSA estimated that there are approximately 9,000 Canada-domiciled, for-hire motor carriers of property and passengers, and freight forwarders actively operating commercial motor vehicles (CMVs) in the United States that are subject to FMCSA's current Federal motor carrier financial responsibility rules.

Canada requested that FMCSA amend 49 CFR part 387 so that an insurance policy issued by a Canadian insurance company satisfies the Agency's financial responsibility requirements. Canada asserted that the insurance company will be legally authorized to issue such a policy in the Province or Territory of Canada in which the Canadian motor carrier has its principal place of business or domicile. Furthermore, the insurance company should also be required to designate a person upon whom process, issued by or under the authority of any court having jurisdiction over the subject matter, may be served in any proceeding at law or equity brought in any State in which the motor carrier operates.

This change would eliminate the need for Canadian insurance companies to link with a U.S. insurance company to legally insure Canada-domiciled motor carriers operating in the United States. It should be noted that although Canada's petition only requested to amend 49 CFR 387.11, its proposal would require changes in other sections of part 387 for the sake of consistency. Section 387.35 applies § 387.11 requirements to motor passenger carriers, who must obtain a Form MCS-90B endorsement. Furthermore, § 387.315 imposes the same

requirements on motor carriers who must file evidence of insurance with FMCSA, and § 387.409 applies similar financial responsibility requirements on freight forwarders. Therefore, FMCSA has amended those sections for consistency as well.

Canada pointed out that, for many years, it has recognized and accepted non-commercial motor vehicle liability policies issued in either country as acceptable proof of financial responsibility. Furthermore, all jurisdictions in Canada accept the signing and filing of a Power of Attorney and Undertaking (PAU) by U.S.-licensed insurers as valid proof of financial responsibility for U.S.-domiciled motor vehicles of all categories. The PAU provides that the U.S. insurer will comply with and meet the minimum coverage and policy limits required in any Canadian jurisdiction in which a crash involving its insured occurs. Canada stated that the PAU is similar to the MCS-90 endorsement required under part 387. Canada also noted that the PAU is filed with the Canadian Council of Insurance Regulators (CCIR), which is the Canadian equivalent to the U.S. National Association of Insurance Commissioners (NAIC).

#### *The Security and Prosperity Partnership of North America*

The Security and Prosperity Partnership of North America (SPP) was dedicated to increasing security and enhancing prosperity among the United States, Canada, and Mexico through greater cooperation and information sharing. The President of the United States, the Prime Minister of Canada, and the President of Mexico (the Leaders) announced this initiative on March 23, 2005. Among other things, the initiative reflects the goal of improving the availability and affordability of insurance coverage for motor carriers engaged in cross-border commerce in North America.

On June 27, 2005, a Report to the Leaders was signed on behalf of the United States by the Secretaries of Homeland Security, Commerce, and State. (See <http://www.spp.gov>, and click on link to "2005 Report to Leaders.") One of the Prosperity Priorities of the SPP is to "[s]eek ways to improve the availability and affordability of insurance coverage for carriers engaged in cross-border commerce in North America." At [http://www.spp.gov/report\\_to\\_leaders/prosperity\\_annex.pdf?dName=report\\_to\\_leaders](http://www.spp.gov/report_to_leaders/prosperity_annex.pdf?dName=report_to_leaders), the following key milestone is stated for this initiative:

"U.S. and Canada to work towards possible amendment of the U.S. Federal Motor Carrier

Safety Administration Regulation to allow Canadian insurers to directly sign the MCS-90 form concerning endorsement for motor carrier policies of insurance for public liability: by June 2006."

Canada advocated a change to part 387 to assist in meeting the stated goals of the SPP. Canada stated, "Achieving a seamless motor vehicle liability insurance policy between Canada and the United States for motor carriers" will contribute to enhancing the competitive and efficient position of North American businesses. FMCSA recognized the importance of considering these requests and granted the petition by initiating a rulemaking proceeding to solicit public comment on Canada's proposal.

#### *Advance Notice of Proposed Rulemaking (ANPRM)*

On December 15, 2006, FMCSA published an ANPRM (71 FR 75433) in response to Canada's petition for rulemaking. The ANPRM also requested public comment on a petition for rulemaking from the Property Casualty Insurers of America (PCI), which requested that FMCSA make revisions to the Forms MCS-90 and MCS-90B endorsements to clarify that language in the endorsements imposing liability for negligence "on any route or in any territory authorized to be served by the insured or elsewhere" does not include liability connected with transportation within Mexico.

The PCI petition was the result of a Federal District Court decision holding that the Form MCS-90B endorsement applied to a crash that occurred in Mexico. As a result, PCI requested that the endorsement be amended by inserting the phrase: "within the United States of America, its territories, possessions, Puerto Rico, and Canada" following the words "or elsewhere."

However, in September 2007, the U.S. Court of Appeals for the Fifth Circuit issued a decision, *Lincoln General Insurance Co. v. De La Luz Garcia*, 501 F.3d 436 (5th Cir., 2007), effectively overturning the District Court decision that had prompted PCI to file its petition. Because the Court of Appeals decision provided PCI with the relief requested in its petition and because the issues raised in the PCI petition are different from the issues raised in Canada's petition, FMCSA decided that a regulatory change need not be considered, and the issue would not be addressed further in this rulemaking.

FMCSA received comments on the ANPRM from six commenters. FMCSA addressed the issues raised by the six commenters in its June 10, 2009, notice of proposed rulemaking (74 FR 27485).

#### *Notice of Proposed Rulemaking (NPRM)*

FMCSA published an NPRM on June 10, 2009, concerning Canada's proposal to amend 49 CFR 387.11 to allow Canadian insurance companies, licensed in the province or territory where the motor carrier has its principal place of business, to issue proof of financial responsibility for Canada-domiciled motor carriers by executing the Forms MCS-90 and MCS-90B directly rather than as the agent of a U.S. insurer. FMCSA also proposed to amend other sections of part 387 (§§ 387.35, 387.315, and 387.409) for consistency.

#### **II. Discussion of Comments Received on NPRM**

FMCSA provided a 60-day comment period for the NPRM that ended on August 10, 2009. In response, nine organizations and one individual filed comments as follows: the Insurance Bureau of Canada (IBC); the Insurance Corporation of British Columbia; the Canadian Trucking Alliance; Canada; NAIC; the American Insurance Association (AIA); the American Trucking Associations, Inc. (ATA); the National Interstate Insurance Company (NIIC); PCI; and Mr. Michael Stanley. Canada and the NAIC filed additional comments in the docket on September 23, 2009, and on November 23, 2009, respectively. The Agency reviewed and considered all comments submitted to this docket.

#### *General Comments*

Seven commenters supported the NPRM; two commenters were also supportive of the NPRM if certain concerns were addressed.

#### *Specific Comments From PCI and IBC*

PCI and IBC stated that a "U.S.-only" coverage territory definition should be added to the MCS-90 and MCS-90B forms.

#### *FMCSA Response:*

FMCSA disagrees with this comment. As noted previously and described more fully in the NPRM (74 FR 27487), the September 2007 Fifth Circuit decision addressed this issue and essentially provided PCI with the legal resolution requested in its petition for rulemaking. Therefore, FMCSA concluded that it was unnecessary to add the territorial definition to the MCS-90 and MCS-90B forms. As PCI and IBC did not provide any new arguments to support adding the territorial definition, FMCSA will not address it further in this final rule.

#### *Specific Comments From the ATA*

ATA was generally supportive of the NPRM but requested that the Agency

respond to its concerns. ATA believed that several issues still needed to be resolved and addressed, as follows:

*ATA Comment 1:*

ATA argued that Canadian insurance companies should be required to comply with all FMCSA's requirements for U.S.-based insurers (*i.e.*, as required by FMCSA under 49 CFR 387.11(b)). ATA also contended that Canadian insurance companies should comply with any other applicable U.S. insurance regulations on a State-by-State basis. ATA suggested that this could prove to be difficult for Canadian insurers because they would need to register in each State and be subject to a variety of additional requirements in each jurisdiction. ATA also suggested that these aspects of the U.S. financial responsibility requirements would tend to discourage Canadian carriers and insurance companies from participating in the U.S. market.

*FMCSA Response:*

Under part 387 of the FMCSRs, the Agency has authority to prescribe the minimum levels of financial responsibility required to be maintained by motor carriers, freight forwarders and property brokers. In terms of making determinations about what laws and regulations will apply to U.S.-based insurers, that is a State process. FMCSA does not intend to enter into that process as part of this rule. However, FMCSA *indirectly* imposes requirements on U.S. insurers by not accepting the Forms MCS-90 and MCS-90B unless the insurer meets certain requirements. The Agency could impose a requirement for Canada-based insurance companies as a condition of accepting their policies. Such a requirement would be contrary to the purpose of this rulemaking, however, given that if the companies were licensed by a State, they would already satisfy the existing rule. Furthermore, based on the information reviewed by the Agency, such a requirement is unnecessary, considering that the Canada-based insurers must be licensed in the Canadian Province or Territory where the motor carrier or freight forwarder has its principle place of business. Currently, the Agency has an internal process to verify that U.S.-based insurers are solvent and duly licensed in the State(s) where they write and issue insurance policies for the motor carrier entities that must comply with part 387. FMCSA verifies the name of the insurance company, its home office address and telephone number, and its solvency by checking the Best Insurance

Reports<sup>1</sup> or by going online to <http://www.ambest.com>. FMCSA leaves it up to the States to monitor U.S.-based insurance companies and, if this rule is implemented, would leave it up to the Canadian government and its Provinces and Territories to monitor Canada-based insurance companies in the same manner (*see* RIA, pages 14 and 15).<sup>2</sup> Thus, the Agency disagrees with ATA about the need for requiring licensing in the U.S. FMCSA can readily verify if the companies are solvent and duly licensed in the jurisdictions where the insurance is issued.

Likewise, FMCSA does not agree with ATA that it is necessary to require, indirectly, that Canada-based insurance companies comply with U.S.-based insurance regulations. As noted above, the Canadian federal government and its Provinces and Territories share jurisdiction over the insurance regulation of Canada-based motor carriers. Indeed, FMCSA is engaged in an on-going process with its Canadian counterparts to identify opportunities for establishing reciprocity arrangements to achieve a seamless motor vehicle liability insurance policy for adequate protection of the public between the two nations, but it does not regulate the insurance industry in this country or any other.

<sup>1</sup>For most insurance companies domiciled in the U.S., the data in the Best Insurance Reports is based on each insurance company's sworn annual and quarterly financial statement as prescribed by the National Association of Insurance Commissioners (NAIC) and as filed with the Insurance Commissioners of the States in which the companies are licensed to do business. This source also provides data related to companies operating outside of the U.S., but it is presented in accordance with customs or regulatory requirements of the country of domicile.

<sup>2</sup>The Canadian federal government and the Provinces/Territories share jurisdiction over insurance regulation in Canada. Property and casualty (P&C) insurers can be incorporated under either level of government. The Canadian federal and provincial governments share jurisdiction over insurance matters in Canada; therefore both levels of government are involved in the regulation and supervision of participants in Canada's P&C insurance industry. Canadian federal authorities look after the solvency of companies incorporated federally, as well as Canadian branch operations of firms incorporated outside Canada. Provincial authorities are responsible for the solvency of provincially incorporated insurers, for reviewing and interpreting insurance contracts and for licensing and supervising agents and adjusters.

Approximately three-quarters of the P&C insurers active in Canada are supervised by the federal government through the Office of the Superintendent of Financial Institutions (OSFI), as they operate in more than one province or are branches of foreign companies. These federally regulated insurers make up more than 80 per cent of the total business of the P&C insurance industry in Canada. Federally regulated companies must, however, also be licensed in each Province and Territory in which they undertake insurance activities.

This final rule amends §§ 387.11, 387.35, 387.315, and 387.409 to allow a Canadian insurer to submit an insurance policy on behalf of a Canada-based motor carrier that will satisfy the financial responsibility requirements if the insurer is: legally authorized to issue a policy of insurance in the Province or Territory of Canada in which a motor carrier has its principal place of business or domicile; and is willing to designate a person upon whom process, issued by or under the authority of any court having jurisdiction of the subject matter, may be served in any proceeding at law or equity in any State in which the motor carrier operates. Thus, any Canadian insurance policy submitted on behalf of a Canada-based motor carrier must designate an agent in each State upon whom service of process may be served as required by FMCSA regulations under part 387.

*ATA Comment 2:*

ATA also argued that the oversight of Canada-based insurance companies must be at least as stringent as that over U.S.-based companies.

*FMCSA Response:*

Prior to this rule, Canadian insurers providing coverage to Canadian motor carriers operating in the U.S. were already responsible for the insurance coverage limits in the U.S. when they were arranging insurance through a U.S.-based insurance company. The Agency believes Canada has a very strong, prudential Federal regulator of its financial institutions, as evident from the comments submitted by IBC and NAIC. NAIC stated that the financial responsibility levels required in Canada for commercial vehicles are comparable to those requirements in the U.S. The Office of the Superintendent of Financial Institutions (OSFI) is responsible for monitoring the solvency of Canadian federal financial institutions, including banks and insurance companies (*i.e.*, those which are licensed at the federal level and in each Province and Territory in which they undertake insurance activities), and ensuring that these companies are in sound financial condition. NAIC noted that, similar to the NAIC insurer's quarterly financial filing requirements, OSFI posts extensive financial information (*e.g.*, balance sheet, income statement, some operating information, and solvency calculation) for each federally regulated Canadian insurer on its Web site each quarter at [http://www.osfi-bsif.gc.ca/osfi/index\\_easp?ArticleID=3](http://www.osfi-bsif.gc.ca/osfi/index_easp?ArticleID=3).

NAIC also stated there are significant similarities between the States' insurance regulations and Canadian Federal, Provincial, and Territorial

insurance regulations. In Canada, there is a guarantee fund mechanism in case an insurer becomes insolvent. This mechanism is the Property and Casualty Insurance Compensation Corporation (PACICC), which is an industry-financed policyholder protection scheme for most insurance policies that are issued by property and casualty insurance companies in Canada. PACICC, which is approved by government regulators, is the national guarantee fund that protects insurance customers from undue financial loss in the event that a member insurer fails. It guarantees payments up to \$250,000 per claim, less deductibles, should an insurer become insolvent. More information about PACICC is available at [http://www.pacicc.com/english/sub\\_contents.htm](http://www.pacicc.com/english/sub_contents.htm).

The Canadian government and the insurance companies it regulates have demonstrated that they have the ability and willingness to honor their financial obligations without the need for any additional oversight. Therefore, FMCSA believes that Canada has a satisfactory oversight system in place to ensure the solvency of Canada-based insurance companies.

In addition, FMCSA believes that Canadian insurers are seeking the same level of fair and equal treatment that is afforded to U.S. insurers that insure U.S.-domiciled carriers operating in Canada. The objective of this rulemaking initiative is to provide reciprocity between the U.S. and Canada. As noted previously in this final rule, FMCSA would leave it up to the Canadian government and its Provinces and Territories to monitor Canada-based insurance companies in the same manner as the States monitor U.S.-based insurance companies (See FMCSA response to ATA comment 1.)

*ATA Comment 3:*

ATA contended that every Canadian insurance policy must contain an endorsement stating that the insurance company complies with U.S. laws and 49 CFR part 387.

*FMCSA Response:*

In an effort to garner the transportation and insurance industries' compliance with the 1980 Act's mandated levels of financial responsibility, FMCSA established the MCS-90 endorsement to make the insurer a surety to the public. The Act requires the MCS-90 endorsement be attached to any liability policy issued to motor carriers operating commercial motor vehicles in interstate or foreign commerce. It ensures that members of the public are protected when injured by members of the transportation industry. The motor carrier must specify

that coverage will remain in effect continuously until terminated as required by the law (see 49 CFR 387.15).

With regard to ATA's argument that every Canadian insurance policy must contain an endorsement stating that the insurance company complies with U.S. laws and 49 CFR part 387, FMCSA believes this type of endorsement is unnecessary because the MCS-90 forms already fulfill this purpose.

*ATA Comment 4:*

FMCSA must require Canadian insurance companies to acknowledge and give "full faith and credit" to any final and non-appealable judgment rendered against their insured Canadian carriers who operate in the U.S.

*FMCSA Response:*

Pursuant to the terms of the MCS-90 endorsement, Canadian insurance companies would have to pay, within the limits of the stated liability in the MCS-90 forms, any final judgment rendered by a U.S. court with competent jurisdiction against their insured Canadian carriers. Additionally, U.S. consumers have access to the mandatory third-party dispute resolution mechanism required of Canadian insurers and therefore could raise their disputes directly with Canadian insurers. If the U.S. consumer is not satisfied with this alternative, the consumer could seek a judicial resolution through the Canadian court system. The traditional common law rule is clear. In order to be recognizable and enforceable, a foreign judgment must be: (a) For a debt, or definite sum of money (not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty); and (b) final and conclusive, but not otherwise. *Pro Swing Inc. v. Elta Golf Inc.*, 2006 Can. Sup. Ct. LEXIS 52; 2006 SCC 52; [2006] S.C.J. No. 52. Thus, a Canadian-insurance company would be legally bound to make payments to U.S. claimants based on a final judgment issued by a U.S. court.<sup>3</sup>

We realize that pursuing these matters through the Canadian court system could be an inconvenience for most U.S. claimants, but FMCSA does not regulate the insurance industry. FMCSA will, however, continue to monitor Canadian insurers that submit insurance policies on behalf of Canada-based motor carriers to ensure that these companies are in sound financial condition (see

<sup>3</sup> In furtherance of this principle, IBC also notes that legislation pertaining to automobile insurance in each of Canada's Provinces and Territories mandates the coverage that is required under automobile insurance policies that are provided when the vehicles are being operated in Canada or in the U.S. while being transported between these countries.

RIA, pages 14–15). The Agency will also continue to invite comments from members of the public and encourage them to keep FMCSA informed of any problems they incur with Canadian insurers that fail to honor their financial obligations to U.S. claimants against Canada-domiciled carriers.

*Specific Comments From the National Association of Insurance Commissioners (NAIC)*

In its initial comment letter dated August 7, 2009, NAIC expressed concern that FMCSA would defer to the OSFI to monitor the solvency of the Canadian insurers executing the MCS-90 forms without ensuring the comparability of the Canadian insurer solvency system to our U.S. insurer solvency standards. NAIC submitted another letter to the docket, dated November 23, 2009, which states: "As a result of ongoing dialogue with OSFI, NAIC now has greater confidence that there are significant similarities between the U.S. State insurance regulatory system and Canadian federal insurance regulation. NAIC has also learned that, similar to the NAIC's insurer quarterly financial filing requirements, OSFI posts extensive financial information (e.g., balance sheet, income statement, some operating information, and solvency calculation) for each federally regulated Canadian insurer on its Web site each quarter[.]" at [http://www.osfi-bsif.gc.ca/osfi/index\\_e.aspx?ArticleID=3](http://www.osfi-bsif.gc.ca/osfi/index_e.aspx?ArticleID=3). Based on this additional information, NAIC indicates that it and State Insurance Regulators now support the rulemaking, but made two recommendations to FMCSA as follows:

(1) NAIC contends that FMCSA should develop an early warning system to notify the NAIC of any financial difficulty arising with any Canadian insurer operating on a cross-border basis. Furthermore, FMCSA should have the authority to require the affected motor carriers to find an alternate insurance provider. Once the Canadian regulators certify that the Canadian insurer is no longer in financial difficulty, then that insurer could again become eligible to execute the MCS-90 and MCS-90B forms; and (2) In the interest of true reciprocity, NAIC contends that FMCSA should require Canadian insurers executing the Form MCS-90 to file a duly executed Power of Attorney and Undertaking (PAU) with the NAIC, since existing regulations require U.S.-based insurers to file a PAU with the Canadian Council of Insurance Regulators (CCIR) for their cross-border activities. The PAU would give U.S. State insurance regulators—and U.S. claimants—equivalent

reassurance that there would be a Canadian insurer agent/representative within that State to accept notice and service of process on behalf of the Canadian insurer and, more importantly, preserve necessary protections to U.S. consumers.

*FMCSA Response:*

First, developing a notification system for NAIC is unnecessary because FMCSA informally monitors the financial solvency of U.S.-based insurers and will work with OSFI in the future to perform the same level of monitoring of Canada-based insurers. Thus, FMCSA will not develop a system to notify the NAIC of any solvency problems arising from Canadian insurers operating on a cross-border basis.

Second, FMCSA does not have the authority to require Canadian insurers executing the Form MCS-90 to file a duly executed PAU with NAIC. However, we are exploring non-regulatory alternative processes, such as facilitating reciprocity agreements between the parties so that Canada-based insurers could agree in the future to file a PAU with U.S. insurance regulators for their cross-border activities. While these reciprocity arrangements have not yet been established, FMCSA will keep the public informed of any new developments in this area.

*Other comment(s):*

Mr. Stanley generally opposed the NPRM because, he stated, FMCSA should keep the current requirements in place, and because it is impossible to receive compensation from a Canadian insurer. He did not, however, provide any substantiated data or evidence to support his opposition.

*FMCSA Response:*

Based on the existing practice of the two nations to enter into insurance fronting arrangements, the additional data submitted to the docket showing the willingness of Canadian insurance companies to honor their financial obligations and the Canadian government's mandate to ensure their solvency, including Agency research that shows Canadian courts give full faith and credit to U.S. judgments, FMCSA has no reason to believe that Canadian insurance companies will not be responsive to claims filed by U.S. citizens or businesses against Canada-domiciled carriers.

In view of the preceding consideration of comments and responsive analysis, FMCSA amends its regulations regarding the minimum levels of financial responsibility for motor carriers and freight forwarders, as proposed.

### III. Regulatory Analyses

*Comments on FMCSA's Regulatory Impact Analysis (RIA)*

The National Interstate Insurance Company (NIIC) requested information on how the Agency derived the annual effect of the rule on the U.S. economy. Also, NIIC asked what portion of the current revenue was attributed to NIIC.

*FMCSA Response:*

As stated in the RIA, the potential costs and benefits of this rule largely apply to Canada-based entities. The analysis addressed trade benefits (*i.e.*, elimination of trade barriers) pursuant to the NAFTA and increased cooperation among the U.S. and Canada pursuant to the SPP.

As to NIIC's question, FMCSA could not obtain revenue information on the impact of Canada's petition for rulemaking on U.S.-domiciled insurance companies, but the Agency estimates that the effects of forgone revenues, per company, will likely be insignificant. This is due to the following reasons: (1) Canadian motor carriers are only a small proportion of total clients; (2) only certain U.S. insurance companies do, and wish to, contract with foreign entities; and (3) transportation insurance is only one of many types of insurance.

*Summary of Regulatory Impact Analysis*

In examining the economic impact of this rulemaking, FMCSA considered two options: (1) The Agency's proposed amendments to 49 CFR part 387 that would permit Canadian insurance companies to issue insurance policies for Canada-domiciled carriers and freight forwarders operating CMVs in the U.S., and (2) maintaining the status quo.

Under the first option, FMCSA included active, Canada-domiciled, for-hire motor carriers of property and passengers and freight forwarders. It is assumed that a small proportion of Canada-domiciled motor carriers and freight forwarders will elect to continue with the status quo, at least in the short term, and will not seek direct insurance representation by a Canadian insurance company for their U.S. operations. Those carriers and freight forwarders are assumed to be a negligible percentage of the total affected entities and are thus not considered in the analysis.

The RIA examined the direct costs of implementing the final rule in terms of administrative costs incurred by the FMCSA in processing insurance filings and in forgone revenue by U.S.-based insurance companies currently representing Canadian motor carriers and freight forwarders (of which there

are approximately five). In addition, the RIA examined the functional impact of rule compliance under this option from the perspectives of the FMCSA's enforcement program and the Canadian motor carriers.<sup>4</sup>

The RIA also examined the benefits of this rulemaking, which are largely the relief from a disproportional cost and administrative burden and inconvenience currently borne by Canada-domiciled motor carriers in comparison to their U.S. counterparts. Other benefits include the elimination of trade barriers (*i.e.*, disproportionate cost burden) in accordance with the goals of NAFTA, and increased cooperation between the U.S. and Canada pursuant to the SPP.

This analysis was conducted under the assumption that there are approximately 9,000<sup>5</sup> active Canada-domiciled motor carriers and freight forwarders conducting CMV operations in the U.S.<sup>6</sup>

The RIA finds that the final rule yields a discounted net benefit of \$273 million estimated over a 10-year period. These quantified net benefits accrue to the Canada-domiciled for-hire motor carriers and freight forwarders which are impacted by this rulemaking. This amounts to approximately \$30,000 per carrier over that period.

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

The DOT and the Office of Management and Budget (OMB) do not consider this action to be a significant regulatory action under Executive Order 12866 (Regulatory Planning and Review) and the DOT's Regulatory Policies and Procedures (44 FR 11034, February 26, 1979). No changes have been made to this rule subsequent to its review by DOT and OMB, and therefore

<sup>4</sup> The FMCSA notes that cost information used in its analyses was obtained from the Agency's data base, Canada Finance, the American Insurance Association, the Property Casualty Insurers Association of America and publicly available information.

<sup>5</sup> Licensing and Insurance database, at <http://li-public.fmcsa.dot.gov>, and the Motor Carrier Management Information System (MCMIS) database, at <http://MCMIS.fmcsa.dot.gov>, as of February 20, 2009.

<sup>6</sup> The FMCSA Licensing and Insurance (L&I) system provides up-to-date information about authorized for-hire motor carriers who must register with FMCSA under 49 U.S.C. 13901 and 13902. FMCSA utilized the L&I database as its primary source for its RIA because it does not include overlapping carrier data. Under MCMIS, a motor carrier may have multiple carrier classifications and thus may be counted more than once. The Agency did, however, use MCMIS as a source to obtain the number of Canada-domiciled, for-hire carriers exempt from registration under 49 U.S.C. 13901 and 13902 since they are not found in the L&I database.

it is not subject to OMB review. A final regulatory evaluation is available in the docket.

While the Agency expects a positive discounted net benefit of approximately \$273 million over a 10-year period, the net benefits are for Canada-domiciled motor carriers. Because the benefits pertain to foreign entities, they are not considered for the purposes of determining whether the rulemaking is significant under Executive Order 12866, as amended. Therefore, the Agency determined this action is not an economically significant regulatory action under section 3(f), Regulatory Planning and Review, because it will not have an annual effect on the United States' economy of \$100 million.

#### *Regulatory Flexibility Act*

The FMCSA determined that this final rule will not have a significant impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601–612), as amended by the Small Business Regulatory Enforcement and Fairness Act (RFA) (Pub. L. 104–121). Small entities are defined in the Act to include small businesses, small non-profit organizations, and small governmental entities. This rule provides relief primarily to foreign entities, which are not considered for the purposes of determining whether the rule is significant under Executive Order 12866, as amended. In addition, no significant adverse comments were received from small entities during the NPRM comment period.

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

The FMCSA analyzed this final action in accordance with the principles and criteria contained in Executive Order 13132 (64 FR 43255, August 10, 1999), and determined that this final rule will not affect the States' ability to discharge traditional State government functions.

#### *International Trade and Investment*

The Trade Agreement Act of 1979 (19 U.S.C. 2531–2533) prohibits Federal agencies from establishing standards that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives such as safety are not considered unnecessary obstacles. In developing rules, the Trade Act requires agencies to consider international standards and, where appropriate, requires that those standards be the basis of U.S. standards. FMCSA assessed the potential effect of this final rule and determined that the expected economic impact of this rule is minimal and should not affect trade opportunities for U.S. firms doing business in Canada or for Canadian

firms doing business in the United States because, in accordance with the goals of NAFTA, the rule merely relieves the Canada-domiciled carriers from a disproportional cost and administrative burden that was not borne by their U.S. counterparts.

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

The Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4; 2 U.S.C. 1532) requires that each agency assess the effects of its regulatory actions on State, local, and tribal governments and the private sector. This final rule does not impose unfunded mandates under UMRA. It does not result in costs of \$140.8 million (as adjusted by DOT Guidance, April 28, 2010, to reflect inflation) to either State, local, or tribal governments, or to the private sector in any one year. Therefore, FMCSA has determined that this rule will not have an impact of \$140.8 million in any one year.

#### *Paperwork Reduction Act*

Under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), a Federal agency must obtain approval from OMB for each collection of information it conducts, sponsors, or requires through regulations. This final rule contains no new information collection requirements or additional paperwork burdens on existing OMB Control Number 2126–0008, “Financial Responsibility for Motor Carriers of Passengers and Motor Carriers of Property,” an information collection burden which is currently approved at 4,529 annual burden hours per year through March 31, 2013.

#### *National Environmental Policy Act*

The Agency analyzed this final rule for the purpose of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*), the Council on Environmental Quality Regulations Implementing NEPA (40 CFR parts 1500 to 1508), and FMCSA's NEPA Implementation Order 5610.1 (issued on March 1, 2004, 69 FR 9680). This action is categorically excluded from further environmental documentation under Appendix 2.6.v. of Order 5610.1, which contains categorical exclusions (CEs) for regulations prescribing the minimum levels of financial responsibility required to be maintained by motor carriers operating in interstate, foreign, or intrastate commerce. In addition, FMCSA believes this final action does not involve circumstances that would affect the quality of the environment. Thus, this final action does not require

an environmental assessment or an environmental impact statement.

The FMCSA also analyzed the final rule under the Clean Air Act (CAA), as amended, section 176(c), (42 U.S.C. 7401 *et seq.*) and implementing regulations promulgated by the Environmental Protection Agency. Approval of this final action is exempt from the CAA's general conformity requirement since it involves policy development and civil enforcement activities, such as investigations, inspections, examinations, and the training of law enforcement personnel. See 40 CFR 93.153(c)(2). It will not result in any emissions increase or result in emissions that are above the general conformity rule's *de minimis* emission threshold levels, because the action merely relates to insurance coverage across international borders between the U.S. and Canada.

#### *Environmental Justice*

The FMCSA considered the environmental effects of this final rule in accordance with Executive Order 12898 and DOT Order 5610.2 on addressing Environmental Justice for Minority Populations and Low-Income Populations, published April 15, 1997 (62 FR 18377). The Agency has determined that there are no environmental justice issues associated with this final rule, nor any collective environmental impact resulting from its promulgation. Environmental justice issues would be raised if there were “disproportionate” and “high and adverse impact” on minority or low-income populations. Neither of the regulatory alternatives considered in this final rule will result in high and adverse environmental impacts.

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

The FMCSA analyzed this final rule under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, and we do not believe that this final action will effect a taking of private property or otherwise have implications under the Executive Order.

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

The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this final rule.

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

The FMCSA analyzed this final action under Executive Order 13211, Actions

Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. The Agency determined that it is not a significant energy action within the meaning of section 4(b) of the Executive Order and will not likely have a significant adverse effect on the supply, distribution, or use of energy. Therefore, the Agency has determined that a Statement of Energy Effects is not required.

*Executive Order 12988 (Civil Justice Reform)*

The FMCSA has determined that this final rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

*Privacy Impact Assessment*

The FMCSA conducted a privacy impact assessment of this final rule as required by section 522(a)(5) of the Transportation, Treasury, Independent Agencies, and General Government Appropriations Act, 2005, Public Law 108-447, div. H, 118 Stat. 2809, 3268, (December 8, 2004) [set out as a note to 5 U.S.C. 552a]. The assessment considered any impacts of the final rule on the privacy of information in an identifiable form and related matters. FMCSA determined this final rule contains no privacy impacts.

*Executive Order 13045 (Protection of Children)*

The FMCSA analyzed this final rule under Executive Order 13045, entitled "Protection of Children from Environmental Health Risks and Safety Risks." The Agency determined that this final rule will not cause any environmental risk to health or safety that may disproportionately affect children.

*Executive Order 13175 (Tribal Consultation)*

The FMCSA analyzed this action under Executive Order 13175, dated November 6, 2000, and determined that this final rule will not have substantial direct effects on one or more Indian tribes; will not impose substantial compliance costs on Indian tribal governments; and will not preempt tribal law. Therefore, a tribal summary impact statement will not be required.

**List of Subjects in 49 CFR Part 387**

Buses, Freight, Freight forwarders, Hazardous materials transportation, Highway safety, Insurance, Intergovernmental relations, Motor carriers, Motor vehicle safety, Moving of household goods, Penalties, Reporting

and recordkeeping requirements, Surety bonds.

**IV. The Final Rule**

■ For the reasons stated in the preamble, FMCSA amends 49 CFR part 387 in title 49, Code of Federal Regulations, chapter III, subchapter B, as follows:

**PART 387—MINIMUM LEVELS OF FINANCIAL RESPONSIBILITY FOR MOTOR CARRIERS**

■ 1. The authority citation for part 387 continues to read as follows:

*Authority:* 49 U.S.C. 13101, 13301, 13906, 14701, 31138, and 31139; and 49 CFR 1.73.

■ 2. Amend § 387.11 to add paragraph (d) to read as follows:

**§ 387.11 State authority and designation of agent.**

\* \* \* \* \*

(d) A Canadian insurance company legally authorized to issue a policy of insurance in the Province or Territory of Canada in which the Canadian motor carrier has its principal place of business or domicile, and that is willing to designate a person upon whom process, issued by or under the authority of any court having jurisdiction over the subject matter, may be served in any proceeding at law or equity brought in any State in which the motor carrier operates.

■ 3. Amend § 387.35 to add paragraph (d) to read as follows:

**§ 387.35 State authority and designation of agent.**

\* \* \* \* \*

(d) A Canadian insurance company legally authorized to issue a policy of insurance in the Province or Territory of Canada in which a Canadian motor carrier has its principal place of business or domicile, and that is willing to designate a person upon whom process, issued by or under the authority of any court having jurisdiction over the subject matter, may be served in any proceeding at law or equity brought in any State in which the motor carrier operates.

■ 4. Amend § 387.315 to add paragraph (d) to read as follows:

**§ 387.315 Insurance and surety companies.**

\* \* \* \* \*

(d) In the Province or Territory of Canada in which a Canadian motor carrier has its principal place of business or domicile, and will designate in writing upon request by FMCSA, a person upon whom process, issued by or under the authority of a court of

competent jurisdiction, may be served in any proceeding at law or equity brought in any State in which the carrier operates.

■ 5. Amend § 387.409 to add paragraph (d) to read as follows:

**§ 387.409 Insurance and surety companies.**

\* \* \* \* \*

(d) In the Province or Territory of Canada in which a Canadian freight forwarder has its principal place of business or domicile, and will designate in writing upon request by FMCSA, a person upon whom process, issued by or under the authority of a court of competent jurisdiction, may be served in any proceeding at law or equity brought in any State in which the freight forwarder operates.

Issued on: June 18, 2010.

**Anne S. Ferro,**  
*Administrator.*

[FR Doc. 2010-16009 Filed 7-1-10; 8:45 am]

**BILLING CODE 4910-EX-P**

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 679**

[Docket No. 0910131363-0087-02]

RIN 0648-XX19

**Fisheries of the Exclusive Economic Zone Off Alaska; Greenland Turbot in the Aleutian Islands Subarea of the Bering Sea and Aleutian Islands Management Area**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Temporary rule; apportionment of reserves; request for comments.

**SUMMARY:** NMFS apportions amounts of the non-specified reserve to the initial total allowable catch of Greenland turbot in the Aleutian Islands subarea of the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary to allow fishing operations to continue. It is intended to promote the goals and objectives of the fishery management plan for the BSAI.

**DATES:** Effective July 1, 2010 through 2400 hrs, Alaska local time, December 31, 2010. Comments must be received at the following address no later than 4:30 p.m., Alaska local time, July 16, 2010.

**ADDRESSES:** Send comments to Sue Salveson, Assistant Regional