

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Part 372

[Docket No. FMCSA-2023-0007]

RIN 2126-AC57

Exemption from Operating Authority Regulations for Providers of Recreational Activities

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

ACTION: Final rule.

SUMMARY: FMCSA amends its regulations to implement the statutory exemption from its operating authority registration requirements for providers of recreational activities.

The exemption applies to motor carriers operating a motor vehicle designed or used to transport between 9 and 15 passengers (including the driver), whether operated alone or with a trailer attached to the transport vehicle, if the motor vehicle is operated by a person that provides recreational activities within a 150 air-mile radius of the location at which passengers initially boarded the motor vehicle at the beginning of the trip. FMCSA also defines *recreational activities* to clarify the exemption, adopting, in response to a comment, a definition modified from that proposed in the notice of proposed rulemaking (NPRM).

DATES: This final rule is effective [Insert date 60 days after date of publication in the FEDERAL REGISTER].

Petitions for Reconsideration of this final rule must be submitted to the FMCSA Administrator no later than [Insert date 30 days after date of publication in the FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Mr. Antonio Harris, Registration, Licensing and Insurance Division, Office of Research and Registration, FMCSA, 1200 New Jersey Avenue SE, Washington, DC 20590-0001; (202) 366-2964; antonio.harris@dot.gov. If you have questions on viewing or submitting material to the docket, call Dockets Operations at (202) 366-9826.

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I. AVAILABILITY OF RULEMAKING DOCUMENTS

To view any documents mentioned as being available in the docket, go to <https://www.regulations.gov/docket/FMCSA-2023-0007/document> and choose the document to review. To view comments, click this final rule, then click “Browse Comments.” If you do not have access to the internet, you may view the docket online by visiting Dockets Operations at U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590-0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366-9317 or (202) 366-9826 before visiting Dockets Operations.

II. EXECUTIVE SUMMARY

A. Purpose and Summary of the Regulatory Action

Section 23012 of the Infrastructure Investment and Jobs Act (IIJA) (Pub. L. 117-58, 135 Stat. 429 (H.R. 3684, Nov. 15, 2021)) amended 49 United States Code (U.S.C.) 13506 by adding, in paragraph (b)(4), a new exemption from FMCSA’s operating authority registration requirements. FMCSA adds new regulatory text implementing this statutory exemption. The exemption from operating authority registration applies to motor carriers operating a motor vehicle designed or used to transport between 9 and 15 passengers (including the driver), whether operated alone or with a trailer attached to the transport vehicle, if the motor vehicle is operated by a person¹ that provides recreational activities and the transportation is provided within a 150 air-mile radius of the location at which passengers initially boarded the motor vehicle at the outset of the trip.

¹ While the statute refers to a “person,” that term can refer both to an individual or to a motor carrier under the definitions of that term in 49 U.S.C. 13102(18) and 1 U.S.C. 1.

FMCSA also defines *recreational activities* to clarify the exemption. The statute, which requires that the motor vehicle be operated “by a person that provides recreational activities,” does not define *recreational activities*. The Agency’s definition clarifies the types of recreational activities FMCSA has determined would qualify for the exemption in 49 U.S.C. 13506(b)(4). FMCSA adopts a definition of *recreational activities* consistent with the activities that Congress outlined in another section of the IIJA that uses this term. Section 11512 of the IIJA provided examples of “groups representing recreational activities and interests” in subsection (c)(4) which provided some insight as to legislative intent for the term *recreational activities* in section 23012. The definition FMCSA adopts in implementing section 23012 includes activities Congress mentions in section 11512 and also describes activities that fall outside the intended scope of the term. This language is intended to illustrate which activities are within the exemption, based on the intent of Congress, and to allow sufficient flexibility for analysis of the term’s applicability to activities not specified in the regulation.

B. Costs and Benefits

The cost savings associated with this rulemaking include changes in paperwork, fees, and insurance costs associated with maintaining for-hire operating authority. Because there is no pre-existing definition of *recreational activities*, motor carriers previously may have been interpreting their eligibility for the operating authority exemption in varying ways. Through this rulemaking, there will be increased costs for motor carriers that inappropriately interpreted their eligibility for the exemption, and decreased costs for those carriers that now have clear regulatory language to support use of the exemption. The differing interpretations by regulated entities and enforcement

officials may have hindered consistent enforcement practices, thereby impacting business-related decisions in providing transportation for recreational activities. The clarification in this rule may resolve possible information asymmetry and enforcement differences by creating a common understanding between FMCSA and motor carriers. Because this rule may also lead to an increase in exemption use, it will benefit carriers by improving the efficiency of their business operations and increase both consumer and producer surplus.

III. ABBREVIATIONS

AOA	America Outdoors Association
AWM	AWM Associates, LLC
BEA	Bureau of Economic Analysis
BLS	Bureau of Labor Statistics
CE	Categorical Exclusion
CFR	Code of Federal Regulations
DOL	U.S. Department of Labor
DOT	Department of Transportation
E.O.	Executive Order
FMCSA	Federal Motor Carrier Safety Administration
FMCSRs	Federal Motor Carrier Safety Regulations
FR	Federal Register
FRFA	Final Regulatory Flexibility Analysis
GDP	Gross Domestic Product
ICR	Information Collection Request
IRFA	Initial Regulatory Flexibility Analysis
IJA	Infrastructure Investment and Jobs Act
MCMIS	Motor Carrier Management Information System
NAICS	North American Industry Classification System
NAMIC	National Association of Mutual Insurance Companies
NPRM	Notice of Proposed Rulemaking
OEWS	Occupational Employment and Wage Statistics
OMB	Office of Management and Budget
PIA	Privacy Impact Assessment
PTA	Privacy Threshold Assessment
RIA	Regulatory Impact Analysis
Secretary	The Secretary of the Department of Transportation
SBA	Small Business Administration
UMRA	Unfunded Mandates Reform Act of 1995
URS	Unified Registration System

U.S.C.	United States Code
USDOT	United States Department of Transportation
Vehicle Associations	Motorcycle Industry Council, Specialty Vehicle Institute of America, and Recreational Off-Highway Vehicle Association

IV. LEGAL BASIS

Section 23012 of the IIJA amended 49 U.S.C. 13506 by adding a new exemption from the requirement to obtain operating authority registration for “providers of recreational activities” operating passenger vehicles designed or used to transport between 9 and 15 passengers (including the driver) (see 49 U.S.C. 13506(b)(4)). The statute, which requires that the motor vehicle be operated “by a person that provides recreational activities,” does not define *recreational activities*. This final rule defines *recreational activities* to clarify the exemption’s applicability.

Under Title 49, Code of Federal Regulations (CFR) 1.87(a)(5), the authority of the Secretary of the Department of Transportation (the Secretary) to carry out the functions relating to the registration requirements in 49 U.S.C. 13901 and 13902 is delegated to the FMCSA Administrator. Sections 13901 and 13902 generally require that any person wishing to provide transportation subject to jurisdiction under subchapter I of chapter 135² must be registered as a *motor carrier*, defined in 49 U.S.C. 13102(14) as “a person providing motor vehicle transportation for compensation.” The requirements of these sections, which are enforced under § 392.9a (“Operating authority”), are the basis for the rules governing applications for operating authority registration in 49 CFR part 365.

² Absent an exemption, the Secretary has jurisdiction over transportation by motor carrier and the procurement of that transportation, to the extent that passengers, property, or both, are transported by motor carrier in interstate commerce (49 U.S.C. 13501). This authority has been delegated to the FMCSA Administrator under 49 CFR 1.87(a)(3).

Under 49 CFR 1.87(a)(3), the authority of the Secretary to carry out the functions related to the jurisdiction requirements in 49 U.S.C. 13506 is delegated to the FMCSA Administrator. Section 13506 provides miscellaneous motor carrier transportation exemptions, including the exemption from operating authority for providers of recreational activities added by the IIJA. The statutory exemption provided in section 13506 provides the basis for the regulatory exemption added under this rule in 49 CFR 372.113, including the definition of recreational activities added to 49 CFR 372.107.

V. DISCUSSION OF PROPOSED RULEMAKING AND COMMENTS

A. Proposed Rulemaking

On June 21, 2023, FMCSA published in the *Federal Register* (Docket No. FMCSA-2023-0007, 88 FR 40146) an NPRM titled “Exemption from Operating Authority Regulations for Providers of Recreational Activities.” The NPRM proposed a new § 372.113 that outlines the exemption from operating authority registration for providers of recreational activities in 49 U.S.C. 13506(b)(4). This new section would reflect the statutory language and incorporate the exemption into the FMCSRs. The NPRM also proposed adding a definition of *recreational activities* to § 372.107 which would provide a clear description of the types of activities that qualify for the exemption in 49 U.S.C. 13506(b)(4). The proposed definition set out the meaning of *recreational activities*, provided a non-exhaustive list of included activities, and identified two types of excluded activities. The NPRM asked for comments addressing whether the last part of the definition, excluding certain types of activities, should be retained or removed.

B. Comments and Responses

FMCSA solicited comments concerning the NPRM for 60 days ending August 21, 2023, and by that date four comments were received. AWM Associates, LLC (AWM), the National Association of Mutual Insurance Companies (NAMIC), and a private citizen each submitted a comment, and a joint comment was submitted by the Motorcycle Industry Council, Specialty Vehicle Institute of America, and Recreational Off-Highway Vehicle Association (the “Vehicle Associations”).

FMCSA did not receive any comments regarding the portion of the *recreational activities* definition that excludes certain types of activities. The exclusions are provided to clarify that certain activities are exempt activities where the service provided by the motor carriers mainly focuses on transportation from one location to another. In such cases, the motor carrier's business is in fact selling transportation—not providing recreational activities. FMCSA has received inquiries illustrative of these types of activities. For example, a bus company offering scheduled route service with multiple stops would not fall within the exemption merely because one of the scheduled stops was at or near a water park or a horseback riding stable. Likewise, motor carriers that advertise and provide alcohol, music, or other “party” activities on board the vehicle as the principal activity or purpose of the transportation would not be eligible for the exemption. In these situations, the activity cannot be completed and has no purpose without the transportation. The transportation in such circumstances is integral to the activities, rather than incidental. Accordingly, the definition in § 372.107 explicitly excludes any activity: (1) for which the activity offered or sold is occurring

simultaneously with the transportation; or (2) for which the transportation is the primary service offered for sale.

AWM

Comment: AWM objected to the creation of an exemption from the operating authority registration rules for providers of recreational activities and questioned whether the cost of compliance for providers of recreational activities under the current regulations is burdensome. Going beyond the exemption at issue, AWM stated that the FMCSRs are unclear regarding which motor carriers are required to apply for operating authority under part 365. AWM also questioned whether the providers of recreational activities would be required to obtain operating authority under part 365.

Response: The exemption being added to § 372.113 simply reflects the statutory language in 49 U.S.C. 13506(b)(4) that is currently in effect and incorporates the statutory exemption from operating authority registration into the FMCSRs for convenient reference. FMCSA is not determining through this rulemaking whether there should be an exemption from the operating authority registration rules for providers of recreational activities; that decision was made by Congress when it passed the IIJA which created a statutory exemption. FMCSA's role in this rulemaking is to define the term *recreational activities* and consider the regulatory and economic impacts of clarifying the definition. The Agency considers the objection to the creation of the exemption outside the scope of the rule and declines to make any changes to the rule based on it.

AWM's comment questions whether the cost of obtaining and maintaining operating authority is burdensome, and it critiques portions of the comment from the America Outdoors Association (AOA) relating to this issue. The AOA comment, which

relates to operating authority for recreational activity providers, predates both the IIJA and this rule, and AOA submitted it in response to a DOT notice requesting that the public identify and provide input on the Department's existing guidance documents that are good candidates for repeal, replacement, or modification.³ The Agency added AOA's comment to the docket for this rulemaking and cited it in the NPRM in support of its proposed definition of the term *recreational activities*. However, the Agency did not rely on AOA's comment in the regulatory impact analysis (RIA). The Agency's analysis accounts for the impact of the statutory exemption, which was enacted after AOA's comment was submitted to FMCSA. The Agency's RIA considers the impact of codifying and clarifying the statutory exemption currently in effect, whereas AWM's comment is directed towards AOA's comments on cost and the impact of establishing the exemption as an initial matter. Therefore, the Agency considers this portion of AWM's comment outside the scope of the rule and declines to make any changes to the rule based on it.

Regarding the applicability of operating authority requirements in part 365, 49 U.S.C. sections 13901 and 13902 generally require that any person that wishes to provide transportation subject to jurisdiction under subchapter I of chapter 135 be registered as a *motor carrier*, defined in 49 U.S.C. 13102(14) as "a person providing motor vehicle transportation for compensation." The requirements of these sections, which are enforced under § 392.9a ("Operating authority"), are the basis for the rules governing applications for operating authority registration in 49 CFR part 365. Part 365 states that the rules governing applications for operating authority apply to motor carriers

³ AOA's comment was submitted in response to DOT's Notice of Review of Guidance, 84 FR 1820, Feb. 5, 2019.

of property or passengers.⁴ Congress established the operating authority registration exemption for providers of recreational activities carrying 9 to 15 passengers when it passed the IIIA. This rulemaking seeks only to clarify the statutory exemption by defining the term *recreational activities*. This rulemaking does not make any changes to the operating authority provisions in 49 CFR part 365. The Agency considers this portion of AWM’s comment outside the scope of the rule and declines to change the rule based on it.

The Vehicle Associations

Comment: The Vehicle Associations generally supported the proposed exemption but proposed a modification to the definition of *recreational activities*. They proposed modifying the definition to state that *recreational activities* means motorized and non-motorized activities, and to add off-highway vehicle driving and riding to the list of activities expressly included. The Vehicle Associations stated that this modification is supported by the inclusion of off-highway motorcycling, all-terrain vehicles, and other off-road motorized vehicle activities in section 11512 of the IIIA, which is the IIIA section the Agency cited in the NPRM in support of the proposed definition. The Vehicle Associations also stated that the modified definition would be consistent with recreation-related terms defined elsewhere in Federal statute, as well as lists of recreational activities provided as examples by Federal land management agencies.

Response: The Agency adopts the Vehicle Associations’ proposed modification in part. The Agency agrees that adding “off-highway vehicle driving and riding” to the non-

⁴ Further explanation of the regulations applicable to passenger motor carriers is provided in Appendix A to Part 390—Applicability of the Registration, Financial Responsibility, and Safety Regulations to Motor Carriers of Passengers.

exhaustive list of covered activities will help clarify the exemption. As the Vehicle Associations note, inclusion of these activities is supported by the list of recreational activities in section 11512 of the IIJA. Although that section appears in a separate division and title of the IIJA from the motor carrier safety provisions in Division B, Title III, and does not conclusively define the scope of the exemption in section 23012, it does provide some insight into the legislative intent, as explained in the NPRM. The Agency adopts the addition of “off-highway vehicle driving and riding” to align with that intent. The Agency considers the other part of the proposed modification, the addition of the phrase “motorized and non-motorized,” unnecessary and declines to adopt it.

NAMIC

Comment: NAMIC raised a concern that “expanding eligibility for an exemption from federal requirements for insurance coverage ... could create confusion for policyholders and may not be administratively possible for insurers.” NAMIC raised a further concern that differing State and Federal requirements for insurance coverage risk confusion and underinsurance among motor carriers. NAMIC suggested further investigation into the availability of “coverage on a monthly basis and for which coverage can be stopped and started at reasonable notice periods,” and whether “states will permit similar staggering of insurance coverage for such vehicles.”

Response: As explained in response to AWM’s comment, this rule codifies and clarifies in the CFR an existing statutory exemption from operating authority requirements. Although operating authority is linked to insurance through financial responsibility requirements, this rule does not create or expand any exemption to Federal insurance requirements more broadly because motor carriers eligible for the operating

authority exemption may still be required to maintain financial responsibility under other regulations in the FMCSRs (see, e.g., 49 CFR 387.31(a)). The Agency declines to make any changes to the final rule based on NAMIC's concern regarding expansion of an exemption from Federal insurance requirements.

Regarding potential confusion with State insurance requirements, the Agency believes this rule will alleviate confusion. The rule provides a definition for *recreational activities*, consistent with the Agency's understanding of congressional intent when establishing the exemption, to create a common understanding among motor carriers and enforcement officials about the exemption. The rule should clarify the Federal requirements and has no impact on the applicable State requirements. The Agency disagrees that the rule increases the risk of confusion as compared to the statutory exemption in 49 U.S.C. 13506(b)(4) standing alone, and it declines to make any changes to the exemption based on NAMIC's comment. State insurance requirements are relevant to two scenarios in the RIA, because a seasonal motor carrier eligible for the exemption may still have to carry insurance in the off-season to satisfy State requirements, depending on its particular circumstances. The Agency has added a statement in the RIA to clarify that cost impacts will vary depending on State insurance coverage requirements.

Whether certain insurance policies are available to motor carriers providing recreational activities eligible for the operating authority exemption, where such policies offer cost savings to the motor carriers due to the exemption, is a separate concern from the applicability of the exemption. Changing the extent of the exemption is outside the Agency's authority, and the Agency declines to make any changes to the exemption

based on this portion of NAMIC's comment but does consider it in relation to the RIA for the rule.

In the NPRM, the Agency's RIA included an estimate of potential insurance cost savings, among other potential cost savings, for eligible motor carriers.⁵ The Agency requested comments on its estimates of liability insurance costs and the administrative costs of researching liability insurance or other financial responsibility options, but the Agency did not receive any comments on this issue. NAMIC suggested further research into the availability of monthly insurance coverage options for exemption-eligible motor carriers, but otherwise the Agency did not receive any data or other information regarding its insurance cost estimates.

Based on the information gathered and the Agency's experience administering the relevant regulations, FMCSA believes it is possible for a motor carrier providing recreational activities on a seasonal basis to carry an insurance policy during its operating season, terminate the policy at the end of the season, and obtain a new policy at the beginning of its next operating season.⁶ The NPRM RIA used the forgone insurance premiums in the offseason as an estimate of insurance cost savings for motor carriers in this scenario. The Agency maintains that this method provides a reasonable estimate of the potential insurance cost savings, even though the actual insurance cost savings realized by motor carriers in this scenario may differ depending on their specific insurer,

⁵ Whether a motor carrier eligible for the operating authority exemption in this rule sees an impact to their insurance costs as a result of this rule depends on a number of factors: (1) whether the motor carrier operates year-round, (2) whether they operate only seasonally, but maintain year-round insurance coverage to satisfy other Federal or State requirements, or (3) whether they are already using the statutory operating authority exemption. Although the exemption in this rule will not impact the insurance costs for all carriers, they may realize other benefits such as administrative cost savings, as described elsewhere in the rule.

⁶ For example, Progressive offers policyholders the option to adjust coverage based on seasonal changes (Progressive Commercial Auto Insurance, available at <https://www.progressivecommercial.com/commercial-auto-insurance/> (accessed Sept. 20, 2023)).

policy, location, and other particular circumstances. The Agency has added a statement in the RIA to clarify that cost impacts will vary depending on State insurance coverage requirements and has removed quantified estimates of insurance cost savings. For further assumptions made on insurance coverage, refer to the section labeled “Insurance” in the RIA.

Comments Outside the Scope of the Rulemaking

Comment: A private citizen objected to the creation of an exemption from the operating authority registration rules for providers of recreational activities.

Response: As explained in response to AWM’s comment, the exemption that is being added to § 372.113 reflects the statutory language in 49 U.S.C. 13506(b)(4) and incorporates the statutory exemption into the FMCSRs. FMCSA is not determining through this rulemaking whether there should be an exemption from the operating authority registration rules for providers of recreational activities. The Agency considers this comment outside the scope of the rule and declines to make any changes to the rule based on it.

VI. CHANGES FROM THE NPRM

In response to a comment, FMCSA is changing the definition of *recreational activities* in this final rule from that proposed in the NPRM. The Agency is modifying the definition of *recreational activities* in § 372.107 to include off-highway vehicle driving and riding in the non-exhaustive list of activities provided as examples within the definition. The Agency is also making a grammatical change to the last sentence of the definition to give the numbered clauses parallel structure.

VII. SEVERABILITY

Congress created an exemption from FMCSA’s operating authority registration rules for “providers of recreational activities.” (49 U.S.C. 13506(b)(4)). This final rule adds new regulatory text implementing this statutory exemption and defines the term *recreational activities*. This final rule is meant to operate holistically in addressing a range of issues necessary to ensure the implementation of the exemption. However, FMCSA recognizes that certain provisions focus on unique topics. Therefore, FMCSA finds that the various provisions within this rule are severable and able to operate functionally if one or more provisions were rendered null or otherwise eliminated. The remaining provision or provisions within the rule will continue to operate functionally if any one or more provisions were invalidated and any other provision(s) remained. In the event a court were to invalidate one or more of this final rule’s unique provisions, the remaining provisions should stand, thus allowing this congressionally mandated exemption to continue to operate.

VIII. SECTION-BY-SECTION ANALYSIS

This section-by-section analysis describes the proposed changes in numerical order.

Section 372.107 Definitions.

As proposed in the NPRM, FMCSA adds a new paragraph (i), which defines *recreational activities*.

Section 372.113 Providers of Recreational Activities.

As proposed in the NPRM, FMCSA adds a new § 372.113 to subpart A of 49 CFR 372. This new section outlines the exemption from operating authority registration in 49 U.S.C. 13506(b)(4).

IX. REGULATORY ANALYSES

A. Executive Order (E.O.) 12866 (Regulatory Planning and Review), E.O. 13563 (Improving Regulation and Regulatory Review), E.O. 14094 (Modernizing Regulatory Review), and DOT Regulatory Policies and Procedures

FMCSA has considered the impact of this final rule under E.O. 12866 (58 FR 51735, Oct. 4, 1993), Regulatory Planning and Review, E.O. 13563 (76 FR 3821, Jan. 21, 2011), Improving Regulation and Regulatory Review, and E.O. 14094 (88 FR 21879, Apr. 11, 2023), Modernizing Regulatory Review. The Office of Information and Regulatory Affairs within the Office of Management and Budget (OMB) determined that this final rule is not a significant regulatory action under section 3(f) of E.O. 12866, as supplemented by E.O. 13563, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that order. Accordingly, OMB has not reviewed it under that E.O.

Purpose

This final rule codifies the exemption for providers of recreational activities in regulation and defines *recreational activities* to clarify this exemption by providing a clear description of what types of recreational activities do and do not qualify for the exemption in 49 U.S.C. 13506(b)(4). This ensures that providers of recreational activities are aware of their eligibility for the exemption from filing for operating authority that FMCSA is adding in new § 372.113. Specifically, this rule affects motor carriers operating a motor vehicle designed or used to transport between 9 and 15 passengers (including the driver), whether operated alone or with a trailer attached to the transport vehicle, if the motor vehicle is operated by a person that provides recreational activities

and the transportation is provided within a 150 air-mile radius of the location at which passengers initially boarded the motor vehicle at the outset of the trip.

This rule provides clarity to both motor carriers and enforcement officials regarding which carriers qualify for the new exemption in section 23012 of the IIJA as of November 15, 2021. Because Congress did not define *recreational activities* and there is no pre-existing definition of *recreational activities* in statute or regulation, FMCSA is bringing the FMCSRs into alignment with the IIJA's exemption by adding a new definition of that term. This clarity resolves possible information asymmetry currently affecting the regulated industry and enforcement officials as to which carriers qualify for the operating authority exemption.

Baseline

For the purposes of this analysis, the changes in this rule are compared to the baseline established by section 23012 of the IIJA and the current requirements for providers of recreational activities under 49 U.S.C. 13901 and 13902 and 49 CFR part 365. As discussed above, the IIJA created a new exemption from the requirement to obtain FMCSA operating authority registration for providers of recreational activities. Accordingly, this exemption has been available to these motor carriers since the IIJA was enacted on November 15, 2021. Therefore, the incremental impacts of this rule relative to the baseline lie in how the affected industry and enforcement officials have been interpreting the term in the absence of a definition in the FMCSRs.

Uncertainties

The Agency relies on the Motor Carrier Management Information System (MCMIS) database to obtain information on commercial motor carriers subject to the FMCSRs. While MCMIS does contain data on passenger vehicle size (e.g., weight and

capacity) and type, it does not track industry type, nor whether an operating authority exemption is applicable. Consequently, the Agency knows neither the magnitude of the population affected by this rule, nor the degree to which passenger carriers are currently taking advantage of the exemption. Therefore, FMCSA estimates how different carriers will be impacted by costs and benefits on a per-unit basis, depending on their current behavior.

In the NPRM, the Agency invited the public to provide information to address uncertainty surrounding the size of the affected population and the frequency of exemption use. While FMCSA did not receive such information, a comment from AWM provided questions about whether an exemption from the current requirements for obtaining and maintaining operating authority was necessary. However, FMCSA is not determining through this rulemaking whether there should be an exemption from the operating authority registration rules for providers of recreational activities. This decision was made by Congress when it passed the IIJA in 2021, which created a statutory exemption. FMCSA's role in this rulemaking is only to define the term *recreational activities* and consider the impacts of clarifying the exemption. The Agency will therefore not revise the rule in response to comments outside of that scope.

Carrier Cost Components

The resulting cost impacts of the definitional clarification in this rule include changes in paperwork, fees, and insurance costs associated with maintaining operating authority. Because there is no pre-existing definition of recreational activities, motor carriers may be interpreting their eligibility for the operating authority exemption in varying ways. Depending on current interpretations, this rule will either increase, decrease, or have no incremental impact on the degree to which the operating authority

exemptions are used relative to the baseline. Because FMCSA is unable to ascertain how various carriers interpreted this exemption set forth by section 23012 of the IIJA in 2021, the Agency estimates the impacts of this rule based on four hypothetical scenarios of exemption use. These four scenarios make use of the forms and insurance cost analyses set forth below, in advance of the scenarios.

Forms

Currently, there are several forms that providers of recreational activities are responsible for submitting to FMCSA in order to maintain operating authority registration. As detailed later in this analysis, the use of these forms, as explained in Table 1, may change as a result of this rule, depending on how the affected carriers are interpreting this exemption.

Table 1. Forms Currently Used in Maintaining Operating Authority

Form	Affected Groups
Motor Carrier Automobile Bodily Injury and Property Damage Liability Certificate of Insurance (BMC-91 or BMC-91X)	Carriers that must provide proof of liability insurance meeting the minimum levels of financial responsibility
Motor Carrier Records Change (MCSA-5889)	Carriers reinstating operating authority
Request for Revocation of Authority Granted (OCE-46)	Carriers voluntarily revoking operating authority
Application for Motor Passenger Carrier Authority (OP-1(P))	Carriers with an existing USDOT number wishing to expand to an operation requiring operating authority

Tables 2 and 3 display the paperwork burden of these forms to private entities and to the Government, respectively. These estimates are based on the Information Collection Request (ICR) supporting statements associated with each form. For example, Table 2 shows that Forms BMC-91 and BMC-91X are estimated to take 10 minutes to complete

by an insurance claims and policy processing clerk at a wage rate⁷ of \$39.36, leading to a paperwork burden of \$7 (10 minutes \times \$39.36 = \$7).^{8,9}

Table 2. Paperwork Costs to Private Sector (2022\$)

Paperwork	Wage	Hours to Submit Form	Cost per Form	Filing Fee	Total Cost
Forms BMC-91 or BMC-91X by insurance claims processor	\$39.36	0.17	\$7	--	\$7
Form MCSA-5889 by office clerk	\$31.99	0.25	\$8	\$80	\$88
Form OCE-46 by office clerk	\$31.99	0.25	\$8	--	\$8
Form OP-1(P) by office clerk	\$31.99	2	\$64	\$300	\$364

Estimates may not total due to rounding.

Table 3. Paperwork Costs to Government (2023\$)

Paperwork	GS-9, Step 5 Wage	Hours to Process Form	Cost per Form
Form MCSA-5889	\$73.71	0.25	\$18
Form OCE-46	\$73.71	0.25	\$18
Form OP-1(P)	\$73.71	6.5	\$479

Estimates may not total due to rounding.

FMCSA computes its estimates of labor costs using data gathered from several sources. Labor costs comprise wages, fringe benefits, and overhead. Fringe benefits include paid leave, bonuses and overtime pay, health and other types of insurance, retirement plans, and legally required benefits (Social Security, Medicare, unemployment insurance, and workers compensation insurance). Overhead includes any expenses to a

⁷ DOL, BLS. Occupational Employment and Wage Statistics (OEWS). National. May 2022. 43-9041 Insurance Claims and Policy Processing Clerks. Available at <https://www.bls.gov/oes/current/oes439041.htm> (accessed Sept. 1, 2023).

⁸ This estimate is based on the calculations used in the ICR titled, “Financial Responsibility Motor Carriers, Freight Forwarders and Brokers,” covered by OMB Control Number 2126-0017.

⁹ The supporting statement for the “Financial Responsibility Motor Carriers, Freight Forwarders and Brokers” ICR estimates Government costs for Forms BMC-91 and BMC-91X at \$0, as they are filed electronically.

firm associated with labor that are not part of employees' compensation; this typically includes many types of fixed costs of managing a body of employees, such as management and human resource staff salaries or payroll services. The economic costs of labor to a firm should include the costs of all forms of compensation and labor-related expenses. For this analysis, costs of labor to a firm have been calculated relative to total compensation (base wages, plus fringe benefits, plus overhead).

The primary source for industry wages is the median hourly wage data (May 2022) from the U.S. Department of Labor (DOL), Bureau of Labor Statistics (BLS), Occupational Employment and Wage Statistics (OEWS).¹⁰

BLS does not publish data on fringe benefits for specific occupations, but it does for the broad industry groups in its Employer Costs for Employee Compensation release. For office clerk employees, this analysis uses an average hourly wage of \$28.89 and average hourly benefits of \$14.85 for private industry workers in “transportation and warehousing”¹¹ to estimate that fringe benefits are equal to 51.4 percent ($\$14.85 \div \28.89) of wages. For insurance claims processors, this RIA uses an average hourly wage of \$37.31 and average hourly benefits of \$18.92 for private industry workers in “financial activities”¹² to estimate that fringe benefits are equal to 50.7 percent ($\$18.92 \div \37.31) of wages.

For estimating the overhead rates on wages, the Agency used industry data gathered for the Truck Costing Model developed by the Upper Great Plains

¹⁰ DOL, BLS. *Occupational Employment and Wage Statistics (OEWS). National. May 2022*. Available at: https://www.bls.gov/oes/current/oes_nat.htm (accessed Sept. 1, 2023).

¹¹ DOL, BLS. *Table 4: Employer costs for Employee Compensation for private industry workers by occupation and industry group, Dec 2022*. Available at: https://www.bls.gov/news.release/archives/ecec_03172023.htm (accessed Sept. 1, 2023).

¹² *Ibid.*

Transportation Institute, North Dakota State University as a proxy for the overhead cost of employees in the transportation intermediary and surety and trustee industries.¹³

Research conducted for this model found an average cost of \$0.107 per mile of commercial motor vehicle operation for management and overhead, and \$0.39 per mile for labor, indicating an overhead rate of 27 percent (27 percent = $\$0.107 \div \0.39 , rounded to the nearest whole percent).

It is assumed that FMCSA reviewers will be Federal government employees located in the Washington, DC region at the GS-9 Step 5 wage rate.¹⁴ OPM does not publish annual rates that include fringe benefits or overhead. OMB does publish an object class analysis of the budget of the U.S. Government. The Object Class Analysis estimates that, in 2021, DOT spent \$6,351 million in employee compensation and \$2,840 million in employee benefits. FMCSA estimates a fringe benefit rate of 45 percent ($\$2,840 \div \$6,351$) for FMCSA personnel. FMCSA uses the DOT Volpe Center overhead rate of 64 percent for Federal personnel.¹⁵ The Volpe Center is a Federal fee-for-service research and innovation center in the DOT. Unlike most Federal agencies, Volpe receives no direct appropriation from Congress and must cover direct and indirect expenses through agreements with project sponsors.^{16,17} These indirect costs are recovered through the

¹³ Berwick, Farooq. *Truck Costing Model for Transportation Managers*. North Dakota State University. Upper Great Plains Transportation Institute. August 2003. Appendix A, pp. 42-47. Available at: <https://www.ugpti.org/resources/reports/downloads/mpc03-152.pdf> (accessed Jan. 5, 2024).

¹⁴ OPM Pay & Leave Salaries & Wages. Salary Table 2023-DCB, Hourly Basic (B) Rates by Grade and Step. Available at https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/23Tables/html/DCB_h.aspx (accessed Sept. 5, 2023).

¹⁵ DOT, Volpe Center. *Volpe Project Costs*. Available at: <https://www.volpe.dot.gov/work-with-us/volpe-project-costs> (accessed Jan. 4, 2024).

¹⁶ DOT, Volpe Center. *How to Initiate Work*. Available at: <https://www.volpe.dot.gov/work-with-us/how-initiate-work> (accessed Jan. 4, 2024).

¹⁷ DOT, Volpe Center. *Volpe Project Costs*. Available at: <https://www.volpe.dot.gov/work-with-us/volpe-project-costs> (accessed Jan. 4, 2024).

overhead rate charged on direct labor costs. Volpe employees are compensated according to the Federal locality pay tables used for all Federal employees and their labor costs include the same employee benefits. Therefore, FMCSA believes that the overhead rate for Volpe personnel is similar to the rate for all DOT personnel.

Insurance

In addition to submitting forms to FMCSA, providers of recreational activities wishing to maintain a valid operating authority registration must also have proof of liability insurance filed with FMCSA. The Agency estimates that such liability insurance currently costs entities an average of \$190 per month for one vehicle, or \$2,280 per year ($\$190 \times 12 = \$2,280$).¹⁸ Using a range of fleet sizes for illustrative purposes, Table 4 presents the estimated costs currently associated with maintaining liability insurance by fleet size.

Table 4. Current Insurance Estimates by Fleet Size (2022\$)

Number of Vehicles in Fleet	Monthly Premium	Yearly Premium
1	\$190	\$2,280
5	\$950	\$11,400
10	\$1,900	\$22,800

Exemption Use Scenarios for Analyzing Carrier Costs

The following four scenarios build on the forms and insurance cost analyses detailed above and examine how the impact of this rule on carrier costs may vary under different exemption use conditions. The scenarios are an increase in exemption use by

¹⁸ Insuranks Online Insurance Comparison Marketplace. <https://www.insuranks.com/commercial-van-insurance> (accessed Sept. 12, 2023). These estimates are quoted from 12 different insurance companies, including Geico, Progressive, State Farm, and others. The monthly quotes were summed and then divided by 12 to obtain an estimated monthly average for the industry: $(\$115 + \$120 + \$130 + \$183 + \$165 + \$180 + \$195 + \$210 + \$221 + \$232 + \$254 + \$270) \div 12 = \$190$.

carriers, a decrease in exemption use by carriers, no change in exemption use, and exemption use by new carriers entering the industry.

Scenario One: Increase in Exemption Use

Scenario One includes providers of recreational activities that have been eligible for the operating authority exemption established by section 23012 of the IIJA in 2021 but are not utilizing it due to the definitional ambiguity of *recreational activities*. If there are such carriers, after publication of this final rule they will understand they are classified as providers of recreational activities and are, therefore, eligible for this exemption. This would lead to an incremental increase in the number of operational authority exemptions being used relative to the baseline. As explained in detail below, these carriers will be impacted in different ways by the following costs and cost savings: financial responsibility compliance costs, operating authority registration fees, and paperwork costs.

Carriers under Scenario One that are currently maintaining their operating authority registration year-round would experience cost savings associated with maintaining financial responsibility. In the NPRM, the Agency invited the public to provide additional information on the scenarios presented in the RIA, and the estimated insurance premiums. While no data were provided on these estimates, NAMIC suggested that the Agency further research the availability of insurance policies that provide coverage on a monthly basis, and whether States would permit similar staggering of required insurance coverage.

As detailed above in section V.B. Comments and Responses, based on the information gathered and the Agency's experience administering the relevant regulations,

FMCSA believes it is possible for a motor carrier providing recreational activities on a seasonal basis to carry an insurance policy during its operating season, terminate the policy at the end of the season, and obtain a new policy at the beginning of its next operating season.¹⁹ The Agency declines to make any modifications to this analysis based on this comment.

Regarding the second part of NAMIC's comment, the Agency concurs that the degree of insurance cost savings is dependent on several factors, including other Federal or State insurance requirements. FMCSA amends this RIA by removing quantified estimates of insurance cost savings and acknowledging the varying impacts State insurance requirements will have on the degree of cost savings.

As described above, FMCSA estimates average monthly insurance premiums of \$190 per vehicle. The Agency maintains that certain motor carriers will experience insurance cost savings; however, the quantified amount of those savings may be offset by the need to satisfy other Federal or State insurance requirements. Motor carriers that do not have to meet other Federal or State insurance requirements would save on insurance costs during months they are not in operation.

There may also be cost savings as a result of avoided insurance-related administrative requirements. Currently, carriers must choose an insurance plan or other acceptable form of financial responsibility, and have proof filed with FMCSA whenever they apply for or reinstate operating authority. The Agency estimates that it takes carriers 8 hours to research and identify which insurance company, financial surety, or bond

¹⁹ For example, Progressive offers policyholders the option to adjust coverage based on seasonal changes (Progressive Commercial Auto Insurance, available at <https://www.progressivecommercial.com/commercial-auto-insurance/> (accessed Sept. 20, 2023)).

provider they will use. Assuming this task is performed by an office clerk, this activity is estimated to cost each carrier \$256 ($\$31.99 \times 8 \text{ hours} = \256).²⁰

As displayed in Table 2, carriers under Scenario One were also required to ensure that their financial responsibility provider submit Forms BMC-91 or BMC-91X to FMCSA at a cost of \$7 per form. These administrative requirements for insurance were no longer required after the enactment of the IIJA in 2021; therefore, the definitional clarification in this rule may lead to cost savings of \$256 to the carrier and \$7 to the insurance company.

Some carriers under Scenario One were filing Form OCE-46 to voluntarily revoke their operating authority registrations during the off-season months so that they did not need to maintain insurance at FMCSA's minimum prescribed levels during those months. To resume operations, the providers were then required to submit Form MCSA-5889 to reinstate their operating authority registrations during the months when they were operating. As displayed in Tables 2 and 3, it is estimated to cost \$8 to submit Form MCSA-5889, plus a fee of \$80 to carriers, and \$18 in costs to FMCSA.²¹ Form OCE-46 is also estimated to cost \$8 per carrier and \$18 for FMCSA processing time.²² As a result of this rule, if there are carriers under this scenario, they would no longer be subject to the costs associated with submitting Form MCSA-5889 or Form OCE-46.

²⁰ DOL, BLS. Occupational Employment and Wage Statistics (OEWS). National. May 2022. 43-4071 Office Clerks, General. Available at: <https://www.bls.gov/oes/current/oes434071.htm> (accessed Sept. 9, 2023).

²¹ This estimate is based on the calculations used in the ICR titled, "Motor Carrier Records Change Form" (Form MCSA-5889), covered by OMB Control Number 2126-0060. The cost of a paper submission is \$7 and the cost of an electronic submission is \$0.

²² This estimate is based on the calculations used in the ICR titled "Request for Revocation of Authority Granted," covered by OMB Control Number 2126-0018.

Scenario Two: Decrease in Exemption Use

It is also possible that this rule will limit the use of this exemption for certain carriers. Because neither FMCSA nor Congress provided a definition of *recreational activities*, there may be carriers that incorrectly believed they are providers of recreational activities, but upon issuance of this rule, would realize they are not. These carriers may currently be incorrectly utilizing this exemption and revoking their operating authority when they were not eligible to do so. Therefore, if such carriers exist, they may incur a cost of \$88 to submit Form MCSA-5889 as a result of this rulemaking for reinstatement of their operating authority (Table 2). They would also need to resume paying for financial responsibility in order to maintain valid operating authority. Illustrative examples of possible insurance-related costs are displayed in Tables 4 and 5.

Scenario Three: No Incremental Change in Exemption Use

There may also be eligible carriers that correctly interpreted Congress' intent and have been utilizing the exemption correctly since the IIJA's enactment. These carriers are not expected to be impacted by this rule relative to the baseline. They have already gone through the steps of voluntarily revoking their operating authority with FMCSA, are maintaining financial responsibility only while in operation, and are not paying fees or completing paperwork associated with maintaining operating authority.

Scenario Four: New Providers

This rule may also affect eligible providers considering engaging in providing recreational activities in the future. If there are new carriers considering entering this field that were not aware of the IIJA exemption, they would no longer need to account for the following costs as a result of this rule: year-round financial responsibility premiums

required by FMCSA, financial responsibility-related administrative costs, and operating authority fees and paperwork.

Prior to the enactment of the IIJA, new providers of recreational activities had to submit the “Application for Motor Passenger Carrier Authority” (Form OP-1(P)).²³ The Agency estimates that this form costs \$64 with a \$300 fee for carriers, and \$479 in Government costs (Tables 2 and 3, respectively).²⁴ Additionally, as described in the *Financial Responsibility under Scenario One* section, the avoided insurance-related administrative costs would be \$7 for insurance companies and \$256 for carriers. An illustrative example of potential avoided insurance premium costs is presented in Table 5.

Government Costs

In addition to the cost to carriers analyzed in the four scenarios above, this rule may have government costs. The changes implemented by this rule will not require additional training for enforcement personnel. The Agency expects that the definitional clarification set forth in this rule will be communicated to FMCSA personnel and the Agency’s State-based enforcement partners through existing means, such as policy updates and ongoing training. The Agency will be impacted by the costs and cost savings associated with this rule, as outlined in Table 3 (\$479 for Form OP-1(P), \$18 for Form OCE-46 and Form MCSA-5889).

Benefits

The affected entities are providers of recreational activities that typically consist of physically demanding outdoor experiences or excursions that do not have

²³ Applicants that have never held a USDOT number or any other registration issued by FMCSA must file the URS online application (Form MCSA-1) to obtain a USDOT number and register for operating authority.

²⁴ This estimate is based on calculations used in the ICR titled “Licensing Applications for Motor Carrier Operating Authority,” covered by OMB Control Number 2126-0016.

transportation as an integral part of the activity itself. Overall, the outdoor recreation economy accounted for 1.9 percent (\$454 billion) of current-dollar gross domestic product (GDP) for the nation in 2021.²⁵ Hawaii, Montana, Vermont, Alaska, and Maine are among the States where outdoor recreation as a percent of that States' GDP ranks the highest. For example, in 2021, outdoor recreation accounted for \$4.4 billion of Hawaii's \$91.1 billion overall GDP, or 4.8 percent – the highest proportion of any State. In terms of actual levels, the States that produced the highest outdoor recreation GDP in 2021 were California (\$54.7 billion), Florida (\$41.9 billion), and Texas (\$37.5 billion).

Differences in interpretation between regulated entities and enforcement officials may be hindering consistent enforcement practices, thereby impacting business-related decisions in providing transportation for recreational activities. This rule may resolve this information asymmetry by creating a common understanding between FMCSA and motor carriers. Because this rule may also lead to an increase in exemption use, it will benefit carriers by improving the efficiency of their business operations and therefore increase both consumer and producer surplus.

B. Congressional Review Act

This rule is not a *major rule* as defined under the Congressional Review Act (5 U.S.C. 801–808).²⁶

²⁵ DOL, Bureau of Economic Analysis (BEA). BEA Data, Special Topics, Outdoor Recreation Satellite Account, U.S. and States, 2021. Current release Nov. 9, 2022. Available at <https://www.bea.gov/data/special-topics/outdoor-recreation> (accessed Sept 13, 2023).

²⁶ A *major rule* means any rule that OMB finds has resulted in or is likely to result in (a) an annual effect on the economy of \$100 million or more; (b) a major increase in costs or prices for consumers, individual industries, geographic regions, Federal, State, or local government agencies; or (c) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets (5 U.S.C. 802(4)).

C. Regulatory Flexibility Act (Small Entities)

The Regulatory Flexibility Act of 1980, Pub. L. 96-354, 94 Stat. 1164 (5 U.S.C. 601-612), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-121, 110 Stat. 857, March 29, 1996) and the Small Business Jobs Act of 2010 (Pub. L. 111-240, 124 Stat. 2504, September 27, 2010), requires Federal agencies to consider the effects of the regulatory action on small business and other small entities and to minimize any significant economic impact. The term *small entities* comprises small businesses and not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. Accordingly, DOT policy requires an analysis of the impact of all regulations on small entities, and mandates that agencies strive to lessen any adverse effects on these businesses.

FMCSA has not determined whether this final rule will have a significant economic impact on a substantial number of small entities. Therefore, FMCSA prepared an initial regulatory flexibility analysis (IRFA) for the NPRM and a final regulatory flexibility analysis (FRFA) for the final rule.

A FRFA must contain the following:

1. A statement of the need for, and objectives of, the rule.
2. A statement of the significant issues raised by the public comments in response to the IRFA, a statement of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments.
3. The response of the agency to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration (SBA) in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments.

4. A description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available.
5. A description of the projected reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.
6. A description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.
7. Description of steps taken by a covered agency to minimize costs of credit for small entities.

1. A statement of the need for, and objectives of, the rule.

Section 23012 of the IIJA amended 49 U.S.C. 13506 by adding a new exemption in paragraph (b)(4) from the operating authority registration requirements. FMCSA is adding a new regulatory section incorporating that statutory exemption and also including a definition for the exempt operations. The exemption from operating authority registration applies to motor carriers operating a motor vehicle designed or used to transport between 9 and 15 passengers (including the driver) whether operated alone or with a trailer attached to the transport vehicle, if the motor vehicle is operated by a person that provides recreational activities and the transportation is provided within a 150 air-mile radius of the location at which passengers initially boarded the motor vehicle at the outset of the trip. The new statutory exemption did not include a definition of recreational activities, creating some ambiguity in the exemption's applicability. The Agency is codifying the exemption in regulation and removing ambiguity by defining *recreational activities*.

2. A statement of the significant issues raised by the public comments in response to the IRFA, a statement of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments.

The public comments raised no significant issues in response to the IRFA. The Agency received four comments from AWM, NAMIC, the Vehicle Associations, and a private citizen.

In response to the Vehicle Associations' comment, the Agency is modifying the definition of *recreational activities* in § 372.107 to include off-highway vehicle driving and riding in the non-exhaustive list of activities provided as examples within the definition. As detailed in section V. Discussion of Proposed Rulemaking and Comments of this final rule, the Vehicle Associations proposed modifying *recreational activities* to include motorized and non-motorized activities, such as off-highway vehicle driving and riding. The Agency adopts the Vehicle Associations' proposed modification in part.

As detailed in paragraph 4 of this FRFA, FMCSA provided a wide range of North American Industry Classification System (NAICS) codes of the recreational activities industry in the IRFA, in order to capture all of the potential sectors that providers of recreational activities may operate under. The addition of "off-highway vehicle driving and riding" to the list of examples is intended for additional clarification and will not expand the list of affected NAICS codes that were estimated in the IRFA, as presented in Table 6.

As described in section IX.A Regulatory Analyses, the Agency's preliminary RIA included quantified estimates of potential insurance cost savings, among other potential cost savings, for eligible motor carriers and the Agency invited the public to provide additional information on these estimates. While no data were provided as to the

estimated premiums, NAMIC suggested that the Agency further research the availability of insurance policies that provide coverage on a monthly basis. The Agency maintains that certain motor carriers may save on insurance costs as a result of this rule, depending on their particular circumstances as detailed in section IX.A, but the Agency removes the quantified estimates of that savings from the RIA.

The Agency concurs that the degree of insurance cost savings is dependent on several factors, including other Federal or State insurance requirements. Therefore, FMCSA amends this RIA by removing quantified estimates of insurance cost savings and acknowledging the varying impacts State insurance requirements will have on the degree of cost savings. The quantified amount of those savings may be offset by the need to satisfy other Federal or State insurance requirements. Motor carriers that do not have to meet other Federal or State insurance requirements would save on insurance costs during months they are not in operation.

The remaining comments from AWM and the private citizen did not relate to the clarification of the recreational activities exemption. AWM questioned the magnitude of the burden associated with obtaining and maintaining operating authority, and the private citizen raised concerns about effects on public land usage. As detailed in section V. Discussion of Proposed Rulemaking and Comments, FMCSA is not determining through this rulemaking whether there should be an exemption from the operating authority registration rules for providers of recreational activities. This decision was made by Congress when it passed the IIJA in 2021, which created a statutory exemption. FMCSA's scope in this rulemaking is only to define the term *recreational activities* and consider the impacts of providing that definition to clarify the exemption. The Agency

considers the objections to the creation of the exemption outside the scope of the rule and declines to make any changes to the rule based on them.

3. The response of the agency to any comments filed by the Chief Counsel for Advocacy of the SBA in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments.

The Chief Counsel for Advocacy of the SBA filed no comments to the proposed rule. Thus, FMCSA has nothing to respond to from the Chief Counsel for Advocacy of the SBA.

4. A description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available.

Small entity is defined in 5 U.S.C. 601. Section 601(3) defines a *small entity* as having the same meaning as *small business concern* under section 3 of the Small Business Act. This includes any small business concern that is independently owned and operated and is not dominant in its field of operation. Section 601(4), likewise includes within the definition of *small entities* not-for-profit enterprises that are independently owned and operated and are not dominant in their fields of operation. Additionally, section 601(5) defines *small entities* as governments of cities, counties, towns, townships, villages, school districts, or special districts with populations less than 50,000.

This final rule affects motor carriers operating a motor vehicle designed or used to transport between 9 and 15 passengers (including the driver) whether operated alone or with a trailer attached to the transport vehicle, if the motor vehicle is operated by a person that provides recreational activities and the transportation is provided within a 150 air-mile radius of the location at which passengers initially boarded the motor vehicle at the outset of the trip. Providers of recreational activities affected by this rule operate under

many different NAICS²⁷ codes with differing size standards. The SBA has released updated small entity size standards since the publication of the IRFA. The new size standards became effective March 17, 2023.²⁸ FMCSA has updated the estimates and size standards in this FRFA where needed.

In the IRFA for the proposed rule, FMCSA provided a wide range of NAICS codes in the recreational activities industry, in order to capture all of the potential NAICS codes that providers of recreational activities may operate under. In doing so, FMCSA highlighted many entities that perform various other functions beyond transporting passengers to and from recreational activities. The Agency also requested public comment on the NAICS codes analyzed in the IRFA but did not receive any such comments. Therefore, the Agency assumes the NAICS codes analyzed in the IRFA are representative of the composition of the affected industries and is retaining those codes for the purposes of this FRFA.

As shown in Table 6 below, the SBA size standards for providers of recreational activities range from \$9 million in revenue per year for the All Other Amusement Recreation Industries NAICS national industry, to \$47 million in revenue per year for Racetracks.

²⁷ More information about NAICS is available at <http://www.census.gov/naics> (accessed Sept. 13, 2023).

²⁸ SBA Table of Small Business Size Standards Matched to NAICS effective Mar. 17, 2023, located at https://www.sba.gov/sites/sbagov/files/2023-06/Table%20of%20Size%20Standards_Effective%20March%2017%2C%202023%20%282%29.pdf (accessed Sept. 13, 2023).

Table 6. SBA Size Standards for Selected Industries (in millions of 2023\$)

NAICS Code	NAICS Industry Description	SBA Size Standard in millions
Subsector 487 – Scenic and Sightseeing Transportation		
487110	Scenic and Sightseeing Transportation, Land	\$20.5
487210	Scenic and Sightseeing Transportation, Water	\$14.0
487990	Scenic and Sightseeing Transportation, Other	\$25.0
Subsector 561 – Administrative and Support Services		
561520	Tour Operators	\$25.0
Subsector 711 – Performing Arts, Spectator Sports, and Related Industries		
711212	Racetracks	\$47.0
711219	Other Spectator Sports	\$16.5
Subsector 713 – Amusement, Gambling, and Recreation Industries		
713910	Golf Courses and Country Clubs	\$19.0
713920	Skiing Facilities	\$35.0
713940	Fitness and Recreational Sports Centers	\$17.5
713990	All Other Amusement Recreation Industries	\$9.0

FMCSA examined data from the 2017 Economic Census, the most recent Census for which data were available, to determine the percentage of firms that have revenue at or below SBA’s thresholds within each of the NAICS industries.²⁹ Boundaries for the revenue categories used in the Economic Census do not precisely coincide with the SBA thresholds. Instead, the SBA threshold generally falls between two different revenue categories. However, FMCSA was able to make reasonable estimates as to the percent of small entities within each NAICS code.

²⁹ U.S. Census Bureau. *2017 Economic Census*. Available at <https://data.census.gov/cedsci/table?q=EC1700&n=48-49&tid=ECNSIZE2017.EC1700SIZEREVEST&hidePreview=true> (accessed Sept. 13, 2023).

The Agency estimates that many entities affected by this rule fall under the Scenic and Sightseeing Transportation NAICS subsector (487). Firms in this subsector utilize transportation equipment to provide recreation and entertainment. These operations are distinct from passenger transportation carried out for other types of for-hire transportation. The recreational activities involved are local in nature, usually involving a same-day return to the point of departure.³⁰ Industry groups under this subsector include Scenic and Sightseeing Transportation, Land (4871), Scenic and Sightseeing Transportation, Water (4872), and Scenic and Sightseeing Transportation, Other (4879).

The Scenic and Sightseeing Transportation, Land NAICS national industry (487110) has a revenue size standard of \$20.5 million, which falls between two Economic Census revenue categories, \$10 million and \$25 million. This industry comprises firms engaged in various outdoor excursions, including horse-drawn sightseeing rides. The percentages of Scenic and Sightseeing Transportation, Land with revenue less than these amounts ranged from 97 percent to 98 percent. Because the SBA threshold is closer to the higher of these two boundaries, FMCSA has assumed that the percent of Scenic and Sightseeing Transportation, Land entities that are small will be closer to 98 percent and is using that figure.

For Scenic and Sightseeing Transportation, Water (487210), the \$14 million SBA threshold falls between two Economic Census revenue categories, \$10 million and \$25 million. Entities in this national industry are primarily engaged in providing scenic and sightseeing transportation on water, such as fishing boat charter operation. The percentages of Scenic and Sightseeing Transportation, Water with revenue less than these

³⁰ U.S. Census Bureau 2022 NAICS Definition. Available at <https://www.census.gov/naics/?input=48&year=2022&details=487> (accessed Sept. 13, 2023).

amounts ranged from 97 percent to 99 percent. Because the SBA threshold is closer to the lower of these two boundaries, FMCSA has assumed that the percent of these entities that are small will be closer to 97 percent and is using that figure.

Scenic and Sightseeing Transportation, Other (487990) focuses on all other scenic and sightseeing transportation, such as hot air balloon rides and glider excursions. The SBA size standard for this national industry is \$25 million. The \$25 million SBA threshold falls between two Economic Census revenue categories, \$10 million and \$25 million. The percentages of these entities with revenue less than these amounts were 93 percent and 98 percent. Because the SBA threshold coincides with the higher of these two boundaries, FMCSA has assumed that the percent of these providers that are small will be closer to 98 percent and is using that figure.

Firms falling under the Travel Arrangement and Reservation Services industry group (5615) may also be impacted by this NPRM. This industry group comprises the Travel Agencies (561510), Tour Operators (561520), and Convention and Visitors Bureaus (561591) national industries.³¹ The Agency assumes that providers of recreational activities fall under the Tour Operators national industry.

Tour Operators (561520) focuses on arranging and assembling tours, including travel or wholesale tour operators. The SBA size standard for this national industry is \$25 million, which falls between two Economic Census revenue categories, \$25 million and \$100 million. The percentages of Tour Operators with revenue less than these amounts were 92 percent and 100 percent. The Agency presents a high-end estimate of 100 percent due to limitations in Economic Census data availability. Revenue data for firms

³¹ US Census Bureau 2022 NAICS Definition. Available at <https://www.census.gov/naics/?input=56&year=2022&details=5615> (accessed Sept. 14, 2023).

with revenue less than \$100,000, which would be considered small, are suppressed by the Economic Census to avoid disclosing for individual companies. Because the Agency is unable to ascertain the revenue for the suppressed firms, the high-end estimate assumes that all such firms fall under the \$25 million SBA threshold and would be considered small. The low-end estimate assumes the suppressed firms are not small. Because the SBA threshold is closer to the lower of these two boundaries, FMCSA has assumed that the percent of Tour Operators that is small will be closer to 92 percent and is using that figure.

The Agency estimates that many providers of recreational activities affected by this NPRM would also fall under the Arts, Entertainment, and Recreation sector (71). This sector includes a wide range of firms operating facilities that meet varied cultural, entertainment, and recreational interests of patrons.³² Subsectors under this group include Performing Arts, Spectator Sports, and Related Industries (711), Amusement, Gambling, and Recreational Industries (713), and others.

The industry groups under the Spectator Sports and Related Industries (711) subsector cover Spectator Sports (7112). Spectator Sports includes the Racetracks (711212) and Other Spectator Sports (711219) national industries.

Racetracks (711212) focuses on firms operating racetracks without casinos, such as auto, motorcycle, snowmobile, and horse races. The SBA size standard for this national industry is \$47 million. The \$47 million SBA threshold falls between two Economic Census revenue categories, \$25 million and \$100 million. The percentages of

³² US Census Bureau 2022 NAICS Definition. Available at <https://www.census.gov/naics/?input=71&year=2022&details=71> (accessed Sept. 5, 2023).

these entities with revenue less than these amounts were 83 percent and 100 percent.³³

Because the SBA threshold is closer to the lower of these two boundaries, FMCSA has assumed that the percent of Racetracks entities that are small will be closer to 83 percent and is using that figure.

Other Spectator Sports (711219) focuses on independent athletes, owners of racing participants (such as cars, dogs, and horses), and firms engaged in specialized services in support of said participants. The SBA size standard for this national industry is \$16.5 million, which falls between two Economic Census revenue categories, \$10 million and \$25 million. The percentages of these entities with revenue less than these amounts were 82 percent and 100 percent.³⁴ Because the SBA threshold is closer to the lower of these two boundaries, FMCSA has assumed that the percent of Other Spectator Sports entities that are small will be closer to 82 percent and is using that figure.

The industry groups under the Amusement, Gambling, and Recreation Industries (713) subsector include Amusement Parks and Arcades (7131), Gambling Industries (7132), and Other Amusement and Recreation Industries (7139).³⁵ The Agency estimates the entities affected by this NPRM would fall into the third industry group, Other Amusement and Recreation Industries (7139). This group, as detailed below, covers firms

³³ The Agency presents a high-end estimate of 100 percent due to limitations in Economic Census data availability. Revenue data for firms with revenue less than \$100,000, which would be considered small, are suppressed by the Economic Census to avoid disclosing for individual companies. Because the Agency is unable to ascertain the revenue for the suppressed firms, the high-end estimate assumes that all such firms fall under the \$47 million SBA threshold. The low-end estimate assumes the suppressed firms are not small.

³⁴ The Agency presents a high-end estimate of 100 percent due to limitations in Economic Census data availability. Revenue data for firms with revenue less than \$100,000, which would be considered small, are suppressed by the Economic Census. Because the Agency is unable to ascertain the revenue for the suppressed firms, the high-end estimate assumes that all such firms fall under the \$16.5 million SBA threshold. The low-end estimate assumes the suppressed firms are not small.

³⁵ US Census Bureau 2022 NAICS Definition. Available at <https://www.census.gov/naics/?input=71&year=2022&details=713> (accessed Sept. 5, 2023).

operating golf courses and country clubs, skiing facilities, and all other amusement and recreation activities.³⁶

Entities falling under Golf Courses and Country Clubs (713910) primarily engage in operating such facilities, and providing food and beverage services, equipment rental, or golf instruction. The SBA size standard for this national industry is \$19 million, which falls between two Economic Census revenue categories, \$10 million and \$25 million. The percentages of Golf Courses and Country Clubs with revenue less than these amounts were 95 percent and 99 percent. In the IRFA, FMCSA presented the estimated percent of small entities using a low-end estimate of 95 percent. However, the SBA size standard for this national industry increased from \$16.5 million in 2022 to \$19 million in 2023, making the new threshold closer to the higher of the revenue boundaries. Therefore, FMCSA has assumed that the percent of these entities that are small will be closer to 99 percent and is using that figure in the FRFA.

Skiing Facilities (713920) industries primarily operate downhill, cross country, or related skiing areas, and provide food and beverage services, equipment rental, and ski instruction. The SBA size standard for this national industry is \$35 million, which falls between two Economic Census revenue categories, \$25 million and \$100 million. The percentages of Skiing Facilities with revenue less than these amounts were 93 percent and 98 percent.³⁷ Because the SBA threshold is closer to the lower of these two

³⁶ US Census Bureau 2022 NAICS Definition. Available at <https://www.census.gov/naics/?input=71&year=2022&details=7139> (accessed Sept. 5, 2023).

³⁷ The Agency presents a high-end estimate of 98 percent which includes assumptions about limitations in Economic Census data. Some revenue data for firms that would be considered small (revenue categories of \$100,000 or more and \$250,000 to \$499,999) are suppressed by the Economic Census. Because the Agency is unable to ascertain the revenue for the suppressed firms, the high-end estimate assumes that all such firms fall under the \$35 million SBA threshold. The low-end estimate assumes the suppressed firms are not small.

boundaries, FMCSA has assumed that the percent of these facilities that are small will be closer to 93 percent and is using that figure.

The Agency estimates that the majority of entities affected by this Final Rule would fall under the All Other Amusement Recreation Industries (713990) national industry. This includes whitewater rafting, hunting, horseback riding stables, boating clubs, canoeing, archery and shooting ranges, hiking, and others. The SBA size standard for this national industry is \$9 million. The \$9 million SBA threshold falls between two Economic Census revenue categories, \$5 million and \$10 million. The percentages of these providers with revenue less than these amounts were 60 percent and 99.6 percent. The Agency estimates a wide range in estimates due to limitations in Economic Census data for this NAICS category. Specifically, of the 12,688 firms in this industry, 12,631 have revenue between \$100,000 and \$10 million. However, data on small entities with revenue under \$250,000 are suppressed. There are 7,490 small entities (59 percent) with revenue between \$250,000 and \$5 million, and 139 firms with revenue between \$5 million and \$10 million (1.1 percent). Of the 12,688 firms in All Other Amusement Recreation Industries, there are 5,002 firms without revenue data (39.4 percent). The high-end estimate assumes all such firms are small (99.6 percent) and FMCSA uses that figure.

Table 7 below shows the complete estimates of the number of small entities within the national industries affected by this rule.

Table 7. Estimates of Numbers of Small Entities

NAICS Code	Description	Total Number of Firms	Number of Small Entities	Percent of all Firms
487110	Scenic and Sightseeing Transportation, Land	520	512	98%
487210	Scenic and Sightseeing Transportation, Water	1,129	1,097	97%
487990	Scenic and Sightseeing Transportation, Other	169	165	98%
561520	Tour Operators	2,175	1,991	92%
711212	Racetracks	299	248	83%
711219	Other Spectator Sports	1,916	1,577	82%
713910	Golf Courses and Country Clubs	8,076	7,712	99%
713920	Skiing Facilities	203	189	93%
713990	All Other Amusement Recreation Industries	12,688	7,629	60%

5. A description of the reporting, recordkeeping, and other compliance requirements of the final rule, including an estimate of the classes of small entities subject to the requirements and the type of professional skills necessary for preparation of the report or record.

This rule will not result in new recordkeeping requirements.

6. A description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

Given that the recreational activities exemption was statutorily mandated, FMCSA did not have an alternative or discretion as to whether to adopt the exemption but did consider whether to clarify a definition of the term *recreational activities* or to remain silent. FMCSA also considered the alternative of adding a definition without including non-exhaustive examples. However, FMCSA believes that remaining silent or proposing a definition without such examples could result in confusion or inconsistent

enforcement and that it is better to provide a definition with examples consistent with the legislative intent to minimize any significant economic impact on small entities.

7. Description of Steps Taken by a Covered Agency to Minimize Costs of Credit for Small Entities

FMCSA is not a covered agency as defined in section 609(d)(2) of the Regulatory Flexibility Act and has taken no steps to minimize the additional cost of credit for small entities.

D. Assistance for Small Entities

In accordance with section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121, 110 Stat. 857), FMCSA wants to assist small entities in understanding this final rule so they can better evaluate its effects on themselves and participate in the rulemaking initiative. If the final rule will affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please consult the person listed under FOR FURTHER INFORMATION CONTACT.

Small businesses may send comments on the actions of Federal employees who enforce or otherwise determine compliance with Federal regulations to the Small Business Administration's Small Business and Agriculture Regulatory Enforcement Ombudsman (Office of the National Ombudsman, see <https://www.sba.gov/about-sba/oversight-advocacy/office-national-ombudsman>) and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of FMCSA, call 1-888-REG-FAIR (1-888-734-3247). DOT has a policy

regarding the rights of small entities to regulatory enforcement fairness and an explicit policy against retaliation for exercising these rights.

E. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) (UMRA) requires Federal agencies to assess the effects of their discretionary regulatory actions. The Act addresses actions that may result in the expenditure by a State, local, or Tribal government, in the aggregate, or by the private sector of \$192 million (which is the value equivalent of \$100 million in 1995, adjusted for inflation to 2022 levels) or more in any 1 year. Though this final rule would not result in such an expenditure, and the analytical requirements of UMRA do not apply as a result, the Agency discusses the effects of this rule elsewhere in this preamble.

F. Paperwork Reduction Act

This final rule contains no new information collection requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520).

G. E.O. 13132 (Federalism)

A rule has implications for federalism under section 1(a) of E.O. 13132 if it has “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.”

FMCSA has determined that this rule will not have substantial direct costs on or for States, nor would it limit the policymaking discretion of States. Nothing in this document preempts any State law or regulation. Therefore, this rule does not have

sufficient federalism implications to warrant the preparation of a Federalism Impact Statement.

H. Privacy

The Consolidated Appropriations Act, 2005,³⁸ requires the Agency to assess the privacy impact of a regulation that will affect the privacy of individuals. This rule would not require the collection of personally identifiable information (PII).

The Privacy Act (5 U.S.C. 552a) applies only to Federal agencies and any non-Federal agency that receives records contained in a system of records from a Federal agency for use in a matching program.

The E-Government Act of 2002,³⁹ requires Federal agencies to conduct a PIA for new or substantially changed technology that collects, maintains, or disseminates information in an identifiable form. No new or substantially changed technology will collect, maintain, or disseminate information as a result of this rule. Accordingly, FMCSA has not conducted a PIA.

In addition, the Agency submitted a Privacy Threshold Assessment (PTA) to evaluate the risks and effects the proposed rulemaking might have on collecting, storing, and sharing personally identifiable information. The PTA was adjudicated by DOT's Chief Privacy Officer on December 15, 2023.

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

This rule does not have Tribal implications under E.O. 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian Tribes, on the relationship between the Federal

³⁸ Pub. L. 108-447, 118 Stat. 2809, 3268, note following 5 U.S.C. 552a (Dec. 4, 2014).

³⁹ Pub. L. 107-347, sec. 208, 116 Stat. 2899, 2921 (Dec. 17, 2002).

Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

J. National Environmental Policy Act of 1969

FMCSA analyzed this rule pursuant to the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 et seq.) and determined this action is categorically excluded from further analysis and documentation in an environmental assessment or environmental impact statement under FMCSA Order 5610.1 (69 FR 9680), Appendix 2, (6)(b). The categorical exclusion (CE) in paragraph (6)(b) covers regulations which are editorial or procedural, such as those updating addresses or establishing application procedures, and procedures for acting on petitions for waivers, exemptions and reconsiderations, including technical or other minor amendments to existing FMCSA regulations. The requirements in this rule are covered by this CE, there are no extraordinary circumstances present, and the action does not have the potential to significantly affect the quality of the environment.

LIST OF SUBJECTS IN 49 CFR PART 372

Agricultural commodities, Buses, Cooperatives, Freight forwarders, Motor carriers, Moving of household goods, Seafood.

Accordingly, FMCSA amends 49 CFR chapter III, part 372 as follows:

PART 372 - EXEMPTIONS, COMMERCIAL ZONES, AND TERMINAL AREAS

1. The authority citation for part 372 continues to read as follows:

Authority: 49 U.S.C. 13504 and 13506; Pub. L. 105-178, sec. 4031, 112 Stat. 418; and 49 CFR 1.87.

2. Amend § 372.107 by adding paragraph (i) to read as follows:

§ 372.107 Definitions.

* * * * *

(i) *Recreational activities*. The term “recreational activities” means activities consisting of an outdoor experience or excursion typically of a physical or athletic nature which require transportation for the sole purpose of moving customers to another location or locations where the outdoor experience or excursion will take place and collecting those customers to transport them back to the place of initial boarding or another outpost of the motor carrier. Recreational activities include but are not limited to hiking, biking, horseback riding, canoeing, whitewater rafting, water trails, tubing, skiing, snowshoeing, snowmobiling, hunting, fishing, mountain climbing, swimming, and off-highway vehicle driving and riding. The term does not include any activity:

(1) for which the activity offered or sold is occurring simultaneously with the transportation; or

(2) for which the transportation is the primary service offered for sale.

3. Add § 372.113 to read as follows:

§ 372.113 Providers of recreational activities.

Transportation by a motor vehicle designed or used to transport not fewer than 9, and not more than 15, passengers (including the driver), whether operated alone or with a trailer attached for the transport of recreational equipment, is exempted from regulation promulgated pursuant to Part B of Title 49 U.S.C. subtitle IV if:

(a) the motor vehicle is operated by a person that provides recreational activities;

(b) the transportation is provided within a 150 air-mile radius of the location at which passengers initially boarded the motor vehicle at the outset of the trip; and

(c) in the case of a motor vehicle transporting passengers over a route between a place in a State and a place in another State, the person operating the motor vehicle is lawfully providing transportation of passengers over the entire route in accordance with applicable State law.

Issued under authority delegated in 49 CFR 1.87.

Sue Lawless,
Acting Deputy Administrator.