

FMCSA'S CARRIER FITNESS PLAN FAILS ON ALL COUNTS



More than a decade ago, Congress ordered the Federal Motor Carrier Safety Administration to revise its safety fitness determination rules set forth in 49 CFR §385 so that it could rate each operator of commercial motor vehicles in interstate commerce. The agency FMCSA first tried to build on the much-criticized SafeStat system with no success.

Then in 2010, FMCSA rolled out the Compliance, Safety Accountability/ Safety Measurement System methodology, which provided a more finely granulated and intricate system of weighing and measuring inspection data and roadside infractions.

The plaintiff's bar, safety advocates and sellers of carrier data welcomed SMS for use by the

shipping public as "stakeholders" in making safety fitness decisions. While FMCSA did not claim SMS was fit for its own use in making safety fitness determinations, it touted SMS as important information for shippers and brokers to use in carrier selection, even though determining whether a carrier is safe is not their job.

FMCSA did this even though it settled litigation over SMS in March 2011 by acknowledging that "Unless a motor carrier in the SMS has received an UNSATISFACTORY safety rating pursuant to 49 C.F.R. Part 385, or has otherwise been ordered to discontinue operations by the FMCSA, it is authorized to operate on the nation's roadways."

Even some who had welcomed CSA and SMS initially soon recognized its many flaws, including

the fact that it does not predict crashes by individual carriers. Scores fluctuate wildly due to "peer group creep." Disparate enforcement by states skews inspection data. DataQs, the system for appealing wrongfully assigned violations, is cumbersome.

Dissatisfaction with SMS culminated in December 2015 with the passage of the FAST Act. Congress ordered FMCSA to pull down CSA scores pending a study and corrective action plan and to ensure that any new regulation related to SMS incorporated the corrective action plan.

Congress also specifically said FMCSA could not base safety fitness determinations on information regarding SMS alerts or relative percentiles until the review and corrective action plan had been approved. The agency pretends

to get around this prohibition by converting percentile rankings into raw static numbers.

Unless more time is granted, carriers, shippers, brokers, and other stakeholders have until May 23 to comment on the agency's proposed safety fitness determination rule — a plan that FMCSA published in open defiance of the FAST Act. Even before the comment deadline, dozens of transportation-related associations have lined up to fight it — both in comments and in Congress.

One very important area of analysis is how the proposed rule stacks up against the Administrative Procedures Act, which requires the agency to show that the rule:

- **Will effectively meet its goal of determining which carriers are fit to operate;**
- **Produces benefits that are justified by the cost;**
- **Is not unduly burdensome on small businesses;**
- **Is not arbitrary and capricious;**
- **Is the best way to achieve the desired results; and**
- **Considers and makes findings of fact and law on each material issue presented.**

Meeting these statutory requirements is going to be a difficult task for the agency.

A safety fitness determination for each CMV operator

Using the static raw numbers and the re-engineered peer groups the rule proposes, the whole roadside inspection/SMS system would identify fewer than 400 carriers as unfit each year — not counting a few thousand found unfit through a modified audit process. Using 2011 data as a baseline, the agency claims that 75,000 carriers would be monitored by data, but our own analysis of current data suggests far fewer carriers would be reviewed. In any event, 75,000 is not the universe of carriers.

Cost-benefit analysis

Congress told FMCSA to devise a system to measure the safety performance of every carrier. After 13 years of development and massaging data, the agency presents a system that ultimately identifies no more than 400 carriers as unsafe. The agency cannot bootstrap a feasibility study to support this rulemaking by saying that it

measures all or even 75,000 carriers when so few carriers are identified as unfit.

Effect on small businesses

Nowhere in its safety fitness determination rulemaking does the agency address the persistent criticism that publication of SMS methodology unfairly brands small carriers, stifles free enterprise and competition and places an undue and unintended burden on shippers and brokers to credential carriers the agency itself finds as safe to operate.

Based on its proposal, FMCSA presumably considers SMS to be a reliable basis for safety fitness determinations at the 96th and 99th percentile, depending on the Driving Behavior Analysis Safety Improvement Category (BASIC). And yet the agency does not comment on whether it still intends to tout SMS methodology as suitable — if not required — for shippers and brokers to use.

Arbitrary and capricious standard

Even after three years of development before launch and five years of tinkering since, SMS still suffers from multiple flaws and inadequacies that disqualify its use for safety rating purposes. Consider that:

- **A Government Accountability Office study suggests 20 data points are necessary for statistical relevance. The agency has chosen 11 as the minimum for a data-only rating;**
- **Critics have pointed out that any percentile ranking in the Unsafe Driving BASIC is arbitrary because of enforcement anomalies resulting from “probable cause” states and speed traps;**
- **Comparing carriers using electronic logs with carriers that maintain paper logs is unfair when paper logs account for 50 percent of the violations due to “form and manner” errors;**
- **The Vehicle Maintenance BASIC is ineffective as a predictor of safety because about half of the points accumulated relate to trailer marker lights and other non-out-of-service issues;**
- **FMCSA's pronouncements about SMS and the safety fitness being justified due to crash predictability fails to acknowledge that the vast majority of motor carriers it regulates operate 10 or fewer**

vehicles. Statistically, if these carriers are involved in a couple of crashes in a year they are over the national average, but most crashes are non-preventable. Amazingly, the agency itself implicitly recognizes this flaw as it does not plan to use the Crash Indicator BASIC in data-only reviews, and it proposes to use it in audits only if it has confirmed a crash as preventable.

A better way

As noted, FMCSA's proposal doesn't come even close to satisfying the mandate that it rate all carriers. If the agency is serious about rating all carriers, it should audit all carriers. FMCSA could require each motor carrier upon request to file records electronically any records the auditor deems appropriate related to driver qualification, vehicle maintenance, hours of service and so on. If performed by an independent contractor, such an audit would cost an estimated \$250 to \$300 unless a more intensive on-site audit is found necessary.

So for about \$60 million a year — roughly 10 percent of the agency's budget — FMCSA could survey 200,000 carriers a year timed to the filing of carriers' MCS-150s. The agency could confirm that the carrier's fleet size and profile are correct and current and that any issues raised by inspection and other data had been addressed.

Making rulings on each issue of material fact or law presented

Finally, FMCSA concluded that it did not need to consider input from the industry in developing the proposal because it had heard industry's concerns and previously addressed them in SMS listening sessions. This claim flies in the face of repeated comments filed by shippers, brokers and carriers at every opportunity.

To date, the agency has not addressed whether shippers and brokers can rely on the simple premise that “safe to operate is safe to use,” without fear of lawsuit. Nor has it responded to the problems with flawed data, inconsistent enforcement anomalies and the law of small numbers preclude any use of a roadside formula to determine ultimate carrier safety.

Simply put, FMCSA's safety fitness determination proposal is unfit. ♥



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