



May 19, 2016

VIA ELECTRONIC SUBMISSION

Mr. T.F. Scott Darling, III  
Acting Administrator, Federal Motor Carrier Safety Administration  
U.S. Department of Transportation  
1200 New Jersey Avenue, SE  
Washington, DC 20590  
Electronic Address: <http://www.regulations.gov> (Docket No. FMCSA-2015-0001)

***Re: Comments on FMCSA's Carrier Safety Fitness Determination Rule***

Dear Acting Administrator Darling:

The U.S. Small Business Administration's (SBA) Office of Advocacy (Advocacy) submits the following comments on the Federal Motor Carrier Safety Administration's (FMCSA's) *Proposed Carrier Safety Fitness Determination (SFD) Rule*.<sup>1</sup> FMCSA's proposed rule would implement a new statistical measuring program designed to determine which motor carriers are "fit" to operate in interstate commerce and which ones are not.<sup>2</sup> There are some 503,000 small business motor carriers (493,000 property and 10,000 passenger) representing nearly ninety-nine percent of the motor carrier industry.<sup>3</sup> Advocacy recommends that FMCSA fully assess the validity of its proposed SFD methodology and whether it will have a disproportionate impact on small carriers, consider significant alternatives to the proposed rule, and await the conclusion of a Congressionally-mandated study by the National Research Council of the National Academies of Science (NAS) before finalizing a new rule.

**Office of Advocacy**

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within SBA, so the views expressed by Advocacy do not necessarily reflect the views of SBA or the Administration. The Regulatory Flexibility Act (RFA),<sup>4</sup> as amended by the Small Business Regulatory

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<sup>1</sup> 81 Fed. Reg. 3562 (January 21, 2016).

<sup>2</sup> *Id.*

<sup>3</sup> 81 Fed. Reg. 3596.

<sup>4</sup> 5 U.S.C. § 601 et seq.



Enforcement Fairness Act (SBREFA),<sup>5</sup> gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives. Moreover, the Small Business Jobs Act of 2010<sup>6</sup> requires federal agencies to give every appropriate consideration to comments provided by Advocacy. Specifically, the agency must include, in any explanation or discussion of a final rule published in the Federal Register, the agency's response to comments submitted by Advocacy and a detailed statement of any changes made to the final rule as a result of those comments, unless the agency certifies that the public interest is not served by doing so.<sup>7</sup>

## **Background**

FMCSA is required by statute to determine whether motor carriers (property and passenger) are qualified to operate in interstate commerce. Traditionally, this has meant that the motor carrier was properly licensed, authorized, and insured. However, in the early 2000s, FMCSA developed a program call "SafeStat," a data-driven analysis system to measure the relative safety status of individual motor carriers based on inputs such as safety and inspection data and crash history. SafeStat was replaced in 2010 by a new program called "CSA" – "Compliance, Safety, Accountability." CSA was designed to improve SafeStat by peer ranking not only motor carriers, but also drivers, based on a number of safety data points, and to identify carriers and drivers for safety interventions or "unsatisfactory" ratings by FMCSA. The worst ranked carriers would be ordered out of service.

CSA utilizes a safety measurement system (SMS) to peer-rank carriers and drivers based on safety criteria called "BASICS" ("Behavioral Analysis and Safety Improvement Categories"). The seven BASICS include: 1) Unsafe Driving, 2) Hours-of-Service Compliance, 3) Driver Fitness, 4) Controlled Substances/Alcohol, 5) Vehicle Maintenance, 6) Hazardous Materials Compliance, and 7) Crash Indicator. CSA was highly controversial because carriers and drivers were peer ranked against one another, even though they are subject to different inspection biases based on the size and type of truck they operate (long-haul v. short-haul), their geographic area of operation (urban v. rural), and enforcement variability between states and regions (strict v. more lenient enforcement). Further, FMCSA made the CSA rankings publicly available, so transportation brokers and shippers were reluctant to hire lower-ranked carriers out of fear that they would be sued for negligence if there was a crash. The CSA program ended up in litigation and FMCSA agreed to remove the peer-ranked scores from its website.

SFD is the newly proposed analytic methodology to replace CSA. Essentially, the proposed SFD method would retain the seven BASICS and utilize both road-side inspection data and the results of investigations by FMCSA to rank carriers and drivers against an absolute safety standard (rather than peer-to-peer) to designate the carriers and drivers as either "fit" or "unfit." The proposed SFD rule would also designate regulatory violations as "critical" or "acute," attach "severity" weights to infractions, and adjust ("normalize") the results to take account of the various biases noted above. Carriers deemed unfit would be ordered "out of service" and could

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<sup>5</sup> Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).

<sup>6</sup> Small Business Jobs Act of 2010 (P.L. 111-240) §1601.

<sup>7</sup> *Id.*, codified at 5 U.S.C. 604(a)(3).

only resume operations if there was flawed or unconsidered inspection data used, or if they resume operations under a compliance agreement. The proposed rule would establish formal timelines for appeals and final agency action.

### **Small Entities Have Expressed Concern With FAA's Proposed Rule**

Advocacy commends FMCSA for its efforts to develop a simple, reliable methodology to identify unfit carriers and remove them from the nation's roadways. However, following publication of FMCSA's proposed rule, a number of small business representatives contacted Advocacy and expressed concerns about the proposed rule. These small businesses and their representatives support the effort to identify and remove unsafe carriers, but believe the proposed methodology is flawed and unworkable as currently proposed.

In order to obtain input about the proposed rule from small businesses and their representatives, Advocacy hosted a small business roundtable on May 5, 2016 to discuss the proposed rule.<sup>8</sup> Representatives from FMCSA also attended the roundtable to provide an overview of the proposed rule and answer questions about it. The following comments are reflective of the issues raised during the roundtable and in other discussions with small businesses and their representatives. Advocacy recommends that FMCSA carefully consider any comments it receives from small business and incorporate those concerns into any final rule.

- 1. Advocacy is concerned that the proposed SFD methodology is flawed and the proposed rule will have a disproportionate impact on small carriers.** Small business and their representatives expressed concern about the validity of FMCSA's CSA and SMS methodologies, citing studies by the Government Accountability Office<sup>9</sup> and the Department of Transportation's (DOT's) Inspector General<sup>10</sup> that were critical of CSA methodology and the sufficiency of SMS data in identifying unsafe carriers. Since much of CSA and SMS methodology is carried over to the proposed SFD rule, these methodological concerns remain. For example, different inspection biases based on the size and type of truck they operate (long-haul v. short-haul), their geographic area of operation (urban v. rural), and enforcement variability between states and regions (strict v. more lenient enforcement), can significantly impact whether a carrier receives a roadside inspection and is cited for a violation. Small businesses and their representatives expressed concern that the proposed rule may also have a disproportionate adverse impact on small carriers. For example, a roundtable attendee cited FMSCA data to assert that small carriers are twice as likely to be inspected as large carriers, and that small carriers account for seventy percent of total inspections even though they make up only about half of total truck capacity on the roadways. Another attendee stated that a significant number of carriers identified as high risk by SMS were

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<sup>8</sup> Advocacy also arranged a meeting on October 10, 2010 between small business representatives and FMCSA Administrator Anne Ferro and her staff to discuss small business concerns with the CSA program. Advocacy then hosted a small business roundtable on the CSA program on February 14, 2012 that Administrator Ferro and her staff also attended.

<sup>9</sup> "Modifying the Compliance, Safety, Accountability Program Would Improve the Ability to Identify High Risk Carriers," GAO-14-114 (available at <http://www.gao.gov/products/GAO-14-114>).

<sup>10</sup> "Improvements Needed in the Motor Carrier Safety Status Measurement System," *Federal Motor Carrier Safety Administration Report No-HM-2004-034* (available at <https://www.oig.dot.gov/library-item/30311>).

not involved in accidents in the previous two years – suggesting that SMS data does not correlate to crash likelihood. Another attendee stated that small carriers are much more likely to receive roadside inspections than larger carriers, and are thus disproportionately vulnerable to a proposed or unfit determination regardless of the safety culture of the company. The attendee noted that a significant portion of the carrier population will never be assessed. Since these examples raise questions about the validity of the proposed SFD methodology and its impact on small carriers, Advocacy recommends that FMCSA fully assess the validity of the proposed SFD methodology and whether it will have a disproportionate impact on small carriers before proceeding with a final rule.

- 2. Advocacy is concerned that FMCSA’s Regulatory Flexibility Act analysis and Regulatory Evaluation lacks key data needed to better inform the agency’s decision making process.** Several attendees at the roundtable were critical of FMCSA’s analysis under both the Regulatory Flexibility Act and Executive Order 12866.<sup>11</sup> For example, one attendee noted that FMCSA only estimates costs for terminated drivers looking for new jobs after a carrier is placed out of service. However, as attendees noted, there may be additional costs as well, such as other terminated employees (non-drivers) looking for jobs, costs for improving performance to come into compliance after a proposed or unfit determination (such as outside attorney and consultant fees and employee training costs), costs of administrative appeals, damage to business reputation and creditworthiness, lost sales, and the opportunity costs of time away from growing the business. Further, by grouping all carriers together and looking only at average cost, cost variations by industry subsectors or sizes are glossed over. For this reason, Advocacy recommends that FMCSA reassess its Regulatory Flexibility Act analysis and examine affected small businesses by different industry subsectors and sizes to discover if and where the agency should consider regulatory alternatives. This would allow a more informed discussion on the effectiveness of alternative approaches for small carriers, such as expedited or administrative reviews, more time and flexibility in improving compliance, compliance assistance, or alternative safety fitness assessments for lower risk small carriers. The agency should consider preparing and publishing for additional public comment a Supplemental Regulatory Flexibility Act analysis if its reassessment of small business impacts and significant alternatives warrants.

Similarly, FMCSA’s Regulatory Evaluation under Executive Order 12866 could be improved. For example, the agency counts costs of only \$10 million (the costs for terminated drivers looking for new jobs after a carrier is placed out of service as well as costs to the agency), but estimates benefits of approximately \$200 million – an impact that exceeds the \$100 million impact threshold under Executive Order 12866. By acknowledging, but not quantifying or qualitatively describing additional costs, the agency is not able to fully consider regulatory alternatives that might maximize net benefits under OMB Circular A-4<sup>12</sup> principles – including tailoring regulations to the size of the business. Further, the public is not able to effectively evaluate the net benefits of

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<sup>11</sup> Executive Order 12866, Regulatory Planning and Review of September 30, 1993 (available at [https://www.whitehouse.gov/sites/default/files/omb/inforeg/eo12866/eo12866\\_10041993.pdf](https://www.whitehouse.gov/sites/default/files/omb/inforeg/eo12866/eo12866_10041993.pdf)).

<sup>12</sup> Office of Management and Budget, Circular A-4, Regulatory Analysis, September 17, 2003 (available at [https://www.whitehouse.gov/sites/default/files/omb/assets/regulatory\\_matters\\_pdf/a-4.pdf](https://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/a-4.pdf)).

the rule if significant costs are not factored into the calculation. For this reason, Advocacy recommends that FMCSA reassess its Regulatory Evaluation and consider preparing and publishing for additional public comment a full Regulatory Impact Analysis if warranted.

- 3. Advocacy is concerned that FMCSA has not considered significant alternatives to the proposed rule that meet its statutory objectives and minimize any significant economic impact on small carriers.** The only significant alternative FMCSA discusses in its Regulatory Flexibility Act analysis is a phased or delayed implementation of the proposed rule.<sup>13</sup> However, attendees mentioned several possible approaches FMCSA might consider as alternatives to the proposed rule itself. These included expedited or administrative reviews, more time and flexibility in improving compliance, compliance assistance, or alternative safety fitness assessments for lower risk small carriers. In addition, one attendee suggested that FMCSA should develop separate rules for the motor coach and freight carrier industries, since the two segments have different business models and roadside inspection structures (e.g., you cannot easily empty a bus full of people on a busy or inclement roadside to inspect the bus). Another attendee suggested that FMCSA consider an alternative rule that requires a biennial remote electronic (desktop) audit similar to the off-site audits conducted for new carrier entrants now. Under this approach, all 500,000-plus carriers could be contacted and required to submit key operational information and safety data to a FMCSA or third-party auditor for review (leading to possible intervention and escalation). The attendee also suggested that FMCSA retain the corrective action plan provision in the current regulation, which allows greater flexibility than the proposed compliance agreement in the SFD proposal. Advocacy recommends that FMCSA reassess the assumptions underlying its proposed rule and consider significant alternatives to the proposed rule that meet its statutory objectives and minimize any significant economic impact on small carriers as required by the RFA.<sup>14</sup>
- 4. Advocacy believes that FMCSA should await the conclusion of the Congressionally-mandated study of the CSA program and SMS methodology before proceeding to a final rule.** As discussed at the roundtable, President Obama signed the Fixing America's Surface Transportation Act (FAST Act)<sup>15</sup> on December 4, 2015. This legislation sets funding authorization levels for FMCSA through Fiscal Year 2020 and mandates several rulemakings, reports to Congress, studies, and working groups. Of particular importance for this rulemaking, the legislation directs the National Research Council of the National Academies of Science (NAS) to conduct a thorough study of the CSA program, and specifically SMS methodology.<sup>16</sup> The study must specifically analyze and/or consider the accuracy with which the SMS BASICs identify high-risk carriers and can predict or

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<sup>13</sup> 81 Fed. Reg. 3596.

<sup>14</sup> The RFA suggests agencies consider alternatives such as the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; the use of performance rather than design standards; and, an exemption from coverage of the rule, or any part thereof, for such small entities. *See*, 5 U.S.C. 603(c).

<sup>15</sup> PL 114-94, §§ 5221, 5223.

<sup>16</sup> *See*, <https://www.fmcsa.dot.gov/fastact/csa>.

are correlated with future crash risk, crash severity, or other safety indicators for motor carriers. The study by NAS was contracted in February 2016 and the results are to be transmitted by FMCSA within 18 months to both Congress and the DOT's Office of Inspector General, and be posted on DOT's website. Since this study is now underway and will address key aspects of this SFD rulemaking, Advocacy recommends that FMCSA await the conclusion of this study so the study can properly inform the agency's decision making.

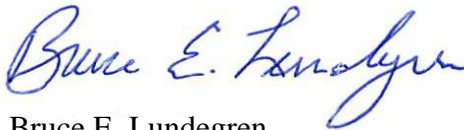
### **Conclusion**

Thank you for the opportunity to comment on FMCSA's proposed Carrier Safety Fitness Determination rule. One of the primary functions of the Office of Advocacy is to assist federal agencies in understanding the impact of their regulatory programs on small entities. To that end, Advocacy hopes these comments are helpful and constructive. Please feel free to contact me or Bruce Lundegren (at (202) 205-6144 or [bruce.lundegren@sba.gov](mailto:bruce.lundegren@sba.gov)) if you have any questions or require additional information.

Sincerely,



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Copy to: The Honorable Howard Shelanski, Administrator  
Office of Information and Regulatory Affairs  
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