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Date: Thu, Jun 23, 2016 1:03 pm

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Agency: Federal Motor Carrier Safety Administration (FMCSA)
Document Type: Rulemaking
Title: Comment from Henry Seaton
Document ID: FMCSA-2015-0001-0184

Comment:
Please see the attached REPLY COMMENTS OF A COALITION INCLUDING:

Alliance for Safe, Efficient and Competitive Truck Transportation (ASECTT)
Air & Expedited Motor Carriers Association (AEMCA)
American Home Furnishings Alliance (AHFA)
Auto Haulers Association of America (AHAA)
National Association of Small Trucking Companies (NASTC)
The Expedite Alliance of North America (TEANA)
Transportation Loss Prevention & Security Association (TLP&SA)
Western States Trucking Association (WSTA)

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- Coalition_reply_comments_on_SFD_NPRM_FINAL 6-23-16.pdf

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First Name: Henry
Last Name: Seaton

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BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION
WASHINGTON, D.C.

Docket No. FMCSA-2015-0001
Notice of Proposed Rulemaking – Carrier Safety Fitness Determination

REPLY COMMENTS OF A COALITION INCLUDING

Alliance for Safe, Efficient and Competitive Truck Transportation (ASECTT)
Air & Expedited Motor Carriers Association (AEMCA)
American Home Furnishings Alliance (AHFA)
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Date Due and Filed: June 23, 2016

In response to the comments of other stakeholders as well as to information that was not available at the time initial comments were drafted, the parties filing these comments (Coalition, or Commenters) would note as follows:

1. FMCSA must reaffirm that fit to operate means fit to use. Shippers, brokers and carriers were uniform in pointing out the collateral damage caused by publication of Safety Measurement System (SMS) data based on roadside inspections in the absence of action by the Federal Motor Carrier Safety Administration (FMCSA, or the Agency) to affirm the principle that "fit to operate is fit to use." See Comments of Transportation & Logistics Council (TLC), Transportation Intermediaries Association (TIA), and the Coalition.

TIA and CH Robinson point out the need for a "red light/green light" system to ensure that the shipping public is not required to independently credential carriers before use based on a relevant standard. Commenters submit, however, that such a system will not provide the desired protection unless the doctrines of field, implied, conflict and express preemption are applied so as to make the Agency solely responsible for determining which carriers are fit to operate, and for publishing that ultimate safety fitness determination (SFD) for use by the public.

There is general agreement that the Agency's advocacy of roadside inspection data and SMS methodology as carrier selection criteria has created collateral damage leading to vexatious litigation against the shipping public. The result has been chaos in the selection process and interference with competition, as well as with Congress' intent that all authorized carriers be able to compete based on "routes, rates and services" regulated solely at the federal level.

In the Coalition's view, the initial comments document the reason why Congress required in the Fixing America's Surface Transportation (FAST) Act that any major rulemaking be undertaken only after all segments of the industry had input. The collateral damage testified to by many commenters proves that the Agency has not properly addressed these concerns.

2. The NPRM would appear to be a pointless – or at least premature – exercise. On June 8, 2016, Transportation Secretary Anthony Foxx told the Senate Commerce, Science and Transportation Committee that in two years SMS scores would once again be made public. It appears that the Secretary has prejudged the independent study being conducted by the National Academies under the FAST Act, and has presupposed that the Agency will be able to present a satisfactory corrective action plan in response to the many prior independent studies (both governmental and non-governmental) that have criticized SMS methodology. Those studies were collected in the Supporting Documents appended to the Coalition's initial comments.

The Coalition submits that the Agency cannot prejudge or presuppose that SMS methodology, roadside inspections and the proposed "absolute" scoring mechanisms can be rehabilitated to the point where they are suitable for public consumption or for any use other than as an internal enforcement targeting tool.

As of this writing the very publication of the notice of proposed rulemaking (NPRM) is under scrutiny by Congress. That publication appears to have been premature because it did not consider the interests of stakeholders in a negotiated rulemaking or through issuing an advance NPRM.

The Coalition submits that the proposed assignment of SFDs based on roadside inspections under the newly proposed absolute standard, with its high limbo bars based on the 96th and 99th percentile, is not supported by the stale supporting data from 2011, and belies any argument that the system can even identify "the worst of the worst." Especially is this true when the Agency continues to use average crash ratios which are particularly prejudicial to small carriers as the Gimpel study, Wells Fargo study and the Coalition's initial comments clearly demonstrate.

Finally, most of the other commenters focused on use of roadside data and on collateral damage caused by publication of misleading scores. Only the Coalition offered a thorough analysis to refute the agency's 2011 data, by graphing individual carrier performance and by showing the de minimis safety returns that would result in subsequent years if absolute standards were put in place until changed through subsequent rulemaking.

3. A system of rankings based on roadside inspections is fatally flawed – with or without peer grouping. With few exceptions, major industry stakeholders agree that after nine years of effort, the proposed use of SMS methodology based on roadside inspections and infractions simply does not accurately measure safety performance of individual carriers. See comments of Owner-Operators Independent Drivers Association (OOIDA), TIA, American Trucking Associations (ATA), the Coalition and others.

ATA and several large carriers hold out hope that roadside inspection data can ultimately be improved and used. They argue that the Agency's peer group analysis should be replaced with a single uniform raw number standard -- even though the Agency acknowledges that to do so would result in "a disproportionately high number of small carriers [being found] unfit." (See p. 3377).

In rebuttal, the Coalition would point out that the systemic flaws explained in its initial comments serve to brand small carriers with higher average scores due to factors having no proven relationship to crash predictability. A uniform raw number standard would magnify the disparate impacts of SMS methodology on small carriers. Even with the arbitrary peer groups used in the Agency's test study, 53% of the small carriers that would have been found unfit using inspection data alone did not have a single recordable accident during the evaluation period.

Thus, it is clear that the Agency cannot devise a system of inspection-based SFDs – with or without peer groups – that is anything other than arbitrary or that truly predicts individual carrier performance. The inclusion of unscrubbed accidents together with the combination of profiling, the law of small numbers and enforcement anomalies create a conundrum for the Agency that cannot be overcome.

The fact that FMCSA must use peer groups with arbitrary cutoffs in order to imperfectly attempt to adjust for dissimilar roadside treatment is the core issue that invalidates SFDs based on SMS methodology. ATA and several large carriers complain that any peer grouping that gives small carriers higher absolute thresholds is unfair. But the fact remains that power units operated by the smallest carriers – those with 1 to 4 power units – are inspected 2.9 times as often as those operated by carriers with 1,000 or more power units, according to data from FMCSA's Motor Carrier Management Information System. So leveling the playing field with respect to the

number of inspections would require that the 290 largest motor carriers, which operate nearly 1.1 million power units, be inspected about 633,000 more times per year than they are now. That would mean a 24 percent increase in **all** motor carrier inspections just to level the playing field between the smallest carriers and the 290 largest carriers. Given that total inspections have actually dropped in recent years, this approach is untenable.

The different approaches of different segments of the motor carrier industry to the fairness and equity of peer grouping highlight a basic unaddressed problem. The roadside inspection system is biased against small carriers in numerous ways as pointed out in the Coalition's comments. Notwithstanding the Agency's best intentions, neither eliminating peer groups nor artificially manipulating them can alter the systematic flaws that create these discrepancies.

4. A new approach could ensure equitable treatment for all carriers. Even if all of the problems with SMS methodology and distorted roadside inspection data could be fixed – and the Coalition does not believe this is possible – the law of small numbers alone would make it impossible for carriers of all sizes to be judged accurately and fairly against a single absolute standard. ATA itself concedes the volatility problem (see page 8 of ATA comments) without offering any solution.

The Coalition contends that there *is* a way to achieve a level playing field; it just cannot be done using SMS and roadside inspection data. As discussed on pages 60 through 64 of our initial comments, FMCSA could satisfy the mandate of Congress to assess *all* carriers and treat carriers of *all* sizes equitably by adopting an entirely new approach: namely, conducting desktop audits of all regulated motor carriers every two years in conjunction with the mandatory biennial update and the new on-line tools being created to implement URS.

The idea of a remote audit is not new, however. As noted very briefly in our initial comments, the concept of universal biennial electronic audits would be similar to the new entrant safety audit. Indeed, more than half of U.S. states are now conducting new entrant audits using an off-site process whereby carriers provide documentation to auditors through means other than an on-site inspection. See https://cms.fmcsa.dot.gov/safety/carrier-safety/new-entrant-site-safety-audits-national-implementation-schedule (last accessed June 21, 2016)

As this website shows, the Agency clearly has studied the viability of efficient offsite audits as an efficient way to identify carriers in need of continual monitoring. While obviously more resources would be needed, the Coalition's proposal that a similar audit be conducted biannually on each motor carrier authorized to operate is a viable alternative to the use of systemically flawed SMS data and roadside inspections.

Commenters stress that the proposal to use offsite investigations should be a component of ensuring compliance by monitoring carriers consistent with the Agency's announced policy of "progressive intervention," and should be part of an educational program to improve motor carrier compliance. It should not be a substitute for the ultimate use of CRs to determine the ability and willingness of carrier management to comply with provisions of the Federal Motor Carrier Safety Regulations.

5. Lack of other stakeholders' attention to proposed investigation-based SFD method does not free FMCSA to adopt it. Other commenters almost uniformly did not address the Agency's proposal to eliminate CRs in favor of various types of investigations or to replace corrective action plans and conditional safety ratings with a type of probation and Agency dictated compliance agreements. At pages 39 through 44 of its comments, the Coalition explained its due process concerns about the Agency's apparent attempt in the name of expediency to place carriers out of service by simply counting violations without a thorough review based upon an audit to determine whether a carrier lacks the safety management procedures to continue to operate.

The Coalition submits that the essence of the critical violation formula under a CR is to conduct a random and objective audit to assess accurately the degree of noncompliance for which management is responsible. Based upon our analysis of the NPRM relative to current Agency practice, and upon information obtained since the end of the initial comment period, as well as upon information FMCSA disclosed in a website posting on May 23 – the very last day of the comment period – the Coalition truly fears that the Agency plans to compound its proposed over-reliance on roadside inspection data by injecting such data into investigation-based SFDs.

Using roadside data directly in investigations would result in small carriers being placed out of service based not on a true assessment of carrier management but on actions by drivers that are not reasonably monitored or controlled until after they occur. Just as important, it would introduce into investigations the very distortions in data that make SMS an unfair and inaccurate basis for assigning carrier SFDs.

Our initial comments noted that FMCSA and state partners have been identifying violations related to the Unsafe Driving BASIC for some time, but these violations do not count in the assessment of acute and critical violations within the six current Part 385 factors. Since the end of the initial comment period it has come to our attention that at least some field auditors are now using roadside inspection data related to the Vehicle Maintenance BASIC in determining that a critical violation has occurred in a CR. The following is from a very recent compliance review report, redacted slightly to avoid identifying the carrier in question:

1 STATE	Primary: 396.3(a) Secondary: 4901:2-5-03 CFR Equivalent: 396.3(a)	**Discovered**	**Checked**	**Drivers/Vehicles** **In Violation Checked**
Description Failing to systematically inspect, repair, and maintain, or cause to be systematically inspected, repaired, and maintained, all motor vehicles and intermodal equipment subject to your control **Example** [Investigation - The FMCSA and State partners have identified violations across multiple inspections at the roadside over the previous 24 months that are reflected in the Vehicle Maintenance BASIC of the Carrier Safety Measurement System, including:				

This development further supports our belief, as stated in the Coalition's initial comments and mentioned above, which is that FMCSA does not intend not to confine use of SMS data to identify carriers at the 96th and 99th percentile where it asserts percentile-converted inspection scores are relevant. It also intends to use "off-site investigations" as a substitute for CRs and to populate samplings with roadside inspections and violations rather than random audit data. This data is subject to the distortions and inequities that the Coalition has discussed in detail – not just in our comments in this rulemaking but indeed in numerous rulemaking, quasi-rulemaking and judicial pleadings for more than five years.

We would note that FMCSA has said nothing to dispel our argument since the Coalition brought these issues to the agency's attention during the Small Business Administration Roundtable on May 5, 2016. Indeed, here FMCSA's response to a question posed to the Agency, which is posted on FMCSA's website at https://www.fmcsa.dot.gov/content/carrier-safety-fitness-determination-notice-proposed-rulemaking-sba-roundtable-questions (last accessed June 21, 2016):

> Question 6: What constitutes a "record" that would be examined? For example, would a single driver's inspection history be a "record"? Presumably an inspection cannot be a record because there is no such thing as a clean Unsafe Driving inspection.
>
> Response 6: Investigations into Unsafe Driving may involve several regulatory areas and records to be reviewed. For example, specifically relating to speeding, the most common record would be a driver's record of duty status. Other parts of the investigation **may include a review of inspections reports**, or driver qualification files. (Emphasis added)

The Coalition's due process concerns over using roadside inspection data in this way are exacerbated by the fact that the "10 percent of records examined" is not necessarily – and, indeed, probably not – based on a random sampling. This is a longstanding problem with how CRs are conducted and FMCSA confirmed in its May 23 website posting that it has no plans to change the practice:

> Question 7: Would the presence of Unsafe Driving violations in "at least 10% of records examined" in an investigation be determined on the basis of a randomly selected sample of records? If not, how would the 10% violation rate be calculated?
>
> Response 7: FMCSA has discretion in how to sample drivers based on available carrier data.

So not only would FMCSA base SFDs – at least in part – on flawed inspection data, but it also would continue to use flawed inspection data as a basis for targeting carrier investigations. In essence, flaws in SMS and roadside inspection data would corrupt the investigation-based SFD method just as it would the inspection-based method.

For example, under a focused investigation that includes roadside data, a 20-truck fleet with an excellent SMS score could easily fail a BASIC with just two violations if the sampling were targeted using roadside inspections.

As set forth in the Coalition's initial comments, the unaddressed variables of profiling, PrePass, and the failure of law enforcement to record good inspections contaminates any ability to substitute roadside data for a random and objective audit.

For all these additional reasons, beyond those comprehensively presented in the Coalition's initial comments, the FMCSA is urged to withdraw this NPRM, or suspend it until completion of the SMS review and reform process mandated by Congress in the FAST Act.

Respectfully submitted for the Coalition by:

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Date Due and Filed: June 23, 2016