

# Regulatory and Legislative Update

August 2018

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## Regulation and Enforcement

### FMCSA finally submits SMS corrective action plan to Congress

Months after it was supposed to be completed, the Federal Motor Carrier Safety Administration (FMCSA) in July submitted its “corrective action plan” to Congress on reforms to the Compliance, Safety, Accountability (CSA) program and the Safety Measurement System (SMS). The document, which was required by Section 5221 of the Fixing America’s Surface Transportation (FAST) Act in response to the recommendations of the National Academy of Sciences (NAS), is just 10 pages, and that includes a recap of some of the NAS recommendations and previous actions, such as a public meeting conducted in September 2017. The plan focuses on what the agency considers to be the central NAS recommendation of replacing the current SMS methodology with one based on an abstruse Item Response Theory (IRT). For the full NAS report, visit <https://www.nap.edu/read/24818>.

According to the action plan, FMCSA is still developing cost estimates and benchmarks for the action plan, but the initial estimate – not including federal staff time – is about \$2.5 million over two years. The estimates include:

- \$140,000 annually to create a standing committee, for a total of \$280,000 (Research funding).
- \$500,000 annually in new contract labor costs for additional expertise in statistical modeling, for a total of \$1,000,000.
- \$500,000 annually in reallocation of contract resources from current work on SMS to work on implementation of the NAS recommendations.

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FMCSA said that that actual cost estimates may change and do not include the costs associated with changing existing FMCSA information technology systems. Final benchmarks and schedules will be revised as the work develops, but the high-level benchmarks are:

- **September 2018:** Run small scale IRT model.
- **April 2019:** Run full scale IRT model.
- **June 2019:** Evaluate results and effectiveness of the full-scale model.

FMCSA contracted with NAS to assist with its response to the report's recommendations. NAS established a new Standing Committee, as a follow on to the public committee, that includes subject matter experts on organization safety, statistics, research and evaluation methods, motor carrier operations, enforcement, and IRT modeling.

The NAS committee will provide expertise, guidance, and oversight to FMCSA in developing and testing IRT modeling, providing feedback and input on the other recommendations, and providing input on how to best measure motor carrier safety and system effectiveness. The panel also will solicit input from stakeholders during the implementation process and will advise FMCSA in the implementation of the recommendations. FMCSA said the standing committee will hold closed and open meetings to review FMCSA's progress in implementing its action plan and to provide guidance and advice. FMCSA said it plans to establish a committee under the Motor Carrier Safety Advisory Committee (MCSAC) to provide feedback on implementation.

To download a copy of the corrective action plan, visit <https://www.fmcsa.dot.gov/fastact/csa>.

### **FMCSA withdraws proposed SMS enhancements**

Citing its decision to move forward with the recommendations of the National Academies of Sciences (NAS) regarding the Safety Measurement System (SMS), FMCSA on July 16 withdrew proposed SMS enhancements that had been initially published in June 2015 and revised in October 2016. The agency said that it had accepted the NAS report's recommendations, including the recommendation to develop a new statistical model to support the SMS, and that is working to implement the recommended changes. FMCSA noted that "the NAS cautioned the Agency against making changes to the algorithm based on ad hoc analysis and instead to rely on the Item Response Theory model." In addition to withdrawing the proposed enhancements, FMCSA has removed the preview of those enhancements from the SMS website. For the Federal Register notice, visit <https://www.federalregister.gov/d/2018-15109>.

### **MCSAC discusses regulatory reform, FMCSA strategic plan**

The Motor Carrier Safety Advisory Committee (MCSAC) – a panel selected by FMCSA itself – met July 30-31 to review three agenda items from its last meeting in June 2017: (1) autonomous vehicles; (2) approval of the FMCSA's four-year strategic plan; and (3) consideration of regulatory reform initiatives.

MCSAC is currently chaired by safety advocates. Five safety advocates were present and voted. Counting OOIDA there were four members representing labor. Regulated motor carriers were represented by the ATA and one carrier rep. There was no shipper or broker representation. Much of MCSAC's time was taken up discussing autonomous vehicles, with more questions asked than answers provided.

Adoption of the FMCSA's strategic plan for the next four years did not address the merits or provide completion dates for any of the long pending tasks assigned to the agency by Congress in the FAST Act and MAP-21, such as CSA reform, reduced use of "guidance" in lieu of rulemaking, and completion of a Uniform Registration System (URS) that remains bogged down with the computer-code writers five years after it was supposed to be "final," to name only a few items.

MCSAC noted that highway crashes involving commercial motor vehicles were increasing each year but affirmed a goal that highway fatalities be reduced by 50% over the next five years.

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The safety advocates made clear that increasing carrier insurance requirements remains one of their major agenda items, despite the Agency's prior determination not to proceed for want of supporting evidence. That faction of MCSAC still supports initiatives to use new and complex "big data" metrics under the previously referenced IRT – such as methods of calculating driver pay, driver turnover rates, night-time driving, weather conditions and other factors *which are not violations of the safety regulations* – as determinative factors in issuing safety ratings.

To its credit, the FMCSA does propose to change certain existing regulations in such areas as driver qualifications and hours-of-service exemptions and has further postponed its controversial effort to re-regulate bus leasing practices. Apparently, however, the Agency remains unwilling to address much greater opportunities for streamlining its regulatory processes and increasing their fairness. As indicated above, "big data" approaches such as CSA (with an IRT overlay) and an excessively complex URS still appear to be sacred cows for the agency.

During public discussion, representatives of the Motor Carrier Regulatory Reform Coalition (MCRR), NASTC and the Small Business Administration pointed out that neither the Agency nor MCSAC had addressed the regulatory reform issues which MCRR and NASTC have presented in prior years. See <https://www.regulations.gov/document?D=FMCSA-2006-26367-0154>. These issues have included a biennial audit as an alternative to further development of CSA or the IRT model, completion of a simplified and more user-friendly URS, assurance of due process in carrier safety fitness proceedings, and affirmation of the preemptive effect of federal regulation over state laws. The FMCSA is seeking new members for the MCSAC. Applications can be made to Administrator Martinez at [Raymond.martinez@dot.gov](mailto:Raymond.martinez@dot.gov).

### **FMCSA plans study on link between maintenance and safety**

FMCSA is seeking comments by September 14 on an information collection request (ICR) regarding truck and bus maintenance requirements and their impact on safety. The study objectives are to:

- Develop an operational definition of "systematic maintenance."
- Evaluate whether current regulations and the intervention process could be modified to improve compliance with vehicle maintenance requirements. Examples of such requirements are
  - Preventive maintenance intervals;
  - Preventive maintenance inspections with adequately trained/equipped mechanics, and
  - Adequacy of motor carriers' maintenance facilities.
- Gather information to assist in establishing minimum standards for inspection intervals, mechanic qualifications and training, and certification of maintenance facilities.

For the Federal Register notice, visit <https://www.federalregister.gov/d/2018-15151>.

### **Carrier seeks exemption to add pulsating brake lamp fleet wide**

FMCSA is accepting comments until August 29 on an exemption application from Groendyke Transport, Inc. to allow its fleet to use a pulsating brake lamp in addition to the steady burning brake lamps required by the Federal Motor Carrier Safety Regulations (FMCSR). With the exception of signal and hazard lamps and some application-specific situations, current regulations require all exterior lamps – both required lamps and any additional lamps – to be steady-burning. Groendyke told the agency that operating a pulsating brake lamp on the rear of its trailers on a fleet-wide basis would allow the company to operate its equipment more effectively, efficiently, and safely, and would maintain a level of safety that is equivalent to, or greater than, the level that it would achieve without the requested exemption. For the Federal Register notice, visit <https://www.federalregister.gov/d/2018-16223>.

### **Beverage hauler seeks HOS relief for short-haul drivers**

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FMCSA is accepting comments until September 5 on an application from Allied Beverage Group L.L.C. for an exemption from the requirement that short-haul drivers using the records of duty status (RODS) exception return to their normal work-reporting location within 12 hours of coming on duty. Allied requests that their company drivers who operate beverage trucks be allowed to use the short-haul exception but return to their work-reporting location within 14 hours instead of the usual 12 hours. For the Federal Register notice, visit <https://www.federalregister.gov/d/2018-16762>.

### **Waste Management Holdings seeks HOS exemption for short-haul drivers**

FMCSA is accepting comments until August 16 on an application from Waste Management Holdings, Inc., (WMH) requesting an exemption from the that CMV drivers qualifying for the “short-haul—100 air-mile radius driver” exception must return to the original work reporting location within 12 hours of coming on duty. WMH asks that its short-haul CMV drivers be permitted to return within 14 hours without losing their short-haul status. FMCSA requests public comment on WMH's application for exemption. For the Federal Register notice, visit <https://www.federalregister.gov/d/2018-15264>.

### **Virginia DMV gets renewal of exemption on SPE certificate**

FMCSA has renewed for five years the Virginia Department of Motor Vehicles (DMV) exemption to allow interstate CMV drivers licensed in Virginia and subject to the federal Skill Performance Evaluation (SPE) certificate to continue to fulfill the federal requirements with a state-issued SPE and to operate CMVs in interstate commerce anywhere in the United States. For the Federal Register notice, <https://www.federalregister.gov/d/2018-16225>.

## Legislation

### **Senate passes bill that includes fiscal 2019 DOT funding**

The U.S. Senate on August 2 passed legislation (H.R. 6147) that bundles fiscal 2019 funding for multiple federal agencies, including FMCSA and the rest of the Department of Transportation. The FMCSA portion of the bill primarily deals with funding levels and includes only a few minor legislative provisions, all but one of which are in current law. The new provision simply states that “To the maximum extent practicable, the Federal Motor Carrier Safety Administration shall ensure the safe and timely completion of the flexible sleeper berth pilot program of the Administration.” The study, which is to be conducted by the Virginia Tech Transportation Institute, was to begin data collection this summer, but it appears to be behind schedule.

The purpose of combining several appropriations bills into one is to expedite congressional consideration of the bills. The House Appropriations Committee approved its version of DOT funding in May, but nothing has occurred since then. The committee's version of the bill includes several measures of interest to the motor carrier industry. The bill includes language that would modify the Federal Aviation Administration Authorization Act of 1994 (F4A) to bar states from enacting or enforcing laws that prohibiting employees subject to federal hours-of-service regulations from working to the full extent allowed “or imposing any additional obligations on motor carriers if such employees work to the full extent or at such times as permitted” under federal law. A similar provision is in the FAA authorization bill (H.R. 4) passed by the House on April 27. The House bill also includes a provision that would block FMCSA from implementing or enforcing the May 2015 final rule “Lease and Interchange of Vehicles; Motor Carriers of Passengers” and would retain the provision in the fiscal 2018 bill that exempts transportation of livestock and insects from the ELD mandate.