

Regulatory and Legislative Update

October 2017

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Regulation and Enforcement

MCRR Coalition faults new SMS model, touts periodic reviews of all carriers

In comments to the Federal Motor Carrier Safety Administration, the Motor Carrier Regulatory Reform (MCRR) Coalition argued that any new statistical model to replace the Safety Measurement System (SMS) inherently would suffer from most – if not all – of the same systemic flaws that make SMS wholly ineffective and unfair. Moreover, FMCSA cannot dismiss as merely “anecdotal” the overwhelming evidence that publication of flawed SMS metrics has hurt shippers, brokers, and – especially – small carriers and would continue to do so under any system based on a statistical model, the coalition contended.

Instead of a highly complex statistical model based on Item Response Theory (IRT) that could never capture more than a small fraction of carriers, the MCRR Coalition recommended that FMCSA implement a system to review electronically the safety and compliance programs of all motor carriers every two years on the same schedule as carriers’ mandatory MCS-150 updates, the coalition said. The MCRR Coalition includes the following organizations:

- Air & Expedited Motor Carrier Association
- Alliance for Safe, Efficient and Competitive Truck Transportation
- American Home Furnishings Alliance/Specialized Furniture Carriers
- Apex Capital Corp.
- Auto Haulers Association of America
- National Association of Small Trucking Companies
- Tennessee Motor Coach Association
- The Expedite Alliance of North America
- Transportation and Logistics Council
- Transportation Loss Prevention & Security Association

The comments came in response to a Federal Register notice posted by the agency to solicit comments on the National Academy of Sciences (NAS) report on SMS and the Compliance, Safety, Accountability (CSA) program. In addition to seeking written comments, FMCSA held a September 8 public meeting on the report at

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which Irwin Shires of Panther Premium Logistics commented at length on behalf of the MCRR Coalition. (*For details of the NAS study and of FMCSA's request for comments, see the July and August 2017 editions of Regulatory Update.*)

Before addressing the six specific issues FMCSA raised in its Federal Register notice, the MCRR Coalition argued that the corrective action plan required by the Fixing America's Surface Transportation (FAST) Act requires far more than just a response to the NAS study's six summary recommendations – especially if the agency intends to restore relative percentiles and alerts for public consumption. Not only is FMCSA required to address “any deficiency” identified in the NAS report, but the Department of Transportation Inspector General (DOT IG) also must certify that the corrective action plan implements the recommendations of the February 2014 Government Accountability Office (GAO) report, which called for raising the data sufficiency threshold substantially for SMS metrics.

Below is a brief summary of the MCRR Coalition's responses to the NAS study and FMCSA's information request. In addition to the 33-page formal comments, the Coalition provided 35 pages of affidavits from subject-matter experts, mostly providing additional evidence of the harmful effects of public disclosure. For a copy of the MCRR Coalition's comments and affidavits, visit http://bit.ly/MCRR_NAS. Other comments are available at http://bit.ly/NAS_All.

Summary of NAS recommendations and MCRR Coalition responses

NAS recommendation

Development and testing of IRT model as an SMS replacement

Steps to Improve carrier exposure and crash data

Data on driver pay and turnover and type of cargo, subject to cost/benefit analysis

User-friendly version of MCMIS data file to help researchers and carriers

Study to understand statistical operating characteristics of percentile ranks to support decision on publishing scores

Identification of carriers to receive both absolute and relative measures and compute percentiles for both safety event groups and all motor carriers

MCRR Coalition response

Systemic flaws that undermine SMS methodology would plague any statistical model based on the same data – even the NAS panel's proposed IRT approach

Significant improvements in carrier exposure and crash data will be nearly impossible.

Additional proposed data elements in MCMIS – especially driver compensation – would not be meaningful.

FMCSA can barely maintain current information technology systems let alone pursue new objectives.

The Agency cannot deny or ignore the adverse consequences of SMS methodology and its publication.

Combining relative and absolute metrics would further confuse stakeholders.

New Jersey motor vehicle agency chief named to head FMCSA

President Trump on September 26 announced his intention to nominate Raymond Martinez to be administrator of the Federal Motor Carrier Safety Administration. Martinez currently is chairman and chief administrator of the New Jersey Motor Vehicle Commission, which is charged with the licensing of nearly 6 million drivers and the titling, registration and inspection of more than 6 million vehicles. He also is a member of the New Jersey State Planning Commission. Previously, Martinez has served as the state commissioner of motor vehicles for New York, as chairman of the Governor's Traffic Safety Committee and as a deputy chief of staff and special counsel to New York's attorney general. He holds a law degree from St. John's University and a bachelor's degree from Long Island University's C.W. Post College.

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Currently, only one of the Department of Transportation's (DOT) modal agencies – the Federal Aviation Administration – has a confirmed administrator, although FAA Administrator Michael Huerta holds a tenured position and is a holdover from the Obama administration. President Trump has nominated individuals to head all the other DOT agencies except for the National Highway Traffic Safety Administration.

DOT seeks input on regulations to repeal or modify

DOT has invited comments until November 1 on what existing regulations or other actions that would be good candidates for repeal, replacement, suspension, or modification. The department said it may also hold a public meeting to discuss and consider comments. The initiative responds to several executive orders issued by President Trump earlier this year.

Because safety is DOT's highest priority, the department seeks comments on existing regulations and other agency actions that may be repealed, replaced, or modified without compromising safety. DOT is especially interested in identifying regulations that:

- Eliminate jobs or inhibit job creation;
- Are outdated, unnecessary, or ineffective;
- Impose costs that exceed benefits;
- Create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies;
- Could be revised to use performance standards in lieu of design standards, or
- Potentially burden the development or use of domestically produced energy resources.

DOT said it welcomed comment on any regulation or action, but it suggested that those that “impose significant costs on the public may provide greater opportunity for identifying and alleviating unnecessary burdens.” The department listed economically significant rulemakings issued in recent years. Among those related to motor carriers are FMCSA's rules on ELDs, a drug and alcohol clearinghouse, and entry-level driver training requirements; and the National Highway Traffic Safety Administration rules on greenhouse gas emissions/fuel efficiency for medium- and heavy-duty vehicles and electronic stability control systems for heavy vehicles. For the Federal Register notice, visit <https://www.federalregister.gov/d/2017-21101>.

FMCSA proposes reduction in UCR fees

FMCSA has proposed to reduce the annual registration fees collected under the Unified Carrier Registration (UCR) Plan and Agreement for registration years 2018, 2019 and subsequent years. For the 2018 registration year, the fees would be reduced by about 9.10% to ensure that fee revenues do not exceed the statutory maximum and to account for the excess funds held in the depository. The proposed cut translates into a reduction of \$7 for the smallest entities to more than \$6,700 for carriers with more than 1,000 trucks.

For the 2019 registration year, fees would rise slightly over 2018 but would remain about 4.55% below current levels to ensure the fee revenues in that and future years do not exceed the statutory maximum. This adjustment would translate to fees that are \$3 to nearly \$3,400 below current levels. Comments were due October 2. For the Federal Register notice, visit <https://www.federalregister.gov/d/2017-20079>.

FHWA seeks comment on definition of automobile transporter

The Federal Highway Administration (FHWA) is requesting comments until October 16 on a proposed revision of the definition of an automobile transporter. Typically defined as specialized equipment designed and used for the transport of cars, automobile transporters under existing guidance must be able to carry cars as cargo on the truck tractor itself. FHWA is asking for comments on the potential inclusion of a non-cargo-carrying, tractor-high mount trailer combination as part of the definition of an automobile transporter. Expanding the definition would eliminate standard length restrictions for this class of carriers so they can transport additional vehicles. For the Federal Register notice, visit <https://www.federalregister.gov/d/2017-19516>.

Utility contractors, YRC Worldwide seek ELD exemptions

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With five pending bids already for partial or total relief from the electronic logging device (ELD) mandate, FMCSA in September received two more applications. The Power and Communication Contractors Association (PCCA) seeks an exemption for all operators of a commercial motor vehicle in the power and communications construction industry. PCCA argues that because of the limited time during a workday that their drivers spend driving on public roads, ELDs would not produce a significant safety benefit. Comments are due October 16. For the Federal Register notice, visit <https://www.federalregister.gov/d/2017-19512>.

YRC Worldwide Inc.'s exemption application is almost identical to one submitted already by UPS and covers an alternate phase-in method, data elements for duty status change, a special driving mode for special yard moves, and alternate annotation for certain brief vehicle moves. Comments are due October 19. For the Federal Register notice, visit <https://www.federalregister.gov/d/2017-19909>. (For a rundown on earlier ELD exemption applications, see the September 2017 Regulatory Update.)

Rest break exemption sought for petroleum haulers

The National Tank Truck Carriers (NTTC) asked FMCSA for an exemption that would allow drivers of commercial motor vehicles (CMVs) transporting petroleum-based fuels to satisfy the 30-minute rest break requirement by counting the time required to attend the load. NTTC notes that most drivers who haul petroleum operate under the 100 air-mile exception and are exempt from the 30-minute rest break mandate. However, on the occasions when drivers do not qualify for the exception, the requirement is problematic because petroleum shipments are hazardous materials (HM) loads and must be attended at all times, NTTC said. The association asked that time attending to loads count toward the 30-minute rest break requirement provided that the only work performed during that time is attending the load. Comments are due October 26. For the Federal Register notice, visit <https://www.federalregister.gov/d/2017-20525>.

Asphalt pavers seek two HOS exemptions

The National Asphalt Pavers Association (NAPA) is seeking two exemptions from the requirements of the hours-of-service (HOS) regulations for drivers of certain CMVs operated by NAPA members. First, NAPA seeks an exemption that would allow drivers transporting asphalt and related materials to use 30 minutes or more of on-duty "waiting time" to satisfy the 30-minute rest break requirement. The second exemption would allow those drivers to use the short-haul exception from the record of duty status (RODS) if they return to their work-reporting location within 14 hours. By regulation, the RODS exception requires drivers to return within 12 hours. Comments are due October 10. For the Federal Register notice, visit <https://www.federalregister.gov/d/2017-18985>.

Legislation

Schumer, Booker push bill to mandate sleep apnea screening

Senate Minority Leader Charles Schumer (D-New York) and Sen. Cory Booker (D-New Jersey), the top Democrat on the Senate Commerce surface transportation subcommittee, announced September 28 that they are introducing legislation to require a final rule for the screening, testing, and treatment for sleep disorders of individuals operating commercial vehicles and trains. Schumer and Booker had sharply criticized DOT for the withdrawal in August of a rulemaking on sleep apnea. (See the September 2017 Regulatory Update.)

Senate passes bills related to commercial vehicles in human trafficking

The U.S. Senate on September 15 passed two bills related to the role of drivers and motor carriers in fighting human trafficking. S. 1532 would permanently disqualify from operating a commercial motor vehicle anyone who uses a CMV in committing a felony involving human trafficking. S. 1536 would designate a human trafficking prevention coordinator within the Department of Transportation to work across all modes and would expand the scope of FMCSA's outreach and education program to include human trafficking prevention activities. For

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information on S. 1532, visit <https://www.congress.gov/bill/115th-congress/senate-bill/1532>. For information on S. 1536, visit <https://www.congress.gov/bill/115th-congress/senate-bill/1536>.

Meanwhile, Rep. Elizabeth Esty (D-Connecticut) has introduced legislation (H.R. 3813) similar to S. 1536. For information on H.R. 3813, visit <https://www.congress.gov/bill/115th-congress/house-bill/3813>.

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