October 20, 2015

To: Members of the House Transportation & Infrastructure Committee

Re: Urgent Request for Modification of Part II: Compliance, Safety and Accountability Reform Portion of Highway Bill Intended for Markup 10/23/15

Dear Congressmen:

The undersigned eight businesses and trade associations represent over 9,500 motor carriers, brokers and shippers affected by Part II of the Highway Bill scheduled for markup on Thursday. We urgently request you take the following two actions:

1. Delete Sec. 5224(b), the Interim Hiring Standard, and any language which suggests that the FMCSA's ultimate safety fitness determination is not the sole standard for determining an interstate motor carrier's fitness for use.

In the current bill, an "interim hiring standard" is proposed which would open the door for vast market distortions, as shippers seek to avoid vexatious litigation by using only the relatively small number of carriers covered by the "standard." Evidently the authors of this provision were not aware that the FMCSA has awarded "Satisfactory" safety ratings to only 16,883 carriers in the past 5 years -- although it currently certifies approximately 525,000 registrants, including over 200,000 for-hire carriers, as fit to operate on the nation's roadways as either Satisfactory, Conditional or Unrated.

By effectively requiring the shipping public to use only carriers with a satisfactory safety rating, for fear of facing lawsuits invoking such theories as "negligent selection" of carriers, sec. 5224(b) would disenfranchise 95 percent of the for-hire carriers authorized to operate on the nation's roadways by the FMCSA. In most cases these are small carriers to which the agency has not gotten around to assigning any safety rating at all. The result of enacting this "hiring standard" would be to award excessive pricing power to the few carriers with satisfactory safety ratings, and to revive and worsen the severe distortions of truck capacity experienced throughout the economy last year.

Under existing law (49 U.S.C. §31144) and the FMCSA's settlement in the case of NASTC et al. v. FMCSA (D.C. Circuit 2010), the shipping public can properly rely upon the agency's ultimate safety fitness determination as the sole criterion for use of a carrier without fear of liability for failing to properly second guess the agency's ultimate determination.

Any bill which deviates from the preemptive principle that "fit to operate" is equivalent to "fit to use" would have a devastating effect upon the shipping public and the ability of small carriers to compete.

In its report to Congress dated October 2015, the agency admits it does not have the tools to rate 469,662 small carriers. These carriers are adjudged fit to operate under 49 U.S.C. § 31144, but the "interim hiring standard" would subject shippers to jeopardy for using them. Since the stated objective of Part II of the bill is to "reform" the agency's Compliance, Safety,

Accountability (CSA) program and the unvetted Safety Measurement System (SMS) spawned by that program, it would be not only ironic but unconscionable if the bill crippled the competitiveness of the small carriers that the agency admittedly cannot measure with SMS or any other tool.

2. Replace the deleted portions of Sec. 5224(b) with a simple affirmation of existing law as agreed to by the FMCSA in *NASTC et al. v.* FMCSA to wit:

"NATIONAL HIRING STANDARD

> **Unless a motor carrier in the SMS has received an UNSATISFACTORY safety rating pursuant to 49 CFR Part 385, or has otherwise been ordered to discontinue operations by the FMCSA, it is authorized to operate on the nation's roadways and therefore fit for the shipping public to use."**

The undersigned all agree that CSA/SMS methodology is flawed and in need of continuing Congressional oversight to ensure that it can properly be used as an internal targeting tool by the agency for prioritizing the use of its enforcement resources. The importance of the suggested substitute is to affirm Congress' intent that CSA/SMS methodology is not now or ever intended to become an external safety rating system imposing escalated legal liability on the motor carrier industry and the public it serves.

Please understand that these issues are vital to protecting a competitive and free marketplace, so that unintended consequences unleashed in the name of safety do not ruin an industry.

Scott Klever, President

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