

January 12, 2016

Senator Deb Fischer
454 Russell Senate Office Building
Washington, DC 20510
Fax: (202) 228-1325

Congressman John J. Duncan Jr.
2207 Rayburn HOB
Washington, DC 20515
Fax: (202) 225-6440

Senator John Thune
511 Dirksen Senate Office Building
Washington, DC 20510
Fax: (202) 228-5429

Congressman Bill Shuster
2268 Rayburn HOB
Washington, D.C. 20515
Fax: 202.225.2486

Congressman Lou Barletta
115 Cannon HOB
Washington, DC 20515
Fax: (202) 226-6250

VIA FACSIMILE

Re: FMCSA's Plan to Initiate Safety Fitness Determination Rulemaking in Violation of Sections 5202 and 5221 of FAST Act

Dear Senator Fischer, Senator Thune, and Representatives Barletta, Duncan and Shuster:

At the outset, the 8 trade associations listed at the end of this letter commend each of you for your leadership in terminating the public release of individual motor freight carriers' percentile scores and "alerts" (golden triangles) under the so-called Safety Measurement System ("SMS") that had been promulgated without rulemaking by the Federal Motor Carrier Safety Administration ("FMCSA") in 2010. These legally and statistically flawed scores and "alerts" were removed from FMCSA's public websites as of December 4, 2015, under section 5223(a) of the Fixing America's Surface Transportation Act ("FAST Act," Pub.L. No. 114-94). The takedown of this dubious data exceeds the expectations of most industry observers as recently as six months ago, and represents a landmark achievement in restraining bureaucratic overreach.

We write you today, however, out of concern that FMCSA plans to ignore the clear mandates of the FAST Act when it opens a rulemaking this month that would change existing standards for determining the safety fitness of individual motor carriers. Although the undersigned associations are not privy to the details of the proposed rule, FMCSA Administrator Darling advised the Transportation Research Board on January 11 that this Notice of Proposed Rulemaking ("NPRM") will be published "before the end of this month" and will "incorporat[e] current on-road safety performance data." See *Transport Topics* article reproduced as Exhibit A to this letter. Similarly, the most recent "Significant Rulemakings" report issued by the United States Department of Transportation ("USDOT") on December 14, 2015 (eleven days after enactment of the

FAST Act), indicated that the proposed rule would assign and publish Safety Fitness Determinations (“SFDs”) for individual motor carriers based in part on their “on-road safety performance in relation to five of the Agency’s seven Behavioral Analysis and Safety improvement Categories (BASICs).” See page 42 of December 14 report, reproduced as Exhibit B to this letter. Moreover, FMCSA apparently plans to allow only three months for public comment. See NPRM schedule included in Exhibit B.

Regardless of whether the proposed SFD rulemaking will incorporate every detail of the current SMS methodology that Congress determined was unworthy of public release by FMCSA, it is apparent that the proposed rule would incorporate the same “on-road safety performance data” that FMCSA has used in calculating BASICs under SMS and its related program known as Compliance, Safety, Accountability (“CSA”). We believe that if FMCSA goes ahead with its proposed “quickie” rulemaking on use of SMS/CSA data (or on use of BASICs derived from such data) in determining the safety fitness of individual motor carriers, such action would disregard at least the following three provisions of the FAST Act:

(1) Under new subsection 31136(g) of Title 49, U.S. Code, as enacted by section 5202 of the FAST Act, any future NPRM issued by FMCSA that is “likely to lead to the promulgation of a major rule” may not be “published” until the agency either “issue[s] an advance notice of proposed rulemaking [ANPRM]” or “proceed[s] with a negotiated rulemaking [reg-neg].” In this instance, FMCSA itself has characterized its projected SFD rulemaking as “Major” (see Exhibit B), but its own procedural history of the matter (id.) shows that it **has neither issued an ANPRM nor followed reg-neg procedures**. Until it proceeds with one of those two preliminary steps, **any publication of an NPRM would constitute a direct violation of new subsection 31136(g)**. Although paragraph (g)(3) of that subsection allows omission of an ANPRM (not reg-neg) if issuing such a notice is “impracticable, unnecessary, or contrary to the public interest,” agencies typically invoke similar waivers under the Administrative Procedure Act (“APA”) only for technical or time-sensitive matters. By contrast, the NPRM planned here involves “Major” rather than mere technical changes to motor carrier safety credentialing, and its completion can hardly be considered time-sensitive when FMCSA admittedly has been doing internal studies of the SFD process since June 21, 2007 (see procedural history included in Exhibit B).

(2) Under new subsection 31136(f) of Title 49, U.S. Code, again enacted by FAST Act section 5202, the “regulatory impact analysis” concerning a “proposed or final major rule issued by [FMCSA]” must consider the impact of such a rule on “different segments” of the motor carrier industry, and on carriers of “various sizes.” Moreover, FMCSA’s segment-specific analyses must be based on “representative” data for such carriers and on “the best available science.” Although such analyses could be omitted if they are not “practicable[,] ... feasible and appropriate,” in this instance there are numerous available studies showing the statistical defects of SMS scores and demonstrating the disparate impact of such “on-road data” on small carriers. Those studies, as you and your staffs

know, are detailed in reports by the Government Accounting Office and the USDOT Inspector General, and are spread across the records of hearings before Senate and House committees as well as before the Small Business Administration. The drafters of Section 5202 clearly intended a full, zero-based analysis of these factors before FMCSA adopts new major rules on SFDs or anything else. **A “quickie” rulemaking on SFD criteria, in which any aspects of the agency’s flawed SMS methodology would be treated as a given and small-business impacts would be ignored, is patently not what Congress intended in the FAST Act.**

(3) Finally, any safety fitness determination based upon roadside compliance data and crash statistics developed for use in SMS/CSA methodology is precluded by subparagraph 5221(d)(2)(C) of the FAST Act. Under that subparagraph, “any rulemaking by [USDOT] that relates to the CSA program, including the SMS or data analysis under the SMS” must consider the results of a comprehensive and necessarily time-consuming review process as required under subsections 5221(a) through (d) of the FAST Act. That process includes:

(a) preparation and delivery of a detailed study on eleven topics relating to CSA, SMS and the BASICs by the widely respected and independent National Research Council of the National Academies (“NRC”) under subsections 5221(b) and (c). This study must be completed, and its results reported by the FMCSA Administrator to Congress and the USDOT Inspector General, within 18 months after enactment of the FAST Act.

(b) preparation and delivery by the FMCSA Administrator of a “corrective action plan” under subsection 5221(d) with regard to defects identified by NRC in CSA/SMS/BASICs methodology. This deliverable must be provided to the relevant Congressional Committees and to the USDOT Inspector General within 120 days after the Administrator’s submission of the NRC report to those bodies. **It is that corrective action plan which must be considered in “any rulemaking” that “relates to the CSA program, including the SMS or data analysis under the SMS.”**

It is clear from the attached Exhibit B that the SFD rulemaking contemplated by FMCSA would “relate to ... SMS or data analysis under the SMS,” because FMCSA admittedly wants to use data compiled for five of the BASICs in arriving at SFDs for individual motor carriers. Regardless of any attempted hair-splitting by the agency to the effect that particular details of SMS may not be carried forward into the NPRM, the fact remains that the BASICs indisputably are derived from and related to “data analysis under the SMS” regarding on-road performance by carriers. Consequently, **FMCSA cannot lawfully complete such a rulemaking until it receives the NRC report and delivers any required corrective action plan** – a process which could take up to 22 months.

For all the reasons stated in this letter, we submit that FMCSA would be flouting the intent of Congress if it proceeds at this time with the contemplated NPRM on SFDs. For FMCSA to limit the public to a three-month comment period, after which all concerned would have to let the NRC and corrective action processes run their course under section 5221 before the rulemaking could be completed, would be wasteful in the extreme for all concerned. After all, the conclusions reached independently by the NRC could lead to a decision by the current Administration (or the next one) to abandon the entire CSA/SMS project as impossible to salvage in its current form. Moreover, **a “quickie” rulemaking would be not only wasteful in view of the required section 5221 process, but plainly unlawful in view of the ANPRM/reg-neg and “best available science” mandates in section 5202.**

The root cause of the Congressional mandate for terminating publication of SMS/CSA data has been the agency’s overreach in publishing unscrubbed “safety compliance” information as fit for use without going through the rigors of the APA. After over a decade of work on CSA/SMS data and methodology, Congress and the GAO have repeatedly cited the SMS program for data sufficiency problems including (1) compliance and enforcement anomalies between States; (2) the lack of sufficient roadside data to measure 90% of the regulated carriers (GAO Study); (3) the inability to determine crash preventability in assessing carrier safety performance, and (4) the inherent instability of SFDs for small carriers based on monthly changes in their “on-road safety performance data.” The undersigned associations have repeatedly pointed out that any use of roadside data to characterize the safety performance of small carriers is statistically flawed due to the law of large numbers, which GAO has confirmed and which Congress has required NRC and the agency to address.

Not only has Congress ordered the agency to submit a corrective action plan addressing those issues after receiving the NRC report and before implementing a rulemaking procedure; it has been directed to ensure that the economic consequences of any proposed new safety rule are fully considered in an ANPRM or a reg-neg process before any rule is issued. Thus, it is clear that any “quickie” rule cannot comply with the FAST Act if (1) it relies upon data implicating the issues which must be addressed in the NRC report and in the agency’s subsequent corrective action plan; or (2) it is issued without consideration of “the different segments” within the motor carrier industry, including carriers of “various sizes.”

By copy of this letter to Administrator Darling, we are expressing our concerns that any Notice of Proposed Rulemaking involving a safety fitness determination at this time in light of the strictures imposed by the FAST Act is highly inappropriate and will be challenged.

Respectfully submitted,

Scott Klever, President



Mike Pettrey, President

The Expedite Alliance
of North America



TLP&SA
TRANSPORTATION LOSS PREVENTION
& SECURITY ASSOCIATION

William D. Bierman,
Executive Director

David Owen, President
National Association of Small
Trucking Companies



David Purvis

American Home Furnishings Alliance (AHFA)
Specialized Furniture Carriers
International Casual Furnishings Association



William P. Schroeder
Auto Haulers Association of America



Enclosures: Exhibit A
Exhibit B

cc (w/encl.): Thomas F. Scott Darling III
Administrator-Designate and Chief Counsel
Federal Motor Carrier Safety Administration
West Building, 1200 New Jersey Avenue, S.E., Sixth Floor
Washington, DC 20590-9898
Fax: 202.366.3224

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EXHIBIT A

1/11/2016 11:05:00 AM

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FMCSA's Scott Darling Promises Safety Fitness Determination Rule This Month

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Speaking at the Transportation Research Board's annual meeting, Federal Motor Carrier Safety Administration acting Administrator Scott Darling said the agency will publish its safety fitness determination proposal this month.



Clark University

"Before the end of this month we will publish the safety fitness determination proposal," Darling announced Jan. 11 in Washington. "It will change the agency's safety rating process by incorporating current on-road safety performance data. We'll also complete the initial implementation of a new [online] unified registration system. We will soon publish the proposed rule on entry level driver training. We also plan to publish the final rule later this year. We are implementing Phase 3 of [the Compliance, Safety, Accountability program] to better identify at-risk carriers so that we can intervene more quickly. This year, we are setting a high bar for ourselves as we advance our safety mission."

Darling, who has been serving in the acting role since August, told Transport Topics that he's not letting his ongoing lack of congressional approval change his approach.

"I'm going to come to work every day," he said. "I'm going to do my job. The work that we do is important because safe trucking moves the economy. When Congress wants to see me, I will be there."

As to that work, Darling said, "This is going to be an exciting year for us. We're going to be working a lot with all our stakeholders to make sure we get the FAST Act provisions implemented as quickly as possible. ... We had a big year in 2015, and we have a big year ahead of us in 2016. We are ramping up our efforts to broaden and deepen our partnerships with state and local governments, law enforcement, safety advocates, labor [and] the trucking industry. Our partners are our force multipliers. We perform at our highest level when we work closely with them."

Among those partners are the National Academies of Science, which Darling said is teaming with FMCSA to study CSA. The agency also is studying the effects on drivers of round-trip commutes to work of more than 150 miles and is considering giving credits to carriers for using advanced safety equipment, enhanced driver fitness measures and fleet safety management tools.

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By *David Elfin*
Staff Reporter

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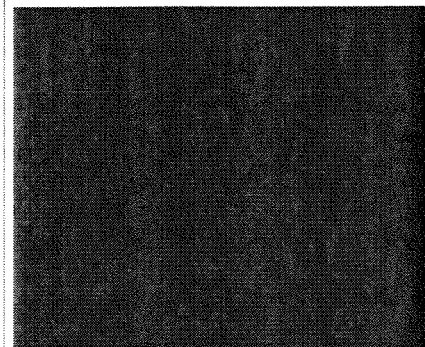


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FMCSA's Scott Darling Promises Safety Fitness Determination Rule This Month

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FMCSA's John Van Steenburg followed Darling by presenting data that showed that while fatal crashes involving large trucks are down since 2004, they are up since 2009, the bottom of the recession. Illinois and New York had the largest decreases, while Oklahoma and California had the largest increases.

The agency's William Quade said that FMCSA will be proposing standards shortly for entry-level drivers and is planning to launch a pilot program for drivers younger than 21 who have military experience from actual service as well as in the Reserve and the National Guard. Quade added that FMCSA soon will issue a final rule on the drug and alcohol data base but is waiting on the Department of Health and Human Services before it can move ahead on hair testing. Colleague Jeff Loftus noted that under the Unified Registration System, more than 300,000 DOT numbers were taken out of service over the two years that ended in November.

"Contrary to popular belief, we don't sit in our building in Washington and look for ways to mess with the trucking industry," Quade said. "The goal is to put in place systems that improve safety. We believe that the safety fitness determination proposal will do that."

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By *David Elfin*
Staff Reporter

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EXHIBIT B

Federal Motor Carrier Safety Administration

37. **Carrier Safety Fitness Determination** Red

Popular Title: Carrier Safety Fitness Determination

RIN 2126-AB11

Stage: NPRM

Previous Stage:None

Abstract: FMCSA proposes to amend the Federal Motor Carrier Safety Regulations (FMCSRs) to adopt revised methodologies that would result in a safety fitness determination (SFD). The proposed methodologies would determine when a motor carrier is not fit to operate commercial motor vehicles (CMVs) in or affecting interstate commerce based on (1) the carrier's on-road safety performance in relation to five of the Agency's seven Behavioral Analysis and Safety Improvement Categories (BASICS); (2) an investigation; or (3) a combination of on-road safety data and investigation information. The intended effect of this action is to more effectively use FMCSA data and resources to identify unfit motor carriers and to remove them from the Nation's roadways.

Effects:

Economically Significant
Major
Regulatory Flexibility Act

Prompting action: Secretarial/Head of Operating Administration Decision

Legal Deadline: None

Rulemaking Project Initiated: 06/21/2007

Docket Number:

Dates for NPRM:

Milestone	Originally Scheduled Date	New Projected Date	Actual Date
To OST	11/12/2007	10/02/2009	09/25/2009
Withdrawn from OST		03/22/2010	03/22/2010
Resubmitted to OST		02/17/2015	03/02/2015
To OMB	12/15/2007	06/10/2015	06/23/2015
OMB Clearance	03/15/2008	12/15/2015	
Publication Date	03/29/2008	12/29/2015	
End of Comment Period	06/29/2008	03/29/2016	

Explanation for any delay: Additional coordination necessary
Unanticipated issues requiring further analysis

Federal Register Citation for NPRM: None