

February 3, 2016

The Honorable Deb Fischer
Chairman, Subcommittee on Surface Transportation
and Merchant Marine Infrastructure, Safety and Security
Committee on Commerce, Science and Transportation
U.S. Senate
454 Russell Senate Office Building
Washington, DC 201510
Fax: 202-228-1325

VIA FACSIMILE

RE: Safety fitness determination NPRM and Scott Darling's nomination hearing

Dear Chairman Fischer:

The trade associations listed at the end of this letter once again thank you for your leadership in reforming the Federal Motor Carrier Safety Administration's regulation and enforcement in general and the agency's Compliance, Safety, Accountability (CSA) program and Safety Measurement System (SMS) methodology in particular. The provisions in Fixing America's Surface Transportation (FAST) Act forcing FMCSA to pull down percentile scores and golden triangles from public websites pending a thorough reform of SMS protects tens of thousands of our nation's motor carriers from arbitrary and unfair branding as unsafe based on extremely flawed metrics.

We are writing today in response to comments made by FMCSA Administrator-designate T.F. Scott Darling, III, during the nomination hearing you chaired on January 20, 2016. We note that under your order the hearing record remains open for two weeks beyond the live hearing, and we believe this represents an important opportunity to elicit more complete information about FMCSA's carrier safety fitness determination (SFD) notice of proposed rulemaking (NPRM), which was released January 15 and published formally on January 21.

The SFD NPRM is premature

At the outset, we reiterate and elaborate on our objections stated in a January 12 letter to you and other key Congressional leaders to the very issuance of the NPRM. FMCSA granted itself a questionable waiver from the requirement in Section 5202 of the FAST Act that the agency either issue an advance notice of proposed rulemaking (ANPRM) or engage in negotiated rulemaking prior to promulgating a major rule.

The agency posted its regulatory evaluation on the NPRM in the public docket on January 22. At first impression, it does not appear that the brief 42-page document provides the rigorous regulatory impact analysis that Congress intended in Section 5202 of the FAST Act.

However, it is absolutely clear that FMCSA's SFD rule would violate Section 5221 of the FAST Act because it "relates to the CSA program, including the SMS or data analysis under the SMS." As we noted in our January 12 letter, the FAST Act requires FMCSA to consider in any such rulemaking the agency's corrective action plan – a plan that would reflect reforms identified by the National Academies following a study that is expected to take 18 months and certification by the Department of Transportation Inspector General.

The NPRM confirmed our expectations that FMCSA's "new" program is based squarely on and intertwined with CSA and SMS. Motor carriers would be targeted – and in some cases directly rated – with SMS methodology using the same Behavior Analysis and Safety Improvement Categories (BASICS). The violation severity weights FMCSA proposes to use (Appendix B Violation Severity Tables, see Federal Register, January 21, 2016, page 3617) are the same as those in the current SMS methodology.

FMCSA makes no effort to hide the fact that its SFD NPRM fundamentally relies on CSA/SMS: "It is important to note that while the relative percentiles in SMS are not used in making Safety Fitness Determinations under this NPRM, the same data are used" (see Federal Register, January 21, 2016, page 3564).

Rather than take to heart Congress's broad-based concerns about CSA and SMS, the agency hides behind the technical point that the NPRM complies with Section 5223(b) of the FAST Act because SFDs are not based on SMS alerts or relative percentiles. Even this claim is not necessarily accurate because the fixed failure standards for proposed ratings based on on-road data alone are calculated using BASICS percentiles. Section 5223(b) arguably is broader than FMCSA's interpretation:

Information regarding (emphasis added) alerts and the relative percentile for each BASIC developed under the CSA program may not be used for safety fitness determinations until the Inspector General of the Department makes the certification under subsection (a).

Is a fixed failure standard based on a relative percentile in each BASIC "information regarding...the relative percentile for each BASIC"? Given Congress's fundamental concerns about SMS – well beyond alerts and relative percentiles per se – we believe it is.

We are just beginning to analyze the NPRM, but we already have identified a number of serious concerns about inequitable treatment, due process and more. We certainly will share those concerns with your office once our analysis is complete.

Mr. Darling's hearing responses were incomplete

We very much appreciate your focus on this important issue during Mr. Darling's confirmation hearing. However, as you can see from just the sentence from the NPRM quoted above, your exchanges with Mr. Darling did not really elicit the information you wanted. Attached as Exhibit A is the complete transcript of your exchange with Mr. Darling related to the SFD NPRM.

You had asked Mr. Darling whether the NPRM was “going to include CSA-related data” and whether the flawed data was “going to be used in any way this new rulemaking,” but his responses focused on the argument that SFDs would not be based on SMS alerts or relative percentiles.

We understand and appreciate that you were asking Mr. Darling a broader, more important question. SMS data and methodology are thoroughly integrated into the agency’s NPRM, which is clearly not what you and other transportation leaders in Congress intended.

Mr. Darling’s comments regarding the NPRM’s threshold of 11 inspections with violations in a BASIC for conducting a data-only review also require clarification. First, the violations are, indeed, “flawed data from the CSA” because SMS methodology is the very core of the NPRM. It appears that Mr. Darling interpreted your question as applying only to Section 5223(b) even though you really were asking a more fundamental question.

Moreover, Mr. Darling himself unintentionally raised a serious question about FMCSA’s proposal. He acknowledged GAO’s recommendations that FMCSA use 20 violations as a threshold for analyzing carriers under SMS, but he simply states that “we are going to use 11, which will provide carriers with enough information to make a safety fitness determination assessment for a carrier.” Mr. Darling doesn’t explain why FMCSA chose 11 inspections as a threshold, which is hardly surprising since FMCSA doesn’t explain it in the NPRM either. To us, the choice of 11 violations appears arbitrary.

Again, we will outline many more flaws in FMCSA’s NPRM by the end of the unreasonably short 60-day comment period, but we wanted to highlight specific concerns raised during Mr. Darling’s confirmation hearing while there is still time to address them.

Thank you.

Respectfully submitted,

Scott Klever, President



The
AIR & EXPEDITED
MOTOR CARRIER ASSOCIATION

David Purvis

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



Mike Pettrey, President

The Expedite Alliance
of North America



TLP&SA

TRANSPORTATION LOSS PREVENTION
& SECURITY ASSOCIATION

A handwritten signature in black ink that reads "Wm. D. Bierman".

William D. Bierman,
Executive Director

A handwritten signature in black ink that reads "David Owen".

David Owen, President
National Association of Small
Trucking Companies



A handwritten signature in black ink that reads "Bill Schroeder".

William P. Schroeder
Auto Haulers Association of America



A handwritten signature in black ink that reads "Tom Sanderson".



A handwritten signature in black ink that reads "Joseph Rajkiewicz".



Exhibit A – Exchange between Sen. Deb Fischer and Scott Darling regarding SFD NPRM during January 20, 2016 confirmation hearing

Sen. Fischer:

It seems like you have been moving forward rather vigorously in the past several weeks to issue some rulemakings on the ELDs and the SFD proposed rule. Why are you moving forward on that rulemaking when we've already given you so much to do with the passage of that bipartisan FAST Act, and we really worked together on that – worked very hard to find consensus so that we could see some changes made.

Mr. Darling:

Those two rules that you mentioned have been in the works for 10 years. They were in the works and production prior to me even showing up at FMCSA. As we go through, we were at a stage where we got approval from the Office of Management and Budget to move forward, and the ELD rule was mandated and we wanted to make sure we completed that mandate.

Sen. Fischer:

As you continue to move forward on the rulemaking and we look at the SFD rule that is coming out, it is my understanding that it is going to include CSA-related data. Is that correct?

Mr. Darling:

The SFD rule doesn't include the two CSA data points that the FAST Act doesn't allow us to use – prohibits us from using – which are the alerts and the relative percentages. The SFD is predicated on a fixed-measure formula the carriers will have to meet, and it uses that information against the carrier itself, not against other carriers. So the carrier is actually measured against itself -- its own performance.

Sen. Fischer:

So the stakeholders really shouldn't be concerned, then, that data that has been deemed flawed by the GAO is going to be used in any way this new rulemaking? Are you totally discounting that so we don't have issues with that flawed data in the future?

Mr. Darling:

The data that is being used is data that is collected against the carrier itself.

Sen. Fischer:

Is it true the CSA process, though, that was deemed flawed by the GAO is still going to be collected that way and used against stakeholders?

Mr. Darling:

The GAO said that -- The safety fitness determination rule will use 11 inspections before a carrier is rated. The GAO said, they said 20. But they said this was just an illustration and the

number -- we don't know what the number is. But we are going to use 11, which will provide carriers with enough information to make a safety fitness determination assessment for a carrier.

Sen. Fischer:

Will one of those 11 be that flawed data from the CSA?

Mr. Darling:

No.

Sen. Fischer:

Good to hear. Thank you.