



ASSOCIATION HIGHLIGHTS

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MOTOR-REGULATORY

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FAST Act at Odds with FMCSA Proposed Overhaul of Safety Fitness Determinations

A. FAST Act orders study of CSA

The first long-term surface transportation funding bill in more than a decade was signed into law on December 4, 2015, titled the Fixing America's Surface Transportation Act of 2015 (FAST Act). One of the most notable requirements is that the Federal Motor Carrier Safety Administration (FMCSA) must commission a study to examine its Compliance Safety Accountability (CSA) system and file a public report by the middle of 2017. FAST Act at § 5221-25.

Trucking companies have frequently challenged the validity of CSA data in analyzing safety. The study will evaluate essentially the entire CSA system: whether the CSA safety categories (BASICS) correlate to future crash risk; the underlying methodology; the value of inspection information as compared to roadside enforcement data; and the accuracy and completeness of the data and how that data is used by the public. In the meantime, the percentile scores in the CSA BASIC categories have been removed from public view. During the review process, “[i]nformation regarding alerts and the relative percentile for each BASIC developed under the CSA program may not be used for safety fitness determinations” *Id.* at § 5223(b).

B. FMCSA nevertheless wants to use CSA data

Despite the new law, the FMCSA issued an Notice of Proposed Rulemaking in January indicating its intent to overhaul the way it analyzes commercial motor carrier safety by incorporating CSA data as part of its safety fitness determinations. 81 Fed. Reg. 3562 (Jan. 21, 2016). The three tiered system that has been used for more than thirty years ("satisfactory," "conditional," or "unsatisfactory") would be replaced with the binary rating: "fit" or "unfit."

The current system of carrier fitness determination relies on investigations and compliance reviews. The process is labor intensive and such evaluations are few and far between, often leaving fitness determinations in place for

many years and leaving many motor carriers unrated. The newly proposed system would allow the FMCSA to evaluate five times as many motor carriers with many more data points than are currently available.

The FMCSA pointed out that "while the relative percentiles in SMS are not used in making Safety Fitness Determinations under this NPRM, the same data are used." *Id.* at 3564. Acknowledging that the percentiles and data have been criticized, the FMCSA listed the ways in which it believes it has addressed many of those concerns in the proposed rulemaking, including: requiring significantly more evidence of noncompliance for an "unfit" rating that what is used for current interventions; using absolute values for an unfit determination, not relative rankings, so the performance of other carriers does not affect an individual carrier's status; straight trucks (usually used in short haul operations) would be segmented out from combination trailers (usually used in long haul operations), addressing the disparity between long and short haul operations; and the Crash Indicator BASIC would account for the difference in urban and rural routes. *Id.* at 3563-64.

Comments are due by March 21, 2016. While change may be made eventually to the CSA data as a part of the study mandated by the FAST Act, the FMCSA continues its intent to use CSA data for safety fitness determinations.

C. Use of CSA data in the meantime

Even though the data is no longer public, under the FAST Act the FMCSA may continue to use CSA data to prioritize enforcement, just as it had done before the FAST Act. And shippers, brokers and insurers may still obtain CSA data, but must request such data from the motor carriers, who also may access their own data.

D. Other FAST Act provisions and omissions

Another notable FAST Act provision allows carriers to begin using hair testing rather than urinalysis for federally mandated drug tests once the federal Department of Health and Human Services establishes guidelines for hair testing, which they have a year to do. FAST Act at § 5402.

Notably, the bill did not include an increase to the maximum weight of vehicles above 80,000 lbs, or increase the maximum length of tractor-trailers. There had been efforts to increase the weight limit to 91,000 and to allow a tractor-trailer combination of two 33-foot trailers or "twin-33s."

Congress Extends Hours of Service Restart Review

In other Congressional action, Congress further delayed the reinstatement of the 34-hour restart rule in a mid-December omnibus funding bill titled the Consolidated Appropriations Act of 2016. Historically, commercial drivers could restart the clock on the number of hours he or she was permitted to drive during a week by being off duty for 34 consecutive hours. In mid-2013 the FMCSA added a further requirement that this 34-hour period must include two consecutive periods between 1 a.m. to 5 a.m. There were concerns that this rule puts more drivers on the road during daylight hours, which are more heavily travelled and thus might have an adverse impact on safety (and traffic), among other complaints. Congress suspended the 1-5 a.m. requirement in 2014 while the FMCSA was to review the requirement further. Under the Consolidated Appropriations Act, the FMCSA's review of the restart rule must have "demonstrated statistically significant improvement in all outcomes related to safety, operator fatigue, driver health and longevity, and work schedules", as compared to before the rule went into effect.

Random Drug Testing May be Cut in Half in 2016

The FMCSA has announced that random drug testing may be reduced from 50% of drivers to 25% of drivers in 2016. 80 Fed. Reg. 80446 Dec. 24, 2015). Low percentages of positive drug tests prompted the change (less than 1% of random drug tests were positive in 2011, 2012 and 2013), and the testing will increase again if the percentage of positive drug tests rise above 1%. This change is in line with decreased drug testing in other transportation modes.

FMCSA Wants Truck Passengers to Wear Seat Belts Too

A proposed rule by the FMCSA would require occupants riding in property-carrying commercial motor vehicles to wear seat belts while the vehicle is being driven on public roads. 80 Fed. Reg. 76649 (Dec. 10, 2015). Under the rule, motor carriers and drivers would be responsible for their passengers. Unsurprisingly, National Highway Traffic Safety Administration data suggests that seat belts save the lives of passengers in commercial trucks. In 2013, about 5% of passengers in commercial trucks that were involved in fatal crashes were killed while wearing a seat belt, while about 25% of those not wearing seat belts were killed, more than half of whom were totally or partially ejected from the truck.

Quick Takes:

- FMCSA Acting Administrator T.F. Scott Darling, who has served as the agency head since August 2014, had a confirmation hearing before Senate Commerce, Science and Transportation Committee on January 20, 2016.
- As of the writing of this article, the Senate had not scheduled a vote on his nomination. The FMCSA issued its long awaited final rule requiring electronic logging devices (ELDs) to record driver hours of service. 80 Fed. Reg. 78292 (Dec. 16, 2015). Compliance is required as of December 18, 2017.
- The FMCSA issued a final rule that prohibits motor carriers, shippers, receivers, or transportation intermediaries from coercing commercial motor vehicle drivers from violating FMCSA regulations. 80 Fed. Reg. 74695 (Nov. 30, 2015).
- The FMCSA launched the first phase of its Unified Registration System in mid-December: a new, simplified online registration application form for truckers, brokers and equipment providers.
- The FMCSA withdrew the rule it proposed in June of 2015 that would have required motor carriers to use only trucks that displayed a label declaring that it met federal safety standards. 80 Fed. Reg. 81503 (Dec. 30, 2015). The FMCSA stated that regulatory enforcement of existing regulations would be the most effective way to ensure compliance with the safety standards and additional rulemaking was unnecessary.