



# ASSOCIATION HIGHLIGHTS

**May-June 2016**

## **MOTOR-REGULATORY**

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### *Use of Compliance Safety Accountability Data by the FMCSA Remains an Issue for Certain Members of Congress*

A group of 36 members of the U.S. House of Representatives wrote a letter to Federal Motor Carrier Safety Administration (FMCSA) Acting Administrator Scott Darling in May urging the FMCSA to delay its rulemaking that would change the process by which the agency makes safety fitness determinations for motor carriers. The FMCSA uses Compliance Safety Accountability (CSA) data, which includes safety-based violations from roadside inspection, among other compliance data, to determine which carriers are in need of a safety intervention. But the FMCSA has not used CSA data to make safety fitness determinations, which is the carrier's overall safety rating. Instead, the FMCSA has only used onsite investigations and compliance reviews.

Critics contend that the CSA data is not valid for safety analysis, and Congress supported these critics by including a provision of the Fixing America's Surface Transportation Act of 2015 (FAST Act) that requires that the FMCSA study its CSA system and to remove the data for trucking companies from public review in the meantime. Soon after the FAST Act passed, however, the FMCSA proposed to expand the use of CSA data to its safety fitness determinations.

Onsite investigations and compliance reviews are labor intensive and infrequent. Years often go by between investigations. The FMCSA claims that using CSA data would enable the agency to evaluate five times as many motor carriers with many more data points than are currently available. The FMCSA acknowledged the criticism of the data's current use, but indicated that the underlying data itself could still be valid and useful for safety fitness determinations, with certain adjustments to mitigate critics' concerns.

The American Trucking Associations' vice president of safety policy, Rob Abbot, has said that "Though ATA supports the use of real-time, on-road performance data for assigning safety fitness determinations (a.k.a. safety ratings), the organization is opposed to the use of CSA data in its current form for this purpose." The letter to the FMCSA shares a similar sentiment, stating that "[c]ommon sense dictates that FMCSA should complete the reforms to the CSA/SMS system before proceeding to a new method of evaluating safety fitness of carriers." The

letter then states more forcefully that until the evaluation of CSA data is complete, “it is inappropriate for FMCSA to move forward with its proposal.”

### *Senate Hours of Service Rule Being Attacked from Trucking Groups and Safety Advocates Alike*

While fixing a drafting error, Senate appropriators took the opportunity to include a new hours of service requirement that is drawing criticism from the trucking industry and from safety advocates. Commercial truck drivers’ hour of service regulations prohibit a driver from working more than 60 hours in seven days or 70 hours in eight days. However, drivers may restart the clock on the number of hours they are permitted to drive during this period by being off duty for 34 consecutive hours. In 2013, the FMCSA instituted a further requirement that this 34-hour period must include two consecutive periods between 1 a.m. and 5 a.m. Congress suspended the 1-5 a.m. requirement the following year, and a law passed in December was intended to make it harder for the FMCSA to reinstate that requirement. However, a drafting error would have jettisoned the restart system altogether, rather than just the 1-5 a.m. requirement.

Rather than just fix the error, appropriators passed a bill that would prevent truckers from driving if they work more than 73 hours in seven-day period, regardless of whether or not they had used the 34-hour restart. The new 73-hour cap is intended to address claims from safety organizations that a trucker could reach 82 hours in a week using restarts. The measure takes the hours of service debate out of the hands of the FMCSA.

The American Trucking Associations, speaking through its press secretary, initially showed support for the new language but later, speaking through its lead lobbyist, stated that it is against the cap. The Advocates for Highway and Auto Safety and the Trucking Alliance, a coalition of trucking and logistics companies advocating for safe working conditions for commercial truckers, have voiced opposition to the cap.

Senator Susan Collins, who leads the spending panel, stated that the 73-hour limit was a compromise proposal. The bill passed the Appropriations Committee unanimously, but could be revised on the floor.

### *FDA Finally Issues Final Rule on Sanitary Transportation of Human and Animal Food*

More than a decade in the making, the U.S. Food and Drug Administration’s (FDA) passed a final rule in April regarding the sanitary transportation of human and animal food by truck and rail. 81 Fed. Reg. 20092 (April 6, 2016). At last year’s annual meeting of the ATLP, David Prohofskey, Esq., Senior Counsel for CSX Transportation, and Jon Samson, Executive Director-Agricultural & Food Transportation Conference for the American Trucking Association, presented on the proposed rule.<sup>1</sup>

Among several significant changes to the rule since the advance notice of proposed rulemaking, the FDA revised the rule to primarily place on the shipper the responsibility for determining appropriate transportation operations and the relevant operating temperature and mode of temperature monitoring, stating that of the parties covered by the rule, the shipper is in the best position to know the appropriate specifications for transport of its food. The shipper may assign some of these responsibilities to other parties, such as loaders or carriers, by contract.

Shippers are granted certain flexibility as well. As an example, if the temperature was not precisely maintained throughout transport, the shipper can determine if the food was adulterated or not. Furthermore, rather than using prescriptive requirements for temperature-monitoring devices and continuous monitoring of temperature during transport, the shipper and carrier may agree to a temperature monitoring mechanism for shipments of food that require temperature control for safety. Food transported in a completely enclosed container is excluded from the rule, except food that requires temperature control for safety, food contact substances, and human food byproducts transported for use as animal food without further processing.

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<sup>1</sup> Their PowerPoint presentations are available to ATLP members on the ATLP’s website [atlp.org](http://atlp.org).

The rule applies to shippers, loaders, receivers and carriers by motor vehicle and rail vehicle engaged in food transportation. Additionally, individuals will be responsible for possible food safety failures they observe. The rule states that “[i]f a person subject to this rule becomes aware of an indication of a possible material failure of temperature control or other conditions that may render the food unsafe during transportation, the person must take appropriate action to ensure that the food is not sold or otherwise distributed unless a determination is made by a qualified individual, that the temperature deviation or other condition did not render the food unsafe.”

Large businesses will be required to comply with the new regulation by April 2017 and smaller businesses will be given an additional year.

### *PHMSA Hazmat Reverse Logistics Final Rule Eases Regulatory Compliance Requirements*

The Pipeline and Hazardous Materials Safety Administration (PHMSA) issued a rule regarding hazardous material “reverse logistics,” which is “the process of offering for transport or transporting by motor vehicle goods from a retail store for return to its manufacturer, supplier, or distribution facility for the purpose of capturing value (e.g., to receive manufacturer’s credit), recall, replacement, recycling, or similar reason.” 81 Fed. Reg. 18527 (Mar. 31, 2016). Because reverse logistics movements originate at retail stores, the shippers are less likely to be knowledgeable about the requirements for shipping hazmat, or when such regulations apply. Knowledgeable shippers that do comply with hazmat laws face a high regulatory burden relative to the volume of hazardous material shipped.

The rule eases certain compliance burdens for lower risk hazmat while helping to ensure that retail employees have knowledge and familiarity in preparing hazardous materials for reverse logistic shipments through mandatory instructions or training. The scope of the rule, however, is limited: it applies only to movements from retail stores; it only applies to movements by truck; and some of the flexibility only applies to private carriers, not common or contract carriers. The rule also allows wet batteries, such as lead-acid batteries like automotive batteries, to be picked up along multiple stops for the purpose of consolidating shipments of the batteries for recycling. Without this change, trucks that pick up wet batteries would have to return with them to a recycling center before picking up any others, which adds mileage and could reduce compliance.

### *FMCSA Exploring Complaints that Trust Funds are not Being Properly Disbursed*

In response to numerous complaints and request for guidance regarding the disbursement of funds being held in trust for insolvent freight brokers and freight forwarders, the FMCSA is seeking comment and holding a roundtable discussion. Brokers and freight forwarders must have a \$75,000 surety bond or trust agreement guaranteeing their performance. The agency would like to hear from motor carriers and shippers that have had difficulty receiving compensation for claims against freight forwarders and brokers due to insufficient funds, according to an FMCSA announcement. The FMCSA said that is not seeking to increase the size of the trust. Rather, it is analyzing the federal requirements for financial institutions, and the underlying instruments they issue for use by brokers and freight forwarders submitting trust agreements to the agency. The FMCSA wants to know which trust fund holders regularly deny claims, what assets are being held, and what the agency can do to help ensure funds are disbursed for legitimate claims.

### *FMCSA Considering Requiring States to Establish Inspection Program for Commercial Passenger Vehicles.*

Commercial motor vehicles must be inspected annually in one of three ways: (1) its own qualified personnel; (2) a qualified third party; or (3) a qualified state inspection, which only exist in 22 states. Section 32710 of the Motorcoach Enhanced Safety Act of 2012, part of the Moving Ahead for Progress in the 21st Century Act (MAP-21), required that the Secretary of Transportation consider requiring States to establish an annual inspection program for passenger carrying vehicles. Recognizing that the FMCSA does not have the power to make states comply, and that Congress did not identify a funding source that might incentivize state compliance, the agency

has issued an advance notice of proposed rulemaking directed to the states asking for feedback on how to implement and incentivize a state inspection program. 81 Fed. Reg. 24769 (April 27, 2016).

### *NHTSA Proposes Safer Glass for Buses*

In response to several National Transportation Safety Board (NTSB) recommendations, the National Highway Traffic Safety Administration (NHTSA) created a comprehensive plan pertaining to improvements in motorcoach safety nearly eight years ago with four priority areas: requiring seat belts (minimizing passenger and driver ejection from the motorcoach), improved roof strength, emergency evacuation, and fire safety. Following several rules addressing these issues over the past few years, in May, NHTSA issued a notice of proposed rulemaking that would require advanced glazing on bus side and rear windows, as well as glass panels and windows on the roof. 81 Fed. Reg. 27904 (May 6, 2016). If the rule were to be enacted, NHTSA would not be inclined to require that buses be retrofitted, since it believes the requirement should apply to buses that also have increased structural integrity, which was the subject of a 2014 NHTSA notice of proposed rulemaking. Technical requirements and testing procedures are set forth in the proposed rule.