

# Regulatory and Legislative Update

September 2023

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## Regulation and Enforcement

### FMCSA relaunches effort to revamp safety fitness determinations

FMCSA once again is considering changes to its methodology for determining when a motor carrier is unfit. The advance notice of proposed rulemaking (ANPRM) comes more than six years after the agency withdrew a regulatory proposal to change the way it assigns carrier safety fitness determinations (SFDs). The ANPRM seeks comment on the need for rulemaking to revise the SFD regulations and seeks available science or technical information to analyze regulatory alternatives for determining SFDs.

The prior NPRM, which was published in January 2016, focused heavily on use of Safety Measurement System (SMS) metrics to assign SFDs automatically in certain circumstances. That proposal would have eliminated the current rating terms of satisfactory, unsatisfactory, and conditional, replacing them with a single determination that a carrier is unfit. FMCSA noted in the ANPRM that most safety advocacy and state law enforcement groups supported the 2016 proposal but that others opposed it, including large and small carriers and some trade associations. FMCSA had already decided during the Obama administration that the proposal needed further review, but the agency withdrew it altogether in 2017 during the Trump administration due to the pending review of SMS and the Compliance, Safety, Accountability (CSA) program by the National Academies of Science as ordered by Congress in December 2015.

The ANPRM addresses the issues surrounding SFDs more broadly than did the 2016 NPRM, posing 12 specific questions – many of which have multiple parts – on which the agency seeks public comment. However, the agency remains interested in whether the SFD process should use “all available safety data, such as all

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inspection-based data.” For example, FMCSA seeks input on whether it should use SMS methodology to issue SFDs in a manner that is similar to what was proposed in the 2016 NPRM. “The Agency is interested in comments specifically on whether the integration of on-road safety data into the SFD process would improve the assessment of motor carriers’ safety posture and the identification of unfit motor carriers,” FMCSA said.

Some of the questions resurrect various initiatives that have largely been ignored in recent years. For example, the 2015 law known as the FAST Act directed FMCSA to consider a “Beyond Compliance” program that would encourage implementation of best practices and technologies. Although the ANPRM does not explicitly reference the Beyond Compliance program, it addresses it implicitly by asking whether the agency should consider motor carriers’ adoption and use of safety technologies in a carrier’s rating.

The ANPRM poses several questions related to a possible link between driver behavior and carrier SFDs. For example, FMCSA asks whether safety fitness methodology should give more weight to unsafe driving violations given the correlation between speed and texting with crash risk.

Comments on the ANPRM are due October 30. For the Federal Register notice, visit <https://www.federalregister.gov/d/2023-18494>.

### **FMCSA proposes a federal appeals process for DataQs**

FMCSA issued a notice proposing development and implementation of a federal appeals process for requests for data review (RDRs) submitted to the agency through its DataQs system. The proposed review process would provide an opportunity to have requests reviewed by FMCSA after the request has been reviewed and denied after reconsideration by the state agency. The outcome of the FMCSA review would be deemed final.

Under FMCSA’s proposal, all information and documentation provided to the agency on appeal would be contained in the DataQs RDR itself. Neither the requestor nor the program office would be allowed to submit new facts or evidence during the final appeal request.

FMCSA proposes to limit RDRs accepted for FMCSA appeal to requests that pertain to significant matters of legal interpretation or implementation of enforcement policies or regulations. “Requests involving mere factual dispute between parties would not ordinarily be accepted for review through the FMCSA appeal process,” it said. Also, RDRs submitted to the crash preventability determination program and petitions to the drug and alcohol clearinghouse would not be eligible for an FMCSA appeal. FMCSA’s notice provides various examples of situations that would and would not qualify for a federal appeal. The agency also seeks comment on six specific questions.

Comments are due November 13. For the Federal Register notice, visit <https://www.federalregister.gov/d/2023-19904>.

### **DOL proposes to guarantee overtime pay for more workers**

The U.S. Department of Labor issued a notice of proposed rulemaking that would guarantee overtime pay for most salaried workers earning less than \$1,059 per week, or \$55,068 per year, and the threshold would be adjusted for inflation periodically going forward. The current salary threshold for salaried workers to be considered exempt under the Fair Labor Standards Act is \$684 per week, or \$35,568 per year.

Comments on the NPRM are due November 7. For the Federal Register notice, visit <https://www.federalregister.gov/d/2023-19032>. The Small Business Administration’s Office of Advocacy will hold virtual roundtable meetings on the DOL proposal from 1 p.m. to 3 p.m. on both September 26 and September 27. To RSVP, contact Janis Reyes at [Janis.Reyes@sba.gov](mailto:Janis.Reyes@sba.gov).

### **Lawless named FMCSA assistant administrator and chief safety officer**

DOT has named Sue Lawless assistant administrator and chief safety officer of FMCSA, replacing Jack Van Steenburg, who recently retired. Prior to her appointment, Lawless served as director of FMCSA’s Motor Carrier, Driver, and Vehicle Standards Division. She first joined FMCSA in 2001 but later moved to the private

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sector where she was a partner in a law firm and represented motor carriers, motor carrier drivers, and various transportation businesses. Lawless rejoined FMCSA in 2010 and previously served as a trial attorney, assistant chief counsel, and division chief.

### **Two devices removed from list of registered ELDs**

Effective September 14, FMCSA has removed FALCON ELD and KSK ELD from the list of registered electronic logging devices (ELDs) and placed them on the list of revoked devices due to a failure to meet the minimum requirements established in 49 CFR part 395, subpart B, appendix A. Motor carriers using revoked devices must immediately discontinue their use and replace them within 60 days of the revocation. In the interim, carriers must revert to paper logs or logging software. For a list of registered and revoked ELDs, visit <https://eld.fmcsa.dot.gov/List>.

### **FMCSA announces grants for CDL programs, infrastructure**

In separate announcements, FMCSA announced grants totaling \$48 million for commercial driver's license (CDL) training opportunities and process improvements and more than \$80 million in infrastructure funding for projects such as truck parking, technology, and other improvements. For more information on the grants, visit <https://ai.fmcsa.dot.gov/Grants>.

### **Alaskan ice road school denied skills test exemption**

FMCSA has denied an application from Alaska's Ice Road Driving School for an exemption from the skills road test portion of the behind-the-wheel (BTW) entry-level driver training (ELDT) requirements for driver trainees. The applicant had contended that due to the unique road system and challenging terrain in Alaska, it is difficult to adhere to the driver training regulations. FMCSA determined that the exemption would not likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption. The Federal Register notice is available at <https://www.federalregister.gov/d/2023-19614>.

### **Hawaii seeks CDL skills test relief for Lanai and Molokai**

FMCSA is requesting comments by September 25 on an application from the state of Hawaii to exempt specified portions of the CDL skills test for drivers on the islands of Lanai and Molokai due to the lack of highway infrastructure to allow completion of the full skills test. The state proposes to issue a restricted CDL to drivers who pass a limited CDL skills test in which the driver would not be required to demonstrate the ability to perform those on-road skills. For the Federal Register notice, visit <https://www.federalregister.gov/d/2023-18361>.

## Legislation

### **Senate considering consolidated funding bill that includes DOT programs**

As of September 18, the U.S. Senate is considering an amendment that would incorporate its version of the DOT appropriations bill, among others, as part of a military constructions and veterans affairs bill (H.R. 4366) that has already passed the House of Representatives. The House Appropriations Committee has approved its own version of the DOT funding bill (H.R. 4820), but that legislation has yet to be considered by the full House.

The amendment in the nature of a substitute includes substantially all the FMCSA-related provisions that were in the Senate version of the DOT bill (S. 2437) that was approved by the Senate Appropriations Committee in July. The most notable provision in that package was a measure that – like the House bill – would invalidate two conditions FMCSA has placed on participation in the Safe Driver Apprenticeship Pilot Program.

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The pilot program was established by the Infrastructure Investment and Jobs Act in 2021 to test the use of commercial drivers aged 18 to 20 in interstate operations.

For information on H.R. 4366, visit <https://www.congress.gov/bill/118th-congress/house-bill/4366>. For information on S. 2437, visit <https://www.congress.gov/bill/118th-congress/senate-bill/2437>. For information on H.R. 4820, visit <https://www.congress.gov/bill/118th-congress/house-bill/4820>.

### Advocacy and Comment

#### Stopping Supply Chain Fraud in the Trucking Industry

The hottest topic in trucking is the 400% increase in fraud which affects all constituencies in the trucking industry.<sup>1</sup> Major trade associations are having their annual fly-ins and the issue will be vetted with Congress and Agency officials. Although various supply chain protocols are proposed to better vet carriers and intermediaries, there has been no progress made on the Braun, Bost et al. initiative for DOT's Office of Inspector General to assume responsibility for investigating and leading prosecution of criminal fraud.

There is broad consensus on the need for prosecution of systemic criminal fraud in the interstate trucking industry regardless of the nature of the cargo or the size of the vehicle transporting it. This task is within DOT's authority but beyond FMCSA's mandate.

Grassroots advocacy by victims with their U.S. Senators and Representatives is urged to highlight the seriousness of this issue and gain bipartisan support for federal funding as necessary.

#### Pending Advance Notices of Safety Fitness Rulemaking

As noted above, FMCSA has relaunched its safety fitness determination rulemaking in two parts. Due October 30th are public comments on tailored questions intended to elicit support for revitalizing the roadside inspection system initiated in CSA 2010. The metrics and details of the new proposal have changed, but the systemic flaws have not been eliminated. The National Academy of Sciences found the CSA/SMS system of roadside inspections unsustainable without adoption of the Item Response Theory and additional data which the Agency implicitly rejected. The DOT declined to endorse the Agency's program in 2015 and still requires that CSA scores be removed from public view. The Agency published a proposed safety fitness rule in 2016 but dismissed that rulemaking after comments were received.

Although FMCSA has been running SMS data in the background ever since to set priorities for carrier audits under existing rules, using roadside inspection data as a predictor of safety, as of August 25, 2023 it has issued only issued less than 3,000 safety fitness determinations leaving nearly 100,000 new entrants with the less than reassuring status of "unrated."

The second part of FMCSA's proposed revamping of its safety rating process relates to its use of crash data in making safety fitness determinations. Ultimate legal responsibility for crashes is subject to judicial determination through review of the facts and law of the reportable accident. The Agency's DataQ process is not designed to meet due process standards. Instead it determines "preventability" based on qualified exclusions as demonstrated in after-the-fact accident reports prepared by police officials who were not eyewitnesses to the accident.

The DataQ process is triggered after the occurrence of the accident and relies on hearsay data only assumed to be accurate. While the proposed new use of DataQ would permit administrative and judicial appeal on issues of law, apparently the truth of the reported facts about the accident or its "causation" would not be considered.

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<sup>1</sup> "Fraud-The Other F Word in Trucking," *Truckstop* (June 15, 2023).

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### **Due Process and the APA**

Importantly, the two advance rulemaking notices discussed above represent the first step in formal rulemaking; the Agency to its credit has recognized that more than mere guidance is ultimately required for safety fitness determinations that can put a carrier out of business. The two pending notices are the first stage of an administrative process that ultimately requires the Agency to make findings of fact and conclusions of law on material issues. In particular, the Administrative Procedure Act and related statutes will require (1) special consideration of the effect of rules on small business entities and (2) a cost-benefit analysis of the administrative burden new rules would impose. These issues have been raised with the FMCSA before and will be relevant again.

### **Vetting Carriers and Brokers**

Many of the receivers of this update are partners in advocacy on both the anti-fraud and safety fitness determination issues. There is an important connection between the government's roles in preventing fraud and ensuring safe operations. The nexus revolves around vetting carriers and intermediaries as safe to operate and otherwise fit to use. The number of new applicants for carrier, broker, and forwarder authority is huge and licenses are granted 25 days after filing based on evidence of insurance and process agents. While recently the agency has started requesting copies of the application signer's driver's license along with the letter assigning the applicant's tax id number, there is no other vetting of the applicant's identity or principal place of business, let alone any requirement for completion of its new carrier audit procedure before authority is issued. Supporters of this newsletter have previously suggested to FMCSA and DOT that the desktop audit procedure should be used to vet new carriers prior to issuing a grant of authority.

With respect to fraud prevention, a similar vetting by FMCSA of all new applicants within the 25 day pendency of a grant to a new applicant would be a far better way to confirm fitness to operate and prevent fraud or identity theft than either the status quo or the proposed reboot of SMS.