

BEFORE THE  
U.S. DEPARTMENT OF TRANSPORTATION  
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

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DOCKET No. FMCSA-2015-0001

CARRIER SAFETY FITNESS DETERMINATION

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REPLY COMMENTS OF  
NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC.

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## I.

## ELIMINATING CURRENT SATISFACTORY SAFETY RATINGS UNNECESSARILY WOULD CREATE MAJOR PROBLEMS FOR THE TRANSPORTATION COMMUNITY

In its opening comments, the National Motor Freight Traffic Association, Inc. (NMFTA) asserted that the proposed elimination of the current satisfactory safety rating assigned to motor carriers would not be consistent with the Federal Motor Carrier Safety Administration's (FMCSA) statutory duties under 49 U.S.C. Section 31144 to assign safety ratings. Moreover, such action would be contrary to FMCSA's own regulation set forth in Section 385.9 of 49 C.F.R., which acknowledges its responsibility to determine whether a motor carrier is compliant with FMCSA's safety standards, and, accordingly, to assign a safety fitness determination. Further, eliminating the satisfactory safety rating would leave motor carriers, shippers and/or brokers without the long-utilized standard by which the transportation community identifies compliant carrier safety programs.<sup>1</sup> The record supports the validity of those serious concerns.

FMCSA's release to the public of information underpinning the Safety Measurement System gave rise to suits in which that data was used to establish "negligent hiring" liability on the part of shippers utilizing the services of certain involved motor carriers. That fear of the increased vicarious liability of the shipping community is exacerbated by the FMCSA's proposal to eliminate the satisfactory safety rating currently applicable to motor carriers.<sup>2</sup> With the proposed removal of that safety fitness determination, both the shipping community and the motor carriers will be without any affirmation that the involved safety program is in compliance with FMCSA's safety regulations. That removal will not only create complications in contracts in ascertaining a motor carrier's safety compliance, which is a critical term because of potential liability implications, but also will create difficulties for motor carriers in establishing, and shippers in determining, that the transportation services to be provided are compliant with FMCSA's safety regulations. Retaining the satisfactory safety rating will not create any additional burden for FMCSA or interfere with its proposed program to identify unfit motor carriers.<sup>3</sup>

## II.

## GOING FORWARD WITH THIS PROPOSAL PRIOR TO THE DETERMINATION OF THE UNIFORMITY, ACCURACY AND PROBATIVE VALUE OF THE UNDERLYING DATA IS PREMATURE

The record contains substantial information and comments which challenge the accuracy, uniformity and reliability of the data which would be utilized in the determination of the safety fitness of

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<sup>1</sup> See, also, Comments of the Alliance for Safe, Efficient and Competitive Truck Transportation; and the Alliance for Safe, Efficient and Competitive Truck Transportation.

<sup>2</sup> See, e.g., Comments of the Transportation & Logistics Council, Inc., the National Shippers Strategic Transportation Council, Inc.; and the American Trucking Associations, Inc.

<sup>3</sup> SNAC International supports the proposed single classification of "unfit" alleging that the three-tier system has generated considerable confusion among shippers and the public over what is exactly meant by a carrier's inclusion. However, that position is not supported or confirmed by other organizations representing the interests of the shipping public, which have expressed considerable concern regarding the prospect of the greater threat of vicarious liability associated with the removal of the safety fitness determinations of carriers not found to be unfit. (See, e.g., the Comments of the Transportation & Logistics Council, Inc., which represents some 300 shippers, discussing the shippers' reliance on safety ratings in determining the use of carriers.)

a motor carrier.<sup>4</sup> Concomitantly, in the Fixing America's Surface Transportation Act, Part II, Compliance, Safety, Accountability Reform, Section 5221, Correlation Study, Congress has directed the Administrator of FMCSA to commission the National Research Council to conduct a comprehensive study of both the Compliance, Safety and Accountability program (CSA), and the Safety Measurement System (SMS) used by FMCSA to determine motor carrier safety fitness, which information would be utilized in conjunction with proposed program to determine unfit carriers. In part, the accuracy of the Behavior Analysis and Safety Improvement Categories (BASIC) is to be reviewed, as is the methodology used to calculate BASIC percentiles and to identify carriers for enforcement. Further, it is to be determined whether alternatives to SMS provide comparable precision and confidence in the safety fitness determinations. Eighteen months after enactment the Administrator is to submit the Correlation Report to the Committee on Commerce, Science and Transportation of the Senate and to the Committee on Transportation and Infrastructure of the House. Thereafter, the Administrator must submit within 120 days an action plan addressing any deficiencies or opportunities for improvement identified in the Correlation Study.

A number of parties submitting comments have suggested that this proceeding is premature and should be held in abeyance pending the results of the Correlation Report.<sup>5</sup> That request appears particularly reasonable given the timeframe within which the Correlation Report is to be completed and the Administrator is to submit such action plan as may be required. Moreover, should any major revisions be required regarding the CSA and/or the SMS, or substantial revisions are required in the BASICS, parties interested in, and/or affected by the proposed Safety Fitness Proceeding, would have to resubmit comments addressing the issues as they would exist at that time. Until such later time, the actual proposal under consideration may differ, to a significant degree, from that under consideration in this proceeding. Accordingly, NMFTA supports holding this proceeding in abeyance until such time as the proposal has been revised or finalized.

### III.

#### THE TIMEFRAMES PROPOSED FOR ADMINISTRATIVE APPEALS ARE WHOLLY INADEQUATE

As indicated in the January 21, 2016 issue of the Federal Register, motor carriers receiving a notice of a proposed unfit safety fitness determination would have 15 days to seek an administrative review based on material errors; 10 days to request an administrative review claiming unconsidered inspection data; and 15 days to request that FMCSA defer the entry of a final unfit safety determination and to permit the motor carrier to operate under a compliance agreement. The importance of providing a motor carrier a reasonable opportunity to seek administrative review of a proposed unfit safety determination cannot be underscored. In today's transportation market where negligent hiring claims are becoming common, even information of a proposed unfit safety rating will cause the loss of the carrier's customer base. Consideration of the information and documents which must accompany such requests, and the fact that currently the timeframe for such submissions is 90 days, the proposed reductions in time for filing are inadequate and will not provide a reasonable opportunity for the motor carrier to seek administrative relief. Under no circumstance should the timeframe be less than 30 days for petitions alleging material error or the existence of unconsidered inspection reports, and in the case of the submission of a compliance agreement no less than 45 days should be provided for the filing.

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<sup>4</sup> See Comments of the Owner Operator Independent Drivers Association, Inc.; the American Trucking Associations, Inc.; and the Alliance for Safe, Efficient and Competitive Truck Transportation.

<sup>5</sup> See, e.g., Comments of the Intermodal Association of North America, Inc.; UPS, Inc.; and the American Trucking Associations, Inc.;

Widespread concerns have been expressed in the comments regarding the exceedingly short times motor carriers are provided to submit requests for administrative review of a proposed unfit safety determination.<sup>6</sup> Given the very serious consequences which will befall a motor carrier with an unfit rating, administrative due process dictates that a reasonable opportunity be provided to request an administrative review of that proposed finding, and/or to formulate an acceptable compliance agreement to enable the motor carrier to continue to provide transportation services on behalf of its shipping customers.

## IV.

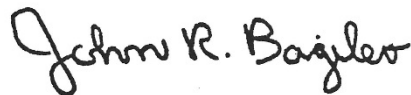
## CONCLUSION

For the foregoing reasons NMFTA, on behalf of its 554 member motor carriers, requests that the satisfactory safety rating be retained; that this proceeding be held in abeyance pending the completion of the Correlation Report, and FMCSA's compliance with any recommendations which may be made pertaining to the Compliance, Safety and Accountability program, the Safety Measurement System, and/or the Behavior Analysis and Safety Improvement Categories; and that the times for filing requests for administrative reviews and for a compliance agreement be revised to reflect a reasonable opportunity to submit the required information and documents.

Respectfully submitted,



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<sup>6</sup> See, e.g., Comments of the Intermodal Association of North America, Inc.; the National Association of Small Trucking Companies; the Alliance for Safe, Efficient and Competitive Truck Transportation; American Trucking Associations, Inc., and the Coalition, Safe, Efficient & Competitive Truck Transportation, et al.