

DEPARTMENT OF TRANSPORTATION
Federal Motor Carrier Safety Administration

Docket No. FMCSA-2015-0001

Carrier Safety Fitness Determination

Notice of proposed rulemaking (NPRM); request for comments.

Comments of the
Transportation and Logistics Council, Inc.

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**COMMENTS OF THE
TRANSPORTATION AND LOGISTICS COUNCIL, INC.**

1. THE INTEREST OF THE TRANSPORTATION AND LOGISTICS COUNCIL, INC.

The Transportation and Logistics Council, Inc. is a voluntary, not for profit organization of some 300 shippers and receivers of freight nationwide, founded in 1974. The Council's membership includes transportation professionals from companies, both large and small, who are responsible for the shipping, receiving and distribution needs of their companies.

Among the various functions these transportation professionals are responsible for are the purchase of motor carrier transportation services. Therefore, the Council's members have a direct interest in these proceedings.

The Federal Motor Carriers Safety Administration ("FMCSA") has requested comments on the proposal to amend the Federal Motor Carrier Safety Regulations to revise the current methodology for issuance of a safety fitness determination (SFD) for motor carriers.

2. COMMENTS


We believe that the proposed new regulations will have a significant impact on shippers, brokers and third party logistics providers that engage the services of motor carriers and freight forwarders.


For many years purchasers of motor carrier transportation assumed that they could rely on the Safety Fitness Procedures and safety ratings in 49 CFR Part 385 that were promulgated almost thirty years ago.

Starting with the establishment of the "SafeStat" database and ratings in the mid-1990's, and then later with "CSA 2010" and the initiation of the Safety Management System, there was great concern throughout the industry about both the methodology and the use of that data, including "BASIC" scores, by the public in vetting and selecting carriers. This concern arose because of litigation involving accident claims, such as the *Schramm v. Foster*, 341 F.Supp.2d 536 (D. Md. 2004) and *Jones v. CH Robinson*, 558 F.Supp.2d 630 (W.D. Va 2008) cases, and the very real exposure to liability based on some theory of "negligent hiring".

As a result of this uncertainty, as to whether the availability of SMS data would create an obligation on the part of shippers, brokers and third party logistics companies to use the information as part of their "due diligence" in selecting carriers, and pressure from a number of motor carrier groups, the FMCSA agreed to post a disclaimer to clarify the intent and use of the performance data. The SMS disclaimer on the FMCSA website states as follows:

USE OF SMS DATA/INFORMATION

The data in the Safety Measurement System (SMS) is performance data used by the Agency and enforcement community. A  symbol, based on that data, indicates that FMCSA may prioritize a motor carrier for further monitoring.

The  symbol is not intended to imply any federal safety rating of the carrier pursuant to 49 USC 31144. Readers should not draw conclusions about a carrier's overall safety condition simply based on the data displayed in this system. Unless a motor carrier in the SMS has received an UNSATISFACTORY safety rating pursuant to 49 CFR Part 385, or has otherwise been ordered to discontinue operations by the FMCSA, it is authorized to operate on the nation's roadways.

Notwithstanding the disclaimer, plaintiffs' lawyers in accident cases have continued to argue that the failure to take this data into account when hiring a carrier constitutes negligence. As such, shippers, brokers and 3PLs continue to face exposure to possible liability for "negligent hiring".

We maintain that it is within the sole purview of the FMCSA and appropriate state agencies to regulate motor carriers and ensure that motor carriers are operating in a safe manner. However, as a result of the "negligent hiring" claims, this regulatory burden has improperly shifted to shippers, brokers and 3PLs.

On December 4, 2015, pursuant to the FAST Act of 2015, the FMCSA announced that much of the CSA data that has been available on its website would no longer be accessible by the general public - at least until the FMCSA has completed further studies, reports and modifications to the satisfaction of Congress. The FAST Act did, however, permit the FMCSA to continue publication of "inspection and violation information submitted to the Federal Motor Carrier Safety Administration by commercial motor vehicle inspectors and qualified law enforcement officials, out-of-service rates, and absolute measures".

The dilemma faced by purchasers of motor carrier transportation is now once again arising in the provisions of the proposed Safety Fitness Determination rules. While the NPRM mentions some of the data in the present SMS system that is available to the public on the FMCSA website, it omits any mention of data – other than the SFD determination of "UNFIT" – that would continue to be available to the public. For example, if "crash" data continues to be shown on the FMCSA website, how would

shippers or brokers be expected to interpret such reports when they know nothing about the facts involved or what parties may be at fault?

The bottom line is that the NPRM fails to state whether or not the public can rely solely on an SFD determination that carrier is "fit" or "UNFIT" in vetting or hiring a motor carrier, without fear of exposure from "negligent hiring".

These omissions are an invitation for more of the vexing litigation that has plagued the industry.

3. CONCLUSION

In view of the foregoing, the Council believes that the final regulations, when published, must make it crystal clear that purchasers of motor carrier transportation need only verify whether the carrier has been declared "UNFIT", and have no responsibility to independently examine the safety fitness of a motor carrier beyond this determination, or any liability if they have done this.