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Re-Regulation Risks and Rewards

By Marc Blubaugh

FMCSA continues to pursue new regulatory initiatives that impose substantial burdens on the transportation industry – a number of which have dubious benefits.

MOTOR CARRIERS hauling goods across the nation's highways have never been safer. For instance, fatal crashes are down 32 percent, and the crash rate per 100 million miles has dropped by 74 percent since economic deregulation got underway in 1980. Indeed, since 2004 alone, fatal crashes involving commercial trucks are down more than 21 percent. Nevertheless, somewhat counter-intuitively, the Federal Motor Carrier Safety Administration (FMCSA) continues to pursue new regulatory initiatives that impose substantial burdens on the transportation industry – a number of which have dubious benefits. Some of FMCSA's actions leave the industry with the impression that the Agency is proposing solutions in search of a problem.

Background

One key way for the transportation industry to monitor the status of federal regulatory activity is to review the monthly *Report on Significant Rulemakings* published by the U.S. Department of Transportation. The report identifies formal current regulatory efforts underway at the Federal Aviation Administration, the Federal Highway Administration, the Federal Railroad Administration, the Federal Transit Administration, the Maritime Administration, the National Highway Traffic Safety Administration, the Office of the Secretary, the Pipeline and Hazardous Materials Safety Administration, and FMCSA. However, notably, the report does *not* identify informal regulatory efforts that such agencies pursue through "guidance" or otherwise.

The June 2016 report identifies nearly 100 ongoing rulemaking efforts at these agencies, including 14 underway at FMCSA. Of course, FMCSA has also just recently completed two other very significant important regulatory initiatives. What follows are some practical tips for compliance with two new regulations and a preview of what is to come.

Coercion

FMCSA enacted regulations, effective January 29, 2016, to prohibit motor carriers, freight brokers, freight forwarders, and shippers from "coercing" drivers from operating in violation of, among other things, safety regulations and hazardous-materials regulations. Coercion includes taking adverse employment actions against drivers, as well as merely threatening loss of a driver's business, employment, or work opportunities. Fortunately, merely asking a driver to make a trip that would cause a safety violation is not in and of itself coercion. The driver must object to the allegedly coercive action. For instance, a warehouseman tendering a load to a motor carrier's driver has no duty to ask the driver whether or not he or she can complete the requested services without violating safety regulations.

However, since penalties are severe – as much as $16,000 per offense – operators are urged to be cautious. For instance, warehouseman and intermediaries should keep the following in mind:

- *Communication.* Minimize direct communication with drivers when possible

(i.e., one should deal with the motor carrier's dispatcher instead of the driver whenever practicable).

- *Staff Training*. Train employees to understand the new coercion rule and to be sensitive to driver statements that might, on first impression, appear innocuous (such as statements about low tire tread).
- *Collaboration*. Be prepared to collaborate with all involved in order to find an alternative means of transporting a load when a driver objects.
- *Carrier Centric*. Impose any penalties and charge-backs upon the motor carrier rather than directly against the driver.
- *Documentation*. Document any responses made to a driver's objection regarding arguably coercive conduct.

Above all, motor carriers, freight forwarders, freight brokers, shippers and other intermediaries must not take any actions that may be construed as threatening, pressuring, intimidating or harming the driver, especially after the driver expresses any safety concerns.

Electronic Logging Devices

The final rule regarding mandatory use of electronic logging devices (ELDs) was published in December 2015. The rule requires all drivers who currently use paper logs to use ELDs by December 2017. In other words, certain short-haul drivers are exempt from the new rule.

The rule outlines various design and performance specifications (grandfathering in certain devices), contains protections for drivers concerned about the potential for driver harassment (such as putting limits on the precision of location monitoring), and establishes certain supporting documents that drivers must nevertheless maintain. Motor carriers would be well served to keep the following items in mind:

• *Early Adoption*. Many shippers and brokers have announced that they will stop using motor carriers not equipped with ELDs long before the December 2017 deadline arrives.

Motor carriers, freight forwarders, freight brokers, shippers and other intermediaries must not take any actions that may be construed as threatening, pressuring, intimidating or harming the driver, especially after the driver expresses any safety concerns.

(These shippers are concerned that motor carriers who wait until the last minute to comply will inevitably experience operational challenges that will jeopardize capacity.) Even though capacity will likely dip as December 2017 approaches, motor carriers who move to ELDs almost uniformly report an immediate reduction in technical "form and manner" logbook violations by their drivers.

• *Training*. Motor carriers must train their drivers to use ELDs properly so as to avoid the possibility of "false" entries. In other words, a driver who registers his or her time as "sleeper berth" instead of simply "off duty" has arguably made a "false" entry if he or she moves the truck when the ELD is in "sleeper berth" duty status. Straightforward training can help to avoid these technical hiccups.

• *Auditing*. Motor carriers should evaluate the use of ELDs to ensure that drivers are not trying to take advantage of perceived "loopholes" in ELD technology. For example, some drivers have been known to abuse the personal-use exemption. Others have wrongfully manipulated "unassigned" driving time that is recorded when duty status is not selected. Similarly, controls must be in place to manage the editing of ELD data by a motor carrier's back office. While edits are absolutely necessary on certain occasions when a driver erroneously identifies a duty status, excessive editing can be a telltale sign of abuse.

Regardless of one's view of ELDs, motor carriers are well advised to prepare for the December 2017 deadline sooner rather than later.

Looking ahead further on the regulatory horizon, FMCSA characterizes the following four of its 14 current rulemakings as "major": (1) Carrier Safety Fitness Determinations, (2) CDL Clearinghouse, (3) Heavy Vehicle Speed Limiters, and (4) Entry-Level Driver Training.

Carrier Safety Fitness Determination

FMCSA's Compliance, Safety, Accountability (CSA) program, which went "live" in 2010, was never the subject of formal agency rulemaking because FMCSA maintained that CSA was to be used only for prioritizing its own enforcement efforts. Nevertheless, brokers, shippers and insurers began using published CSA scores as further criteria upon which to evaluate motor carriers. At the same time, the traditional safety rating system remained in place. Under that system, motor carriers are either unrated or rated as Satisfactory, Unsatisfactory or Conditional.

The proposed Safety Fitness Determination (SFD) rule is aimed at decoupling safety ratings from the necessity of an on-site inspection and replacing it with CSA-driven data. Under the proposed SFD rule, motor carriers would be deemed either "fit" or "unfit." However, due to concerns with the CSA program, the U.S. Congress included in the Fixing America's Surface Transportation Act (the FAST Act), enacted in December 2015, various hurdles to the SFD rule moving forward. Specifically, the FAST Act requires the FMCSA to commission the National Research Council of the National Academies to undertake a thorough examination of the CSA program, including the critical Safety Measurement System utilized by the CSA program. The mandated examination will focus on whether a motor carrier's Behavior Analysis and Safety Improvement Categories (BASICs) correlate to future crash risk, the methodology used to calculate BASICs, the relative value of inspection information and roadside enforcement data,

any data collection gaps, accuracy of crash data when a motor carrier was free of fault, inconsistent reporting rates with respect to the same violation in different jurisdictions, and how the public is using CSA data.

The National Research Council must publicly publish and submit its report to the U.S. Congress and to the Inspector General by June 2017. If the report identifies deficiencies, FMCSA must submit to the U.S. Congress a detailed corrective action plan (including benchmarks, programmatic reforms, proposals, etc.) within the following 120 days (i.e., by October 2017). The Inspector General will then review the corrective action plan and submit a report to Congress regarding the adequacy of the corrective action plan within the next 120 days (i.e., by February 2018). In the meantime, throughout this entire process, FMCSA is prohibited from publishing to the general public any analyses of violations, certain crash data, alerts or the relative percentiles for each BASIC.

Notably, the FAST Act also provides that "[i]nformation regarding alerts and the relative percentile for each BASIC developed under the CSA program may *not* be used for safety fitness determinations" until the Inspector General makes the certifications mentioned above. Notwithstanding this clear statutory directive, FMCSA published the proposed SFD in January 2016, arguing that the SFD rule does not technically rely upon "alerts" or "relative percentiles" but, rather, "raw" scores and supposedly "absolute" criteria.

In any event, shippers, brokers and insurers who have had doubts about the probative value of CSA-related data ever since the CSA program was rolled out have yet another reason to be highly circumspect about relying on CSA data when selecting motor carriers to use. While FMCSA will still use CSA data for its own prioritization of enforcement efforts, and while shippers, brokers and insurers can legally request that motor carriers disclose such data to them, all involved should tread cautiously. Motor carriers who have received CSA "alerts" or who otherwise appear to be "unsafe" through a CSA prism can now point to the FAST Act and the Congressionally mandated study of CSA data as further good reasons as to why shippers, brokers and insurers should not rely on that data.

CDL Clearinghouse

This proposed regulation requires employers of commercial-driver-license holders to report positive drug and alcohol test results (and refusals to test) into a national clearinghouse. The data in the clearinghouse will be available to prospective employers of any driver who consents to the search. No driver who has a record of positive tests (or refusals to test) in the clearinghouse will be permitted to drive a commercial motor vehicle without complying with FMCSA's existing "return to duty" process. In general, this regulation will likely prove to be a material benefit to the industry. Ironically, publication of the final rule continues to be delayed due to, cryptically, "unanticipated issues requiring further analysis." In June 2016, FMCSA predicted publication of the final rule on August 29, 2016.

Heavy Vehicle Speed Limiters

This proposed regulation requires the use of speed-limiting devices in heavy-duty commercial vehicles. FMCSA has continued to postpone the Notice of Proposed Rulemaking that will outline the contours of this rule. Earlier this year, FMCSA stated that the notice would issue in Spring 2016. In June, FMCSA announced that the notice would not issue until Summer 2016. FMCSA states that it "believes that this rule would have minimal cost, as all heavy trucks already have these devices installed, although some vehicles do not have the limit set." Nevertheless, as the notice has not issued, questions exist as to whether the rule will establish a particular maximum speed limit, whether exceptions will exist, etc. Small carriers remain particularly concerned that this rule will ultimately impose meaningful additional costs on their operations.

Entry-Level Driver Training

This proposed regulation will require those applying for CDLs (or upgrading their CDLs from a Class B to a Class A) to complete some combination of classroom and behind-the-wheel training from a registered training provider. The rule in its current form has not been exceedingly controversial, although many in the industry would have preferred to have seen a greater emphasis upon actual road training as compared with classroom training. The date for compliance will be three years after the effective date of the final rule.

In short, FMCSA has been increasingly active (by virtue of both formal rulemaking and informal regulatory efforts), despite the fact that deregulation has supposedly been ongoing since the Reagan era. Over 30 years later, it remains the case for much of the motor carrier industry that, as the Gipper himself quipped, "The most terrifying words in the English language are: 'I'm from the government and I'm here to help.'"

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