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CSA Update – The Continuing Struggle to Get Things Right

A few months back I wrote a comprehensive review of the FMCSA's CSA program, including a summary of how it started, its current stage and where it may go in the future. SEE, "CSA and Motor Carrier Safety Ratings: The Past, Present and Future" published in *JD Supra* (February 9, 2012)ⁱ. This article is an update. CSA continues to be a work in progress and recent changes make it no less controversial. Developments that have occurred since my article was published include a delay by the FMCSA in implementing a system for assessing carrier responsibility for reportable crashes, changes or "enhancements" to the Safety Measurement System ("SMS"), and a further delays in implementing the FMCSA's plan to use SMS data in the making of Safety Fitness Determinations for carriers. These three issues will be addressed separately below.

CRASH INDICATOR BASIC CHANGES

Controversy abounds over the decision by the FMCSA to delay the March implementation of a system for assessing fault for reportable crashes and using the assessment to weigh reportable crash data for the Crash Indicator CSA BASIC. Presently, scores for the Crash Indicator BASIC are not being made public because of the FMCSA's recognition of motor carrier concerns that many crashes cannot be attributed to motor carriers, and therefore should not be viewed by shippers or insurers. The crash data numbers now used come from "reportable accidents" defined as "[t]he number of crashes that required at least one vehicle to be towed from the scene due to disabling damage is presented, as well as the number of crashes that resulted in an injury or fatality to a person involved in the crash"ⁱⁱ.

As described by the FMCSA, this is how the system now uses all crashes, regardless of fault, in scoring carriers under the Crash Indicator BASICⁱⁱⁱ:

The structure of the new SMS is such that crash accountability is not automatically determined or considered. In fact, recordable crash reports that States submit to the Federal Motor Carrier Safety Administration do not include an accountability determination. Consequently, motor carriers are identified for possible intervention based on recordable crashes without consideration of accountability. Why does the Federal Motor Carrier Safety Administration take this approach? This approach is taken because data analysis has historically shown that motor carriers who are involved in crashes, regardless of accountability, are likely to be involved in more future crashes than carriers who are not. Put simply, past crashes are a good predictor of future crashes.

The agency has been working on a plan to provide carriers with an assessment of fault in the crashes used for the Crash Indicator. The plan, as originally proposed, would place primary reliance upon information gleaned from accident police reports and carrier statements. If a carrier were found to be without fault in certain reportable accidents, the adverse impact of those accidents on the carrier's score would be diminished through a system of weighting crashes for fault. This fault assessment plan was to be released in March. Instead, the agency abruptly changed course in early March and decided to reconsider the plan, out of concerns voiced by safety advocates^{iv} that the plan did not provide the means for interested parties to comment upon the facts. Apparently the agency's ultimate goal remains to promulgate a crash accountability process, but the ATA and other trucking representatives remain highly critical of the FMCSA's delay in implementing a fault assessment system for SMS crash data.

Plans for the FMCSA's crash fault assessment process apparently provide for a method of coding every interstate motor carrier crash as either "accountable" or "not accountable" to the motor carrier and the driver^v. According to the agency "FMCSA is assessing the feasibility of evaluating crashes for accountability/preventability before they are used by the SMS in the Crash Indicator BASIC. This would allow FMCSA to better concentrate intervention efforts on motor carriers that have high preventable/accountable crash rates^{vi}."

Although there is a delay in disclosing and implementing a fault assessment system for the Crashes BASIC, at present the Crash Indicator BASIC can only be seen by enforcement personnel or by a motor carrier that is logged into its own safety profile and it is not publically available. Nevertheless, trucking industry representatives have been highly critical of the delay, in part because industry representatives have worked so hard to cooperate with the FMCSA during the entire CSA process and the agency has pulled back from its earlier commitment to have the fault assessment system in place by now. In addition, industry leaders believe that the use of law enforcement accident reports should provide an objective source of information upon which to base a fault assessment.

The frustration over the lack of a fault assessment process mounted when the FMCSA announced plans to disclose the number of fatal accidents to which a carrier has been involved separately from "injuries/crashes" a carrier's information category. The change would go public in July. The planned breakout of fatality numbers is part of a slate of FMCSA changes to its Compliance, Safety, Accountability program^{vii}. These changes are discussed in more detail in the section below. The FMCSA describes this issue as follows^{viii}:

Overview: In the "Summary of Activities" section of a carrier's information on SMS Website, FMCSA displays a count of reportable crashes broken into two categories: "fatal/injury" and "tow away." Stakeholders have asked FMCSA to separate the combined "fatality/injury" category.

Solution: FMCSA developed a method to display injury crashes and fatality crashes separately.

The decision to make the fatality accident breakout, coupled with the delay in implementing the fault assessment system, allows the number of a carrier's fatal accidents to be highlighted in public view, while withholding the fault assessments that might put the raw numbers of fatal accidents in a different light.

SMS ENHANCEMENTS

On March 27, 2012, the FMCSA published a Notice in the Federal Register entitled “Motor Carriers Can Now Preview the First Package of SMS Enhancements”^{ix}. It announced the first of a series of changes to be made to the SMS system up to twice a year. The changes are detailed in the posted “Foundational Document” entitled “Safety Measurement System Changes.”^x The comment period formally ends on May 29, 2012. The changes will be implemented into the publicly displayed web site in July. In the meantime, individual carriers may preview how the changes may impact them, by logging into the CSA Website or the FMCSA Portal.

According to the Foundational Document, the following changes are being proposed^{xi}:

1. Strengthening the Vehicle Maintenance Behavior Analysis and Safety Improvement Category (BASIC) by incorporating cargo/load securement violations from today's Cargo-Related BASIC.
2. Changing the Cargo-Related BASIC to the Hazardous Materials (HM) BASIC to better identify HM-related safety problems.
3. Better aligning the SMS with Intermodal Equipment Provider (IEP) regulations.
4. Aligning violations that are included in the SMS with Commercial Vehicle Safety Alliance (CVSA) inspection levels by eliminating vehicle violations derived from driver-only inspections and driver violations from vehicle-only inspections.
5. More accurately identifying carriers involved in transporting HM.
6. More accurately identifying carriers involved in transporting passengers.
7. Modifying the SMS display to (i) change current terminology, “inconclusive” and “insufficient data,” to fact-based descriptions and (ii) separate crashes with injuries and crashes with fatalities.

Through change items 1 and 2 above, the FMCSA is shifting cargo/securement violation data from the current BASIC category called “Cargo Related” into the “Vehicle Maintenance” Category and is essentially creating a free standing Hazmat violations category. The change is apparently made in response to complaints from flatbed carriers that cargo/securement violations had too much of an impact on overall scores. The change tends to dilute the impact of cargo/securement violations.

The agency will create a new HM BASIC based on vehicle inspections (i.e., Level 1, 2, 5 and 6) and HM violations where the vehicle was transporting placardable quantities of HM. The changes increase the impact of Hazmat violations for carriers whose Hazmat cargos are a small part of their overall freight profile. According to the FMCSA, the change was made because “the Cargo-Related BASIC currently includes HM violations and load securement violations, some HM safety issues could be masked”. The agency currently plans to make the results of the new HM BASIC category public when the changes go into effect, even though the current Cargo Related BASIC is not. The agency had not been publicly displaying the Cargo Related BASIC, out of concerns raised by industry representatives that Hazmat violations do not represent a valid crash risk element. Apparently, though, the agency is now taking the position that Hazmat violations are directly related to accident propensity.

Changes # 3 and 4 are also maintenance/inspection related. Change # 3 specifically relates to regulatory changes with regard to responsibility to make pre-trip inspections for intermodal trailers. The SMS does not currently include any roadside violations associated with an intermodal (“IEP”) trailer distinct from

the motor carrier. Such violations will now be applied to the motor carrier when there is evidence that the driver performed a pre-trip inspection and the violation could have been detected in a pre-trip inspection. In change # 4, the FMCSA will remove vehicle violations found during driver-only inspections and driver violations found during vehicle-only inspections to align the SMS with existing CVSA policies regarding inspection levels.

Changes 5 through 7 are intended to more accurately identify certain categories of carriers. Change # 5 is primarily with regard to Hazmat carriers. The agency is trying to restrict the number of carriers subject to the more stringent HM thresholds. FMCSA will tighten Hazmat placardable inspection criteria, while keeping the HM review and permit criteria, to focus intervention resources on carriers involved in the majority of placardable HM transport^{xii}. For a carrier to be subject to the HM threshold due to HM inspection activity, that carrier must have:

- At least two HM placardable inspections within the past 24 months, with one inspection occurring within the past 12 months, and
- At least 5% of total inspections that are HM placardable inspections.

Change # 6 is intended to more accurately identify passenger carriers subject to a significantly higher standard than non-passenger carriers and subject to intervention under those standards.

Change # 7 provides alternative terminology to better describe carriers that either have enough inspections but too few violations to warrant being considered for FMCSA interventions (“inconclusive”) or carriers that do not have enough inspections to produce a measure “robust enough” to even be assessed (“insufficient”). Change # 7 also breaks out fatal accidents separately from “injuries/crashes” in a carrier’s information category, as discussed in the first section.

Although available for preview by trucking companies for less than a month, some carriers have been able to determine the potential impact of the changes on their CSA scores. There is some significant concern being expressed by carriers who haul Hazmat cargos, but not frequently, concerning the creation of the standalone Hazmat BASIC . Some of these carriers, in viewing their data preview, have found that the changes are causing “causing sudden, dramatic shifts in some carriers’ scores^{xiii}” and primarily raising the scores (thereby showing less safety). Flatbed carriers have generally seen their scores improve, since cargo securement is now a part of the larger Vehicle Maintenance” Category.

FURTHER DELAYS IN USING SMS DATA TO MAKE SAFETY FITNESS DETERMINATIONS

Still coming in the CSA implementation process is an expected Notice of Public Rulemaking (“NPRM”) to amend existing regulations to allow for the use of SMS data in making Safety Fitness Determinations. Until that rule change is made, SMS data will serve simply as a tool to determine when the intervention of the FMCSA is necessary, based on the carrier’s percentile BASICs scores in relationship to other carriers. According to the FMCSA, “The third part of CSA, the updated Safety Fitness Determination (SFD), will require rulemaking to decouple the Agency’s official Safety Rating (as required in 49 U.S.C. 31144) from the requirement of an onsite investigation. It will allow FMCSA to base Safety Ratings directly on performance data and to update them on a monthly basis.^{xiv}” However, the issuance of the SFD Notice of Rulemaking has been delayed several times by the FMCSA, with the most recent indications from the agency that the proposed rule will be forthcoming late this year. According to the

FMCSA, Draft rulemaking is currently in review within USDOT, but the NPRM is expected to be published in late 2012^{xv}. Under the proposed SFD rule, the FMCSA would utilize SMS data by^{xvi}:

- **Incorporating on-road safety performance** via the new SMS, which will be updated on a monthly basis
- **Continuing to include** major safety violations found as part of CSA investigations
- **Produce an SFD** to determine if a carrier is unfit to operate

When SMS data is ultimately used as the basis for a carrier's bottom line Safety Fitness Determination, the FMCSA plans to use only accidents determined to be at least partially the carrier's fault.^{xvii}

CONCLUDING REAMRKS

The implementation of CSA will be ongoing for the near future. Both the FMCSA and trucking industry representatives will continue to work hard to deal with the multitude of issues and details left to be worked out. The process has already been much slower than many would like, has not been without controversy and will likely generate new controversy. Stay tuned!

This Journal is intended to give a unique perspective on the practical business impacts of developments in the law relating to transportation. The contents of this Journal are not intended to be and should not be relied upon as legal advice.

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WALT METZ BIO

Walt Metz was Vice President, General Counsel and Secretary of Americold Realty Trust/Americold Logistics in Atlanta for five years from 2005 to 2010, and has several years of experience working as in-house counsel for two major trucking companies. At Americold he directed the legal affairs for North America's largest provider of temperature controlled food distribution and logistics services, Americold Logistics, LLC. Before taking his position at Americold, Walt served in the legal departments of Sears, Roebuck and Company in the Chicago area and Werner Enterprises of Omaha. During Walt's seven plus years at Werner Enterprises he supervised the nationwide defense of high exposure trucking and transportation litigation for the large transportation carrier, and provided advice on claims, litigation and risk management issues, including the structure of self-insured liability and workers compensation programs and the associated layers of excess insurance policies. At Sears he continued to manage litigation, including high exposure commercial litigation and class actions. Walt also recently completed a short tenure at Old Dominion Freight Lines. Prior to going in-house, Walt was a member of two Omaha law firms, where he practiced primarily in Commercial Litigation and General Practice. He graduated from the University of Nebraska-Lincoln with High Distinction and was elected to membership in Phi Beta Kappa. He also earned his JD at Nebraska. Walt continues to be a huge Big Red fan!

Walt's complete professional profile can be accessed at: <http://www.linkedin.com/in/waltmetz>.

Mr. Metz is available for a new in-house legal opportunity.



ENDNOTES:

- ⁱ (<http://www.jdsupra.com/post/documentViewer.aspx?fid=2b80cd60-d261-4776-903f-52e9f816d6dd>).
- ⁱⁱ What is included in the Summary of Activities?, FAQs, <http://csa.fmcsa.dot.gov/faqs.aspx?faqid=1421>.
- ⁱⁱⁱ Frequently Asked Questions, How does the Safety Measurement System (SMS) handle crashes when motor carriers are not at fault?, <http://csa.fmcsa.dot.gov/faqs.aspx?faqid=1421>.
- ^{iv} "FMCSA Stops Plan to Determine Accountability in CSA Crash Data", By *Oliver B. Patton*, *Washington Editor, Truckinginfo*, the web site of Heavy Duty Trucking Magazine, March 12, 2012.
- ^v "Trucking Officials Blast FMCSA Over Crash-Fault Review Delay, ", By *Eric Miller*, Staff Reporter, *Transport Topics*,, *Transport Topics*, March 19, 2012.
- ^{vi} What is the Federal Motor Carrier Safety Administration (FMCSA) doing in the long-term about crash accountability? FAQs, <http://csa.fmcsa.dot.gov/FAQs.aspx?faqid=1421>
- ^{vii} "FMCSA to Disclose Crash Data Despite Delay of Fault Rulings", By *Eric Miller*, Staff Reporter, *Transport Topics*,, *Transport Topics*, April 9, 2012.
- ^{viii} http://csa.fmcsa.dot.gov/Documents/SMS_FoundationalDoc_final.pdf
- ^{ix} 77 FR 18298; <https://federalregister.gov/a/2012-7360>.
- ^x http://csa.fmcsa.dot.gov/Documents/SMS_FoundationalDoc_final.pdf
- ^{xi} http://csa.fmcsa.dot.gov/Documents/SMS_FoundationalDoc_final.pdf
- ^{xii} http://csa.fmcsa.dot.gov/Documents/SMS_FoundationalDoc_final.pdf
- ^{xiii} "Trucking's CSA Concerns Are Justified, Studies Claim", By *Eric Miller*, Staff Reporter, *Transport Topics*, April 16, 2012.
- ^{xiv} <http://www.fmcsa.dot.gov/documents/strategic-plan/draft-fmcsa-2011-2016-strategic-plan.pdf>, P. 8.
- ^{xv} FMCSA Presentation to SBA, February, 2012.
- ^{xvi} FMCSA Presentation to SBA, February, 2012.
- ^{xvii} "In the short-term, the Federal Motor Carrier Safety Administration's proposed rule on SFD will propose that a motor carrier's formal safety rating (i.e., the replacement for the traditional Unsatisfactory, Conditional, or Satisfactory rating process) would be adversely affected by crashes only when the motor carrier is at least partly at fault. These are known as "preventable accidents." A Safety Investigator would determine which crashes are preventable." FAQs, <http://csa.fmcsa.dot.gov/FAQs.aspx?faqid=1421>.