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New Entrant Safety Assurance Process, Notice of Proposed Rulemaking, 71 FR 76730, December 21, 2007

Advocates for Highway and Auto Safety (Advocates) submits these comments in response to the Federal Motor Carrier Safety Administration's (FMCSA) proposed revisions to the new motor carrier entrant safety assurance process. Section 210 of the Motor Carrier Safety Improvement Act of 1999 (MCSIA) added 49 U.S.C. § 31144(g) directing the establishment of regulations requiring each own or operator with new operating authority to undergo a safety review within 18 months of starting operations.[1] P.L. 106-159, 113 Stat. 1764 (Dec. 9, 1999). FMCSA proposes to strengthen the new entrant approval and oversight process for domestic motor carriers in various ways and to include, for the first time, a special new entrant application and safety evaluation process that specifically addresses the movement of commercial motor vehicles (CMVs) across the U.S. southern border to and from countries by transiting Mexico. 71 FR 76730, 76735-76737. The agency notes that it previously has interpreted Section 210 of the MCSIA to extend to all motor carriers, not just for-hire motor carriers, under federal jurisdiction. The agency has applied the new entrant safety assurance process to all

[1] Although FMCSA accurately glosses the relevant statutory provision, the agency promotes unnecessary terminological confusion throughout the notice of proposed rulemaking by sometimes referring to Compliance Reviews, used to determine safety fitness with a resulting assigned rating, as "safety reviews," when the agency's interpretation of the phrase 'safety review' in the MCSIA clearly refers to Safety Audits which are primarily educational in nature and do not result in a safety fitness rating. Even more anomalously, a concept of "safety review" has no operational meaning within FMCSA regulation. An evaluation of the safety of a motor carrier is either a Compliance Review resulting in an assigned safety fitness rating, or a Safety Audit, which is less intensive and less comprehensive and does not result in a safety fitness rating. *See*, *e.g.*, 71 FR 76735-76736, where the agency refers to a "safety review," but is describing a Safety Audit, and, *e.g.*, at 76736 where the agency uses the expression 'safety review' to refer to a non-North American motor carrier Compliance Review.

domestic and Canada-domiciled motor carriers regardless of whether they must register with FMCSA pursuant to 49 U.S.C. § 13901.[2] *Id.* at 76731.

I. Introduction.

Because there are numerous, specific items being proposed both for domestic and foreign new entrant motor carriers applying for FMCSA registration and operating authority, Advocates provides this summary overview of some of the major issues in this proposed rule and Advocates' positions on the merits. While Advocates supports several of the specific proposals of the agency to strengthen the new entrant approval process, we continue to object to the agency's ongoing use of both the Safety Status Measurement System (SafeStat) and its roster of Acute and Critical regulations as the guideposts for determining which carriers are increased safety risks. *Id.* at 76731. Advocates also continues to disagree with FMCSA on its adopted threshold criteria for scoring violations of Acute and Critical regulations, including the agency's use of the benchmarks of rural and urban crash rates for determining new entrant unacceptable safety performance. *Id.* We have similar disagreements with FMCSA's standard for failing a Safety Audit (SA) if a new entrant fails 3 or more separate factors of the 6 regulatory factors. Primarily, our objection is that these threshold criteria and scoring systems are ultimately arbitrary and, moreover, their basis is unexplained by FMCSA in the preamble of the instant proposed rule. In particular, the agency's SafeStat system of scoring safety is not objective at several levels and, moreover, does not index carrier safety adequacy to an objective standard of safety but instead uses a peer-to-peer, relativist approach to safety scoring that has no reference to independent standards of motor carrier safety.[3]

Advocates also continues to strongly disagree with FMCSA on its basic approach to new entrant application, grants of temporary registration and operation authority, and grants of permanent registration and operating authority following the 18-month probationary period for new entrants as specified in Section 210 of the MCSIA. *Id.* at 76730-76731. We continue to support a pre-authorization SA for U.S. motor carriers

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[2] *See*, 67 FR 31979 (May 13, 2002).

[3] Advocates has detailed its objections to the SafeStat system in its comments dated June 30, 2006, filed with Docket No. FMCSA-2005-23239, "Proposed Improvements to the Motor Carrier Safety Status (SafeStat) Measurement System," 71 FR 26170 (May 3, 2006). It is noteworthy that the Regulatory Evaluation/Regulatory Flexibility Analysis, *New Entrant Safety Audit Rule Revision*, FMCSA, January 2006, accompanying this proposed rule contains a bibliography which does not cite any of the in-depth examinations of SafeStat that have been performed by the U.S. Government Accountability Office, the U.S. Department of Transportation Office of the Inspector General, or by independent organizations contracted by FMCSA to evaluated SafeStat such as the Oak Ridge National Laboratory. These investigations all found that both the basis for and the operation of SafeStat, including the accuracy and completeness of its data base, are unsound and cannot accurately determine which motor carriers are at risk for crashes and other safety violations. *See*, Advocates' comments to the cited SafeStat docket that review the findings of these three investigations of SafeStat.

coupled with a written proficiency examination to determine the knowledge and capabilities of new entrant motor carriers for complying with the Federal Motor Carrier Safety Regulations (FMCSR) and the Hazardous Materials Regulations (HMR).

It is also unwise for the agency to regard the SA eventually conducted at some point before expiration of the 18 months of temporary registration and operation authority as primarily an educational tool and not as a mechanism for vetting the specific safety abilities of an applicant motor carrier. *Id.* at 76731. The SA should simultaneously evaluate, at the applicant's place of business, the safety management controls the new entrant has in place and test the proficiency of the applicant new entrant's understanding and application of the FMCSR and HMR to its vehicles, drivers, and operations. Without this threshold assessment, FMCSA is simply rubberstamping a new entrant's registration to begin operations with no knowledge or assurance that it does not present a threat to public safety. That potential threat to public safety could have been controlled by an initial approval process that vets the applicant's company for its safety capabilities and knowledge of applicable laws and regulations before it begins operating.

This lack of initial testing and approval stands out in even greater relief given the agency's acknowledgement in this rulemaking proceeding that the self-certifying statements currently solicited on Form MCS-150A for new entrant applications for registration are essentially worthless because of the false responses often provided by new motor carriers. *Id.* at 76733. We agree with and support FMCSA's proposed action to eliminate Form MCS-150A as a gratuitous paper exercise that cannot provide reliable information about the knowledge and safety management capabilities of U.S. domestic new entrant motor carrier applicants.

However, Advocates cannot support the agency's proposal to continue the *status quo* of waiting until later during the 18-month probationary period to perform, at some unspecified time, an SA of a new entrant. Since the agency itself characterizes an SA as primarily an educational tool,[4] the determination of adequate safety management controls and knowledge of relevant motor carrier regulations by an applicant motor carrier does not rise to the level of the detailed scrutiny applied through a Compliance Review (CR). *Id.* at 76731, 76737. Although Advocates agrees that a CR resulting in a safety fitness rating can only be meaningfully used after a carrier has had some period of time in operation, we disagree with the central focus of the SA as education. Along with a required proficiency examination, U.S. applicant motor carriers should receive an initial SA that vets not only the safety management controls that the company is proposing to use to haul freight or passengers, but also includes an initial evaluation of the equipment and drivers that the new entrant proposes to use.

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[4] Also *see*, *Proposed Rule Regulatory Evaluation-Regulatory Flexibility Analysis: New Entrant Safety Audit Rule Revision*, Federal Motor Carrier Safety Administration (Docket No. FMCSA-2001-11061-36). January 2006, at 1, where FMCSA implicitly argues that educational purposes and determination of adequate safety management controls are equally important for SAs.

The agency advances no rationale in the preamble of the proposed rule for why a pre-authorization SA is necessary for certain foreign motor carriers but is not needed for U.S. applicant motor carriers. FMCSA only asserts that it is familiar with the safety systems and operations of U.S. and Canadian motor carriers, but that it lacks such familiarity with non-North American (non-NA) motor carriers. *Id.* at 76735-76736. Advocates fails to see why familiarity with U.S. motor carriers somehow justifies not conducting a pre-authorization SA for domestic companies to determine an applicant's initial safety knowledge and capabilities for complying with the FMCSR and HMR.

The proposed elimination of form MCS-150A makes the contradiction even more apparent between the self-certifying statements elicited by the agency's proposed adaptation of form OP-1(MX) for non-NA motor carriers and its admission that self-certifying statements by U.S. new entrant applicants are not reliable indicia of a motor carrier's familiarity with and willingness to comply with the FMCSR and the HMR. *Id.* at 76735-76736. FMCSA, in fact, advances no arguments in the instant rulemaking proposal that legitimize its reliance upon self-certifying statements in Section V of OP-1(MX) when, at the same time, the agency rejects the use of the similar self-certifying statements that formed the heart of form MCS-150A.[5]

Advocates believes that the value of MCS-150A and of OP-1(MX) stand or fall together. If MCS-150A is no longer regarded by the agency as a tenable means of determining the safety knowledge and capabilities of U.S. applicant motor carriers, then it is difficult to see how FMCSA can justify the use of Section V of OP-1(MX) for applicant carriers from Mexico and from non-NA countries further to the south. Advocates cannot find any statements of record by FMCSA demonstrating the extent to which subsequent inspections and other oversight actions, including enforcement, of Commercial Zone-only Mexico-domiciled motor carriers, have shown that the safety self-certifications and additional, required attachments of Section V of OP-1(MX) match the facts and reality of the safety knowledge and practices of these freight- and passenger-carrying firms operating in the border zones. A significant percentage of the representations made in Section V of OP-1(MX) could in fact be fraudulent, just as the agency has found in its examination of MCS-150A.

Because the non-NA motor carriers FMCSA has found to be conducting illegal operations in the U.S. are already in interstate commerce,[6] Advocates agrees with the agency that it is appropriate for FMCSA to conduct CRs for these companies within 3 months of the effective date of the proposed regulation and to conduct CRs for companies

[5] Similarly, Advocates notes that it can find no statements of record by FMCSA of the percentage of applicant Mexico-domiciled motor carriers using form OP-2 providing fraudulent responses to the self-certifying inquiries of Section V of this form for southern Commercial Zone-only operations.

[6] "This group of carriers allegedly drives or flies into interior States to purchase used tractor/trailers, school buses, farm equipment, and other vehicles. These vehicles are transported to Central America through the United States and Mexico without proper registration, insurance or licensing." 71 FR 76736.

issued a U.S. DOT registration number and/or operating authority between the date of the proposed rule and before the effective date of a final rule. *Id.* at 76736. Advocates also supports the agency's proposal that all non-NA motor carriers undergo a pre-authorization audit before being granted new entrant registration or operating authority. *Id.* at 76737. This is appropriate because, as with Mexico-domiciled motor carriers applying for operation in the U.S. beyond the southern Commercial Zones, these non-NA interstate motor carriers should be subjected to the approval regime triggered by applicants using form OP-1(MX).

Finally, Advocates would like to emphasize that conducting exit CRs continue to be a pressing need for new entrant U.S. motor carriers after the initial 18 months of temporary registration and operating authority. If conducting CRs before granting permanent registration are appropriate for foreign motor carriers from countries south of the U.S. to operate in the U.S., then the value of this detailed safety fitness evaluation is equally appropriate for U.S. motor carriers in order to gain permanent registration and operating authority. Since it is well-known that FMCSA conducts only a tiny percentage of CRs each year on existing U.S. motor carriers and that the number of U.S. motor carriers registered with the agency now exceeds 700,000, the agency is only adding to the increasing backlog of unrated motor carriers by implicitly refusing to perform CRs on new entrants. If FMCSA is serious about improving motor carrier safety, it needs to evaluate the adequacy of new U.S. motor carriers with the intensive safety fitness investigation of a CR prior to allowing them to operate without any further requirements for safety evaluation. FMCSA has stated in this notice that approximately 48,000 new U.S. motor carriers apply for registration and/or operating authority each year. *Id.* at 76743. The agency needs to require that these motor carriers undergo a CR and, if successful, that they are assigned a safety rating after they have accumulated 18 months of temporary operation and before they are granted permanent registration or operating authority. FMCSA in this rulemaking notice continues to uphold the insupportable paradox of requiring foreign motor carriers to submit to pre-authorization SAs and subsequent, exit CRs, but not to apply similar, stringent safety screening as routine for new U.S. motor carriers. The agency has no arguments in this notice for perpetuating this disparity that poorly serves the interest of the public in reducing motor carrier crashes, deaths, and injuries.

Advocates will discuss below specific proposals of the instant rulemaking action.

- **Safety Audit Reliance on Critical and Acute Regulatory Violations.**

SafeStat suffers from the subjectivity used in severity weighting the many Review Measures used to operate the SafeStat algorithm for reaching scores and percentile rankings of motor carriers. SafeStat has 183 Acute and Critical regulations. In each case,

the Measure or Violation is denominated as either Acute or Critical and a severity weight of 1, 2, or 3 is assigned to the Measure or Violation.[7]

These Acute and Critical categories are ultimately the result of the "expert judgment" of panels of trucking industry-related or enforcement community representatives that chose whether a regulation was "Acute" or "Critical" and assigned an increasing severity weight of 1, 2, or 3 to each of the 183 categories.[8] 'Acute' is defined by the agency as "those regulations where noncompliance is so severe to require immediate corrective actions by a motor carrier regardless of the overall safety posture of the motor carrier." 'Critical' is defined by the agency as "those identified regulations where noncompliance relates to management and/or operational controls." 62 FR 28826, 28832 (May 28, 1997).

These definitions and the quantitative weighting assigned to each of the regulations denominated as either "Acute" or "Critical" have been the subject of much dispute over the years, including challenges by the trucking industry to FHWA's adoption and use of these violation characterizations in calculating safety fitness ratings.[9] In addition, Advocates does not agree in many instances with the assignment of numerous regulations to each of the two categories and of the weightings assigned to many of the listed regulatory violations.

For example, a violation of the commercial driver regulation 49 CFR §383.23(a), "knowingly allowing, requiring, permitting, or authorizing an employee with a Commercial Driver's License which is suspended, revoked, or canceled by a state or who is disqualified, to operate a commercial motor vehicle" is considered only a Critical, not an Acute, violation and is only assigned a severity weight of 2 rather than 3. Similarly, a violation of § 392.4(b), "requiring or permitting a driver to drive while under the influence of, or in possession of, a narcotic drug, amphetamine, or any other substance capable of rendering the driver incapable of safely operating a motor vehicle" is, again, assigned only a severity weight of 2 rather than 3. A similarly lenient view of violation

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[7] SafeStat is currently in its eleventh (11th) full, published iteration. The current version of SafeStat is Version 8.6, which is available from the FMCSA web site through the John A. Volpe National Transportation Systems Center, http://www.fmcsa.dot.gov and http://ai.fmcsa.dot.gov/SafeStat. Previous versions were promulgated intermittently since the initial Version 5 was first adopted and implemented on October 4, 1997. *See*, http://ai.fmcsa.dot.gov/SafeStat/Versionnotes.asp at 1. *See*, Version 8.6, Appendix B.

[8] Advocates was participated as a member on one of these panels in the early 1990s. Advocates objected to the arbitrary nature of both the violations identified, the choice of whether to term them Acute or Critical, and the severity weights considered. Advocates raised its concerns at the time to FHWA representatives that the agency was attempting to create an system of arbitrary pseudo-quantification of motor carrier violation categories and severity weights through focus group discussions.

[9] *See*, the discussion of the rulemaking history and of the legal actions filed against FHWA that are reviewed in the 1997 Federal Register notice. 62 FR 28826 *et seq.* (May 28, 1997).

severity governs all of the separate regulatory violations of commercial driver Hours of Service (HOS) requirements and limits. In each instance, a violation, such as drivers exceeding maximum driving time or taking insufficient off-duty time to get enough sleep, are only regarded as Critical, not as Acute, violations, and all HOS violations are assigned severity weights of 2 rather than 3.[10]

For the 118 hazmat regulations and their violations, only 4 are assigned severity weights of 2 or 3. The other 114 violations are all given the lowest severity rating of 1. Violations assigned only the lowest severity rating of 1 include "moving a transport vehicle containing hazardous materials that is not properly marked or placarded." Even the separate category of hazmat Severe Regulations only has the value of 1 assigned as the severity weight for each violation. These violations of Severe Regulations with the lowest assigned severity weight include, "failing to mark a package of hazardous materials with the words 'Inhalation Hazard' when required," "offering a forbidden material for transportation," "offering for transportation materials which if combined would likely cause a dangerous evolution of heat, flammable or poisonous gas or vapor, or corrosive material," "transporting or loading two or more materials in a cargo-tank motor vehicle which resulted in an unsafe condition (fire, explosion, etc.)," and "transporting a hazardous material in a cargo-tank motor vehicle which had a dangerous reaction when in contact with the tank."[11] It is not difficult to take issue with the low weighting of the seriousness of these violations because of their potential threat to public safety.

Advocates regards the listing of which violations are "Acute" and which are "Critical" as having no credibility whatever. The weighting of each of the 183 violations similarly are fatally infected with subjectivity without objective correlation with actual safety risk and operational consequences. Both the categories of "Acute" and "Critical" and the weighting of each of violations continue to be applied by FMCSA with no defense or explanation. Consequently, Advocates has no confidence in the pseudo-quantification of 5 of the 6 Factors that the agency uses in a SA to assess 1.5 points for each instance of noncompliance with an Acute regulation and 1 point for each instance of noncompliance with a Critical regulation. We do not believe that FMCSA has ever provided a rational defense of its presumption that these scores accurately identify which new motor carriers are deemed to be at an increased risk of dangerous operations or of regulatory noncompliance. 71 FR 76731. These ratings of Acute or Critical, and associated severity weightings, are not defensible, underrate the real-world safety threat of scores of violation categories, and are long overdue for fundamental revision. Most of them indulge motor carrier practices that constitute substantial dangers to public safety,

[10] Each example discussed is drawn from the listing of Acute and Critical regulations in Tables B-1 – B-5 of Version 8.6, Appendix B.

[11] All examples are taken from the violations listing of SafeStat Version 8.6, Appendix B.

and their threat level needs to be increased with the corresponding levels of investigation and enforcement commensurately made more severe.

FMCSA in the preamble of the notice alludes to its study of a "new approach to assessing the severity of violations as part of its announced CSA [Comprehensive Safety Analysis] 2010 Initiative (69 51748)."[12] 71 FR 76731. The discussion of what that would consist of is relatively brief and general in nature and does not provide the level of detail that permits thoughtful evaluation of the agency's reasoning or proposal. *See*, 71 FR 61131, 61134-62235 (Oct. 17, 2006). However, as Advocates has pointed out in its comments on the CSA 2010 Initiative, we strongly disagree with the agency's argument that fatigued driving can be determined from hours of service (HOS) violations discovered during various investigations of drivers, vehicles, and motor carriers, and from crash reports with "driver fatigued" indicated as a contributing factor. This approach to detecting fatigue is strewn with pitfalls and will clearly underestimate the prevalence of driver fatigue by a wide margin.

With regard to the agency's determination of the severity of violations for drivers related to the use of controlled substances and alcohol, it is clear that CMV drivers can use common pharmaceuticals, such as painkillers, that cannot be detected through routine or reasonable suspicion drug testing. This was strongly emphasized in the Medical Review Board public meeting of January 10, 2007, held at the U.S. Department of Transportation.[13] Advocates is pleased to note FMCSA's candid acknowledgement in the CSA 2010 Initiative that current testing methods and other issues affecting the accuracy and value of motor carrier controlled substances and alcohol testing programs may be inadequate and in need of revision. 71 FR 61134. Advocates views the entire medical program, including health care provider driver examinations and driver medical qualifications, as too lax. The current physical qualifications and medical examiner discretion to award medical exemptions allow drivers who can be a threat to public safety nevertheless to hold Commercial Driver Licenses (CDLs) and to drive large trucks and motorcoaches in interstate commerce.

- **Crash Rate for Determining Safety Management.**

FMCSA continues to rely on the demarcation of acceptable versus unacceptable safety management controls based in part on whether a new entrant exceeds a rate of 1.5 crashes per million miles of travel in rural operations and 1.7 in urban operations. Advocates regards the "recordable accident rate" as heavily freighted with arbitrary qualifications about what does or does not constitute a "recordable accident." For example, in the interpretations issued by the agency as controlling glosses of key terms and concepts of 49 CFR § 390.5 where the concept of "recordable accident" is used

[12] The Federal Register citation provided by FMCSA is incomplete. The date of publication of the CSA 2010 Initiative in the Federal Register was October 17, 2006.

[13] 71 FR 69179 (Nov. 29, 2006).

repeatedly, the agency asserts that a person not treated immediately at the scene of a crash, but later found to require medical care at a health care provider facility, disqualifies the collision from being regarded as a "recordable crash." Similarly, if a large truck goes out of control and vehicles in the vicinity make evasive maneuvers which result in collisions between some of these other vehicles or result in single vehicle crashes, the offending truck or bus is nevertheless not considered to have been involved in a "recordable accident."[14] Moreover, crash reporting is chronically underreported to FMCSA, as has been documented in several reports issued by the General Accounting Office and the Office of the Inspector General of the U.S. Department of Transportation.[15] Advocates regards the crash data collected by the agency, its definition of 'recordable accident', and the threshold used for rural and urban crash involvement rates as having little, if any, credibility for determining adequate safety management.

- **Compliance Period.**

FMCSA continues to rely on a compliance period for motor carriers plus agency extensions that Advocates regards as undermining the purposes of the SA and the curtailment of threats to public safety presented by motor carriers who fail their SAs. Advocates in the first instance continues to disagree with the agency's liberal policy of allowing 45 days for motor carriers of passengers (16 passengers including the driver or greater), 45 days for transporters of placardable quantities of hazardous materials, and 60 days for all other new entrants. 71 FR 76731-76732. Although Advocates strongly supports FMCSA's proposal to lower the threshold for new entrant oversight to only 9 passengers including the driver, *id.* at 76735, we cannot support the current regulatory

[14] http://www.fmcsa.dot.gov/rules-regulations/administration/fmcsr/interp390.5.htm. Note that this interpretation of "accident" contradicts the portion of its definition in Section 1 that states that an accident consists of "(iii) One or more motor vehicles incurring disabling damage as a result of the accident, requiring the motor vehicles to be transported away from the scene by a tow truck or other motor vehicle." 49 CFR § 390.5 Definitions. There is no mention here that the disabling damage must result from direct impact with the commercial motor vehicle.

[15] In November 2005, for example, the GAO issued yet another report on the failures of FMCSA to correct data deficiencies. *Highway Safety: Further Opportunities Exist to Improve Data on Crashes Involving Commercial Motor Vehicles*, GAO-06-102, November 18, 2005, transmitted to the Subcommittee on Transportation, Treasury, the Judiciary, House and Urban Development, and Related Agencies, Committee on Appropriations, United States Senate; and to the Subcommittee on Transportation, Treasury, and Housing and Urban Development, the Judiciary, and District of Columbia, Committee on Appropriations, United States House of Representatives. (This report unfortunately duplicates many of the same criticisms of agency data system failures that GAO pointed out back in 1999. *See*, *Truck Safety: Motor Carriers Office Hampered by Limited Information on Causes of Crashes and Other Data Problems*, GAO/RCED-99-182, June 29, 1999.) In general, GAO found that CMV crash data still do not meet general data quality standards of completeness, timeliness, accuracy, and consistency. One-third of CMV crashes that the states are required to report to FMCSA were not reported and those crashes that were reported were not always accurate, timely, or consistent. GAO also found that FMCSA had no formal guidelines for awarding grants to the states for their data improvement efforts. Moreover, even the agency's ratings of how well or badly states were performing in their data collection and transmission efforts were flawed because of the methodology used by FMCSA to develop the state rating system.

timeframes for corrective action by a motor carrier of safety deficiencies. This timeframe, moreover, can be extended by the agency up to an additional 45 or 60 days, depending on the nature of the motor carrier. *Id.* at 76731.

Even these time limits of up to 90 or 120 days are not final for FMCSA to issue an out of service order and to revoke the new entrant's registration if it fails to successfully correct identified safety deficiencies found in a SA. The preamble affords the agency even greater discretion: "FMCSA may extend the compliance period if it determines the new entrant is making a good faith effort to remedy the problems." *Id.* This open-ended discretion does not appear in the regulatory text for this proposed rule.

Advocates strongly opposes the amounts of time allowed to motor carriers of freight, passengers, or hazmat to continue operations with identified safety deficiencies that can threaten public safety while purported attempts at corrections are underway. In addition, we also particularly oppose FMCSA's attempt in the preamble to ratify open-ended agency discretion to extend the amounts of time for completing such corrective actions specified in the proposed regulatory text for 49 CFR § 385.19. 71 FR 76749.

Advocates believes that FMCSA will in fact use this amplified discretion to continue to allow dangerous motor carrier operations to be perpetuated beyond the time limits specified in § 385.19 to the detriment of highway safety. This kind of *ad hoc* use of regulatory authority is not tolerable, and the agency must repudiate this attempt to amplify its discretion beyond the boundaries specified in the proposed regulation. It does a disservice to the agency's paramount mission to advance motor carrier safety to the highest feasible level to allow motor carriers with identified safety deficiencies to continue to operate for long periods of time, especially given FMCSA own emphasis in this proposed rule that there are "11 infractions . . . [that] are so basic to ensuring safety that no carrier should be allowed to operate if any of these violations are found and not corrected." *Id.* at 76732.

Advocates agrees. As a consequence, the amounts of time proposed for notice (up to 60 days) and subsequent corrective action (up to another 60 days) plus an open-ended extension of these limits by the agency on an impromptu basis openly conflicts with the entire purpose of this rulemaking "to strengthen the safety audit," *id.* at 76732, and to adopt a proposed regime of "expedited action" "to tighten scrutiny of new entrants before and after the safety audit." *Id.* at 76733. If FMCSA really intends to strengthen the safety audit and remove offending carriers more quickly from the road, it needs to reduce the amount of time before notice is given that safety violations must be corrected, reduce the amount of time for those violations to be corrected, and eliminate the attempt by the agency to award itself even further discretion to allow dangerous motor carriers to continue to threaten public safety.

- **Safety Violations Triggering Safety Audit Failure.**

FMCSA points out that under current regulation, a motor carrier can commit one of the 11 identified, basic violations that the agency considers as the bedrock of motor carrier safety compliance, and yet that carrier can still pass the SA. *Id.* at 76732. The agency proposes that this policy be revised and made more stringent so that committing any one of 11 key regulatory violations would result in the automatic failure of the SA. *Id.*

Advocates agrees with this proposal as a genuine attempt to strengthen the purposes and safety effects of the SA. However, we question the identification of only 11 violations for triggering SA failure. Although Advocates agrees with the 11 violations listed, it is not difficult to itemize other violations that are just as critical to public safety that also should trigger SA failure. Advocates does not agree with the agency's artificial demarcation of regulations that evidence "safety management controls" and the resulting exclusion of other, major safety regulations as not relevant to "safety management controls."

For example, one of the listed violations is "failing to require a driver to make a record of duty status." 49 CFR § 395.8(a); 71 FR 76732. FMCSA itself in this notice asserts that "driver fatigue has been identified as a contributing factor in many CMV crashes[,]" and that '[h]ours of service comprise the largest percentage of driver out-of-service violations at the roadside." *Id.* The agency also states that motor carriers should have a "safety management control for preventing fatigued drivers from operating a CMV . . ."

Yet, the essential point here is not just that a motor carrier should ensure that each of its drivers prepares a credible record of duty status (RODS), but that the carrier also prevents drivers for violating the hours of service requirements (HOS). As Advocates has argued on prior occasions, we strongly support making HOS violations found in a SA to be *prima facie* grounds for automatic failure of the SA. This includes identified false entries on RODS. Drivers and motor carriers found to have violated these limits on driving and working time, and off-duty rest time, should automatically fail the SA.

The agency misses the essential point of RODS and HOS: a motor carrier can comply with 49 CFR § 395.8(a) by ensuring that all of its drivers prepare RODS. However, that compliance is not equivalent to preventing drivers from violating the HOS requirements or from driving fatigued even under the terms of the current HOS regulation. Accordingly, a crucial SA requirement is not just a matter of a truck or bus company having all drivers prepare RODS, but that company also preventing its drivers from violating the HOS limits. The agency has no entry in its roster of critical violations that predicates SA failure on the basis of HOS noncompliance. Motor carrier HOS violation should be added to the list of critical violations that are sufficient for SA failure even if only one violation is found.

Similarly, other licensing violations should be grounds for immediate SA failure, such as the use of drivers without CDLs to operate CMVs in interstate commerce requiring CDLs, and drivers with CDLs without the endorsements for transporting 15 or more passengers, for operating school buses, and for transporting placardable quantities of hazardous materials. In addition, motor carriers with various waivers or exemptions for their operations, such as agricultural operations, or operations with air-mile radius limits for eliminating RODs, or driver HOS exemptions, should liable for immediate SA failure if they violate the terms and conditions of these waivers or exemptions. The provisions governing the award and use of these waivers and exemptions are intended to curtail any adverse safety impact. If motor carriers are found in an SA to have violated the requirements of waivers and exemptions, these carriers should immediately fail the SA.

These safety considerations for SA failure go beyond FMCSA's citation of, for example, the use of already disqualified drivers or of drivers having their CDLs suspended, revoked, or canceled. *Id.* at 76732. Also, motor carriers and their drivers in interstate commerce operating vehicles between 10,001 and 26,000 pounds gross vehicle weight are also subject to FMCSA jurisdiction even though they do not have CDLs. Suspensions, revocations, or cancellations of non-CDL licenses for operating these CMVs should also be grounds for SA failures. Advocates provides this list as exemplary – it is not intended to be exhaustive. Advocates urges FMCSA to review the list of 11 crucial safety violations for the purpose of adding these and other regulatory violations to the roster that, in each instance, is sufficient grounds for SA failures.

- **Expedited Action.**

FMCSA points out that under existing 49 CFR § 384.307(a), having a crash rate or driver or vehicle violation rate higher than the industry average for similar motor carrier operations triggers an expedited SA or CR of the new entrant. The agency proposes replacing these provisions with the Expedited Action provisions currently applicable to Mexico-domiciled motor carriers pursuant to 49 CFR § 385.105. That investigative protocol was set forth by FMCSA in its Safety Monitoring System and Compliance Initiative for Mexican Motor Carriers Operating in the United States. 66 FR 22415 (May 3, 2001). Expedited Action is triggered by any one of seven categories of violations that the agency considers as imminent threats to public safety. Those violations are discoverable and will trigger Expedited Action not only through SAs and CRs, but also through roadside inspections. Expedited Action would consist of flagging the carrier for a SA as soon as practicable. 66 FR 22416; 71 FR 76733. If the carrier had already undergone a SA, FMCSA will send the carrier a letter requesting evidence of corrective actions within 30 days of the notice or the company's registration would be revoked. *Id.; Id.* Furthermore, if the agency judges that the violations are so serious that even more intensive investigation of company safety practices is warranted, FMCSA will schedule a CR. *Id.*; *id.*

Advocates strongly agrees with the extension of this part of the oversight and enforcement mechanisms of the proposed Mexico-domiciled motor carrier safety monitoring system to U.S. motor carriers. However, we do not agree with how FMCSA has construed some of the threshold violations that would trigger Expedited Action. Since the monitoring system proposed in 2001 has not been issued as a final rule, the agency's chosen characterizations of what constitute Expedited Action violations are subject to revision. Although Advocates agrees with the first six violations as appropriate for triggering expedited action, we do not agree with the seventh criterion.

Expedited Action in this instance is taken if a motor carrier "[has] a driver or vehicle out-of-service rate of 50 percent or more based on at least three inspections within a consecutive 90-day period." 71 FR 76733. FMCSA argues that this appropriately replaces the current Expedited Action criterion of a "vehicle or driver violation rate that is higher than the industry average for similar motor vehicle operations" because that standard is "subjective." 49 CFR § 385.307. Advocates agrees with the agency that this standard is a relativist criterion and that an objective benchmark for gauging motor carrier operating safety and management controls is necessary. However, FMCSA provides no rationale for why this high out-of-service rate over the proposed timeframe is regarded as serious enough for Expedited Action. Advocates strongly disagrees with this criterion for several reasons.

First, FMCSA does not document that this high violation threshold will capture more offending motor carriers. The agency simply presumes that this will occur. Second, the criterion ignores the size of a motor carrier and the corresponding adverse safety impact of such a high rate over a short timeframe of serious safety regulation violations. For example, a small carrier with perhaps four vehicles in service is found to have two of its vehicles having repeatedly violated at least one of the seven regulatory categories, and the small carrier becomes subject to Expedited Action because the three sequential out-of-service orders occurred within the 90 days timeframe. However, another motor carrier has 100 vehicles and an equivalent or greater number of drivers. Fifty (50) of these vehicles and/or drivers are placed out-of-service three successive times within the 90 days timeframe. The large carrier is also now subject to Expedited Action.

But this approach is thoroughly abstract and has nothing to do with the actual threat to public safety fostered by the small carrier as compared with the large carrier. The agency's proposed seventh criterion for triggering Expedited Action disregards the size of the carrier in relation to the real-world safety threat. A large carrier can successfully avoid the out-of-service orders and a subsequent SA or CR under Expedited Action because it does not receive a 50 percent out-of-service rate on three occasions within a 90-day period – for example, it receives only a 36 percent rate.

In the example stated above, the large carrier not meeting the 50 percent/three out-of-service order/90 days timeframe proposed standard actually constitutes a much greater threat to public safety than the small carrier with very few vehicles and drivers.

That small carrier, admittedly, may constitute an elevated risk to safety, but given its small size it cannot match the proportions of the increased public safety threat that a large carrier can sustain while yet avoiding a 50 percent rate of out of service orders within the 90 days timeframe. The small carrier's violations trigger Expedited Action, but the large carrier's far greater threat to public safety from its much higher number of violations, even given its 36 percent out-of-service order rate, does not. FMCSA's proposed criterion may not be subjective, but it is arbitrary, too indulgent of serious and repeated violations, and it permits dangerous carriers presenting a far greater threat to public safety to continue to operate unencumbered by more intensive and rapid safety oversight while the very small carrier which presents a much smaller threat to public safety undergoes closer safety scrutiny under Expedited Action. The agency's criterion, therefore, may serve bureaucratic convenience in selecting a unitary criterion, but in practice it can allow serious, chronic threats to public safety to continue unabated. In plain English, this standard of Expedited Action misses the forest for the trees.

- **Elimination of Form MCS-150A.**

Advocates has sufficiently addressed this issue in the introduction and summary of its comments (*supra*.).

- **Timing of Administrative Reviews.**

FMCSA proposes clarification of the current provisions of 49 CFR § 385.327 because they are ambiguous with regard to the timeframe during which a carrier is allowed to file a request for administrative review and when it files a request for that review to be completed before revocation of its registration. 71 FR 76733-76734. FMCSA proposes a revision so that if a new entrant disagrees with the findings of a SA, it is required to file a request for administrative review within 90 days of the date of the notice of SA failure or within 90 days of the notice of efforts at corrective action having been found to be inadequate. FMCSA also proposes that if a new entrant wants a decision rendered before registration revocation occurs, it must file a request for review within 15 days of the date of the notice of SA failure. Although requests filed later than the 15 days timeframe might be considered, the registration revocation might occur before the administrative review process is completed, even if the new entrant prevails and its registration is restored. *Id.* at 76734. Advocates supports clarification, but we regard the 90 days timeframe for both circumstances to be excessive. Advocates supports a reduction of the timeframes to 60 days both for requests for administrative review and for requests made as a result of notice of unacceptable corrective action.

- **"Chameleon" Motor Carriers.**

FMCSA states its concern about carriers that try to evade enforcement actions or out-of-service orders by attempting to register as a new company operating under a newly assigned U.S. DOT registration number. Motor carriers may attempt to hide prior registration revocations by falsifying or failing to respond to information requested on Form MCS-150 for applying for a U.S. DOT registration number. Accordingly, the agency proposes to clarify the action it may take pursuant to 49 CFR § 385.305 against

carriers providing fraudulent information to re-gain federal registration. If a carrier gains a new registration number after being ordered to cease operations, FMCSA will revoke the new registration and also consider other enforcement actions. If a carrier without an order to cease operations also attempts to re-start its operations as a new company, FMCSA may determine that the new registration will not be revoked but will link the carrier's safety and enforcement history under the old registration with the new registration. 71 FR 76734. Although FMCSA does not further explain the motives for a company not ordered to cease operations but nevertheless seeking to re-enter business under a new registration, it is obvious that some carriers could be close to enforcement actions and would attempt to register as a new operation in order to "wipe the slate clean" of a previous poor safety history before enforcement actions are triggered. Advocates strongly supports the agency's clarification of its proposed actions in this notice, but it must be emphasized that FMCSA provides no information on how it will detect "chameleon" carriers when over 700,000 motor carriers are currently under its jurisdiction, with this number expected to grow even larger in the near future.

- **Reapplication Process.**

FMCSA proposes a revised 49 CFR § 395.329 whereby a new entrant whose registration has been revoked because of a failed SA could reapply by submitting an updated Form MCS-150 and also providing evidence of corrective actions that FMCSA would review for adequacy. If FMCSA concludes that the new entrant applicant has taken corrective action, the applicant would again be registered by would not be subject to a second SA. However, the new entrant would retain the same, original U.S. DOT number and would be monitored again for a full 18 months from the date of the new application approval. 71 FR 76734.

Advocates supports a restarted 18 months of new entrant safety monitoring, but we strongly disagree with the agency's stance that corrective actions amount to a paper review. Advocates believes that a new entrant that attempts to register again after ceasing operations because of a revoked registration should be subjected to a pre-authorization SA to verify whether the corrective actions were taken as directed by the agency. Absent this, some new entrants will undoubtedly provide fraudulent representations that appropriate corrective actions were taken as specified by FMCSA. Advocates also opposes FMCSA's proposal to amend § 395.329(b) to eliminate the current requirement that a new entrant must restart its 18 months of temporary registration and operation if it fails a SA in favor of allowing the carrier to continue the initial 18 months of temporary registration to completion if it supplies proof of corrective actions for the cited violations. 71 FR 767343. A new entrant that fails a SA should be required to restart a full 18 months of probationary operation before the agency awards permanent registration and operating authority, especially since the "proof" of corrective actions taken is only written characterizations sent by the new entrant to FMCSA.

FMCSA also proposes that if a new entrant's registration is revoked because it refused to be safety audited, an attempt at new registration would require an updated

MCS-150 and an audit as soon as practicable once the new application is approved. The registrant would retain its prior U.S. DOT number. *Id.* Advocates opposes any delay in safety auditing an applicant attempting to restart its new entrant status. A motor carrier that refused to be safety audited could conduct dangerous operations for months before FMCSA determined that the company has unacceptable safety controls and operations. An applicant under the described circumstances should be safety audited at the time it files its application. and that application should not be granted unless a pre-authorization SA is conducted.

- **Non-North American Motor Carrier Oversight and Enforcement Regime.**

Advocates has sufficiently discussed this initiative by FMCSA in the introduction to these comments. We strongly support the agency's effort to control what currently are illegal and potentially dangerous interstate operations in the U.S. by non-NA motor carriers accessing the U.S. across our southern border by transiting Mexico. We strongly agree with and commend FMCSA for its effort to stop these illegal operations both for new non-NA entrants and for existing non-NA motor carriers. Advocates also supports the agency's promise to conduct periodic safety compliance strike force actions targeting these illegal non-NA motor carriers. *Id.* at 76734-76735. However, we again emphasize that the agency has provided no arguments or analysis sustaining its decision to subject both Mexico- and non-NA-domiciled motor carriers to pre-authorization SAs and exit CRs prior to granting permanent registration in contrast with its policy of conducting SAs at some unspecified time prior to the expiration of the 18 months of monitoring U.S. new entrants and not to conduct CRs and to assign safety fitness ratings at the end of this probationary period. Advocates does not regard this glaring disparity as a sustainable policy stance for FMCSA.

With regard to other proposed policies for non-NA motor carriers, Advocates strongly supports FMCSA's decision to require all drivers of non-NA domiciled motor carriers to have U.S. CDLs or Canadian commercial driver licenses and to be subject to U.S. DOT drug and alcohol testing requirements. However, Advocates does not support the agency's proposal for non-NA commercial drivers to be recognized as having a valid commercial driver license if any driver possess a Licencia Federal de Conductor (LFC). Advocates has been on record for many years disagreeing with the U.S. declaration of equivalence between the U.S. CDL and the LFC. We believe that if FMCSA is serious about ensuring that operators of non-NA domiciled trucks and buses are qualified, only the U.S. and Canadian commercial licenses should be acceptable. In this connection, Advocates would like to point out that anecdotal information indicates that some of the CMVs moving in commerce across the U.S. southern border by non-NA domiciled motor carriers are less than 26,000 pounds gross vehicle weight (GVW). Drivers of such CMVs above 10,000 pounds are not required under federal law and regulation to possess CDLs. Advocates seeks clarification of whether the agency intends that drivers of CMVs of non-NA domiciled motor carriers will be required, if licensed in the U.S., to have CDLs that are required for operating CMVs greater than 26,000 pounds GVW.

With regard to filing evidence of financial responsibility, Advocates strongly supports agency action to require non-NA domiciled motor carriers of property or passengers to file evidence of financial responsibility. This is a prudent policy. Advocates also supports agency action to extend the requirement to file evidence of financial responsibility to U.S. and Canadian private motor carriers. *Id.* at 76737.

- **Proposed New Form OP-1(NNA).**

Advocates supports the specific proposals of FMCSA for the new application form and other requirements for safety fitness, biennial registration updating , etc., for non-NA motor carriers. However, we strongly oppose the restriction of the cargo insurance requirement to only household goods carriers, as stated in FMCSA's notice of proposed rulemaking of 70 FR 28990 (May 19, 2005).[16]

As already stressed in our introduction to these comments, Advocates also strongly opposes reliance on narrative responses to Section V of the adapted form OP1-(MX) and self-certification responses to proposed Sections VIII and IX. The agency is underwriting potential fraudulent representations by relying solely on certifying statements regarding crucial issues of knowledge and capability by non-NA domiciled motor carriers to comply with relevant U.S. law and to abide by major FMCSR. Advocates supports the features of the proposed safety monitoring system, including pre-authorization SAs, and CRs performed prior to granting permanent registration.

However, we oppose the agency's attempt to provide itself with open-ended discretion so that "if [it] is unable to conduct a compliance review within the 18-month period, proposed § 385.715(c) would extend the safety monitoring period until such time as the agency completes and evaluates a review." *Id.* at 76739. Some of these non-NA domiciled motor carriers may not be subjected to a searching review of their safety since the pre-authorization SA. As a result, they may present a threat to public safety that would be protracted in duration if the agency accords itself the authority to indefinitely extend the period of time before it conducts a CR and assigns a safety rating to the non-NA domiciled motor carrier. Given the agency's own characterization of the elevated threat to public safety these carriers already present because of openly illegal operations in the U.S., no non-NA domiciled motor carrier should be permitted to gain permanent registration or operating authority without an exit CR conducted no later than the termination of the 18 months of new entrant temporary registration.

II. Conclusion.

In most respects, the proposed rule fails to offer major changes that clearly would enhance both the safe operations of new entrants as well as increase the chances for

[16] *See*, comments of Advocates for Highway and Auto Safety, dated August 16, 2005, to Docket No. FMCSA-97-2349.

motor carriers to continue to maintain safety management controls and safe operations after they have been granted permanent registration and operating authority.

This failure of the proposed rule centers mainly on the agency's continuation of the *status quo* policy of only conducting a SA for U.S. motor carriers sometime during the 18 months of new entrant temporary registration and concluding that probationary period with only a grant of permanent registration or operating authority provided without an exit CR. In contrast, FMCSA proposes an extension of the safety oversight framework for Mexico-domiciled motor carriers applying for registration and operating authority under OP-1(MX), to non-NA motor carriers whose places of business lie south of Mexico. That extension of the Mexico-domiciled motor carrier safety oversight regime comprises a pre-authorization SA and an exit CR.

It is anomalous for the agency to continue this insupportable disparity between the oversight program for U.S. new entrants and Mexico- and non-NA-domiciled motor carriers. Implicitly refusing to extend this more intensive, superior safety monitoring effort to U.S. motor carriers may allow FMCSA to avoid more administrative burdens, but it does not advance U.S. motor carrier safety. It is also contradictory for the agency to conclude that Form MCS-150A is essentially a worthless instrument for vetting U.S. new entrant applicants because it centers on self-certifying statement by these motor carriers and yet to continue to rely on such self-certification for Mexico- and non-NA-domiciled motor carriers.

Advocates continues to support the administration of a threshold safety proficiency examination to all new entrant applicants to determine their actual knowledge of the FMCSR and HMR, and how they actually operate their businesses to avoid violations and reduce crash risk. For U.S. new entrants in particular, FMCSA offers a new entrant program that requires no pre-authorization SA, no proficiency examination, and no exit CR with an assigned safety rating. An agency that has chronically failed to keep pace with the growth in the number of registered interstate motor carriers and has allowed the backlog of unrated carriers and carriers with outdated ratings to increase unchecked, needs to consider changing a failed safety oversight policy in a way that will ensure much more intensive testing and oversight of new entrant motor carriers and the assignment of safety ratings to these truck and bus companies when they complete their 18 months of temporary registration.

Finally, FMCSA has not mounted a sufficient effort in this proposed rule to reform its inadequate criteria for judging motor carrier safety based on the use of SafeStat and its roster of Acute and Critical regulations. Similarly, the agency's list of 11 key regulations and their violation which in any one instance can trigger an out-of-service order and other enforcement actions is inadequate, as is its use of specific urban and rural crash rates for scoring violations. Another failure of the proposal is FMCSA's reliance on written responses from new entrant motor carriers that either are threatened with out-of-service orders or have received out-of-service orders that they have taken the

appropriate corrective action. Reliance on such written representations of compliance can continue to allow dangerous motor carriers to threaten public safety. With regard to out-of-service orders, Advocates regards the agency's proposal for Expedited Review based on an out-of-service order rate of 50 percent or more from 3 inspections conducted within 90 days to be (1) artificial, (2) to ignore the reality of the unequal safety threat posed by motor carriers of widely differing sizes, and (3) to indulge continuing operations by dangerous motor carriers that already have been found in the first inspection to be scofflaws. This approach to Expedited Review does not adequately respond to actual motor carrier safety dangers.

Respectfully submitted,
ORIGINAL SIGNED
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