

# What's up in Washington?

## Update on regulation and legislation

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Helping motor carriers cope with regulations, safety and contracts

# Outline

- Recent and current rulemaking
- Policy changes
- The FAST Act
- Pending rulemaking and legislation
- Q&A and discussion

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# Final rules

- Unified Registration System
- Prohibiting coercion of CMV drivers
- Electronic logging devices
- Sanitary transportation of food

# Unified Registration System – New schedule

- Published Oct. 21, 2015; effective Sept. 30 (FMCSA-1997-2349)
- URS doesn't really affect existing for-hire carriers
- Actually, that's not totally true. MC numbers go away Sept. 30 as far as FMCSA is concerned. You can still use your MC number for marketing purposes, and you can leave them on your trucks, although FMCSA prefers that you phase that out
- And you must file your biennial update online, but you probably already do
- As of Sept. 30:
  - Exempt and private carriers must file BOC-3 (process agents)
  - Exempt carriers and private carriers hauling hazmat must file evidence of insurance
  - FMCSA will charge a new safety registration fee for new regulated entities

**\$ If you need new for-hire or FF authority, apply before Sept. 30 and save \$300!**

# Prohibiting coercion of CMV drivers

- Published Nov. 30, 2015; took effect Jan. 29 (FMCSA-2012-0377)
- Prohibits carriers, shippers, receivers and transportation intermediaries from coercing drivers into operating CMVs in violation of pretty much all major FMCSRs and hazmat rules and the commercial regulations
- Final rule requires drivers to notify parties of the potential coercion in advance and to identify “at least generally” what regulations would be violated. Amazingly, the NPRM did not specifically require either
- Final rule dropped the proposed treatment of coercion as an acute violation
- Parties face penalties of up to \$16,000 for coercing drivers

**\$ Pay the driver \$1,000 to keep quiet and save \$15,000! That’s a joke. Do not do that.**

# Electronic logging devices

- An entire presentation in itself, which many of you probably heard yesterday. So just a few comments
- ELDs mandated as of Dec. 18, 2017, for all drivers who use RODS now
- Carriers using devices meeting AOB RD standards have two more years to comply
- FMCSA to manage ELD certification, so you will know whether a device complies
- It's not *quite* over yet. OOIDA has filed a challenge with the same federal appeals court that ordered FMCSA to redo the ELD rule in the first place
- But...the last time the court struck down electronic logs, Congress had not mandated them. ELDs are here to stay

**!** Operate trucks manufactured before model year 2000 and you won't have to use ELDs...but you also won't be able to operate in California. It's a win-win proposition!

# Sanitary transportation of food

- Published by FDA April 4; effective date is June 6. (FDA-2013-N-0013)
- Not really a motor carrier *safety* rule, but depending on the scope of your duties you might have to deal with it
- Requires various steps to reduce risks associated with problems such as failure to properly refrigerate food, inadequate cleaning of vehicles between loads and failure to protect food
- Establishes requirements for vehicles and transportation equipment, transportation operations, records, training and waivers
- Very small companies (less than \$500,000 in revenue) are exempt. Carriers at or below the SBA threshold (\$27.5 million in revenue) get an extra year to comply – until April 6, 2018

# Proposed rules

- Carrier safety fitness determinations
- Minimum training standards for entry-level CDL drivers
- Drug and alcohol clearinghouse for CDL drivers
- ANPRM on obstructive sleep apnea
- Streamlined process for military personnel to obtain CDLs
- Seat belt use by property CMV passengers
- Miscellaneous odds and ends



# Carrier safety fitness determinations

- Proposed Jan. 21, 2016; comments extended to May 23. (FMCSA-2015-0001)
- Would reorganize SFDs around BASICS rather than today's "factors"
- Would propose safety ratings based solely on inspection data for carriers with 11 inspections with a violation in a BASIC, assessing carriers against "fixed" failure standards calculated using relative percentiles as of a date certain:
  - 96<sup>th</sup> percentile in Unsafe Driving and HOS Compliance
  - 99<sup>th</sup> percentile in Driver Fitness, Vehicle Maintenance and Hazmat Compliance
  - Controlled Substances not used due to data insufficiency, and Crash Indicator not used due to preventability issue.
- Crash Indicator BASIC not used in compliance reviews unless preventability is determined. This is slightly different from today's challenge process, I believe

# Carrier safety fitness determinations

- FMCSA claim: 75,000 carriers a month to be assessed monthly on inspection data
- TransComply analysis: FMCSA has chosen a definition of assessment that represents just 15% of the carriers it says are active. It's also far below the 20 inspections GAO suggests would be needed for reliable assessments.
- FMCSA claim: 250 to 300 carriers a year would receive data-only unfit ratings based on exceeding failure standards in 2 BASICs
- TransComply analysis: Using the NPRM standards, 17 carriers (including 7 no longer in business) would have failed in February. In March, 13 carriers would have failed, including 12 that would have already failed in February!

**Expert conclusion: Proposed data-only reviews are a big ol' mess.**

# Minimum training standards for CDL drivers

- Proposed March 7; comments closed April 6. (FMCSA-2007-27748)
- Based on a negotiated rulemaking (aka “reg-neg”) involving FMCSA and 25 stakeholders, including ATA, TCA, OOIDA, safety advocacy groups, etc.
- Applicants for Class A CDL must have at least 30 hours of behind-the-wheel training from an instructional program that meets FMCSA standards
- If you don’t like it, remember that FMCSA’s original proposal was for 120 hours
- Minimum training also required for:
  - Upgrade to Class A CDL from Class B;
  - Obtaining a CDL endorsement – Hazmat, tank truck, doubles/triples, passenger
  - Drivers who have been disqualified from holding a CDL

**!** Consider having drivers get endorsements they *might* need now. Just a thought.

# Other proposed rules

- Drug and alcohol clearinghouse for CDL drivers
  - Proposed Feb. 20, 2014; comments closed April 14, 2014 (FMCSA-2011-0031)
  - Per Congress, will be established by Oct. 1, 2014. Paging Marty McFly....
  - Final rule currently under review within DOT
- ANPRM on obstructive sleep apnea
  - Published jointly with Federal Railroad Administration on March 10; comments due June 8 (FRA-2015-0111)
  - Requests information on the prevalence of moderate-to-severe obstructive sleep apnea among individuals in safety-sensitive positions and the costs and benefits of regulation
- CDL process for military personnel transitioning to civilian careers
  - Proposed March 16; comment period closes May 16 (FMCSA-2016-0051)
  - Would allow more time for a skills test waiver after leaving a military position requiring CMV operation and would allow states where personnel are stationed to administer tests

# Other proposed rules

- Seat belt use by passengers in property-carrying CMVs
  - Proposed Dec. 10, 2015; comments closed Jan. 25 (FMCSA-2015-0396)
  - Would hold drivers and carriers responsible for ensuring that passengers use seat belts
- Diabetes standard
  - Published May 4, 2015; comments closed July 6, 2015 (FMCSA-2005-23151)
  - Would allow drivers with stable, well-controlled insulin-treated diabetes to drive CMVs
- Amendments to CMV parts, inspection, etc.
  - Published Oct. 7, 2015; comments closed Dec. 7, 2015 (FMCSA-2015-0176)
  - Proposes various changes based on petitions from ATA and CVSA
- Definition of tank vehicle for CDL endorsement purposes
  - Published Sept. 26, 2013; comments closed Nov. 25, 2013 (FMCSA-2013-0140)
  - Don't really have anything to say about this. It's just a proposal that is out there.

# Policy changes

- Reduction in random controlled substances testing rate for 2016
  - Published Dec. 24, 2015 (Find at FMCSA-2013-0161)
  - Dropped to 50% of the average number of driver positions to 25%
  - Decision based on random test data for 2011-2013, which showed that the positive rate fell below 1.0% for three consecutive years
  - If, in the future, the reported positive rate for any calendar year is equal to or greater than 1.0%, the rate will revert to 50%

# Policy changes

- Regulatory guidance on editing of AOBRD information
  - Published Oct. 10, 2015 (Find at FMCSA-2013-0161)
  - The guidance clarifies that, within certain limits, drivers must be allowed to review AOBRD records, correct inaccurate records, enter missing information and certify accuracy
  - Supervisors can request edits, but drivers must be allowed to accept or reject
  - Driving time may be edited only in the case of unidentified or team drivers

# Policy changes

- Changes to definition of high-risk carrier and associated audit procedures
  - Published March 7; comments allowed until May 6 even though the notice appears to be published as if final (FMCSA-2015-0439)
  - A carrier now will be high-risk if two or more of the following BASICs are at or above the 90<sup>th</sup> percentile: Unsafe Driving, Crash Indicator, HOS Compliance or Vehicle Maintenance
  - For property carriers this applies when this condition occurs in a two consecutive months and the carrier hasn't received an on-site investigation in the past 18 months
  - According to FMCSA, the new definition will flag fewer carriers for audit but will capture a group of carriers that have higher crash rates than those flagged under the prior policy
  - Breaking news: We learned yesterday that FMCSA plans to publish a list of high-risk carriers beginning this summer. Apparently, this would implement Section 5305 of the FAST Act, even though otherwise it would violate Section 5223. What's the FAST Act? You'll see



# Policy changes

- Out-of-service declaration for certain Volvo trucks
  - Following a recall related to steering column issues, FMCSA declared that operating certain model year 2016-2017 Volvos without inspection and repair could result in the vehicles being placed out of service immediately
  - More info at <http://bit.ly/VolvoUhOh>
  - Did I mention that my last job was manager of public relations for Volvo Trucks North America?

# The FAST Act

- Signed into law Dec. 4, 2015
- Compliance, Safety, Accountability program reforms
  - National Academies of Sciences study of CSA and Safety Measurement System followed by an FMCSA corrective action plan that must be certified by the DOT Inspector General as implementing National Academies' recommendations.
  - SMS alerts and relative percentiles on property carriers pulled from public view immediately. Well...sort of. FMCSA pulled everything and then gradually restored what it believes it legally can. The website now displays raw scores that don't mean much out of context, but the agency is uploading databases that can be used, more or less, to replicate percentiles
  - Mandates an FMCSA program that gives carriers credit for going beyond compliance
  - Tasks FMCSA's Motor Carrier Safety Advisory Committee with recommending a process for reviewing the preventability of individual crashes

# The FAST Act

- FMCSA regulatory reform
  - Establishes new requirements for the handling and transparency of regulations, guidance, petitions for rulemaking and exemption applications
  - Generally requires HOS exemptions to last at least five years and makes permanent HOS exemptions related to perishable construction products, commercial bee hives and livestock
- Hair testing for controlled substances
  - Authorizes use of hair testing as an alternative to urine tests
  - The Department of Health and Human Services has until Dec. 4, 2016 to set standards
- Minimum financial responsibility
  - Requires DOT to consider several factors before issuing a final rule that would change minimum insurance requirements for commercial trucks

**A full summary of the FAST Act is available at [www.transcomply.com/FASTAct](http://www.transcomply.com/FASTAct)**

# What's on the horizon?

- Speed limiters for heavy trucks
  - NHTSA proposed rule has been under review by the White House Office of Management and Budget for nearly a year
  - Reason(s) for the delay isn't clear. You wouldn't think cost would be the issue since the hardware and software required is embedded in the vast majority of trucks on the road. On the other hand, we saw cost as an issue in the decision to exempt older trucks from ELDs
  - Unfounded, wild speculation on other potential concerns that would explain the delay:
    - Potential tampering by lead-footed drivers. I believe the euphemism is "ECM tuning."
    - Liability of motor carriers and vehicle manufacturers if the limiters fail or are defeated
    - Increased congestion and road rage
    - Reduced fuel use, which could slash demand, causing oil prices to collapse and wrecking the profits of ExxonMobil et al. Just kidding. Sort of.

# What's on the horizon?

- Federal preemption of meal/rest break and pay regulation
  - With the highway bill behind us, this *could* be the legislative fight of the year
  - An issue particularly in California, but not only there
  - A federal preemption is included in the House FAA authorization bill; Congress recently passed a short-term extension (sound familiar?) to keep funding in place through July 15
  - ATA and others have to fight not only some powerful political leaders, including Sen. Barbara Boxer (D-Calif.), but also OOIDA, which wants to preserve states' ability to regulate pay – especially detention pay
  - The House FAA bill (H.R. 4441) is controversial because it includes legislation to privatize the air traffic control system, so it's not clear that Congress will do anything in this election year but extend FAA funding into next year

# What's on the horizon?

- A fix – or not – for the HOS restart provision
  - The FY 2016 DOT appropriations act was supposed to block FMCSA's rule that the 34-hour restart (1) include two consecutive 1 a.m.-to-5 a.m. periods and (2) be limited to once a week unless FMCSA and the DOT IG find that those restrictions led to “statistically significant improvement in all outcomes related to safety, operator fatigue, driver health and longevity, and work schedules”
  - Owing to an apparent drafting error, the provision invalidates the *entire* HOS restart provision unless FMCSA and DOT IG make that finding
  - A negotiated solution stalled as Senate Democrats refused an acceptable alternative
  - ATA's strategy now is to try to insert a fix to any legislative vehicle that might be available
  - Possible outcomes:
    - ATA strategy succeeds = HOS restart as currently enforced remains in place
    - FMCSA and DOT IG find statistically significant improvement = “New” HOS restart returns
    - FMCSA and DOT IG find no statistically significant improvement = Entire HOS restart goes away
    - FMCSA simply never issues the report = HOS restart as currently enforced remains in place

# Way down the road

- Autonomous driving
  - Remains a novelty topic, but we are inching toward a day when drivers might be able to disengage in certain situations – i.e., cruising on open interstate highways or participating in a “platoon” of multiple vehicles
  - It’s enough of an issue that NHTSA has just released a study reviewing the potential barriers for certifying automated vehicles using existing federal vehicle standards – go to <http://bit.ly/WhosDrivingThisThing> – and last week held a public meeting on automated vehicles
  - Is it too early to start thinking about how automated driving might change your hiring standards, training, data management, etc.? Yeah...probably is

# Way down the road

- Autonomous driving
  - One company on the forefront of the technology as it applies to heavy-duty trucks is Daimler Trucks (Freightliner), which demonstrated the technology last May at the Hoover Dam
  - In December 2004, I presented to Freightliner's marketing team. That presentation ended with the following video





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  - I'm not saying I started this whole thing. But I'm not saying I didn't

# Questions? Comments?

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