

See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.

John A. Karousos,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 98-19300 Filed 7-17-98; 8:45 am]

BILLING CODE 6712-01-F

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

49 CFR Part 385

[FHWA Docket No. FHWA-98-3639]

RIN 2125-AE37

Safety Fitness Procedures

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Advance notice of proposed rulemaking (ANPRM); request for comments.

SUMMARY: On November 6, 1997, the FHWA published a final rule incorporating the safety fitness rating methodology (SFRM) into 49 CFR 385 as appendix B. In that document the FHWA identified its ultimate goal as creating a more performance-based means of determining the fitness of carriers to conduct commercial motor vehicle (CMV) operations in interstate commerce. The final rule announced that the FHWA would publish an ANPRM shortly which would request comments on the future evolution of a rating system that could be used both in making safety fitness determinations and meeting the demands of shippers, insurers and other present and potential users interested in evaluating motor carrier performance. Since the final rule, legislation was enacted that substantially heightens the importance of unsatisfactory ratings. Accordingly, at this time the FHWA is seeking comments and supporting data on what issues should be considered in constructing a rating system for the future.

DATES: Comments must be received on or before September 18, 1998.

ADDRESSES: Submit written, signed comments to the docket number that appears in the heading of this document to the Docket Clerk, U.S. DOT Dockets, Room PL-401, 400 Seventh Street, SW.,

Washington, DC 20590. All comments received will be available for examination at the above address between 10 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays. Those desiring notification of receipt of comments must include a self-addressed, stamped envelope or postcard.

FOR FURTHER INFORMATION CONTACT: Mr. William C. Hill, Office of Motor Carrier Research and Standards, (202) 366-4009, or Mr. Charles Medalen, Office of the Chief Counsel, (202) 366-1354, Federal Highway Administration, 400 Seventh Street, SW., Washington, D.C. 20590, Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal Holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

Internet users can access all comments received by the U.S. DOT Dockets, Room PL-401, by using the universal resource locator (URL): <http://dms.dot.gov>. It is available 24 hours each day, 365 days each year. Please follow the instructions online for more information and help.

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Background

Safety ratings for interstate motor carriers have been in use by the Department of Transportation (DOT) since 1966 when Congress transferred the responsibility for regulating motor carrier safety to the Department from the Interstate Commerce Commission (ICC). Congress delegated the authority to regulate qualifications and maximum hours-of-service of drivers, and the safety of operations and equipment of motor carriers in interstate commerce to the FHWA, an operating administration of the DOT. Pub. L. 89-670, § 6(f)(3)(B), Oct. 15, 1966, 80 Stat. 940, repealed and recodified by Pub. L. 97-449, Jan. 12, 1983, 96 Stat. 2415, 49 U.S.C. 104(c). Section 215 of the Motor Carrier Safety Act (MCSA) of 1984 (Pub. L. 98-554, 98 Stat. 2844, 49 U.S.C. 31144) required the Secretary of Transportation to prescribe by regulation procedures for determining the safety fitness of owners and operators of CMVs in interstate commerce, including those seeking new or additional operating authority from

the ICC. It also stated that "rules adopted under this section shall supersede all Federal rules regarding safety fitness and safety rating of motor carriers in effect on the date of enactment of this Act." The final rule implementing the new safety fitness procedures mandated by the MCSA of 1984 became effective in 1989 (53 FR 50968, Dec. 19, 1988, 49 CFR Part 385). The procedures and rating methodology implementing the 1989 final rule were recently modified in a rulemaking concluding in a final rule issued on November 6, 1997, (62 FR 60035). This action was necessitated by a ruling of the U.S. Court of Appeals for the D.C. Circuit in *MST Express et al. v. Department of Transportation (FHWA)*, 108 F.3d 401 (D.C. Cir. 1997), to the effect that the rating methodology had not been adopted through notice and comment rulemaking as required by the Administrative Procedure Act (5 U.S.C. 553).

In the Transportation Efficiency Act for the 21st Century (TEA-21), Pub. L. 105-178, enacted June 9, 1998, Congress amended 49 U.S.C. 31144 to prohibit transportation of any property in interstate commerce by motor carriers with unsatisfactory ratings, and provides such carriers 60 days within which to improve the rating (extendable another 60 days) before the prohibition takes effect. This provision will be incorporated into the current regulations in a subsequent rulemaking.

Safety Rating System

A safety fitness rating system was first used by the FHWA to provide safety information to the ICC to assist in screening applicants seeking operating authority. It evolved into a means to identify motor carriers most likely to benefit from on-site compliance reviews (CRs). Presently, safety ratings are made available to anyone upon request. Shippers, including governmental agencies, use the ratings in making carrier selections and insurers use them in making decisions regarding coverage.

Safety ratings are developed in part through an on-site CR of a motor carrier's records, operations and, when available, equipment. The review is used to assess whether a commercial motor carrier's safety management controls are functioning effectively to ensure acceptable compliance with § 385.5, safety fitness standard. Safety rating factors are used in determining a safety rating. Four rating factors relate to the regulatory requirements of the Federal Motor Carrier Safety Regulations (FMCSRs) (general, driver, operational, vehicle) and one to the Hazardous Materials Regulations

(HMR), if applicable. The carrier's accident rate is the remaining factor. The rating factors are given equal weight, and one of three safety ratings can be assigned: satisfactory, conditional, or unsatisfactory. This process also identifies motor carriers needing improvement in their compliance with the FMCSRs and HMRs. Motor carriers rated unsatisfactory generally receive a higher priority for future compliance and enforcement efforts.

Statutory Prohibitions

In 1991, following a mandate in the MCSA of 1990 (Pub. L. 101-500, § 15(b)(1), 104 Stat. 1218, 49 U.S.C. 5113), the FHWA promulgated § 385.13 which prohibits motor carriers of hazardous materials (in quantities requiring placarding) and passenger carriers transporting more than 15 passengers including the driver from operating with an unsatisfactory safety rating unless the rating is improved within 45 days.

The prohibition against transportation of passengers or hazardous materials was significant because it applied serious statutory consequences to an unsatisfactory rating and limited the motor carrier's ability to operate in interstate commerce. With this change, Congress equated the unsatisfactory rating with unsafe operations. The MCSA of 1990 also prohibited Federal agencies from using motor carriers with an unsatisfactory rating to transport hazardous materials in a quantity requiring placarding or more than 15 passengers.

Section 4009 of the TEA-21 now gives most carriers found by the FHWA to be unfit a grace period 60 days. Those unable to improve their fitness determination during that period will have to halt trucking operations on the 61st day. However, passenger and hazardous materials carriers found to be unfit remain subject to a 45-day grace period before shutting down. A rule to implement TEA-21 will be proposed later.

In the November 6, 1997, final rule, the FHWA included an amendment which gives all motor carriers (not just those subject to operational prohibitions) a 45-day grace period before a less-than-satisfactory rating takes effect. Under the new procedures, motor carriers receive a Notice of Proposed Rating when the rating would be less than satisfactory. The notice informs the carrier of the reasons for the unsatisfactory or conditional rating and that it will take effect in 45 days. It also advises the carrier of its procedural options under Part 385. During the exit

interview at the conclusion of the CR, the motor carrier also is informed of the safety violations discovered and is advised how improvements can be made.

Other Uses of Ratings

As the safety rating system has evolved, the assignment of ratings has taken on new importance to the public, particularly shippers and insurance companies. The changing use and public perception of the ratings provide the impetus for this rulemaking. Over time, the reliance on the safety ratings to make important business decisions regarding which carriers to use or which to insure has continued to grow. The ability of the agency to maintain current ratings for all motor carriers has not. Experience over the last eight years illustrates the impracticality of attempting to rate all carriers in an industry with high company turnover. The motor carrier industry has also grown at a prodigious rate, especially since 1980. For example, in 1979, the year before deregulation, for-hire carriers holding interstate authority from the ICC numbered under 20,000. Today that group, which probably has the greatest demand for safety fitness determinations, comprises nearly 80,000 registrants. The OMC census, which includes private carriers and compensated carriers previously exempt from ICC regulation, contains well over 400,000 companies.

Completing on-site rating reviews, bringing enforcement actions against high-risk carriers, doing legislatively mandated complaint investigations requiring on-site carrier reviews, and responding to individual requests from motor carriers that need a satisfactory rating for business purposes or that object to the ratings they have received, all serve to contribute to a high demand the agency is not able to fulfill with current resources.

New Demands

The Congress directed the FHWA in Sec. 4003 of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. 102-240, 105 Stat. 1914, 2144, to establish information systems containing safety fitness data, including roadside inspections and out-of-service orders for State commercial motor vehicle registrants (49 U.S.C. 31106). The Congress further directed the Department to demonstrate methods of linking a carrier's safety fitness to vehicle registration and to determine the types of sanctions and limitations which may be imposed to ensure the safety fitness of the registrant. That demonstration project, formerly known

as the Commercial Vehicle Information System (CVIS), developed a new methodology to prioritize motor carriers for on-site reviews and monitor their safety performance. It is now called the Performance and Registration Information System Management (PRISM). The FHWA is planning to issue a Notice of Proposed Rulemaking in the near future which will set forth mechanisms to encourage carriers to improve their safety performance and enhance the FHWA's ability to focus resources on poor performers, i.e., those carriers over-involved in crashes or presenting the greatest potential for crashes.

SAFESTAT

The demonstration project also produced a new safety risk assessment model, the Motor Carrier Safety Status Measuring System or SAFESTAT, which varies significantly from the current SFRM, because it makes extensive use of performance data and assesses carrier performance over time. A safety rating is static and does not change, even though actual performance may improve or decline, until a new CR is performed. In contrast, SAFESTAT uses all available safety performance data to continuously assess the safety status of carriers and generate a safety indicator. The indicator is a preliminary *ranking* of carriers relative to their peers and is designed to identify those carriers presenting potential risks that require additional attention. In SAFESTAT, the results of a CR contribute additional data elements to be considered along with safety performance data, such as accident rates, roadside vehicle inspections, driver performance, and enforcement actions. Other data elements, such as driver moving violations, will be added to the model as they become more generally available. SAFESTAT evaluates all data elements on the basis of severity and time. For example, more weight is given to a fatal or serious injury crash than a tow-away crash and recent crashes are weighted more heavily than crashes occurring in the past. The CR remains as an integral part of SAFESTAT, and is used to gather safety data that cannot be obtained at the roadside. SAFESTAT represents another method of assessing carrier safety, but at present it is not a substitute for the current safety fitness rating process.

Third-party Ratings

Because of the increasing demand for safety fitness evaluations and the realization that present resources are not likely to grow dramatically, the FHWA is exploring the feasibility of using

third-party contractors to increase the pool of safety information available. This is authorized by Sec. 4006 of TEA-21. Private rating services could be used to meet the public demand for additional safety information upon which to base business decisions. Federal resources would be freed up to pursue corrective measures against poorly performing carriers.

The U.S. Army's Military Traffic Management Command currently uses third-party services to assess the safety fitness of motor carriers under contract to the military. Private services could operate much like those already providing consumer credit histories, significantly increasing the availability of and access to relevant safety information. The FHWA and the industry could join in a partnership to set the standards for the conduct of safety fitness reviews, the use of safety information, and other aspects of such a system. A large data bank could be created into which safety information generated by Federal, State and private sources would be deposited. So long as shippers, insurers, and other stakeholders insisted on making decisions about the use of motor carriers based, at least in part, on their safety records, the demand for such a service would expand. Motor carriers interested in marketing their services would inevitably need to have a good safety rating to remain competitive. The FHWA is particularly interested in the feasibility of such a system.

General Discussion

Since its adoption, the safety rating process has been the subject of much confusion, controversy, and dispute. Although the FHWA had preferred to use the process as a means of targeting scarce enforcement and oversight resources, its use in making value judgments about the quality of motor carriers has increasingly been perceived as a primary function.

In a Notice of Proposed Rulemaking issued April 29, 1996, (61 FR 18870), the FHWA discussed the potential for the unsatisfactory rating to become the equivalent of a judgment that the motor carrier is unfit to operate in interstate commerce and to take on the aspect of a debarment in fact, if not in law. The statutory prohibition against the transportation of passengers or hazardous materials by a motor carrier with an unsatisfactory rating is now, with the enactment of TEA-21, to apply to all transportation of property. Most governmental shippers consider the unsatisfactory rating a disqualifier, and many other shippers treat it the same way. This is consistent with the

FHWA's belief that unsatisfactory carriers should be well below the average and that the percentage of carriers earning such a rating ought to be small. The unsatisfactory rating has become and will remain a judgment that a carrier should discontinue operations until it can demonstrate a commitment to maintain adequate safety practices. That judgment must be correctly determined and fairly applied. In our system, a guilty judgment follows the opportunity to be heard, and the notice procedure adopted in the November 6, 1997, final rule should afford that opportunity.

In view of recent developments regarding the current safety fitness rating process and methodology and the obvious limitations on the availability of resources required to maintain a safety fitness evaluation process at the level many in the public and perhaps even the Congress expect, the FHWA is asking for comments and suggestions for changes through the following questions. In answering the questions, if possible, please provide any statistical information or empirical evidence to support your comments.

General

1. What do you believe should be the principal ingredients of a rating system? What kind of a rating system would best suit your needs? Why?
2. What benefits do you expect to gain from a rating system? What business decisions do you presently base on carrier ratings?
3. Are there differences in the way ratings should be used? (e.g., by FHWA? By shippers? By others?)
4. If ratings must impact the continued operations of rated carriers, what is the appropriate threshold for determining that a carrier is unsatisfactory, meaning "unfit to operate"?

Tiered System

5. Should the FHWA continue to maintain the three ratings: *satisfactory*, *conditional*, or *unsatisfactory*? If yes, what benefits do you perceive in maintaining the three ratings?
6. What should be the highest tier in such a system, and what should it connote?
7. How long should any rating last?
8. Do you see any benefit to a single rating system by the FHWA which would be concerned only with *unsatisfactory* carriers that would have to improve or cease operating?

Criteria

9. Should such ratings be determined entirely by objective (performance-based) criteria? Why?

10. What data elements best reveal the safety performance of the motor carrier and should receive consideration in future safety fitness determinations?

11. How should regulatory compliance be treated in safety fitness determinations? Which regulations are most important in evaluating safety fitness?

12. How should poor compliance be reconciled with good safety experience? Should a motor carrier be rated *unsatisfactory* even if it has a low accident rate?

Data Sources

13. Do you believe there is presently sufficient data available to make judgments about a motor carrier's ability to stay in business?

14. Should carriers be grouped by similarity of operations? By size?

Third-party System

15. Are there significant benefits to be derived from a third-party on-site review system for evaluating motor carriers? What do you perceive them to be?

16. If a third-party review system were to start up, what should be the Federal role in such a system?

17. Could and should a private third-party review system coexist with a Federal system? What would be their respective roles? What relationships should there be, if any, between coexisting Federal and private review systems?

18. What should be the effect of the third-party rating on the carrier's operation? What kind of review procedures would be required?

19. Should the information from third-party on-site reviews become a part of the FHWA data base? How should such information be treated?

20. Should a third-party reviewer have direct access to FHWA's data base to a greater extent than such information is presently available to the public?

21. Should there be standards for third-party reviews, including the identification of the relevant data elements to be employed for evaluative purposes? How should such standards be developed?

Rulemaking Analyses and Notices

All comments received before the close of business on the comment closing date indicated above will be considered and will be available for examination in the docket room at the above address. Comments received after

the comment closing date will be filed in the docket and will be considered to the extent practicable, but the FHWA may issue an NPRM at any time after the close of the comment period. In addition to late comments, the FHWA will also continue to file, in the docket, relevant information that becomes available after the comment closing date, and interested persons should continue to examine the docket for new material.

Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

The FHWA has determined that this document does not contain a significant regulatory action under Executive Order 12866. The FHWA does not know what direction this rulemaking will take, however, it does not expect that this rulemaking will be inconsistent with any other agency actions or materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs. The FHWA anticipates that the costs of any rulemaking action that might be implemented in response to comments received would be no greater than the motor carrier's current costs of complying with the regulatory requirements. At this preliminary stage, we do not anticipate that any regulatory action taken in response to comments introduced here would be of sufficient economic magnitude to warrant a full regulatory evaluation.

Regulatory Flexibility Act

Although this document does not include any specific proposal at this time, the FHWA believes this action will not lead to a proposed rule that would have a significant economic impact on a substantial number of small motor carriers.

To meet the requirements of the Regulatory Flexibility Act (5 U.S.C. 601-612), however, the FHWA would evaluate the effects on small entities of any rule promulgated in subsequent phases of this proceeding. Therefore, the agency is particularly interested in comments from small entities on whether there are impacts from this action and how those impacts may be minimized.

Unfunded Mandates Reform Act of 1995

The FHWA will analyze any proposed rule to determine whether it would result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, as required by the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1532).

Executive Order 12612 (Federalism Assessment)

The FHWA will analyze any proposed rule using the principles and criteria contained in Executive Order 12612 to determine whether the proposal would have sufficient federalism implications to warrant the preparation of a federalism assessment. The FHWA does not expect that any action developed in response to comments introduced here would infringe upon the State's ability to discharge traditional State governmental functions because interstate commerce, which is the subject of these regulations regarding interstate operations, has traditionally been governed by Federal laws.

Executive Order 12372 (Intergovernmental Review)

Catalog of Federal Domestic Assistance Program Number 20.217, Motor Carrier Safety. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this program.

Paperwork Reduction Act

The FHWA does not anticipate that any rulemaking action implemented in subsequent phases of this proceeding would result in changes in the collection of information requirements that are currently approved. The FHWA does not foresee the likelihood of increased paperwork burdens because what is being considered in this action is an evaluative process to determine, in part, how regulated motor carriers are complying with existing regulations. Should revisions to the safety assessment and rating system be proposed in this proceeding, however, the agency will evaluate carefully the information collection implications of such revisions under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501-3520.

National Environmental Policy Act

The agency will analyze any action implemented in subsequent phases of this proceeding for the purposes of the National Environmental Policy Act of 1969 (42 U.S.C. 4321-4347) to determine whether the action would affect the quality of the environment.

Regulation Identification Number

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be

used to cross reference this action with the Unified Agenda.

List of Subjects in 49 CFR Part 385

Highway safety, Highways and roads, Motor carriers, Motor vehicle safety, and Safety fitness procedures.

Issued on: July 10, 1998.

Kenneth R. Wykle,

Federal Highway Administrator.

[FR Doc. 98-19294 Filed 7-17-98; 8:45 am]

BILLING CODE 4910-22-P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

49 CFR Parts 395 and 396

[FHWA Docket No. FHWA-98-3414]

RIN 2125-AE35

Out-of-Service Criteria

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Advance notice of proposed rulemaking (ANPRM); request for comments.

SUMMARY: The FHWA seeks public comment concerning use of the "North American Uniform Out-of-Service Criteria" (OOS Criteria). During roadside inspections, Federal, State and local safety inspectors use the OOS Criteria as a guide in determining whether to place commercial motor vehicles (CMVs) or drivers of CMVs out-of-service. The OOS Criteria is a list of those violations which are so unsafe that they must be corrected before operations can resume. Correction of other less severe violations can be deferred to a more convenient time and place. The FHWA is seeking public comment on the future scope and effect of the OOS Criteria, which are not part of the Federal Motor Carrier Safety Regulations (FMCSRs). The agency is also seeking comment on the need to formalize these guidelines.

DATES: Comments should be received on or before September 18, 1998.

ADDRESSES: Signed, written comments should refer to the docket number appearing at the top of this document and must be submitted to the Docket Clerk, U.S. DOT Dockets, Room PL-401, 400 Seventh Street, SW., Washington, DC 20590-0001. All comments received will be available for examination at the above address between 10 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays. Those desiring notification of receipt of comments must include a self-addressed, stamped envelope or postcard.