



DEPT. OF TRANSPORTATION
DOCKET SECTION

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ILLINOIS STATE POLICE
Division of Operations

Jim Edgar
Governor

Gene P. Marlin
Acting Director

August 20, 1998

Federal Highway Administration
FHWA Docket No. FHWA-98-3414 - 5
Docket Clerk, U.S.DOT Dockets
Room PL-401, 400 Seventh Street, S.W.
Washington, D.C. 20590-0001

To Whom It May Concern:

The Illinois State Police appreciates the opportunity to comment on Docket No. FHWA-98-3414 regarding the advance notice of proposed rulemaking concerning the North American Uniform Out-of-Service Criteria. The ISP is proud to be the sole enforcement agency of the Motor Carrier Safety Regulations as they pertain to roadside safety inspections in the state of Illinois.

We do not support the adoption of the OOS Criteria as part of the Federal Motor Carrier Safety Regulations. The ISP believes that regulations regarding out-of-service criteria are already contained in 49 CFR 396.9, which states that authorized personnel shall declare and mark "out-of-service" any vehicle which by reason of its mechanical condition or loading would likely cause a crash or a breakdown. In addition, Appendix G of Subchapter B contains a list of inspection items which if found to be out of adjustment, defective or functioning improperly would result in the vehicle being placed out of service.

An exemption found in 49 CFR 396.7 allows for a motor vehicle discovered to be in an unsafe condition while operating on a highway to continue to the nearest place where repairs can be safely effected. In addition, the operation can only continue if it is less hazardous to the public than to permit the vehicle to remain on the highway. As stated in the advance notice of proposed rulemaking, the OOS Criteria was developed by the Commercial Vehicle Safety Alliance as a reference guide to assist enforcement personnel in deciding whether to allow a commercial motor vehicle or driver, found in violation of law, to continue in commerce. The OOS Criteria was compiled using crash data and other information to determine if a particular safety violation presented no immediate or undue threat to public safety and which lacked sufficient justification to restrict further operation.

Motor carriers and their drivers are able to anticipate reasonably uniform treatment of violations in all jurisdictions throughout this country because of the general acceptance of the **OOS** Criteria. The responsibility of maintaining the **OOS** Criteria should remain the responsibility of the CVSA and member jurisdictions which would help guarantee motor carriers and drivers continue to receive uniform treatment

The duty of implementing the **OOS** Criteria should remain with any state or federal agency responsible for the enforcement of the FMCSRs. It should also be the duty of each jurisdiction to determine if the **OOS** Criteria should apply to motor carriers and drivers involved in interstate and/or intrastate commerce.

As previously indicated, the ISP cannot support the adoption of the **OOS** Criteria as part of the FMCSRs. Please feel free to contact at 217-782-4726 if you have any questions concerning these comments.

Respectfully,



Master Sergeant Edward A. Weigler
Supervisor, Commercial Vehicle Enforcement Section

cc: Mr. Larry Stern, CVSA
Mr. Larry Wort, IDOT
Captain Stephen Marada
Lieutenant Rick Karhliker

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:

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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

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.,

(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 esit

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]

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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.

FOR FURTHER INFORMATION CONTACT: Mr. Robert F. Schultz, Jr., Office of Motor Carrier Research and Standards (HCS-10), (202) 366-4009, or Mr. Charles Medalen (HCC-20), Office of the Chief Counsel, (202) 366-1354, Federal Highway Administration, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

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What is the "North American Uniform Out-of-Service Criteria"?

The OOS Criteria is a reference guide developed and maintained by the Commercial Vehicle Safety Alliance (CVSA) to assist enforcement personnel in deciding whether to allow a CMV or driver, found in violation of law, to continue in commerce. The CVSA is an association of State, local, provincial and Federal officials responsible for the administration and enforcement of motor carrier safety laws and regulations in the United States, Canada, and Mexico. The CVSA provides a mechanism for the development of consensus upon issues of common concern. The OOS Criteria is a detailed list of conditions which the CVSA membership has agreed are sufficiently hazardous to justify restricting further operation by a driver or a CMV. Each year the CVSA reviews the OOS Criteria, and makes necessary changes.

How are the OOS Criteria Used?

The majority of the safety violations found during inspections at the roadside relate to the condition of the CMV. Some of these violations can be corrected at the roadside; for example, a driver can repair a turn signal which is not functioning. Others must be corrected at a repair facility. If a particular safety violation presents no immediate or undue threat to public safety, it would be an unnecessary interruption in the flow of commerce and perhaps even cause a traffic safety problem to require the motor carrier to undertake corrective action on site. In such cases, the assessment of a warning, fine, or other penalty is sufficient; the repairs necessary to prevent further deterioration or ultimately correct the condition may safely be deferred to another time and place.

In this sense, the OOS Criteria are usually less stringent than the FMCSRs. For example, a CMV with a single headlamp incapable of producing a low beam during night-time driving does not comply with the FMCSRs (49 CFR 393.9). The OOS Criteria, however, are not operable until both headlamps are incapable of producing a low beam. In this example, the inspector would cite the motor carrier for the violation of the FMCSRs, but permit the CMV to proceed so that repairs to the headlamp can be made at a more convenient time and place. In cases such as this, the OOS Criteria serve as enforcement tolerances because the violation of the FMCSRs is allowed to continue. In other instances, provisions of the OOS Criteria correspond precisely with the FMCSRs. For example, a CMV with only one rear turn signal working properly does not comply with the FMCSRs (49 CFR 393.11). The OOS Criteria also provides that the CMV should not be moved until both signals are in working order.

State inspectors with general police powers have authority under State law to stop and seize summarily. All States participating in the Motor Carrier Safety Assistance Program (MCSAP) have agreed that their inspectors will use the OOS Criteria when exercising this power. If an inspector, during an inspection activity, observes inherently dangerous conditions which are identified in the OOS Criteria, the inspector may issue an out-of-service order. Motor carriers and their drivers are able to anticipate reasonably uniform treatment of violations in all jurisdictions throughout this country because of the general acceptance of the OOS Criteria.

The majority of drivers who are placed out-of-service are so treated because they are driving in violation of the maximum hours-of-service rules under 49 CFR part 395. Such violations are usually corrected by the driver being off-duty at least eight consecutive hours.

An FHWA inspector at roadside may order a motor carrier's driver or CMV to cease operation. When conducting roadside vehicle and driver inspections, the FHWA uses the OOS Criteria in deciding whether to allow particular motor carriers, CMVs, or drivers to proceed in violation of the FMCSRs.

How has the OOS Criteria Evolved?

Out-of-service criteria for drivers and CMVs have been in existence over forty years. Prior to its absorption into the United States Department of

¹ See 49 CFR 395.13(a), and 396.9(c).

Transportation in 1967, the Bureau of Motor Carrier Safety (BMCS), a part of the former Interstate Commerce Commission, developed the first out-of-service criteria in carrying out its inspection function. Those criteria continued in use by the FHWA safety investigators thereafter.

In 1980, the FHWA conducted a pilot program to assess the potential of States to enforce CMV safety rules at the same time they enforce the restrictions on the size and weight of CMVs. Four States participated and generated results which were a factor in the enactment of legislation in 1982 authorizing the Motor Carrier Safety Assistance Program. That program, which provides funding to the States in their efforts to enforce motor carrier safety regulations, has been quite successful.

The States were brought together on another front by their search for a solution to the problems created by the patchwork of diverse State laws and regulations governing motor carrier safety. The States came to realize that a larger number of motor carriers could comply with safety laws and regulations if greater uniformity in enforcement were achieved. Several western States and Canadian Provinces formed the CVSA to reach agreement on issues such as inspections and out-of-service criteria. With the subsequent encouragement and support of the FHWA through the MCSAP, the CVSA expanded dramatically. Soon all 50 States and the District of Columbia became partners with the FHWA by adopting and enforcing, with minor variances, the FMCSRs and the Hazardous Materials Regulations (HMRs) of the Research and Special Programs Administration, and by using uniform inspection criteria.

In 1988, the FHWA published a comparison of the OOS Criteria and the FHWA's inspection criteria in 49 CFR Ch. III, subchapter B, appendix G. The fact that this comparison is so outdated and of little use today demonstrates one of the issues discussed below in the options for further regulatory action.

The Motor Carrier Act of 1991 (the Act) prescribed certain penalties for motor carriers or drivers found to have violated out-of-service orders (49 U.S.C. 31310(g)(2)). The Act made the adoption of such penalties by the States, and a program of random reinspection of vehicles placed out-of-service, a condition for receipt of Federal safety funding under the MCSAP. The Congress also made a State's adoption of the penalties for violation of out-of-service orders a condition of continued receipt of the State's full allocation of highway construction funds (49 U.S.C.

31311). The FHWA published implementing regulations on May 18, 1994 (59 FR 26022) (codified in part at 49 CFR 383.5 and 390.5, definitions of "out-of-service criteria").

What is the FHWA's Role in the Development of the OOS Criteria?

The FHWA is a non-voting member of the CVSA, as are representatives of numerous trade organizations, such as the American Trucking Associations (ATA), the National Private Truck Council (NPTC), the Owner-Operator Independent Drivers Association, Inc. (OOIDA), and the National Tank Truck Carriers, Inc. (NTTC). Committees of the CVSA consider and recommend modifications to the OOS Criteria, which are then accepted or rejected by a vote of CVSA member jurisdictions. The revised OOS Criteria are then submitted to the FHWA for its use.

The FHWA's interest in the OOS Criteria is three-fold. First, as part of the MCSAP program, each State develops a Commercial Vehicle Safety Plan (CVSP) which the FHWA must approve before authorizing funds. At the present time, the CVSPs of all the States provide for use of the OOS Criteria in conducting driver, vehicle, and hazardous materials inspections at the roadside.

Second, the FHWA's own safety investigators use the CVSA.4 OOS criteria in the limited number of roadside inspections they perform each year. By following the CVSA OOS criteria in determining whether to place a driver or vehicle out-of-service, the FHWA is promoting consistency with these State-developed criteria and further uniformity in treatment of carriers nationwide.

Third, the FHWA also uses the OOS Criteria indirectly in determining the safety fitness of motor carriers (49 CFR 383.5). The FHWA's safety ratings for motor carriers include three categories: Satisfactory, Conditional, or Unsatisfactory (49 CFR 335.7). The ratings are based on a number of factors, including compliance with the FMCSRs

The FHWA has recently placed greater emphasis on the safety performance of motor carriers in the rating process, and this action has led to additional emphasis on the OOS Criteria. The FHWA considers the vehicle out-of-service experience of motor carriers when calculating the vehicle factor, one of the six components of a motor carrier's safety rating. Rather than taking all roadside violations into account, the FHWA

considers only out-of-service violations on the presumption that, because they are more serious, they are more likely to reflect on the inspection, repair, and maintenance programs of motor carriers.²

Why is the FHWA Undertaking This Action?

The agency believes that the OOS Criteria serve as guides for enforcement personnel in the exercise of discretion. The inspector determines if there is a violation of the underlying substantive safety regulation, whether it be the FMCSRs, a State law or regulation compatible with the FMCSRs, or the HMRs. When this determination has been made, the inspector faces a second question: may this particular driver or vehicle resume operations immediately in the face of this violation? The inspector exercises his or her discretion in answering this question. The OOS Criteria serve as guidelines to help the inspector determine whether the condition that he or she is observing is sufficiently hazardous to warrant placing the driver or CMV out-of-service, or conversely, whether the condition is not serious enough to prevent the driver and CMV from proceeding in violation of the regulation, deferring the repairs until a more convenient time and location. Thus, the OOS Criteria take on the character of enforcement tolerances.

The FHWA is responding today, however, to a growing perception within the industry that the CVSA OOS Criteria play a significant role in the enforcement of the FMCSRs, and that publication of the criteria as a part of the FMCSRs is therefore warranted. The FHCVA believes that the time has come for a full discussion of the OOS Criteria: what are they; what is their purpose; how are they used; who is responsible for implementing them; and whether they are regulatory or merely guides for the use of necessary discretion in the enforcement of motor carrier safety.

² The out-of-service history is drawn from the nearly 2 million vehicle inspections which are performed each year by the States participating in the MCSAP. If a motor carrier experiences a ratio of out-of-service inspections to "clean" inspections of 34 percent or greater [minimum of 3 inspections], the initial rating for the Vehicle Factor is Conditional. The FHWA believes setting the ratio, commonly called the "out-of-service rate," at 34 percent is appropriate because the national average is 33 percent.

For a more detailed explanation of the Safety Fitness Rating Methodology, please consult FHWA Docket No. 94-22; FHWA-97-2252 (59 FR 47203), and see two notices: (1) Notice of Proposed Rulemaking, Safety Fitness Procedures; Safety Ratings, May 28, 1997 (62 FR 28826), and (2) Final Rule, Safety Fitness Procedures, November 6, 1997 (62 FR 60035).

The FHWA is undertaking this action because there has been criticism of the manner in which the CVSA OOS Criteria are currently utilized. On May 1, 1989, the Maine State Police petitioned the FHWA to incorporate the CVSA OOS Criteria by reference within the FMCSRs. On October 29, 1993, the CVSA, petitioned the FHWA to define "out-of-service criteria," and incorporate the CVSA OOS Criteria into the FMCSRs by reference. On June 13, 1994, the OOIDA filed a motion with the FHWA to stay the imposition of certain final FHWA rules pertaining to penalties for violation of out-of-service orders, and cited in support of its motion the failure of the FHWA to formally incorporate these standards *within the FMCSRs (FHWA Docket No. MC-92-13; FHWA-97-2279 at 59 FR 26022).

On April 20, 1995, the National Tank Truck Carriers, Inc. petitioned the FHWA to propose a rulemaking to establish the OOS Criteria as an appendix to the FMCSRs. On June 10, 1997, the FHWA granted the NTTC's petition, stating as part of the order entered that the FHWA would "publish a rulemaking to discuss the entire issue and propose a resolution." This ANPRM initiates that rulemaking.

Public comment on the issues raised in this ANPRM will assist the FHWA in determining whether any further regulatory action is required.

What Should be the Future Scope and Effect of the OOS Criteria?

1. Maintain the current FHWA policy.

As stated above, the FHWA uses the current CVSA OOS Criteria in several ways. The FHWA has treated these criteria as enforcement tolerances, as guidelines for its own staff, and as acceptable alternatives for States to use in their State Enforcement Plans adopted under the Motor Carrier Safety Assistance Program. Although these criteria are mentioned in the Federal Motor Carrier Safety Regulations (ser. e.g., 49 CFR sections 383.5 and 390.5, definitions of "out-of-service orders"), the criteria themselves have not been adopted by the FHWA pursuant to notice and comment rulemaking. As noted above, some industry representatives believe that the FHWA's use of these criteria has evolved to the point where adoption of the criteria pursuant to notice and comment rulemaking is warranted and desirable.

As part of this rulemaking, the FHWA will consider the scope and effect of the OOS criteria and the use to which the FHWA puts these criteria. One possible alternative is to limit the use of the criteria in ways that do not require adoption of the criteria as regulations,

Under its current policy, the FHWA considers the OOS criteria to be a tool to determine whether violations of the FMCSRs (or compatible State safety regulations) are so serious as to warrant ordering a motor carrier to cease using the driver or vehicle in question. The criteria themselves do not establish separate standards of conduct for regulated entities, nor is it intended that use of the criteria excuses other less serious violations of applicable safety regulations.

Accordingly, comment is requested on the fundamental question of how the FHWA should use any OOS criteria. Comment is also solicited on the desirability of adopting the OOS criteria after notice and opportunity for comment, even if such opportunity for further public participation is not required.

2. Adoption of the OOS Criteria in the FMCSRs.

Comment is requested on the alternative of adopting the OOS criteria as part of the Federal Motor Carrier Safety Regulations, either because of the use to which the criteria is or should be put or because of the desirability of the opportunity for public participation inherent in the process of adopting these criteria as Federal regulations. If the FHWA should adopt out-of-service criteria by regulation, can the FHWA avoid undermining the general principle that compliance with all applicable safety regulations is required? Should the FHWA specifically require the use of such federally adopted out-of-service criteria by States as a condition of MCSAP, or could the adopted criteria be one of several acceptable sets of criteria States could use? How would, or should, adoption of such criteria limit the discretion of Federal and State safety investigators to address discovered driver and vehicle safety violations at the roadside? Should investigators be limited to issuing out-of-service orders only to cases that expressly meet the adopted criteria? Should investigators be required to issue out-of-service orders in all cases where the criteria are met? How much discretion should investigators retain to address safety hazards discovered at the roadside that may not be precisely covered in the adopted criteria?

3. How should out-of-service criteria be adopted?

In addition to the basic question of whether the FHWA should adopt these criteria as regulation, the FHWA is requesting comment on the most desirable way to accomplish any such adoption. As explained above, the existing criteria are developed by the CVSA. Section 12 of Pub. L. 104-113 (see 5 U.S.C. 272 note) directs agencies

to use technical standards that are developed or adopted by voluntary consensus standards bodies. The FHWA appreciates the work done by the CVSA in maintaining the current criteria, and recognizes the value of that effort. The FHWA is also mindful of the role of the States in the MCSAP program and the desirability of using State-developed criteria or standards in the MCSAP program whenever possible. Therefore, the FHWA is seeking specific comment on how the FHWA should adopt any out-of-service criteria. Should the FHWA, for example, consider adopting the CVSA criteria and incorporating them in the FMCSRs, either as an appendix to the FMCSRs or by seeking approval from the Director of the Office of the Federal Register to incorporate by reference the CVSA criteria into the FMCSRs? Should the FHWA set forth the text of any criteria adopted in the body of its safety regulations? What implications, if any, would there be for continued State development of out-of-service criteria if the FHWA adopts separate criteria or incorporates existing criteria? How can the FHWA best address the federalism implications of adopting out-of-service criteria that may be used by the States which have concurrent motor carrier safety jurisdiction? How can national uniformity be promoted, and how can maximum State and industry acceptance of the criteria be gained, by any proposed alternative adoption method?

Request for Comments

A copy of the CVSA OOS criteria has been placed in the docket and may be accessed and viewed electronically following the instructions provided at the beginning of the Supplementary Information section of this ANPRM. Copies of the OOS Criteria may also be obtained at offices of the Federal Highway Administration's Office of Motor Carriers located in each State. The telephone numbers of the State offices may be obtained by telephoning 1-800-832-5660.

The FHWA invites public comment on the OOS Criteria: What are they? Who should be responsible for implementing them? How should they be used? Are they appropriate for regulatory treatment, or should they remain as guides to the enforcement of motor carrier safety by participating jurisdictions? What should the scope and effect of the OOS Criteria be? Should they be referred to in the FMCSRs? If so, in what manner? Should

they continue to be used in safety fitness determinations? The FHWA welcomes the presentation of alternatives to the approaches outlined in this document. The FHWA is not, however, seeking comment on the substance of the OOS Criteria at this time.

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. 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 action is not significant within the meaning of Executive Order 12866 or significant within the meaning of Department of Transportation regulatory policies and procedures. Due to the preliminary nature of this document and lack of necessary information on costs, the FHWA is unable to evaluate the economic impact of the potential regulatory changes being considered in this rulemaking. Based on the information received in response to this notice, the FHWA intends to carefully consider the costs and benefits associated with various alternative requirements. Comments, information, and data are solicited on the economic impact of any potential change.

Regulatory Flexibility Act

Due to the preliminary nature of this document and lack of necessary information on costs, the FHWA is unable to evaluate the effects of the potential regulatory changes on small entities. Based on the information received in response to this notice, the FHWA intends, in compliance with the Regulatory Flexibility Act (5 U.S.C. 601-612), to carefully consider the economic impact of these potential changes on small entities. The FHWA solicits comments, information and data on these impacts.

Unfunded Mandates Reform Act

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)

This action has been analyzed using the principles and criteria contained in Executive Order 12612. Because of the preliminary nature of this document, it is not possible to determine whether this proposal will have sufficient federalism implications to warrant the preparation of a federalism assessment. The FHWA is presenting this rulemaking as an opportunity to air complex issues.

These issues appear to have federalism implications. For example, adoption by the FHWA of the OOS Criteria as part of the FMCSRs would have an effect on States and municipalities. By making the OOS Criteria a part of the FMCSRs, the FHWA would be exercising control over those criteria. The CVSA might experience a diminished role in the development of policy standards for the exercise of enforcement discretion. Its member States might likewise experience a reduced role in their relationships with the Federal government. Incorporation by reference within the FMCSRs might have less of a federalism impact. The FHWA would have to conduct a rulemaking whenever the CVSA developed revisions of the OOS Criteria. But, because the language of the OOS Criteria would be more directly under the control of the CVSA, the federalism impact would be less than in the first approach. Maintaining the current policy would appear to have minimal federalism impact. The State-Federal partnership which has been operative in this area would presumably continue, and the CVSA and its member States would continue to play a large role in the maintenance of the OOS Criteria.

Executive Order 12372 (Intergovernmental Review)

The regulations implementing Executive Order 12372 regarding

intergovernmental consultation on Federal programs and activities do not apply to this program. Catalog of Federal Domestic Assistance Program Number 20.217, Motor Carrier Safety.

Paperwork Reduction Act

This action does not contain a collection of information requirement for purposes of the Paperwork Reduction Act of 1995, 44 U.S.C. 3501-3520.

National Environmental Policy Act

The agency has analyzed this action for purposes of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and it has determined that this action would not have any effect on 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

49 CFR Part 395

Highway safety, Motor carriers, Reporting and recordkeeping requirements.

49 CFR Part 396

Highway safety, Motor carriers, Motor vehicle safety, Reporting and recordkeeping requirements.

Authority: 49 U.S.C. 31133, 31136, 31310, and 31502; sec. 345, Pub.L. 104-59, 109 Stat. 568,613; and 49 CFR 1.48.)

Issued on: July 10, 1998.

Kenneth R. Wykle,

Federal Highway Administrator.

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