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*Before the*  
**U.S. DEPARTMENT OF TRANSPORTATION  
FEDERAL HIGHWAY ADMINISTRATION**

September 18, 1998  
WASHINGTON, DC

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*Comments of*  
**AMERICAN TRUCKING ASSOCIATIONS**  
*On*  
**ADVANCE NOTICE OF PROPOSED RULEMAKING:  
REQUEST FOR COMMENTS**  
**OUT-OF-SERVICE CRITERIA**

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**FHWA Docket No. FHWA 98-3414 - 13**  
Federal Register [Vol. 63, No. 138]



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## FOREWORD

The American Trucking Associations (ATA), with offices located at 2200 Mill Road, Alexandria, Virginia 22314, is the national trade association of the trucking industry. Through our affiliated associations in located in every state and the District of Columbia, and their more than 30,000 motor carrier members, fourteen affiliated conferences, and other organizations, ATA represents every type and class of motor carrier operation in the country.

The ATA Safety Policy Department is charged with the responsibility of reviewing legislative and regulatory actions proposed by any jurisdiction within the United States. The Safety Policy Department solicits industry views and develops and submits, in rulemaking proceedings, comments reflecting trucking industry policy. It has also submitted comments to final rules and petitions for regulatory amendments to enhance safe motor carrier operations and overall highway safety. Additionally, the department develops materials and programs which assist motor carriers in meeting their responsibilities for regulatory compliance and safe operations.

ATA files these comments on behalf of its members and the American Moving and Storage Association (AMSA), the Association of Waste Hazardous Materials Transporters (AWHMT), the Munitions Carriers Conference (MCC), the National Automobile Transporters Association (NATA), the National Tank Truck Carriers, Inc. (NTTC), the Towing and Recovery Association of America, Inc. (TRAA), the Truckload Carriers Association (TCA), and the Specialized Carriers and Rigging Association (SC&RA), in response to the Federal Register Advance Notice of Proposed Rulemaking (ANPRM); Request for Comments; FHWA Docket No. FHWA-983414; Department of Transportation, Federal Highway Administration (FHWA) regarding Out-of-Service Criteria.

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## I. INTRODUCTION

The American Trucking Associations, Inc. (ATA) is pleased to provide comments to the Federal Highway Administration (FHWA) regarding its Advance Notice of Proposed Rulemaking (ANPRM) on the North American Uniform Out-of-Service Criteria (OOS 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 commercial motor vehicle (CMV) or driver, found in violation of the law, to continue in commerce. Moreover, 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.

The CVSA is an association of federal, state, local, and provincial 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. As such, each year the CVSA reviews the OOS criteria, and makes necessary changes.<sup>1</sup>

ATA is concerned that the development and maintenance of the OOS criteria will be severely hampered if it is subject to the Federal Register notice and comment process. Most likely, the widespread acceptance of the CVSA OOS criteria is due to the process by which it is now developed. Anyone can suggest a change, addition, or deletion to the OOS criteria to the CVSA. The committee responsible for maintaining that part of the criteria in question is given the responsibility to research and discuss the recommendation. Discussion takes place at a committee meeting and all persons in attendance are given the chance to voice their opinions, including representatives from

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<sup>1</sup> Federal Register, Volume 63, No. 38 FHWA Docket No. FHWA-98-3414, Out-of-Service Criteria, 7/20/98, p.38791.



industry. Once discussed, a vote is taken to either approve or disapprove the recommended action.

Once the committee has finalized its position on an issue, it is sent to the CVSA Executive Committee for further discussion. Industry representatives have no vote in the Executive Committee and, at times, this has caused problems because agreements made at the committee level, where industry representatives are allowed to vote, have been overridden by the Executive Committee. In spite of this, the method of maintaining the OOS criteria has been fairly successful. Therefore, there is no need to incorporate the CVSA OOS criteria into the Federal Motor Carrier Safety Regulations (FMCSR).

## II. OOS CRITERIA HAS BEEN DEVELOPED OVER THE LAST 40 YEARS

OOS criteria has been in existence for over forty years. Prior to its integration into the United States Department of Transportation in 1967, the Bureau of Motor Carrier Safety (BMCS), a part of the former Interstate Commerce Commission, developed the first OOS criteria in carrying out its inspection function. Those criteria continued in use by the FHWA.

In 1980, FHWA conducted a pilot program to assess the potential of States to enforce CMV rules. Four states participated and generated satisfactory results. Subsequently, in 1982, legislation was passed that created the Motor Carrier Safety Assistance Program (MCSAP). Because of the patchwork of state laws and regulations, the states came to realize that a larger number of motor carriers would be in compliance if greater uniformity in enforcement were achieved. Several western states, Maine, and several Canadian provinces formed the CVSA to reach agreement on issues such as inspections and OOS criteria.



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With the subsequent support and encouragement of FHWA, 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 Federal Motor Carrier Safety Regulations (FMCSR) and the Hazardous Materials Regulations (HMR) of the Research and Special Programs Administration (RSPA), by using uniform inspection criteria.

The Motor Carrier Safety Act of 1991 (the Act) prescribed certain penalties for motor carriers or drivers found to have violated OOS orders (49 U.S.C. 31310(g)(2)). Additionally, 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 of receipt of Federal safety funding under MCSAP. The Congress also made a state's adoption of penalties for violations of OOS orders a condition of continued receipt of the State's full allocation of highway construction funds (49 U.S.C. 31311). And finally, 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")?

### III. THE MOTOR CARRIER INDUSTRY HAS PLAYED AN ESSENTIAL ROLE IN THE DEVELOPMENT OF THE CVSA OOS CRITERIA

ATA has taken an active role in the development of the OOS criteria since the inception of CVSA in the early 1980's. Representatives from ATA's Engineering and Safety Departments have provided significant input into the development and maintenance of the vehicle, driver, and hazardous materials OOS Criteria. Recently, ATA took an active role in CVSA's 1996 Oregon State University study that thoroughly scrutinized the impact on safety of the OOS criteria.<sup>3</sup> This important study validated

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<sup>2</sup> Ibid, pp.38791 - 38792.

<sup>3</sup> Miller, S. G., Montagne, P. E., Randhawa, S. U., and Bell, C. A., "Out of Service Criteria for Commercial Vehicles" Transportation



much of the work of CVSA, the federal government, and industry in formulating the OOS criteria. For the most part, researchers found the criteria was based on sound science and reasoning. This was especially true in the vehicle OOS Criteria.

Not only has ATA taken part in formulation of the OOS criteria, but other motor carrier and related industry members have participated in its development as well. Through associate member status of CVSA, many industry segments have been represented, including less-than-truckload (LTL), truckload (TL), tank truck (TT), owner-operators, and manufacturers of vehicle safety systems and tie-down assemblies. While not always in agreement with eventual outcomes, there were many times when the enforcement community depended on industry expertise to verify if there was a need for implementing a new criterion. Industry has been an integral part of the various CVSA committees responsible for development of driver, vehicle and hazardous materials inspection and OOS criteria.

#### IV. GENERAL APPLICATION

During the period of time the CVSA has been responsible for development of the OOS criteria there have been no significant problems encountered by motor carriers at roadside inspections regarding the criteria. Most roadside inspection complaints regarding the criteria are generated through unilateral decisions made by specific inspectors to allow a vehicle to proceed to a "safe" place, even after the vehicle is placed out-of-service. This practice is not condoned by the States or FHWA. And, motor carriers are opposed to "random" applications of the OOS Criteria because of the tremendous liability associated with moving a vehicle on a public highway with the knowledge that it may be inherently unsafe to do so.



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Additionally, motor carriers have experienced problems with improper applications of the criteria. Application problems usually can be traced back to new inspectors or improper training. Also, a lack of understanding of the intent of the OOS criteria due to expansion and change of the criteria over the years has contributed to some of this confusion.

Another area of concern to motor carriers is the sometime arbitrary nature of the application of the CVSA decal. While CVSA provides specific guidelines to inspectors for this procedure, there are times that it appears to be reluctance on the part of inspectors to “award” a CVSA decal to motor carrier whose vehicle has passed the CVSA level I inspection.<sup>4</sup> Other times, there appears to be an undercurrent of either competition or mistrust on the part of inspectors from different states and they refuse to honor a decal earned by the carrier and applied by a neighboring jurisdiction.

As these examples indicate, industry concerns with the inspection process have their roots in uniformity issues, not in the criteria development process. Conduct of inspections, issuance of CVSA decals indicating that one has passed an inspection, and treatment of the carrier during an inspection are all issues generating concerns. However, were there no OOS criteria that situation would be much worse because there would be no uniform foundation upon which to build training and enforcement programs.

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<sup>4</sup> CVSA decals are placed on vehicles at the time of inspection only by certified CVSA inspectors. While it is not blanket protection from further inspections, the decal indicates that the vehicle has passed a CVSA Level I inspection and should allow that vehicle to “pass through” inspections for a period of 90 days, unless there is an apparent defect or violation noted as the vehicle proceeds through the inspection line.



**V. FHWA SHOULD CONSIDER AN ALTERNATIVE TO THE FEDERAL REGISTER NOTICE AND COMMENT PROCESS FOR OOS CRITERIA DEVELOPMENT**

ATA does not agree with the organizations that have petitioned FHWA to subject the OOS criteria to full notice and comment in the Federal Register. While we understand the arguments of the petitioners, we view the criteria as enforcement tolerances and not rules. However, due to the important implications of the criteria, including safety ratings and targeting of motor carriers for compliance audits, ATA suggests an alternative to the full Federal Register notice and comment process. This alternative method should fulfill the intent of the Federal Register process while maintaining the flexibility of the present procedure of OOS Criteria development.

The method that ATA recommends is as follows:

1. Incorporate the CVSA OOS criteria into the FMCSR by reference as the standard for placing CMV's out-of-service.
2. Each year (January or February), FHWA would publish a Notice of Availability and Request for Comments in the Federal Register. This would announce the availability of the newest version of the CVSA OOS criteria and would provide the process for obtaining a copy of the criteria and other pertinent information about CVSA and the criteria.
3. The notice could state that the new OOS criteria would be effective on April 1<sup>st</sup> after publication in the Federal Register and it would be applied as it appears during the course of the year.
4. Interested parties could be given 30 - 60 days to submit comments to FI-IWA.
5. Comments would be received by FI-IWA and then forwarded to CVSA.
6. CVSA would address each concern raised during its Spring and Fall meetings.



7. The OOS criteria would be amended as recommended by CVSA and forwarded to FHWA.
8. The new version would then be introduced in the Federal Register the following January/February and the process would begin anew.

This process addresses both the need for flexibility in OOS criteria development and the need to include the FHWA and input from a larger population. By instituting the aforementioned procedure, the development of criteria remains the obligation of CVSA. Industry involvement remains high and the working relationship between industry and enforcement remains intact. And, although the OOS criteria is put out to the public for comment, implementation it is not held up in the formal notice and comment procedure. Otherwise, the opportunity for outside input is provided and the intent of the Federal rulemaking procedure is upheld.

#### VI. THERE IS NO NEED TO CHANGE THE WAY THE OOS CRITERIA IS UTILIZED

There is no need to change the function of the OOS criteria. When used properly, the OOS Criteria provides a cushion between violation and inherent danger. For instance, a vehicle with one brake out of adjustment is in violation of the FMCSR, and without the OOS criteria, that vehicle could be put out-of-service for that one defect.<sup>5</sup> However, the OOS Criteria allows up to 20% of the vehicle's brakes to be out of adjustment before the vehicle is determined to be so inherently unsafe that it should not continue in commerce.

On the other hand, there are times that the OOS criteria and the FMCSR violation are the same. In these cases, the single defect creates the inherently unsafe condition that poses a serious threat to highway safety and the vehicle should not be allowed to

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<sup>5</sup> FMCSR, Part 393, Section 393.48



continue until the defect is corrected. For example, one flat tire on the vehicle not only is in violation of the FMCSR, but also is serious enough to place the vehicle out-of-service.<sup>6</sup>

The OOS criteria should not be used to further penalize motor carriers either through higher fines or more severe actions on the part of enforcement agencies. Without any further action on the part of enforcement agencies, a motor carrier's OOS history and subsequent safety rating could be enough to "punish" a motor carrier through lost business and revenues. Therefore, the function of the OOS criteria should remain to be a guide for removing only the most dangerous vehicles from the highway.

## VII. CONCLUSION

There is no need to change the fundamental process for development and utilization of the OOS criteria. Fifteen plus years of experience with the CVSA as the custodian of the OOS criteria have shown that the present process is basically sound and that there are few problems associated with its intended use. Changes made to the OOS criteria have been timely and have been made with substantial input from industry and Federal and State enforcement personnel. The success of the present process should be proof enough to dispel any pressing need to incorporate the OOS criteria into the FMCSR.

To incorporate the OOS criteria into the FMCSR and thus subject it to the Federal Register notice and comment process would be imprudent. The notice and comment process is unnecessary because they do not constitute regulations, and furthermore it is cumbersome, time consuming, and would most likely cause a schism between the OOS criteria requirements and current technology. The CVSA process provides the flexibility to address problems in a timely fashion as they arise.

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<sup>6</sup> FMCSR, Part 393, Section 393.75



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A modification to the CVSA process that involves incorporation of the OOS criteria into the FMCSR by reference and the yearly announcement of its availability and a request for comments in the Federal Register as described in section V, could provide even greater opportunity for relevant input. We trust that FHWA will seriously consider this option.

And finally, we recommend that FHWA not change the function of the OOS criteria. It should remain an enforcement tolerance and the standard for all CMV enforcement agencies to utilize as the indicator of inherently dangerous vehicles and drivers. Without the OOS criteria as the “cushion” between violation and an inherently unsafe operation, motor carriers would be subject to the letter of the FMCSR without any other rational or reasonable considerations.

We appreciate this opportunity to comment on CVSA OOS criteria.

