



**ADVOCATES  
FOR HIGHWAY  
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Docket No. FMCSA-2001-11060 - 29  
U.S. DOT Dockets, Room PL-401  
U.S. Department of Transportation  
400 Seventh Street, SW  
Washington, DC 20590

**Certification of Safety Auditors, Safety Investigators, and Safety Inspectors  
Interim Final Rule With Request for Comments, 67 FR 12776 *et seq.*, March 19, 2002**

Advocates for Highway and Auto Safety files the following comments in response to the Federal Motor Carrier Safety Administration (FMCSA) proposal to implement Section 211 of the Motor Carrier Safety Improvement Act of 1999 (MCSIA).

Section 211 of the MCSIA mandates the FMCSA to fulfill the following action:

(a) Not later than 1 year after the date of the enactment of this section, the Secretary of Transportation shall complete a rulemaking to improve training and provide for the certification of motor carrier safety auditors, *including private contractors*, to conduct safety inspection audits and reviews described in subsection (b).

49 U.S.C. § 31148 (emphasis supplied).

This first subsection (a) of the cited legislation is not quoted by the FMCSA in the preamble of this rulemaking action. Similarly, the interim final rule itself contains no provisions implementing the clear statutory command of Section 211 that the agency institute training and certification for private contractor motor carrier safety auditors.

However, the FMCSA does acknowledge the effect of subsection (a) on agency compliance with Section 211:

The language of section 211 authorizes non-government personnel to conduct the safety review required of new entrants. FMCSA seeks comments on the advisability of certifying non-government employees that meet all training and experience criteria to conduct safety reviews as provided in the IFR.<sup>1</sup>

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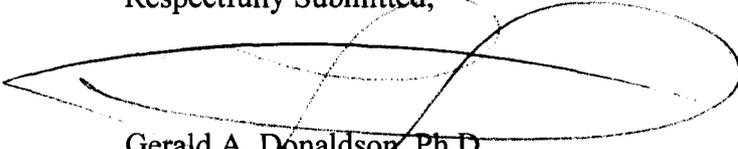
<sup>1</sup>The full citation of the abbreviation 'IFR' appears nowhere in the preamble of this notice, but appears to refer to "interim final rule." Resort to the use of an interim final rule,

67 FR 12776, 12777.

It is apparent that the FMCSA has misunderstood statutory instruction in Section 211. There is no issue in subsection (a) concerning the "advisability" of using non-government personnel to perform safety reviews. First, the effect of this subsection is evident on its face and admits of no discretion by the agency. Second, the Congressional direction in this subsection speaks to both safety audits and safety reviews, not just safety reviews. Third, the language of the subsection does not restrict the use of such private sector personnel to only the performance of safety evaluations of new entrants. Fourth, the subsection does not authorize but rather commands the training, certification, and use of private sector personnel for all aspects of safety evaluation of both new and existing carriers already awarded operating authority. The FMCSA has introduced multiple distortions into its gloss of the directive language of Section 211(a): the agency is mistaken if it believes that eliding the citation of subsection (a) on the first page of this notice and regarding the implementation of its direction as an optional action can allow it to evade a Congressional dictate. These facile maneuvers cannot shield the agency from the consequences of openly disobeying the express direction of Congress in subsection (a). Not only has the agency violated the deadline for regulatory action required by Congress and thereby denied the American people the timely benefits of an improved training and certification regime for motor carrier safety auditors, but it has usurped the prerogatives of Congress and overridden an unambiguous statutory command with an agency decision to ignore federal law. Advocates strongly advises the agency to correct its misreading of Section 211 as quickly as possible.

Finally, Advocates does not agree that the FMCSA requires such extraordinary flexibility that it cannot ventilate its training requirements in the Federal Register for public evaluation and comment. The agency argues that "[c]odification would make the program inflexible and difficult to manage." However, this claim does not moot the value of receiving informed views on the content of the different training regimes used for auditors, investigators, and inspectors. Advocates strongly recommends that the agency reconsider its rejection of submitting its training curricula to public review. This can be conducted as an evaluation of draft policies without necessarily entailing regulatory codification.

Respectfully Submitted,



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which forswears adequate public notice and comment, would not have been necessary had FMCSA complied with the statutory time limit for conducting and completing rulemaking pursuant to Section 211 of the MCSIA.