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FMCSA's forthcoming Safety Measurement System overhaul

WHAT TO EXPECT FROM THE FEDERAL WEBSITE'S UPDATE AND HOW TO USE ITS DATA TO PLEAD THEORIES OF NEGLIGENT ENTRUSTMENT, NEGLIGENT HIRING, AND NEGLIGENT RETENTION

Each year, crashes involving large commercial trucks kill thousands of people and injure tens of thousands more. Behind those numbers is a federal regulatory promise: that dangerous motor carriers will be identified for intervention before safety problems lead to the next crash. The primary mechanism for keeping that promise is the Safety Measurement System ("SMS") – the data-driven framework the Federal Motor Carrier Safety Administration ("FMCSA") uses to monitor carrier safety performance through monthly safety-performance data.

On November 20, 2024, FMCSA published a comprehensive notice announcing approved enhancements to the SMS methodology – the most substantial revision of the system since its 2010 implementation. (See Enhanced Carrier Safety Measurement System (SMS), 89 Fed. Reg. 91,874, 91,880 (Nov. 20, 2024) (Docket No. FMCSA-2022-0066).) FMCSA announced that a follow-up Federal Register notice would publicize the launch date for the enhanced SMS website. Unless that launch notice issues before publication, practitioners should treat the 2024 notice as FMCSA's definitive statement of the forthcoming methodology, not as proof that the enhanced methodology is already operative.

This article explains what the SMS is, where it came from, what the 2024 notice approved, and how those approved changes will affect the way we prosecute commercial motor vehicle cases once they launch.

Background: From SafeStat to CSA

Before SMS, FMCSA used a predecessor system called SafeStat. It evaluated carriers across four Safety Evaluation Areas: Accident History, Driver Performance, Vehicle Condition, and Safety

Management. SafeStat relied on a narrow set of data inputs, updated infrequently, and showed weak predictive value for identifying high-risk carriers before crashes occurred.

In 2010, FMCSA launched the Compliance, Safety, Accountability initiative ("CSA") and SMS. SMS replaced SafeStat as the analytical engine behind federal carrier oversight. It draws on data from FMCSA's Motor Carrier Management Information System (MCMIS), which records violations from roadside inspections, traffic enforcement, and investigations, along with crash and motor carrier census data. Instead of four broad evaluation areas, SMS organized carrier safety data into seven Behavior Analysis and Safety Improvement Categories, known as "BASICS": Unsafe Driving, Hours-of-Service Compliance, Driver Fitness, Controlled Substances and Alcohol, Vehicle Maintenance, Hazardous Materials Compliance, and Crash Indicator. Each BASIC organizes the relevant subset of that data into a safety-performance measure. Carriers are scored within each BASIC and percentile-ranked against comparable carriers to produce a normalized safety profile. Carriers exceeding threshold percentile scores in any BASIC trigger an "alert" flag, signaling elevated risk and potential for FMCSA intervention.

FMCSA's published SMS Effectiveness Test demonstrates carriers identified for intervention have a 61% higher crash rate than carriers not identified, and the group of carriers meeting the FMCSA's high-risk criteria has a crash rate that is 178% higher than the national average. (See 88 Fed. Reg. at 9, 955.) These are not marginal correlations, but an empirical foundation that supports both FMCSA's enforcement program and the plaintiff lawyer's use of SMS data as evidence supporting notice, standard-of-

care, and negligent-retention theories.

For plaintiffs' lawyers, SMS was immediately valuable. A carrier's BASIC scores and alert history provided a documentary basis for arguing that the carrier knew or should have known that its safety practices were deficient before the crash. That prior-knowledge argument supports claims for negligent retention of an unsafe driver, negligent maintenance, and, in appropriate cases, gross negligence and punitive damages.

The FAST Act, the NAS study, and the data-access problem

In 2015, Congress passed the Fixing America's Surface Transportation Act, known as the FAST Act. It requires FMCSA to review motor carriers that, through performance data, are among the highest-risk carriers for four consecutive months. Section 5223 directed FMCSA to remove BASIC percentile scores and alerts from public view for motor carriers transporting property, pending a methodological review by the National Academies of Sciences ("NAS"). (See FAST Act, Pub. L. No. 114-94, § 5223, 129 Stat. 1312 (2015).) Passenger carrier percentile scores and alerts were not subject to the restriction. Section 5221 required NAS to study the SMS methodology and report its findings. Section 5305(a) required FMCSA to review carriers among the highest risk for four consecutive months.

NAS issued its report on June 27, 2017. (See National Academies of Sciences, Engineering, and Medicine, *Improving Motor Carrier Safety Measurement* (Washington, D.C.: National Academies Press, 2017).) It concluded that SMS in its then-current form was "structured in a reasonable way" and that its method of identifying carriers for alert status was defensible, but had six recommended improvements. The relevant recommen-

dation called on FMCSA to develop an Item Response Theory (IRT) model and, if it performed well, to use IRT to replace SMS.

FMCSA tested the IRT model thoroughly and concluded that it did not perform better than SMS for identifying high-risk carriers. IRT was biased toward smaller carriers with few inspections, lacked the on-road exposure adjustments SMS uses through Vehicle Miles Traveled and Power Units, was opaque to industry and the public, could not be independently computed by a single carrier, and ran far too slowly. FMCSA rejected it, but used the IRT analyses to identify the SMS improvements that became the 2023 proposal and ultimately the 2024 notice.

The effect of Section 5223 has been significant. With property carrier percentile scores hidden from the public portal, attorneys lost access to the comparative ranking data that most powerfully illustrated a carrier's relative dangerousness. Raw inspection violations and crash history remained accessible, but the percentile scores, the metric that demonstrated where a given carrier ranked in the industry on critical safety, were gone from the public-facing interface for property carriers, a significant percentage of trucking defendants.

What the 2024 notice approved

On February 15, 2023, FMCSA published proposed changes to SMS, opening a 90-day preview and comment period granting carriers access to a Prioritization Preview site to see how the proposed methodology would affect their own scores. FMCSA received 176 comments. Their response, and the substantive announcement of the seven enhancements that will define the system going forward, came in the November 20, 2024 Federal Register notice. (See Enhanced Carrier Safety Measurement System (SMS), 89 Fed. Reg. 91,874, 91,880 (Nov. 20, 2024).) The launch date for the enhanced methodology will be announced by separate notice.

The approved enhancements address seven categories of change:

Compliance Categories will replace BASICs. The most visible terminolo-

gy change is that FMCSA will replace BASICs with "Compliance Categories." FMCSA accepted the American Trucking Association's suggestion that the new term "more accurately depicts the information categorized" and provides simpler, more relatable terminology.

Restructured Compliance Categories. More significantly, the composition of the categories will change. The Controlled Substances and Alcohol category, currently a standalone BASIC, will be absorbed into a new Unsafe Driving Compliance Category, along with all Operating While Out-of-Service violations. FMCSA explained that drug/alcohol-impaired driving "is a form of unsafe driving" and that the relative sparsity of these violations inhibits the BASIC system's ability to identify high crash risk carriers.

Vehicle Maintenance and Vehicle Maintenance: Driver Observed. The Vehicle Maintenance BASIC will be split into two compliance categories: Vehicle Maintenance and Vehicle Maintenance: Driver Observed, distinguishing between violations more commonly identified by a mechanic during routine maintenance or detected as part of a Full (Level 1) roadside inspection (Vehicle Maintenance) and violations that could reasonably be observed by a driver or detected as part of a Walk-Around (Level 2) roadside inspection (Vehicle Maintenance: Driver Observed). The Driver Fitness Compliance Category will include a new violation group called "Operating While Prohibited." FMCSA moved violation code 390.3E from Unsafe Driving to Driver Fitness and added 49 C.F.R. § 392.15 to Driver Fitness. Both relate to operating a CMV while prohibited from safety-sensitive functions under 49 C.F.R. § 382.501(a).

FMCSA will segment two additional compliance categories. The Unsafe Driving and Crash Indicator categories already segment carriers between Straight and Combination operations under the current methodology. The Driver Fitness Compliance Category will also segment between Straight and Combination carriers, and the Hazardous Materials Compliance Category will segment between Cargo Tank and Non-Cargo Tank carriers.

Consolidated violations. FMCSA will

reorganize the 959 roadside inspection violations used in the current methodology into 116 violation groups. This consolidation responds to inconsistencies that arise when multiple violations are cited for the same underlying safety issue, and that "determining whether a safety issue is identified is more important than determining how many ways it was documented." Under the new approach, any of the underlying violations can still be cited during a roadside inspection and will continue to appear on the inspection report. For prioritization purposes, however, multiple violations from a single inspection within the same group will count as one violation when calculating the carrier's compliance category measure.

Simplified violation severity weights. The one-to-ten severity weight scale will be replaced with a simplified one or two scale. Two categories of violations will receive a weight of two: out-of-service violations in all compliance categories except Unsafe Driving, and driver-disqualifying offenses under 49 C.F.R. § 383.51 within the Unsafe Driving Compliance Category. All other violations will receive a weight of one. FMCSA's analysis concluded that the number of violations a carrier has is a stronger indicator of safety compliance than the precise severity weight assigned to any one violation. Upon launch, defense experts who have emphasized the precision of FMCSA's one-to-ten weighting will face a different evidentiary landscape in which carrier risk is measured by patterns of violation rather than by gradations of single events.

Proportionate percentiles. The Safety Event Groups used in the current methodology to bucket carriers for percentile calculation will be replaced with "Proportionate Percentiles." This change is designed to eliminate the large, non-safety-related percentile jumps that occur when a carrier shifts between event groups. For carriers and counsel attempting to track safety performance over time, the change will yield more meaningful month-to-month movement in the underlying data.

Greater focus on recent violations. The 12-month data sufficiency standard that currently applies to the Unsafe Driving

and Controlled Substances/Alcohol BASICs will be retained for Unsafe Driving and extended to the Hours of Service, Vehicle Maintenance, Vehicle Maintenance: Driver Observed, Hazardous Materials, and Driver Fitness Compliance Categories. Going forward, percentiles in those categories will be calculated only for carriers with cited violations in the past 12 months. This change will make the data more temporally relevant and encourage carriers to promptly address compliance problems. For lawyers, the change will mean a sustained alert is more probative of contemporary safety practices than the same alert would have been under the current methodology, where older violations could continue to affect percentiles during the 24-month SMS lookback even if the carrier had no cited violations in the most recent 12 months.

Improved intervention thresholds. FMCSA will raise the intervention thresholds for the Driver Fitness Compliance Category and for the Hazardous Materials Compliance Category. The Vehicle Maintenance and Vehicle Maintenance: Driver Observed Compliance Categories will retain the existing Vehicle Maintenance BASIC thresholds. The adjustments to Driver Fitness and Hazardous Materials reflect FMCSA's conclusion that these categories have the lowest correlation to crash risk.

Updated Utilization Factor. For the Unsafe Driving and Crash Indicator categories, the Utilization Factor, which adjusts for variation in on-road exposure across carriers, will be extended from 200,000 to 250,000 vehicle miles traveled per average power unit. The change recognizes that higher-utilization carriers exist in the population and ensures that their safety profiles will not be distorted by an artificial mileage ceiling.

The persistent FAST Act Section 5223 restriction

The November 2024 notice does not restore public visibility of percentile scores for motor carriers transporting property, and the launch of the enhanced methodology will not change that. Under FAST Act Section 5223, FMCSA continues to remove property carrier percentiles

and alerts from the public SMS website. Passenger carrier percentiles and alerts remain publicly available, as do inspection, investigation, crash, and registration data for all carriers. This means that percentile and alert data must be obtained through means other than the public SMS portal for cases involving property carriers.

Three avenues are available. First, the defendant carrier itself accesses its own complete SMS profile through the FMCSA login portal. Discovery should specifically request preservation and production of the carrier's monthly SMS prioritization reports for the relevant period. Second, the carrier's insurance applications, internal compliance documents, and board-level safety reports frequently reference specific percentile scores. Third, FOIA requests to FMCSA may be worth pursuing for non-exempt underlying records, but counsel should not rely on FOIA to obtain nonpublic percentile or alert data within the discovery cycle due to the extensive backlog in fulfilling FOIA requests.

For motorcoach and other passenger carrier cases, percentile and alert data remain publicly visible on the SMS website. Counsel handling these matters should screenshot the operative SMS profile at intake and preserve archived versions as litigation progresses.

How plaintiffs' lawyers use SMS data

At intake, counsel should preserve a contemporaneous record of the carrier's public SMS data – inspection, investigation, crash, and registration data remain visible for all carriers – noting the date, time, and methodology version displayed. SMS data updates monthly; by the time litigation begins, a carrier's public profile may look materially different from what it showed at the time of the collision. For passenger carrier matters, where percentiles and alerts remain public, preservation of that data is essential.

SMS alert flags and BASIC data support pleading theories of negligent entrustment, negligent hiring, and negligent retention. A carrier operating with a documented pattern of Hours-of-Service violations before a fatigue-related crash

cannot credibly claim it had no notice of the driver's compliance problem. CMV safety experts routinely rely on SMS data to establish industry standard-of-care arguments and to opine on a carrier's relative position within the population of motor carriers. And in jurisdictions permitting punitive or exemplary damages, a sustained pattern of SMS alerts, particularly where FMCSA issued intervention letters ignored by the carrier, supports the standard required for punitive recovery in many jurisdictions. The carrier's own regulatory file, supplemented by its internal SMS reports obtained in discovery, often provides evidence of gross negligence.

The discovery roadmap, by Compliance Category

Unsafe Driving (49 C.F.R. Parts 392, 397). Under the approved methodology, the Unsafe Driving Compliance Category will capture both traditional moving violations and the controlled substances and alcohol violations currently housed in a separate BASIC, along with Operating While Out-of-Service violations. A sustained alert shows the carrier has a driver-behavior problem it has tolerated.

Discovery for the moving-violation component should target the complete roadside inspection reports underlying every Unsafe Driving violation in the thirty-six months before the crash, the driver qualification files (49 C.F.R. § 391.51) for every driver who received such a violation, all coaching and disciplinary documentation for those drivers, the carrier's internal safety and progressive-discipline policies, and the driver-facing camera and telematics event records that frequently document but never reach the FMCSA file.

Discovery for the drug-and-alcohol component should include the carrier's complete testing program documentation covering random, pre-employment, and post-accident testing (49 C.F.R. §§ 382.301, 382.303, 382.305, 382.41), the driver's complete testing history across all categories, designated employer representative records, third-party administrator records, random testing selection logs to verify both randomness and adequate frequency, Clearinghouse query records

(49 C.F.R. § 382.701), and any substance abuse professional referrals. Post-crash testing documentation for the subject crash is essential as gaps and delays in post-crash testing are themselves evidence of program inadequacy. Internal communications between safety and operations are often the most damaging across both components. They reveal that the carrier knew which drivers were dangerous and chose to keep them running regardless.

Hours-of-Service Compliance (49 C.F.R. Part 395). Discovery should target the subject driver's complete ELD data (raw data file, not the carrier's summary reports) for at least 90 days preceding the crash, along with dispatch records, load assignments, and delivery deadlines for that period. Pay records are essential because pay-per-mile structures are direct evidence of hours-of-service pressure. The carrier's hours-of-service compliance audits and the driver's hours-of-service disciplinary record close the loop. When falsification is suspected, ELD provider records obtained directly by subpoena to Motive, Samsara, Geotab, etc. often reveal the gap between what the carrier produced in discovery and what the device actually recorded.

Driver Fitness (49 C.F.R. Part 391). A sustained Driver Fitness alert says the carrier let unqualified people drive. Under the approved methodology, the category will specifically include drivers prohibited from safety-sensitive functions under the Clearinghouse. The discovery foundation is the complete driver qualification file (49 C.F.R. Parts 40, 382). Part 382 drug-and-alcohol testing records and Clearinghouse materials should be requested separately. Layer on the carrier's hiring policy, any deviations granted for the subject driver, the carrier's ongoing MVR monitoring program, and the driver's Clearinghouse history (49 C.F.R. §§ 382.301, 382.303, 382.305, 382.401). Internal communications about the driver's hire, particularly between recruiting and safety, often reveal that the carrier knew about disqualifying conduct and hired the driver anyway.

Vehicle Maintenance and Vehicle Maintenance: Driver Observed (49 C.F.R. Parts 393, 396). The approved split between

these two compliance categories will matter for discovery strategy when the enhanced methodology launches. Vehicle Maintenance will focus on underlying mechanical defects that a driver could not reasonably detect on a pre-trip inspection. Driver Observed will focus on conditions the driver could and should have caught. Both categories warrant production of the full maintenance file for the relevant period, including all records required by section 396.3, and any older records maintained in the ordinary course for the vehicle's time in the carrier's fleet, pre-trip inspection and check documentation, driver review or acknowledgment of the prior DVIR under section 396.13, DVIRs and defect reports under sections 396.11 and 396.13, annual periodic inspection records, and the carrier's maintenance policy and standard operating procedures. If maintenance is outsourced, subpoena the maintenance provider directly. Outsourced shops frequently retain detailed repair-order documentation the carrier's own files lack. Brake records deserve particular focus since brake violations are the most common Vehicle Maintenance citation and a recurrent contributor to catastrophic crashes.

Hazardous Materials Compliance (49 C.F.R. Parts 171-180). In cases involving hazardous materials, a sustained alert in this category creates significant punitive exposure. Discovery should reach hazardous materials training records for every driver, shipping papers and emergency response information for the subject load, placarding records and program documentation, hazardous materials equipment inspection records, and any prior hazardous materials incidents or releases. Communications with shippers about characterization and classification are often productive. Improper classification is a frequent cost-cutting shortcut and an independent ground for negligence.

Crash Indicator. The Crash Indicator Compliance category applies severity weights to crashes, placing more weight on crashes involving injury or fatality and on hazardous materials releases than on tow-away crashes. Discovery targets include the carrier's complete crash

register, every state-reported crash report involving the carrier's vehicles for the relevant period, internal post-accident investigation files for every prior crash, root cause analyses, corrective action plans, board-level safety reviews, and driver discipline following each prior crash. Insurance loss runs are essential and often more complete than the carrier's own crash register. Insurance applications and renewals shed light on what the carrier represented about its loss history to underwriters. These applications frequently contradict the carrier's litigation position about its safety record.

Counsel should also anticipate the defense's invocation of the Crash Preventability Determination Program ("CPDP"). Under the current SMS and continuing under the approved enhanced methodology, crashes adjudicated as "Not Preventable" through FMCSA's CPDP are excluded from the Crash Indicator calculation, and the defense will often petition for that determination in cases involving prior crashes that hurt the carrier's safety profile.

Conclusion

Time will tell how the changes to the SMS will affect tort cases. However, the core function of the SMS has not changed. SMS data often tells a powerful notice story: what safety problems were visible to the carrier, how long those problems persisted, and whether the carrier acted before the crash. Plaintiffs' lawyers who gather the proper evidence to tell the story to juries are not simply winning cases, they are enforcing the safety framework that Congress and FMCSA built and holding accountable the carriers the system was designed to stop.



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