

Chairman John Thune
Questions for the Record
Commerce Committee Hearing on the Nomination of T. F. Scott Darling, III
to be Administrator of the Federal Motor Carrier Safety Administration
January 20, 2016

- 1. Section 5223 of the recently enacted FAST Act places a clear restriction on the use of CSA analysis in making safety fitness determinations (SFD) before the flawed analysis has been corrected using the procedure described in the law. The recent notice of proposed rulemaking for the new SFD process notes that the violations, and violation weight measures will be used in evaluating a motor carrier's safety record. Please provide a detailed explanation of your thoughts on this potential conflict with the law.**

RESPONSE: Section 5223 of the FAST Act prohibits FMCSA from using any information regarding alerts and the relative percentiles for each Behavior Analysis and Safety Improvement Category (BASIC). The Safety Fitness Determination notice of proposed rulemaking (NPRM) does not use alerts or percentiles. In response to concerns about the Safety Measurement System (SMS), FMCSA purposefully constructed the NPRM to use absolute measures of the motor carrier and fixed failure measures. Therefore, motor carriers are compared to the failure standard, not each other, in determining if they should be proposed unfit.

The proposed Safety Fitness Determination rule also acknowledges a flaw in the CSA program due to disparate enforcement of various moving and nonmoving events which result in CSA violations. What is the FMCSA doing to promote a more uniform enforcement of these events to fix the flaw? Also, what measures have the FMCSA considered to account for the disparate enforcement so that geographical and jurisdictional enforcement issues do not continue to skew carrier's percentiles?

RESPONSE: As indicated in the Safety Fitness Determination (SFD) notice of proposed rulemaking, while enforcement differences exist among the States, the high failure standards proposed in this rule would be met or exceeded only after a sustained pattern of noncompliance. If a carrier is proposed unfit as a result of on-road safety data, it is not the result of these disparities but of recurring non-compliance. In most cases, the motor carrier would have been subject to previous interventions, such as warning letters, focused reviews, and/or civil penalty enforcement actions. If the safety deficiencies were not corrected, however, the carrier could ultimately meet or exceed the safety failure standards that result in a proposed unfit SFD. Additionally, it should be noted that violations are cited only when there is non-compliance with existing regulations. Motor carriers that are not in violation of the regulations do not have to be concerned with potential enforcement variances.

Senator Debra Fischer
Questions for the Record
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- 1. Regarding the CSA program, as I've mentioned before, I support utilizing a risk-based approach to developing safety standards. However, in order to avoid unintended consequences, we need to ensure that this program is utilizing accurate data and methodology. Would you please detail for the committee the FMCSA's step-by-step plans and a timeframe, if possible, to accomplishing the FAST Act requirements for the CSA program? When does FMCSA expect to have the program certified and back in order?**

RESPONSE: As prescribed in Section 5221, titled "Correlation Study," FMCSA expects to award a contract to the National Research Council (NRC) of the National Academies of Sciences (NAS) on February 8, 2016. FMCSA has met with NAS several times in advance of the award to discuss the FAST Act requirements and provided NAS with background documents in advance so that the NRC may begin its work immediately upon award. The timeline for the NAS' work is in keeping with Section 5221(c)'s 18-month requirement for a report to Congress.

Additionally, Section 5222 requires FMCSA to establish a "Beyond Compliance" program as a condition of restoring the Safety Measurement System. Such a program was already under consideration before enactment of the FAST Act; the Agency published a Federal Register Notice seeking comment on April 23, 2015. In addition, the Agency has since conducted public listening sessions on this topic on January 12 and 31. A second Federal Register notice is currently being prepared to seek further comments on a proposed program.

- 2. Right now, there are no requirements that a shipper or broker check a motor carrier's qualifications when they hire a truck. In your opinion, would it improve trucking safety to establish a requirement that shippers and brokers check that a motor carrier is authorized to be safe by FMCSA before they hire a truck?**

RESPONSE: FMCSA and I continue to advise shippers and brokers to use all available data in selecting a motor carrier. Shippers and brokers should confirm, at a minimum, that motor carriers have the proper registration and authority to operate, have the necessary evidence of financial responsibility on file with FMCSA, and do not have an unsatisfactory safety rating or unfit safety determination.

Imposing a new statutory or regulatory requirement on shippers and brokers to perform these checks before selecting a motor carrier, however, might or might not improve trucking safety. FMCSA does not have data or information that would enable us to determine that answer at this time.

To the extent such legislation placed new burdens on FMCSA to identify and take enforcement action against shippers or brokers for failing to perform these checks, however, I would be very concerned about diversion of scarce agency resources away from our core safety mission of ensuring that the carriers and commercial motor vehicle drivers themselves are operating safely.

- 3. The proposed notice of the Safety Fitness Determination (SFD) rulemaking clearly states that the FMCSA is using the same methodology utilized for the CSA program, is using the same BASICS, and the same peer groups. Further, the "fixed standard" by which carriers will be rated Fit or Unfit is a percentile (96 or 99) of the current percentiles in the respective Basics and peer groups. Recognizing serious flaws in the underlying CSA data and methodology, the FAST act required a National Academy of Sciences review and the development of a corrective action plan. Can you please explain how your SFD proposal and the setting of failure threshold percentiles comports with the FAST Act with relation to the use of data analysis, and the concerns of the GAO, the DOT Inspector General, and law enforcement with the flawed CSA comparative analysis?**

RESPONSE: As indicated above, Section 5223 of the FAST Act prohibits FMCSA from using any information regarding alerts and the relative percentiles for each Behavior Analysis and Safety Improvement Category (BASIC). In response to concerns about the Safety Measurement System (SMS), FMCSA purposefully constructed the proposal to use absolute measures of the motor carrier and fixed failure measures. Therefore, motor carriers are compared to the failure standard, not each other, in determining if they should be proposed unfit.

FMCSA also interprets Section 5223, including the prohibition on making percentiles and alerts available to the general public and the requirement that percentiles and alerts not be "used for safety fitness determinations" as applying to the safety performance of individual motor carriers. The references to the 96 and 99 percentiles in the Safety Fitness Determination proposed rule are included for the purpose of helping the industry understand that the proposed failure standards would be equivalent to those percentiles in SMS. To the extent that FMCSA can be seen as "using" the percentiles, it is doing so only to establish the absolute fixed standard that will be published shortly before the final rule is published. That standard would not fluctuate from month to month and could be changed only through subsequent regulation. As articulated in the NPRM, the Agency will not use percentiles or alerts to make fitness determinations on individual carriers.

- 4. If you recall, I have been a strong advocate of performance-based regulations that assess risk based on past performance. Performance based regulatory regimes establish goal-oriented outcomes, rather than prescribing specific actions for the regulated entity. I have a more general question about your thoughts as to the metrics and goals that should be utilized to determine the effectiveness of FMCSA rulemakings. As the FMCSA moves to more risk based models such as the SFD and CSA programs, would you agree that the purpose of safety regulations should be to**

reduce the frequency and severity of commercial vehicle crashes? If so, should the FMCSA measure the effectiveness of its rules by these metrics?

RESPONSE: Yes. When developing rulemakings FMCSA always considers the costs and benefits, both the safety (i.e., fatalities and injuries prevented) and economic implications of each rule. The Agency is required by statute and OMB directives to do so. The estimates of costs and benefits are based, to the greatest extent practicable on NHTSA's Fatality Analysis Reporting System (FARS) and General Estimates System (GES), and FMCSA's Motor Carrier Management Information System (MCMIS) crash data. The Agency estimates the number of crashes attributable to certain lapses in safety management controls or unsafe practices, and the percentage of those crashes that could be prevented altogether, or reduced in severity. The Agency requests public comments on the regulatory proposals and encourages comments to review its estimates of the costs and benefits.

As to measuring regulatory effectiveness, some time after a rule has been implemented—usually a few years—the Agency may conduct a study to determine whether the regulation has accomplished the safety goal described in the rulemaking. Those studies do look at reductions in the frequency and severity of CMV crashes and fatalities, which are at the core of FMCSA's mission. It is difficult to measure the effectiveness of a particular rule in improving safety, of course, since crashes depend on a great variety of factors, some so transitory that they cannot adequately be measured while others reflect overall traffic volume. Attributing a decline in crashes—in other words, crashes that did not occur—to any particular rule is a challenge that statistical analysis cannot always meet.

- 5. A number of petitions were filed by the motorcoach industry for reconsideration of the final rule concerning the lease and interchange of passenger vehicles. Can you provide an update on where the FMCSA stands with regard to responding to these petitions?**

RESPONSE: FMCSA received numerous petitions for reconsideration of the final rule concerning the lease and interchange of passenger vehicles. The petitions provided more in-depth and detailed information than FMCSA received from the comments filed during the rulemaking process. We are analyzing the new information to determine if the petitions will be granted. FMCSA will respond to the petitioners when we determine our course of action.

- 6. I understand there have been positive discussions held with the motorcoach industry, including discussion of viable solutions to address the issues raised in the petitions. Because compliance with the rule is scheduled for January 2017, just at the time when a new Administration would be taking office, can you provide any assurances that this issue will be resolved prior during your tenure in office?**

RESPONSE: Yes, we have held positive discussions with the motorcoach industry as to the best way forward on bus leasing. The Agency is actively working to complete its

review of the petitions and plans to issue decisions later this year before the compliance date.

- 7. As mentioned during the confirmation hearing, the FMCSA must study the impact the Hours-of-Service regulations on safety and has already contracted out for the study. As you know, members of Congress have expressed concern with the July 2013 revised Hours-of-Service regulations. Do you expect the outcome of this study to underscore the concerns raised by members on the Hours-of-Service Study?**

RESPONSE: I am very committed to fulfilling the study requirements of Sec. 133 of the 2015 Consolidated Appropriations Act. As you know, this law required a study comparing the relative net benefits, in terms of operational, safety, health and fatigue impacts, of the restart provisions in effect before and after July 1, 2013. We recognize that the 2015 law required FMCSA to submit the study to the DOT IG for review last year. However, I believed the public interest would be best served by ensuring the Agency collected as robust a data set as possible before submitting the study to Congress.

Following enactment of the 2015 law, the Agency sought out a wide variety of motor carriers and drivers to collect an incredible set of operating data for the study. Due to the exemplary planning and execution provided by our researchers and the cooperation of many motor carriers and drivers, I am pleased to report that the draft report is complete and is currently undergoing Departmental review.

While I am committed to releasing the results of the study as soon as possible, Sec. 133(e) of the 2015 Appropriations Act included specific reporting requirements that we must follow. Specifically, once the Departmental review is complete, the law requires FMCSA to submit the study to the DOT Office of Inspector General for a 60 day review to determine compliance with the study requirements under the 2015 law. Following the completion of the IG's review, the law requires that we submit the study to Congress.

I will continue to update you on our progress to complete this important study.

Senator Steve Daines
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- 1. Mr. Darling, thank you for testifying again before the Commerce Committee. As we have discussed, my home, Montana, is the 4th largest state. Last year, Montana's nearly 75,000 miles of public roads supported over 12 billion vehicle miles traveled. We face unique transportation challenges and an extraordinary dependence on our transportation infrastructure. Safety and efficiency are critical when commuting across our widespread state.**

You previously testified before this Committee in March of last year. At that time, your term as Acting Administrator was expiring in 19 days. I asked you what the contingency plan was for the Federal Motor Carrier Safety Administration (FMCSA) after your term expired, leaving FMCSA without an Administrator. You only stated there would be adequate administrative support going forward. In total, it took the Administration 345 days to make a nomination. Congratulations on securing the nomination. You have now been the Acting Administrator or the de-facto head for over 513 days.

How will the FMCSA be managed more efficiently should you be confirmed? Specifically, what will be different over the next 11 months compared to the current status quo?

RESPONSE: Last year, the Agency accomplished much to advance safety of commercial motor vehicles (CMVs) on our Nation's roadways. We published the Electronic Logging Device final rule, which will save lives and dramatically reduce paperwork burdens on the industry. We published a final rule prohibiting motor carriers, brokers, freight forwarders, shippers and receivers from coercing drivers to violate Federal safety regulations. The Agency also conducted a negotiated rulemaking, bringing a diverse group of stakeholders to the table to come together on new standards for the training of entry-level drivers of CMVs. In addition to these rules, the Agency has conducted public listening sessions on key safety issues, promoting stakeholder engagement and discussion.

If confirmed, I will lead FMCSA in broadening and strengthening our partnerships with stakeholders to build on our 2015 achievements. We are committed to working with Congress as we put in place dozens of FAST Act provisions. For example, we will streamline our grant programs to give States increased flexibility to tailor funding to conditions on the ground. We are taking comments from stakeholders and the public on an incentive program to encourage carriers to adopt cutting edge safety technology and practices. And the National Academy of Sciences study on the effectiveness of our CSA program is scheduled to begin in the coming days.

At my direction, FMCSA is also creating a new Program Integration Office (PIO) to improve the efficiency of Agency management long term. The PIO's draft mission statement is "to champion consistent project integration and synchronization practices, which will allow FMCSA to effectively prioritize and manage projects and resources that will help the agency fulfill its mission and strategic goals. In addition, the PIO governs high priority and high/medium risk projects in coordination with the FMCSA Leadership Team." Goals and objectives of the new office, which would be headed initially by a GS-15 career employee, include defining and managing high and medium risk priority projects, integrating and synchronizing projects across FMCSA offices, improving our project management processes and support through better employee training, experience and leadership, and making sure projects are on time, cost-effective and within scope.