

BEFORE THE
DEPARTMENT OF TRANSPORTATION
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

COMMENTS OF THE
NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC.
IN RESPONSE TO NOTICE AND REQUEST FOR PUBLIC COMMENTS
DOCKET NO. FMCSA-2015-0124
BEYOND COMPLIANCE PROGRAM

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INTRODUCTION

The National Motor Freight Traffic Association, Inc. (“NMFTA”) submits these comments in response to the April 20, 2016 Notice and Request for Public Comments, published by the Federal Motor Carrier Safety Administration (“FMCSA” or “Agency”) at 81 Fed. Reg. 23351 (“Notice”), seeking comments on FMCSA’s proposed Beyond Compliance program (the “Program”). The Program is being proposed to implement a Congressional directive in the FAST Act to recognize carriers that install safety equipment, use driver fitness measures, or adopt fleet safety management tools, technologies, and programs that exceed regulatory requirements. As proposed, recognition would take the form of a new Behavioral Analysis and Safety Improvement Category (“BASIC”) in the Agency’s Safety Management System (“SMS”) that identifies those carriers accepted into the Program.

NMFTA is a nonprofit membership organization headquartered at 1001 North Fairfax Street, Suite 600, Alexandria, VA 22314. Its membership is comprised of approximately 600 motor carriers operating in interstate, intrastate and foreign commerce, primarily specializing in the movement of less-than-truckload quantities of freight (LTL). NMFTA’s mission is to promote, advance and improve the welfare and interest of its members and the motor carrier industry in general. To this end, and pertinent here, NMFTA presents its members’ position in relevant judicial, regulatory and legislative proceedings.

Motor carrier safety performance data, including NMFTA member carriers’ ratings in each of the existing BASICs, is currently retained by FMCSA in the SMS and most of the BASIC scores will at some future date be available for public access. If the Beyond Compliance program is put into effect as proposed by FMCSA, those members will each have to decide whether to seek approval to participate in the Program and have their participation

recognized in the publicly-available Beyond Compliance BASIC. Although NMFTA's members support reasonable attempts by the Agency to promote safe performance, they have authorized the filing of these comments because of concerns regarding several aspects of the Program proposed by FMCSA to achieve this goal.

As discussed below, NMFTA believes the establishment of the new BASIC is premature until after the equipment, technologies, practices, and safety programs that will allow participation are identified. Should the Agency nevertheless move ahead with implementation of the new BASIC, NMFTA has serious reservations about the dissemination, via the public SMS website, of the identity of carriers approved to participate in the Program. Such a public display might turn what should be an enforcement tool for the Agency's internal use into a marketing tool for the group of carriers accepted into the Program. NMFTA also believes that FMCSA's decision to restrict participation in the Program to carriers that have a Satisfactory safety rating and BASICs below the intervention thresholds is misguided. Carriers with poorer ratings or scores are the group most in need of extra effort in safety matters and, therefore, should not only be allowed to participate, but should be encouraged to do so. Finally, NMFTA is concerned about FMCSA's decision to assign the initial evaluation of carriers for participation in the Program to outside third-party contractors without establishing any process for carriers to challenge recommendations that they be denied the right to participate in the Program. Fundamental fairness requires that the carrier, before a denial is finalized, be given an opportunity to either resubmit a revised application or to explain why the application as originally submitted should be approved.

DISCUSSION

I. Implementation of the Beyond Compliance BASIC is Premature

When Congress mandated the establishment of a Beyond Compliance program, it required FMCSA to develop and implement a process for identifying and reviewing the advanced safety equipment, enhanced driver fitness measures, as well as the fleet safety management tools, technologies, and programs, that a carrier would need to use in order to receive recognition. FAST Act, Sec. 5222(c). The implementing statute appears to contemplate a petition process that is separate from and that takes place prior to the evaluation of individual motor carrier applications for approval to participate in the Program. *Id.* at 5222(c)(2). Further, the statute requires FMCSA to conduct a notice and comment proceeding to obtain input from industry stakeholders regarding the petition process. *Id.* That should be the primary focus of this rulemaking.

The review of carrier applications for participation and the listing of approved carriers in the new BASIC itself should not begin until after the identification and qualification of the various safety-related equipment, technologies, practices, or programs to be included are implemented. Moreover, NMFTA and other stakeholders cannot provide a fully responsive set of comments on the Program until it is clear what equipment, technologies, practices, and programs are to be recognized. Thus, the development and implementation of any other aspects of the Program is premature.

II. Public Identification of Beyond Compliance Carriers Is Unwarranted

FMCSA has chosen to implement the Beyond Compliance program through a new BASIC that would recognize carriers accepted to participate in the Program. 81 Fed. Reg. at 23352-23353. Specifically, acceptance into the Program would be signified initially by a

“Deployed” notation and later by an “Improved” notation in the Beyond Compliance BASIC in a carrier’s SMS profile. *Id.* at 23353. That status would be available for the public to access along with most other BASICs when the public display of most BASIC scores is reinstated. *Id.* at 23352-23353.

FMCSA maintains that in order to accomplish its mission to reduce the number of crashes involving large trucks, the Agency must effectively identify motor carriers that pose the greatest safety risk and focus its limited enforcement resources on that group. The BASICs assist in that process by providing the Agency with a tool that attempts to measure the relationship between various aspects of a motor carrier’s performance and the likelihood of crashes. While a new BASIC recognizing safety-related actions beyond the current regulatory requirements would be helpful insofar as it adds one more piece of data to be considered internally by FMCSA in determining whether Agency intervention is needed in a particular case, making that information available to the public will not in any way aid the Agency’s enforcement process.

To the contrary, the public identification of those carriers accepted into the Beyond Compliance program might have the effect of transforming the Program into a marketing tool for those carriers.¹ Indeed, it could be improperly viewed by shippers as a list of “super-carriers” having the Agency’s stamp of approval, carriers that should be preferred by shippers over other carriers. As noted by a number of commenters at an earlier stage of this proceeding, a public listing of participants “would provide value” precisely because it would

¹ NMFTA is also concerned that the existence or non-existence of a Beyond Compliance “Deployed” or “Improved” rating will become a tool in litigation involving trucking accidents. Lack of eligibility for the Program or denial of an application could be treated as negligence by those who might sue carriers. The focus here should be on whether the driver caused the accident or whether his or her negligence contributed to the accident.

allow “companies with this BASIC to distinguish themselves from other companies.” *Id.* at 23353. In effect, participants want shippers to think their participation signifies FMCSA’s stamp of approval to their operations.

Such a result would be inconsistent with the position taken earlier this year by FMCSA, when the Agency proposed in a Safety Fitness Determination rulemaking proceeding to modify the current Unsatisfactory, Conditional, and Satisfactory carrier safety rating system. *See* 81 Fed. Reg. 3562 (Jan. 21, 2016). In that proceeding, FMCSA stated that “the Agency will not devote its limited enforcement resources toward reviews initiated for the sole purpose of assigning a more positive safety rating label to carriers that are not prohibited from operating in interstate or intrastate commerce.” *Id.* at 3571. The “Deployed” and “Improved” ratings being proposed for carriers accepted into the Beyond Compliance program could appear to be just that, a more positive safety rating label for a group of carriers that have not been prohibited from operating by FMCSA. As in the Safety Fitness arena, all involved parties using the BASICS in the SMS (FMCSA, shippers, and carriers) should be guided by the carrier’s actual safety records -- crashes in which the carrier and/or its driver are at fault -- not the particular safety-related equipment, technologies, practices, or programs used by each carrier.

Moreover, giving credit publicly conveys the impression that Beyond Compliance participants will operate more safely than non-participating carriers when that is not invariably so. There are many carriers who, through careful selection of drivers, solid training programs, and rewards for safe driving, have excellent safety records without the use of the newest high-tech equipment, enhanced driver fitness measures, or specialized fleet safety management tools or technologies. Carriers should not be

penalized because they cannot afford or simply choose not to allocate funds to exceed FMCSA's current safety regulations, when the proactive safety program in place produces excellent results.

Treating the Beyond Compliance BASIC exclusively as a tool for the Agency's internal use does not mean that extra measures to enhance safety will not be recognized. First, FMCSA can still use participation in the Program as a factor in determining what if any interventions to take for carriers that exceed other BASIC intervention thresholds. Second, if the recognized additional safety measures actually improve carrier safety performance, then they should result in an improvement in a carrier's other BASIC scores such as the crash indicator and unsafe driving scores. As it should be, their value is that they should improve a carrier's overall safety record and rating. That should be the critical measuring stick for FMCSA.

III. Any Regulated Carrier Should Be Eligible to Participate in the Program

When Congress mandated a Beyond Compliance program, it did not specify or in any way limit the motor carriers that would be eligible to participate in the Program. Lacking any guidance, FMCSA has proposed limiting eligibility to carriers that do not have a Conditional or Unsatisfactory safety rating,² that do not have any BASIC over the CSA intervention thresholds, and that are not in the new entrant monitoring period. 81 Fed. Reg. at 23353. In addition, a participating carrier would be removed from the Program immediately if its status

² FMCSA has also proposed this year to replace this three-tier safety rating system for carriers with one "unfit" categorization that is based upon the carrier's on-road safety data in relation to five of the seven BASICS and/or an investigation. *See* 81 Fed. Reg. 3562. FMCSA has not indicated in the present Notice how the change, if implemented, will affect participation in the Beyond Compliance program. If, however, the same strategy is used, carriers found to be unfit would not be eligible to participate in the Program.

changes to Conditional or Unsatisfactory or if it exceeds an intervention threshold for more than 6 months after receiving a warning. *Id.* at 23554.

Put simply, the Agency would limit the Program to those carriers that already have and maintain a demonstrated good safety record (i.e., a Satisfactory rating) and a low crash risk (i.e., all BASIC scores below intervention thresholds). These, of course, are the carriers least in need of recognition to foster a good safety posture. The carriers most in need of help and most likely to benefit from safety-related equipment, technologies, practices, and programs that exceed current regulatory requirements are automatically excluded from participation.

If the purpose of the Beyond Compliance program is to give FMCSA another tool to help improve highway safety, then the Agency's approach is counter-productive. The Program is far more likely to generate measurable improvements in carrier safety performance if it is expanded to give recognition to any and all carriers willing to take affirmative steps to improve their safety posture.³ Accordingly, carriers with Conditional or Unsatisfactory ratings should be allowed to apply and to demonstrate to FMCSA the safety equipment, practices, or programs they would like to be recognized for using.

³ It is not clear from the Notice whether carriers that started using qualifying safety-related equipment, technologies, practices, or programs before the Beyond Compliance program becomes operational could apply for and be accepted into the Program. It is NMFTA's position that **any** carrier that makes the effort and incurs the expense of going beyond current regulatory requirements should be recognized for its actions. Timing should not be determinative. However, while carriers seeking to qualify based upon new equipment, technologies, practices, or programs must, under the proposal, demonstrate that such measures had an impact on their baseline safety performance approximately 6 months after acceptance into the Program, carriers that implemented such measures before applying to the Program should be allowed to demonstrate improvement using historic data.

IV. The Current Process For Denying Carrier Applications Denies Them Due Process

FMCSA has proposed the award of a “no-cost contract” to one or more outside third-party contractors to provide monitoring support for the Beyond Compliance program. 81 Fed. Reg. at 23352 & 23353. This means that carriers, not the Agency, will pay for the contractor’s services. *Id.* at 23354. The support contemplated takes several forms. Contractors would interview applicants, validate their applications, and make recommendations to the FMCSA as to whether or not each application should be approved. *Id.* at 23353. Contractors would also monitor participating carriers to ensure continued use of the approved equipment, technology, practice, or program, and to determine whether the enhanced safety measures had any impact on the carrier’s baseline performance. *Id.* Either discontinuation of whatever was approved or a failure to improve performance over time could ultimately result in removal from the Program. *Id.* at 23354. Thus, contractors have substantial control over which carriers get into and which carriers stay in the Program.

As proposed, if FMCSA adopts the contractor’s approval recommendation, that approval would be reflected in the Beyond Compliance BASIC in the carrier’s SMS profile. *Id.* at 23353. If, on the other hand, FMCSA disagrees with the contractor’s recommendation of approval, it will provide the carrier with a written justification for the difference of opinion and allow the carrier to adjust and resubmit the application. *Id.* NMFTA believes that a carrier that is unable or unwilling to modify its application should alternatively be given the opportunity in such a case to explain in writing why the application should be approved in its original form.

Additionally, the Notice does not indicate what will happen if the contractor recommends denial of the application, which leaves FMCSA free to simply adopt that

recommendation without any further input from the involved carrier. NMFTA believes that if the Agency is considering affirming and finalizing the denial of approval, then principles of fundamental fairness inherent in due process require that a carrier in this situation also be given a prior opportunity to adjust and resubmit the application or to explain in writing why the denial was mistaken upon the information provided.

Respectfully submitted,

Handwritten signatures of Paul G. Levine and Claire Shapiro in blue ink.

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