



MOVIN' ON UP

FMCSA's New Safety Fitness Determinations

The Federal Motor Carrier Safety Administration ("FMCSA") published an advanced notice of proposed rulemaking ("APRNM") and request for comment on Thursday, August 29, 2023, in efforts to fulfill the Motor Carrier Safety Act of 1984's directive to devise and periodically update motor carrier safety fitness determinations ("SFDs"). The APRNM gives stakeholders an early opportunity to influence the possible new era of federal SFDs by providing feedback to the agency on or before **October 30, 2023**.

The APRNM discusses the current SFD process, the need to update that process, the history of the SFD procedure, and the questions that the FMCSA has in mind to inform its development of a new proposal to update the SFDs. This bulletin provides an overview of the topics discussed in the APRNM.

Current SFD Process

The FMCSA currently uses a rating methodology ("Safety Rating") based upon an evaluation of a motor carrier's compliance with the SFDs. It uses this system to issue Safety Ratings to carriers based on the results of a compliance review ("CR"). Motor carriers are prioritized

for CRs based largely on their performance on roadside inspections and accident history. The evaluation of such performance produces metrics known as Behavior Analysis and Safety Improvement Categories ("BASICs") scores under the Safety Management System ("SMS"). Once a motor carrier is selected for an investigation, that investigation can either be an on-site comprehensive CR or a focused off-site investigation. During a comprehensive CR, the FMCSA looks at the following six factors:

1. General
2. Driver
3. Operational
4. Vehicle
5. Hazardous Materials
6. Accident

Each factor is then individually rated as Satisfactory, Conditional, or Unsatisfactory based upon the number of "acute" and "critical" violations. The "Accident" factor is based upon accident rate per million miles. Once these individual factors are determined, the overall Safety Rating can be calculated. A motor carrier will then receive a Satisfactory, Conditional, or

Unsatisfactory Safety Rating. Conditional and Unsatisfactory Safety Ratings go into effect either 45 days (Hazmat carriers) or 60 days (non-Hazmat carriers) after the Safety Rating is proposed. Until that time expires, a motor carrier may attempt to have the proposed Safety Rating upgraded through demonstrated corrective actions. Satisfactory and Conditionally-rated motor carriers may still operate, while carriers with an Unsatisfactory Safety Rating are placed out of service until their Safety Rating is upgraded.

The Need for Updating SFDs

Despite a long history of working toward updating the SFDs, the FMCSA has not yet settled upon a specific methodology. The current system uses an exorbitant amount of agency resources, while reaching only a tiny fraction of the motor carrier population. Even before facing travel and safety concerns during the COVID-19 pandemic, the FMCSA was only able to rate approximately 2% of motor carriers in 2019. As a result, most of today's motor carriers are either listed as Unrated or are the subjects of outdated CRs.

The History of SFDs

For decades, the federal government has grappled with devising an appropriate methodology for determining the safety fitness of a commercial motor vehicle owner or operator. A timeline of the nearly 40-year-old journey follows:

- **1984**—The Motor Carrier Safety Act of 1984 (“Act of 1984”) directs one of the FMCSA’s predecessor agencies, the Federal Highway Administration (“FHWA”), to develop a process to make SFDs.
- **1988**—In response to the Act of 1984, the FHWA, establishes procedures to investigate motor carriers and resolve disputes pertaining to them in response to the Act of 1984.
- **1990**—The Motor Carrier Safety Act of 1990 (“Act of 1990”) establishes the three-tiered Safety Rating system (*i.e.*, Satisfactory, Conditional, and Unsatisfactory).
- **1991**—In response to the Act of 1990, the FHWA prohibits motor carriers transporting over 15 passengers or placardable quantities of hazardous materials from operating after receiving an Unsatisfactory Safety Rating.
- **1997**—(March): The United States Circuit Court for the District of Columbia finds that the FHWA failed to comply with the Act of 1984’s directive because, while the formula used to rate a motor carrier as Conditional was made public, the agency did not promulgate a regulation including the formula.
- **1997**—(May): The FHWA proposes to revise the SFD methodology and expand usage of the three-tiered rating system to all classes of motor carriers.
- **1998**—(June): The Transportation Equity Act for the 21st Century (“TEA-21”) prohibits motor carriers transporting over 15 passengers or placardable quantities of hazardous materials from operating after receiving an Unsatisfactory Safety Rating. TEA-21 also prohibits federal agencies from obtaining transportation services from motor carriers having an Unsatisfactory Safety Rating.
- **1998**—(November): The FHWA makes minor edits to its previous rule.
- **1999**—The United States Court of Appeals for the District of Columbia finds the FHWA’s level of specificity and interpretations met the Act of 1984’s directive.
- **2000**—(January): Congress creates the FMCSA to assume certain safety-related functions once performed by the Interstate Commerce Commission and other agencies.
- **2000**—(August): Pursuant to TEA-21, the FMCSA publishes a final rule as well as several amendments updating regulations affecting “acute” and “critical” Safety Ratings.
- **2007**—(July): The FMCSA makes further revisions to the SFDs to reflect amendments to the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy of Users (“SAFETEA-LU”).
- **2007**—(July): The National Transportation Safety Board (“NTSB”) suggests that the FMCSA use all violations to make SFDs.
- **2008**—The Motor Carrier Safety Advisory Committee (“MCSAC”) unanimously recommends that the FMCSA follow NTSB guidance.
- **2015**—(September): NTSB agrees with the FMCSA’s plan to include violation severity weights in its Safety Measurement System (“SMS”) in lieu of the NTSB proposed plan.
- **2015**—(December): The Fixing America’s Surface Transportation (“FAST”) Act directs the National Academy of Sciences (“NAS”) to evaluate the efficacy of the SMS independently.
- **2016**—The FMCSA proposes making SFDs by using on-road safety data, an investigation, or a combination of the two. In other words, the methodology would identify unfit carriers using an absolute measure instead of relative percentile ranking.
- **2017**—(March): The FMCSA withdraws its 2016 proposal in anticipation of the results from NAS’ study of the SMS.
- **2017**—(June): NAS finds the SMS is reasonably structured, but primarily recommends that the FMCSA develop a model based upon the item response theory to be used in lieu of the SMS for the purpose of identifying unfit motor carriers.
- **2023**—The FMCSA updates its 2016 proposal by detailing the complications experienced after developing and experimenting with the item response theory model, as recommended by NAS.

Questions for Stakeholder Consideration

After this long history, the FMCSA is now eliciting feedback, in the form of questions, on varying methodologies and the necessary data points as well as potential advantages and disadvantages of said methodologies. These questions are as follows:

1. Should FMCSA retain the current three-tiered rating system of Satisfactory, Unsatisfactory, and Conditional? Why or why not?
 - A. In the 2016 NPRM, FMCSA proposed replacing the three-tiered structure with a single rating of Unfit. Under such a structure, carriers that completed safety fitness reviews successfully would continue operating and not appear different, in terms of their SFD, from carriers that had not yet been reviewed. Would this approach be sufficient to ensure safety? Please explain your views.

- B. What are the costs and/or benefits to a motor carrier associated with each current possible rating? Please provide data or information relating to the costs and/or benefits for motor carriers who are issued final ratings for each of the ratings listed below:
- Unsatisfactory rating (Unfit)
 - Conditional rating
 - Satisfactory rating
2. Should FMCSA include additional [hazardous materials] regulatory requirements in Appendix B to [49 C.F.R] Part 385 (Explanation of Safety Rating Process) in the SFD calculation?
 3. Currently, the table of regulatory factors in Appendix B to [49 C.F.R] Part 385 (at II(C) (b)) excludes parts 172 and 173. However, there are violations in these parts included in the list of critical and acute violations in Appendix B. Should they be included in the SFD calculations?
 4. Should motor carriers of passengers be subject to higher standards than other motor carriers in terms of safety fitness rating methodology? If yes, what should these higher safety standards or thresholds be, and why are they appropriate? If no, why not?
 5. Is there a specific aspect of safety management, such as driver training, driver fatigue management and mitigation, vehicular maintenance and repair, etc., that is so fundamentally different in passenger transportation, relative to CMVs transporting property, that FMCSA's safety fitness rating methodology should take this aspect into special consideration? If yes, what is this specific aspect of safety management, and how do you recommend FMCSA handle the matter within its safety fitness rating methodology? If no, why are the safety management aspects the same?
 6. How will States be affected if the Agency changes the SFD? What resources might be needed to accommodate any changes, and how long would it take to incorporate any proposed changes?
 7. The current SFD does not use all available safety data, such as all inspection-based data. Should the SMS methodology be used to issue SFDs, in a manner similar to what was proposed in the 2016 NPRM? If so, what adjustments, if any, should be made to that proposal? If not, should the Agency include more safety data in the SFD process in other ways and, if so, how? The Agency is interested in comments specifically on whether the integration of on-road safety data into the SFD process would improve the assessment of motor carriers' safety posture and the identification of unfit motor carriers.
 8. Given the importance of driver behavior in preventing crashes, how would you recommend the Agency incorporate driver behavior data into the SFD? What data should the agency use? How should this methodology distinguish between data resulting in a conviction and data without a conviction?
 9. What changes, additions, or deletions, from the current list of critical and acute violations should be included in the NPRM, and why? Should the list be retained? Why or why not?
 10. Should SFD consider motor carriers' adoption and use of safety technologies in a carrier's rating? How should this fit into the SFD methodology?
 11. Should the Agency revise the current administrative review procedures in [49 C.F.R] §§ 385.15 and 385.17(j) related to administrative review and corrective action? Which of those procedures should be changed or discarded? Please give the reasons for your views.
 12. Given that unsafe driving behaviors, such as speeding and texting while driving, are highly correlated with crash risk, should the safety fitness rating methodology give more weight to unsafe driving violations of [49 C.F.R] § 392.2? For example, each pattern of noncompliance with a critical regulation relative to [49 C.F.R] Part 395, Hours of Service of Drivers, is assessed double the points in the safety fitness rating methodology. Should violations of [49 C.F.R] § 392.2, or a subset of those violations, be treated in a similar manner?

Conclusion

It appears from the APNRM that the FMCSA is inclined to change the current Safety Rating system and incorporate SMS data into the SFD process. The SMS system currently involves data that is influenced by a motor carrier's operational model, peers, and even geographic areas of operation to an extent. In addition, the FMCSA proposed substantial changes to the SMS in a Notice in the Federal Register on February 15, 2023. While these changes have not yet occurred, it is clear the FMCSA wants to overhaul the SMS system. Therefore, until the actual changes are known and implemented, the true effect of making the SMS integral to the SFD cannot be evaluated in a meaningful fashion.

While the APNRM asks whether FMCSA should simply use two Safety Rating designations, Unfit carriers and a catchall for all other motor carriers, the factors that would result in an Unfit rating are not explicitly discussed. However, the FMCSA seems to lament that, under the current system, motor carriers with a Conditional Safety Rating can still operate. In other words, FMCSA appears to believe that more motor carriers should not be allowed to operate. It is likely the FMCSA intends to have any future Unfit Safety Rating criteria ensnare more carriers than under the current SFD, which results in an Unsatisfactory Safety Rating.

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It is not possible at this time to gauge the effect of any proposed changes to the SFDs until they become effective or are at least the subject of an actual proposed rule by the FMCSA. However, the APNRM strongly indicates that the FMCSA wants to integrate the SMS, in its current form or with future changes, into the SFD. In addition, it is probable the FMCSA seeks to have more motor carriers fall into any future Unfit Safety Rating than under the current Unsatisfactory Safety Rating. Likewise, it appears probable that more motor carriers would receive an out-of-service order under the proposed rating system.

The FMCSA is soliciting comments to the APNPM. The comment period is open until October 30, 2023. We encourage all affected parties to file comments under FMCSA Docket Number FMCSA-2022-0003.

For questions or assistance, please find the contact information below.



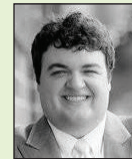
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