



Docket No. FMCSA-2001-11061
U.S. DOT Dockets, Room PL-401
U.S. Department of Transportation
400 Seventh Street, SW
Washington, DC 20590-0001

**Comments of Public Citizen Re: New Entrant Safety Assurance Process, Interim
Final Rule (IFR) 49 CFR Part 385**

In response to the Federal Motor Carrier Safety Administration's request for comments on its new entrant safety assurance process, Public Citizen¹ is pleased to submit the following comments.

In December of 2001, the Department of Transportation Appropriations Act (Public Law 107-87), instructed the Federal Motor Carrier Safety Administration (FMCSA) to ensure that new entrant carriers were "knowledgeable" about federal safety standards as a condition of their authorization and engagement in interstate commerce. The final rule is scheduled to become effective on January 1, 2003. A notice of proposed rulemaking will not precede the issuance of the final rule. The final rule is scheduled for release following the close of the Interim Final Rule (IFR) comment period on July 12, 2002.

On May 22nd and 23rd of this year, the Minnesota State Patrol conducted its yearly "saturation days" where state troopers do nothing but inspect large trucks. According to the president of the Minnesota State Troopers Association, "Of the 909 trucks checked, there were 2,970 driver and equipment violations. Of those, nearly 200 were mechanical defects serious enough to take those trucks out of service. Deficiencies in braking and steering were two of the most common mechanical defects."²

¹ Public Citizen is a nonprofit consumer advocacy organization based in Washington, D.C., that accepts no industry or government funding. Public Citizen has fought vigorously on behalf of auto safety since its inception in 1971.

² Statement of Mathew J. Hodapp, President Minnesota State Patrol Trooper's Association before the Subcommittee on Highways and Transit of the House Committee on Transportation and Infrastructure Hearing on Trucking Safety July 9, 2002.

Unfortunately, every day is not saturation day. It is universally accepted that new trucking companies pose the greatest safety threat in the trucking industry.³ Thus, preventing bad actors from ever commencing operations is the single most important step toward improving motor carrier safety.

The IFR, however, grants bad actors operating authority and consequently compromises public safety and overly burdens law enforcement agencies. FMCSA and state law enforcement officials must together work towards ensuring motor carrier safety. This IFR establishes a bureaucratic requirement, not a safety rule.

Congress charged FMCSA with establishing minimum safety requirements for applicant motor carriers seeking interstate operating authority. FMCSA's IFR fails to realize the potential safety benefits that are the very essence of such an action. Public Citizen's principal criticisms of the IFR include the following:

- 1) The agency's failure to hold a full, public notice-and-comment.
- 2) Omission of a proficiency examination as a certification requirement.
- 3) Extension of operating authority to applicant motor carriers based on unverified applicant promises and exclusive of any reasonable safety assurance.
- 4) Flagrant neglect demonstrated by the agency's decision to permit new entrant motor carriers to operate in excess of 18 months without ever being subject to a safety audit.
- 5) The undue laxness in enforcement of standards for non-compliant motor carriers.

By Silencing the Public Voice, FMCSA is Failing to Fulfill its Statutory Duties

Sensible safeguards depend on an equation that offsets agency expertise with strict public oversight. Public involvement is an essential aspect of the rulemaking equation because it provides a critical balance to the special interests of the motor carrier industry. Moreover, in light of the glaring incompetence exhibited in the IFR, public comments provide the last hope for the development of an effective final rule. To silence the voice of those whom the rule is intended to protect, is a disgraceful denigration of administrative law. Moreover, as the primary stakeholder in the outcome of the new entrant safety assurance process, the public is entitled to full participation. Omission of public oversight from the rulemaking equation threatens the integrity of crucial safeguards.

³ See 67 F.R. 31981 (stating that a "series of analyses and reports have demonstrated that new motor carriers are less likely to comply with safety regulations, and are more likely to be involved in crashes, than established motor carriers"). The agency neglected, however, to include these studies in the public docket.

Procedural transparency in conjunction with public oversight and participation are fundamental aspects of the rulemaking process. Under 5 U.S.C. 553(b)(3)(B),⁴ FMCSA has chosen to issue an IFR, and is apparently regarding the normal notice-and-comment period as being in conflict with the public interest or just inconvenient. FMCSA, however, has a statutory obligation to provide its rationale for the omission of public oversight. Entombing the new entrant safety assurance process not only perpetuates a poor procedural precedent, but also threatens the foundation of public policy. Public Citizen requests that FMCSA publish its justification in the Federal Register.

History of Rulemaking Requirements and the Need for Effective New Rules for Applicant Motor Carriers

The Motor Carrier Safety Improvement Act of 1999 (MCSIA) (49 U.S.C. 3114(f)) required that the Transportation Secretary issue regulations to establish minimum requirements for applicant motor carriers seeking federal interstate operating authority. Congress found that the then existing regulatory schema enabled motor carriers to commence operations without any assurance of regulatory knowledge or compliance. In order to eliminate this threat to highway safety, the MCSIA required that new entrants be subject to a safety audit within the first 18 months of operations. All for-hire motor carriers, in addition to privately owned, not-for-hire motor carriers that currently are not required to register with FMCSA under 49 U.S.C. 13901, must meet these minimum standards in order to continue operating both during and after the 18-month authorization period. The agency plans on aiding new entrants in their pursuit of adequate safety performance by “providing educational and technical assistance” to new carriers.

Public Citizen commends FMCSA for extending the concept of “operating authority” beyond the jurisdiction of the Interstate Commerce Commission to include all motor carriers subject to Federal safety jurisdiction. Every year, approximately 5000 fatalities and almost 150,000 injuries result from crashes involving large trucks. As evidenced by the explicit direction of Congress, protecting the public from the lethal threat posed by large trucks is critical to improving highway safety.

The agency’s final rule, therefore, should be built on the premise that participation in interstate commerce is a privilege, not a right. Upon being given the authority to commence operations, motor carriers will stand to earn a substantial profit. FMCSA roll and obligation is to ensure that motor carriers do not profit at the expense of public safety. Motor carriers are not entitled to interstate operating authority; rather, they must prove themselves worthy of this status.

Motor carrier accountability will be attained only if motor carriers are required to demonstrate a minimum level of knowledge and compliance with federal safety regulations. Therefore, it is critical that the final version of the new entrant safety

⁴ 5 U.S.C. 553(b)(3) (B), “When the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”

assurance process efficiently screens out unqualified applicants from being granted either temporary or extended status. Operating authority should be bestowed only under circumstances that provide meaningful assurances of safe operation. Due to the agency's apparent unwillingness to use this opportunity to establish critical safety checks, the current rule fails to achieve this goal and thus undermines public trust in government action. By moving to grant operating authority to motor carriers with such little regard for highway safety, FMCSA perpetuates the very system it set out to reform.

New Entrant Status: Certification Without Verification

Currently, in order for a motor carrier to begin operating in interstate commerce, the motor carrier must submit the Motor Carrier Identification Report Form (Form MCS-150A) to the agency. In addition, unless the new entrant has received an exemption, the carrier must also apply for the appropriate operating authority, make the necessary administrative filings and pay a fee, as required by the Interstate Commerce Commission Termination Act of 1995 (ICCTA).

The IFR proposes new minimum service requirements for all motor carriers seeking operating authority in the U.S. for the first time. The requirements will apply to all new entrants domiciled in either the U.S. or Canada. The agency will provide new entrants with educational and technical assistance materials to help new entrants comply with the Federal Motor Carrier Safety Regulations (FMCSRs) and Hazardous Materials Regulations (HMRs). New entrants will be required to certify their knowledge of, and compliance with, safety regulations prior to being granted "new entrant" status. Under the IFR, knowledge and compliance will be assessed through an 18-month safety audit, rather than at the time of certification.

The Safety Certification for Applications for a U.S. DOT number (Form MCS-150A) will oblige new entrants to attest, in writing, that systems have been established to ensure compliance with the following requirements, as applicable:

1. Driver qualifications
2. Hours of service
3. Controlled substance and alcohol testing
4. Vehicle conditions
5. Accident monitoring
6. Hazardous materials

Upon completing the application forms, FMCSA will then issue the new entrant a United States Department of Transportation (U.S. DOT) number. All applicant motor carriers who do not receive exemption from ICCTA registration must be granted operating authority before being able to commence business operations.

Public Citizen maintains the view that any applicant seeking operating authority should be required to demonstrate proficiency in, and knowledge of the FMCSRs and HMRs (when applicable) prior to being granted new entrant status, but the IFR fails to

accomplish this. The agency states in the IFR that an applicant seeking new entrant status must “certify their knowledge of and compliance with safety regulations.” Anyone can make such a declaration. It must be verified.

According to the agency’s notice, the MCS-150A “reminds new entrants of its statutory and regulatory responsibilities”⁵ and the consequences of violating these responsibilities. Motor carriers, however, ought to be more than merely *reminded* of their statutory and regulatory responsibilities. Under MCSIA, in fact, full knowledge of regulatory responsibilities and consequences and compliance Federal regulations are the only circumstances under which FMCSA is authorized to grant operating authority to applicant motor carriers. FMCSA must have a verification process.

Our great disappointment with FMCSA’s inadequate IFR is reinforced by the agency’s certification process, which is anything but certain. FMCSA’s Safety Certification form (Form MCS 150A) relies completely on uncorroborated declarations by the applicant. FMCSA fails to cite any existing or planned verification process by which it plans to substantiate the applicant’s claims that it understands and complies with Federal Regulations. In addition to validating an applicant’s ability to place a check in twenty-two “yes” boxes, the MCS 150A certifies only an applicant motor carrier’s ability to write its name, business address and IRS number.

The amazing omission of any “No” boxes on the MCS 150A directly encourages applicants to falsify certification information. Disappointingly, the MCS 150A fails to establish, with any degree of certainty, that an applicant understands and complies with Federal Regulations. Considering that an applicant motor carrier has the financial incentive to expedite the certification process, it is irresponsible and dangerous for the agency to blindly grant even temporary operating authority to applicant motor carriers. The current certification system will not disqualify any applicant who falsifies the statements “certified” on the MCS-150A. The non-compliant motor carrier would simply be granted new entrant status and could subsequently commence operations with a complete disregard for FMCSRs and HMRs. Furthermore, the new entrant would be able to operate in noncompliance until the agency performs the required safety audit. Because the applicant would receive advance notice of the safety audit, it will enable the carrier to haphazardly achieve partial regulatory compliance and subvert agency oversight. Additionally, the safety audit may admittedly take in excess of 18 months to execute. Thus, the new entrant could potentially operate for over 18 months without complying with Federal Regulations.

FMCSA must reject the “turn ‘em loose and try to catch ‘em philosophy.” It simply cannot work. The loopholes in the certification process indicate extreme negligence on the part of the agency and must be corrected in the final rule. The agency’s principal duty is to protect the interest and safety motoring public from commercial carriers. The certification process must have the capability of sifting out unqualified applicants before they are allowed to operate and the current protocol is grossly inclusive. Compliance and proficient knowledge of FMCSRs and HMRs must be

⁵ Federal Register, Vol. 67, No. 92, 49 CFR Part 385, p. 31980.

achieved before a new entrant sends its first rig onto an American roadway. Anything less is simply irresponsible.

A Regulatory Proficiency Examination: the First Step Toward a Meaningful Safety Assurance Process

Section 210(b) of the MCSIA required the Secretary to consider establishing a proficiency examination, among other requirements, to ensure applicants understand applicable safety requirements. Indefensibly, the agency has chosen not to require a proficiency examination. The agency claims in the IFR, “the educational and technical assistance materials provided to the new entrants and the safety certifications on the required application forms will demonstrate the new entrants understand applicable safety regulations.” In colloquial language, this is a complete “cop out.”

Public Citizen urges the agency to adopt a true proficiency examination for all applicants seeking operating authority. Such a test would be a far more comprehensive evaluation of regulatory knowledge than the empty promises set forth in the MCS 150A. Similar to the exams administered to prospective lawyers, doctors or plumbers seeking the licensing authority to practice in a given region, the proficiency examination would establish a minimum standard of regulatory knowledge for those motor carriers seeking participation in the domain of interstate commerce. A proficiency exam would improve highway safety because it would ensure that all applicant motor carriers at least demonstrate a quantifiable and therefore comparable level of regulatory knowledge.

FMCSA, the Arthur Andersen of Safety Auditing: Why FMCSA’s Safety Audit Doesn’t Add Up

Following receipt of a U.S. DOT number, the 18-month registration period will begin and the new entrant will be subject to a safety audit, which is intended to evaluate the carriers’ safety management practices. The safety audit will generally be performed at the new entrant’s place of business, and the new entrant will receive “adequate notice” of both the content and date of the audit. The audit includes a review of a selected carrier’s records and operational practices, but the agency is not limited to reviewing these documents alone. FMCSA states that the safety audit will not be used to determine a safety fitness rating. Instead, a rating of satisfactory, conditional, or unsatisfactory will be given following a compliance review. The safety audit may, however, result in the revocation of new entrant status.

The audit will cover the following areas:

- 1) Driver qualifications
- 2) Driving a commercial motor vehicle
- 3) Hours of service
- 4) Vehicle inspection
- 5) Repair and maintenance
- 6) Transporting and marking hazardous materials

- 7) Substance abuse testing
- 8) Commercial driver's license standards
- 9) Financial responsibility

According to FMCSA, the audit period is intended to familiarize carriers with FMCSRs and Hazardous Material Regulations HMRs. In addition, the agency will highlight areas where the applicant is in violation of applicable safety regulations. If FMCSA finds evidence that a new entrant fails to exercise basic safety management controls, the agency will then require that corrective action be taken. If the new entrant fails to take the appropriate corrective action, the agency will prohibit the trucking company from operating in interstate commerce.

The agency also claims that if the safety audit reveals that the new entrant's safety procedures are inadequate, the carrier will then be allocated 45 days to report a remedial action for hazardous material violations and 60 days to report remedial actions for all other regulatory noncompliance. If the applicant fails to take appropriate action, the new entrant status will be revoked and the carrier will be deemed out-of-service (OOS).

FMCSA is seeking comments on the resource cost to the economy of denying permanent registration. It is unclear what purpose could possibly be served by collection of this data, given that the crystal-clear mandate from Congress contains no off-setting command vis-à-vis cost to industry. FMCSA fails to indicate how such information could possibly be used to further weaken this already weak proposal, in light of the command of Congress to establish a new system for registrants.

If FMCSA insists upon solicitation of this data, from industry sources that are highly likely to skew the possible fiscal consequences of denial, the agency must also examine the economic impact of allowing non-compliant motor carriers to operate. Once the agency accounts for the costs of emergency response team, medical care, insurance premiums, property damage, travel delay, and, most importantly, the potential loss of human life each time an unnecessary crash occurs, it is perfectly reasonable to deny permanent registration to non-compliant motor carriers. Public Citizen urges the agency to severely penalize those who neglect to comply with Federal Regulations. Again, operating authority is a privilege for those motor carriers who agree to comply with the terms of new entrant status, not an economic right. Denial of permanent registration is not only reasonable, but would also provide the incentive necessary to ensure compliance. Motor carriers that choose to violate FMCSRs and HMRs in effect choose to be barred from operating authority. FMCSA must make it clear to new entrants that regulatory noncompliance and unsafe practices will not be tolerated.

A new entrant that has been deemed OOS must wait 30 days before reapplying for new entrant status. Permanent registration will be given to applicants who meet the requirements of the safety audit and are not under notice by the agency to remedy their safety management practices. New entrants, who are under notice to remedy its safety management practices, will not be given permanent registration until FMCSA determines that corrective actions have been taken.

When the agency deems it necessary, it may invoke the full range of enforcement actions for non-compliant new entrant carriers. Compliance reviews, civil penalties, and revocation of new entrant registration are the enforcement actions named in the rule. FMCSA states, however, that it is not limited solely to the enforcement actions listed in the rule. A new entrant may appeal to FMCSA and request that it conduct an administrative review if the applicant believes the agency committed an error. Following its analysis, FMCSA will make a final decision.

Public Citizen is particularly concerned about FMCSA's ability to conduct safety audits within a reasonable time period. In the IFR the agency states that, "If a safety audit has not been conducted on a new entrant, through no fault of the carrier, the new entrant designation will continue until such time as a safety audit is conducted."⁶ The agency foresees that safety audits will not be conducted within the 18-month period and therefore seeks comments on two possible remedies: conducting multiple safety audits at once and training and hiring private contractors to conduct audits.

Although conducting multiple safety audits simultaneously would expedite the number of audits and help ease agency backlog, new entrants may be reluctant to fully participate in such an audit out of fear of exposing potential vulnerabilities to its competitors. Also, conducting an audit at an off-site location would limit the audit's scope because the new entrant might not be capable of bringing every relevant document to the alternate location. Public Citizen recommends that safety audits be conducted at the new entrant's place of business.

The agency should further explore the hiring of private contractors to conduct safety audits. It would help FMCSA increase the number of new entrants audited and relieve agency backlog. Considering that applicants will be granted new entrant status without any verification of regulatory knowledge or compliance, it is critical that safety audits be executed as expeditiously as possible. FMCSA should use the funds generated by its final fee structure under the Motor Carrier Replacement Information/ Registration System to help pay private auditors. However, just as with the federal control over safety inspections at the nation's airports, strong federal oversight will be necessary. Any use of private contractors should only be viewed as a temporary measure to alleviate strain on the agency; and its phase-out and replacement by federal auditors should be the ultimate goal.

Public Citizen is appalled that applicant motor carriers unfamiliar with FMCSRs and HMRs will be granted new entrant status. Regarding the safety audit as a period of regulatory orientation only further highlights both the inadequacy of the initial certification process as well as the agency's unashamed disregard for highway safety. Regulatory education and testing must occur prior to certification of operation, not after a safety audit. The safety audit should instead be designed to subject the safety fitness procedures of new entrants to a rigorous evaluation. The proper screening of applicants will ease the burden on enforcement officials.

⁶ Federal Register, Vol. 67, No. 92, 49 CFR Part 385, p. 31980.

If the applicant satisfies the criteria of the safety audit, it will “remain closely monitored” until the end of the 18-month period. If the safety audit is not conducted in the 18-month period on account of a failing of the agency, new entrant status will be extended until the safety audit is completed. This could be months or years. FMCSA must meet a firm deadline of 18-months to complete any safety audit. The IFR fails to describe any of the oversight procedures that might achieve the level of “close monitoring,” as alleged by the agency. Presumably a number of new entrants will be in violation of FMCSRs and HMRs prior to receiving a safety audit. Therefore the agency proposes to permit non-compliant trucks and carriers to share roadways with American motorists. The current rule also fails to exercise any motor carrier oversight until a safety audit is conducted. This is unacceptable.

According to the IFR, “A new entrant who has not undergone a safety audit within the 18 months because it has refused to allow the FMCSA to conduct the safety audit *may* have its new entrant registration revoked ten days after receiving notice from the FMCSA.”⁷ FMCSA employs language in this portion of the rule, which is far too permissive. Any new entrant who refuses to participate in a safety audit *must* have its operating authority terminated immediately following such a display of arrogance. Because new entrants receive operating authority without any agency verification, a refusal to submit to a safety audit must be construed as an attempt to conceal regulatory non-compliance and must not be tolerated. The current language in the rule invites motor carriers to rebuff a safety audit without any threat of consequences.

Those applicants required to take remedial action are merely required to send FMCSA “a written response demonstrating a corrective action that is likely to achieve compliance with the appropriate safety regulations.” The agency will then notify the carrier via written response that their new entrant status will be continued until the end of the 18-month period. If the FBI or State Police acted with such nonchalance, they would be harshly criticized. FMCSA must be the federal cop on the regulatory beat, not the motor carriers’ best friend. The public and taxpayers deserve no less.

Motor carriers must not be permitted to act freely. FMCSA must design a safety assurance process that will hold motor carriers accountable for their conduct. In order for the new entrant safety assurance process to provide any valid public assurance of motor carrier safety, it must abandon any procedure that relies on lip service and self-serving self-reporting from motor carriers. Instead of requiring a new entrant to write a letter that tells the agency what it wants to hear, FMCSA should instead provide the motor carrier with a single opportunity to achieve compliance. After physically determining whether or not compliance has been achieved, the agency should then either extend the applicant’s new entrant status or revoke the new entrant status. A letter from the motor carrier is not satisfactory evidence that corrective action has been taken. In fact, it’s a fraud on the public.

⁷ Federal Register, Vol. 67, No. 92, 49 CFR Part 385, p. 31980.

Due to the gaping loopholes resulting from a process rooted in self-reporting and devoid of meaningful oversight, an applicant motor carrier would have to exercise extreme negligence to be denied operating authority under the current proposal. Although new entrants may prove themselves adequate by virtue of the proposed safety assurance process; the process is fundamentally flawed and would provide only marginal, if any, safety benefits.

Conclusion: FMCSA Should Go Back to the Drawing Board and Produce a Rule With Teeth

Administrator Clapp and FMCSA embrace the urgent need for enhanced motor carrier safety in rhetoric alone. According to the testimony of Administrator Clapp before the House Subcommittee on Highways and Transit, “FMCSA’s strong enforcement programs and aggressive goals are helping to substantially reduce the number of commercial vehicle-related fatalities.”⁸ There is no evidence, however, of strong enforcement programs or aggressive safety goals in the current IFR. In light of the new entrant safety assurance process, the agency’s goal of reducing motor carrier related fatalities by 50 per cent in the year 2010 is incomprehensible. FMCSA abandoned its commitment to improving motor carrier safety when it published this IFR in the Federal Register.

Furthermore, FMCSA’s unwarranted decision to limit public involvement in the rulemaking process breaches the agency’s covenant with those whom the agency claims to protect. The agency should change course immediately by taking the following 5 simple steps

- 1) FMCSA amend its current posture to permit full public involvement in the new entrant safety assurance rulemaking.
- 2) FMCSA purge the new entrant safety assurance process of all instances of uncorroborated self-reporting on the part of applicant motor carriers.
- 3) A proficiency examination, in addition to third party verification of regulatory compliance and knowledge made prerequisites for granting new entrant status.
- 4) A plan must be developed to efficiently conduct safety audits within the allotted time period.
- 5) The Final Rule must include stricter penalties for regulatory non-compliance and insolent motor carriers.

⁸Statement of Joseph M. Clapp before the House Subcommittee of Highways and Transit Committee on Transportation and Infrastructure July 9, 2002.