



**ADVOCATES**  
for Highway & Auto Safety

September 22, 2011

**Docket FMCSA-2011-0097**

Docket Management Facility (M-30)  
U.S. Department of Transportation  
West Building  
Ground Floor, Room 12-140  
1200 New Jersey Avenue, S.E.  
Washington, D.C. 20590-0001

**Pilot Project on NAFTA Trucking Provisions  
76 Federal Register 56272, September 12, 2011**

Advocates for Highway and Auto Safety (Advocates) files these comments in response to the Federal Motor Carrier Safety Administration (FMCSA) notice and request for public comment regarding the Pilot Project on NAFTA Trucking Provisions (76 Federal Register 56272, Sept. 12, 2011). The notice provides information related to the pre-authorization safety audit (PASA) conducted by FMCSA for Grupo Behr De Baja California SA de CV, the first motor carrier to be granted temporary operating authority to participate in the Pilot Project on NAFTA Trucking Provisions. Advocates has several concerns regarding both the implications of the notice for the legality of the cross-border trucking pilot program, as well as for procedural issues involving the publication of this and other PASA notices.

**Safety Issues**

Grupo Behr De Baja California SA de CV (Grupo Behr) is the first company to be approved and granted operating authority to participate in the Department of Transportation (DOT) Pilot Project on NAFTA Trucking Provisions. According to public information available from FMCSA, Grupo Behr has a 45.8% rating for vehicle maintenance which means that the company is in the bottom half of motor carriers for truck maintenance, with a performance rating that is worse than 55.2% of all similar companies in the FMCSA database. Also, Grupo Behr had 10 inspections with at least 1 Out of Service (OOS) violation out of a total of 36 vehicle inspections, yielding an OOS rate of 28.6% which is higher than the 2009-2010 national average of 20.7%. The company was issued 40 vehicle violations over the 24 months prior to August 26, 2011.<sup>1</sup>

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<sup>1</sup> Information from the FMCSA Safety Measurement System (SMS) website available at <http://ai.fmcsa.dot.gov/SMS/Data/carrier.aspx?enc=kf1YcEFsOhIbdeWTi1qZvQo4rB1LV3/SYUTsfkubpWk=>, last accessed on September 21, 2011.

The fact that the applicant motor carrier has higher than average percentages in recent inspections for both OOS orders and vehicle maintenance raises safety concerns. Even if the vehicle maintenance level is not sufficient to draw FMCSA attention or to disqualify Grupo Behr from participation in the pilot program, nevertheless these above average poor marks is not reassuring regarding vehicle maintenance and safety.

Grupo Behr is one of the motor carriers that received temporary operating authority in 2007 to participate in the prior cross-border long-haul demonstration project.<sup>2</sup> However, no information regarding Grupo Behr's participation and record in the demonstration project is provided in the PASA notice for the motor carrier. The agency does not include how long the company was in the demonstration project nor how many cross-border trips were made into the U.S. commercial zones or beyond the commercial zones by the four Grupo Behr trucks that participated in that program. As important, there is no information about the motor carrier's record of inspections and violations while a participant in the earlier demonstration project. Grupo Behr's safety record in the prior demonstration project should be disclosed to the public and made part of the agency record of the present pilot program initiative.

Likewise, although FMCSA records indicate that the agency conducted a compliance review of Grupo Behr following the demonstration project in 2010,<sup>3</sup> no information about the compliance is disclosed to the public. The agency provides no public information or records from the compliance review and fails even to state the reason a compliance review of Grupo Behr was conducted.

Furthermore, based on the information provided in the PASA notice, Grupo Behr plans to have five vehicles and three drivers participate in long-haul cross border transportation under the auspices of the pilot program. However, there is no information in the PASA notice regarding whether these drivers and vehicles were involved in the 10 OOS orders and other violations. Although the driver inspections to Grupo Behr drivers resulted in no driver violations, nevertheless the drivers are responsible for inspecting their vehicles prior to driving so the resulting 10 OOS orders for vehicle maintenance problems may indicate that the drivers failed to notice or ignored serious vehicle maintenance or equipment problems on their trucks. Without disclosure of more information on this point the American public cannot properly analyze the situation or make an informed decision about Grupo Behr's participation in the pilot program. The lack of basic information places the public in the untenable position of being asked to

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<sup>2</sup> See <http://www.fmcsa.dot.gov/intl-programs/cross-border-carriers.htm> last accessed on September 21, 2011.

<sup>3</sup> SMS website last accessed on September 21, 2011, at <http://ai.fmcsa.dot.gov/SMS/Data/carrier.aspx?enc=kf1YcEFsOhIbdeWTi1qZvQo4rB1LV3/SYUTsfkubpWk=>.

comment on specific company PASA results without being provided the basic facts and information essential to analyze the facts and to draw sound conclusions about whether the motor carrier, its vehicles and drivers may represent a safety threat on American highways. It is essential that the FMCSA provide greater public disclosure of specific information held by the agency regarding the applicant motor carriers, their records and the agency's PASA examination, if the agency truly expects and intends to receive informed public comment. The agency should begin by providing such detailed background information on driver and vehicle maintenance records for the other motor carriers that are pending PASA review.

### **Comprehensive PASA Data and Information is Lacking**

Section 6901 of the U.S. Troop Readiness, Veterans' Care, Katrina Recovery and Iraq Accountability Appropriations Act of 2007, Pub. L. 110-28 (May 25, 2007) requires, among other things, that prior to expending funds to initiate a pilot program to allow Mexico-domiciled trucks to operate beyond the border zones in U.S. territory, the Secretary of Transportation must publish in the Federal Register "comprehensive data and information on the preauthorization safety audits [PASA] . . ." of participating Mexico-domiciled motor carriers.<sup>4</sup> Although the FMCSA has published some conclusory information regarding the Grupo Behr PASA results in the Appendix to the current notice, the information contained in Appendix Tables 2, 3 and 4 provides little useful information, certainly not comprehensive information. The Tables are comprised of one word entries and non-illuminating information that provides little or no insight into the specific conduct and findings of the PASA. Rather than being comprehensive, the information disclosed is highly limited to a formalistic presentation of bureaucratic check boxes that do not convey the type and quality of information that was reviewed and analyzed in making the PASA decision. The fact that the applicant motor carrier received a "Pass" for each verification element provides no insight about the conduct, performance or results of the PASA. Obviously, had the applicant failed in any one of the five verification elements the applicant would not have "passed" the PASA and the failure would have been indicated in column K of Table 3.

In order to comply with this requirement the FMCSA should publish the full records of the PASA and what the inspectors reviewed and analyzed in making the PASA decisions including any information regarding safety problems that do not rise to the level of failing the PASA. However, since the only information contained in the PASA notice that is of any value to the public is that the applicant motor carrier, Grupo Behr, in fact passed the PASA and that five vehicles were inspected, Advocates must conclude that the FMCSA has not complied with this portion of Section 6901.

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<sup>4</sup> 6901(b)(2)(B)(i).

### **No Indication That A Representative Sample of Motor Carriers Will Participate**

Section 6901 also requires that the pilot program must “consist[ ] of a *representative and adequate sample* of Mexico-domiciled carriers . . .”<sup>5</sup> Although Grupo Behr passed the PASA, the FMCSA has given no indication that Grupo Behr is representative of Mexico-domiciled motor carriers that may eventually engage in long-haul cross border transportation (beyond the commercial zones along the U.S. border), or how it fits into the representative sample of carriers that will participate in the pilot program. This is a fundamental problem for the agency because it has not yet identified the type of Mexico-domiciled motor carrier that is likely to participate in long-haul freight transport within the U.S. Without such an analysis, it is impossible for the agency to identify what constitutes a representative sample of motor carriers for participation in the pilot program. The agency has not published any study or documentation regarding the population of motor carriers that may potentially seek cross-border entry. FMCSA has neither studied nor analyzed the potential population of motor carriers nor made any effort to define what would comprise a representative sample for participation in the pilot program. Lacking such an analysis, the agency cannot select a representative sample of motor carriers for participation in the pilot program.

In lieu of selecting a representative sample, it appears the FMCSA is content to choose among the applicants that have voluntarily applied for permission to participate in the pilot program. While this method of selection of participants may be dictated by the lack of outpouring among Mexico-domiciled motor carriers to participate in the pilot program, it hardly meets the statutory requirement established by Congress in Section 6901. The selection of a representative sample of Mexico-domiciled motor carriers (or at least those that may engage in long-haul commerce) is a prerequisite and essential under the law. Comprising the cohort of pilot program participants solely based on volunteers and not on a representative sample is arbitrary and capricious.

### **No Indication That An Adequate Sample of Motor Carriers Will Participate**

The same provision of Section 6901 that requires a representative sample also requires an adequate sample of Mexico-domiciled motor carriers. Although the term adequate is not defined, it is evident that a mere handful of motor carriers are not sufficient to provide an adequate sample for statistical purposes. Even if a valid number of inspections are conducted, if those inspections are only conducted on a small group of participating motor carriers the data will be skewed and any findings will lack statistical validity. Currently, it is not all clear that there is adequate participation of Mexico-domiciled motor carriers to yield sufficient and robust data and a scientifically valid cohort of carriers to provide viable statistical results. Any data collection that is dependent on inspections of the same small set of vehicles and motor carriers is suspect

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<sup>5</sup> 6901(c)(3) (emphasis added).

and will fail to establish that an adequate sample of motor carriers were involved in the pilot program.

### **Lack of Adequate Public Notice**

Section 6901 also requires that publication in the *Federal Register* “provide sufficient opportunity for public notice and comment . . .”<sup>6</sup> However, although the agency did not publish the instant notice in the *Federal Register* until September 12, 2011, public comment is required by September 22, 2011, just 10 days from the date of publication. This lack of sufficient notice and time to respond places an undue burden on the public, is less than the 30 day notice generally provided for public comment and is 20 days less than the notice generally provided as a minimum under the Administrative Procedure Act (APA) for public comment on regulatory issues.

Advocates has previously pointed out in connection with the prior FMCSA pilot program demonstration project that lack of adequate notice is a violation of Section 6901. When the agency then provides only 20 days for public comment, twice the time provided to respond to the instant notice, Advocates stated that:

This is neither “sufficient opportunity for public notice and comment” as required by section 6901(b)(2)(B), nor the traditional minimum 30-day notice that accompanies even the most trivial and uncontroversial agency regulatory notices.<sup>7</sup>

Combined with the lack of comprehensive information provided to the public through the PASA notice, this foreshortened public notice procedure prevents proper evaluation and investigation of the facts before public comment is required to be submitted. Given the press of other work the limited time for public comment appears to be a deliberate effort to prevent information gathering and analysis by the public.



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Henry M. Jasny  
Vice President

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<sup>6</sup> 6901(b)(2)(B).

<sup>7</sup> *Opening the Border – Shutting Out Safety, The DOT Truck Pilot Program Defrauds Safety, Disregards Federal laws and Denies Access to Information*, pages 7-8, Advocates (June 2007).