



National School Transportation Association

122 South Royal Street  
Alexandria, VA 22314  
(703) 684-3200  
info@yellowbuses.org

May 23, 2016

Docket Management Facility  
U.S. Department of Transportation  
1200 New Jersey Avenue, SE  
West Building, Ground Floor  
Room W12-140  
Washington, D.C. 20590-0001

Attention: Written Comments to the Notice of Proposed Rulemaking on Carrier Safety Fitness Determination (FMCSA-2015-0001)

Dear Sir or Madam:

The National School Transportation Association (NSTA) is pleased to offer written comments to the Federal Motor Carrier Safety Administration's Notice of Proposed Rulemaking (NPRM) on Carrier Safety Fitness Determination as published in Volume 81 of the *Federal Register* on January 21, 2016.

NSTA is the membership organization for school bus companies engaged primarily in transporting students to and from school and school-related activities under contract to public school districts. Our members offer an array of services to our school district partners, from full turn-key service to management operations and specialized transportation. NSTA members range from small family businesses serving one district to large corporations operating thousands of buses across many states, all committed to the safe, efficient, and economical transportation of America's children.

NSTA has a multitude of concerns with this Safety Fitness Determination proposal as offered by the Federal Motor Carrier Safety Administration (FMCSA). FMCSA has seemingly rushed to issue this proposal without regard for the concerns raised by the school transportation industry, recommendations made by the Government Accountability Office or the Department of Transportation's Inspector General, reforms directed by Congress in the Fixing America's Surface Transportation Act (FAST Act), the safety culture inherent in the school transportation industry or common sense and as such, we strongly urge FMCSA to rescind this proposal.

### **Foundational Concerns**

The Consolidated Appropriations Act of 2012 directed the Government Accountability Office (GAO) to monitor the utilization of FMCSA's Compliance, Safety and Accountability (CSA) Program as it had recently been implemented as the tool to identify the riskiest carriers, replacing SafeStat. In its study, "*Modifying the Compliance, Safety, Accountability Program Would Improve the Ability to Identify High Risk Carriers*"

(GAO-14-114: Published: Feb 3, 2014), GAO found two major concerning issues in its review. First, most regulations used to calculate Safety Measurement System (SMS) scores were not violated with enough frequency to create a strong enough association with crash risk for individual carriers and second, most carriers lacked sufficient safety performance data to ensure that FMCSA could reliably compare them with other carriers. Both of these findings are of concern on their own, but are of significant concern when looking through the behavior lens created by FMCSA as the Agency has repeatedly stated that the best predictor of future behavior (those that will crash) is to review past behavior (those that have crashed). In addition, FMCSA built CSA upon the premise that performance ratings should be calculated by comparing similarly-sized carriers. Following its review, GAO concluded that due to the concerns raised, misclassifications could cause FMCSA to focus intervention efforts on carriers that were actually operating safely, while missing opportunities to intervene with carriers that were operating less safely. FMCSA has seemingly dismissed this finding.

GAO recommended FMCSA revise the SMS methodology to better account for limitations in drawing comparisons of safety performance information across carriers. In addition, GAO recommended FMCSA conduct a formal analysis to specifically identify: limitations in the data; data quality and quantity available for assessments; and limitations in the resulting SMS scores.

The U.S. Department of Transportation Inspector General issued a report in March of 2014 *“Actions Are Needed to Strengthen FMCSA’s Compliance, Safety, Accountability Program”* (Office of Inspector General Audit Report No. MH-2-14-032, March 5, 2014). The report outlined concerns about the CSA data that would form the basis for Safety Fitness Determinations in the proposed rule. These include the adequacy of data used to rate motor carriers and the extent to which data on regulatory violations by carriers predict future crash involvement or severity.

FMCSA has only offered superficial responses to the issues raised in these two reports. Simultaneous to the GAO study and report, FMCSA issued a number of regulatory actions addressing various parts of the CSA and its SMS – pushing forward despite the concerns being raised. (NOTE: We understand that the Safety Fitness Determination proposal is based on raw data scores and the Safety Fitness Determination methodology.) NSTA and many other entities offered comments to FMCSA at each opportunity detailing concerns with the CSA Program. Specifically, NSTA offered the following in March 25, 2015 when offering comments on FMCSA’s Notice on Crash Weighting Analysis (FMCSA-2014-0177):

“We appreciate FMCSA’s efforts to determine the best methodology for evaluating the safety performance of a motor carrier as it related to a future crash risk. It is readily apparent the current crash indicator methodology is underpinned by some problems which render the indicator unusable in its current state. The current methodology has not proven to be a good measure of passenger carrier crash risk and does not help to prioritize safety inspections or investigations as hoped. More importantly, should the flawed Crash Basic be made visible to the public it has greater potential to misinform the motoring public as to the safety and crash risk of the commercial passenger vehicles on the road today. This misrepresentation may in some cases actually cause people to choose a less safe operator.”

In addition, on January 15, 2015, NSTA offered the following comments to the Notice on Enhancements to the Motor Carrier Safety Measurement System (SMS) public website (FMCSA-2013-0392):

“Within the peer groupings, however, we would like to suggest that like entities are grouped. As it current exists, carriers are grouped by size, which is understandable, but there is no consideration

for whether they are a freight carrier or a passenger carrier – both of which have significantly different operating environments and characteristics as well as safety concerns. We believe that by grouping freight carriers truly with their peers of other freight carriers and passenger carriers truly with their peers of other passenger carriers, a more accurate depiction of safety performance rankings will be realized.”

NSTA also submitted the following in July 27, 2015 in its comments on FMCSA’s proposal for Future Enhancements to the Safety Measurement System (SMS) (FMCSA-2015-0149):

“We strongly encourage FMCSA to address the crash preventability issue by removing non-preventable crashes from the BASIC based upon police reports. In addition, crashes should be normalized by million miles driven rather than the utilization factor currently employed.”

Noting FMCSA’s unwillingness to address the concerns and recommendations raised by GAO, Congress directed a comprehensive review and reform of the CSA Program in the Fixing America’s Surface Transportation Act (FAST) Act, enacted in December 2015. Specifically, the FAST Act required a National Academy of Sciences study on the CSA program and SMS. This is a 16-month study, which began in February 2016. After the completion of the study, the Department of Transportation (DOT) is directed to submit a report to Congress on the results of the study. Six months after submitting its report to Congress, DOT is required to submit a corrective action plan responding to deficiencies identified in the report; provide an estimate of the costs to address the deficiencies; and include an implementation plan with benchmarks, programmatic reforms, and revisions to regulations or proposals for legislation. Within six months of submitting the corrective action plan, the Inspector General is required to review the extent to which the plan addresses the recommendations of the report required under the FAST Act and the GAO study.

Despite this Congressional mandate for review and program adjustments, FMCSA has proposed a new rule on motor carrier safety fitness standards using the same CSA data that generated these concerns. The proposed new Safety Fitness Determination proposes a new methodology built upon the same flawed CSA Program and its SMS, relying upon the same flawed data within each. Instead of pausing to address the multitude of concerns raised by the school transportation industry and many other affected industries, GAO, the Inspector General and Congress, the Agency is charging ahead to build a new safety fitness methodology on a flawed program before incorporating the required corrective action plan into the CSA Program and SMS and improving the system. This is akin to adding another story to a house with a crumbling foundation and is simply irresponsible. The proper reviews must be completed, all of the concerns and recommendations must be addressed and the system must be fixed before any further layers should be added or compounding regulatory action should be taken. In addition, FMCSA’s apparent plan to push forward on the Safety Fitness Determination and then correct, if needed, following completion of the CSA reform process will cause burdensome midstream corrections to the Safety Fitness Determination process creating confusion for operators and customers alike, as well as force additional training and expense for carriers.

### **Additional Concerns**

In addition to the previously expressed foundational concerns, NSTA has several concerns with the merits of the proposal itself. Those include: the proposed change in the rating system; the proposed change in methodology to determine an unfit carrier; the disregard for the Congressionally-directed procedures for undertaking a significant rulemaking; and a few concerns with specific elements offered by FMCSA such as

failure standards, carrier ratings on window displays, reduction in time to file a petition for administrative review and recordable crash rates.

The current safety fitness rating system ranks a carrier as “Satisfactory,” “Conditional” or “Unsatisfactory” based on a comprehensive safety compliance review. This system aligns well with the safety culture within the school transportation industry as well as the safety culture that is expected by the public and in the enforcement community. By viewing these ratings there is no doubt as to the status of the carrier. However, we recognize that many carriers are unrated under this system. This Safety Fitness Determination proposal would radically modify the Safety Fitness rating system and the new methodology would be based on on-road safety data in relation to five of the Agency’s seven Behavior Analysis and Safety Improvement Categories (BASICS); an investigation, or a combination of on-road safety data and investigation information. NSTA has grave concerns about method proposed in this rulemaking. The proposed new system would remove all existing ratings and create only one rating, “Unfit.” Rather than recognize a safe carrier as being safe, this proposal would simply leave a safe carrier unrated, offering very limited guidance on the safety record of the carrier and cause potential confusion carriers, law enforcement and the public. This rating change, which lacks common sense, is culturally flawed as it seeks only to recognize carriers that do not adhere to the regulations while failing to positively acknowledge those that invest time, resources and personnel into being in compliance and operating safely.

In addition to the National Academy of Sciences study directed through the FAST Act, the legislation also contained several provisions addressing regulatory reform at FMCSA. This section specifically directed that if a proposed rule is going to lead to a major rule, FMCSA must first begin with an Advance Notice of Proposed Rulemaking (ANPRM) or a Negotiated Rulemaking. FMCSA utilized a waiver requirement in the law that permits the Agency to waive the requirement if it deems an ANPRM impracticable, unnecessary, or contrary to the public interest. The Safety Fitness Determination proposal is a very significant proposal which would fundamentally alter the rating system used to determine the safety of a commercial motor vehicle carrier and alter the paradigm in which the new rating occurs. By sidestepping the Advance Notice of Proposed Rulemaking stage or deciding not to form a Negotiated Rulemaking Committee, FMCSA is choosing to begin the discussion with its own proposal, rather than seek input from the very motor carriers the proposal would affect. Many motor carriers have offered criticism of the CSA System and its SMS, agreeing with the school transportation industry that it is based on flawed data. To ignore that criticism and continue to push forward while also offering a proposal without first seeking input from its affected audience is misguided. FMCSA has on two recent instances chosen to utilize the ANPRM (in the case of Obstructive Sleep Apnea) and the Negotiated Rulemaking (for Entry-Level Driver Training) processes and NSTA sees no reason why the Agency could not proceed with either of those methods on the Safety Fitness Determination rulemaking as it will have such a significant impact on all regulated commercial motor vehicle operators, including the school transportation industry.

Under Section VI, Proposed Safety Fitness Determination Changes, of the Notice, FMCSA proposes to determine an unfit rating based on either two failed BASICS on 24 months of inspection data; an investigation; or a combination of roadside inspection data and inspections. FMCSA offers that if a motor carrier is cited for a violation of an acute regulation associated with a BASIC, it would fail that BASIC. Further, if a motor carrier is cited for a violation of a critical regulation with violations discovered in a minimum of 10 percent violation of the records examined, it would fail that BASIC. Finally, if a motor carrier failed two or more BASICS due to violations of the proposal critical and/or acute regulations, this would result in a proposed “Unfit” rating. NSTA finds this extremely worrisome as this in essence, means that a carrier could be rated “Unfit” from one single safety event. This methodology also raises concerns for carriers with multiple operating locations as under the proposal if two BASIC’s were found with acute

violations or several critical violations at one operating location, the carrier as a whole would be found to be, "Unfit," affecting all operating locations.

In addition under Section VI, Proposed Safety Fitness Determination Changes, FMCSA requested feedback on whether passenger carriers should be held to more stringent Safety Fitness Determination failure standards. Under the proposal, FMCSA stated its interest in alternative methods for identifying high-risk passenger carriers during an investigation. FMCSA also noted its consideration of lowering the minimum rate of violations for a pattern, for purposes of a critical regulation violation from 10 percent to 5 percent or a lower number. NSTA believes that FMCSA already factors in lower intervention thresholds in SMS for passenger carriers and it provides a higher standard for intervention. These lower intervention thresholds provide an early warning signal to FMCSA that a potential for a higher risk safety event exists. Further provisions are not necessary if FMCSA acts based upon the warning signs.

FMCSA acknowledges that MAP-21 directed the Department of Transportation to make a passenger carrier's Safety Fitness Determination available to the public, possibly through a window display on vehicles and asks for comment on this suggestion. NSTA believes that the FMCSA website and the Agency's SaferBus app already provide passengers with a sufficient opportunity to check on a carrier's safety performance. If the proposed safety rating system is finalized, there would simply be nothing to display other than "Unfit" and a carrier with such a rating is not likely to comply with such a requirement. Further this approach is once again culturally flawed as it seeks to focus on carriers who do not adhere to the regulations while failing to acknowledge those that do in a positive manner. A window display could be effective under the Agency's current three-tiered rating system of "Satisfactory," "Conditional," and "Unsatisfactory."

Under Section VII, Revised Safety Fitness Appeals Process, FMCSA proposes to reduce the time for filing a petition for administrative review from the current maximum of 90-days to 15-days after the issuance of the proposed unfit Safety Fitness Determination. NSTA does not find 15-days adequate to allow carriers proper time to investigate and file responses to the findings. NSTA supports the current 90-day maximum.

Finally, with respect to the Agency's proposed crash calculation for determining a carrier's Safety Fitness Determination, the recordable crash rate or the preventable crash rate would be more appropriate. In addition, the Agency should retain the current thresholds for urban (1.7) and non-urban (1.5) carriers. NSTA also suggests the Agency factor preventability as a determining factor for recordable crash ratings.

In sum, NSTA has concerns with the proposed Safety Fitness Determination and the change in the rating system; the proposed change in methodology to determine an unfit carrier; and the disregard for the Congressionally-directed procedures for undertaking a significant rulemaking. In addition, we also have a few concerns with specific elements offered by FMCSA such as failure standards, carrier ratings on window displays, reduction in time to file a petition for administrative review and recordable crash rates. Due to our concerns we urge FMCSA to rescind this proposal.

In closing, we appreciate the opportunity to offer our comments on this issue and look forward to continuing to work with the Federal Motor Carrier Safety Administration on this issue. We take safety very seriously and are very proud of the work we do each and every day to transport children to school safely as well as the charter work we operate.

Thank you for the opportunity to provide these written comments. If you require further clarification, please do not hesitate to contact me at (703) 684-3200.

Sincerely,

A handwritten signature in black ink, appearing to read "Ronna Sable Weber", is displayed on a light gray rectangular background.

Ronna Sable Weber  
Executive Director