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Honorable Anne S. Ferro  
Administrator  
Federal Motor Carrier Safety Administration  
1200 New Jersey Avenue, SE  
Washington, DC 20590

RE: GAO Report on FMCSA Safety Measurement System (SMS)

Dear Ms. Ferro,

I have spent most of my professional career in the logistics industry, as General Counsel to one of the nation's largest logistics companies, as CEO of another logistics company, and as a private practice lawyer who has represented transportation and logistics companies in all parts of the United States.

For more than three years, many of my clients have sought to bring reason and insight to the issue of improving safety for public carriers within the context of responsible information about such carriers. Although my clients and I have meaningful differences with FMCSA, we have at all times found in common the mission we share with FMCSA of improving safety on our nation's highways. Our differences center on the nature, validity and reliability of information made available by FMCSA, especially since the introduction of your CSA 2010 Safety Measurement System ("SMS") and its carrier measurement categories, Behavior Analysis and Safety Improvement Categories ("BASIC").

From the inception of SMS we, along with many industry organizations, have maintained that the BASICs now displayed on FMCSA's website are invalid and unreliable for the purpose of evaluating carrier safety. As such, SMS misleads the shipping public and unfairly characterizes the safety worthiness of motor carriers, both as to which are safe and unsafe. We have advocated that fundamental position in the courts, Congress, and public media, as numerous private studies have consistently confirmed our premise.

As you know, the Government Accountability Office (GAO) was directed by the Senate Appropriations Committee to monitor the implementation of CSA, and on February 3, 2014, reported their audit findings on the reliability of SMS data. In their analysis of the key issue of SMS data validity, they report:

We find that a substantial portion of regulatory violations in SMS *cannot be empirically linked to crash risk for individual carriers*... These results suggest that the specific weights that SMS assigns to many regulations when calculating safety risk *cannot be directly validated with empirical data*, and many of the remaining regulations do not have meaningful associations with crash risk at the carrier level. (GAO-14-114 Federal Motor Carrier Safety; Appendix V: Analysis of Regulatory Violations and Crash Risk. p. 58)

Our interpretation of this fundamental conclusion by GAO is consistent with the position we have advocated with Congress, the media, and directly to FMCSA for more than three years. Data is always either valid or not. If, by definition, SMS data is invalid, it is unreliable for its purported essential purpose. If carrier safety risk, as determined by SMS, and portrayed publicly on your website, cannot be "validated with empirical data", then SMS BASICs are invalid and unreliable per se. As such, they continue to cause the shipping public to make erroneous and prejudicial decisions about carrier safety. They also needlessly and unfairly deprive carriers of due process and economic opportunity in relation to their competitors, and artificially create a shortage of carrier capacity.

Many studies have now documented the prejudicial effect of public display of this invalid information. We cannot infer from the GAO report all the many ways such information may be claimed by FMCSA to be useful for internal purposes, but even that utility was found lacking by GAO:

Overall, these results raise concerns about the effectiveness of the existing SMS as a tool to help FMCSA prioritize intervention resources to most effectively reduce crashes. FMCSA's existing SMS method successfully identified as high risk more than 2,800 carriers whose vehicles were involved in 12,624 crashes. However, FMCSA would have potentially prioritized limited resources to investigate more than 4,000 carriers that did not crash at all. (Id. at 27)

We believe GAO's conclusions as to both the invalidity and unreliability of SMS data should be considered within a historical context, when considering FMCSA's responsibility, accountability and future direction on the more narrow issue of publicly displaying such invalid and prejudicial information.

I. **Prior Guidance by USDOT Office of Inspector General (OIG) on FMCSA Responsibility for Public Dissemination of Invalid SafeStat Information on Carrier Safety**

SMS was preceded by the former SafeStat methodology for measuring carrier safety. FMCSA's experience with SafeStat is particularly relevant, because during its use from 1999 through 2009

FMCSA received several admonitions from OIG and Congress about lack of data quality, and the likely effects of publicly displaying invalid information on carriers.

Almost exactly 10 years ago, at the request of Representative Thomas Petri, then Chairman of the House Transportation Subcommittee, OIG performed an audit of SafeStat and reported:

- FMCSA should take action to improve data quality because significant problems exist with the data motor carriers and the states provide, and these data problems limit SafeStat's effectiveness and introduce bias into the ranking process.
- [W]hile SafeStat is sufficient for targeting compliance reviews and considered valuable by internal users, its continued public dissemination and external use require prompt and complete action to improve the model and improve the quality of the data used.
- Because carrier safety data and the model's rankings are publicly disclosed, a higher standard of quality must be met to ensure fairness to motor carriers who may lose business or be placed at a competitive disadvantage by inaccurate SafeStat results.
- FMCSA will need to demonstrate timely improvements if it is to continue to publicly disclose carrier results across all SafeStat categories. ( U.S. Department of Transportation, Office of Inspector General: *Executive Summary Audit Report No. MH-2004-034, February 13, 2004*; <http://www.oig.dot.gov/sites/dot/files/pdfdocs/mh2004034.pdf>)

In 2007, at the request of Congressman Petri, OIG did a follow-up review of FMCSA's SafeStat data and the specific issue of whether such information should be displayed publicly. In their report to Congressman Petri, OIG again came to similar conclusions:

- We found that, although improvements have been made, problems still exist with the reporting of crash data.
- Completeness of data is critical for SafeStat **because scoring involves a relative safety ranking of one carrier against other carriers competing for the same business.**
- Missing crash reports may place a lower risk carrier in a deficient category because data for a higher risk carrier is not included in the calculation. Consequently, **FMCSA should continue to limit public use until it can assess whether significant crash reporting problems remain.**
- **Before FMCSA allows public access to SafeStat scores,** it must improve its ability to measure the completeness of non-fatal crash reporting. (U.S.

Department of Transportation, Office of Inspector General: *Letter from Inspector General Scoval to Congressman Petri with attached Briefing, June 19, 2007; <http://www.oig.dot.gov/sites/dot/files/pdffdocs/SAFESTAT.PDF>* (emphasis mine)

## II. Common Pattern of Knowingly Publishing Unreliable, Invalid and Prejudicial Data

Frankly, we find a common theme in the prior findings and recommendations by IOG with regard to SafeStat and GAO's recent report on SMS. In all efforts by FMCSA to produce a statistically reliable and valid reporting device on carrier safety, not once in more than 10 years has any government agency reported either SafeStat or SMS capable of empirically predicting crash risk for individual carriers. In fact, those agencies with this monitoring responsibility have consistently reported to Congress that FMCSA has failed in that effort. Yet, FMCSA continues to publish data proven to be invalid for its stated purpose, and most important, FMCSA refuses to take such data out of public view notwithstanding FMCSA's admission of knowledge that the shipping public is relying upon this invalid data in making decisions about carrier selection.

It is also notable that both IOG and GAO have on many occasions drawn the distinction between FMCSA using SafeStat and SMS internally, in contrast to external publication of the SafeStat and SMS measurements. One of the primary reasons for this distinction is concisely stated by IOG in their Audit Report of 2004:

***Because carrier safety data and the model's rankings are publicly disclosed, a higher standard of quality must be met to ensure fairness to motor carriers who may lose business or be placed at a competitive disadvantage by inaccurate SafeStat results.*** (Executive Summary, supra, p. iv)

Similarly, GAO, in its February 3, 2014 report on SMS, draws attention to the same inherent inequity found in public reporting of invalid data.

In addition to using SMS for internal purposes, FMCSA has also stated that SMS provides stakeholders with valuable safety information, which can “empower motor carriers and other stakeholders...to make safety-based business decisions”...Nonetheless, entities outside of FMCSA are also using SMS scores to assess and compare the safety of carriers...***Given such uses, it is important that any information about SMS scores make clear to users, including FMCSA, the purpose of the scores, their precision, and the context around how they are calculated.*** (GAO-14-114 *Federal Motor Carrier Safety*, p. 30)

FMCSA continues to publicly report SMS scores on carriers, even though GAO now reports “...a substantial portion of regulatory violations in SMS cannot be empirically linked to crash risk for individual carriers”, and “...the specific weights that SMS assigns to many regulations when calculating safety risk cannot be directly validated with empirical data”.

In short, FMCSA is intentionally disseminating carrier safety risk information to the public that is both “influential”, and without “objectivity”, as those terms are defined by both Office of Management and Budget (OMB) and the Department of Transportation (DOT) in their Guidelines pursuant to the Information Quality Act of 2001.

Further, and beyond the issue of dissemination of information by FMCSA, there is the issue of internal use of SMS information for the purpose determining whether a carrier is fit to operate. As noted by GAO, and worthy of repeating here, “...the specific weights that SMS assigns to many regulations when calculating safety risk cannot be directly validated with empirical data”. Until FMCSA demonstrates objectivity, reliability and validity to SMS data, fundamental fairness and equal protection principles require FMCSA to refrain from making such decisions from SMS data in all instances where such determinations would be made solely from SMS data.

GAO agrees with this assessment in their concluding remarks,

In addition, if these same safety performance data are going to be used to determine whether a carrier is fit to operate, FMCSA needs to consider and address all identified data limitations, or these determinations will also be at risk. (GAO-14-114 *Federal Motor Carrier Safety*, p. 31)

### III. **FMCSA Future Actions in Relation to GAO Findings and the Information Quality Act**

The Information Quality Act of 2001, as implemented by OMB and DOT Guidelines, requires that data disseminated by federal agencies and known to have substantial impact on important public policies, or important private sector decisions, must have a minimum level of quality. Quality in this context includes “Objectivity”, where objectivity “focuses on whether the disseminated information is being presented in an accurate, clear, complete, and unbiased manner, and as a matter of substance, is accurate, reliable, and unbiased.” (OMB *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies*, 67 Fed. Reg. 8452 (Feb. 22, 2002))

DOT Guidelines, issued at the directive of OMB, provide;

Consequently, when this document refers to “the guidelines,” it should be taken to refer to the OMB guidelines, as applied to DOT programs and activities, as well as the DOT guidelines themselves, unless the context suggests otherwise. (DOT *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility and Integrity of Information Disseminated by the Department of Transportation* (Oct. 1, 2002).

It is clear that the implementing Guidelines from both OMB and DOT require that SMS information disseminated to the public be “...presented in an accurate, clear, complete, and unbiased manner, and as a matter of substance, is accurate, reliable, and unbiased.” (OMB)

With these Guidelines in place, FMCSA, by way of its SMS website, routinely publishes BASIC statistical scoring on carriers, with a “Note” to the public: “(Note: a high BASIC percentile indicates high noncompliance)”. Within each BASIC, FMCSA provides a statistical indication of “Intervention Thresholds”. The website informs the public that, “[t]he Intervention Thresholds for carriers are organized by BASIC and are set based on a given BASIC’s relationship to crash risk.” (<http://www.ai.fmcsa.dot.gov/sms/InfoCenter/#question1561>) So it is, by way of FMCSA’s dissemination of statistical information, the public is informed by FMCSA that the BASICs and Intervention Thresholds are based on each BASIC’s relationship to “crash risk”. However, GAO finds the following with regard to “crash risk”:

- We find that a substantial portion of regulatory violations in SMS *cannot be empirically linked to crash risk for individual carriers.* (GAO-14-114 *Federal Motor Carrier Safety*, p. 58)
- [T]he specific weights that SMS assigns to many regulations when calculating safety risk *cannot be directly validated with empirical data*, and many of the remaining regulations do not have meaningful associations with *crash risk* at the carrier level. (Id.)
- For SMS to be effective in identifying carriers that crash, the violation information that is used to calculate SMS scores should have a relationship with *crash risk*... However, we found that FMCSA’s safety data do not allow for validations of whether many regulatory violations are associated with higher *crash risk* for individual carriers. (Id. at 15)
- The relationship between violation of most regulations FMCSA included in the SMS methodology and *crash risk* is unclear, potentially limiting the effectiveness of SMS in identifying carriers that are likely to crash. (Id.)
- First, we found that the majority of regulations used to calculate SMS scores are not violated often enough to strongly associate them with *crash risk* for individual carriers. (Id. at 13)
- SMS is intended to provide a safety measure for individual carriers, and *FMCSA has not demonstrated relationships between groups of violations and the risk that an individual motor carrier will crash.* (Id. at 16)

GAO’s findings in their report to Congress clearly demonstrate that SMS information is invalid and unreliable for the purpose of providing safety measures on carriers, since there is no essential proof of validity in your assumptions and nexus of crash risk to ratings. FMCSA’s continued

dissemination of statistical information characterizing carriers' safety status by public disclosure of SMS BASICS, Intervention Thresholds and relative comparisons of carriers is now, likewise, a purposeful violation of the Information (Data) Quality Act and the Guidelines of OMB and DOT.

There is no way for FMCSA to rationalize with GAO findings your stated purpose for publicly disseminating SMS information and concomitant prejudicial assessments of carriers. Likewise, there is no rationalization of continued publication/dissemination of SMS information that is not inconsistent with OMB/DOT's Information Policy of disseminated information "... being presented in an accurate, clear, complete, and unbiased manner, and as a matter of substance, is accurate, reliable, and unbiased."

#### **IV. Conclusion**

Administrator Ferro, respectfully and with recognition of our good faith differences, we call on FMCSA to recognize the compelling nature of GAO's findings, and with deliberate immediacy cease the public dissemination of SMS information by way of your website, while FMCSA proceeds with GAO's instructions to revise the SMS methodology. We are confident that you, Secretary Foxx and Congress will agree, in light of GAO's findings and recommendations, that continuing to publish this information while revising SMS is clearly misleading and prejudicial to all who are affected by this information in its current state.

Respectfully,

*Paul Stewart*

Paul Stewart  
Attorney at Law

cc: Anthony R. Foxx, Secretary, Department of Transportation  
Chairman Thomas E. Petri, Committee on Transportation and Infrastructure  
Chairman Sam Graves, House Committee on Small Business  
Representative John J. Duncan, Jr.  
Representative Steve Cohen