

DOT Gets Aggressive

FMCSA Imposes Additional Industry Compliance Reviews, Stiffer Penalties

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If the past several months are any indication, the DOT's Federal Motor Carrier Safety Administration (FMCSA) has completely abandoned the "carrot" approach and is wielding a large "stick" to ensure safety compliance by the nation's trucking companies. The FMCSA's aggressive approach is made clear in the sampling of its press releases issued over the past year:



- DOT shuts down Indiana trucking firm (August 30, 2000)
- U.S. Secretary Slater announces aggressive fines for repeat safety regulation violators; proposes to shut down motor carriers who don't pay (September 22, 2000)
- FMCSA fines Michigan-based motor carrier \$185,770 for violating hours of service regulation (November 9, 2000)
- FMCSA fines North Carolina passenger carrier \$35,500 for multiple safety violations (May 4, 2001)
- FMCSA fines two motor carriers for multiple violations; earlier investigation of third leads to criminal action (May 15, 2001)

Substantial increase in on-site compliance reviews and fines.

Since the establishment of the FMCSA in January 1, 2000, the number of on-site compliance reviews conducted on trucking companies by the FMCSA has increased substantially. In comparison with 1999, when a total of 6,252 compliance reviews were conducted, the FMCSA is on target to conduct well over 11,000 reviews in 2001.

Similarly, the amount of fines issued to trucking companies as a result of violations discovered during the on-site compliance review has also substantially increased. In the year 2000, the FMCSA issued fines totaling over 23 million dollars against 4,000 different motor carriers across the country for an average fine of approximately \$5,500. This is more than double the total fines assessed by the



FMCSA's predecessor, the Office of Motor Carriers, in 1999.

DOT is more likely to shut down a carrier's operations. While increased fines are of obvious concern to motor carriers, compliance reviews may include even greater threats to a carrier's operations and even its public image. Based upon the information obtained from its field investigators during a compliance review, the FMCSA can also issue a motor carrier either a conditional or unsatisfactory safety rating that becomes a part of the trucking company's permanent public record. The issued safety rating automatically goes into effect approximately 45 days after the compliance review unless the trucking company successfully petitions for an upgrade of its rating during this time. The issued rating is also readily available to the trucking company's competitors and customers through the FMCSA's Web site.

In recent years, the safety rating assessed during a compliance review has been a significant factor used by insurers and shippers to select safe and compliant carriers. In fact, shippers sometimes refuse to do business with a motor carrier that has anything less than a satisfactory safety rating. Moreover, an adverse safety rating could result in additional liability exposure for

a motor carrier in accident litigation where the carrier's own negligence or intentional acts in allowing an unsafe transportation operation sometimes comes into play.

Effective November 20, 2000, the FMCSA adopted a new regulation prohibiting any motor carrier that is issued an unsatisfactory rating from continuing to operate commercial motor vehicles in interstate commerce if the rating is not upgraded within 60 days. Thus, not only can an unsatisfactory safety rating result in substantial fines issued by the FMCSA and the loss of a carrier's customers, it can also result in an out-of-service order issued if the problems resulting in the unsatisfactory rating are not quickly corrected. In the case of one Indiana trucking company, an out-of-service order was handed to the company's president at the same time that the Indiana State Police were physically removing license plates from the company's trucks and trailers.

When can a carrier expect the DOT to come knocking?

Under the FMCSA's SAFESTAT system, all motor carriers are assessed a numerical ranking in four different areas based on their history of road-side inspection, prior compliance reviews, accidents, and the number of traffic violations incurred by their driver workforces. These numerical rankings are then compared with the rankings of all trucking companies across the country. The FMCSA uses the comparison results to assign each carrier an overall safety and compliance rating of A,B,C,D,E, F or G. Currently, the FMCSA is scheduling on-site compliance review for carriers that are identified as A or B carriers in the SafeStat system. However, even carriers with favorable SafeStat ratings can be suddenly targeted for review due to a serious accident, a driver complaint or a high vehicle or driver out-of-service rate.

The compliance review usually begins with an unannounced visit by either a federal field investigator or a state enforcement officer. The investigator will focus his attention on the carrier safety compliance program and, in particular, the mass of paperwork that a trucking company is required

to maintain under the Federal Motor Carrier Safety Regulations. The carrier's compliance efforts are broken down by the investigator into six general factor areas that will each be rated as "satisfactory," "conditional," or "unsatisfactory."

Those factor areas include:

- General Compliance
- Driver Compliance (driver qualification files and drug and alcohol testing)
- Operation Compliance (log keeping and hours of service compliance)
- Vehicle Compliance (vehicle maintenance, inspection and repair)
- Hazardous Material Compliance
- Accident Factor

In issuing a rating in each of these six categories, the investigator will be searching for acute or critical violations in the various documents reviewed. For example, an acute violation will be assessed if the trucking company uses a driver who has refused to submit to a drug or alcohol test as required under 49 C.F.R. § 382.211. A critical violation, on the other hand, is less serious and can only be found if the investigator finds a pattern of similar violations that indicate a breakdown in the trucking companies management controls. For example, a critical violation can be assessed if the inspector finds a substantial number of violations in which a driver has been allowed to drive more than 10 days without first taking an 8-hour break. Each identified acute or critical violation will result in the assessment of one point. One point in any six factor areas will then result in a "conditional" rating in the factor and two or more points in each factor will result in a "unsatisfactory" factor rating. Once a rating has been assessed in each of the six factors, an overall rating will be generated by the investigator.

Discretion of DOT investigators causes unpredictability in results.

Although the general process for conducting a compliance review is contained in the FMCSA's regulations, the individual

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investigators have a substantial amount of discretion regarding the specific records that are reviewed during a compliance investigation. One investigator might decide to review a random sample of the driver logs to ensure compliance in the factor area relating to hours of service. However, another investigator may choose to review only the logs of drivers who have been involved in accidents or who have been assessed citations in connection with roadside inspections. Obviously, if both investigators performed a compliance review on the same company, the results for the latter investigator could be substantially different from the first investigator's results. Because of these subjective issues, it is difficult for trucking companies to attempt to predict with any degree of certainty the acute or critical violations that may be assessed by the FMCSA.

An Internal audit now can prevent penalties later
Our firm, which represents thousands of transportation-industry clients all over the country, finds itself far too often advising motor carriers on ways to respond to unfavorable safety ratings resulting from DOT audits. We prefer to advise motor carriers to take a proactive approach before a compliance review occurs. One way to achieve satisfactory DOT compliance results is through the scrutiny of a mock review conducted by an independent consultant. By reviewing the carrier's documents and operations that as a DOT investigator would, the consultant can inform the carrier of any potential problem areas a DOT review would likely uncover. This assessment will provide the carrier with an opportunity to reduce or rectify any potential violations before an actual DOT compliance review in order to avoid any fines and unfavorable safety ratings. ◆