



# In Transit

The newsletter of the  
Trucking Law Committee

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**Piece by piece. Fact by fact. Getting to the Big Picture.**

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Leadership Note

# From the (Immediate Past) Chair

By MaryJane Dobbs



All good things must come to an end. My tenure as the chair of the DRI Trucking Law Committee officially came to an end as of the recent DRI Annual Meeting, and it is with great pride that I handed the reins over to a talented group of attorneys dedicated to defend the trucking industry. We have provided and will continue to provide interesting articles and great programming for all transportation professionals: young, old, seasoned, and new to trucking. The Trucking Law Committee is thriving and if you are reading this message, please email me at [mjdobbs@bressler.com](mailto:mjdobbs@bressler.com), new chair Matt Hefflefinger at [mhefflefinger@heyloyster.com](mailto:mhefflefinger@heyloyster.com), or new vice chair Steve Pesarchick at [spesarchick@sugarmanlaw.com](mailto:spesarchick@sugarmanlaw.com) to get involved with our group.

Although I depart as chair, my work continues with the Trucking Law Committee. In furtherance of our dedication to helping young attorneys and those new to trucking, the DRI Trucking Law Committee will be presenting a mock trial primer on the “Ins and Outs of Trying a Trucking Case” on June 26, 2019, in Nashville, Tennessee. This program

will focus on what attorneys can expect when handling a commercial vehicle accident case that goes to trial. Experienced litigators will demonstrate a variety of trial techniques necessary to win a commercial vehicle case. The DRI Young Lawyers Seminar will follow the program.

Stay tuned for more great things from the DRI Trucking Law Committee!!

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## Feature Articles

# Preserving Electronic Data for Use at Trial

By Christina L. Capobianco and Nicole Crowley



Electronic data has been part of the automotive industry for some time, but has become increasingly complicated with each new technological advance. In the trucking world, there are varieties of devices that can help us defend our companies and clients, including modules that track the vehicle's speed and performance, electronic logs, and telematics that can identify where our driver was at any point in time. The technology is constantly changing and keeping up with it can be a difficult task. This article will discuss the variety of information we can obtain from both private passenger vehicles, as well as trucks, and the steps to take to ensure that evidence is preserved in such a manner that it will be admissible at trial.

## ECM vs. EDR: The Difference Matters

Generally, a heavy truck may be equipped with an Engine Control Module ("ECM") while a lightweight vehicle, one under 8,500 pounds, could have an Event Data Recorder ("EDR"). While both an ECM and EDR may contain similar data, they are very different systems and the difference matters when it comes to obtaining and preserving the data.

As of September 1, 2013, the National Highway Traffic Safety Administration mandated that all passenger vehicles being manufactured and sold in the United States that are equipped with an EDR must be able to capture or record 45 different data points. Some of the data is recorded at sample rates, including vehicle speed, service brake, and driver safety belt status. Other data is recorded when a specific event occurs, such as an accident that causes the airbag to deploy. For instance, when the frontal or side airbags are activated, the data related to the incident causing the activation is recorded and locked. The data *cannot* be overwritten. If a collision or other event occurs that does not cause the airbags to deploy, the EDR must keep two events recorded; this data can be overwritten. When dealing with an EDR, therefore, airbag deployment is the single event that determines whether data can be overridden. This is very different from an ECM.

An ECM determines an event is recordable based upon a sudden change in the vehicle's speed. However, there are currently no standards as to what specific change in speed

makes an event recordable or what data is recorded. Heavy truck engine makers began manufacturing engines with ECMs at different times and there is a wide variety in the types of information recorded and saved by each manufacturer. There are no laws or regulations that require the data to be maintained. Moreover, there is a variety of thresholds for what determines a recordable event. Depending on the manufacturers and for some engines, a fleet owner or vehicle operator can adjust the threshold of what is a recordable event, or even disable it.

The availability of additional information other than Hard Stop/Sudden Deceleration data also varies across engine manufacturers. For example, a Caterpillar engine's ECM will not record last stop data, but a Detroit Diesel's ECM has that capability, with the caveat that the last stop data will be overwritten as soon as the vehicle is driven from the scene.

The disparity between what data is available, the threshold of what determines a recordable event and how data is maintained makes ECM data more difficult to obtain and easier to lose. An ECM download can often introduce new fault codes, and even overwrite fault codes associated with the accident, if a download is conducted without ensuring appropriate protocols are in place. On the other hand, an EDR will likely have important data frozen and unable to be overwritten if an accident causes front or side airbags to deploy. These differences between an ECM and EDR are important when considering your procedures for obtaining and preserving this evidence.

## Preserving Electronic Data

The first step in preserving electronic data is identifying who owns the vehicle. Pursuant to the Driver Privacy Act of 2015, a vehicle's owner has the sole right to collect ECM and EDR data unless: 1) the owner gives consent, 2) there is a court order, 3) the data removal is for vehicle safety research, or 4) the removal is related to diagnosing, servicing or repairing the vehicle. Individual states have also implemented their own requirements. For example, Colorado requires the owner's written consent within 30 days of retrieving the data and in North Dakota, retrieval permission cannot be a condition in an insurance agreement. Determining who owns the vehicle is crucial after any accident so that preservation letters can be served as soon as possible, notifying all

parties that are involved of their obligation to maintain the vehicle's electronic data.

Again, the difference between an ECM and EDR matters. If multiple heavy trucks are involved in the accident or a passenger vehicle's airbags did not deploy, the time to preserve the relevant data can be a short window. The data can, and will likely be, overwritten if the vehicles are driven or repaired. Specifically for an ECM, if a mechanic accesses the ECM for diagnostic and repair purposes without understanding the importance of maintaining the data, the data is likely to be overridden during the repair process.

In addition to the ECM and EDR data, it should be determined whether the truck was equipped with any telematics software or electronic driving logs. If the truck was so equipped, it should be obtained and stored immediately after an accident to prevent arguments that the information was altered.

## Spoliation

When downloading an ECM, you should specify what data you are requesting to download and save as not every expert or person qualified to download an ECM may have the same understanding of what is to be captured. For instance, a qualified technician for an engine manufacturer may not typically take a snap shot of Hard Stop data because it may not be data typically used in their diagnostic and repair testing. It is important to have a conversation with the expert and/or technician performing the download to ensure you, the technician and any experts agree about what information can be downloaded and how the download will be conducted to ensure no data will be lost or overwritten.

For an EDR, the risk of altering or deleting the data is not as high in accidents involving the airbag because the data is locked. There is also a lesser risk of losing data from other, non-airbag inducing accidents because the evidence is not simply overwritten by driving away from the scene. However, it should still be a high priority to download an EDR soon after a non-airbag inducing accident to ensure that the data is not overwritten by any subsequent incidents.

Despite spoliation arguments related to lost ECM data after accidents, courts are reluctant to impose sanctions on defendants. One reason appears to be that there is generally other physical evidence that experts are able to use to recreate how the accident occurred. Also, courts are accepting defense arguments related to the fickle nature of ECM downloads. In 2012, for instance, the Middle District of Florida denied a plaintiff's motion for sanctions against a defense attorney who failed to preserve hard stop data. *Rahmings v.*

*David Essary d/b/a Essary Transport*, 210CV716FTM29DNF, 2012 WL 12910263, at \*1 (M.D. Fla. Jan. 19, 2012). The defense attorney did have the ECM downloaded following the accident, but the technician performing the download did not obtain the Hard Stop data during the download. The court held that the defense attorney did not intentionally destroy evidence and the defendant was not subject to spoliation sanctions.

Although courts have been reluctant to impose sanctions for lost ECM data, it is unlikely that courts will extend their restraint to other electronic data, such as electronic logbooks or telematics data, which a company had in its possession with knowledge of pending litigation but failed to preserve or maintain. This data is often available in a printout or form and does not require the technical specialty of an ECM or EDR download. Therefore, steps should be taken to preserve this data in its native form immediately after an accident.

## Admitting Data into Evidence

ECM and EDR data, as well as electronic logbooks and telematics information, are generally admissible into evidence with the appropriate expert foundation, and have been admitted under both the *Frye* and *Daubert* standards. However, there have been issues as to the authenticity of the data and its probative value. Authenticity problems may arise in situations where there is a dispute about the ECM's distance and time recordings. Moreover, a faulty download could result in exclusion of evidence based upon an argument that the data has been altered.

As for electronic driver logs, drivers can attempt to alter electronic logs by turning the device off or unplugging it, manually altering when she is on or off duty, or knowing the speed threshold for when the device automatically determines the truck is moving and changing the driver status while stuck in traffic. Obtaining the driver records as soon as possible is critical for determining whether the driver was accurately reporting her time.

While seemingly obvious, these authenticity issues can be easily forgotten in the rush of an accident investigation. Prior to any download, you should ask your expert how she intends to correlate any specific data obtained from a download to the specific accident. It is also important to have an understanding of how a company's electronic driver log protocols work so that a determination can be made early about whether a driver was accurately reporting her driving time.

Additionally, the ECM/EDR data itself is not dispositive, especially if there is contradictory evidence or a suggestion that the module malfunctioned (much like how electronic logbooks are not dispositive). For example, the First Circuit Court of Appeals found an argument “that an electrical component cannot malfunction and that its unfailing performance can be predicted with absolute certainty in any and all circumstances” unpersuasive. *Perez-Trujillo v. Volvo Car Corp. (Sweden)*, 137 F.3d 50, 54–55 (1st Cir. 1998). The Texas Court of Appeals has also held that module data is not conclusive, especially in the face of other, contradictory evidence. *Sipes v. Gen. Motors Corp.*, 946 S.W.2d 143, 153 (Tex. App. 1997), writ denied (Aug. 25, 1998), writ denied (Oct. 8, 1998). The courts emphasize that the data is simply one tool that helps in the telling of the accident’s narrative. The data gives more context to the accident, but it cannot be the sole tool relied upon.

Electronic Data is here to stay and it requires companies and defense attorneys to become more technologically savvy to ensure data is preserved in such a manner that it can be admitted into evidence years following an accident.

Having upfront conversations with drivers, experts and technicians, establishing and following clear protocol for accident investigation, and establishing and following clear company policies on data retention are the first steps to making sure important data is preserved and admissible at trial.

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## Regulatory Update: Proposed Rulemaking Gone Missing in the Era of Trump Deregulation

By Sarah E. Hansen



The election of Donald Trump as the 45th President of the United States ushered in an era of increasing deregulation across all of the federal departments. The Department of Transportation (DOT) and Federal Motor Carrier Safety Administration (FMCSA) are no exceptions. Both have seen long-discussed proposed regulations go by the wayside under the administration, now in its second year of a four-year term. The administration’s regulatory stance has been highlighted by an Executive Order issued on January 30, 2017, only ten days after President Trump entered office, which stated that “[u]nless prohibited by law, whenever an executive department or agency publicly proposes for notice and comment or otherwise promulgates a new regulation, it shall identify at least two existing regulations to be repealed,” also known as the “one-in, two-out” policy.

Common themes in the new administration, in addition to a shift away from regulatory initiatives being

spearheaded by the prior administration, also include an emphasis on improvement of infrastructure and other measures aimed to benefit what the administration sees as the average, blue-collar, middle-class, American truckers; a group of men and women that President Trump has called his “heroes.” This article seeks to touch on two of the regulatory developments that were in the works in the remaining days of the Obama administration, pertaining to sleep apnea monitoring and mandatory speed governors, where these regulations may be heading, and how they may still affect your trucking clients.

### Sleep Apnea Monitoring

One of the gasping breaths of the Obama administration was the late attempt to implement a program for sleep apnea monitoring of commercial vehicle drivers. Existing FMCSA regulations state that a motor carrier may not require or permit a driver to operate a commercial motor

vehicle (CMV) if the driver has a condition that would affect his or her ability to safely operate the vehicle. 49 CFR §391.41.

The Mayo Clinic defines obstructive sleep apnea (“OSA”) as a respiratory disorder characterized by a reduction or cessation of breathing during sleep. Sleep apnea can cause drivers to become fatigued, have difficulty staying awake and concentrating, have problems focusing, and can adversely affect the driver’s reaction time to changing conditions on the road. There are several risk factors for sleep apnea, which include: (1) a BMI over 33 percent; (2) neck size – males 17” or larger; females 16” or larger; (3) age – 42 years or older; (4) high blood pressure/hypertension; (5) loud snoring/small airway; (6) gender – male or post-menopausal female; (7) type 2 diabetes; (8) medical history – stroke, coronary artery disease, or irregular heart-beat; (9) ethnicity; and/or (10) smoking or alcohol use.

During the last year of the Obama administration, on March 10, 2016, the FMCSA issued a Notice of Proposed Rulemaking (NPRM) concerning the prevalence of moderate to severe OSA among individuals occupying safety-sensitive positions in highway transportation and its potential consequences for the safety of highway transportation. The NPRM would have required driver screening for OSA risk factors to determine if the driver should be referred for sleep apnea testing and/or treatment.

These efforts, however, never got off the ground. On August 4, 2017, the FMCSA published an official notice, indicating it was withdrawing the NPRM regarding OSA screening of drivers and other individuals in safety-sensitive highway transportation positions. Under the new administration, the FMCSA stated that it “believes the current safety programs . . . and rulemaking addressing fatigue risk management are the appropriate avenues to address OSA.”

The “current safety programs” referred to by the FMCSA are the physical fitness requirements that must be met by every driver to operate a CMV. Pursuant to the FMCSA regulations, the physical qualifications for drivers relative to sleep apnea-related issues simply require that the driver “[h]as no established medical history or clinical diagnosis of a respiratory dysfunction likely to interfere with his/her ability to control and drive a commercial motor vehicle safely.” See 49 CFR §391.41(e)(5). FMCSA regulations require each driver to obtain a “Medical Examiner’s Certificate” from a medical examiner, stating that they are medically fit to operate a CMV. See 49 CFR §391.41(a)(1)(i). The current regulations state that if a medical examiner detects a respiratory dysfunction that in any way is likely to

interfere with the driver’s ability to safely control and drive a CMV, then the driver must be referred to a specialist for further evaluation and therapy. See 49 C.F.R. §391.41(b)(5).

While the Obama-era initiative of OSA driver screening is no longer moving forward, attorneys, risk managers, and adjusters still need to be aware of these regulatory efforts and be cognizant of technology that is developing to address issues with driver fatigue, in general, and sleep apnea, in particular. The FMCSA is already studying driver distraction and fatigue detection warning systems, aimed at detecting behavior indicative of fatigued driving, such as the driver’s pose, hand gestures, yawning, erratic lane changing and speed variations, and heart rate monitoring. This technology, if implemented, would provide a warning system if these behaviors were detected, notifying both the driver and transmitting this information back to the terminal.

Initiatives such as driver fatigue technology and sleep apnea screening are likely to be expensive and time consuming for motor carriers to implement. However, the fact that these options are available, although not yet mandatory pursuant to governmental regulation, opens the door to possible argument and questioning by plaintiffs’ counsel about why these options were not exercised in cases involving driver fatigue, if not adopted by the motor carrier on a voluntary basis.

Be prepared for plaintiffs’ counsel to argue that considerations of “community safety” and “best practices” would have been promoted by the company’s adoption of OSA screening methods and/or driver fatigue monitoring devices, even though they are not required by regulation. In responding to these arguments, it is important to emphasize that every situation must be looked at individually to determine the best methods for doing business in a responsible manner, taking all considerations into account, and thereby avoiding falling into the “reptile theory” trap.

The Obama-era initiative may not have been the end of the sleep apnea initiatives, and fatigued driving is still a predominant area of concern in both the trucking industry and in trucking accident litigation. According to 2017 data from the National Highway Traffic Safety Administration (NHTSA), over 16 percent of fatal crashes involve a drowsy driver. At the same time, the number of individuals diagnosed with sleep apnea has risen considerably, with a recent study indicating that sleep apnea affects about 26 percent of adults between age 30 and 70. The Trump administration’s regulatory agenda as it relates to fatigued driving has predominantly centered around Hours of Service regulations and efforts to alleviate unnecessary

burdens placed on drivers while maintaining safety on the road. However, regulations setting forth sleep apnea screening initiatives may still be on the horizon and remain a consideration for motor carriers.

## Speed Limiter Mandate

Another casualty of the Trump administration's anti-regulatory policy was the Obama-era push for mandatory speed limiters on tractor trailers. A speed limiter (also known as a governor) is a device utilized to measure and regulate the speed of an engine, including limiting the speed of a motor vehicle.

There has been ongoing discussion regarding the requirement of mandatory speed governors on CMVs dating back several decades. In 1991, the NHTSA published a report called "Commercial Motor Vehicle Speed Control Devices" in response to the 1988 Truck and Bus Safety and Regulatory Reform Act. While the report supported the use of speed monitoring and limiting devices, it concluded that the target population size (versus overall size of the population) was not sufficient justification to require application of speed limiting devices to all CMVs at that time.

In 2006, the non-profit group, Road Safe America, and nine different motor carriers petitioned the FMCSA to require speed governors on all trucks made after 1990 with a gross weight exceeding 26,000 pounds, which would limit those trucks to 68 miles per hour. NHTSA responded to the petitions by indicating that they merited consideration through the agency rulemaking process and started that process in early 2011. In 2013, the FMCSA joined in the rulemaking process with the NHTSA, so that the speed limiter mandate would apply to all trucks, not just newer models, and the proposed speed for the limiters was reduced from 68 miles per hour to 65 miles per hour. At that time, the anticipated timeline was to have the NPRM published later in 2014.

It was not until August 26, 2016, however, that the NPRM regarding speed limiters on large CMVs was released by the DOT. The NPRM would have required vehicles with a gross vehicle weight of more than 26,000 pounds to be equipped with a speed limiting device. It would have required motor carriers operating such vehicles in interstate commerce to maintain functional speed limiting devices in their vehicles and manufacturers to ensure that all applicable vehicles manufactured and sold had speed limiters. The NPRM did not determine what speed would be chosen as the highest permitted speed under this new rulemaking, deferring that decision to a later time. It applied to all multipurpose passenger vehicles, trucks, and buses meeting the 26,000-

pound minimum, with the NHTSA and FMCSA acting in unison so that the rule would be applicable to nearly all vehicles on the roadway of that weight.

The NPRM for the mandatory speed limiter rule garnered a high amount of interest, with more than 5,400 public comments filed. The predominant argument in favor of mandatory speed limiters is to promote safety and save fuel costs. On the other hand, opponents of mandatory speed limiters argued that the data does not show that they are effective. Opponents have also focused on the high cost to the industry to implement mandatory speed governors on all CMVs, both new and retrofitting prior models. They also claimed the lack of a national speed limit would also result in "wide divergencies" in speed between trucks and other traffic.

While the mandatory speed limiter rule seemed to finally be progressing forward in the later days of the Obama administration, 2017 opened with the proposed rulemaking nowhere to be found, coupled with a regulatory freeze and the President Trump's "one in, two out" directive. Finally, after months of uncertainty, a July 20, 2017 "unified agenda," published by the Office of Management and Budget, revealed that the speed limiter initiative had fallen off the DOT's agenda, both for the FMCSA and NHTSA agencies. Instead, the speed limiter rule was moved to the DOT's long-term agenda, with no action taken on it since that time. Given a lack of industry support and the Trump administration's policy on rolling back regulations, it seems unlikely that the speed limiter mandate will be addressed in the next few years, at the very least.

At this point, the mandatory speed limiter rule is, essentially, on hiatus, although it is not completely out of the question and we will have to see if it is revived at some point. Regardless, speed governors continue to be widely used in the industry. A 2016 survey from the American Transportation Research Institute showed that more than 85 percent of fleets responding to the survey utilized speed limiters on 100 percent of their trucks, with another seven percent utilizing them on more than 70 percent of their fleet. See Jaillet, James, "Survey: Speed Limiter Usage Widespread Among Fleets, ELD Adoption Flat Despite Mandate" (Sept. 29, 2016). The most common speed limit used on speed governors was 65 miles per hour. Speed governors have been mandatory on large trucks in the European Union, Australia, and Japan for at least the past 10 years. The Canadian provinces of Ontario and Quebec also require speed governors on heavy CMVs.

With respect to claims and litigation, like the sleep apnea testing discussed above, attorneys, adjusters, and risk man-

agers should keep in mind plaintiffs' arguments that even though this kind of technology is not *mandatory*, it is still available. In the case of speed governors, they are widely used and there may be arguments that the use of speed governor has become an "industry standard." If you have a claim in which your client does not have a speed governor on their vehicle and there are allegations that excessive speed caused or contributed to the accident, you will want to be prepared for arguments that the technology was available and your client was at fault for not utilizing it. Be careful during discovery, and depositions in particular, with questions regarding the impact of this kind of technology on "safety" initiatives and goals and with other attempts by

the plaintiffs' bar to use this technology to open the door to "reptile theory"-style arguments.

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## CSA's Slow Response to FAST Act Mandates: What to Expect Next

By Teanna L. Buchner



On December 4, 2015, President Obama signed the Fixing America's Surface Transportation (FAST) Act. Among other things, the Act directed the Federal Motor Carrier Safety Association (FMCSA) to evaluate and improve the Compliance, Safety, Accountability (CSA) program, including the manner, methods, and implementation of motor carrier safety data. On July 16, 2018, following recommendations by the National Academy of Sciences, the FMCSA announced it had delivered to Congress a Corrective Action Plan report outlining proposed changes to CSA.

### What Is CSA?

In 2010, the FMCSA introduced the CSA initiative to improve the overall safety of commercial motor vehicles. CSA acts as a safety enforcement program rooted in carrier performance. The CSA program is meant to allow the FMCSA to identify and focus on companies that pose the highest safety risks on the roads. While the system was implemented to improve overall safety, savvy plaintiff attorneys have utilized CSA scoring and information to call into question the overall compliance and safety of driver and motor carrier defendants.

CSA uses a complex scoring system to assign ratings to motor carriers over a selection of safety categories. There are seven basic categories tracked by the FMCSA through its Safety Measurement System (SMS). The seven

categories are known as Behavior Analysis and Safety Improvement Categories ("BASICS") and include: (1) Unsafe Driving; (2) Crash Indicator (accident history); (3) Hours-of-Service Compliance; (4) Vehicle Maintenance; (5) Controlled Substances/Alcohol; (6) Hazardous Materials Compliance; and (7) Driver Fitness.

Any interstate carrier with a US DOT number is covered by the CSA program. By extension, every driver operating a commercial vehicle is subject to the CSA program. This is important because individual drivers' safety performance and FMCSR compliance impact the motor carrier's scores.

Carriers are given "scores" in each of the BASICS based upon violations and carriers are grouped by BASIC with other carriers with similar occurrence of various safety issues, including crashes, inspections, and violations. Based upon the scores, the carriers are ranked by percentile from 0 to 100, with higher percentiles reflecting poorer safety ratings. Motor carriers with the highest percentile ranking (*i.e.* most safety violations) are issued warning letters that identify where a carrier is deficient in a BASIC and advise of possible consequences if the issue is not resolved. This information is also used for targeted roadside inspections of specific motor carriers, which focuses inspection on the previously deficient areas as well as other safety intervention methods.

## FAST Act Recommendations for Changes and FMCSA's Corrective Action Plan

Many motor carriers and drivers took great umbrage at their SMS and detailed safety scores being made public on the FMCSA website. Indeed, because some motor carriers and drivers view the SMS and BASICs system to be inherently flawed, or empirically unfair, the availability of such information became a major area of contention across the industry. As a result, the FAST Act included changes to the CSA system that were intended to move much of the SMS data from the general public. In addition to removing CSA scores from public view, the FAST Act also mandated that FMCSA establish a means to provide motor carriers with recognition, including credit or improved SMS percentiles.

Following passage of the FAST Act, the National Academy of Sciences (NAS) published a report titled "Improving Motor Carrier Safety Measurement." The report, commissioned by FMCSA per the FAST Act, did not recommend any immediate changes to the SMS methods, but it did suggest that the FMCSA explore updated statistical models to take the place of SMS and evaluate methods of improving overall data collection on motor carrier safety.

Specifically, the NAS report included six recommendations for the FMCSA to consider. In June 2018, after a year of evaluation, research, and public comment, stemming from the NAS report, the FMCSA responded to each of the six recommendations. Below are each of the recommendations made by the NAS report and the response position of the FMCSA in its report to Congress.

### ***NAS Recommendation No. 1***

Development of a new statistical model to identify motor carriers for intervention;

### **FMCSA Response to Recommendation No. 1**

The FMCSA is currently working to develop a new strategic Item Response Theory model for collecting and evaluating safety information on motor carriers. While the model is developed, the current SMS scheme will remain in place. The new model will be compared against the current SMS structure and if found more effective, will replace the existing SMS.

### ***NAS Recommendation No. 2***

Improvement of the quality of the data used in support of SMS by continued collaboration with States and other agencies;

### **FMCSA Response to Recommendation No. 2**

The FMCSA agrees that more detailed information regarding vehicle miles traveled would reduce the need for FMCSA to use substitute values and would improve overall quality of the data in SMS. The FMCSA plans to work with States regarding implementing best practices collectively across all states. There is further consideration of incentivizing motor carriers to voluntarily provide more accurate and detailed data.

### ***NAS Recommendation No. 3***

Investigation of ways to collect additional data to enhance safety assessment, including carrier characteristics like driver turn over, cargo type, and compensation;

### **FMCSA Response to Recommendation No. 3**

The FMCSA agrees that additional information regarding motor carrier operations may improve analysis and identification of non-compliant motor-carriers. The Agency notes, however, that collection of this additional data would be costly and the benefits of such data are currently unknown. In evaluating this recommendation, the Agency plans to research potential protections companies may have in such data as well as a cost-benefit analysis to determine the cost to the industry to provide the additional data. If the cost benefit analysis supports collection of the data, the Agency will submit request for approval.

### ***NAS Recommendation No. 4***

Development of user friendly Motor Carrier Management Information System (MCMIS), without personal identifying information, for use by outside parties (including public and motor carriers);

### **FMCSA Response to Recommendation No. 4**

The FMCSA agrees to develop a webpage where researchers, motor carriers, and the public can view simplified versions of MCMIS data.

### ***NAS Recommendation No. 5***

Study whether motor carrier percentile ranks should be available to the public; and

### **FMCSA Response to Recommendation No. 5**

The FMCSA will gather information from motor carriers, insurance companies, and shippers regarding the ways in

which the public uses SMS data. Through public listening sessions, the FMCSA will complete a study regarding availability and use of public percentile ranks.

### **NAS recommendation No. 6**

Use of absolute measures, in conjunction with percentiles ratings within safety event groups, in order to identify carriers who need to receive alerts or intervention.

### **FMCSA Response to Recommendation No. 6**

Upon completion of the new Item Response Theory strategic data model, the FMCSA will evaluate absolute measures for set intervention thresholds.

### **Cost of Implementation of the Action Plan**

Changing the CSA program will come at a cost to the DOT. According to the FMCSA, \$2,500,000 will be spent over the next two years just to implement the Action Plan, including \$280,000 to create a standing committee, \$1,000,000 for new contract labor costs and experts in statistical modeling, and \$1,000,000 to reallocate current SMS contract resources to work on implementation of the Action Plan.

The various actions set forth by the Action Plan will include ongoing public meetings and FMCSA listening sessions so interested parties can analyze the new systems and evaluate how they impact the industry. In the short term, the FMCSA plans to run a small scale test of new strategic data model in September 2018. Thereafter, they plan to run the new model in full scale by April 2019, and have the effectiveness of the full-scale model evaluated by June 2019.

### **What This Means for the Future of CSA**

The recommendations made by NAS provide a much needed band aid to the CSA program's imperfect and inherently flawed SMS system. Whether the FMCSA's responses and subsequent report to Congress will result in an exponentially better CSA program is unclear.

The new Item Response Theory model will most likely ultimately replace SMS, just as the SMS system replaced its predecessor initiative. Based on the benchmarks set forth in the Action Plan, the new system may be ready for implementation in the next two years. Whether the next Item Response Theory model will ultimately result in a more complete and equitable analysis of motor carrier safety seems up for dispute given the public comments received by the DOT. Nonetheless, the new program does

appear to address the biggest complaints that many had about the SMS system.

Indeed, across all of the recommended revisions and changes to CSA as set forth in the Action Plan there is a conspicuous recognition by the FMCSA that the manner in which SMS collects and uses data must shift towards a more equitable methodology. While the collection of additional data as proposed may assist in identification and intervention of unsafe motor carriers, it is unclear whether the new data will unintentionally result in safe carriers drawing the ire of the FMCSA. Data is certainly not without its drawbacks. For litigators, particularly in the current era of Big Data, one can easily envision how massive amounts of otherwise useless data could be improperly manipulated by the entrepreneurial plaintiff attorney or expert.

More data-driven safety information may also lead to the unintended consequence of that data being more easily admitted as evidence in litigation. For years, trucking practitioners have, with varied success, been able to exclude CSA data from evidence on the grounds that it is irrelevant, too cumulative, or lacks the necessary evidentiary foundation to be admissible. Inasmuch as the new Item Response Theory will bridge many of the gaps that made SMS scores inadmissible, it necessarily raises a question of how these new scores will be treated in courtrooms. Certainly, motor carrier and driver data that is more closely tied to scientific standards is going to present new challenges to trial lawyers in the future.

Pressure continues to mount from both outside and within the trucking industry for additional safety information from the FMCSA to again be made available to the general public. If the FMCSA determines that CSA percentile rankings and complete data should once again be made available it could change the dynamic and direction of litigation, most notably including the use of data at the depositions of safety directors and persons most knowledgeable. With each tragic and newsworthy accident involving trucks making the morning news, demands build for a more transparent industry.

### **Conclusion**

CSA was intended by the DOT to be a groundbreaking and industry transformative initiative. In most ways, CSA has succeeded with identifying patently unsafe carriers. But, Congress required in the FAST Act that overdue and necessary changes be implemented at the behest of the trillion dollar transportation industry. The NAS report and the FMCSA's subsequent report to Congress reflect that changes, however slow they appear, are finally becoming

a reality. Ultimately, the changes finalized by the FMCSA to CSA will have broad and lasting implications to the industry and the defense of trucking cases across the United States. Trucking defense lawyers should continually monitor the progress of these changes through the FMCSA over the next 24 months and, particularly, take advantage of attending public comment sessions to appreciate what these changes mean to motor carriers.

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## The World of FCAM Technology

By Bryson F. Datt, Jr., and Claire M. Milinski



The recent advances in forward collision avoidance and mitigation (“FCAM”) technology have made FCAM technology an option for many commercial trucks and

heavy vehicles. This article discusses the various types of FCAM technology and the current state of regulations governing FCAM technology in commercial vehicles.

### Background

FCAM technology combines collision warning and collision mitigation braking systems. Specifically, FCAM technology utilizes radar technology, by deploying forward-looking sensors that detect a potential forward collision. When the potential collision is detected, a warning sound and the automatic braking system engages to prevent a potential accident. These systems have different names, but offer similar functionality. The most commonly seen are:

- crash imminent braking (CIB);
- autonomous emergency braking (AEB);
- emergency brake assist (EBA);
- predictive brake assist (PBA); and
- pre-crash warning and braking systems (PCWBS).

While similar, these systems offer slightly different capabilities. Crash imminent braking systems slow a vehicle automatically when frontal crash sensors “believe” that an impact is imminent or pending. Similarly, autonomous emergency braking goes beyond detecting forward

collisions, and directly applies the brakes. Emergency brake assist helps drivers apply force to their brakes during emergent braking events. Predictive brake assist is a feature that helps a vehicle come to a stop more quickly than normal brake application. Finally, pre-crash warning and braking systems warn drivers of an imminent frontal collision and, if such a collision is immediate, applies the brakes if necessary. In short, FCAM systems sense the potential for a rear-end collision ahead, warn the driver of the potential for that collision, and then engage the brakes to avoid or lessen the potential impact.

The National Highway Traffic Safety Administration (“NHTSA”) has been monitoring and researching the development of these systems. While the technology has continued to develop over the past several years, NHTSA has yet to issue any motor vehicle safety standards pertaining to FCAM technology.

On February 19, 2015, the Truck Safety Coalition, the Center for Auto Safety, Advocates for Highway and Auto Safety, and Road Safe America submitted a petition to NHTSA requesting that the Agency establish a new federal motor vehicle safety standard to require vehicle manufacturers to install FCAM systems on all vehicles with a gross vehicle weight rating (GVWR) of 10,000 pounds or more. NHTSA granted the petition on October 16, 2015. However, NHTSA noted that additional research and evaluation of real-world performance of systems through track testing and field operational testing was necessary. NHTSA reported that after completion of the necessary research,

the agency would then determine whether to issue a rule. As of this date, NHTSA has not issued a rule.

On January 13, 2016, Consumer Watchdog, Center for Auto Safety, and Public Citizen submitted a petition to NHTSA to begin a rulemaking proceeding to mandate all light vehicles be equipped with three types of automatic emergency braking (AEB) technologies: (1) forward crash warning; (2) crash imminent braking; and (3) dynamic brake support. On January 25, 2017, NHTSA denied the petition, asserting that the agency has already taken significant steps to incentivize the installation of these technologies in a way that allows for continued innovation and technological advancement.

The American Trucking Association has stated that the industry supports proven safety technologies. On June 30, 2017, American Trucking Associations' Technology & Maintenance Council released their 2017 Recommended Practices Supplement, which discussed guidelines for forward collision warning & collision mitigation systems for Class 5-8 vehicles. Before recommending a practice, each recommended practice is researched and subjected to strict evaluation by the Technology & Maintenance Council members.

Heavy Duty Trucking ("HDT"), which is an organization that advocates for the trucking industry, had several presenters at a recent Heavy Duty Manufacturers Association's conference discuss and offer opinions regarding forward collision technology. During the presentation, a spokesperson for HDT noted that, "[w]hile progress has been made in the last few years seeking adoption of forward collision warning and mitigation systems, adoption is not yet there." Industry leaders provided three takeaways when dealing with this

technology: (1) Educate truck owners; (2) Follow education with incentives; and (3) Regulation is necessary.

## Conclusion

In the coming years, it will be important for attorneys to monitor NHTSA's rule-making in response to advances in FCAM technology. As of now, NHTSA has yet to issue a rule regarding FCAM technology. It appears to be that the federal government may allow the technology to continue to develop without enacting specific regulations as it has done in the growing field of automated driving systems. Nonetheless, it will remain important to follow the advances in technology and any regulating developments initiated by NHTSA as any mandated changes will take time and resources for fleets to enact.

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