



COMPLIANCE, SAFETY AND ACCOUNTABILITY (CSA)  
**A Positive Development for the Transportation Industry?**



No stranger to regulatory oversight, the transportation industry has been monitored by Federal and State agencies for compliance with Department of Transportation standards for forty years. Since the 1980s, data reported to the Federal Motor Carrier Safety Administration (“FMCSA”) through Compliance Review and more recently, SafeStat, was used to evaluate motor carrier compliance. In its largest systems overhaul in decades, the FMCSA has replaced SafeStat with a new system for evaluating and monitoring commercial motor vehicle drivers and motor carriers – Compliance, Safety and Accountability (“CSA”) . CSA’s goal is to improve safety and reduce crashes, injuries and fatalities through a more proactive and efficient methodology of evaluation. This will, in turn, help to identify and remedy behavior recognized as increasing the risk of accidents.

Phased implementation of the initiative was completed in late 2010. Enforcement staff training and new interventions will be implemented on a state-by-state basis throughout 2011. While the full impact of CSA on the commercial motor vehicle industry remains to be seen, the new system will undoubtedly affect “business as usual” for motor carriers, drivers, risk managers, insurance carriers and brokers.

## What is CSA?

CSA quantifies the safety performance of motor carriers and drivers based on a series of reports, including state-reported crashes, roadside inspections and reported violations (speeding tickets, hours of service violations, etc.), which determine specific problems and identify the need for intervention. The CSA operational model is broken down into the following Behavioral Analysis Safety Improvement Categories (“BASICS”):

- **Unsafe Driving** – e.g., speeding, reckless driving and moving violations.
- **Fatigued Drivers** – e.g., hours-of-service violations, log violations and driving while fatigued.
- **Driver Fitness** – e.g., failure to possess a valid Commercial Motor Vehicle license or being medically unfit to operate a commercial motor vehicle.
- **Controlled Substances/Alcohol** – e.g., use or possession of a controlled substance.
- **Vehicle Maintenance** – e.g., mechanical defects and failure to make required repairs.
- **Cargo-Related** – e.g., overloading of cargo and unsafe handling of hazardous materials.
- **Crash Indicator** – e.g., history or pattern of crash involvement.

A carrier’s BASIC measurement depends on the severity, frequency and timing of occurrences and violations within each category, with recent occurrences being weighted more heavily than older ones. Once an overall measurement is calculated, a carrier is then compared to its peers—other carriers with a similar number of inspections—and given a score from 0 to 100 (100 being the worst score). Overall, the goal of this metric is to allow the FMCSA to identify carriers requiring an intervention (such as warning letters, onsite and offsite inspections and cooperative safety plans) and those that should be classified as “unfit to operate” through a regulatory process known as a “Safety Fitness Determination.”

As highlighted below, CSA differs most notably from SafeStat in the expanded criteria used to evaluate both motor carriers and individual drivers:

SafeStat	CSA Safety Measurement System (SMS)
Organized in 4 Safety Evaluation Areas (SEAs): Accident, Driver, Vehicle and Safety Management	Organized by 7 BASICS (described above)
Identifies carriers for Compliance Review (CR)	Identifies safety problems to determine who to investigate and where to focus the investigation
Uses only out-of-service (OOS) and moving violations from roadside inspections	Emphasizes on-road safety performance, using all safety-based roadside inspection violations
No impact on safety rating	Used to propose adverse safety fitness determination based on carriers’ current on-road safety performance
No risk based violation weightings	Violations are weighted based on relationship to crash risk
Assesses carriers only	2 distinct systems assess carriers and individual drivers
Safety score often took years to update or change	Safety scores change on a monthly basis



### Implementation of CSA

With the adoption of CSA, motor carriers industry wide can expect to see much more interaction with the FMCSA. Under SafeStat, it has been estimated that federal or state investigators examined only one or two percent of commercial truck and bus operations per year. Instead, the focus was on known or suspected “bad actors.” CSA, with its stated goal of comprehensive data capture for every motor carrier, should substantially increase interaction between the FMCSA and all motor carriers.

Over the past two years, many carriers in the nine pilot states (Colorado, Delaware, Georgia, Kansas, Maryland, Minnesota, Missouri, Montana and New Jersey) identified areas that would be problematic with widespread implementation. The Minnesota Trucking Association and the American Trucking Association sought specific revisions to CSA, some of which were implemented by the FMCSA after due consideration. Unfortunately, important issues remain unresolved and are less likely to be addressed as CSA has now been fully implemented.

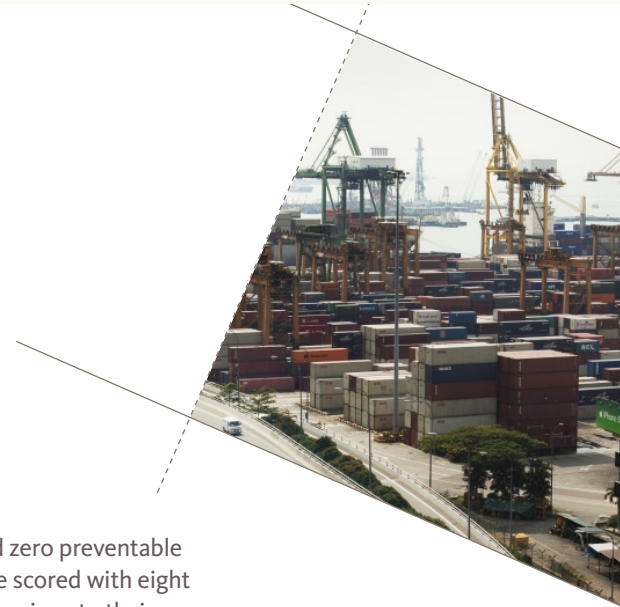
For example, inconsistency in state enforcement is an area likely to disadvantage those carriers that operate in states with more aggressive motor carrier enforcement programs. This state-to-state variance may also disproportionately impact interstate carriers more than intrastate carriers especially compared with carriers fortunate enough to operate in a state with less rigorous enforcement standards. Despite working in conjunction with the Commercial Vehicle Safety Alliance and the states to prepare guidelines that promote more consistent documentation of roadside inspection and violations, the FMCSA did not change the SMS methodology to account for such inconsistencies.

Coupled with inconsistent enforcement is the treatment of warning tickets under CSA. Under SafeStat, warning tickets were not included in carrier review. Under CSA, however, all recorded moving violations, whether or not an actual

violation has been issued to the driver, are included in SMS calculations. No distinction is made between warning tickets and actual violations, as both are given the same weight in calculating a score. As it stands now, data such as that culled from the Unsafe Driving BASIC will be counted even if derived from warning tickets that have no legal consequence and are outside the bounds of court challenge.

The FMCSA maintains that regardless of whether an act warrants a warning ticket or a violation, its analysis of statistical data demonstrates that there is a strong relationship between high scores in the Unsafe Driving BASIC and future crashes. It also suggests that there is a relationship between moving violations recorded during roadside inspections, including speeding violations and future crash involvement, regardless of whether a citation was issued. Simply put, the warning ticket problem is not going away. However, extending an olive branch, the FMCSA agreed to implement modifications to the roadside inspection software used by its staff and state authorities to allow enforcement officers to designate whether a recorded speeding violation was 1-5 MPH, 6-10 MPH or 11-14 MPH, etc., over the speed limit. This modification allows the FMCSA to assign reduced severity weights to less severe speeding violations.

CSA has also changed the peer group profiles required for carrier rankings. Under SafeStat, interstate and intrastate carriers were lumped together into peer groups under broad categories, at times resulting in peer groups with 25,000 members. Under CSA, for most of the BASICs, peer groups are defined based upon the number of relevant inspections that a carrier has received. This can result in nontraditional pairings such as enclosed trailer operations being compared to open equipment operations and Over-the-Road carriers being ranked with Less-than-Truckload carriers delivering to fewer areas and exposed to fewer roadside inspections.



According to the FMCSA, its peer grouping attempts to account for the widely diverse motor carrier population while ensuring that similarly situated carriers are treated with the same standards. As a result, specifying stricter criteria for inclusion in a peer group and designating different peer groups, depending on the BASIC being calculated, has resulted in substantial shifts in carrier scores. In one test example in Minnesota, a carrier saw a 30+ point jump in its BASIC ranking resulting in a deficient assessment for that BASIC due solely to its inclusion in a different, smaller peer group than utilized under SafeStat.

In response to pilot and industry feedback, the FMCSA modified the measure of exposure for the Unsafe Driving BASIC from Power Units (PUs) only to a combination of Power Units and Vehicle Miles Traveled. Further, the carrier population has been segmented into two groups based on the types of vehicles operated—"combo" or "straight"—so that companies operating fundamentally different types of vehicles are no longer compared against each other. Combo refers to combination trucks/motor coach buses constituting 70% or more of the total PUs in a carrier's fleet. Straight refers to straight trucks/other vehicles constituting more than 30% of the total PUs in a carrier's fleet. These changes should positively impact how carrier groups are defined, creating more uniformity within peer groups and reducing outlier scores such as that noted above.

CSA also captures data concerning accidents, regardless of fault or circumstances. The CSA methodology determines a carrier's "Crash Indicator" by an algorithm that incorporates accidents and the number of inspections with a violation for the Unsafe Driving BASIC. The program does not, however, take into account that the majority of accidents are caused by conditions outside of carrier performance. An example: Carrier A has eight preventable accidents and zero non-preventable accidents. Carrier B has eight

non-preventable accidents and zero preventable accidents. Under CSA, both are scored with eight accidents with no consideration given to their nature or cause.

The FMCSA has adopted several short-term and long-term solutions to address this issue. Initially, accountability for crashes will be considered by the FMCSA prior to the issuance of any formal or final adverse safety fitness ratings that follow compliance reviews. In addition, the FMCSA has agreed to exclude the SMS assessment for the Crash BASIC from any public websites, thus reducing the censured party's exposure to reputational injury as well as heightened scrutiny by the plaintiffs' bar.

Long-term, the FMCSA is analyzing the impact of having its staff assess state reported crashes for accountability, possibly through review of police accident reports, before the crashes are considered in a carrier's CSA score. While an ongoing debate, the FMCSA does note that data analysis indicates that past crashes are a good predictor of future crashes, regardless of accountability. Therefore, until a long-term solution can be devised and implemented, data on all recordable crashes is included in CSA scores.

**The scoring process methodology also appears to create anomalies. Some examples:**

- The failure to report traffic law convictions, weighted at six, is three times greater than the failure to wear corrective lenses or hearing aids, weighted at two.
- Loose or unfastened tiedowns (weighted at ten) result in a total failure under the assessment. If a driver opts to use six chains instead of the requisite five, and the sixth is loose, he is also assessed a violation weighted at ten.
- Driving under the influence carries the same penalty as failing to properly secure cargo.

The FMCSA notes that the precision of the severity weights is not a major factor in identifying carriers with safety problems. In other words, carriers with systemic safety problems across multiple inspections tend to rise to the top of the rankings. The FMCSA also observes that severity weight determinations reflect existing statistical data associating the violations with crash occurrences. Thus, the higher weights assigned under CSA are intended to represent this correlation. The FMCSA views this as a significant improvement over the SafeStat system but has pledged to continue to examine the severity weighting and recommendations for modification. This highlights the need for parties to continue to press for review and improvement to the underlying logic and metrics employed in the SMS calculation.

#### **Impact on the Transportation Industry**

What then is the impact of this new statute on the transportation industry? Unfortunately for those in the industry, application of the statute caused many carriers' ratings to worsen almost immediately, due largely to inclusion of the additional data captured under CSA's BASIC criteria. During the pilot testing phase of this program, many motor carriers found themselves with safety ratings warranting deficiency letters under the new system, a surprise since previously reported Safe Stat data indicated sufficient safety ratings. In fact, more than 6,600 warning letters were issued during the 30-month pilot. Safety investigators conducted up to 35% more carrier investigations with nearly 50% of follow up investigations resulting in a: Notice of Claim (NOC), Notice of Violation (NOV) or Cooperative Safety Plan (CSP), compared to 35% under the prior enforcement model.

CSA's impact has also been felt by individual drivers whose scores have deteriorated. The stringent requirements and more focused interventions of CSA may render large numbers of drivers as unfit to operate. CSA now effectively requires motor carriers to develop a system to continuously review the compiled data of individual drivers, data only informally pursued under SafeStat. Worsened driver scores may result in a severe shortage of qualified drivers and the unemployability of those with lower scores.

Information about the motor carrier is also available for review by potential customers and brokers. Although detailed information about specific drivers is available only for carrier view, a broker or shipper can request information about specific drivers and demand certain scores be uniform for the fleet, ultimately becoming standards for larger customers. This could seriously exacerbate the already resulting driver shortage if fewer drivers meet these standards and increase the costs to shippers and ultimately consumers.

With all the changes CSA brings to the industry, it is understandable that motor carriers want to ensure that their drivers are properly trained and are aware of the impact that their driving and operating practices will have on carriers' scores. Drivers who employ good safety practices by monitoring their speed, wearing a seatbelt and ensuring all equipment is in good operational order will minimize the risk of being stopped or cited by law enforcement. Avoiding warning tickets or violations for any of the aforementioned will drastically improve the safety ratings of most carriers and drivers under the CSA program.

Carriers that primarily use independent drivers need to consider that there is a fine line between updating drivers on CSA and providing drivers with a set of core skills that may appear to create an employer-employee relationship. Altering this relationship can have broad reaching impact on a motor carrier's business operation and potential liability. FMCSA officials have stated that they do not expect fleets to be penalized for providing driver safety training. The Obama administration, however, has indicated that it intends to actively pursue cases in which companies seek to deflect liability by improperly claiming that workers are independent contractors instead of employees. How these factors mesh with an individual court's characterization of a particular driver education program cannot, of course, be predicted. Carriers should consult with their independent advisors regarding what impact, if any, the provision of CSA training will have on their business relationship with their independent contractors.

### Impact on Third Party Litigation

Increased training and supervision of drivers may increase claims of negligent retention and hiring. With the implementation of CSA, an employer now has the ability to obtain 3 years of roadside inspection data and 5 years of crash data for a specific driver. This will provide access to the driver's history of unsafe driving, as well as the driver's prior hours of service violations. This information could have a profound impact on litigation since failure to review it could pose a challenge in defending a claim of negligent hiring.

The additional data provided under CSA may lead to an increase in claims involving liability for brokered loads, an area already a hot topic in litigation. Over the past several years, courts have begun to expand liability to brokers and third party logistics providers (3PLs) who merely contract with a motor carrier or freight forwarder to deliver cargo. In some cases, courts have imposed on a 3PL the duty to use reasonable care in the selection of a motor carrier, expanding its duty to check the safety statistics and evaluating the motor carrier's safety record via the SafeStat database maintained by the FMCSA. By enhancing the data now available to a shipper, CSA may increase the shipper's liability risk if it fails to use or disregards such data in hiring a low score driver involved in a subsequent accident. Also, the substantial shift in SMS scores may present an opportunity for plaintiffs' attorneys to bolster negligent hiring claims against carriers, 3PLs and shippers alike. Plaintiffs' attorneys may attempt to introduce SMS scores above the FMCSA threshold as evidence of carriers' unsafe operating and hiring practices. Whether courts will allow this information as evidence to help establish liability remains to be seen.

### Partnership with Chartis

Implementation of CSA has only begun and its full and likely significant impact on the transportation industry is yet to be realized. Greater accumulation of and improved access to driving data will affect companies' operations as well as their litigation profile. Partnering with insurance organizations that understand this landscape and have the expertise to address the issues noted above is critical. Chartis is such an organization.



## Author Bios

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Joseph R. Fowler is a principal in the Casualty Department and Chairman of the Transportation Group at Post & Schell. He focuses his practice on the defense of commercial vehicle accident cases for trucking companies, public transportation companies and their insurers. He also maintains a general liability practice defending premises liability cases. Joseph is a frequent lecturer on transportation-related topics for a variety of organizations, including the Transportation Lawyers Association, Mealey's Publications, Dispute Resolution Institute, Pennsylvania Bar Institute, Lorman Education, as well as numerous insurance companies and self-insureds. He has extensive trial and appellate experience in both the Pennsylvania federal and state courts. In addition to defending UM/ UIM cases, Joseph is appointed as a defense arbitrator for numerous insurance carriers. In 2007, 2008 and 2009, he was recognized as a Pennsylvania "Superlawyer" by his peers as published by American Lawyer Media and Philadelphia Magazine. Joseph's Martindale-Hubbell rating is AV, the highest rating given by Martindale-Hubbell. Joseph is a graduate of Villanova University and Villanova University School of Law. He is admitted to practice law in Pennsylvania.

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M. Leeann Irvin is a Director of Issue Management, one of the resource groups comprising the global claims organization of Chartis. Leeann joined the organization in 1998, after five years of practicing law in New York. Prior to joining Issue Management, she worked within the Toxic Tort, Excess Claims and Cat Excess Claims departments and served as a coverage attorney within Chartis' staff counsel operations. Leeann is a graduate of Nyack College and Pace University School of Law. She is admitted to practice law in New York and the Federal Southern and Eastern Districts of New York.

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Steven E. Lessick is Vice President of Issue Management, one of the resource groups comprising the global claims organization of Chartis. Steve has over 25 years of claims and legal experience. He joined the organization in 1990 in the Environmental Claims Department, and has since held a series of claims technical and management positions in Claims, Litigation Management and Product Development. Previously, Steve served for three years as Deputy Attorney General for the State of New Jersey. Steve is a graduate of Temple University and the Rutgers School of Law. He is admitted to practice law in New Jersey.

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