



DOT Docket No. FMCSA-01-10886
DOT Docket No. NHTSA-02-11592
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Docket Management
U.S. Department of Transportation
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- 1) Comments of Public Citizen Regarding FMCSA-01-10886:
Parts and Accessories Necessary for Safe Operation; Certification of
Compliance With Federal Motor Vehicle Safety Standards (FMVSSs);
Proposed Rule**
- 2) Comments of Public Citizen Regarding NHTSA-02-11592:
Recordkeeping and Record Retention; Proposed Rule**
- 3) Comments of Public Citizen Regarding NHTSA-02-11593:
Importation of Commercial Motor Vehicles; Proposed Rule**
- 4) Comments of Public Citizen Regarding NHTSA-02-11594:
Retroactive Certification of Commercial Vehicles by Motor Vehicle
Manufacturers; Proposed Rule**

Introduction

Public Citizen appreciates the opportunity to comment on the four rulemakings listed above and published in the Federal Register on March 19, 2002.¹ These rulemakings, taken in sum, close a loophole in the regulations of both the National Highway Traffic Safety Administration (NHTSA) and the Federal Motor Carrier Safety Administration (FMCSA). This loophole has allowed foreign-domiciled motor carriers, in violation of the law, to bring many thousands of commercial motor vehicles (CMVs)

¹ At 67 FR 12782 *et seq.*, 67 FR 12800 *et seq.*, 67 FR 12806 *et seq.*, and 67 FR 12790 *et seq.* respectively.

into the United States without complying with the Federal Motor Vehicle Safety Standards (FMVSSs) and the parallel FMCSA regulations. We are pleased that the agencies are closing this “unofficial” loophole, though we believe the official loophole they create in its place is both illegal and exceeds the powers granted by the National Traffic and Motor Vehicle Safety Act (Vehicle Safety Act). The 24 month so-called “grace period” that FMCSA proposes to bestow upon CMVs that currently operate in the United States but do not yet have certificates showing that the vehicles were manufactured in compliance with the FMVSSs should not be offered at all.²

Appendix 2 is comprised of notes taken at the U.S.-Mexico border by Laura MacCleery of Public Citizen. These notes highlight the fact that the DOT had not yet completed all of the tasks necessary to open the border in March.

Background – Foreign-domiciled trucks are currently operating without their needed FMVSSs certifications

The Vehicle Safety Act of 1966, as encoded at 49 USC 30112, states:

A person may not manufacture for sale, sell, offer for sale, introduce or deliver for introduction in interstate commerce, *or import into the United States*, any motor vehicle or motor vehicle equipment manufactured on or after the date an applicable motor vehicle safety standard prescribed under this chapter takes effect unless the vehicle or equipment complies with the standard and is covered by a certification issued under section 30115 of this title. (Emphasis added)

This statutory language is unequivocal: no vehicle may be imported unless it is already covered by a certification assuring that it complied with all FMVSSs in effect at the time of its manufacture.

These rulemakings are designed to create a process by which Mexico- and Canada-domiciled motor carriers must certify that their vehicles do comply with the relevant FMVSSs to avoid being in violation of the law when the carriers commence cross-border operations outside of the border zones. Currently, foreign-domiciled CMVs operate both within and outside of U.S. border zones (if they were allowed to commence operations prior to 1982). Ostensibly, 49 USC 30112 *currently* applies to these vehicles, but they have been allowed to operate within the U.S. without the required certification or inspections to determine if they comply with U.S. standards. The agency has thus created the question of how to allow their continued operation while enforcing U.S. laws equally upon both foreign and domestic-domiciled carriers.

² Public Citizen adds that we agree with the comments expressed by Advocates for Highway and Auto Safety to these same dockets.

FMCSA has proposed an unsafe, illegal solution to the problem of uncertified vehicles

Rather than recognize the error of allowing these vehicles to operate for years in the United States without certifying compliance with U.S. standards, FMCSA seeks to grant them an additional reprieve from having to comply. Despite the fact that “foreign motor carriers that begin operations in the United States or expand their operations to go beyond the southern border zones...[must] ensure that all CMVs...have the necessary certifications,” those carriers that are already operating within our border zones or beyond would have 24 months of continued illegal operations before their compliance would be mandatory. (67 FR 12784. See Footnote 5 at this citation for a list of carriers who would be granted the 24 month “grace period” before being required to comply)

The FMVSSs are critical for ensuring the safety of American motorists. They require CMVs to have such elements as antilock brakes, rear impact guards, and brake slack adjusters, all important safeguards against the catastrophe of a truck crash.³ FMCSA’s negligence in enforcing these requirements to date is not an excuse for creating a two-tiered safety system in the United States.⁴

Apart from the grave safety implications of this decision, FMCSA is acting without any legal basis. The statutory requirement for all vehicles to comply with FMVSSs is longstanding and does not provide for any grace periods or blanket exemptions of the sort that FMCSA seeks to grant. According to current law, any CMV that cannot be certified as in compliance with the FMVSSs must cease operations immediately. FMCSA must enforce the law rather than try to circumvent it by adding an illegal provision in this new set of regulations.

NHTSA proposes to offer retroactive certification for compliance with the FMVSSs, but does not include enough safeguards against fraud

NHTSA estimates, at 67 FR 12792, that “about 130,000” of the 400,000 trucks currently in use on the Federal roads in Mexico may comply with all applicable FMVSSs.⁵ This leaves 270,000 vehicles that will not be eligible for retroactive certification, a sizable enough market that it should make fraudulent certification a serious concern for the agency. However, the agency provides few safeguards in its proposed regulation to prevent this fraud from occurring.

NHTSA proposes at 67 FR 12800 to require vehicle manufacturers who retroactively apply compliance certification labels “to make and retain records identifying the vehicles they have so certified.” However, the amount of information NHTSA

³ See Appendix 1 for a complete list of the relevant sections of the FMVSSs.

⁴ Despite the addition of manufacturing standards since 1992, there still is no Mexican government requirement for certifying and labeling the date of manufacture of CMVs.

⁵ In the FMCSA notice for Docket No. FMCSA-01-10886, the FMCSA repeatedly makes it manifest that the agency does not actually know the number of vehicles that comply with the FMVSS, *e.g.*, “[I]t is uncertain how many vehicles produced for use in Mexico meet all applicable U.S. safety requirements.” 67 FR 12782, 12783.

requires manufacturers to retain is *de minimus* – manufacturers would need only to retain the date of manufacture, date of certification, and vehicle identification number (VIN). This is simply not enough information to insure that manufacturers offering retroactive certification actually designed and manufactured their vehicles to comply with the appropriate FMVSSs. While NHTSA does “not require any certifying manufacturer to do so,” the possibility of offering retroactive certification has never before existed and so a higher level of scrutiny is justified in this case.⁶

NHTSA should require manufacturers to retain the following pieces of information, along with the VIN, dates of manufacture and certification for five years following any grant of retroactive certification:

- Evidence that the manufacturer can verify the date of manufacture of the CMV in question;
- Evidence that the manufacturer knows the FMVSSs that were in effect at the time of manufacture;
- Evidence that the manufacturer checked the relevant equipment on the truck in question and found it to be in compliance with the FMVSSs that were in effect at the time of manufacture or added the necessary equipment to the vehicle to bring it into compliance.

If manufacturers are not required to retain this information, they may be tempted to offer retroactive certification with little more than a cursory review of the vehicle in question. NHTSA should require that manufacturers retain these records and deliver copies of them to the agency so that the information they contain can be quickly transmitted to inspectors. Without the availability of this data, enforcement personnel will have no means of checking the compliance of a vehicle.

Requiring roadside inspectors to review all of this material in the course of a routine inspection does impose a substantial burden on them. Consequently, any vehicles that are retroactively certified and will be travelling beyond the border zones should have their documentation reviewed during the pre-authorization safety audit, which will provide inspectors with ample time to review claims of retroactive certification. Finally, to give vehicle inspectors an additional tool against fraud, retroactive certification labels should be clearly marked as such.

Registered importers should not be given the responsibility of certifying compliance

NHTSA should not grant registered importers the ability to retroactively certify CMVs. The extensive information needed to make this decision will only be available to manufacturers. Allowing registered importers to make this determination could lead to forum shopping by the carriers as they seek out one importer after another to help them certify their vehicles.

⁶ 67 FR 12801

The 3-year time period for gaining retroactive certification needs to be justified by NHTSA

Public Citizen agrees with NHTSA that there should be a cap on the amount of time allowed before the ability to receive retroactive certification should end. However, NHTSA has not offered an explanation as to why three years is an appropriate cap. The agency should explain why it believes this constitutes an appropriate window of opportunity. The process of data retrieval and determination of compliance should not be a lengthy one for most manufacturers, who should keep the relevant records as a matter of doing business and will quickly learn, in the course of their first reviews, which of their vehicles were built in compliance with the FMVSSs.

All vehicle markings and certifications should clearly distinguish between CMVs that can only operate in the border zones and those with nationwide access

Because of the large number of vehicles that cross the U.S. borders each day, there is a strong need for federal and state enforcement officers to quickly determine the legal status of each vehicle. To meet this need and reduce opportunities for fraud, FMCSA should issue certification markings that are embossed upon each vehicle or bolted to them in a manner that is difficult to remove. Border zone-only tucks should also be visually distinguishable from trucks that are allowed to operate beyond the border zones to allow inspectors to quickly differentiate among vehicles at the border and within the U.S.

Conclusion

While Public Citizen is happy to see that FMCSA intends to begin enforcing a long-ignored, yet critically important, U.S. law, the time to begin enforcement is upon opening the border, not 24 months later. The agency should reconsider its plan to grant a 24 month grace period in light of the legal questions such an exemption would raise.

Joan Claybrook
President, Public Citizen

Appendix 1 – Federal Motor Vehicle Safety Standards applying to Commercial Motor Vehicles

Code of Federal Regulations Citation	Requirement
49 CFR § 393.53(a)	Each CMV manufactured on or after October 20, 1993, and equipped with a hydraulic brake system, shall meet the automatic brake adjustment system requirements of FMVSS No. 105
49 CFR § 393.53(b)	Each CMV manufactured on or after October 20, 1994, and equipped with an air brake system, shall meet the automatic brake adjustment system requirements of FMVSS No. 121
49 CFR § 393.53(c)	Each CMV manufactured on or after October 20, 1994, and equipped with an air brake system that contains an external automatic adjustment mechanism and an exposed pushrod shall have the condition of service brake underadjustment displayed by a brake adjustment indicator conforming to the requirements of FMVSS No. 121
49 CFR § 393.55(a),(b)	Each truck and bus manufactured on or after March 1, 1999, and equipped with a hydraulic brake system, shall be equipped with an antilock brake system (ABS) that meets the requirements of FMVSS No. 105 and shall be equipped with an ABS malfunction indicator system meeting the requirements of FMVSS No. 105
49 CFR § 393.55(c)(1)	Each air braked truck tractor manufactured on or after March 1, 1997, shall be equipped with an ABS that meets the requirements of FMVSS No. 121
49 CFR § 393.55(c)(2)	Each air braked CMV other than a truck tractor (trucks, buses, semitrailers, full trailers, dollies) manufactured on or after March 1, 1998, shall be equipped with an ABS that meets the requirements of FMVSS No. 121
49 CFR § 393.55(d)(1)	Each truck tractor manufactured on or after March 1, 1997, and each single-unit air braked vehicle manufactured on or after March 1, 1998, subject to the forgoing requirements for ABS, shall be equipped with an electrical circuit capable of signaling a malfunction affecting the generation or transmission of response or control signals to the vehicle's ABS, as required by FMVSS No. 121

49 CFR § 393.55(d)(2)	Each truck tractor manufactured on or after March 1, 2001, and each single-unit vehicle that is equipped to tow another air-braked vehicle subject to the requirement for ABS, shall be equipped with an electrical circuit capable of transmitting a malfunction signal from the ABS on the towed vehicle to the trailer ABS malfunction lamps in the cab of the towing vehicle, and shall have the means for connection of the electrical circuit to the towed vehicle, as required by FMVSS No. 121
49 CFR § 393.55(d)(3)	Each semitrailer, trailer converter dolly, and full trailer manufactured on or after March 1, 2001, and subject to the requirements for ABS, shall be equipped with an electrical circuit capable of signaling a malfunction in the trailer's ABS, and shall have the means for connection of the ABS malfunction circuit to the towing vehicle, as required by FMVSS No. 121. Also, each trailer manufactured on or after March 1, 2001, subject to the requirements for ABS, designed to tow another air-brake equipped trailer shall be capable of transmitting a malfunction signal from the ABS of the trailer being towed to the vehicle in front of the trailer, as required by FMVSS No. 121
49 CFR § 393.55(e)	Each trailer, including a trailer converter dolly, manufactured on or after March 1, 1998, and before March 1, 2009, and subject to ABS requirements, shall be equipped with an ABS malfunction indicator lamp, which meets the requirements of FMVSS No. 121
49 CFR § 393.86(a)	Each trailer and semitrailer, except for pulpwood trailers, low chassis vehicles, special purpose vehicles, wheels-back vehicles, and trailers towed in driveaway/towaway operations, with a gross vehicle weight rating of 10,000 pounds or more manufactured on or after January 26, 1998, must be equipped with a rear impact guard that meets the requirements of FMVSS No. 223 and No. 224
49 CFR § 393.41	Every CMV manufactured on or after one year after March 7, 1989, that is, on or after March 7, 1990, except for an agricultural commodity trailer, converter dolly, heavy hauler or pulpwood trailer, shall be equipped with a parking brake systems as required by FMVSS No. 121

Appendix 2 – Notes from Border Visit to El Paso

February 20-21, 2002
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The following is my effort to capture observations and information from my visit to the El Paso, Texas border area in February 2002. Preparations are being made there by the Federal Motor Carrier Safety Administration (FMCSA) to open the border to longhaul trucking this June.

The notes are based on my visit to two El Paso inspection stations; one visit (to the Bridge of the Americas, or BOTA) was quite extensive and included a Level 1 inspection of a truck that was taken out of service, and a second visit to Ysleta (which includes hazmat crossings) that was fairly cursory. I was met at the inspection station by two officials from FMCSA, Jerry Coopers of the Atlanta office and Ramon Munoz of the Texas regional office.

While in Texas, I also met with Major Coy Clanton of the Texas Department of Public Safety (DPS). Notes regarding that meeting are below.

Overall, I observed the following serious flaws in a border opening scheduled for June:

- 1) Resources, such as space and modem lines, around the border areas remain extremely limited and mainly under the control of the U.S. Customs Service.
- 2) The inspection system lacks any attempt to achieve consistent coverage of trucks as they cross - coverage of the post-Customs area is totally haphazard. Trucks are picked out for inspection based on visual clues that are likely to diminish or become less reliable as more sophisticated companies enter the longhaul market. Most troublingly, if all inspectors on duty are undertaking inspections in the out-of-service area, it does not appear to disturb anyone that no one will be in line to monitor the trucks coming across (in contrast, state enforcement by Texas officials have expended considerable resources to design a truck inspection system that will provide at least a visual inspection of every truck, including detailed computer models which have formed the basis of an in-depth staffing analysis and three-year employment plan);
- 3) There are no plans for the federal inspectors to monitor state registration, weight or emissions, as the federal inspectors understand these to be state functions. However, Texas has no plan or equipment to monitor emissions. In addition, the weigh-in-motion (WIM) station at BOTA, which is being counted for the purposes of Murray-Shelby as one of the WIM requirements, is currently located under a bridge where it is not legible and is unmonitored by both state or federal inspectors. Additional equipment and staff

would be required to monitor the WIM machinery. In addition, while the BOTA Bridge is the only border crossing in which the state has secured adjacent land, the area is still only an empty dirt lot.

4) State personnel issues may greatly affect monitoring. Texas inspectors are comprised of both armed law enforcement offices, who are equipped with arrest power, guns and vehicles, and non-commissioned officers, who require an office to conduct business. The lack of facilities and time required to train new officers continues to be a serious challenge to the state's preparedness to assist with inspections. In addition, the state is hiring inspectors under a one-year appropriation of federal money, which makes a three-year staffing plan intrinsically risky.

5) The Level I inspection I witnessed was thorough but also time-consuming and absorbing for the inspector, five of whom were on duty at the time. The inspector estimated that he performed only 6 or 7 Level I inspections per day. In addition, the vehicle placed out-of-service following the inspection (the vehicle was carrying loose piles of scrap metal easily able to fly through a large opening between the two doors at the rear of the trailer) was in fact towed to its original destination on the U.S. side of the border for numerous repairs, suggesting that the incremental cost of driving a shoddy vehicle is merely a delay and an extra tow trip, rather than the presumably higher cost of being turned back and returned to Mexico.

6) The two FMCSA officials sent did not have a substantive answer when asked about enforcement of hours-of-service rules, given Mexico's lack of standards. Instead they asserted that the safety auditors would handle the issue on-site (but this would apply only to 50 percent of carriers) and that the Mexican trucking association has its own, voluntary standards. This is clearly insufficient to meet the standard in Murray/Shelby.

7) State officials disapprove of the drayage system, as it implies that some part of the state can essentially be "written off" for safety purposes and inflicts a good deal of damage on local roadways.

8) Texas has no state emissions laws, yet particular regions, including some border areas and large cities, are struggling with present or projected future compliance under the Clean Air Act. There is no move by either state or federal officials to monitor truck emissions at the border.

Facts Regarding the Federal Truck Inspection Station at BOTA

- X BOTA is the only "free bridge" which fails to charge taxes and fees. Hazmat is not permitted.
- X The state owns 5 acres adjacent to the federal facility (only state land on border in Texas).
- X Federal and state inspectors are hammering out incomplete inspection-sharing agreement to reduce redundant inspections.
- X Will have 7 inspectors full time (adding five who will complete training in a

- week).
- X FMCSA has 10-12 out-of-service spaces that are also inspection areas (Customs has 29 plus).
 - X Open for inspections same hours as Customs: 5:30 am to 5:30 pm.
 - X The visual inspection of trucks passing through Customs is by inspectors standing in the roadway - they check for inconsistent or obviously fraudulent markings; bald tires, oil leaks, etc. **If no inspector is on the roadway, trucks do not receive even a visual inspection.**
 - X The inspector suggested that the database on Mexican drivers was not very reliable - three inputs could yield three different results.
 - X **Level I Inspection** of truck picked out “randomly” by inspector. Once he was pulled over, the inspector recognized the driver as a repeat offender. The following problems were uncovered by the inspection, which took between 45 minutes and an hour: defective bumper, loose cat walk (cracked tractor cross member connecting tractor to trailer), no reverse light, oil leak, cracked suspension frame on trailer, unsecured load (loose scrap metal), large open area between the back doors at rear of trailer, large cracks in both sides of the trailer frame (repair welds split open), torn tire, loose muffler with cracked bracket and missing bolt, no tag light, missing law air warning system on brakes, loose air tank line on reservoir, loose clavis pin on the right side of the second axle, differential air leak, cracked brake shoe, loose rivets, a bent cross member on axle 2, and excessive levels of chafing in the air line at axle 4. After the inspector electronically verified the license of the driver and checked the book for the level of each infraction, the vehicle was placed out-of-service for some of these offenses though others would not have triggered that order if alone. The vehicle was towed to the site of the cargo drop-off on the U.S. side of the border for repairs. The repair bill is supposed to be returned to the inspectors, though a busy traffic in license plates makes it hard to monitor and I was not confident from their responses of the validity of the repair monitoring done by inspectors.
 - X Inspectors are located in a trailer off the lot which is due for expansion with new staff. They are planning to have laptops for each staff member and handheld palm pilots with satellite links to databases for use out in the lot.
 - X Noon to 1 or 2 p.m. and 6 p.m. to 6:30 pm are the busiest times for crossings.
 - X Total number of trucks inspected daily: 49-55 est.’d.
 - X 1100-1200 trucks cross per day, 95 vehicles per hour, based on Customs figures.
 - X Percentage of trucks given out-of-service orders: 32% est.’d.
 - X Insurance is essentially verified by checking the document, on its face, for patent evidence of fraud. When in doubt, the inspector said, he will occasionally make a phone call to validate the insurance and has caught some perpetrators in this way.

Facts Regarding Federal Inspections at Ysleta Crossing

- X Larger port than BOTA physically, though it has the same number of crossings daily (1,124), 70 vehicles per hour, based on Customs figures.
- X 20+ out of service/inspection spaces.
- X The same problem with coverage: if inspectors are occupied, there is no effort to visually inspect remainder of trucks or concern about in-depth staffing coverage.
- X No nearby state space yet secured, though room appears available to the eye
- X Hazmat is permitted, though no special staff is available. Much of the high volume of traffic is bound for the Twin Plants, a chemical company in the area. Hazmat is typically transported in bulk tankers or in 55 gallon drums of gas or chemicals.

Highlights of March 23 Meeting with Major Coy Clanton of Texas DPS

- X Texas Dept. of Transportation will be responsible for property purchases and management; DPS will staff and operate facilities.
- X No permanent state inspection stations at any of 13 state border crossings.
- X Except for BOTA, state is an “invited” guest of Customs.
- X There are a limited no. of personnel assigned to some counties. Due to quality of life issues at border there are constraints upon assigning personnel.
- X No real weigh stations, though some on highway, i.e., off Rte. 375 at Ysleta, though no real area at those to do a safe inspection and no out-of-service area;
- X Personnel structure makes it necessary to have a work location for staff - at present, state can only assign commissioned officers because non-commissioned personnel need a fixed site.
- X Existing WIM systems at crossings were largely installed for toll enforcement and statistical purposes and will need upgrades (in the form of tracking-related cameras and monitors) to be used in monitoring weights on an ongoing basis. All eight of state’s planned permanent inspection facilities are slated to be equipped with WIM scales in every lane; TX asked FMCSA for \$300,000 for scales. He asserted they would have WIM by June at required sites. In addition, they will need semi-portable scales for precise results at all major crossings (an additional \$469,000).
- X Texas in fact has no state law on emissions for commercial vehicles and there is no requirement that states adopt emissions laws, although there are incentives from infrastructure and other impacts.
- X Otay Mesa is viewed as the model and Texas officials have visited and asked what CA would improve if they were to do it over.
- X The long-term plan is to close BOTA because it is free.
- X Texas has asked for 94 percent of the total federal budget for inspection monies, based on the number of crossings into the state.

- X The state contracted with a consultant to produce a complex and responsive computer model of an inspection station, with the goal of visual inspecting every truck, and with the most efficient mode of routing trucks given the decal system mandated by Murray-Shelby. By executing the model with different traffic levels, the proper level of staffing that allows at least visual inspection of every truck can be determined. Traffic levels are based on traffic counts, out-of-service and violation rates, the number of bays, and the vehicle inspection goal. **This is an example of what should be done at the federal level on staffing analysis.** Based on this model and traffic projections, the state has drawn up a staffing plan for each crossing and a three-year staffing budget. The goal is to visually inspect every truck and to sort them for inspection based on the CVSA decal, WIM results, and obvious safety defects and markings.
- X They have also considered the possibility of building a one-stop facility with fed/state officials for FDA, Customs, DOT, etc. but land constraints and space needs make this very hard in specific areas, such as Eagle Pass.
- X In Laredo, the condemnation process may be necessary to get space near the World Trade Bridge.
- X He dislikes the drayage system, which disregards safety in a swath of the state.
- X **Currently, the funding from the one-year federal appropriations process is the basis for this budget.** Major Clanton felt that there was no significant amount of state money on the table and that the process of getting state funding would be highly political.
- X Job descriptions for new openings were posted the week before our meeting; hope to hire existing law enforcement officers from elsewhere in state.
- X Also have equipment needs, i.e., cars, computers, creepers (dolly for under-truck inspections).
- X By June/July, the new employees will, he hopes, have done the basic program and be able to function in some capacity.
- X The state has a contingency plan to shift inspectors from other areas (barred under M/S only for federal inspectors) and has made an internal commitment to see to it that inspection resources are there when border is opened.
- X The new positions include 61 non-commissioned inspectors and 26 commissioned troopers, 12 command staff and 12 support staff, as well as 3 commissioned trainers = 114 total new personnel. Phase 1 will require \$9 million; Phase 2 will require \$11 million and Phase 3 will require \$14 million to sustain in perpetuity.
- X Education program for new inspectors includes:
 - X 1 week for basic license/weight checks
 - X 2 weeks North America Inspection Standard training by CVSA
 - X Specialized training: Hazmat (1 week); bus (1 week); cargo (1 week)
 - X Field hours requirements under supervision