DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Part 385

FMCSA Policy on Calculating Crash Rates and Driver, Vehicle, and Hazardous Materials Out-of-Service Rates and the Top 30 Percent of the National Average Under 49 CFR 385.407

AGENCY: Federal Motor Carrier Safety Administration (FMCSA).

ACTION: Notice of enforcement policy.

SUMMARY: FMCSA may not issue a hazardous materials safety permit to a motor carrier that has a crash rate, driver, vehicle or hazardous material out-of-service rate in the top 30 percent of the national average pursuant to 49 CFR 385.407. This document states the FMCSA policy on calculating motor carrier crash rates, and driver, vehicle, and hazardous material out-of-service rates that represent the top 30 percent of the national average as indicated in the Motor Carrier Management Information System (MCMIS). The document explains how FMCSA calculates the top thirty percent of the national average and how it calculates whether a single motor carrier falls within the top thirty percent of the national average in each of these categories. The document restates without change the FMCSA policy that has been publicly available on its Web site since January 2005.

EFFECTIVE DATE: January 3, 2005.

FOR FURTHER INFORMATION CONTACT: James O. Simmons, Office of Enforcement and Compliance, Hazardous Materials Division, 1200 New Jersey Avenue, SE., Washington, DC 20590, (202) 493–0496 (voice), *james.simmons@dot.gov* (e-mail), Debra S. Straus, Office of the Chief Counsel, (202) 366–2266 (voice), or *debra.straus@dot.gov* (e-mail).

SUPPLEMENTARY INFORMATION:

Background: Congress established the hazardous materials safety permit (safety permit) requirement as part of the Hazardous Materials Transportation Uniform Safety Act of 1990 (''HMTUSA'') Public Law 101–615, 104 Stat. 3244 (Nov. 16, 1990). On January 1, 2000, the Federal Motor Carrier Safety Administration (FMCSA) was established as a separate administration within the U.S. Department of Transportation pursuant to the Motor Carrier Safety Improvement Act of 1999. FMCSA assumed responsibility for the enforcement of hazardous materials transportation laws by motor vehicle transportation. On June 30, 2004, FMCSA issued a Final Rule containing the regulations implementing the safety permit program. 69 FR 39350.

The Final Rule, codified at 49 CFR Part 385, identifies who must hold a safety permit, establishes the application process for a safety permit, and the conditions that must be satisfied before FMCSA will issue a safety permit to a carrier. Those conditions are set out in 49 CFR 385.407.

Section 385.407 requires that a carrier must have a ''Satisfactory'' safety rating, must certify that it has a satisfactory security program, and must be properly registered with the Pipeline and Hazardous Materials Safety Administration (PHMSA). 49 CFR 385.407(a)(1), 385.407(b) & (c). Section 385.407(a)(2) additionally states that FMCSA will not issue a safety permit to a motor carrier that * * *:

(ii) Has a crash rate in the top 30 percent of the national average as indicated in the FMCSA Motor Carrier Management Information System (MCMIS); or

(iii) Has a driver, vehicle, hazardous materials, or total out-of-service rate in the top 30 percent of the national average as indicated in the MCMIS.

The safety permit requirement became effective for motor carriers on the date after January 1, 2005, when the motor carrier was required to file a Motor Carrier Identification Report Form (MCS–150) according to a schedule set forth in 49 CFR 390.19(a). A motor carrier is required to file its MCS–150 form every two years. Thus, the safety permit requirement was implemented over the course of two years as motor carriers subject to the permit requirement reached the date for filing their MCS–150. The application for the safety permit was incorporated into the MCS–150, as an expanded form entitled ''MCS–150B or Combined Motor Carrier Identification Report and HM Permit Application.''

On or about January 3, 2005, the Office of Enforcement and Compliance (OEC) published on its public Web site [1] the formula for determining the national average, the crash rates and driver, vehicle and hazmat out-of-service (OOS) rates that established the threshold for the ''top 30 percent of the national average,'' and other information about calculating these rates. The website also explained how a carrier can calculate its own crash and OOS rates. For OOS rates, OEC explained that it determined the top 30 percent of the national average as follows:

To calculate this percentage for (OOS) Rate, FMCSA looked at the driver, vehicle, or HM OOS percentage rates of all carriers (HM and non-HM) for calendar years 2003 and 2004. FMCSA then determined what the numerical value was that resulted in 70 percent of the carriers having a driver, vehicle, or HM OOS percentage rate lower than that figure, and 30 percent of the carriers having a driver, vehicle, or HM OOS percentage rate higher than that figure.

The published guidance also instructed carriers on how to calculate their OOS percentage rates:

Divide the total number of out-of-service inspections from the previous twelve month time period for each category by the total number of inspections for that category for the same twelve month time period. For example, if for the previous twelve month time period a motor carrier had twenty driver inspections and two of these resulted in an out-of-service condition then the Driver out-of-service rate would be 0.10. ($2 \div 20 \times 100\% = 10\%$)

The OEC Web site provided notice to the regulated community on how FMCSA would establish the national averages and cut-offs for the top, or worst-performing, 30 percent of the motor carrier population. Using these formulas, FMCSA established the thresholds for crash rates, vehicle, driver, and hazardous materials OOS rates and published these thresholds on its Web site in January 2005. The thresholds remained effective for the first two years of the program. In January 2007, using data for calendar years 2005 and 2006, FMCSA recalculated the top thirty percent of the national average and published the threshold crash rates, driver, vehicle, and hazardous materials OOS rates that would be effective in 2007 and 2008. The threshold rates were as follows:

	Motor carrier crash rate	Driver OOS rate	Vehicle OOS rate	Hazmat OOS rate
2005 & 2006	0.125	8.92%	33.3%	5.88%

[1] *http://www.safersys.org/HazMatRatesPost.aspx#OOSRates.*

	Motor carrier crash rate	Driver OOS rate	Vehicle OOS rate	Hazmat OOS rate
2007 & 2008	0.125	9.52%	33.33%	6.06%

Challenges to the Rule

Over the course of the two-year implementation period of the safety permit requirement, two motor carriers that were denied safety permits challenged the adequacy of the notice to the regulated community of FMCSA's method for calculating the top thirty percent of the national average and the crash and OOS rates for individual carriers. Despite the clear and accessible notice on the agency's public Web site of the threshold rates and the method by which these rates and those of individual carriers are calculated, the challenging motor carriers asserted that this notice was insufficient because it was not published in the **Federal Register**. FMCSA maintains its position that adequate and fair notice was provided to the regulated community of the method by which it would apply the conditions for issuing a safety permit under 49 CFR 385.407. Nevertheless, to foreclose further challenges, FMCSA is restating its methodology through this publication in the **Federal Register**.

Subpart E—Hazardous Materials Safety Permits

Calculating Crash Rates

Under 49 CFR 385.407(a)(2)(ii), FMCSA may not issue a safety permit to a motor carrier that has a crash rate in the top 30 percent of the national average as indicated in the MCMIS. To calculate the threshold rate above which a motor carrier's crash rate will fall into the top, or worst-performing, 30 percent of the national average, FMCSA looked at all carriers in its census (HM and non-HM) that had more than one crash during the previous two-years. To calculate the national average, FMCSA:

(1) Determined the number of crashes for each qualifying carrier over a two-year period.

(2) Determined the number of power units that the carrier operated over the two year period.

(3) For each carrier, divided the number of crashes by the number of power units times 2 to determine each carrier's crash rate, i.e., [(# of crashes) ÷ (# of power units × 2) = crash rate].

(4) Using these rates, determined the numerical value that resulted in 70 percent of the carriers having a crash rate lower than that figure, and 30 percent of the carriers having a crash rate higher than that figure.

The resulting numerical value represents the threshold for the worst-performing 30 percent of the national average. The threshold crash rate will be recalculated every two years using the crash data from the previous two years. FMCSA examines two years of data in order to evaluate crash rates that accurately represent occurrences in the industry and that will remain consistent throughout the two-year period during which carriers are required to apply for a safety permit. (The calculations to determine crash rates have been performed in this manner since the inception of the program in January 2005. Information on the Web site erroneously indicated that only one year of data was considered in setting the national averages when in fact two years of data has consistently been used.)

FMCSA examines one year of crash data to determine the crash rate for an individual carrier that is applying for a safety permit. The carrier will divide the number of crashes for the previous twelve-month period by the total number of power units that it operated during that twelve-month period. For example, if a motor carrier had 2 crashes and 10 power units, the crash rate would be 0.20 based upon a calculation of (2 = 10 = 0.20). FMCSA examines one year of data to remain consistent with FMCSA practice of reviewing one year of records during a compliance review. FMCSA does not consider a single crash to be statistically valid. Thus, crash rates will be calculated only for carriers with more than one crash in the previous twelve-month period.

Calculating Out-of-Service (OOS) Rates

Under 49 CFR 385.407(a)(2)(iii), FMCSA may not issue a safety permit to a motor carrier that has a driver, vehicle, hazardous material or total out-of-service (OOS) rate in the top 30 percent of the national average as indicated in the MCMIS. To calculate the threshold rates above which a motor carrier's rate will fall into the top, or worst-performing, 30 percent of the national average for each of the listed categories, FMCSA separately examined the driver, vehicle, or hazmat OOS rate of all the carriers in its census. OEC did not include carriers that only had one inspection and only considered hazmat carriers in the calculation for the hazmat OOS rate. OEC examined two years of data, initially for calendar years 2003 and 2004, and subsequently, for calendar years 2005 and 2006.

In each category, OEC determined the OOS rate for each qualifying carrier in the census by dividing the total number of OOS violations by the total number of inspections over the two-year period. For the hazmat OOS rate, the total number of hazmat OOS violations was divided by the total number of hazmat inspections over the two-year period. OEC then determined the numerical value that resulted in 70 percent of the carriers having a driver, vehicle, or hazmat OOS rate lower than that figure, and 30 percent of the carriers having a driver, vehicle, or hazmat OOS percentage rate higher than that figure. These numbers established the threshold above which a carrier falls into the top, or worst-performing, 30 percent of the national average in each category. OEC determined that looking at a total OOS rate was redundant and that total OOS rates were adequately considered by the examination of OOS rates in each of the three categories. The threshold rates representing the cut-off for the top thirty percent of the national average will be recalculated every two years on the first workday of the year. The first calculations for the national average were made on January 3, 2005 using the available MCMIS data for calendar years 2003 and 2004, the second calculations for the national average were made on January 3, 2007, using the available MCMIS data for calendar years 2005 and 2006.

A motor carrier calculates its OOS rate in each of the three categories by examining the number of inspections and OOS violations during the preceding twelve-month period. The carrier must then divide the number of OOS violations for the category by the total number of inspections for that category. The resulting figure is the motor carrier's OOS rate for the particular category. For example, if during the previous twelve-month period, a motor carrier had twenty driver inspections and two of these resulted in an OOS condition, the driver OOS rate would be 0.10 (2 ÷ 20 = 0.10 or 10%). Each of the OOS categories, Driver, Vehicle, and Hazardous Materials, shall be calculated separately. FMCSA does not consider a single OOS inspection in any category to be statistically valid and thus will not deny a permit to a carrier based upon an OOS

rate that results from a single OOS inspection.

Issued on: October 31, 2007.

John H. Hill,

Administrator.

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