

FMCSA TO ADD NO-FAULT CRASH CATEGORY TO MOTOR CARRIER SAFETY RATING SCORES

The U.S. DOT's Federal Motor Carrier Safety Administration (FMCSA) is taking action to change the way no-fault accidents are recorded in its carrier safety rating program. The new regulatory action is important to petroleum marketers because it will remove a significant factor that removes a key data point that can lower safety scores under the Compliance, Safety Accountability (CSA scores). Low safety scores can lead to loss of operating authority. The CSA program, which monitors and records carrier safety data, replaced the former and less obtuse motor carrier safety rating system about 10 years ago. The single biggest complaint against the CSA program since its inception is the failure to take into account fault when scoring commercial motor vehicle crashes. No-fault crashes are counted against motor carriers regardless of whether the carrier was to blame. This has led to artificially low CSA scores which can affect everything from operating authority, enhanced safety monitoring, legal defenses to insurance rates. The FMCSA said it will make permanent the current no-fault data demonstration project that allows truck crashes in which the driver was not at fault to be listed as "not preventable" in CSA program scores. The FMCSA first launched the Crash Preventability Demonstration Project in 2017 as a two-year demonstration project.

The program currently classifies a crash as "not preventable" on a CSA profile when the carrier is not at fault. However, before that determination can be made, a carrier must submit a request for data review through the agency's DataQs system, attaching documentation that establishes no fault. Currently there are eight crash categories that can be challenged under the new program. Prior to no fault designation on CSA scores, fatal crashes listed on a carrier's safety profile did not contain information on whether the carrier was at fault in the crash. Under the new program, if a crash is found to be not preventable, a carrier's private Crash Indicator Behavioral Analysis Safety Improvement Category, or BASIC, score would be recalculated with the crash omitted. BASIC scores underpin carrier ratings in the CSA program. The FMCSA said that the new no-fault program can be implemented without a formal rulemaking.

HOW TO AVOID COSTLY FINES TRANSPORTING SKID TANKS

Increasingly, federal and state enforcement authorities are handing out costly citations to petroleum marketers for improperly transporting portable skid tanks to and from construction sites, farms and other commercial user locations. Typically, skids are transported empty on a flatbed truck and then filled with product after delivery to the end user. When the end user is finished with the skid tank, it is shipped back to the marketer's tank yard in the same manner it was delivered. Since skid tanks at this point may only contain a small amount of fuel mixed with residue that is unsuitable for use in motor vehicles or other equipment, many marketers consider them "empty" for purposes of complying with federal Hazardous Materials Regulations (HMR). Unfortunately, "empty" can be a relative term. Skid tanks deemed empty by marketers are often treated as containing hazardous materials by roadside inspectors. This difference of opinion over what constitutes "empty" is likely to result in marketers being cited for failure to comply with the HMR accompanied by a hefty fine and probable out of service order.

While a marketer may deem a skid tank empty of usable product the fuel/residue mixture is still classified as a hazardous material under the HMR and must be properly placarded, accompanied by a shipping paper and transported by a CDL driver with a HAZMAT endorsement. This is true regardless of the amount of residue left in the tank. There are no limited quantity exceptions for product remaining in skid tanks. Any amount of hazardous material transported in a skid tank is sufficient to trigger compliance with the HMR. Only when the skid tank is cleaned and purged of vapors is it considered truly "empty" under section 49 CFR 173.29 of the HMR and no longer subject to federal regulation.

The costs for assuming a skid tank is empty when it is not are high, particularly when transporting multiple tanks on the same truck. Under the HMR, a person who violates a requirement applicable to the transportation of hazardous materials is liable for a civil penalty of not more than \$55,000 and not less than \$250 for each violation. The maximum civil penalty is \$110,000 if the violation results in death, serious illness or severe injury to any person or substantial destruction of property, and a minimum \$495 civil penalty applies to a violation relating to HAZMAT training. When the violation is a continuing one, each day of the violation constitutes a separate offense.

AVOIDING CITATIONS AND OUT OF SERVICE ORDERS

Marketers can avoid unnecessary and costly citations by ensuring that the following DOT requirements are met when transporting skid tanks that have not been cleaned and purged of product:

Placards - Skid tanks must be placarded unless they have been cleaned of all residue and purged of vapors (49 CFR 172.29). Skid tanks must be placarded on all four sides when being transported (49 CFR 172.504). There is an exception to this rule when the gross aggregate capacity of the tank(s) is less than 1000 gallons - then only two sides need be placarded (49 CFR 172.514(c)).

Shipping Papers – Skid tanks containing only residue must still be accompanied by shipping papers that comply with U.S. DOT HAZMAT regulations. Use the same format on skid tank shipping papers as used with fuel being transported by cargo tank truck or transport. The quantity on the shipping paper – usually designated in gallons or by truckload should be noted as “residue”. Residue is the substance left in a tank that is not suitable for powering any engine or equipment due to its impurities. Any amount remaining in the tank above a residue must be designated in gallons.

Driver Qualifications – Only a driver with a current CDL and HAZMAT endorsement may transport skid tanks containing fuel or residue.

The Bottom Line - if a skid tank has not been cleaned and purged, then it must be transported as if it were full and subject to all applicable federal hazardous materials transportation regulations. A good rule of thumb is to always treat skid tanks as containing product when transporting between customer and tank yard.

FDA ISSUES PROPOSED RULE REQUIRING NEW HEALTH WARNINGS ON CIGARETTE PACKAGING

Last week, the U.S. Food and Drug Administration (FDA) issued a proposed rule to require new health warnings on cigarette packages and in cigarette advertisements to increase the public’s understanding of the health consequences of smoking. These new cigarette health warnings would consist of text warning statements accompanied by realistic photo images. The new cigarette health warnings would occupy the top 50 percent of the area of the front and rear panels of cigarette packages and at least 20 percent of the area at the top of cigarette advertisements.

The proposed rule would implement a provision of the federal Family Smoking Prevention and Tobacco Control Act that requires the FDA to issue a regulation mandating new text warning messages along with color graphics to replace the current Surgeon General cigarette warning labels.

PMAA is reviewing the proposed rule and will submit comments prior to the October 15, 2019 deadline. FDA will review all comments filed and may issue its final rule by March 15, 2020. Once issued, the effective date would be 15 months later (June 15, 2021). The proposed rule can also be challenged in court by cigarette manufacturers.

HOUSE COMMITTEE LAUNCHES INQUIRY INTO E-CIGARETTE COMPANIES

Legislation to Combat Youth Tobacco and Vaping Use Introduced

This week, House Energy and Commerce Committee Chairman Frank Pallone (D-NJ) sent letters to the four largest e-cigarette manufacturers requesting information on each of the companies’ research into the public health impacts of their products, their marketing practices and their role in the promotion of e-cigarette use by underage youth. The letters were sent to Reynolds American, JUUL Labs, Japan Tobacco International USA and Fontem Ventures.

The companies are required to respond to the questions asked by Pallone by September 20 and must provide the committee with details about their products, including how useful they’ve proven to be in helping people who smoke traditional combustible cigarettes to stop smoking.

Earlier this year, Chairman Pallone and Rep. Donna Shalala (D-FL) introduced the “Reversing the Youth Tobacco Epidemic Act of 2019.” The bill includes a number of provisions:

- Requires FDA to finalize a rule requiring graphic health warnings for cigarette packages within 12 months;
- Extends FDA regulations on the sale, distribution, and use of cigarettes and smokeless tobacco to all deemed tobacco products, including e-cigarettes;
- Raises the minimum age for purchasing tobacco products to 21 years and makes it unlawful for any retailer to sell a tobacco product to any person younger than 21 years of age;
- Directs FDA to prohibit non-face-to-face sales of all tobacco products including e-cigarettes and e-cigarette accessories;
- Prohibits all characterizing flavors of tobacco products, including menthol;
- Provides FDA with authority to collect user fees from all classes of tobacco products, including e-cigarettes;
- Instructs FDA to issue a final rule on the regulation of products containing synthetic nicotine or nicotine that is not made or derived from tobacco;
- Makes it unlawful to market, advertise, or promote any e-cigarette products to individuals under the age of 21; and,
- Requires the Federal Trade Commission (FTC) to issue an annual report to Congress on the domestic sales, advertising, and promotional activity of cigarette, cigar, smokeless tobacco, and e-cigarette manufacturers.

Although many of these provisions have been recently considered or implemented at the local, state and federal levels, this bill takes a more comprehensive approach to product regulation. The bill is unlikely to pass given the GOP-controlled Senate, however, broad support for moving the legal tobacco purchasing age to 21 is growing.

PLAN TO ATTEND THE 2020 WPMAEXPO

WPMAEXPO

Mark your calendars for February 18-20, 2020. Make plans now to attend the 2020 WPMAEXPO. It will be held once again at the Mirage in Las Vegas, Nevada.

MARK YOUR CALENDARS FOR UPCOMING EVENTS

September 11-13, 2019 – Utah (UPMRA) – Convention – Zermatt Resort, Midway, UT

September 13, 2019 – Idaho (IPM&CSA) Teton Golf Tournament – Teton Springs Resort, Victor, ID

October 14, 2019 - Hawaii (HPMA) - Golf Tournament - Oahu Country Club, Honolulu, HI

February 18-20, 2020 – WPMA Convention & Expo – Mirage Hotel– Las Vegas, NV

May 7-8, 2020 – Nevada NPM&CSA – Big Dogs - Las Vegas, NV

June 22-25, 2020 – Washington (WOMA) – Convention – Suncadia Resort – Cle Elum, Washington

August 5-7, 2020 – Idaho (IPM&CSA) – Convention – Coeur d' Alene Resort – Coeur d' Alene, Idaho

September 9-10, 2020 – Utah (UPMRA) – Convention – Park City Marriott – Park City, Utah

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Petro Pete: “Note to self: Just because it pops into my head does not mean it should come out of my mouth.”

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