**MCSAC Task 12-04: Recommendations and Suggestions on FMCSA’s Methodology for Conducting Section 610 Reviews under the Regulatory Flexibility Act**

Introduction

In Task 12-04, FMCSA requested that the MCSAC present recommendations and suggestions on FMCSA’s methodology for conducting Section 610 Reviews to determine if rules have Significant Economic Impact on a Substantial Number of Small Entities (SEISNOSE) under the Regulatory Flexibility Act (RFA). FMCSA further requested that the MCSAC identify ideas and concepts for ensuring opportunities for public engagement in the Section 610 Review process. In the first section of this report, the MCSAC’s consensus comments and recommendations are presented following statements summarizing the Committee’s understanding of the Section 610 Review process, which are based on its August 28, 2012 public discussions with Neil Eisner (Assistant General Counsel for Regulation and Enforcement, U.S. DOT) and Catherine Taylor (Economist, Volpe Center, U.S. DOT). The second section of this report contains the MCSAC’s recommendations for how FMCSA can ensure opportunities for public engagement in the Section 610 Review process. The third and last section of this report consists of the MCSAC’s recommendations regarding which rules should be on FMCSA’s Section 610 Review agenda.

1. **FMCSA’s Methodology for Conducting Section 610 Reviews**
   1. Significant Economic Impact on a Substantial Number of Small Entities (SEISNOSE)
      1. Significant is not defined by the RFA. Previous FMCSA analyses have used 1 percent of annual revenue of a single vehicle. Annual revenue per vehicle is roughly $172,000, so annual costs would need to be greater than $1,720.
         1. Definition of “small” is based on the Small Business Administration’s (SBA’s) definitions of small business in the trucking industry. Department of Commerce census information is updated every 10 years. ($172,000 is from 2008.)
         2. The 1 percent threshold is a FMCSA convention.
         3. MCSAC Comments:
            1. Is this number relevant to the industry today?
            2. $1,720 per vehicle seems high for a small business. This amount could be a significant percentage of an individual’s profit.
      2. SBA defines a “small” business in the trucking industry as one with annual revenues under $25.5 million. This roughly equals any company with a fleet size smaller than 150.
         1. MCSAC Comments:
            1. Definition of “small” is different for motorcoach companies (annual revenues under $14 million for passenger carriers).
            2. In trucking, 90 percent of companies are 20 or fewer trucks.
      3. MCSAC Recommendation: FMCSA should consider that many truck operations will have considerably lower revenue than $172,000.
   2. Cost Exceptions (i.e., not included in SEISNOSE determination)
      1. Imposed by statute.
      2. Imposed by other agencies.
      3. Imposed by State law.
      4. Imposed as a prudent/ordinary business practice.
         1. MCSAC Comments:
            1. This determination seems subjective. Would FMCSA know better than vehicle operators what are prudent and ordinary business practices?
            2. Should this cost exception exist? There’s a large variation between what different carriers would consider prudent or ordinary business practices (e.g., Electronic On-Board Recorders (EOBRs)).
            3. Prudent/ordinary business practice exception does not come from the RFA. The SBA Office of Advocacy looks at the baseline and direct costs of federal mandates, which are the costs that should be included in an RFA analysis.
         2. MCSAC Recommendations:
            1. This cost exception should be more precisely defined.
            2. FMCSA should engage the industry via a public comment period to gain better information (i.e., data) to help the Agency appropriately determine what current ordinary business practices are, as they relate to the regulatory requirement at issue.
      5. Imposed due to non-compliance, such as fines.
      6. MCSAC Recommendation: FMCSA should consider how different cost exceptions may work together, i.e., how what is considered a prudent business practice is actually driven by regulation.
   3. If there is evidence of SEISNOSE, the agency should explore ways to mitigate those costs, while considering the following factors (these five factors are dictated in the RFA statute):
      1. The continued need for the rule.
      2. The nature of complaints or comments received concerning the rule from the public.
      3. The complexity of the rule.
      4. The extent to which the rule overlaps, duplicates or conflicts with other Federal rules, and, to the extent feasible, with State and local governmental rules.
      5. The length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.
         1. MCSAC Recommendation: FMCSA should also consider the availability of data or economic studies since the rule was promulgated that address the issues in the rule at issue.
      6. MCSAC Recommendations:
         1. FMCSA should consider whether a rule has an effect on safety outcomes.
         2. FMCSA should consider the availability of “Significant Alternatives,” which SBA Office of Advocacy defines as alternatives that: (1) meet the statutory objectives; (2) are feasible; and (3) minimize the impact on small entities.
            1. This language tracks the RFA statutory language.
2. **MCSAC Recommendations for How FMCSA Can Ensure Opportunities for Public Engagement in the Section 610 Review Process**
   1. Engage trade associations.
   2. FMCSA should maintain an email list serve.
   3. Listening sessions.
      1. FMCSA could utilize the audiences at truck shows to obtain information.
      2. Other industry events, including utility group conferences.
      3. Commercial Vehicle Safety Alliance (CVSA) meetings.
      4. Bus association meetings.
      5. Webinars.
      6. Idea scale.
   4. Inspectors can note and send up information that they observe is redundant.
   5. FMCSA should consider attempting to make regulations easier to navigate and understand, e.g., by providing a summary.
      1. Key is to make relevant regulations easier to find and easier to understand.
   6. The SBA Office of Advocacy would welcome the opportunity to assist FMCSA and other agencies with industry outreach on Section 610 reviews, including the utilization of its list serves and small business regulatory roundtables.
3. **Which rules should be on FMCSA’s Section 610 Review agenda?**
   1. FMCSA should consider prioritizing rules for which the agency has updated economic studies or other technical data.
   2. FMCSA should consider reviewing oldest regulations and that have been untouched for the longest periods of time to examine the continued need for the rule.
   3. FMCSA should consider reviewing regulations that reference a specific technology to determine the extent to which technology has changed in the area affected by the rule.
      1. Consider that the definition of what constitutes a certain technology may have changed over time.
   4. FMCSA should elevate the priority of review for those rules which, based on Compliance, Safety, Accountability (CSA) Program data, bear little relation to crash risk.