

otherwise interfere with, the current process administered by the CVSA.

The American Trucking Associations, Inc., (ATA) believes that the development and maintenance of the Criteria would be severely hampered if it were subject to a notice and comment rulemaking process. ATA recommends incorporation by reference of the Criteria with the publication by FMCSA of a notice of availability and request for comments in January or February of each year. The comments would then be forwarded to CVSA for appropriate handling during CVSA's spring and fall meetings, and revised accordingly. Several other commenters had similar suggestions.

The Canadian Council of Motor Transport Administrators (CCMTA) indicated that Canadian governments have expressed concern about placing the Criteria in the Federal safety regulations. They believe doing so would have an adverse impact on the international collaborative nature of developing, revising and implementing the Criteria throughout North America. CCMTA indicated that it would not object to FMCSA referencing the Criteria in such a way that the CVSA process could continue to be used to update the document.

The International Brotherhood of Teamsters supports the formal adoption of the Criteria either through codification of each criterion or through incorporation-by-reference. The Teamsters believe the Criteria represent enforcement standards and that failure to adopt the Criteria through a notice and comment process may undermine the ability of the agency to pursue enforcement actions.

The Advocates for Highway and Auto Safety (Advocates), Owner-Operator Independent Drivers Association, Inc., (OOIDA), National Tank Truck Carriers, Inc., (NTTC) and the Iowa Department of Transportation support codification of the Criteria. Advocates does not believe the Criteria are legally binding on inspectors or their agencies since the document is not included in the FMCSRs. Advocates argues that the agency must assert the formal policy needed to bind field enforcement personnel by both directing and circumscribing the exercise of enforcement discretion through application of the Criteria. NTTC believes enforcement personnel treat the Criteria as substantive rules and that there are procedural and substantive deficiencies in the way the Criteria are structured and used. OOIDA believes the agency must adopt the Criteria as part of the FMCSRs because it represents the legal standard under

which vehicles and drivers are placed out of service. Iowa DOT believes that including the Criteria in the regulations enhances the availability of the Criteria to motor carriers and drivers so that they will know which safety conditions will place them in jeopardy of not being able to complete their trip.

#### **FMCSA Response to Comments**

FMCSA believes the commenters have made compelling arguments against the agency taking any action that could adversely impact the current process for amending or revising the Criteria. The agency agrees with commenters that the current process for maintaining the Criteria provides an effective mechanism for Federal, State and Provincial officials and industry representatives from the U.S., Canada, and Mexico to work together to ensure uniform international enforcement tolerances. The agency believes that it is in the public interest to continue this process for ensuring highway safety, and facilitating international trade between the U.S., Canada, and Mexico.

However, the agency does not share commenters' belief that the mere act of adopting the Criteria into the Code of Federal Regulations would adversely impact the current process for maintaining the document. The adoption of the Criteria would amend the FMCSRs such that Federal personnel could use only those criterion included in the Federal regulations. The Federal version of the Criteria could only be amended or revised through notice-and-comment rulemaking. By contrast, each State would be responsible for taking the necessary actions to adopt compatible requirements under State laws and regulations, with the authority of State enforcement personnel being limited by those State laws and regulations, not the Federal regulations. Since States would be responsible for having a mechanism or process for adopting compatible laws and regulations, the States could adopt enforcement tolerances that differ from those used by the FMCSA if the State believes there is a safety problem that is not adequately addressed through the Federal enforcement tolerances.

Section 3114(c)(4) of Title 49 of the United States Code allows the States to adopt more stringent requirements than those specified in the FMCSRs. Under this provision, if the FMCSA determines that a State law or regulation is additional to or more stringent than a regulation prescribed under the authority of 49 U.S.C. 31136, the State law or regulation may be enforced unless the agency decides that (1) the State law or regulation has no safety

benefit; (2) the State law or regulation is incompatible with the regulation prescribed by the agency; or (3) enforcement of the State law or regulation would cause an unreasonable burden on interstate commerce. This means that Federal requirements would not automatically preempt more stringent State requirements. Therefore, irrespective of FMCSA's decision concerning the Criteria, the States could adopt more stringent enforcement tolerances than the FMCSA. This could include the States adopting criteria independently of the FMCSA's enforcement tolerances.

If the Criteria includes more stringent guidelines for determining when to place a driver or vehicle out of service than the Federal policy provides, the States would in effect, be adopting more stringent enforcement tolerances than those used by the FMCSA. Also, since State personnel conduct the overwhelming majority of the more than 2.7 million roadside inspections completed each year in the United States, FMCSA's adoption of the Criteria would not alter in any meaningful way, the enforcement tolerances that interstate motor carriers are subjected to during such inspections. Federal adoption would only increase the likelihood of creating inconsistencies between the enforcement tolerances used by Federal personnel and those used by State officials with no readily apparent benefit to motor carrier safety. Furthermore, such inconsistencies would only worsen the problems perceived by those persons who believe it is necessary to adopt the Criteria into the FMCSRs. Due to the success of the collaborative process currently used for amending or revising the Criteria, enforcement agencies throughout North America have achieved a level of uniformity that negates the need for separate enforcement tolerances for each jurisdiction.

With regard to commenters who believe that incorporation-by-reference of the Criteria would be less likely to disrupt the current process used to amend or revise the enforcement tolerances than including the text of the guidelines in the regulations, the FMCSA considers this to be a distinction without a meaningful difference. The Office of the Federal Register prescribes regulations (1 CFR part 51) concerning Federal agencies' incorporation-by-reference of publications prepared by non-Federal entities. Section 51.1 limits the incorporation to the specific edition approved by the Director of the Federal Register. Future amendments or revisions of the Criteria would not be