

## SECTION 4

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# **MOTOR VEHICLE LAW**

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## A. TRANSPORTATION IN AMERICA

Hundreds of millions of motor vehicles traverse America's roads and highways, providing individual mobility and linking distant markets and consumers in a vibrant economy. The roads and highways are the circulatory system of the nation. The automobile is mobility for Americans; the truck is the beast of burden of commercial goods.

But there is a dark side to transportation as well. Not only are motor vehicles the most significant source of carbon emissions, more than 40,000 Americans die annually in motor vehicle crashes, and nearly 3 million are seriously injured.<sup>1</sup> Motor vehicle deaths account for 95 percent of all transportation-related deaths and 99 percent of all transportation injuries. They are the leading cause of death for Americans in every age group from 5 to 55.<sup>2</sup> The financial cost exceeds \$200 billion.<sup>3</sup> Large motor vehicles make up only 3 percent of registered vehicles, yet they account for 11 percent of fatal crashes. In 2003 (the last year for which data is available), large motor vehicles were involved in more than 430,000 crashes, killing approximately 5,000 people; there were also 289 fatal crashes involving buses.<sup>4</sup> When large commercial trucks collide with automobiles, the occupants of the passenger vehicles are 15 times more likely to be killed than are the drivers of the large trucks.<sup>5</sup>

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<sup>1</sup> The highest number of traffic fatalities was recorded in 1979, when 51,100 Americans died. Between 1995–2003, the number of deaths remained relatively constant, averaging 41,900 annually. U.S. GOV'T ACCOUNTABILITY OFFICE, HIGHWAY SAFETY: BETTER GUIDANCE COULD IMPROVE OVERSIGHT OF STATE HIGHWAY SAFETY PROGRAMS 2 (2003). See also U.S. GOV'T ACCOUNTABILITY OFFICE, HIGHWAY SAFETY: RESEARCH CONTINUES ON A VARIETY OF FACTORS THAT CONTRIBUTE TO MOTOR VEHICLE CRASHES (2003); U.S. GOV'T ACCOUNTABILITY OFFICE, HIGHWAY SAFETY: RELIABILITY AND VALIDITY OF DOT CRASH TESTS (1995).

<sup>2</sup> Statement of J. Richard Capka, Administrator, Federal Highway Administration, before the Subcommittee on Highways Transit & Pipelines, Committee on Transportation and Infrastructure. U.S. House of Representatives, Implementation of SAFETEA-LU (June 7, 2006), <http://testimony.ost.dot.gov/test/Capka1.htm>.

<sup>3</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, HIGHWAY SAFETY: IMPROVED MONITORING AND OVERSIGHT OF TRAFFIC SAFETY DATA PROGRAM ARE NEEDED 1 (Nov. 2004).

<sup>4</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, HIGHWAY SAFETY: FURTHER OPPORTUNITIES EXIST TO IMPROVE DATA ON CRASHES INVOLVING MOTOR VEHICLES 1 (Nov. 2005).

<sup>5</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, TRUCK SAFETY: SHARE THE ROAD SAFELY PROGRAM NEEDS BETTER EVALUATION OF ITS INITIATIVES 1 (May 2003). PAUL DEMPSEY, THE SOCIAL AND ECONOMIC CONSEQUENCES OF DEREGULATION 120–25 (1989).

Most motor vehicle accidents have multiple causes. Three factors have been identified as the principal causes of crashes—human (the driver's actions or condition, such as speeding and violating traffic laws or the effects of drugs, inattention, and driving errors); roadway environment (including hazards and roadway conditions); and vehicle factors (the failure of the vehicle or its design).<sup>6</sup> Alcohol-related crashes account for more than 40 percent of all motor vehicle fatalities.<sup>7</sup> The roadway environment is the second most prevalent contributing factor. Only about 2 percent of crashes are caused by a vehicle-related failure.<sup>8</sup>

Though there are many motor vehicle regulations promulgated by the various administrations of the U.S. DOT (including those adopted by NHTSA and the Federal Motor Carrier Safety Administration (FMCSA)), this study emphasizes those programs administered by FHWA in cooperation and coordination with the state DOTs. The purpose of this study is to comprehensively examine the broad subject of motor vehicle and driver laws, but also to focus more specifically on certain aspects of this broad topic that have not been as thoroughly addressed in other NCHRP research papers, particularly, FHWA oversight of vehicles and vehicular behavior, such as size and weight limits, vehicle safety programs, and driver safety programs.

This section examines the historical evolution of the federal and state relationship over highways, and describes the evolution of federal law as it progressed to a concern over infrastructure and to safety, environmental, and security concerns. It emphasizes federal laws addressing vehicles and vehicle behavior (e.g., size and weight limits, vehicle safety programs, driver safety programs), and the programs administered by FHWA, though the programs administered by the FMCSA and NHTSA will be mentioned for context.

## B. MOTOR VEHICLE: STATUTORY DEFINITIONS

We begin this study with an examination of what constitutes a “motor vehicle.” There are a number of alternative definitions in federal law. This section compares and contrasts those alternative definitions. Generally speaking, the U.S.C. has two alternative references that have been developed over time: (1) motor vehicles, and (2) commercial motor vehicles (CMVs).<sup>9</sup>

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<sup>6</sup> See generally Howard Latin & Barry Kasolis, *Bad Designs and Lethal Profits: The Duty to Protect Other Motorists Against SUV Collision Risks*, 82 B.U. L. REV. 1161 (2002).

<sup>7</sup> Young, male drivers are also responsible for a disproportionate number of automobile accidents. U.S. GOV'T ACCOUNTABILITY OFFICE, HIGHWAY SAFETY: FACTORS CONTRIBUTING TO TRAFFIC CRASHES AND NHTSA'S EFFORTS TO ADDRESS THEM 5–8 (May 2003).

<sup>8</sup> *Id.* at 5–9.

<sup>9</sup> See U.S. GEN. ACCOUNTING OFFICE, COMMERCIAL MOTOR VEHICLES: EFFECTIVENESS OF ACTIONS BEING TAKEN TO

For DOT transportation policy purposes, Title 49 of the U.S.C. defines the term "motor vehicle" as a

vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used on a highway in transportation, or a combination determined by the Secretary, but does not include a vehicle, locomotive, or car operated only on a rail, or a trolley bus operated by electric power from a fixed overhead wire, and providing local passenger transportation similar to street-railway service.<sup>10</sup>

This definition must have been developed at a time when electric trolleys dominated city streets in America; they were explicitly excluded from the definition. Also for DOT transportation policy purposes, Title 49 defines a "motor vehicle" as a "vehicle driven or drawn by mechanical power and manufactured primarily for use on public streets, roads, and highways, but does not include a vehicle operated only on a rail line."<sup>11</sup> Thus, cars, trucks, and buses are motor vehicles, but trains and trolleys are not.

A similar definition is included in the National Driver Register program, which defines a "motor vehicle" as a "vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used on public streets, roads, or highways, but does not include a vehicle operated only on a rail line."<sup>12</sup>

CMVs tend to be defined by their weight and capacity or type of goods transported. The Motor Carrier Safety Act of 1984<sup>13</sup> defined a CMV as "any self-propelled vehicle in interstate commerce to transport passengers or property" having a gross vehicle weight rating (GVWR) of 10,001 lb or more, designed to transport 15 or more passengers (including the driver),<sup>14</sup> or transporting hazardous materials in sufficient quantities that placarding is required.<sup>15</sup> The Commercial Motor Vehicle

Safety Act of 1986,<sup>16</sup> which required implementation of a single commercial driver's license program, limited motor vehicles subject to its requirements to those transporting more than 15 passengers, including the driver.<sup>17</sup>

The ICC Termination Act of 1994<sup>18</sup> (ICCTA) amended the passenger-vehicle component of CMV, in part, to one

designed or used to transport passengers for compensation, but exclude vehicles providing taxicab service and having a capacity of not more than 6 passengers and not operated on a regular route or between specified places [or] designed or used to transport more than 15 passengers, including the driver, and is not used to transport passengers for compensation.<sup>19</sup>

ICCTA authorized, but did not require, FHWA to amend the FMCSRs accordingly. The "designed or used" language would make a vehicle designed for 12 passengers, but actually carrying 16 passengers, subject to the act.<sup>20</sup>

TEA-21<sup>21</sup> further amended the CMV definition to make it clear that the 10,001-lb requirement referred to either gross vehicle weight (GVW) or the gross vehicle weight rating (GVWR). TEA-21 allowed the agency to exercise jurisdiction based on GVW or GVWR, whichever is greater. Thus, a vehicle operating in interstate commerce having a GVWR of 9,800 lb would be subject to the regulations if it were loaded to 10,200 lb.<sup>22</sup>

Thus, under the Commercial Motor Vehicle Safety Program, a commercial motor vehicle is a self-propelled or towed vehicle used on the highways in interstate commerce to transport passengers or freight if it (1) has a GVR or GVWR of more than 10,000 lb; (2) transports more than a designated number of passengers; or (3) transports hazardous materials.<sup>23</sup> The Commercial Mo-

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IMPROVE MOTOR CARRIER SAFETY IS UNKNOWN (2000); U.S. GOV'T ACCOUNTABILITY OFFICE, COMMERCIAL MOTOR VEHICLES: SIGNIFICANT ACTIONS REMAIN TO IMPROVE TRUCK SAFETY (Mar. 2000).

<sup>10</sup> 49 U.S.C. § 13102(14). See 49 U.S.C. § 14301 for the definition for security interests.

<sup>11</sup> 49 U.S.C. § 30102(6).

<sup>12</sup> 49 U.S.C. § 30301(4). Elsewhere in the Motor Vehicle and Driver Program, 49 U.S.C. § 32101(7) defines a "motor vehicle" as a vehicle driven or drawn by mechanical power and manufactured primarily for use on public streets, roads, and highways, but does not include a vehicle operated only on a rail line.

<sup>13</sup> 49 U.S.C. § 2311(c), Pub. L. No. 98-554, 98 Stat. 2832 § 204 (1984).

<sup>14</sup> CMVs that transport between 9 and 15 passengers (including the driver) for compensation must file a motor carrier identification report, mark their vehicles with a DOT identification number, and maintain an accident register. 49 C.F.R. pt. 390 (1999). 66 Fed. Reg. 2756 (Jan. 11, 2001).

<sup>15</sup> 49 U.S.C. § 31132(1); 49 C.F.R. § 390.5. Since the definition applies to interstate commerce, intrastate transit vehicles do not fall under it.

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<sup>16</sup> Pub. L. No. 99-570; 100 Stat. 3207-170.

<sup>17</sup> 49 U.S.C. § 31301(4)(B). See also 49 U.S.C. § 32304 (passenger motor vehicle country of origin labeling).

<sup>18</sup> Pub. L. No. 104-88, 109 Stat. 803.

<sup>19</sup> 49 U.S.C. § 31132(1).

<sup>20</sup> 64 Fed. Reg. 48510 (Sept. 3, 1999).

<sup>21</sup> Pub. L. No. 105-178, 112 Stat. 107 (June 9, 1998).

<sup>22</sup> 64 Fed. Reg. 48510 (Sept. 3, 1999).

<sup>23</sup> For purposes of the CMV Safety Program: 49 U.S.C. § 31101(1):

"commercial motor vehicle" means (except in section 31106) a self-propelled or towed vehicle used on the highways in commerce principally to transport passengers or cargo, if the vehicle—

(A) has a gross vehicle weight rating or gross vehicle weight of at least 10,001 lb, whichever is greater;

(B) is designed to transport more than 10 passengers including the driver; or

(C) is used in transporting material found by the Secretary of Transportation to be hazardous under section 5103 of this title and transported in a quantity requiring placarding under regulations prescribed by the Secretary under section 5103.

tor Vehicle and Driver Program extends to a larger class of commercial motor vehicles: (1) those with a GVW or GVWR of at least 26,001 lb or lesser if prescribed by regulation, but not less than 10,001 lb; (2) those that transport at least 16 passengers including the driver; and (3) those that transport certain hazardous materials.<sup>24</sup> FHWA regulations promulgated thereunder define a CMV as one “designed or regularly used to carry freight, merchandise, or more than ten passengers, whether loaded or empty, including buses, but not including vehicles used for vanpools, or vehicles built

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Elsewhere in the CMV Safety Program, 49 U.S.C. § 31132(1) provides:

"commercial motor vehicle" means a self-propelled or towed vehicle used on the highways in interstate commerce to transport passengers or property, if the vehicle—

(A) has a gross vehicle weight rating or gross vehicle weight of at least 10,001 lb, whichever is greater;

(B) is designed or used to transport more than 8 passengers (including the driver) for compensation;

(C) is designed or used to transport more than 15 passengers, including the driver, and is not used to transport passengers for compensation; or

(D) is used in transporting material found by the Secretary of Transportation to be hazardous under section 5103 of this title and transported in a quantity requiring placarding under regulations prescribed by the Secretary under section 5103.

49 C.F.R. § 390.5.

<sup>24</sup> 49 U.S.C. § 31301(4) provides:

"commercial motor vehicle" means a motor vehicle used in commerce to transport passengers or property that—

(A) has a gross vehicle weight rating or gross vehicle weight of at least 26,001 lb, whichever is greater, or a lesser gross vehicle weight rating or gross vehicle weight the Secretary of Transportation prescribes by regulation, but not less than a gross vehicle weight rating of 10,001 lb;

(B) is designed to transport at least 16 passengers including the driver; or

(C) is used to transport material found by the Secretary to be hazardous under section 5103 of this title, except that a vehicle shall not be included as a commercial motor vehicle under this subclause if—

(i) the vehicle does not satisfy the weight requirements of subclause (A) of this clause;

(ii) the vehicle is transporting material listed as hazardous under section 306(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 42 U.S.C. 9656(a) and is not otherwise regulated by the Secretary or is transporting a consumer commodity or limited quantity of hazardous material as defined in section 171.8 of title 49, Code of Federal Regulations; and

(iii) the Secretary does not deny the application of this exception to the vehicle (individually or as part of a class of motor vehicles) in the interest of safety.

and operated as recreational vehicles.”<sup>25</sup> Thus recreational and vanpool vehicles are excluded from federal regulation.<sup>26</sup>

At this writing, a CMV is defined as a self-propelled or towed vehicle used in interstate commerce to transport passengers or property if the vehicle (1) has a GVW or GVWR of 10,001 lb or more,<sup>27</sup> whichever is greater; (2) is designed or used to transport more than eight passengers (including the driver) for compensation; (3) is designed or used to transport more than 15 passengers (including the driver) and is not used to transport hazardous material in such quantity as to require placarding.<sup>28</sup> Moreover, the Motor Carrier Safety Improvement Act of 1999<sup>29</sup> added commercial vans known as “camionetas” and commercial vans operating in interstate commerce outside of commercial zones that have been determined to pose serious safety risks.

### C. EVOLUTION OF STATUTORY MOTOR VEHICLE LAW AND HISTORY OF THE FEDERAL/STATE RELATIONSHIP

Early roadways were little more than Indian traces, widened for local travel. The first major road on the American continent was built by the British government for military purposes.<sup>30</sup> The first improved roads were chiefly constructed through private enterprise and therefore took the form of turnpikes or toll roads to provide a return on investment. By the 1800s, hundreds of turnpike companies were collecting tolls on the roads they had built.

The first post roads came along in the 1770s, subsequent to Congress receiving power in 1789 under Article I, Section 8, of the U.S. Constitution “to lay and collect taxes,” and, amongst other responsibilities, “to establish Post Offices and post roads.” The Post Office Act of 1792 authorized the creation of post roads. Though there were only 6,000 mi of post roads in 1792,

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<sup>25</sup> 23 C.F.R. § 658.5.

<sup>26</sup> 69 Fed. Reg. 11,994 (Mar. 12, 2004).

<sup>27</sup> There are three classes of CMVs: Class A (any combination of vehicles with gross weight of 26,001 or more lb, provided the vehicle(s) towed exceed 10,000 lb); Class B (vehicles with gross weight of 26,001 or more lb, provided the vehicle towed is less than 10,000 lb in weight); and Class C (any vehicle other than a Class A or B vehicle that is either designed to transport 16 or more passengers, including the driver, or is placarded for hazardous materials). It is the Class C vehicle that is relevant for transit operators.

<sup>28</sup> 49 U.S.C. § 31132.

<sup>29</sup> Pub. L. No. 106-159, 113 Stat. 1748 (1999).

<sup>30</sup> TOM LEWIS, *DIVIDED HIGHWAYS: BUILDING THE INTERSTATE HIGHWAYS, TRANSFORMING AMERICAN LIFE* 56 (1997). ARTHUR TWINING HADLEY, *RAILROAD TRANSPORTATION: ITS HISTORY AND ITS LAWS* 24 (1903).

by 1829 there were 114,780 mi.<sup>31</sup> A number of stagecoach trails were improved into post roads, and became arteries of commerce.<sup>32</sup>

The states also began building roads in the 18th century. For example, the hard-surfaced, 60-mi Lancaster Pike<sup>33</sup> linking Philadelphia and Lancaster, Pennsylvania, was built between 1792 and 1795.<sup>34</sup> New York and southern New England followed Pennsylvania in road building. Many states (notably Pennsylvania and Kentucky) subsidized private turnpikes.<sup>35</sup>

In 1797, the federal government began construction on the National Pike. It was to follow the old Cumberland Road to the West. The first segment of the National Pike was completed in 1818, from Cumberland, Maryland, to Wheeling, (West) Virginia,<sup>36</sup> with additional extensions made from year to year over the next 20 years reaching as far as Vandalia, Illinois.

The National Pike came to a halt when Andrew Jackson became President in 1832. A champion of states' rights, Jackson was opposed to federal involvement in construction projects within any of the individual states. As a result, the National Pike was abandoned as a federal project and turned over to the states. Jackson's actions would establish the basis for the highway development policy that exists today. Thus, the federal-state cooperative relationship on road building has deep historic roots.

The first federal agency addressing roads was the Office of Road Inquiry, established in 1893 in the U.S. Department of Agriculture. From 1893 until 1916, the federal government focused on disseminating scientific,

engineering, and economic information to assist in the design and construction of proper roads.<sup>37</sup> Because of Jacksonian Era policy, ownership, maintenance, and administration of roads and highways remained a state and local responsibility.

Recognizing the potential importance of motor carriage,<sup>38</sup> Congress began to promote its growth with federal matching grants for highway construction, first with the Federal-Aid Road Act of 1916,<sup>39</sup> which established the Bureau of Public Roads. It set the basic pattern for development of a national highway system which prevails to this day, whereby the federal government subsidizes planning and the funding of capital improvements, but the states remain responsible for ownership, the actual construction, and maintenance of their highways. In other words, the federal government funds and establishes standards, while the states and local governments actually build and maintain the highways.

The 1916 legislation got off to a poor start, with only \$5 million in federal money available during the first year. The United States entered World War I in April of 1917, compounding shortages of road-building material and causing road deterioration because of increased traffic. When the war ended in November 1918, it was apparent that significant changes were needed in several areas: (1) the definition of "rural post road"; (2) the \$10,000 per mi limitation, and (3) the decision to leave project selection in the hands of state highway officials leading to disconnection of improvements with other states.<sup>40</sup> These problems were partly remedied by the Federal Highway Act of 1921.

During World War I, the nation's highways were improved and many companies went into the inter-city trucking business and the operation of motorized bus lines. Further highway improvements came as a result of the Great Depression and work projects designed to keep people employed. The Franklin Roosevelt years were marked by strong marketplace intervention. The

<sup>31</sup> Joseph Belluck, *Increasing Citizen Participation in U.S. Postal Service Policy Making: A Model Act to Create a Post Office Consumer Action Group*, 42 BUFF. L. REV. 253, 257 (1994).

<sup>32</sup> Nancy K. McKenzie, *Commercial Speech and the First Amendment: Ambiguity, Commercial Speech and the First Amendment*, 56 U. CIN. L. REV. 1295 (1988).

<sup>33</sup> The first improved roads were primarily constructed through private enterprise, and therefore took the form of turnpikes or toll roads to provide a return on investment. Blocking access to these roads was a pole on a hinge. The pole was referred to as a pike, and once payment was made, the pike would be swung or turned (either upward or outward) to allow passage. Hence, derivation of the word "turnpike." By the 1800s, there were hundreds of turnpike companies.

PAUL DEMPSEY, LAURENCE GESELL, & L. WELCH PAGUE, *AIR TRANSPORTATION: FOUNDATIONS FOR THE 21ST CENTURY* 9 (2d ed. 2005).

<sup>34</sup> RUSSELL BOURNE, *AMERICANS ON THE MOVE: A HISTORY OF WATERWAYS, RAILWAYS AND HIGHWAYS* 27 (1995).

<sup>35</sup> HADLEY, *supra* note 30, at 26. Pennsylvania paid about \$1,000 a mile, about a third of the total cost.

<sup>36</sup> In 1818, Wheeling was a part of the Commonwealth of Virginia. In 1861, after Virginia seceded from the Union, West Virginia seceded from Virginia, and was admitted into the Union in 1863. Thus, today Wheeling is in West Virginia.

<sup>37</sup> ROSS NETHERTON, *FEDERALISM AND THE INTERMODAL SURFACE TRANSPORTATION EFFICIENCY ACT OF 1991* 7 (NCHRP Legal Research Digest No. 32, 1995).

<sup>38</sup> The early 20th century saw the emergence of a new form of competition, the motor carrier. In 1904, there were but 700 trucks operating in the United States, most powered by steam or electrical engines. The following year, the first scheduled bus service began in New York City. But still, growth of this important means of transport was hampered by poor roads and the economic dominance of the railroad industry.

<sup>39</sup> Pub. L. No. 64-156, 39 Stat. 355 (July 11, 1916). WALTER MCFARLANE, *STATE HIGHWAY PROGRAMS VERSUS THE SPENDING POWER OF CONGRESS* (NCHRP Research Results Digest No. 136, 1982).

<sup>40</sup> 60 RICHARD WEINGROFF, *FEDERAL HIGHWAY ADMIN., U.S. DEPT OF TRANSP., FROM 1916 TO 1939: THE FEDERAL-STATE PARTNERSHIP AT WORK* 1 (1996), <http://www.tfhr.gov/pubrds/summer96/p96su7.htm>.

1930s were an era of increasing economic regulation in all sectors of industry, including transportation.

From the time the Act to Regulate Commerce was passed in 1887, the ICC had been given increasing authority to regulate the railroads and other forms of transportation. To support efficiency, economy, and safety in the burgeoning motor carrier industry<sup>41</sup>—and with the support of the ICC, most of the State public utility commissions (PUCs); the truck, bus, and rail industries; and many shippers—Congress promulgated the Motor Carrier Act of 1935, adding bus and trucking companies to the jurisdiction of the ICC.<sup>42</sup> It gave the ICC jurisdiction over motor carrier safety, entry, rates, and business activities. The new legislation gave the ICC power to establish requirements for the qualifications of common, contract, and private carrier drivers, maximum hours of service, and standards of equipment.<sup>43</sup> By 1940, all five modes of public transportation (rail, water, highway, pipeline, and air) were under some form of governmental regulation.<sup>44</sup>

The Transportation Act of 1940 added a national statement of transportation policy to the Interstate Commerce Act.<sup>45</sup> In it, Congress provided for “the impartial regulation of the modes of transportation” and in regulating those modes:

- To recognize and preserve the inherent advantage of each mode of transportation;
- To promote safe, adequate, economical, and efficient transportation;
- To encourage sound economic conditions in transportation, including sound economic conditions among carriers;
- To encourage the establishment and maintenance of reasonable rates for transportation without unreasonable

<sup>41</sup> *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 538–39, 60 S. Ct. 1059, 1061–62, 84 L. Ed. 1345, 1348–49 (1940); *Friedrich v. U.S. Computer Servs.*, 974 F.2d 409, 412 (3d Cir. 1992).

<sup>42</sup> Daniel W. Baker & Raymond A. Greene, Jr., *Commercial Zones and Terminal Areas: History, Development, Expansion, Deregulation*, 10 *TRANSP. L.J.* 171, 176 (1978).

<sup>43</sup> 1 WILLIAM KENWORTHY, *TRANSPORTATION SAFETY LAW PRACTICE MANUAL* § 4.1 (1989).

<sup>44</sup> The 1938 Civil Aeronautics Act (as amended by government reorganization in 1940) created the Civil Aeronautics Board to regulate air transportation. It was passed during a period of strong governmental regulation in all modes of transportation.

<sup>45</sup> The 1940 Act also extended the jurisdiction of the ICC to water carriers and relieved the land-grant railroads of giving the federal government a discount on nonmilitary traffic, provided they surrendered their claims to unpatented lands. KEITH BRYANT, JR., *HISTORY OF THE ATCHISON, TOPEKA & SANTA FE RAILWAY* 270–71 (1982). Freight forwarders were brought under the ICC's jurisdiction with the Transportation Act of 1942. Act of May 16, 1942, 56 Stat. 285. Congress again regulated freight forwarders with the Act of Dec. 20, 1950, 64 Stat. 1113.

discrimination or unfair or destructive competitive practices;

- To cooperate with each State and the officials of each State on transportation;
- To encourage fair wages and working conditions in the transportation industry.<sup>46</sup>

Thus, cooperation with the states, and the regulation of safety, were major national transportation policy objectives. For much of U.S. history, the relationship between the federal and state governments can be described as one of “dual federalism,” in which the national and state governments functioned independently as parallel sovereigns. By the 1940s, however, “cooperative federalism”—a blended program in which federal funding is used to support state and local action and federal goals are achieved indirectly through state and local action—began to take hold.<sup>47</sup>

World War II had mobilized the rail, motor carrier, and airline industries to supply the logistical needs of the nation. After the War, the nation had some seven million trucks and a healthy transportation industry. World War II also accelerated highway development with the authorization in 1944 of the National System of Interstate Highways. What evolved were high-speed, quality-engineered, limited-access expressways much like the autobahns in Germany. Because tolls were collected for use of some of the limited access highways in the East, they were described as “turnpikes” (e.g., the Pennsylvania Turnpike or the New Jersey Turnpike). Conversely, because limited-access highways in the West were open to public use at no charge they became known as “freeways” (e.g., the San Bernardino Freeway).

Several major separated highways were built before World War II. Notable among them were the Pennsyl-

<sup>46</sup> 49 U.S.C. § 10101 (Supp. IV 1980) (emphasis supplied).

<sup>47</sup> One source described cooperative federalism in the context of transportation:

[I]n the case of federal highway aid, it was the states that set the goal of “getting the farmer out of the mud” through improved rural road networks. State and local bodies decided where, when, and how their roads would be built. Federal oversight was chiefly to ensure that funded work was carried out efficiently and economically. In the process, federal influence also worked to improve standards of design and construction and preserve the system's engineering integrity by preventing deprivation as a result of local political pressure....

In the 1960s, cooperative federalism entered a new phase, with dramatic increases in national programs directly addressing activities that previously had been the responsibility of state and local governments.... In the field of surface transportation, grants of federal-aid funds for highways, mass transit, and highway traffic safety were made conditional on the recipient's compliance with national standards and regulations laid down by Congress and the Administration for achieving the goals of other nontransportation programs.

NETHERTON, *supra* note 37, at 3.

vania Turnpike and Robert Moses's network of parkways on Long Island.<sup>48</sup> During the 1950s, it was President Dwight Eisenhower who saw the need to build a national system of interstate highways to link the country for, *inter alia*, purposes of national defense. In 1919, as a young Army officer, Eisenhower had participated in a transcontinental caravan of cars and trucks from the White House in Washington, D.C., to Union Square in San Francisco. Averaging only 5 mph an hour, the trip took 62 days. As the leader of Allied Forces in Europe, General Eisenhower became acquainted with one of the great public works project of the Third Reich—the autobahns—highways that facilitated the expeditious movement of the Wehrmacht to invade nearly every nation that bordered Germany, a transport network relatively impervious to air attack.<sup>49</sup>

As President, Eisenhower championed the Federal Highway Act of 1956, which launched the largest public works project ever undertaken—the 43,000-mi National System of Interstate and Defense Highways. The companion Highway Revenue Act of 1956 created the Highway Trust Fund comprised of revenue from user charges (sales of gasoline, diesel, tires and a weight tax for heavy trucks and buses)—the first time Congress had earmarked taxes for specific purposes.<sup>50</sup> As the Interstate highways grew, the market share of freight transported by trucking companies enjoyed a corresponding growth.

The Interstate highway system took more than four decades to complete. The network of expressways connected the nation's larger cities and provided unprecedented access between centers of production and their primary markets. While vast stretches of the Interstate system can be crossed without encountering delays, the same is not so near major cities.

By the 1960s, environmental pollution had become a national policy concern. The Motor Vehicle Air Pollution Control Act of 1965<sup>51</sup> required the Secretary of the Department of Health, Education, and Welfare to promulgate automotive emission standards.<sup>52</sup>

Discussions about creating a federal DOT began as early as 1940.<sup>53</sup> In the 1960s, the Landis Report<sup>54</sup> cited

<sup>48</sup> LEWIS, *supra* note 30, at 38, 59–62.

<sup>49</sup> *Id.* at 89–90.

<sup>50</sup> Mark Solof, History of Metropolitan Planning Organizations—Part II, Section III, Federal Legislation on Transportation Planning; A Chronological Review 4 (1998), [http://www.du.edu/transportation/Resources/pdfs/Vol\\_II\\_Sec\\_II\\_I.pdf](http://www.du.edu/transportation/Resources/pdfs/Vol_II_Sec_II_I.pdf).

<sup>51</sup> Pub. L. No. 89-272, 79 Stat. 992 (1967).

<sup>52</sup> Penny Mintz, *Transportation Alternatives Within the Clean Air Act: A History of Congressional Failure to Effectuate and Recommendations for the Future*, 3 N.Y.U. ENVTL. L.J. 156, 160 (1994); John Dwyer, *Environmental Federalism: The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183 (1995).

<sup>53</sup> DONALD WHITNAH, U.S. DEPARTMENT OF TRANSPORTATION: A REFERENCE HISTORY 6 (1998).

the need for an office to coordinate and develop a national transportation policy, which led President Kennedy to ask his aides to offer suggestions concerning transport policy. Legislation passed by Kennedy in 1961 provided the first federal program of urban transit support.<sup>55</sup> With Kennedy's assassination, the task force on transportation advised President Lyndon Johnson that no focal point for transportation existed in the Executive Branch, and that therefore a cabinet-level department of transportation should be created.<sup>56</sup> The bill creating the U.S. DOT was signed on October 15, 1966, and the agency was established on April 1, 1967.<sup>57</sup> The U.S. DOT was created pursuant to the Department of Transportation Act of 1966 to coordinate national transportation programs and to facilitate safe, expeditious, efficient, economical, and convenient transportation. The U.S. DOT was essentially created from an amalgamation of several preexisting governmental agencies. From the ICC came the Bureau of Railroad Safety (which formed a part of the Federal Railroad Administration (FRA)), and the Bureau of Vehicle Safety (which formed a part of the FHWA), including the ICC's jurisdiction over safety regulation of motor vehicle drivers and equipment, and motor carriers.<sup>58</sup> Specifically, the DOT Act provided that FHWA would perform the "functions, powers and duties" of the Secretary of Transportation over motor carrier safety.<sup>59</sup> The independent Federal Aviation Agency (which had earlier been split off from the Civil Aeronautics Board) became the U.S. DOT's FAA. The Commerce Department gave U.S. DOT the St. Lawrence Seaway Development Corporation, surrendered to the FHWA the National Highway Safety Bureau, and gave the FRA the Office of Groundspeed Transportation. The Treasury Department gave U.S. DOT the Coast Guard. The Department of Interior gave the FRA the Alaska Railroad. A new quasi-independent agency, the National Transportation Safety Board, was also housed within U.S. DOT.<sup>60</sup>

<sup>54</sup> Report on Regulatory Agencies to the President Elect (1960), [http://www.sechistorical.org/collection/papers/1960/1960\\_1221\\_Landis\\_report.pdf](http://www.sechistorical.org/collection/papers/1960/1960_1221_Landis_report.pdf).

<sup>55</sup> Congress created a comprehensive program of transit assistance in the Urban Mass Transit Act of 1964. H.R. REP. NO. 88-204 (1963). The first long-term commitment for transit was the Urban Mass Transportation Assistance Act of 1970. The Federal Highway Act of 1973 opened the highway trust fund to transit, while the National Mass Transportation Assistance Act of 1974 made operating expenses eligible for federal funding.

<sup>56</sup> WHITNAH, *supra* note 53, at 9–10.

<sup>57</sup> *Id.* at 11.

<sup>58</sup> *Owner-Operators Indep. Drivers Ass'n v. Skinner*, 931 F.2d 582, 585 (9th Cir. 1991).

<sup>59</sup> *Oil Chemical and Atomic Workers v. Skinner*, 724 F. Supp. 1264, 1267 (N.D. Cal. 1989).

<sup>60</sup> WHITNAH, *supra* note 53, at 11.

The National Traffic and Motor Vehicle Safety Act of 1966 is the basic safety statute administered by NHTSA.<sup>61</sup> It was promulgated to “reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents.”<sup>62</sup> The Vehicle Safety Act created the core safety grants program, consistently reauthorized since as the Section 402 State and Community Grants program, which allows states to use funds flexibly for a variety of safety programs.<sup>63</sup> It also required the establishment of federal safety regulations for vehicles and tires. The Vehicle Safety Act granted to U.S. DOT the authority to (1) “prescribe motor vehicle safety standards for motor vehicles and motor vehicle equipment in interstate commerce” and (2) “carry out needed safety research and development.”<sup>64</sup> The U.S. DOT Secretary was required to establish Federal Motor Vehicle Safety Standards that “shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms.”<sup>65</sup> In response, in 1967, the U.S. DOT’s NHTSA promulgated Standard 208 to address two types of problems: (1) vehicle defects that cause accidents (e.g., brakes, lights, tires), and (2) vehicle defects that aggravate injuries to passengers involved in accidents (also known as vehicle “crashworthiness”).<sup>66</sup>

Safety also became a major policy objective in the mid-1960s. The Highway Safety Act of 1970 established NHTSA within U.S. DOT, as the successor to the National Highway Safety Bureau.<sup>67</sup> The Clean Air Act Amendments of 1970 authorized the EPA to set ambient air quality standards, set emission standards for new automobiles, and ban lead in gasoline.<sup>68</sup>

The Motor Vehicle Information and Cost Savings Act of 1972 promoted safer automobiles, less prone to re-

pair, and required stronger auto bumpers and vehicles better able to withstand collisions.<sup>69</sup> The Motor Vehicle and School Bus Safety Amendments of 1974 required mandatory seat belt–ignition interlock systems. It also required manufacturers to notify and remedy consumers of any defects in their vehicles at no cost to the consumer. The remedy must take one of three forms: (1) repair the vehicle; (2) replace the vehicle; or (3) refund the purchase price.<sup>70</sup> The Hazardous Materials Transportation Act of 1974<sup>71</sup> provided for federal preemption of any state or local law affecting the carriage of hazardous materials unless it was at least as stringent as relevant federal statutes and regulations.<sup>72</sup>

The Clean Air Act Amendments of 1977<sup>73</sup> fortified the automobile emission strategies by requiring an automobile emissions inspection program in areas failing to meet ozone or carbon monoxide standards.<sup>74</sup> The Motor Carrier Act of 1980 eliminated economic entry regulation of interstate motor carriers, but retained fitness regulation.<sup>75</sup>

STAA, in 1982, comprehensively addressed the subject of highway safety and motor carriers. It established a program of federal grants for state agencies to develop rules and regulations compatible with federal CMV standards.<sup>76</sup> Though imposing significantly higher fees and excise taxes on heavy trucks, STAA also improved motor carrier efficiency by establishing uniform size and weight standards for trucks operating on the National Network, and authorized the use of twin trailers or tandem trailers.<sup>77</sup> STAA required states to permit commercial motor vehicles consisting of 48-ft semitrailers or 28-ft twin trailers on the National Network, and prohibited states from restricting CMV semitrailer and

<sup>61</sup> Kevin McDonald, *Don't TREAD on Me: Faster Than a Tire Blowout, Congress Passes Wide-Sweeping Legislation That Treads on the Thirty-Five Year Old Motor Vehicle Safety Act*, 49 BUFF. L. REV. 1163 (2001).

<sup>62</sup> 15 U.S.C. § 1381.

<sup>63</sup> U.S. GEN. ACCOUNTING OFFICE, *HIGHWAY SAFETY: BETTER GUIDANCE COULD IMPROVE OVERSIGHT OF STATE HIGHWAY SAFETY PROGRAMS* 4–5 (2003).

<sup>64</sup> Kevin McDonald, *Federal Preemption of Automotive Recalls: A Case of Too Many Backseat Drivers?*, 71 TENN. L. REV. 471, 477 (2004).

<sup>65</sup> 15 U.S.C. § 1392(a). Samuel Elswick, *Geier v. American Honda Motor Company: Airbags, Federal Preemption, and the Viability of a Regulatory Compliance Defense*, 28 N. KY. L. REV. 135 (2001).

<sup>66</sup> *Wood v. Gen. Motors Corp.*, 865 F.2d 395, 397 (1st Cir. 1988).

<sup>67</sup> Kevin McDonald, *Shifting Out of Neutral: A New Approach to Global Road Safety*, 38 VAND. J. TRANSNAT'L L. 743 (2005).

<sup>68</sup> Thomas McGarity, *Regulating Commuters to Clean the Air: Some Difficulties in Implementing a National Program at the Local Level*, 27 PAC. L.J. 1521 (1996); Craig Oren, *How a Mandate Came from Hell: The Making of the Federal Employee Trip Reduction Program*, 28 ENVTL. L. 267, 280 (1998).

<sup>69</sup> Joan Claybrook & David Bollier, *The Hidden Benefits of Regulation: Disclosing the Auto Safety Payoff*, 3 YALE J. ON REG. 87, 105 (1985).

<sup>70</sup> McDonald, *supra* note 67, at 471, 479–80.

<sup>71</sup> Pub. L. No. 93-666; 88 Stat. 2156 (1975).

<sup>72</sup> Christopher Baum, *Banning the Transportation of Nuclear Waste: A Permissible Exercise of the State's Police Power?*, 52 FORDHAM L. REV. 663 (1984); William Banks & Kirk Lewis, *Article Federalism Disserved: The Drive for Deregulation*, 45 MD. L. REV. 141, 143–44 (1986).

<sup>73</sup> Pub. L. No. 95-95, 91 Stat. 685 (1977).

<sup>74</sup> Craig Oren, *Getting Commuters Out of Their Cars: What Went Wrong?*, 17 STAN. ENVTL. L.J. 141 (1998).

<sup>75</sup> Paul Dempsey, *Congressional Intent and Agency Discretion—Never the Twain Shall Meet: The Motor Carrier Act of 1980*, 58 CHI.-KENT L. REV. 1 (1982); Paul Dempsey, *The Interstate Commerce Commission: Disintegration of an American Legal Institution*, 34 AM. U. L. REV. 1 (1984).

<sup>76</sup> RICHARD JONES, APPLICATION OF THE FOURTH AMENDMENT TO THE INSPECTION OF COMMERCIAL MOTOR VEHICLES AND DRIVERS (NCHRP Legal Research Digest No. 43, 2000).

<sup>77</sup> KENWORTHY, *supra* note 43 § 17.1.



trailer lengths that had previously been operated legally in the state.<sup>78</sup>

The National Driver Register Act of 1982<sup>79</sup> required the DOT Secretary to establish a National Driver Register to assist the states in exchanging motor vehicle driving records of individuals.<sup>80</sup> The Bus Regulatory Reform Act of 1982 partially preempted state economic regulation of bus carriers.<sup>81</sup>

The Tandem Truck Safety Act and Motor Carrier Safety Act of 1984<sup>82</sup> amended the size and length restrictions, attempted to achieve state compliance with federal standards, and froze the length of commercial trucks and trailers.<sup>83</sup> The Motor Carrier Safety Act required the DOT Secretary to “prescribe regulations on commercial motor vehicle safety. The regulations shall prescribe minimum safety standards for commercial motor vehicles.”<sup>84</sup> The regulations must ensure that:

(1) Commercial motor vehicles are maintained, equipped, loaded and operated safely; (2) the responsibilities imposed on operators of commercial motor vehicles do not impair their ability to operate the vehicles safely; (3) the physical condition of operators of commercial motor vehicles is adequate to enable them to operate the vehicles safely; and (4) the operation of commercial motor vehicles does not have a deleterious effect on the physical condition of the operators.<sup>85</sup>

The Safety Act imposed carrier record retention requirements, owner and operator safety fitness requirements, and employee maximum service hour requirements.<sup>86</sup> To fulfill the Act’s mandate to advance CMV safety, the FHWA amended the Motor Carrier Safety Regulations.<sup>87</sup> The Act also required states to file their laws and identify whether they were as stringent as federal standards, and established a Commercial Motor Vehicle Safety Regulatory Review Panel to review state regulatory and enforcement activities.<sup>88</sup> The governor of a state may request the U.S. Secretary of Transporta-

tion to exempt certain portions of the Interstate system from the preemptive provisions of STAA.<sup>89</sup>

The Commercial Motor Vehicle Safety Act of 1986<sup>90</sup> (Title XII of the Anti-Drug Abuse Act of 1986), established a single,<sup>91</sup> uniform, classified commercial driver’s license (CDL) information program.<sup>92</sup> The Act prohibited CMV operators from holding more than a single driver’s license, and encouraged states to issue commercial licenses only to persons domiciled within them.<sup>93</sup> The 1986 Safety Act also included a commercial driver’s license information system as a clearinghouse for the licensing and disqualification of drivers.<sup>94</sup> The Act required U.S. DOT to “issue regulations to establish minimum Federal standards for testing and ensuring the fitness of persons who operate commercial motor vehicles,”<sup>95</sup> and forbade anyone from operating a CMV unless he “has taken and passed a written and driving test to operate such vehicle which meets the minimum Federal standards established by the Secretary....”<sup>96</sup>

STURAA,<sup>97</sup> in 1987, established national uniformity in size and weight standards for the previously established CMVs; federal weight laws apply only to the Interstate highway system.<sup>98</sup> An amendment to the omnibus drug bill, the Truck and Bus Regulatory Reform Act of 1988, imposed federal safety regulations on all carriers, even those operating within a commercial zone. The Act also required the U.S. DOT to promulgate regulations addressing the maintenance and inspection of brake systems and to conduct a study of the hours-of-service regulations and their impact on driver fatigue and accidents.<sup>99</sup>

The Clean Air Act Amendments of 1990<sup>100</sup> established stricter auto emission standards, requiring all cars and

<sup>78</sup> *Continental Can Co. v. Yerusalum*, 854 F.2d 28–29 (3d Cir. 1988).

<sup>79</sup> Pub. L. No. 97-364, 96 Stat. 1738.

<sup>80</sup> KENWORTHY, *supra* note 43 § 4.4.

<sup>81</sup> DEMPSEY, *supra* note 5, at 106, 162, 195.

<sup>82</sup> Pub. L. No. 98-554, 98 Stat. 2829.

<sup>83</sup> KENWORTHY, *supra* note 43 §§ 4.5, 17.103.

<sup>84</sup> *Radio Ass’n on Defending Airwave Rights v. U.S. Dep’t of Transp.*, 47 F.3d 794, 797 (6th Cir. 1995).

<sup>85</sup> 49 U.S.C. § 31136(a).

<sup>86</sup> *Truckers United for Safety v. Fed. Highway Admin.*, 139 F.3d 934, 936 (D.C. Cir. 1998); *Truckers United for Safety v. Mead*, 86 F. Supp. 2d 1, 14 (D.D.C. 2000).

<sup>87</sup> *Friedrich v. U.S. Computer Servs.*, 974 F.2d 409, 413 (3d Cir. 1992). However, its effort to establish safety rating determinations to determine carrier fitness were vacated because they were not promulgated through notice and comment rule-making. *MST Express v. Dep’t of Transp.*, 323 U.S. App. D.C. 347, 108 F.3d 401 (D.C. Cir. 1997).

<sup>88</sup> KENWORTHY, *supra* note 43 § 4.5.

<sup>89</sup> 49 U.S.C. § 31111(f). See *N.Y. State Motor Truck Ass’n v. City of N.Y.*, 654 F. Supp. 1521 (S.D.N.Y. 1987).

<sup>90</sup> Pub. L. No. 99-570, 100 Stat. 3207 (1986).

<sup>91</sup> No longer could a driver hold a license from more than one state.

<sup>92</sup> It required that DOT establish and maintain a “National Driver Register to assist chief driver licensing officials of participating States in exchanging information about the motor vehicle driver records of individuals.” 49 U.S.C. § 30302 (2000). Before this legislation was passed, persons licensed to drive automobiles could drive tractor-trailers.

<sup>93</sup> *Int’l Bhd. of Teamsters v. Pena*, 301 U.S. App. D.C. 125, 17 F.3d 1478, 1481 (D.C. Cir. 1994).

<sup>94</sup> KENWORTHY, *supra* note 43 § 4.6.

<sup>95</sup> 49 U.S.C. App. § 2704(a); *Int’l Bhd. of Teamsters v. Pena*, 305 U.S. App. D.C. 125, 17 F.3d 1478, 1484 (D.C. Cir. 1994).

<sup>96</sup> 49 U.S.C. App. § 2704(b)(1).

<sup>97</sup> Pub. L. No. 100-17; 101 Stat. 132. See 23 C.F.R. pt. 658.

<sup>98</sup> KENWORTHY, *supra* note 43 §§ 4.3, 17.2.

<sup>99</sup> KENWORTHY, *supra* note 43 § 4.7.

<sup>100</sup> Pub. L. No. 101-549, 104 Stat. 2399.

engines meet federal emission standards.<sup>101</sup> The Hazardous Materials Transportation Uniform Safety Act of 1990<sup>102</sup> established uniform, national rules for the transportation of hazardous materials and created a comprehensive regulatory scheme for the designation, handling, packaging, labeling, and shipping of hazardous materials.

ISTEA, in 1991, embraced intermodalism as a national policy goal, created new transportation planning procedures that facilitated closer state and local cooperation, and allowed greater funding flexibility.<sup>103</sup> ISTEA also mandated that air bags be installed in new vehicles.

The Omnibus Transportation Employee Testing Act of 1991<sup>104</sup> (Testing Act) directed U.S. DOT to promulgate regulations requiring motor carriers to perform pre-employment, reasonable suspicion, random, and post-accident drug and alcohol tests on their drivers.<sup>105</sup>

The Energy Policy Act of 1992<sup>106</sup> promoted alternative fuels for motor vehicles. The Federal Aviation Authorization Act of 1994 preempted state regulation of intrastate motor carriers of property (except household goods carriers) regarding prices, routes, and services, but allowed continuation of state safety enforcement.<sup>107</sup> The National Highway System Designation Act of 1995 repealed the national 55 mph speed limit.

The ICC Termination Act of 1996<sup>108</sup> (ICCTA) eliminated the ICC and replaced it with the Surface Transportation Board. It also required FHWA to promulgate rules addressing fatigue-related issues affecting motor carrier safety<sup>109</sup> and rules imposing sanctions and penalties on CMV drivers who violate railroad-highway grade crossing laws.<sup>110</sup>

TEA-21<sup>111</sup> authorized approximately \$2.3 billion for highway safety grant programs for FYs 1998–2003,<sup>112</sup>

and reauthorized the core federally funded highway safety program. It also authorized seven additional incentive grant programs<sup>113</sup> designed to encourage use of seat belts and child passenger seats, as well as to prevent drinking and driving.<sup>114</sup> In addition to the seat belt and occupant protection program of incentive and educational grants and the incentive alcohol program, TEA-21 established a state highway safety data improvement incentive grant program and created a consolidated behavioral and roadway State and Community Highway Safety formula grant program. TEA-21 also gave states and local governmental institutions significant funding flexibility.

The Department of Transportation and Related Agencies Appropriations Act<sup>115</sup> prohibited the expenditure of DOT-appropriated funds “to carry out the functions and operations of the Office of Motor Carriers within the Federal Highway Administration.”<sup>116</sup> However, such funds could be spent if the functions and operations of the Office of Motor Carriers were redelegated outside FHWA. Ten days later, the DOT extricated the Office of Motor Carriers from FHWA.<sup>117</sup> To remove any doubt, Congress promulgated the Motor Carrier Safety Improvement Act of 1999,<sup>118</sup> which formally established the Federal Motor Carrier Safety Administration,<sup>119</sup> and directed it to “consider the assignment and maintenance of safety as the highest priority” in CMV transportation.<sup>120</sup> That legislation also established a program to improve CMV crash data collection and analysis.<sup>121</sup> It also authorized additional funding to states to assist compliance with federal and state motor carrier safety rules (principally through roadside inspections and compliance reviews), improved the CDL program, and imposed requirements on states to produce a long-term strategic plan and progress reports.<sup>122</sup>

<sup>101</sup> Philip Weinberg, *Public Transportation and Clean Air: Natural Allies*, 21 ENVTL. L. 1527 (1991).

<sup>102</sup> 49 U.S.C. § 5101 *et seq.*

<sup>103</sup> Paul Dempsey, *The Law of Intermodal Transportation: What It Was, What It Is, What It Should Be*, 27 TRANSP. L.J. 367 (2000); Andrew Goetz, Paul Dempsey & Carl Larson, *Metropolitan Planning Organizations: Findings and Recommendations for Improving Transportation Planning*, 32 PUBLIS: THE JOURNAL OF FEDERALISM 87 (2002).

<sup>104</sup> Pub. L. No. 102-143, 105 Stat. 917.

<sup>105</sup> See PAUL DEMPSEY, *Transit Law*, SELECTED STUDIES IN TRANSPORTATION LAW, vol. 5 § 7-15 (2004).

<sup>106</sup> Pub. L. No. 102-486, 106 Stat. 2776 (1992).

<sup>107</sup> PAUL DEMPSEY & LAURENCE GESELL, *AIR COMMERCE AND THE LAW* 208 (2004).

<sup>108</sup> Pub. L. No. 104-88, 109 Stat. 803.

<sup>109</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, *COMMERCIAL MOTOR VEHICLES: EFFECTIVENESS OF ACTIONS BEING TAKEN TO IMPROVE MOTOR CARRIER SAFETY IS UNKNOWN* 6 (2000).

<sup>110</sup> ICCTA § 403, 49 U.S.C. § 31310(h). The regulations were promulgated by FHWA at 64 Fed. Reg. 48,104, 49 C.F.R. pts. 383, 384 (Sept. 2, 1999).

<sup>111</sup> Pub. L. No. 105, 112 Stat. 107–78.

<sup>112</sup> Dempsey, *supra* note 103, at 367.

<sup>113</sup> See tbl. 3, p. 38.

<sup>114</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 1, at 1.

<sup>115</sup> Pub. L. No. 106-69, 113 Stat. 986.

<sup>116</sup> *Id.* § 338.

<sup>117</sup> 64 Fed. Reg. 56,270, 49, pt. 1 (Oct. 19, 1999); 64 Fed. Reg. 58,355, 49 C.F.R. ch. III (Oct. 29, 1999).

<sup>118</sup> Pub. L. No. 106-159, 113 Stat. 1748.

<sup>119</sup> See James Flint, *Highway Safety in the 21st Century*, 1 TRANSP. L. 20 (Feb. 2000); Bernard Haggerty, “TRU” *Cooperative Regulatory Federalism: Radioactive Waste Transportation Safety in the West*, 22 J. LAND RESOURCES & ENVTL. L. 41, 61 (2002).

<sup>120</sup> *Fezekas v. Fed. Motor Carrier Safety Admin.*, 2004 U.S. Dist. LEXIS 4397 (E.D. La. 2004).

<sup>121</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 4, at 2, 9.

<sup>122</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 9, at 5. See Osman Nowaz, *You Are Not a Lawyer: Does Representation of Carriers by Non-Lawyers in Federal Motor Carrier Safety Administration Enforcement Cases Constitute the Unauthorized Practice of Law?*, 32 TRANSP. L.J. 21, 28 (2004).

The Transportation Recall Enhancement, Accountability and Documentation Act of 2000 (TREAD Act) required improvements in tire safety and strengthened manufacturer notification and recall requirements.<sup>123</sup> Additional reporting requirements were imposed upon manufacturers, including notification of (1) overseas recalls or other foreign safety campaigns, (2) “early warning” information, and (3) sales of defective or non-compliant tires.<sup>124</sup> For the first time, it amended the Vehicle Safety Act to include criminal penalties.<sup>125</sup>

Shortly after the tragic events of 9/11, Congress passed the Aviation and Transportation Security Act of 2001 (ATSA),<sup>126</sup> which included 91 new measures, 55 of which had designated implementation deadlines. The most significant of ATSA’s mandates included federalizing the airport security function (which had theretofore been performed by the airlines, under FAA regulations), imposing minimum job qualifications upon security employees, imposing background checks on airport employees, and requiring impregnable cockpit doors.<sup>127</sup> Having concluded that the FAA had been historically slow to implement its wishes, Congress created a new multimodal Transportation Security Administration (TSA) within U.S. DOT.

Fourteen months after the terrorist attacks on the World Trade Center and the Pentagon, Congress passed the Homeland Security Act of 2002 (HSA),<sup>128</sup> which established a new cabinet-level executive branch agency, the Department of Homeland Security (DHS),<sup>129</sup> headed by a Secretary of Homeland Security.<sup>130</sup> It was the most

sweeping overhaul of federal agencies since President Harry Truman asked Congress to create the Central Intelligence Agency and unify the military branches under the Department of Defense in 1947.<sup>131</sup>

In creating DHS, Congress consolidated 22 existing agencies that had combined budgets of approximately \$40 billion and employed some 170,000 workers.<sup>132</sup> Several of the agencies historically have been involved in airport and airline passenger and cargo review, including the Customs Service, Immigration and Naturalization Service, Animal and Plant Inspection Service of the Department of Agriculture, and the nascent TSA.<sup>133</sup> Given its multimodal emphasis, TSA also has jurisdiction over security in motor vehicles, particularly CMVs crossing the borders from Canada and Mexico.

SAFETEA-LU elevated the Highway Safety Improvement Program (HSIP) to a core, separately funded, Federal-aid highway safety program.<sup>134</sup> More than \$5 billion is allocated to the program during 2006–2009.<sup>135</sup> The HSIP requires states to develop Strategic Highway Safety Plans that annually identify at least 5 percent of their most hazardous venues, their progress in implementing safety projects, and their effectiveness in reducing injuries and fatalities. The legislation provides increased flexibility for state funding of transportation safety projects.

## D. FEDERAL GOVERNMENTAL INSTITUTIONS

This section describes the major federal governmental institutions that oversee motor vehicles, and their jurisdictions. The U.S. DOT is the parent executive branch agency over all modes of transportation.

In cooperation with the states, the FHWA coordinates construction of federal highways and oversees the Federal-Aid Highway Program, which provides grants to

<sup>123</sup> See McDonald, *supra* note 61, at 1163, 1187–88.

<sup>124</sup> Kevin McDonald, *Separations, Blow-Outs and Fallout: A Treatise on the Regulatory Aftermath of the Ford-Firestone Tire Recall*, 37 J. MARSHALL L. REV. 1073, 1077, 1105 (2004).

<sup>125</sup> *Id.* at 1170.

<sup>126</sup> The Aviation and Transportation Security Act of 2001 established the Transportation Security Administration (TSA).

<sup>127</sup> In order to ensure intragovernmental communication and cooperation, a Security Oversight Board (comprised of the cabinet secretaries or their designees from the National Security Council, the Office of Homeland Security, the Central Intelligence Agency, and the Secretaries of Defense and Treasury, and chaired by the Secretary of Transportation) was established to oversee TSA.

<sup>128</sup> Pub. L. No. 107-296, 116 Stat. 2135 (Nov. 25, 2002) (hereinafter Homeland Security Act of 2002). In November 2002, legislation approving creation of the Department of Homeland Security (DHS) passed in the House of Representatives, 299-121, and in the Senate 90-9.

<sup>129</sup> Homeland Security Act of 2002 § 101 (2002). The Homeland Security Act of 2002 expanded federal power on security and reorganized TSA as an Administration within the newly created DHS. See Paul Dempsey, *Aviation Security: The Role of Law in the War Against Terrorism*, 41 COLUM. J. TRANSNAT’L L. 649–733 (2003).

<sup>130</sup> Several Under Secretaries were created as well, including an Under Secretary for Border and Transportation Security. Homeland Security Act of 2002 § 103 (2002).

<sup>131</sup> Mimi Hall, *Deal Set on Homeland Department*, USA TODAY, Nov. 13, 2002, at 1.

<sup>132</sup> *Id.*

<sup>133</sup> Homeland Security Act of 2002 § 402 (2002). See Dempsey, *supra* note 129, at 649.

<sup>134</sup> 23 U.S.C. § 148.

<sup>135</sup> SAFETEA-LU significantly increases the national policy emphasis on safety and the resources available to reduce traffic fatalities and injuries on all public roads. SAFETEA-LU authorizes a new core Highway Safety Improvement Program (HSIP) and provides States more than \$5 billion over four years to implement the HSIP—almost double the amount of funds available for infrastructure safety under the Transportation Equity Act for the 21st Century (TEA-21). SAFETEA-LU also creates new safety programs such as the Safe Routes to School (SRTS) program to enable and encourage children, including those with disabilities, to walk and bicycle to school. SRTS is separately funded at \$612 million over 5 years. <http://testimony.ost.dot.gov/test/Capka1.htm> (visited June 21, 2006).

states for highway construction and improvements.<sup>136</sup> As part of the grant conditions, the FHWA administers the federal size and weight program and other federal laws relevant to operation of the road system.

The FHWA is headed by an Administrator. The Assistant Federal Highway Administrator is the chief engineer of the Administration. The Assistant Administrator carries out the highway safety programs, and in particular, Chapter 4 of Title 23.<sup>137</sup> That title requires each state to maintain a highway safety program approved by the DOT Secretary designed to reduce highway accidents and death, in accordance with uniform guidelines promulgated by DOT.<sup>138</sup> These guidelines shall include programs to

- Reduce injuries and deaths from motor vehicles traveling at excessive speeds;
- Encourage the use of occupant protection devices;
- Reduce deaths and injuries caused by drivers driving under the influence of alcohol or controlled substances;
- Prevent accidents and deaths and reduce injuries resulting from accidents involving motor vehicles and motorcycles;
- Reduce injuries and deaths resulting from accidents involving school buses; and
- Improve law enforcement in the areas of motor vehicle accident prevention, traffic supervision, and post-accident investigations.<sup>139</sup>

23 U.S.C. § 109 authorizes DOT control of federal highway standards. Highway system standards shall be developed in cooperation with the states.<sup>140</sup> No federal funds may be expended on any federal highway unless proper safety protective devices established by DOT have been installed.

State programs must be administered by the governor of the state through a state highway safety agency with sufficient authority to carry out such responsibilities.<sup>141</sup> Local jurisdictions may be subdelegated to perform such functions if the local highway safety programs are approved by the governor and in accordance with the minimum DOT standards.<sup>142</sup>

The DOT Secretary may promulgate rules to identify highway safety programs that are effective in reducing motor vehicle crashes, deaths, and injuries. However, such rulemaking must “take into account the major role of the States in implementing such programs.”<sup>143</sup> Hence,

<sup>136</sup> *Sierra Club v. U.S. Dep’t of Transp.*, 310 F. Supp. 2d 1168, 1203 (D. Nev. 2004).

<sup>137</sup> 49 U.S.C. § 104(3).

<sup>138</sup> 23 U.S.C. § 402.

<sup>139</sup> 23 U.S.C. § 402(a).

<sup>140</sup> 23 U.S.C. § 103(b).

<sup>141</sup> 23 U.S.C. § 402(b)(1)(A).

<sup>142</sup> 23 U.S.C. § 402(b)(1)(B).

<sup>143</sup> 23 U.S.C. § 402(j).

the role of the states is primary in implementing the federal highway safety program

Established in 1970, NHTSA is the successor to the National Highway Safety Bureau. It is responsible for reducing deaths, injuries, and economic losses caused by motor vehicle crashes.<sup>144</sup> NHTSA carries out safety programs under the National Traffic and Motor Vehicle Safety Act of 1966<sup>145</sup> and the Highway Safety Act of 1966.<sup>146</sup> NHTSA investigates safety defects in motor vehicles, establishes and enforces safety performance standards for motor vehicles and equipment, and provides grants to state and local governments to support local highway safety programs.<sup>147</sup> NHTSA also sets and enforces fuel economy standards; helps states reduce alcohol-related injuries; and promotes the use of safety belts, child safety seats, and air bags.<sup>148</sup>

Formerly a part of FHWA, the FMCSA was established within U.S. DOT on January 1, 2000, pursuant to the Motor Carrier Safety Improvement Act of 1999.<sup>149</sup> The U.S. General Accounting Office had this to say about its creation:

The establishment of the motor carrier administration within DOT enhances accountability and visibility of motor carrier safety because its primary function is safety and it has been placed on a par with other modal administrations within the Department. Moreover, the agency’s new structure...supports a greater emphasis on enforcement and compliance. In contrast to its predecessor organization, which was within the Federal Highway Administration, field operations now receive instructions from the Association Administrator for Enforcement and Program Delivery, increasing accountability and reducing the potential for conflict instructions. In addition, ...the agency will have attorneys and support staff in four regional centers whose sole responsibility will be to enforce compliance with truck safety regulation. Previously, these attorneys performed legal work, including truck safety work, for the Federal Highway Administration as a whole.<sup>150</sup>

<sup>144</sup> <http://www.dot.gov/summary.htm>.

<sup>145</sup> 49 U.S.C. ch. 301.

<sup>146</sup> 23 U.S.C. ch. 4.

<sup>147</sup> Jerry Marshaw & David Harfst, *Inside the National Highway Traffic Safety Administration: Legal Determinants of Bureaucratic Organization and Performance*, 57 U. CHI. L. REV. 443 (1990). U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 7.

<sup>148</sup> <http://www.dot.gov/summary.htm>.

<sup>149</sup> Pub. L. No. 106-159, 113 Stat. 1748.

<sup>150</sup> U.S. GEN. ACCOUNTING OFFICE, *supra* note 9, at 13. *See also* U.S. GEN. ACCOUNTING OFFICE, *supra* note 9, at 6–7. The GAO noted that the U.S. DOT had “increased the number of compliance reviews of motor carriers, taken a harder line on enforcement, undertaken efforts to improve the data on which it makes decisions, and has moved quickly to put a new organization in place to carry out the requirements of the 1999 Motor Carrier Safety Improvement Act.” *Id.* at 9.

U.S. DOT has been given wide-ranging jurisdiction to address highway safety.<sup>151</sup> In order to promote the safe operation of CMVs, to minimize dangers to CMV operators and other employees, and to ensure increased compliance with traffic laws and CMV safety and health regulations,<sup>152</sup> CMVs and their driver qualifications and certifications are regulated by the FMCSA.<sup>153</sup>

The FMCSA provides oversight of motor carrier, driver, and vehicular safety. Its principal mission is to reduce the number and severity of crashes, injuries, and fatalities involving large trucks and buses.<sup>154</sup> Its regulations govern motor vehicles with GVWR or gross combination weight rating (GCWR), or gross combination weight (GCW) exceeding 10,000 lb and operating in interstate commerce. FMCSA also regulates passenger vehicles with more than 15 occupants (including the driver), as well as interstate passenger vehicles that transport between 9 and 15 passengers more than 75 mi from the driver's normal work-reporting location. FMCSA also has jurisdiction over carriers of hazardous materials in interstate commerce in sufficient quantities to require placards. For-hire carriers falling into any of these categories must comply with the FMCSRs,<sup>155</sup> and the Financial Responsibility Requirements.<sup>156</sup> FMCSA performs compliance reviews of motor carriers and safety audits of new entrants.<sup>157</sup> SAFETEA-LU authorizes grants to states and local governments to conduct audits of new entrant carriers.<sup>158</sup>

Insofar as is relevant here, the Office of Hazardous Materials Safety in the Pipeline and Hazardous Materials Safety Administration has jurisdiction over hazardous materials transportation. The NTSB investigates transportation accidents and recommends regulatory improvements. Created after the 9/11 attacks, the TSA is housed within the DHS, and regulates the security of all modes of transport, including motor vehicles.

<sup>151</sup> U.S. DOT has jurisdiction to conduct and make contracts for inspections and investigations; compile statistics; make reports; issue subpoenas; require production of documents and property; take depositions; hold hearings; prescribe record keeping and reporting; conduct and make contracts for studies, development, and testing evaluation and training; and perform such other acts it deems appropriate. 49 U.S.C. § 31133(a).

<sup>152</sup> 49 U.S.C. § 31131(a).

<sup>153</sup> General driver qualifications are set forth in 49 C.F.R. § 391.11. See 63 Fed. Reg. 33254 (June 18, 1998). See also FEDERAL AND STATE LICENSING AND OTHER SAFETY REQUIREMENTS FOR COMMERCIAL MOTOR VEHICLE OPERATORS AND EQUIPMENT (TCRP Legal Research Digest No. 19, 2001). They are discussed in Paul Dempsey, *Transit Law* § 7-26, in 5 SELECTED STUDIES IN TRANSPORTATION LAW (2004).

<sup>154</sup> <http://www.fmcsa.dot.gov/about/aboutus.htm>.

<sup>155</sup> 49 C.F.R. pts. 40, 325, 350–399, 571, and 658.

<sup>156</sup> 49 C.F.R. § 387.7.

<sup>157</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 4, at 6.

<sup>158</sup> SAFETEA-LU sec. 4107, amending 49 U.S.C. § 31104.

## E. THE FEDERAL/STATE RELATIONSHIP

### 1. Federal Regulatory Programs

This section describes the contemporary relationship between the federal and state governments over motor vehicles. Though the focus of this study is on federal law, it must be recognized that most motor vehicle law originates at the state level. There are also various Interstate Compacts,<sup>159</sup> International Registration Plans,<sup>160</sup> and International Fuel Tax Agreements<sup>161</sup> (and reciprocity agreements that precede them) that apply. The federal government attempts to persuade, and coerce, the states to adopt federal standards in three principal ways: (1) through the carrot of federal financial support for state programs that comply with federal standards; (2) through the stick of a withdrawal of federal funds for state programs that do not so comply; and/or (3) through federal preemption of inconsistent state law. For example, most state governments have adopted all or most of FMCSA's motor carrier safety regulations and have focused major state efforts toward implementing programs to enforce those federal rules. This process has been driven by the availability of federal funding for these state programs, provided through the Motor Carrier Safety Assistance Program (MCSAP) administered by FMCSA.

Title 23 of the U.S.C. directs the Secretary of Transportation to assist and cooperate with, *inter alia*, state and local governments, to increase highway safety.<sup>162</sup> Each state is required to have a highway safety program, approved by U.S. DOT, "designed to reduce traffic accidents and deaths, injuries, and property damage

<sup>159</sup> Pub. L. No. 85-684, 72 Stat. 635, as amended by Pub. L. No. 88-466, 78 Stat. 564, provides:

The consent of Congress is hereby given to any two or more of the several States...to enter into agreements or compacts—

(1) for cooperative effort and mutual assistance in the establishment and carrying out of traffic safety programs, including, but not limited to, the enactment of uniform traffic laws, driver education and training, coordination of traffic law enforcement, research into safe automobile and highway design, and research programs of the human factors affecting traffic safety, and

(2) for the establishment of such agencies, joint or otherwise, as they deem desirable for the establishment and carrying out of such traffic safety programs.

<sup>160</sup> 49 U.S.C. §§ 31701–31706. The 48 contiguous U.S. states, the District of Columbia, and 10 Canadian provinces (i.e., Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Ontario, Prince Edward Island, Quebec, and Saskatchewan) participate in the International Registration Plan; the Plan authorizes registration of over 1.7 million commercial vehicles. [http://www.ncdot.org/dmv/vehicle\\_services/registrationtitling/commercialIRP.html#IRP%20About](http://www.ncdot.org/dmv/vehicle_services/registrationtitling/commercialIRP.html#IRP%20About) (visited June 15, 2006).

<sup>161</sup> 49 U.S.C. §§ 31701–31708.

<sup>162</sup> 23 U.S.C. § 401.

resulting therefrom.”<sup>163</sup> These state programs must be provided by a highway safety agency having adequate powers that is sufficiently equipped to be able to carry out a satisfactory program and approved by the governor of the state. Local subdivisions may carry out the state highway safety program if they are approved by the governor and meet minimum U.S. DOT standards. The state must also certify that it will implement “national highway safety goals to reduce motor vehicle related fatalities.”<sup>164</sup> One source summarized U.S. DOT oversight of state highway safety programs, and its interaction with the states:

In 1998, NHTSA adopted a “performance-based” approach to its oversight of highway safety programs. Under this approach, a state develops an annual performance plan and establishes traffic safety goals and performance measures. In addition, the performance plan must describe the process the state used to identify problems, establish goals, and select projects. Based on the performance plan, the state prepares an annual highway safety plan, which identifies projects to be funded that address the state’s goals. In addition, at the end of the year, the state is required to prepare an annual report that describes (1) the state’s progress in meeting its highway safety goals, using the measures described in its performance plan and (2) the contribution of funded projects to meeting the state’s highway safety goals. Under the performance-based approach, NHTSA does not approve the state’s highway safety plan or projects. Instead, it focuses on whether the state is achieving the goals it set for itself in its plans. However, if the state is not making progress toward meeting its goals, NHTSA regulations state that the NHTSA region and state should develop an improvement plan to address the shortcomings.<sup>165</sup>

Much of federal oversight over safety is coupled with funding—the allocation of economic resources collected in the Highway Trust Fund for programs designed to improve motor vehicle safety, for example. U.S. DOT Administrations principally are funding agencies, implementing congressional power under the spending clause of the Constitution.<sup>166</sup> The spending power includes the ability to impose requirements on state and local governments as a condition of receiving federal funds. Often, federal appropriation statutes condition the receipt of federal funds on the state’s enactment of prescribed legislation.<sup>167</sup> For example, at various times, federal funds for highway safety have been conditioned on state promulgation of a motorcycle helmet law,<sup>168</sup> on

a state’s promulgation of laws setting the drinking age at 21, or on the enactment of a 55-mph speed limit.<sup>169</sup>

TEA-21 funded a series of highway safety programs. Administered by NHTSA, these programs increased state funding for activities designed to encourage, *inter alia*, the use of seat belts<sup>170</sup> and to prevent drinking and driving. For example, economic incentives exist for states that have enacted and are enforcing a law declaring that any person driving with a blood alcohol concentration of 0.08 or more is guilty of a per se offense of driving while intoxicated.<sup>171</sup> As of January 2003, 17 states had set the blood alcohol concentration threshold at 0.10 percent, while the remaining states had set it at 0.08.<sup>172</sup> Economic incentives also exist for states promulgating repeat intoxicated driver laws<sup>173</sup> and those adopting and implementing “effective programs to reduce traffic safety problems resulting from individuals driving while under the influence of alcohol.”<sup>174</sup> States that do not adopt either the open container or repeat offender requirements must transfer a specified percentage (initially 1.5 percent, and in 2002, 3 percent) to their Section 402 State and Community Highway Safety grant program.<sup>175</sup> Table 1 summarizes the seven Highway Safety Incentive grant programs established by TEA-21.

<sup>169</sup> 23 U.S.C. § 158. See generally *Speed Management Program*; MARGARET HINES, JUDICIAL ENFORCEMENT OF VARIABLE SPEED LIMITS (NCHRP Legal Research Digest No. 47, 2002); DANIEL GILBERT, NINA SINES & BRANDON BELL, PHOTOGRAPHIC TRAFFIC LAW ENFORCEMENT (NCHRP Legal Research Digest No. 36, 1996).

<sup>170</sup> 23 U.S.C. §§ 405, 406.

<sup>171</sup> 23 U.S.C. § 163. U.S. GEN. ACCOUNTING OFFICE, HIGHWAY SAFETY: EFFECTIVENESS OF STATE .08 BLOOD ALCOHOL LAWS (1999). *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 110 S. Ct. 2481, 110 L. Ed. 2d 412 (1990) (state sobriety checkpoints are consistent with the Fourth Amendment). *Delaware v. Prouse*, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979) (stopping a motorist to check his driver’s license and auto registration was improper under the Fourth Amendment, and marijuana seized could not be introduced as evidence at trial).

<sup>172</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 7, at 7.

<sup>173</sup> 23 U.S.C. § 164.

<sup>174</sup> 23 U.S.C. § 410.

<sup>175</sup> U.S. GEN. ACCOUNTING OFFICE, *supra* note 172, at 13.

<sup>163</sup> 23 U.S.C. § 402(a).

<sup>164</sup> 23 U.S.C. § 402(b).

<sup>165</sup> U.S. GEN. ACCOUNTING OFFICE, *supra* note 1, at 7.

<sup>166</sup> *San Antonio Metro. Transit Auth. v. Donovan*, 557 F. Supp. 445 (W.D. Tex. 1983).

<sup>167</sup> *City of Columbus v. Ours Garage and Wrecker Service*, 536 U.S. 424, 438, 122 S. Ct. 2226, 2235, 1532 Ed. 2d 430, 943 (2002).

<sup>168</sup> 23 U.S.C. § 153.

**TABLE 1—HIGHWAY SAFETY INCENTIVE GRANT PROGRAMS<sup>176</sup>**

<b>Incentive Category</b>	<b>Title of Incentive</b>	<b>Description</b>
Seat belt/occupant protection incentives	Section 157: Safety Incentive Grants for the Use of Seat Belts	Creates incentive grants to states to improve seat belt use rates. A state may use these funds for any highway safety or construction program.
	Section 157: Safety Innovative Grants for Increasing Seat-Belt Use Rates	Provides that unallocated Section 157 incentive funds be allocated to states to carry out innovative projects to improve seat belt use.
	Section 405: Occupant Protection Incentive Grant	Creates an incentive grant program to increase seat belt and child safety seat use. A state may use these funds only to implement occupant protection programs.
	Section 2003(b): Child Passenger Protection Education Grants	Creates a program designed to prevent deaths and injuries to children, educate the public on child restraints, and train personnel on child restraint use.
Alcohol incentives	Section 163: Safety Incentives to Prevent the Operation of Motor Vehicles by Intoxicated Persons	Provides grants to states that have enacted and are enforcing laws stating that a person with a blood alcohol concentration of 0.08 or higher while operating a motor vehicle has committed a per se driving-while-intoxicated offense. A state may use these funds for any highway safety or construction program.
	Section 410: Alcohol Impaired Driving Countermeasures	Revises an existing incentive program and provides grants to states that adopt or demonstrate specified programs or to states that meet performance criteria showing reductions in fatalities involving alcohol-impaired drivers.
Data incentives	Section 411: State Highway Safety Data Improvements	Provides incentive grants to states to improve the timeliness, accuracy, completeness, uniformity, and accessibility of highway safety data.

<sup>176</sup> Adapted from U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 7, at 17; and U.S. GEN. ACCOUNTING OFFICE, *supra* note 1, at 6.

The states established highway safety goals and initiated projects to achieve those goals, while NHTSA provided advice, training, and technical assistance. For example, federal grants are available for the development of state traffic safety information systems<sup>177</sup> and to make state highway safety data improvements.<sup>178</sup> TEA-21 allocated about \$2 billion to support state highway safety programs for 5 years in the following ways:

- \$729 million was provided for behavioral highway safety programs under the core Section 402 State and Community Highway Safety grants program;
- \$936 million was provided under seven incentive programs (see Table 1), funds from two of which could be used for behavioral highway safety programs or highway construction, of which the states allocated \$789 million for behavioral programs and \$147 million for construction; and
- \$361 million in penalty transfer programs (in FY 2001 and 2002) whereby funds were transferred from highway construction to highway safety programs for states not passing laws prohibiting open container laws and establishing specific penalties for individuals convicted of repeat drinking and driving offenses.<sup>179</sup>

Chart 1<sup>180</sup> reveals the subject matter allocation of these funds.

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<sup>177</sup> 23 U.S.C. § 408.

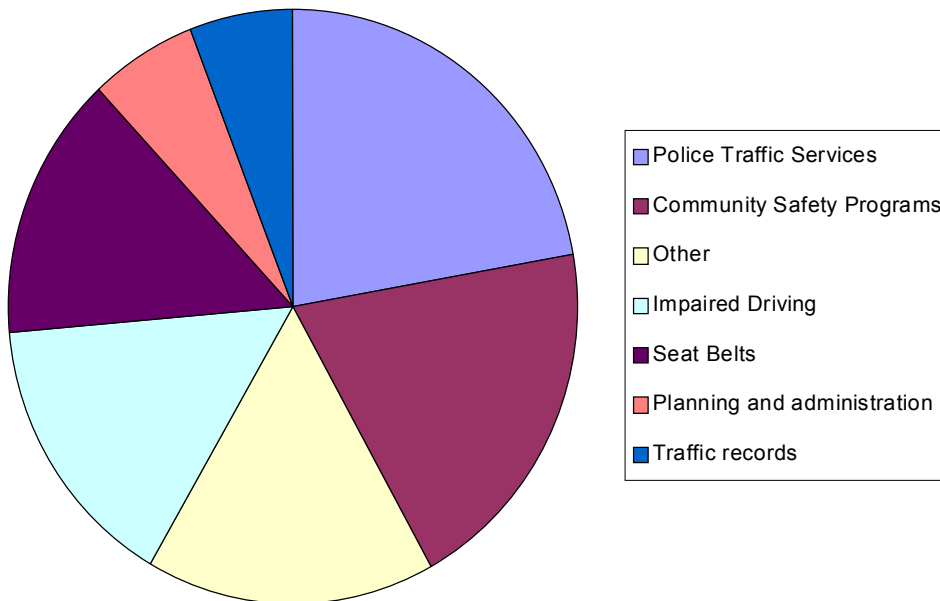
<sup>178</sup> 23 U.S.C. § 411. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 157.

<sup>179</sup> U.S. GEN. ACCOUNTING OFFICE, *supra* note 172, at 10. Open container laws were addressed in 65 Fed. Reg. 55532 (Aug. 24, 2000); 23 C.F.R. pt. 1270.

<sup>180</sup> U.S. GEN. ACCOUNTING OFFICE, *supra* note 172, at 12; U.S. GEN. ACCOUNTING OFFICE, *supra* note 165, at 16.



CHART 1 - USES OF STATE AND COMMUNITY GRANTS FUNDS, FY 1998-2002



MCSAP provides financial assistance to states to reduce accidents and hazardous materials incidents involving CMVs. The program is designed to reduce motor vehicle accidents, fatalities, and injuries. FHSA provides grants-in-aid up to 80 percent of the cost of enforcing federal and compatible state motor carrier safety and hazardous materials requirements.<sup>181</sup> MCSAP promotes the adoption and enforcement of uniform safety rules, regulations, and standards compatible with the FMCSRs and FHMRs for interstate and intrastate motor carriers and drivers.<sup>182</sup> Some states merely incorporate the federal requirements in their statutes and regulations by reference, and enforce the requirements through state DOTs, PUCs, and highway patrol and municipal police officers.<sup>183</sup>

<sup>181</sup> RICHARD JONES, APPLICATION OF THE FOURTH AMENDMENT TO THE INSPECTION OF COMMERCIAL MOTOR VEHICLES AND DRIVERS (NCHRP Legal Research Digest No. 43, 2000).

<sup>182</sup> 23 U.S.C. § 402; 49 C.F.R. pts. 350, 355.

<sup>183</sup> Pennsylvania is such a state. See <http://www.dot.state.pa.us/Internet/Bureaus/pdBOMO.nsf/infoRMCPAssistance?>

An example of how the federal and state governments cooperate in the area of motor vehicle safety is the CMV data program. The FMCSA oversees two major initiatives to assist states in their reporting of CMV crash information: (1) a commercial vehicle crash data improvement program; and (2) a data quality rating system. Between 2002 and 2005, FMCSA issued almost \$21 million in discretionary grants to states to improve their CMV crash data. The grant program requires states to complete three activities: (1) establish a coordinating committee of stakeholders to provide guidance in developing traffic safety data; (2) conduct an assessment of the existing system; and (3) develop a strategic plan that prioritizes data needs and establishes goals.<sup>184</sup> With the Volpe National Transportation Systems Center, the FMCSA has also developed a State Safety Data Quality map—a color-coded display that categorizes data quality for each state—which encourages states to

OpenForm.

<sup>184</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 3, at 8–9.

improve their safety data.<sup>185</sup> One source summarized the federal/state relationship on these issues as follows:

FMCSA works in partnership with states to reach commercial motor vehicle safety goals. States are the gatekeepers for the collection and reporting of commercial motor vehicle crash information. They receive crash reports completed by law enforcement personnel in local jurisdictions, compile them, and then submit crash reports to FMCSA. At the federal level, FMCSA manages a database which provides data that is used in rating motor carriers according to various safety indicators. Based on this rating, motor carriers are selected for safety inspections and reviews as part of FMCSA's enforcement efforts. While the data collected is primarily for federal use, states use the information to assist overall crash safety efforts and in setting commercial motor vehicle safety goals for themselves.<sup>186</sup>

SAFETEA-LU reaffirms the duty of states to provide U.S. DOT with "accurate, complete, and timely motor carrier safety data,"<sup>187</sup> and authorizes U.S. DOT to make grants to states covering 80 percent of the cost of programs or activities designed "to improve the accuracy, timeliness, and completeness of commercial motor vehicle safety data reported to the Secretary."<sup>188</sup> FMCSA compiles state data in its Motor Carrier Management Information System (also known as SafeStat) to target motor carriers for safety compliance audits. FMCSA also trains state inspectors to conduct safety audits of truck and bus companies. This federal-state partnership results in approximately 3 million motor carrier inspections, between 7,000 and 13,000 compliance reviews, and over 19,000 new entrant safety audits.<sup>189</sup>

SAFETEA-LU also replaced the single-state registration system<sup>190</sup> with a new Unified Carrier Registration System, a central depository and clearinghouse of information on all foreign and domestic motor carriers, private carriers, brokers, freight forwarders, and other transportation providers.<sup>191</sup> It includes information on

<sup>185</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 157, at 5.

<sup>186</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 157, at 1–2. U.S. GEN. ACCOUNTING OFFICE, *supra* note 165.

<sup>187</sup> SAFETEA-LU sec. 4106, amending 49 U.S.C. § 31102.

<sup>188</sup> SAFETEA-LU sec. 4128.

<sup>189</sup> U. S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 157, at 6–7.

<sup>190</sup> 49 U.S.C. § 14504.

<sup>191</sup> On May 12, 2006, FMCSA announced the establishment of a Board of Directors for the Unified Carrier Registration Plan mandated by SAFETEA-LU. The Board will be responsible for issuing rules to govern the Unified Carrier Registration (UCR) Agreement. The UCR Agreement will replace the Single State Registration System (SSRS), which expires on January 1, 2007. The UCR Agreement will govern the collection of fees paid by private and for-hire motor carriers, brokers, freight forwarders, and leasing companies. Including private motor carriers, brokers, freight forwarders, leasing companies, and exempt for-hire motor carriers in the UCR Agreement will lower the registration costs of for-hire motor carriers and ensure that SSRS states do not lose essential funding for safety

their motor carrier safety rating and compliance with their financial responsibility requirements.<sup>192</sup> It is anticipated that the new system will require less paperwork and be less costly than the single-state registration system it replaces.<sup>193</sup>

As an example of state implementation of the registration program, the State of New York implements the program under the following guidelines:

All motor carriers authorized to engage in interstate transportation of passengers or property as a common or contract carrier by the Federal Highway Administration (formerly the Interstate Commerce Commission) shall register in the motor carrier's registration state for all states of travel.

The "registration state" means the jurisdiction where the registrant maintains its principal place of business. If the applicant's principal place of business is located in a jurisdiction that is not a participating state, the applicant shall apply for registration in the state in which the applicant will operate the largest number of motor vehicles during the next registration year. If the motor carrier will operate the largest number of vehicles in more than one state, the applicant or registrant shall choose which participating state will be the carrier's registration state. Once the registration state is determined, this designation shall be effective until the registrant changes its principal place of business.

The applicant shall file annually an application for registration of Federal Highway Administration regulated interstate operations with the registration state only.<sup>194</sup>

Other states provide guidance as to how motor carriers may comply with the federal registration system on their Web sites.<sup>195</sup> Some state PUCs have asked their legislatures to grant them authority to administer the new Unified Carrier Registration System.<sup>196</sup>

If an owner or operator of a CMV maintains its principal place of business in a state, and that state concludes the carrier is unfit to operate in intrastate commerce, the U.S. DOT shall prohibit the owner or operator from operating in interstate commerce until the state determines it is fit.<sup>197</sup>

We shall review FHWA regulation of the National Network, and the motor vehicle size, length, and weight restrictions below. But in addition to the NHTSA and FMCSA oversight of motor vehicle safety, FHWA also funds and oversees transportation safety projects. For

services. Currently, 39 states participate in SSRS and use this registration system to generate revenues to supplement state general fund accounts and conduct safety-related activities. <http://testimony.ost.dot.gov/test/Capka1.htm>.

<sup>192</sup> SAFETEA-LU sec. 4304, amending 49 U.S.C. § 13908.

<sup>193</sup> [http://www.buses.org/government\\_affairs/legislative\\_\\_regulatory\\_affairs/1916.cfm](http://www.buses.org/government_affairs/legislative__regulatory_affairs/1916.cfm).

<sup>194</sup> <http://www.dot.state.ny.us/ts/license.html#ssrs>.

<sup>195</sup> See, e.g., Kentucky Division of Motor Carrier's Web site: <http://transportation.ky.gov/dmc/ssrs.htm#FHWAauthority>.

<sup>196</sup> See, e.g., Colorado Public Utilities Commission Web site: <http://www.dora.state.co.us/puc/about/AboutTrends.htm>.

<sup>197</sup> SAFETEA-LU sec. 4114, amending 49 U.S.C. § 31144.

example, its Hazard Elimination program provides financial support for construction of safety improvements on public roads, surface transportation facilities, or bicycle and pedestrian pathways or trails. States that suffer penalty transfer requirements may use those funds for safety construction projects under the Hazard Elimination program.<sup>198</sup> During FY 1998–2003, \$579 million was authorized from the Highway Trust Fund to subsidize up to 80 percent of state development and implementation of programs to improve CMV safety and enforce CMV regulations.<sup>199</sup>

Section 202 of the Motor Carrier Safety Improvement Act of 1999 addresses requirements for state participation. It requires that the states adopt and carry out a program of CMV licensing and ensuring driver fitness.<sup>200</sup> States are required to adopt regulations governing the fitness of CMV operators consistent with the U.S. DOT standards,<sup>201</sup> to issue a CDL only to individuals who pass written and driving tests for the operation of a CMV that satisfy those minimum federal standards, and to have in effect and enforce blood alcohol concentration prohibitions at least as stringent as those adopted by U.S. DOT.<sup>202</sup> Failure to comply results in a withholding of federal funds.<sup>203</sup> Here again, federal funding and the threat of its loss for noncompliance result in widespread state adoption of federal motor vehicle standards. Failure requires DOT to withhold 5 percent of state transportation funding under 23 U.S.C. § 104 during the first fiscal year of noncompliance, and 10 percent thereafter.<sup>204</sup> SAFETEA-LU also allocates \$880 million for the elimination of rail–highway grade crossings in an effort to improve railroad efficiency and reduce highway facilities.

## 2. Preemption of State Laws

The states have exerted their police powers over a wide array of motor vehicle activities. For example, the

<sup>198</sup> U.S. GEN. ACCOUNTING OFFICE, *supra* note 1, at 8.

<sup>199</sup> 49 U.S.C. §§ 31103, 31104.

<sup>200</sup> 49 U.S.C. § 31311.

<sup>201</sup> A state that enacts a law or regulation affecting CMV safety must submit a copy to U.S. DOT immediately after its enactment or issuance. 49 U.S.C. § 31141(b). If the U.S. DOT Secretary determines it is not as stringent as that prescribed by U.S. DOT, the state regulation may not be enforced. 49 U.S.C. § 31141(c)(3). Moreover, a state may not enforce a CMV law or safety regulation that the U.S. DOT Secretary decides may not be enforced. 49 U.S.C. § 31141(a). The state may, however, petition for a waiver, which the Secretary may grant if it is “consistent with the public interest and the safe operation of commercial motor vehicles.” 49 U.S.C. § 31141(d).

<sup>202</sup> 49 U.S.C. § 31311.

<sup>203</sup> Sec. 203 of the Motor Carrier Safety Improvement Act of 1999 (State noncompliance). 49 U.S.C. § 31314. Sec. 221 of the Motor Carrier Safety Improvement Act of 1999 provided for state-to-state notification of violations data. 49 U.S.C. § 31111(c).

<sup>204</sup> 49 U.S.C. § 31314.

State of Minnesota authorizes its Commissioner of Transportation to

[P]rescribe rules for the operation of motor carriers, including their facilities; accounts; leasing of vehicles and drivers; service; safe operation of vehicles; equipment, parts, and accessories; hours of service of drivers; driver qualifications; accident reporting; identification of vehicles; installation of safety devices; inspection, repair, and maintenance; and proper automatic speed regulators if, in the opinion of the commissioner, there is a need for the rules.<sup>205</sup>

Before Congress promulgated statutes addressing motor vehicle size and weight restrictions, states regulated these issues under their police powers.<sup>206</sup> The states were deemed to have a legitimate interest in regulating the size and weight of vehicles in order to protect their highways from unnecessary wear and tear and to protect their citizens from the hazards of safety.<sup>207</sup> Federal acts are not deemed to supercede state police power unless it was “the clear and manifest purpose of Congress” to do so.<sup>208</sup> However, such a “manifest purpose” does not require explicit statutory language preempting the state law. Various federal safety statutes have been held to preempt inconsistent state law, either explicitly or implicitly.

In recent decades, Congress has passed laws intruding upon the state police powers in the area of motor vehicle law. We will discuss the substance of these requirements below. But we address their preemption here. Though highway safety is often described as falling within the police powers of the states, federal regulation of interstate roads and highways has been upheld under the Commerce Clause. In *United States v. Lopez*,<sup>209</sup> the U.S. Supreme Court noted that the Commerce Clause conferred upon Congress the power to “regulate the use of the channels of interstate commerce.” The power of the federal government under the Commerce Clause is vast, and its preemptive force is equally vast.<sup>210</sup>

<sup>205</sup> <http://www.revisor.leg.state.mn.us/stats/221/031.html>.

<sup>206</sup> Lorrie Marcil, *State Statutes That Exempt Favored Industries from Meeting Highway Weight Restrictions: Constitutionality Under the Equal Protection Clause*, 1984 DUKE L. REV. 963 (1984).

<sup>207</sup> See, e.g., *Sproles v. Binford*, 286 U.S. 374, 52 S. Ct. 581, 76 L. Ed. 1167 (1932); 52 S. Ct. 581, 76 L. Ed. 1167, *Kassel v. Consol. Freightways*, 450 U.S. 662, 101 S. Ct. 1309, 67 L. Ed. 2d 580 (1981); J. Michael Ivens, *Recent Development: Constitutional Law—Commerce Clause—Validity of State Regulation of Truck Lengths to Promote Highway Safety*; *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981), 49 TENN. L. REV. 389 (1982).

<sup>208</sup> Jennifer Andrews, *Saving Preemption: A Conflict Preemption Quandary Resolved in Geier v. American Honda Motor Co., Inc.*, 32 TRANSP. L.J. 221, 229 (2005).

<sup>209</sup> 514 U.S. 549, 558 (1995).

<sup>210</sup> “The power of the federal government to displace state law in those areas in which Congress has the ability to legislate is a potent one; it divests states of the ability to regulate in an

The Supremacy Clause<sup>211</sup> of the U.S. Constitution “invalidates any state law that contradicts or interferes with an Act of Congress.”<sup>212</sup> Although state highway regulation historically has fallen within the traditional police powers of the states, three circumstances exist under which state police power regulation of a matter of local concern will be deemed preempted by federal law: (1) *Explicit preemption*—where Congress explicitly preempted the states;<sup>213</sup> (2) *Occupy the field*—where the scheme of federal regulation is so pervasive as to leave no room for the states to supplement it;<sup>214</sup> or (3) *Same purpose covered*—where the object to be obtained by the federal law and the character of the obligations imposed by it reveal the same purpose as the state regulation.<sup>215</sup> The second and third of these categories (i.e., field preemption and conflict preemption) are instances of implicit preemption.<sup>216</sup>

Sometimes, preemption is avoided via the technique of “cooperative federalism,”<sup>217</sup> whereby Congress offers the states the choice of either implementing the federal regulations or losing federal funding.<sup>218</sup> Thus, under the

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area within the state’s domain.” Susan Stabile, *Preemption of State Law by Federal Law: A Task for Congress or the Courts?*, 40 VILL. L. REV. 1, 88, 90 (1995).

<sup>211</sup> Article VI of the Constitution (the Supremacy Clause) provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding....

U.S. CONST. art. VI.

<sup>212</sup> *Hayfield N. R. Co. v. Chicago & N.W. Transp. Co.*, 467 U.S. 622, 627; 104 S. Ct. 2610, 2614 (1984); 81 L. Ed. 2d 527, 533.

<sup>213</sup> *See Jones v. Rath Packing Co.*, 430 U.S. 519, 97 S. Ct. 1305, 51 L. Ed. 2d 604 (1977).

<sup>214</sup> *Fidelity Fed. Savings & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 153, 102, S. Ct. 3014, 3022, 73 L. Ed. 2d 664, 675 (1982) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947)).

<sup>215</sup> *Pacific Gas & Elec. v. State Energy Res. Conservation Comm’n*, 461 U.S. 190, 204, 103 S. Ct. 1713, 1722, 75 L. Ed. 2d 752, 765 (1983).

<sup>216</sup> *Andrews*, *supra* note 208, at 221, 228–29.

<sup>217</sup> Some commentators have observed that cooperative federalism is evolving into “interactive federalism,” whereby negotiated compromises are resulting from informal give-and-take federal/state relationships. With the promulgation of ISTEA, regional MPOs were empowered to help coordinate regional transportation, land use, and environmental issues. ROSS NETHERTON, *FEDERALISM AND THE INTERMODAL SURFACE TRANSPORTATION EFFICIENCY ACT OF 1991* (NCHRP Legal Research Digest No. 32, 1995); Dempsey, *supra* note 105 §§ 1-13–1-14, 2-3–2-4, 2-25–2-26 (2004).

<sup>218</sup> Craig Albert, *Your Ad Goes Here: How the Highway Beautification Act of 1965 Thwarts Highway Beautification*, 48 KAN. L. REV. 463, 520 (2000).

Spending Clause, Congress sometimes ties state compliance with federal standards to funding.<sup>219</sup> For example, a state’s failure to adopt a seatbelt law results in a loss of federal funds, but the state is not compelled to adopt a seatbelt law. On the other hand, a state’s efforts to limit truck size and weights have been deemed directly preempted by federal law promulgated under the Commerce Clause.

The most obvious case for federal preemption exists when Congress has expressly declared its intent to do so, and it has legitimately exercised its authority under the Commerce Clause.<sup>220</sup> But Congress is rarely so pre-

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<sup>219</sup> FHWA and other DOT administrations also have promulgated a wide variety of regulations and other legal obligations contractually (through the Master Agreement and various compliance statements), with the possibility of suspending or terminating funds for noncompliance.

<sup>220</sup> *See, e.g., Barnett Bank of Marion County v. Nelson*, 517 U.S. 25, 31, 116 S. Ct. 1103, 1108, 134 L. Ed. 2d 237, 244 (1996); *Greenwood Trust Co. v. Commonwealth of Mass.*, 971 F.2d 818, 822 (1st Cir. 1992). *See also Nat. Freight v. Larson*, 760 F.2d 499 (3d Cir. 1985) (state statute imposing overall truck trailer lengths conflicted with a federal statute, and was therefore preempted under the Supremacy Clause).

Three broad areas have since been identified that Congress may legitimately regulate:

1. Congress may regulate the use of the channels of interstate commerce, *See Heart of Atlanta Motel v. United States*, 379 U.S. 241, 85 S. Ct. 348, 13 L. Ed. 2d 258 (1964);
2. Congress may regulate instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the concern arises from intrastate activities, *See Shreveport Rate Cases*, 234 U.S. 342, 34 S. Ct. 833, 58 L. Ed. 1341 (1914); and
3. Congress may regulate those activities having a substantial relation to, or substantial effect on, interstate commerce, *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 575 S. Ct. 615, 81 L. Ed. 893 (1937).

In *English v. Gen. Elec. Co.*, 496 U.S. 72, 78, 110 S. Ct. 2270, 2275, 110 L. Ed. 2d 65, 74 (1990), the U.S. Supreme Court observed:

Our cases have established that state law is pre-empted under the Supremacy Clause, in three circumstances. First, Congress can define explicitly the extent to which its enactments pre-empt state law. Pre-emption fundamentally is a question of congressional intent, and when Congress has made its intent known through explicit statutory language, the courts’ task is an easy one.

Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Such an intent may be inferred from a “scheme of federal regulation...so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,” or where an Act of Congress touches “a field in which federal interest is so dominant that the federal system will be assumed to

cise in demarking the jurisdictional lines between the federal and state spheres. The form of preemption that has generated the most litigation is where, under the “dormant” Commerce Clause (or negative Commerce Clause doctrine),<sup>221</sup> a court holds that state action is preempted. Under the judicially created dormant Commerce Clause analysis, preemption is appropriate where (1) the federal scheme is “so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it”;<sup>222</sup> (2) the field of regulation has a federal interest “so dominant that the federal system [must] be assumed to preclude enforcement of state laws on the same subject”;<sup>223</sup> or (3) the prospect of a conflict between the federal and state regimes creates “a serious danger of conflict with the administration of the federal program.”<sup>224</sup>

With promulgation of the STAA, Congress sought to impose uniformity of state length and width requirements on CMVs using the National Network. STAA

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preclude enforcement of state laws on the same subject.” Although this Court has not hesitated to draw an inference of field pre-emption where it is supported by the federal statutory and regulatory schemes, it has emphasized: “Where...the field which Congress is said to have pre-empted” includes areas that have “been traditionally occupied by the States,” congressional intent to supersede state laws must be ‘clear and manifest.’ ”

Finally, state law is pre-empted to the extent that it actually conflicts with federal law. Thus, the Court has found pre-emption where it is impossible for a private party to comply with both state and federal requirements, or where state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”

*Id.* [citations omitted].

In order for Congress to preempt state activity under the Commerce Clause, two requirements must be met: (1) there must be a rational basis for Congress’s conclusion that the activity has a substantial impact on interstate commerce; and (2) the means chosen must be reasonably adapted to a constitutional end. *Hodel v. Va. Surface Min. & Recl. Ass’n*, 452 U.S. 264, 101 S. Ct. 2352, 69 L. Ed. 2d 1 (1981). See Robert McFarland, *The Preemption of Tort and Other Common Causes of Action Against Air, Motor and Rail Carriers*, 24 *TRANSP. L.J.* 155, 167 (1997).

<sup>221</sup> In his concurring opinion in *Amer. Trucking Ass’n v. Smith*, 496 U.S. 167, 200, 110 S. Ct. 2323, 2343, 110 L. Ed. 2d 148, 174 (1990), (a case holding that a flat tax on interstate commerce offended the Commerce Clause because it imposed a greater burden on out-of-state vis-à-vis in-state motor carriers), Justice Scalia described negative Commerce Clause jurisprudence as a “quagmire,” “arbitrary, conclusory, and irreconcilable with the constitutional text,” “inherently unpredictable,” and “has only worsened with age.” *Am. Trucking Ass’n*, 496 U.S. at 202–24 (Scalia, J., concurring).

<sup>222</sup> *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 1152, 91 L. Ed. 1447, 1459 (1947).

<sup>223</sup> *Id.*

<sup>224</sup> *Pennsylvania v. Nelson*, 350 U.S. 497, 505, 76 S. Ct. 477, 482, 100 L. Ed. 640, 654 (1956).

preempted the states in two ways: (1) it preempted state limitations on the size of vehicles using the National Network; and (2) it preempted state restrictions on federally approved vehicles’ use of, or access to, the National Network.<sup>225</sup> Much litigation has arisen under STAA’s preemption provisions.

Before 1982, the Commonwealth of Pennsylvania permitted the use of tractor–trailer combinations with trailers up to 53 ft in length, but with an overall combination length of no more than 60 ft. STAA permitted CMVs consisting of 48-ft semitrailers or 28-ft twin trailers on the National Network, and prohibited states from restricting CMV semitrailer and trailer lengths that had previously been lawfully operated in the state. Pennsylvania responded by passing legislation retaining an overall length limit of 60 ft on semitrailer combinations with trailers of more than 48 ft. In *National Freight v. Larson*,<sup>226</sup> the U.S. Court of Appeals for the Third Circuit held that Pennsylvania’s overall length restrictions (of 60 feet on semi-combinations with trailers in excess of 48 feet on the National Network) conflicted with STAA, and could not be imposed on vehicles using the National Network.<sup>227</sup> The Third Circuit observed, “In including within the federal statute a prohibition against the use of overall length limitations, Congress apparently desired to reduce the use of the dangerous ‘short tractors’ that had been developed in response to the various state overall length limitation laws.”<sup>228</sup>

STAA also established a uniform width requirement of 102 in., except for Hawaii. Pennsylvania’s effort to impose a 96-in. width requirement failed in *Continental Can Co. v. Yerusolim*.<sup>229</sup> The Third Circuit held, “the uniform width standard does apply, at least as a maximum width, to vehicles covered by the grandfather clause.”<sup>230</sup>

The State of Connecticut attempted to ban tandem trailers from all its highways (including those in the National Network) in 1983. In *United States v. Connecticut*,<sup>231</sup> a federal district court found that the state statute directly conflicted with Section 411(c) of STAA, which prohibited states from restricting tandem trailers, and was therefore preempted under the Supremacy Clause. Though the state challenged the constitutionality of STAA, the court found the statute was supported by a rational purpose—facilitating interstate

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<sup>225</sup> *N.Y. State Motor Truck Ass’n v. City of N.Y.*, 654 F. Supp. 1521, 1524 (S.D.N.Y. 1987).

<sup>226</sup> *Nat’l Freight v. Larson*, 760 F.2d 499 (3d Cir. 1985).

<sup>227</sup> *Id.* at 507.

<sup>228</sup> *Id.* at 505.

<sup>229</sup> *Continental Can Co. v. Yerusolim*, 854 F.2d 28 (3d Cir. 1988).

<sup>230</sup> *Id.* at 30.

<sup>231</sup> 566 F. Supp. 571 (D. Conn. 1983).

trucking—and was therefore a proper exercise of federal power under the Commerce Clause.<sup>232</sup>

In 1983, the State of Florida passed a statute and promulgated emergency rules: (1) vesting in the Florida DOT the authority to designate the state primary system highways to be included in the tandem truck network; (2) granting to the department the power to designate which highways may be used by truck tractor-semitrailer combinations that are longer than 55 ft; and (3) restricting the days and hours of operation of tandem trucks. In *United States v. Florida*,<sup>233</sup> a federal district court found all three provisions were preempted by STAA and void under the Supremacy Clause. The court found that STAA vests in the U.S. Secretary of Transportation the power to designate which Federal-Aid Primary Highways will constitute the tandem truck network. STAA also prohibits the states from imposing any restrictions on overall lengths of CMVs, and prohibits the states from prohibiting CMV tractor trailer combinations from the National Network.<sup>234</sup>

In order to protect the health and safety of its residents, in 1999, the New Jersey DOT issued regulations seeking to reduce the number of large CMVs on non-National Network roads. Under the regulations, a large CMV with neither an origin nor destination in the state was required to stay on the National Network routes except to access terminals, food, fuel, or repairs. The American Trucking Associations and a motor carrier brought a Commerce Clause challenge against the New Jersey regulation on grounds that intrastate trucking companies were favored over interstate motor carriers. But the regulation survived a summary judgment motion in *American Trucking Associations v. Whitman*,<sup>235</sup> where the federal district court could find no facial discriminatory purpose or effect. Said the court:

State regulation in the field of highway safety traditionally is accorded great deference and the Supreme Court often has articulated its reluctance to invalidate such statutes. A strong presumption of validity is given to highway safety regulations that do not discriminate on their face or in effect. Challengers may overcome the presumption by showing that the purported safety benefits are slight, problematic, or illusory. Absent such a showing, the court should uphold uniform safety statutes.<sup>236</sup>

The preemption provisions of STAA have also reached local restrictions on CMV operations. In *New York State Motor Truck Ass'n v. City of New York*,<sup>237</sup> a federal dis-

trict court struck down a city ordinance that sought to restrict CMV length and use restrictions on certain Interstate highways flowing through it. Though the court conceded that a local government could legitimately exercise its police power to protect public safety on state roads, it was prohibited by STAA from denying tandems the use of Interstate highways and reasonable access thereto. Nor could a state impose time of day curfews on such vehicles.<sup>238</sup> According to the court, “Congress’ primary objective in enacting the STAA was to relieve commercial trucking operators of the burden inherent in planning and operating a multi-state haul of tandems through states with conflicting regulations of tandem operations.”<sup>239</sup> Moreover, FHWA was not authorized to allow, by regulatory fiat, that which the statute prohibited. Said the judge, “even deferring to the Secretary’s construction of § 411(d) as allowing her to require FHWA approval of state tandem regulations, I am not constrained to accord any weight to her conclusion that these particular regulations do not violate the congressional objectives behind the STAA.”<sup>240</sup> He therefore enjoined the city from implementing or enforcing its regulations.<sup>241</sup>

Local restrictions fared better in *New Hampshire Motor Transport Ass’n v. Town of Plaistow*,<sup>242</sup> which assessed whether enforcement of a city zoning ordinance that prohibited nuisances against CMVs was preempted by federal legislation and the Commerce Clause of the U.S. Constitution.<sup>243</sup> The city issued a cease and desist order limiting operations at a local trucking terminal as follows:

6:00 a.m. to 9:00 p.m.	No restrictions.
9:00 p.m. to 11:00 p.m.	Two trucks may arrive or depart.
11:00 p.m. to 5:00 a.m.	No trucks may arrive or depart.
5:00 a.m. to 6:00 a.m.	Three trucks may arrive or depart.

Most of the traffic at the terminal came from I-495, about 6 mi from the terminal. The First Circuit observed that the STAA (“the Surface Act”), as amended by the Tandem Truck Safety Act of 1984 (“the Tandem Act”),<sup>244</sup> establishes uniform, national standards governing the maximum size and weight of trucks and trailers used in interstate commerce, and prohibits

<sup>232</sup> *Connecticut*, 566 F. Supp. at 577. However, in *Ga. Dep’t of Transp. v. Dole*, 561 F. Supp. 1024 (N.D. Ga. 1983), a federal district court concluded that regulations promulgated by the DOT under STAA exceeded the statutory authority of the agency and violated the Administrative Procedure Act.

<sup>233</sup> 585 F. Supp. 807 (N.D. Fla. 1984).

<sup>234</sup> *Florida*, 585 F. Supp. at 809–11.

<sup>235</sup> 136 F. Supp. 2d 343 (D.N.J. 2001).

<sup>236</sup> *Am. Trucking*, 136 F. Supp. 2d at 349 (citations omitted).

<sup>237</sup> *N.Y. State Motor Truck Ass’n v. City of N.Y.*, 654 F. Supp. 1521, 1524 (S.D.N.Y. 1987).

<sup>238</sup> *Id.* at 1535.

<sup>239</sup> *Id.* at 1536.

<sup>240</sup> *Id.* at 1537.

<sup>241</sup> *Id.* at 1541.

<sup>242</sup> 67 F.3d 326 (1st Cir. 1995), *cert. denied*, 517 U.S. 1120 (1996).

<sup>243</sup> U.S. CONST. art. 1, § 8.

<sup>244</sup> 49 U.S.C. § 31111 *et seq.*

states from enacting or enforcing laws that restrict trucks and trailers from operating on the National Network.<sup>245</sup> The court conceded that the restriction on reasonable access to the National Network extends beyond the Interstate highways:

The "prohibition on denying access," 49 U.S.C. § 31114, extends far beyond the operation of interstate highways or federally funded state roads that are designated parts of the national network. Local roads and other facilities are also covered by the provision to the extent needed to assure reasonable access to the national network. 23 C.F.R. § 658.19. The guarantee of reasonable access thus has a formidable reach, extending to local regulatory measures that operate miles away from any interstate or national network highway.<sup>246</sup>

The First Circuit held that the statutory language allowing a local government to impose "reasonable restrictions, based on safety considerations, on a truck tractor–semitrailer combination in which the semi-trailer has a length of not more than 28.5 feet" was not limited to circumstances where the restrictions were based on safety considerations, and could include reasonable curfew restrictions predicated on residential concerns about noise, odor, dust, and vibration. Although three federal district courts had held to the contrary,<sup>247</sup> the First Circuit held that although safety was a paramount reason justifying a reasonable restriction limiting access, "it is not the only reason permitted by Congress."<sup>248</sup>

In *Plaistow*, the First Circuit also rejected a challenge to the city's ordinance on grounds that it conflicted with the "federal speedy-transport mandate" of the Hazardous Materials Transportation Uniform Safety Act of 1990.<sup>249</sup> The court distinguished its decision in *National Tank Truck Carriers, Inc. v. Burke*,<sup>250</sup> in which it struck down a Rhode Island statewide prohibition of the transportation of liquefied natural gas:

A general, state-wide restriction is obviously more vulnerable to attack both because its impact is likely to be much greater and because it treats alike all situations regardless of need or danger. Quite possibly a local restriction might also unjustifiably interfere with hazardous shipment movements, either standing alone or in combination with restrictions in other communities. But the burden is upon those who attack the restriction to show the impact.<sup>251</sup>

The court also concluded that the enforcement of the ordinance did not conflict with the Noise Control Act of

1972<sup>252</sup> since the city was not regulating the decibel levels of the trucks.<sup>253</sup> In assessing whether the ordinance ran afoul of the Commerce Clause itself, the First Circuit weighed the burden on interstate commerce against the local benefit of the curfew. As to the burden, the court characterized it as a curfew that "prevents arrivals and departures at one terminal, at one location in the state, during six late-night hours (from 11 p.m. to 5 a.m.) with lesser restrictions for three hours (from 5 a.m. to 6 a.m. and from 9 p.m. to 11 p.m.)." The benefit was sparing local residents the nuisance imposed by trucks operating in their community late at night. The court found the ordinance akin to local traffic and safety restrictions traditionally applied on a local level, for which there is no alternative federal protection. The burden on interstate commerce was not shown to outweigh the local benefits, and thus, the curfew withstood the Commerce Clause preemption challenge.<sup>254</sup>

However, the City of Portsmouth's ordinance attempting to prohibit the continuous running of truck engines and refrigeration units for more than 15 minutes at a truck stop 1 mi from I-95, was enjoined by a federal district court in *Hanscom's Truck Stop v. City of Portsmouth*.<sup>255</sup> The court found unpersuasive the city's argument that its ordinance did not restrict "access" to the truck stop. The court found that the ordinance did indeed restrict access because it effectively prohibited most trucks from using the stop. In balancing the competing interests of the local government and the truck stop, the court found the facts distinguishable from *Plaistow*, discussed above. Here, the truck stop had been in operation for 30 years on a through truck route within a mile of a noisy Interstate highway. The ordinance's 15-minute time limitation bore no relationship to the need of trucks to refuel or be repaired, or for their drivers to use the facility for resting. The ordinance was enforced only at the truck stop, and at no other service station on the highway. Hanscom's was the only 24-hour truck stop on 100 mi of an Interstate highway, and therefore provided critical service for highway safety.<sup>256</sup> As to the city's interest in reducing noise and odor, the judge concluded:

While an interest in controlling noise and odors by limiting diesel engine operation may be within the police powers, the Ordinance, as adopted and enforced, is not a "reasonable" restriction on access in light of all the evidence. Of particular weight in my analysis is the potential impact of the Ordinance on access to Hanscom's late-night services or resting facilities during bad weather, and the attendant highway safety risks. On balance, I find that Hanscom's has demonstrated that the Ordinance is an

<sup>245</sup> *Plaistow*, 67 F.3d at 329.

<sup>246</sup> *Id.* at 330.

<sup>247</sup> *A.B.F. Freight System v. Suthard*, 681 F. Supp. 334, 341 (E.D. Va. 1988); *N.Y. State Motor Truck*, 654 F. Supp. 1521, 1539 (S.D.N.Y. 1987); *Consol. Freightways Corp. of Delaware v. Larson*, 647 F. Supp. 1479, 1483–84 (M.D. Pa. 1986).

<sup>248</sup> *Plaistow*, 67 F.3d at 331.

<sup>249</sup> 49 U.S.C. § 5101.

<sup>250</sup> 698 F.2d 559 (1st Cir. 1983).

<sup>251</sup> *Plaistow*, 67 F.3d at 331–32 (citations omitted).

<sup>252</sup> 42 U.S.C. § 4901 *et seq.*

<sup>253</sup> *Plaistow*, at 332.

<sup>254</sup> *Id.* at 333.

<sup>255</sup> Civ. No. 98-488-B, 1998 U.S. Dist. LEXIS 18059 (D.N.H. Nov. 10, 1998).

<sup>256</sup> *Id.* at 20.

unreasonable restriction, prohibited by 49 U.S.C. § 31114(a).<sup>257</sup>

The issue of federal preemption also has arisen in products liability litigation.<sup>258</sup> In *Geier v. American Honda Motor Co.*,<sup>259</sup> the U.S. Supreme Court was confronted with conflicting provisions in the National Traffic and Motor Vehicle Safety Act of 1966—one a preemption provision, while the other was a savings clause. The former provided: “Whenever a Federal motor vehicle safety standard...is in effect, no State or political subdivision of a State shall have any authority...to establish...any safety standard applicable to the same aspect of performance...which is not identical to the Federal standard.”<sup>260</sup> The latter provided that “compliance with” a federal safety standard “does not exempt any person from any liability under the common law.”<sup>261</sup> In a close decision, the Supreme Court found that although the explicit preemption provision did not preclude the common law lawsuit, neither provision precluded implicit conflict preemption.<sup>262</sup> The Court found that Congress intended to apply ordinary conflict preemption where an actual conflict with federal objectives arose.<sup>263</sup> Applying ordinary conflict analysis, the Court concluded that a state common law “no-airbag” action was preempted since it would have been an obstacle to the implementation of the Federal Motor Vehicle Safety Standard regarding passive automobile re-

straints.<sup>264</sup> A number of law review articles have criticized the majority’s decision in *Geier*.<sup>265</sup>

Other situations in which federal preemption has arisen in a torts context include CMV tractor-trailer design cases,<sup>266</sup> seatbelt requirements,<sup>267</sup> fuel content,<sup>268</sup> and hazardous materials transportation.<sup>269</sup>

The issue of preemption also has arisen in the context of state economic regulation of intrastate motor and bus carriers. The Federal Aviation Administration Authorization Act of 1994, in part, preempted state economic regulation of intrastate trucking. The legislation included a savings clause preserving state regulation of certain functions (including safety regulation) to the “authority of a State,”<sup>270</sup> while other clauses conferred it to the “authority of a State or a political subdivision of a State.”<sup>271</sup> The U.S. Supreme Court addressed the preemption issue head in *City of Columbus v. Ours Garage and Wrecker Service*,<sup>272</sup> a case in which a tow-truck op-

<sup>257</sup> *Id.* at 21.

<sup>258</sup> See, e.g., Ralph Nader & Joseph Page, *Automobile-Design Liability and Compliance with Federal Standards*, 64 GEO. WASH. L. REV. 415 (1996); Susan Raeker-Jordan, *The Pre-Emption Presumption That Never Was: Pre-Emption Doctrine Swallows the Rule*, 40 ARIZ. L. REV. 1379 (1998).

<sup>259</sup> 529 U.S. 861, 120 S. Ct. 1913, 146 L. Ed. 2d 914 (2000). Samuel Elswick, *Geier v. American Honda Motor Company: Airbags, Federal Preemption, and the Viability of a Regulatory Compliance Defense*, 28 N. KY. L. REV. 135, 140 (2001).

<sup>260</sup> 80 Stat. 718, now codified at 49 U.S.C. § 30103(b)(1). See Ellen Theroff, *Preemption of Airbag Litigation: Just a Lot of Hot Air?*, 76 VA. L. REV. 577 (1990).

<sup>261</sup> 49 U.S.C. § 30103(e).

<sup>262</sup> *Geier*, 529 U.S. at 869.

<sup>263</sup> *Geier*, 529 U.S. at 871. Andrews, *supra* note 208, at 221, 222.

<sup>264</sup> *Geier*, 529 U.S. at 886. The Court concluded:

the pre-emption provision itself reflects a desire to subject the industry to a single, uniform set of federal safety standards. Its pre-emption of all state standards, even those that might stand in harmony with federal law, suggests an intent to avoid the conflict, uncertainty, cost and occasional risk to safety itself that too many different safety-standard cooks might otherwise create.... This policy by itself favors pre-emption of state tort suits, for the rules of law that judges and juries create or apply in such suits may themselves similarly create uncertainty and even conflict....

*Id.* at 894.

<sup>265</sup> See, e.g., Theroff, *supra* note 260, at 577; Alexander Haas, *Chipping Away at State Tort Remedies Through Pre-emption Jurisprudence: Geier v. American Honda Motor Co.*, 89 CAL. L. REV. 1927 (2001); Joseph Mulherin, *Geier v. American Honda Motor Co.: Has the Supreme Court Extended the Pre-emption Doctrine Too Far?*, 21 NAT’L ASS’N ADMIN. L. JUDGES 173 (2001); Susan Raeker-Jordan, *A Study in Judicial Sleight of Hand: Did Geier v. American Honda Motor Co. Eradicate the Presumption Against Preemption?*, 17 BYU J. PUB. L. 1 (2002).

<sup>266</sup> *Freightliner v. Myrick*, 514 U.S. 280, 115 S. Ct. 1483, 131 L. Ed. 2d 385 (1995) (tort negligence action for design of tractor-trailers not preempted).

<sup>267</sup> *Griffith v. GMC*, 303 F.3d 1276 (11th Cir. 2002) (negligence suit brought for selecting a vehicle restraint system authorized by federal regulation preempted). See Kurt Chadwell, *Automobile Passive Restraint Claims Post-Cipollone: An End to the Federal Preemption Defense*, 46 BAYLOR L. REV. 141 (1994).

<sup>268</sup> *Exxon Mobil Corp. v. U.S. EPA*, 217 F.3d 1246 (9th Cir. 2000) (the Clean Air Act does not preempt state requirements of minimum oxygen content of fuel).

<sup>269</sup> *Massachusetts v. USDOT*, 320 U.S. App. D.C. 227, 93 F.3d 890 (D.C. Cir. 1996) (DOT ruling that the Massachusetts hazardous material law’s requirement of uniformity was preempted was erroneous).

<sup>270</sup> 49 U.S.C. § 14501(c)(2)(A).

<sup>271</sup> 49 U.S.C. § 14501(c)(2)(C), (3)(A).

<sup>272</sup> 536 U.S. 424, 122 S. Ct. 2226, 153 L. Ed. 2d 430 (2002).



erator and its trade association sought an injunction against a municipality's tow-truck regulations on grounds of preemption.<sup>273</sup> The Supreme Court concluded that the statute did not manifest a clear intent that Congress sought to supplant local authority over the traditional state function of highway safety.<sup>274</sup> Congress's purpose in promulgating this statute was to ensure that federal preemption of state motor carrier economic regulation did not interfere with "the preexisting and traditional state police power over safety."<sup>275</sup> That power includes the discretion of a state to subdelegate motor vehicle safety regulation to local governments.<sup>276</sup> Nevertheless, where local safety regulation conflicts directly with a federal safety statute, the local law is preempted.<sup>277</sup>

In the Bus Regulatory Reform Act of 1982 (the Bus Act), partial preemption of state licensing and market entry regulations also led to a series of notable lawsuits, which pitted newer bus companies, seeking competitive access to expanding passenger markets, in litigation against state regulatory agencies and established bus companies whose lucrative intrastate bus routes had been protected from competition by restrictive state entry standards and procedures.<sup>278</sup> These lawsuits showcased the success enjoyed by these upstart bus companies in using the Bus Act's preemptive provisions as a wedge to pry open the "closed door" of state regulatory barriers to competitive entry in the bus industry. They also involved interesting questions about the interplay of federal and state powers and procedures for adjudicating disputes over intrastate bus operations by interstate common carriers, in which the primary jurisdiction of the former ICC, and its use of "declaratory orders," ultimately prevailed over contrary state administrative factfinding.

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<sup>273</sup> *City of Columbus v. Ours Garage & Wrecker Service*, 536 U.S. 424, 122 S. Ct. 2226, 153 L. Ed. 2d 430 (2002) (municipalities may regulate safety of tow truck operators). See also *Cole v. City of Dallas*, 314 F.3d 730 (5th Cir. 2002) (local regulation of tow truck operators not preempted).

<sup>274</sup> *City of Columbus*, 536 U.S. at 434.

<sup>275</sup> *Id.*, 536 U.S. at 438.

<sup>276</sup> *Id.*, 536 U.S. at 438.

<sup>277</sup> See *CSX Transp. v. City of Plymouth*, 86 F.3d 626 (6th Cir. 1996) (municipal ordinance that limited the time that trains could disrupt local traffic preempted by the Federal Railway Safety Act); *Stucky v. City of San Antonio*, 260 F.3d 424 (5th Cir. 2001) (the federal statute demonstrates congressional intent not to include political subdivisions of a state within the exception to preemption).

<sup>278</sup> See, e.g., *Holland Indus. v. Div. of Transp. of the State of Mo.*, 763 S.W.2d 666 (Mo. 1989); *Funbus Sys. v. Cal. Pub. Utilities Comm'n*, 801 F.2d 1120 (9th Cir. 1986); *Trailways, Inc. v. Interstate Commerce Comm'n*, 727 F.2d 1284 (D.C. Cir. 1984); *Airporter of Colo., Inc. v. I.C.C.*, 866 F.2d 1238, 1240 (10th Cir. 1989); *Gray Lines Tour Co. of S. Nev. v. I.C.C.*, 824 F.2d 811 (9th Cir. 1987); *Aspen Limousine Serv. v. Colo. Mountain Express*, 891 F. Supp. 1450, 1455 (D. Colo. 1995).

In *Funbus Systems v. California PUC*,<sup>279</sup> the Ninth Circuit addressed the preemptive provisions of the Bus Act in a case involving an intrastate airport shuttle service from Los Angeles International Airport to various points in Orange County, California. The issue before the court was whether the ICC could issue certificates authorizing intrastate service wholly independent of interstate service. The salient provision of the Bus Act provided that the ICC "shall issue a certificate... authorizing...regular-route transportation entirely in one state as a motor common carrier of passengers if such transportation is to be provided on a route over which the carrier has been granted authority...to provide interstate transportation of passengers."<sup>280</sup> The court agreed with the petitioner and the California PUC that if the "Congress had intended to preempt state authority to regulate purely intrastate operations, it would have said so."<sup>281</sup> Noting that the U.S. Supreme Court has held that "the historic police powers of the State were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress,"<sup>282</sup> the Ninth Circuit concluded that the statutory language quoted above was not explicit preemptive language, and therefore turned to the legislative history of the Bus Act to ascertain intent.<sup>283</sup> In order for the ICC to issue intrastate authority, there had to be actual, bona fide, interstate services over the route.

In *Funbus*, the Court observed that the Bus Act was not intended to effectuate total deregulation and complete preemption of state authority over the bus industry, but instead was a case-by-case preemption promulgated as a compromise between the interests of the industry and the interests of the state.<sup>284</sup> The Court concluded that there had to be a nexus between a carrier's interstate and intrastate operations in order for the ICC to legitimately exercise jurisdiction over the intrastate operations,<sup>285</sup> and the ICC abused its discretion in attempting to confer intrastate operating authority to *Funbus* disconnected to its interstate operations.<sup>286</sup>

After the *Funbus* decision, Congress added a provision to the Interstate Commerce Act limiting a carrier's intrastate operations over a certificated interstate route to those circumstances where "the carrier provides

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<sup>279</sup> 801 F.2d 1120 (9th Cir. 1986).

<sup>280</sup> 49 U.S.C. § 10922(c)(2)(B).

<sup>281</sup> *Funbus*, 801 F.2d at 1126.

<sup>282</sup> *Pacific Gas*, 461 U.S. at 206, *Santa Fe Elevator*, 331 U.S. at 230.

<sup>283</sup> *Funbus*, 801 F.2d at 1126.

<sup>284</sup> *Id.* at 1127.

<sup>285</sup> *Id.* at 1128.

<sup>286</sup> *Id.* at 1129. However, in *Trailways v. Interstate Commerce Comm'n*, 727 F.2d 1284 (D.C. Cir. 1984), the D.C. Circuit took a more expansive view of a different provision of the Bus Act, holding that the ICC could issue intermediate intrastate authority over both certificated routes and superhighway and deviation routes created by rulemaking and letter notice proceedings.

regularly scheduled interstate transportation service on the route.<sup>287</sup> Interpreting this provision, the Tenth Circuit, in *Airporter of Colorado v. Interstate Commerce Commission*,<sup>288</sup> concluded that the ICC had failed to assess whether a bus company to which intrastate authority had been granted was operating over a route that actually, substantially, and in a bona fide way involved interstate operations by it.<sup>289</sup>

State courts are split on the issue of whether the ICC has primary jurisdiction to first determine whether there is a bona fide relationship between the intrastate authority and interstate operations under the Bus Act and its amendments. The Missouri Supreme Court concluded the issue had to be first determined by the ICC.<sup>290</sup> With the sunset of the ICC, these responsibilities were transferred to the FMCSA. In a recent decision upholding the jurisdiction of its PUC to exert jurisdiction over the issue, the Colorado Supreme Court summarized the law as follows:

[I]t is well settled that intrastate transportation of passengers under an FMCSA certificate is only authorized if the interstate transportation of passengers meets certain criteria. Specifically, the “interstate traffic ‘must be a regularly scheduled service, it must be actual, it must be bona fide and involve service in more than one State, and it must be substantial.’” While the interstate and intrastate services need not be identical or offered in the same vehicle, the mere holding out to perform interstate transportation services on a particular route is not enough to support intrastate transportation on that route. Rather, “the interstate traffic must be substantial in relation to the interstate traffic in that same operation.”<sup>291</sup>

We now turn to a discussion of the federal size, weight, and route restrictions that were at issue in several of the preemption decisions discussed above.

## F. SAFETY REGULATION—MOTOR VEHICLE, HIGHWAY, AND ROUTING REQUIREMENTS

### 1. Vehicle Route and Size Restrictions

#### a. The National Network of Highways

Under its regulations, FHWA is obliged to “provide a safe and efficient National Network of highways that can safely and efficiently accommodate the large vehicles authorized by the STAA. This network includes the Interstate system plus other qualifying Federal-Aid

Primary System Highways.”<sup>292</sup> Federal regulation applies to the National Network and reasonable access thereto. It does not, however, apply to other highways, where the states may impose size and weight limits, so long as they do not restrict reasonable access to the National Network.<sup>293</sup> Sometimes states use other terminology for their National Network highways. New York, for example, identifies them as “Qualifying Highways,” and state roads that can be used by STAA vehicles<sup>294</sup> not on the National Network are known as “Access Highways.”<sup>295</sup>

Federal vehicular size and length standards prevail on the National Network of highways.<sup>296</sup> The National Network of highways was established by the Tandem Truck Safety Act of 1984, and is available to vehicles authorized by the STAA.<sup>297</sup> Consisting of about 200,000 mi of highways,<sup>298</sup> the National Network includes the Interstate Highway System<sup>299</sup> plus other qualifying Federal-Aid Primary System highways. Routes on the National Network and to and from terminals must be available to large, tandem trucks. States may apply their size and weight limits to other highways except where they would deny reasonable access<sup>300</sup> to the National Network.<sup>301</sup> The following criteria govern designation of highways as parts of the National Network:

- The route is a geometrically typical component of the Federal-Aid Primary System, linking major cities and densely developed areas of the state;

<sup>292</sup> 23 C.F.R. § 658.3.

<sup>293</sup> 23 C.F.R. § 658.7.

<sup>294</sup> STAA vehicles consist of the following types of vehicles: 48 ft (L) x 102 in. (W) trailers, twin 28 ft-6 in. (L) tandem trailers, maxicubes, triple saddlemounts, conventional auto carriers, stinger-steered auto carriers boat transporters and beverage semitrailers. In New York, STAA vehicles are a subset of a class of vehicles called special dimension vehicles. Special dimension vehicles include the above list plus one additional vehicle combination: 53 ft trailers with a 41 ft kingpin distance, available at [http://www.dot.state.ny.us/traffic/desig\\_hwy.html](http://www.dot.state.ny.us/traffic/desig_hwy.html).

<sup>295</sup> [http://www.dot.state.ny.us/traffic/desig\\_hwy.html](http://www.dot.state.ny.us/traffic/desig_hwy.html).

<sup>296</sup> The National Network is the network of highways of each state on which vehicles are authorized to operate under the Surface Transportation Assistance Act of 1982. It includes the Interstate system, except those portions excepted under 23 C.F.R. §§ 653.11(d), or 658.11(f). 23 C.F.R. pt. 658 app. A. 67 Fed. Reg. 48,821 (July 26, 2002).

<sup>297</sup> 23 C.F.R. pt. 658; 49 C.F.R. pt. 658.

<sup>298</sup> 23 C.F.R. § 658.3. The Interstate Highway System and the Federal-Aid Primary System are described in 23 U.S.C. §§ 103(b), 139(a). The National Network criteria are set forth in 23 C.F.R. § 658.9.

<sup>299</sup> Interstate highways are those designed to connect the nation’s “principal metropolitan areas, cities and industrial centers” and “serve the national defense.” 23 U.S.C. § 103.

<sup>300</sup> Reasonable access is defined in 23 C.F.R. § 658.19.

<sup>301</sup> 23 C.F.R. §§ 658.7, 658.21, and pt. 658 app. A.

<sup>287</sup> 49 U.S.C. § 10922(c)(2)(J).

<sup>288</sup> 866 F.2d 1238 (10th Cir. 1989).

<sup>289</sup> *Airporter of Colo.*, 899 F.2d at 1239.

<sup>290</sup> See *Holland Indus. v. Div. of Transp.*, 763 S.W.2d 666 (Mo. 1989). Federal supremacy over the issue was also recognized in *Tri-State Coach Lines v. Ill. Commerce Comm’n*, 559 N.E.2d 869 (Ill. 1990).

<sup>291</sup> *Trans Shuttle v. Pub. Utilities Comm’n*, 89 P.3d 398, 405 (Co. 2004) (citations omitted).

- The route is of high volume, used extensively by large vehicles in interstate commerce;
- The route has no restrictions precluding the use of conventional combination vehicles;
- The route can support safe operations considering sight distance, severity and length of grades, width, curvature, bridge clearances and load limits, traffic volumes, and vehicular mix;
- The lanes are 12 ft or wider or otherwise consistent with highway safety; and
- The route has no unusual characteristics creating safety problems.<sup>302</sup>

States typically post designated routes for Class I, Class II, and Class III vehicles<sup>303</sup> and vehicle weight limits<sup>304</sup> on their Internet Web sites. FHWA rules on all proposed additions or deletions to the National Network.<sup>305</sup> FHWA has acknowledged the concern that “the fact that Federal weight law applies only to Interstate highways, with Federal size laws applying on the National Network (NN), has resulted in an unintended diversion of overweight violators onto non-Interstate and often non-NN State and local highways.”<sup>306</sup>

Table 2 summarizes the federal size restrictions on CMVs operating on the National Network.

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<sup>302</sup> 23 C.F.R. § 658.9.

<sup>303</sup> See, e.g., Illinois’ routes available at <http://www.dot.state.il.us/road/destruckroute.html>. Illinois state roads where permit loads are restricted due to dimensional restrictions, closed bridges, <http://www.dot.state.il.us/road/nopermits.pdf>.

<sup>304</sup> See, e.g., Nebraska’s vehicle weight limits, depending on the number of axels, <http://www.dor.state.ne.us/intermodal/pdfs/weights.pdf>.

<sup>305</sup> 23 C.F.R. § 658.11.

<sup>306</sup> 67 Fed. Reg. 48,821, 23 C.F.R. pt. 657 (July 26, 2002) (citations omitted).

**TABLE 2—FEDERAL COMMERCIAL VEHICLE SIZE LIMITS  
ON THE NATIONAL NETWORK<sup>307</sup>**

<b>Overall vehicle length</b>	<p>No federal length limit is imposed on most truck tractor–semitrailers’ operation on the National Network</p> <p>Exception: On the National Network, combination vehicles (truck tractor plus semitrailer or trailer) designed and used specifically to carry automobiles or boats in specially designed racks may not exceed a maximum overall vehicle length of 65 ft, or 75 ft, depending on the type of connection between the tractor and trailer.</p>
<b>Trailer length</b>	<p>Federal law provides that no state may impose a length limitation of less than 48 ft (or longer if provided for by grandfather rights) on a semitrailer operating in any truck tractor–semitrailer combination on the National Network. (Note: A state may permit longer trailers to operate on its National Network highways.)</p> <p>Similarly, federal law provides that no state may impose a length limitation of less than 28 ft on a semitrailer or trailer operating in a truck tractor–semitrailer–trailer (twin-trailer) combination on the National Network.</p>
<b>Vehicle width</b>	<p>On the National Network, no state may impose a width limitation of <i>more or less</i> than 102 in. Safety devices (e.g., mirrors, handholds) necessary for the safe and efficient operation of motor vehicles may not be included in the calculation of width.</p>
<b>Vehicle height</b>	<p>No federal vehicle height is imposed. State standards range from 13.6 ft to 14.6 ft.</p>

<sup>307</sup> [www.ops.fhwa.dot.gov/freight/sw/overview](http://www.ops.fhwa.dot.gov/freight/sw/overview).

### b. Federal Weight Restrictions

The federal government did not impose truck size and weight restrictions until 1956, when a maximum grossweight limit of 73,280 lb (along with maximum weights of 18,000 lb on single axles and 32,000 lb on tandem axles) was imposed on vehicles operating on the Interstate Highway System; states had theretofore regulated sizes and weights of vehicles. Higher state restrictions were grandfathered in by the 1956 legislation. The federal maximum vehicle width was set at 96 in. Congress increased gross weight and axle weight limits in 1975, and in 1982, required that states adopt federal weight limits on Interstate highways and allow vehicles with specified minimum dimensions on the National Network, including tractor-semitrailer combinations with 48-ft long semitrailers, and twin-trailer combinations with trailers up to 28 ft.<sup>308</sup> However, under the grandfather clause, 14 states elected to retain their preexisting size and weight requirements, and therefore can exceed federal axle weight or gross weight limits without federal permits; for divisible loads, 30 states also permit exceptions to the Interstate system axle load or gross weight limits.<sup>309</sup>

Today, FHWA weight limitations apply to the Interstate highways and reasonable access thereto. The maximum gross weight per vehicle is 80,000 lb unless lower gross weight is dictated by the Bridge Gross Weight Formula specified in the regulations, depending on the number and spacing of the axle.<sup>310</sup> The maximum gross weight per axle is 20,000 lb, and on tandem axles is 34,000 lb.<sup>311</sup> States also may not limit tire loads to less than 500 lb per inch of tire width, nor may they limit steering axle weights to the lesser of 20,000 lb or the axle weight established by the manufacturer.<sup>312</sup> A state that imposes weight restrictions different from the federal restrictions risks losing its entire National Highway System funds.<sup>313</sup>

### c. Federal Length Restrictions

FHWA has established minimum *length* provisions that prohibit the states from imposing the following length limitations for vehicles on the National Network:

- 48 ft on a semitrailer operating in a truck tractor–semitrailer combination;

<sup>308</sup> U.S. DEPT OF TRANSP., COMPREHENSIVE TRUCK SIZE & WEIGHT STUDY (Aug. 2000), <http://www.fhwa.dot.gov/reports/tswstudy/Vol2-Chapter1.pdf>.

<sup>309</sup> U.S. DEPT OF TRANSP., COMPREHENSIVE TRUCK SIZE AND WEIGHT STUDY I-16 (Aug. 2000), *available at* <http://www.fhwa.dot.gov/policy/otps/truck/finalreport.htm>.

<sup>310</sup> See 23 C.F.R. § 658.17(e) for the Bridge Gross Weight Formula.

<sup>311</sup> 23 C.F.R. § 658.17(c)(d).

<sup>312</sup> 23 C.F.R. § 658.17(f).

<sup>313</sup> 23 U.S.C. § 127(a); 23 C.F.R. § 658.21.

- 28 ft on any semitrailer or trailer operating in a truck tractor–semitrailer–truck combination; and
- Any overall length limitations on commercial vehicles operating in truck tractor–semitrailer or truck tractor–semitrailer–trailer combinations.<sup>314</sup>

States are also prohibited from prohibiting CMVs operating in truck tractor–semitrailer–trailer combinations. Trucks having a length up to 65 ft engaging in lawful operation as of December 1, 1982, were grandfathered.<sup>315</sup> Specific rules have been promulgated for various types of specialized vehicular equipment, including automobile transporters, boat transporters, truck–tractor semitrailer–semitrailer combination vehicles, maxicube vehicles, beverage semitrailers, and munitions carriers using dromedary equipment.<sup>316</sup>

### d. Federal Width Restrictions

FHWA regulations also prohibit minimum CMV *width* limitation of more or less than 102 in.<sup>317</sup> However, a state may grant special use permits, or allow certain larger recreational vehicles without a special use permit.<sup>318</sup> Certain fixtures on the vehicle (e.g., bumpers, mirrors, aerodynamic devices) are to be excluded in calculating length or width compliance.<sup>319</sup> However, such fixtures may not extend more than 3 in. beyond the sides of a CMV.<sup>320</sup> A state that subjects vehicles to size standards different from the federal standards may be subject to a civil action in federal court for injunctive relief.<sup>321</sup>

### e. State Size and Weight Restrictions

Size and weight restrictions constitute an integral part of CMV safety oversight.<sup>322</sup> FHWA regulations prescribe requirements for vehicle size and weight restrictions on Federal-aid highways, requiring an annual certification by the state.<sup>323</sup> States are obliged to enforce

<sup>314</sup> 23 C.F.R. § 658.13.

<sup>315</sup> 23 C.F.R. § 658.13.

<sup>316</sup> 23 C.F.R. § 658.13(e).

<sup>317</sup> 23 C.F.R. § 658.15(a). A statutory exception of 108 in. exists for Hawaii under STAA § 416(a).

<sup>318</sup> 23 C.F.R. § 658.15(c). These rules were amended in 2004 to remove recreational vehicles from consideration as CMVs, allowing the states the discretion to regulate their width and allow them to be exempt from any over-width permit requirements. 69 Fed. Reg. 11,994 (Mar. 12, 2004).

<sup>319</sup> 23 C.F.R. § 658.16.

<sup>320</sup> A proposal to extend the width exclusive devices to 4 in. so as to harmonize the rules with Canada and Mexico was rejected in 2004. 69 Fed. Reg. 62,426 (Oct. 26, 2004).

<sup>321</sup> 49 U.S.C. § 31115.

<sup>322</sup> 67 Fed. Reg. 48,821 (July 26, 2002). WATSON ARNOLD, TRIAL STRATEGY AND TECHNIQUES IN ENFORCING LAWS RELATING TO TRUCK WEIGHTS AND SIZES (NCHRP Research Results Digest No. 154, 1986).

<sup>323</sup> 23 U.S.C. § 141; 23 C.F.R. § 657.1. Truck Size and Weight, Length, Width, and Weight Limitations, 23 U.S.C. §§ 127, 315;

vehicle size and weight restrictions to ensure that vehicles using Federal-aid highways do not exceed the limits designed to prevent premature deterioration of the pavement and structures and provide a safe driving environment.<sup>324</sup> SAFETEA-LU expands state flexibility in the use of highway grants to allow enforcement of CMV size and weight restrictions at locations other than fixed weight facilities, such as at steep grades or mountainous terrains or at ports.<sup>325</sup> Each state plan must describe the procedures, resources, and facilities it intends to dedicate to enforcement of the size and weight restrictions. The state plan shall address the following areas:

- *Facilities and resources.* The state program shall include at least two of the following—fixed platform scales, portable wheel weigher scales, semiportable or ramp scales, or weigh-in-motion (WIM) equipment; if more than one agency has weight enforcement responsibility, the lead agency must be designated;
- *Practices and procedures.* The plan of operation and its geographic coverage and hours of operation must be designated generally. Policies and practices with respect to overweight violators, penalties, and special permits for overweight vehicles must be included; and
- *Updating.* The state plan should be modified based on experience and new developments in the enforcement program.<sup>326</sup>

Each state must submit its enforcement plan or its annual update to the FHWA Office of Motor Carriers annually. The state will be advised of any deficiencies in and necessary changes to the plan by FHWA.<sup>327</sup> Each state must also annually certify to FHWA that it is enforcing all state laws relevant to maximum size and weight restrictions.<sup>328</sup> Should a state fail to provide such certification, or should the U.S. DOT Secretary conclude that the state is not adequately enforcing its size and weight laws, federal highway funds to the state shall be reduced by 10 percent.<sup>329</sup> Table 3 reveals the similarities and differences in federal and state truck size and weight limits:

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23 C.F.R. pts. 657, 658; 49 U.S.C. §§ 31111, 31112, 31114; 49 C.F.R. § 1.48(b)(19). See [http://ops.fhwa.dot.gov/freight/size\\_weight.htm](http://ops.fhwa.dot.gov/freight/size_weight.htm).

<sup>324</sup> 23 C.F.R. § 637.5.

<sup>325</sup> SAFETEA-LU sec. 4106, amending 49 U.S.C. § 31102. It also allows federal grants to states that share land borders with another country to carry out border CMV safety programs and related enforcement activities and projects. SAFETEA-LU sec. 4110, amending 49 U.S.C. § 31107.

<sup>326</sup> 23 C.F.R. § 657.9.

<sup>327</sup> 23 C.F.R. § 657.11.

<sup>328</sup> 23 C.F.R. § 657.13.

<sup>329</sup> 23 C.F.R. § 657.19. The procedures for reduction of funds are set forth in 23 C.F.R. § 657.21.

<b>TABLE 3—TRUCK SIZE AND WEIGHT LIMITS SPECIFIED IN LAW<sup>330</sup></b>		
<b>AREA</b>	<b>FEDERAL LAW</b>	<b>STATE LAW</b>
<b>VEHICLE WEIGHT LIMITS</b>		
Number of Tires	No	Some
Tire Load Limit	No	Some
Load Distribution Between Tires	No	No
Load Limits by Axle Type	Yes	All
Load Distribution Between Axles in a Group	No	Some
Suspensions	No	No
Lift Axles	No	No
Gross Vehicular Weight (GVW) Bridge Formula	Yes	All
GVW Cap	Yes	All
<b>VEHICLE DIMENSION LIMITS</b>		
Height	No	All
Width	Yes	All
Single Unit Length	No	All
Semitrailer Length	Yes	All
Trailer Length	Yes	All
Combination Length	Yes	Some
<b>VEHICLE SPECIFICATIONS</b>		
Configurations	No	Some
Body Type	No	No
<b>EQUIPMENT SPECIFICATION</b>		
Safety-Related Hitching	Yes	No
Safety-Related Weight Distribution	No	Some
Safety-Related Power/Weight	No	Some
Kingpin	No	Many
Hitching	No	No

<sup>330</sup> Adapted from U.S. DEPT OF TRANSP., COMPREHENSIVE TRUCK SIZE AND WEIGHT STUDY, tbl. 1-5 (2000) available at <http://www.fhwa.dot.gov/reports/tswstudy>.

Several states have aligned their CMV size and weight permitting procedures to facilitate through transportation of non-reducible loads. Thus, 12 western and Sunbelt states<sup>331</sup> have adopted a common permit, allowing a motor vehicle permitted in any of the 12 states to move on through them all.<sup>332</sup> California is not a part of this consortium of states, and has its own size and weight and permitting requirements.<sup>333</sup>

## 2. Mexican Vehicles, Carriers, and Drivers

With the exception of cross-border transportation of passengers in charter and tour bus service, prior to conclusion of the North American Free Trade Agreement (NAFTA), operations of Mexican motor vehicles were limited to the commercial zones (a zone extending from 3 to 20 mi of a city's limits, depending upon population) of U.S. border communities. In the commercial zone, Mexican carriers would deliver trailers to U.S.-based,

<sup>331</sup> Ariz., Colo., Idaho, La., Mont., Nev., N.M., Okla., Or., Tex., Utah, and Wash.

<sup>332</sup> See [http://www.wsdot.wa.gov/commercialvehicle/pdf/Permit\\_Brochure.pdf](http://www.wsdot.wa.gov/commercialvehicle/pdf/Permit_Brochure.pdf).

<sup>333</sup> The following is a list of requirements for legal, unpermitted vehicles to operate in California.

*Width*—The maximum allowable vehicle width is 102 in. (some exceptions apply).

*Height*—The maximum allowable vehicle height is 14 ft.

*Length (California Legal)*—The maximum allowable lengths for vehicles that can travel throughout California are as follows (some exceptions apply):

- Single vehicle length is 40 ft.
- Combination length is 65 ft.
- Trailer length is not specified.
- KPRA (kingpin-to-rear-axle) is 40 ft maximum.
- Doubles—75 ft for combination of vehicles consisting of a truck tractor and two trailers, provided neither trailer length exceeds 28 ft, 6 in.
- Doubles—65 ft for combination of vehicles consisting of a truck tractor and two trailers, if one trailer length exceeds 28 ft, 6 in.

*Length (STAA)*—The maximum allowable lengths for vehicles that are limited to the National Network and Terminal Access routes are as follows:

- Combination length is unlimited.
- Maximum trailer length is 53 ft.
- KPRA is unlimited if trailer is no more than 48 ft.
- KPRA is 40 ft maximum if trailer is more than 48 ft.
- Doubles—unlimited length for combination of vehicles consisting of a truck tractor and two trailers, but *neither* trailer length can exceed 28 ft, 6 in.

*Weight*—The maximum allowable lengths are as follows:

- Gross combination weight is 80,000 lb.
- Single-axle weight is 20,000 lb.
- Maximum weight on a tandem axle with a 4-ft spread is 34,000 lb.

<http://www.dot.ca.gov/hq/traffops/trucks/trucksize/ops-guide/legalsize.htm>.

long-haul trucks, which slowed the movement of goods and increased the cost. These limitations applied to Mexican common carriers and private carriers and to carriers of both regulated and exempt commodities. Prior to NAFTA, U.S. carriers were barred totally from operating in Mexico, even though Mexican carriers were able to operate within U.S. commercial zones.

Under the terms of NAFTA, which became effective in January 1994, most restrictions against Mexican carriers operating in the United States were to have been phased out in the 1990s. Under NAFTA, beginning December 18, 1995, Mexican trucking companies were to have been allowed to obtain licenses to perform cross-border operations into the four U.S. border states (i.e., California, Arizona, New Mexico, and Texas), and U.S. carriers were to have been allowed entry into the six northern border states of Mexico. On January 1, 2000, NAFTA provided for cross-border access for Mexican carriers, in foreign commerce only, throughout the United States, and for U.S. carriers throughout Mexico.

Foreign ownership restrictions were also to be lifted under NAFTA. Under it, on December 18, 1995, Mexican investors were to be permitted to invest in 100 percent of a U.S. carrier providing international service, while U.S. investors were allowed to invest up to 49 percent in Mexican carriers. On January 1, 2001, the percentage increased to 51 percent; complete ownership is to be permitted in 2004.<sup>334</sup>

The provisions allowing Canadian carriers, vehicles, and drivers were dutifully implemented by the United States. Canada has a truck inspection program similar to that of the United States. But on December 17, 1995, only 1 day before the U.S.–Mexican border was scheduled to open, President Clinton issued a safety proclamation for unilaterally closing the border to Mexican trucks beyond the commercial zones, thereby failing to implement NAFTA. The Mexican government responded by placing a similar restriction on U.S. vehicles.

President Clinton's suspension of implementation of NAFTA led the Mexican government to file a formal complaint in 1998 requesting arbitration under the treaty's dispute resolution provisions. The Mexicans alleged protectionism. The U.S. counterclaimed, accusing Mexico of improper retaliation by sealing off its borders to U.S. carriers. The process was to take 6 years to run its course.

While the arbitration panel was being formed, Congress passed the Motor Carrier Safety Improvement Act of 1999, which created the FMCSA within U.S. DOT and increased the penalties for Mexican carriers operating outside the commercial zones. Under the Act, foreign domiciled carriers must carry a copy of their registration, and if a vehicle operates beyond the scope of its registration, it may be placed out of service; the carrier

<sup>334</sup> Eric Benton, Update on Mexican Trucking Before the Annual Meeting of the Transportation Lawyers Association (May 13, 2000).



is liable for a civil penalty and, depending on whether the violation is intentional, may be suspended from operating anywhere in the United States for a period of time.

On February 6, 2001, the five-member arbitration panel unanimously concluded that the U.S. decision to block Mexican trucks from entering the United States was in breach of the NAFTA agreement, as was its refusal to allow Mexican companies to invest in U.S. international cargo companies. It gave the United States 30 days to conclude a plan identifying a timetable and action steps the U.S. will take or face possible sanctions.<sup>335</sup> If negotiations to implement NAFTA were unsuccessful, Mexico had the right to levy compensatory duties equal to the economic damage it incurred as a result of a closed border since 1995, which some estimate to be around \$200 billion.<sup>336</sup> President George W. Bush promised to implement the arbitration decision expeditiously. As Governor of Texas, Mr. Bush had signed a letter with the governors of Arizona, California, and New Mexico, insisting, "This transborder trucking delay robs the entire U.S.-Mexico border region of the full economic benefits that NAFTA promises."<sup>337</sup>

Mexican drivers typically drive 20 hours per day in Mexico. When they crossed the border, they would be subjected to the 10-hour safety requirements of U.S. drivers. However, they would not be subject to U.S. labor laws, such as minimum wage requirements.<sup>338</sup> There is also some concern about the ability of the United States to police Mexican vehicles to assure they meet U.S. safety standards. Border crossings are notoriously understaffed. The U.S. DOT Inspector General found that, although the number of federal border inspectors increased to 60 from 40 in 2000, and 7 in 1995, an additional 126 inspectors are needed.<sup>339</sup> For example, California gave full safety inspections to only 2 percent of the 920,000 short-haul trucks that entered from Mexico in 2000.<sup>340</sup> In 1999, the Texas Department of Public Safety inspected only about 1 percent of the trucks crossing the U.S.-Mexico border; half the Mexican trucks were turned away for safety and other violations.<sup>341</sup>

Though the U.S. DOT inspected fewer than 1 percent of Mexican trucks in 2000, it estimated that 35 percent

of Mexican trucks were put out of service due to significant safety violations, compared to a national average of 25 percent.<sup>342</sup> But these statistics have improved. More than 40 percent of Mexican trucks that were inspected were taken out of service in 1997-98, compared with 25 percent for U.S. trucks and 17 percent for Canadian trucks. In 1995, 54 percent of Mexican trucks were pulled out of service.<sup>343</sup>

By 2001, some 184 Mexican trucking companies had applied to transport goods in the United States.<sup>344</sup> Applications from 190,000 trucks were waiting to be processed.<sup>345</sup> But several safety issues required resolution:

- Road sign standardization;
- Drug and alcohol testing procedures;
- Medical examinations;
- Safety inspection and inspector training standards; and
- Database of Mexican trucking companies.<sup>346</sup>

<sup>335</sup> Alexandra Walker, *No Easy Solutions to Mexican Truck Safety Issues*, STATES NEWS SERVICE (Feb. 22, 2001).

<sup>336</sup> Daniel McCosh, *Mexico Talk Trucks*, J. COM. (Mar. 22, 2001).

<sup>337</sup> Steven Greenhouse, *Bush to Open Country to Mexican Truckers*, N.Y. TIMES, Feb. 7, 2001, at A12.

<sup>338</sup> Robert Collier, *Long-Distance Haulers are Headed into U.S. Once Bush Opens Borders*, S.F. CHRON., Mar. 4, 2001, at A1.

<sup>339</sup> *Mexico's Truckers Detoured By Legal, Safety Barriers*, TULSA WORLD, Mar. 4, 2001.

<sup>340</sup> Collier, *supra* note 338, at A1.

<sup>341</sup> Charlene Oldham, *U.S. Aid Sought for Truck Inspections*, DALLAS MORNING NEWS, Mar. 6, 2001, at 1D.

<sup>342</sup> TULSA WORLD, *supra* note 339; *Unions Aim to Block Trucks*, USA TODAY, Mar. 13, 2001, at 11A.

<sup>343</sup> Brendon Case, *Mexican Truckers Challenge Image*, DALLAS MORNING NEWS, Mar. 7, 2001, at 1D.

<sup>344</sup> Ciro Rodriguez, *Safety on the NAFTA Superhighway* (Congressional Press Release, Feb. 17, 2001).

<sup>345</sup> Diane Lindquist, *Driving Controversy: NAFTA and Mexico's Trucks*, COPLEY NEWS SERVICE, Feb. 12, 2001.

<sup>346</sup> TULSA WORLD, *supra* note 339.

Table 4 summarizes the differences in the regulatory regimes at the time of the arbitration decision:

<b>TABLE 4—TRUCK AND DRIVER SAFETY REQUIREMENTS<sup>347</sup></b>		
<b>SAFETY STANDARDS</b>	<b>UNITED STATES</b>	<b>MEXICO</b>
Hours of Service	10 hours consecutive driving; 15 hours consecutive duty; 8 hours consecutive rest; maximum 70 hours driving in 8 days	No
Licensure	2 to 6 years	10 years
Age of Driver	21 years minimum interstate	18 years old
Skills Test	Yes, for all drivers	Yes, for new drivers
Medical Card	Yes	No—medical qualifications on license
Automatic Medical Dis- qualification	Yes	No
National Monitoring System	Yes, to detect violations	Information system in infancy
Drug Testing	Testing and documentation	Documentation lax
Logbooks	Standardized logbooks with date graphs required	Standardized logbooks in dif- ferent format, unenforced
Gross Vehicle Weight Limits	80,000 lb	135,360 lb
Roadside Inspections	Yes	Discontinued; new program to be phased in over 2 years
Out-of-Service Rules	Yes	New program to be phased in over 2 years
Hazmat Regulation	Strict standards, training, licen- sure, and inspections	Covers fewer chemicals and substances and has fewer licen- sure requirements
Vehicle Standards	Standards for antilock brakes, un- derride guards, night visibility of ve- hicle	Voluntary inspections
Safety Rating System	Yes	No

<sup>347</sup> Robert Collier, *Mexico's Trucks on Horizon*, S.F. CHRON., Mar. 4, 2001, at A1.

Only 50 federal motor carrier safety inspectors were then assigned to police the entire U.S.–Mexican border. Texas has only 353 inspectors, and the state legislature has denied the Department of Public Safety’s request for 171 more.<sup>348</sup> In May 2001, the U.S. DOT inspector general reported that the FMCSA was inadequately staffed to handle the influx of Mexican drivers and vehicles.<sup>349</sup>

President Bush proposed spending \$88 million for new truck inspectors and stations, and threatened to veto legislation that would delay implementing the NAFTA provisions allowing Mexican trucks to operate on U.S. highways. Meanwhile, U.S. DOT Secretary Norman Mineta anticipated that the administration’s January 1 deadline for the entry of Mexican trucks into the United States might have to be postponed. Final U.S. DOT rules governing the issue were anticipated to be released in September 2001; they would insure that Mexican trucking companies satisfy the same safety, driver training, licensing, insurance, and drug-testing requirements as those imposed on U.S. and Canadian companies.<sup>350</sup> The President finally lifted the moratorium on Mexican motor carriers in November 2002, after which FMCSA issued governing safety regulations. Mexican carriers are under special certification requirements.<sup>351</sup>

In 2004, in *DOT v. Public Citizen*,<sup>352</sup> the U.S. Supreme Court held that the FMCSA did not violate NEPA by failing to consider environmental consequences of Mexican trucks entering the United States.<sup>353</sup> SAFETEA-LU requires the FMCSA to conduct a study “to determine the degree to which Canadian and Mexican commercial motor vehicles, including motor carriers of passengers...comply with the Federal motor vehicle safety standards.”<sup>354</sup> Also in 2004, a federal district court held it lacked subject matter jurisdiction to entertain tort claims against the United States brought by aggrieved Mexican motor carriers unable to penetrate the U.S. transportation market as promised under NAFTA.<sup>355</sup> NAFTA explicitly prohibits any person from filing suit to challenge “any action or inaction by any department, agency, or other instrumentality of the United States...on the ground that such action or inaction is inconsistent with...NAFTA.”<sup>356</sup>

<sup>348</sup> Molly Ivins, *NAFTA Trucks Are in Traffic Jam*, DES MOINES REGISTER, Aug. 21, 2001, at 7.

<sup>349</sup> *Teamsters Use DOT Facts*, FT. LAUDERDALE SUN-SENTINEL, Aug. 20, 2001, at 20A.

<sup>350</sup> David Hendricks, *U.S. May Delay Mexican Trucks*, SAN ANTONIO EXPRESS-NEWS, Aug. 23, 2001, at 1A.

<sup>351</sup> 49 C.F.R. § 365.101(h).

<sup>352</sup> 541 U.S. 752, 124 S. Ct. 2204, 159 L. Ed. 2d 60 (2004).

<sup>353</sup> See generally Paul Dempsey, *Free Trade But Not Free Transport: The Mexican Standoff*, 30 DENV. J. INT’L L. & POL’Y 91 (2002).

<sup>354</sup> SAFETEA-LU sec. 4139, amending 49 U.S.C. § 31100 note.

<sup>355</sup> *Lopez v. United States*, 309 F. Supp. 2d 22 (D.D.C. 2004).

<sup>356</sup> 19 U.S.C. § 3312(c).

### 3. Federal Motor Vehicle Safety Standards

Congress has passed a number of laws requiring that motor vehicles be designed and fitted with safety devices.<sup>357</sup> These statutes, and the regulations promulgated thereunder, include requirements that vehicles be equipped with bumpers<sup>358</sup> having certain specifications. Also required, for consumer protection reasons, are laws requiring odometers and prohibiting tampering therewith.<sup>359</sup>

Examples of such safety requirements are seat belt and air bag requirements. Seat belt requirements were first imposed by NHTSA in 1967. Originally, seat belts were required to be installed in all automobiles.<sup>360</sup> In 1972, NHTSA amended the regulations to require full passive protection of front seat occupants for automobiles manufactured after August 15, 1975.<sup>361</sup> Between August 1973 and 1975, manufacturers were given the option of either installing a passive restraint system such as seatbelts or airbags or installing seatbelts with an interlock ignition device to prohibit the car from starting if the seat belts are not buckled.<sup>362</sup> The unpopularity of these requirements with drivers led Congress to pass the Motor Vehicle and School Bus Safety Amendments of 1974,<sup>363</sup> which forbade NHTSA from imposing them. The statute required that any seat belt standard had to be submitted to Congress prior to its effective date, and that Congress might veto the standard by a concurrent resolution of both Houses.<sup>364</sup>

In 1976, NHTSA suspended the passive restraint requirement, and substituted therefore a demonstration plan involving up to half a million automobiles with passive restraints. However, the following year, the demonstration project was terminated, and passive restraint requirements were pushed back to 1982 for large vehicles, and to 1984 for all vehicles.<sup>365</sup> These amendments were challenged before the U.S. Supreme Court, which concluded that NHTSA had failed to pro-

<sup>357</sup> See, e.g., 49 U.S.C. §§ 30122–30147; 49 C.F.R. pt. 571. See, e.g., Stephen Holley, *The Relation Between Federal Standards and Litigation in the Control of Automobile Design*, 57 N.Y.U. L. REV. 804 (1982); Jerry Marshaw & David Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 YALE J. ON REG. 257 (1987); Joan Claybrook & David Bollier, *The Hidden Benefits of Regulation: Disclosing the Auto Safety Payoff*, 3 YALE J. ON REG. 87 (1985); McDonald, *supra* note 61, at 1163.

<sup>358</sup> 49 U.S.C. § 32502.

<sup>359</sup> 49 U.S.C. § 32705. See *Mitchell v. White Motor Credit Corp.*, 627 F. Supp. 1241 (M.D. Tenn. 1986).

<sup>360</sup> 49 C.F.R. § 571.208.

<sup>361</sup> 37 Fed. Reg. 3911 (1972).

<sup>362</sup> 37 Fed. Reg. 3911 (1972); Samuel Elswick, *Geier v. American Honda Motor Company: Airbags, Federal Preemption, and the Viability of a Regulatory Compliance Defense*, 28 N. KY. L. REV. 135, 138 (2001).

<sup>363</sup> Pub. L. No. 93-492, 88 Stat. 1482.

<sup>364</sup> Elswick, *supra* note 362, at 135, 138.

<sup>365</sup> 42 Fed. Reg. 34,289 (1977).

vide clear and convincing reasons why it abandoned rules requiring new cars to have seat belts; remanded to reconsider rules.<sup>366</sup>

In 1984, the rules were again amended, requiring a gradual phase-in of passive restraints in three annual stages, whereby all new automobiles would have automatic occupant crash protection after September 1, 1989.<sup>367</sup> The rules gave manufacturers the option to install airbags, automatic seat belts, or other passive restraint technologies.<sup>368</sup> All automobiles manufactured after September 1, 1997, were required to have an airbag at the driver and front passenger positions.<sup>369</sup> Under current law, all passenger vehicles manufactured after October 31, 1997, must have an airbag at the driver and front passenger positions.<sup>370</sup>

U.S. DOT has promulgated regulations addressing safety requirements for CMVs.<sup>371</sup> Motor carriers must conform to FMCSA regulations addressing motor vehicle inspection, maintenance, and repair.<sup>372</sup>

#### 4. Notification and Recalls

The National Traffic and Motor Vehicle Safety Act of 1966 requires vehicle manufacturers to notify both NHTSA and owners when their vehicles possess a safety-related defect, and then to remedy those defects at no charge to the owners (also known as the “notification and remedy duty”).<sup>373</sup> A “defect” is “any defect in performance, construction, a component, or material of

a motor vehicle or motor vehicle equipment,” and a “safety-related” defect is one that presents an “unreasonable risk of accidents.”<sup>374</sup> The U.S. DOT Secretary holds broad power to investigate, to order the manufacturer to take remedial action, and to bring an enforcement action in federal court.<sup>375</sup>

The Transportation Recall Enhancement, Accountability, and Documentation Act of 2000<sup>376</sup> imposes new reporting requirements.<sup>377</sup> A manufacturer of a vehicle or replacement equipment must notify NHTSA if it “Learns the vehicle or equipment contains a defect and decides in good faith that the defect is related to motor vehicle safety.”<sup>378</sup> A manufacturer must submit to NHTSA all “notices, bulletins, and other communications...regarding any defect of its vehicles or items of equipment (including any failure or malfunction beyond normal deterioration in use, or any failure of performance, or flaw or unintended deviation from design specifications), whether or not such defect is safety related.”<sup>379</sup>

## G. SAFETY REGULATION—PERSONNEL REQUIREMENTS

### 1. Driver Fitness and Testing Requirements

No person may operate a CMV without a properly authorized CDL.<sup>380</sup> The U.S. DOT prescribes CMV driver fitness and testing requirements.<sup>381</sup> The FHWA promulgated regulations requiring that operators of CMVs have a CDL in 1992.<sup>382</sup>

CDLs are issued by states<sup>383</sup> under minimum uniform standard regulations<sup>384</sup> promulgated by U.S. DOT re-

<sup>366</sup> Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 103 S. Ct. 2856, 77 L. Ed. 29 443 (1983).

<sup>367</sup> 49 Fed. Reg. 28,962 (July 17, 1984).

<sup>368</sup> *Id.* Elswick, *supra* note 362, at 135, 139–40.

<sup>369</sup> 49 C.F.R. § 571.208.

<sup>370</sup> 49 C.F.R. § 571.208. 49 C.F.R. pt. 571; final rule published at 69 Fed. Reg. 51598 (Aug. 20, 2004). *See* U.S. GEN. ACCOUNTING OFFICE, MOTOR VEHICLE SAFETY: COMPREHENSIVE STATE PROGRAMS OFFER BEST OPPORTUNITY FOR INCREASING USE OF SAFETY BELTS (1996); Patrick Norton, *What Happens When Air Bags Kill: Automobile Manufacturers’ Liability for Injuries Caused by Air Bags*, 48 CASE W. RES. L. REV. 659 (1998); Lauren Pacelli, *Asleep at the Wheel of Auto Safety? Recent Air Bag Regulations by the National Highway Traffic Safety Administration*, 15 J. CONTEMP. HEALTH L. & POL’Y 739 (1999); Public Citizen v. Nat. Highway Traffic Safety Admin., 374 F.3d 1251 (D.C. Cir. 2004) (air bag regulations reasonable).

<sup>371</sup> In 1993, FHWA promulgated regulations banning the use of radar detectors in CMVs. Radio Ass’n on Defending Airwave Rights v. U.S. Dep’t of Trans., 47 F.3d 794, 800 (6th Cir. 1995). More recently, the U.S. DOT issued a notice of proposed rulemaking announcing the potential requirement of event data recorders aboard CMVs in 69 Fed. Reg. 32932 (June 14, 2004), which would create a new 49 C.F.R. pt. 563.

<sup>372</sup> 49 U.S.C. § 31142; 49 C.F.R. pt. 396. *See* RICHARD JONES, APPLICATION OF THE FOURTH AMENDMENT TO THE INSPECTION OF COMMERCIAL MOTOR VEHICLES AND DRIVERS (NCHRP Legal Research Digest No. 43, 2000).

<sup>373</sup> 49 U.S.C. § 30118(c).

<sup>374</sup> 49 U.S.C. § 30102(a)(8).

<sup>375</sup> 49 U.S.C. § 30163-66.

<sup>376</sup> Pub. L. No. 106-414, 114 Stat. 1800.

<sup>377</sup> *See* Note, Eric McCallum, *Rearranging the Deck Chairs on the Titanic: Will the Early Warning Requirement Required by the TREAD Act Uncover Deadly Defects Soon Enough?*, 44 ARIZ. L. REV. 939 (2002); McDonald, *supra* note 61, at 1163, 1187–88.

<sup>378</sup> 49 U.S.C. § 30188(c)(2).

<sup>379</sup> 49 C.F.R. § 573.8. *See* Kevin McDonald, *Judicial Review of NHTSA-Ordered Recalls*, 47 WAYNE L. REV. 1301 (2002); Teresa Schwartz & Robert Adler, *Product Recalls: A Remedy in Need of Repair*, 34 CASE W. RES. L. REV. 401 (1984); U.S. GEN. ACCOUNTING OFFICE, MOTOR VEHICLE SAFETY: NHTSA’S ABILITY TO DETECT AND RECALL DEFECTIVE REPLACEMENT CRASH PARTS IS LIMITED (2001).

<sup>380</sup> 49 U.S.C. § 31302.

<sup>381</sup> Commercial driver fitness and testing requirements are set forth in 49 U.S.C. § 31305; 49 C.F.R. pt. 391.

<sup>382</sup> *Sys. Bd. 46 v. Burlington N. R.R. Co.*, 838 F. Supp. 1342 (D. Minn. 1993).

<sup>383</sup> 49 U.S.C. § 31301(3); 49 C.F.R. pt. 384.

<sup>384</sup> Registration requirements are set forth in 49 U.S.C. § 30302. State compliance obligations are set forth in 49 C.F.R. pt. 384.

quiring written and driving tests ensuring that the operator understands applicable U.S. DOT safety regulations<sup>385</sup> and has adequate physical qualifications for the position.<sup>386</sup> A passenger driver must pass a specific knowledge<sup>387</sup> and skills<sup>388</sup> test in order to secure a “P” (passenger) endorsement on his or her CDL.<sup>389</sup> An individual may hold only a single CDL. Typically, the states issue different classes of drivers’ licenses depending upon vehicle size and weight.<sup>390</sup>

Once licensed, CMV drivers must notify their employer of violations of state or local motor vehicle laws; driver’s license suspension, revocation, or cancellation; and any previous employment as a CMV operator.<sup>391</sup> The carrier may not knowingly allow its drivers to operate a CMV while their CDLs are suspended, revoked, or cancelled, or when they have lost the right to operate a CMV in a state, have been disqualified from operating a CMV, or have more than a single driver’s license.<sup>392</sup>

The U.S. DOT maintains a clearinghouse and depository of information about the licensing, identification, and disqualification of CMV operators.<sup>393</sup> Under its National Driver Register program, states must notify U.S.

<sup>385</sup> 49 U.S.C. §§ 31305(a), 31308. 49 C.F.R. § 383.71. 49 C.F.R. pt. 393.

<sup>386</sup> 49 C.F.R. pts. 383, 391.

<sup>387</sup> 49 C.F.R. § 393.111 app. A. The general knowledge test is comprised of at least 30 questions, and the applicant must answer 80 percent of them correctly.

<sup>388</sup> 49 C.F.R. § 383.113 app. B. The applicant must also pass a skills test in a vehicle of the type he or she is expected to operate.

<sup>389</sup> Motor Carrier Safety Improvement Act of 1999 § 214 created a special CDL school bus endorsement.

<sup>390</sup> There are three classes of vehicles that require a North Carolina CDL:

*Commercial Class A*—Any combination of vehicles with a gross vehicle weight rating (GVWR) of 26,001 lb or more, provided the GVWR of the vehicle or vehicles being towed is in excess of 10,000 lb.

*Commercial Class B*—Any single vehicle with a GVWR of 26,001 lb or more, and any such vehicle towing a vehicle not in excess of 10,000 lb.

*Commercial Class C*—Any vehicle not described in Class A or B above but is:

- Designed to transport 16 or more passengers, including the driver; or
- Used in the transportation of hazardous materials that require the vehicle to be placarded under C.F.R. pt. 172, subpt. F.

[http://www.ncdot.org/dmv/driver\\_services/commercialtrucking/requirements.html](http://www.ncdot.org/dmv/driver_services/commercialtrucking/requirements.html). For the requirements for a CMV drivers’ license in Michigan, see [http://www.michigan.gov/documents/Section\\_1\\_-\\_Introduction\\_109896\\_7.pdf](http://www.michigan.gov/documents/Section_1_-_Introduction_109896_7.pdf). For Minnesota’s, see <http://www.dps.state.mn.us/dvs/Commercial%20Drv/cdlmanual.pdf>.

<sup>391</sup> 49 U.S.C. § 31303.

<sup>392</sup> 49 U.S.C. § 31304.

<sup>393</sup> 49 U.S.C. §§ 31106, 31309(a).

DOT of any individual who is denied a motor vehicle operator’s license, or has had it revoked, for cause, or who is convicted of operating a motor vehicle under the influence of alcohol or a controlled substance; for being involved in a fatal traffic accident, reckless driving, or racing on the highways; for failing to give aid or information when involved in an accident resulting in death or personal injury; or for engaging in perjury or knowingly making a false affidavit or statement to officials regarding activities governed by law involving the operation of a motor vehicle.<sup>394</sup>

The ICC first promulgated regulations requiring “good eyesight in both eyes either without glasses or by correction with glasses”<sup>395</sup> in 1937. In 1939, the regulations were amended to require 20/40 (Snellen) in one eye, and 20/100 (Snellen) in the other. They were amended again in 1952 to require 20/40 (Snellen) in each eye, either corrected or uncorrected.<sup>396</sup> In 1964, requirements were added for “field of vision” and ability to distinguish colors.<sup>397</sup> Today, the regulations require that commercial truck drivers have visual acuity of at least 20/40 in each eye, have a field of vision of at least 70 degrees, and not be color blind.<sup>398</sup> In 1992, the FHWA began a program of waiver issuance for visually impaired drivers who failed to meet the vision requirements but had a history of operating a CMV.<sup>399</sup> Waivers may be granted so long as they are “consistent with the public interest and safe operation of motor vehicles.”<sup>400</sup> The FHWA may grant a waiver to vision requirements if it would likely “achieve a level of safety that is equivalent to, or greater than, the level of safety that would be obtained in the absence of the waiver.”<sup>401</sup>

Motor carriers and their employees must comply with the FMCSA regulations.<sup>402</sup> Section 4007 of ISTEA directed the U.S. DOT to promulgate safety regulations for entry-level training of drivers in the heavy truck, motor coach, and school bus industries.<sup>403</sup> SAFETEA-LU established a grant program to train CMV operators in the safe use of such vehicles.<sup>404</sup> No one may operate a

<sup>394</sup> 49 U.S.C. § 30304(a).

<sup>395</sup> 49 C.F.R. § 192.3 (1938).

<sup>396</sup> 17 Fed. Reg. 4424 (1952).

<sup>397</sup> *Rauenhorst v. U.S. Dep’t of Transp.*, 95 F.3d 715, 719 (8th Cir. 1996).

<sup>398</sup> 49 C.F.R. § 391.41(b).

<sup>399</sup> 57 Fed. Reg. 23370 (June 3, 1992). *Rauenhorst v. U.S. Dep’t of Transp.*, 95 F.3d 715, 716 (8th Cir. 1996); *Buck v. U.S. Dep’t of Transp.*, 56 F.3d 1406, 1409 (D.C. Cir. 1995).

<sup>400</sup> 49 U.S.C. § 31136.

<sup>401</sup> 49 U.S.C. § 31315.

<sup>402</sup> U.S.C. §§ 31131, 31135.

<sup>403</sup> 49 C.F.R. pt. 380.

<sup>404</sup> SAFETEA-LU sec. 4134, amending 49 U.S.C. § 31301 note. Driver training requirements are set forth in 49 C.F.R. pt. 380. See 69 Fed. Reg. 29384 (May 21, 2004).

In March [2006], FMCSA published a Final Rule to implement the SAFETEA-LU provision concerning school bus driver qualifications. As a result, States that had not previously

CMV in interstate commerce without a valid CDL issued pursuant to federal regulations.<sup>405</sup>

Several cases have addressed various physical requirements of drivers and the issue of whether the failure to grant waivers thereto constitutes arbitrary and capricious agency conduct.<sup>406</sup> In *Rauenhorst v. Department of Transportation*,<sup>407</sup> the U.S. Court of Appeals for the Eighth Circuit held that “until the administrative standards for waivers to monocular drivers is revised to reflect the current knowledge the administrator must grant separate, individually tailored waivers.”<sup>408</sup>

In *Anderson v. Department of Transportation*,<sup>409</sup> that same Circuit addressed the failure of the FHWA to grant a waiver to a driver who had suffered a retinal detachment that resulted in the total loss of vision in that eye. Though he was granted a waiver from the State of Minnesota to operate as a commercial driver in intrastate commerce, the FHWA denied him a waiver, concluding that at least 3 years of driving with the impairment are required before a waiver will be granted. The Eighth Circuit concluded that the denial was not arbitrary and capricious because (1) it takes time for a person with a vision deficiency to recover from that deficiency; (2) the best predictor of future performance of a driver is his past record of accidents and violations; and (3) the 3-year standard conforms to the longest period of time that states uniformly maintain driving records.<sup>410</sup>

But FHWA fared worse in the Sixth Circuit, where its denial of a waiver was deemed arbitrary and capricious. In *Parker v. Department of Transportation*,<sup>411</sup> the court addressed FHWA’s denial of a waiver to Jerry Parker, who suffered from monocular vision and was missing part of his left arm. Parker proved he had driven more

than 1.2 million mi safely in a CMV over several years. Despite his stellar driving record, the FHWA denied him a waiver on grounds that there was insufficient evidence that someone with multiple impairments (here, vision and amputation) could operate a CMV with the same degree of safety as an unimpaired driver.<sup>412</sup> The FHWA argued that it has insufficient data on the performance of drivers with multiple disabilities to determine whether a person having them would achieve an equal or greater level of safety than if the waiver was denied, as the statute requires.<sup>413</sup> The court concluded:

By failing to assess Parker’s actual capabilities, the DOT has in essence created a per se rule against granting vision waivers to individuals with multiple disabilities, thereby limiting such individuals’ employment opportunities. This stands in direct contradiction to the goals and purpose of the rehabilitation Act which is to provide equal opportunities for disabled individuals, including assisting such individuals with substantial employment.<sup>414</sup>

## 2. Employee Health and Medical Standards

The U.S. DOT establishes minimum health and medical standards for drivers of CMVs<sup>415</sup> and also prescribes alcohol and controlled substances testing requirements.<sup>416</sup> In 1988, FHWA promulgated drug testing requirements for CMV drivers, to be administered prior to employment, biennially, randomly, upon reasonable cause to believe a driver has used a controlled substance, and immediately after an accident.<sup>417</sup> The purpose of the regulations was “to detect and deter the use of drugs by bus and truck drivers.”<sup>418</sup> FHWA concluded that “the clear public interest in assuring that commercial motor vehicle drivers perform their duties free of prohibited substances”<sup>419</sup> outweighed the individual interest in privacy.

In 1994, the U.S. DOT and several of its operating administrations, including FHWA, promulgated regulations implementing the requirements of the Omnibus Transportation Employee Testing Act of 1991.<sup>420</sup> The Testing Act required regulations that imposed obliga-

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adopted rules to satisfy FMCSA’s requirement for certain testing of applicants for a school bus endorsement were provided with additional time to achieve compliance with the Federal CDL standards. On May 2, [2006,] FMCSA announced its plans in the Federal Register to modernize the Commercial Driver’s License Information System (CDLIS) in response to SAFETEA-LU.

<http://testimony.ost.dot.gov/test/Capka1.htm>.

<sup>405</sup> 49 U.S.C. §§ 31302–31304. Motor Carrier Safety Improvement Act of 1999 § 204 required background checks before issuance of driver’s licenses.

<sup>406</sup> Vision requirements and waivers therefrom have been addressed in *Anderson v. USDOT*, 213 F.3d 422 (8th Cir. 2000); *Parker v. USDOT*, 207 F.3d 359 (6th Cir. 2000); and *Rauenhorst v. USDOT*, 95 F.3d 715 (8th Cir. 1996). Colorblindness was addressed in *Shannon v. N.Y. City Transit Auth.*, 189 F. Supp. 2d 55 (S.D.N.Y. 2002). Hearing requirements and waivers therefrom were addressed in *Buck v. USDOT*, 312 U.S. App. D.C. 56 F.3d 1406 (D.C. Cir. 1995).

<sup>407</sup> 95 F.3d 715 (8th Cir. 1996).

<sup>408</sup> *Id.* at 723.

<sup>409</sup> 213 F.3d 422 (8th Cir. 2000).

<sup>410</sup> *Id.* at 424.

<sup>411</sup> 207 F.3d 359 (6th Cir. 2000).

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<sup>412</sup> *Id.* at 362.

<sup>413</sup> *Id.* at 362–63.

<sup>414</sup> *Id.* at 363.

<sup>415</sup> 49 U.S.C. §§ 31305 note, 31502; 49 C.F.R. §§ 383, 384, 391; 49 C.F.R. pt. 399. Motor Carrier Safety Improvement Act of 1999 § 215 (Medical certificate).

<sup>416</sup> 49 U.S.C. § 31306. 49 C.F.R. pts. 40, 382.

<sup>417</sup> 49 C.F.R. §§ 391.81–391.23. *Owner-Operators Indep. Drivers Ass’n v. Skinner*, 931 F.2d 582, 584 (9th Cir. 1991).

<sup>418</sup> 53 Fed. Reg. 47,151 (Nov. 21, 1988).

<sup>419</sup> 53 Fed. Reg. at 47,317 (1988). These regulations were upheld in *Int’l Bhd. of Teamsters v. Dep’t of Transp.*, 932 F.2d 1292 (9th Cir. 1991).

<sup>420</sup> Pub. L. No. 102-143, 105 Stat. 951.

tions of preemployment, reasonable suspicion, random, and post-accident drug and alcohol testing of drivers.<sup>421</sup>

### 3. Operational Requirements

U.S. DOT prescribes maximum driving requirements.<sup>422</sup> Federal drivers' hours of service regulations first were imposed by the ICC in the late 1930s, and remained virtually unchanged until 2003, except for a significant amendment in 1962 that changed the 24-hour requirement from a noon-to-noon or midnight-to-midnight cycle to one that focused on minimum 8-hour off-duty periods.<sup>423</sup> Changes in the regulations promulgated in 2003 were struck down by the U.S. Court of Appeals for the D.C. Circuit because FMCSA failed to consider the impact of the rules on the health of drivers, as required by statute,<sup>424</sup> and therefore the rules were arbitrary and capricious.<sup>425</sup> The rules were readopted by the FMCSA in 2006.<sup>426</sup> They impose restrictions on driving, duty and off-duty time, a recovery period, and sleeping berths.<sup>427</sup>

## H. SECURITY AND HAZARDOUS MATERIALS REGULATION

### 1. Personnel Requirements

The TSA issues and administers the security regulations under Title 49 of the U.S. C.F.R.<sup>428</sup> As a part of its

<sup>421</sup> 59 Fed. Reg. 7302 (Feb. 15, 1994). These regulations were upheld in *Int'l Bhd. of Teamsters v. FHWA*, 312 U.S. App. D.C. 278, 56 F.3d 242 (D.C. Cir. 1995). They are discussed in detail in Dempsey, *supra* note 105 § 7-15.

<sup>422</sup> 49 U.S.C. § 31502. Driving requirements are set forth in 49 C.F.R. pt. 392.

<sup>423</sup> 70 Fed. Reg. 49978 (Aug. 25, 2005).

<sup>424</sup> 49 U.S.C. § 31136(a)(4).

<sup>425</sup> *Pub. Citizen v. FMCSA*, 374 F.3d 1209 (D.C. Cir. 2004) (failure of FMCSA to consider the health of drivers in promulgating duty time regulations violated the statute). *See* R. Clay Porter, *The Hidden Cost of Non-Compliance: Another Reason to Synchronize the Trucking Industry and the Hours of Service Regulations*, 2 *TRANSP. L.* 28 (Oct. 2002); James Flint, *Rooting Out Fatigue Isn't the Only Road to Improved Highway Safety*, 2 *TRANSP. L.* 24 (Dec. 2002).

<sup>426</sup> 70 Fed. Reg. 49978 (Aug. 25, 2005). 49 C.F.R. pt. 395.

<sup>427</sup> The courts have generally upheld such requirements. *See, e.g., A.D. Transp. Express v. United States*, 290 F.3d 761 (6th Cir. 2002) (requiring toll receipts to be maintained with individual drivers' records rather than stored in bulk was a reasonable requirement for verifying driver duty status).

<sup>428</sup> 49 C.F.R. pts. 1400–1699. *See, e.g.,* Transportation of Explosives from Canada to the United States via Commercial Motor Vehicle and Railroad Carrier, 68 Fed. Reg. 6083 (Feb. 6, 2003). Security Threat Assessment for Individuals Applying for a Hazardous Materials Endorsement for a Commercial Driver's License, 68 Fed. Reg. 23852 (May 5, 2003). Security Threat Assessment for Individuals Applying for a Hazardous Materials Endorsement for a Commercial Driver's License, 68 Fed. Reg. 63033 (Nov. 7, 2003). Security Threat Assessment for

Hazmat Threat Assessment Program mandated under the USA PATRIOT Act,<sup>429</sup> the TSA requires that applicants who seek an HME on their state-issued CDL submit to fingerprinting and the submission of biographical information.<sup>430</sup> Applicants must undergo a security threat assessment,<sup>431</sup> which includes an FBI criminal history check, an intelligence-related check, and an immigration status verification.<sup>432</sup> States may not issue an HME without approval from TSA that the individual does not pose a security threat, and must revoke any HME issued whenever TSA informs the state that the individual fails a security threat assessment.<sup>433</sup>

### 2. Hazardous Materials Transportation

Comprehensive federal regulations govern the movement of hazardous materials transportation.<sup>434</sup> Federal hazardous materials transportation law was enacted "to provide adequate protection against the risks to life and

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Individuals Applying for a Hazardous Materials Endorsement for a Commercial Driver's License, 69 Fed. Reg. 17969 (April 6, 2004). Hazardous Materials: Enhancing Hazardous Materials Transportation Security, 68 Fed. Reg. 23832 (May 5, 2003), Research and Special Programs Administration (RSPA). Limitations on the Issuance of Commercial Driver's Licenses with a Hazardous Materials Endorsement, 68 Fed. Reg. 23844 (May 5, 2003) (FMCSA).

<sup>429</sup> Section 1012 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act (Pub. L. No. 107-56, 115 Stat. 272) of 2001 amended 49 U.S.C. ch. 51 by adding a new § 5103a titled "Limitation On Issuance of Hazmat Licenses." Section 5103a(a)(1) provides that, "A State may not issue to any individual a license to operate a motor vehicle transporting in commerce a hazardous material unless the Secretary of Transportation has first determined, upon receipt of a notification under subsection (c)(1)(B), that the individual does not pose a security risk warranting denial of the license." FMCSA and TSA share responsibility for implementing § 1012 of the USA PATRIOT Act. *See* Security Threat Assessment for Individuals Applying for a Hazardous Materials Endorsement for a Commercial Drivers License—Final Rule, 69 Fed. Reg. 17969 (Apr. 6, 2004); 68 Fed. Reg. 23844 (May 5, 2003).

<sup>430</sup> 49 C.F.R. pt. 1570. *See* 14 C.F.R. pt. 1572—Credentialing and Background Checks for Maritime and Land Transportation Security.

<sup>431</sup> These rules were adopted at 68 Fed. Reg. 23852 (May 5, 2003).

<sup>432</sup> [http://www.tsa.gov/public/interapp/editorial/editorial\\_multi\\_image\\_with\\_table\\_0219.xml](http://www.tsa.gov/public/interapp/editorial/editorial_multi_image_with_table_0219.xml) (visited Dec. 17, 2005). Immigration status requirements are set forth in 49 C.F.R. § 1572.105. Disqualifying criminal offenses are set forth in 49 C.F.R. § 1572.103. *See* Security Threat Assessment for Individuals Applying for a Hazardous Materials Endorsement for a Commercial Driver's License, 68 Fed. Reg. 23852 (May 5, 2003).

<sup>433</sup> 49 C.F.R. § 1472.13.

<sup>434</sup> *See, e.g.,* Hazardous Materials Transportation; Driving and Parking—49 C.F.R. pt. 397.

property inherent in the transportation of hazardous material in commerce.<sup>435</sup> The FMCSA is responsible for implementing Section 5105(e), addressing inspections of motor vehicles transporting certain material; Section 5109, addressing issuance of motor carrier safety permits for the transportation of hazardous materials; and Section 5119, addressing uniform forms and procedures.<sup>436</sup>

Hazardous materials may not be moved without a U.S. DOT safety permit.<sup>437</sup> Permits are required for the movement of the following commodities:

- *Radioactive Materials*: A highway route-controlled quantity of Class 7 material;<sup>438</sup> and
- *Explosives*: More than 25 kg (55 lb) of a Division 1.1, 1.2, or 1.3 material, or an amount of a Division 1.5 material requiring a placard.<sup>439</sup>

- *Toxic by Inhalation Materials*:

- a. *Hazard Zone A*: More than 1 L (1.08 qt) per package of a "material poisonous by inhalation," that meets the criteria for "hazard zone A." 49 C.F.R. §§ 171.8, 173.116(a), 173.133(a).

- b. *Hazard Zone B*: A "material poisonous by inhalation," as defined in 49 C.F.R. § 171.8, that meets the criteria for "hazard zone B," as specified in 49 C.F.R. §§ 173.116(a), 173.133(a) in bulk packaging (capacity greater than 450 L (119 gal)).

- c. *Hazard Zones C and D*: A "material poisonous by inhalation," as defined in Section 171.8 of this title, that meets the criteria for "hazard zone C," or "hazard zone D," as specified in 49 C.F.R. § 173.116(a), in a packaging having a capacity equal to or greater than 13,248 L (3,500 gal).

- *Methane*: A shipment of compressed or refrigerated liquid methane or natural gas or other liquefied gas with a methane content of at least 85 percent in a bulk packaging having a capacity equal to or greater than 13,248 L (3,500 gal) for liquids or gases.

Part 177 of the Hazardous Materials Regulations<sup>440</sup> requires that motor carriers that transport hazardous materials comply with Part 383 of the FMCSRs, which

establish CDL requirements.<sup>441</sup> TSA published regulations to establish procedures for making determinations as to whether an individual poses a security threat warranting denial of a hazardous materials endorsement for a CDL.<sup>442</sup> Part 383 sets forth CDL requirements. FMCSA amended Part 383 to prohibit states from issuing a CDL with an HME unless the Attorney General has conducted a background records check of the applicant and TSA has determined that the applicant does not pose a security threat warranting denial of the HME.<sup>443</sup> Special regulations have been promulgated addressing motor vehicle transportation to and from Canada and Mexico.<sup>444</sup>

## I. OTHER MOTOR VEHICLE REGULATORY REQUIREMENTS

Beyond the general requirements of NEPA, which govern all major federal actions significantly impacting the quality of the human environment,<sup>445</sup> a number of specific federal environmental statutes have targeted the automobile and other motor vehicles. The Clean Air Act requires states to adopt federal environmental standards for motor vehicle emissions, unless they adopt the more stringent California standards.<sup>446</sup> Fuel

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<sup>441</sup> See Interim Final Rule: Limitations on the Issuance of Commercial Driver's Licenses with a Hazardous Materials Endorsement, 68 Fed. Reg. 23844 (May 5, 2003), FMCSA; Interim Final Rule: Hazardous Materials: Enhancing Hazardous Materials Transportation Security, 68 Fed. Reg. 23834 (May 5, 2003) (RSPA).

<sup>442</sup> 68 Fed. Reg. 23851 (May 5, 2003).

<sup>443</sup> See the interim final rule at 68 Fed. Reg. 23844 (May 5, 2003).

<sup>444</sup> See Interim Final Rule: Transportation of Explosives from Canada to the United States via Commercial Motor Vehicle and Railroad Carrier, 68 Fed. Reg. 6083 (Feb. 6, 2003); Jan Morris & Marc McClean, *Explosives Transportation Security: US/Canada Immigration Issues*, 4 TRANSP. L. 19 (Feb. 2003); Notification Requirements of the U.S. Bureau of Customs and Border Protection and FDA; Mark Andrews, *Logistical Impacts of the "Bioterror" Rules Issued by the U.S. Food and Drug Administration*, 5 TRANSP. L. 35 (Feb. 2004); Richard Furman, *Advance Filing of Manifests: Customs' New Cargo Security Initiative*, 4 TRANSP. L. 20 (Feb. 2003); Richard Furman, *Advance Filing of Customs Manifests, The Twenty-Four Hour Rule Updated*, 4 TRANSP. L. 16 (Apr. 2003).

<sup>445</sup> Because these general environmental requirements have been extensively explored elsewhere, they are not discussed here. For a comprehensive examination of federal environmental law in the transportation context, see Dempsey, *supra* note 105 § 3.

<sup>446</sup> 42 U.S.C. § 7543. For a good description of the Clean Air Act and its amendments, see *Motor Vehicle Mfrs Ass'n v. N.Y. State Dep't of Env'tl. Conservation*, 79 F.3d 1298 (2d Cir. 1996). The case discussed whether New York could adopt a requirement for a fixed percentage of zero emission automobiles, and whether it could adopt emission standards without adopting clean fuel requirements.

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<sup>435</sup> 49 U.S.C. § 5101.

<sup>436</sup> See John Ruhl, *Federal Liability for Transporters of Hazardous Waste*, 18 TRANSP. L.J. 1 (1989).

<sup>437</sup> 49 U.S.C. § 5109.

<sup>438</sup> 49 C.F.R. § 173.403; Steven Goldberg, *State Nuclear Transportation Routing Laws*, 18 TRANSP. L.J. 15 (1989). Special licensing requirements for the transportation of hazardous and radioactive materials are set forth in 49 U.S.C. §§ 5103a, 5105, 5108, 5110, 5112.

<sup>439</sup> 49 C.F.R. pt. 172 subpt. F. However, farmers are exempted on the transportation of ammonia nitrate for distances up to 150 mi.

<sup>440</sup> 49 C.F.R. pt. 177. See also 49 C.F.R. pt. 1570: Land Transportation Security.



economy standards for motor vehicles are prescribed by U.S. DOT.<sup>447</sup> Noise emission standards for interstate motor carriers have been promulgated by the U.S. EPA.<sup>448</sup>

Congress has also mandated disclosure requirements on the transfer of motor vehicles,<sup>449</sup> and theft prevention requirements.<sup>450</sup> Since the emphasis of this study is on the programs administered by FHWA, they are only briefly mentioned here.

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<sup>447</sup> 49 U.S.C. § 32902; 68 Fed. Reg. 74931 (Dec. 29, 2003).

<sup>448</sup> 40 C.F.R. pt. 202; 49 C.F.R. pt. 325.

<sup>449</sup> 49 U.S.C. § 32705.

<sup>450</sup> Anti-Theft Car Act of 1992; 49 U.S.C. §§ 33103–33118; 49 C.F.R. pt. 541. National Stolen Passenger Motor Vehicle Information System; 28 C.F.R. pt. 8.