



October 12, 2017

VIA ELECTRONIC CORRESPONDENCE

The Honorable Elaine L. Chao  
Secretary, U.S. Department of Transportation  
1200 New Jersey Avenue, SE  
9<sup>th</sup> Floor  
Washington, DC 20590-9898

Dear Secretary Chao:

As a result of President Trump's Executive Orders, 13771 and 13777, the Office of Advocacy (Advocacy) has begun an effort to hear first-hand from small businesses across the country about specific federal regulatory burdens facing their businesses. As you know, under the Regulatory Flexibility Act (RFA), agencies are required to consider the impact of their regulations on small entities when promulgating federal regulations.<sup>1</sup> We believe the RFA and consideration of small business economic impacts is a good place to start when an agency is selecting rules that are being reviewed for reform or elimination.

We recently hosted roundtables in Baton Rouge and New Orleans, Louisiana; Boise and Coeur d'Alene, Idaho; Cincinnati, Cadiz, and Cleveland, Ohio; Lexington, Kentucky; St. Louis, Missouri; and Overland Park, Kansas. Advocacy also invited small businesses who could not attend the roundtables to submit their comments on Advocacy's website. Advocacy would like

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<sup>1</sup> Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The RFA, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives. 5 U.S.C. § 601 et seq.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy. The agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so. Small Business Jobs Act of 2010 (PL 111-240) § 1601.

to inform you of the specific concerns and regulations that we heard about from small businesses in these regions, and comments we received from our website.

## **Summary of Concerns from Roundtables and Website**

### **Federal Aviation Administration (FAA)**

- **Design and Production Approvals**

A small business representative from the aviation manufacturing industry complained about the difficulty and long delays his company has experienced in trying to obtain design and production approvals from FAA. He said his company finally went to the Europe Aviation Safety Agency (EASA) and paid the review fees to obtain its approval, and now FAA is taking an exceedingly long period of time to validate the European approval. He thinks both the FAA approval process and its validation approval process need significant reform.

### **Federal Motor Carrier Safety Administration (FMCSA)**

- **Compliance, Safety, Accountability (CSA), Safety Measurement System (SMS), and Carrier Safety Fitness Determination (CSFD)**

Small business representatives have complained that CSA and its SMS methodology are systematically flawed and cannot accurately predict the safety performance of individual motor carriers. Further, they said CSA/SMS is harming small businesses because some brokers are unwilling to use them, for fear of vicarious liability, if they are unrated or rated less than satisfactory. They also cited the National Academies of Science's criticism of the proposed CSFD methodology, and stated that even the recommended new Item Response Theory (IRP) model using new or different data points will not provide an accurate assessment of a carrier's safety performance. As an alternative, many small business representatives have suggested that FMCSA abandon this effort in favor of a biennial desktop audit of all carriers by FMCSA or third-party auditors based on criteria set by the agency.

- **Electronic Logging Devices (ELDs)**

Small business representatives have stated that FMCSA should delay the effective date of the ELD mandate because the ELD technology is inadequate and not properly certified by FMCSA (or a responsible third party), and because law enforcement has not properly been trained in the application and use of the technology. They also stated that FMCSA should reassess its economic analysis of the rule because its analysis does not accurately reflect the actual costs and benefits of the rule. Other small business representatives stated that FMCSA should exempt small businesses and allow them to maintain paper logs.

- Federal Railroad Administration (FRA)

### **Training, Qualification, and Oversight for Safety-Related Railroad Employees (49 CFR 243)**

Small business representatives complained that FRA’s training rule, which covers safety-related railroad employees and contractors, is redundant with other FRA training regulations. They also said it is unduly complicated, requires excessive documentation, and does not consider “on-the-job” training. They stated that the regulations – which are designed for large Class 1 railroads - needlessly require small railroads to train and document the same employee on multiple processes because the employees wear multiple hats, such as engineer, conductor, carman, and signal/track inspector in these small operations. They would like FRA to eliminate duplicative training requirements and allow greater flexibility for small railroads based on the size and complexity of the operation.

- **Positive Train Control (PTC) Exemption**

Small business representatives stated that FRA should clarify that the positive train control (PTC) exemption for short line railroads is mandatory and that large railroads cannot require small railroads to pay for costly upgrades to their tracks and infrastructure. They stated that large railroads are trying to recoup the costs of PTC implementation from small railroads, which was not intended by the final regulation that exempted them.

- **Risk Reduction and Crew Size Proposed Rules**

Small business representatives said these two proposed rules are problematic because they do not provide adequate understanding of and flexibility for small railroads. They said the risk regulation proposal, which contains a five-percent index rating formula for evaluating safety performance, could harm very small railroads with fewer employee hours and does not provide an adequate process to graduate from the safety intervention program once in. They also stated that single person crews should continue to be allowed for some operations, such as non-hazardous trains operating at low speeds and light grades. They recommend that FRA withdraw or substantially revise these proposed rules to account for small railroad operation that differ significantly from their large railroad counterparts.

The Office of Advocacy looks forward to working with your agency to reduce the burden of federal regulations on behalf of the small businesses that have asked us to be their voice in this regulatory reform process. We hope that you will include these specific rules when you compile your list of rules to review. Advocacy would be happy to meet with you or your representative so that we may detail the concerns and help suggest less burdensome alternatives for small business as rules are being considered for revision. I have provided the contact information for Assistant Chief Counsel Bruce Lundegren, who covers transportation and other issues here at Advocacy.

As we continue to hear from small businesses across the country at our regional regulatory reform roundtables or through our outreach from our regulatory reform website, we will update you with additional summaries from those locations.

Thank you for considering small business impacts as a vital part of your regulatory reform efforts and for including the Office of Advocacy as an important part of the process.

Sincerely,



Major L. Clark, III  
Acting Chief Counsel for Advocacy

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Copy to:       The Honorable Jeffrey A. Rosen  
                  Deputy Secretary of Transportation