



February 25, 2011

BY ELECTRONIC MAIL

The Honorable Anne S. Ferro
Administrator, Federal Motor Carrier Safety Administration
U.S. Department of Transportation
120 New Jersey Avenue, SE
Washington, DC 20590
Electronic Address: <http://www.regulations.gov> (RIN 2126-AB26; Docket No. FMCSA-2004-19608)

Re: Comments on FMCSA's Proposed Hours of Service of Drivers Rule

Dear Administrator Ferro:

The U.S. Small Business Administration's (SBA) Office of Advocacy (Advocacy) submits the following comments on the Federal Motor Carrier Safety Administration's (FMCSA's) *Proposed Hours of Service of Drivers Rule*.¹ FMCSA's proposed rule would revise its regulations for hours of service for drivers of property-carrying commercial motor vehicles (CMV) by, among other things, reducing the daily maximum driving limit from 11 hours to ten, reducing the maximum on-duty time within the driving window from 14 hours to 13, requiring the release from duty at the end of the 14-hour driving window, requiring a mandatory break of at least 30 minutes within seven hours of the last off-duty period, and requiring that the current 34-hour restart provision include at least two periods between midnight and 6:00 a.m.² A more detailed discussion of the proposed rule is provided below.

Office of Advocacy

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 SBA, so the views expressed by Advocacy do not necessarily reflect the views of SBA or the Administration. The Regulatory Flexibility Act (RFA),³ as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),⁴ 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

¹ 75 Fed. Reg. 82170 (December 29, 2010).

² *Id.*

³ 5 U.S.C. § 601 et seq.

⁴ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).

burdensome alternatives. Moreover, Executive Order 13272⁵ requires federal agencies to notify Advocacy of any proposed rules that are expected to have a significant economic impact on a substantial number of small entities and to give every appropriate consideration to any comments on a proposed or final rule submitted by Advocacy. Further, both Executive Order 13272 and a recent amendment to the RFA, codified at 5 U.S.C. 604(a)(3), require the agency to include in the final rule the response of the agency to any comments filed by Advocacy, and a detailed statement of any change made to the proposed rule as a result of the comments.

Background

As indicated above, FMCSA's rule would revise current hours of service regulations for drivers of property-carrying CMVs by, among other things, reducing the daily maximum driving limit, reducing the maximum on-duty time limit, requiring the release from duty at the end of the driving window, requiring mandatory break periods, and altering the 34-hour restart provision.⁶ A side-by-side table prepared by FMCSA⁷ comparing the current regulations to the proposed rule is attached to this letter for reference. It should be noted that with respect to reducing the daily maximum driving limit from 11 hours to ten, FMCSA has proposed alternatively, due to susceptible data interpretation, to either leave the daily maximum driving limit at 11 hours or to reduce it to ten; however, the agency expresses a preference for reducing it to ten.⁸

According to FMCSA, the purpose of the proposed rule is to improve safety, protect driver health, and provide flexibility.⁹ The agency believes that reducing hours of service will lessen fatigue, improve highway safety, and enhance driver health.¹⁰ However, the agency is forthright in acknowledging that there has been no decline in highway safety since the current hours of service rules (which raised the daily maximum driving limit from ten hours to 11) were promulgated in 2003,¹¹ that the impact of fatigue on safety and crash rates is difficult to infer from the many other factors that contribute to vehicle crashes,¹² that the agency has no data to measure crash risk along all of the dimensions for which the regulations are proposed,¹³ that the relationship between hours of service and driver health is difficult to calculate,¹⁴ and that there is no data available that demonstrates that reducing driving time from 11 hours to ten hours will reduce crashes.¹⁵

⁵ Executive Order 13272, *Proper Consideration of Small Entities in Agency Rulemaking* (67 Fed. Reg. 53461) (August 16, 2002).

⁶ 75 Fed. Reg. 82170.

⁷ Available at <http://www.fmcsa.dot.gov/rules-regulations/topics/hos-proposed/hos-proposed.aspx>.

⁸ 75 Fed. Reg. 82179, 82191.

⁹ 75 Fed. Reg. 82171, 82175.

¹⁰ 75 Fed. Reg. 82175.

¹¹ 75 Fed. Reg. 82171, 82191.

¹² 75 Fed. Reg. 82171.

¹³ 75 Fed. Reg. 82175.

¹⁴ 75 Fed. Reg. 82177.

¹⁵ 75 Fed. Reg. 82179.

As discussed in the preamble, the hours of service rule has been the subject of ongoing litigation since 2003 and the agency is currently required by a settlement agreement with the petitioners in that litigation to publish a final rule by July 26, 2011 after considering all of the comments it receives on the proposed rule.¹⁶ As such, the agency acknowledges that it has not had time to gather all of the data it needs or would like to have concerning the relationships between hours of service, fatigue, improved highway safety, and enhanced driver health.¹⁷ The agency recognizes the broad diversity of the trucking industry (e.g., large versus small firms, long-haul versus short-haul operations, truckload versus less-than-truckload carriers, etc.), which makes development of hours of service regulations particularly difficult.¹⁸ The agency has determined that, under the RFA, the proposed rule would have a significant economic impact on a substantial number of small entities and prepared and published an Initial Regulatory Flexibility Analysis along with the proposed rule.¹⁹

Small Entities Have Expressed Serious Concerns About The Proposed Rule

In response to the publication of the proposed rule, Advocacy hosted a small business roundtable on February 9, 2011 to discuss the proposed rule and to obtain small business input on it. Representatives of FMCSA also attended the meeting and provided a background briefing on the proposed rule. Small business representatives at the meeting represented the broad diversity of the trucking industry. The following comments are reflective of the issues raised during the roundtable discussion and in subsequent conversations with small business representatives, and are nearly identical to many of those expressed at FMCSA's public listening session on the proposed rule, held on February 17, 2011, which Advocacy also attended.

- 1. The proposed rule is not supported by existing safety and health data.** Small business representatives at both the roundtable and at FMCSA's public listening session uniformly stated that they oppose the proposed rule and would like FMCSA to retain its current regulations. Representatives stated that trucking firms and drivers have adjusted to the existing hours of service rules (that have been in effect since 2003) and that the rules are working well. They pointed to the lack of data to indicate that the proposed rule is needed or that it would result in improved safety or enhanced driver health. Attendees stated that changing the current rules would cause disruptions to current scheduling, reduce driver flexibility, and increase traffic and congestion on the roadways. Further, the attendees expressed concern that the proposed changes are being driven by litigation and that the changes are not justified by existing safety and health data. Based on these comments, Advocacy recommends that FMCSA consider retaining its current regulations while conducting additional research to determine whether changing the current rules will meet the agency's stated objective of improving safety, enhancing driver health, and providing flexibility.

¹⁶ 75 Fed. Reg. 82173.

¹⁷ Fed. Reg. 82175.

¹⁸ 75 Fed. Reg. 82175, 82185.

¹⁹ 75 Fed. Reg. 82190.

- 2. The proposed rule would reduce flexibility and could actually impede safety and driver health.** Small business representatives at both the roundtable and at FMCSA's public listening session stated that the proposed rule would reduce flexibility and could actually impede safety and driver health. Representatives were particularly opposed to reducing the current 11-hour driving window, the proposed 34-hour restart provision (i.e., requiring at least two periods between midnight and 6:00 a.m.), and to the mandatory break provision (i.e., required within seven hours of last off-duty period). Representatives stated that many drivers do not drive into the 11th hour, and that many who do are trying to find a place to park, which they said is becoming increasingly difficult as many rest areas have closed and truck parking laws have become more restrictive. Representatives indicated that reducing the driving and duty windows could cause drivers to rush, adding stress and increasing the likelihood of an accident. Similarly, with respect to the proposed 34-hour restart provision, representatives stated that they support the existing restart rule and would like FMCSA to retain it. One driver noted that if he arrived home at 12:05 a.m., he would effectively have to take three days off before he could drive because the proposed rule would set an arbitrary timeframe that drivers would have to fit into. Others oppose the provision because they said they prefer to drive at night when there is less traffic and congestion, especially in urban areas. Representatives also expressed concern over the mandatory break provision, stating that drivers already take breaks when they are tired and that the break provision is arbitrary and unsupported by data. Many indicated that accidents are more likely to occur early in their shift, not later as FMCSA suggests. Based on these comments, Advocacy recommends that the agency reassess its assumptions about whether the proposed rule would improve safety, enhance driver health, and provide flexibility and assess potential unintended effects that could offset the purported benefits of the rule.
- 3. The proposed rule would be operationally disruptive and costly.** Small business representatives at both the roundtable and at FMCSA's public listening session stated that the proposed rule would be operationally disruptive and costly by requiring more drivers, more trucks, and less efficient operations. First, representatives stated that reducing the hours of service would require companies to hire additional drivers to maintain current output levels. Representatives said that these additional drivers are not readily available and that they would be less qualified in terms of skills and experience if hired (adding both operational and safety concerns). Another representative stated that many potential drivers would not be able to pass employment screening criteria, such as drug testing or driving record. Second, representatives stated that shortening driving and duty windows could require companies to purchase additional trucks, putting more trucks on the road and increasing traffic and congestion, driver stress, and the likelihood of an accident. Representatives stated that because the proposed rule would narrow the driving and duty windows, more drivers would be forced into more congested pick-up and delivery windows, hampering efficiency and reducing flexibility. A number of representatives stressed that drivers are subject to factors beyond their control, particularly loading dock availability. Finally, changing the hours of service would

cause companies and drivers to have to reprogram their scheduling and distribution systems to comply with the new rules, which they argue is not justified. Based on these comments, Advocacy recommends that the agency carefully evaluate whether these operational disruptions and costs are justified given the admittedly uncertain safety and health benefits of the proposed rule.

- 4. Truck-related accidents are decreasing under the current rules, even while truck miles driven have increased.** Small business representatives at both the roundtable and at FMCSA’s public listening session argued in favor of retaining the current hours of service rule by pointing out that truck-related accidents have been decreasing even while truck miles driven have increased since the current rules have been in effect. A presentation at the roundtable provided by a representative of the trucking industry indicated that since 2004, truck-related injuries are down 39 percent and truck-related fatalities are down 33 percent, even while truck miles driven (from 2003 – 2008) rose from nearly 221 billion to over 227 billion miles annually.²⁰ These statistics, coupled with FMCSA’s candid acknowledgement of the limitations of its data concerning the link between hours of service, safety, and driver health suggest that the wisdom of changing the current rules is subject to valid debate. Based on these comments, Advocacy recommends that the agency carefully assess the costs, benefits, and possible unintended effects of the proposed rule (such as increased traffic and congestion, driver stress, and operational disruptions) before proceeding.

Conclusion

Thank you for the opportunity to comment on this proposed rule. One of the primary functions of the Office of Advocacy is to assist federal agencies in understanding the impact of their regulatory programs on small entities. In that regard, we hope these comments are both helpful and constructive to the agency’s understanding of the industry, and particularly the views of small business. Please feel free contact me or Bruce Lundegren (at (202) 205-6144 or bruce.lundegren@sba.gov) if you have any questions or require additional information.

Sincerely,

/s/

Winslow Sargeant, Ph.D.
Chief Counsel for Advocacy

/s/

Bruce E. Lundegren
Assistant Chief Counsel for Advocacy

²⁰ PowerPoint presentation entitled, “*Overview of FMCSA’s Proposed Hours of Service Rules for Truck Drivers*,” American Trucking Associations.

Copy to: The Honorable Cass R. Sunstein, Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget

Attachment

Attachment

FMCSA HOURS-OF-SERVICE RULEMAKING, RIN 2126-AB-26 Primary Changes Proposed for Property-Carrying Drivers			
PROVISION	CURRENT RULE	PROPOSED RULE	NOTES
"DAILY" DUTY PERIOD			
Off-duty period	10 consecutive hrs.	No change	
"Driving Window"	For most drivers, 14 consecutive hrs. (may continue on-duty/not driving after 14 hrs.); "Regional" allowed one 16-hr. period "weekly" but release from duty required after 16 hrs; Non-CDL w/i 150 miles allowed two 16-hr. periods "weekly" (may continue on-duty/not driving after 16 hrs.).	<i>For all property-carrying CMV drivers(unless excepted):</i> 14 consecutive hrs. with release from duty required at end of driving window; 16 consecutive hrs. no more than twice "weekly" with release from duty required at end of driving window.	<u>Any on-duty time</u> after 14th hour constitutes use of a 16-hr. period.
Max. on-duty within driving window	Normally 14 hrs; 16 hrs. once per week for "regional" drivers; 16 hrs. twice per week for non-CDL w/i 150 miles.	13 hrs.	Proposal not applicable to non-CDL 150 mile short-haul drivers. 13 hrs. during 14- or 16-hour driving windows for others.
Max. driving within driving window	11 hrs.	10 or 11 hrs. (Both being considered)	
Limit on consecutive hours of driving	None	May drive only if it has been 7 hours or less since last off-duty period of at least 30 minutes	Proposal not applicable to non-CDL 150 mile short-haul drivers.
"WEEKLY" DUTY PERIOD			
Max. on-duty hours	60 hrs. in 7 days/ 70 hrs. in 8 days	No change	
"Restart"	34 consecutive hrs.	See "limits on restarts" below.	
Limits on Restarts	None	(1) Must include two periods between Midnight-6 a.m.; (2) May only be used once per week.	Driver must designate the period being used as a restart
SLEEPER BERTH			
When used as substitute for 10 consecutive hrs. off duty	Two periods: One at least 8 consecutive hrs. in SB; other at least 2 hrs. SB or off-duty. The shorter period does NOT extend the driving window.	Continue 8/2 hr. periods, but apply same new driving, on-duty, and duty-period limits as proposed for non-SB drivers.	
DEFINITION OF ON-DUTY TIME			
On-duty time	Includes any time in CMV except sleeper-berth.	Does not include any time resting in a parked CMV. In moving CMV, does not include up to 2 hrs. in passenger seat immediately before or after 8 consecutive hrs. in sleeper-berth.	Also applies to passenger-carrying drivers.
OILFIELD EXEMPTION			
Oilfield exemption	"Waiting time" for certain drivers at oilfields (which is off-duty but does extend 14-hr duty period) must be recorded and available to FMCSA, but no method or details are specified for the recordkeeping.	"Waiting time" for certain drivers at oilfields must be shown on RODS or electronic equivalent as off duty and identified by annotations in "remarks" or a separate line added to "grid."	"Waiting time" is not included in on-duty time or the calculation of the 14 or 16-hr. driving window.