December 15, 2000

The Honorable Rodney Slater
Secretary of Transportation
Department of Transportation
400 Seventh Street, S.W.
Washington, D.C. 20590-0001

Re: FMCSA-97-2350-21956; Hours of Service of Drivers; Driver Rest and Sleep for Safe Operations

Dear Secretary Slater:

On May 2, 2000, the Federal Motor Carrier Safety Administration (FMCSA) published its proposed rule -- Hours of Service of drivers. This proposal would revise FMCSA's current hours-of-service (HOS) regulations to require motor carriers to provide drivers with better opportunities to obtain sleep, and thereby reduce the risk of drivers operating commercial motor vehicles while drowsy, tired, or fatigued. FMCSA estimates that 755 fatalities and 19,705 injuries occur each year on the Nation's roads due to drowsy, tired or fatigued drivers and proposed this rule in order to reduce the number of crashes involving these drivers.

As you are aware, the Office of Advocacy was created in 1976 under Public Law 94-305 to represent the views and interests of small businesses in federal policy making activities. The Chief Counsel for Advocacy participates in rulemakings when he deems it necessary to ensure proper representation of small business interests. In addition, the Chief Counsel monitors compliance with the Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996.[1] By working with federal agencies, the Chief Counsel can ensure that the impact of regulations on small entities is analyzed to the extent required by law and good public policy.

Advocacy notes the numerous meetings and discussions held with FMCSA staff, which took place prior to the publication of the proposed rule, where Advocacy detailed its initial RFA concerns with the draft proposal. Some important changes were made to the draft proposal as a result of these discussions, indicating FMCSA's desire to comply with the mandates of the RFA and willingness to address some of those important issues. We look forward to continuing this positive working relationship, especially at the pre-proposal stage of other rules.

[1] 5 U.S.C. § 601 et seq.

FMCSA is unable to certify the rule under the RFA – Additional analysis needed

Advocacy does not believe there is an adequate basis for a certifying that this rule will have no impact on a substantial number of small entities and, based upon the recent information and analysis, FMCSA cannot do so under the provisions of the Regulatory Flexibility Act. After review of the proposed rule, as well as the numerous comments by small business and their trade associations, Advocacy continues to remain concerned about the potential severe economic impact of this rule on small business. In its proposal, (and subsequent Errata)[2], the FMCSA stated that it believed this rule would effect a substantial number of small entities, although it indicated that its current analysis and available data did not lead the agency to conclude there would be a significant economic impact upon them. FMCSA admitted that it did not know with certainty what the full economic impact of the proposal would be on small entities and appropriately requested information on costs and impacts of this proposal from small entities.

Although adequate data on small business was not previously available to the agency, the more than 70,000 comments[3] now contained in the record, provide a sufficient basis for further analysis of the impact of this rule. Many small entities and their representatives have described just how this proposal would affect them and how their costs will increase as a result of the rule. These comments provide an adequate framework for FMCSA to perform a more detailed analysis of the proposed rule.

We therefore believe FMCSA would be in compliance with the RFA if it assesses this recent information from small business and performs a subsequent regulatory flexibility analysis, consistent with the apparent significant economic impact of this rule upon a substantial number of small entities, as required by the RFA. This revised regulatory analysis should then be made public by publishing it in the Federal Register as a

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[2] We recognize that the FMCSA mistakenly published RFA certification language within the original May 5th proposal and later properly withdrew that certification in an Errata dated May 31, 2000; 65 Fed. Reg. 34904. Advocacy accepts the Errata and understands that FMCSA did not have sufficient information to perform a detailed Initial Regulatory Flexibility Analysis for the proposed rule. Rather FMCSA submitted to the public a preliminary regulatory flexibility analysis done for the proposed rule and properly requested information and comments on that analysis and potential small business impact, as required by the RFA. Now that the public has commented however, Advocacy believes a proper regulatory flexibility analysis containing the new data and information should be made available to the public for comment, prior to the publication of a final rule.

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[3] The 70,000 figure comes from various press release statements calculating the number of comments received by DOT, as reported by FMCSA. However, the docket for this rule shows that there are over 22,000 entries. We recognize that many of these entries contain numerous comments that have been put together and counted as one comment within the docket. Whatever the exact number may be, there are tens of thousands of comments providing valuable information on this proposed rule which FMCSA must review.

supplemental regulatory flexibility analysis. This should be done so that the public can assess the validity of FMCSA's assumptions and analysis regarding the small business impact of this rule, as well as the validity of the information thus obtained from the public.

Incomplete Information in the Regulatory Flexibility Act Section

In the Regulatory Flexibility Act section of the proposed rule,[4] FMCSA correctly listed the elements requiring review and explanation when doing a Initial Regulatory Flexibility Analysis (IRFA). The proposed rule then goes on to discuss each element, including: 1) a description of the reasons why the rule is being promulgated; 2) a succinct statement of the objectives of, and legal basis for, the proposal; 3) and a description/estimate of the number of small entities to which the proposed rule would apply. However, the agency failed to continue with the list and provide explanations for the other 3 requirements of an IRFA, as correctly listed: 4) a description of the recordkeeping requirements, including an estimate of the classes of small entities subject to the rule; 5) an identification of all federal rules which may duplicate, overlap, or conflict with the proposal; and 6) a description of any significant alternatives to the proposed rule. In supplemental publications, FMCSA should highlight the information that was missing from the proposal, although contained within a separate document available in the record[5], so that the public may comment on those important provisions, as required by the Regulatory Flexibility Act.

Omitted Costs

In order to perform an accurate regulatory flexibility analysis, FMCSA must examine numerous costs to small business, which Advocacy believes were omitted from the cost of the proposed rule. These cost omissions are real costs to small employers who will be affected by this regulation. Under the RFA, a proper regulatory flexibility analysis must consider all of the relevant costs to small business which are the result of the proposal, in order to determine with accuracy the economic impact upon small entities.

Advocacy is concerned that the Hours of Service regulation, as currently written, is a one-size-fits-all approach. The proposed rule treats all of the motor carrier operations within various industries, as if they were the same. Some industries are fundamentally different than the general trucking industry; yet, the proposed rule lumps them together with all of the other industries involving motor carriers. As a result of their inclusion within this propose rule, the cost assessment provided by FMCSA does not accurately reflect the actual costs which will be incurred by these industries. For example, the over the road bus/motorcoach industry does not operate in the same fashion as a typical long haul truck driver. A motorcoach full of passengers does not have a sleeper berth to

[4] 65 Fed. Reg. at 25595.

[5] Although this information was omitted from the proposed rule, an appendix within FMCSA's "Preliminary Regulatory Evaluation and Regulatory Flexibility Act Analysis" did contain these missing items. However, a small business owner would have had to access the docket for the Department of Transportation, sift through the numerous entries in the docket and locate the appendix in order to read the missing information.

accomplish the required driver rest mandated by the rule. Tour buses cannot merely pull into a truck stop so that the driver may obtain the rest required by the proposed rule.

Similarly, utility companies, as well as emergency vehicles, are affected differently by this proposal than the general trucking industry. By nature of their business, they operate on schedules, which are directed by demand for repair, service and also emergencies. The additional costs of operation within the provisions of the proposed rule, will have a greater impact upon businesses of this type. It is important for FMCSA to include these differences within its analysis when determining overall costs of the rule on small entities.

The proposed rule does make an attempt to treat varying categories of operators differently by dividing the provisions of the rule into five types.[6] However, many small business operators do not fit neatly into these five types. Types 4 and 5 are the most troublesome categories for small business. It is common practice for drivers to operate in more than one category type in a week, or even in a day. The additional costs of changing the operations of a business depending upon the category and the burden of shifting operations from one category type to another, need to be considered as a real cost to small business operators who frequently have drivers that fall in both of these categories.

Advocacy has met with many small business operators, trade associations, etc. which have complained that the Hours of Service proposal will have a drastic affect on this nation's roadways. Advocacy agrees with this assessment. The current proposal for revising the hours in which a motor carrier operator may be on the road before he/she must rest is structured in such a way to shift the hours of operation to daylight hours. This shift in time will mean increased traffic on our nation's highways during peak daylight and rush hours. Additionally, FMCSA stated in its proposal that this new rule will require more than 50,000 new truck drivers,[7] as a result of the diminished time in which drivers are allowed to operate motor carriers. This is a substantial increase in the number of inexperienced truck drivers who will be sharing the roads with the general public.

Another costly provision within the proposal concerns the required use of electric on-board recording devices (EOBR) in order to provide the employer with information on its employees' operation of the motor carriers in accordance with the sleep/rest provisions mandated by the proposed rule. Mandating the purchase of technology is always a more costly scenario for a small business. Although FMCSA provides 4 years for small

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[6] Type 1. Long-haul operations that require the driver to be away from work for 3 or more consecutive days.
Type 2. Long-haul operations that require the driver to be away from work overnight, but less than 3 days.
Type 3. Operations that require the driver to operate during 2 separate scheduled duty periods on the same workday. The driver returns to work reporting location within 15 hours of beginning work.
Type 4. Operations in which driver returns to work within 12 hours.
Type 5. Operations in which driving is incidental to other primary work activities.

[7] 65 Fed. Reg. at 25572.

businesses to comply with the EOBR provision of the rule, this time differential may not be sufficient to reduce the cost of the provision significantly for small entities.

Further, FMCSA in its cost analysis of these devices utilized a lower cost figure than it should have when determining economic impact. Estimates of the cost of these devices have ranged from $1,000 to $19,000 per unit. FMCSA used $2,850 as a per unit cost in its cost/benefit analysis. We disagree with the choice of this very low figure. At the very least, an average cost should be used. Ideally, the cost of the units for small businesses will be calculated at the more realistic higher rate of $17-19,000. Small businesses do not have the economies of scale in purchasing power that large businesses have. Most operators of small businesses do not have a fleet of trucks for which they can purchase these units in bulk. Clearly they would be unable to obtain the units at such a low point on the price spectrum as FMCSA has assumed. Additionally, the agency should include training costs that will result from the requirement to purchase and use these recording devices on every truck.

Finally, FMCSA should carefully re-examine its proposal to ensure that it does not exacerbate existing traffic concerns on the nation's roadways and its impact on safety, particularly given the increase in "road rage." These and other important costs highlighted above must all be taken into account when determining the economic impact of this rule on small entities and should be included in FMCSA's supplemental regulatory flexibility analysis.

Feasible Alternatives not Examined

Although the proposal and supplemental analysis discusses 5 options, that vary the number of hours on/off duty, change the driver categories, and even eliminate the requirement to use an EOBR, the agency failed to consider all feasible alternatives to the proposal as required by the Regulatory Flexibility Act. A number of small businesses in various industries, which differ from the general motor freight transportation industry, yet still are required to comply with this rule, would have a less severe economic impact if the agency were to craft an alternative proposal more tailored to their operations and potential costs. An exemption from the main proposal, which takes into account the dramatically different ways in which these industries[8] operate, would reduce the severe cost to small business as a result of this rule. Perhaps some of these industries could be given flexibility to determine the number of hours of truck drivers (within a certain framework) based upon their safety record, thereby providing an added incentive to operate motor carriers in a safe manner.

Another alternative mentioned to Advocacy by numerous small businesses is one that is performance based. Why not consider a performance based rule as a whole, or just for those industries with the highest safety records, as an alternative to the proposal?

[8] i.e. the bus industry, utility industries, rural motor carrier operations, etc.

FMCSA could take action on those businesses, industries when needed, thereby avoiding an expensive regulation for many small entities.

These and other feasible alternatives deserve consideration by the agency. If there are alternatives methods of accomplishing the agencies objectives, while avoiding undue burden on small businesses, then the agency is required to examine and discuss these alternatives. Until all feasible alternatives are considered and discussed by the agency, then made public for consideration by small business, FMCSA's regulatory flexibility analysis will not meet the requirements mandated by the RFA.

Conclusion

Advocacy strongly urges FMCSA to review these and other comments submitted for the Hours of Service rulemaking. Additional information from small business, and their representatives should be analyzed and included within a revised economic analysis of the impact on small entities. Any omitted costs and revised assumptions should be included in this analysis and then made public through a revised or interim regulatory flexibility analysis published in the Federal Register. This new analysis should include consideration of all feasible alternatives and a discussion of why they were not chosen. If these things are done, FMCSA will be in full compliance with the provisions of the Regulatory Flexibility Act.

We look forward to continuing discussions on this and other rulemakings at the Department of Transportation. If there are any questions, please contact Claudia Rayford Rodgers, of my staff at 202-205-6533.

Sincerely,

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Claudia R. Rodgers
Assistant Chief Counsel