

July 9, 2012

Via Regulations.gov

Thomas Yager
Chief, Driver and Carrier Operations Division
Federal Motor Carrier Safety Administration
U.S. Department of Transportation
1200 New Jersey Ave, SE
Washington, DC 20590

Re: Docket No. FMCSA-2012-0183: Hours of Service of Drivers of Commercial Motor Vehicles; Regulatory Guidance for Oilfield Exception

The American Trucking Associations (ATA)¹ offers its comments on the Federal Motor Carrier Safety Administration's (FMCSA) notice of regulatory guidance (notice) regarding the applicability of the oilfield exceptions to the hours of service.² ATA recognizes that prior to the issuance of this guidance, there were inconsistencies in the application of these exceptions in different states and that FMCSA has an institutional duty to ensure uniformity in the enforcement of the Federal Motor Carrier Safety Regulations (FMCSRs) nationwide. However, the manner in which FMCSA instituted this guidance denied drivers and motor carriers the opportunity to raise their concerns about the possible effects of the change. The change further left motor carriers with no room to reconfigure their operations to comply with the new working applications of the definitions of the 395.1(d)(1) and (d)(2) exceptions. For that reason, ATA recommends the following:

- FMCSA should rescind the effective date of its June 5, 2012 guidance document and operate under its former interpretation until such time as the agency has had an opportunity to allow for public comment and to adjudicate those comments,
- FMCSA should extend the comment period on its June 5, 2012 notice from 60 to 90 days to give industry ample time to gather data on the ramifications of such a change and to present those ramifications to the agency in formal written comments, and
- FMCSA should review all comments submitted before publishing guidance for interpreting 395.1(d)(1) and (d)(2) that properly balances the usage of the exceptions to any legitimate safety concerns that may be attached to them.

Laying out its proposed guidance, FMCSA notes, "A significant increase in oil and gas drilling operations in many States has resulted in a major increase in CMV traffic to move the oilfield equipment, and to transport large quantities of supplies, such as water and sand, to the sites. The operators of many of these vehicles have raised questions about the applicability of §395.1(d) to them."³ Discussions with FMCSA staff have indicated that the agency's senior employees, both in the field and at headquarters, consulted with each other at great

¹ ATA is a federation of motor carriers, state trucking associations, and national trucking conferences that promotes and protects the interests of the trucking industry. Directly, and through its affiliated organizations, ATA represents more than 37,000 motor carriers of every size, type, and class in the U.S., Canada and Mexico.

² See 77 *Federal Register* 108. 33098-33100. (June 5, 2012).

³ *Ibid.* 33099.

length before coming to this decision. However, as Administrator Ferro frequently says in her speeches, highway safety is a partnership between government and industry. Unfortunately, FMCSA staff did not consult with industry on this change, and the guidance reflects that.

The interpretation issued on June 5 conflicts with the longstanding understanding of which drivers and vehicles may utilize the 395.1(d) exceptions in those States that have a history of, and therefore a familiarity with, utilizing the oilfield exceptions to the hours of service rules. Historically, in those States, motor drivers and vehicles that met the qualifications to utilize the 395.1(d)(1) exception were authorized to utilize the 395.1(d)(2) exception as well.

The trucking industry is sensitive to the concerns of those residing in areas that previously did not have oil and natural gas drilling operations. Their concerns have merit and should be properly adjudicated by FMCSA in an open and honest discussion. ATA does not object to the consideration of those concerns. However, we do strenuously object to the arbitrary nationwide imposition of this new interpretation without any opportunity to weigh in before its being thrust upon us. Truly, this change in interpretation has serious effects on motor carriers' ability to adequately plan for servicing their customers. By imposing an immediate effective date, rather than engaging in the traditional comment and adjudication process that accompanies *Federal Register* announcements before issuing a definitive interpretation, FMCSA has capriciously changed the standards of operation without giving industry an opportunity to prepare or to air our concerns.

Such a change, while billed as a notice of regulatory guidance, amounts to far more than a change in FMCSA's interpretative posture. Given the wide-ranging effects of this "guidance," both regulatory and economic, the change is more akin to a rulemaking than a change in guidance. ATA does not dispute the agency's ability to interpret its rule, merely that FMCSA has done so without properly considering the effects of its change. At heart, such an action represents backdoor rulemaking.

Adding insult to this injury, FMCSA announced this interpretive change on June 5, the same day that the Commercial Vehicle Safety Alliance's annual Roadcheck program began. This year's Roadcheck, as always closely planned with FMCSA, ran from June 5-8 and should have represented an excellent opportunity to provide useful data about the usage of the oilfield exceptions. However, one of the foci of this year's Roadcheck was compliance with the oilfield exceptions to the hours of service regulations.⁴ Essentially, FMCSA changed the rules mid-game on the first day that every commercial motor vehicle enforcement jurisdiction was conducting inspections at its greatest manpower of the year. Changing the interpretation in such a way and at such a time pulls the rug out from motor carriers attempting to comply with FMCSA's regulations and points to an attitude more focused on 'gotcha!'-style enforcement than the government-industry partnership model espoused by FMCSA. Such a mid-course change means that any data collected about the usage of the oilfield exceptions will be essentially meaningless. With a less than twelve-hour lag between issuing the guidance and enforcing it, most carriers would not even have been aware of the change to comply with it. Without some sort of prior notice, enforcement agencies certainly could not have distributed the guidance and properly educated their personnel on its interpretation either.

For all these reasons, we believe FMCSA's best course is to rescind the current guidance in favor of taking comment on it as proposed guidance. Then, after the comment period closes, all parties interested will have had an opportunity to weigh in on the proposed change in enforcement. After reviewing those submissions, FMCSA will be better able to make an informed decision as to the ramifications of its actions.

⁴ See Commercial Vehicle Safety Alliance. *Roadcheck Gets Unsafe Commercial Motor Vehicle Drivers, Vehicles Off the Road*. Press Release. June 7, 2012. http://www.cvsaa.org/news/2012_press.php.

In addition to considering rather than enforcing the notice, ATA believes that interested parties will need more time than the current 60-day comment period. The oil and natural gas drilling industry is complex and draws commodities from the earth in a myriad of different manners all supported in some way by the trucking industry. Each of these different manners requires somewhat different trucking support. In order to properly answer the questions raised by FMCSA's changed guidance, ATA and other interested parties will need to reach out to those that are directly involved in these enterprises to most appropriately be able to describe the ramifications of the suggested changes. We believe that a 90-day comment period is more appropriate for this kind of outreach and ask that FMCSA make such an extension to the timeline.

Given the wide-ranging effects of changing its interpretation for the 395.1(d) oilfield exceptions, ATA believes that FMCSA should accept and review comments before it makes this changed guidance effective. The operational changes required to comply with the new guidance will require more trucks, more drivers, and could very easily reach into the millions of dollars. At the same time, ATA is not aware that FMCSA has initiated any research as to the safety effects of this change. In addition to the costs mentioned above, FMCSA has not taken into account the further damage to mainly rural roads from more trucks traveling over them. Further, FMCSA has not had the opportunity to fully review the safety implications of increasing traffic on such roads, nor has it availed itself to the opportunity to conduct research into how this change will affect the costs of extracting oil or natural gas from a site. These changes have the potential to render some sites economically unfeasible for exploration, hobbling America's efforts towards energy independence. Ultimately, the unknowns are simply too great. FMCSA needs to pursue further research in this matter before changing the playing field.

Thank you for considering ATA's concerns about this guidance. ATA salutes FMCSA's attempts to bring nationwide uniformity to the enforcement of the FMCSRs. However, sudden and capricious changes to the agency's interpretations of the FMCSRs are counterproductive. Without proper agency outreach and research, they do little to inspire confidence in FMCSA's desire to act as an honest agent for promoting safety. Worse, still, without proper implementation time, they do little to improve safety. ATA is hopeful that, working together, FMCSA and industry can develop guidance for the use of the 395.1(d)(1) and 395.1(d)(2) exceptions that effectively balance FMCSA's mission to improve commercial motor vehicle safety with the oil and natural gas transportation sector's role in providing a constant and affordable source of energy for U.S. consumers. Should you have any questions related to these issues, please contact the undersigned at 703-838-7982 or bstephen@trucking.org.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'B. Stephenson', is written over a light gray rectangular background.

Boyd Stephenson
Director, Hazardous Materials Policy
American Trucking Associations