



**Before the
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION
Washington, D.C. 20590**

In the Matter of)	Docket No. FMCSA 2004-19608
)	
Proposed Rulemaking on)	
)	
Hours of Service of Drivers)	

COMMENTS OF THE COMPETITIVE ENTERPRISE INSTITUTE

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On behalf of the Competitive Enterprise Institute (CEI), a non-profit public policy group specializing in regulatory issues, I respectfully submit this comment letter on the Federal Motor Carrier Safety Administration's (hereinafter FMCSA or the Agency) proposed rule, *Hours of Service of Drivers* (hereinafter HOS Rule).¹

This comment letter develops the following points:

1. The HOS Rule would disproportionately impact compliant commercial motor vehicle (CMV) owner-operators.
2. Adjusting limits on hours-of-service (HOS) is an inappropriate mechanism for improving highway safety, as high-risk CMV operators have a strong economic incentive to engage in noncompliant behavior.
3. FMCSA's largely unenforceable and overly complicated regulatory regime crowds out private arrangements between CMV operators and CMV insurers.

1. HOS restrictions unfairly burden compliant CMV owner-operators/sole proprietorships.

According to the latest data available from the Bureau of Transportation Statistics' *2007 Commodity Flow Survey*, trucking accounts for 70 percent of annual U.S. freight movement by weight (8.8 billion tons) and 71 percent by value (\$8.3 trillion).² Of this, CMV owner-operators and self-employed CMV operators comprise nearly 8 percent of the domestic trucking market.³ These drivers are typically paid according to a per-mile rate and/or a percentage of the shipping revenue, and are thus highly sensitive to regulatory changes that affect scheduling and delivery.

By FMCSA's own admission in the most recent *Regulatory Impact Analysis* (RIA), the annual costs of HOS Rule (for all options) as a percentage of annual revenue is more than twice as great for single power unit carriers (sole proprietorships) as it is for carriers with multiple power units.⁴

The December HOS Rule RIA uses the most optimistic cost-benefit modeling to date. The Agency's 2005 RIA found that implementing the 10-hour driving option would result in net annual costs of \$1.98 billion.⁵ The latest RIA's finding that net benefits of Option 2

¹ Federal Motor Carrier Safety Administration, *Hours of Service of Drivers*, December 29, 2010, 75 FR 82170; hereinafter cited as HOS Rule.

² Bureau of Transportation Statistics, *State Summaries: 2007 Commodity Flow Survey*, December 2010, p. 1, http://www.bts.gov/publications/commodity_flow_survey/2007/state_summaries/pdf/entire.pdf.

³ Bureau of Labor Statistics, "Truck Drivers and Driver/Sales Workers," *Occupational Outlook Handbook, 2010-2011 Edition*, p. 3, <http://www.bls.gov/oco/pdf/ocos246.pdf>.

⁴ FMCSA, "2010-2011 Hours of Service Rule," *Regulatory Impact Analysis*, RIN 2126-AB26, December 20, 2010, Exhibits 7-7 and 7-8, <http://www.fmcsa.dot.gov/rules-regulations/TOPICS/hos-proposed/AB26%20HOS%20RIA.pdf>.

⁵ FMCSA, "Executive Summary," *Regulatory Impact Analysis and Small Business Analysis for Hours of Service Options*, Exhibit ES-5, <http://www.fmcsa.dot.gov/documents/rulesregs/hos/regulatory-impact-summary.pdf>. Costs

(eliminating the 11th hour, among other changes) “could range from a negative \$750 million per year to more than a positive \$1.4 billion per year” relies on tenuous health-impact data concerning operator sleep patterns.⁶ Removing the health component and instead calculating benefits solely in terms of crash reduction results in negative net benefits.⁷ In any event, it falls outside the Agency’s primary mission to “reduce crashes, injuries and fatalities.”⁸

The Agency’s assumption in calculating supposed health benefits that simply eliminating the 11th hour will somehow result in an increase in duration of operator sleep is absurd on its face. Assuming drivers will spend an additional hour exercising or attempting to sleep fails to address underlying medical conditions that result in fewer hours of sleep and thus increased fatigue, such as obstructive sleep apnea syndrome (OSAS) and other sleep disorders responsible for chronic sleep disruption.⁹

The Agency should reexamine the methodologies used in its cost-benefit analysis of the economically significant HOS Rule, particularly since a disproportionate share of the burden will fall upon compliant CMV owner-operators/sole proprietorships.

2. High-risk CMV operators have a strong economic incentive to ignore HOS restrictions.

In the conclusion to FMCSA’s December 20, 2010, RIA on the HOS Rule, it was stated that “there appears to be no alternative available to the Agency that would limit driver fatigue while allowing more work. To improve public safety, all drivers, regardless of the size of the carrier they work for, must work within reasonable limits.”¹⁰ However, contrary to the Agency’s assertion, the focus on adjusting HOS as a means to improve highway safety is fundamentally flawed.

A thorough review of the limited scholarly literature on CMV scheduling would have brought to the Agency’s attention that high-risk, sleep-deprived operators tend to have a strong economic incentive to violate HOS limits.¹¹ These operators are often paid by the

originally calculated in 2004 dollars. The cited figure was inflated to 2008 dollars using BLS’s CPI Inflation Calculator (http://www.bls.gov/data/inflation_calculator.htm) to offer a better comparison to figures cited in the latest HOS Rule RIA.

⁶ FMCSA, “2010-2011 Hours of Service Rule,” *Regulatory Impact Analysis*, RIN 2126-AB26, section ES-3.

⁷ *Ibid.*, Exhibits ES-1 and ES-2. The net benefit for Option 2 minus purported health benefits calculated in the latest RIA is -\$30 million assuming 18 percent of crashes are due to fatigue, -\$310 million assuming 13 percent, and -\$640 million assuming 7 percent.

⁸ FMCSA, “Our Mission – Federal Motor Carrier Safety Administration,” FMCSA website, accessed February 15, 2011, <http://www.fmcsa.dot.gov/about/what-we-do/mission/mission.htm>.

⁹ Failing to address the underlying medical causes of low sleep will do little to improve health or safety outcomes. See, e.g., Alex Sassani, MD, et al., “Reducing Motor-Vehicle Collisions, Costs, and Fatalities by Treating Obstructive Sleep Apnea Syndrome,” *SLEEP* Vol. 37 No. 3, May 2004, pp. 453-8, <http://www.journalsleep.org/Articles/270312.pdf>.

¹⁰ FMCSA, “2010-2011 Hours of Service Rule,” *Regulatory Impact Analysis*, RIN 2126-AB26, section 7-10.

¹¹ See, e.g., Kristen Monaco, Lindy Olsson, and Justin Hentges, “Hours of Sleep and Fatigue in Motor Carriage,” *Contemporary Economic Policy* Vol. 23 No. 4, October 2005, pp. 622-3.

mile and face penalties for late cargo deliveries. Scheduling optimization is an incredibly complex undertaking, particularly given the presence of regulatory uncertainty and ever-evolving constraints such as the current rolling 60/70-hour on-duty limits and restart periods.¹² Furthermore, as time-on-task fatigue is the primary issue, FMCSA's own commissioned report found that "the impact of time-on-task, which is the basis for the 10th vs. 11th driving-hour debate, does not seem to be an obvious or significant factor when considering increased critical-incident risk."¹³ These facts and findings render the proposed HOS Rule an inappropriate method to enhance highway safety.

A focus on ineffective safety enhancements is hardly limited to FMCSA. Indeed, this problem is endemic to the entire federal highway safety apparatus—from the authors of legislation in Congress to the National Highway Traffic Safety Administration. As internationally recognized traffic safety analyst Leonard Evans noted in his comprehensive 2004 volume on personal auto safety, "US safety policy priorities have been ordered almost perfectly opposite to where technical knowledge shows benefits are greatest [...] because US policy was defined and led by ideologically driven lawyers lacking knowledge or interest in technical matters."¹⁴

Rather than focusing on the ineffective regulatory changes presented in the HOS Rule, which will do little if anything to improve safety, the Agency should partner with academic researchers, insurers, and transport industry stakeholders to examine ways to develop improved schedule planning practices that could enhance both highway safety and carrier productivity.

3. FMCSA's largely unenforceable (in terms of having significant preventative impact) and burdensome regulations crowd out private solutions between CMV carriers and insurers.

Having established that the FMCSA's HOS Rule is at best misguided in its purported aim to improve highway safety, this final section will focus on the Agency's institutional problems and recommend an alternative regime that would better enhance safety on America's highways.

FMCSA's primary mission, as stated on its website, "is to reduce crashes, injuries and fatalities involving large trucks and buses."¹⁵ Unfortunately, the standard regulatory framework by which the Agency operates is likely forgoing improved safety by crowding out more effective private arrangements. John Semmens, a former research project manager at the Arizona Department of Transportation Research Center, has noted that

¹² Asvin Goel, "Truck Driver Scheduling and U.S. Hours of Service Regulations," MIT-Zaragoza International Logistics Program *Working Paper*, June 3, 2009, p. 19, <http://ssrn.com/abstract=1407509>.

¹³ Richard J. Hanowski, et al., "Analysis of Risk as a Function of Driving-Hour: Assessment of Driving-Hours 1 Through 11," *Final Report to the Federal Motor Carrier Safety Administration*, January 2008, p. 73, <http://www.fmcsa.dot.gov/facts-research/research-technology/report/hos-assessment-of-driving-hours-finalreport.pdf>.

¹⁴ Leonard Evans, *Traffic Safety*, Bloomfield Hills, Michigan: Science Serving Society, 2004, p. 389.

¹⁵ FMCSA, "Our Mission – Federal Motor Carrier Safety Administration."

because of this crowding-out effect, “private insurance companies have very weak incentives to guard against persons buying inadequate insurance or canceling coverage once their vehicle obtains the desired registration tags.”¹⁶

While Semmens was specifically referring to state licensing and testing of personal auto drivers, the same principles hold for CMV operators and insurers. Once the operator and/or carrier has obtained the necessary registration and licensing from the Agency, CMV insurers must essentially assume operator testing and vehicle inspection regimes are adequate and that the data maintained by the Agency accurately reflect operator and carrier risk profiles. It is no surprise that the established insurance industry, represented by industry lobbies and research organizations such as the Insurance Institute for Highway Safety, supports the HOS Rule.¹⁷

Unleashing the competition and creativity of the marketplace could do much to improve highway safety. Private industry is generally risk-averse and new methods of coping with this risk would certainly have to be learned. Incumbent firms will likely be skeptical of such a significant paradigm shift in doing business. However, once CMV insurers are free to issue licenses and registrations, they will be able to minimize risk by assessing actuarially sound premiums to customers while earning a profit and no longer subsidize high-risk operators and carriers.¹⁸

This process of experimentation is probably too risky and complex to implement immediately at a national scale. Nevertheless, allowing a rollout of state-based pilot programs could give insurers the necessary experience and expertise to implement in the future a nationwide private licensing and registration regime. This would both improve safety and reduce costs. The above would require congressional action, but the Agency’s Office of Analysis, Research and Technology can conduct a preliminary examination on the topic. The Administrator should direct the Office of Analysis, Research and Technology to commission a report on the advantages and disadvantages of private institutional alternatives to FMCSA.

Conclusion

The Agency does not properly establish the need for revised hours-of-service limitations proposed in the HOS Rule. It has repeatedly obfuscated the core issue by relying on non-safety health impact benefits calculated under a dubious methodology to force a non-negative net benefit finding. This is particularly troubling due to a disproportionate share of the compliance cost burden being borne by small carriers and owner-operators/sole proprietorships.

¹⁶ John Semmens, “Improving Road Safety by Privatizing Vehicle and Driver Testing,” *Street Smart: Competition, Entrepreneurship, and the Future of Roads*, Ed. Gabriel Roth, Oakland, Calif.: The Independent Institute, 2006, p. 103.

¹⁷ See, e.g., Insurance Institute for Highway Safety, “Hours of Service of Drivers, 49 CFR Parts 385 and 395; Interim Final Rule, Request for Comments Docket No. FMCSA-2004-19608,” Comments to the FMCSA, March 6, 2008, http://www.iihs.org/laws/comments/pdf/comment_fmcsa_2008-03-06.pdf.

¹⁸ Semmens, p. 112.

The Agency also ignores relevant scholarly literature on fatigue and proposes the HOS Rule without adequately understanding the underlying medical conditions, such as OSAS, responsible for fatigue.

Finally, the Agency fails to understand its own institutional limitations and consider that private market regimes may provide solutions that result in superior safety and cost outcomes. Examining alternative private institutions that could better enhance highway safety and productivity should be made a priority by the Agency's Office of Analysis, Research and Technology.