

Congress of the United States
U.S. House of Representatives
Committee on Small Business
2361 Rayburn House Office Building
Washington, DC 20515-6515

To: Members, Subcommittee on Contracting and Workforce
From: Committee Staff
Date: November 18, 2013
Re: Hearing, "WRONG WAY: The Impact of FMCSA's Hours of Service Rule on Small Businesses"

On November 21, 2013 at 10:00 a.m., the Subcommittee on Contracting and Workforce will meet for the purpose of receiving testimony on the impact of the Federal Motor Carrier Safety Administration's (FMCSA) 2011 Hours of Service (HOS) final rule¹ on small businesses in the trucking and commercial freight logistics industries. Small businesses and officials from FMCSA have been invited to testify.

I. The Role of Small Businesses in Commercial Freight Hauling and Logistics

The United States depends on large commercial motor vehicles (CMVs), defined as those weighing greater than 10,000 pounds, to move goods to any number of locations across the country via the nation's interstate highway system. According to data from FMCSA, of the approximately 433,535 CMV carrier firms in the United States, up to 425,786 would be subject to changes in their operations by the HOS 2011 Final Rule.² Of these potentially affected firms, approximately 97 percent operate 100 or fewer trucks and are most likely to meet the definition of a small business.³

II. Federal Regulation of Commercial Motor Vehicles

The economy's dependence on the highway commercial freight transportation industry is accompanied by the risk of accidents involving or caused by CMV operators. In order to increase safety in the industry, Congress created FMCSA⁴ and empowered the agency to issue regulations intended to ensure the safe operation of CMVs.⁵

Among FMCSA's most recent regulatory actions intended to reduce CMV operator fatigue-related accidents and improve CMV operator health is the institution of a new HOS rule. The rule limits the

¹ Hours of Service of Drivers, Final Rule, 76 Fed. Reg. 81,134 (December 27, 2011) ("HOS 2011 Final Rule").

² *Id.* at 81,181.

³ *Id.* The Small Business Administration defines a trucking firm as small if it earns less than \$25.5 million in gross revenue. 13 C.F.R. § 121.201. For purposes of its rulemaking, FMCSA estimates the average small business trucking firm would have fewer than 141 trucks. HOS 2011 Final Rule, 76 Fed. Reg. at 81,181.

⁴ Motor Carrier Safety Improvement Act of 1999, Pub. L. No. 106-159, § 101, 113 Stat. 1748, 1750 (codified at 49 U.S.C. § 113).

⁵ 49 U.S.C. § 113(f).

aggregate driving and on-duty hours of CMV operators. It also regulates the amount of time a driver must spend at rest during and between driving shifts. The HOS 2011 Final Rule was an update from previous regulations issued by the agency in 2003.⁶

III. FMSCA Hours of Service Regulations

The purpose of HOS regulations is to improve safety by reducing the incidence of CMV crashes due to driver fatigue. HOS regulations establish maximum daily and weekly limits for the number of hours an operator may be on duty,⁷ how one can drive in a day, often referred to as the driving window, and how much time an operator must spend off duty.

Among the changes made by the HOS 2003 Rule was a decrease in the on-duty period from 15 hours per day to 14 hours per day;⁸ an increase in the daily time an operator could spend driving from 10 hours per day to 11 hours per day;⁹ and an increase in the duty resting time from 8 hours per day to 10 hours per day.¹⁰ Other significant changes included the creation of a 34-hour restart period and a mandatory break period.¹¹

Many in the highway commercial freight transportation industries praised the HOS 2003 Rule as striking the right balance between improving highway safety while providing drivers and carriers the flexibility to efficiently and profitably operate their businesses.¹² However, some public safety advocacy groups were less than satisfied with the HOS 2003 Rule and these groups challenged the rule in federal court.

FMSCA entered into a settlement agreement with the safety groups that required the agency to publish a new final rule by July 26, 2011,¹³ which went into effect on July 1, 2013.¹⁴ The most significant changes made by the HOS 2011 Final Rule entail modifications to the 34-hour restart provision and a new requirement for mandatory break periods.

⁶ Hours of Service of Drivers; Driver Rest and Sleep for Safe Operations, Final Rule, 68 Fed. Reg. 22,456 (April 28, 2003) (“HOS 2003 Rule”). Unless otherwise stated, citation to a codified FMCSA rule is a citation to the HOS 2003 Rule.

⁷ On-duty time is defined as all time from the time a driver begins to work or is required to be in readiness to work until the time the driver is relieved from work and all responsibility for performing work. 49 C.F.R. § 395.2.

⁸ *Id.* at § 395.3(a)(2).

⁹ *Id.* at § 395.3(a)(3).

¹⁰ *Id.* at § 395.3(a)(1).

¹¹ HOS 2003 Rule, 68 Fed. Reg. at 22,515-16.

¹² Letter from Dave Osiecki, Senior Vice President of Policy and Regulatory Affairs and Rob Abbott, Vice President, Safety Policy, American Trucking Associations to Federal Motor Carrier Safety Administration at 2 (March 4, 2011) [hereinafter ATA Comments], available at <http://www.regulations.gov/#!documentDetail;D=FMCSA-2004-19608-20873>.

¹³ Hours of Service of Drivers, Notice of Proposed Rulemaking, 75 Fed. Reg. at 82,169, 82,173 (December 29, 2010) (“HOS 2010 NPRM”). A complete explanation of the various legal challenges, subsequent court rulings, and agency and Congressional responses to these rulings is beyond the scope of this memorandum. Instead, the memorandum will focus on the most recent changes to the HOS regulations and explain how these differ from the HOS 2003 Rule.

¹⁴ HOS 2011 Final Rule, 76 Fed. Reg. at 81,134.

A. The 34-Hour Restart Provision

In recognition of the fact that fatigue can build up over time, FMCSA requires maximum daily and weekly driving and on-duty time limits to ensure that CMV operators are well-rested. To prevent fatigue from building up over multiple days of driving, HOS regulations have consistently limited operators from being on duty for more than 60 hours over a 7-day period, or 70 hours over an 8-day period.¹⁵

The HOS 2003 Rule maintained these weekly limits, but incorporated a restart provision that would reset an operator's maximum duty limits following a minimum of 34 hours of consecutive off-duty time. However, the HOS 2011 Final Rule requires that the 34-hour restart must include two consecutive periods of off-duty time between 1 a.m. to 5 a.m. and limits the use of the restart to once per week.¹⁶ The impacts of these changes on small firms will be addressed in a latter section of the memorandum.

B. Mandatory 30-minute Break Provision

The HOS 2011 Final Rule also requires CMV operators take a 30-minute off-duty break sometime before operating the vehicle for eight or more consecutive hours.¹⁷ This break may include time spent off-duty for meals or time spent off-duty in a CMV sleeper berth, if so equipped.¹⁸

Many CMV operators do not object to the concept of break periods. However, some believe the specificity of the provision, requiring that the break occurs before the eighth hour of driving, needlessly reduces a driver's flexibility to determine for themselves when is the best time to take a break.¹⁹

IV. Potential Small Business Impact of the HOS Rules

As stated in an earlier section of the memorandum, the United States economy is dependent on CMVs to move products to customers via the nation's interstate highway system. Therefore, any policy that potentially reduces the ability of firms to efficiently transport goods could result in direct effects to small businesses in the commercial freight transportation industry and indirect effects to small businesses that utilize these firms to transport goods to customers.

In relation to the potential direct effects of the HOS 2011 Final Rule, a number of small businesses in the freight transportation industries have stated they believe it will cause significant economic harm to their operations without providing any meaningful improvement in highway safety. Of particular concern is the

¹⁵ 49 C.F.R. § 395.1.3(b)(1),(2) (2012). The establishment of these weekly limits are longstanding policy and predate the HOS 2003 Rule. HOS 2003 Rule, 68 Fed. Reg. at 22,502.

¹⁶ HOS 2011 Final Rule, 76 Fed. Reg. at 81,188 (to be codified at 49 C.F.R. § 395.3(c)(1)-(2)).

¹⁷ *Id.* at 81,187 (to be codified at 49 C.F.R. § 395.1(g)(1)(i)(A)(I)).

¹⁸ *Id.* at 81,188 (to be codified at 49 C.F.R. § 395.3(a)(3)(ii)). The mandatory break provision is not applicable to short haul operators. Hours of Service of Drivers; Amendment of the 30-Minute Rest Break Requirement, Final Rule, 78 Fed. Reg. 64,179 (October 28, 2013). In addition, there are other exemptions that are not relevant to the issues to be addressed at the hearing.

¹⁹ Letter from James Johnston, President, Owner-Operator Independent Drivers Association to Federal Motor Carrier Safety Administration at 11 (March 4, 2011) [hereinafter OOIDA Comments], available at <http://www.regulations.gov/#!documentDetail;D=FMCSA-2004-19608-20982>.

specific requirement that the 34-hour restart include two consecutive periods of off-duty time between 1 a.m. to 5 a.m.

One of the direct economic consequences of requiring two consecutive off-duty periods between 1 a.m. to 5 a.m. is that it may reduce the ability of drivers, many of whom are CMV owner-operators, to operate during nighttime hours. Most CMV carriers are compensated on a per-mile basis and driving at night provides a way to avoid traffic congestion thus increasing the amount of miles they can travel in a given time period.

Another potential economic consequence of requiring two consecutive 1 a.m. to 5 a.m. periods in the restart is the potential that some operators may not be able to return to duty after 34 hours of rest. As FMCSA itself acknowledges, some nighttime drivers would need up to 61 hours off duty before being permitted to operate their CMV.²⁰ In addition, limiting the use of the 34-hour restart to once per week could further reduce the amount of time an operator has to drive and earn an income.

According to a survey of CMV drivers, approximately 93 percent reported utilizing the 2003 rule's restart provision.²¹ Of these drivers and carriers, 74.4 percent of CMV operators and 84.1 percent of motor carriers reported that the new 34-hour restart provision would have a major or moderate economic impact on their operations,²² a far higher number than the 15 percent estimate by FMCSA.²³ Similarly, 60.8 percent of CMV operators and 63.7 percent of carriers report limiting the 34-hour restart to once per week would result in a moderate to major impact on their operations.²⁴

For many owner-operators, this affects the viability of their business. Small CMV carriers that employ drivers also may face adverse economic consequences by having to abandon certain shippers given their labor force, number of trucks, and these new rules.

The rule's mandatory 30-minute break period may also result in direct economic and operational effects. As previously mentioned in the memorandum, many small business CMV operators do not oppose the concept of mandatory breaks but believe that operators should have the flexibility to determine when to take them based on their personal and operational needs.²⁵ For example, some operators may find taking multiple small breaks during the day more restful than taking their break time all at once.²⁶ Finally, the addition of a mandatory break does not take into consideration other periods of the day when the driver

²⁰ A driver who normally operates between 11 p.m. to 10 a.m. 6 days a week would need to take two full days plus 13 hours off to obtain the 2 night periods and be able to return to work for an 11 p.m. start. HOS 2011 Final Rule at 81,155.

²¹ AMERICAN TRANSPORTATION RESEARCH INSTITUTE, ASSESSING THE IMPACTS OF THE 34-HOUR RESTART PROVISION 12 (June 2013) [hereinafter ATRI Operator Survey]. This survey collected responses from both CMV drivers, many of whom also may be a CMV owner-operator, and carriers. *Id.* at 10.

²² *Id.* at 14, 21. In contrast, FMCSA estimated that fewer than 15 percent of operators would have to significantly adjust their operations due to the new restart provision. FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION, HOURS OF SERVICE (HOS) FINAL RULE REGULATORY IMPACT ANALYSIS 3-2 (Dec. 2011), available at

http://www.fmcsa.dot.gov/documents/hos/2011_HOS_Final_Rule_RIA.pdf.

²³ *Id.*

²⁴ ATRI Operator Survey, *supra* note 21, at 15, 23.

²⁵ OOIDA Comments, *supra* note 19, at 13.

²⁶ *Id.* at 14.

may be able to obtain brief periods of rest, such as down time caused by delays in loading and unloading cargo.²⁷

The indirect economic effects of the rule to small businesses outside of the commercial freight transportation industries are more diffuse and difficult to quantify. Nevertheless, regulations that influence the operating patterns of CMV operators could have ramifications for businesses along commercial supply chains. For example, many businesses improve their efficiency by utilizing just-in-time inventory management methods that reduce expenses associated with warehousing. However, this supply management method also increases their vulnerability to disruptions in the supply chain. In addition, while many large businesses, such as manufacturers and retailers, often operate their own fleet of CMVs to facilitate delivery of products to their various locations and customers, most small businesses in these industries contract with freight brokers, who in turn contract with carriers, to transport their own products. If the HOS 2011 Final Rule reduces the total volume of freight CMV carriers can move in a timely manner it could result in a number of potential economic impacts to these firms.

Finally, many have questioned the safety efficacy of the proposed rule. During the period the HOS 2003 Rule was in effect, highway injury crashes involving CMVs declined by 29.2 percent despite an increase in vehicle miles travelled.²⁸ While the memorandum is not drawing a firm conclusion, it would appear intuitive that the greater flexibility CMV operators had under the HOS 2003 Rule to operate during late night hours, when there are far fewer passenger vehicles on the road, could at the very least explain why crashes involving CMVs did not rise or remain static during this period.

Legislation has been introduced in the House of Representatives that would reinstate the HOS 2003 Rule until the United States Government Accountability Office completes a study of the HOS 2011 Final Rule methodology to determine its economic impact on industry and its safety efficacy.²⁹ The legislative language authorizing this study is similar to a provision contained in the most recently enacted highway reauthorization bill that required FMCSA to complete and report to Congress by September 30, 2013 a field study on the efficacy of the HOS 2011 Final Rule,³⁰ which has not been received by Congress.

V. Conclusion

In underestimating the number of drivers and carriers affected by HOS 2011 Final Rule, FMCSA may have likewise significantly underestimated the rule's costs to small businesses. The hearing will provide members of the subcommittee with additional information to examine the economic impacts of this regulation on small businesses, especially CMV drivers and the small businesses that employ them.

²⁷ ATA Comments, *supra* note 12 at 15.

²⁸ NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, UNITED STATES DEPARTMENT OF TRANSPORTATION, TRAFFIC SAFETY FACTS, LARGE TRUCKS, 2011 DATA at 2 (April 2013), available at <http://www-nrd.nhtsa.dot.gov/Pubs/811752.pdf>.

²⁹ H.R. 3413, the True Safety Act of 2013. The legislation specifies that FMCSA could reinstate the current 34-hour restart provision six months after completion of the study.

³⁰ Moving Ahead for Progress in the 21st Century Act, Pub. L. No. 112-141, § 32303, 126 Stat. 405, 786 (2012).