



November 20, 2017

The Honorable Elaine L. Chao, Secretary  
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**Re: Comment to United States Department of Transportation (“USDOT”) in the matter of Docket ID: DOT-OST-2017-0069-1442; Complaint to United States Small Business Administration (“SBA”); Emergency Application to Federal Motor Carrier Safety Administration (“FMCSA”) for Exemption and Request for Stay of the December 18, 2017 Electronic Logging Device (“ELD”) Rule.**

Dear Ladies and Gentlemen:

This is in response to a *Notification of Regulatory Review* and request for comments issued by the USDOT on October 2, 2017 seeking comment from the public on existing rules and other agency actions that are good candidates for repeal, replacement, suspension, or modification, due by December 1, 2017. The Small Business in Transportation Coalition (“SBTC”) offers these comments as a petition for reconsideration of USDOT rulemaking concerning ELDs previously promulgated by FMCSA and set to go into effect on December 18, 2017 (see: <https://www.gpo.gov/fdsys/pkg/FR-2015-12-16/pdf/2015-31336.pdf>).

**THIS IS AN EMERGENCY PETITION TO THE SECRETARY OF TRANSPORTATION FOR AN EXEMPTION FOR ALL MOTOR CARRIERS WITH FEWER THAN 50 EMPLOYEES FROM THE ELD RULE, RECONSIDERATION OF THE CURRENT ELD FINAL RULE INsofar AS THE FIRST AMENDMENT AFFORDS ALL DRIVERS A RIGHT TO COMMERCIAL FREE SPEECH, AND A STAY ON THE DECEMBER 18, 2017 ELD EFFECTIVE DATE UNTIL THE SECRETARY RULES ON THIS PETITION.**

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This is also a complaint to the SBA insofar as the USDOT has issued a rule codified at 49 CFR 395.8 mandating ELDs to replace paper log books that does not take into account the impact on the smallest businesses in the transportation industry and the free commercial speech rights of all motor carriers and independent drivers.

### **ANALYSIS OF FMCSA'S INTERPRETATION OF MAP-21 & RULEMAKING ON ELDS**

By way of background, the SBTC is a 501(c)(6) non-profit trade organization with over 8,000 dues-paying members that represents, promotes, and protects the interests of small businesses in the transportation industry. The SBTC specifically seeks (before December 18, 2017) assistance from the SBA in obtaining ELD rule reconsideration from the USDOT and reassessment of the impact of the ELD rule on small private, common and contract motor carriers with fewer than 50 employees, including, but not limited to, one-man private and for-hire owner-operators of commercial motor vehicles operating in interstate commerce.

In terms of action taken by the FMCSA, an agency of the USDOT, which the SBTC wishes to be reconsidered, the FMCSA published a final rule --after conducting public notice and comment rulemaking—in furtherance of the Moving Ahead for Progress in the 21<sup>st</sup> Century Act (“MAP-21”) on December 16, 2015, in which, the FMCSA referenced the steps it had taken to minimize adverse economic impacts on small entities (see: <https://www.gpo.gov/fdsys/pkg/FR-2015-12-16/pdf/2015-31336.pdf>).

However, a reading of the FMCSA analysis suggests that FMCSA has essentially **ignored and disregarded** the impact on the smallest of industry players in an overbroad assessment that places one-man interstate owner-operators into the same category as other “small businesses” within the trucking industry. For instance, in referencing North American Industry Classification System (“NAICS”) codes 484110 through 484230 (Freight Trucking), the FMCSA makes no distinction whatsoever between businesses with annual revenues of \$27.5 million and mere one-man operators of commercial motor vehicles. That is, FMCSA stated:

*“Of the population of motor carriers that FMCSA regulates, 99 percent are considered small entities under SBA’s definition. Because small businesses constitute a large part of the demographic the Agency regulates, providing exemptions to small business to permit noncompliance with safety regulations is not feasible and not consistent with good public policy. The safe operation of CMVs on the Nation’s highways depends on compliance with all of FMCSA’s safety regulations. Accordingly, the Agency will not allow any motor carriers to be exempt from coverage of the rule based solely on a status as a small entity.*”

*Furthermore, exempting small businesses from coverage would be inconsistent with the explicit statutory mandate contained in MAP–21.”*

We contend that the FMCSA is misguided in its interpretation here in a few respects.

First, the ELD rule is not a “safety regulation” per se as the FMCSA has concluded. Rather, it is a mechanism intended to enforce a safety regulation by regulating the manner in which a driver records and communicates his compliance. That is, it is merely a tool to determine compliance with an existing rule that regulates over-the-road drivers’ driving and on duty time, namely the actual safety regulation: the hours of service regulations codified at 49 CFR 395.3 and 395.5. However, the ELD rule is not a safety regulation itself.

Second, as a matter of strict construction, MAP-21 merely calls for commercial motor vehicles to be “**equipped**” with ELDs. It does not appear to require the Secretary to mandate the replacement of paper logs with ELDs or force the use of ELDs:

*Use of Electronic Logging Devices.-- <<NOTE: Deadline.>> Not later than 1 year after the date of enactment of the Commercial Motor Vehicle Safety Enhancement Act of 2012, the Secretary of Transportation shall prescribe regulations--*

*(1) requiring a commercial motor vehicle involved in interstate commerce and operated by a driver subject to the hours of service and the record of duty status requirements under part 395 of title 49, Code of Federal Regulations, be **equipped** with an electronic logging device to improve compliance by an operator of a vehicle with hours of service regulations prescribed by the Secretary (emphasis added);*

Third, the regulation of the manner in which a motor carrier or independent driver tracks and communicates its compliance with the hours of service regulations is a matter of **commercial free speech**. Historically, drivers have articulated their compliance by using paper log books called record of duty status (“RODS”). As indicated by our poll results referenced below, many drivers, including older drivers and one-man owner-operators, simply do not wish to use new technology to track and communicate evidence of their compliance with safety regulations. Motor carriers responsible for their own safety management practices and controls should have the right to exercise commercial free speech in determining, as a matter of company policy, whether their drivers are to use ELDs, paper logs, or both. One-man operators who drive independent of a carrier organization should have the right to make this choice themselves.

Regulations that seek to restrict commercial free speech are governed by American case law.

In *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), the United States Supreme Court laid out a four-part test for determining when restrictions on commercial speech violated the First Amendment of the United States Constitution. The Court ruled that a regulation that completely bans an electric utility from advertising to promote the use of electricity violates the First and Fourteenth Amendments. The Court instituted a four-step analysis for commercial speech to the Commission's arguments in support of its ban on promotional advertising:

1. Is the expression protected by the First Amendment? For speech to come within that provision, it must concern lawful activity and not be misleading.
2. Is the asserted governmental interest substantial?
3. Does the regulation directly advance the governmental interest asserted?
4. Is the regulation **more extensive than is necessary** to serve that interest? That is, there must be a "reasonable fit" between the government's ends and the means for achieving those ends (emphasis added).

Like in *Central Hudson*, here... the USDOT --through its agency FMCSA-- is completely banning the industry from communicating its compliance through the use of paper logs without a clear Congressional directive to do so. Although electronic logging is an alternate mechanism of tracking and communicating a driver's compliance with hours of service regulations available to him, mandating same as the only way to communicate his compliance arbitrarily and capriciously **restricts a driver's choice** on how to communicate his compliance and infringes upon his right to commercial free speech. MAP-21 does not call for this level of infringement upon free speech and even if it did, it would be actionable as a matter of Constitutional law.

Communicating one's compliance with hours of service regulations is a matter of engaging in protected free speech in furtherance of lawful transportation business activity in interstate commerce.

The government's compelling interest, here, in regulating drivers is obviously to protect the public from unsafe drivers who recklessly drive beyond a reasonable number of hours in a day, thus ignoring the risks of driver fatigue, which can and does cause fatalities. However, the USDOT has already effected a rule that addresses that objective in that it has promulgated the hours of service regulations.

While it could be argued that ELDs advance that government objective, the reasonableness of the ELD mandate rests on the 4<sup>th</sup> prong of *Central Hudson*; namely, whether the regulation is **more extensive than is necessary** to serve that interest.

We suggest that it is.

We therefore **petition FMCSA for reconsideration of the ELD rule to reflect all drivers' choice to use paper logs in lieu of an ELD.** While the statute requires commercial motor vehicles to be **equipped** with ELDs, FMCSA is free as a matter of rulemaking to afford a driver the **choice** to either turn the ELD on and use that device as the mechanism to communicate his compliance, or simply turn the ELD off and revert to long-standing paper logs as a matter of personal preference.

Fourth, the regulation of one-man operators in the same manner as drivers of other “small business” carriers --not to mention large “Fortune 500” carriers-- is unreasonable and does not conform to the National Transportation policy codified by Congress at 49 U.S. Code § 13101 as matters of fair competition and destructive competitive practices.

*49 U.S. Code § 13101 - Transportation policy*

*(a) In General.—To ensure the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States, including the United States Postal Service and national defense, it is the policy of the United States Government to oversee the modes of transportation and—*

*(1) in overseeing those modes—*

*(A) to recognize and preserve the inherent advantage of each mode of transportation;*

*(B) to promote safe, adequate, economical, and efficient transportation;*

*(C) to encourage sound economic conditions in transportation, including sound economic conditions among carriers;*

*(D) to encourage the establishment and maintenance of reasonable rates for transportation, without unreasonable discrimination or unfair or destructive competitive practices;*

*(E) to cooperate with each State and the officials of each State on transportation matters; and*

*(F) to encourage fair wages and working conditions in the transportation industry;*

*(2) in overseeing transportation by motor carrier, to promote competitive and efficient transportation services in order to—*

*(A) encourage fair competition, and reasonable rates for transportation by motor carriers of property;*

*(B) promote efficiency in the motor carrier transportation system and to require fair and expeditious decisions when required;*

- (C) meet the needs of shippers, receivers, passengers, and consumers;*
- (D) allow a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping and traveling public;*
- (E) allow the most productive use of equipment and energy resources;*
- (F) enable efficient and well-managed carriers to earn adequate profits, attract capital, and maintain fair wages and working conditions;*
- (G) provide and maintain service to small communities and small shippers and intrastate bus services;*
- (H) provide and maintain commuter bus operations;*
- (I) improve and maintain a sound, safe, and competitive privately owned motor carrier system;*
- (J) promote greater participation by minorities in the motor carrier system;*
- (K) promote intermodal transportation;*
- (3) in overseeing transportation by motor carrier of passengers—*
  - (A) to cooperate with the States on transportation matters for the purpose of encouraging the States to exercise intrastate regulatory jurisdiction in accordance with the objectives of this part;*
  - (B) to provide Federal procedures which ensure that intrastate regulation is exercised in accordance with this part; and*
  - (C) to ensure that Federal reform initiatives enacted by section 31138 and the Bus Regulatory Reform Act of 1982 are not nullified by State regulatory actions; and*
- (4) in overseeing transportation by water carrier, to encourage and promote service and price competition in the noncontiguous domestic trade.*

## **FMCSA EXEMPTION AUTHORITY**

Section 13541(a) of title 49 of the United States Code (49 U.S.C. 13541) requires the Secretary of Transportation (Secretary) to exempt a person, **CLASS OF PERSONS**, or a transaction or service from the application, in whole or in part, of a provision of 49 U.S.C., Subtitle IV, Part B (Chapters 131-149), or to use the exemption authority to **modify** the application of a provision of 49 U.S.C. Chapters 131-149 as it applies to such person, **CLASS**, transaction, or service when the Secretary finds that the application of the provision (emphases added):

- Is not necessary to carry out the transportation policy of 49 U.S.C. 13101
- Is not needed to protect shippers from the abuse of market power or that the transaction or service is of limited scope; and
- Is in the public interest.

We contend the mandating of the form and manner of a driver's communication of his compliance is not necessary to carry out the transportation policy of 49 U.S.C. 13101.

ELDS are not needed to protect shippers from the abuse of market power.

Restriction of commercial free speech through regulations that are **more extensive than necessary** is not in simply not in the public interest.

The Secretary therefore has the lawful authority --and obligation-- to modify the MAP-21 requirement and exempt a "class of persons," in this instance-- the smallest of the industry's stakeholders, from the ELD mandate.

### **FMCSA'S EXISTING ELD EXEMPTIONS**

In requesting an exemption from the ELD rule for carriers with fewer than 50 employees (if FMCSA opts not to reconsider the ELD rule to afford all drivers' the right to choose the mechanism of communicating their compliance with the hours of service regulations), we note that FMCSA has already issued ELD exemptions:

\*Drivers who use the timecard exception are not required to keep records of duty status (RODS) or use ELDs. Additionally, the following drivers are not required to use ELDs; however, they are still bound by the RODS requirements in 49 CFR 395 and must prepare logs on paper, using an Automatic On-Board Recording Device (AOBRD), or with a logging software program when required:

\*Drivers who use paper RODS for not more than 8 days out of every 30-day period.

\*Drivers of vehicles manufactured before 2000.

\*Drivers who are required to keep RODS not more than 8 days within any 30-day period.

\*Drivers who conduct drive-away-tow-away operations, where the vehicle being driven is the commodity being delivered, or the vehicle being transported is a motor home or a recreation vehicle trailer with one or more sets of wheels on the surface of the roadway.

\*Drivers of vehicles manufactured before the model year 2000. (As reflected on the vehicle registration)

We understand FMCSA has also at least partially granted specific applications for exemption to requesting parties such as Truck Renting and Leasing Association (TRALA) and United Parcel Service (UPS)

<https://www.ooida.com/MediaCenter/PressReleases/pressrelease.asp?prid=447>).

## THE U.S. GOVERNMENT REGULARLY EXEMPTS THE SMALLEST BUSINESSES

I. Small employers with fewer than 20 employees are exempt from the Consolidated Omnibus Budget Reconciliation Act (“COBRA”).

<https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/publications/an-employers-guide-to-group-health-continuation-coverage-under-cobra.pdf>

II. Small businesses are exempt from corporate income taxes if they elect to declare themselves “S-Corps.” According to the IRS website:

*“S corporations are corporations that elect to pass corporate income, losses, deductions, and credits through to their shareholders for federal tax purposes. Shareholders of S corporations report the flow-through of income and losses on their personal tax returns and are assessed tax at their individual income tax rates. This allows S corporations to avoid double taxation on the corporate income. S corporations are responsible for tax on certain built-in gains and passive income at the entity level.”*

<https://www.irs.gov/businesses/small-businesses-self-employed/s-corporations>

III. Affordable Care Act Exemption:

Most employers have fewer than 50 full-time employees or full-time equivalent employees and are therefore not subject to the Affordable Care Act’s employer shared responsibility provision.

<https://www.irs.gov/affordable-care-act/individuals-and-families/find-out-how-aca-affects-employers-with-fewer-than-50-employees>

IV. OSHA Exemptions

Businesses with 10 employees or fewer are exempt from OSH Act’s injury and incident reporting as well as programmed inspections by Occupational Safety and Health Administration employees. Other small businesses with more than 10 employees may also be exempt from the programmed inspections. This applies to certain “low-hazard industries” identified by OSHA.

[https://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=standards&p\\_id=9632](https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=standards&p_id=9632)

V. Family Medical Leave Act

Family and Medical Leave Act (FMLA) exempts employers with fewer than 50 employees. <https://www.dol.gov/whd/regs/compliance/whdfs28.pdf>

## UNIQUE MOTOR CARRIER EXEMPTIONS

There is a motor carrier exemption under the Fair Labor Standards Act (FLSA)  
<https://www.dol.gov/whd/regs/compliance/whdfs19.htm>

There is a common carrier exemption under the FTC Act  
<https://www.law.cornell.edu/uscode/text/15/45>

## DRIVER SURVEY

Finally, SBTC conducted a survey to sample the motor carrier industry's beliefs about the ELD Mandate, asking interstate drivers a poll (<https://poll.fbapp.io/sbtc-eld-poll>) question:

*What is your issue with the Electronic Logging Device ("ELD") mandate... Do you take issue with the ELD mechanism as an enforcement tool because it closes the gap on "creative" paper log-keeping? Is the real problem the Hours of Service ("HOS") regulations the ELDs are designed to enforce? Or, maybe you don't have an issue with ELDs or HOS at all. Answers below are presented in random order...*

Respondents answered:

*The ELD mandate is an attack on owner-operators by the big carriers 29.6%*  
*The problem is the underlying HOS rule, not the ELDs... 22.9%*  
*The ELD mandate is a driver safety issue. 17.9%*  
*Other 13.3%*  
*The ELD mandate is a driver privacy issue. 9.2%*  
*The ELD mandate is a driver harassment issue. 5.4%*  
*The problem is the ELDs stop drivers from fudging their logs. 0.8%*  
*There is no problem with either HOS or ELDs. 0.8%*

With less than 1% of drivers stating there is no problem with the ELD mandate, clearly the industry's smallest players are pleading for relief from the United States Government. And only another 1% appears to be interested in using paper logs to evade regulation. Owner operators have pointed to bona fide issues of driver safety, privacy, harassment, and unfairly having their costs driven up at the insistence of larger carriers seeking to use the governmental process as an economic weapon. But no issue is more basic in American jurisprudence than the fundamental right to free speech. Here, we simply ask the agency to consider equitably reconciling carriers' free speech against the need to ensure safe public highways in a fair and reasonable fashion.

## **CONCLUSION**

For the reasons asserted herein, the SBTC hereby respectfully requests:

1. The FMCSA reconsider the ELD rule to afford independent drivers and carriers' the choice of either using the ELD, once equipped, or continuing to use paper logs.
2. The Secretary consider using her exemption authority to issue an immediate ELD exemption for independent owner operators and small carriers with less than 50 employees before December 18, 2017.
3. The Small Business Administration advocate for the interests of the motor carrier industry's smallest players and help the SBTC seek reconsideration of the FMCSA's impact and assessment on all levels of small businesses.
4. A stay on the December 18, 2017 ELD effective date be issued until this petition can be addressed.

Thank you for your consideration.

Sincerely,

/s/JAMES LAMB  
SBTC President

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