

October 21, 2019

Docket Management Facility
U.S. Department of Transportation
1200 New Jersey Avenue, SE
West Building, Ground Floor
Room W12-140
Washington, D.C. 20590-00001

RE: **Docket No. FMCSA-2018-0248**; Hours of Service of Driver; Notice of Proposed Rulemaking

The Food Marketing Institute (“FMI”) appreciates the opportunity to comment in response to the Federal Motor Carrier Safety Administration’s (“FMCSA”) Notice of Proposed Rulemaking regarding proposed amendments to the hours-of-service (“HOS”) rules.¹ FMI supports FMCSA’s effort to provide increased flexibility for drivers subject to the HOS rules without sacrificing safety or negatively impacting driver health. FMI appreciates the agency’s commitment to examine its rules in light of new data made available as a result of the electronic logging device (“ELD”) rule.

FMI is the national trade association that conducts programs in public affairs, food safety, research and industry relations on behalf of the food retail industry, representing more than 1,225 food retailer and wholesaler companies in the United States and around the world. The food retail industry employs nearly 5 million workers and represents annual sales volume of almost \$800 billion. FMI member companies operate nearly 34,000 retail food stores and 12,000 pharmacies. FMI membership covers the spectrum of diverse venues where food is sold, including single owner grocery stores, large multi-store supermarket chains, and mixed retail stores. FMI routinely engages in advocacy before regulatory agencies and has a long history of involvement in HOS rulemakings.

I. BACKGROUND

The saying “If you got it, a truck brought it” could not be truer than at your neighborhood supermarket. Nearly every product found on the shelves, including dry goods, perishable, dairy, soft drinks, juices, deli items, meats, poultry, seafood, bakery items, prescription drugs, household cleaning items, and personal care products to name just a few, was delivered by a truck. FMI members are collectively among the nation’s largest purchasers of truck transportation, but they also operate their own private fleets.

Customer expectations of their food retailers have changed dramatically over time. Stores are now open every day of the year – many for all 24 hours of the day. Consumers expect stores to be fully stocked with a wide variety of products and demand fresh fruits and vegetables. Getting

¹ 84 Fed. Reg. 44190 (Aug. 22, 2019).

those products onto the shelves involves an intricate supply chain, of which trucking is the linchpin.

A quick look at the headlines shows that the food industry is struggling to grapple with the higher costs of transportation.² These higher costs continue to eat away at a supermarket's slim profit margin, which operates on an average 1.2% net profit margin.³ Despite the cost pressures, FMI members hold safety in the highest regard. Therefore, FMI and its members are understandably vitally interested in preserving the world's leading system of food distribution through regulations that promotes safety without sacrificing efficiency and productivity.

II. ANALYSIS OF THE PROPOSED CHANGES

A. Short Haul Operations

FMCSA proposes changes to the short-haul exception in 49 C.F.R. § 395.1(e)(1) from records of duty status, ELDs, and the rest break requirement so the maximum allowable workday increases from 12 to 14 hours and the radius requirement from normal work reporting location increases from 100 to 150 air miles. FMI supports FMCSA's proposal, as it provides additional flexibility without sacrificing safety. Notably, the proposed change does not increase driving time available.

FMI members engage in a wide variety of operations, many of which involve multi-stop deliveries. Dating back to comments to HOS rules in March 2005, FMI has been concerned about the necessity and efficacy of the 30-minute break. The proposed changes to the short-haul expansion should allow more operations to fit within the short-haul exception and thus avoid the break requirement FMCSA has recognized is unnecessary for short-haul, multi-stop operations.

In its 2005 Final Rule, FMCSA examined short-haul operations working within a 150 air-mile radius of the normal work reporting location. The agency cited research finding that "short-haul drivers have significantly fewer fatigue related crashes as compared to drivers for longer trips (0.4 percent for short-haul trucks compared to 3.0 percent for other trucks)."⁴ Other research found that driving only made up about 40% of a short-haul driver's work time and no fatigue-related crashes were reported in a field study of short-haul drivers.⁵ Since stress due to time pressure was frequently cited by short-haul drivers, FMCSA also explored expanding the working hours. The agency concluded that studies "confirm the ability of drivers to work a 16-

² Jessi Devenyns, "Will High Trucking Costs Eventually Run Over Food Companies' Ability to Grow?" (Aug. 13, 2018) available at <https://www.fooddive.com/news/will-high-trucking-costs-eventually-run-over-food-companies-ability-to-grow/529941/>; Alicia Kelso, "Food Companies Struggle to Overcome High Freight Costs" (Jun. 20, 2018) available at <https://www.grocerydive.com/news/grocery--food-companies-struggle-to-overcome-high-freight-costs/533922/>; Heather Haddon, "Food Distributors Make Changes as Costs Bite" (Nov. 23, 2018) available at <https://www.wsj.com/articles/food-distributors-make-changes-as-costs-bite-1542974400>.

³ Food Marketing Institute, "Supermarket Facts" (Oct. 2019) available at <https://www.fmi.org/our-research/supermarket-facts>.

⁴ 70 Fed. Reg. 49,978, 49,995 (Aug. 25, 2005) (citing Massie, D.L. *et al.*, "Short-Haul Trucks and Driver Fatigue," (Sept. 1997)).

⁵ *Id.* (citing Hanowski, R.J., *et al.*, "Impact of Local/Short Haul Operations on Driver Fatigue, Task I: Focus Group Summary and Analysis," (1998); Hanowski, R.J., *et al.*, "Impact of Local/Short Haul Operations on Driver Fatigue, Final Report," (2000)).

hour shift without significant degradation of performance.”⁶ FMCSA’s proposed changes to the short-haul exception provide additional flexibility and are supported by short-haul specific research.

B. Adverse Driving Conditions

FMCSA proposes changes to the adverse driving conditions provision in 49 C.F.R. § 395.1(b)(1) to allow for a two hour extension of the 14-hour driving window to correspond with the two-hour extension of the driving time currently granted under adverse driving conditions. FMI supports the proposed change. Although FMI does not believe the provision is invoked frequently, the proposed change would encourage safer decision-making with respect to how to proceed in the face of adverse conditions. In some instances, a carrier may save having to break a trip into two trips, if a carrier is now able to wait out the adverse driving condition’s presence.

C. 30-Minute Break

As noted earlier, FMI has long questioned the necessity of the 30-minute break provision that exists under the current HOS rules. FMCSA proposes two changes to the 30-minute break requirement: 1) the break requirement would be triggered by reaching 8 hours of driving time as opposed to 8 hours of working time; and 2) instead of requiring the break to be off-duty, it can be on-duty, not driving, off duty, or sleeper berth. FMI strongly supports this proposal, because it adds desperately-needed flexibility to multi-stop operations while better conforming to the existing fatigue research.

Even when their operations are outside the range of the proposed short-haul exception, FMI trucking operations generally involve multiple stops for loading and unloading food. Therefore, they take on certain beneficial characteristics of short-haul operations in that some drivers do not drive for long periods of time and even if they do, the driving activity is followed by physical activity associated with loading and unloading.

As one of the important studies used to originally justify the rest break requirement noted, research on crash risk and HOS has focused on time-on-task, i.e., the buildup of fatigue while engaged in a continuous task.⁷ The Blanco Study found that breaks, whether on-duty or off-duty, addressed negative time-on-task effects and offered significant safety benefits.⁸

Food industry drivers, unlike the drivers in the Blanco Study, often take multiple breaks from the task of driving during a shift. These multiple breaks help reset fatigue and increase alertness levels during the ensuing work period. Additionally, the Blanco Study’s findings that off-duty rest breaks lead to a greater reduction in safety critical events (“SCEs”) than on-duty, working breaks have been criticized as being flawed.⁹

⁶ *Id.*

⁷ Blanco, Myra, *et al.* “The Impact of Driving, Non-Driving Work, and Rest Breaks on Driving Performance in Commercial Motor Vehicle Operations” at p. 5 (Mar. 2011) (“Blanco Study”).

⁸ *Id.* at 77.

⁹ See 84 Fed. Reg. at 44200-01. Additionally, due to small sample sizes with respect to the classification of breaks, the off-duty breaks were bundled together with on-duty resting breaks and mixed on-duty working and rest breaks, so there was no way to determine the statistical significance of those categories standing alone.

The proposal to require the break after 8 hours of driving time, instead of 8 hours of on-duty time, is also consistent with the notion that time-on-task is the primary concern affecting fatigue. The research examines fatigue building up while engaged in the same task. Therefore, focusing on the time spent on a single task, i.e., driving, is a reasonable approach.

FMCSA has granted a number of exemptions from the 30-minute off-duty rest break requirement. To date, those exemptions appear to bear out what the research predicts; namely, breaks from time-on-task are the key to maintaining safety performance.

FMI's members and their carriers would greatly benefit from the proposed changes to the rest break requirement. The changes will likely allow the flexibility to add one or two more stops to a route. The proposal to allow on-duty, working breaks, e.g., loading or unloading, to count toward the break requirement will address one of the food industry's driver's biggest complaints – forcing a driver to take a break when he/she is not fatigued or tired while discouraging them from taking a break when they are tired or fatigued.

D. Split Sleeper Berth

FMCSA proposes to modify the sleeper berth exception to allow a driver to meet the 10 hours off duty requirement by taking two off-duty periods, one of which must consist of at least seven consecutive hours in the sleeper berth and the other of which must consist of a period of at least two hours. FMI supports the proposal, because it gives drivers more flexibility to arrange for their rest when they need it. As the research suggests, some drivers simply cannot get more sleep just because they are confined to the sleeper berth for 8 hours (as under the current rules), and the restorative impact of rest breaks and naps improves driver performance.¹⁰ Although the split sleeper berth provision is not universally used in the food industry, the proposed change is consistent with a more flexible regulatory approach that maintains or improves safety.

E. Split Duty Period

FMCSA proposes to allow a single break of off-duty time ranging from 30 minutes to 3 consecutive hours to pause the 14-hour driving window. FMCSA further ask whether operations would benefit from multiple off-duty periods totaling 3 hours. FMI supports the original proposal but also confirms that multi-stop operations would benefit from the ability to pause the 14-hour driving window as a result of multiple off-duty periods that total no more than 3 hours.

As congestion increases and as multiple stops are required in metropolitan areas, the ability to make the same number of stops within the 14-hour driving window has diminished. Like short-haul drivers' complaint under the 12-hour window, more and more drivers complain of the time pressure they feel is imposed by the 14-hour window. That pressure can be relieved if the driver is able to pause the 14-hour clock with each corresponding off-duty period of 30 minutes or more. Drivers will better be able to navigate the challenges of driving in congestion and/or urban environments that do not fall within the definition of "adverse driving conditions."

¹⁰ See 84 Fed. Reg. at 44204-05.

FMI understands that adopting this approach could extend the workday up to 17 hours. First, drivers in the food industry typically work regularly scheduled shifts, with many returning home each night. They have no incentive to prolong their day any more than necessary. Second, research indicates that drivers can safely work a 16-hour shift without significant degradation in performance presenting a safety risk.¹¹ That study failed to take into account the impact of one or more off-duty rest breaks of 30 minutes or more up to 3 hours and their importance in combating fatigue. Therefore, the research would suggest there is no deleterious impact to extending the 14-hour driver window when there is a corresponding off-duty period.

Allowing multiple off-duty periods to pause the 14-hour window is consistent with the Blanco Study's conclusion that breaks address negative time-on-task effects and have important safety benefits. The proposal would provide flexibility where and when it is needed. The proposal would likely allow more trips and stops to be completed in one day but not necessarily result in additional driving miles.

III. CONCLUSION

Although FMI members are not primarily in the trucking business, trucking is a vital component to ensuring FMI members can provide the products that customers demand. FMI welcomes FMCSA's commitment to re-assessing the HOS rules in light of the ever-changing environment in which trucking operates and data available to FMCSA. FMI members have a staunch commitment to truck safety – whether it be in the conduct of private fleet operations or the expectations of their trucking service providers. Without weakening that commitment, FMI supports the proposed changes to the HOS rule allow more flexibility in addressing productivity and efficiency challenges without increasing the maximum driving time allowed.

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If you have questions about these comments or would like additional information, please don't hesitate to contact me at mviohl@fmi.org or (202) 220-0634.

Sincerely,



Matthew Viohl
Manager, Labor Policy & Sustainability
Food Marketing Institute

¹¹ 70 Fed. Reg. at 49,995 (citing Van Dongen, H.P.A., *et al.*, "The Cumulative Cost of Additional Wakefulness: Dose-Response Effects on Neurobehavioral Functions and Sleep Physiology from Chronic Sleep Restriction and Total Sleep Deprivation," *Sleep*, Vol. 26, No. 2, p. 125 (2003)).