

# Regulatory and Legislative Update

January 2017

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## Regulation and Enforcement

### FMCSA announces plans to revise SFD proposed rule

FMCSA announced January 12 that it plans to publish a supplemental notice of proposed rulemaking (SNPRM) to pursue changes in the way the agency determines the safety fitness of motor carriers. FMCSA published an NPRM on safety fitness determinations (SFDs) in January 2016, and the public comment period ended in June. The agency said that an SNPRM is an appropriate next step so it can “thoroughly evaluate and possibly incorporate” comments received on the NPRM and to address any recommendations resulting from the National Academy of Sciences (NAS) study regarding the Compliance, Safety, Accountability program.

FMCSA said the anticipated rulemaking scheduled would be available in January 2017 through the Department of Transportation's monthly report of significant rulemakings. However, the January DOT report has not been published, and it is unclear whether the announcement, which came during the Obama administration, means anything under the Trump administration. In any event, FMCSA contracted with NAS in early 2016 for the study, which is expected to take 18 months. If an SNPRM is published to respond to NAS recommendations, presumably it would not be published until this fall.

The NPRM was almost uniformly criticized by associations representing property and passenger carriers almost uniformly objected to major aspects of the NPRM. A provision in the House version of the transportation funding bill would have blocked the rule, but legislation enacted in December to fund the government through April did not include such a provision.

### DOT nominee Chao vows 'balance' in safety regulation

The Senate Commerce Committee on January 11 considered the nomination of Elaine Chao to be secretary of the Department of Transportation in what might be the friendliest confirmation hearing to date on one of President Trump's cabinet nominees. Chao, who served as secretary of the Department of Labor under

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President George W. Bush and as deputy DOT secretary under President George H.W. Bush, appears set for easy confirmation.

The confirmation hearing barely touched on motor carrier safety issues. Sen. Deb Fischer (R-Nebraska), who chairs the subcommittee that oversees motor carriers, referred to the regulatory reforms ordered in the FAST Act and asked Chao how DOT could best ensure both safety and efficiency and keep regulations from being burdensome.

“The great challenge for all regulators is to balance the ultimate goal of safety, but also to make sure the regulations are based on sound science and true data, and that the underlying analysis is solid,” Chao said.

### **Appears court denies rehearing on electronic logging devices**

A federal appeals court has rejected a request that it rehear a challenge to FMCSA's rule mandating electronic logging devices (ELDs) for drivers required to maintain records of duty status (RODS). On October 31, a three-judge panel of the U.S. Court of Appeals for the 7th Circuit ruled in FMCSA's favor in a lawsuit filed by the Owner-Operator Independent Drivers Association. OOIDA then asked the entire circuit court hear the challenge.

Unless the Supreme Court or Congress act to overturn or delay the rule or FMCSA itself reverses or postpones it, drivers maintaining paper logs must use either ELDs or automatic onboard recording devices (AOBRDs) – the current standard for electronic logs – by December 18, 2017. OOIDA said that it will appeal to the Supreme Court but that it also will push Congress for action. Its current focus is on building support within the membership of the House Freedom Caucus, which recently included ELDs on a list of 232 final or proposed rules that the Trump administration should reverse or drop. The only other FMCSA item on that list is the proposed rule to mandate speed limiters.

### **Safety groups, OOIDA seek stronger driver training rule**

FMCSA's decision not to specify a minimum number of hours in behind-the-wheel training in the final entry-level driver training rule drew a petition for reconsideration from several safety advocacy groups and the Owner-Operator Independent Drivers Association. Although FMCSA's proposed rule called for a minimum of 30 hours in behind-the-wheel (BTW) training for Class A commercial driver's license (CDL) applicants and a minimum of 15 hours in BTW training for Class B CDL applicants, the final rule dropped an hours-based requirement in favor of a proficiency-based requirement.

In a December 21 petition, OOIDA, Advocates for Highway and Auto Safety, Truck Safety Coalition, and Citizens for Reliable and Safe Highways argued that final rule disregards congressional mandates, federal court precedent and recommendations by the ELDTAC. For example, the groups note that FMCSA conceded in the notice of proposed rulemaking (NPRM) that "Congress intended that the BTW training requirements be more extensive than a simple one-time demonstration of skills." And yet, the final rule gives the CDL instructor the flexibility to require to require the specific means or methods by which the applicant can demonstrate "proficient performance of required BTW skills," the groups said.

A copy of the petition is available at <http://bit.ly/ELDT-Petition>. The final rule is available at <https://www.federalregister.gov/d/2016-28012>.

### **Several carriers propose pre-employment hair testing**

FMCSA has requested comment by February 21, 2017, on a petition by six trucking companies that they be allowed to use hair analysis instead of urine testing for pre-employment controlled substances testing of commercial driver's license (CDL) holders.

All six carriers – J.B. Hunt, Schneider National, Werner Enterprises, Knight Transportation, Maverick Transportation, and Dupre Logistics – currently conduct both hair analysis on their own initiative and pre-employment urine testing to satisfy Department of Transportation requirements under 49 CFR Part 40. In their

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exemption application, the carriers said their data "demonstrates that hair analysis is a more reliable and comprehensive basis for ensuring detection of controlled substance use."

A copy of FMCSA's notice is available at <https://www.federalregister.gov/d/2017-01278>. A copy of the petition is available at <http://bit.ly/Hair-Petition>.

### **FMCSA delays full URS implementation indefinitely**

After twice delaying full implementation of the Unified Registration System, FMCSA has postponed the second phase of URS without setting a new date. In a Federal Register notice, the agency said additional time is needed "to securely migrate data from multiple legacy platforms into a new central database and to conduct further compatibility testing with its State partners."

FMCSA recently moved its information technology systems to a "cloud" environment, which was necessary to implement the second phase. A major element of URS is combining FMCSA's separate existing databases for registration, safety monitoring and licensing and insurance into a single platform that is intended to make it easier to monitor carriers and expose so-called "chameleon carriers" that try to circumvent enforcement. Once URS is fully implemented, FMCSA plans to use only USDOT numbers to track carriers.

Moving the implementation date will provide states more time to develop, update, and verify data connectivity and system reliability and allow the agency to conduct more thorough training and to implement broader outreach and education activities, FMCSA said. Other key elements of URS require:

- Online filing for new USDOT numbers and operating authority, biennial updates, etc.;
- A new \$300 safety registration fee for FMCSA-regulated carriers in addition to the \$300 fee for operating authority, if applicable;
- The designation of agents for service of process by private and exempt carriers; and
- The filing of evidence of minimum financial responsibility by exempt carriers and by private carriers.

The first phase of URS, which took effect in December 2015, required individuals and businesses seeking new USDOT numbers to do so online using a new interface.

A copy of FMCSA's notice is available at <https://www.federalregister.gov/d/2016-31706>.

### **Carrier seeks greater flexibility on split rest for teams**

Dillon Transportation LLC has requested an exemption from the hours-of-service regulations to allow its team drivers to take the equivalent of 10 consecutive hours off duty by splitting sleeper berth time into two periods totaling 10 hours provided that neither is less than three hours. The regulations allow for split rest by team drivers but only if one rest period is at least eight hours and a separate rest period is at least two hours. Comments on the application are due February 6, 2017.

Dillon stated in its application that it is common knowledge that sleeping in a moving vehicle is more difficult than for a single driver who can stop the truck during their sleeper time. It argued that having the flexibility to switch with a partner allows each driver to take advantage of shorter driving periods when they feel fatigued even though they have available driving time. This will result in a more flexible work pattern improving personal and vehicular safety, the carrier said.

Countermeasures offered by Dillon include a reduction of permitted drive time to 10 hours from 11 hours and use of electronic logs and speed limiters. To support its request for the exemption, Dillon cited the results of a recent study conducted by Gregory Belenky, MD at the Sleep and Performance Research Center, which concluded that when consolidated nighttime sleep is not possible, split sleeper berth time is preferable to consolidated daytime sleep.

A copy of FMCSA's notice is available at <https://www.federalregister.gov/d/2017-00011>.

### **FMCSA initiates annual survey on controlled substances**

FMCSA has notified selected truck and bus companies that they will be required to submit their 2016 USDOT drug and alcohol testing program results within 60 days as directed by 49 CFR 382.403. The annual survey

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results are used to determine the random testing rates for the following year. Carriers notified by FMCSA that they have been selected to complete the annual survey must respond by March 15, 2017, and failure to do so could result in civil penalties.

### Legislation

#### Lawmakers eye changes in how federal agencies regulate

The 115th Congress convened on January 3, 2017, with Republicans holding control over both Houses. More significant, however, is that with the election of Donald Trump as president, it is the first time in more than a decade that both houses of Congress and the White House are in GOP hands.

Early legislative action has involved mostly the introduction of bills that might be considered down the road. So far, only one introduced bill directly relates to motor carriers. H.R. 364, introduced by Rep. Markwayne Mullin (R-Oklahoma), would exclude from on-duty time under the hours-of-service rules waiting time at natural gas or oil well sites.

Many bills would affect motor carriers among others through broad changes. Most notably, at least 13 bills requiring some type of change in the federal regulatory process have been introduced, including:

- **H.R. 5** – To reform the process by which federal agencies analyze and formulate new regulations and guidance documents, to clarify the nature of judicial review of agency interpretations, to ensure complete analysis of potential impacts on small entities of rules, and for other purposes. Sponsored by Rep. Bob Goodlatte (R-Virginia);
- **H.R. 26** – To amend chapter 8 of title 5, U.S. Code, to provide that major rules of the executive branch shall have no force or effect unless a joint resolution of approval is enacted into law. Rep. Doug Collins (R-Georgia);
- **H.R. 31** – To provide for the periodic review of the efficiency and public need for federal agencies, to establish a commission for the purpose of reviewing the efficiency and public need of such agencies, and to provide for the abolishment of agencies for which a public need does not exist. Rep. Richard Hudson (R-North Carolina);
- **H.R. 33** – To amend the Regulatory Flexibility Act to ensure complete analysis of potential impacts on small entities of rules, and for other purposes. Rep. Steve Chabot (R-Ohio);
- **H.R. 41** – To amend title 5, United States Code, to require agencies to respond to comments from congressional committees about proposed rulemaking, and for other purposes. Rep. Markwayne Mullin (R-Oklahoma);
- **H.R. 45** – To reform the process by which federal agencies analyze and formulate new regulations and guidance documents. Goodlatte;
- **H.R. 70** – To amend the Federal Advisory Committee Act to increase the transparency of federal advisory committees, and for other purposes. Rep. Lacy Clay (D-Missouri);
- **H.R. 74** – To amend title 5, U.S. Code, to postpone the effective date of high-impact rules pending judicial review. Rep. Tom Marino (R-Pennsylvania);
- **H.R. 75** – To amend title 5, U.S. Code, to provide for the publication, by the Office of Information and Regulatory Affairs, of information relating to rulemakings, and for other purposes. Rep. John Ratcliffe (R-Texas);
- **H.R. 76** – To amend title 5, U.S. Code, to clarify the nature of judicial review of agency interpretations of statutory and regulatory provisions. Ratcliffe;
- **H.R. 77** – To require each agency, in providing notice of a rulemaking, to include a link to a 100-word plain language summary of the proposed rule. Rep. Blaine Luetkemeyer (R-Missouri);

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- **S. 21** – To amend chapter 8 of title 5, U.S. Code, to provide that major rules of the executive branch shall have no force or effect unless a joint resolution of approval is enacted into law. Sen. Rand Paul (R-Kentucky);
- **S. 56** – To require each agency to repeal or amend two or more rules before issuing or amending a rule. Sen. Dan Sullivan (R-Alaska);

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