



**DEPARTMENT OF TRANSPORTATION**

**[4910-EX-P]**

**Federal Motor Carrier Safety Administration**

**[Docket No. FMCSA-2018-0312]**

**Hours of Service of Drivers: American Bakers Association and International Dairy Foods Association; Application for Exemption**

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.

**ACTION:** Notice of final disposition; denial of application for exemption.

**SUMMARY:** FMCSA announces its decision to deny the joint request from the American Bakers Association (ABA) and International Dairy Foods Association (IDFA) for an exemption from the Federal hours-of-service (HOS) rules for commercial motor vehicle (CMV) drivers. The requested exemption would have covered drivers engaged in the delivery of baked goods and milk products in anticipation of a natural disaster or emergency, such as extreme weather events, natural disasters, etc. FMCSA analyzed the application and public comments, and determined that drivers operating under the proposed exemption would not achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption.

**FOR FURTHER INFORMATION CONTACT:** Mr. Richard Clemente, FMCSA Driver and Carrier Operations Division; Office of Carrier, Driver and Vehicle Safety Standards; Telephone: 202-366-2722. E-mail: [MCPSD@dot.gov](mailto:MCPSD@dot.gov). If you have questions on viewing or submitting material to the docket, contact Docket Services, telephone (202) 366-9826.

**SUPPLEMENTARY INFORMATION:**

**I. Public Participation**

[Viewing Comments and Documents](#)

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to [www.regulations.gov](http://www.regulations.gov) and insert the docket number, FMCSA-2018-0312, in the “Keyword” box and click “Search.” Next, click the “Open Docket Folder” button and choose the document to review. If you do not have access to the Internet, you may view the docket online by visiting the Docket Management Facility in Room W12-140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue, SE, Washington, DC 20590, between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays.

## **II. Legal Basis**

FMCSA has authority under 49 U.S.C. 31136(e) and 31315 to grant exemptions from certain Federal Motor Carrier Safety Regulations (FMCSRs). FMCSA must publish a notice of each exemption request in the **Federal Register** (49 CFR 381.315(a)). The Agency must provide the public an opportunity to inspect the information relevant to the application, including any safety analyses that have been conducted. The Agency must provide an opportunity for public comment on the request.

The Agency reviews safety analyses and public comments submitted, and determines whether granting the exemption would likely achieve a level of safety equivalent to, or greater than, the level that would be achieved by the current regulation (49 CFR 381.305). The Agency’s decision must be published in the **Federal Register** (49 CFR 381.315(b)) with the reasons for denying or granting the application and, if granted, the name of the person or class of persons receiving the exemption, and the regulatory provision from which the exemption is granted. The notice must also specify the effective period (up to 5 years) and explain the terms and conditions of an exemption. An exemption may be renewed (49 CFR 381.300(b)).

## **III. Request for Exemption**

The American Bakers Association (ABA) represents the wholesale baking industry; the International Dairy Foods Association (IDFA) represents the dairy manufacturing and marketing industry. ABA/IDFA seek an exemption from the provisions of 49 CFR 395.3, “Maximum driving time for property-carrying vehicles,” for their drivers delivering “essential food staples,” particularly baked goods and milk products, in anticipation of natural disasters or other emergency conditions. The requested exemption would cover only the 72-hour period in advance of, during, and shortly after the emergency condition, when ABA/IDFA claim the hours-of-service (HOS) rules can be an unintended barrier to efficient disaster preparations and operations.

The applicants indicated that disaster conditions would include the events listed in the definition of “Emergency” in 49 CFR 390.5 but be modified to encompass conditions that are expected but have not yet occurred. The exemption would apply 72-hours in advance of the time that a natural disaster or emergency is reasonably anticipated until a reasonable time after the disaster has ended. The applicants state that, although some element of reasonable judgment is necessarily inherent in this proposed approach, a definition that is tied to § 390.23 would defeat the purpose of the exemption by forcing suppliers to wait for the issuance of an official Declaration of Emergency by the President, State governors, or FMCSA, which would often leave insufficient lead time to avoid the depletion of the merchandise from the shelves. Accordingly, the requested exemption would allow suppliers to use reasonable judgment based on early warning announcements, such as hazardous weather announcements. Per ABA/IDFA, the best way to prepare for anticipated disasters or emergencies is to increase delivery runs ahead of the impending situation.

In short, this exemption would allow suppliers of essential food staples to increase driving hours to pre-stock stores before an emergency made such deliveries more difficult or even impossible. The exemption would help avoid shortages of essential food staples at retail stores and food establishments that could otherwise result if deliveries are restricted by the generally applicable HOS rules in 49 CFR 395.

The application for exemption is in the docket for this notice.

#### **IV. Public Comments**

On December 18, 2018, FMCSA published notice of this application and requested public comments (83 FR 64927). The Agency received 13 comments. Four commenters, including the Commercial Vehicle Safety Alliance (CVSA), opposed the exemption request. CVSA said it was both unjustified and impractical. Per CVSA, exemptions from Federal safety regulations have the potential to undermine safety while complicating the enforcement process. Furthermore, the Federal Motor Carrier Safety Regulations and the Hazardous Materials Regulations exist to ensure that those operating in the transportation industry are equipped to do so safely. CVSA stated that, if granted, the exemption would burden the enforcement community excessively and impact safety negatively. CVSA added that exemptions cause confusion and inconsistency in enforcement, which undermines the very foundation of the Federal commercial motor vehicle (CMV) enforcement program—uniformity. CVSA insisted that regulations are effective only if they are clear and enforceable.

Four other commenters also opposed the application, indicating that the HOS “blanket” exemption requested by ABA/IDFA is covered by 49 CFR 390.23, which provides regulatory relief for regional and local declared emergencies.

Eight commenters supported the ABA/IDFA exemption. One said the following, “In the current driver shortage, finding the capacity to deliver our products is hard enough. Ahead of a storm, where the need for bread dramatically increases, increasing delivery capacity is nearly impossible. If this exemption were to be granted, these companies would be able to utilize this flexibility to keep up with demands for our food products. The exemption would not only help our company meet this increased demand, but would also dramatically increase roadway safety by reducing the number of driver who run out of hours in traffic.”

#### **V. FMCSA Response and Decision**

FMCSA has evaluated ABA/IDFA’s joint application and the public comments and decided to deny the exemption. When the Agency established the rules mandating HOS, it relied upon research indicating that the rules improve CMV safety. These regulations put limits in place for when and how long an individual may drive to ensure that drivers stay awake and alert while driving and on a continuing basis to help reduce the possibility of driver fatigue.

The ABA/IDFA application provides neither an analysis of the potential safety impacts of the requested exemption nor countermeasures to be undertaken to ensure that the exemption would likely achieve a level of safety equivalent to, or greater than, the level that would be achieved by the current regulations. In addition, comments received – most notably those comments from CVSA -- opposed the granting of the exemption as it could cause confusion and undermine enforcement.

The Agency cannot ensure that the exemption would achieve an equivalent level of safety for the following reasons:

1. The terms and conditions, as proposed in the application, would provide unlimited flexibility in: driving more than 11-hours, following 10 consecutive hours off-duty;

driving after the 14<sup>th</sup> hour of coming on duty; driving after accumulating 60 hours on duty in 7 consecutive days, or 70 hours on duty in 8 consecutive days; accumulating less than 10 consecutive hours off duty following a work shift. The exemption would not include specific criteria controlling drivers' work and rest schedules which makes it impossible to ensure there is an equivalent level of safety for drivers operating under the exemption. Also, the absence of specific criteria or terms means the exemption could not be enforced.

2. The exemption would allow unlimited flexibility based on weather or other conditions which may or may not result in an emergency declaration. Relief would be provided in anticipation of problems. In fact, ABA/IDFA member companies would be allowed to determine whether the weather conditions warrant the use of the exemption based on their judgment or reasonable anticipation of the need for certain food products. Also, there would be no documentation clearly identifying which drivers are responding to the urgent need identified by the ABA/IDFA member companies. Enforcement officials would have no way of knowing whether a driver was operating under such an exemption except by asking him/her. FMCSA cannot delegate to private parties the inherently Federal authority to determine the applicability of an exemption from the Federal Motor Carrier Safety Regulations.

For the reasons discussed above, FMCSA denies the request for exemption.

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Jim Mullen  
Deputy Administrator

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