



U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

OFFICE OF CHIEF COUNSEL FOR ADVOCACY

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May 13, 1996

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Federal Highway Administration
U.S. Department of Labor
400 Seventh Street, SW
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LEGIS. / REGS
DIVISION
FEDERAL HIGHWAY
ADMINISTRATION

Re: Safety Performance History of New Drivers
49 CFR Parts 382, 383, 390 and 391
FHWA Docket No. MC-96-6

Dear Mr. Kussy:

FHWA-97-2277-26

The U.S. Department of Transportation's Federal Highway Administration (FHWA) is proposing to modify its existing standard on minimum safety information required to be collected by new or prospective employers under §114 of the Hazardous Materials Transportation Authorization Act of 1994.¹ In addition to the mandates of this law, the rulemaking will set new requirements for former employers.

The Office of Advocacy of the U.S. Small Business Administration was established by Congress under Public Law No. 94-305 to advocate the views of small business before Federal agencies and Congress. Advocacy is also required by §612 of the Regulatory Flexibility Act (RFA)² to monitor agency compliance with the RFA. These comments will be directed towards the FHWA's compliance with RFA and specific issues within the proposed rulemaking that should be evaluated for their impact on small businesses.

Regulatory Flexibility Act

Pursuant to §605 of the Regulatory Flexibility Act, an agency head or delegate may certify that a proposed rule will not have a significant economic impact on a substantial number of small entities. The RFA requires that a certification be accompanied by a succinct statement explaining the certification. The statement must be sufficiently explicit to ensure that the small business sector of the regulated industry can determine whether an agency's certification is accurate.

¹ Public Law 103-311

² 5 U.S.C. §§601-612

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In the preamble of this proposed rulemaking, the Federal Highway Administration has certified that this action will not have a significant economic impact on a substantial number of small entities. In evaluating the rulemaking, the Office of Advocacy in a preliminary evaluation concluded that a substantial number of small entities will be impacted. Specifically, over 100,000 small motor freight and passenger transport companies would be subjected to the expansion of this rulemaking.³

We recognize that the FHWA is obligated by statute to implement the rulemaking, and the Office of Advocacy in these comments will attempt to provide alternatives that will minimize the economic impact on these small entities.

The Office of Advocacy evaluated the following factors: reporting requirements, recordkeeping requirements, and other compliance requirements. The obligations under the Paperwork Reduction Act⁴ address most of these factors. We would recommend that the agency publish its projected paperwork burden hours in the preamble in future proposed rulemakings to facilitate the evaluation.⁵ This information would be especially helpful to small businesses which have limited resources to navigate the red tape of acquiring further documentation from other Federal agencies e.g., the Office of Management and Budget.

We also considered the overall intent of this rulemaking and how it would impact other economic factors that are part of doing business. Primarily, we believe the intent is to give new and prospective employers of drivers more fact-based information to use in their decision-making. As a result, safer drivers can be employed, and the cost of doing business, including insurance rates and financial liabilities, can be reduced over time.

Reporting and Recordkeeping

The new reporting requirements for former employers include responding to a greater number of inquiries than were previously required. In addition, the new 30 day response time is an added burden. These reporting requirements are a result of the statutory mandate. However, nearly all employers in this scheme will be the inquiring or responding party at some point in time.

³ Source: U.S. Small Business Administration Office of Advocacy, based upon data prepared under contract by the U.S. Bureau of the Census (1992).

⁴ Public Law 104-13

⁵ 5 CFR §1320.5(a)(1)(iv)(B)(5) and §1230.11 (a)

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FACT-BASED INFORMATION

The information provided by former employers should be factual and provable. Under proposed 49 §382.413, FHWA should consider adding a provision that clearly defines what fact-based information must be requested from and provided by a former employer. Opinion and hearsay should be discouraged to minimize liability and circulation of false information.

PHASE-IN PERIOD

Also, the proposal to extend recordkeeping for accidents from one to three years will be difficult to meet immediately. A phase-in period would be appropriate. Because current retention of historical information is limited, employers may not be able to respond fully to inquiries of new or prospective employers or FHWA representatives. The FHWA should consider an addition to proposed 49 CFR § 390.15 that specifies that records from an accident occurring one year preceding the rulemaking or after must be kept for at least three years. At the least, Advocacy recommends field compliance guidance that explains records for accidents occurring over one year prior to implementation of this regulation may not be available because they were not previously required, without penalty or enforcement being applied.

Other Compliance Issues Affecting Small Business

The primary burden of compliance requirements, beyond those described above, falls upon a new or prospective employer. The specific list of issues that must be covered in an inquiry by a new or prospective employer is useful. However, the Office of Advocacy is offering some suggestions.

ALCOHOL AND CONTROLLED SUBSTANCE VIOLATIONS

First, one new requirement will be very difficult to meet for practical reasons. Under proposed 49 §382.413(a)(1), the inquiring employer is charged with collecting information about a driver's violations of "the alcohol or controlled substances rules of other DOT agencies" from the former employers. We understand that this mandate stems from the statute. This requirement may be improved, especially for small business compliance, with the following clarifications:

- 1) specific identification of the other DOT laws within the regulation;
- 2) explanation of how to find records about such violations of these rules (guidance materials and access to the FHWA's Safer System); and

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3) the effect of such violations on a driver's qualifications (guidance materials).

Implementation of this requirement of the HazMat Act of 1994 has obstacles of a practical nature as was described in the FHWA's preamble to this proposal. They can be minimized.

Second, proposed 49 § 382.413(a)(2) requires a new or prospective employer to obtain alcohol and drug information that the previous employer obtained from other previous employers. Our concern is there seems to be no specific requirement that the employer retain records from the previous employers. In evaluating 49 §382.401 and § 382.403, we could not identify this record retention requirement.

Since the new law requires new or prospective employers to collect information for the preceding three years from all employers, it would be redundant for former employers to keep the records of other employers about incidents in the preceding three years. The information collection exercise will bring to bear all of the records from the primary source. We recommend that this requirement is eliminated.

OUT-OF-HOURS/OUT-OF-SERVICE ORDER

Proposed 49 CFR §391.23(c)(1)(ii) leads to confusion about how to comply and even the necessity of the section. This proposed regulation would require new or prospective employers to collect information from former employers about hours-of-service violations resulting in an out-of-service order. This requirement was not specified in the HazMat Act of 1994.

Under current 49 CFR §395.13, a record of such a violation is made by a special agent of the FHWA. There is no indication this record must be maintained by the current or former employer. If a new or potential employer makes this inquiry to a previous employer, there seems to be no requirement that the record is to be kept.

While this safety issue may be of importance, Advocacy would recommend that FHWA demonstrate how former employers' recordkeeping and reporting and new or prospective employers' information collection will significantly contribute to safety.

This information has been recorded by the FHWA, the employer has already been required to take action, complete paperwork and file

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it with the Regional Director of Motor Carriers,⁶ and the driver has been cited by the FHWA.

If the FHWA's citation system for this violation does not sufficiently address these violations, it would seem more appropriate to correct the system. If the FHWA is planning to address the hours-of-service issue as it contributes to roadway safety, Advocacy recommends that the FHWA consider industry-specific trends and further that any corrective measures are tailored to impact specific problems.

The Office of Advocacy recommends the withdrawal of the proposed requirement to inquire about of hours-of-service violations resulting in out-of-service orders. Its implementation will be difficult, and the effectiveness of it has not been explained.

COMPLIANCE ASSISTANCE

To minimize the burden of the reporting, recordkeeping, and information collection, the FHWA should develop, as part of the agency's guidance materials, a nonmandatory form for use by the new or prospective employer and responding former employers. It could include: name of inquiring party, name of responding former employer, a description of each type of factual information being requested, a location for the employee to sign, and a section for response by the former employer. While the response may come by telephone, the authorization by the employee could be in a standardized format for easy use by the employers.

Conclusion

The Office of Advocacy has requested copies of the three information collection request applications submitted by the FHWA to the Office of Management and Budget. We request the opportunity to provide further comments once the three documents from OMB have been provided to our office, and we have been able to evaluate the estimated burden hours.

FHWA has determined that the proposed rules would "not have a significant impact on a substantial number of small entities" in its certification under the Regulatory Flexibility Act.

The Office of Advocacy requests that FHWA publish a correction to the proposed rule with an adequate certification statement including more information on the number and size of entities and the estimated cost. We also suggest that more extensive

⁶ "Motor Carrier Certification of Action Taken" portion of the form MCS-63

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information about the paperwork burden estimate is included.

The Office of Advocacy would be happy to assist FHWA with RFA compliance. If you have any questions, please call me or Anita Drummond of my staff at (202) 205-6533.

Thank you for your cooperation.

Sincerely,



Jere W. Glover
Chief Counsel for Advocacy

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