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BEFORE THE
FEDERAL HIGHWAY ADMINISTRATION
UNITED STATES DEPARTMENT OF TRANSPORTATION

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DOCKET SECTION

COMMENTS OF THE
OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC.

IN RESPONSE TO
ADVANCE NOTICE OF PROPOSED RULEMAKING
REQUEST FOR COMMENTS

[FHWA Docket No. FHWA-98-3414] -35
RIN 2125-AE35

Out-of-Service Criteria

49 CFR Parts 395 and 396

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BEFORE THE
FEDERAL HIGHWAY ADMINISTRATION

I. INTRODUCTION

A. Procedural Statement

These comments are submitted by the Owner-Operator Independent Drivers Association, Inc. (“OOIDA” or “Association”) in response to the advance notice of proposed rulemaking (“ANPRM”) request for comments published by the Federal Highway Administration (“FHWA” or “Agency”), Docket No. FHWA-98-3414, RIN 2125-AE35. [63 FR 138] (July 20, 1998).

This advance notice seeks public comment concerning the use of the “North American Uniform Out-Of-Service Criteria” (“OOSC”). The FHWA is seeking public comment on the future scope and effect of the OOSC, which are not a part of the Federal Motor Carrier Safety Regulations (“FMCSRs”). The Agency is also seeking comment on the need to formalize these guidelines.

B. Interest of the Owner-Operator Independent Drivers Association, Inc.

The Owner-Operator Independent Drivers Association, Inc., is a not-for-profit corporation incorporated in 1973 under the laws of the State of Missouri, with its principal place of business in Grain Valley, Missouri. The more than 40,000 members of OOIDA are small business men and women in all 50 states and Canada who collectively own and operate more than 60,000 individual heavy-duty trucks and small truck fleets. Owner-operators represent

nearly half of the total number of Class 7 and 8 trucks operated in the United States. The mailing address of the Association is:

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311 R.D. Mize Rd.
Grain Valley, Missouri 64029

OOIDA is the international trade association representing the interests of independent owner-operators and professional drivers on all issues that affect small business truckers. The Association advocates the views of small business truckers through its interaction with state and federal government agencies, legislatures, courts, other trade associations, and private businesses to promote an equitable environment for commercial drivers. OOIDA is active in all aspects of highway safety and transportation policy, and represents the positions of small business truckers in numerous committees and various forums on the local, state, national, and international levels. The evolution, administration and enforcement of the OOSC directly affects owner-operators, professional drivers and motor carriers, including OOIDA members.

II. COMMENTS OF THE ASSOCIATION¹

A. Out-Of-Service Criteria

What are the Out-of-Service Criteria? What is the purpose of the Out-of-Service Criteria? How are the Out-of-Service Criteria used? Who is responsible for implementing the Out-of-Service Criteria?

The purpose of out-of-service criteria is to define a set of physical conditions under which a commercial motor vehicle ("CMV") or commercial driver may be placed out of service. The Secretary of Transportation's statutory authority for issuing out-of-service orders is predicated upon a finding that a regulatory violation "poses an imminent hazard to safety."

¹ Unnumbered headings consist of the questions identified in the ANPRM and answered in the subsequent text.

49 U.S.C. § 521 (b)(5)(A). The term “imminent hazard” is defined as “any condition.. . likely to result in serious injury or death.. .” 49 U.S.C. § 521(b)(5)(B).

The out-of-service criteria should establish binding norms for use by vehicle safety inspectors and other law enforcement officials to define certain conditions that pose an imminent hazard to safety and permit the inspector to order the driver and/or his CMV out of service.

OOIDA believes that the description of the Commercial Vehicle Safety Alliance’s (“CVSA’s”) North American Out-Of-Service Criteria in the ANPRM is seriously flawed and should be reevaluated carefully by FHWA. According to the ANPRM, the OOSC “serve as guides for enforcement personnel in the exercise of discretion.” 63 Fed. Reg. 38791, 38793 (1998). In fact, the language used by CVSA in publishing its OOSC establishes binding norms that limit rather than expand the discretion of inspecting officers.

The ANPRM states that the OOSC are usually less stringent than the FMCSR’s. The OOSC are seen as acting as enforcement tolerances because violations of the FMCSA’s are allowed to continue in cases where no out-of-service order is issued. 63 Fed. Reg. at 38792. OOIDA respectfully suggests that this is not an accurate description of the status quo. FHWA’s authority to issue out-of-service orders is narrowly circumscribed by 49 U.S.C. § 521 (b)(5)(A) and (B) which authorizes out-of-service orders only in cases where an “imminent hazard” is present. CVSA’s OOSC do not follow this restrictive standard but authorize out-of-service orders under a far more liberal standard. Since CVSA’s OOSC may be applied more liberally than the federal standard, the OOSC are actually more stringent than authorized under the federal law. FHWA’s statement that OOSC act as “enforcement tolerances” because they permit vehicles to proceed even where FMCSR violations are found reflects an erroneous view of the current law. FHWA’s statement seems to assume that vehicles and drivers may be ordered out

of service under the federal standard for any violation of the FMCSR's. On the basis of this faulty assumption, the OOSC are reviewed as establishing enforcement tolerances under which inspecting officers may permit the vehicle or driver to proceed even though a violation of the FMCSRs has been identified. The reality of the situation is that only violations of the FMCSA's that constitute an imminent hazard justify out-of-service orders. 49 U.S.C. § 521(b)(5)(A) and (B). If drivers and vehicles are allowed to proceed after a violation is identified, it is because there is no imminent hazard, not because an out of service condition has been waived through some enforcement tolerance established under CVSA's OOSC.

OOIDA urges FHWA to reexamine the conceptual framework for this ANPRM. A reappraisal of the current legal framework for federal out-of-service orders appears necessary. A closer reading of CVSA's OOSC and the standards used by that organization in establishing its criteria also appears warranted. If, as OOIDA believes, the standards used by CVSA in adopting its current OOSC are not consistent with the federal statutory standard, then use of CVSA's OOSC as the jumping off point for further regulatory action should be seriously questioned.

B. Why a New Disposition for the OOSC is Necessary

Are the Out-of-Service Criteria appropriate for regulatory treatment or should they remain merely guidelines for use in the enforcement of motor carrier safety by participating jurisdictions?

The FHWA must adopt out-of-service criteria as a part of the FMCSRs because they represent the practical legal standard under which vehicles and drivers are placed out of service. Out-of-service criteria raise serious issues under the Administrative Procedures Act ("APA") and the Constitutional protections of the Fourth, Fifth and Fourteenth Amendments. These principles are raised by any process pursuant to which the government (1) searches and seizes a person and his property without a warrant; (2) predicates the search on rules not adopted into the federal

regulations; and (3) fails to compensate the person for taking this property. The processes by which the government performs such acts may only be established through carefully formulated and formally adopted rules and regulations. These constitutional concerns are especially acute where the inspecting officer simultaneously holds the roles of witness, accuser, judge, jury, and executioner.

1. The Secretary's Failure to Promulgate Regulations Places the OOSC in Regulatory Limbo

There is a strong statutory basis for requiring that out-of-service criteria be enacted in the form of regulations. The Secretary of Transportation's general authority to regulate the safety and operation of Motor Carrier equipment is set forth in 49 U.S.C. § 3 1502(b). Various statutory provisions direct the Secretary to enact safety regulations. For example, 49 U.S.C. § 3 1136(a) mandates that "the Secretary of Transportation shall prescribe regulations on commercial motor vehicle safety." Such regulations must establish standards on how equipment is maintained and the physical condition of operators. Id. 49 U.S.C. § 3 1142(b) specifies that "the Secretary of Transportation shall prescribe regulations on Government standards for inspection of commercial motor vehicles. . . ."(emphasis added).

Further, 49 U.S.C. § 3 1161 (b) and (c) provide that the Secretary of Transportation shall prescribe regulations covering the correction of safety defects identified during an inspection including regulations addressing a nationwide system of random reinspection of vehicles and drivers previously declared out of service. Statutory provisions also direct the Secretary to: (1) promulgate regulations to enforce out-of-service orders; (2) require disclosure of out-of-service orders to employers and to the state that issued the driver's operating license; and (3) require

provisions disqualifying drivers who violate out-of-service orders. 49 U.S.C. § 31310(g)(1)(A) and (B).

Thus, the Secretary is mandated by law to promulgate safety regulations and to prescribe regulations covering virtually every aspect of out-of-service status. These statutory provisions not only authorize the promulgation of out-of-service criteria by FHWA, they mandate such promulgation. The Secretary's failure to promulgate criteria for declaring a vehicle or driver out of service seems clearly inconsistent with his statutory responsibilities in this area.

FHWA's present policy has led to a confusing set of federal and state standards that lack uniformity and predictability. The policy fails to inform those who are subject to regulation what is expected of them and how they may comply with the law.

The authority to order a vehicle or a driver out of service is set forth in 49 U.S.C. § 521(b)(5)(A). That section provides:

If, upon inspection or investigation, the Secretary determines that a violation of a provision of subchapter III of chapter 311 (except sections 31138 and 31139) or section 31302, 31303, 31304, 31305(b), or 31502 of this title or a regulation issued under any of those provisions, or combination of such violations, poses an imminent hazard to safety, the Secretary shall order a vehicle or employee operating such vehicle out of service, or order an employer to cease all or part of the employer's commercial motor vehicle operations. In making any such order, the Secretary shall impose no restriction on any employee or employer beyond that required to abate the hazard. Subsequent to the issuance of the order, opportunity for review shall be provided in accordance with section 554 of title 5, except that such review shall occur not later than 10 days after issuance of such order.

Subsection (B) provides a general definition of imminent hazard:

In this paragraph, "imminent hazard," means any condition of vehicle, employee, or commercial motor vehicle operations which is likely to result in serious injury or death if not discontinued immediately.

49 U.S.C. § 521(b)(5)(B).

Subsection (B) creates an exceptionally high standard that must be met before an out-of-service order may be issued. Note that the Secretary is not authorized to place a vehicle or driver out of service under Subsection (5)(A) unless he finds that the violation in question constitutes an “imminent hazard,” that is a hazard that is “likely to result in serious injury or death.” Obviously, not every violation of the FMCSRs is “likely to result in serious injury or death.” Since not every violation of the FMCSRs justifies an out-of-service order, the characterization of CVSA’s OOSC as establishing enforcement tolerances is simply incorrect.

It appears that the agency has, at least by default, decided to let the CVSA fulfill its duty to establish the regulatory details of the out-of-service criteria. Even if the CVSA had the authority to perform this function, which it does not, there is no indication that CVSA has followed this federal statutory standard when it published its Uniform North American Out-Of-Service Criteria.

2. CVSA’s OOSC May Not be Adopted as the Federal Out-of-Service Regulations

In order for FHWA to adopt the CVSA’s OOSC, it must first be shown that those criteria are consistent with the authority to order drivers or vehicles out of service under federal law. An examination of CVSA’s OOSC fails to show that that organization used the federal standard authorized by 49 U.S.C. § 521(b)(5)(B) when it adopted its OOSC. Indeed, all indications are that CVSA grounded its OOSC on an entirely different standard. The CVSA’s OOSC are overbroad and may not be adopted in their present form under the Secretary’s statutory authority to promulgate out-of-service criteria.

Appendix A, Part I, North American Uniform Driver Out-Of-Service Criteria States as follows:

Policy Statement

The purpose of this part is to identify violations that render the commercial motor vehicle operator **unqualified** to drive or out of service. The necessity for all enforcement personnel to implement and adhere to these standards is: (1) a matter of law; (2) perceived as necessary by the society we are charged with protecting, and (3) a professional obligation if substantial enhancement in the safety of commercial motor vehicle operators is to be achieved.

Except where state, provincial, or federal laws preclude enforcement of a named item, motor carrier safety enforcement personnel and their jurisdictions shall comply with these driver out-of-service violation standards.

Id. at 2 (emphasis added).

It is difficult to discern what standard CVSA may have had in mind when it adopted this policy statement. The language itself seems more hortatory than substantive. Certainly there is no reference to the federal standard for imminent hazard, a condition likely to lead to “serious injury or death,” as specified in 49 U.S.C. § 521(b)(5)(A) and (B). CVSA informs us that the necessity for its standard is a “matter of law” yet it identifies no specific law. We are next informed that its chosen standard is “perceived as necessary by the society we are charged with protecting. . . .” CVSA does not explain how “society” communicated this necessity to it or how it as an organization was given the specific charge to protect society in this way. Finally, CVSA exhorts us that there is a “professional responsibility if substantial enhancement in the safety of commercial motor vehicle operators is to be achieved.” This may be so, but there are numerous activities that may be more effective in enhancing the safety of drivers. These include better training, higher certification standards, realistic hours of service, provision of sufficient rest stops, etc. CVSA’s pronouncement seem more an exercise in self-justification than a serious legal foundation for depriving drivers of their liberty or property.

Appendix A, Part II, North American Uniform Vehicle Out-of-Service Criteria does a better job of articulating a standard justifying an out-of-service order. Unfortunately, the standard articulated does not embrace the federal statutory standard for out-of-service orders. The CVSA standard for out of service vehicles provides:

The purpose of this part is to identify critical vehicle inspection items and provide criteria for placing vehicles out of service subsequent to a safety inspection.

OUT-OF-SERVICE: Authorized personnel shall declare and mark “out-of-service” any motor vehicle which by reason of its mechanical condition or loading would be likely to cause an accident or breakdown. An “out-of-service vehicle” sticker shall be used to mark vehicles “out-of-service”. No motor carrier shall require nor shall any person operate any commercial motor vehicle declared and marked “out-of-service” until all repairs required by the “out-of-service notice” have been satisfactorily completed.

No person shall remove the “Out-of-Service Vehicle” sticker from any motor vehicle prior to completion to all repairs required by the “out-of-service notice”.

Id. at 7 (emphasis added).

CVSA’s OOSC are based upon conditions that could cause an “accident or breakdown” rather than conditions that are “likely to result in serious injury or death . . .” as prescribed in 49 U.S.C. § 521(b)(5)(A) and (B). Conditions that would likely cause an “accident or breakdown” provide a far broader basis for an out-of-service order than does the federal standard which requires an imminent hazard, that is a condition that is likely to result in serious injury or death. We suppose that a condition that may cause an “accident” could lead to serious injury or death. Whether a serious injury or death is “likely” is not so clear. There is no indication that conditions that could lead merely to a breakdown would likely cause serious injury or death.

Thus, under the status quo, there is a serious dichotomy between the Secretary's authority to promulgate out-of-service orders and CVSA's published OOSC. CVSA appears to have followed no recognizable standard when it adopted OOSC for drivers and the wrong standard when it adopted OOSC for vehicles. Moreover, CVSA's OOSC takes the form of binding norms that inspecting officers must follow rather than guidelines to aid in the exercise of discretion. To the extent FHWA personnel subscribe to the CVSA's OOSC in issuing out-of-service orders (See 49 C.F.R. § 390.5) they are likely acting beyond the authority conferred on them by 49 U.S.C. § 521(b)(5)(A) and (B). Federal promotion of CVSA's OOSC surely does not promote uniformity or predictability, and likely causes confusion. FHWA's current move toward the adoption of out-of-service criteria that are consistent with federal statutory standards is most welcome. The starting point for developing standards consistent with 49 USC. § 521(b)(1)(A) and (B) is almost certainly not CVSA's OOSC in its present form.

C. Several Standards Mandate Promulgation of Out-of-Service Criteria Under the APA

How should the Out-of-Service Criteria be used? Should the current FHWA policy be maintained? How should the Out-of-Service Criteria be adopted? Should the FHWA adopt the Out-of-Service Criteria in the FMCSRs? Generally, what should be the future scope and effect of the Out-of-Service Criteria? Should the FHWA limit the use of the Out-of-Service Criteria in ways that do not require adoption of the criteria as regulation? If limited, how should the OOSC be used? Why should the OOSC be subject to notice and comment rulemaking? Should the FHWA set forth the text of any criteria adopted in the body of its safety regulations? Should the FHWA consider adopting the CVSA criteria and incorporating them in the FMCSRs either as an appendix to the FMCSRs or by seeking approval from the Director of the Office of the Federal Register to incorporate by reference the CVSA criteria into the FMCSRs?

The out-of-service criteria should be used to remove unsafe or hazardous vehicles and drivers from the road under relevant statutory standards. In order for the out-of-service criteria to be used for this purpose they must be adopted into the FMCSRs. Several important legal principles require it. These include: (1) the principle requiring that rules acting as binding

norms must be promulgated in accordance with the Administrative Procedure Act; (2) Administrative due process that requires fair notice to the regulated community before a rule is enforced; (3) the principles that apply to warrantless searches in pervasively regulated industries; and (4) constitutional principles forbidding uncompensated taking by regulatory law.

1. Rules That Act as Binding Norms, That Have the Force and effect of Law, Must be Promulgated According to the APA

The current OOSC published by the CVSA cannot under any circumstances be considered “merely guidelines” for use by participating jurisdictions. CVSA’s OOSC are comprised of a series of highly specific conditions which constitute “binding norms” under which a participating jurisdiction ~~must issue out-of-service orders~~, Part 1, of the North American Uniform Driver Out-of-Service Criteria published by CVSA on April 1, 1998 states:

Except where state, provincial, or federal laws preclude enforcement of a named item, motor carrier safety enforcement personnel and their jurisdictions shall comply with these driver out-of-service standards.

Id. at 2.

Likewise, Appendix A, Part II, North American Uniform Vehicle Out-of-Service Criteria provides:

The purpose of this part is to identify critical vehicle inspection items and provide criteria for placing vehicles out of service

Authorized personnel shall declare and mark “out-of-service” any motor vehicle which by reason of its mechanical condition or loading would be likely to cause an accident or breakdown.

Id. at 7. This language clearly indicates that the inspection criteria are intended to serve as binding norms, that, when met, must result in the issuance of an out-of-service order. If FHWA

intends to adopt out-of-service criteria that resemble CVSA's current OOSC, it must be prepared to do so following notice and comment rulemaking.

It is blackletter law that a regulation has the "force of law" only if it is (1) within the scope of authority delegated by Congress, and (2) promulgated in accord with procedures required by law. *Chrysler Corp. v. Brown*, 441 U.S. 281, 301-03 (1979). Substantive rules, i.e. binding norms, cannot be enforced unless promulgated according to the APA. See, e.g., *Chrysler corp.*, 441 U.S. at 313 ("[c]ertainly regulations subject to the APA cannot be afforded the 'force and effect of law' if not promulgated pursuant to the statutory procedural minimum found in that Act"); *United States v. Picciotto*, 875 F.2d 345 (D.C. Cir. 1989); *United States v. Reinis*, 794 F.2d 506 (9th Cir. 1986); *US v. Nova Scotia Food Products Corp.*, 568 F.2d 240 (2d Cir. 1977).

The district court in *Nova Scotia* enjoined the processing of whitefish in violation of FDA's "good manufacturing practices" regulations. The Second Circuit reversed, holding the rule invalid for failure to disclose scientific data relied upon by FDA in promulgating the rule, failure to respond to comments, and failure to issue standards applicable to each species of fish. A regulation requiring the reporting of currency transactions in excess of \$10,000 was at issue in *Reinis*. The Ninth Circuit held that plaintiff could not be punished for violating the regulation because it had not been promulgated in compliance with the APA. A Park Service regulation barring the storage of excess personal property at a demonstration site was at issue in *Piciotto*. The D.C. Circuit set aside a criminal conviction because the regulation was not the product of notice and comment rulemaking and because the agency was not entitled to rely on the interpretative rule exception to notice and comment safeguards.

Compliance with the procedural safeguards of the APA is required for a substantive rule to have the force of law. “It has been established in a variety of contexts that properly promulgated, substantive agency regulations have the ‘force and effect of law.’” *Chrysler Corp.*, 441 U.S. at 301-03. The Court held that a regulation authorizing the disclosure of records otherwise exempt under the Freedom of Information Act was invalid because it was not issued pursuant to authority delegated by Congress and because it was infected by a procedural defect, failure to publish the rule and provide for comment as required by § 553 of the APA:

In order for a regulation to have the “force and effect of law,” it must have certain substantive characteristics and be the product of certain procedural requisites. . . . That an agency regulation is “substantive,” however, does not by itself give it the “force and effect of law.” The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes. . . . Likewise, the promulgation of these regulations must conform with any procedural requirements imposed by Congress. . . . For agency discretion is limited not only by substantive, statutory grants of authority, but also by the procedural requirements which “assure fairness and mature consideration of rules of general application.” *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759,764 (1969). The pertinent procedural limitations in this case are those found in the APA.

Comparing the failure to publish the disclosure rule at issue with the court-imposed procedures found unlawful in *Vermont Yankee Power Corp. v. NRDC*, 435 U.S. 519 (1978), the *Chrysler Corp.* Court observed:

It is within an agency’s discretion to afford parties more procedure, but it is not the province of the courts to do so. . . . Courts upset that balance [“between opposing social and political forces,” *Vermont Yankee*, 435 U.S. at 547, quoting *Wong Yang Sung v. McGrath*, 339 U.S. 33, 40 (1950)] when they override informed choice of procedures and impose obligations not required by the APA. By the same token, courts are charged with maintaining the balance: ensuring that agencies comply with the “outline of minimal essential rights and procedures” set out in the APA. H.R. Rep. No. 1980, 79th Cong., 2d Sess. 16 (1946). . . . Certainly regulations subject to the APA cannot be afforded the “force and effect of law” if not promulgated pursuant to the statutory procedural minimum found in that Act.

Id. at 3 13. Under *Vermont Yankee*, courts may not impose additional procedural requirements,² but under *Chrysler*, courts must insist on agency adherence to the minimum requirements specified by Congress. Together, these cases teach that courts must insist on strict compliance with the APA procedural safeguards.

In *Chrysler*, the agency had argued that the disclosure regulation was an interpretative rule and therefore exempt from public participation under § 553(b)(3)(A). This Court said it didn't matter whether the rule was interpretative or substantive because it could not have the "force of law" because it was not promulgated with public participation:

It is enough that such regulations are not properly promulgated as substantive rules, and therefore not the product of procedures which Congress prescribed as necessary prerequisites to giving a regulation the binding effect of law. . . . This disposition comports with both the purposes underlying the APA and sound administrative practice. Here important interests are in conflict: the public's access to information in the Government's files and concerns about personal privacy and business confidentiality. The [agency's] regulations attempt to strike a balance. In enacting the APA, Congress made a judgment that notions of fairness and informed administrative decisionmaking require that agency decisions be made only after affording interested persons notice and an opportunity to comment. With the [agency] consideration that is the necessary and intended consequence of such procedures, [the agency] might have decided that a different accommodation was more appropriate.

Id. at 3 15-1 6. *Cf. Morton v. Ruiz*, 415 U.S. 199,232 (1974) (eligibility requirement published in staff manual cannot have the "force of law" because it was not published in accord with APA); *NLRB v. Wyamn-Gordon Co.*, 394 U.S. 759,764 (1969) (agency cannot impose legislative rule through adjudication); *see also, e.g., NBC v. United States*, 3 19 U.S. 190, 224-25 (1943) (upholding "chain broadcasting" rules in part because "there [was] no basis for any claim that the Commission failed to observe procedural safeguards required by law.(").

² "[N]othing in the APA . . . entitled the court to review and overturn the rulemaking proceeding on the basis of the procedural devices employed (or not employed) . . . so long as the [agency] employed at least the statutory minima . . ." 435 U.S. at 549. "Of course, the court must determine whether the agency complied with the procedures mandated by the relevant statute." *Id.* n.2 1.

Out-of-service criteria are precisely the kind of rules contemplated by the APA. The criteria are used to place drivers and vehicles out of service. By definition they are used to restrict a driver's movement and detain property. In their present form, CVSA's OOSC take the form of binding norms which inspecting officers are commanded to follow. CVSA's OOSC, or any similar replacement criteria adopted by FHWA, have, *de facto*, the force and effect of law. Under these circumstances, the out-of-service criteria must be promulgated under notice and comment rulemaking provisions of the APA.

2. Administrative Due Process Mandates That "Fair Notice" Be Given Of Enforced Safety Standards

The FHWA may not sanction the use of out-of-service criteria outside of the framework of formal regulations. The use of out-of-service criteria has important due process of law implications under the Fifth and Fourteenth Amendments. Declaring a vehicle or a driver out of service deprives the driver of important personal and property interests. Imposition of out-of-service status must therefore be accompanied by due process of law. Formal publication of the standards pursuant to which out-of-service status is imposed is absolutely essential to the driver's right to due process of law.

A recent excellent example of this principle is *United States v. Chrysler*, 1998 U.S. App. Lexis 27786 (D.C. Cir. Oct. 30, 1998). In *Chrysler*, the Court overturned the district court's affirmance on a NHTSA recall order because NHTSA had not given reasonable and fair notice of what was required of a safety standard, specifically the testing procedures required to demonstrate (certify) compliance with the standard. Without such notice, there can be no recall based solely on non-compliance (i.e. distinguishing situations where the vehicle is found to be actually unsafe). The many cases cited by the Court at *13-*14 illustrate the principle that

“traditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule,” *citing Satellite Broadcasting Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987).

In order for out-of-service criteria to be enforced by the government, the regulated community must be given proper notice of what the rules are. The CVSA’s procedures to create and publish the OOSC, whatever those are, are no substitute for the requirement that the agency must give notice of the rules it enforces.

This standard would be satisfied if the out-of-service criteria were adopted into the FMCSRs either as a part of the rules themselves or as an appendix. If the Agency were to incorporate the out-of-service criteria into the FMCSRs by reference, leaving their formulation to a private organization with no public accountability, the FHWA would not be fulfilling its duty of providing the regulated community with notice of the rule.

3. Roadside Inspections Are Warrantless Searches Subject To 4th Amendment Protections

Adoption of out-of-service criteria through formal rulemaking is only the first step that is necessary to satisfy a driver’s rights under the law. The ability of an inspecting officer to conduct a safety inspection (a warrantless search) requires that the inspecting officer satisfy all of the conditions imposed by the U.S. Supreme Court respecting warrantless search (inspections) in pervasively regulated industries.

With certain well-defined exceptions, searches conducted without a judicial warrant issued upon probable cause are not considered reasonable. *See, Skinner v. Railway Labor Executives Ass’n*, 109 S. Ct. 1402, 1402 (1989) and cases cited therein. One such exception to the warrant requirement applies to industries that are closely regulated by the government. In a closely regulated industry, the Supreme Court has held that the existence of pervasive regulations

may, in some circumstances, diminish an individual's reasonable expectation of privacy. *See, e.g., US. v. Biswell*, 406 U.S. 311, 315-16 (1972); *Marshall v. Barlow's Inc.*, 436 U.S. 307, 313 (1978).

Assuming arguendo that the trucking industry is "pervasively regulated," the application of this exception depends upon the procedural safeguards provided by the statute and its implementing regulations. *New York v. Burger*, 482 U.S. 691, 701 (1987). Such statutory and regulatory provisions are often referred to as a "constitutionally adequate substitute for a warrant." *Donovan v. Dewey*, 452 U.S. 594,603 (1981).

In *Donovan v. Dewey*, the Supreme Court held that Section 103(a) of the Federal Mine Safety and Health Act of 1977, which authorized warrantless searches of mines, fell within the pervasively regulated industry exception. The Court found that when an individual elects to participate in a pervasively regulated business his 'justifiable expectations of privacy' are necessarily diminished. The Court further found that reasonably defined inspection schemes accompanied by appropriate standards for implementation, pose only limited threats to those limited expectations of privacy. 452 U.S. at 600.

In *New York v. Burger, Supra*, the Supreme Court reaffirmed the principles articulated in *Donovan*, setting forth a three-pronged test to determine whether the exception applied:

1. Is the business in question closely regulated;
2. Are warrantless inspections necessary to further the regulatory scheme; and
3. Does the statute's inspection program, in terms of the certainty and regularity of its application, provide a constitutionally adequate substitute for a warrant.

482 U.S. at 702-03. In *Colonnade Catering Corp. v. U.S.*, the Court specifically held that "[w]here Congress has authorized inspection, but made no rules governing procedures that

Several years ago drivers were exposed to extreme harassment by officers of the Tennessee Public Service Commission. Inspecting officers intruded upon the driver's privacy in cabs and sleeper berths searching for drugs and alcohol without probable cause and under the pretext of safety inspections. OOIDA had to bring a civil action against the Tennessee Public Service Commission. Eventually, the legislature in Tennessee abolished the PSC because of these and similar abuses, but not until after the constitutional rights of many drivers were violated. Regulations which serve to control such abusive practices are necessary in order to justify warrantless searches/inspections and to avoid litigation of the kind brought by OOIDA.

In failing to publish out-of-service regulations: (a) limiting the discretion of law enforcement officers in the field, (b) establishing limits on the intrusion involved, (c) ensuring the regularity of the inspection process, and (d) safeguarding the privacy interests of motor carrier operators, the relevant state and federal statutory and regulatory provisions fail to provide a "constitutionally adequate substitute for a warrant". Absent uniform out-of-service criteria and uniform inspection and enforcement procedures, random roadside inspection of drivers performed under the threat of arrest, being placed out of service, or with the risk of employer reprisal is supported by neither precedent nor reason and should be found to be unreasonable.

Promulgation of any out-of-service criteria in the FMCSR's following formal notice and comment rulemaking would be an important step by the FHWA in seeking to comply with these Fourth Amendment requirements. FHWA should take advantage of the current rulemaking process to simultaneously adopt additional procedures to bring these inspections in compliance with drivers' Fourth Amendment rights.

4. Economic Regulation Can Constitute An Uncompensated “Taking” In Violation Of The Fifth Amendment

Even the temporary detention of a driver and his CMV for a safety inspection is a “taking” of that person’s property. Regulations that interfere with the free use of private property should be kept to a minimum and procedural safeguards maximized in order to avoid “takings” claims. Governmental “taking” of private property violates the Fifth Amendment’s prohibition against uncompensated takings. *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (building permit conditioned on dedicating part of land to public use held a taking even though it passed “essential nexus” test but failed “rough proportionality” analysis).

Pervasive governmental regulatory programs, such as the OOSC at issue here, can rise to the level of an unconstitutional taking. *Hodel v. Irving*, 481 U.S. 704 (1988); *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987); *Duquesne Light Co. v. Barasch*, 109 S. Ct. 609 (1989); *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575,586 (1942); *Jersey Central Power & Light Co. v. FERC*, 810 F.2d 1168, 1175 (D.C. Cir. 1987). Economic regulation that “goes too far” has routinely been analyzed as a taking. *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) (government regulation often curtails some potential for the use or economic exploitation of private property). The Fifth Amendment protects personal property as well as real property. *See, e.g., Phillips v. Washington Legal Foundation*, 118 S. Ct. 1925(1998) (interest on IOLTA accounts); *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980) (interest in court clerk accounts); *Pete v. United States*, 531 F.2d 1018, supplemented, 569 F.2d 565 (Ct. Cl. 1976); *Haldeman v. Freeman*, 558 F. Supp. 514 (D.D.C. 1983).

Also, a taking need not be permanent. A temporary, even a brief, prohibition on the use of property constitutes an unconstitutional taking. *First English Evangelical Lutheran Church of*

Glendale v. Los Angeles County, 482 U.S. 304 (1987); *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949); *Yuba Natural Resources, Inc. v. United States*, 821 F.2d 638 (Fed. Cir. 1987).

Under these standards, even the temporary detention of a CMV and driver constitutes a taking. To avoid a taking, the Secretary should minimize the regulatory interference with the driver and his truck, and maximize procedural safeguards by giving the regulated community adequate notice of the scope and purpose of the taking (the search and seizures).

D. Policy Considerations In Support Of Adoption Of The Out-Of-Service Criteria Under The Apa's Notice And Comment Rulemaking

The adoption of the out-of-service criteria will promote several beneficial policy objectives:

1. Predictability To The Regulatory Community

Predictability of the law promotes compliance with it. Out-of-service criteria have the force and effect of law, on the nation's roads and highways.

Just as inspectors need specific guidelines to help them understand how to properly enforce federal regulations and when to order drivers and CMVs out of service, so too drivers should have the same benefit of knowing the out-of-service criteria in advance and understanding what is expected of them. Only with predictable out-of-service criteria will CMV owners and drivers know how to inspect and properly maintain their own vehicles and under what circumstances they should take their vehicles off the road for repairs. Under existing statutory provisions, FHWA is constrained in issuing out-of-service orders by 49 U.S.C. § 521(b)(1)(A) and (B). It does not appear that CVSA's OOSC were adopted with the federal standard in mind. Today, federal and state enforcement of out-of-service criteria are hopelessly

out of sync. Predictability is one of the first casualties of this situation. FHWA should act promptly to correct this problem.

2. Flexibility Will Not Be Sacrificed

There is no reason that the out-of service criteria could not evolve and adjust to new technology and changes in the trucking industry. The FHWA could certainly adopt changes to the out-of-service criteria when circumstances require such a change. Should an amendment to the out-of-service criteria be needed to address an emergent condition, the federal rulemaking process can be expedited to meet any such necessity. Flexibility to amend the criteria will not be sacrificed by their adoption into the FMCSRs. In fact, compliance with changes to the out-of-service criteria will be expedited as amendments are promulgated in a rulemaking that maximizes and facilitates public awareness of them.

With appropriate laws enacted at the state level, changes to federal out-of-service criteria could be incorporated into the state enforcement procedures automatically. This approach gives greater flexibility and certainty than the current practice. CVSA now adopts changes to the OOSC without notice and comment rulemaking and without legal notice to the regulated community.

3. Uniformity Of Application

The establishment of appropriate out-of-service criteria and subsequent revisions through proper notice and comment rulemaking will promote the uniformity of its application across the United States. Uniformity of application is an important goal. A CMV typically crosses state lines dozens of times per week. Uniformity of out-of-service criteria would make it much easier for drivers to know what standards they must follow in any given jurisdiction. Better compliance with the criteria will promote safer highways, less frequent violations, and fewer vehicles and

drivers ordered out of service. All of these benefits of uniformity promote the free flow of interstate commerce.

a. How national uniformity in the out-of-service criteria can be promoted

Uniformity of the out-of-service criteria and uniformity in their enforcement can best be achieved by formal federal adoption into the Code of Federal Regulations. Currently, OOSC and the procedures used to enforce them are uneven and unpredictable from state to state, and they are out of step with the federal statutory standard for issuing out-of-service orders. Federal adoption of out-of-service criteria will have numerous positive effects on uniformity in the law: all states will adopt the same OOSC; all safety inspectors will be better informed as to what regulations they should be following; all drivers and motor carriers will be better informed as to what the criteria are; drivers will understand better how to inspect their own vehicles; and drivers and motor carriers will know that their efforts to keep their vehicles in compliance will keep them in compliance in all states. It is difficult to see a single way in which formal adoption of these criteria as part of the FMCSRs will fail to promote the goal of uniformity in the law.

An equally important extension of uniform out-of-service criteria would be a schedule of uniform fines for violations, including violations that do not require an out-of-service order. The level of fines for each violation of the FMCSRs must serve the purpose of promoting public safety in general and compliance with the rules specifically. Currently, localities are often more concerned with fines as a revenue stream than with their purpose to promote public safety. Imposition of excessive fines that bear no relationship with the seriousness of the violations charged does not promote respect for the FMCSR's. The FHWA should promote consistency in the fine schedule and condition MCSAP funds on the use of fine revenue for highway safety programs. Establishment of a "minimum fine" schedule does not adequately address the need

for a uniform fine schedule as states establish excessive fines based upon non-safety agendas.

As any driver will tell you, states have never created a uniformity problem by imposing fines that are too low.

E. Federalism Concerns Addressed

Should FHWA specifically require the use of such federally adopted Out-of-Service Criteria by States as a condition of MCSAP?

Yes.

Could the adopted Out-of-Service Criteria be one of several acceptable sets of criteria States could use?

No. The FHWA should require that states adopt the federally established out-of-service criteria as a condition of receiving MCSAP funding in the exact manner states must already adopt the FMCSRs. 49 U.S.C. § 31102 (c).

What implications, if any, would there be for continued State development of Out-of-Service Criteria if the FHWA adopts separate criteria or incorporates existing criteria?

States with particular needs for variation of the federal out-of-service criteria should be allowed to adopt supplemental criteria in a manner that does not conflict with the federal OOSC or create an unnecessary burden on interstate commerce. See *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959) (holding state regulation mandating mud flap shape on trucks was not a significant enough state interest to impose a burden on interstate commerce). Additionally, any state variation must also be established through their own formal proceedings that preserves Constitutional protections under the Fourth and Fourteenth Amendments.

Aside from particular state variations, the development and evolution of federal out-of-service criteria should continue to include the input of all states and interested parties. Should the CVSA continue to act as the organization with primarily (although not sole) responsibility for

suggesting amendments to out-of-service criteria, states, as members of the CVSA, will continue to have an important roll in the development of the OOSC.

How can the FHWA best address the federalism implications of adopting out-of-service criteria that may be used by the States which have concurrent motor carrier safety jurisdiction?

The FHWA has the important task of overseeing and promoting the best, safest and most efficient transportation system possible to promote interstate commerce. Uniform and predictable safety standards are a vital requirement for motor carriers, owner-operators and drivers who travel through dozens of states on a weekly basis. The Agency will be fulfilling its duty to ensure the safe and efficient movement of interstate commerce by establishing uniform regulations. The adoption of the FMCSRs by the states is already a requirement for the receipt of MCSAP funds. A rulemaking adopting federal out-of-service criteria, and requiring state adoption of them, does not overstep the right Congress has to condition funds to states on their compliance with federal regulations.

How can maximum State and industry acceptance of the criteria be gained by any proposed alternative adoption method?

OOIDA does not support any alternative method of adoption and therefore has no comment on this question.

F. Miscellaneous Issues

Will adoption of the Out-of-Service Criteria into federal regulation undermine the general principal that compliance with all applicable safety regulations is required?

No. As long as the violation of all regulations is backed up by enforcement and the imposition of lesser penalties, reserving the extreme penalty of ordering a vehicle or driver out-of-service for the most serious safety violations, publication of a federal out-of-service criteria will not undermine the integrity of all FMCSRs.

How would, or should, adoption of such criteria limit the discretion of Federal and State safety inspectors to address discovered driver and vehicle safety violations at the roadside? Should inspectors be limited to issuing out-of-service orders only to cases that expressly meet the adopted criteria? How much discretion should inspectors retain to address safety hazards discovered at the roadside that may not be precisely covered in the adopted criteria?

Properly crafted regulations should strictly narrow an inspector's discretion to put vehicles and drivers out of service to those circumstances that create an imminent hazard that is likely to result in serious injury or death if not discontinued immediately. Such circumstances may arise through an express violation of one of the out-of-service criteria or as a combination of violations of various FMCSRs that individually may not be an OOSC violation. When the latter scenario arises, safety inspectors might still be allowed to exercise their discretion through specifically proscribed and formally adopted procedures set out within the out-of-service criteria. Whenever a vehicle is taken out of service, the safety inspector should be required to give the driver a written, detailed description of all of the reasons for the out-of-service determination. This is especially important if the inspector is given discretion to place a vehicle out of service for reasons that might, standing alone, not violate any of the specifically enumerated criteria.

Should inspectors be required to issue out-of-service orders in all cases where the criteria are met?

No. Inspectors should be given the discretion to determine when the public safety is best served by ordering a driver or truck out of service under the rules. In some circumstances, stopping and ordering a vehicle out of service at a particular part of the road may cause a greater harm to public safety than would allowing the CMV to move on to a rest stop or convenient place of repair. The location of a CMV may make it impractical or unsafe for the driver to repair the vehicle and put it back in service. In these and other situations the safety inspector may need the discretion to decide what course of action best serves the public safety and the safety of the

driver. Therefore, safety inspectors should not be required to issue an out-of-service order every time the criteria are met.

III. CONCLUSION

Existing regulations covering out-of-service orders are seriously flawed. The lawfulness of FHWA's regulations that sanction the use of CVSA's North American Uniform Out-Of-Service Criteria, where it appears that CVSA has not followed the federal statutory standard for out-of-service orders, is highly doubtful. CVSA's OOSC on its face requires inspecting officers to issue out-of-service orders if any of the criteria are met. The OOSC are clearly binding norms rather than enforcement tolerances as asserted in the ANPRM. The approval of these binding norms in FHWA regulations (49 C.F.R. § 390.5) should not have been sanctioned without notice and comment rulemaking. Any new out-of-service criteria that resemble CVSA's existing OOSC would also constitute binding norms and therefore require promulgation following notice and comment rulemaking.

Enforcement of FMCSRs through random inspections is an activity that has serious implications under the Fourth Amendment's search and seizure provisions. Future rulemaking in this area should address the legitimate Fourth Amendment concerns of drivers by establishing the scope of the inspecting officers authority, the scope of the inspection being undertaken and the privacy interests of drivers that must be respected during the inspection. FHWA's regulations should serve as an adequate substitute for a warrant within the meaning of applicable Supreme Court precedent. If history is any guide, such regulations are critical in preventing invasion of driver's constitutional rights through illegal searches conducted under the pretext of safety inspections.

The promulgation of federal out-of-service criteria through notice and comment rulemaking is certainly something that OOIDA applauds. OOIDA supports FHWA's initiative in moving forward in this area and looks forward to the opportunity of participating in notice and comment rulemaking.

Respectfully submitted,



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