



October 21, 2019

Attn: Mr. Richard Clemente, Driver and Carrier Operations Division, FMCSA
Subject: Comments on Proposed Revisions to the Hours of Service Regulation for Drivers, 84 Fed. Reg. 44190 (Aug. 22, 2019), Docket No. FMCSA–2018–0248

The Institute for Policy Integrity submits the following comments on the Federal Motor Carrier Safety Administration’s (“FMCSA”) proposed revisions to its hours of service (“HOS”) regulation for drivers of property-carrying commercial motor vehicles.

The Institute for Policy Integrity at New York University School of Law is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy.

The proposed regulation follows a long history of revisions to the HOS rule.¹ While previous versions of the rule had the goals of increasing safety and protecting driver health,² this proposed revision focuses on providing “greater flexibility for drivers without adversely affecting safety”³ by making changes to: the short-haul exception,⁴ the on-duty window for adverse driving conditions,⁵ the 30 minute break requirement,⁶ the sleeper berth requirement,⁷ and the split-duty period.⁸

Before finalizing any such proposed revisions, FMCSA must conduct a more thorough analysis of the costs and benefits of a range of regulatory alternatives, and FMCSA must select a final alternative only if, based on reliable evidence, it is anticipated to increase and maximize net benefits; the agency should be careful not to sacrifice safety and driver health for the sake of greater flexibility without weighing all the forgone welfare benefits against the alleged cost savings. Specifically, FMCSA should:

- Weigh all costs and benefits for each provision in the rule to select the alternative that maximizes net social welfare.
- Explain how the Motor Carrier Management Information System (“MCMIS”) crash data for concrete mixers creates a reliable indicator for crash risk for commercial motor vehicles (“CMVs”) under proposed changes to the short-haul hour exception.
- Analyze each proposed provision’s effect on driver health, especially the provisions with the

¹ For a history of the revisions to the HOS rule, see Institute for Policy Integrity, Comment Letter on Proposed Revision to the Hours of Service Regulation for Property-Carrying Commercial Motor Vehicles, March 11, 2011, https://policyintegrity.org/documents/Policy_Integrity_Final_Comments_on_HOS_Rule.pdf.

² See Hours of Service of Drivers, 75 Fed. Reg. 82,170, 82,170 (proposed Dec. 29, 2010).

³ Hours of Service of Drivers, 84 Fed. Reg. 44,190, 44,190 (proposed Aug. 22, 2019).

⁴ *Id.* at 44,197 (extends the maximum duty period allowed under the short haul exception from 12 hours to 14 hours, but maintains the limit of 11 hours of driving time within the 14-hour on-duty window; extends the maximum distance from the work-reporting location in which drivers qualifying for the short-haul exception from 100 air-mile radius to 150 air-mile radius).

⁵ *Id.* at 44,199 (allows two additional hours of driving time for adverse conditions; from 11 hours up to 13 hours of driving time).

⁶ *Id.* at 44,200 (permits the 30-minute break to be satisfied with a period: off duty, in the sleeper berth; or on-duty not-driving).

⁷ *Id.* at 44,202 (allows the 10-hour break requirement before the on-duty clock starts anew to be split into two breaks: a 7-hour break for sleeping and another three-hour break when the driver chooses).

⁸ *Id.* at 44,206 (allows a single break of off-duty time, ranging from 30 minutes to no more than 3 consecutive hours, to pause 14-hour driving window; the driver still must have at least 10 consecutive hours off duty before the start of his or her next duty period).

greatest potential to affect driver health: namely, the changes to the 30-minute break requirement and to the sleeper berth exception.

1. FMCSA Must Weigh All Costs and Benefits for Each Provision.

FMCSA should improve its calculation of the costs and the benefits of the HOS regulation by assessing each key provision independently and in comparison to meaningful alternatives. Thorough cost-benefit analysis is required under Executive Orders 12,866, as is consideration of meaningful alternatives.⁹ Executive Order 12,866 provides that “[c]osts and benefits” must be understood by agencies “to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider.”¹⁰ In addition, Executive Order 12,866 requires agencies to consider “costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation identified by the agencies or the public.”¹¹

In the proposed rule, FMCSA evaluates alternatives based only on the goal of increasing flexibility and reducing costs for carriers.¹² But this cannot be FMCSA’s only goal. The Motor Carrier Safety Act of 1984 requires the Secretary of Transportation to ensure that the physical condition of CMV drivers does not impair their ability to drive safely, and that the operation of CMVs “does not have a deleterious effect on the physical condition of drivers.”¹³ The D.C. Circuit has emphasized that the Motor Carrier Safety Act of 1984 requires FMCSA to consider the impact of its regulations on drivers’ health in addition to, and independent from, safety-related health concerns.¹⁴

The agency should weigh all costs and benefits to select the alternative that maximizes net social welfare. FMCSA has not, for example, considered any alternatives that would be more stringent than the current HOS regulations, even though such unexplored alternatives could increase worker health and safety and provide benefits that would exceed and justify any increased costs to industry. The failure to consider a reasonable range of alternatives violates the requirements of Executive Order 12,866, as well as the norms of rational rulemaking.

2. FMCSA Must Explain Its Use of MCMIS Crash Data.

FMCSA relies on an under-explained and problematic assumption that the proposed changes to the maximum duty period allowed under the short-haul exception would create no increased crash risk. FMCSA relies on “MCMIS crash data” from concrete mixers that are currently exempt from the 12-hour short-haul exemption to support its conclusion that extending the short-haul exemption from 12 to 14 hours would not statistically increase the share of exempt trucks involved in crashes under the proposed rule.¹⁵ This is the only data cited to substantiate the agency’s conclusion.

⁹ Exec. Order No. 12,866 §§ 1(a), 6(3)(C)(iii), 58 Fed. Reg. 51,735, 51,735, 51,741 (Oct. 4, 1993) (codified at 45 C.F.R. pt. 88); see also Exec. Order No. 13,563 § 1(b), 76 Fed. Reg. 3821, 3821 (Jan. 18, 2011) (affirming cost-benefit principles specified in Exec. Order 12,866).

¹⁰ Exec. Order No. 12,866, *supra* note 9, § 1(a) at 51,735; see also Exec. Order No. 13,563, *supra* note 9, § 1(a) at 3821. (“Our regulatory system must . . . take into account benefits and costs, both quantitative and qualitative. . . . It must measure, and seek to improve the actual results of regulatory requirements”).

¹¹ Exec. Order No. 12,866, *supra* note 9, § 6(3)(C)(iii) at 51,741.

¹² For example, FMCSA considered eliminating the 30-minute break entirely as the sole alternative to the current proposed change to the 30-minute break requirement. Hours of Service of Drivers, 84 Fed. Reg. at 44,211.

¹³ 49 U.S.C. § 3115(a)(4).

¹⁴ *Pub. Citizen v. FMCSA*, 374 F.3d 1209, 1217 (D.C. Cir. 2004) (vacating HOS regulation as arbitrary and capricious because agency failed to consider driver health).

¹⁵ Hours of Service of Drivers, 84 Fed. Reg. at 44,198.

But CMVs may operate differently from concrete mixers under the same conditions; FMCSA has not explained why the data on concrete mixer is relevant to the experiences of CMVs. For example, CMVs may be more likely than concrete mixers to use the entire daily maximum duty period of 14 hours. CMVs may also travel at increased speeds or log more highway miles than concrete trucks. Any of these factors might create a significant enough difference between concrete mixers and CMVs to warrant a more thorough and detailed explanation for the conclusion that extending the short-haul exemption from 12 to 14 hours will not increase the number of CMVs involved in crashes. The Department of Transportation has cautioned analysts, for example, to be certain that crash data used in cost-benefit analyses is carefully “matched to the correct crash types, crash severity, and area type of the project,” and advises that it would be “inappropriate,” for instance, to apply crash modification factor data developed in an urban setting to assess safety effects in a rural area.¹⁶ Similarly, if the experiences of concrete trucks are not sufficiently analogous to CMVs, using the data from concrete truck crashes to justify the proposed rule change for CMVs may not be appropriate.

If FMCSA cannot reasonably explain why data on concrete mixers is relevant to and justifies the proposed short-haul hour exemption, the agency should not finalize the proposal.

3. FMCSA Must Analyze Each Proposed Provision’s Effect on Driver Health.

FMCSA must analyze each proposed provision’s effect on driver health, especially the provisions with the greatest potential to affect driver health: the 30-minute break requirement and changes to the sleeper berth exception. In previous comments to FMCSA about proposed changes to the HOS regulation in 2010, the Institute for Policy Integrity noted that FMCSA should conduct a threshold analysis of morbidity reduction benefits and analyze the proposed rule’s effect on driver exposure to Diesel Exhaust (“DE”).¹⁷ While the aim of the proposed rule today is different from that of 2010, the same concerns arise again now about whether FMCSA has insufficiently considered the quantified costs and benefits to driver health in this proposed rule.

FMCSA does address changes in vehicle miles travelled (“VMT”) for each provision, finding that neither the proposed 30-minute break requirement nor the sleeper berth exception will result in substantially more VMT.¹⁸ FMCSA also states that driver fatigue is not likely to increase under the proposed sleeper berth exception because aggregate drive limits and off-duty time will remain unchanged.¹⁹ But the proposed rule does not analyze these changes with regard to driver health. This is especially concerning because both the 30-minute break requirement and allowing breaks to be split as 7 hours of sleeping against 3 hours of the driver’s choosing (the “7/3 split”) can affect the amount of time drivers will take in extended rest, and so these proposed changes could potentially alter drivers’ circadian rhythms. The agency acknowledges that changes to the sleeper berth exception will potentially affect a driver’s circadian rhythms,²⁰ but asserts without evidence that naps at the driver’s convenience will offset reduced sleep and/or suboptimal sleep schedules under the proposed provision.²¹ The primary study on which FMCSA relies to support the proposed change is one that concludes “split sleep schedules are feasible and can be used to enhance the flexibility of sleep/work schedules involving restricted nocturnal

¹⁶ Dept. of Transportation, *Benefit-Cost Analysis Guidance for Discretionary Grant Programs* 14 (2018).

¹⁷ See Institute for Policy Integrity, Comment Letter on Proposed Revision to the Hours of Service Regulation for Property-Carrying Commercial Motor Vehicles, *supra* note 1, at 1.

¹⁸ Hours of Service of Drivers, 84 Fed. Reg. at 44,192.

¹⁹ *Id.*

²⁰ *Id.* at 44,203.

²¹ *Id.* at 44,205.

sleep due to scheduling.”²² But this study focuses on the *fatigue effects* of split sleep schedules, not on any other health effects on drivers, such as alterations to circadian rhythms or morbidity from associated chronic diseases and disorders. The provisions as currently proposed fail to explain how the alternative chosen does “not have a deleterious effect on the physical condition of drivers,” as is FMCSA’s statutory mandate.²³

Driver morbidity is linked with increased work hours and decreased sleep,²⁴ both of which may result from the proposed 7/3 split sleeper berth exception and the other proposed rule changes. FMCSA must analyze the impact of these proposals on driver morbidity. As FMCSA has noted in analysis for past rules, studies show that CMV truckers experience obesity, diabetes, cardiovascular disease, hypertension, and high cholesterol at rates that far exceed both the national average and the average among adult male workers.²⁵ The agency fails to assess here how the proposed rule may exacerbate these conditions.

FMCSA has concluded that mandating eight consecutive hours in the sleeper berth is undesirable because it hampers driver flexibility,²⁶ but has made this conclusion without considering important benefits of a continuous eight-hour rest period. For example, according to the Centers for Disease Control and Prevention, sleep disorders and sleep loss are “associated with mental distress, depression, anxiety, obesity, hypertension, diabetes, high cholesterol, and adverse health behaviors such as cigarette smoking, physical inactivity, and heavy drinking.”²⁷ Such chronic health conditions can be very costly in terms of healthcare expenditures,²⁸ lifetime earnings, impacts to driver safety, and overall quality and life and wellbeing.²⁹ To the extent the proposed rule changes could exacerbate any of these

²² *Id.* at 44,203 (citing Mollicone, D.J., Van Dongen, H.P.A., Dinges, D.F. (2007) “Optimizing Sleep/Wake Schedules in Space: Sleep During Chronic Nocturnal Sleep Restriction With and Without Diurnal Naps,” *Acta Astronautica*, 60 (2007) 354–361).

²³ 49 U.S.C. § 31135(a)(4).

²⁴ See Institute for Policy Integrity, Comment Letter on Proposed Revision to the Hours of Service Regulation for Property-Carrying Commercial Motor Vehicles, *supra* note 1, at 10-13. Those comments are attached to this submission, and the literature cited at those pages is hereby incorporated.

²⁵ FMCSA, *Regulatory Impact Analysis for the Proposed Hours-of-Service (HOS) Rule* (2010) [hereinafter FMCSA 2010 RIA], ES-4, at 5-1 & 5-11 to 5-12. See also Bradley C. Martin et. al, *The Impact of Overweight and Obesity on the Direct Medical Costs of Drivers*, 51 J. OCCUPATIONAL AND ENVTL. MED. 180, 184 (2009) (finding a 55% obesity rate among truckers and “substantially higher healthcare costs” among truckers who are either overweight or obese as compared with those of normal weight, and concluding that truckers are “particularly vulnerable to obesity related complications and appropriate targets for interventions to reduce weight.”); Peter T. Katzmarzyk et. al., *Sitting Time and Mortality from All Causes, Cardiovascular Disease, and Cancer*, 41 MED. & SCI. SPORTS & EXERCISE 998, 1002 (2009) (finding that prolonged periods of sitting is associated with elevated risks of mortality and of cardiovascular disease, *after* controlling for age, sex, smoking status, alcohol consumption *and leisure time physical activity levels*).

²⁶ Hours of Service of Drivers, 84 Fed. Reg. at 44,203, 44,205.

²⁷ CTRS. FOR DISEASE CONTROL AND PREVENTION, *Perceived Insufficient Rest or Sleep – Four States, 2006*, MORBIDITY AND MORTALITY WEEKLY REPORT, Feb. 29, 2008, at 2.

²⁸ According to the Centers for Disease Control and Prevention, 90 percent of national annual healthcare expenditures in 2017 were for chronic and mental health conditions. CTRS. FOR DISEASE CONTROL AND PREVENTION, *Health and Economic Costs of Chronic Diseases*, <https://www.cdc.gov/chronicdisease/about/costs/index.htm> (last visited Oct. 12, 2019). Obesity alone has historically accounted for over 9 percent of the nation’s *direct* medical costs, Steven Reinberg, *Almost 10 Percent of U.S. Medical Costs Tied to Obesity*, ABCNEWS.COM, (July, 28, 2009), <http://abcnews.go.com/Health/Healthday/story?id=8184975&page=1> (reporting that just over 9% of all national medical spending, or \$147 billion annually, is due to obesity), and Patients with diabetes, heart disease, hypertension, asthma and/or mood disorders accounted for 49 percent of national health care costs in 1996, AGENCY FOR HEALTHCARE AND RES. QUALITY, *The High Concentration of U.S. Health Care Expenditures*, 19 RESEARCH IN ACTION 1, 7 (2006).

²⁹ FMCSA has in the past recognized the impact of adverse health outcomes on safety, earnings, and quality of life. See FMCSA 2010 RIA, *supra* note 25, at 5-11 to 5-12 (stating that some studies suggest that obesity causes an increased crash risk, in addition to causing premature death and increased healthcare costs); *id.*, at 5-1 (“Another possible impact of long work hours is the foregone earnings that would result if a driver were to develop a medically disqualifying condition.”); *id.*, at 5-11 (“Research indicates that the metabolic and endocrine disruptions associated with short sleep time and long work hours are

conditions, there could be important forgone benefits both to road safety and to driver health and welfare. The fact that many of the chronic conditions associated with sleep loss develop over significant periods of time,³⁰ such that drivers may not have upfront the information, foresight, or negotiating power to bargain for compensating wages, makes it all the more important that FMCSA fully weigh the potential forgone benefits to driver health and welfare of the proposed regulatory changes. Even if FMCSA cannot establish a precise dose-response curve between sleep and morbidity, the agency cannot ignore or assign a zero value to the potential forgone benefits to driver health and welfare.³¹

Besides sleep effects, FMCSA should also analyze the potential effects of its proposed changes on driver exposure to diesel exhaust (“DE”). In particular, existing DE exposure levels could increase under the proposed 30-minute break period and the sleeper berth exception, because each of these proposals could result in extended idling. As EPA has noted in previous rulemaking:

Extended idle occurs when Class 8 long haul drivers rest in the sleeper cab compartment during rest periods as drivers find it both convenient and less expensive to rest in the truck cab itself than to pull off the road and find accommodations. During this period, a driver will idle the truck in order to provide heating or cooling or run on-board appliances. In some cases the engine can idle in excess of 10 hours. During this period, the truck will consume approximately 0.8 gallons of fuel and emit over 8,000 grams of CO₂ per hour. An average truck can consume 8 gallons of fuel and emit over 80,000 grams of CO₂ during overnight idling in such a case.³²

The phenomenon of extended idling periods is significant because the adverse health effects of DE exposure depend on the degree and duration of exposure.³³ When a truck idles, it generates greater DE exposure than when the truck is moving.³⁴ FMCSA has not considered how changes to the 30-minute break period and the sleeper berth exception might increase exposure to DE, to the detriment of driver’s health. With shorter consecutive-hour sleep requirements, for example, drivers may be less motivated to find accommodations outside their truck cabs, and may instead spend more time inside idling trucks. Such increased idling could have important health effects on drivers, as well as ancillary negative effects in terms of fuel use and greenhouse gas emissions.

It is also unclear how the agency plans to acquire the information it needs to properly assess the proposed rule changes. For example, FMCSA cancelled a pilot program to study the health effects on drivers of alternative split-berth rules.³⁵ The agency did not explain why the program was cancelled.

significantly related to obesity. . . . Obesity is in turn associated with higher incidences of diabetes, cardiovascular disease, hypertension and OSA. . . . Each of these medical conditions imposes costs on drivers who suffer from them and affects the quality of their lives.”).

³⁰ Michael J. O’Grady & James C. Capretta, PARTNERSHIP TO FIGHT CHRONIC DISEASE, HEALTHCARE COST PROJECTIONS FOR DIABETES AND OTHER CHRONIC DISEASES 4 (2009), available at http://www.fightchronicdisease.org/pdfs/CBO_whitepaperwPFCDback.pdf (“[T]here is often a significant time lag between the act of prevention and the realization of a possible health benefit.”).

³¹ Under basic administrative law principles, the difficulty of establishing a precise dose-response curve between increased sleep and decreased morbidity does not justify assigning it a zero value. In *Ctr. for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1200 (9th Cir. 2008), the 9th Circuit found NHTSA’s decision to assign a zero value to greenhouse gas emission reductions to be arbitrary and capricious. The court explained that: “while the record shows that there is a range of values, the value of carbon emissions reduction is certainly not zero.” *Id.* OMB instructs agencies “[w]hen benefit and cost estimates are uncertain...you should report benefit and cost estimates (including benefits of risk reduction) that reflect the full probability distribution of potential consequences.” OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR A-4, REGULATORY ANALYSIS 18 (2003).

³² Greenhouse Gas Emissions Standards and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles, 75 Fed. Reg. 74,152, 74,185 (proposed Nov. 30, 2010).

³³ See Hours of Service of Drivers, 70 Fed. Reg. 49,978, 49,984 (Aug. 25, 2005).

³⁴ *Id.*

³⁵ See Hours of Service of Drivers, 84 Fed. Reg. 44,190, 44,205 (proposed Aug. 22, 2019).

Perhaps more concerning, FMCSA has not explained how it will replace the data and information it might have gained from the program had it been carried out as planned. FMCSA also solicits comments on a 6/4 split break, in addition to the proposed 7/3 split break.³⁶ Data from a pilot program might have allowed the agency to meaningfully consider the health and safety differences between these alternatives, but, as proposed, the agency has not explained from where it will obtain the data necessary to analyze whether either a 7/3 split or 6/4 split break schedule will have deleterious health effects on drivers.

Finally, the agency should also consider alternatives that would be more protective of driver health and welfare, and select from the full range of feasible alternatives the rule that maximizes net social welfare. FMCSA's choice among alternatives should be based on evidence and should be made only after considering all effects, including driver health and safety.

Conclusion

The proposed changes to the HOS regulation are too narrowly focused on providing greater flexibility for drivers, instead of on maximizing net social welfare by weighing all costs and benefits, including safety and driver health. FMCSA has under-explained how several key provisions of its proposed changes will not come at the expense of safety and driver health. In general, FMCSA should weigh all costs and benefits for each provision in the rule to select the alternative that maximizes net social welfare, and analyze each proposed provision's effect on driver health, especially the provisions with the greatest potential to affect driver health: changes to the 30-minute break requirement and to the sleeper berth exception. More specifically, FMCSA should explain how the MCMIS crash data for concrete mixers creates a reliable indicator for crash risk for CMVs, and should explain why FMCSA cancelled the pilot program to study the health effects on drivers of alternative split-berth rules.

Sincerely,

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Attached, as a source of additional arguments and supporting literature:

Policy Integrity, Comment Letter on Proposed Revision to the Hours of Service Regulation for Property-Carrying Commercial Motor Vehicles, March 11, 2011,
https://policyintegrity.org/documents/Policy_Integrity_Final_Comments_on_HOS_Rule.pdf

³⁶ *Id.*