

**BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION
UNITED STATES DEPARTMENT OF TRANSPORTATION**

**COMMENTS SUBMITTED BY
THE OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC.**

**IN RESPONSE TO
A NOTICE OF PROPOSED RULEMAKING; REQUEST FOR COMMENTS
LIMITING THE USE OF WIRELESS COMMUNICATION DEVICES**

DOCKET NO. FMCSA-2009-0370

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FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION
UNITED STATES DEPARTMENT OF TRANSPORTATION

I. INTRODUCTION

The Owner-Operator Independent Drivers Association's (OOIDA's) Board of Directors has voted to support a ban on texting. OOIDA has several comments to the proposed rule that it believes would make the rule fairer, clearer, and more consistently applied. OOIDA believes there are inconsistencies between the types of technology that are permitted and not permitted by the rule. Additionally, OOIDA asks for clarification of when and where texting would be permitted and prohibited.

OOIDA also believes that driver compliance would be improved and driver cooperation with enforcement would be fostered were the agency to provide guidance as to how this rule will be enforced. Finally, contrary to the assertion made in the Notice of Proposed Rulemaking (NPRM), the agency has proposed the collection of personally identifiable information covered by the Privacy Act. Therefore, the agency must do a privacy impact analysis.

II. COMMENTS OF THE ASSOCIATION

A. Technology Covered by the Rule

OOIDA asks the agency to clarify what types of technology are permitted or prohibited by the rule. For example, there are many different types of devices, from cell phones to laptops, that use GPS and navigation software. There are also numerous Global Positioning System (GPS) and navigation software applications. For example, Sprint has its own Sprint Navigation

program available for use on certain devices, such as the BlackBerry. Many of these applications provides audible directions to the driver.

Some OOIDA members use such navigation software on their laptops, but they perform in the same manner as devices manufactured by Garmin, Tom Tom, and Magellan which are permitted in the proposed NPRM . Further information on the navigation software used by OOIDA members on their laptops can be found at the following sites: <http://www.delorme.com/> and <http://www.alk.eu.com/> .

These programs do not require a driver to access the Internet. They rely upon a GPS device that is plugged into the USB port. They access the Internet only for software updates. Because such GPS and navigation software is available on different technology platforms, including laptops, OOIDA members are unclear whether their use would be permitted or prohibited under the proposed rule. OOIDA asks FMCSA to clarify the rule on this point.

B. The Proposed Exemption for Fleet Management Systems

OOIDA is concerned that the proposed rule permits the use of “fleet management systems” without any analysis of what kind of distraction they impose on drivers. OOIDA cannot believe that FMCSA simply put its faith in “safety conscious fleet managers” to not require drivers to type or read messages while driving. In its comments to the Electronic On-Board Recorder (EOBR) rulemaking, OOIDA described extensively how large motor carriers have used such wireless electronic devices 1) to monitor drivers’ hours of service and push them to maximize their driving time, and 2) to set off an audible alarm while the driver was asleep in the sleeper berth. Additionally, drivers routinely complain to OOIDA about how they are bombarded with messaging from their motor carrier. Certainly there are motor carriers

abiding in good faith and not abusing fleet management systems, but many are not so enlightened. OOIDA does not see any basis in the record to support the Agency's across-the-board positive assumptions about the behavior of fleet managers.

Although the Agency states that it may address fleet management systems in a future rulemaking, this rulemaking specifically addresses this issue by proposing they be exempted. The Agency issued this proposal without any analysis of the amount of driver distraction created by fleet management systems. Therefore, because the agency made no finding that the use of fleet management systems are any less of a distraction than the use of devices banned under the proposed rule, the fleet management system exemption is nothing short of arbitrary and capricious.

OOIDA asks that the amount of driver distraction presented by fleet management devices be quantified, compared to prohibited wireless communication devices, and brought within the rule's prohibition if so dictated by safety. Additionally, just as drivers will face stiff penalties for violating the proposed rule, the rule should also impose stiff penalties on motor carriers who use these devices in any manner that could distract drivers.

Furthermore, small-business motor carriers use different electronic devices, such as laptops, to perform many of the same functions served by fleet management systems. For example, they can record their record of duty status and be contacted by brokers with dispatch updates. Because the proposed ban covers those devices and not fleet management systems, this rule imposes a disparate burden on small businesses. The agency did not identify or analyze this disproportionate effect of the proposed rule on small businesses under the Regulatory Flexibility Act.

OOIDA believes that the agency would bring greater clarity to the rule if it were to define the unacceptable level of driver distraction created by wireless electronic devices. For example, the agency could ban the use of all devices that required more interaction with the driver than permitted under the proposed rule for the use of cell phones. By establishing such a definition or standard, the rule would be easier to understand, fairer in its application, and more consistent in the level of safety achieved with each driver. It would also fulfill its stated goal of adapting to the rapidly changing marketplace for wireless electronic devices.

C. Definitions of When Texting is Prohibited and Permitted

OOIDA asks the FMCSA to also clarify or revise the circumstances under which texting is prohibited and permitted, both when the engine is running and when the truck is stationary.

1. When the Motor is Running

The proposed rule attempts to link the texting ban to when the truck motor is running. But what if the driver is in a traffic jam and at a complete standstill in the middle of the highway? In those instances, there is virtually no risk that the driver will cause an accident. The drivers' use of wireless electronic devices for weather, alternate routes, and other safety information would be reasonable. Drivers sometimes need to glance at a screen to verify where they are, see where they are going, and learn other important information while on the road. This interaction with a wireless device often requires no more interaction than the consultation with navigation devices as permitted by the proposed rule or the monitoring of various gauges located in the dashboard.

OOIDA is aware that certain brands of navigation software "blanks" the screen of lap tops when the vehicle is in motion (see: <http://www.mobilemounts.com/>). Additionally, as

reported by David Pogue in *the New York Times* on April 29, 2010, there is a new category of cell phone application that makes the device unusable when the vehicle is moving. Use of technology that contains these “blinking” functions should be permitted under the rule, no matter what their function or purpose, and no matter whether the motor is running or not.

2. The Need to Clarify “Safely Remain Stationary”

The rule also permits texting only when the truck has halted in a location where it “can safely remain stationary.” If the Agency does not change its texting ban to circumstances when the truck is not moving, as suggested above, then OOIDA believes the phrase “can safely remain stationary” requires additional clarification. Is this phrase intended to require a level of certainty that the truck will not move? Or does it require that the truck and driver will remain safe or that the truck is in a safe location while stationary?

Often drivers find themselves ready to go off-duty in a locality where they have never been. They may not know the local truck parking locations, or all of the available truck parking appears to be taken. Drivers must sometime improvise to find a place to rest, such as on an on-ramp or off-ramp or on the side of the road in an industrial area. Would those be areas that a local state trooper considers not a safe location in which to be stationary? Could a texting trucker parked in such a location be cited for violating the rule? OOIDA believes that this rule intends to permit texting only when the truck is assuredly not going to move, wherever its location, and we ask FMCSA to make this clarification.

D. Enforcement

The proposed rule is completely silent on how enforcement will be performed. The regulatory scheme must limit the scope of inspecting officials and give drivers notice of what

will be expected of them during an inspection. Legally, such notice is required by the United States Constitution. In practical terms, FMCSA will achieve better compliance and cooperation from drivers if they know what is expected of them during a stop or inspection.

The Fourth Amendment to the United States Constitution provides as follows:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Supreme Court has recognized that the federal government may have a compelling interest in specific industries where the existence of pervasive regulations may diminish an individual's reasonable expectation of privacy. See, e.g., *U.S. v. Biswell*, 406 U.S. 311, 315-16 (1972); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978)

In *Donovan v. Dewy*, the Supreme Court decided that where an individual elects to participate in a pervasively regulated business his “justifiable expectations of privacy” are necessarily diminished. Reasonably defined inspection schemes are accompanied by appropriate standards for implementation that pose only limited threats to those limited expectations of privacy. 452 U.S. at 600. In *New York v. Burger*, 482 U.S. 691 (1987), the Court reaffirmed the principles articulated in *Donovan*, including the 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.

The foregoing cases establish that routine warrantless inspections of commercial property associated with heavily regulated industries may be considered reasonable within the meaning of the first clause of the Fourth Amendment where the nature of the incursion involved was limited and where statutory regulatory provisions created certainty and regularity to the inspection program thereby acting as a constitutionally adequate substitute for a warrant. The controlling Supreme Court cases demonstrate the importance of published regulations limiting the discretion of the officers in the field, ensuring that the permissible limits of the intrusion are narrowly defined and addressing special privacy interests of the subjects of the search. In the absence of such statutory or regulatory provisions, there can be no finding of reasonableness. Thus, in *Colonnade* the Court specifically held that “[w]here Congress has authorized inspection but made no rules governing procedures that inspectors must follow, the Fourth Amendment and its various restrictive rules apply.” 397 U.S. at 77.

The proposed rule presents enforcement issues that have not yet been raised in motor carrier safety regulation. OOIDA does not believe that the existing rule, or the proposed rule, provides guidance on how this rule will be enforced. This raises important questions that must be addressed.

- * Will a trooper be permitted to request access to a driver’s electronic wireless devices and search them to: 1) confirm the driver was texting while driving as just observed by that trooper, or, 2) confirm whether the driver sent any texts during the time his logbook showed he was driving?
- * Will a trooper be permitted to search an entire cab for a electronic wireless device and then review its activity call log if the trooper believes he saw the driver texting?
- * Will a trooper be permitted to read a driver’s texts or e-mails? Will the trooper be able to retain copies of the drivers texts or e-mails as proof of the driver’s violation?

- * Who has the burden of proof that the driver violated or did not violate the law? What level of proof must exist for a trooper to issue a citation? Will a driver be forced to prove his innocence if accused of texting while driving?
- * Given the fact that the level of distraction demanded of a driver by both permitted and banned wireless electronic devices can overlap, how will an enforcement person be able to determine whether a driver was using a permitted or banned device as he observes the driver go down the road?

While OOIDA wholeheartedly supports a ban on texting while driving, these enforcement issues must be addressed, especially when the Agency is proposing significant penalties for violations of the rule. OOIDA knows that unless constrained by a rule or procedure, creative law enforcement officials will see no limit on the actions they can take to enforce this rule. Finally, if the Agency were to publish enforcement procedures that are consistent with the U.S. Constitution and easy for drivers to understand, the Agency will have maximized driver compliance with the rule and driver cooperation with enforcement.

E. Privacy Impact Analysis

The NPRM states that no privacy impact analysis was necessary because no personally identifiable information would be collected. But wouldn't personally identifiable information be collected, stored in FMCSA's databases, and disseminated through the Agency's CSA 2010 initiative when a driver receives a citation for violating the rule? Also, will text messages or e-mails be reviewed, copied, collected and stored by law enforcement as proof of the rule's violation? The proposed rule appears to sanction the collection of personally identifiable information and, therefore, FMCSA must perform an adequate privacy impact analysis

III. CONCLUSION

OOIDA strongly urges FMCSA to include a prohibition on the use of in-cab fleet

management systems in the final rule. OOIDA asks FMCSA to clarify when texting is and is not permitted under the rule, and to make public to drivers what types of enforcement actions will be permitted to enforce the rule. OOIDA believes adoption of these recommendation will result in a better rule, more consistent enforcement, and safer highways.

IV. THE INTEREST OF THE OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC.

These comments are submitted by the Owner-Operator Independent Drivers Association, Inc., in response to a Notice of Proposed Rulemaking and Request for Comments, “Limiting the Use of Wireless Communication Devices,” Docket No. FMCSA-2009-0370, published on April 1, 2010.

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. OOIDA is the largest international trade association representing the interests of independent owner-operators, small-business motor carriers and professional drivers. The more than 155,000 members of OOIDA are professional drivers and small-business men and women located in all 50 states and Canada. One-truck motor carriers represent nearly half the total number of active motor carriers operating in the United States while approximately 96 percent of active motor carriers operate 20 or fewer trucks. The address of the Association is:

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The Association actively promotes the views of small-business truckers and professional

drivers through its interaction with state and federal government agencies, legislatures, the courts, other trade associations, and private businesses to advance an equitable and safe environment for commercial drivers. OOIDA is active in all aspects of highway safety and transportation policy, and represents the position of small-business truckers and professional drivers on numerous committees and in various forums on the local, state, national, and international levels. Many of OOIDA's members rely upon communication technology when away from home and are exposed to the danger posed by any driver distracted by the use of wireless communication devices while driving.

Respectfully submitted,



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