

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

---

---

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

**IN RESPONSE TO FMCSA'S  
NOTICE AND REQUEST FOR COMMENT  
ON DRAFT STRATEGIC PLAN**

**Docket No. FMCSA-2011-0098**

---

---

**JAMES J. JOHNSTON  
President  
Owner Operator Independent  
Drivers Association, Inc.**

**PAUL D. CULLEN, SR,  
PAUL D. CULLEN, JR.  
The Cullen Law Firm, PLLC  
1101 30<sup>th</sup> Street, N.W., Suite 300  
Washington, DC 20007**

**August 2, 2011**

## **I. STATEMENT OF INTEREST**

These comments are submitted on behalf of Owner-Operator Independent Drivers Association, Inc. (“OOIDA” or “Association”) in response to the Notice and Request for Public Comment published by the Federal Motor Carrier Safety Administration, (“FMCSA” or “Agency”), Docket No. FMCSA-2011-0098, 76 Fed. Reg. 38267 (June 29, 2011). (Hereinafter “the Notice”). The Notice requests comments on FMCSA’s draft strategic plan.

OOIDA, 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 151,000 members of OOIDA are professional drivers and small-business men and women located in all 50 states and Canada who collectively own and operate more than 200,000 individual heavy-duty trucks. Single-truck motor carriers represent nearly half of the total of active motor carriers operated in the United States. The mailing address of the Association is:

Owner-Operator Independent Drivers Association, Inc.  
P.O. Box 1000  
1 NW OOIDA Drive  
Grain Valley, Missouri 64029  
[www.ooida.com](http://www.ooida.com)

The Association actively promotes the views of professional drivers and small-business truckers through its interaction with state and federal government agencies, legislatures, 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 positions of professional drivers and small-business truckers in numerous committees and various forums on the local, state, national, and international levels. In sum,

OOIDA's mission includes the promotion and protection of the interests of independent truckers on any issue which might touch on their economic well-being, their working conditions, or the safe operation of their motor vehicles on the nation's highways.

## **II. GENERAL COMMENTS**

### **• Drivers — Partners Not Piñatas in the Pursuit of Safety**

OOIDA joins enthusiastically with FMCSA in its principal goal of reducing crashes, injuries and fatalities involving commercial motor vehicle (CMV) transportation. There are several million CMV drivers whose lives and livelihoods would be improved substantially if this goal is achieved. Every CMV accident involves a driver whose actions and interactions with others on the road could have a positive impact on highway safety. Curiously, drivers are not identified by FMCSA as partners in the efforts to achieve higher levels of safety. The proposed Strategic Plan all too often treats drivers as *piñatas* rather than *partners* in the quest for safer highways. OOIDA is not a disinterested observer when it comes to FMCSA's policies and goals. After years of observation and interaction, OOIDA is left with the impression that FMCSA treats drivers much as a child treats a *piñata* at a birthday party. If he can only continue to beat it with a stick surely something good will fall out of the bottom. What FMCSA's draft strategic plan fails to recognize is that there are certain real world imperatives that have an impact on driver behavior that must be taken into account as part of any safety strategy. Failure to do so compromises safety. The proposed strategic plan should be modified to deal with the real world that drivers face every day. FMCSA should also focus on ways to make drivers true partners in its quest for safer highways.

- **Real World Economics**

Every owner-operator driver must be able to earn sufficient revenue from his or her trucking operation to pay for and maintain a truck, buy fuel, tires, insurance, license plates, taxes, etc. There must also be a little left over to support a family. Revenue is generated by moving freight. If freight doesn't move, revenue doesn't come in. Regulators can limit the hours of service, dictate when naps should be taken (even if the driver is not tired), restrict speed and lane availability and mandate EOBRS for trucks. But if regulations do not address the other side of the driver's ledger, economic imperatives will force consequences that will have a decidedly negative impact on safety. If drivers cannot earn a living within the rules, two things can happen. First, experienced drivers will pursue more attractive options outside of trucking. This opens the door for less experienced individuals who have up to three times the crash risk to enter the industry. (American Trucking Associations Hours of Service Issue Paper at: <http://www.safedriverhours.com/113010FINALUpdatedHOSIssuePaper.pdf>). Safety suffers. Second, drivers may game the system so that regulatory obstacles do not interfere with revenue generation. Again, safety suffers.

If FMCSA wants to significantly improve highway safety and reduce truck crashes, then it must change its enforcement focus from one that is almost entirely directed to punishing drivers, to one that proactively and forcefully supports drivers. In the last two decades, Congress and DOT have been focused on increasing driver fines, establishing new reasons to disqualify drivers, imposing greater intrusions into driver privacy, and imposing greater regulatory burdens on drivers with the stated purpose of reducing truck crashes. None of these efforts seek to resolve the real causes of truck crashes—the economic pressure on drivers to operate in violation of the rules and driver inability to stand up to and resist such pressure. In an industry that, at

least in the truckload sector, has a historical 120 percent annual turnover, drivers who are disqualified or otherwise become unemployable because of an FMCSR violation on their record are replaced by new drivers who face the same pressures to operate in the same manner as the drivers they replaced. For all practical purposes, drivers who prefer to comply with the rules get no help from the FMCSA to resist such pressure. The fact that drivers are being forced to work, uncompensated, for various periods of time is one of the most significant sources of pressure on drivers to operate long hours. Not only is it patently unfair not to compensate drivers for their work, such demands on their time put greater pressure on drivers to use their remaining on-duty time to pursue that work they are actually paid for—driving the truck. These factors create an intense and demanding work environment for drivers because they work to deny drivers the ability to earn a reasonable living in compliance with the FMCSRs. The marketplace has not resolved these issues.

The proposition that economic issues are beyond FMCSA's control is not an excuse for ignoring the realities of the real world. It's like saying that safety regulators need not consider weather conditions because they have no ability to control when it rains or snows. As we discuss below, there are many issues that FMCSA has control over that impact driver economics and ultimately driver safety. Further, FMCSA has the ability to work with other agencies and Congress on economic issues that have the potential to contribute to an environment more hospitable to highway safety.

We will start here with a number of comments addressing problems/opportunities for making drivers true partners in highway safety. We then follow with comments on specific sections of the draft plan.

- **Harassment**

The HOS regulations are designed to limit the number of hours an individual may be on-duty driving so that sufficient time is available for drivers to be off duty getting restorative sleep. Both sides of the on-duty, off-duty equation are important to ensure that drivers are well-rested and alert when operating their CMVs. FMCSA seems all too eager to monitor and measure driving time, but is visibly apathetic when it comes to driver rest. OOIDA has been very vocal in pursuing the problem of driver harassment by motor carriers. All too often motor carriers insist that drivers record waiting time and loading and unloading time as off-duty, not-driving time. Drivers are “pinged” through Qualcomm devices while resting to “encourage” them to use all legal driving time even when they are tired. There is a federal statute requiring FMCSA to deal with such harassment when EOBRs are mandated. 49 U.S.C. §31137(a). Yet FMCSA shows a distinct anti-driver bias when it refuses to recognize this problem and is currently resisting an opportunity to satisfy its statutory duty. FMCSA can be heard complaining loudly and frequently about false log-books yet it refuses to believe anyone but the driver contributes to this problem. OOIDA has been forced to litigate this issue because FMCSA has turned a blind eye to the harassment problem. If FMCSA wants drivers to be partners in highway safety it should address the problem of driver harassment.

Additionally, OOIDA is concerned that several of the technical requirements for EOBRs under 49 C.F.R. §395.16 will have the effect of harassing or distracting the driver during periods when the driver is compliant with the HOS rules, but add stress to already stressful working conditions. For example, §395.16 (o) (4) requires that: “The EOBR must provide an audible and visible signal to the driver at least 30 minutes in advance of reaching the driving time limit and the on-duty limit for the 24-hour period.” §395.16 (o) (5) requires that: “The EOBR must be

able to track total weekly on-duty and driving hours over a 7- or 8-day consecutive period. The EOBR must be able to warn a driver at least 30 minutes in advance of reaching the weekly duty-/driving-hour limitation.” Additionally, §395.16 (o) (6) states: “The EOBR must warn the driver via an audible and visible signal that the device has ceased to function. “Ceasing to function” for the purpose of this paragraph does not include brief losses of communications signals during such time as, but not limited to, when the vehicle is traveling through a tunnel.” Finally, §395.16 (o) (8) states: “The audible signal must be capable of being heard and discerned by the driver when seated in the normal driving position, whether the CMV is in motion or parked with the engine operating. The visual signal must be visible to the driver when the driver is seated in the normal driving position.” But legitimate (and legal) reasons to exceed allowable driving limits exist (i.e. §395.1 (b) Adverse driving conditions). A driver operating through a blinding snow storm under the exemption would also need to accomplish that difficult task with a continual audible signal from the EOBR. Currently, the regulation does not permit any driver override function for the audible alert. For team drivers specifically, the driver in the sleeper berth attempting to get rest will be roused from sleep by any audible signal that can be heard by the driver behind the wheel. OOIDA asks FMCSA to consider adjustments to these rules so that they do not unnecessarily make a driver’s work environment more burdensome, and less safe, than necessary.

- **Detention Time**

Drivers spend excessive amounts of time waiting to load or unload because of inefficiencies by shippers and receivers at the loading docks. Most of this time goes uncompensated and, if properly recorded, counts against available on-duty hours. Shippers and receivers transfer the cost of their inefficiency to drivers. Motor carriers are afraid to side with

their drivers because they don't want to offend their customers. Mandating compensated detention time would force shippers and receivers to become more efficient resulting in improved HOS compliance by drivers with related safety benefits.

- **Fatigue Based Out-of-Service Orders**

The FMCSRs do not authorize performance based out-of-service orders (OOSOs) for fatigue. 49 C.F.R. §383.5 defines out-of-service orders to include only violations of 49 C.F.R. §§386.72, 392.5, 395.13, 396.9 “or compatible laws, or the North American Uniform Out-of-Service Criteria.” Each of these FMCSR sections specifically authorizes an out-of-service order. Violation of 49 C.F.R. §392.3 is not identified as the basis for an OOSO. Section 392.3 is used primarily *by drivers* in the prosecution of wrongful termination cases based upon forced dispatch, i.e. an attempt by a motor carrier to force a driver to take a load under dispatch when the driver believes himself to be too tired or ill to drive.<sup>1</sup> Apart from situations involving drugs and alcohol, the regulations only authorize OOSOs for HOS and log book violations. No state that we are aware of has adopted standards for performance based OOSOs for fatigue. Yet FMCSA regularly funds state enforcement officers’ misguided efforts to place drivers out of service, notwithstanding drivers’ compliance with the HOS rules. Minnesota is the most prominent example, but there are many others. FMCSA should not fund these state activities through MCSAP unless and until it authorizes performance based OOSOs for fatigue and establishes criteria for measuring levels of fatigue that would justify an OOSO.

---

<sup>1</sup> *Yellow Freight System, Inc. v. Reich*, 27 F.3d 1133, 1135 (6th Cir. 1994). Forcing a driver to accept a load under dispatch when he is too ill or fatigued to drive within the meaning of Section 392.3 is actionable under Section 405(a) of the Surface Transportation Assistance Act of 1982, 49 U.S.C. App. §2305 (1988).

- **Fatigue Inspections**

The federal court in Minnesota has held that fatigue inspections by the Minnesota State Patrol (MSP) are not covered by the pervasively regulated industry exception to the Fourth Amendment's warrant requirement. This confirms the position taken by OOIDA that there is nothing in the FMCSRs that acts as a constitutionally adequate substitute for a warrant in connection with fatigue inspections as required under *New York v. Burger*, 482 U.S. 691 (1987). The Minnesota federal court found further that the North American Standard Level III inspection does not authorize detaining drivers for fatigue inspections absent probable cause or reasonable articulable suspicion. This ruling has implications for fatigue inspection in all states. FMCSA should drop MCSAP funding for state fatigue inspections until proper Burger-style regulations are adopted or other Fourth Amendment protections are put in place.

- **Fatigue Based OOSO's — Punitive Not Remedial**

Trial testimony by Major Ken Urquhart during the Minnesota fatigue litigation established that OOSOs for fatigue are punitive not remedial. Drivers placed out-of-service are not monitored to see that they get rest, nor are they reinspected before they are allowed to resume driving. Under a Minnesota State Patrol General Order, after a driver is placed out-of-service for fatigue, the motor carrier is to be notified that under federal regulations they may keep the driver on-duty with the vehicle. The whole process is a farce. Without FMCSA leadership on this issue, CVSA has filled the void by creating out-of-service criteria, but CVSA has neither the authority nor the expertise to establish valid or reliable criteria for identifying and measuring driver fatigue. FMCSA should identify reforms to fatigue inspection and regulation as a priority in its Strategic Plan.

FMCSA was soundly criticized by Judge Donovan Frank during the Minnesota trial for its hands off approach. OOIDA attempted to ask FMCSA for information and individuals who could explain FMCSA's policies related to fatigue and DataQs, but was refused by a four page letter by Debra Straus from the Office of Chief Counsel, Enforcement and Litigation Division. Then, well after the discovery process was over, FMCSA's William Quade belatedly volunteered to become a witness at the trial. Judge Frank refused to allow him to testify, remarking on FMCSA's failure cooperate during the litigation.

- **CVSA**

CVSA has no authority to promulgate substantive regulations. Its out-of-service criteria (OOSC) are merely enforcement tolerances that are supposed to provide guidance to officers as to when an out-of-service order is appropriate once it is determined that a substantive regulation enacted by FMCSA or a state has been violated. The OOSC for fatigue contains no standards for determining when a driver is so fatigued that he (she) cannot continue to operate his (her) vehicle safely. CVSA should be directed to drop this item from its OOSC until standards are approved. CVSA's current provision that a driver found to be fatigued must remain out-of-service for 10 hours is completely inappropriate. First, CVSA has no standards to determine when an individual is too tired to drive safely. It follows then that CVSA has no data to support the implied conclusion that persons are alert enough to drive after 10 hours. Second, CVSA has no legal authority to legislate substantive violations or penalties. FMCSA's failure to provide leadership here has created a vacuum within which confusion and uncertainty reign.

- **General Truck Inspections**

FMCSA should also be concerned about the adequacy of its regulations to support even routine vehicle and driver inspections. Under the test in *New York v. Burger*, a warrantless

administrative inspection may not take place absent regulations informing drivers of the authority of inspecting officers and any limitations on that authority. Violation of state adopted versions of the FMCSRs is a misdemeanor in most states. Nothing in the regulations informs drivers of the authority of inspecting officers to pose questions and what limitations there are with respect to that authority. No federal or state regulations inform drivers of what obligations they may have to answer such questions. FMCSA should adopt a regulation stating that, where violations have criminal penalties, drivers have a right to remain silent and inspecting officers have no authority to force drivers to answer incriminating questions. These are the rules where FMCSA and states elect to operate within the pervasively regulated industry exception to the Fourth Amendment's warrant requirement.

- **Regulations Governing Other North American Standard Inspections**

FMCSA's legal authority to sanction and fund warrantless vehicle and driver inspections is also suspect for another reason. North American Standard Level I, II and III inspection procedures have never been incorporated into the FMCSRs, and to our knowledge, they have not been formally adopted as regulations by individual states. It does not appear that the status of the North American Standard procedures as binding regulations has ever been actually challenged and litigated. FMCSA should address the lack of formal regulations governing North American Standard inspections. Again, drivers' Fourth Amendment rights are directly tied into FMCSA's responsibilities.

- **Lack of Uniform Sanctions**

Federal statutes authorizing MCSAP funding require that FMCSA promote consistent and reasonable sanctions by participating states. 49 U.S.C. § 31102(b)(1)(S). Participating states must agree to such consistent and reasonable sanctions. 49 C.F.R. § 350.211. Fines imposed for

violations of FMCSRs vary significantly from state to state. FMCSA should require uniform fines by states participating in MCSAP. The level of such fines should be dictated by safety goals not the revenue needs of each individual state.

- **Lumping**

49 U.S.C. §14103 supposedly insulates drivers, owner-operators and motor carriers from having to bear the expense of required loading and unloading assistance, it doesn't. Receivers continue to take advantage of the vulnerability of drivers, who are "in the hole" when they arrive at receiving docks, to require uncompensated work by drivers. After the drivers have put cargo at the disposition of the receiver, they are frequently required to provide uncompensated work, e.g. moving the cargo from the trailer to the dock and or thereafter sorting it, as a condition to their receiving documentary proof of delivery, which is in turn a condition to being paid. Shippers effectively require drivers to provide assistance unloading by stacking pallets whose weight is beyond the capacity of the pallet jacks available to drivers at the point of delivery. Lumping assistance is required because of the receivers' policies, but receivers do not pay for the unloading assistance necessitated by their decisions. Receivers often effectively require drivers to have assistance unloading by giving them a choice of evils, the lesser of which is to pay for lumping assistance. For example, receivers limit the availability of self-unloading equipment, or tender worn out difficult to use pallet jacks, or demand proof of insurance beyond the federally mandated minimums as a condition to self-unloading. The receivers then deny they have "required" unloading assistance, and refuse to reimburse the out-of-pocket drivers. The problem is aggravated when receivers create lumper-service monopolies on their docks and then share in the lumper fees. Under 49 U.S.C. §14702, the Secretary currently has explicit unconstrained authority to enforce §14103, but to the best knowledge of OOIDA it has never exercised that

authority. Unloading chores forced upon drivers can have a significant impact on fatigue and ultimately safety. FMCSA should include a section on loading/unloading problems in its strategic plan.

- **Safety Data**

FMCSA announces its intention to become the authoritative source for comprehensive CMV-related data to driver decision-making. OOIDA applauds this ambitious goal, but hastens to add that FMCSA has miles to go before this goal is reached. It is difficult to select and prioritize proposals to improve highway safety if the causes of traffic accidents are not understood or accurately quantified. During the recent rulemaking (EOBR I) proposing a requirement that motor carriers with deficient hours-of-service compliance records be required to use EOBRs, a number of individuals filed comments on the lack of data available to measure safety benefits from the use of EOBRs. The Commercial Vehicle Safety Alliance and the California Highway Patrol cited the lack of data linking EOBRs and safety outcomes. NPRM-EOBR, 72 Fed. Reg. 2340. FMCSA has admitted that “comprehensive research data regarding the safety benefits of EOBR deployment are sparse,” 72 Fed.Reg. at 2357, Col. 3 and that “there is little research data linking EOBR deployment directly to safety benefits.” 72 Fed.Reg. at 2365-1. FMCSA’s Regulatory Impact Analysis (RIA) for the Final EOBR I rule readily admitted that it “lacks sufficient data” to analyze the effects (benefits) of the proposed rule.<sup>2</sup> 2010 RIA at 7. Undeterred by this lack of data, FMCSA used its analysis from the 2003 Regulatory Impact Analysis for the HOS NPRM as a proxy for its analysis. FMCSA admitted that, in its final rule, “many elements of the analysis of benefits and costs of this rule use estimates that were derived from [its] 2003 estimates concerning the effects of HOS rules.” 75

---

<sup>2</sup> Regulatory Impact Analysis of Electronic On-Board Recorders. Docket No. FMCSA-2004-18940-1157.

Fed. Reg. at 17211-2. See also NPRM-EOBR, 72 Fed. Reg. at 2343. But FMCSA admitted in 2003 that “there were insufficient economic and safety data to justify an EOBR requirement at that time.” Final Rule-HOS, 68 Fed. Reg. at 22489. FMCSA admitted that “it would have been preferable to use more recent analysis that reflects current regulations, however current data is unavailable and analysis of the 2005 HOS rule did not reexamine the costs and benefits of full compliance with the HOS regulations.” 2010 RIA at 8. When publishing its final rule in EOBR I, FMCSA admitted that “due to data limitation, [it] used outdated studies in the analysis for this rule.” 75 Fed. Reg. at 17211. The studies were not only outdated, they had been rejected as inadequate in 2003. FMCSA’s promise to do better in the future is welcome. The future is now.

FMCSA’s cost-benefit analysis in EOBR I depended to a significant degree on demonstrating that EOBRs would cause improvements in compliance with the HOS rules. Such a demonstration necessarily implied the ability to measure historic HOS compliance levels as a baseline for measuring improvements, or potential improvements, as a result of use of EOBRs. The 2010 RIA informed us that determining the “true degree of non-compliance is difficult,” and that “it is still not possible to determine the level of non-compliance.” 75 Fed. Reg. at 17211-2. FMCSA’s concerns seem well placed.

On December 29, 2010, FMCSA issued a NPRM to revise the HOS rules. There it observed: “FMCSA has consistently been cautious about inferring causal relationships between the HOS requirements and trends in overall motor carrier safety.” (2010 NPRM-HOS, 75 Fed. Reg. 82170, 82171, citing 2008 FMCSA Hours of Service Final Rule, 73 Fed. Reg. 69567, 69572, November 19, 2008). The 2010 RIA acknowledges that any safety benefit from use of EOBRs is difficult to “estimate” because of the lack of enough detail from police accident reports establishing that any HOS violation was the primary cause of a crash. (RIA Sep. App 31).

FMCSA concluded that, “at present, it is extremely difficult to construct reliable estimates of crash risk associated with particular HOS violations because, although data on the coincidence of crashes and violations exist, there is a *dearth of data* on overall exposure to crash risk from HOS violations.” (*Id.* 32-33). *See* also 2010 NPRM-HOS, 75 Fed. Reg. 82170, 82175-76 (the agency has not been able to gather data which relate hours of service compliance with fatigue based crash risk and safety benefits).

Based upon FMCSA’s inability to document the benefits of HOS regulations or EOBR use in recent rulemakings, better data collection and management should be a high priority in FMCSA’s final strategic plan. Pursuit of various regulatory alternatives (like EOBRs) should be put on hold until hard data is available that confirms that individual approaches have demonstrable potential to improve safety.

### **III. OOIDA’S COMMENTS ON SPECIFIC STRATEGIES IN THE NOTICE**

**Goal 1:** *Develop and deliver programs focused on identifying and addressing CMV safety deficiencies and assigning management or operational accountability and responsibility.*

Strategy 1.1: Identify gaps in current legislative and regulatory authorities that prevent FMCSA from reaching certain elements of the CMV transportation life-cycle (e.g., entities touching roadway movement of passengers and freight: shippers, receivers, brokers, freight forwarders) who may have a deleterious effect on safety through their actions.

#### **OOIDA’s Comments:**

OOIDA fully supports FMCSA imposing greater responsibility on all parties who have an influence on the demands of drivers in truck transportation. This has long been the practice of the Country of Australia, with their “Chain of Responsibility.”

#### **Economic Factors and Detention Time in Trucking**

FMCSA must recognize that as it tries to change driver behavior to encourage compliance with the rules, economic pressure is clearly the greatest negative influence on driver behavior. That pressure comes in many forms to a driver. For

example, it has been estimated that drivers spend up to 40 hours a week in uncompensated on-duty time, and that such inefficiencies account for 3 to 6 billion dollars in unproductive and inefficient use of labor and equipment. This uncompensated on-duty time squeezes drivers between the hours-of-service requirements to record *all* on-duty time and the reverse incentive to hide most loading and unloading time since it is not typically compensated. Hence drivers are subtly coerced to save as much on-duty time for their only source of compensation – driving. Representative DeFazio has introduced legislation (H.R. 756) with the purpose of defining and regulating unreasonable and uncompensated detention time required of drivers. In January 2011, the U.S. Government Accountability Office reported on the extent to which drivers are detained in uncompensated work activities and, most importantly, the extent to which no government agency monitors these problems, or has sought to address them. Significantly, the GAO stated the following in their report:

*“The interstate commercial motor carrier industry moves thousands of truckloads of goods every day, and any disruption in one truckload’s delivery schedule can have a ripple effect on others. Some waiting time at shipping and receiving facilities—commonly referred to as detention time—is to be expected in this complex environment. However, **excessive detention time could impact the ability of drivers to perform within federal hours of service safety regulations**, which limit duty hours and are enforced by the Federal Motor Carrier Safety Administration (FMCSA).”* (Emphasis added).

That statement from GAO is at odds with the testimony of ATA Vice Chairman, Dan England at a July 21, 2011 hearing of the Senate Subcommittee on Surface Transportation and Merchant Marine Infrastructure, Safety and Security. Mr. England commented that the GAO report found “no nexus to highway safety.” Such motor carrier management denial of this problem illustrates the squeeze placed on drivers between the rules and the work demands placed on them.

### **FMCSA’s Existing Enforcement Authority**

While FMCSA has asked whether it has sufficient authority to meet its goals, OOIDA would like to remind FMCSA that it already has the authority to address many of these issues to help drivers resist pressure from motor carriers, shippers, receivers, brokers and any other person who makes demands of drivers that compromise safety. 49 CFR §390.13 provides: “No person shall aid, abet, encourage, or require a motor carrier or its employees to violate the rules of this chapter.” Under this rule, FMCSA has the authority to deal with any party affecting compliance with the FMCSRs. It should seek ways to maximize this authority to support drivers.

### **The Hours of Service Rules**

Another rule specifically prohibits motor carriers from requiring drivers to operate in violation of the hours-of-service rules, 49 CFR 395.3. While FMCSA looks for HOS violation in roadside inspections and compliance reviews, OOIDA is not aware of any FMCSA effort to enforce this rule. It is a difficult problem, because the pressure from motor carriers is often oral, undocumented, and difficult to prove. But it is a key problem to address if FMCSA would like to see more than routine progress in increasing HOS compliance. As mentioned above, without any leadership from FMCSA on enforcement related to motor carrier behavior, states have turned this rule into one that punishes, not protects, drivers.

### **The Anti-Lumping Statute**

Not only is uncompensated detention time a problem, but so is the practice of “lumping” - when the receiver requires the *driver* to pay the receiver’s dock workers (“lumpers”) to unload the *receiver’s* freight. The anti-lumping statute, 49 U.S.C. §14103, was passed in 1980 to stop this practice. The Secretary has unambiguous authority to enforce this statute under 49 U.S.C. §14702. OOIDA is unaware of the Secretary or FMCSA taking any action to enforce this statute. Drivers who refuse strong “suggestions” to use and pay for lumpers are frequently told to get to the back of the line and wait to unload - for hours if not longer. Long delays in unloading disrupt schedules and create disincentives to HOS compliance. This problem continues unchanged since 1980, and therefore remains a significant potential area of FMCSA enforcement to support drivers.

### **Broker Bond Enforcement**

FMCSA could also provide greater assistance to small-business motor carriers just by better enforcing the broker bond regulations found at 49 CFR §387.307. OOIDA has provided to FMCSA examples of brokers stealing hundreds of thousands of dollars in transportation from dozens of motor carriers and then closing up business with only the \$10,000 bond covering their obligations. Surety companies regularly interpret the liability of the bond to be a single total of \$10,000 (although no such limitation can be found in the regulations), and then they pay cents to the dollar of liability of motor carrier claims - after deducting attorneys fees from the \$10,000. Additionally, many surety companies require motor carriers to obtain a court judgment before making a claim on a bond. Such policies discourage motor carriers who stand to gain 5 cents on the dollar for their \$800-\$1,200 claim from even pursuing a claim against the bond. These practices defeat the purpose of FMCSA’s broker bond rules. The attendant economic

losses add to the pressure on small businesses that OOIDA describes in these comments and that affect truckers' ability to comply with the rules.

### **Protecting Ill or Fatigued Drivers**

Next, OODIA is unaware of FMCSA enforcing the rule prohibiting the motor carrier dispatch of an ill or fatigued driver in 49 CFR 392.3. This rule was intended to protect drivers from improper carrier pressure and retribution when the driver is not able to drive because of illness or fatigue. Without federal leadership in enforcing motor carrier compliance with this rule, some state enforcement agencies have flipped this rule on its head, turning it into a tool that is solely used to punish drivers.

Clearly, FMCSA has significant untapped existing authority to help change the working environment to one that fosters safe driving and compliance with the rules. OOIDA stands ready to help FMCSA define what additional authority it needs in order to address the pressure on drivers to violate the rules. But in the meantime OOIDA encourages FMCSA to begin to use its existing authority in partnership with drivers.

### **The Need to Address Retaliation Against Drivers**

Not only should FMCSA step up to help drivers enforce these rules, but it must do so in a way that protects drivers from the under-the-radar retaliation that good drivers faced. For example, the DAC (once USIS, now HireRight) system of reporting driver employment histories permits carriers to tell potential future employers whether or not the driver had a late delivery, refused a load, or whether he violated company policy (without saying what policy) even if those actions by the driver were a refusal to violate the FMCSRs. That kind of a DAC report will foreclose a driver from employment at many carriers, and be used by other carriers as leverage to offer lower than market rate compensation for that driver. These can be the consequences to a good driver trying to make a living in compliance with the FMCSRs. These industry practices have the effect of rewarding drivers willing to ignore the FMCSRs, and eliminating from the industry conscientious drivers attempting to comply with the rules. FMCSA's agenda should take an aggressive and forceful action in order to address these incipient problems in the working environment of the truck driver.

Strategy 1.2: Develop a new credentialing standard to include effective vetting, training, and testing elements for all regulated entities, establishing an understanding of and compliance with FMCSA safety, hazmat, drug and alcohol testing, and commercial regulations.

## **OOIDA's Comments:**

OOIDA has observed both brokers and motor carriers accumulate debts to drivers in violation of the FMCSA rules, then go out of business or file for bankruptcy, and then reopen under a different business name with brand new FMCSA authority and continue to operate in the same unlawful manner. Often they will use a close relative or support staff member to sign and file the application for new authority. OOIDA encourages FMCSA to create credentialing rules that permit the agency to track such bad actors and then use their authority under 49 U.S.C. §13902 to identify and deny authority to motor carriers and brokers with such a history.

Administratively, FMCSA could do a much better job of inviting public comment to identify such bad actors. First and foremost, the FMCSA Register is an arcane and almost indecipherable source of information on pending applications for authority. It is hard to find on the FMCSA website. The available data is limited in time. The meanings of the various lists are difficult to understand, and provide very little information that would allow the public to know who has applied for authority so that bad actors could be identified. OOIDA believes that FMCSA should use regulations.gov, or use it as a model, for posting all applications for authority and related paperwork and communications so that the public can search by date, address, names associated with an application. The paperwork should be online indefinitely, and like regulations.gov, the public should be able to submit comments and information that the FMCSA would review in determining whether to grant, deny, or revoke a motor carrier or broker's authority. Provision should be made to enable FMCSA to deal with entities who slip through the system and acquire new credentials after their undeserving applications go undetected by past victims.

**Goal 2:**     *Establish strong enforcement strategies and sanctions that achieve effective safety-management practices and systems by regulated entities or remove them from the CMV transportation system.*

Strategy 2.1: Enhance and provide the tools to regulated entities to assist them in proactively tracking and improving their own safety performance management.

## **OOIDA's Comments:**

If by "tools" FMCSA is referring to establishing an Employer Notification System (ENS) or even the proposed Drug and Alcohol clearinghouse (the legislation introduced by Senators Pryor and Alexander, S. 754) for positive test results, FMCSA should be cautioned against placing these databases in the hands of private third parties as is allowed in that bill. OOIDA's foremost concern is

that drivers have easy access to such information, that unauthorized parties get no access to it, that such information is correct and accurate, privacy is protected, and that the driver has a fair and impartial process for correcting such information.

Thus far, we're not encouraged that FMCSA's management of systems containing driver data honors these principles. FMCSA's Pre-Employment Screening Program (PSP) is required to give drivers free access to their data held by the agency. Unfortunately, the information they receive from a Freedom of Information Act (FOIA) request is virtually unintelligible. OOIDA members have complained that their PSP comes to them as a completely non-readable EXCEL spread sheet. Drivers should be able to get a copy of the PSP that is readable, understandable and not have to go through the lengthy FOIA process. Why should it be that much more difficult for a driver to see his own records than motor carriers and other parties going through FMCSA's third party contractors?

Additionally, OOIDA has informed Administrator Ferro by letter of drivers who have had citations for FMCSR violations dismissed or overturned in state court, but have been denied the opportunity to correct those citations through the DATA Q system. OOIDA believes that FMCSA's efforts in this area fall far short of achieving the goals of system accuracy and fair access by drivers. FMCSA must look to drivers as a partner in ensuring the accuracy of these systems because as the agency is well aware, many third party providers of data mining software are assigning self generated "driver safety scores" which unenlightened motor carrier management is misusing to "blackball" otherwise safe and veteran drivers.

As a policy matter, OOIDA is not certain what ends FMCSA intends to achieve with these systems. FMCSA clearly has the power to exclude from the industry any driver who lacks the proper qualifications or who has a poor safety history (§383.51). If the purpose of these systems is not to monitor and exclude bad drivers from the trucking industry, then FMCSA must define its purpose in order for the public to make comment on how to best achieve that purpose. What purpose is there to, instead of disqualifying the bad driver, allowing drivers' records to be public in hopes that motor carriers do not hire them? Is this an attempt by FMCSA to *de facto* disqualify drivers without having to go through the administrative burden of doing so? OOIDA believes that likely result of this approach is that bad drivers will be hired by bad carriers who do not care to rely upon the agency's system and good carriers will mostly hire new drivers with little or no driving experience. Is that the result FMCSA hopes to achieve?

OOIDA is concerned that FMCSA's is simply becoming an extension of motor carrier HR departments. These FMCSA databases will relieve motor carriers of the burden of performing their own appropriate due diligence in the hiring

process. Use of these FMCSA databases will become affirmative defenses to negligent hiring claims in litigation.

Strategy 2.2: Remove unsafe and high-risk behaviors from the CMV transportation system by creating and applying appropriate interventions and enforcement sanctions to improve behavior and safety performance.

**OOIDA's Comments:**

OOIDA understands that FMCSA is scheduled to issue an NPRM later this year tying safety fitness determination (ratings) for motor carriers to data contained in the Safety Measurement System. OOIDA also understands that FMCSA would also like to use the DSMS (Driver Safety Measurement System) to create safety fitness determinations for CDL holders. OOIDA has previously identified for FMCSA many of the flaws present in the methodology, accountability, and severity weightings in the DSMS. FMCSA must take the time and make the effort to address these concerns so that the system will not unfairly discriminate against drivers because of its inaccuracies and unreliability.

OOIDA would also like to encourage the agency to understand the dynamic at play between the experience of drivers and the safety of the motor carrier. There is a general misperception that newer motor carrier are less safe than older motor carriers. OOIDA believes a motor carrier's safety experience is largely based on the experience of its drivers. Many new motor carriers are owner-operators who have successfully survived the business for ten years or more. Experienced drivers operating under their own authority will have a much better safety experience than older motor carriers using new drivers.

Larger motor carriers with a driver turnover problem must constantly recruit, train and hire as many new drivers as possible. When those drivers get into trouble with the FMCSRs, they are fired and frequently replaced with a new driver with the same lack of qualifications and experience. OOIDA encourages FMCSA to keep these factors in mind as it creates analytical tools to review motor carrier data.

**Goal 3:** *Develop, enhance, and promote safe driving programs and policies that address driver behaviors to reduce CMV-related crashes, injuries, and fatalities.*

Strategy 3.1: Advance education programs for high-risk drivers operating around CMVs (e.g., young, inexperienced, distracted, or aggressive drivers).

**OOIDA's Comments:**

Instead of continuing a singular regulatory approach of driver enforcement, FMCSA should further expand the safety benefits of initiatives such as Ticketing Aggressive Cars and Trucks (T.A.C.T.) This program at least minimally recognize that non-CMV drivers share responsibility for safety on the roads and have a significant negative impact on over-all CMV safety.

OOIDA also reminds FMCSA that a new mandatory driver training rule has been pending since March of 2008. As FMCSA knows, the U.S. Court of Appeals held in December of 2005 that FMCSA's previous efforts to create 10 hours of classroom training was insufficient to meet the statutory mandate to create training that met the identified industry need. FMCSA proposed training in 2007, but no final rule has been forthcoming. OOIDA believes that no single rule that the FMCSA could produce would have as much beneficial impact on driver safety than driver training and a graduated CDL.

Strategy 3.2: Emphasize expanded traffic enforcement for all drivers operating in and around CMVs. Strategy

**OOIDA's Comments:**

If meaningful improvements are to be made in highway safety, FMCSA should place paramount importance on targeting enforcement on those parties most responsible for truck crashes and fatalities - drivers of other vehicles. Unfortunately, the current accident recording system holds both motor carriers and their drivers responsible for *every* incident without making any "at fault" determination. This distorts the real safety accomplishments of the industry, and distorts the extent to which FMCSA's efforts vis-à-vis motor carriers affect crash rates. FMCSA must manage its own expectations, and that of Congress, for the total potential of safety gain to be achieved through programs focused solely on truck drivers. There is much greater potential for safety improvements with a focus on the behavior of automobile drivers operating around CMV's.

Strategy 3.3: Increase efforts to combat fraud within the CDL issuance and maintenance process, the drug and alcohol testing process, and the medical certification process.

**OOIDA's Comments:**

OOIDA fully supports this effort. But OOIDA also reminds FMCSA, that if it hopes to maintain its position that Mexican and Canadian CDLs are equivalent to

U.S. CDLs, then it must insist that those two countries follow suit in any improvement to U.S. CDLs.

Strategy 3.4: Develop and promulgate a driver safety fitness standard and associated driver monitoring process. Strategy 3.5: Develop training and testing standards for CMV drivers on applicable Federal safety regulations.

See OOIDA's comments to strategy 3.1 above.

**Goal 4:**     *Establish new partnerships and enhance collaboration with existing partners as a force-multiplier supporting FMCSA's regulatory compliance focus.*

Strategy 4.1: Foster a broader array of partnerships to address CMV transportation issues such as enforcement, driver medical standards, drug and alcohol testing, passenger transportation, driver licensing, and consumer protection.

Strategy 4.2: Expand grant application opportunities and increase FMCSA's financial assistance flexibility.

**OOIDA's Comments:**

In response to Strategies 4.1 and 4.2, OOIDA is not certain what FMCSA intends from these descriptions. If this refers to the initiative FMCSA announced at the April 2011 CVSA meeting to encourage more non-MCSAP law enforcement entities to begin enforcement on CMV operators, OOIDA is seriously concerned that FMCSA is not ready to ensure that such enforcement follows consistent standards and practices. FMCSA is awarding hundreds of millions of dollars in MCSAP grant money without effective monitoring and oversight. Different states put a focus on different FMCSRs. OOIDA notes similar themes in the DOT Inspector General's testimony of July 21, 2011, before a hearing of the Senate Subcommittee on Surface Transportation and Merchant Marine Infrastructure, Safety and Security. A section of that testimony was entitled "FMCSA Acquisition and Contract Management Weaknesses Undermine Opportunities to Enhance Safety Oversight" (*see*: <http://www.oig.dot.gov/node/5597>).

From OOIDA members' observations, different states train their inspectors to interpret and enforce the FMCSRs differently than they are viewed in other parts of the country. For example, the State of Minnesota's so-called fatigue enforcement efforts. When OOIDA brought this issue to the attention of the various state CVSA representatives in April of this year, state patrol representatives of several states responded that they were just going to do whatever enforcement they believed was necessary and drivers better just accept it. This is

the culture OOIDA sees within the FMCSR enforcement community - the culture that must dramatically change to make drivers partners in safety. CVSA's primary reason for existence is to partner with law enforcement, government, **and industry** to create uniformity of enforcement throughout the country. We believe that critical mission is being lost and FMCSA has a powerful tool to leverage – the funding – to get the alliance more focused on its core mission.

Strategy 4.3: Improve FMCSA's rulemaking process by seeking opportunities to increase transparency and participation.

**OOIDA's Comments:**

OOIDA believes that FMCSA's rulemakings do not adequately consider the incidental costs of its rules to the majority of its regulated community – small businesses. While OODIA believes the agency has all the authority it needs to accommodate these issues in its cost analyses, OOIDA supports the House Small-Business Committee's current legislation (H.R. 527) to specifically require an accounting of costs of particular application to small businesses. These include:

- Changes to the definition of economic impact to include both direct *and* indirect impacts of a regulation
- Regulatory impact analysis must contain an alternative that would maximize beneficial economic effects on small entities
- Expand small business impact review panel requirements across all agencies (currently only EPA and OSHA)
- Require the formation of a small business impact review panel to examine a rule (current agencies determine when to form a review panel)
- RFA would be expanded to cover guidance and policy statements, not just regulations

OOIDA encourages the FMCSA to adopt these principles to improve its cost-benefit analyses without waiting for legislation to do so.

**Goal 5:** *Implement communications and outreach strategies that promote improved compliance and informed and transparent decision-making.*

Strategy 5.1: Expand the use of listening sessions, new media (including social networking sites), and similar tools to facilitate an environment of enhanced openness and public participation.

### **OOIDA's Comments:**

OOIDA applauds increased transparency in government. Too often an agency's activities in preparing for a rulemaking are unannounced and unseen by the public. It is widely assumed that by the time a Notice of Proposed Rulemaking is published, the public has little opportunity to significantly affect the final rule through the comment process. During the EOBR rulemaking process, the agency experimented with the "Regulation Room" which was operated by the Cornell e-Rulemaking Initiative. Most stakeholders that participated in the Regulation Room were clearly drivers. More drivers submitted their thoughts through this portal than through the traditional regulations.gov site. OOIDA would welcome the opportunity for processes that make rulemakings more of a dialogue among participants and the agency on the record.

Strategy 5.2: Continue to promote compliance incentives for motor carriers to use advanced safety technologies (e.g., electronic on-board recorders (EOBRs), collision warning systems, on-board view-ahead cameras, stability control systems, crash imminent braking, and back up warning systems).

### **OOIDA's Comments:**

Advanced safety technologies impose huge costs on small business truckers for little or no return on investment from a safety standpoint. There are over 400,000 motor carriers who operate 20 or fewer trucks that will be disadvantaged by these costs, compared with only 3,780 motor carriers with 100 or more trucks, who arguable can afford expensive technology. Technology that may well make sense for larger motor carriers should not lead to "one-size-fits-all" proscriptive regulations where small-businesses essentially end up subsidizing the poor business practices of their larger competitors. Further, OOIDA would like to point out that this equipment is usually promoted by contractors seeking to create a new market for their products, motor carriers who want to impose costs on their competitors, and for some technologies motor carriers who see avenues to face less scrutiny over their compliance with the FMCSRs. In many cases, these are further efforts from carriers asking FMCSA to save them from their own poor hiring and training, and oversight standards. FMCSA should not buy into the facial appeal of such equipment, but should make contractors them prove their positive impact on safety (not just compliance with the rules) before even considering permitting their adoption. A primary example of this point is that **nobody**, not even FMCSA has attempted to explain, with any rational analysis or reliable data, how the adoption of EOBR's with improved highway safety. FMCSA has relied upon unfounded assumptions, first, that EOBRs will improve HOS compliance, and second, that improved HOS compliance is linked to safety.

These initiatives have very little appeal to small-business motor carriers - the vast majority of the motor carrier industry. For those who have accumulated millions of miles of driving without any incidents, forcing them to adopt/acquire many of the new safety technologies represents nothing more than unwarranted burdens on small businesses and the privacy of drivers under the false guise of “safety.”

**Goal 6:** *Be the authoritative source for comprehensive CMV-related data to drive decision-making and support CMV Safety 1<sup>st</sup> Culture.*

Strategy 6.1: Assemble and share comprehensive safety information collected by FMCSA in a single CMV transportation safety data system that is easily accessible to all partners and stakeholders.

Strategy 6.2: Pursue access to relevant external data sources, including naturalistic data, to develop new regulations that address high-risk driving behaviors.

Strategy 6.3: Protect data from unauthorized access and safeguard personally-identifiable information in accordance with Federal mandates, while allowing motor carriers to effectively access their safety and driver data.

Strategy 6.4: Enhance data quality management to ensure the most accurate, timely, relevant, and complete data possible.

**OOIDA’s Comments:**

As mentioned above, FMCSA must revamp its DATAQ challenge system. There is great confusion among the states as to the proper role for DATAQ. Is the DATAQ system designed and intended to merely correct data entry errors, or is it a system designed to hear appeals from enforcement action? Some state law enforcement officials have adopted DATAQ not as a system for correcting improperly entered data to FMCSA’s ASPEN system. They are referring drivers to the DATA Q system as the place to adjudicate the question of whether or not the driver or equipment was in violation of the FMCSR as reported to ASPEN. There are no legal or evidentiary standards, no opportunity for the driver to confront his accuser, no independent fact finder, and no appeal from such a review. There is complete lack of due process and checks and balances. The Data Q system essentially asks state law enforcement officers to determine whether their brother in the field made a mistake. There is a clear conflict of interest built into the system. As OOIDA described in its comments above and in a recent letter to Administrator Ferro, state officials responding to DATAQ challenges are ignoring the adjudications of FMCSR violations by judges in their own state and refusing to remove violations from ASPEN even when the citation for that violation has been dismissed or a “not guilty” verdict has been issued.

This system must be revamped if it is to be fair to drivers and motor carriers and contain the most accurate data possible. The starting point is for FMCSA to clearly state what the purpose of the system is. It should then evaluate and adopt procedures and standards that are appropriate for that purpose.

**Goal 7:** *Conduct and use transformative research that focuses on risk factors and safety technology to inform and enhance FMCSA's programs and priorities.*

Strategy 7.2: Identify, test, and deploy smart roadside technologies in partnership with Federal, State, and local safety agencies.

**OOIDA's Comments:**

OOIDA adamantly opposed any mandate to equip CMVs with RFID tags to facilitate wireless roadside inspections as proposed by CVSA. Such expansive continuous monitoring of the trucking industry is unjustified and meets no known problem in FMCSR enforcement.

Strategy 7.3: Accelerate the deployment of onboard safety systems by promoting the benefits to fleets and insurance carriers and test next-generation onboard safety systems in partnership with technology providers and other DOT agencies.

**OOIDA's Comments:**

See OOIDA's comment to Strategy. 5.2

**IV. CONCLUSION**

If FMCSA would like to craft a strategic plan that makes serious progress in motor carrier safety, it must make serious adjustments to the focus of its enforcement efforts. OOIDA encourages FMCSA to use this Strategic Plan to adjust its focus to one that makes drivers its partners, rather than piñatas, in safety. OOIDA stands ready to assist FMCSA in achieving these goals.

JAMES J. JOHNSTON  
President  
Owner-Operator Independent  
Drivers Association, Inc.

*/s/ Paul D. Cullen, Sr.*  
\_\_\_\_\_  
PAUL D. CULLEN, SR.  
THE CULLEN LAW FIRM, PLLC  
1101 30th Street N.W.  
Suite 300  
Washington, DC 20007  
(202) 944-8600

August 2, 2011