

BEFORE THE
DEPARTMENT OF TRANSPORTATION
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

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

IN RESPONSE TO NOTICE OF PROPOSED RULEMAKING

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INTRODUCTION

The Owner-Operator Independent Drivers Association, Inc. (“OOIDA”) submits these comments in response to the Department of Transportation, Federal Motor Carrier Safety Administration (“FMCSA” or “Agency”) notice, at 75 Fed. Reg. 80014 (Dec. 21, 2010) (“Notice”), seeking comments on FMCSA’s proposal to restrict the use of hand-held mobile telephones (“cell phones”) by commercial motor vehicles (“CMV”) drivers and impose harsh penalties for violations. The proposed restriction on hand-held cell phone use is one facet of the FMCSA’s distracted driving campaign, that has already included the adoption of a ban on texting by CMV drivers.

OOIDA is a not-for-profit corporation incorporated in 1973 in Missouri with its principal place of business located at 1 NW OOIDA Drive, Grain Valley, Missouri 64029. The more than 152,000 members of OOIDA are independent owner-operators, small business motor carriers, and professional truck drivers (“small-business truckers”) located in all 50 states and Canada. These groups have a significant presence in the trucking industry: 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.

OOIDA is the largest international trade association representing these small-business truckers. The Association actively promotes their views through its interaction with state, provincial and federal government agencies, legislatures, courts, other trade associations, and private businesses, to advance an equitable and safe working environment for them. OOIDA also actively represents the positions of this group on all aspects of highway safety and transportation policy in numerous

committees and various forums on the local, state, national, and international level.

Government-compiled statistics in the Fatality Analysis Reporting System (FARS) shows that the safety record of professional truck drivers has improved significantly in recent years. *See* FARS, at www-fars.nhtsa.dot.gov. Indeed, large truck fatalities per hundred million miles driven have steadily declined during that period, with the rate of decline increasing dramatically to 20 percent in only one year between 2008 and 2009. This should not be especially surprising. Because of the amount of time truck drivers spend on the road, their lives and livelihood as well as the viability of their businesses quite literally depend upon highway safety. Accordingly, they tend as a group to adopt safe-driving practices and support government efforts to eliminate practices that their experience shows to be unsafe. For this reason, the OOIDA Board voted to support a ban on texting while driving.

For the reasons discussed more fully below, however, OOIDA can not support the current proposed restrictions on use of hand-held cell phones by CMV drivers - nor further restrictions on the hands-free use of cell phones. Texting requires a driver to divert his eyes and attention away from the road for a far longer period of time than does a phone call. Moreover, the level of attention required to read or write a text message requires far more concentration than that involved in answering or making a call on a cell phone, particularly if the cell phone has headphone, voice activation, or speed-dial capabilities. Indeed, cell phone use is no more distracting than other types of communications and electronic equipment used regularly by truck drivers such as in-cab fleet management devices, global positioning and other navigation systems, and Citizens Band (CB) radios, that have not received the same level of scrutiny by FMCSA. 75 Fed. Reg. at 80025; 75 Fed. Reg. 59118, 59126 (Sept. 27, 2010). Nor is it any more distracting than various in-cab technologies

promoted by FMCSA in the name of safety, such as anti-rollover devices, collision warning systems, tire pressure alerts, lane departure devices, and some speed limiting technology, which rely on bells, lights, sounds, and haptic sensations, and often require a response from the driver, all of which have the potential for distracting the driver from the primary driving task at hand.

OOIDA's opposition to the proposed restriction should not be taken as a suggestion that FMCSA ignore the unsafe use of cell phones by all drivers, truck drivers included. To the contrary, as pointed out in FMCSA's Notice, OOIDA "calls upon government entities to aggressively pursue opportunities to educate the motoring public on safe driving practices. The Association also encourages law enforcement agencies to fully enforce existing laws pertaining to inattentive or negligent driving." 75 Fed. Reg. at 80019, *citing* [www.oida.com/Issues&Actions/Issues/Distracted Driving/distracted-driving.htm](http://www.oida.com/Issues&Actions/Issues/Distracted_Driving/distracted-driving.htm); *see also* www.oida.com/MediaCenter/Press_Releases/2010/012610 (Jan. 26, 2010). Education pertaining to the safe use of cell phones, combined with a more concentrated use of the existing arsenal of enforcement tools, should do far more to improve highway safety than the presently-proposed restriction which lacks any enforcement plan.

DISCUSSION

I. The role of cell phones in safety critical events can be reduced without completely restricting their use by CMV drivers.

Thus far, in its campaign to end distracted driving by CMV drivers, FMCSA has proposed and adopted restrictions on texting while driving, which it followed with the current proposal to impose a comparable restriction on the use of hand-held mobile phones, popularly called cell phones. The selection of cell phones as the newest target for restrictions is unwarranted and unfair, based in large part upon misguided public perceptions about the common causes of crashes involving trucks

instead of hard statistics. 75 Fed. Reg. at 80017. In actuality, failure to keep within proper lane and driving to fast for conditions or in excess of proper speed limits are the factors cited most often in connection with fatal truck crashes, far more than all types of inattention combined. *See* FARS. Further, the possible imposition of restrictions on all cell phone usage ignores how they are used safely by most drivers and that cell phones are the preferred method of communicating for business purposes by small-business truckers in lieu of expensive fleet management hardware whose use is neither practical nor economically feasible. All in all, this suggests that FMCSA should focus more of its resources on the other factors such as speeding and failure to keep within proper lane, contributing factors that play a more frequent role in the most serious crashes.

Indeed, a naturalistic study focusing on driver distraction in CMV operations conducted for FMCSA by Virginia Tech Transportation Institute (“VTTI”), that addressed the prevalence of driver distraction in CMV safety-critical events (defined as “crashes, near-crashes, crash-relevant conflicts, and unintentional lane deviations”), shows that talking or listening on a hand-held cell phone in real-world driving conditions does not create **any** increased risk of such safety-critical events for CMV drivers. Olson, Hanowski, Hickman, & Bocanegra, *Driver Distraction in Commercial Vehicle Operations*, Doc. No. FMCSA-RRR-09-042 (“VTTI Distraction Study”); *see* Fed. Reg. at 80020-80021 & Table 1. As even FMCSA is forced to concede, “it is not clear if simply talking on a mobile telephone presents a significant risk.” 75 Fed. Reg. at 80015. To get around this uncontroverted fact, FMCSA finds primary support for restricting hand-held use in other “risk-increasing tasks” potentially associated with the use of a cell phone, such as reaching for and dialing a phone number before engaging in a conversation. 75 Fed. Reg. at 80016. This focus is justified largely by the amount of time such tasks might take a driver’s eyes and attention off the road. *Id.* FMCSA’s

analysis in this regard, however, ignores a couple of salient facts.

First, FMCSA, echoing the VTTI Study, lumps all cell phones together when it addresses these other tasks. *Id.* at 80021. While OOIDA can agree that keying in a ten-digit phone number might be too distracting in some driving situations, most cell phones can be equipped with technologies such as Bluetooth, voice activation and/or speed dialing capabilities that significantly or completely reduce the amount of time that a driver's attention is diverted from the road in making a call. With these functions, a conversation may be initiated with as little as the push of a single button or even less. In those circumstances, there is no meaningful difference between the use of cell phones and Citizens Band ("CB") radios, which truck drivers have safely used for decades and which FMCSA has correctly chosen not to regulate. 75 Fed. Reg. at 80025.

Second, FMCSA seems to disregard the fact that any cell phone can often be used via headsets plugged in to the device or, absent such headsets, be kept in a fixed convenient and well-defined spot that makes them easy to use with an amplifying speaker without any fumbling and very limited or no diversion. As with all vehicle operators, truck drivers safely reach for and press buttons or turn knobs to operate various equipment, including windshield wipers, temperature controls, radios, and CD players. Initiating a conversation via a headset or reaching for a strategically-placed cell phone does not create any greater distraction than these other systems. Indeed, this is a case where directed education programs could eliminate any problems that might otherwise arise when reaching for a phone.

Perhaps in recognition of these realities associated with cell phone use, FMCSA poses questions towards the end of its Notice that seem implicitly to recognize that, if cell phone use is to be regulated, alternative systems that focus on the time that a CMV driver interacts with the phone,

or on the number of keystrokes or button pushes, may achieve a higher level of safety than an absolute ban. 75 Fed. Reg. 80027 (questions 3-5). Without conceding that any restrictions are necessary given laws already on the books that address inattentive driving, OOIDA would say that a system that focuses on the actual level of visual, manual, and cognitive distraction caused by use of a particular model cell phone would also be less intrusive and fairer in its application.

Third, in overall tenor the Notice seems to assume that even a momentary distraction to press a button on a cell phone is unacceptable because truck drivers should be looking straight out the windshield at all times, sitting with hands in the 10 o'clock 2 o'clock position on the steering wheel. To the contrary, staring straight ahead when driving for extended periods of time can and will result in a well-documented form of unsafe driving, commonly called "highway hypnosis," a condition where drivers do not really see what is happening on the road. Consequently, many safe CMV drivers, either through years of experience or advanced driver training in situational awareness, learn or are taught, not only to constantly monitor the instrumentation on the dashboard,¹ but to regularly check both side mounted mirrors and study surrounding traffic located away from the direct line of sight, and to visually check the condition of loads and equipment.²

II. The safety risks associated with cell phone usage are less than the risks from other permitted communications equipment.

¹ Instrumentation on most trucks includes gauges measuring speed, engine RPMs, oil pressure, oil temperature, fuel, turbo boost pressure, turbo temperature, water temperature, transmission temperature, temperature gauges for rear-ends, fuel gauges, outside temperature, air filter restriction, primary air/secondary air, air pressure, brake application pressure, amp meter, voltage, and GPS displays.

² Situational awareness skills are taught in advanced driver training course such as those offered by the "Smith System," one of the leaders in hands-on, on-the-road CMV driver training. See www.smith-system.com.

While focusing on hand-held cell phones in the present rulemaking, the FMCSA has also questioned whether hands-free cell phones are safe and has also asked for comments on whether both types of cell phones should be restricted.³ 75 Fed. Reg. at 80016, 80025, 80027. This fixation on cell phones is a striking contrast to FMCSA's treatment of other forms of communication equipment. In particular, FMCSA has excluded in-cab fleet messaging equipment and other electronic dispatching tools from any ban except when used for texting purposes. The disparate treatment is inexplicable when the VTTI study assigns to "interact with/look at dispatching device" an odds ratio for safety-critical events of 9.9. This is significantly higher than the risk created by any of the tasks associated with the use of a hands-held cell phone (talking/listening to cell phone-1; dialing cell phone-5.9; use/reach for electronic device-6.7).

In the Notice, FMCSA states its belief that "safety-conscious fleet managers would neither allow nor require their drivers operating CMV's to use these devices [fleet management systems and electronic dispatching tools] or hand-held mobile telephones while driving." 75 Fed. Reg. 80025. However, in contrast to FMCSA's continued reliance upon the good graces of fleet managers to properly restrict the non-texting use of fleet management and dispatch systems, FMCSA was not content to rely upon fleet managers to control unsafe cell phone use. The more lenient treatment of fleet management and dispatch systems is particularly unwarranted since, as OOIDA pointed out in its texting comments and before that in comments on the Electronic On-Board Recorder (EOBR)

³ Indeed, since use of CB radios presents a de minimus, but slightly higher crash risk than the use of hands-free cell phones, one must ask whether they might be a future FMCSA target notwithstanding the fact that they have been safely used by CMV drivers for decades to alert other drivers to road hazards (like cell phones are some times used today). Certainly, the fact that they are excluded from this rulemaking because they do not fall within the FCC's definition of "commercial mobile radio services" does not preclude this possibility. 75 Fed. Reg. at 80025.

rulemakings, drivers often report that large motor carriers use such devices to push them to maximize driving time, to redirect them to new locations, and to otherwise bombard them with messages while they are driving. *See* Texting comments, FMCSA-2009-0370-0391.1, p.2; EOBR comments, FMCSA-2004-18940-0281, pp. 9-11. Since keeping America's highways safe is the goal of FMCSA's distracted driving campaign, as stated by DOT Secretary Ray LaHood (75 Fed. Reg. at 80018), then the Agency might better focus its resources on these other systems with greater distraction levels and impose strict penalties on the motor carriers who purposefully use them in a manner that could distract drivers.

III. FMCSA needs an enforcement plan to avoid Fourth Amendment problems.

FMCSA's proposal treats the use of a hand-held cell phone as a serious traffic violation punishable by harsh sanctions that are disproportionate to the nature of the offense. Indeed, the rule allows fines up to \$2,750 for drivers and up to \$11,000 for employers for even the first violation, notwithstanding the lack of any crash or other safety-critical event. 75 Fed. Reg. at 80014, 80017, 80026. A driver with multiple convictions for violations of a cell phone restrictions – State and local, as well as federal – may also be disqualified from driving a CMV, again even in the absence of any safety-critical event. *Id.* These penalties are clearly excessive when compared to the significantly lower fines for egregious traffic violations such as DUI/DWI or excessive speeding. In those contexts, fines for a first offense typically max out in the hundreds of dollars, instead of the thousands.

FMCSA's reliance upon State and local convictions as the basis for disqualification draws attention to the fact that FMCSA has presented no enforcement plan for the federal cell phone restrictions now being proposed. Indeed, the rule is completely silent on the manner on how the

restriction will be enforced. This allows many different scenarios to unfold, some acceptable while others are not.

Enforcement could be secondary, limited to cases where the use of a cell phone played a measurable role in a safety-critical event. It could also be limited to situations where a violation of either a State or local cell phone prohibition or other law pertaining to inattentive or negligent driving was also alleged. Although such secondary enforcement would, of course, increase the penalties associated with cell phone use and therefore might have a slightly greater deterrent effect, it is not at all clear that this would translate to an improvement on highway safety beyond that already generated by existing State and local laws.

Even if FMCSA embarks upon primary enforcement of the federal prohibition, it is not apparent whether the enforcing officer must actually observe a CMV driver reach for, answer or dial, and talk on the phone; or whether any one or two of those are sufficient to establish a violation; or whether cell phone usage might be added to the other items checked as part of a roadside safety inspection. Nor is it clear, if cell phone use were to become part of routine inspection, whether an officer will be allowed to search the entire truck cab for a phone, turn it on, and review the activity log. Even if recent usage is found, what steps will the officer be required to take to verify that it occurred “while driving?” Voice activation can initiate any call (or text for that matter) on many cell phone models and any activity log of past calls (and text messages) will not indicate whether this technology was utilized. If FMCSA intends to limit enforcement to cases where the prohibited conduct is actually observed by the officer, then that should be stated to give drivers and motor carriers fair notice of what to expect. If FMCSA contemplates broader enforcement via roadside inspections, then the specific purpose of the inspection and guidelines for their conduct must be set

forth in the regulations to both ensure fairness and that potential constitutional problems inherent in such inspections are avoided.

The Fourth Amendment to the United States Constitution protects the right of individuals against “unreasonable searches and seizures” and ordinarily requires court-issued warrants to ensure reasonableness. Admittedly, the pervasive regulation of the trucking industry, diminishes a truck driver’s expectations of privacy protected by the Fourth Amendment and allows trucks to be inspected without a warrant from time to time in the interest of public safety. *See, e.g., United States v. Biswell*, 406 U.S. 311, 315-316 (1972); *Marshall v. Barlows, Inc.*, 436 U.S. 307, 313 (1978). This, however, does not allow for unbridled discretion. Even in pervasively regulated industries, warrantless inspections are permissible only when it can be shown that they are necessary to further the regulatory scheme and where the inspection program provides a constitutionally-adequate substitute for a warrant, as evidenced by the certainty and regularity of application. *New York v. Burger*, 482 U.S. 691, 702-703 (1987); *Donovan v. Dewy*, 452 U.S. 594, 600 (1981). Certainty and regularity can only exist if there is a published enforcement plan limiting the discretion of the officers in the field, ensuring that the scope of the intrusion is narrowly defined to protect the privacy interests of the involved CMV drivers.⁴

Absent any specific procedural rules pertaining to the enforcement of restricting the use of a cell phone or even general regulatory standards to guide inspectors in exercising their authority, the Fourth Amendment restrictions on searches apply. *Donovan, supra*, 452 U.S. at 599, *citing*

⁴ If the cell phone activity log is being reviewed, there is the possibility that personally identifiable information will be reviewed, collected, and potentially stored. Thus, contrary to FMCSA’s conclusion (75 Fed. Reg. at 80030), if this manner of enforcement is chosen, this could be a privacy-sensitive rulemaking .

Colonnade Catering Corp. v. United States, 397 U.S. 72, 77 (1970). This includes the requirement that inspectors have “reasonable articulable suspicion” for the search. Indeed, that is precisely what Judge Frank recently found in *OOIDA v. Dunaski*, Civil No. 09-1116, 2011 WL 317648 (D. Minn. Jan. 28, 2011), a case involving fatigue inspections that could result in CMV drivers being placed out-of-service. As stated in the *Dunaski* opinion, the fatigue inspections were constitutionally-defective because “there were no limitations or restrictions placed on the discretion of the inspecting officers” resulting in “no notice [to drivers] of this procedure, including the purpose of the detention, the scope of the questions, or the purpose of the questions.” Thus, Minnesota State Patrol officers could not conduct such a fatigue inspection unless they had a “reasonable articulable suspicion” that a particular driver was too fatigued to drive safely. Similarly here, in the absence of any enforcement guidelines from FMCSA, the authorities conducting inspections for cell phone usage must have reasonable articulable suspicion for individual searches, based upon facts leading up to the search. When OOIDA raised similar concerns in the texting context, FMCSA did not deny the lack of an enforcement plan. Rather, it said only that “FMCSA does not believe that questions about specific enforcement procedures are a basis for not taking action to restrict texting while driving.” 75 Fed. Reg. 59118, 59128 (Sept. 27, 2010). OOIDA must beg to differ. As a practical matter, regulatory prohibitions on allegedly unsafe driving-related conduct are of little or no value if they can not legally and/or reasonably be enforced to improve highway safety. Further, as discussed above, enforcement can not take place unless some procedural guidelines, taking the place of a warrant, have been established by FMCSA.

CONCLUSION

For the reasons discussed above, OOIDA opposes the proposed restrictions on the use of cell

phones, whether they are hand-held or hands-free. The statistical evidence shows that CMV drivers are able to talk on cell phones without an unacceptable level of distraction. In addition, the distraction otherwise caused by the actions required to initiate a conversation can be minimized through commonly-available features such as auto-dial, voice recognition, headsets, and strategic placement of the cell phone in the truck cab. Safer use of cell phones can also be furthered through an education campaign aimed at CMV drivers, combined with enforcement of State and local laws already on the books that more generally address inattentive and negligent driving practices. Such an alternative approach should achieve the same or even a greater level of highway safety without potentially jeopardizing the constitutional rights of CMV drivers.

Respectfully submitted,

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