

DEPARTMENT OF TRANSPORTATION

[4910-EX-P]

Federal Motor Carrier Safety Administration

49 CFR Part 395

[Docket No. FMCSA-2018-0348]

RIN 2126-AC24

Hours of Service of Drivers; Definition of Agricultural Commodity

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Advance notice of proposed rulemaking (ANPRM).

SUMMARY: The FMCSA seeks public comment to assist in determining whether, and if so to what extent, the Agency should revise or otherwise clarify the definitions of “agricultural commodity” or “livestock” in the “Hours of Service (HOS) of Drivers” regulations. Currently, during harvesting and planting seasons as determined by each State, drivers transporting agricultural commodities, including livestock, are exempt from the HOS requirements from the source of the commodities to a location within a 150-air-mile radius from the source. This ANPRM is prompted by indications that the current definition of these terms may not be understood or enforced consistently when determining whether the HOS exemption applies.

DATES: Comments on this notice must be received on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: You may submit comments bearing the Federal Docket Management System Docket ID (FMCSA-2018-0348) using any of the following methods:

Federal eRulemaking Portal: Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.

Mail: Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE, West Building Ground Floor, Room W12-140, Washington, DC 20590.

Hand Delivery or Courier: U.S. Department of Transportation, 1200 New Jersey Avenue, SE, West Building Ground Floor, Room W12-140, Washington, DC 20590, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.

Fax: (202) 493-2251.

Submissions Containing Confidential Business Information (CBI):

Mr. Brian Dahlin, Chief, Regulatory Evaluation Division, 1200 New Jersey Avenue SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: For information concerning this ANPRM, contact Mr. Richard Clemente, Driver and Carrier Operations Division, FMCSA, 1200 New Jersey Avenue, SE, Washington, DC 20590, (202) 366-4325, MCPSD@dot.gov. If you have questions on viewing or submitting material to the docket, contact Docket Services at (202) 366-9826.

SUPPLEMENTAL INFORMATION:

I. Public Participation and Request for Comments

A. Submitting Comments

If you submit a comment, please include the docket number for this notice (FMCSA-2018-0348), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these methods. FMCSA recommends that you include your name and a

mailing address, an email address, or a phone number in the body of your document so the Agency can contact you if it has questions regarding your submission.

To submit your comment online, go to <http://www.regulations.gov> and put the docket number (FMCSA-2018-0348) in the “Keyword” box, and click “Search.” When the new screen appears, click on the “Comment Now!” button and type your comment into the text box in the following screen. Choose whether you are submitting your comment as an individual or on behalf of a third party and then submit. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope.

Confidential Business Information (CBI) is commercial or financial information that is customarily not made available to the general public by the submitter. Under the Freedom of Information Act (5 U.S.C. 552), CBI is eligible for protection from public disclosure. If you have CBI that is relevant or responsive to this ANPRM, it is important that you clearly designate the submitted comments as CBI. Accordingly, please mark each page of your submission as “confidential” or “CBI.” Submissions designated as CBI meeting the definition noted above will not be placed in the public docket of this ANPRM. Submissions containing CBI should be sent to Mr. Brian Dahlin, Chief, Regulatory Evaluation Division, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue, SE, Washington, DC 20590-0001. Any comments not specifically designated as CBI will be placed in the public docket for this rulemaking. FMCSA will consider all comments and material received during the comment period.

B. Viewing Comments and Documents

To view comments, go to <http://www.regulations.gov> and insert the docket number (FMCSA-2018-0348) in the “Keyword” box and click “Search.” Next, click the “Open Docket Folder” button and choose the document listed to review. If you do not have access to the internet, you may view the docket by visiting the Docket Management Facility in Room W12-140 on the ground floor of the U.S. Department of Transportation (DOT) West Building, 1200 New Jersey Avenue, SE, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

C. Privacy Act

DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to www.regulations.gov, as described in the system of records notice (DOT/ALL 14 - FDMS), which can be reviewed at <https://www.transportation.gov/privacy/>.

II. Legal Basis

Section 204(a) of the Motor Carrier Act of 1935 (Pub. L. 74–255, 49 Stat. 543, 546, Aug. 9, 1935), as codified at 49 U.S.C. 31502(b), authorizes the Secretary of Transportation (Secretary) to “prescribe requirements for — (1) qualifications and maximum hours of service of employees of, and safety of operation and equipment of, a motor carrier; and (2) qualifications and maximum hours of service of employees of, and standards of equipment of, a motor private carrier, when needed to promote safety of operation.” This ANPRM specifically addresses the maximum HOS of drivers transporting agricultural commodities by commercial motor vehicle (CMV).

The Motor Carrier Safety Act of 1984 provides concurrent authority to regulate drivers, motor carriers, CMVs, and vehicle equipment. Section 206(a) of that act (98 Stat. 2834), codified at 49 U.S.C. 31136(a), grants the Secretary broad authority to issue regulations “on commercial motor vehicle safety.” The regulations must ensure that “(1) commercial motor vehicles are maintained, equipped, loaded, and operated safely; (2) the responsibilities imposed on operators of commercial motor vehicles do not impair their ability to operate the vehicles safely; (3) the physical condition of operators of commercial motor vehicles is adequate to enable them to operate the vehicles safely...; (4) the operation of commercial motor vehicles does not have a deleterious effect on the physical condition of the operators; and (5) an operator of a commercial motor vehicle is not coerced by a motor carrier, shipper, receiver, or transportation intermediary to operate a commercial motor vehicle in violation of a regulation promulgated under this section, or chapter 51 or chapter 313 of this title.” (49 U.S.C. 31136(a)(1)-(5)).

The provisions this ANPRM addresses are connected primarily with 49 U.S.C. 31136(a)(1)-(2) relating to safety of the vehicle and driver and secondarily with (a)(4) relating to the health of the driver. This ANPRM does not directly address medical standards for drivers (section 31136(a)(3)). This ANPRM does not propose any specific regulatory requirements; therefore, FMCSA does not anticipate that drivers would be coerced (section 31136(a)(5)) as a result of this notice.

More specifically, this ANPRM is based on a statutory exemption from HOS requirements for drivers transporting “agricultural commodities” “during planting and harvesting periods, as determined by each State.” The exemption was initially enacted as

Sec. 345(a)(1) of the National Highway System (NHS) Designation Act of 1995 [Pub. L. 104-59, 109 Stat. 568, 613, Nov. 28, 1995].

Section 4115 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) [Pub. L. 109-59, 119 Stat. 1144, 1726, Aug. 10, 2005] retroactively amended the Motor Carrier Safety Improvement Act of 1999 (MCSIA) [Pub. L. 106-159, 113 Stat. 1748, Dec. 9, 1999] by transferring Sec. 345 to new Sec. 229 of MCSIA [113 Stat. 1773]. Section 4130 of SAFETEA-LU then revised Sec. 229, as transferred by Sec. 4115, mainly by adding the current definitions of “agricultural commodity” and “farm supplies for agricultural purposes” [119 Stat. 1743], as discussed further below. This definition is codified at 49 CFR 395.2.

Section 32101(d) of the Moving Ahead for Progress in the 21st Century Act (MAP-21) [Pub. L. 112-141, 126 Stat. 405, 778, July 6, 2012] revised Sec. 229 again, mainly by expanding the 100 air-mile radius of the exemption to 150 air miles. This change is reflected in 49 CFR 395.1.

The Administrator of FMCSA is delegated authority under 49 CFR 1.87(f) and (i) to carry out the functions vested in the Secretary by 49 U.S.C. chapters 311 and 315, respectively, as they relate to CMV operators, programs, and safety.

III. Background

A. HOS Regulations

The HOS rules, set forth in 49 CFR part 395, limit property-carrying CMV drivers to 11 hours of driving time within a 14-hour period after coming on duty following 10 consecutive hours off duty (except that drivers who use sleeper berths may combine a period of 2 hours of off-duty time with a period of 8 consecutive hours in the

sleeper berth). Drivers must take at least 30 consecutive minutes off duty if more than 8 hours have passed since their last off-duty period of at least 30 minutes, if they wish to drive or continue driving. Drivers may not drive after accumulating 60 hours of on-duty time in any 7 consecutive days, or 70 hours in any 8 consecutive days, however, drivers of property-carrying CMVs may restart the 60- or 70-hour clock by taking 34 consecutive hours off duty (or 24 hours off duty for some industries). The Agency is currently preparing an NPRM (RIN 2126-AC19) which will propose revisions to certain HOS requirements to provide greater flexibility for drivers, without adversely affecting highway safety.

As discussed further below, these limits on maximum driving and on-duty time do not apply during harvest and planting periods, as determined by each State, to drivers transporting agricultural commodities (and farm supplies for agricultural purposes) from the source of the commodities to a location within a 150-air-mile radius from the source.

B. June 2018 Regulatory Guidance – Application of the 150-Air-Mile HOS

Exemption

On June 7, 2018, FMCSA issued regulatory guidance on the transportation of agricultural commodities as defined in § 395.2 (83 FR 26374). The guidance addressed various issues related to the statutory term “source of the commodities,” but it did not directly address the scope or meaning of the term “agricultural commodity.” Specifically, the June 2018 guidance addressed: drivers operating unladen CMVs enroute to pick up an agricultural commodity or returning from a delivery point; drivers engaged in trips beyond the 150 air miles from the source of the commodity; determining the “source” of

agricultural commodities for purposes of the exemption; and how the exemption applies when agricultural commodities are loaded at multiple sources during a trip.

C. Statutory Definition of “Agricultural Commodity”

Although the HOS exemption enacted by Sec. 345(a)(1) of the NHS Designation Act did not define the term “agricultural commodities,” Sec. 4130 of SAFETEA-LU enacted a definition now codified verbatim at 49 CFR 395.2:

“Agricultural commodity means any agricultural commodity, non-processed food, feed, fiber, or livestock (including livestock as defined in sec. 602 of the Emergency Livestock Feed Assistance Act of 1988 [7 U.S.C. 1471] and insects).”

FMCSA added to § 395.2 the definition of “livestock” as set forth in the Emergency Livestock Feed Assistance Act of 1988. The current definition in § 395.2 reads as follows:

“Livestock means cattle, elk, reindeer, bison, horses, deer, sheep, goats, swine, poultry (including egg-producing poultry), fish used for food, and other animals designated by the Secretary of Agriculture that are part of a foundation herd (including dairy producing cattle) or offspring; or are purchased as part of a normal operation and not to obtain additional benefits under the Emergency Livestock Feed Assistance Act of 1988, as amended.”

Congress recently amended the definition of “livestock” in the Emergency Livestock Feed Assistance Act of 1988 (Section 12104 of the Agriculture Improvement Act of 2018 [Pub. L. 115-334, 132 Stat. 4490, December 20, 2018]). Among other things, the 2018 amendment revised the definition of “livestock” by removing the term “fish used for food” and adding “llamas, alpacas, live fish, crawfish, and other animals that”

are part of a foundation herd (including dairy producing cattle) or offspring; or are purchased as part of a normal operation and not to obtain additional benefits [under the Emergency Livestock Feed Assistance Act of 1988]”. The 2018 amendment also removed the Secretary of Agriculture’s discretion to designate animals in addition to those specifically listed.

As explained above, the current definition of the term “livestock” in § 395.2 restates, without change, the definition of “livestock” as set forth in the Emergency Livestock Feed Assistance Act of 1988 when FMCSA initially implemented this statutory provision in 2007. The Agency intends to conform the current text of the definition of “livestock” in § 395.2 to the change made by to the text of the 2018 amendment to the Emergency Livestock Feed Assistance Act of 1988, as discussed above. That conforming change, adding llamas, alpacas, live fish and crawfish, deleting the term “fish used for food,” and removing the reference to the Secretary of Agriculture’s discretion to designate additional animals, will be made at a later date. The Agency notes, however, that a primary sponsor of the 2018 amendment stated her intention that transporters of these additional species be included within the scope of the HOS exemption set forth in § 395.1(k)(1)¹. FMCSA therefore concludes that the 2018 changes to the definition of “livestock” in the Emergency Livestock Feed Assistance Act of 1988 are self-executing for that purpose, becoming effective on December 20, 2018.²

¹ Senator Deb Fischer, the primary sponsor of the 2018 amendment, noted her intention that transporters of llamas, alpacas, live fish, and crawfish be covered by the HOS exemption for agricultural commodities. <https://www.fischer.senate.gov/public/index.cfm/2018/6/bipartisan-farm-bill-clears-senate-agriculture-committee-with-senator-fischer-s-support>

² President Trump signed the Agriculture Improvement Act of 2018 into law on December 20, 2018.

The Agency intends to issue guidance addressing FMCSA's implementation of this statutory change in the near future.

IV. Discussion of the ANPRM

A. Ambiguities in the Definition of "Agricultural Commodity"

Although the statutory definition of "agricultural commodity," set forth in § 395.2, is quite detailed in some respects, it is also circular and ambiguous. For example, "agricultural commodity" is defined in part as "any agricultural commodity..." The definition is thus susceptible to multiple interpretations, resulting in potentially inconsistent application of the HOS exemption set forth in § 395.1(k)(1). The Agency therefore seeks comment, along with relevant quantitative or qualitative data, addressing how FMCSA could define or interpret the term "agricultural commodity" in § 395.2 more clearly, while remaining consistent with Congress's intent to provide a limited HOS exemption for CMV drivers who transport agricultural commodities. FMCSA is specifically interested in knowing what else should be added to the definition of "agricultural commodity." The purpose of the definition is to determine which agricultural commodities are eligible for the HOS exemption provided in § 395.1(k)(1), which is designed to allow additional driving and working hours for drivers transporting these commodities. The exemption gets the agricultural commodities to market with fewer delays "during planting and harvesting periods, as determined by each State." Keeping that in mind, and the statutory limitation of using this exemption during "planting and harvesting periods, as determined by each State," should the Agency establish more specific, but still broad, categories of eligible commodities falling within the definition of "any agricultural commodity"? Alternatively, should the Agency adopt a

list of individual commodities (either by name or specified agricultural classification) that would fall within the definition?

In addition to the ambiguous term “any agricultural commodity,” the definition of “agricultural commodity” in § 395.2 also refers to “non-processed food, feed, fiber, or livestock.” Although FMCSA has not issued formal regulatory guidance addressing how the term “non-processed” should be defined or applied, in its June 2018 guidance concerning the transportation of agricultural commodities the Agency provided some guidance by stating that: “The source may be any intermediate storage or handling location away from the original source at the farm or field, *provided the commodity retains its original form and is not significantly changed by any processing or packing*” [emphasis added].³

The Agency requests comments on how the term “non-processed” is currently understood and applied. How can the Agency best determine the point at which an agricultural commodity, such as food, feed, or fiber, becomes “processed?” The Agency welcomes specific examples of agricultural commodities that should be considered “non-processed” within the meaning of § 395.1(k)(1). FMCSA also requests comment on the definition of the term “livestock,” as discussed further below.

B. USDA’s Classification of “Agricultural Commodities”

The Agency notes that the U.S. Department of Agriculture’s (USDA) statutes and regulations classify and define the term “agricultural commodity” in a variety of ways, depending on the underlying statutory and regulatory framework. The extent to which USDA definitions of the term are consistent with the definition in § 395.2 may become

³ 83 FR 26374, 26376 (June 7, 2018).

relevant when transporters of agricultural commodities by CMV are subject to certain USDA requirements. For example, USDA administers the Perishable Agricultural Commodities Act (PACA) (7 U.S.C. 449a(1)), which establishes a code of fair trading practices for the benefit of growers, shippers, distributors, retailers, and others. The PACA is a remedial statute, designed to protect those who deal in perishable agricultural commodities from unfair and fraudulent practices. The USDA enforces PACA through a licensing system. The PACA implementing regulations, set forth in 7 CFR subchapter B, part 46, require perishable agricultural commodity grocery wholesalers, retailers, commission merchants, processors, brokers, and truckers under specified circumstances⁴, to obtain a PACA license. Those agricultural transporters subject to PACA requirements are also subject to the Federal Motor Carrier Safety Regulations (FMCSRs), including HOS regulations.

The PACA defines “perishable agricultural commodity” as “any of the following, whether or not frozen or packed in ice: fresh fruits and fresh vegetables of every kind and character...” (7 U.S.C. 499a(b)(4)(A)). The PACA regulations state that the term “fresh fruits and vegetables” “does not include those perishable fruits and vegetables which have been manufactured into articles of food of a different kind or character” (7 CFR 46.2(u)).

To avoid confusion for both transporters of agricultural commodities and enforcement personnel, FMCSA is considering whether it would be feasible and desirable to revise the definition of “agricultural commodity” in § 395.2 to make the term more

⁴ Under 7 CFR 46.2(gg)(3), “trucker/dealer” is “a branch or additional business facility” subject to the PACA licensing requirement if “the driver is authorized to buy, sell, or otherwise contract for commodities on behalf of the firm.”

compatible with applicable USDA rules and practice. The Agency notes, however, that any revisions to its definition of “agricultural commodity” must remain consistent with statutory intent to allow an exemption tailored to the needs of a specific segment of CMV drivers – those transporting agricultural commodities “during planting and harvesting periods, as determined by each State.” One possible implication of that restriction is that the exemption should apply to commodities subject to relatively short-term perishability. Accordingly, to the extent that PACA’s definition of “agricultural commodity” includes “frozen” fruits and vegetables, it is inconsistent with FMCSA’s definition of the term. The Agency concludes that, because frozen fruits and vegetables are processed and packaged, Congress did not intend to include frozen commodities within the scope of the definition as codified in § 395.2. On the other hand, there may be many non-frozen fruits and vegetables that fall within the scope of both FMCSA’s definition of “agricultural commodity” and USDA’s definition of “fresh fruits and vegetables” set forth in 7 CFR 46.2(u). One approach might be for FMCSA to cross-reference or otherwise incorporate applicable PACA or other USDA definitions or interpretations, many of which are already familiar to some transporters of agricultural commodities. The Agency requests feedback on this approach, particularly from stakeholders subject to regulation by both USDA and FMCSA. The Agency would also like to know whether enforcement officials would find helpful cross-references to, or incorporation of, specified USDA rules and practices.

C. Definition of “Livestock”

Finally, the Agency is aware that some stakeholders believe the current definition of “livestock,” as set forth in § 395.2, is incomplete. For example, transporters of animals

not currently included in the definition have argued that they should be eligible for the HOS exemption in § 395.1(k)(1) because such animals are subject to risks to health and safety in transit as are cattle, sheep, swine, and other “covered” animals. FMCSA notes that the NHS Designation Act’s definition of “agricultural commodity,” as discussed above, includes, but is not limited to, livestock as defined in the Emergency Livestock Feed Assistance Act of 1988. The Agency solicits comments on whether the current definition of “livestock” in §395.2 should be expanded beyond the animals identified in the Emergency Livestock Feed Assistance Act (including, for purposes of this discussion, the animals added by Section 12104 of the Agriculture Improvement Act of 2018, as discussed above). Another possible approach would be to adopt a definition of “livestock” broad enough to include all eligible animals, including those covered by the Emergency Livestock Feed Assistance Act (as amended), without listing them individually.

V. QUESTIONS

FMCSA requests that commenters respond to the questions below, but the Agency also welcomes comments or questions on any other issues related to the definitions of “agricultural commodity” and “livestock” as those terms are used in § 395.1(k)(1). Please provide specific examples and, to the extent practicable, quantitative or qualitative data to support your answers.

1. The statute and regulation define a term with the same term: “*Agricultural commodity* means “any agricultural commodity....” Does that lack of detail cause compliance or enforcement problems? Should FMCSA consider adopting a list of specific agricultural commodities, or clarify its current approach utilizing the

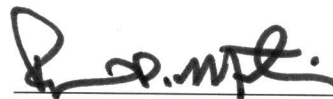
more general definition? If you wish to suggest that specific commodities (e.g., sod or other types of horticulture) be included in the definition, please explain how they fit within the statutory definition, and provide information about the average and maximum transportation times and the extent to which the commodities are perishable.

2. Should FMCSA define or otherwise clarify the term “non-processed,” as applied in the definition of “agricultural commodity?” If so, given the context of harvesting and planting seasons referenced in the applicable statute, how should that term be defined? Please provide examples of “non-processed” agricultural commodities that should be included and discuss the distinction between “processed” and “non-processed.”
3. Would clarification or definition of other terms used in the definition of “agricultural commodity,” such as “food,” “feed,” or “fiber,” be helpful? Please provide recommendations and data to support your suggested definition.
4. Should the definition of “livestock” be revised to include aquatic animals in addition to live fish and crawfish? Please provide data to support your answer, such as how far aquatic animals are typically transported and why you believe the HOS exemption would be appropriate for the transportation of specific aquatic animals.
5. Is the list of animals in the definition of “livestock” in § 395.2 adequate? As noted above, the Agency intends to add llamas, alpacas, live fish, and crawfish to the definition, consistent with Agricultural Improvement Act of 2018 amendment to the Emergency Livestock Feed Assistance Act of 1988. Should other animal

- species be included? Please provide data on the average and maximum transportation times for additional livestock you believe should be included in the definition of “livestock” in §395.2 and the impacts of longer transportation times.
6. Are there cost or safety implications of adding specific agricultural commodities or livestock to the current definitions of “agricultural commodity” and “livestock”? Please provide data to support your answer.
 7. Are there benefits of adding specific agricultural commodities or livestock to the current definitions of “agricultural commodity” and “livestock”? Please provide data to support your answer.
 8. USDA regulations define “agricultural commodity” in a variety of ways, depending on the underlying statutory authority and regulatory purpose. For transporters of agricultural commodities subject to both USDA and FMCSA regulations, what are the practical implications of *not* having consistent definitions of that term? Should FMCSA adopt or cross-reference any of the definitions applied by USDA, to the extent they are compatible with the statutory definitions of “agricultural commodity” and “livestock” incorporated in § 395.2?
 9. If the definitions of “agricultural commodity” or “livestock” in § 395.2 were more consistent with applicable USDA definitions of the terms, would use of the definition for purposes of § 395.1(k)(1) result in cost or benefit impacts to CMV drivers who transport such commodities, the motor carriers who employ them, growers or distributors of those commodities, or enforcement personnel? Please provide data to support your answer.

10. Are motor carriers being exposed to financial liability in situations where their drivers complied with HOS regulations and (1) the receiver refused delivery because the shipment did not meet contract specifications requiring the driver to deliver to an alternative location; and/or (2) the freight claim was not paid or was reduced because the grade standard of quality and condition, or temperature at destination, was not acceptable due to the driver's compliance with HOS regulations; (3) the receiver refused delivery because the shipment was late due to the driver's compliance with HOS regulations; (4) the receiver made the driver wait to unload because the shipment was late and charged a late delivery fee due to the driver's compliance with HOS regulations?
11. Do you believe ambiguities in the current definition of the terms "agricultural commodity" or livestock," as applied to the HOS exemption in § 395.1(k)(1), impact highway safety? If so, how?

Issued under the authority of delegation in 49 CFR 1.87.



Raymond P. Martinez,
Administrator