



October 25, 2017

The Honorable Elaine Chao
Secretary, U.S. Department of Transportation
1200 New Jersey Avenue, S.E.
Washington, D.C. 20590

The Honorable Daphne Jefferson
Deputy Administrator
Federal Motor Carrier Safety Administration
1200 New Jersey Avenue, S.E., Suite 600
Washington, D.C. 20590

RE: Request for a One Year Enforcement Delay followed by a waiver and limited exemption from compliance with the December 18, 2017, implementation date for the Final Rule on Electronic Logging Devices (ELD) and Hours of Service (HOS) 80 Fed. Reg. 78292 (Dec. 16, 2015)

Dear Secretary Chao and Deputy Administrator Jefferson:

On behalf of members of the Agricultural Retailers Association (ARA), I am writing to request that you grant a one year enforcement delay followed by a waiver and limited exemptions from compliance with the December 18, 2017, implementation date for the Final Rule on Electronic Logging Devices (ELD) and Hours of Service (HOS) 80 Fed. Reg. 78292 (Dec. 16, 2015). Furthermore, we request that you take action to address significant problems with the current ELD mandate that will likely occur if the compliance deadline is not extended by your agency.

As detailed below, ARA believes the public interest clearly favors a one year compliance deadline delay followed by the granting of limited exemptions for impacted industries. We are seeking a delay for the following reasons:

- Our industry is not fully prepared to meet the December 18, 2017 compliance date;
- The current ELD retail marketplace does not accommodate the needs of our impacted industry segment and are not able to factor in existing HOS exemptions currently being utilized by agricultural retailers (i.e. farm supply dealers) and other impacted industry sectors. The current ELD self-certification system is completely inadequate and needs to be revised where all ELD devices sold are

FMCSA certified, similar to the process used by the agency to certify medical examiners.

- ARA members operate in rural areas of the United States where connectivity issues continue to remain a major problem. It is highly questionable whether any ELD self-certified device, especially an App, would fully function given the lack of access to rural broadband in many rural areas.
- Cybersecurity also continues to remain a major area of concern as the transportation of products could become known to terrorists using an ELD system vulnerable to a cybersecurity attack.
- Cyber-attacks via the communication system links could impact Homeland Security since a significant number of transported products involve hazardous chemicals.
- ELD Mandate Inconsistent with Other Federal & State Laws Banning Use of Electronic Devices.
- Enforcement and necessary compliance monitoring will be a significant new cost and administrative challenge to the governing departments to accomplish in the next 60 days.

Statement of Interest

Agricultural Retailers Association

ARA is a not-for-profit trade association that represents America's agricultural retailers and distributors. Agricultural retailers play an important role in feeding the world by providing farmers with crop input products like seed, fertilizer, crop protection products and equipment. Agricultural retailers also provide their farmer customers with crop consulting and custom application services. Agricultural retailers can perform soil sampling so that the right kind and amount of fertilizer is applied in the right place; thus, preventing leaching. Also, agricultural retailers perform approximately 45 percent of crop pesticide application. Agricultural retailers are trained and certified to perform these activities. Agricultural retailers primarily rely on trucks to deliver crop input products to the farm. Retailers usually employ their own drivers and the work is generally seasonal as the business is busiest during planting and harvest seasons. ARA members have a strong commitment to vehicle safety and support FMCSA's mission to reduce crashes, injuries and fatalities involving large trucks.

DOT and FMCSA Have the Authority to Extend the Compliance Deadline and Grant Limited Exemptions of the ELD Mandate

The Secretary has the authority under both Section 553(e) of the Administrative Procedures Act (APA) and 49 USC § 31315 to grant petitioners both a compliance extension and a regulatory exemption if she finds that the exemption "is in the public interest, and it is likely to achieve a level of safety that is equivalent to, or greater than, the level would be achieved absent such exemption."

- A. Granting the Petition Will Achieve a Level of Safety Equivalent to the Level Achieved by the ELD Mandate.*

Granting this petition, and maintaining the status quo for agricultural retailers and distributors involved in the U.S. transportation industry will continue to achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent an exemption. ARA interprets this new mandate to exempt agricultural retailers and distributors as they fall within the “agricultural operations”¹ exemptions included in 49 CFR 395, which covers a 150-air mile radius. Most of these same agricultural retailers may also fall under the ELD short haul exemption as their drivers in most instances will not transport products outside of 100-air mile radius from their facility. However, we remain concerned that a few months or less in each year some of these same agricultural operations may not fall within the listed exemptions in certain states and yet still be required to make significant financial and time investments for an ELD system. There remains a considerable amount of confusion surrounding the differing ELD air mile exemptions. We believe FMCSA providing for a one year enforcement delay and greater clarity on business operations exemption from this unfunded, expensive federal mandate is warranted. It would also make sense for FMCSA to utilize the 150-air mile exemption for all drivers covered under the ELD mandate to alleviate any unnecessary confusion and provide regulatory consistency.

Agricultural retailers primarily rely on trucks to deliver farm supplies and other products to their customers. Retailers usually employ their own drivers and the work is generally seasonal as their primary business is conducted during planting and harvesting seasons. ARA members have their drivers complete extensive education and training, especially if they are hauling hazardous materials such as anhydrous ammonia. Safety is of paramount importance to our industry and its strong safety record and support for effective regulation are well documented.

B. Granting the Petition is in the Public Interest

Granting this petition and maintaining the current status quo for our industries is in the public interest. As previously discussed, agricultural retailers and distributors transport critical farm supplies and other important products such as propane and home-heating oil to agricultural operations and residences in rural communities. We remain concerned some within our industry, especially smaller operations, are not fully prepared to meet the ELD requirements by the existing compliance deadline. This could negatively impact our industry, food production, and the timely delivery of other essential products to rural communities. There is no evidence a delay in the ELD mandate would adversely impact transportation safety.

Agricultural retailers and distributors are not fully prepared to meet the December 18, 2017 ELD Compliance Date

It has been reported that with less than 12 weeks before the ELD mandate takes effect, nearly 1 million truck drivers have yet to purchase an ELD. This compromises nearly

¹ 49 CFR 395.1(k)

one-third of the estimated 3.5 million truck drivers in the United States.² While FMCSA has conducted some outreach efforts, there are many smaller trucking entities that need additional information and guidance to properly comply with the regulation. It is not clear that the majority of ELD manufacturers recognize or are aware of the many unique HOS exemptions that currently exist when they were designing their products.

According to trucking data, the average age of American truck drivers is 49³. For our sectors, the average age is likely significantly higher. In addition, driving is only a small part of their job as most of their work is spend at their place of business or at the customers or job site location. As a result, these drivers are less familiar with the use of new technology and require more training and education to properly use an ELD device. The training should be done by an FMCSA certified ELD manufacturer or training school.

Current ELD Retail Marketplace May Not Adequately Support Industry Needs

From extensive research that has been conducted by groups like the National Pork Producers Council (NPPC) and others, it is readily apparent that the ELD retail marketplace and the compatibility of the ELDs with our industry sectors may not adequately support our industry. The costs associated with the purchase and monthly service charges of an ELD device that may work is likely to be significantly more expensive than originally estimated by FMCSA. The estimated costs for an ELD device ranges from \$200 to \$1,000 with an estimated \$20 monthly service charge. The NPPC ELD vendor survey found that at least 38 of the 55 self-certified ELD vendors could not or would not answer specific questions on the compatibility of their product with existing HOS exemptions for various industry sectors, including livestock. Of the remaining vendors, “a handful acknowledged no compatibility, but hoped to have software solutions available in the future for livestock haulers.”⁴ The remaining ELD vendors will require drivers to edit their logs manually or maintain paper records to track the exemptions, which seems to negate the entire purpose of the ELD mandate. These steps only create additional and unnecessary regulatory burdens on all impacted industries.

Granting at least a one year delay and limited exemptions from the ELD mandate for agricultural retailers and distributors will give the marketplace the time necessary to develop cost-effective and practical solutions for the specific needs of impacted stakeholders and allow FMCSA to properly address necessary training programs with compliant ELD options. We believe the current ELD self-certification process is

² “As ELD Mandate Nears, 1 Million Truckers Have Yet to Comply”, Trucks.com story by Clarissa Hawes, October 4, 2017.

³ <http://www.trucking.org/ATA%20Docs/News%20and%20Information/Reports%20Trends%20and%20Statistics/10%206%2015%20ATAs%20Driver%20Shortage%20Report%202015.pdf>

⁴ National Pork Producers Council ELD Wavier & Exemption Petition to Secretary Chao and Deputy Administrator Jefferson, Sept. 12, 2017, page 6.

seriously flawed. There does not appear to be any robust third-party screening process to verify the claims being made by these manufacturers. Even though FMCSA is unwilling to certify ELD devices, there are manufacturers in the retail marketplace claiming their ELD product is “FMCSA certified.”

Example of Misleading Claims by ELD Vendors

The screenshot shows a product listing for 'E-Log Plus' with the following details:

- Product Name:** E-Log Plus
- Identifier:** ELP0100
- Build:** L0.1712.7443
- Manufacturer:** E-Log Plus
- Contact:** 8778434773, info@e-logplus.com
- Company Website:** www.e-logplus.com

The listing also features a badge that reads "E-Log Plus - FMCSA Certified" and an "INSTALL" button. Below the badge, there are icons for "Download", "3.5", "By name", and "Service". A note at the bottom of the listing states: "The listed devices are self-certified by the manufacturer. The Federal Motor Carrier Safety Administration does not endorse any electronic logging devices."

To become a “Certified Medical Examiner”⁵, which performs driver medical exams, FMCSA requires medical examiners to enroll, complete necessary training, and pass a certification test. A medical examiner must receive notification of certification from FMCSA before authorized to perform authorized DOT driver exams. To be able to provide medical examiner training FMCSA requires the following of organizations:

- Be accredited by a nationally recognized medical profession accrediting organization to provide continuing education units
- Meet the current core curriculum specifications established by FMCSA for medical examiner training
- Provide training participants with proof of participation
- Provide FMCSA point of contact information to training participants

These testing organizations that wish to be listed on the National Registry must:

1. Meet federal defined criteria

⁵ <https://nationalregistry.fmcsa.dot.gov/NRPublicUI/home.seam>.

2. Submit documented policies and procedures to FMCSA and apply to be a test delivery organization for the National Registry
3. Agree to initial security site visit and future FMCSA reviews⁶

ARA strongly believes that FMCSA needs to establish a similar stringent and robust certification process for ELD vendors so the industry being required to purchase their products due to a federal mandate will have the full confidence that the systems purchased work as intended and if properly utilized will be in compliant with the ELD regulations.

Major Problems with Broadband Connectivity Issues in Rural Areas

Rural Americans lack sufficient broadband infrastructure to fully utilize new technologies such as ELDs. As reported by the Wall Street Journal, rural Americans are stranded in the digital age due to the high costs and lack of access to adequate broadband services.⁷ Over 34 million Americans, including 23 million rural Americans, do not have internet service available to them at an adequate speed and quality.⁸ "Consider, for example, conditions in Washington County, Missouri, which has a density of just 33 people per square mile:

At the county's 911 center, dispatch director William Goad sometimes loses his connection to the state emergency system. That means dispatchers can't check license plates for police or relay arrest-warrant information.

As severe thunderstorms approached in late February, Mr. Goad tried to keep watch using an internet connection sputtering at speeds too slow to reliably map a tornado touchdown or track weather patterns.

"We drill for oil above the Arctic Circle in some of the worst conditions known to man," Mr. Goad said. "Surely we can drop broadband across the rural areas in the Midwest." [*The Wall Street Journal*]⁹

The Federal Communications Commission (FCC) is proposing to change the current national broadband standard (25/3 mbps) to 10/1 mbps, as well as a finding that internet access through a cellphone plan is a sufficient household substitute for fixed broadband. In August, 12 Democratic Senators wrote the FCC to raise concern with this proposal, stating, "It appears by declaring mobile service of 10Mbps download/1Mbps uploads speeds sufficient, could conclude that American's broadband needs are being met – when in fact they are not. By redefining what it means to have access, the FCC could abandon further efforts to connect Americans, as under this definition, its statutory requirement would be fulfilled. ARA believes that mobile

⁶ ID.

⁷ "Rural America Is Stranded in the Dial-Up Age: High costs and lack of access to broadband service prevent residents of far-flung communities from joining the modern economy", Wall Street Journal, June 15, 2017.

⁸ <https://www.fcc.gov/reports-research/reports/broadband-progress-reports/2016-broadband-progress-report>.

⁹ <http://theweek.com/speedreads/706172/rural-america-serious-internet-problem>

broadband service cannot adequately support the same functions as does fixed service currently, and therefore, cannot be a substitute at this time. A small business owner who wants to begin a new venture today would not be adequately supported by mobile only service.”¹⁰

There continues to be places in rural America where there is no internet access or slow broadband as well as minimal to no mobile phone service. The FMCSA imposing an ELD mandate at a time where there are many locations in rural America where the device will not properly function due to lack of connectivity issues will only cause economic hardship and create serious compliance issues for our impacted industries, especially small independent businesses.

Cyber-security Major Threat to ELD Devices

Cyber-attacks and data breaches continue to cost organizations billions of dollars annually, a sum that is only likely to go up with the increasing integration of new pieces of technology into daily operations.¹¹ After cyber-attacks, the threat of a data breach ranked second among global business fears, while an unplanned IT and telecom outage was third.¹² “In the last 12 months, hackers have breached half of all small businesses in the United States, according to the 2016 State of SMB Cybersecurity Report.”¹³

According to John Swanciger, CEO of Manta, “the general majority of small-business owners don’t have an IT person. It’s not the first place they spend their money. They’re really relying on themselves to update their software and check for security patches.”¹⁴ “Cyber-security is clearly a concern that the entire business community shares, but it represents an especially pernicious threat to smaller businesses,” the Securities and Exchange Commission wrote in a 2015 report. “The reason is simple: Small and midsize businesses are not just targets of cybercrime; they are its principal target.”¹⁵ In addition, it is well documented that foreign adversaries to the United States such as Russia and China are targeting Americans, including businesses through cyber-attacks and hacking into sensitive business networks. These cyber-attacks include smartphones and mobile apps.

According to a story reported by Politico on October 5, 2017, “White House officials believe that chief of staff John Kelly’s personal cellphone was compromised, potentially as long ago as December, according to three U.S. government officials.”¹⁶ The report goes on to discuss concerns raised that hackers or foreign governments may have had access to data on Kelly’s phone while he was secretary of Homeland Security and after

¹⁰ Senate Democrats letter to FCC Chairman and other FCC Commissioners on mobile broadband proposals, August 31, 2017.

¹¹ <https://www.bloomberg.com/news/articles/2017-02-21/threat-of-cyber-attack-is-biggest-fear-for-businesses-survey>.

¹² Id.

¹³ <https://www.cnbc.com/2017/04/05/congress-addresses-cyberwar-on-small-business-14-million-hacked.html>.

¹⁴ Id.

¹⁵ Id.

¹⁶ <http://www.politico.com/story/2017/10/05/john-kelly-cell-phone-compromised-243514>

he became White House Chief of Staff. In addition, in 2016 it was reported that the Federal Reserve has been under constant attack by hackers since 2011, including four attempts it labels as “espionage.”¹⁷ Back in 2015 the Obama Administration reported that 21.5 million Americans personal information, including Social Security numbers and some fingerprints, were swept up in a major breach of government computer systems, constituting the largest cyberattack into the systems of the United States government.¹⁸ The latest major data-breach of personal and financial data includes almost 146 million and counting of U.S. consumers comprised by Equifax.¹⁹ This is just the latest in a long line of data breaches.

FMCSA imposing an ELD mandate at a time of high vulnerability to cyber-attacks could provide a roadmap to foreign adversaries, terrorists or other criminals to the location of hazardous materials transportation shipments throughout the United States. Given the continued threat from both foreign and domestic terrorist attacks, especially through their use of trucks²⁰, it only makes sense for FMCSA to delay the ELD mandate until it can provide assurances to impacted stakeholders that these electronic products are safe and secure from any cyber-attacks, including any back-office systems that would be required to be utilized in a small business’s home office. Many of our members transport hazardous materials. While trucks transporting hazardous materials have not been known to have been used in recently reported terrorist attacks, they did not have an ELD roadmap for them to help locate and secure these trucks.

ELD Mandate Appears Inconsistent with Other Federal & State Laws Banning Use of Electronic Devices

It has been reported that annually more than 3,000 people are killed and in addition 400,000 are injured in the United States in distracted driving crashes. Distracted driving has risen with the wide spread proliferation of cell phones, global positioning systems and other in-vehicle and personal electronic devices. The federal and state governments have responded with laws and regulations to restrict the use of electronic devices while driving. According to FMCSA data²¹, research regarding distractions due to electronic devices in motor vehicles shows that distracted driving has an increased association with visual distractions which divert driver vision from the road, manual distractions which reduce the physical ability of drivers to control the vehicle, and cognitive distractions which reduce attention and mental focus to the driving task. The ELD mandate seems counter-productive and appears will only exacerbate the use of in-vehicle electronic devices and create unsafe driving conditions rather than increase safety. We also remained concerned with the ability of state enforcement officials to

¹⁷ <http://money.cnn.com/2016/06/01/technology/federal-reserve-hack/index.html>

¹⁸ <https://www.nytimes.com/2015/07/10/us/office-of-personnel-management-hackers-got-data-of-millions.html>

¹⁹ <http://thehill.com/blogs/congress-blog/technology/355927-equifax-and-the-data-breach-era>

²⁰ <http://www.cnn.com/2017/05/03/world/terrorist-attacks-by-vehicle-fast-facts/index.html>

²¹ FMCSA Drivers of CMVs: Restricting the Use of Cellular Phones, Final Rule. Fed Reg. 2011 Dec 2;76:75470–488.

adequately monitor compliance efforts as well as their new costs and administrative challenges that may be diverted from more important federal transportation regulations.

Conclusion

ARA looks forward to working with DOT and FMCSA on additional solutions to address the needs of our industry while continuing to protect the safety of our highways. We hope your agency will properly recognize the significant challenges and harm that the ELD rule will cause agricultural retailers and distributors and their farmer customers unless FMCSA delays the compliance deadline to resolve many unanswered compliance questions with the final FMCSA ELD rule.

Please contact me at 202-595-1699 or by email at richard@aradc.org if you have any questions.

Sincerely,

A handwritten signature in black ink that reads "Richard D. Gupton". The signature is written in a cursive, flowing style.

Richard D. Gupton
Senior Vice President, Public Policy & Counsel