



# ASSOCIATION HIGHLIGHTS

**September-October 2017**

## **MOTOR-REGULATORY**

**Jameson B. Rice**

Holland & Knight LLP

Tampa

813.227.6402

Jacksonville

904.798.7371

*jameson.rice@hklaw.com*

### *President Trump Nominates New FMCSA Administrator*

President Trump has nominated Raymond Martinez to be the next head of the Federal Motor Carrier Safety Administration (FMCSA). Martinez is the chairman and chief administrator of the New Jersey Motor Vehicle Commission, a post he has held since 2010. He is also a member of the New Jersey State Planning Commission.

Martinez has served the last three Republican Presidents as a member of the White House advance team for domestic and international trips, and previously served as commissioner of the New York State Department of Motor Vehicles.

A date has not been set for a Senate confirmation hearing.

### *FMCSA and FRA Drop Obstructive Sleep Apnea Rulemaking*

The FMCSA and the Federal Railroad Administration (FRA) have withdrawn their joint advance notice of proposed rulemaking regarding obstructive sleep apnea that was issued under the Obama Administration. 82 Fed. Reg. 37038 (Aug. 8, 2017). The National Transportation Safety Board (NTSB) told the Associated Press that it was disappointed in the decision to not pursue the “much-needed rulemaking” which was “the probable cause of 10 highway and rail accidents investigated by the NTSB in the past 17 years and obstructive sleep apnea is an issue being examined in several, ongoing, NTSB rail and highway investigations.” Michael Balsamo & Michael R. Sisak, Experts: Lives at risk if no sleep tests for train engineers, Associated Press, Aug. 9, 2017 (available at <https://apnews.com/ac5ac5c34bf64a09af0a0678e0823ff6>). The NTSB revealed on September 21, 2017 that the engineer in the Long Island Rail Road train crash in Brooklyn on January 4, 2017 had undiagnosed severe obstructive sleep apnea. While the FRA and FMCSA said that obstructive sleep apnea remains an on-going concern, the agencies “believe that current safety programs and FRA’s rulemaking addressing fatigue risk management are the appropriate avenues to address [obstructive sleep apnea].” 82 Fed. Reg. 37038 (Aug. 8, 2017).

The FMCSA may update its Bulletin to Medical Examiners and Training Organizations Regarding Obstructive Sleep Apnea, but the decision of whether or not to issue a medical certificate to a driver “are made by the examiners based on the examiner’s medical judgment rather than a Federal regulation or requirement.” Id. at 37039. The agency continues to recommend that drivers and their employers use the North American Fatigue Management Program (NAFMP), which is a voluntary, fully interactive web-based educational and training program, which addresses obstructive sleep apnea, among other fatigue factors.

The FRA will continue to monitor the railroads’ voluntary obstructive sleep apnea programs, and the implementation of fatigue risk management plans, which were mandated by the Rail Safety Improvement Act of 2008. While the Rail Safety Improvement Act did not specifically mention obstructive sleep apnea, the FRA stated that it believes that railroads will consider it when addressing medical conditions that affect alertness under a railroad’s fatigue risk management plan. However, the regulations that would implement the law with respect to freight railroads has not been finalized, and the regulations that would implement the law with respect to passenger railroads have been stayed by President Trump.

The New York and New Jersey senate delegation wrote a letter to Secretary of Transportation Elaine Chao requesting “all data and information used to make the decision to withdraw the rule, and DOT’s plan to identify and treat operators suffering from obstructive sleep apnea before more fatal tragedies take place.” The senators cited the 2013 Metro-North Derailment in the Bronx – which killed four and injured more than 60, and was determined to have been caused by obstructive sleep apnea’s impact on the conductor – and the 2016 Hoboken NJ Transit crash – which killed one and injured more than 100 in which the engineer was found to suffer from undiagnosed sleep apnea – as the reason for their request from the Secretary.

#### *Motor Carriers Will Receive a Small Reprieve in Electronic Logging Device Implementation*

Trucking companies will receive a small reprieve when it comes to implementation of the FMCSA’s electronic logging device (ELD) rule that takes effect on Dec. 18, 2017. The rule, which is designed to reduce inaccurate hours of service reporting, requires truck drivers that currently use paper logbooks to record their on- and off-duty status to instead use electronic on-board devices.

The Commercial Vehicle Safety Alliance (CVSA) announced on Aug. 28, 2017, that inspectors and roadside officers will begin issuing citations on Dec. 18 for failure to have an ELD or automatic onboard recording device, and fines may be issued. However, the CVSA said that trucks will not be placed out of service for violations until April 1, 2018. The CVSA – a nonprofit association comprised of governmental commercial motor vehicle safety officials and industry representatives – said that this two-phase enforcement plan is consistent with the enforcement of previous major trucking regulations. FMCSA spokesperson Duane DeBruyne reiterated the CVSA decision and further emphasized that companies that continually violate the rule could be subject to federal investigation. It should be further noted that even if trucks are not placed out of service, trucking companies risk the possibility that shippers and brokers will refuse to use carriers that are not in compliance with the law.

The ELD rule remains a topic of debate. Rep. Brian Babin (R-Texas) proposed a bill in the U.S. House of Representatives that would delay implementation of the ELD rule, but the measure was rejected 173 to 246 on September 7, 2017, and it is not believed that Congress will act to delay the effective date of the rule. The ELD rule was upheld by the U.S. Court of Appeals for the Seventh Circuit after a challenge by the Owner-Operator Independent Drivers Association (OOIDA). On June 12, 2017, the U.S. Supreme Court declined to hear an appeal, rendering the Seventh Circuit decision final.

#### *FMCSA to Reduce Registration Fees*

The FMCSA will be reducing the cost of its annual registration fees for motor carriers, brokers, freight forwarders, and leasing companies in 2018 and 2019, and possibly future years. For registration year 2018 the fees will be reduced by about 9.10% and in 2019 the fees will be reduced by about 4.55%. The FMCSA collected

more revenue than the statutory maximum in 2016, which spurred the fee reduction. 82 Fed. Reg. 44143 (Sept. 21, 2017).

### *EPA to Revisit Trailer Rule*

The Environmental Protection Agency's (EPA) Phase 2 provisions on greenhouse gas emissions and fuel efficiency for medium- and heavy-duty engines also included, for the first time, trailers. The agency said that it will revisit the trailer and glider provisions in an Aug. 17, 2017 statement from Administrator Scott Pruitt. He stated further that "[w]e intend to initiate a rulemaking process that incorporates the latest technical data and is wholly consistent with our authority under the Clean Air Act." However, the EPA has not fast-tracked its action and environmental groups are prepared to challenge any changes. Furthermore, any changes would be subject to a notice and comment rulemaking. Without any intervention, trailer manufacturers must begin meeting the EPA's requirements for its new trailers starting January 1, 2018, however small business trailer manufacturers are permitted to delay compliance until January 1, 2019.

### *FMCSA Revokes License of Reckless Driver*

The FMCSA revoked the license of a commercial truck driver who killed a Fairfax County, Virginia high school football coach in June when his box truck drifted into a median near the Washington, D.C. beltway. The man had driven 103 hours in an eight-day period, despite the hours of service requirements permitting only 70 hours in that timeframe. The driver also had not taken federally-mandated breaks. He was charged by the police with reckless driving.