



ASSOCIATION HIGHLIGHTS

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MOTOR-REGULATORY

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EPA Regulation of Truck Trailers and Gliders Being Rolled Back

Last year, the Environmental Protection Agency (EPA) and the National Highway Traffic Safety Administration (NHTSA) issued Phase 2 of its environmental regulation of medium and heavy duty trucks that would improve the fuel economy and emissions for these vehicles. The regulations included trailers for the first time, requiring them to become more aerodynamic. It also treated “gliders” – new truck chassis with rebuilt engines – as new vehicles subject to EPA regulations. The EPA has under-gone a philosophy shift under the Trump Administration. In August, EPA Administrator Scott Pruitt said that the agency would “revisit” the trailer and glider provisions.

With respect to trailers, the U.S. Court of Appeals for the D.C. Circuit beat him to the punch. The Court determined on October 27, 2017 that the EPA rule is “stayed insofar as it purports to regulate trailers.” The regulations would have begun to apply to trailers starting January 1, 2018. The Truck Trailer Manufacturers Association had challenged the EPA’s authority to regulate trailers under the Clean Air Act.

The California Air Resources Board, and the states of Connecticut, Iowa, Massachusetts, Oregon, Rhode Island, Vermont and Washington, were among groups requesting that the D.C. Circuit keep the regulation in effect. They were not able to persuade the court not to issue the stay. The stay does not conclude the matter, but based upon Administrator Pruitt’s comments, it seems unlikely that trailers will be regulated by the EPA during this administration.

Separately, the EPA has proposed to repeal the emissions rule for “gliders” claiming that it does not have authority to regulate glider vehicles, glider engines, and glider kits, because they are not “new motor vehicles,” “incomplete” new motor vehicles or “new motor vehicle engines.” 82 Fed. Reg. 53442 (Nov. 16, 2017). In the proposed repeal, the EPA went to great effort to demonstrate that there was at least some ambiguity as to whether or not it has the authority under the Clean Air Act to regulate gliders as new vehicles with new engines. It then proposed to interpret the applicable statute in a way that it does not have such authority.

About 10,000 gliders are manufactured each year, which is less than 5% of the heavy-duty high-way truck market.

The EPA will take public comment through Jan. 5, 2018.

Cross-Border Trucking Fight under NAFTA Continues

As NAFTA negotiations continue, the American Trucking Associations (ATA) is advocating to keep in place a controversial program that allows Mexican trucks to operate in the U.S. by transporting international cargo to and from Mexico. The trade group wrote a letter to U.S. Trade Representative Robert Lighthizer arguing that such operations reduce border congestion. This is because the regulation allows Mexican carriers that drop off a load in the U.S. to pick up a load for the return to Mexico rather than returning empty. Trucks are inspected at the border whether empty or loaded, so it is more efficient to return loaded trucks, the ATA argues. Furthermore, the use of additional equipment and handling adds cost, increases the likelihood of delay and the potential for damage.

The Owner-Operator Independent Drivers Association (OOIDA) – the largest trade association representing small-business truckers and professional truck drivers -- in conjunction with the International Brotherhood of Teamsters (which represents truckers in the U.S. and Canada), also wrote a letter to the U.S. Trade Representative arguing that Mexican trucking companies are taking away jobs and profits from American drivers and motor carriers, while endangering the public. They argued further that there is little incentive for U.S. carriers to operate in Mexico, and that Mexican trucks have been a conveyance for contraband and undocumented immigrants.

Mexican-domiciled carriers may operate in the U.S. today if approved by the FMCSA. This right arose from the first negotiation of NAFTA and has been hard-fought, as the following timeline demonstrates:

- 1994 - NAFTA goes into effect, which included a phase-out of restrictions on cross-border carriage, first to border states and then the rest of the U.S.
- 1995 - U.S. refuses to lift restrictions on Mexican trucks
- 2001 - NAFTA dispute settlement panel finds U.S. to be in violation of its NAFTA obligations.
- 2002 - The FMCSA implements an interim final rule allowing cross border operation.
- 2004 – the U.S. Court of Appeals for the Ninth Circuit sets aside the FMCSA rule, then the United States Supreme Court reverses the Ninth Circuit. See *Dept. of Transp. v. Public Citizen*, 541 U.S. 752 (2004).
- 2007 - Congress requires that a pilot program be implemented before Mexico-domiciled carriers are permitted to conduct long-haul operations in the U.S. See Section 6901 of the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act of 2007. A small pilot program allowing cross border carriage begins.
- 2009 - U.S. removes funding for the pilot program and Mexico implements retaliatory duties on more than \$2 billion worth of U.S. goods.
- 2011 - another pilot program begins, and Mexico lifts its retaliatory duties.
- 2015 - following the end of the pilot program and a report to Congress, the FMCSA begins accepting and processing applications for long-haul operating authority from Mexico-domiciled carriers.

Despite the arguments from both sides, and the effort exerted in allowing such operation, relatively few Mexican-domiciled carriers are currently operating in the U.S. The FMCSA website lists 35 Mexico domiciled motor carriers as authorized to operate long-haul ([Mexico-Domiciled Motor Carriers Authorized to Operate Long-Haul under OP-1MX Authority](#)). Clearly, the ATA would like the possibility to see such operations expanded in the future, while OOIDA and the Teamsters are continuing the multi-decade fight to prohibit Mexican carriers

from operating in the U.S. Some argue that excessive control reviews on behalf of U.S. authorities have become a deterrent for additional and existing Mexican participants.

The U.S. Trade Representative is declining to comment at this time as to whether it intends to renegotiate this portion of NAFTA. There have been conflicting reports that have been leaked by government officials that are familiar with the talks but not authorized to speak. One has said that the U.S. proposal would allow restrictions and limitations on Mexican trucking if certain conditions were reached. Another official described it as a broad industry exclusion.

Whether or not the U.S. should stop allowing Mexican-domiciled carriers to operate in the U.S. should not be analyzed in a vacuum. If the U.S. does seek to end such operations, a countervailing response from Mexico will be expected. Since Mexico and the U.S. have not exchanged any formal conclusion of the NAFTA dispute, Mexico could reinstate retaliatory duties at any time, even before any renegotiation of NAFTA is complete. Only at that point can the costs and benefits of such an action be evaluated.

Carlos Vejar, Senior Counsel in Holland & Knight's Mexico City office, assisted in the preparation of this article.

[FMCSA Grants 90-Day Agriculture ELD Waiver, Denies Most Other ELD Exemption Requests](#)

The FMCSA announced on November 20, 2017 that it would grant transporters of agricultural commodities a 90-day waiver from the mandate that drivers use electronic logging device (ELD) to record their hours of service, which goes into effect December 18, 2017. The agency also announced that it would issue guidance pertaining to hours of service exemptions to provide clarity and allow industry to maximize the use of available exemptions.

Notwithstanding the 90-day waiver, the message from the FMCSA has been clear: the ELD law will go into effect. Acting FMCSA Administrator Ray Martinez has voiced his support for the ELD mandate, legal challenges have failed, and attempts at a legislative reprieve have stalled and at the point seem unlikely. In keeping with this message, the FMCSA recently denied two ELD exemption requests. The Pipe Line Contractors Association (PLCA) were seeking an exception for all pipeline contractor vehicle drivers who typically use the short-haul exception to the logging requirement, which also exempts them from using ELDs. Even drivers who exceed the short-haul exception may use paper logs instead of ELDs so long as they only exceed the short-haul exception eight or less times per month. The PLCA sought an exemption for those who exceeded the short-haul exemption more than eight times per month, which the FMCSA denied, for not achieving an equivalent level of safety as the ELD mandate.

MBI Energy Services - a provider of water management logistics and well intervention services - sought an exemption for travel that is incidental to normal work activities for its vehicles such as cranes, workover rigs, and swab units, which often sit at a worksite for long periods of time before being moved. However, on occasion, they may move more than eight times per month. The FMCSA denied the exemption request.

Apart from the 90-day waiver for agriculture drivers, hardly any exemptions have been granted. Those that have been granted have been minor and technical. Carriers and shippers should expect to be subject to the ELD law as of December

18, 2017. Inspectors and roadside officers will begin issuing citations and fines for failure to use an ELD. Trucks may be placed out of service for failure to comply with the ELD man-date beginning April 1, 2018.

[Opioid Crisis Leads to Expanded Department of Transportation Mandated Drug Testing](#)

Safety-sensitive transportation workers, including truck drivers that are required to have a commercial driver's license, are required to submit to random drug testing under federal law. Starting January 1, 2018, they will be required to be tested for the opioids hydrocodone, hydromorphone, oxy-morphone and oxycodone. 82 Fed. Reg. 52229 (Nov. 13, 2017). The Department of Transportation rule mirrors testing required by the Department of Health and Human Services. Many trucking companies had already been testing for these synthetic opioids, because of the impairment they can cause, but there had not previously been a federal mandate to test for these prescription drugs.

[FMCSA Leadership Changes](#)

Ray Martinez was approved by the Senate Commerce Committee to be Administrator of the Federal Motor Carrier Safety Administration (FMCSA), clearing the way for a vote by the entire senate. He is expected to be approved, and the vote is not expected to be contentious. Daphne Jefferson, the acting FMCSA administrator, has retired. She had held various high ranking roles at DOT, and within FMCSA. Cathy Gautreaux, the long-time executive director of the Louisiana Motor Transport Association, has succeeded Ms. Jefferson as acting administrator.