



April 13, 2011

Ms. Karina Ricks, Associate Director
District Department of Transportation
Government of the District of Columbia
Frank D. Reeves Municipal Center
Seventh Floor
2000 Fourteenth Street, N.W.
Washington, DC 20009

By mail, and by email to: publicspace.committee@dc.gov

Dear Associate Director Ricks:

The American Trucking Associations (ATA), the American Moving & Storage Association (AMSA), the Maryland Motor Truck Association (MMTA), the Truck Renting and Leasing Association (TRALA), and the Virginia Trucking Association (VTA) hereby file comments on the Notice of Proposed Rulemaking issued by the District Department of Transportation (DDOT) on March 18, 2011, concerning proposed amendments to Chapters 24 and 26 of Title 18 of the District of Columbia Municipal Regulations, implementing the Commercial Curbside Loading Zone Implementation Act of 2009 (the Act, D.C. Law 18-66).

Summary

ATA, AMSA, MMTA, TRALA, and VTA believe the primary purpose of the District's proposed regulations is to impose a tax upon motor carriers operating in the City, and our comments analyze the proposal from this point of view. In short, the proposal will inevitably create such significant practical difficulties for motor carriers, for businesses and individual residents within the District, and for the District Government itself that the fundamental purposes of the Act – more efficient traffic management and motor carrier operations – will be defeated. DDOT has evidently not attempted to quantify any such benefits in this regard; we believe they are wholly illusory. Moreover, we strongly believe that certain aspects of the proposed tax and the proposed credentials associated with that tax are in violation of federal statute (49 U.S. Code section 14506) and the Commerce Clause of the U.S. Constitution.

We note that ATA, MMTA, and VTA, in a letter dated November 24, 2009, to DDOT Director Gabe Klein, commented on an earlier draft of these same regulations. We focused in that letter on the legal failings of the proposed tax, which are still embodied in the current proposed regulations. Here, we will focus first in our comments on the

Good stuff.



practical difficulties that will ensue upon implementation of the regulations as they are currently proposed, and, in the second part of our analysis, elaborate on the legal problems the proposal still contains.

The Act itself is simple and straightforward; but the proposal, largely because the proposed regulations would transform the Act into a tax law, is complex, unwieldy, and counterproductive. We cannot believe this was the intent of the District Council, and we urge the Council to disapprove these proposed regulations.

The Commenting Associations

ATA, based in Arlington, Virginia, is a national federation of all types and sizes of motor carrier, as well as allied industries, individual-member councils, affiliated conferences of specialized carriers, and fifty affiliated state trucking associations, representing altogether some 37,000 motor carrier members.

AMSA, headquartered in Alexandria, Virginia, is the only national trade association representing the professional moving and storage industry. The association has 3,200 members who provide household goods moving services, specialized transportation for sensitive freight such as computers and trade show exhibits, and warehouse storage services.

Founded in 1935, MMTA is a 950-member non-profit trade association that represents the state's trucking industry through a range of informational, educational, regulatory, legislative, and business-development initiatives.

TRALA is a voluntary, non-profit national trade association founded to serve as a unified and focused voice for the truck renting and leasing industry. TRALA's mission is to foster a positive legislative and regulatory climate within which companies engaged in leasing and renting vehicles and trailers, as well as related businesses, can compete without discrimination in the North American marketplace. TRALA's regular membership includes more than 500 companies representing the vast majority of truck renting and leasing operations in the United States. Together, the industry purchases almost 40 percent of all new commercial trucks in classes 3-8 manufactured in the United States and placed into commercial service.

VTA is a statewide, non-profit association of trucking companies, private fleet operators, industry suppliers, and other firms and individuals interested in the well-being of motor freight transportation at the local, state, and national level.

Analysis

Part I. Practical Aspects

Effectively, all deliveries of freight made within the District of Columbia are made by truck. Disruption of freight deliveries will necessarily lead to the disruption of the conduct of practically all other businesses, including government, operating in the City. We believe that the proposed regulations will significantly hamper motor carriers in loading and unloading freight and office and household goods, and will very probably worsen rather than alleviate traffic problems in the downtown area of the City. In this regard, the regulations contravene the Act they are to implement. The Act provides a framework for DDOT to improve traffic management and freight movements in the City. The focus of the regulations on the tax aspects of the scheme prevents any such improvements. Moreover, if the District implements this proposal, it must undertake to enforce it adequately, or the program will rapidly degenerate into a mere sham. But adequate enforcement will not be easy or cheap, and we believe it will prove a significant drain upon District resources. Some of our comments on these issues must remain to a degree tentative, since the regulations are in our view incomplete in certain key respects, are unclearly drafted in others, and have been contradicted by oral statements by representatives of DDOT.

In general, we find the scheme established by the proposed regulations to be unworkably complex and unduly inflexible. It is evident that much of the unwarranted complexity has been proposed to support the elaborate structure of the parking tax, and the inflexibility introduced in an effort to make the tax requirements enforceable. The Act discloses no intent on the part of the D.C. Council to encourage so elaborate and expensive a scheme, which in our view will make the District's traffic problems more rather than less intractable.

Carrier Access

In today's economy, with its emphasis on low wholesale and retail inventories and timely delivery, motor carriers' success in business depends on the efficiency with which they make pick-ups and deliveries. Delays are costly, not only to the carriers but to their customers.

The whole tendency of the District's proposed regulations is to restrict parking at loading zones. Unless these restrictions are matched by a concomitant expansion of the number and extent of such zones, the program is clearly doomed to failure. Unfortunately, while the regulations are very detailed about the restrictions, they are vague on where, when, and to what extent additional commercial parking zones will be made available for use by motor carriers that serve the District's businesses.

Unless parking is available, the double-parking of commercial vehicles will continue, except in the face of rigorous enforcement. Rigorous enforcement without adequate parking, however, will require commercial operators to circle blocks waiting for space, and will increase traffic churning in those areas of the District that already have the most problems in this respect.

Parking Time

The proposed regulations restrict parking times too rigidly. The requirements of motor carrier operations in this respect differ greatly. It will be counterproductive to limit all stays at curb zones to two hours. This may be adequate for many operations, but for some it will frequently be insufficient. Office movers and household goods moving companies, for example, regularly require much more time than this to load or unload, and the proposal offers them no solution but the infeasible one of leaving a location after a couple of hours, and touring the area until the location is again free. (DDOT representatives assure us that special permits to take care of such situations are available, but it is not clear how the rules governing those permits will mesh with the more general proposed regulations here.) Other types of operation, including especially those with larger or involved deliveries, will be similarly hampered. So will those carrier operations, such as restaurant suppliers, who may service several businesses over several hours while parked in a single location. They too will have to change locations, in they are to comply with the regulations, disrupting both their operations and those of their customers, and adding to the traffic in the District's most congested areas. Then there are the carriers whose deliveries or pick-ups commonly take little time, but whose customers may on occasion require more attention than will be allowed by the 30 minutes or one hour the carrier paid for, on an annual basis, months before.

A final element in the complex of problems concerning parking time goes under the name of detention. This term stands for the many instances when a carrier arrives at a place of loading or unloading, only to find that its customer is not immediately able to take the delivery or tender the outgoing shipment. Then, through no fault of its own, and in fact to its cost and frustration, the truck and driver must wait, frequently for hours, until the customer is ready. Circumstances such as these have become a problem of such severity that federal legislation has been introduced to explore statutory limits on the time for which a carrier may be detained by a shipper or receiver. (See H.R. 756, 112th Cong., DeFazio-OR.) The inflexibility of the District's proposed regulations will tend to make motor carriers' problems associated with detention much more severe in the City.

The rigidity of the proposal will yield many more anomalies such as these, which carriers will be able only to address through added expense, unnecessary delays, or noncompliance.

Credentials - Annual

The requirements contained in the proposed regulations with respect to the credentials associated with the annual parking permits and the daily parking permits are highly problematic for motor carriers. (See below for our contention that these credential requirements are also a clear violation of federal law.)

Here, the problems with the proposed credentials are heightened by conflicting DDOT statements. The proposed regulations specify that a carrier's possession of an annual parking permit is to be evidenced by a "decal" [§§ 2428.2, et seq.]. On page 10 of the *Proposed Commercial Curbside Loading Zone Management Plan* submitted by DDOT and dated November 4, 2009, there is shown a sample of the proposed decal. This includes a "Plate#," from which we infer that the decal is to be vehicle-specific. However, at an information hearing held by DDOT on April 12, 2011, DDOT representatives asserted that the annual permit would be evidenced not by a decal but by a piece of paper, obtainable by carriers on-line, and not vehicle-specific. That DDOT would contradict its formally proposed regulations in such a manner is neither helpful nor encouraging.

Decal requirements are always troublesome for motor carriers. The display of a decal in no way proves that an underlying requirement – in this case the payment of the parking tax – has been complied with, only that the carrier has obtained a decal. Conversely, failure to display a decal does not prove the carrier's failure to pay the tax. Yet, since the decal is a visible, tangible indicator, enforcement tends to focus on that to the exclusion of the government's real underlying interest. Practically, there is the tendency of decals to fall off, or fade, or even get stolen. All of these problems are compounded when the decals are vehicle-specific.

Paper credentials such as cab cards, that must be kept in a vehicle, share many of the deficiencies of decals. They too can be lost or stolen, and they can be forged more easily.

Moreover, the proposed regulations arouse concern that carriers may not be able to obtain the decals (or paper permits, as the case may be) that they need. Although a carrier's annual fee is based on the size of its overall fleet, rather than the number of vehicles it reasonably expects to park in the District during the year, the regulations indicate that the carrier will receive only so many decals as will suffice for the vehicles for which it will require parking. Although representatives of DDOT repeatedly emphasized that this is the District's position on the matter, they seemed to retreat from this position at the April 12 information hearing, and said at that time that a carrier purchasing an annual permit might access the credential on-line and print off as many credentials as it needed. As far as we are aware, the District currently possesses no system that would allow this to be done; in fact, the District's vehicle permitting system has been notably inadequate and inefficient. We are therefore at a loss to understand what DDOT may actually intend in this regard.

And the decals are vehicle-specific (or so we must continue to assume): what happens when a carrier buys replacement equipment during the year, or expands its fleet, or on occasion operates a rental vehicle? What happens if a vehicle or decal is stolen, or a decal is lost, fades out, or falls off? Will the District be able to make available to such a carrier the additional or replacement decals the carrier requires, and in a timely enough manner that the carrier can conduct its business without interruption? The experience of our members with the District's current vehicle-permitting process does not make us hopeful.

If the credential requirement -- in whatever form it may take -- is in fact implemented, it would be helpful to include on the device an indication of what period of time -- 30 minutes, one hour, or two hours -- the carrier has paid for. Without such an indicator, and unless a driver has been thoroughly trained in the District's rules, he may have little idea how much time he is allowed in a given location. Insufficiently trained enforcement officials will have the same problem.

Credentials - Daily

The proposed requirement for daily permits evidenced by pieces of paper shares many of the same problems we have outlined with respect to the annual permits and the associated decals. Our major additional concern with respect to the daily permits is whether, as a practical matter, they will actually be available to carriers, especially in a timely fashion.

Commonly, and most particularly for a carrier with only occasional operations in the District, the need for a daily permit will come suddenly, and the carrier will need the permit immediately. Will the carrier be able to get one on an immediate basis? How will the carrier pay for it? Will a carrier with an annual permit, or one that covers only one zone, and that needs authority with more scope be able to get a permit in a timely manner that covers the additional time period or zone? The regulations are inspecific, to say the least, but solid, reliable answers are needed to all of these questions and more *before* the program is implemented, particularly since not all loading zones will be metered. The District should review its current vehicle-permitting process, which may well need a thorough overhaul before it can cope with the exigencies of this proposed program. If daily permits cannot be provided to carriers as and when they need them, many will have no realistic choice but to make their pick-ups and deliveries contrary to the rules.

Credentials - Company Logo

Section 2428.5 of the proposed regulations indicates that, subject to DDOT approval, a carrier which has purchased an annual citywide permit may "use their company logo instead of the decal." This is intriguing, but the proposal fails to follow up with any

specifics on how the department's approval is to be obtained or how enforcement personnel would know which carrier logos were authorized to be used in lieu of decals, and which not.

In one respect, the reference to logos is encouraging; it indicates that DDOT in fact believes that additional, physical credentials are not in fact necessary for the enforcement of its tax scheme, and that other means might be substituted. We suggest that enforcement personnel be given access on the street to a timely database of carriers that possess valid annual and daily permits. This could eliminate the legal problems the program, as currently proposed, has with respect to physical indicia for carrier vehicles. (See below.)

Leased and Rented Vehicles

A very large proportion of the commercial vehicles on the road are leased or rented to the carriers that actually operate them. This may be particularly the case with private carriers – those hauling their own goods – as opposed to for-hire carriers. Nowhere in the proposed regulations are leased or rented vehicles – or their lessors – mentioned. This leaves unanswered a number of questions whose resolution will be necessary for any implementation of the proposed tax. Among these are: May a truck-leasing company purchase permits for its carrier customers? May carrier-lessees buy permits for the vehicles they lease and operate? What would the procedures be in each case, and can the District provide credentials timely? Can parking violations be cited to the vehicle operator (the lessee), that is, the responsible party, rather than to the vehicle owner (the lessor), even if the lessor is the permitholder? Will the rate of the tax depend on the size of the lessee's fleet, or of the lessor's?

Need for Enforcement

If the proposed regulations are really to be implemented as they are currently written, the District must be prepared to enforce these requirements strictly and consistently. If this is not done, compliant carriers, those who have paid the parking tax, will be at a tremendous disadvantage compared to those who have not paid and will occupy their parking space free of charge.

But enforcement will require that enforcement personnel be recruited, thoroughly trained, and consistently assigned to perform commercial vehicle parking enforcement. Without additional personnel, we believe the District's enforcement resources will be inadequate; unless these personnel are well trained, the complexities of the program will frustrate proper enforcement; and if personnel, once hired and trained, are not in fact used for this purpose, the District will not realize the revenues for which the program has been chiefly designed. In particular, we are curious to know how a carrier's stay at a given, non-

metered parking spot will be timed. This process seems to us to be highly labor-intensive, but if it is not regularly and consistently performed, the program will fail spectacularly. We might point out that although strict enforcement of the tax aspects of the regulations – that is, their primary focus – might render the tax somewhat more equitable, as it would tend to cut out freeloading, it will exacerbate those traffic problems that the Act itself seems to have been designed to address.

Enforcement – Drafting Problems

We would point out that sections 2402.12 and 2432.1 of the proposed regulations are drafted in such a way that they may be misleading to enforcement personnel. To take the shorter section 2402.12 by way of example: Under this subsection, a violation may be found if (a) the meter has expired or the time on the receipt is up, or (b) there is no receipt, or (c) the vehicle displays no permit. The intent presumably, is to charge a violation if the meter has expired, *and* there is no receipt or permit; but read literally, a violation could be found if any one of the three conditions were not met. Section 2432.1 exhibits the same drafting problem in lengthier form.

Conclusion – Practical Aspects

We believe the problems we have outlined above with the practical application of the proposed regulations are so serious that there can be no successful implementation of the program; that is, in anything like its present form the program will lead to additional traffic problems in the District, will significantly disrupt both carrier operations and those of the businesses served by carriers (that is, essentially all the businesses in the City), will prove to be very costly for the District to implement and enforce, and will fail to yield the District the revenues it expects. We emphasize once again that nothing we have seen indicates that DDOT has made any investigation or assessment of the potential improvements that the establishment of a system truly aimed at better commercial traffic management in the City could bring to District business and residents.

Part II. Legal Aspects

Federal Law

Section 4306 of the 2005 federal highway reauthorization bill, SAFETEA-LU (P.L. 109-59), effective August 10, 2005, and codified at 49 U.S. Code section 14506, generally preempts state and local requirements for interstate motor carriers to display any form of identification in or on a commercial motor vehicle. The only exceptions are credentials required in connection with (1) the International Registration Plan, (2) the International Fuel Tax Agreement, (3) a state law regarding motor vehicle registration license plates,

(4) federal requirements for the transportation of hazardous materials, (5) federal vehicle inspection standards, and (6) state weight-distance taxes. Section 14506 appears clearly to preempt the credential requirements associated with the Plan.

An identification requirement similar to the District's, imposed by Oregon in connection with that state's weight-mile tax system, was earlier determined by the United States Department of Transportation to be preempted. See *Identification of Vehicles: Oregon Department of Transportation Tax Credentials Petition for Determination*, Docket no. FMCSA-2006-25004, 72 *Fed. Reg.* 9996 (Mar. 6, 2007) (copy enclosed).

In finding the Oregon cab-card credential to be preempted, the U.S. DOT noted that "ensuring that the paper documents are distributed to and carried on each vehicle, and that [the] driver has ready access to the document, could add considerably to the paperwork burden of the carrier and driver, especially if similar documents were to be required by other States." The agency further observed that "[t]he fact that enforcement could be 'more challenging' does not outweigh the burden that the additional paperwork places on carriers engaged in interstate commerce" and concluded that tax compliance identification credentials such as the Oregon cab card "are exactly the type of display Section 4306 was enacted to prohibit."

It is worth noting that Oregon did not actually require a carrier to display its credential; rather, the state denied significant related benefits to carriers which did not display it. This brings the Oregon situation even closer to the District's proposed annual decals and daily permits, whose display would be provided as a more convenient, more cost-effective "option" for motor carriers in lieu of metered parking.

Subsequent to the Oregon decision, FMCSA has rendered a similar decision under ISTECA section 4306 (49 U.S.C. §14506) with respect to credentials required of interstate motor carriers by New Jersey, New York City, and Cook County, Illinois. See *Identification of Interstate Motor Vehicles: New York City, Cook County, and New Jersey Tax Identification Requirements*; Petition for Determination, Docket No. FMCSA-2009-0271, 75 *Fed. Reg.* 64779 (Oct. 20, 2010) (copy enclosed). In each case, FMCSA found that the challenged credential violated federal law and was unenforceable. It is worth noting that both the New York City and Cook County credentials were imposed in connection with schemes for the local taxation of commercial vehicles not dissimilar to the District's proposed tax on commercial vehicle parking.

We submit that there is little question that the Plan's credential requirements fall squarely within the scope of preemption found by the U.S. DOT in the Oregon matter. Indeed, the Plan requirement that a decal be affixed to a vehicle and displayed by those holding annual permits is arguably even more burdensome for the industry than the paper cab card found preempted in Oregon. In any such scheme, it is all too easy for enforcement to focus on details of the credential requirement itself rather than on the underlying obligation – such as the payment of taxes – by the party required to display the credential.

We note in this connection that the District's proposed regulation provides separate and equivalent fines for failure to obtain a decal (or other device) and failure to display it properly. This was indeed just the sort of thing that section 4306 was enacted to prohibit.

Commerce Clause

We further believe that the fees outlined in the Plan would most likely be held to violate the Commerce Clause of the United States Constitution. As discussed below, in our view unapportioned flat charges like those proposed in the Plan inherently discriminate against and burden interstate commerce and are unconstitutional. Indeed, direct United States Supreme Court precedent leaves little room for doubt that the proposed fees would violate the Commerce Clause. See *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266 (1987).

In *Scheiner*, the U.S. Supreme Court examined two unapportioned per-truck charges imposed by Pennsylvania: a \$36 per-axle truck tax and a \$25 per-truck fuel identification marker fee. The Court's analysis made clear that such flat taxes are structurally flawed and are both malapportioned and discriminatory in effect. Exposure of interstate transportation activities to a crippling cumulative tax burden is one of the principal structural infirmities of the flat fee form of taxation. Applying its "internal consistency test," which looks at the impact on interstate commerce if all states imposed identical flat fees, the Court concluded that "flat taxes would occasion manifold threats to the national free trade area" and "divide and disrupt the market for interstate transportation services." 483 U.S. at 285.

The taxes proposed in the District's regulation would similarly fail internal consistency. A motor carrier with a fleet of twenty trucks operating solely in the District of Columbia would have to pay \$3,154.67 to purchase a Class A, Zone 1, annual permit to use loading zones in the District. If parking fee requirements similar to those proposed in the Plan were in effect in, say, ten other cities around the country, an interstate motor carrier of identical size would have to pay ten times as much, or \$31,546.70, in order to use the loading zones in those cities. The cumulative burden imposed on interstate motor carriers by the proposed \$35 per-truck flat fee leaves "no conceivable doubt that commerce among the states would be deterred." *Scheiner*, 483 U.S. at 284.

The failure of the Plan's proposed parking fees to pass the internal consistency test establishes as a matter of law that the charge would violate the Commerce Clause. See *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995). ("A failure of internal consistency shows as a matter of law that a state is attempting to take more than its fair share from the interstate transaction, since allowing such a tax in one State would place interstate commerce at the mercy of those remaining States that might impose an identical tax.")

In addition to exposing interstate commerce to a cumulative burden, flat annual fees inevitably lead to a cost per-mile discrimination in favor of locally based carriers. The U.S. Supreme Court in *Scheiner* recognized that intrastate or local motor carriers inevitably, on average, have more concentrated operations in a state than interstate motor carriers. See *Scheiner*, 483 U.S. at 291 (explaining that intrastate carriers, which use the state's roads whenever in operation, are the primary beneficiaries of a flat per-truck tax); see also *id.* at 284 n. 16 (explaining that "the very nature of market that interstate operators serve prevents them from making full use of the privilege of doing business for which they have paid the State.") For example, under a \$100 flat annual tax, an interstate truck that only uses a state's roads 100 miles per-year pays \$1.00 per mile, while a local carrier that uses the roads 10,000 miles pays 1 cent per mile. This inevitable result places a discriminatory share of the state's regulatory costs on interstate motor carriers, while protecting intrastate and local motor carriers from their appropriate share of the state's costs.

Since the announcement of the *Scheiner* decision, more than a score of flat state taxes and fees on the trucking industry have been struck down under its principles as violative of the Commerce Clause. Based on these precedents, there is little question in our minds that if the District adopts the flat annual parking fees proposed in the Plan, they would be vulnerable to constitutional challenge under the Commerce Clause.

In this connection, the District's proposed requirement to base its tax on the size of an interstate carrier's entire fleet, regardless of how many of its vehicles may ever enter the District or load or unload there, is especially egregious. This feature practically ensures that a large fleet based outside of D.C. and with only limited operations there, will be overpaying in comparison with a local operation, both on a per-mile and a per-transaction basis. Coupled with the inevitable practical difficulties we have outlined earlier in these comments associated with a carrier's obtaining in a timely fashion either daily permits or additional annual decals, such a carrier will be obliged in practice to rely on the most expensive "option" of all – metered parking (provided, of course, the driver can find an unoccupied space with a meter). In these circumstances, the relevance of the *Scheiner* decision to the District's proposed tax is all the more obvious.

It is worth noting that several schemes successfully challenged under the *Scheiner* case included "options" like those the District proposes to offer; that is, use of metered parking, or purchase of a daily permit instead of the annual permit. But as the annual permit and payment of the associated tax is designed to be most convenient and cost-effective, then clearly the District itself believes its "options" to be even more burdensome for interstate carriers.

DDOT representatives have suggested that other cities across the Nation have instituted commercial parking programs similar to that embodied in the proposed regulations. This is misleading. While it appears to be true that certain other cities require parking permits for unloading and unloading in at least some instances, all of these programs are quite

evidently aimed primarily at traffic regulation rather than – as under the proposed regulations – at the taxation of the motor carriers that serve those cities. Most revealing in this respect is that none of these other jurisdictions base their parking fees on the overall size of a motor carrier's national fleet.

Conclusion – Legal Aspects

For the reasons laid out above, ATA, AMSA, MMTA, TRALA, and VTA believe that the Plan's provisions for loading-zone parking permit fees and the associated credentials are invalid under federal law and the U.S. Constitution.

Conclusion

In conclusion, the undersigned trucking industry associations believe that the District of Columbia Council should disapprove the proposed DDOT regulations implementing the Commercial Curbside Loading Zone Implementation Act of 2009, for the following reasons:

The proposed regulations will cause serious disruption to the operations of motor carriers making pick-ups and deliveries in the District, and to businesses, individual residents, and governments located in the District.

The proposed regulations convert the simple, straightforward Act into a complicated tax law, difficult and expensive for motor carriers to comply with and for the District to administer and enforce.

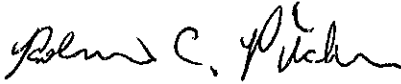
Implementation of the proposed regulations would very likely make the District's traffic problems worse rather than better. Nor has DDOT apparently made any attempt to quantify the actual effect of the regulations on traffic movement in the City.

The District should completely overhaul its commercial-vehicle permitting process before implementing these regulations, which will prompt a flood of time-sensitive permit applications.

DDOT appears not to have adequately considered the significant costs in personnel and other District resources it will take to enforce the proposed regulations.

The proposed regulations appear to be in violation of federal statute and of the Commerce Clause of the U.S. Constitution.

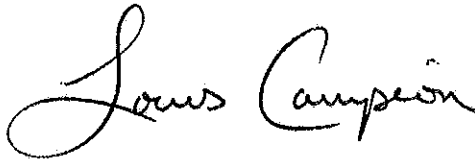
Respectfully submitted,




Robert C. Pitcher
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Louis Campion
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Tom James
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P. Dale Bennett
President & CEO
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Enclosures: U.S. DOT Decision, Docket no. FMCSA-2006-25004
U.S. DOT Decision, Docket No. FMCSA-2009-0271

cc: The Honorable Vincent C. Gray
The Honorable Kwame R. Brown
The Honorable Anne Ferro, Federal Motor Carrier Safety Administrator
Eulois E. Cleckley, DDOT
William C. Auchter, The Kane Company

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DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2006-25004]

Identification of Vehicles: Oregon Department of Transportation
Tax Credentials Petition for Determination

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

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ACTION: Notice; Denial of petition for determination.

SUMMARY: FMCSA denies a petition from the Oregon Department of Transportation (ODOT) for a determination that the State may continue to require interstate motor carriers to display weight-mile tax credentials (WMTCs) in commercial motor vehicles (CMVs) in Oregon. The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) prohibits States from requiring motor carriers to display in, or on, CMVs any form of identification other than forms required by the Secretary of Transportation. However, SAFETEA-LU also provides that a State may continue to require display of credentials that the Secretary determines are appropriate. ODOT requested that FMCSA determine that its WMTCs are appropriate under SAFETEA-LU. FMCSA denies ODOT's request because it could find no evidence to support a determination that the display of the WMTCs is appropriate. Therefore, the State of Oregon may no longer require interstate motor carriers to display WMTCs.

DATES: This decision is effective March 6, 2007.

FOR FURTHER INFORMATION CONTACT: Mr. Thomas Yager, Chief, Driver and Carrier Operations Division, Office of Bus and Truck Standards and Operations, MC-PSD, Federal Motor Carrier Safety Administration, 400 Seventh Street, SW., Washington, DC 20590-0001. Telephone: 202-366-4009. E-mail: MCPSD@dot.gov.

SUPPLEMENTARY INFORMATION:

Background

Section 4306 of SAFETEA-LU prohibits States from requiring motor carriers to display in or on commercial motor vehicles any form of

identification other than forms required by the Secretary of Transportation [49 U.S.C. 14506(a)]. However, Sec. 14506(b)(3) provides, in part, that "a State may continue to require display of credentials that are required * * * under a State law regarding motor vehicle license plates or other displays that the Secretary determines are appropriate."

ODOT requested that FMCSA determine that the State's WMTCs are appropriate in the context of 49 U.S.C. 14506(a). Oregon has been requiring motor carriers to obtain weight-mile tax credentials since 1947.

Oregon Revised Statutes (ORS) 825.454 authorizes ODOT to require the use of identification devices, such as cab cards, stamps or carrier identification numbers, to identify, and be carried in or placed upon, each motor vehicle authorized to be operated in Oregon. ODOT may require annual application for identification devices and it may charge a fee not to exceed \$8 for each device issued on an annual basis. ORS 825.450 requires ODOT to issue a permanent credential and ORS 825.470 authorizes issuance of temporary credentials. Until 2001, ODOT required out-of-state carriers to display a special Oregon license plate on each truck registered to operate in the State. State legislation passed in 2001 eliminated the need for out-of-state based vehicles to display the Oregon license plate and substituted the simpler requirement to carry a permanent or temporary paper credential.

ODOT states the current WMTCs identify a motor carrier's Oregon account, facilitate reporting and payment of the tax, and assist in tracking vehicle-miles traveled over Oregon highways. ODOT also believes truck drivers want to have the credential at hand when fueling in Oregon, because fuel providers use it to verify that a vehicle is exempt from Oregon fuel tax. ODOT advises that approximately 15,000 out-of-state based carriers operate 283,000 trucks that carry a permanent Oregon tax credential. It also advises that approximately 10,000 trucks with a 10-day temporary credential operate within the State at any given time. A copy of ODOT's petition for determination is available for review in the docket for this notice.

Public Comments

On June 13, 2006, FMCSA published a notice in the Federal Register requesting public comment on the ODOT request to be allowed to continue requiring motor carriers to display weight-mile tax credentials. ["Identification of Vehicles: Oregon Department of Transportation Tax Credentials; Petition for Determination;" Docket No. FMCSA-2006-25004, June 13, 2006, 71 FR 34188]. In formulating its position, FMCSA considered all of the comments received in response to the Agency's Federal Register notice.

Eleven comments were submitted to the docket. The comments were almost evenly divided between supporters and opponents of Oregon's request for exception. Six commenters supported ODOT's request; this includes a comment filed by ODOT. Five commenters opposed the request and urged FMCSA to deny it.

The commenters' discussions, both for and against granting the exemption request, centered on the following issues:

Intended versus unintended consequences of denying ODOT's request;

Denying ODOT's request could result in complications for motor carriers;

Denying ODOT's request could result in complications for

Oregon;

Benefits associated with the weight-mile tax credential;
Ease of obtaining the credential; and
Consideration of grandfather privileges.

Intended Versus Unintended Consequences of Denying ODOT's Request

The ODOT suggests, in its July 6, 2006, filing to the docket, that Congress may have unintentionally included Oregon's weight-tax credential when enacting the provisions of 49 U.S.C. 14506. However, ODOT admits there is no specific discussion of its weight-tax credential in the Congressional record. ODOT suggests that the only evidence of legislative intent may be found in a March 8, 2006, bipartisan letter, filed in the docket on June 13, 2006, from Oregon's Congressional delegation to the Secretary of Transportation expressing concern about the preemption and support for the State's request. ODOT goes on to suggest that its weight-tax credentialing program may have been confused with the International Fuel Tax Agreement and International Registration Plan. This argument is supported by the Oregon Concrete & Aggregate Producers Association, Inc., the American Automobile Association (AAA) of Oregon/Idaho, and AAA of Washington, DC.

The Owner-Operator Independent Drivers Association, Inc. (OOIDA) states that ODOT provides no compelling information in its argument which would suggest Congressional intent. The OOIDA suggests that ODOT's weight-mile tax credential is precisely the type of document Congress had in mind when it was considering section 4306. The OOIDA states, "There is nothing in SAFETEA-LU that singles out Oregon for either attention or a special exemption."

In comments to the docket, the American Trucking Associations cite legislation that it suggests shows Congress's intent to lessen the paperwork requirements on interstate motor carriers by individual States.

FMCSA Response: No information was presented to support ODOT's assertion that Congress

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"unintentionally" included Oregon's weight-tax credential when it adopted the provisions of 49 U.S.C. 14506(b). To the contrary, ODOT's weight-mile tax credential is likely the type of paper credential intended to be prohibited. Absent clear evidence of Congressional intent, the Agency must follow the plain language of the statute.

Denying ODOT's Request Could Result in Complications for Motor Carriers

The ODOT suggests in its comments that many interstate motor carriers use the credential to obtain the benefit of not having to pay a fuel-tax when purchasing diesel fuel in the State. The ODOT suggests that not having the credential to present to suppliers at the time of purchase will result in an unnecessary administrative burden when reclaiming the fuel tax. Other commenters did not address this issue.

The OOIDA states in its comments that over the past two decades, Congress and the Department of Transportation have simplified multiple-licensing, registration, and reporting requirements that States imposed on interstate commerce. Also, OOIDA states that it and other industry associations have concluded that there is no net benefit to requiring

display of the ODOT weight-mile tax credential.

The United Parcel Service (UPS) states that Federal and State regulatory agencies, in conjunction with the motor carrier industry, have worked to reduce vehicle paperwork requirements to only those which are truly safety-related (hazardous materials, emergency, vehicle inspection, etc.). Furthermore, UPS argues that Oregon already verifies electronically the compliance of motor carriers with its financial responsibility requirements and is well positioned to expand that system to weight-distance tax compliance.

The Oregon Concrete & Aggregate Producers Association, Inc. advises that it and its members do not find that being required to maintain the weight-mile tax credential is burdensome. The AAA organizations also suggest the weight-mile tax credential requirement is not burdensome, primarily because of the ease of obtaining the credential electronically.

FMCSA Response: No motor carriers commented directly upon ODOT's claim that display of the weight-mile tax credential has benefits for carriers, such as providing them documentation for fuel-tax relief. FMCSA recognizes that the elimination of paperwork is a goal included in most Federal programs, and believes that such paper-based credentials should be authorized only when absolutely necessary.

Denying ODOT's Request Could Result in Complications for Oregon

The ODOT states that if not granted the exception, enforcing the weight-mile tax will be more challenging and opportunities for tax evasion will increase. It suggests that evasion by motor carriers in purchasing the weight-mile tax credential will result in a loss of funding for the State.

Opponents of the exception all suggest that ODOT can develop technological means that would allow for immediate verification by enforcement officials as to whether or not a motor carrier has complied with Oregon's weight-mile tax laws.

FMCSA Response: ODOT acknowledged that by accessing State data systems, police officers may be able to verify payment of the weight-mile tax without having the paper credential on the vehicle. The fact that enforcement could be "more challenging" does not outweigh the burden that the additional paperwork places on carriers engaged in interstate commerce.

Benefits Associated With the Weight-Mile Tax Credential

The ODOT and all of the commenters that support the weight-mile tax credential suggest that one of its benefits is to ensure that motor carriers meet their cost responsibility for road use in Oregon.

The ODOT also contends that the weight-mile tax credential has a safety-related benefit, resulting in Oregon's Motor Carrier Management Information System non-match rate \1\ being one of the lowest in the country.

\1\ "Non-match rate" refers to the matching of driver-vehicle inspections conducted by State officials with the appropriate motor carrier record in the FMCSA Motor Carrier Management Information System. A valid "match" enables use of the State data in determining safety status of an interstate motor carrier.

The OOIDA and UPS both contend that ODOT could and should rely solely on the U.S. DOT number, as required by 49 CFR 390.21, to accurately identify motor carriers operating in its State, and that the weight-mile tax credential does not significantly add any value to this process. The OOIDA argues that Oregon wants to maintain the "easy revenue" derived from fining drivers who misplace the paper credentials.

FMCSA Response: The value of the Oregon weight-mile tax credential as an enforcement tool was previously addressed. Although the existence of a weight-mile tax credential on the vehicle might assist an officer in determining the correct identification of the motor carrier, there are many other factors having a greater value, such as vehicle markings, shipping documents, and lease agreements. Considering the use of owner-operators and leased vehicles, the weight-mile tax credential would not necessarily be a determinative factor in identifying the responsible motor carrier.

Ease of Obtaining the Credential

The ODOT and the commenters who support the weight-mile tax credential advise that it can be obtained electronically without elaborate administrative processes. However, ODOT states that only those motor carriers registered to use its Trucking Online Internet-based service can obtain the weight-mile tax credential online.

No commenter that opposes the credential contradicted the assertion of the ease of electronic filing. Several, however, including OOIDA, ATA, and UPS, contend that the overall process of applying for and obtaining the paper credential is an administrative burden and serves no purpose other than to generate revenue for the State. Each contends that motor carriers that fail to produce the weight-mile tax credential at time of inspection are issued citations even though the carrier may be registered with the State.

FMCSA Response: Although it may be relatively easy for a motor carrier to obtain the Oregon weight-mile tax credentials, ensuring that the paper documents are distributed to and carried on each vehicle, and that the driver has ready access to the document, could add considerably to the paperwork burden of the carrier and driver, especially if similar documents were to be required by other States.

Consideration of Grandfather Privileges

ODOT contends that it should be granted grandfather privileges for requiring the weight-mile tax credential because it has been requiring the road user taxes since 1947. However, it offers no evidence that Congress intended to grant such privileges regarding section 4306, as pointed out by OOIDA in its comments.

FMCSA Response: Section 4306 does not provide any authority for, or indication of Congressional intent supporting, the grandfathering of existing credentials that would otherwise be prohibited.

FMCSA Decision

The FMCSA has decided to deny ODOT's request that the Agency determine that the State's WMTCs are appropriate in the context of 49

U.S.C. 14506(a). The Agency considered all comments submitted to the docket, including the ODOT's assertion that

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preemption of the WMTCs is an ``unintended consequence'' of Section 4306. The Agency found no evidence to support that position. In fact, one could just as easily conclude that the WMTCs are exactly the type of display Section 4306 was enacted to prohibit. Furthermore, there is no indication in the legislative history of SAFETEA-LU that Congress intended to ``grandfather'' existing display requirements, other than those specifically listed in 49 U.S.C. 14506(b). In consideration of the above, the State of Oregon may no longer require interstate motor carriers to display weight-mile tax credentials on CMVs.

Issued on: February 26, 2007.

John H. Hill,
Administrator.

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DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2009-0271]

Identification of Interstate Motor Vehicles: New York City, Cook County, and New Jersey Tax Identification Requirements; Petition for Determination

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

ACTION: Notice; Grant of petition for determination.

SUMMARY: The FMCSA grants three petitions submitted by the American Trucking Associations (ATA) requesting determinations that the commercial motor vehicle (CMV) identification requirements imposed by the State of New Jersey, New York City, and Cook County, Illinois are preempted by Federal law. The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) prohibits States and their political subdivisions from requiring motor carriers to display in or on CMVs any form of identification other than forms required by the Secretary of Transportation, with certain exceptions. FMCSA grants ATA's requests because the three credential display requirements do not qualify for the relevant statutory exception for State display of credentials and are preempted by Federal statute.

DATES: This decision is effective October 20, 2010.

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FOR FURTHER INFORMATION CONTACT: Genevieve D. Sapir, Office of the Chief Counsel, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590, (202) 366-7056; e-mail Genevieve.Sapir@dot.gov.

SUPPLEMENTARY INFORMATION:

Background

New Jersey's tax code requires all motor carriers hauling, transporting, or delivering fuel to display a Motor Fuel Transport License Plate and annual Transport License Certificate. This requirement applies to all motor carriers hauling, transporting, or

delivering fuel in New Jersey regardless of their State of domicile or registration. New Jersey Statutes Annotated Sec. 54:39-41 and Sec. 54:39-53. New York City's Administrative Code, Sec. 11-809, requires CMVs used principally in New York City or in connection with a business carried on within New York City to pay a tax and display a stamp. The requirement appears to apply whether or not the CMV is registered to an address in New York City. Cook County's Code of Ordinances requires motor vehicle owners residing within the unincorporated area of Cook County to: (a) Display a window sticker showing payment of fees; and (b) paint business vehicle identification information on their vehicles. Article XIV of chapter 74 of the Cook County Code of Ordinances is referred to as the "Cook County Wheel Tax on Motor Vehicles Ordinance."

Section 4306(a) of SAFETEA-LU, codified at 49 U.S.C. 14506(a), prohibits States from requiring motor carriers to display in or on CMVs any form of identification other than forms required by the Secretary of Transportation. Section 14506(b), however, establishes several exceptions to this prohibition:

(b) Exception.--Notwithstanding subsection (a), a State may continue to require display of credentials that are required--

(1) Under the International Registration Plan under section 31704 [of title 49, United States Code];

(2) Under the International Fuel Tax Agreement under section 31705 [of title 49, United States Code];

(3) Under a State law regarding motor vehicle license plates or other displays that the Secretary determines are appropriate;

(4) In connection with Federal requirements for hazardous materials transportation under section 5103 [of title 49, United States Code]; or

(5) In connection with the Federal vehicle inspection standards under section 31136 [of title 49, United States Code].

The exception relevant to ATA's petitions is Sec. 14506(b)(3), which provides that "a State may continue to require display of credentials that are required * * * under a State law regarding motor vehicle license plates or other displays that the Secretary determines are appropriate." The Secretary's authority is delegated to FMCSA by 49 CFR 1.73(a)(7).

ATA's petitions seeking determinations, along with the applicable statutes, regulations, and ordinances, are available for inspection in the docket established for this notice.

Public Comments

On October 19, 2009, FMCSA published a notice in the Federal Register, "Identification of Interstate Motor Vehicles: New York City, Cook County and New Jersey Tax Identification Requirements; Petition for Determination" (74 FR 53578), requesting public comment on ATA's petitions. In formulating its decision, FMCSA considered all of the comments received in response to the Agency's notice.

FMCSA received 11 comments, of which 7 were from trade associations, 3 from motor carriers, and 1 from an individual. All commenters supported preemption.

ATA and the Distribution and LTL Carriers Association commented that the credential display requirements are related to revenue raising and that they do not fall under any of the Sec. 14506(b) exceptions.

Con-way Inc. commented that the credential display requirements are impediments to interstate commerce. United Parcel Service, Inc. (UPS) commented that, as an interstate carrier operating in many States, it finds credential display requirements to be burdensome. UPS further commented that, although the vehicles in its fleet may be in compliance with State or local tax, fee, or permit requirements, if its drivers cannot display the appropriate credential on demand, the company can nonetheless receive a citation. Martin Storage Co. also commented that the paperwork associated with State and local credential display requirements is burdensome. The Truckload Carriers Association and the Truck Renting and Leasing Association commented that the credential display requirements are not eligible for the Sec. 14506(b)(3) exception because they are not related to vehicle registration. The National Private Truck Council observed that none of the affected jurisdictions submitted comments to justify the credential display requirements.

In addition, FMCSA received a letter from the Office of the State's Attorney of Cook County acknowledging that its credential display requirement is preempted. This letter is also available for review in the docket.

FMCSA Decision

New Jersey's tax credential display requirement is a State-mandated form of identification preempted by 49 U.S.C. 14506(a) and does not qualify for the exception at Sec. 14506(b)(3). First, it is not an identification requirement related to motor vehicle license plates. Even though the credential itself is in the form of a license plate, its purpose does not relate to State licensing of vehicles. Rather, it appears to identify those motor carriers, registered in New Jersey or elsewhere, that have paid State taxes for hauling, transporting, or delivering motor fuel. Second, New Jersey failed to articulate any justification for FMCSA to exercise its delegated discretion to approve the display.

New York City's and Cook County's display requirements are also preempted by 49 U.S.C. 14506(a) because they are identification requirements mandated by political subdivisions of a State. However, the assessment of whether a Sec. 14506(b) exception applies to these display requirements requires a slightly different analysis. The prohibition in Sec. 14506(a) specifically applies to States, political subdivisions of States, interstate agencies and other political agencies of two or more States, whereas the exceptions in Sec. 14506(b) apply to States without mention of political subdivisions or agencies. Consequently, the first question the Agency must answer is whether a Sec. 14506(b) exception can apply to a political subdivision of a State.

Two possible interpretations exist. One is that Congress intended for States, political subdivisions of States, interstate agencies and other political agencies of two or more States to be subject to the general prohibition on display of identification requirements, but only intended for States (and not the other subdivisions and agencies) to be eligible for the exceptions in Sec. 14506(b). The second is that Congress intended the States, as well as political subdivisions and agencies, to be eligible for the exceptions and that its omission of these other entities from Sec. 14506(b) is not evidence of its intent to exclude them from being eligible for the exception. FMCSA believes that the latter is the correct interpretation.

In *City of Columbus v. Ours Garage & Wrecker Service*, 536 U.S. 424 (2002), the Supreme Court considered a provision with nearly identical language to Sec. 14506 and determined that Congress' exclusion of political

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subdivisions in the exception was not a sufficiently clear and manifest indication of its intent to preempt local regulation. In reaching this conclusion, the Court made two points that guide our analysis and conclusions here. First, consistent with existing precedent, a political subdivision may exercise whatever portion of State power the State chooses to delegate under its own constitution and laws. *Id.* at 428. Second, if the exception were interpreted to apply only to States, political subdivisions would be preempted from enforcing laws legitimately enacted by the State pursuant to the exception. The Court found it unlikely that Congress would preserve State power to enact rules but bar routine enforcement through local instrumentalities. *Id.* at 435.

The Agency concludes that the exceptions in Sec. 14506(b) can apply to New York City's and Cook County's credential display requirements, if they meet the statutory criteria. The only exception relevant to ATA's petition is found in Sec. 14506(b)(3); however, no evidence supports the application of this exception to New York City's and Cook County's credential display requirements. These display requirements are unrelated to State vehicle licensing requirements, and neither jurisdiction articulated any justification for the Agency to exercise its delegated discretion to approve the display. In fact, the only jurisdiction to respond to the Agency, Cook County, conceded that its credential display requirements are preempted by Federal law.

In consideration of the above, FMCSA grants the petitions submitted by ATA. New York City, New Jersey, and Cook County are preempted from imposing and may no longer enforce their credential display requirements.

Issued on: October 4, 2010.

Anne S. Ferro,
Administrator.

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