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BEFORE THE

FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

UNITED STATES DEPARTMENT OF TRANSPORTATION

COMMENTS OF THE

OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC.

IN RESPONSE TO FMCSA'S NOTICE AND

REQUEST FOR COMMENTS:

AGENCY INFORMATION COLLECTION ACTIVITIES;

NEW INFORMATION COLLECTION:

LEASE AND INTERCHANGE OF VEHICLES

Docket No. FMCSA-2013-0050

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I. STATEMENT OF INTEREST

These comments are submitted on behalf of Owner-Operator Independent Drivers Association, Inc. (“OOIDA” or “Association”) in response to the notice and request for comments, “Agency Information Collection Activities; New Information Collection: Lease and Interchange Of Vehicles,” published by the Federal Motor Carrier Safety Administration, (“FMCSA” or “Agency”), Docket No. FMCSA-2013-0050, 78 Fed. Reg. 18666 (March 27, 2013) (the “Notice” or “NPRM”). The Notice requests comments on a proposed information collection request.

OOIDA is the national organization representing the interests of the community of commercial motor vehicle drivers whose rights and interests are protected by the Truth in Leasing Rules that are the apparent subject of this information collection. OOIDA is a not-for-profit corporation incorporated in 1973 under the laws of the State of Missouri, with its principal place of business in Grain Valley, Missouri. OOIDA is the largest international trade association representing the interests of independent owner-operators, small-business motor carriers, and professional drivers. The approximately 150,000 members of OOIDA are professional drivers and small-business men and women located in all 50 states and Canada who collectively own and operate more than 200,000 individual heavy-duty trucks. Single-truck motor carriers represent nearly half of the total of active motor carriers operated in the United States. The mailing address of the Association is:

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The Association actively promotes the views of professional drivers and small-business truckers through its interaction with state and federal government agencies, legislatures, courts, other trade associations, and private businesses to advance an equitable and safe environment for commercial drivers, including those with their own federal motor carrier operating authority. OOIDA is active in all aspects of highway safety and transportation policy, and represents the positions of professional drivers and small-business truckers in numerous committees and various forums on the local, state, national, and international levels. In sum, OOIDA's mission includes the promotion and protection of the interests of independent truckers on any issue which might touch on their economic well-being, their working conditions, or the safe operation of their motor vehicles on the nation's highways. Any agency activity that bears on the subject of the Truth in Leasing Rules found at 49 C.F.R. Part 376 directly affects the rights of OOIDA owner-operator members.

II. SUMMARY OF THE COMMENTS

The Notice appears to initiate the formalities required under Federal Information Policy requiring an agency to periodically seek public comment on the burden of any "Information Collection Request" ("ICR") required under its authority. The Supporting Statement filed in this regulatory document confusingly refers to this "new information collection request." It appears, however, that this is a request for comments from the public and not, literally, the creation of a "new" requirement for the collection of information under the rules. While the adoption of the "information collection request" procedures by FMCSA for the Truth in Leasing Rules may be "new," those rules have been in existence for decades. With this in mind, OOIDA provides these comments to: (a) answer the questions posed in the notice; (b) correct several statements made by both the Notice and Supporting Statement about the Truth in Leasing Rules; and, (c)

encourage the FMCSA to be more explicit in its Notice about the persons and interests served by these rules.

A full analysis will demonstrate that, although the FMCSA has chosen not to be actively involved in the enforcement of the Truth in Leasing Rules, these rules continue to prevent abuse of owner-operator truckers and contribute to their economic stability. Economically stable owner-operators are safe owner-operators. Motor carriers who ignore the rules regularly run owner-operators to the edge of self-sustainability or into a state of constant debt to the motor carrier. They do so by creating the need for drivers to maximize their hours driving to earn just enough income to get them to their next load, if not to support their families and maintain their trucks. Minimizing driver compensation means minimizing the operating revenue available to adopt the latest safety equipment and maintain their vehicles on a regular basis. The carriers who undercut the economic viability of their drivers in order to boost their own profits and to offer better rates to shippers undercut not only the safety of their own drivers, but force their competitors to find areas to cut their budgets to keep the business. In other words, motor carriers who violate the rules drive down the safety standards for the entire industry.

OOIDA must also ask why, for the first time since the Truth in Leasing Rules were adopted, FMCSA has initiated a request for comments on this ICR? Who or what prompted the initiation of this ICR, and what is its purpose? Why is FMCSA attempting to study an area of regulation that Congress largely left in the hands of private parties and that FMCSA has steadfastly refused to become involved in despite several entreaties by OOIDA in the past?

III. COMMENTS

A. THE NOTICE DOES NOT CLEARLY STATE THE SCOPE OF THE ICR REQUEST FOR COMMENTS.

It is generally apparent that this Information Collection Request (“ICR”) Notice concerns the rules promulgated at 49 C.F.R. Part 376 (the “Truth in Leasing Rules”). The purpose and function of the Leasing Rules is outlined, although incompletely and, at times, inaccurately, in the Notice and in the “Supporting Statement” filed in the regulatory docket at FMCSA-2013-

0050-0002. But the scope of this ICR is not clear. The only statement in the Notice about the focus of the ICR is contained in the “Summary”: “This ICR will enable FMCSA to document the burden associated with the *marking regulations* codified in 49 C.F.R. Part 376” (emphasis added). The marking regulations are those required under the “General Leasing Requirements” at 49 C.F.R. § 376.11(c)(1) which require identification of the leased equipment in accord with 49 C.F.R. § 390.21, “Marking of self-propelled CMVs and intermodal equipment.”

The Supporting Statement in the regulatory docket, FMCSA-2013-0050-0002 and dated April 25, suggests a broader scope to the ICR. The “Introduction” to the supporting statement states that the ICR “will enable the Federal Motor Carrier Safety Administration (FMCSA) to document the burden associated with the former ICC regulations now codified in 49 C.F.R. Part 376...” This would be a much broader inquiry than one directed only at the marking regulations described in the Notice. OOIDA assumes that this “burden” to be documented, in accordance with the ICR procedures, is solely limited to the burden related to the information requirements of the Leasing Rules – not the burden of the Leasing Rules as a whole. But neither the Notice nor the Supporting Statement makes this clear. Neither of the documents methodically describes which aspects of the rules FMCSA is seeking comments. For the purpose of these comments OOIDA will assume that FMCSA is seeking comments on the broader inferences to be made

from these documents – even if that scope is broader than necessary for an ICR under the statute and rules.

B. THE PURPOSE OF THE TRUTH IN LEASING RULES FULFILLS FMCSA’S FUNCTIONS.

Since their revision in 1979, the relationship between owner-operators and regulated motor carriers has been governed by the federal Truth-in-Leasing regulations.¹ The ICR Notice states that “[t]he rules were adopted to ensure that small trucking companies were protected when they agreed to lease their equipment and drivers to larger for-hire carriers. They also

ensure that the government and members of the public can determine who is responsible for a property-carrying commercial motor vehicle.” This is a more accurate description than the statement contained in the Supporting Statement that states “This ICR supports the Department of Transportation’s strategic goal of economic competitiveness by promoting economic opportunities for freight operation on surrounding communities.” OOIDA is not sure what is meant by “freight operations on surrounding communities” in the Truth in Leasing Rules context. The Truth in Leasing Rules, however, fulfill FMSCA’s purpose because 1) they formalize the relationship under which FMCSA requires motor carriers to be responsible to the public for the safe operation of commercial motor vehicles; and, 2) they aid in ensuring the economic stability of owner-operator drivers who make daily decisions that affect highway safety – how long they must drive to earn a living and when to maintain and repair their equipment.

¹ *Lease and Interchange of Vehicles*, 131 M.C.C. 141 (1979). In 1996, the regulations were redesignated from 49 C.F.R. Part 1057 to Part 376 without substantive change. *See* 61 Fed. Reg. 54706, 54707 (Oct. 21, 1996).

Because they typically do not have their own federal operating authority, Owner-operators own their own equipment and lease out their trucks and hauling services to authorized motor carriers pursuant to written leases, the terms of which are governed by federal law. *Id.* According to one recent Federal Register notice, there are 500,000 motor carriers and 4,000,000 drivers in the long-haul trucking industry.² It is estimated that there are tens of thousands of motor carriers who haul freight using equipment and driving services provided by several hundred thousand independent owner-operator drivers. *See generally OOIDA v. Swift Transp. Co.*, 367 F.3d 1108, 1110 (9th Cir. 2004)(“There are hundreds of thousands of owner-operators in the United States, many of whom contract with various federally regulated motor carriers.”).

In the Supporting Statement to the ICR Notice, the agency estimates that there are 311,000 owner-operators who are the subject of the Truth in Leasing rules. There is no routine survey or census conducted by any party to confirm the number of owner-operators today, but this number appears reasonable to OOIDA for the limited purposes of the notice.

The U.S. Department of Transportation (“DOT”) is authorized to regulate the relationship between owner-operators and motor carriers, including the terms in their leases. *See* 49 U.S.C. § 14102(a). The federal Truth-in-Leasing regulations, 49 C.F.R. Part 376, set forth strict obligations on motor carriers regarding their leasing arrangements with owner-operator drivers. These regulations were drafted in response to concerns that carriers were taking advantage of owner-operators and overcharging them with undisclosed mark-ups on certain items. *See OOIDA v. Swift Transp. Co.*, 367 F.3d 1108, 1110 (9th Cir.2004).

For decades, interstate motor carriers have been notorious for exploiting the economic

² Notice of Proposed Rulemaking, Electronic On-Board Recorders and Hours of Service Supporting Statement, 76 Fed. Reg. 5537 (February 1, 2011), Regulatory Impact Analysis (January 24, 2011) at ii. Available at <http://www.regulations.gov/#!documentDetail;D=FMCSA-2010-0167-0003>

domination they exercise over owner-operators. In 1977, the Interstate Commerce Commission (ICC) announced: “the Commission's deep concern for the problems faced by the owner-operator in making a decent living in his chosen profession.” 42 Fed. Reg. 59,984 (Nov. 23, 1977). In its notice of proposed final rules, the ICC stated its objectives were “to eliminate or reduce opportunities for skimming and other illegal or inequitable practices; and to promote the stability and economic welfare of the independent trucker segment of the motor carrier industry.” 43 Fed. Reg. 29,812 (July 11, 1978); *OOIDA v. New Prime, Inc.*, 398 F.3d 1067, 1070 (8th Cir. 2005). When commenting on the proposed rules, ICC Chairman O’Neal observed:

My concern is that because they like to eat, owner-operators will continue to find it necessary to enter into contracts with carriers they would like to avoid.... The

difficulty is that one owner-operator by himself will have very little chance of bargaining any changes in any contract. His option will be take it or leave it.

Id. at 29,813.

As the U.S. Court of Appeals for the Ninth Circuit observed in *OOIDA v. Swift Transp., Inc.*, 367 F.3d 1108, 1110 (9th Cir. 2004), “[a] primary goal of this regulatory scheme is to prevent large carriers from taking advantage of individual owner-operators due to their weak bargaining position.” “The regulations . . . were promulgated in response to serious financial problems affecting the nation’s independent truckers.” *Global Van Lines, Inc. v. I.C.C.*, 627 F.2d 546, 551 (D.C. Cir. 1980). “[T]he purpose of the . . . regulations ‘is to protect the industry from practices detrimental to the maintenance of sound transportation services consistent with the regulatory system.’” *Id.* (quoting *American Trucking Ass’n v. United States*, 344 U.S. 298, 310, 73 S.Ct. 307, 314 (1953)).

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These regulations are remedial in nature and are “intended to remedy disparities in bargaining positions between independent truck owner operators and motor carriers.”³ Courts interpreting the leasing regulations have noted the purposes of the regulations include eliminating or reducing opportunities for skimming and other illegal or inequitable practices.⁴ The concern for owner-operator abuse is as valid today as it was the day the Truth in Leasing Rules were promulgated. The rules continue to fulfill the FMCSA’s goals even though FMCSA takes no active role to enforce them.

The Truth-in-Leasing regulations were originally enforced by the Interstate Commerce Commission (“ICC”). *Id.* When the ICC was terminated in 1995,⁵ Congress created a private right of action allowing owner-operators to enforce the regulations. 49 U.S.C. § 14704(a). Under 49 U.S.C. § 14704(a)(1) an owner-operator “may bring a civil action for injunctive relief for violations of sections 14102 and 14103.”

Prior to 1996, the legally protected rights of owner-operators were enforceable through the Interstate Commerce Commission which had plenary enforcement authority.⁶ Among the

³ *Owner-Operator Indep. Drivers Ass’n, Inc. v. New Prime, Inc.*, 398 F.3d 1067, 1070 (8th Cir. 2005).

⁴ *See, e.g., Owner-Operator Indep. Drivers Ass’n, Inc. v. Swift Transp. Co.*, 367 F.3d 1108, 1110 (9th Cir. 2004) (“A primary goal of this regulatory scheme is to prevent large carriers from taking advantage of individual owner-operators due to their weak bargaining position.”).

⁵ *Interstate Commerce Commission Termination Act of 1995* (ICCTA), Pub. L. 104-88, 109 Stat. 803 (codified in various sections of Title 49, United States Code).

⁶ The ICC was fully engaged in dispute resolution between owner-operators and carriers under the Leasing Regulations. *Owner-Operator Indep. Drivers Ass’n v. New Prime*, 192 F.3d 778, 781 (8th Cir. 1999) (*New Prime I*). It had broad authority to enforce the Truth-in-Leasing regulations, under 49 U.S.C. § 11701 *et. seq.* (1995), including by administrative action or litigation. *See ICC v. Transcon Lines*, 513 U.S. 138, 145 (1995); *Shaw Warehouse Co. v. Southern R. Co.*, 308 I.C.C. 609, 633-634, 637 (1959) (cease and desist order); *ICC v. All-American, Inc.*, 505 F.2d 1360 (7th Cir. 1974) (court injunction); 49 U.S.C. § 16(8) and 49 U.S.C. § 11901(a) (civil forfeiture). *ICC v. Atlas Van Lines, Inc.*, 825 F.Supp. 771 (N.D. Tex. 1993) (action for injunction after settlement of escrow money damages claims). The courts also

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remedies available for carriers’ violations of the regulations were injunctions to prevent future illegal conduct and to ameliorate past violations, damages paid to owner-operators for violations, and restitution of funds wrongfully withheld from owner-operators.

Pursuant to the Interstate Commerce Commission Termination Act (“ICCTA”),⁷ Congress abolished the ICC, transferred authority over the Truth-in-Leasing regulations to the DOT, and created a private right of action for owner-operators to enforce the leasing regulations in federal court.⁸ Although many regulations of the former ICC were repealed with ICCTA, Congress affirmed and preserved the substantive requirements of the Truth-in-Leasing Regulations, unchanged. Congress indicated that enforcement was now to be accomplished primarily through the vehicle of private suits in federal court. DOT was specifically admonished not to use its scarce resources resolving owner-operator/carrier disputes, but rather to leave such disputes to the parties to resolve in federal court.⁹ Therefore, while the subsequently created FMCSA has assiduously avoided taking any action with regard to the Truth-in-Leasing Rules, they continue to serve an important purpose and aid the agency to meet its safety goals.

entertained complaints by owner-operators alleging violations of the regulations. *See, e.g., Jacobs v. Central Transport, Inc.*, 891 F.Supp. 1088, 1113 (E.D.N.C. 1995).

⁷ Pub.L. 104-88, 109 Stat. 803 (1995) (codified in sections of Title 49).

⁸ *New Prime I*, 192 F.3d at 785 (holding that 49 U.S.C. § 14704(a)(1) and (2) provides a private right of action for injunctive relief and damages for at least some violations of leasing regulations).

⁹ *ICC Termination Act of 1995: Report of the Committee on Transportation and Infrastructure on HR 2539*, 104th Congress, H.R. Rep. No. 104-311, at 87-88 (1995), reprinted in 1995 U.S.C.C.A.N. 793, 799-800 (emphasis added). *See also id.* at 117 (specifically referring to disputes arising under 49 U.S.C. § 14102, “[t]he Committee directs that upon transfer, DOT should not continue any dispute resolution functions regarding the ICC leasing rules, but rather only oversee the regulations”).

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C. CORRECTIONS TO STATEMENTS IN THE NOTICE AND SUPPORTING STATEMENTS ABOUT THE TRUTH-IN-LEASING RULES.

FMCSA makes several statements in the Notice and in the Supporting Statement to describe the Truth-in-Leasing Rules that are either incorrect or do not fully explain the function of the rules.

1. WHO IS PROTECTED BY THE LEASING RULES?

The Supporting Statement represents what it believes to be OOIDA’s description of the professional driver’s narrative. Contrary to the description in the Supporting Statement, professional drivers typically begin as employee drivers, use that experience to gain the confidence to one day buy their own truck and become an owner operator. Then after an average of 10 years operating under another motor carrier’s authority under the leasing rules, an owner-operator may decide to apply for federal operating authority.

But this narrative does not represent the segment of the motor carrier industry that churns through drivers at a rate of over 100% annual turnover – drivers who are also protected by the leasing rules. This industry churning of drivers includes the hiring of a high percentage of neophytes to the trucking industry. The trucking tabloids are full of advertisements promising to sell you a truck, teach you how to drive it, and give you the loads to pay for it. Under such a

model, unsophisticated persons with little or no experience in the trucking industry can enter into the owner-operator model. The Truth-in-Leasing Rules continue to provide valuable protection to all owner-operators by permitting them to manage the businesses, not feel pressured to drive when tired, and make and keep budgets for the proper maintenance of their vehicles. Each of these interests serves FMCSA's primary goal and function: motor carrier safety.

2. THE TRUTH-IN-LEASING RULES ASSIGN RESPONSIBILITY

The Notice and Supporting Statement incorrectly state that “[t]he rules specify what must be covered in the lease, but not how responsibilities must be divided. The parties to the lease determine the details between themselves.” This statement is not an accurate description of the Truth-in-Leasing Rules. The rules require motor carriers, rather than owner-operators, to fulfill numerous mandatory responsibilities and forebear from other practices.

For example,

- 49 C.F.R. '376.12 (c) gives the motor carrier exclusive possession and control of the commercial motor vehicle.
- '376.12 (e) requires the carrier to pay fines for overweight and oversized trailers
- '376.12(f) requires motor carriers to pay the owner-operator within 15 days,
- '376.12(g) require motor carriers to provide copies of freight bills to owner-operators
- Section 376.12(h) requires a motor carrier to make certain disclosures to an owner- operator before making deductions from compensation
- 376.12 (i) prohibits motor carriers from forcing owner-operators to purchase things from the motor carrier.
- 376.12(j) prescribes several motor carrier responsibilities for public liability and other insurance – a central purpose of the motor carrier/owner-operator relationship
- 49 C.F.R. 376.12(k) details the responsibilities of the carrier to the driver with respect to escrow funds.

A close examination of the leasing rules reveals that, rather than simply require a lease to record the division of responsibility bargained for between motor carriers and drivers, these rules

specifically place a number of requirements upon motor carriers that serve to protect owner-operators and the general public.

D. CRITIQUE OF THE BURDEN ESTIMATE FOR THE ICR

The Notice and the Supporting Statement essentially estimate that an average cost of complying with the leasing rules among all subject motor carriers. The estimated annual figures include approximately 5 minutes to make and provide a copy of a one-page leasing document to each of 311,000 owner-operators. The Agency estimates the copying cost of \$.01 per page and the hourly rate of the employee who makes the copy of the leasing rules to be \$16.70 per hour. Therefore, the Notice and Supporting Statement estimate a total labor cost to the industry of \$430,000 and a total copying cost of \$3,100.

OOIDA would like to suggest a change in the narrative supporting this financial analysis but not the final figure. First, often leases are more than one page because they contain contractual provisions beyond those required by the rules. Some carriers choose to express the required information in more lengthy documents. But on the whole, it is fair to say that the information that the Rules require to be disclosed may fit on a single page. On the other hand, while the Supporting Statement is correct that the typical lease is for a term of one year, those leases are regularly self-renewing and not reissued on an annual basis. Therefore, the burden of issuing copies of leases would be less for a motor who has a large percentage of owner-operators who automatically stay longer than 1 year. On the other hand, the trucking industry regularly reports an annual turnover rate of more than 100%. Therefore, even though as many as 50% of all of a motor carrier's leases will be automatically renewed after a year – saving the need for copying a new lease, a turnover rate of 100% a year means that motor carriers probably make as many new copies of their lease as they have drivers. As a whole, however, OOIDA does not believe that FMCSA has overestimated the cost of this burden.

As for other information collection requirements under the leasing rules, OOIDA agrees that it would be difficult to determine which percentage of owner-operators are paid as a

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percentage of the revenue and to measure the burden of providing copies of the freight bill or other documentation. Equally hard to calculate, but unstated in the ICR Notice, are the requirements to provide documentation to justify charge-backs (Section 376.12(h)), to provide a copy of an insurance certificate and policy upon driver request (Section 376.12(j)(2)), and to disclose on settlement sheets and in a final accounting amounts related to an escrow account created under the lease (376.12(k)(i)&(ii)) and 376.12(k)(4). OOIDA members have reported frequent motor carrier non-compliance with these rules – making the burden of their compliance both difficult to measure and largely theoretical. FMCSA may find ways to better fulfill the goals of these aspects of the leasing rules were it to seek comment from drivers on their actual experiences.

IV. CONCLUSION

Although compliance with these rules is not necessary for the day-to-day transactions of FMCSA, Congress affirmatively preserved these rules when it abolished the ICC and provided that they be privately enforced. One purpose of the Truth in Leasing Rules is to directly protect the public by ensuring that motor carriers take responsibility for and are liable for the operation of commercial motor vehicles that they lease from owner-operators. Motor carriers must maintain the required public liability insurance on owner-operators' vehicles. The rules also serve the policy goals of the agency by ensuring that motor carriers do not abuse their power over owner-operators in a manner that puts them on the economic ropes, causing them to drive harder and with fewer resources for equipment maintenance. The principle here is that is an economically sound owner-operator is a safe owner-operator. Neither the Notice nor the Supporting Statement describes these aspects of the rule sufficiently to alert the average member

of the public to provide comments illustrating the benefits of the rules as compared to the burdens the agency is attempting to measure.

OOIDA believes that the agency does its best to estimate the information collection burden with the data it has, but it has not overestimated that burden. The evidence shows that the burden of compliance with these rules is minimal. The information “collected” under the rules is critical to assuring that owner-operators have a stable and predictable economic environment that fosters good driver decision making and safe equipment maintenance.

FMCSA would serve

these interests better if it took an interest in motor carrier compliance with the rules.

OOIDA would scrutinize any suggestions to change these rules to make sure that burdens are not increased on drivers and protections not reduced.

Respectfully submitted,

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