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February 20, 2018

Docket Management Facility, U.S. Department of Transportation  
1200 New Jersey Avenue S.E.  
West Building, Ground Floor, Room W12-140  
Washington, DC 20590-0001

**Re: Docket No. FMCSA-2017-0360, Hours of Service of Drivers of Commercial Motor Vehicles; Proposed Regulatory Guidance Concerning the Transportation of Agricultural Commodities**

To Whom It May Concern:

The New York Farm Bureau (NYFB), New York State's largest general farm organization, appreciates the opportunity to comment on the Federal Motor Carrier Safety Administration's Proposed Regulatory Guidance Concerning the Transportation of Agricultural Commodities. NYFB represents the great diversity of New York agriculture from row crops, specialty crops, vintners, orchards, livestock, dairy and both conventional production and organic production and a wide range of operation sizes.

The U.S. Department of Transportation's (DOT) Federal Motor Carrier Safety Administration provides vital motor vehicle tools and functions to keep America's roadways safe. NYFB's members depend on the secure movement of agricultural commodities across New York State and the country, however, our organization has concerns with the definition of agricultural commodities under the Electronic Logging Device (ELD) regulation and the guidance for transporting those commodities. While NYFB continues to believe a delay of enforcement with respect to the electronic logging device (ELD) mandate is essential to prevent catastrophic outcomes for our members, the live animals we haul, and American consumers, we thank the DOT for continued focus on addressing underlying hours of service (HOS) concerns.

In concurrence with our national organization, the American Farm Bureau Federation, we urge the Department to clarify the transportation of agricultural commodities as it relates to the ELD requirements and the Hours of Service (HOS) rule. The standards of transporting goods across the country should not compromise the health and welfare of animals and the safety of food products.

While many of our members and agricultural haulers may be able to utilize the 150-air mile agricultural commodity exemption described in 49 CFR 395.1 (k)(1), there still remains questions about the applicability to those hauling agricultural commodities. There also is lack of clarity among law enforcement regarding the 150-air mile exemption as it applies to agricultural

commodities. The need for clarity is particularly pressing when coupled with the unforgiving realities of using ELD technology. Thus, NYFB provides the following comments:

1. NYFB agrees with the proposed guidance that time spent operating unladen vehicles traveling to or from the source of an agricultural commodity should be considered exempt time. Many times, drivers will haul fresh produce to locations like Hunts Point Produce Market in New York City and not have anything to haul back to the farm. However, it is imperative that both trips be counted as hauling agricultural commodities to allow greater flexibilities when hauling perishable produce and then allowing the driver to return home.
2. NYFB agrees with the proposed guidance that exiting the 150-air mile radius of an agricultural commodity source does not prevent the driver from applying the 150-air mile exemption to the first 150-air miles driven from the source of the agricultural commodity. By exempting the first 150-air miles for those hauling agricultural commodities, it will allow for those individuals hauling livestock to have more drive time available to them, which is imperative for animal welfare, especially during extreme temperatures.
3. NYFB believes that grain elevators and/or livestock markets are a “source” of agricultural commodities. Often farmers will pick up grain or animals for their operations at these locations and transport them back to their farm. It is important that the guidance provided by DOT outlines a clear interpretation of the term, “agricultural commodity.”
4. NYFB holds that each farm, grain elevator, livestock market or other location where an agricultural commodity is loaded for shipment is a “source” of an agricultural commodity and the exemption contemplated by 49 CFR 395.1(k)(1) should apply as the statute indicates to each source. Some farms in New York have packing or storage facilities that are not located on the farm so it is important that these locations be defined as sources of agricultural commodities to allow greater flexibility when transporting agricultural commodities.

In addition, many times drivers are picking up livestock at multiple livestock markets, and it is unclear when they should begin their trip or when the exemption applies. As an example, if a livestock hauler begins his drive in Albany, New York with an empty trailer, and travels to Morristown, Vermont (187 miles away) to pick up cattle and then drives to Herkimer, New York (220 miles away) to drop them off at a transfer station and then drives back to Albany with an empty trailer, at which point does the 150-air mile exemption apply and could the driver use the 150-air mile exemption from multiple stops? Would the driver be exempt 150-miles from Albany, then 150-miles exempt from Morristown, and 150-miles exempt from Herkimer, if all these locations were treated as sources of agricultural commodities? NYFB is concerned that a driver hauling livestock or live fish would be forced to pull off the road and rest for 10 hours before being able to drive again. This simply does not work due to the health and safety of the animals.

5. NYFB believes the exemption is not limited to a single application per day, instead, as clearly laid out by Congress, it applies each time an agricultural commodity is loaded for shipment at a source. The Moving Ahead for Progress in the 21st Century Act or “MAP-21” amended the Motor Carrier Safety Improvement Act of 1999 (49 U.S.C. § 31136 note) to state regulations

regarding maximum driving and on-duty time for drivers do not apply to “[d]rivers transporting agricultural commodities from the source of the agricultural commodities to a location within a 150-air-mile radius from the source.” (emphasis added). As a result, 49 CFR 395.1(k)(1) was promulgated. Those hauling agricultural commodities including livestock can utilize the flexibility contemplated by the regulation as their cargo is defined as an “agricultural commodity” under 49 CFR 395.2. An agricultural commodity is “any agricultural commodity, nonprocessed food, feed, fiber, or livestock (including livestock as defined in sec. 602 of the Emergency Livestock Feed Assistance Act of 1988 [7 U.S. C. 1471] and insects).”

NYFB also believes that all agricultural commodities should be included in this definition including nursery and greenhouse crops. Nursery and greenhouse crops are customarily classified as agricultural; the widespread presumption is that they are covered under this exemption (as they should be). Nursery and greenhouse production has long been federally recognized as agriculture, and those crops have long been recognized as agricultural crops, or commodities, or products (these terms all being synonymous in this context). The definition of agricultural commodities should also be clarified to include turf and sod.

There also remains questions regarding the transportation of milk and at which point milk is an agricultural commodity versus a processed food. Would milk that is being driven from a farm to a processing facility be considered an agricultural commodity? NYFB would argue that milk that is coming from a farm that is still in a “raw form” still be considered an agricultural commodity. Moreover, in major dairy producing regions, like New York State, milk haulers commonly pick up milk from multiple farms before transporting it to the plant or the terminal. For that reason NYFB believes it is important that the carrier is able to utilize the 150-air mile agriculture exemption at each pickup location. It is inefficient to transport a trailer that is not full, so when a carrier is in a rural part of the state this flexibility is important in allowing them to operate as efficiently as possible to load their trailer and still have the ability to continue to the final destination. Also would milk that has been pasteurized and bottled be considered an agricultural commodity or a food product? Many times, small farmers will diversify their operations by adding processing facilities to bottle their own milk. Would the milk that has been bottled and then transported to retail locations still be considered an agricultural commodity?

## **A. Responses to Proposed Guidance**

### **Question 34: Unladen vehicles**

NYFB agrees with the DOT’s interpretation that unladen vehicles traveling to and from a source of an agricultural commodity should be able to take advantage of the agricultural commodity exemption even though their commercial motor vehicle (CMV) is not actively hauling an agricultural commodity while unladen. Any interpretation to the contrary would be far narrower than necessary and would render the exemption less useful to drivers, especially those hauling livestock or perishable produce or plants.

### **Question 35: Loads beyond the 150-air mile radius**

Although NYFB agrees with the general idea of the proposed guidance that agricultural commodity haulers benefit from the 150-air mile “source” exemption even if they exit the 150-air mile radius of that “source,” we disagree with the proposed guidance as written. The guidance

indicates “[o]nce the hours of service rules have begin [sic] to apply on a given trip, they continue to apply for the duration of that trip, until the driver crosses back into the area within 150 air-miles of the original source of the commodities and is returning to that source.” The statute, as enumerated more fully below, clearly indicates that each farm, grain elevator, livestock market or other location where an agricultural commodity is loaded for shipment is a “source” of an agricultural commodity and, as such, each act of “transporting agricultural commodities from the source” is entitled to the 150-air mile radius exemption described in 49 CFR 395.1(k)(1).

There is no statutory mandate to limit a driver’s use of the 150-air mile exemption to the first stop on a trip. Interpreting the statute and the related regulation in such a narrow and restrictive way would only serve to confuse the issue by adding another term, “trip,” to the discussion and make compliance with and enforcement of the existing law more challenging.

Thus, NYFB request the DOT modify its guidance and response to Question 35 to simply state: “The exception applies to transportation during the initial 150-air miles from the source of the commodity. Once a driver operates beyond the 150-air mile radius of the source, part 395 applies. Starting at zero from that point, the driver must then begin recording his or her duty time, and the limits under the 11-hour, 14-hour, and the 60-/70-hour rules apply.”

## **B. Responses to Request for Comments**

Grain elevators and livestock markets are sources of agricultural commodities. Although the statute and related regulation do not explicitly define what a “source” of an agricultural commodity might be, logic and commonsense indicate grain elevators and livestock markets are a “source.”

The challenges Congress sought to address by giving agricultural commodity haulers some flexibility are all relevant to grain elevators and livestock markets. Animals are unpredictable at livestock markets just like at a farm, they can balk at the loading chute, be uncooperative, and need to be loaded carefully in accordance with appropriate animal husbandry techniques. All of this coupled with oftentimes long post-sale or load-out lines makes applying the flexibility afforded to a “source” of livestock to livestock markets or agricultural commodity at a grain elevator a logical conclusion. Had Congress wanted to narrowly define the “source” of an agricultural commodity to exclude grain elevators or livestock markets, it would have done so. Thus, the Agency should interpret grain elevators and livestock markets to be a “source” of agricultural commodities.

Although informal guidance has indicated the Agency’s belief that a driver may only use the 150-air mile exemption once per trip, the plain language of the statute indicates a broader interpretation is appropriate. Nowhere in the statute or the relevant regulation is the concept of such a “trip” contemplated or defined. As such, applying the exemption only to the first “source” of any given “trip” is a narrower interpretation than the statute calls for. Such an interpretation also opens the use of the exemption to additional confusion in situations where some agricultural commodities or livestock are unloaded and others are picked up and calls for further subjective interpretation as to when a “trip” is started and concluded. Further, the issues associated with

loading and waiting at the source of an agricultural commodity do not dissipate after the first loading occurs at a “source.”

Many times livestock haulers will travel with empty trailers to an auction/ sale barn to pick up a load of cattle. If during the time that the trailer is empty is counted as exempt time, which will allow the driver more exempt time to travel and ensures the ability to haul animals safely to the final destination.

In addition and as already touched on, the unique nature of nursery, greenhouse, and other specialty crops really creates the rationale underlying the agricultural exemption. Specialty crops are typically highly seasonal, perishable, affected by the elements, the availability of inputs such as water and labor, and require timely access to markets. A delay of a day or two can often be make-or-break in terms of marketability or hitting the viable market window. Farmers in New York who grow perishable commodities like green beans have a very narrow opportunity to get their green beans, once picked, from the field to the processing facility, often in a matter of 12-15 hours after picking. During peak season, farmers may have up to 100 tons of green beans per day traveling to processing facilities, and it is important that the 150-air mile radius be as flexible as possible to allow for timely delivery due to the economic implications. This is very similar to other perishable products that are being harvested throughout New York State.

There are also difficulties with farmers having enough time to ship their produce into important markets like the Hunts Point Produce Market in New York City. Farmers have scheduled times that they are able to deliver produce and if the driver gets held up to due traffic or weather, this may cause the driver to exhaust their 11 hours of drive time and have to stop for 10 hours. If the driver misses the scheduled appointment, the farmer may not be able to sell that produce for a higher value due to either too much of the same produce on the market or a decrease in quality.

If the 150-air mile radius does not allow flexibility for those hauling perishable goods, they may be pressured into driving at unsafe speeds in order to get to their final destination within their 11-hour drive time. This defeats the purpose of improving highway safety by limiting drive time and will instead push drivers to fit in as many miles as they can in a short window of time.

As such, the DOT should apply the agricultural commodity exemption to each “source” from which agricultural commodities are gathered as contemplated by 49 U.S.C. § 31136. The DOT should not create a new and confusing interpretation that would limit agricultural commodity haulers to only using the exemption at the first “source” of their “trip” as Congress did not contemplate the concept of a “trip” and clearly intended each farm, grain elevator, livestock market or other location where an agricultural commodity is loaded for shipment to be a “source” of an agricultural commodity.

### **C. Conclusion**

NYFB appreciates the opportunity for continued dialog and clarity. NYFB again urges the DOT to grant a waiver and limited exemption from the ELD mandate while definitions such as the “source” of agricultural commodities are solidified. This delay will enable FMCSA and the agricultural industry to undertake necessary training and outreach to fully understand and apply

existing flexibilities and how they function with the new ELD devices. NYFB would also request that the FMCSA work with the agricultural community to develop guidance that is easily understood by both farmers and law enforcement to ensure correct interpretation and administration of the regulation and guidance.

NYFB shares DOT's commitment to safety and appreciates the challenges FMCSA must address in formulating applicable safety standards across a wide range of circumstances involving motor carriers. We thank you for the opportunity to share these comments and appreciate your thoughtful consideration of this matter. NYFB is committed to working with the agency to address these concerns while still maintaining safety on our roads.

Sincerely,

A handwritten signature in black ink, appearing to read 'David Fisher', with a stylized flourish at the end.

David Fisher  
President, New York Farm Bureau