

DEPARTMENT OF TRANSPORTATION

[4910-EX-P]

Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2007-28043]

Hours of Service (HOS) of Drivers; Renewal of American Pyrotechnics Association (APA) Exemption from the 14-Hour Rule during Independence Day Celebrations

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

ACTION: Notice of renewal of exemption; request for comments.

SUMMARY: The FMCSA announces the renewal of the exemption of specified members of the American Pyrotechnics Association (APA) from FMCSA's prohibition on driving commercial motor vehicles (CMVs) after the 14th hour after the driver comes on duty. The exemption granted to 53 motor carriers and approximately 3,000 CMV drivers is applicable during the periods June 28 - July 8, 2011, and June 28 - July 8, 2012, inclusive. The requested renewal of a prior exemption for one motor carrier is not being granted. Drivers who operate applicable CMVs in conjunction with staging fireworks shows celebrating Independence Day will be allowed to exclude off-duty and sleeper-berth time of any length from the calculation of the 14 hours. These drivers will continue to be subject to the 14-hour cumulative on-duty limit, the 11-hour driving time limit, and the 60- and 70-hour weekly on-duty limits. The FMCSA believes that with the terms and conditions of this exemption in effect, designated APA-member motor carriers will maintain a level of safety that, at a minimum, is equivalent to the level of safety that would be obtained by complying with the regulation.

DATES: This renewed exemption is effective during the periods of June 28 (12:01 a.m.) through July 8, 2011 (11:59 p.m.) and from June 28 (12:01 a.m.) through July 8, 2012

(11:59 p.m.). Comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments identified by Federal Docket Management System Number FMCSA-2007-28043 by any of the following methods:

- **Federal eRulemaking Portal:** Go to www.regulations.gov. In the ENTER KEYWORD OR ID box enter FMCSA-2007-28043 and click on the tab labeled SEARCH. On the ensuing page, click on any tab labeled SUBMIT A COMMENT on the extreme right of the page and a page should open that is titled “Submit a Comment.” You may identify yourself under section 1, ENTER INFORMATION, or you may skip section 1 and remain anonymous. You enter your comments in section 2, TYPE COMMENT & UPLOAD FILE. When you are ready to submit your comments, click on the tab labeled SUBMIT. Your comment is then submitted to the docket; and you will receive a tracking number.
- **Fax:** 1-202-493-2251.
- **Mail:** Docket Management Facility: U.S. Department of Transportation, 1200 New Jersey Avenue, SE, West Building, Ground Floor, Room W12-140, Washington, D.C. 20590-0001.
- **Hand Delivery:** West Building, Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE, Washington, DC, between 9 a.m. and 5 p.m. e.t., Monday through Friday, except Federal holidays.

Instructions: All submissions must include the Agency name and docket number. For detailed instructions on submitting comments and additional information

on the exemption process, see the Public Participation heading below. Note that all comments received will be posted without change to www.regulations.gov, including any personal information provided. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or comments received, go to www.regulations.gov at any time, and in the ENTER KEYWORD OR ID box enter FMCSA-2007-28043 and click on the tab labeled SEARCH.

Privacy Act: Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement published in the **Federal Register** on January 17, 2008 (73 FR 3316) or you may visit <http://edocket.access.gpo.gov/2008/pdf/E8-785.pdf>.

Public Participation: The www.regulations.gov Web site is generally available 24 hours each day, 365 days each year. You can obtain electronic submission and retrieval help and guidelines under the "help" section of the www.regulations.gov web site. If you want us to notify you that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments online.

FOR FURTHER INFORMATION CONTACT: Ms. Christine Hydock, FMCSA Driver and Carrier Operations Division, Office of Bus and Truck Standards and Operations, Telephone: 202-366-4325. E-mail: MCPSD@dot.gov.

SUPPLEMENTARY INFORMATION:

APA Application for Exemption Renewal

The hours-of-service (HOS) rules in 49 CFR 395.3(a)(2) prohibit a property-carrying CMV driver from driving after the 14th hour after coming on duty following 10 consecutive hours off duty. Under 49 U.S.C. 31315 and 31136(e), FMCSA may renew an exemption from the HOS requirements in 49 CFR 395.3(a)(2) for a 2-year period if it finds “such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption.” The procedures for requesting an exemption (including renewals) are prescribed in 49 CFR part 381.

The APA, a trade association representing the domestic fireworks industry, had previously requested and received an exemption from this HOS subsection for certain motor carrier members. The APA has applied for renewal of that exemption. A copy of the request for renewal is included in the docket referenced at the beginning of this notice. A copy of APA’s original 2004 request for waiver or exemption is also in the docket. The FMCSA has evaluated the APA application for renewal on its merits and decided to renew the exemption for 53 companies for a two-year period, and not renew the exemption requested for one company. The list of APA-member companies covered by the exemption from 49 CFR 395.3(a)(2) is included as an Appendix to this Notice.

As stated in APA’s 2004 request for waiver or exemption, the CMV drivers employed by APA-member companies are trained pyrotechnicians, and hold commercial driver’s licenses (CDLs) with hazardous materials (HM) endorsements. They transport fireworks and equipment by CMV on a very demanding schedule during a brief Independence Day period, often to remote locations. After they arrive, the APA drivers are responsible for set-up and staging of the fireworks shows.

In 2009, FMCSA granted a limited exemption to 14 new APA-member motor carriers (74 FR 29266, June 19, 2009) and renewed 61 exemptions of APA-member motor carriers (74 FR 29264, June 19, 2009) for their CMV transportation of fireworks for Independence Day displays in 2009 and 2010. The exemption was limited to the period from June 28 to July 8, inclusive, in 2009 and 2010. Previously, the Agency had granted a waiver to APA for a similar exception for the 2004 Independence Day period, and two-year exemptions for the 2005-2006 and 2007-2008 periods. The Agency is not aware of any adverse safety events related to APA operations during these Independence Day periods.

The APA is seeking renewal of the 2009 exemptions for the 2011 and 2012 Independence Day periods because it argues that compliance with the current 14-hour rule by its members would impose a substantial economic hardship on numerous cities, towns and municipalities, as well as its member companies. To meet the demand for fireworks under the current HOS rules, APA-member companies claim they would be required to hire a second driver for most trips. The APA argues that the result would be a substantial increase in the cost of the fireworks shows – beyond the means of many of its members' customers – and that many Americans would be denied this important component of the celebration of Independence Day.

Method to Ensure an Equivalent or Greater Level of Safety

The APA believes that renewal of the exemption will not adversely affect the safety of the fireworks transportation provided by these motor carriers. According to APA, its member motor carriers have operated under this exemption for seven previous Independence Day periods without a reported motor carrier safety incident. Moreover, it

asserts, without the extra duty-period time provided by the exemption, safety would decline because APA drivers would be unable to return to their home base after each show. They would be forced to park the CMVs carrying HM 1.1G, 1.3G and 1.4G products in areas less secure than the motor carrier's home base. As a condition of holding the exemption, each motor carrier is required to notify FMCSA within 5 business days of any accident (as defined in 49 CFR 390.5) involving the operation of any its CMVs while under this exemption. To date, FMCSA has received no accident notifications, nor is the Agency aware of any accidents reportable under terms of the exemption.

In its original exemption request, APA argued that the operational demands of this unique industry minimize the risks of CMV crashes. In the last few days before the Independence Day holiday, these drivers transport fireworks over relatively short routes from distribution points to the site of the fireworks display, and normally do so in the early morning when traffic is light. At the site, they spend considerable time installing, wiring, and safety-checking the fireworks displays, followed by several hours off duty in the late afternoon and early evening prior to the event. During this time, the drivers are able to rest and nap, thereby reducing or eliminating the fatigue accumulated during the day. Before beginning another duty day, these drivers must take 10 consecutive hours off-duty, the same as other CMV drivers. FMCSA believes that these APA operations, conducted under the terms and conditions of this limited exemption, will provide a level of safety that, at a minimum, is equivalent to the level of safety achieved without the exemption.

Advocates for Highway and Auto Safety (Advocates) June 5, 2009, Comments

During the exemption renewal process in 2009, FMCSA's June 19, 2009, notice did not acknowledge or respond to comments submitted by Advocates. Although Advocates timely filed its comments on June 5, prior to the June 8 deadline for responding to the Agency's May 22 notices (74 FR 24066 and 74 FR 24069), those comments were not available at www.regulations.gov, the Web site at which docket comments are posted, until after the comment period had closed. By the time the personnel responsible for managing this Web site for all Federal regulatory matters had posted Advocates' comments to the electronic docket, FMCSA staff had prepared its draft notice of final disposition. Because of the time constraints for issuing a decision in time for the 2009 Independence Day celebration, FMCSA issued the notice of final disposition on June 19, 2009 (74 FR 29264), without the Advocates' comments.

In consideration of the administrative delay in the posting of the Advocates' comments to the docket, FMCSA published a notice requesting public comment on March 25, 2011, pertaining to the safety impact of the exemption prior to consideration of any subsequent requests for renewal of the exemption (76 FR 16852). The deadline for submitting comments was April 25, 2011. As of June 20, 2011, no comments had been submitted to the public docket. However, because the Agency did not specifically address Advocates' comments in 2009, we will do so now.

FMCSA Response to Advocates' 2009 Comments

Advocates argue that the Agency is relying on uncorroborated statements about APA members' work schedules and safety management controls. The Agency acknowledges that it does not, as a matter of routine practice, review data on the actual schedules drivers are working during the period of the exemption. However, the

participating carriers are generally required under 49 CFR 395.8 to retain records of duty status information for a period of 6 months from the date the records are generated, as is the case for all interstate drivers subject to the recordkeeping provisions of the HOS rules. Therefore, in the event of a crash or unintentional release or detonation of hazardous materials, the carriers would be required to produce, upon demand, records to document the actual work and rest hours of the drivers in question, which would enable the Agency to assess the likelihood of fatigue being a factor in the adverse event. Also, the Agency retains full regulatory jurisdiction to conduct investigations of allegations of violations of the Federal safety or hazardous materials regulations by these carriers, including allegations of violations of the terms and conditions of the exemption.

With regard to participating carriers' safety management controls, the Agency routinely reviews the safety performance records of all carriers prior to granting an exemption. Any carrier with safety management deficiencies that would call into question its ability to operate safely under the terms and conditions of the exemption is excluded from operating under the exemption. Carriers that have violation rates that meet or exceed the thresholds under the Agency's Compliance, Safety, Accountability (CSA) Safety Measurement System are subject to enforcement interventions to address the deficiencies in their safety management controls.

As for Advocates' charge that the exemption process is a procedural and substantive abuse of regulatory authority, the Agency's actions are consistent with the statutory authority provided under 49 U.S.C. 31315 concerning waivers, exemptions and pilot programs. The notice-and-comment process associated with exemption applications is consistent with notice-and-comment rulemaking procedures. In both cases, FMCSA

offers for public comment a matter being considered for action, and the final action taken by the Agency must consider the public comments received. The Agency provides a formal written response to substantive concerns raised by the commenters via a **Federal Register** notice to bring to closure the matter before the Agency. The Agency may agree or disagree with commenters. Any decision to move forward with the exemption is not an abuse of authority, but an exercise of judgment based on the information in the public record.

In that regard, the Agency does not consider the granting of APA's exemption application or requests for renewal to represent a "major departure" from the HOS regulations, as argued by Advocates. While the participating carriers would be provided with limited relief from 49 CFR 395.3(a)(2), which prohibits a property-carrying CMV driver from driving after the 14th hour after coming on duty following 10 consecutive hours off duty, drivers will be prohibited from driving at any time after accumulating 14 hours of on-duty time. Therefore, drivers would not be allowed to drive CMVs in interstate commerce after accumulating 14 hours of on-duty time, following 10 consecutive hours off-duty. The participating drivers will continue to be subject to the 11-hour driving time limit following 10 consecutive hours off duty, and the 60- and 70-hour weekly on-duty limits. The FMCSA believes that with the terms and conditions of this exemption in effect, APA-member motor carriers will maintain a level of safety that is equivalent to, or greater than, the level of safety that would be obtained by complying with the regulation.

Non-renewal of a Prior Exemption

During its review of the safety history of applicants for this exemption, FMCSA examined records of the Pipeline and Hazardous Materials Safety Administration (PHMSA), which has jurisdiction over certain aspects of the transportation of hazardous materials, as specified in the Hazardous Materials Regulations (HMR)(49 CFR parts 105-185). PHMSA records indicate that one of the APA-member applicants for this exemption – Melrose Pyrotechnics, Inc. (Melrose), PO Box 302, Kingsbury, IN 46345, USDOT 434586 – was investigated on November 23, 2009, and that PHMSA investigators discovered five violations regarding the shipment of hazardous materials, one of which was coded as “high severity” (Case 09436056). This resulted in an enforcement action that included a total of \$24,800 in penalties. In view of this unfavorable safety information, FMCSA is not granting APA’s request to include Melrose among the exempted motor carriers.

Terms and Conditions of the Exemption

Period of the Exemption

The exemption from the requirements of 49 CFR 395.3(a)(2) is effective June 28 through July 8, 2011, inclusive, and from June 28 through July 8, 2012, inclusive. The exemption expires on July 8, 2012, at 11:59 p.m.

Extent of the Exemption

This exemption is restricted to drivers employed by the 53 companies, firms and entities listed in the appendix to this notice. The drivers will be given a limited exemption from the requirements of 49 CFR 395.3(a)(2). This regulation prohibits a driver from driving after the 14th hour after coming on duty and does not permit off-duty periods to extend the 14-hour limit. Drivers covered by this exemption may exclude off-

duty and sleeper-berth time of any length from the calculation of the 14-hour limit. This exemption is contingent on each driver driving no more than 11 hours in a 14-hour period. The exemption is further contingent on each driver having a full 10 consecutive hours off duty following 14 hours on duty prior to beginning a new driving period. The carriers and drivers must comply with all other requirements of the Federal Motor Carrier Safety Regulations (49 CFR parts 350-399) and Hazardous Materials Regulations (49 CFR parts 105-180).

Preemption

During the periods the exemption is in effect, no State shall enforce any law or regulation that conflicts with or is inconsistent with this exemption with respect to a person or entity operating under the exemption (49 U.S.C. 31315(d)).

FMCSA Notification

Exempt motor carriers must notify FMCSA within 5 business days of any accidents (as defined by 49 CFR 390.5) involving the operation of any of its CMVs while under this exemption. The notification must include the following information:

- a. Date of the accident,
- b. City or town, and State, in which the accident occurred, or which is closest to the scene of the accident,
- c. Driver's name and driver's license number,
- d. Vehicle number and State license number,
- e. Number of individuals suffering physical injury,
- f. Number of fatalities,
- g. The police-reported cause of the accident,

- h. Whether the driver was cited for violation of any traffic laws, or motor carrier safety regulations, and
- i. The total driving time and the total on-duty time of the CMV driver at the time of the accident.

Termination

The FMCSA does not believe the motor carriers and drivers covered by this exemption will experience any deterioration of their safety record. However, should this occur, FMCSA will take all steps necessary to protect the public interest, including revocation of the exemption. The FMCSA will immediately revoke the exemption for failure to comply with its terms and conditions. Exempt motor carriers and drivers are subject to FMCSA monitoring while operating under this exemption.

Request for Comments

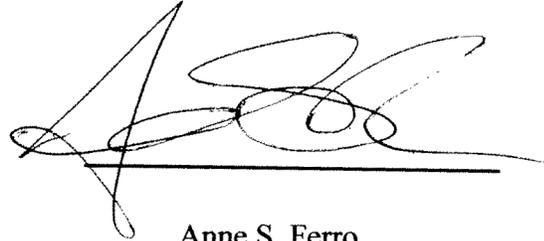
In accordance with 49 U.S.C. 31315(b)(4) and 31136(e), FMCSA requests public comments on the renewal of APA's exemption from the requirements of 49 CFR 395.3(a)(2). The FMCSA will review all comments received and determine whether the renewal of the exemption is consistent with the requirements of 49 U.S.C. 31315 and 31136(e). Comments received after the comment closing date will be filed in the public docket and will be considered to the extent practicable.

Interested parties or organizations possessing information that would show that any or all of these APA member companies are not achieving the requisite

statutory level of safety should immediately notify FMCSA. The Agency will evaluate any information submitted and, if safety is being compromised or if the continuation of the exemption is inconsistent with 49 U.S.C. 31315(b)(4) and 31136(e), FMCSA will immediately take steps to revoke the exemption of the company or companies and drivers in question.

Issued on:

JUN 9 2 2011

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke at the end, positioned above a solid horizontal line.

Anne S. Ferro
Administrator

**Appendix to Notice of Renewal of American Pyrotechnics Association (APA)
Exemption from the 14-Hour HOS Rule during 2011 and 2012 Independence Day
Celebrations**

| | Motor Carrier | Address 1 | Address 2 | Dot # |
|------------|---|-------------------------------------|-------------------------------|--------------|
| 1. | Alonzo Fireworks Display, Inc. | 12 County Rd 75 | Mechanicsville, NY 12118 | 420639 |
| 2. | American Fireworks Company | 7041 Darrow Road | Hudson, OH 44236 | 103972 |
| 3. | Arrowhead Fireworks Co., Inc. | 3625 Normanna Rd | Duluth, MN 55803 | 125673 |
| 4. | Atlas Enterprises Inc. | 6601 Nine Mile Azle Rd | Fort Worth, TX 76135 | 0116910 |
| 5. | Atlas Pyrovision Productions, Inc. | 136 Old Sharon Road | Jaffrey, NH 03452 | 789777 |
| 6. | B.J. Alan Company | 555 Martin Luther King, Jr Blvd. | Youngstown, OH 44502-1102 | 262140 |
| 7. | Cartwright Fireworks, Inc. | 1608 Keely Road | Franklin, PA 16323 | 882283 |
| 8. | Central States Fireworks, Inc. | 18034 Kincaid Street | Athens, IL 62613 | 1022659 |
| 9. | Colonial Fireworks Company | 5225 Telegraph Road | Toledo, OH 43612 | 177274 |
| 10. | Entertainment Fireworks, Inc. | PO Box 7160 | Olympia, WA 98507- 7160 | 680942 |
| 11. | Falcon Fireworks | 3411 Courthouse Road | Guyton, GA 31312 | 1037954 |
| 12. | Fireworks & Stage FX America | PO Box 488 | Lakeside, CA 92040 | 908304 |
| 13. | Fireworks by Grucci, Inc. | 1 Grucci Lane | Brookhaven, NY 11719 | 324490 |
| 14. | Fireworks Productions of Arizona, Ltd. | 17034 S 54th Street | Chandler, AZ 85226 | 948780 |
| 15. | Fireworks West Internationale | 3200 West 910 North | Logan, UT 84321 | 245423 |
| 16. | Garden State Fireworks, Inc. | 383 Carlton Road | Millington, NJ 07946 | 435878 |
| 17. | Gateway Fireworks Displays | PO Box 39327 | St Louis, MO 63139 | 1325301 |
| 18. | Global Pyrotechnics Solutions, Inc. | 10476 Sunset Drive | Dittmer, MO 63023 | 1183902 |
| 19. | Great Lakes Fireworks | 24805 Marine | Eastpointe, MI 48021 | 1011216 |
| 20. | Hamburg Fireworks Display Inc. | 4300 Logan Lancaster Rd | Lancaster, OH | 395079 |
| 21. | Hollywood Pyrotechnics, Inc. | 1567 Antler Point | Eagan, MN 55122 | 1061068 |
| 22. | Ingram Enterprises dba Fireworks over America | 6597 W Independence Drive | Springfield, MO 65802 | 0268419 |
| 23. | Island Fireworks Company | N735 825th St | Hager City, WI 54014 | 414583 |
| 24. | J&M Displays, Inc. | 18064 170th Ave | Yarmouth, IA 52660 | 377461 |
| 25. | Jake's Fireworks/Fireworks Spectacular | 2311 A West 4th St | Pittsburg, KS 66762 | 449599 |
| 26. | Johnny Rockets Fireworks Display Co. | 4410 N. Hamilton | Chicago, IL 60625 | 1263181 |
| 27. | Kellner's Fireworks Inc. | 478 Old Rte 8 | Harrisville, PA | 481553 |
| 28. | Lantis Productions dba Lantis Fireworks and Lasers | PO Box 491 | Draper, UT 84202 | 195428 |
| 29. | Legion Fireworks Co., Inc. | 10 Legion Lane | Wappingers Falls, NY 12590 | 554391 |

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|------------|---|-----------------------------|------------------------------|---------|
| 30. | Mad Bomber/Planet Productions | PO Box 294 | Kingsbury, IN 46345 | 777176 |
| 31. | Montana Display Inc | 9480 Inspiration Drive | Missoula, MT 59808 | 1030231 |
| 32. | Precocious Pyrotechnics, Inc. | 4420-278th Ave NW | Belgrade, MN 56312 | 435931 |
| 33. | Pyro Engineering Inc., dba/Bay Fireworks | 110 Route 110, Suite 102 | Huntington Station, NY 11746 | 530262 |
| 34. | Pyro Shows Inc. | 701 W. Central Ave | LaFollette, TN 37766 | 456818 |
| 35. | Pyro Spectacluars, Inc. | 3196 N Locust Ave | Rialto, CA 92376 | 029329 |
| 36. | Pyrotecnico | 302 Wilson Rd. | New Castle, PA 16105 | 526749 |
| 37. | Pyrotecnico of Louisiana, LLC | 60 West Ct | Mandeville, LA 70471 | 548303 |
| 38. | Rainbow Fireworks, Inc. | 76 Plum Ave. | Inman, KS 67546 | 1139643 |
| 39. | RES Specialty Pyrotechnics | 21595 286th St | Belle Plaine, MN 56011 | 523981 |
| 40. | Rich Brothers Company | 700 S Marion Rd | Sioux Falls, SD 57106 | 001356 |
| 41. | Rozzi's Famous Fireworks, Inc. | 11605 North Lebanon Rd | Loveland, OH 45140 | 0483686 |
| 42. | Skyworks, Ltd. | 13513 W. Carrier Rd. | Carrier, OK 73727 | 1421047 |
| 43. | Spielbauer Fireworks Co, Inc. | 220 Roselawn Blvd | Green Bay, WI 54301 | 046479 |
| 44. | Stonebraker-Rocky Mountain Fireworks Co. | 5650 Lowell blvd, Unit E | Denver, CO 80221 | 0029845 |
| 45. | Vermont Fireworks Co., Inc./Northstar Fireworks Co., Inc. | 2235 Vermont Route 14 South | East Montpelier, VT 05651 | 310632 |
| 46. | Wald & Co., Inc. | PO Box 319 | Greenwood, MO 64034-0319 | 087079 |
| 47. | Walt Disney Parks and Resorts US Inc. | Box 10000 | Lake Buena Vista, FL 32830 | 1025131 |
| 48. | Western Enterprises, Inc. | PO Box 160 | Carrier, OK 73727 | 203517 |
| 49. | Winco Fireworks Int. LLC | 1992 NW Hwy 50 | Lone Jack, MO | 259688 |
| 50. | Wolverine Fireworks Display, Inc | 205 W Seidlers | Kawkawlin, MI | 376857 |
| 51. | Victory Fireworks Inc. | 579 Vincent Lane | Ellsworth, WI 54011 | 539751 |
| 52. | Young Explosives Corp | P.O. Box 18653 | Rochester, NY | 450304 |
| 53. | Zambelli Fireworks MFG, Co., Inc. | PO Box 1463 | New Castle, PA 16103 | 033167 |