

**BEFORE THE
OFFICE OF THE FEDERAL REGISTER
NATIONAL ARCHIVES AND RECORDS ADMINISTRATION**

**COMMENTS OF THE
OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC.**

**IN RESPONSE TO NARA'S
ANNOUNCEMENT OF A PETITION FOR RULEMAKING AND
REQUEST FOR COMMENTS - INCORPORATION BY REFERENCE**

NARA 12-0002

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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 Announcement of a petition for rulemaking and request for comments – Incorporation by Reference - published by the Office of the Federal Register, National Archives and Records Administration (“NARA” or “Agency”), NATA 12-0002, 77 Fed. Reg. 11414 (February 27, 2012)(the “Notice”). The Notice requests comments on a petition for rulemaking on the question of whether material incorporated by reference into federal rules should be required to be freely available to the public, such as on public websites, in order to meet the long standing requirement that material incorporated by reference be “reasonably available.” Because OOIDA’s members are subject to law enforcement actions that rely on copyrighted materials that are, in some instances, unavailable to the public, and in other instances only available for purchase, OOIDA supports this petition for rulemaking.

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 151,000 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:

Owner-Operator Independent Drivers Association, Inc.
P.O. Box 1000
1 NW OOIDA Drive
Grain Valley, Missouri 64029
www.ooida.com

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. OOIDA's mission includes the promotion and protection of the interests of independent truckers on their economic well-being, their working conditions, or the safe operation of their motor vehicles on the nation's highways. Small business motor carriers and their drivers are the subject of rules and inspection regimes created by a quasi-governmental organization, the Commercial Vehicle Safety Alliance ("CVSA"). Documents and standards created by CVSA, such as the North American Standard Out-of-Service Criteria and the North America Standard Inspection Levels are only available to the public by purchase from CVSA. OOIDA members have a keen interest in the greater dissemination of information concerning the standards to which they are held.

II. COMMENTS

a. The Standards That Affect OOIDA Members

Both the North American Standard Out-of-Service Criteria ("OOSC") and the North American Standard Inspection methodology ("NASI") are cited to and relied upon throughout the rules promulgated by the Federal Motor Carrier Safety Administration: Title 49 C.F.R. Transportation, Subtitle B. Other Regulations Relating to Transportation, Chapter III. Federal Motor Carrier Safety Administration, Department of Transportation (Refs & Annos), Subchapter

B. Federal Motor Carrier Safety Regulations. But neither standard is printed in the Code of Federal Regulations, nor are they “reasonably available” to the public.

1. The Out-of-Service Criteria

In two instances, FMCSA acknowledges that it has incorporated the OOSC into its rules in accordance with NARA standards. 49 C.F.R. §§ 385.4 and 385.415. But references to the OOSC are found throughout the motor carrier safety rules.

The OOSC are criteria used by law enforcement officials to determine whether a driver should be ordered off the road immediately (the term used in the rules is “placed out of service”) for violating federal safety regulations. The function of the OOSC that pertain to vehicles is described in Appendix G of the safety rules as “intended to be used in random roadside inspections to identify critical vehicle inspection items and provide criteria for placing a vehicle(s) out-of-service. A vehicle(s) is placed out-of-service only when by reason of its mechanical condition or loading it is determined to be so imminently hazardous as to likely cause an accident or breakdown, or when such condition(s) would likely contribute to loss of control of the vehicle(s) by the driver.” 49 C.F.R. Ch. III, Subch. B, App. G. The OOSC are listed as among those in the definitions of “out-of-service order” found in two sections of the federal motor carrier safety rules: 49 C.F.R. §§ 383.5 and 390.5. The term “out-of-service order” is then used throughout the rules.

Examples of the use of the term out-of service order in the rules include:

- defining some of the circumstances in which a driver may be disqualified from operating a commercial motor vehicle (49 C.F.R. § 391.15)
- imposing “special penalties” to drivers of from \$2,500 to over \$5,000 (49 C.F.R. §383.53)

2. The North American Standard Inspection

The North American Standard Inspection “means the methodology used by State CMV safety inspectors to conduct safety inspections of CMVs. This consists of various levels of inspection of the vehicle or driver or both. The inspection criteria are developed by the FMCSA in conjunction with the Commercial Vehicle Safety Alliance (CVSA), an association of States, Canadian Provinces, and Mexico whose members agree to adopt these standards for inspecting CMVs in their jurisdiction.” 49 C.F.R. § 350.105. In two instances, FMCSA acknowledges that it has incorporated the NASI into its rules in accordance with NARA standards. 49 C.F.R. §§ 385.4 and 385.415. Those sections concern the type of inspections required before transporting radioactive hazardous materials. Another “level” of the inspection methodology for Mexico domiciled motor carriers, 49 C.F.R. § 365.507, and the condition under which a Mexico-domiciled motor carriers may be subjected to an expedited safety audit or compliance review (49 C.F.R. § 385.105). Additionally, under Title 49 Part 350, this term is used to define several aspects of the conditions a state must follow in the enforcement of the motor carrier safety rules to receive federal Motor Carrier Safety Assistance Program funds. 49 U.S.C. §§ 350.105, 350.201, 350.211, and 350.309.

b. The Need for Such Standards to be Free of Charge and Available On-line under the “Reasonably Available” Standard

Both in the instances where the agency acknowledges its incorporation by reference, and in the multiple other instances where it uses terms, FMCSA has decided that the CVSA’s OOSC and NASI standards are important components to their regulatory scheme. Most important to OOIDA members, such standards play a critical role in their obligations under the rules. They define when they may face stiff fines and even disqualification from driving a truck. These rules govern the transportation of radioactive hazardous materials. Some of the rules are imposed

upon Mexico-domiciled motor carriers who do not have a domestic motor carrier's experience and understanding of the rules and standards.

In terms of the OOSC, these standards define the conditions under which an inspector may exercise authority to order a driver or vehicle immediately out of service. With regard to the NASI methodology, these inspection procedures must be made public in order for FMCSA and its state enforcement partners to conduct searches of trucks and drivers (inspections) without a warrant.

It is critical for all affected parties to have access to these standards for several reasons. First, is the interest of public safety: if the public has unfettered access to the standards it was being held to, it could better comply with the rules that rely upon those standards. But it is also important for the public to be sufficiently informed to be able to comment on changes to the standards and rules, and to make the CVSA more accountable for their creation. OOIDA believes that because these standards are closely held by CVSA, and not the subject of public deliberation by FMCSA, that CVSA's practices and procedures are not as open to the public and conducive to a broad consensus as is desirable of standards adopted by the government by reference. The average driver has no notice of when changes to these standards are made. And OOIDA does not believe that FMCSA has taken any action to update its rules to incorporate the latest versions of these standards are required under 1 C.F.R. § 51.1(f).

Current Public Access to the Standards is Limited

The OOSC and NASI standards are copyrighted by CVSA and are only available in extremely limited quantities to CVSA members and to the public for purchase from CVSA's "online store" at <http://cvsa.stores.yahoo.net/>. FMCSA has neither published nor posted online the contents of the OOSC. Nor has FMCSA published or posted online the NASI methodology – although it has a web page that broadly outlines the topics covered by each inspection level.

Very few drivers are members of CVSA. OOIDA believes that the vast majority of truck drivers are not aware that such standards are available from CVSA. And few have the extra funds to make such purchases – especially as frequently as these standards appear to be amended. The average truck driver brings home less than \$40,000 per year. The current cost and the limited understanding of truck drivers that these standards are available from CVSA demonstrates the extent to which these standards are hidden from the public view, thereby inhibiting their understanding of them.

c. The Loss of Revenue to Standard Making Organizations

OOIDA understands the comments of some standard creating organizations -- that charging for copies of their standards is the only way they can afford to conduct the process by which such standards are created. But OOIDA refuses to believe that their value, and the value in their continued updating, is measured solely by their printing revenue and will disappear once they are made available to the public free of charge. The importance of eliminating this private secret law, and the need for the free and fair dissemination of such standards to all who face the regulations dependant on them, is a fundamental democratic principle that trumps the concerns raised by the loss of such revenue.

In the case of the CVSA, OOIDA does not believe this is a concern. This organization is primarily made up of state participants in the federal Motor Carrier Safety Assistance Program (“MCSAP”). CVSA’s activities are largely designed to advise the states how to conform their truck enforcement activities to the requirements of the MCSAP program so that they may remain qualified for the millions of federal dollars appropriated to that program. Although the various states pledge that they do not spend MCSAP funds on CVSA membership, millions of dollars in MCSAP revenue certainly free up other state funds to pay in CVSA dues to help keep them

qualified for MCSAP funds. This incentive will clearly keep CVSA motivated to maintain its standards, whatever the future of its publication revenue.

For other industries, they will simply need to create a new business model and find other ways to monetize the values of those standards. Industries will continue to demand the maintenance and updating of such standards. In many instances, the government appears to be the free rider by adopting, without compensation, the work of others to devise these standards. The federal government saves a lot of resources by borrowing such standards rather than creating them itself. Perhaps these are perspectives that help solve this loss of revenue. This problem, however, does not trump the democratic ideals that that burnished by the public's free access to the rules that govern them.

III. CONCLUSION

OOIDA strongly supports a new rule requiring the free public access, by Internet, of standards adopted by reference into federal regulations.

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