

**TESTIMONY
Before**

**The United States House of Representatives
Committee on Small Business**

Hearing on

“Highway to Headache: Federal Regulations on Small Trucking Industry”

Presented by

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Chairman Chabot, Ranking Member Velazquez, and other members of the Committee on Small Business, I sincerely appreciate the opportunity to appear before you today to discuss how federal regulations impact the small trucking industry, issues of vital importance to the U.S. fireworks industry.

I am Stephen Pelkey, President and CEO of Atlas PyroVision Entertainment Group, headquartered in Jaffrey, New Hampshire. I also currently serve on the Board of Directors of the American Pyrotechnics Association (APA)¹ and as the Chairman of APA's Transportation Committee.

Atlas PyroVision Entertainment Group was founded in 1950 originally as Atlas Display Fireworks. Due to our company's expansion in close proximity pyrotechnics and consumer retail outlets, we changed our name to Atlas PyroVision Entertainment Group in 2015. We are recognized as a prominent professional firework Display Company producing professional fireworks displays throughout New England, including the City of Boston and First Night celebrations. During the past 20 years we have produced the pyrotechnics for the New England Patriots at Gillette Stadium and for six (6) years from 1997-2002, we were contracted to produce the DC Capitol Fourth Display. In 2018 Atlas will represent the US in DaNang, Vietnam and Canada in international competitions. Most recently we received the Gold Jupiter Award during the Montreal International Fireworks Competition for best pyromusical performance among eight (8) countries represented, which is one of the highest honors for a U.S. display company. Through our matching budget program, Atlas PyroVision Entertainment Group is engaged in producing displays for charitable programs in New England such as the Special Olympics, Make A Wish Foundation, Making Strides Against Breast Cancer, Boy Scouts of America, United Way, and the Cystic Fibrosis Ski Challenge.

While we are primarily engaged in professional fireworks displays, Atlas PyroVision also operates six (6) consumer fireworks retail stores located throughout New Hampshire and Maine.

Atlas PyroVision employs 24 full-time workers. During our busy Fourth of July season, our employment rolls swell to approximately 750 total workers. Atlas produces 800 fireworks displays annually, 75% of which occur over a two week period surrounding the Independence Day holiday. Each fireworks display must be transported by a licensed and trained pyrotechnician who holds a valid Commercial Drivers' License (CDL) with a Hazardous Materials Endorsement and our drivers must operate under a valid Hazardous Materials Safety Permit (HMSP) issued to our company. Our display fireworks are classified, regulated and transported as Division 1.1 or 1.3 explosives; consumer fireworks are classified, regulated and transported as Division 1.4 explosives. All of our fireworks are subject to the regulations of the Department of Transportation's (DOT) Pipeline and Hazardous Materials Safety Administration (PHMSA) and the Federal Motor Carrier Safety Administration (FMCSA) when transported in intrastate and interstate commerce. As such, we are a very interested stakeholder in today's hearing: *"Highway to Headache: Federal Regulations on the Small Trucking Industry."*

¹ The APA is the authoritative voice and leading national safety and trade association for the fireworks industry representing manufacturers, importers, distributors, wholesalers, retailers, suppliers and professional display companies. The APA has over 250 member companies. Along with their subsidiaries, APA member companies are responsible for 90% of the fireworks manufactured, imported, distributed and displayed in the U.S.

“One Size Fits All” Transportation Regulations Unfairly Harm Small Business

While the hearing is focused on the impact of federal regulations impacting the small trucking industry, it must be noted that many, many industries, like the fireworks industry involve private carriage transportation of goods and services but driving is incidental to the primary business function of loading, unloading “tools of trade” and providing a specific service. In our case, the set up and execution of a fireworks display. Our Drivers have far more knowledge and specialized training about their cargo than most full time CDL drivers working for long haul companies. Our state licensed technicians who possess a CDL are routinely trained, specifically on the handling, transportation, storage and use of 1.4G/S and 1.3G low explosives.

Our major concern with the current regulatory structure is that small industry stakeholders are continually swept into these “one size fits all” transportation regulations that are best suited for large commercial companies rather than small stakeholders attempting to comply with a myriad of regulations in order to conduct their business operations. While many laws, including the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)², are intended to ensure that requirements appropriate for larger businesses are not forced upon small businesses in the name of administrative convenience, Atlas and the APA stand behind sensible regulation. We recognize the responsibility we have since we handle hazardous materials, and specifically, explosives. In addition, many of our employees are also family members, so safety is very personal to us. There are often many ways to achieve the same goals, and if small businesses are to survive, the DOT regulatory agencies need to do a better job in recognizing the differences between small and big businesses, and that different approaches may be necessary. What works for large, long haul drivers managed under a fleet may be different from what works for small independent drivers, short-haul drivers, and especially intermittent casual drivers who only operate to and from job sites and / or serve unique industries not serviced by common carriers.

U.S. Fireworks Industry “Highway to Headache Regulations”

While certainly not an exhaustive list of current DOT regulations ripe for reform, the following regulations are extremely challenging and have an unfair, burdensome impact on small businesses that rely upon private carriage and intermittent casual drivers delivering goods and services to and from job sites:

Electronic Logging Devices and Hours of Service Mandate

Atlas and members of the APA initially tried to support the Federal Motor Carrier Safety Administration’s (FMCSA) Electronic Logging Device (ELD) mandate³ in concept. Congressionally mandated as part of MAP-21,⁴ it was intended to help create a safe work environment for drivers and make it easier and faster to accurately track, manage, and share Records of Duty Status (RODs). Like most major rulemaking initiatives, it takes time to determine whether compliance can be easily achieved across the full spectrum of individuals, companies and industries impacted.

² P.L. 104-121

³ 80 FR 78292

⁴ Moving Ahead for Progress in the 21st Century Act (P.L. 112-114)

After analyzing the significant impact of the ELD mandate on the operations of the small companies that make up the fireworks industry, Atlas and the APA fully supported a Petition for relief for short-term rental trucks (less than 30 days) filed by the Truck Rental and Leasing Association (TRALA).⁵ APA members believed that the hardest compliance burden for our industry would be during the busy Fourth of July period when our members rely upon over 3,600 rental trucks to handle the volume of Independence Day celebrations. We were extremely disappointed by FMCSA's inflexibility and final disposition of TRALA's Petition for exemption to only authorize an eight (8) day or fewer period of relief from the ELD mandate to allow for the utilization of paper Records of Duty Status (RODs).⁶ In its disposition, the Agency essentially provided limited relief for drivers of property-carrying commercial motor vehicles (CMVs) rented for 8 days or less, regardless of reason, from the ELD requirement. However, in its rationale for the limited 8-day exemption period, the Agency stated that it "believes that an exemption period for up to 8 days for drivers of rental CMVs would give most carriers sufficient time to repair or replace their vehicles while minimizing any temptation to extend non-ELD operations." Additionally the Agency stated that, "an 8-day exemption period coincides with 49 CFR 395.34(d), which provides that a motor carrier that receives or discovers information about an ELD malfunction must correct it within 8 days."

Our industry is unique in that it depends upon utilizing short-term rentals as part of our business model - not as replacement CMVs - but as our primary CMVs given the vast majority of our transportation-related activities occur during the two week period encompassing the Independence Day holiday. Had the TRALA 30 day exemption for short-term rentals been granted, our operations as well as all companies in the fireworks industry would be able to continue to satisfy driver hours of service (HOS) with paper RODs as we have always done to document and satisfy compliance with driver HOS regulations. Furthermore, our experience with a few approved ELD systems do not allow for our existing HOS waiver of 14 hours during an 11 day period around the 4th of July, thus compromising Atlas and APA member companies with the ongoing threat of risking their Hazardous Materials Safety Permit and overall Commercial Motor Vehicle Safety Rating.

The APA has also actively participated in a broad coalition (31 unique industries) opposing the ELD mandate and we strongly supported Rep. Brian Babin's bill H.R. 3282, *the ELD Extension Act of 2017*, which would have provided for a two-year delay in the implementation of this controversial mandate, not only because of the unique hardships that our industry faces in complying with the rule but also for those many, many unique industries, including independent owner / operators. The ELD mandate is estimated to cost impacted stakeholders more than \$2 billion, making it one of the most expensive federal transportation rulemakings over the last decade. This significant mandate provides no safety, economic, or productivity benefits for the many small businesses impacted by the mandate, including each and every one of APA's members.

This is prime example of a costly regulation imposed on small businesses that has no bearing on safety. When so many industries are faced with compliance challenges, it is most telling that the ELD rule should never have gone forward as it only benefits large commercial carriers who manage fleets. Our products primarily move by private carrier and more specifically, by the companies within the fireworks industry. We utilize small trucks, vans and straight trucks of which a substantial portion move only by a hazardous materials safety permit (HMSP). The vast majority of common carriers do not have, nor do they wish to comply with the significant regulatory burdens associated with maintaining a HMSP.

⁵ 82 FR 14789

⁶ 82 FR 47306

The APA recently filed a request for a limited exemption from the ELD mandate for relief during the peak Fourth of July period, similar to APA's Hours of Service (HOS) exemption.⁷ Currently, all of our other avenues for relief have been exhausted and we hope that the newly appointed Administrator of FMCSA and / or the Office of the Secretary (OST) will act favorably upon our Petition for relief. Moreover, we hope that the sheer volume of Petitions for relief filed to-date by various industry groups will send a strong, clear message to the Secretary that this mandate must be rescinded or revisited, and at a minimum, immediately delayed before the December 18, 2017 mandate.

New Minimum Training Requirements for Entry-level Commercial Motor Vehicle ("CMV") Operators

We are very concerned about FMCSA's new Minimum Training Requirements for Entry-Level CMV Operators under 49 CFR Part 380 Subpart E.⁸ This regulation is a classic example of an inappropriate "one size fits all" regulation. It imposes significant burdens on small, unique businesses without any real benefit to the public and will substantially diminish the pool of new driver entrants. For many of APA member companies, locating CMV operators possessing a HMSP (Hazardous Material Safety Permit) reduces the qualified applicant pool by fifty percent. Now with the ELD mandate becoming effective on December 18, 2017, many of those remaining CMV operators will no longer consider hauling fireworks 1.4G and 1.3G more than 100 air miles from any port.

Atlas and APA members, like many small businesses, are family-owned, multi-generational companies who provide industry specific goods and services. Our members utilize CMVs ranging from small cargo vans, pickup trucks to 24' straight trucks, almost all of which are less than 26,000 GVW. During the peak Fourth of July season (two weeks surrounding the holiday), the industry will rent more than 3,600 CMVs. These CMVs are used to deliver consumer product from warehouses to retail stores, stands and tents, as well as professional product and equipment to display sites and community displays. Frequently, the lead professional pyrotechnician for a fireworks display is also the driver who has a Commercial Driver's License (CDL).

The extensive 80-hour classroom and behind the wheel training for entry level drivers who desire to drive semi-trailers and / or operate long-haul commercial transportation may well be necessary and appropriate for them. However, there is no need to engage in that kind of training for short-haul straight truck operations involving far smaller vehicles and whose driving may be incidental to their primary duties of loading and unloading fireworks, already heavily regulated as explosives. This is especially true for the movement of "tools of trade" in the fireworks industry and for the delivery of our products to retail stores and temporary locations, which is best served by hands-on training undertaken by each company individually. Our CDL drivers already obtain a State issued CDL which includes passing a skills performance evaluation. Additionally, the majority of our CDL drivers are also subject to a criminal background check and fingerprinting as required for the hazmat endorsement. With the voluminous number of Federal, State and local regulations impacting operations of the fireworks industry, we are struggling to bring on part-time, intermittent, casual drivers and other personnel due to the seasonality of the business and burdensome training and regulatory requirements. Our members are not full-time

⁷ 81 FR 43701

⁸ 81 FR 88732

truckers – driving is incidental to their primary duties of loading and unloading fireworks, already heavily regulated as explosives.

Hazardous Materials Safety Permit

Atlas and the APA remain concerned about FMCSA's Hazardous Materials Safety Permit Program (HMSP) and the on-going delays in reforming this flawed program. Given the enviable safety record of those subject to this permit program, FMCSA's lack of attention to effect promised reforms is inexcusable. For many HMSP holders, loss of a permit is an "out of business" edict.

Congress established the HMSP in 1990⁹, although FMCSA did not implement the program until 2005.¹⁰ In the preamble to the rule, FMCSA stated that the program would reduce crashes. In fact, the safety record of HMSP holders, while outstanding, is better during the nine years preceding the program than in the 12 years since.

The HMSP program has been seriously flawed since its inception.¹¹ Initially, FMCSA proposed that carriers with a satisfactory rating could get a permit by simply asking. The rationale was that a carrier's safety rating was the agency's fitness standard. To accommodate carriers with no rating, the agency proposed using a fitness metric based on out-of-service (OOS) violations and crash rate. This policy was repeated in the preamble to the final rule. However, the Agency changed the regulatory text to say the permit holders had to have a satisfactory rating and not exceed the OOS and crash rate thresholds. The Agency's rule provided a means for holders to appeal or seek waivers of determinations to revoke or suspend permits, but it provided no such due process if, on the day the holder's permit expired, it was below the OOS thresholds necessary to qualify for a permit.

Because of the safety record of those in the program, FMCSA cannot justify suspending or revoking permits of those holders who are "underwater" based on OOS and crash rates. In the entire course of the program, the Agency had only issued six suspensions, and seven revocations. No HMSP holder has been declared an imminent hazard. So the Agency's inaction to address compliance issues and work with carriers to help them recover when they are underwater results in automatic denials on the date their permits expire. Fireworks companies, like many other companies are required to hold permits, as specialized carriers. If a fireworks display company loses its HMSP, it cannot haul something else while it waits to "age out" disqualification. Fireworks are what the company does. It is effectively "out of business," unless it can find an alternate means to deliver those displays.

The APA, along with several other trade associations representing companies subject to the HMSP program, have been advocating for the need of an administrative process that would allow the FMCSA to intervene outside of DataQs.¹² We refer to this as an "additional level of safety review" to determine a carrier's fitness prior to the denial of a HMSP. In 2011, FMCSA agreed that the program was flawed and accepted a petition for rulemaking submitted by APA and other affected stakeholders to reform the

⁹ Senate Rept. 101-449. Hazardous Materials Transportation and Uniform Safety Act of 1990, August 30, 1990.

¹⁰ 69 FR 39350, June 30, 2004

¹¹ Id.

¹² The DataQ system is flawed. Among criticisms of the program are that it required the officer issuing OOS citation to admit error; it asks this official to be proficient in relatively complex hazmat regulations; and the process is only available for appeals, not waivers.

HMSP. However, we remain disappointed that the Agency has not made reform of this program a priority. Rather, FMCSA said it would not move forward until its Compliance, Safety and Accountability (CSA) safety fitness rule was finalized.

Atlas testified on behalf of the APA and the Interested Parties for Hazardous Materials Transportation (Interested Parties) coalition¹³ before the U.S. House of Representatives, Committee on Transportation and Infrastructure, Subcommittee on Railroads, Pipelines and Hazardous Materials, hearing on “*Examining Issues for Hazardous Materials Reauthorization*” on April 2, 2014. The vast majority of our testimony was focused on the flawed HMSP Program. While there has been some efforts on behalf of FMCSA to recognize the need for providing an “additional level of review” and corrective actions to permit holders who have little roadside data and high OOS rates, we believe more must be done to provide HMSP holders with some level of assurance that they will simply not lose their permit, upon which their livelihoods depend, due to the seriously flawed permit program.

Carrier Safety Fitness Determination

FMCSA issued a Notice of Proposed Rulemaking (NPRM) on January 21, 2016, “Carrier Safety Fitness Determination” (SFD)¹⁴ that would have radically modified the safety fitness rating system in the current federal regulations. The proposed methodology would have utilized the flawed CSA / Safety Measurement System (CSA / SMS) data and scores. Although the rulemaking was withdrawn,¹⁵ the Agency has indicated that it may initiate a new rulemaking after it fully assesses the impacts and recommendations resulting from the National Academy of Sciences (NAS) correlation study on the CSA program. Congress directed this third-party review of the CSA/SMS under the Fixing America’s Surface Transportation Systems (FAST) Act. NAS published its report “*Improving Motor Carrier Safety Measurement*” on June 27, 2017.

Noting our earlier concerns, HMSP holders are subject to FMCSA’s general safety fitness standards. FMCSA’s proposed integration of on-road safety data from inspections, along with results of carrier investigations and crash reports into the agency’s safety fitness rating methodology without providing carriers an opportunity for corrective actions is most troubling. The APA has widespread concerns regarding the Agency’s reliance on the CSA / SMS Behavioral Analysis and Safety Improvement Categories (BASIC) ratings and their accuracy in judging a carrier’s safety fitness especially if the Agency moves forward in the future with just two ratings: fit and unfit.

The CSA process consists of several steps. In the first step, CSA takes each carrier’s safety events (e.g., roadside inspection violations and crashes) and places them into groups called BASICs. Then, the events are assigned a numerical weight based on severity and age. Within each category, measures of performance (time and severity weighted violations and crashes) are adjusted based on either the carrier’s size (number of trucks and annual mileage) or exposure (number of inspections). Using these adjusted measures, carriers are then assigned scores in each category which represent a percentile

¹³ The Interested Parties represent industries and public safety agencies with operations in every state, have combined business revenues in excess of \$1 trillion, employ millions of workers, and have an enviable record of hazardous materials transportation safety and security. The Interested Parties exist to share information, to identify issues and to advocate for policies relating to the safe, secure and efficient transportation of hazardous materials.

¹⁴ 81 FR 3562

¹⁵ 82 FR 14848

ranking compared to carriers of like exposure. Carriers whose scores are deemed deficient (much worse than those of carriers with similar exposure) are prioritized for various FMCSA enforcement interventions – such as warning letters or investigations. The hazardous materials (HM) BASIC would be the primary tool utilized by FMCSA to determine how fireworks transporters rank relative to other HM carriers.

Carriers subject to these complex regulations and potential fitness ratings must be aware of the bar to achieve and maintain a “fit” rating. Additionally, any SFD rating must consider the size of the carrier and their operations. A small carrier cannot be judged against all carriers. Unlike large transportation companies that operate year round and are inspected frequently, display fireworks transporters operate primarily on a seasonal and periodic peak time basis, typically driving much shorter distances and many fewer miles as compared to long-haul freight transporters. Additionally, in order to meet local and state regulations as well as meet their customer’s needs, fireworks display transporters predominately operate over weekends, during holiday periods and at odd hours when inspection stations are not open. Accordingly, any future SFD requirements must not be a one size fits all criterion. Small carriers and their unique operations must be considered in order to develop a fair playing field.

Conclusion

We are grateful to the members of the Committee on Small Business for convening this important hearing to learn about the regulatory burdens imposed on small businesses that must comply with federal trucking / transportation regulations and your desire to explore regulatory relief for small businesses. Small businesses face myriad regulations including safety, security, workplace safety regulations and labor regulations and struggle on a daily and weekly basis to do their best to comply. The U.S. fireworks industry works diligently to comply with all regulations imposed on our small businesses and while we understand a need for certain regulations, especially those related to safety and security because we handle explosives, there are many DOT regulations that are far too broad and burdensome that do not consider the impact on small business; the ELD mandate, new minimum training requirements for entry-level CMV operators, the HMSP Program and Carrier Safety Fitness Determination are just a few of these one size fits all regulations that should be revisited with regard to impacts on small business.

Thank you for this opportunity to testify and share a brief glimpse of the regulatory burdens imposed upon our unique, small business. I would be happy to answer any questions that you may have.