

RICHARD P. SCHWEITZER, P.L.L.C.

..... Attorney at Law

1717 K Street, NW ■ Suite 900 ■ Washington, DC 20006

Phone: (202) 223-3040 Cell: (703) 946-2548

www.rpslegal.com

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VIA ELECTRONIC MAIL AND U.S. POSTAL SERVICE

Administrator Raymond Martinez
Federal Motor Carrier Safety Administration
U.S. Department of Transportation
1200 New Jersey Avenue, S.E.
Washington, D.C. 20590

Re: Request for Clarification on Scope of Agricultural Commodities Guidance

Dear Administrator Martinez:

The Mulch and Soil Council, Inc. ("MSC" or "the Council") seeks clarification from the Federal Motor Carrier Safety Administration regarding the scope and applicability of the exception for transportation of agricultural commodities in 49 C.F.R. § 395.1(k)(1) as explained in the FMCSA's recent guidance document, 83 Fed. Reg. 26374 (June 7, 2018). Specifically, MSC requests confirmation that bagged or bulk mulches and soils used in agricultural or horticultural activities are included in the definition of "agricultural commodity."

MSC is the national non-profit trade association for all producers of horticultural mulches, consumer potting soils and commercial growing media. The Council has approximately 90 member companies, which represents about one half of the total sales volume and employment in the industry. The mission of the MSC is to define quality products and promote a fair and open marketplace. To assist the industry in achieving these objectives, the Council provides industry consensus on product guidelines and promotes these guidelines to all industry and market stakeholders; conducts label review, laboratory testing and periodic field inspection to certify compliance with industry standards; works to create or change laws that assure our industry's right to do business without unfair regulatory burdens; and sponsors training programs on weights and measures issues, product labeling, quality control methods, and best management practices for bagged and bulk production facilities managers.

The distribution of mulch and soil products is a seasonal business. According to a survey of MSC members conducted in April 2018, the industry annually moves approximately 957,000 truckloads of mulch products and 571,000 truckloads of soil products. Of the 1.528 million annual truckloads, about 50% of the volume is transported between the months of March and May (including June, the figure is over 60% of total annual volume shipped in this four month period). This demand spike places a substantial burden on companies and their drivers trying to get product to their customers (primarily commercial nurseries, greenhouse growers, farm stores, garden centers, and big box home improvement stores) in a safe and efficient manner.

Some 60% of the shipments travel less than 150 miles. This makes it possible for many drivers to return to the company facility and take a second, or some instances a third, delivery to customers in a single duty period during times of high demand. About 70% of the shipments take less than one hour to load, and some 62% of shipments take less than one hour to unload, depending on the type of vehicle and the nature of the product.

Congress, the FMCSA, and its predecessor regulatory agencies have long recognized the special needs of and minimal safety concerns presented by carriers transporting a variety of agricultural and horticultural goods and have granted the industry a number of exemptions from statutory and regulatory requirements.

For example, 49 U.S.C. §13506(a)(6)(B) exempts the transportation by motor vehicle of agricultural or horticultural commodities (other than manufactured products thereof) from the motor carrier operating authority and related requirements under Part B of title 49 U.S.C., Subtitle IV. This means that agricultural or horticultural commodities may be transported by exempt for-hire carriers without the need for motor carrier operating authority and are not subject to the non-safety related rules administered by FMCSA. *See* 83 Fed. Reg. 68336, 68337 (October 4, 2016).

In addition, Congress has provided that, pursuant to § 345 of the National Highway System Designation Act of 1995, Pub. L. No. 104-59, 109 Stat. 568, 613, as modified by the Safe, Accountable, Flexible, Efficient Transportation Act, Pub. L. No. 109-59, §§ 4114 and 4130, 119 Stat. 1144, 1726, 1743, the driver hours of service regulations of 49 C.F.R. Part 395 do not apply during planting and harvesting periods, as determined by each State, to drivers transporting agricultural commodities from the source of the agricultural commodities to a location within a 150 air-mile radius from the source. This exemption is now codified in the FMCSA regulations at 49 C.F.R. § 395.1(k)(1).

Recently, the FMCSA issued new guidance on the application of the agricultural commodities exemption in 49 C.F.R. § 395.1(k)(1). 83 Fed. Reg. 26374 (June 7, 2018). The guidance provides that the exception applies to driving, whether the commercial motor vehicle is loaded or unloaded, within 150 air-miles of the place where an agricultural commodity was or will be loaded, and to that portion of a return trip which occurs within a 150 air-mile radius of the place of loading.

If the destination for the commodity is beyond the 150 air-mile radius from the source, the guidance states the exception applies to transportation during the initial 150 air miles from the source of the commodity, regardless of the distance to the final destination. Once the driver has exceeded the 150 air-mile radius, the requirements of Part 395 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.

The "source" of an agricultural commodity, as the term is used in § 395.1(k)(1), is the point at which an agricultural commodity is loaded onto an unladen CMV. If the driver loads

agricultural commodities at multiple stops, the first place where the commodity was loaded is the measuring point for the 150 air-mile radius.

From MSC's industry analysis, 60% of their shipments are within 150 miles of the place of origin, so to the extent they are transporting agricultural commodities, the drivers are already exempt from all of the Part 395 hours of service requirements during planting and harvesting season (the peak demand period) as defined by each State. For those shipments that are transported beyond 150 miles, under the new guidance the hours of service "clock" does not begin to run until the driver has gone beyond 150 air-mile radius of the place where the agricultural commodity was loaded.

Thus, during the planting and harvesting seasons, exempted drivers will not be subject to the HOS requirements on the 11-hour driving time, the 14-hour duty window, or the 30-minute break requirement. "The hours accumulated within the 150-mile radius are not counted toward the driver's hours of service. Returning empty, the driver would be subject to the HOS rules until returning within the 150 air-mile radius in which the trip began." 83 Fed. Reg. at 26376.

The new guidance also notes that once drivers are outside the 150 air-mile radius, they are required to maintain records of duty status (paper logs or AOBDR/ELD) and supporting documents when not operating under an exception. The FMCSA has granted haulers of agricultural commodities a waiver, effective until June 18, 2018, from the ELD rules, so at present these drivers are only required to use paper logs. 83 Fed. Reg. 12685 (March 23, 2018).

This analysis also raises the question of whether much and/or soil is included in the definition of agricultural commodities. Under former Interstate Commerce Commission Administrative Rulings 107 and 119, which have been adopted by the FMCSA for purposes of determining whether or not a carrier is subject to jurisdiction under Part B of title 49, subtitle IV, it appears that bark, either raw or shredded, wood chips, and bulk or packaged manure products are exempt agricultural commodities. Topsoil and potting soil are not exempt, however, even though they are clearly used for horticultural purposes.

But the definition of "agricultural commodity" in 49 C.F.R. § 395.2 applicable to this exception is much broader than the ICC rulings that were the product of a much more protected environment of economic regulations. § 395.2 defines "agricultural commodity" as "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)." (Emphasis supplied.)¹

¹ This regulatory definition began in statute in the Safe, Accountable, Flexible, Efficient Transportation Act: A Legacy for Users ("SAFETEA-LU"), which revised the agricultural commodity exception, redesignated it as new section 229 of Title II of the Motor Carrier Safety Improvement Act of 1999, and defined the terms "agricultural commodity" and "farm supplies for agricultural purposes." Public Law 109-59, sections 4115 and 4130, 119 Stat. 1144, 1726, 1743 (Aug. 10, 2005). These terms are now defined in 49 C.F.R. § 395.2.

The term “any agricultural commodity” suggests Congress intended a broad scope to the provision. A prior statutory definition supports inclusion of mulch and soil in the definition of ‘agricultural commodity.’”

The Agricultural Marketing Act of 1946 provides, “When used in this chapter, the term “agricultural products” includes agricultural, horticultural, viticultural, and dairy products, livestock and poultry, bees, forest products, fish and shellfish, and any products thereof, including processed and manufactured products, and any and all products raised or produced on farms and any processed or manufactured product thereof . . .” 7 U.S.C. § 1626.

The inclusion of both agricultural and horticultural products in the definition of “agricultural products” indicates Congressional intent that both mulch and soil for agricultural and horticultural use would be included in the scope of the term. Moreover, that definition dates back to 1946,² so one may assume that Congress had this broad application in mind when it established the definition of ‘agricultural commodity’ in SAFETEA-LU in 2005.


Finally, including mulch and soil in this exception would be consistent with the concerns stated by 30 bipartisan members of the United States Senate in a May 17, 2018 letter to FMCSA urging the agency to create greater flexibility within the hours of service regulations for commercial motor vehicle drivers.

Specifically, the letter asks for improvements to the HOS regulations that “ensure drivers across differing businesses and operations can safely and efficiently comply” with the rules. The Senators stated, “It is important that HOS regulations provide for a commonsense framework for drivers, rather a one-size-fits-all model.”

The letter suggests that FMCSA “examine a wide range of options to address HOS issues and ensure safety, including, but not limited to, providing certain allowances for unique businesses or driver operations, elimination of unnecessary requirements, or improved utilization of non-driving time.”

For these reasons, MSC asks that FMCSA clarify that that bagged or bulk mulches and soils used in agricultural or horticultural activities are included in the definition of “agricultural commodity.”

Respectfully submitted,



Richard P. Schweitzer

Counsel to the Mulch and Soil Council, Inc.

² Aug. 14, 1946, ch. 966, title II, §207, 60 Stat. 1091; as amended, Pub. L. 92–318, title V, §506(f), June 23, 1972, 86 Stat. 351.