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**COMMENTS OF THE AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS ON
THE FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION'S
"RULEMAKING PROCEDURES UPDATE"
NOTICE OF PROPOSED RULEMAKING
DOCKET NO. FMCSA-2016-0341
82 FED. REG. 36719**

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I. AFPM'S INTEREST IN THE FMCSA'S RULEMAKING

The American Fuel & Petrochemical Manufacturers (“AFPM”) welcomes the opportunity to comment on the Federal Motor Carrier Safety Administration’s (“FMCSA” or “the Agency”) Notice of Proposed Rulemaking (“NPRM”) entitled, “Rulemaking Procedures Update.”¹ This NPRM, published in the *Federal Register* on August 7, 2017, proposes to amend FMCSA rulemaking procedures by revising the process for promulgating rules, petitions, and direct final rules. FMCSA also proposes to add new definitions and make general administrative corrections to its rulemaking procedures. These proposed actions are required under the Fixing America's Surface Transportation Act (the “FAST Act”).² AFPM generally supports FMCSA’s proposed efforts to revise its rulemaking procedures to ensure data-driven, risk-based, and cost-justified approaches to its regulatory process.

AFPM is a national trade association representing nearly 400 companies that encompass virtually all U.S. refining and petrochemical manufacturing capacity. AFPM’s member companies produce the gasoline, diesel, and jet fuel that drive the modern economy, as well as the chemical building blocks that are used to make the millions of products that make modern life possible—from clothing to life-saving medical equipment and smartphones.

To produce these essential goods, AFPM member companies depend on a reliable and safe highway transportation system to move materials to and from refineries and petrochemical facilities. With over four million miles of roads,³ the U.S. highway system does more than just move people, it drives our economy. Highway transportation often serves as a delivery mechanism for moving refined products, feedstocks, and intermediates from refineries and petrochemical manufacturing facilities to final consumers or the next member in the supply chain.

AFPM members are committed to protecting the health and safety of their workers, contractors, customers, and the communities where fuels and petrochemical products are transported. AFPM member companies recognize a safe, reliable, and efficient transportation system is essential for both industry and the American public. FMCSA regulatory requirements help ensure the safe and efficient highway transportation of these goods.

AFPM supports the amendments in the FAST Act that require FMCSA to be more transparent regarding the Agency’s petition and rulemaking processes.⁴ AFPM is generally supportive of the provisions in this NPRM but provides some suggestions to further clarify and improve the proposals and ensure close alignment with the provisions of the FAST Act.

¹ See Docket No. FMCSA-2016-0341, 82 *Fed. Reg.* 36719, proposed August 7, 2017, <https://www.federalregister.gov/documents/2017/08/07/2017-16452/rulemaking-procedures-update>.

² See “Fixing America's Surface Transportation Act,” December 5, 2015, <https://www.congress.gov/114/bills/hr22/BILLS-114hr22enr.pdf>

³ See “2017 Roads Report Card Overview,” May 15, 2017, <https://www.infrastructurereportcard.org/wp-content/uploads/2017/01/Roads-Final.pdf>.

⁴ See Section 5202 of “Fixing America's Surface Transportation Act,” December 5, 2015, <https://www.congress.gov/114/bills/hr22/BILLS-114hr22enr.pdf>

II. MAJOR RULEMAKING PROCEDURES

In this NPRM, FMCSA proposes new rulemaking provisions required by the FAST Act. Specifically, the FAST Act requires FMCSA to consider undertaking a negotiated rulemaking or an Advanced Notice of Proposed Rulemaking (“ANPRM”) for all “major rules” regarding commercial motor vehicle safety. The FAST Act authorizes the FMCSA Administrator to waive this requirement in limited instances where those tools would be impracticable, unnecessary, or contrary to the public interest. Additionally, the NPRM proposes to define a “major rule”⁵ as that term is defined in the Congressional Review Act (“CRA”) (5 U.S.C. 801).⁶ FMCSA would use the CRA definition of a major rulemaking to determine whether an ANPRM or negotiated rulemaking process is necessary.

AFPM supports the proposed provisions requiring advanced or negotiated rulemakings for major rules with the potential for considerable impacts. The ANPRM will facilitate more thoughtfully considered rulemaking by providing additional opportunities for public comment or collaboration. This is particularly important for rules with the potential for large economic impacts.

III. DEFINITION AND PROCESSING OF PETITIONS

Under the current FMCSA regulations for submitting petitions, there is no regulatory definition of “petition.”⁷ Section 5204 of the FAST Act clearly defines the term “petition” to include requests for: a new regulation; a regulatory interpretation or clarification; or a determination by FMCSA that a regulation should be modified or eliminated for one of several enumerated reasons prescribed in section 5204. FMCSA proposes to include this definition in 49 CFR Part 389.

AFPM supports the definition of a “petition”; however, it should be noted that including “a regulatory interpretation or clarification” as part of the definition for “petition” changes the scope of the current regulations. This could have negative impacts on FMCSA’s ability to provide needed guidance in a timely manner to stakeholders. FMCSA should consider these impacts before including interpretations in this process.

AFPM notes that the proposal does not include many of the requirements in Section 5204 of the FAST Act related to petitions for rulemaking. This includes requirements for transparency, incorporating process timelines, and petition prioritization found in Section 5204(a)(1)-(5) of the FAST Act, which FMCSA must adopt.

⁵ The CRA defines a major rule as one that is likely to have an annual effect on the economy of \$100 million or more; that will increase costs and prices for certain constituencies such as consumers or state and local governments; or that will have some other adverse effect on the economy.

⁶ See “Congressional Review Act,” March 29, 1996, <https://www.law.cornell.edu/uscode/text/5/part-I/chapter-8>

⁷ See 49 CFR Part 389, <https://www.law.cornell.edu/cfr/text/49/part-389>.

IV. DIRECT FINAL RULEMAKING PROCEDURES

Under FMCSA's current direct final rulemaking (“DFR”) procedures, if the Agency receives a notice of intent (“NOI”) to file an adverse comment, the DFR will be withdrawn, even if the comment that is eventually filed does not meet the definition of an adverse comment found in 49 CFR 389.39(b). Following withdrawing of the DFR, FMCSA may restart the process by publishing a conventional proposed rule or decide to end the rulemaking process entirely.

FMCSA proposes to change the existing DFR requirement. Upon receiving an NOI to file an adverse comment, the Agency would extend the comment period rather than immediately withdraw the DFR, allowing the commenter additional time to file. Once FMCSA receives the comment, the Agency would determine whether it is adverse. If it is an adverse comment, FMCSA would withdraw the DFR; however, if it does not meet the definition in § 389.39(b), the Agency would move forward with the DFR. If the same or another commenter submits an NOI at the end of the extended comment period, FMCSA will determine, on a case-by-case basis, whether to extend the comment period again, withdraw the DFR, or proceed with the DFR using only the comments already received.

AFPM notes this amendment simply provides additional time to file and evaluate an adverse comment and does not impact any other procedural requirements in § 389.39. While AFPM does not oppose an extension of the comment period for a direct final rule upon receipt of an NOI, we question the need for such a provision. Unlike the other proposals in this rulemaking, this provision does not appear to be related to requirements of the FAST Act. If FMCSA chooses to adopt such a provision, it should clearly articulate the need for such a provision. As currently discussed in the NPRM, sufficient rationale for the provision is not provided. Further, this approach is not consistent with the DFR procedures used by other DOT modal administrations.

Providing an opportunity for meaningful public and stakeholder input will only help to inform decisions at the operating administrations. AFPM thanks FMCSA for the opportunity to provide input on the important issue of regulatory process reform. Please contact me at (202) 552-4374 or rbenedict@afpm.org if you wish to discuss these issues further.

Sincerely,



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