



December 23, 2004

Annette M. Sandberg
Administrator
Federal Motor Carrier Safety Administration
U.S. Department of Transportation
400 7th Street, S.W.
Washington, D.C. 20590

**Comments on Supplemental Notice of Proposed Rulemaking; Request for
Comments; House of Service of Drivers; Supporting Documents;
69 FR 63997 *et seq.*; Docket FMCSA-1998-3706**

Dear Administrator Sandberg:

Public Citizen is pleased to have the opportunity to comment on the Federal Motor Carrier Safety Administration's (FMCSA) supplementary notice of proposed rulemaking (SNPRM) regarding supporting documents that are used to verify the accuracy of drivers' house of service (HOS) and records of duty status (RODS). Federal HOS regulations already require that motor carriers collect and maintain for six months all of their drivers' supporting documents from trips in order to allow enforcement authorities to verify the drivers' RODS.¹ The SNPRM responds to a statutory mandate in section 113 of the Hazardous Materials Transportation Authorization Act of 1994 (HMTAA)² to improve driver and carrier compliance with the HOS regulations and the effectiveness and efficiency of HOS enforcement.

For the reasons below, the agency's proposal fails to accomplish these goals. There are many serious flaws in the agency's proposal, which would cripple its oversight and complicate, rather than simplify, FMCSA's compliance program. These must be addressed before FMCSA can move forward.

- FMCSA's proposal largely reiterates existing supporting document retention requirements without clarifying the definition of those supporting documents, and does not provide guidance about which supporting documents are superior or preferable to others. FMCSA should be clear on "the number, type, and frequency of supporting documents that must be retained" in order to prevent motor carriers from taking advantage of the rule's vagueness to claim that they did not know certain documents must be retained.³

- The proposal allows, and advocates the use of, electronic supporting documents — even in lieu of paper supporting documents — but fails to offer any criteria that would ensure uniformity among the data or that electronic documents provide verifiable and credible support. FMCSA should establish specific criteria for electronic supporting documents to ensure uniformity in the data and that the electronic supporting documents are verifiable and credible.
- The agency proposes maintaining the current six-month retention minimum for supporting documents, but provides no evidence that it is capable of following up on complaints and completing compliance reviews in that short timeframe. FMCSA should extend the minimum period for supporting document retention to one year.
- FMCSA proposes that all motor carriers be required to establish self-monitoring systems for handling supporting documents and verifying driver RODS and compliance with HOS rules, yet the agency fails to provide design criteria for such systems. A wide multiplicity of differently designed self-monitoring systems would substantially impede agency compliance enforcement, and violate Congress' request for increased enforcement efficiency and effectiveness. FMCSA should establish very specific design criteria for the design of motor carrier self-monitoring systems.
- In addition, the agency proposes to allow motor carriers with self-monitoring systems to apply for long-term exemptions from the document retention requirement, counter to Congress's stated request in section 113 of HMTAA, counter to the safety requirements of the waivers and exemptions statute, and counter to FMCSA's responsibilities as a safety agency. Such a policy would lead to the agency's abdication of its enforcement duties for the exempted motor carriers. FMCSA must not provide an exemption for supporting document retention to motor carriers who have established self-monitoring system and request the exemption.

FMCSA fails to demonstrate how this rule would improve driver and carrier compliance with HOS regulations. It certainly would not improve the effectiveness and efficiency of HOS enforcement. The agency proposes regulatory changes that would actually impede and reduce enforcement. The critical problem with HOS driver and carrier compliance is the weak enforcement of the existing rules by the agency, not the clarity of HOS compliance paperwork rules.

Driver and motor carrier compliance with HOS regulations will improve only if the agency's feeble enforcement efforts are significantly enhanced and expanded. Drivers and motor carriers routinely flout HOS regulations because they can get away with it — not because of confusion about what those requirements demand. FMCSA's safety enforcement efforts have been criticized not only by the private safety advocacy community, but by the Department of Transportation's Office of Inspector General,⁴ the Government Accountability Office,⁵ and the National Transportation Safety Board.

FMCSA Fails to Set Guidelines for the Design of Self-Monitoring Systems

As stipulated by section 113 of HMTAA, FMCSA proposes that motor carriers establish and use internal self-monitoring systems to verify driver RODS and compliance with HOS requirements. The self-monitoring systems would collect and use traditional paper or electronic-based supporting documents — such as Electronic On-Board Recorder (EOBR) data — to verify the accuracy of each driver’s times and locations for each working day on each trip, including trip mileage. Regardless of the type of self-monitoring systems established by motor carriers, carriers would still be required to collect and maintain all of its drivers’ supporting documents.

The proposal, however, does not provide any specific guidelines for the type of self-monitoring system that motor carriers should establish. Unbelievably, the proposal allows motor carriers to establish self-monitoring systems of widely varying designs. This means that agency would not be able to establish uniform enforcement and evaluation criteria. Motor carrier compliance assessment would become dramatically more complicated and expensive for the agency. This would violate the order from Congress, in section 113, to improve “the effectiveness and efficiency of Federal and State enforcement officers reviewing” motor carrier and driver compliance with HOS rules.⁶

The lack of specific design parameters for self-monitoring systems also makes the proposal impracticable for motor carriers because the carriers have no assurance that their self-monitoring system’s design will pass muster. More importantly, from a safety perspective, without specific design requirements, motor carriers have an incentive to adopt the cheapest system design possible for compliance, regardless of its level of accuracy. This is unacceptable.

Proposed Exemptions Dangerously Abdicate Agency’s Enforcement Duties

In an abdication of its enforcement responsibilities to the public, FMCSA proposes that a motor carrier could request and receive a waiver allowing it to refrain from keeping all supporting documents when the agency finds that the carrier’s HOS compliance and its self-monitoring system demonstrate that the carrier effectively complies with HOS rules. The agency would base its decision on a compliance review of the carrier and its submitted waiver request.

The basis of this proposal is a part of section 113 of HMTAA that allows “a waiver, on a case-by-case basis, of certain requirements of ... [HOS supporting document requirements]...when sufficient supporting documentation is provided directly and at a satisfactory frequency to enforcement personnel by an intelligent vehicle-highway system.”⁷ However, the agency asserts that this waiver would not fall under the TEA-21 waiver provision codified at 49 U.S.C. 31315(a)(1) because such waivers are limited to three month durations; the proposed supporting document waiver would have a two-year limit, as allowed for “exemptions” under U.S.C. 31315(b).

Public Citizen rejects the agency's proposed exemption for a number of reasons. The FMCSA provides preposterous *a priori* reasoning to justify its interpretation — simply that it “would best serve the industry’s interests and comport with Congress’ intent.”⁸ The agency fails to provide a shred of evidence that demonstrates why it should interpret Congress’ specific reference to a “waiver” (which under federal statute would normally have a three-month limit) as an “exemption” (which get up to two years). Since, according to statute, the sole difference between a “waiver” and an “exemption” is the duration period allowed, FMCSA must justify why Congress, despite using the term “waiver,” actually referred to an exemption.

While FMCSA insists on allowing a long-term exemption, the agency fails to provide any details on the specific criteria that would be used to assess the quality of a motor carrier’s self-monitoring system and the carrier’s compliance with HOS rules when a carrier requests an exemption. FMCSA is also not clear what supporting documents a carrier would be still required to maintain, or if the carrier would have to maintain *any* supporting documents at all.

This is completely unacceptable and undermines the entire purpose of supporting documents: to allow enforcement authorities to verify drivers’ RODS and compliance with HOS rules. Moreover, it violates the statute authorizing waivers and exemptions, which requires that the agency demonstrate that the waivers or exemptions are “likely to achieve a level of safety that is equivalent to, or greater than, the level of safety that would be obtained in the absence of the waiver.”⁹ This has not been demonstrated. In addition, permitting an exemption that allowed a carrier to reduce, perhaps to zero, the amount of supporting documents maintained contradicts Congress’ explicit requirement that FMCSA improve “the effectiveness and efficiency” of enforcement officers reviewing such compliance.¹⁰ The industry cannot reasonably be expected to self-enforce the supporting documents requirement.

FMCSA’s groundless rejection of the three-month waiver (and the agency’s lack of even mentioning the two-year duration limit on exemptions) is of serious safety concern. It suggests that the agency sees the exemptions as a means of enforcement-reduction. Two-year exemptions from HOS supporting document requirements, with unarticulated and perhaps only nominal renewal requirements, would disastrously undercut highway safety because there is no assurance that motor carriers would be subject to regular HOS compliance reviews. FMCSA would abandon much of its oversight authority and safety enforcement to the industry. Once a motor carrier has obtained an exemption, the carrier could theoretically stop maintaining its self-monitoring system and ignore the supporting documents requirements for long periods of time, yet not get caught.

The proposed exemptions would significantly degrade the agency’s ability to ensure motor carrier compliance with HOS regulations and guarantee adequate highway safety. It runs counter to the FMCSA’s responsibilities as a safety agency, counter to the statute governing waivers and exemptions, and counter to Congress’ intent as stated in

section 113 of HMTAA. Public Citizen objects in the strongest possible terms to the proposed exemptions.

Self-Enforcement Schemes Do Not Work

Self-enforcement simply does not work and contradicts the fundamental oversight responsibility of health and safety agencies. Health and safety agencies are entrusted by the public to enforce safety standards because selling a product, not safety, is the industry's first priority. Modifications made in the late 1990's by the United States Department of Agriculture (USDA) in meat safety enforcement provide an instructive example of the failure of self-enforcement.

Beginning in 1997, the USDA implemented a new regulatory plan that required that processing plants identify areas in the plant process where there exists the highest risks of contamination, and then establish "critical control points" at those points where food-borne disease testing would be conducted. These new regulations have been used by the meat industry to move USDA meat inspectors away from direct, on-the-plant-floor sanitation enforcement and push them into simply verifying that the food-borne disease controls selected by the company were working — at least on paper. A 2000 report by the USDA's Office of Inspector General confirmed that the USDA "had reduced its oversight beyond what was prudent and necessary for the protection of the consumer."¹¹

Industry self-monitoring can never replace government safety enforcement, yet FMCSA's proposal suggests that it can. A motor carrier which designed a supporting documents self-monitoring system could request and obtain an exemption that would allow it to perhaps no longer retain supporting documents. In such a case, enforcement authorities would be unable to identify fraudulent RODS. Moreover, since the exemptions could last two-years, perhaps with only a nominal renewal procedure, there is no assurance that FMCSA would conduct any regular safety compliance reviews of an exempted carrier, rendering that carrier largely beyond the reach of the law. Apparently, FMCSA has decided to ignore its statutory mandate that safety is its first priority.

Definition of Supporting Documents Must Be More Specific

Section 113 of HMTAA requires that — in issuing regulations to improve motor carrier and driver compliance with HOS rules — FMCSA must include a description of supporting documents and specify "the number, type, and frequency of supporting documents that must be retained."¹² In response, the agency proposes adopting a broad definition of supporting documents included in section 113, "any document that is generated or received by a motor carrier or commercial motor vehicle driver in the normal course of business that could be used, as produced or with additional identifying information, to verify the accuracy of a driver's record of duty status."¹³

However, FMCSA clearly is misinterpreting section 113 of HMTAA. If Congress had intended the agency to simply adopt the general definition included in section 113, it would have indicated that and would not have requested the agency to

specify “the number, type, and frequency of supporting documents that must be retained.”¹⁴ Clearly, Congress provided the definition in section 113 in order to simply identify the broad category of documents about which it was legislating, and it requested FMCSA to establish — from within this broad category — the specific types of supporting documents that motor carriers must retain, as well as their number and frequency. FMCSA fails to establish specific types of supporting documents that motor carriers must retain, and therefore the agency’s proposal falls short of its statutory assignment.

The broadness of FMCSA’s proposed definition also makes it impracticable for both motor carriers and enforcement officers because it includes such a wide category of documents. It would facilitate abuse of the requirements because unscrupulous carriers could claim that they did not realize certain documents must be retained. And enforcement officials would be burdened by the necessity to verify that a motor carrier had maintained every potential supporting document; at worst the vagueness would encourage enforcement personnel to illegally abbreviate their compliance reviews. Such a complication of FMCSA enforcement directly contradicts Congress’ demand in section 113 that the agency improve the “effectiveness and efficiency” of HOS enforcement reviews.¹⁵

No Protections Against Fraudulent Electronic Supporting Documents

In this notice, FMCSA adopts the position that the use of electronic supporting data/documents that could be used to verify driver RODS and compliance with HOS rules — such as those involving global positioning systems (GPS), automatic vehicle identifier transponders, or electronic bills of lading used by customs officials — is preferable to the use of paper documents. Furthermore, the agency proposes that electronic supporting documents could be supplied by motor carriers in lieu of paper supporting documents.

The lack of guidelines for electronic supporting document systems — other than that they indicate “date, time, location, driver, and the vehicle specific information”¹⁶ — means that agency will face a massive and changing variety of electronic supporting documentation that will make HOS compliance assessment much slower and more difficult. This would be a clear violation of the requirement in section 113 of HMTAA that the agency increase enforcement review efficiency and effectiveness.¹⁷ The agency has not even completed rulemaking on a standard for how EOBRs should operate and what data they should collect. The agency provides no evidence of how it will safeguard against drivers or carriers producing doctored or completely bogus electronic supporting documents. If an electronic supporting document involved a new technology that the agency had never encountered before, how could the agency assess the authenticity of the document or know that the technology was tamper proof? It is difficult to believe that the FMCSA, an agency that is under-funded and with a dismal enforcement record, would have the capacity to conduct meaningful audits without further specification of the type and form of electronic documentation it requires.

Six Month Minimum for Supporting Document Retention Is Insufficient

FMCSA's deliberation over the minimum period motor carriers must retain supporting documents is half-sham because the agency suggests that it could set a retention period of less than six months. However, since, in section 113 of HMTAA, Congress requires that the retention period "be at least six months from the date of a document's receipt," FMCSA cannot truly consider public comments requesting shorter retention periods. The discussion should be what retention requirement — six months or longer — should the agency adopt.¹⁸ What the agency has proposed is the absolute minimum retention period allowable under the law.

More importantly, FMCSA fails to provide any evidence demonstrating six months is a sufficient period of time for enforcement officials to complete compliance reviews. Some motor carriers have hundreds of drivers and independent contract drivers working for them, conducting thousands of trips per year and producing copious amounts of supporting documents annually. As the agency documents in its notice, the Georgia Public Service Commission has argued that, with the workload of state and federal compliance review personnel high and on the increase, six months is already barely enough time to conduct a compliance review following a serious crash.¹⁹

The agency must provide adequate evidence to demonstrate that six months is sufficient time for proper HOS compliance enforcement, or otherwise set a longer supporting documents retention requirement, such as one year.

Conclusion

FMCSA must remedy numerous short comings in its proposal before issuing a final rule.

- **FMCSA must make improving safety enforcement its top priority.** The agency should request more money from Congress to train federal enforcement officers and to enhance FMCSA's electronic databases which track crashes, HOS violations, and other driver and motor carrier safety data. FMCSA should also increase the number of annual safety compliance reviews of motor carriers.
- **The agency should complete its rulemaking on EOBRs and make them standard in motor carrier fleets.** We are attaching our recent comments on EOBRs, which provides a detailed critique and a slate of recommendations on this critical issue.
- **FMCSA must provide clear guidance on which specific types of supporting documents are required to be retained by motor carriers.** This would facilitate compliance enforcement, and also prevent unscrupulous motor carriers can take advantage of the rule's vagueness to claim that it did not realize certain documents must be retained.

- **The agency should establish specific criteria for electronic supporting documents to ensure uniformity in the data and that the electronic supporting documents are verifiable and credible.** FMCSA should also institute a system to allow for new electronic supporting document technology to be submitted to the agency for review — and approval or denial — prior to the technology’s implementation.
- **The six-month minimum for motor carriers to retain supporting documents should be extended to one year.** There is no evidence that FMCSA and state enforcement officials are capable of following up on complaints and completing compliance reviews in six months. With state and federal budget cutbacks, the compliance enforcement workload is increasing, and an extension of time should be contemplated.
- **The agency should establish very specific design criteria for the design of motor carrier self-monitoring systems for handling supporting documents and verifying driver RODS and compliance with HOS rules.** Uniformity in the design of self-monitoring systems would significantly facilitate agency compliance enforcement.
- **FMCSA should not provide an exemption for supporting document retention to motor carriers who have established self-monitoring system and request the exemption.** The quality of a self-monitoring system cannot be the measure of the quality of the actual supporting documents. Moreover, self-enforcement does not work. The proposed exemptions run counter to Congress’ request in section 113 of HMTAA and would abdicate the agency’s fundamental enforcement duties.

Thank you for your consideration of our comments.

Sincerely,

Joan Claybrook
President, Public Citizen

ENDNOTES

¹ 49 CFR § 395.8 (k)(1)

² PL 103-311, August 26, 1994, 108 Stat 1673.

³ PL 103-311, August 26, 1994, 108 Stat 1673, at § 113 (b) (1) and (2).

⁴ “We are concerned that vulnerabilities exist within the current CDL program which allow persons to obtain a license without being legally present in the United States. In a 2002 audit, we recommended that FMCSA require that all CDL applicants demonstrate U.S. citizenship or legal presence...[T]he issuance of this proposed rule is not scheduled until May 2005.” *See*: Mead, Kenneth M., Inspector General, Department of Transportation, “Need to Establish a Legal Presence Requirement for Obtaining a Commercial Driver’s License,” Correspondence to FMCSA Administrator, General Counsel, Chief of Staff, and Deputy Secretary, June 4, 2004.

“We concluded that Federal oversight of the states’ CDL programs was not adequate to reasonably ensure that unsafe commercial drivers were disqualified.” *See* Office of the Inspector General, Department of Transportation, “Disqualifying Commercial Drivers: Federal Motor Carrier Safety Administration,” Report No. MH-2000-106, Audit Report on Disqualifying Commercial Drivers, Washington, D.C.: DOT OIG, June 30, 2000, at 1.

“Inspection resources at our southern border crossings are not adequate; the mandatory shut down provision for unfit carriers contained in the Transportation Equity Act for the 21st Century (TEA-21) is not being used effectively; rulemakings take too long; and most importantly, the leadership needed to provide direction to the new FMCSA is not in place.” *See*: Mead, Kenneth M., Inspector General, Department of Transportation, Statement to Subcommittee on Transportation and Related Agencies, Committee on Appropriations, House of Representatives, March 2, 2000, at 1.

⁵ “FMCSA evaluations of the Share the Road Safely program...have not convincingly demonstrated accomplishment of the program’s intended outcomes: changes in drivers’ knowledge, attitudes, and behaviors.” *See*: Siggerud, Katherine, Acting Director, Physical Infrastructure Issues, General Accounting Office, “Truck Safety: Share the Road Safety Program Needs Better Evaluation of Its Initiatives,” Report to Congressional Committees, Washington, D.C.: GAO, May 2003.

“The Department has not yet developed a comprehensive strategy to achieve its goal of reducing large truck-related fatalities by 50 percent by 2009...the Department has not fully implemented the recommendation we made in June 1999 to prioritize individual initiatives contained in its draft Safety Action Plan according to their potential for reducing truck-related fatalities...DOT has not adopted our recommendation to determine whether it can reasonably expect to accomplish all the actions in its draft plan with its expected budgetary and human resources.” *See*: Scheinberg, Phyllis F., Associate Director, Transportation Issues, Resources, Community, and Economic Development Division, General Accounting Office, “Commercial Motor Vehicles: Significant Actions Remain to Improve Truck Safety,” Testimony before Subcommittee on Transportation and Related Agencies, Committee on Appropriations, House of Representatives, March 2, 2000.

⁶ PL 103-311, August 26, 1994, 108 Stat 1673, at § 113 (a).

⁷ PL 103-311, August 26, 1994, 108 Stat 1673, at § 113 (b) (5).

⁸ Hours of Service of Drivers, Supporting Documents, Supplemental Notice of Proposed Rulemaking, Request for Comments, 69 FR 63997, at 64002.

⁹ 49 USC § 31315 (a) and (b).

¹⁰ PL 103-311, August 26, 1994, 108 Stat 1673, at § 113 (a).

¹¹ USDA Office of Inspector General, *Food Safety and Inspection Service*. June 2000.

¹² PL 103-311, August 26, 1994, 108 Stat 1673, at § 113 (b) (1) and (2).

¹³ PL 103-311, August 26, 1994, 108 Stat 1673, at § 113 (c).

¹⁴ PL 103-311, August 26, 1994, 108 Stat 1673, at § 113 (b) (1) and (2).

¹⁵ PL 103-311, August 26, 1994, 108 Stat 1673, at § 113 (a).

¹⁶ Hours of Service of Drivers, Supporting Documents, Supplemental Notice of Proposed Rulemaking, Request for Comments, 69 FR 63997, at 64005.

¹⁷ PL 103-311, August 26, 1994, 108 Stat 1673, at § 113 (a).

¹⁸ PL 103-311, August 26, 1994, 108 Stat 1673, at § 113 (b) (3).

¹⁹ Hours of Service of Drivers, Supporting Documents, Supplemental Notice of Proposed Rulemaking, Request for Comments, 69 FR 63997, at 64001.



November 30, 2004

Docket Number FMCSA -2004-18940
Docket Management Facility,
U.S. Department of Transportation
Nassif Building, Room PL-401
400 Seventh Street, S.W.
Washington, DC 20590-0001

**Comments on
Federal Motor Carrier Safety Administration (FMCSA)
Advanced Notice of Proposed Rulemaking and
Request for Comments Regarding On-Board Recorders**

Better Enforcement of Regulations Needed and Long Overdue

Public Citizen welcomes the opportunity to offer comments concerning electronic on-board recorders (EOBR). Fatigue-related crashes have long plagued the commercial trucking industry, with deadly results for both truckers and the driving public. FMCSA estimates of annual fatigue-related truck-crash fatalities have ranged from 276 to 755.¹ More than just human tragedies, deaths and injuries resulting from crashes in large trucks also take a toll on the economy, costing the U.S. \$15 billion annually.² To protect highway safety, hours-of-service (HOS) regulations place critical limits on driver duty time to ensure that truckers are able to receive the rest they need to drive safely. Limits on driver time especially are important to highway safety because they counter a tragically prevalent industry pay system that exploits drivers to increase marginal profits through intense pressure to drive longer hours, endangering both drivers and others on the road.

Compliance is critical to reaping the benefits of HOS regulations. FMCSA, however, relies upon manual logbooks known as driver records of duty status (RODS) for documenting driver hours of service. Essentially no more than an honor code system, RODS provide enormous potential for abuse, and falsification of duty time is “widespread” by FMCSA’s own admission.³ This method of documenting hours of

¹ 65 FR 25546. 68 FR 22494.

² Thomas, Neill L. and Deborah M. Freund. *On-Board Recording for Commercial Motor Vehicles and Drivers: Microscopic and Macroscopic Approaches*. 1999.

³ 65 FR 25558.

service effectively undermines enforcement of HOS rules and denies truckers and the driving public the benefits of HOS regulations.

A better method of recording driver duty status might not have been readily available when federal HOS regulations were first promulgated over 65 years ago, but automated recorders capable of more accurately documenting duty status have been available for over 35 years, and can now be purchased off-the-shelf.⁴ It is an injustice to both truckers and the driving public that the Department of Transportation (DOT) has not even seriously pursued requirements for technology to accurately record duty status. Moreover, the U.S. Court of Appeals for the District of Columbia Circuit harshly criticized FMCSA for failing to account for driver health in its 2003 HOS final rule, yet, amazingly, the agency excludes driver health from its discussion of the benefits of EOBRs in this Advanced Notice of Proposed Rulemaking (ANPRM) and Request for Comments. Each year, lives are unnecessarily lost because DOT has not required automated and tamper proof recorders for all carriers under the agency's jurisdiction.

It is far past time FMCSA issued a requirement on automated recorders. Automated recorder technology has been available for decades. Congress recognized the potential of automated recorders to improve HOS compliance in 1988 legislation requiring DOT to issue a rulemaking addressing HOS issues. Also, advocacy groups have petitioned DOT to require automated recorders since 1986. The agency in 1999 proposed an EOBR rule, but failed to issue it. Now, with this ANPRM/Request for Comments, the agency is moving forward, but at a snail's pace. The agency must fix this dangerous hole in HOS regulations promptly and fulfill this major part of its duty to improve large truck safety.

Strong Incentives to Break Hours-of-Service Regulations

Two prevalent payment methods in the trucking industry, by-the-mile and by-the-trip pay, provide strong incentives for truckers to stay on the road as long as possible and engage in other risky behaviors that endanger both them and others on the road. Also, with these two forms of compensation, driver time is essentially free for employers, providing little incentive for them to limit driver duty time or facilitate the efficient transport of goods. This system exploits drivers and encourages dangerous behaviors.

In the U.S., approximately 93 percent of long-haul truckers are paid by the mile or by the trip, rather than by the hour.⁵ Illegal in Europe, by-the-mile and by-the-trip pay reward long hours and high speeds. This system is ripe with the potential for disaster, and the statistics show it: Total on-the-job deaths are higher for truckers than for any other

⁴ Insurance Institute for Highway Safety. "49 CFR Part 395, Hours of Service of Commercial Drivers, Docket No. FMCSA 97-2350." Letter to Acting Deputy Administrator Clyde J. Hart, Jr., December 15, 2000.

⁵ CRASH. Comments, "Compensation," 1997, No. 527, citing Beilock, 1989 Motor Carrier Safety Study. 1989.

occupation,⁶ and in 2002, 4,897 people were killed and 130,000 injured in crashes involving large trucks.⁷

Studies have shown drowsy driving to be a factor in many crashes involving large trucks. In a 1990 study, the National Transportation Safety Board (NTSB) cited fatigue as a probable cause in 31 percent of fatal-to-the-driver large truck crashes it investigated.⁸ Additionally, in a 1995 study, NTSB cited driver fatigue as a probable cause in 58 percent of the single-vehicle large truck crashes it investigated. In the same study, NTSB cited a general research consensus that trucker fatigue is a contributing factor in as many as 30 to 40 percent of all large truck crashes.⁹

NTSB also reported that in interviews with drivers involved in single-vehicle crashes, 19 of 107 drivers admitted falling asleep while driving.¹⁰ Additionally, a FHWA-sponsored survey revealed that 28 percent of drivers admitted falling asleep while driving in the prior month. Of those drivers who admitted falling asleep, 32.2 percent admitted falling asleep between 3 and 6 times in the past month.¹¹

The long hours that by-the-mile and by-the-trip pay reward also endanger the mental and physical health of truckers. Long, solitary shifts can bring feelings of isolation and can strain personal relations. Truckers have reported feeling lonely, tired, and irritable, as well as depression, anxiety, and skeletal-muscular problems.¹²

Additionally, long hours can lead to drug use. There is a strong connection between HOS violations and drug use,¹³ suggesting that drivers may use drugs to stay awake during long shifts. While those drivers who break HOS rules may be predisposed towards reckless behavior, there is also a significant relation between positive drug test results among professional drivers and a shipment deadline for the load being delivered.¹⁴ This undercuts reckless predisposition as an explanation for the connection between drug use and HOS violations. Assuming that drivers on deadline work long hours, which is highly likely, this additionally supports the notion that long hours encourage drug use.

⁶ Christie, Les. "America's Most Dangerous Jobs: The Top Ten Most Dangerous Jobs in America." CNN.com Oct. 13, 2003, available at <http://money.cnn.com/2003/10/13/pf/dangerousjobs/index.htm>.

⁷ Federal Motor Carrier Safety Administration. Available at <http://www.fmcsa.dot.gov/factsfigs/cmvfacts.htm>.

⁸ *Fatigue, Alcohol, Other Drugs, and Medical factors in Fatal-to-the-Driver Heavy Truck Crashes*, NTSB Number SS-90/01. National Transportation Safety Board. 1990.

⁹ *Factors that Affect Fatigue in Heavy Truck Accidents. Volume 1: Analysis*. NTSB Number SS-95/01. National Transportation Safety Board. 1995.

¹⁰ *Id.*

¹¹ Abrams et al. *Commercial Motor Vehicle Driver Alertness, Fatigue, and Countermeasures Survey*. 1997.

¹² Saltzman, Gregory M and Michael H Belzer. "The Case for Strengthened Motor Carrier Hours of Service Regulations." *Transportation Journal*, Volume 41, Issue 4, July 1, 2002.

¹³ *Fatigue, Alcohol, Other Drugs, and Medical factors in Fatal-to-the-Driver Heavy Truck Crashes*, NTSB Number SS-90/01. National Transportation Safety Board. 1990.

¹⁴ *Id.*

By-the-mile and by-the-trip pay also provide little incentive for employers to limit driver hours. With these two payment methods, a driver's time is essentially free, and companies may view long driving hours only as quicker delivery, at no extra cost. This system therefore also provides a strong incentive to promote long duty hours.

Another consequence of "free" driver time is that employers may disregard trucker duty time, contributing to the problem of inefficient dispatches and long waits at shippers and receivers. Lost time costs employers nothing, and with little reason for them to increase efficiency and reduce long waits at shippers and receivers, truck drivers spend an average of 33 – 40 hours per week at loading docks.¹⁵ Lost time does cost drivers, though, insofar as it consumes on-duty time that otherwise could be spent as paid driving time. This places the burden of making up lost time squarely on the shoulders of truckers, who often absorb lost time by illegally documenting it as off-duty time.¹⁶ This unlawful practice keeps drivers on duty longer, at the expense of the critical time needed for rest and sleep.

Public Citizen has received numerous emails from truckers complaining about long waits at shippers and receivers. One trucker wrote: "it is customary for drivers to have to lie on their log books showing an unload of 15 to 30 minutes when in actuality the receivers (who are capable of unloading in 30 min or less) typically take 4 hours or more...."

More than just rewarding and promoting dangerous behaviors, by-the-mile and by-the-trip pay make them virtually inevitable. This system sets the industry up for the plague of risky behavior from which it suffers.

Truckers do not drive long hours simply to make extra money. For many, driving long hours is the only way they can make a living at all. Time lost at shippers and receivers or because of inefficient dispatch is cut from a driver's paycheck if they cannot drive the maximum driving hours. In order to make a decent wage, drivers often must absorb lost time by staying on duty longer. One trucker who wrote Public Citizen described the dilemma truckers face: "We have a choice: to drive safely and live in poverty, drive unsafe and exchange our health for money, or stop driving." Clearly, this is not a choice—but the purest form of exploitation.

HOS Regulations Play a Critical Role in Limiting On-Duty Hours and Protecting Highway Safety

With strong incentives to drive long hours, effective HOS regulations can and should provide a necessary counterbalance. Dangerous behaviors endemic to the trucking industry jeopardize driver mental and physical health, and endanger the lives

¹⁵ PATT. <http://www.patt.org/index2.asp?contentID=317>

¹⁶ Campbell, Kenneth and Michael H. Belzer. *Hours of Service Regulatory Evaluation Analytical Support*. 2000.

and livelihoods of the driving public. New and improved HOS regulations are critical to curbing long driver duty hours in an industry structured to produce them.

HOS regulations are intended to limit drivers to on-duty hours consistent with circadian rhythm, so as to limit fatigue. As a matter of human physiology, truckers can work only so long before suffering performance deterioration. Studies have shown that performance ability decreases after eight hours on duty, and decreases, in FMCSA's language, "geometrically" during the tenth and eleventh hours on-duty.¹⁷

Such deteriorated performance can have tragic results. FMCSA estimates of annual fatigue-related truck-crash fatalities have ranged from 276 to 755.¹⁸ Additionally, studies have shown that truckers at fault in fatal crashes are 2½ times more likely to have driven at least 10 hours than drivers not at fault,¹⁹ and 82 percent of single-vehicle large truck crashes involving drivers who exceeded HOS limits were fatigue related.²⁰

As these statistics make painfully clear, HOS regulations that limit trucker on-duty time to account for natural human fatigue and circadian rhythm are critical to highway safety. There is practically no dispute on this issue. Congress recognized the importance of limiting driver duty time in 1935, and Department of Transportation (DOT) has long acknowledged the dangers of drowsy driving. In 1988, the Federal Highway Administration (FHWA) emphasized the central role driver fatigue plays in large truck crashes and suggested that the problem primarily resulted from violation of HOS regulations.²¹ Driver fatigue was also voted the top safety concern at a 1995 FHWA summit involving drivers, motor carrier representatives, government officials and safety advocates.²²

Driver Records of Duty Status (RODS) Undermine Compliance with Hours of Service Regulations

Though DOT recognizes the importance of HOS regulations, it has effectively undermined them by relying upon manual logbooks for documenting driver hours of service. In order to be effective, HOS rules must be followed. Given the strong incentives to break HOS rules, enforcement is absolutely critical to upholding the integrity of HOS regulations and maximizing the benefits they offer, as FMCSA itself has acknowledged.²³

¹⁷ 68 FR 22471.

¹⁸ 65 FR 25546. 68 FR 22494.

¹⁹ Summala and Mikkola. *Fatal Accidents Among Car and Truck Drivers: Effects of Fatigue, Age, and Alcohol Consumption*. 1994.

²⁰ *Factors that Affect Fatigue in Heavy Truck Accidents. Volume I: Analysis*. NTSB Number SS-95/01. National Transportation Safety Board. 1995.

²¹ Advocates for Highway and Auto Safety. Comments 31-33, 1997. See also DOT, Office of Inspector General. *Motor Carriers Safety Program: Federal Highway Administration*. 1999. Available at http://www.oig.dot.gov/item_details.php?item=143.

²² 65 FR 25541.

²³ 68 FR 22500 – 01; 65 FR 25585; and 65 FR 25596.

Inexplicably, the agency still relies upon a completely out-of-date method of documenting HOS that renders enforcement utterly hollow. First promulgated in 1938, regulations allow drivers to keep track of their own hours in logbooks. Amounting to little more than an honor code, this method of recording HOS provides no protection against the falsification of records. And because police heavily rely upon them to identify HOS violations, RODS undermine enforcement of HOS and, subsequently, HOS regulations themselves.

With so many incentives to violate HOS regulations and with RODS making it so easy to get away with doing so, it is no surprise that studies reveal extensive falsification of HOS records. In a University of Michigan survey, only 16 percent of drivers reported that logbooks are generally accurate, and 56 percent of drivers admitted working more hours than recorded in the last month. In fact, the average driver in the survey worked 64.3 hours in the last seven days, with 25 percent and 10 percent of drivers working 75 hours and 94 hours, respectively.²⁴ These responses corroborate previous surveys, which show widespread violation of HOS rules and falsification of records.

Also, the U.S. Court of Appeals for the District of Columbia Circuit has acknowledged that “driver noncompliance with federal regulation... might be described as the stuff of legend,” citing lyrics from the song “*Six days on the Road*,” by E. Green and C. Montgomery:

The I.C.C. is a-checking on down the line.
Well, I’m a little overweight and my log books are way behind.
But nothing bothers me tonight, I can dodge all the scales all right,
Six days on the road, I’m gonna make it home tonight.²⁵

Also, because RODS allow easy violation of HOS regulations, carriers are provided with a tempting opportunity to seek a competitive advantage over other carriers by breaking HOS rules. By keeping drivers on the road longer than HOS regulations allow, carriers are able to provide faster delivery and deliver more than carriers that comply with HOS regulations. Carriers that comply with HOS regulations then face a competitive disadvantage in comparison to those carriers that do not comply, strongly discouraging compliance with HOS regulations. Given widespread noncompliance with HOS regulations and the agency’s lax attitude towards enforcement, carriers may view compliance as merely an unnecessary incursion upon profits.

Enforcement of HOS regulations is critical. A report written by top specialists at FHWA states that “because compliance with hours-of-service regulations... has a strong influence on the ability of a driver to perform safely, recording of duty status and time

²⁴ 65 FR 25558

²⁵ *Public Citizen v. Federal Motor Carrier Safety Administration*, 374 F.3d 1209 (D.C. Cir. 2004).

becomes an essential regulatory issue.”²⁶ FMCSA is fully aware of widespread noncompliance with HOS regulations, including logbook falsification, which it has described as “widespread.” In fact, the agency’s Regulatory Impact Analysis (RIA) of its 2003 final rule revising HOS regulations took non-compliance to be the norm, and calculated costs based on status quo noncompliance, setting out a different and less likely set of calculations that assumed full compliance.

Incredibly, DOT has, at best, only passively pursued technologies that would improve driver compliance with HOS regulations. The agency currently has no automated recorder requirement, and it has not even issued a requirement for the long-haul sector despite its own acknowledgement of long-haul drivers’ exceeding involvement in fatigue-related fatal crashes.²⁷

Unnecessary Deaths Due to Agency Inaction

So many factors overwhelmingly point to the need for a method of ensuring accurate HOS records. However, federal agencies responsible for large truck safety have failed to update RODS regulations to protect truckers and the public. RODS might have been the only viable option for recording hours of service over 65 years ago when HOS regulations were promulgated, but the fact that DOT has not issued critical revisions to reflect technological advances since then is absolutely irresponsible. Lives are unnecessarily lost week after week because of DOT’s inaction.

Technology to improve the accuracy of HOS records and enforcement has been available for decades. The European Commission established a regulation requiring an automated recorder in 1970, nearly 35 years ago.²⁸ Today, all European Union nations, Turkey, Israel, Japan, South Korea, Brazil, and Venezuela fully require automated recorders.²⁹ Yet the United States, with its vastly larger trucking fleet, dependence on the shipment of goods over highways, high death rate, massive non-compliance and financial capability continues to lag behind on this basic safety measure.

A recent example of consistent agency inaction on this issue is FMCSA’s failure to issue in final form its 2000 proposal to require EOBRs for long-haul and regional drivers in its 2003 final rule.³⁰ The agency claimed that neither “the costs nor the benefits of EOBR systems are adequately known,”³¹ yet data suggest that automated recorders on large trucks improve highway safety. In Germany in 1975, the first year tachographs fully penetrated the trucking fleet, there was one crash involving large trucks

²⁶ Thomas, Neill L. and Deborah M. Freund. *On-Board recording for Commercial Motor Vehicles and Drivers: Microscopic and Macroscopic Approaches*. 1999.

²⁷ 65 FR 25546.

²⁸ Deborah M. Freund. *On-Board Automated Recording for Commercial Motor Vehicle Drivers’ Hours-of-Service Compliance: The European Experience*. August 2001.

²⁹ Lehmann, Dr. Gerhard. “Highway Recording Systems: A Report on European and US Experiences.” May 1999.

³⁰ 65 FR 25540.

³¹ 68 FR 22488.

resulting in injury per 790,000 kilometers traveled. In 1985, the number of miles traveled per crash resulting in injury rose 54 percent, while the number of miles traveled per crash resulting in injury for passenger cars rose only 22 percent during the same period. The mechanical tachographs used in Germany during that period were highly susceptible to tampering, yet their full implementation throughout the truck fleet still resulted in a reduction in injuries resulting from crashes involving large trucks.

NTSB also has long advocated mandatory implementation and use of recorders to monitor HOS. In 1990, NTSB recommended that DOT require automated recording devices in carriers. In 1998, after eight years of agency inaction, NTSB classified the recommendation as “Closed—Unacceptable Action.” As mentioned in FMCSA’s current rulemaking, NTSB stated that it found “no indication of aggressive research and prompt action to develop and require advanced technical solutions to address the intent of Safety Recommendation H-90-28.” Despite NTSB’s recommendation and subsequent placement of automated recorders on its “top ten” list, DOT has failed to act on this critical issue.

Also contradicting FMCSA’s claim, DOT reports have acknowledged the benefits automated recorders offer for safety and hours of service compliance. A 2001 report by the Office of the Inspector General (OIG) stated that “use of electronic recorders and other technologies to manage the hours-of-service requirements has significant safety value.”³² Additionally, a FHWA report noted that many carriers that have used automated on-board recorders improved compliance with HOS regulations.³³ FMCSA also has predicted that electronic recorders would reduce crashes³⁴ and has agreed with NTSB that EOBRs would reduce violations by making record falsification difficult³⁵ and by changing attitudes towards compliance.³⁶

Despite compelling evidence that automated recorders improve highway safety, NTSB’s repeated urgings, and DOT’s own admission of their benefits, DOT has staunchly resisted requiring automated recorders for carriers. In fact, DOT has ignored numerous petitions from auto safety groups to require automated recorders for nearly 20 years. The Insurance Institute for Highway Safety (IIHS) petitioned DOT to require automated recorders in long-distance carriers in 1986, 1987, 1988, 1989, and 1995. Several advocacy groups also joined IIHS in petitioning DOT to require automated recorders in 1995. DOT denied all petitions. Additionally, IIHS submitted further evidence of the technical and economic feasibility of such devices in 2000 and 2002. Its 2000 submission included reference to a study showing a reduction in crash occurrences among vehicles equipped with electronic recorders. This petition was similarly denied.

³² PT-2001-017. January 18, 2001.

³³ Thomas, Neill L. and Deborah M. Freund. *On-Board recording for Commercial Motor Vehicles and Drivers: Microscopic and Macroscopic Approaches*. 1999.

³⁴ 65 FR 25585.

³⁵ 65 FR 25563 and 65 FR 25570.

³⁶ 65 FR 25567 and 65 FR 25596.

Even with a Congressional mandate, DOT has failed to grant recording technology the attention it is due. In 1988, Congress passed a law requiring DOT to issue a rulemaking to improve safety regarding compliance with HOS regulations that specifically mentioned on-board recorders. DOT never issued the rule. In 1995, Congress ordered FHWA to revise HOS regulations to address a number of fatigue-related truck safety issues. On-board recorders again were among the issues listed, yet FHWA never issued the final rulemaking Congress required.³⁷

In 2000, the agency did issue a notice of proposed rulemaking (NPRM) to require truckers to use EOBRs instead of RODS. FMCSA, however, removed the EOBR requirement from the final rule it issued in 2003, citing three primary reasons for its retraction. The agency claimed that: one, it knew neither the costs nor the benefits of EOBRs; two, implementing a performance standard for EOBRs might be difficult; and three, EOBRs might be too intrusive.³⁸

Public Citizen sued FMCSA over the final rule, which Public Citizen claimed violated Congress's mandate. In a decision in favor of Public Citizen, the U.S. Court of Appeals for the District of Columbia Circuit found FMCSA's three excuses "flawed." The court stated that Congress's mandate "required the agency, at a minimum, to collect and analyze data on the costs and benefits of requiring EOBRs," noting that "the agency's explanation in all likelihood does not conform to this statutory requirement."³⁹ Further, the court stated "the agency has offered no good reason for treating this problem with such passivity."⁴⁰

HOS regulations are critical to highway safety, yet they are only effective if they are adequately enforced. RODS, however, greatly compromise enforcement capabilities, effectively undermining HOS regulations and endangering truckers and the driving public. EOBRs would allow for more accurate recording of HOS and would provide much-needed teeth for enforcement of these critical rules.

Action on this issue is long overdue. It is astounding that the agency is merely requesting comments on automated recorders, rather than requiring their installation as a final rule. The agency should have looked into this critical issue with the emergence of automated recorder technology, not decades later. We are worried that FMCSA's ANPRM/Request for Comments will be only another example of agency inaction on this critical issue. We desperately hope, however, that FMCSA will redeem itself and require EOBRs for all commercial motor carriers under the agency's jurisdiction. Though it is already too late for many, this action would grant truckers and the driving public the safety they both deserve. The agency must take this opportunity to live up to its responsibility to save lives.

³⁷ 49 U.S.C § 31136.

³⁸ 68 FR 22488 – 89.

³⁹ *Public Citizen v. Federal Motor Carrier Safety Administration*, 374 F.3d 1209 (D.C. Cir. 2004).

⁴⁰ *Id.*

EOBRs Also Offer Benefits for the Trucking Industry

In addition to safety benefits for truckers and the driving public, EOBRs also offer economic benefits to the trucking industry. EOBRs would reduce costs to the industry that are the result of fatigue-related crashes, allow for better scheduling and routing of trucks, and eliminate the costly paperwork burden associated with RODS. Indeed, many trucking companies have electronic systems for scheduling trucks and tracking deliveries, making the additional HOS tracking function a relatively simple matter.

Many sources, including carriers, have cited the economic benefits of EOBRs. Vehicle operating cost topped both the primary and secondary reasons carriers listed for acquiring electronic recorders.⁴¹ Also, FMCSA noted in its ANPRM/Request for Comments that EOBRs would improve asset management, customer service, and scheduling of vehicles and drivers. In Europe, driver, union, and carrier response to automated recorder requirements reportedly has been positive.⁴² Recorders are viewed as contributing to equal competitive conditions, fostering a better reputation for the transportation industry, and protecting against driver exploitation.⁴³

Additionally, FMCSA stated in its ANPRM/Request for Comments that EOBRs would “substantially reduce the collection of information requirements” of RODS. The paperwork cost associated with RODS is enormous, and substantial savings in this area would greatly benefit the trucking industry. FMCSA estimated in its ANPRM/Request for Comments that motor carriers incur a time burden of 161 million hours each year, and the total cost of RODS is \$63.3 million annually.

Reductions in fatigue-related crashes that would come with better enforcement of HOS regulations would also reduce costs to industry. An FHWA report noted that “savings can also be derived from avoidance of adverse occurrences, such as crashes...”⁴⁴ FHWA cited repairs, insurance claims, cargo damage, increased insurance premiums, and customer relationships as economic costs of crashes.

With so much to gain economically from the use of EOBRs for monitoring HOS compliance, claims that EOBRs will impose an unbearable cost burden upon carriers are at best dubious. In 1998, FHWA invited carriers already using GPS technology to use GPS-based automated recorders to monitor HOS compliance. Despite minimal costs, as carriers already possessed GPS technology, only one carrier accepted.

As this illustrates, cost is not the primary objection to EOBRs for many carriers. Rather, it is likely that the real objection to EOBRs is that they will hold carriers to HOS

⁴¹ Campbell, Kenneth L. et al. *Electronic Recorder Study*. The University of Michigan Transportation Research Institute and Science Applications International Corporation, June 1998, p. 28.

⁴² Lehmann, Dr. Gerharrd. Statement at International Symposium on Transportation Recorders. May 1999.

⁴³ *Id.*

⁴⁴ Thomas, Neill L. and Deborah M. Freund. *On-Board recording for Commercial Motor Vehicles and Drivers: Microscopic and Macroscopic Approaches*. 1999.

regulations, which they have continually been able to evade. FMCSA has a responsibility to enforce HOS regulations, and failing to do so compromise both safety and the integrity of the agency and HOS regulations. FMCSA should not grant objections to compliance with HOS regulations any consideration in the agency's deliberations on driver acceptability of EOBRs. It is the agency's responsibility to ensure compliance with HOS regulations, regardless of whether carriers wish to comply or not.

EOBRs with GPS Technology Provide an Opportunity to Bolster Homeland Security and Would Enable Better Responses to Crashes Involving Trucks Carrying Hazardous Material

Trucks carrying hazardous material provide a tempting target for terrorists, and post 9/11 concerns make this an issue that cannot be ignored—even though the Bush administration has done just that for three years. EOBRs with GPS technology would allow tracking of trucks, especially trucks carrying hazardous materials, providing a much needed security measure. GPS technology would also allow for quicker and more prepared responses to crashes involving trucks carrying hazardous material. EOBRs with GPS technology could be designed to automatically notify emergency responders of a crash involving a truck carrying hazardous material. Information about crash severity, the chemicals that a truck was carrying, and crash location also could be relayed to emergency personnel, enabling a far more prepared response to crashes.

Voluntary Use of EOBRs is Ineffective and Counterproductive

While FMCSA has provided carriers with the opportunity of using EOBRs instead of RODS to monitor hours-of-service, only one company has accepted the offer. Without a requirement from FMCSA, carriers will remain reluctant to use EOBRs. It is likely that one of the primary reasons for this is that carriers fear that if they adopted EOBRs, they would suffer a competitive disadvantage in relation to companies that do not, allowing them more easily break HOS rules. Thus, voluntary use will not provide the full safety benefits of EOBRs.

Privacy Concerns

It is important to guard EOBR data against abuse, but unwarranted privacy concerns do not outweigh the numerous economic and safety benefits that EOBRs offer. Rather than robbing truckers, industry, and the driving public of the benefits of EOBRs, FMCSA should address privacy concerns by looking into ways to protect EOBR data from abuse.

Also, DOT has already confronted privacy concerns regarding monitoring of driver HOS. In 1980, FHWA rejected claims that RODS unduly invaded driver privacy, noting that they are used to monitor compliance with federal regulations.⁴⁵ EOBRs, as

⁴⁵ 45 FR 82284 and 45 FR 82289.

FMCSA acknowledged in its 2000 NPRM, are simply “a more effective form of the self-monitoring and -reporting drivers have been required to perform for many decades.”⁴⁶

Responses to Requested Comments

FMCSA must require EOBRs for all trucks under the agency’s jurisdiction, including both long-haul and short-haul carriers. Public Citizen below responds to FMCSA’s requested comments on the capabilities and technological features needed to ensure effective EOBRs. Responses are provided as appropriate.

A. Synchronization of Recorder to a Vehicle Operation Parameter: As FMCSA notes in its ANPRM/Request for Comments, relying exclusively upon vehicle location and interpretive algorithms to detect driving time has been ineffective in the past. The literature and technology review FMCSA sponsored also noted that relying solely upon vehicle location data was an unreliable method of determining driving time.⁴⁷ The review stated that “the coupling of vehicle location and engine data would improve the quality of the data that is being used to generate the driver log,”⁴⁸ and specifically recommended a combination of vehicle location data and engine data to monitor compliance with HOS regulations.⁴⁹ Accurate monitoring of duty hours is critical to enforcement of HOS regulations and to driver acceptance of EOBRs. FMCSA should follow the recommendation of the report it commissioned when issuing an EOBR requirement.

B. Amendment of Records: Manual entry of duty status and revision of records effectively undermines the purpose of an automated recorder. EOBRs should be designed so that there is no need to amend records. This includes both amending records and manually entering duty status. A driver should not be allowed to revise or manually enter portions of records that recorders are capable of providing. For instance, a driver should not be allowed to revise driving time records, as recorders can accurately monitor driving time. Additionally, the agency must favor recorders that can accurately record non-driving duty status, rather than allow drivers to amend records. For instance, EOBRs that signal with a beep or a blinking light when driver input is needed would undercut the need for drivers to revise non-driving duty records.

C. Duty Status Categories When the CMV Is Not Moving: Again, the agency should require recorders that eliminate the need to amend records.

D. Ensuring that Drivers are Properly Identified: Driver identification is critical to ensuring the accuracy of EOBRs in monitoring driver hours of service. Biometric

⁴⁶ 65 FR 25563.

⁴⁷ Wright, Brad and Erin Fogel. *On-Board Recorders: Literature and Technology Review*. Cambridge Systems, Inc., for the Federal Motor Carrier Safety Administration, March 20, 2002, p. 5-3.

⁴⁸ *Id.*

⁴⁹ Wright, Brad and Erin Fogel. *On-Board Recorders: Literature and Technology Review*. Cambridge Systems, Inc., for the Federal Motor Carrier Safety Administration, March 20, 2002, p. ES-3.

technology, such as a fingerprint scan, may enable a far more precise identification of drivers. Also vehicles should not be able to be turned on until an authorized driver logs in. This would increase security and prevent EOBRs from inadvertently applying on-duty hours to the wrong driver. Miles driven should be recorded for each driver and companies should pay drivers based on these records. This would discourage team drivers from splitting hours between drivers when, in fact, one has done most of the driving.

E. Reporting and Presentation Formats: Any violations should clearly appear on the screen of the recorder so that, at a glance, enforcement personnel can determine whether a driver has committed any violations. The agency should consult enforcement personnel to determine which screen format works best.

F. Audit Trail: An audit trail would assist enforcement of HOS regulations. However, measures to ensure that data cannot be altered must be enacted.

H. Verification of Proper Operation: We support a method for verifying correct EOBR operation, as it is necessary to ensure accurate records. The method the agency ultimately chooses should be easy enough to allow drivers to quickly check for correct recorder function prior to trips, and also to allow enforcement personnel to conduct quick checks at roadside stops. In the case of a malfunctioning recorder, a driver should not be allowed to depart on a trip with a malfunctioning recorder. If a recorder malfunctions mid-trip, a driver should be allowed to use RODS for only a short period of time.

I. Testing and Certification Procedures: FMCSA or some other federal agency should conduct testing of recorders. Recorder manufacturers should not be allowed to certify their own devices. Allowing this would make it very easy for manufacturers to sell non-compliant recorders to carriers, compromising safety. A list similar to NHTSA's Conforming Product List may be the best approach.

J. EOBR Maintenance and Repair: Recorders should be required to document any malfunctions and record notice of the malfunction, including information about its nature and the date and time. This information should also be automatically displayed on the screen of the recorder. Repairs and calibrations should only be made at an agency-approved facility. This would reduce the likelihood of errors and fraud. To allow necessary agency oversight, FMCSA should have access to facilities and relevant materials.

K. Development of "Basic" EOBRs to Promote Increased Carrier Acceptance: As FMCSA's commissioned literature review noted, combining engine and vehicle location data is needed to ensure the accuracy of the data used to calculate driver hours of service. A minimally compliant EOBR that does not incorporate both sets of data will compromise accurate monitoring of driver hours of service. FMCSA should follow the recommendation of its commissioned literature review when issuing an EOBR requirement and require EOBRs that incorporate both engine and vehicle location data.

M. Potential Benefits and Costs: FMCSA, OIG, and FHWA have all recognized the safety benefits of EOBRs and data suggest that automated recorders improve highway safety. Also, NTSB and highway safety advocacy groups have long recommended mandatory use of automated recorders to monitor HOS compliance and improve highway safety. Carriers, FMCSA, and FHWA have also recognized the economic benefits of using EOBRs to monitor HOS compliance. Additionally, European truckers, carriers, insurance companies, and unions have voiced support for recorder legislation, citing several benefits from industry-wide use of automated recorders.

Given the invaluable benefits of lives saved and injuries avoided, on a purely economic level, the benefits of using EOBRs may well outweigh the cost of equipping trucks with EOBRs.

Because of rampant noncompliance with HOS regulations, EOBRs, which help facilitate critical enforcement of HOS regulations, would essentially provide the benefits that HOS regulations intend to, but currently do not. Though federal law, enforcement of HOS regulations has been undermined for decades. This has denied truckers and the public the safety they deserve while also jeopardizing DOT's integrity. Additionally, FMCSA does not even mention the benefits EOBRs would have on driver health in the ANPRM/ Request for Comments. The U.S. Court of Appeals for the District of Columbia Circuit lambasted FMCSA's 2003 final rule for its failure to account for driver health, yet the agency has again done just that.

N. Incentives to Promote EOBR Use: Any incentives granted should be part of a timely phase-in period leading to 100 percent compliance for carriers subject to HOS regulations.

O. Miscellaneous Questions:

1. FMCSA should mandate recorders combining engine and vehicle location data (such as GPS) for all motor carriers under the agency's jurisdiction. The agency must also follow all other specifications outlined above, which are critical to ensuring effective EOBRs.
2. An FHWA report acknowledges that EOBRs have improved carrier compliance with HOS regulations.⁵⁰ FMCSA also has agreed that EOBRs would reduce HOS violations.⁵¹
3. Recorders must be capable of recording accurate duty records, all information relevant to accurate duty records, and extensive crash data. See particular specifications above.

⁵⁰ Thomas, Neill L. and Deborah M. Freund. *On-Board recording for Commercial Motor Vehicles and Drivers: Microscopic and Macroscopic Approaches*. 1999.

⁵¹ 65 FR 25563.

4. FMCSA should focus on acquiring recorders capable of recording duty status without driver input. Recorders should be designed so that there is no need for drivers to make revisions.
5. GPS technology is capable of precise location detection. FMCSA's requirement should reflect this.
6. Biometric identification technology, particularly fingerprint scans, is available and would ensure accurate driver identification.
7. Drivers should not be allowed to amend records.
8. FMCSA should require a standardized file transfer protocol to better facilitate easy data transfer.
9. Any incentive should be granted as a reward for early-compliance with an across-the-board requirement.

Conclusion

FMCSA must require EOBRs for all commercial carriers under its jurisdiction, including both long-haul and short-haul carriers. To ensure accuracy and effectiveness, EOBRs must combine engine and location data to monitor compliance with HOS regulations. EOBRs also must accurately record driver duty status, and must be designed to eliminate the need for driver input. Additionally, EOBRs must be equipped with features to ensure accurate driver identification. Too many lives have already been lost because the agency has failed to meet its responsibility on this issue. FMCSA should immediately issue a rulemaking requiring EOBRs for all commercial carriers under its jurisdiction.