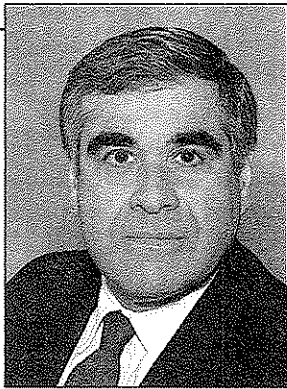


Federal Regulations to Require Electronic On-Board Recorders FOR MOTOR CARRIERS



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Drivers operating commercial motor vehicles, motor carriers and the lawyers who represent them are all familiar with the Federal Motor Carrier Safety Regulations (FMCSRs) requiring drivers to monitor duty status and hours of service. Charting duty status in a logbook and tracking toll receipts, fuel records and other supporting documents has become a matter of daily routine for commercial drivers. This routine stands to change, however, under a new proposed federal regulation requiring motor carriers to equip commercial motor vehicles with electronic on-board recorders (EOBRs) to monitor a driver's duty status and hours of service.¹

History of Electronic On-Board Recorders

Motor carriers² have long utilized EOBRs to record commercial motor vehicle operations.

During the 1980s motor carriers began to explore alternative options to ensure driver compliance with hours of service requirements. In 1985, the Federal Highway Administration (FHWA, the predecessor of the FMCSA) granted waivers to 10 motor carriers allowing the use of on-board computers to maintain records of duty status. The following year,

the Insurance Institute for Highway Safety petitioned the FHWA for a rule requiring the use of on-board computers to track hours of service compliance. The FHWA denied the request, but began rulemaking proceedings to permit the use of such devices. In 1988, the FHWA enacted a rule allowing motor carriers to use electronic devices in lieu of paper logs.³ (The regulation permitting such use refer to the electronic devices as Automatic On-Board Recording Devices or AOBRDs. The function of these devices, however, is essentially identical to that of EOBRs.)

In 1995, industry groups again petitioned for a rule mandating electronic tracking of hours of service requirements. The final rule, published in April 2003, did not include such a mandate.⁴ In 2004, unrelated to the EOBR issue, the U.S. Court of Appeals for the District of Columbia vacated the 2003 final rule.⁵ The *Public Citizen* court did hold, however, that the FMCSA was required "at a minimum, to collect and analyze data on the costs and benefits of requiring EOBRs."⁶

To comply with the *Public Citizen* mandate, the FMCSA undertook an in-depth analysis of the EOBR issue. In January 2007, the FMCSA issued a Notice of Proposed Rulemaking (NPRM), proposing that motor carriers with a serious history of hours of service violations be required to install EOBRs aboard all of their commercial motor vehicles. Any motor carrier in the worst 10% of hours of service violators during a two-year period would be subject to

the EOBR requirement. The final rule went into effect on April 5, 2010. Motor carriers subject to the rule are required to comply with the rule before June 4, 2012.⁷

During the comment period for the April 2010 EOBR rule, the FMCSA received numerous comments calling for expanding the mandatory use of EOBRs to all motor carriers, not just those with a pattern of hours of service violations. Because of the limited scope of the NPRM, the FMCSA was prohibited from considering such an expanded scope. On February 1, 2011, in order to address these concerns, the FMCSA issued a new NPRM. As part of this latest rulemaking initiative, the FMCSA seeks to require EOBR use irrespective of a motor carrier's compliance record. The current NPRM can be accessed online at <http://www.fmcsa.dot.gov/rules-regulations/administration/rulemakings/proposed/ECBR-and-HOS-Supporting-Documents.pdf>.

Requirements of the Proposed Rule

The current FMCSA proposal requires that EOBRs be installed aboard and used in all commercial motor vehicles for which federal regulations require keeping records of duty status. Essentially, any motor carrier whose drivers are required to

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maintain paper logs would now be required to monitor hours of service compliance with EOBRs.

Certain segments of the motor carrier industry would remain unaffected under the proposed rule. For instance, short-haul "100 air mile radius" carriers whose drivers maintain time cards⁸ are not required to use EOBRs. Likewise, hazardous materials carriers and passenger carriers whose drivers do not currently maintain records of duty status are exempt from the requirements of the proposed rule. A hazardous materials carrier or passenger carrier whose drivers do maintain records of duty status, however, are required to install and use EOBRs.

The FMCSA considered adopting a universal EOBR mandate for all commercial motor vehicles. The National Transportation Safety Board and other industry groups advocated for this approach. The FMCSA ultimately rejected this proposal, noting that the anticipated costs outweighed the estimated safety benefits.

The proposed EOBR mandate does not prescribe requirements for EOBRs. Instead, the proposal adopts the requirements of the April 2010 EOBR rule governing motor carriers with a pattern of hours of service violations. Each EOBR device is required to record the following information: (1) driver name, and co-driver, if any; (2) duty status; (3) date and time; (4) vehicle location; (5) distance traveled; (6) motor carrier name and USDOT number; (7) 24-hour period starting time; (8) multiday basis used to compute cumulative duty hours and driving time; (9) hours in each duty status; (10) truck or tractor and trailer numbers; and (11) shipping document numbers, or shipper name and commodity.⁹ These are the same requirements as used for permissive use AOBDRs.¹⁰

The EOBR must allow the driver to review the electronic record for the current day before the driver submits

the information to the motor carrier.¹¹ Additionally, EOBRs must prevent alteration of data.¹² The EOBR must be capable of producing data for the current day and the previous seven days on demand.¹³ Drivers using EOBRs must maintain instructions on how to retrieve EOBR information in the cab.¹⁴ Drivers must also maintain enough paper log forms for the current trip, in the event of EOBR malfunction.¹⁵

It is crucial to note that neither the existing EOBR requirements, nor the proposed rule, alter a motor carrier's duty to maintain supporting documents. Current federal regulations require motor carriers whose drivers keep records of duty status to maintain supporting documents evidencing hours of service requirements.¹⁶ A motor carrier must maintain this information for six months. Under the proposed rule, a motor carrier's duty remains unchanged. The proposed rule will adopt the statutory definition of "supporting document," requiring motor carriers to maintain¹⁷ "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... to verify the accuracy of a driver's record of duty status."¹⁸ The only limited exception would be that motor carriers using EOBRs would no longer be required to maintain supporting documents evidencing driving time, as the EOBR would already capture such information.

The FMCSA's proposed supporting documents requirements are a matter of some consternation in the industry. One would think that requiring verifiable electronic logs would obviate the need to keep paper backup documents. The conversion to EOBRs, maintaining the systems, and storing the data are burden enough, and their electronic nature should make it unnecessary to keep hard copies of documents. The authors contacted the American Trucking Associations (ATA) whose Policy and

Regulatory Affairs office advised that ATA generally supports EOBRs for purposes of documenting hours of service and record of duty status. ATA is concerned, however, about the added and seemingly superfluous requirement to maintain supporting documents as required by the existing regulations.

David Heller, Director of Safety and Policy for the Truckload Carriers Association (TCA) advised that TCA also generally supports EOBRs as they relate to hours of service and record of duty status. TCA is also concerned, however, that the current regulatory and legislative efforts (see below) are vague regarding what data may be required. TCA notes that the legislation requires not only EOBRs, but that the EOBRs be integrated into the power unit's electronic control module (ECM). This subtle requirement causes concern that the FMCSA and DOT may eventually insist that motor carriers keep records of ECM data such as speed, hard brake events, engine RPMs and so forth. This would add to the recordkeeping burden due to the variance of EMCs by engine manufacturer, settings, and data overwriting.

Legislative Efforts

In addition to the proposed regulation, Congress has undertaken a legislative effort to mandate EOBR use. U.S. Sens. Mark Pryor (D-Ark.) and Lamar Alexander (D-Tenn.) have cosponsored federal legislation that would require motor carriers to install EOBRs aboard commercial motor vehicles. Senate Bill 695 – the Commercial Driver Compliance Improvement Act – would require EOBR devices to identify the driver operating the truck, record the driver's duty status, measure hours of service, and monitor the location and movement of the vehicle. The legislation also requires that law enforcement personnel be able to access EOBR information during roadside inspections. As is the case

with the proposed regulation, Senate Bill 695 does not alter the existing regulatory framework for maintaining records of duty status.

As mentioned above, however, the legislation specifically references the integration of EOBRs into the power unit's ECM. This aspect of the legislation has raised concerns among industry leaders.

Senate Bill 695 requires the FMCSA to adopt final rules consistent with the legislative mandates within 18 months of the enactment of the bill. The legislation further requires motor carriers to comply with FMCSA regulations within three years of the rules' enactment.

Senate Bill 695 is currently before the Senate Committee on Commerce, Science and Transportation. The text of Senate Bill 695 can be found online at <http://thomas.loc.gov/cgi-bin/bdquery/D?d112:11:./temp/~bdYVFD::/bss/>.

Public and Industry Reaction to the Proposed Rule

Both public and industry reaction to the proposed rule has been mixed.

As mentioned above, numerous motor carrier associations, including the ATA, the TCA, the National Private Truck Council, and the Alliance for Driver Safety and Security,¹⁹ all endorse both legislative and regulatory efforts to enact EOBR requirements. In voicing their support, these groups each pointed to the need to ease the regulatory burden on maintaining hardcopy supporting documentation to verify HOS compliance.

It should be noted that one reason for the positive industry reaction is that the majority of CSA "fatigued driving" violations stem from log book entries that are "not current." The use of EOBRs would eliminate or sharply reduce "not current" violations because the record of duty status would be electronically recorded in real time. The vagaries of drivers writing down their time on paper logs

would, in a perfect world, become a thing of the past.

Other industry groups, however, have opposed the proposed EOBR rule. Both the Owner-Operator Independent Drivers Association (OOIDA) and the National Association of Small Trucking Companies (NASTC) oppose a federal EOBR mandate (both regulatory and legislative). These groups have cited the FMCSA's acknowledgment that no statistical correlation between EOBR use and safety currently exists. More important, OOIDA and NASTC, which represent smaller carriers and owner-operators, note that a federal EOBR mandate would be cost-prohibitive.

Public commentary on the proposed EOBR rules tends to track industry reaction. The proposed EOBR rule is one of the first proposed federal regulations to utilize the Regulation Room, a partnership between the Legal Information Institute and Cornell University's e-Rulemaking Initiative.²⁰ According to the Regulation Room's findings, some commenters identified many potential benefits from the proposed rule. Others, however, felt that the predicted benefits were overstated. Negative reaction to the proposed EOBR requirements mirrored that of some industry officials. Many commenters expressed concern that regulatory cost will overburden small carriers, and disputed the prediction that EOBR use will improve safety. Some commenters argued that mandating EOBR use will actually increase regulatory inflexibility, rather than reduce the burden on commercial drivers. Public commentary in the Regulation Room can be accessed at www.regulationroom.org.

Proposed Rule Also Affects Cross-Border Trucking Pilot Program

In April 2011, the United States and Mexico announced a revised three-year pilot program that would

allow Mexican trucks to access U.S. highways.²¹ The pilot program is part of the FMCSA's implementation of the cross-border long-haul trucking provisions which were required under the North American Free Trade Agreement (NAFTA). According to the FMCSA, the pilot program is designed to "test and demonstrate the ability of Mexico-based motor carriers to operate safely in the United States[.]"²²

Under the pilot program, Mexican trucks and drivers would be subject to all U.S. laws, as well as any applicable state and local requirements. This would include the proposed EOBR regulations. In an effort to facilitate Mexican compliance with the proposed EOBR requirements, the United States plans to spend \$2.5 million to install EOBRs aboard Mexican commercial motor vehicles. The U.S. subsidy for Mexican EOBR equipment is limited, however. The U.S. will pay to install EOBRs only now, during the rulemaking period for the proposed EOBR regulations. If the FMCSA enacts the proposed rules, Mexican motor carriers will have to pay for EOBRs themselves, just like any other U.S. motor carrier.

Reaction to the cross-border pilot program itself has been mixed. A review of the public comments submitted shows that labor unions and commercial drivers are generally opposed to the pilot program. Commodity producers, import/export enterprises and motor carriers, however, generally support the pilot program.

There is nearly uniform opposition, however, to the EOBR aspect of the cross-border pilot program, with legislators and industry leaders alike objecting to the Mexican EOBR proposal. The American Trucking Associations and the OOIDA both voiced opposition to FMCSA's allocation of U.S. dollars to finance the installation of EOBRs aboard Mexican trucks. U.S. Rep. Peter DeFazio (D-Ore.) also objected to the proposal, noting that the

FMCSA already purchased more than \$1 million worth of EOBRs for Mexican motor carriers during an earlier pilot program, and that the Mexican motor carriers were permitted to keep the devices when that program ended. U.S. Sen. Mark Pryor (D-Ark.) also opposed the proposal, given that, should the FMCSA enact the proposed EOBR rule, U.S. motor carriers would have to finance the purchase and installation of EOBRs themselves.

The Future of EOBR Regulation

Despite mixed reaction to FMCSA's current regulatory proposal,

it is likely, given the recent history of EOBR use and regulation, that FMCSA will adopt the proposed rule. This will require motor carriers subject to the proposed regulation to move rather quickly to comply with the new requirements. The industry as a whole, however, should not have much difficulty in ensuring compliance, as many large motor carriers already use EOBR technology. For smaller carriers, the main issues remain cost, system upkeep and compliance issues.

An EOBR mandate will also likely serve the industry well. It is true that there is no current empirical or statistical link between EOBR

use and driver safety. (Widespread, mandatory EOBR use, however, may ultimately lead to such a correlation.) Nevertheless, as mentioned above, most hours of service violations stem from a driver's failure to currently monitor and record hours of service and changes of duty status, rather than from actual fatigued driving. The EOBR mandate will greatly reduce such errors, leading to greater compliance with hours of service requirements and allowing drivers to concentrate on what is truly important – safe driving.

Endnotes

1. Hours of service and duty status regulations are found at Part 395 of the FMCSRs.
2. For purposes of this article, "motor carrier" means any carrier of property, as well as passengers, whose drivers are required to complete a record of duty status. This is so even though the hours of service regulations for the various types of motor carrier are not identical.
3. See 49 C.F.R. § 395.15.
4. See 68 Fed. Reg. 22456 (April 28, 2003).
5. See *Public Citizen v. FMCSA*, 374 F.3d 1209 (D.C. Cir. 2004).
6. *Id.* at 1221.
7. See 49 C.F.R. § 395.16.
8. Time card regulations are found in the FMCSRs, 49 C.F.R. § 395.1(e).
9. See 49 C.F.R. § 395.16(b). The current voluntary regulation in 49 C.F.R. § 395.16 is extensive and spells out the details regarding all aspects of how EOBR data is to be recorded, retrieved and stored, as well as procedures for calibrating EOBR data, and what to do if the EOBR malfunctions.
10. See 49 C.F.R. § 395.15.
11. See 49 C.F.R. § 395.16(h).
12. See 49 C.F.R. § 395.16(e)(2); 49 C.F.R. § 395.16(p)(2).
13. See 49 C.F.R. § 395.16(k)(1).
14. See 49 C.F.R. § 395.16(l)(1). Interestingly, it has been the authors' experience that the ability of motor carrier enforcement personnel to access and read EOBR data varies widely.
15. See 49 C.F.R. § 395.16(l)(2). 49 C.F.R. § 395.16 contains an exhaustive list of the substantive and technical requirements for EOBRs.
16. See 49 C.F.R. § 395.8(k).
17. The FMCSA proposes slightly altering the text of the retention requirements set forth in 49 C.F.R. § 395.8(k). The title of this particular section currently makes reference to "retention," while the text of that section currently makes reference to "maintenance." The proposed rule seeks to amend the language of 49 C.F.R. § 395.8(k) to include the terms "maintain and retain" to eliminate any perceived inconsistency.
18. 76 Fed. Reg. 5537, 5545 (Feb. 1, 2011).
19. This organization is comprised of several large motor carriers: J.B. Hunt Transport Services, Knight Transportation, Maverick USA, Schneider National and U.S. Xpress Enterprises.
20. The Regulation Room allows members of the public to comment and discuss proposed federal regulations in an interactive setting. At the end of the public comment period, Regulation Room staff digests the commentary and prepares summaries for presentation to the participating federal agency.
21. See 76 Fed. Reg. 20807 (Apr. 13, 2011).
22. 76 Fed. Reg. 20807, 20807. As most readers know, the U.S.-Mexico cross-border trucking program has had a tortured past. A pilot program was adopted under the Bush Administration, but legal challenges plagued the program until Congress withdrew funding altogether. The program was revised and restarted this year.