



OSC | 11
Ohio Safety Congress & Expo

#381 FMCSA: Regulations and recent changes

Linda Gilliam

Thursday, March 31, 2011
8 to 9 a.m.




FMCSA Updates

What's New?

Linda Gilliam, Division Administrator
Federal Motor Carrier Safety Administration
Columbus, OH Division Office
March 2011




Agenda

- Proposed HOS Changes
- EOBR Final Rule
- Distracted Driver Final Rule
- Proposed Cell Phone Use Rule
- HHG Broker Final Rule
- Data Q User Guide Manual
- CSA Warning Letters Released




HOURS OF SERVICE

- **Hours of Service of Drivers**
- **NPRM**
- **(75 FR 82170)**
- **Publication Date: December 29, 2010**




FMCSA Hours of Service Rulemaking

Seven Primary Proposed Changes




Hours of Service Primary Proposed Changes

- 1) Limit drivers to either 10 or 11 hours of driving time following a period of at least 10 consecutive hours off duty





Hours of Service
Primary Proposed Changes

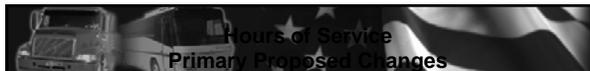
2) Limit the standard “driving window” to 14 hours, while allowing that number to be extended to 16 hours twice a week

3) Actual duty time within the driving window would be limited to 13 hours.



Hours of Service
Primary Proposed Changes

4) Drivers would be permitted to drive only if 7 hours or less have passed since their last off-duty or sleeper-berth period of at least 30 minutes.



Hours of Service
Primary Proposed Changes

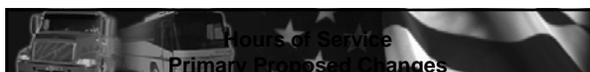
5) The 34-hour restart would be retained, subject to certain limits.

The restart would have to include two periods between midnight and 6 a.m. and could be started no sooner than 168 hours (7 days) after the beginning of the previously designated restart.



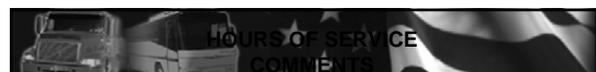
Hours of Service
Primary Proposed Changes

6) The definition of “on duty” would be revised to allow some time spent in or on the CMV to be logged as off duty.



Hours of Service
Primary Proposed Changes

7) The oilfield operations exception would be revised to clarify the language on waiting time and to state that waiting time would not be included in the calculation of the driving window.



HOURS OF SERVICE
COMMENTS

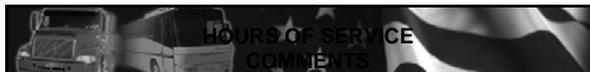
➤ **Submit Comments Online (Federal eRulemaking Portal)**

➤ Go to <http://www.regulations.gov> and click on the "submit a comment" box, which will then become highlighted in blue.

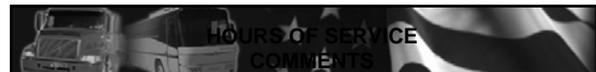
➤ In the "Document Type" drop down menu, select "Proposed Rules," insert "FMCSA-2004-19608" in the "Keyword" box, and click "Search."

➤ When the new screen appears, click on "Submit a Comment" in the "Actions" column.





➤ **Submit Comments by Fax**
 ➤ Fax your comments to: 202-493-2251
 ➤ Please include the docket number **FMCSA-2004-19608** or RIN number **2126-AB26** for this rulemaking. Indicate the specific section of the document to which each comment applies and provide a reason for each suggestion or recommendation.

➤ **Submit Comments by Mail or Hand Delivery**
 ➤ Submit comments to the below address in an unbound format, no larger than 8^{1/2} by 11 inches, suitable for copying and electronic filing.
 ➤ If you would like to know that your mailed comments have reached the facility, please enclose a stamped, self-addressed postcard or envelope.

Monday - Friday, 9 a.m. and 5 p.m., except Federal holidays:

Docket Management Facility (M-30)
 U.S. Department of Transportation, West Building Ground Floor
 Room W12-140
 1200 New Jersey Avenue, SE
 Washington, DC 20590-0001




➤ **Electronic On-Board Recorders for Hours-of-Service Compliance**
 ➤ **(75FR 17208)**

➤ **Publication Date: April 5, 2010**
 ➤ **Effective date: June 4, 2010**
 ➤ **Compliance Date: June 4, 2012**

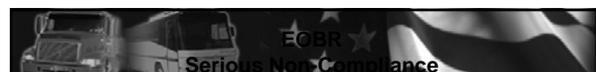



➤ Incorporates new performance standards for EOBRs installed in commercial motor vehicles (CMVs) manufactured on or after June 4, 2012.

➤ On-board hours-of-service (HOS) recording devices meeting FMCSA's current requirements **and** installed in CMVs manufactured before June 4, 2012 may be used for the remainder of the service life of those CMVs.




Motor carriers that have demonstrated serious noncompliance with the HOS rules will be subject to mandatory installation of EOBRs meeting the new performance standards.

➤ Determination based on HOS records reviewed during an investigation that a motor carrier has a 10 percent or greater violation rate ("threshold rate violation") for any HOS regulation listed in the new Appendix C to part 385





EOBR
Remedial Directive

Upon determination of serious non-compliance, FMCSA will issue the carrier an EOBR remedial directive.



EOBR
Remedial Directive

The motor carrier will then be required to install EOBRs in all of its CMVs regardless of their date of manufacture and use the devices for HOS recordkeeping for a period of 2 years and demonstrate to FMCSA that its drivers understand how to use the devices.



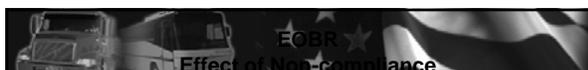
EOBR
Safety Rating Impact

- Concurrent with the notice of remedial directive, FMCSA will issue a proposed unfitness determination.
- In the event the motor carrier fails to comply with the terms of the remedial directive, the carrier will be unfit under the fitness standard
- FMCSA will conditionally rescind the proposed determination of unfitness upon the motor carrier's submission of sufficient proof of EOBR installation in accordance with Sec. 385.811.



EOBR
Remedial Directive

A motor carrier may challenge the notice of remedial directive and proposed determination of unfitness in accordance with Sec. 385.817.



EOBR
Effect of Non-compliance

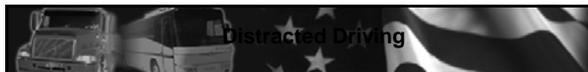
A motor carrier that fails or refuses to comply with the terms of a remedial directive, including a failure or refusal to provide proof of EOBR installation, does not meet the safety fitness standard and the proposed determination of unfitness will be issued.



Driver Distraction Defined

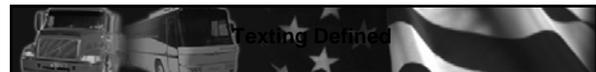
- Driver distraction can be defined as the voluntary or involuntary diversion of attention from the primary driving tasks due to an object, event, or person that shifts the attention away from the fundamental driving task.
- The diversion reduces a driver's situational awareness, decision making, or performance; and it may result in a crash, near-crash, or unintended lane departure by the driver.





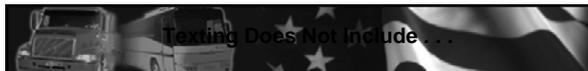
Distracted Driving

- Limiting the Use of Wireless Communication Devices (75 FR 59118)
 - Published September 27, 2010
 - Effective October 27, 2010
 - Prohibits texting by commercial motor vehicle (CMV) drivers while operating in interstate commerce
 - Imposes sanctions, including civil penalties and disqualification from operating CMVs in interstate commerce for drivers who fail to comply
 - Prohibits motor carriers from requiring or allowing their drivers to engage in texting while driving.



Texting Defined

- Texting means manually entering alphanumeric text into, or reading text from:
 - electronic device.
 - short message service
 - e-mailing
 - instant messaging
 - a command or request to access a World Wide Web page
 - engaging in any other form of electronic text retrieval or entry, for present or future communication.



Texting Does Not Include...

- Reading, selecting, or entering a telephone number, an extension number, or voicemail retrieval codes and commands into an electronic device for the purpose of initiating or receiving a **phone call** or using voice commands to initiate or receive a telephone call; or
- Inputting, selecting, or reading information on a **global positioning system or navigation system**; or
- Using a device capable of performing multiple functions (e.g., fleet management systems, dispatching devices, smart phones, citizens band radios, music players, etc.) for a purpose that is not otherwise prohibited.



Restricting the Use of Cellular Phones

- The Federal Motor Carrier Safety Administration (FMCSA) proposes to restrict the use of hand-held mobile telephones, including hand-held cell phones, by drivers of commercial motor vehicles (CMVs) while operating in interstate commerce.
- Additionally, interstate motor carriers would be prohibited from requiring or allowing drivers of CMVs to engage in the use of a hand-held mobile telephone while operating in interstate commerce..



Restricted Cell Phone Use

- Specifically it would prohibit a CMV driver from reaching for, holding, or dialing a mobile telephone in order to conduct a voice communication while driving.
- Essentially, the CMV driver must be ready to conduct a voice communication in compliance with the proposed rule the moment he begins driving the vehicle.



Brokers of Household Goods Transportation by Motor Vehicle

Effective Dates: January 28, 2011

- *Compliance date for 49 CFR 387.307(a)(2):*
Brokers that arrange the transportation of household goods in interstate or foreign commerce must increase their surety bonds or trust funds to the new minimum amount of \$25,000 and have surety companies or trust fund managers file appropriate Forms BMC-84 or BMC-85 with FMCSA no later than January 1, 2012.



Requires a household goods broker to provide shippers with the following information whenever the broker has contact with a shipper or potential shipper:

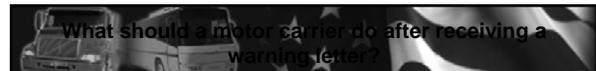
- 1. The broker's U.S. DOT number.
- 2. The FMCSA pamphlet titled, "Your Rights and Responsibilities When You Move."
- 3. A list of all motor carriers providing transportation of household goods used by the broker.
- 4. A statement that the broker is not a motor carrier providing transportation of household goods.



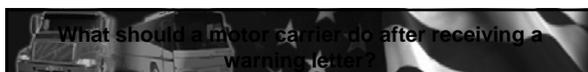

- **The DataQs Users Guide and Manual** is ultimately designed to help improve commercial motor vehicle safety through further strengthening of the accuracy of FMCSA safety performance records. It does this by emphasizing uniformity and consistency in initial reporting and subsequent follow-up actions by federal and state DataQs analysts responding to "Requests for Data Reviews" (RDRs).



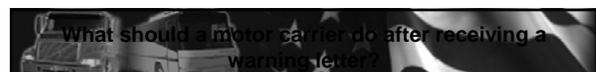

- The warning letter provides motor carriers with early notification of potential safety performance issues.
- Warning letters are based on roadside performance results collected during the previous 24 months.
- The warning letter is sent to the motor carrier's principal place of business and specifically identifies "alerted" BASIC(s) and outlines possible consequences of continued compliance problems.

- Carriers do not need to respond in writing to FMCSA after receiving a warning letter. FMCSA does encourage motor carriers to log in to SMS to examine their data, focusing their attention first on the BASICs that are over or near the intervention threshold. Carriers should consider doing all of the following:
 - **Ensure accuracy of data.** Ensure that all the data listed is accurate and belongs to their US DOT Number.

- **Examine violation types.** Examine the summary of the violations that they are receiving and notice which violations occur most frequently, and those with the highest severity weights.
- **Conduct detailed data analysis.** Download violation data into an Excel spreadsheet for further analysis. Sort the data by driver, date, location of inspection, vehicle, vehicle type, and violation. Analyze the data for any trends to determine the root cause(s) of any safety problem(s) and review with management team.

- **Address identified safety issues.** Develop and execute strategies to improve compliance with safety regulations to prevent more intensive interventions. FMCSA has developed tools and resources that may assist motor carriers with this process. These tools may be found at Section VI "What can a motor carrier do to improve?"
- **Periodically review SMS data.** Review SMS data monthly to monitor progress.





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OSC 11
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A. General Provisions

1. Which drivers would be affected by the proposed HOS rule?

1. The proposed regulatory revisions would apply mostly to property-carrying (generally, trucks) commercial motor vehicle (CMV) drivers.
2. Passenger-carrying drivers (generally, buses) could be affected only by a change to the definition of on-duty, which allows some time spent resting in a parked vehicle to be counted as off duty.
3. The impact of the proposed revisions on an individual driver or carrier would depend entirely on the nature of operations, scheduling, etc.

2. When would the proposed regulations, if adopted, go into effect?

1. FMCSA is required by a settlement agreement to publish a final rule on HOS by July 26, 2011. The effective and compliance dates would not be announced until the final rule is published in the Federal Register. FMCSA typically allows for a delayed compliance date if adopted changes would require significant time to implement. The Agency is requesting public comment on all aspects of the proposed rule, including the compliance or implementation date.

3. How would the proposed definition of "on-duty time" affect drivers?

1. The proposed definition of "on-duty time" would give drivers two new ways to be off duty:
 - o Immediately before or after a period of at least 8 hours in the sleeper berth, a team driver could be off duty while resting in the passenger seat of a property-carrying (generally trucks) vehicle moving on the highway, and
 - o Drivers could be resting in or on a parked vehicle while off duty (applies to property- and passenger-carrying drivers).



B. Proposed Driving Time

1. How much driving time would the proposal allow?

1. Truck drivers would have either 10 or 11 hours of driving time following a period of at least 10 consecutive hours off duty. FMCSA requests public comment and data on how the current 11-hour driving limit is used and how safe it is before making a decision on whether the 10- or 11-hour limit should be adopted.



C. Proposed Off-Duty Breaks

1. Is there a proposed mandatory break?

1. The proposed rule would ensure a driver does not drive more than 7 consecutive hours without having at least a thirty-minute break. Drivers can choose when to take that rest break but they must take it if 7 hours have passed since their last off-duty or sleeper-berth period if they wish to continue to drive.

2. Would a driver have to take more than one break during a duty period?

1. The answer would depend on the timing of the breaks and when the driver stops driving for the day. A driver who takes the break at 6 to 7 hours into the duty period would probably not need to take a second one. A driver who takes a break early in the duty period might need to take a second one to continue driving for the maximum legal period.



D. Proposed 14-Hour Driving Window

1. Is the proposed "14-hour driving window" different from the current "14-hour duty period"?

1. Yes, the "driving window" proposal differs in two ways from the current regulations. First, under the current rule, a driver can be on-duty during the entire 14 consecutive-hour driving window, and beyond. In other words, drivers may continue non-driving tasks beyond the 14-hour window. The proposed rule would essentially limit the standard driving window to 14 consecutive hours, during which a driver could be on duty no more than 13 hours. For example, a driver who wanted to be driving at the end of the 14th hour after coming on duty would have to take breaks totaling at least 1 hour during the period.
2. Secondly, current regulations allow a driver to continue in an "on duty/not driving" status (which may affect compliance with the 60/70 hr. rule) after the end of the 14-hr. period. The proposal, however, requires the driver to go off duty at the end of the 14-hr. period.
3. Note that the 14-hr. period may sometimes be extended to 16 hrs. as explained below. The same concepts would apply to the 16-hr. periods as they do to the 14-hr. period; i.e., limit of 13 hrs. on-duty during period, and must go off duty at end of 16-hr. period.



E. Proposed 13-Hour On-Duty Limit During Driving Window

1. How would the proposed 13-hour on-duty limit affect the "driving window" or "shift"?

1. Currently, a driver normally cannot drive a CMV after 14 consecutive hours from the time he or she comes on duty. The proposal would allow a driver to be on duty for no more than 13 hours in either a 14 or 16 consecutive-hour driving window (16-hour windows would be allowed twice per week). That means that a

driver who wants to drive after 13 hours since coming on duty, must take between 1 (under 14-hour window) and 3 (under 16-hour window) hours off duty sometime during the driving window. Any required "breaks" in consecutive hours of driving may be counted as part of this off-duty time.



F. Proposed 16-Hour Driving Window

1 How often can a driver use the 16-hour driving window?

1. A driver could use the proposed 16-hour driving window no more than twice in any 7-day period. The 7-day period would "roll," that is, the availability of a 16-hour window would be determined by the number of times in the previous 7 days that the driver had used the window. A driver who used the 16-hour window on the last two days before a restart could not use another 16-hour window until 7 days had passed since the last use of a 16-hr. period. This provision is similar to the current rule for non-CDL drivers who operate within a 150-air-mile radius of their normal work reporting location, which limits the use of the 16-hr. window to twice per week.

2. Do the proposed 16-hour windows extend the proposed 13-hour on-duty limit?

1. No. A driver could only be on duty up to 13 hours (and drive up to either 10 or 11 hours) during the proposed 16-hour window.

3. Would a driver have to go off duty at the end of the proposed 16-hour driving window?

1. Yes. In addition, if the driver is on duty for any period past the 14-hour limit, he or she would be deemed to have used one of the two available 16-hr. driving windows for that week.



G. Proposed 34-Hour Restart

1. Would a driver still be able to use a 34-hour restart of the 60/70 hour weekly on-duty limit?

1. Yes, the proposed rule would retain the minimum 34-hour restart, but the proposed restart would have to include 2 nights (between midnight and 6 a.m.) off duty. Therefore, depending on the driver's schedule, the required restart may actually be longer than the minimum 34 hours. A driver could only use the restart once a week (every 168 hours).



H. Sleeper Berths

1. How does the proposed HOS rule affect the sleeper berth regulations?

1. FMCSA is not proposing any changes to the primary requirements of the sleeper berth regulations at this time, but some of the proposed changes would affect the way drivers use the sleeper berth provisions.
 - The proposed definition of "on-duty time" would give drivers a new way to be off duty while in a moving vehicle. A team driver could count 2 hours immediately before or after the 8-hour sleeper berth period as off-duty when riding in the passenger seat.
 - The shorter break of at least 2 hours required by the sleeper berth rule is included in the driving window. If the driver is using the proposed 16-hour window, the shorter break would not affect the available 13-hours of on-duty time (because 3 hours off duty during the driving window would be required anyway). If the driver was using the proposed 14-hour window, the shorter break would reduce the available on-duty time by 1 hour (14 hrs.-2 hrs.=12 hrs. available).
 - The shorter break could be combined with the break of at least a half hour when required.



I. Oilfield Operations

1. How would the proposed HOS rule affect oilfield operations?

The proposed oilfield operations regulations would tell drivers how to record "waiting time" on the records of duty status and make it clear that "waiting time" would not be included in calculating the 14- or 16-hour driving window.



Motor Carrier Early Intervention: The Warning Letter

This **SAMPLE** warning letter is the version that was mailed to motor carriers during the **CSA Operational Model Test** as of **January 1, 2010**. The language in the warning letter may be revised in the future.

 U.S. Department of Transportation
Federal Motor Carrier Safety Administration

1200 New Jersey Ave., S.E.
Washington, D.C. 20590

Month, date, year

In reply, refer to:
USDOT Number: **[DOT NUMBER]**

[Carrier Name]
[Carrier Address]
[Carrier Address]

Dear Motor Carrier:

A review of **[INSERT MOTOR CARRIER NAME]**'s safety data shows a lack of compliance with motor carrier safety regulations and suggests that your safety performance has fallen to an unacceptable level in the area(s) of **[List of BASICs above the threshold]**. The purpose of this letter is to: 1) inform you of your company's current safety performance; 2) explain how you can view your safety record and correct it if it contains erroneous data; and 3) describe what actions may be taken in the future if your safety performance does not improve.

This review and notice was based on the roadside inspection and crash performance of **[Carrier Name]**. Based upon this review, the Federal Motor Carrier Safety Administration (FMCSA) will continue to assess the regulatory compliance of **[Carrier Name]** on a monthly basis. FMCSA will also evaluate your safety performance through increased roadside inspections that target your company's performance area(s).

You are encouraged to visit the website **[INSERT WEBSITE]** to review your company's record. This website also contains instructions for requesting corrections to information that you believe to be incorrect. A password will be required to view your company information. Instructions to obtain a password are found on the website.

We urge you to take this warning letter seriously and improve your safety record. Failure to improve your company's safety performance will result in further investigation of your safety management practices, which may include requests for additional data through offsite or onsite interventions. Continued poor safety performance will result in penalties/sanctions, which could include civil penalties, suspension and/or revocation of State vehicle registration and revocation of your company's operating authority. Further, your operating record is available to other parties, which include shippers, brokers and insurance companies.

You can visit the FMCSA website at <http://www.fmcsa.dot.gov/> to receive information about motor carrier safety rules and regulations. If you have additional questions regarding this matter or need assistance, please contact one of the following:

[Division Office]
[Federal Motor Carrier Safety Administration]
[Street Address]
[Street Address]
[City, State Zip Code]
[Telephone Number]

[State Office]
[Street Address]
[Street Address]
[City, State Zip Code]
[Telephone Number]

Sincerely,

John Van Steenburg
Director, Office of Enforcement and Compliance

Warning letters are an important part of the Compliance, Safety, Accountability (CSA) interventions process. They provide early contact with carriers who have identifiable, but not yet severe, safety problems. A motor carrier representative of one company that received a warning letter in the Operational Model Test (Op-Model Test) advises other carriers to gain a strong understanding of CSA “so they can talk to their office staff; talk to their drivers; lay down the consequences for driver performance; and work to be compliant.” The following are some of the most frequently asked questions about warning letters.

Q. What is CSA?

A. CSA is a Federal Motor Carrier Safety Administration (FMCSA) initiative to improve large truck and bus safety and ultimately reduce commercial motor vehicle (CMV)-related crashes, injuries, and fatalities.

Q. What are warning letters?

A. Warning letters are an important element of the CSA interventions process, which also includes Offsite, Onsite Focused, and Onsite Comprehensive Investigations. CSA's suite of tools will enable Federal and State enforcement staff to select carrier interventions according to the nature and severity of a carrier's safety problems. CSA's array of interventions starts with the warning letter, the earliest contact designed to address the least severe safety problems. The warning letter is designed to make carriers aware of their safety performance issues so they can address these early, before they become habitual and more difficult to correct.

Q. What do warning letters say?

A. Warning letters notify carriers of their safety issues, provide instruction on how to view their safety information online, and warn them that failure to correct safety problems result in future contact by FMCSA. Warning letters will provide motor carriers with an opportunity to examine their data for accuracy and to file any appropriate requests for data review.

Q. Who will get a warning letter and when?

A. Motor carriers that are identified through the CSA Safety Measurement System (SMS) as requiring this first level of intervention will receive a warning letter. Warning letters will be deployed beginning in late 2010.

Q. Does FMCSA send warning letters to drivers or only to carriers?

A. At present, only carriers receive warning letters if their SMS score exceeds the threshold in any Behavior Analysis and Safety Improvement Category (BASIC). FMCSA does not have plans at this time to directly contact drivers.

Q. Do all carriers with safety deficiencies receive a warning letter?

A. No. Motor carriers who are identified as having significant safety problems in the SMS will receive an Offsite or Onsite Investigation depending on the BASICS that exceed the threshold. They will not necessarily receive a warning letter beforehand.

Q. How did warning letters work in the Op-Model Test States?

A. Between February 2008 and June 30, 2010, more than 6,500 warning letters were sent in the nine Op-Model Test States. Over one-half of those carriers logged into the website to view their safety performance information. Moreover, several carriers sent letters detailing their corrective actions or sought guidance from Division Office personnel in response to the warning letters. A motor carrier representative in the Op-Model Test observed, “Getting the warning letter was quite shocking; we immediately sent messages out to our drivers explaining the changes and did

one-on-one training to make them aware of the deficiencies and how to become compliant. This has been good — everyone has stepped up to the plate and we are already seeing safety improvements.”

CSA 2010 INTERVENTIONS

Early Contact

- **Warning Letter**
- Carrier Access to Safety Data and Measurement
- Targeted Roadside Inspection

Investigation

- Offsite Investigation
- Onsite Investigation – Focused
- Onsite Investigation – Comprehensive

Follow-on

- Cooperative Safety Plan
- Notice of Violation
- Notice of Claim
- Operations Out-of-Service Order



Warning letters are often the first step in the intervention process. The Federal Motor Carrier Safety Administration (FMCSA) sends warning letters to motor carriers whose safety performance data indicates they are not complying with applicable FMCSA safety regulations. This document provides key information about warning letters and tips for motor carriers to take action to improve their safety operations.

Warning Letter: An Overview

What is it?

A warning letter is a correspondence sent by FMCSA to a motor carrier's place of business that identifies Behavior Analysis and Safety Improvement Categories (BASICS) that are assigned an "alert" (safety compliance problems in the BASIC) and outlines possible consequences of continued safety problems. The warning letter provides instructions for accessing motor carrier safety data in the Safety Measurement System (SMS) as well as a point-of-contact for additional information.



See the Warning Letter Factsheet for more info: http://csa.fmcsa.dot.gov/documents/CSA2010_WarningLetterFactsheet.pdf

Why did I get one?

Safety performance data shows whether the motor carrier is operating in full compliance with all applicable FMCSA safety regulations. Based on this data, the warning letter lists BASICS where the motor carrier's on-road performance over the past 24 months indicates safety issues and encourages the motor carrier to look at its safety performance data online.



Log in to the SMS to view safety performance data: <http://ai.fmcsa.dot.gov/sms/>

How do I respond?

Motor carriers that receive warning letters should review their safety data in order to develop and execute strategies that will make their operations compliant with safety regulations. Continued poor performance may lead to more intensive interventions. Motor carriers are not required to send a written response to FMCSA when they receive a warning letter.



Review the SMS Information Center to learn more: <http://ai.fmcsa.dot.gov/sms/InfoCenter/>

Useful Links

- **CSA FAQs:** <http://csa.fmcsa.dot.gov/FAQs.aspx>
Search by keyword, such as "warning letter," "intervention," and "SMS"
- **Safety Measurement System (SMS):** <http://ai.fmcsa.dot.gov/sms/>
View motor carrier safety performance data
- **U.S. DOT PIN request:** https://li-public.fmcsa.dot.gov/LIVIEW/PKG_REGISTRATION.prc_option
Request a U.S. DOT PIN in order to log in to SMS
- **DataQs:** <https://dataqs.fmcsa.dot.gov/>
File concerns about Federal and State data
- **SMS Information Center:** <http://ai.fmcsa.dot.gov/sms/InfoCenter/Default.aspx>
Find useful information relevant to SMS, such as what motor carriers can do to improve
- **FMCSA Portal:** <https://portal.fmcsa.dot.gov/>
Access multiple FMCSA resources and information through a single login

Wondering what to do now? Follow these tips...

TIP 1: Check your data

FMCSA released the SMS to the public on December 12, 2010. Motor carriers can log in to the SMS with their U.S. DOT number and PIN to access safety data or log in to the FMCSA Portal.

- **Log in to review data.** Log in to the SMS to examine data, focusing attention first on the BASICS that are over or near the intervention threshold (see explanation of intervention thresholds in Tip 2 below).
- **Ensure data accuracy.** Ensure that data listed is accurate and belongs to the appropriate U.S. DOT number. If you believe data is incorrect, submit a request for data review through the DataQs system.
- **Examine violation types.** Examine the summary of violations received and determine which violations occur most frequently, especially those with the highest severity weights.

TIP 2: Understand your safety assessment: percentiles and alerts

Percentiles

The SMS calculates a measure for each BASIC as described in the SMS Methodology on the CSA website, (<http://csa2010.fmcsa.dot.gov/documents/smsmethodology.pdf>). The measure is then used to assign a ranking or percentile that allows the safety behavior of a motor carrier to be compared with the safety behavior of motor carriers with similar operations and numbers of safety events.

The percentile is computed on a 0-100 scale. *A lower percentile indicates better compliance* with safety regulations than a higher percentile. For example, if a carrier has a BASIC in the 10th percentile, it means that only 10 percent of similarly sized and inspected carriers demonstrated better compliance in that BASIC. On the other hand, a carrier with a BASIC in the 90th percentile is one that demonstrated lower safety compliance than 90 percent of carriers in that BASIC.

FMCSA established percentile thresholds to indicate when safety compliance problems require intervention. If a carrier does not have a percentile, it generally means the carrier has not had enough inspections to allow for an analysis of its records. More information is available in the SMS Information Center. Current intervention thresholds are as follows:

- *Unsafe Driving, Fatigued Driving, Crash Indicator:* General-65%; HAZMAT-60%; Passenger-50%
- *Driver Fitness, Controlled Sub./Alcohol, Vehicle Maint., Cargo:* General-80%; HAZMAT-75%; Passenger-65%

Alerts

A motor carrier can receive an alert in a BASIC in one of two ways. The On-Road column lists the motor carrier's percentile for each BASIC. If the percentile is over the established intervention threshold, the percentile is presented with an orange outline around the percentile. The Investigation column displays the "Serious Violation Found" icon for a BASIC if a serious violation was cited during an investigation within 12 months of the SMS results date. The icon will remain present for 12 months following an investigation regardless of whether corrective actions have occurred.

TIP 3: Take action to improve safety now!

Motor carriers that do not improve may be subject to more intensive interventions such as full or focused compliance reviews or, for carriers in Op-Model Test States, onsite or offsite investigations. Don't wait, improve safety now!

- **Conduct detailed data analysis.** Download violation data into an Excel spreadsheet for further analysis. Sort the data by driver, date, location of inspection, vehicle, vehicle type and violation. Analyze the data for any trends to determine the root cause(s) of any safety problem(s) and review the data with your management team.
- **Address safety issues.** Develop and execute strategies to improve compliance with safety regulations and prevent more intensive interventions. (See the SMS Information Center to learn more about how to improve safety.)
- **Periodically review SMS data.** Review SMS data monthly to monitor progress.

DEPARTMENT OF TRANSPORTATION**Federal Motor Carrier Safety Administration****49 CFR Parts 371, 375, 386, and 387**

[Docket No. FMCSA-2004-17008]

RIN 2126-AA84

Brokers of Household Goods Transportation by Motor Vehicle**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.**ACTION:** Final rule.

SUMMARY: FMCSA amends its regulations to require brokers that arrange the transportation of household goods in interstate or foreign commerce for consumers to comply with certain consumer protection requirements. Brokers must provide: their U.S. DOT number on their advertisements and Internet Web sites; estimates of expected moving charges and brokerage fees; FMCSA pamphlets containing tips for successful moves and the consumer's rights and responsibilities; and the broker's policies concerning deposits, cancellations, and refunds. This rulemaking is in response to the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) and a petition for rulemaking from the American Moving and Storage Association. This rulemaking is intended to ensure that individual shippers who arrange for transportation of household goods through brokers receive necessary information regarding their rights and responsibilities in connection with interstate household goods moves.

DATES: *Effective date:* The effective date of this final rule is January 28, 2011.

Compliance date for 49 CFR

387.307(a)(2): Brokers that arrange the transportation of household goods in interstate or foreign commerce must increase their surety bonds or trust funds to the new minimum amount of \$25,000 and have surety companies or trust fund managers file appropriate Forms BMC-84 or BMC-85 with FMCSA no later than January 1, 2012.

ADDRESSES: For access to the docket to read background documents or comments received, go to <http://www.regulations.gov> at any time or to U.S. Department of Transportation, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Mr. Brodie Mack, FMCSA Household Goods

Enforcement and Compliance Team Leader, (202) 385-2400.

SUPPLEMENTARY INFORMATION:**Legal Basis for the Rulemaking**

The Secretary of Transportation's (Secretary) general jurisdiction to establish regulations concerning the procurement by property brokers of for-hire transportation in interstate or foreign commerce is found at 49 U.S.C. 13501. Brokers of household goods are a subset of all property brokers and specifically register with FMCSA as household goods brokers as required by 49 U.S.C. 13901 and 13904. This rulemaking applies only to household goods brokers that procure for-hire transportation in interstate or foreign commerce.

The Secretary is authorized to collect from household goods brokers "information the Secretary decides is necessary" to ensure a transportation system that meets the needs of the United States (49 U.S.C. 13101 and 13301). The Secretary also has authority to adopt regulations applicable to registered household goods brokers which "shall provide for the protection of shippers by motor vehicle" (49 U.S.C. 13904(c)). The Secretary's authority to inspect and copy household goods broker records is found at 49 U.S.C. 14122. The Secretary has delegated these various authorities to the FMCSA Administrator (49 CFR 1.73(a)).

This rulemaking is based on the statutory provisions cited above and on the Household Goods Mover Oversight Enforcement and Reform Act of 2005, Title IV, Subtitle B of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) (Pub. L. 109-59). This rulemaking focuses on the business practices of household goods brokers engaged in interstate or foreign commerce. Household goods brokers arrange, but do not perform, the transportation of household goods shipments.

Section 4212 of SAFETEA-LU directs the Secretary to require a household goods broker to provide shippers with the following information whenever the broker has contact with a shipper or a potential shipper:

1. The broker's U.S. DOT number.
2. The FMCSA pamphlet titled, "Your Rights and Responsibilities When You Move."
3. A list of all motor carriers providing transportation of household goods used by the broker and a statement that the broker is not a motor carrier providing transportation of household goods.

Section 4209 of SAFETEA-LU adds new civil penalties for unlawful broker estimating practices and increases existing civil penalties for providing household goods motor carrier or broker services subject to FMCSA jurisdiction without being registered with FMCSA.

The Secretary's general jurisdiction at 49 U.S.C. 13501 authorizes FMCSA to establish shipment estimating and other requirements not specifically mandated by SAFETEA-LU in this final rule.

Background*Existing FMCSA Regulations Applicable to Household Goods Brokers*

Household goods brokers have been regulated by FMCSA and its predecessor agencies for many years and a number of regulations apply to them, including registration requirements (49 CFR part 365), process agent requirements (49 CFR part 366), and financial responsibility¹ requirements (49 CFR part 387). Section 387.307 requires property brokers, including household goods brokers, to maintain a surety bond or trust fund agreement in the amount of at least \$10,000 to provide for payments to motor carriers or shippers, if the broker fails to carry out its agreement to supply transportation by authorized motor carriers.

Part 371 of FMCSA's regulations specifies general property broker transaction record requirements, prohibits misrepresentation of the broker's name or non-carrier status, and prohibits certain rebating and compensation practices. Part 379 specifies general recordkeeping retention periods.

FMCSA may also issue orders to compel compliance, impose civil monetary penalties, revoke the broker's license, or seek Federal court orders to stop statutory and/or regulatory violations. Because household goods brokers do not provide the actual transportation, they are not subject to FMCSA's safety jurisdiction.

Petition for Rulemaking

On March 6, 2003, the American Moving and Storage Association (AMSA) petitioned FMCSA to initiate a rulemaking to amend 49 CFR part 371, "Brokers of Property," to impose specific

¹ The term "financial responsibility," is not specifically defined in subpart C of 49 CFR part 387 (property brokers) and takes the general, commonly understood meaning of responsibility to compensate a party for losses, whether those losses are caused by physical damage, breach of contract, or other type of injury. The use of the term "financial responsibility" in Subpart C does not incorporate the definitions of that term found at 49 CFR 387.5 and 387.29, which apply to Subparts A (motor carriers of property) and B (motor carriers of passengers), respectively, of 49 CFR part 387.

additional requirements on household goods brokers. A copy of AMSA's petition is in docket FMCSA-2004-17008. AMSA's main argument for additional rulemaking was its assertion that there were an increasing number of moving-related Web sites hosted by household goods brokers engaging in unfair business practices.

FMCSA granted AMSA's petition and issued an Advance Notice of Proposed Rulemaking (ANPRM) in 2004 (69 FR 76664, December 22, 2004). In the ANPRM, FMCSA sought answers to 36 questions related to household goods broker issues. By posing these questions, the Agency sought to determine the extent to which the public believes a problem exists with household goods brokers and, if so, whether regulatory or non-regulatory solutions would better solve the problem.

Also in the ANPRM, FMCSA discussed how it became responsible for household goods broker regulatory oversight through the Interstate Commerce Commission Termination Act of 1995 (ICCTA) (Pub. L. 104-88, December 29, 1995, 109 Stat. 803) and the Motor Carrier Safety Improvement Act of 1999 (MCSIA) (Pub. L. 106-159, December 9, 1999, 113 Stat. 1748). The ICCTA gave the Secretary of Transportation jurisdiction over the procurement of interstate motor carrier transportation (49 U.S.C. 13501). The MCSIA, in establishing FMCSA, granted to the Agency regulatory oversight of the property broker regulations. The former Interstate Commerce Commission (ICC) decided on May 16, 1949 (Ex Parte MC-39 "Practices of Property Brokers," 49 M.C.C. 277, at 286) (14 FR 2833, May 28, 1949) that it was necessary to regulate all property brokers, including household goods brokers, in interstate or foreign commerce. In that proceeding, the ICC decided it was unnecessary to regulate household goods brokers separately from general freight brokers.

Generally, the commenters to the ANPRM did not express support for rulemaking action or address many of the specific questions raised in the ANPRM. For example, none of the commenters submitted specific information related to the questions about the estimated number of household goods brokers, or questions about details of the household goods broker business. Commenters did, however, offer useful information and suggestions in other areas to assist FMCSA in developing a rulemaking proposal.

The Proposed Rule

The Notice of Proposed Rulemaking (NPRM) (72 FR 5947, February 8, 2007), addressed the problems and recommendations identified by AMSA in its petition, incorporated requirements mandated by SAFETEA-LU, and adopted some of the recommendations made by commenters to the ANPRM. FMCSA proposed to amend the current broker regulations in part 371 by adding a new subpart B specifically for household goods brokers; amend appendix B of part 386 to incorporate the civil penalties applicable to household goods brokers added by SAFETEA-LU; and amend part 387 to increase the amount of the surety bond or trust fund currently required for household goods brokers.

The proposed rule consisted of five basic elements that are being made final in this rule:

- It would require household goods brokers to disclose to individual shippers critical information designed to educate the shipper and facilitate a satisfactory moving experience.
- It would require household goods brokers to use only household goods motor carriers that are properly licensed and insured.
- It would impose requirements governing estimates, consistent with those statutorily imposed on household goods motor carriers.
- It would incorporate new statutory penalties for providing estimates without an agreement with a household goods motor carrier and for operating without being registered with FMCSA.
- It would adjust for inflation the current minimum level of financial responsibility required of household goods brokers.

Discussion of Comments on the Proposed Rule

FMCSA received 11 comments on the notice of proposed rulemaking (NPRM) (72 FR 5947, February 8, 2007). Several commenters expressed general support for the requirements imposed on household goods brokers. The following sections discuss comments on specific issues and FMCSA's responses to those comments.

Scope of Part 371, Subpart B

Proposed § 371.101 would require household goods brokers that operate in interstate or foreign commerce to comply with all of the provisions of subpart B. AMSA recommends adding a phrase to state that the rule applies to a broker offering services "to individual shippers."

FMCSA response. FMCSA agrees with AMSA. The subpart's scope should be

limited to only household goods brokers offering services to individual shippers. It should not include commercial and government shippers that are generally more knowledgeable of brokerage transactions. FMCSA will change the rule to the following. "Yes, you must comply with all regulations in this subpart when you operate as a household goods broker offering services to individual shippers in interstate or foreign commerce. The regulations in this subpart do not apply to a household goods broker when providing services to commercial or government shippers in interstate or foreign commerce."

Definitions of Terms

Proposed § 371.103 would define terms used in subpart B. FMCSA proposed definitions for the terms "household goods," "household goods broker," and "individual shipper." The acronym "FMCSA" was used numerous times in the proposed rule, but the Agency does not show a definition of the term in part 371. The Agency will add the acronym "FMCSA" in the final rule and define it to mean "Federal Motor Carrier Safety Administration."

Qualifications of Motor Carriers Used by the Broker

Proposed § 371.105 would make it clear that a household goods broker may only act as a household goods broker for a household goods motor carrier that has a valid, active U.S. DOT number and valid, active operating authority issued by FMCSA. This requirement was requested by AMSA in its Petition for Rulemaking and was suggested by some of the commenters to the ANPRM. The use of FMCSA-registered household goods motor carriers to provide the transportation will provide a greater level of assurance that the household goods motor carrier will comply with applicable FMCSA regulations. The Public Utilities Commission of Ohio (PUCO) believes it would be useful to keep a database of consumer complaints against each carrier so that potential shippers could identify potentially troublesome movers.

FMCSA response. FMCSA maintains a consumer complaint database and allows public access to consumer complaint information regarding household goods carriers and brokers. This database can be accessed on the Internet by going to <http://www.protectyourmove.gov> and selecting the hyperlink "Search for Moving Companies and View Complaint History" which will lead to <http://ai.volpe.dot.gov/hhg/search.asp>. In a separate rulemaking (73 FR 9266,

February 20, 2008), FMCSA proposed that each household goods carrier must submit a statutorily-mandated quarterly report about consumer complaints it receives, which should assist individual shippers in evaluating their transportation options.

Information in Advertisements and Internet Web Sites

FMCSA proposed (§ 371.107) implementing section 4212 of SAFETEA-LU by requiring that household goods brokers disclose to potential shippers their Department of Transportation registration number and that they are not motor carriers providing transportation of household goods. FMCSA also proposed that household goods brokers disclose certain information not required by SAFETEA-LU, but which FMCSA believes is necessary to assist individual shippers. The Agency proposed that household goods brokers prominently display in their advertisements and on their Web sites the following:

1. The physical location of the business.
2. Its "MC" operating authority number and U.S. DOT registration number.²
3. Its status as a household goods broker that does not transport household goods but that arranges for such transportation.

AMSA urges FMCSA to monitor brokers' Web sites to ensure that unscrupulous brokers are not providing misleading information. The commenter also recommends an additional subparagraph in the rule to prohibit the broker from including the names or logos of motor carriers unless they are FMCSA-authorized household goods motor carriers with which the broker has a written agreement, as specified in § 371.115.

FMCSA response. As a part of its enforcement program, FMCSA already monitors the Web sites of household goods brokers and carriers to determine

²Brokers currently receive "MC" numbers, not U.S. DOT registration numbers. FMCSA proposed eliminating the "MC" operating authority number in its May 19, 2005 NPRM regarding the Unified Registration System (URS) mandated by 49 U.S.C. 13908 (70 FR 28990). FMCSA intends to issue and notify each household goods broker of the U.S. DOT number FMCSA will assign to that active household goods broker before the URS final rule is published. The URS final rule will remove the requirements for household goods brokers to display their "MC" numbers in their advertisements, Web sites, and agreements with household goods motor carriers. Household goods brokers will only be required to display their assigned U.S. DOT number after the URS final rule becomes effective. Until FMCSA publishes a final rule in that proceeding, household goods brokers must display their "MC" numbers in their advertisements.

if they are providing misleading information on the Internet. We conduct compliance reviews and initiate enforcement action when appropriate.

We add a subparagraph in the final rule to provide more information to individual shippers receiving estimates prepared by brokers pursuant to § 371.113(b). A household goods broker that provides an estimate on behalf of a motor carrier must state on the broker's Web site that any estimate must be based on the carrier's tariff and that the carrier is required to make the tariff available for public inspection upon a reasonable request. We add this requirement to better ensure that individual shippers understand their rights with respect to broker-prepared estimates.

We have adopted AMSA's suggestion to add a subparagraph in the final rule to prohibit household goods brokers from including the names or logos of motor carriers unless they are FMCSA-authorized household goods motor carriers with which the broker has a written agreement, as required by § 371.115. We agree that brokers should not misrepresent to shippers that their shipments will be moved by specific moving companies, when the broker does not have agreements with those companies. The provision is intended to further full and honest disclosure to the shipper.

List of Motor Carriers

FMCSA proposed (§ 371.109) that a household goods broker must provide to each potential individual shipper who has contact with the household goods broker a list of all household goods motor carriers used by the broker, to implement sec. 4212(3) of SAFETEA-LU. National Relocation Services and Pro Movers Network believe that the requirement is burdensome on the broker and does not serve a consumer protection purpose for the shipper.

FMCSA response. Notwithstanding the commenters' concerns about burden, the carrier list requirement is mandated by SAFETEA-LU. To address concerns regarding potential burdens on household goods brokers, FMCSA revises its proposal to allow household goods brokers to provide the information required by § 371.109 electronically either through a Web site or by electronic messaging (e-mail), as an alternative to a paper-based communication.

Consumer Protection Information

FMCSA proposed (§ 371.111) requiring that each household goods broker provide potential shippers with one copy of each of the two FMCSA

consumer pamphlets: "Your Rights and Responsibilities When You Move," and "Ready to Move?—Tips for a Successful Interstate Move." Section 4205 of SAFETEA-LU requires household goods motor carriers to distribute both pamphlets and the proposal would impose the same requirement on household goods brokers. Proposed paragraph (a) permitted the household goods broker to make the information available through its Web site or by distribution of paper copies to each potential shipper. PUCO supports the proposed requirement. AMSA suggests FMCSA's requirements for household goods motor carriers in part 375 should allow use of a hyperlink on the carrier's Web site to provide the required consumer protection information.

FMCSA response. To better verify that shippers have been fully informed of their opportunity to access the consumer protection information via the broker's Web site, FMCSA has added a new paragraph (b) to § 371.111 to provide that the broker must state on any written estimate provided pursuant to § 371.113 that the individual shipper has expressly agreed to accept access to the information via the Web site in lieu of paper copies. FMCSA has also revised § 371.111 paragraph (c) to require written or electronic verification of the shipper's agreement to access the Federal consumer protection information via the Internet, instead of receiving the booklet copies in paper form.

AMSA's suggested revision of part 375 has merit and FMCSA will make the change it requested. This change will allow household goods motor carriers also to use a hyperlink on the carrier's Web site to provide the required consumer protection information. FMCSA believes it is in the best interests of shippers, brokers, and carriers for the consumer protection information to be distributed electronically if consumers choose to receive the information in that format. A shipper's ability to receive consumer protection information in his/her preferred medium should not depend on whether he/she arranges for transportation through a broker or directly with a motor carrier.

Written Estimate Based on a Physical Survey

Proposed § 371.113(a) would require that, if the household goods broker provides an estimate, it must be in writing and must be based on a physical survey of the shipper's household goods, if the household goods are located within a 50 air-mile radius of the broker or its estimating agent. The

Owner Operator Independent Drivers Association (OOIDA) believes the household goods broker should be required to conduct a physical survey regardless of the distance from the broker's place of business, unless the shipper can provide the broker a weight by which to determine an estimate of charges.

AMSA argues that proposed § 371.113(a) does not adequately address the inaccurate, "lowball" broker estimating problems experienced by consumers who receive estimates over the telephone or Internet without a physical survey because, in most cases, brokers are not located anywhere near shipping sites. Accordingly, AMSA recommends that the Agency revise its proposal by requiring that estimates be based on a physical survey conducted by the authorized motor carrier on whose behalf the estimate is provided, if the goods are located within a 50-mile radius of the motor carrier or its agent. AMSA also proposes that 49 CFR 375.409(a) be revised to require that all estimates provided by the broker be based on physical surveys conducted by the motor carrier transporting the shipment.

Pro Movers Network opposes the requirement for an in-home survey, because the provision is especially burdensome for consumers who are shipping a very small amount of goods. Pro Movers Network believes that if the list of goods provided by the shipper is complete, an accurate non-binding estimate based on weight does not require an in-home estimate. Also, Pro Movers Network commented that requiring in-home surveys limits a consumer's choices and the ability to receive a moving estimate remotely via the Internet.

FMCSA response. In the NPRM, FMCSA expressly invited comment on the impact to shippers, brokers, and motor carriers of applying or removing the 50-mile requirement for household goods broker estimates based on physical surveys, and invited comments on alternatives to this requirement. The Agency agrees with AMSA that because household goods brokers are rarely located within 50 miles of the shippers to whom they provide estimates, it is likely that the 50-mile radius exception, if implemented as proposed, would become the standard practice. As a result, FMCSA revised § 371.113(a) to require brokers to conduct or arrange for someone to conduct physical surveys of goods that are located within 50 miles of either the broker or the carrier on whose behalf the broker submits an estimate. As we stated in the NPRM, FMCSA recognizes that SAFETEA-LU

did not prescribe estimating requirements for household goods brokers as it did for household goods motor carriers. Nevertheless, 49 U.S.C. 13904(c) grants FMCSA the authority to promulgate this requirement. The Agency believes that an individual shipper's protection against unreliable estimates should not depend upon whether the shipper uses a broker or carrier to provide the estimate. We believe AMSA's suggested revision to proposed § 371.113(a) accomplishes the goal more effectively than FMCSA's original proposal and we adopt that revision in the final rule, with a minor modification as described below.

We decline to adopt AMSA's proposed revision to 49 CFR 375.409(a) requiring that all estimates be based on physical surveys conducted by motor carriers because it would essentially prevent household goods brokers from making estimates under any circumstances. Such a prohibition is inconsistent with section 4209 of SAFETEA-LU, which prohibits household good brokers from making estimates before entering into an agreement with a carrier to provide the transportation. Section 4209, therefore, implicitly recognizes that brokers are permitted to make estimates after entering into agreements with carriers, and not simply to provide shippers with estimates prepared by motor carriers or their agents. However, we have revised § 375.409(a) to make it consistent with revised § 371.113(a).

We also decline to adopt OOIDA's suggestion to require household goods brokers to perform a physical survey regardless of the distance from the broker's place of business. We do not require household goods motor carriers or their agents to perform a physical survey regardless of the distance from the motor carrier's or agent's place of business. We do not believe it would be appropriate to place this burden on brokers when we do not place it on motor carriers.

FMCSA does not agree with the suggestion of Pro Movers Network that the requirement for a physical survey should be eliminated because it limits a consumer's choice to receive a remote estimate. Section 371.113(c) expressly permits the individual shipper to waive the physical survey requirement.

Explanation of Waiving the Physical Survey

PUCO states that estimates are most frequently a disputed issue and it is important that the broker be required to provide estimates in writing based on a survey of the property to be shipped. It believes the option of waiving the

physical survey should be explained and should be printed in a required font size in a required location on a standard document to ensure that the shippers are fully informed.

FMCSA response. We agree with PUCO that waiving the physical survey requirement, where it would otherwise apply, should be explained, printed on a standard document and printed with a minimum font size and font typeface. We have adopted PUCO's suggestion for the final rule. FMCSA will adopt in today's final rule the minimum font size and font typeface following the General Services Administration (GSA) guidelines in the "Standard and Optional Forms Procedural Handbook." The GSA handbook requires the font typeface Universe and minimum font size of 7 points for all standard Federal forms and documents.

Estimates Based on Published Tariffs

FMCSA proposed (§ 371.113(b)) requiring household goods brokers to base their estimates upon the published tariffs (as defined in § 375.103) of the authorized household goods motor carriers they use. Nationwide Relocation Services believes the rule should require any motor carrier accepting jobs from a broker to adopt the broker's tariff as its own for all jobs secured from the broker. AMSA suggests that the rule should require the broker's fee or service charge to be separately stated in the estimate and not included in the motor carrier's estimate of transportation charges.

FMCSA response. Household goods motor carriers are required to maintain tariffs under 49 U.S.C. 13702 and must charge individual shippers in accordance with those tariffs. Implementing regulations of the Surface Transportation Board (STB) governing household goods carrier tariffs, at 49 CFR 1310.3(a), require such tariffs to provide "the specific applicable rates, charges and service terms; and must be arranged in a way that allows for the determination of the exact rate, charges and service terms applicable to any given shipment." Section 1310.3(b) permits use of multiple tariffs to determine applicable rates and charges, provided "the tariff containing the rates must make specific reference to all other tariffs required to determine applicable rates, charges and service terms. The carrier(s) party to the rate(s) must participate in all of the tariffs so linked * * *". A "carrier party to the rate" means more than one carrier can use the same rates. A broker's rate schedule is not a tariff subject to 49 U.S.C. 13702 and the STB regulations. There is no regulatory requirement that brokers adhere to such rate schedules, as there

is for household goods motor carriers to adhere to the terms of their tariffs. FMCSA believes Nationwide Relocation Services' suggestion would be inconsistent with 49 CFR 1310.3 and therefore, FMCSA will not adopt it.

At this time, the Agency does not adopt AMSA's suggestion that the broker's fee or service charge be separately stated in the estimate. The Agency does not have sufficient information about how different brokers charge their fees and what affect this change would have.

Agreements With Motor Carriers

Proposed § 371.115(a) would require household goods brokers to maintain written agreements with authorized household goods motor carriers before providing estimates and lists the items that must be included in these agreements. Nationwide Relocation Services suggests all agreements should be submitted and filed with FMCSA. Paragraph (a)(6) would require the signatures on the agreement to be notarized. Pro Movers Network believes the requirement for a notarized agreement is unrealistic and would almost certainly be impossible to execute successfully. Because household goods carriers typically have working agreements with between 5 and 15 brokers, the commenter asserts, the notary requirement would have to be repeated many times for each carrier. The commenter believes the rule would ultimately be too stressful to the broker-carrier business relationships and transactions. The commenter argues that the potential of lost opportunity costs caused by strained business relationships between household goods brokers and carriers is a distinct possibility and FMCSA's cost and risk assessments did not take these lost opportunity costs into account.

We also proposed changing § 375.409 to state that the written agreement between the household goods broker and the household goods motor carrier must contain all of the items required in proposed § 371.115. AMSA recommends adding a sentence stating that the estimate is based on a physical survey of the goods conducted by the motor carrier.

FMCSA response. We believe the filing requirement suggested by Nationwide Relocation Services would create an unnecessary burden for FMCSA, carriers, and brokers that would have little usefulness in protecting individual shippers. Based on comments received, we agree that the notarization requirement will be unduly burdensome and is unnecessary. We

have removed the requirement that the agreements be notarized.

We have also revised § 375.409 to reflect the changes to § 371.113(a) discussed above (requiring a physical survey if the carrier on whose behalf the broker makes an estimate is within 50 miles of the household goods). However, as discussed earlier in this preamble, we are not adopting AMSA's suggested change to require that all estimates be based on physical surveys of the property conducted by household goods motor carriers, because it would prohibit anyone other than the authorized motor carrier from performing the estimate. As such, it would be inconsistent with SAFETEA-LU and would limit the flexibility FMCSA intends to afford household goods brokers and carriers to provide services to their individual shippers. Motor carriers can certainly provide additional restrictions in their agreements with household goods brokers beyond FMCSA's minimum requirements.

Verifying the Motor Carrier's Authority

As proposed, § 371.119 would have required that each household goods broker "inspect, verify, and document" the validity of the U.S. DOT registration and MC operating authority for each household goods motor carrier with which it arranges transportation each month. The household goods broker would comply with this requirement by using FMCSA's Web site (<http://www.protectyourmove.gov>) to check whether the motor carrier has active for-hire authority to transport household goods and evidence of the necessary financial responsibility on file with FMCSA. Nationwide Relocation Services suggests that monitoring the authority and licensing status of motor carriers is a role best suited for FMCSA, and a private broker should not be required to undertake the regulatory duty of FMCSA in policing the authority status of motor carriers. Pro Movers Network believes FMCSA should devise an e-mail notification system to register a broker's carriers and automatically e-mail the broker when one of its carrier's authorities is suspended or revoked. Manual checks by the broker of its entire network of carriers would be time- and resource-intensive, the commenter asserts, and a once per month check by the broker is not a fool-proof method of verification. The commenter believes the broker should only have to confirm whether the carrier is in "Active" or "NonActive" status in FMCSA's Safety and Fitness Electronic Records (SAFER) database. The commenter also states that it is not the

broker's obligation and responsibility to report carrier non-compliance to FMCSA.

FMCSA response. In response to comments and after further consideration, FMCSA has decided to eliminate proposed § 371.119 from the final rule. The intent of proposed § 371.119 was to provide additional protection to shippers by requiring brokers to verify the validity of carriers' registration and operating authority on a monthly basis. However, proposed § 371.105 independently prohibits anyone from acting as a household goods broker for household goods motor carriers that do not have valid U.S. DOT numbers and valid operating authority from FMCSA. Regardless of whether a broker complies with the monthly verification and recordkeeping requirements, it would nonetheless be bound by § 371.105 and subject to penalties for arranging moves with unregistered or unauthorized carriers. Considering this redundancy, it is unclear what additional protections § 371.119 would provide to shippers. Because brokers would be required to comply with § 371.105 under threat of penalty with or without § 371.119, the Agency does not believe that eliminating § 371.119 would diminish brokers' incentives to avoid doing business with unregistered or unauthorized carriers. Thus, the Agency believes that eliminating § 371.119 would leave shippers with the same level of protection against unregistered or unauthorized carriers, while reducing the administrative burden on brokers. Furthermore, striking this provision would eliminate any confusion over whether compliance with § 371.119 excuses or provides mitigating circumstances for failure to comply with § 371.105. FMCSA is concerned that proposed § 371.119, as written, could be interpreted as a safe haven for brokers who comply with the verification and recordkeeping requirements, but nonetheless arrange a move with an unregistered or unauthorized carrier. FMCSA never intended for proposed § 371.119 to be interpreted this way. As a result, FMCSA leaves it to the household goods brokers to determine the most effective and efficient manner in which to ensure compliance with § 371.105.

Broker Surety Bond or Trust Fund

FMCSA proposed to add specific language to § 387.307(a) to require household goods brokers to have a surety bond or trust fund in effect for \$25,000, based on adjustments for inflation. The former ICC increased the financial responsibility requirement for

brokers in 1979 from \$5,000 to \$10,000.³ See 44 FR 70167, December 6, 1979. The NPRM proposed adjusting the \$10,000 minimum figure for inflation as measured by the Consumer Price Index, which resulted in purchasing power of \$24,490.29 in 2006. Because a final rule based on the NPRM would not be in effect until after the 2007's NPRM, FMCSA found it reasonable to round the minimum requirement up to \$25,000. The requirement was raised to \$10,000 to ensure shippers or motor carriers would be paid if the broker failed to carry out its contracts, agreements, or arrangements for the supplying of transportation by authorized motor carriers. Sandra Irwin supports raising the amount of the surety bond or trust fund, and AMSA, PUCO, and OOIDA believe an increase to \$25,000 is inadequate. According to OOIDA, surety companies have reported an aggregate amount of outstanding claims against broker bonds of between \$300,000 and \$500,000 in response to OOIDA's efforts to submit claims by its members against broker bonds. Nationwide Relocation Services believes the amount of the surety bond or trust fund should be \$50,000, and David Marsh suggests \$100,000. Sandra Irwin, David Marsh, and the Transportation Intermediaries Association suggest the increase in the surety bond or trust fund should apply to all property brokers, not just household goods brokers.

On the other hand, Pro Movers Network points out that household goods brokers may incur a high cost of doing business, such as increased costs of advertising, and increasing the surety bond or trust fund requirement to \$25,000 represents an unnecessary financial burden.

FMCSA response. Commenters that favored increasing the amount of the surety bond or trust fund did not provide adequate justification for an increase above \$25,000, especially in light of the number of small business household goods brokers and the potential impact of significantly increasing the amount of financial responsibility beyond a level adjusted for inflation. Inasmuch as OOIDA did not provide specific information regarding the number and amount of outstanding claims per broker, its argument that an aggregate amount of \$300,000 to \$500,000 in outstanding claims warrants an increase in the amount of the bond to that level is not justifiable.

The surety bond and trust fund provisions apply only to household goods transportation. FMCSA may consider applying the increased surety bond and trust fund provisions to general freight brokers in the future. Finally, FMCSA acknowledges Pro Movers Network's comment about high costs of doing business, however, it did not provide sufficiently specific information to justify changing FMCSA's proposal to something other than an adjustment for inflation.

Implementation of the Household Goods Broker Surety Bond or Trust Fund Amount

FMCSA did not propose how the Agency would implement the additional \$15,000 increase in the amount of the surety bond or trust fund agreement. FMCSA believes it is necessary to provide household goods brokers a sufficient amount of time to acquire the additional \$15,000 for surety bonds and trust funds. The Agency will set one year from the date of the final rule as the date when all brokers of household goods must have filed new BMC-84s or BMC-85s, as appropriate, to prove they have the minimum \$25,000 in effect. This should give sufficient time to household goods brokers, especially small entities, to find sureties willing to write \$25,000 surety bonds to replace their \$10,000 bonds. Likewise, for those household goods brokers using trust fund agreements, this should give sufficient time for these entities to raise the additional \$15,000 of capital to place in escrow with their trust fund managers.

The Final Rule

FMCSA adopts the proposed rule as final with minor changes in response to the comments. First, as discussed in the section on the "Scope of part 371, subpart B," at the suggestion of AMSA, we are limiting the scope of part 371, subpart B to only household goods brokers offering services to individual shippers. We have made the appropriate changes to § 371.101 to limit the scope to individual shippers. Second, as discussed in the section of the "Definitions," the Agency is adding the acronym "FMCSA" and the definition that it means the Federal Motor Carrier Safety Administration, an agency within the U.S. Department of Transportation. Third, as discussed in the section on "information in advertisements and Internet Web homepages," we are adding § 371.107(d) to require household goods brokers who provide estimates on behalf of household goods motor carriers, to state prominently on their Web site(s) that the estimates must

be based on the carrier's tariff and that the carrier is required to make the tariff available for public inspection upon a reasonable request. Fourth, also as discussed in the section on "information in advertisements and Internet Web homepages," at the suggestion of AMSA, we are adding § 371.107(e) to prohibit the broker from including the names or logos of motor carriers unless they are FMCSA-authorized household goods motor carriers with which the broker has a written agreement as specified in § 371.115. Fourth, as discussed in the section "list of motor carriers," FMCSA will allow household goods brokers to provide the information required by § 371.109 electronically as an alternative to a paper-based communication.

Fifth, as discussed in the section "consumer protection information," FMCSA is adding § 371.111(b) to require that, if a shipper elects to access the statutorily-mandated consumer information via the household goods broker's Web site, then the broker must state on the written estimate described in § 371.113 that the individual shipper expressly agreed to access the consumer protection information via the Internet in lieu of a paper copy.

Sixth, as discussed further in the section "consumer protection information," FMCSA has also revised § 371.111 paragraph (c) to require written or electronic verification of the shipper's agreement to access the Federal consumer protection information on the Internet, instead of receiving the booklet copies in paper form.

Seventh, as discussed in the section "Written estimate based on a physical survey," we are adopting one of AMSA's two suggestions to require in § 371.113(a) that a physical survey of the household goods must be conducted by the authorized motor carrier on whose behalf the estimate is provided, if the shipment is located within a 50-mile radius of the carrier's "household goods agent preparing the estimate," unless the physical survey requirement is waived by the shipper.

Eighth, for § 371.113(c)(2), as discussed in the section on "Explanation of waiving the physical survey," we are adopting PUCO's suggestion that the final rule require brokers to explain the physical survey and waiver requirement to individual shippers, print the waiver agreement on the written estimate, and print the agreement with a minimum font size and font typeface. Ninth, as discussed in the section "verifying the motor carrier's authority," FMCSA is eliminating proposed § 371.119 from the final rule. Tenth, as discussed in the sections on "Written estimate based on

³ The ICC established the broker surety bond amount at \$5,000 in 1936, 1 FR 1156, August 20, 1936.

a physical survey” and “Estimates provided by household goods brokers,” we have revised the household goods motor carrier requirements applicable to household goods broker estimates in § 375.409(a) to make them consistent with our revised written estimate revisions in § 371.113(a). Finally, we are adding a 1-year compliance date in § 387.307(a)(2) for household goods brokers to obtain the additional \$15,000 of financial responsibility over the current \$10,000 requirement, and to file with FMCSA the required proof (Forms BMC-84 or BMC-85, as appropriate) of the total \$25,000 minimum financial responsibility required by the 1-year compliance date.

Regulatory Analyses

Executive Order 12866 (Regulatory Planning and Review); DOT Regulatory Policies and Procedures

FMCSA has determined that this action is a not a significant regulatory action within the meaning of Executive Order 12866 and the U.S. Department of Transportation regulatory policies and procedures (44 FR 11034, February 26, 1979). The Agency received only 11 comments and the costs are minimal.

The total cost of the final rule is approximately \$5.543 million in the first year with annual, recurring costs of \$1.776 million thereafter. As such, the costs of this final rule do not exceed the \$100 million annual threshold as defined in Executive Order 12866. The ten-year costs and benefits of the final rule are shown in Table 1:

TABLE 1—SUMMARY OF TEN-YEAR COSTS AND BENEFITS FOR FINAL RULE
[In millions]

7% Discount Rate	Option 3
Costs	\$17.11
Benefits	46.97
Net Benefits	32.25
3% Discount Rate	Option 3
Costs	16.58
Benefits	54.91
Net Benefits	38.33

FMCSA’s full Final Regulatory Evaluation is in the docket for this rule. It explains in detail how we estimated cost impacts for the final rule.

This rule establishes additional consumer protection regulations specifically for household goods brokers to supplement the regulations at 49 CFR part 375, which apply to motor carriers transporting household goods by commercial motor vehicle in interstate and foreign commerce.

FMCSA estimates these regulatory changes will produce three primary cost impacts on household goods brokers: (1) Costs of training certain employees on the proper application of the regulatory changes; (2) costs to revise broker marketing materials, forms, and orders for service, including technical writing, Web site editing, and printing costs associated with incorporating mandated consumer information; and (3) additional information collection burdens associated with the new regulations, including traveling to and performing on-site physical surveys for written estimates; making written agreements with household goods motor carriers, stating on the written estimate that the individual shipper expressly agreed to access the consumer protection information on the Internet; obtaining written or electronic verification of the shipper’s agreement to access the Federal consumer protection information on the Internet; explaining the physical survey and waiver requirement to individual shippers; printing the waiver agreement on the written estimate; printing the agreement with a minimum font size and font typeface; and, finally, requiring household goods brokers to have their sureties or trust fund managers file proof of their \$25,000 minimum financial responsibility on the Forms BMC-84 or BMC-85, as appropriate.

Regulatory Flexibility Act, as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121, 110 Stat. 857), requires Federal agencies, as a part of each rulemaking, to consider regulatory alternatives that minimize the impact on small entities while achieving the objectives of the rulemaking. The Agency’s Initial Regulatory Flexibility Analysis is available in docket FMCSA–2004–17008 at item 0018. FMCSA received no specific comments about its Initial Regulatory Flexibility Analysis. The Agency’s Final Regulatory Flexibility Analysis (FRFA) for this final rule is discussed below.

(1) A description of the reasons why action by the agency is being considered.

The American Moving and Storage Association (AMSA) petitioned the DOT for a rulemaking in March 2003 that would amend the property broker regulations in part 371 to require brokers that arrange for household goods transportation by motor carrier (household goods brokers) to provide

consumer information that only household-goods motor-carriers must now provide, as well as establish additional consumer protection requirements. Many of AMSA’s concerns were addressed in the Safe Accountable, Flexible, Efficient Transportation Equity Act: A Legacy For Users (SAFETEA–LU), Public Law 109–59, which was enacted into law on August 10, 2005. Specifically, section 4212 of SAFETEA–LU directs FMCSA to issue regulations requiring household goods brokers to provide this information to consumers.

(2) Objectives of, and legal basis for, the final rule.

This rulemaking is mandated by section 4212 of SAFETEA–LU. FMCSA’s general authority to enact consumer protection regulations governing broker operations is contained in 49 U.S.C. 13904(c). The objective of this rule is to ensure that individual shippers of household goods that arrange for transportation through household goods brokers (rather than directly through motor carriers) receive necessary information regarding the parties with which they are dealing and their rights and responsibilities in connection with interstate household goods moves. It also is intended to ensure that household goods brokers deal only with properly registered and insured motor carriers and that estimates provided by household goods brokers be provided under specific circumstances designed to protect the shipper against abuse. Finally, it increases the level of financial responsibility required to ensure that household goods brokers perform their transportation contracts.

(3) Significant issues raised by small entities’ comments.

A summary of the significant issues raised by the public in response to the NPRM and the assessment of each significant issue are discussed earlier in this final rule under the heading “Discussion of Comments on the Proposed Rule.”

FMCSA is adopting the proposed rule as final with the minor changes discussed above under the heading The Final Rule, based mainly on comments to the NPRM. FMCSA believes most household goods brokers that commented to the NPRM would meet the definition of a small business entity.

(4) Description and estimate of the number of small entities to which the final rule will apply.

There are currently 615 active, registered household goods brokers and another 394 registered household goods

brokers that are inactive.⁴ We do not know the number of unregistered household goods brokers, but we suspect that there are many. For the purposes of our analysis, we assume the number is 75—which would put the percentage of unregistered brokers at just over ten percent (75 is 10.87% of (615 + 75)). The figure is based on conversations with industry experts and information from broker Web sites. We use 690, then, as the estimate of total active brokers—registered and (now) unregistered. Almost all are small entities according to the definition in Small Business Administration (SBA) regulations (13 CFR part 121) which defines a “small entity” in the North American Industrial Classification System (NAICS) Code 488510 “Freight Transportation Arrangement” industry by average annual receipts, which are currently set at \$7 million per firm. The motor carriers with whom household goods brokers deal may also be indirectly affected.

(5) *Description of the projected reporting, record-keeping and other compliance requirements for small entities.*

The final rule requires additional record-keeping on the part of household goods brokers to demonstrate compliance. The cost to the household goods broker industry of this additional record-keeping (\$5.543 million in the first year and \$1.776 million annually to inform, display, and disclose information to shippers and maintain the files for three years) is reflected in our cost estimates. Additionally, the aggregate cost to the household goods broker industry of raising the financial responsibility requirement to \$25,000 from \$10,000 (approximately \$50,000 annually) is also reflected in our cost estimates. The total cost has a present value of approximately \$17.11 million over ten years when discounted at 7 percent, and does not require any special skills that would be available to large entities any more than to small entities.

(6) *Duplication with other Federal rules.*

FMCSA is unaware of any other Federal rules which will duplicate, overlap, or conflict with this proposed rule except for the household goods carriers rule published on July 12, 2005.⁵ Because these rules apply only to household goods motor carriers, it was necessary to establish separate rules applicable to household goods brokers,

even though they contain certain similarities. For example, SAFETEA-LU requires every shipper to receive the pamphlet “Your Rights and Responsibilities When You Move.” Household goods carriers are already required to make this pamphlet available to every shipper. This rule requires household goods brokers to make the same pamphlet available to shippers. There is no practical way around the duplication because some shippers do not use a household goods broker and those who do often do not have any direct contact with a household goods carrier early enough in the process to make effective use of the information contained in the pamphlet.

(7) *Description of any significant alternatives to the final rule.*

FMCSA believes that there are no significant alternatives to the final rule which would accomplish the stated objectives of the Household Goods Mover Oversight Enforcement and Reform Act of 2005, otherwise known as Title IV, Subtitle B of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) (Pub. L. 109–59) and which would minimize any significant economic impact of the final rule on small entities.

The Agency did consider ways in which it could assist small household goods broker entities to mitigate the impact of increasing the trust fund resources to the new minimum requirement of \$25,000. The Agency decided it could extend the compliance date regarding the financial responsibility requirement so that brokers will have a full year after publication of the final rule to come into compliance with the \$25,000 requirement, increasing trust funds from the minimum of \$10,000 to the final rule’s minimum requirement of \$25,000.

Therefore, FMCSA is mitigating the impact of obtaining the additional \$15,000 of financial responsibility over the current \$10,000 requirement by adding a 1-year compliance date in § 387.307(a)(2). Thus, all household goods brokers will have one year from the date of publication of this final rule to obtain the additional \$15,000 of financial responsibility over the current \$10,000 requirement, and to have their sureties and trust fund managers file with FMCSA the required proof (Forms BMC–84 or BMC–85, as appropriate) of the total \$25,000 minimum financial responsibility required by the compliance date for § 387.307(a)(2).

As we stated above, almost all of the 690 household goods brokers subject to this final rule meet the definition of a small business entity under the RFA.

We have estimated this final rule will cause the average household goods broker to incur an estimated, additional \$8,030 in the first year of implementation and annual recurring costs of about \$2,575. The Administrator of the FMCSA believes this final rule will have a significant economic impact on a substantial number of small entities (SEISONOSE).

Unfunded Mandates Reform Act

This rule does not impose a Federal mandate resulting in the expenditure by State, local, or Tribal governments, in the aggregate, or by the private sector, of \$140.3 million or more in any one year (2 U.S.C. 1531 *et seq.*). The present value of the final rule is about \$17.11 million.

National Environmental Policy Act

The Agency analyzed this rule for the purpose of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*) and determined under our environmental procedures Order 5610.1 published March 1, 2004 (69 FR 9680), that this action is categorically excluded under Appendix 2, paragraphs 6.d, 6.m, and 6.q of the Order from further environmental documentation. These categorical exclusions relate to rulemaking actions affecting household goods brokers. In addition, the Agency believes that the action includes no extraordinary circumstances that would have any effect on the quality of the environment. Thus, the action does not require an environmental assessment or an environmental impact statement.

We have also analyzed this rule under the Clean Air Act, as amended (CAA) section 176(c), (42 U.S.C. 7401 *et seq.*) and implementing regulations promulgated by the Environmental Protection Agency. Approval of this action is exempt from the CAA’s general conformity requirement since it involves rulemaking and policy development and issuance. *See* 40 CFR 93.153(c)(2). It will not result in any emissions increase nor will it have any potential to result in emissions that are above the general conformity rule’s *de minimis* emission threshold levels. Moreover, it is reasonably foreseeable that the rule will not increase total CMV mileage, or change the routing of CMVs, how CMVs operate, or the CMV fleet-mix of motor carriers. This action merely establishes regulations applicable to the business practices of household goods brokers, which do not operate CMVs. FMCSA received no comments to its NEPA and Clean Air Act analyses.

⁴ A broker generally becomes inactive after registering with FMCSA when its surety bond or trust fund is cancelled.

⁵ 70 FR 39949 (Jul. 12, 2005).

Privacy Impact Assessment

FMCSA conducted a privacy impact assessment of this rule as required by section 522(a)(5) of the FY 2005 Omnibus Appropriations Act, Public Law 108-447, 118 Stat. 3268 (Dec. 8, 2004) [set out as a note to 5 U.S.C. 552a]. The assessment considers any impacts of the rule on the privacy of information in an identifiable form and related matters. FMCSA has determined this rule imposes no privacy impacts.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501-3520), a Federal agency must obtain approval from the Office of Management and Budget (OMB) for each collection of information it conducts, sponsors, or requires through regulations. FMCSA seeks approval of the information collection requirements in a new information collection to be entitled "Practices of Household Goods Brokers."

The collected information encompasses that which is generated, maintained, retained, disclosed, and provided to, or for, the agency under 49 CFR part 371. It will assist shippers in their commercial dealings with interstate household goods brokers. The collection of information will be used by prospective shippers to make informed decisions about contracts and

services to be ordered, executed, and settled within the interstate household goods motor carrier industry. Some of these information collection items were required by regulations issued by the former ICC; however, that agency was not required to comply with the PRA. When these items transferred from the ICC to the Federal Highway Administration, and ultimately to FMCSA, no OMB control number was assigned to cover this information collection transfer. It was therefore necessary to calculate the old information collection burden hours for these items approved under the ICC rules and to add the new burden that will be generated by this final rule.

Assumptions used for calculation of the information collection burden include the following: (1) There are currently approximately 690 active household goods brokers; (2) on average, each household goods broker will enter into written agreements to estimate shipment costs with about 31 motor carriers, (3) household goods brokers will eventually sever some of these written agreements and make agreements with new household goods motor carriers. We assume that an average agreement lasts for about six years, meaning that brokers will enter into about five new agreements each year, and (4) FMCSA estimates household goods brokers handle about

100,000 moves each year. The first two items result in 24,390 respondents subject to the information collection ($690 \times 31 = 24,390$). The third item results in an additional 3,450 respondents subject to the information collection ($690 \times 5 = 3,450$). Together with the fourth item, a total of about 127,900 respondents ($24,390 + 3,450 + 100,000$) would be subject to the information collection.

The PRA regulations at 5 CFR 1320.3(b)(2) allow FMCSA to calculate no burden when the agency demonstrates to OMB that the activity needed to comply with the specific regulation is usual and customary. FMCSA sought comment in the NPRM on whether setting up the first accounting system for a new business is a usual and customary business practice. FMCSA received no comments from the public about this accounting system issue. Thus, FMCSA concludes the public believes it is a usual and customary practice when starting a new business.

Table 2 summarizes the information collection burden hours by the actions being taken in the final rule. See attachment S of the supporting statement for the Paperwork Reduction Act Submission in docket FMCSA-2004-17008 for the detailed FMCSA analysis.

TABLE 2—ANNUAL BURDEN HOURS ACROSS THE 127,900 RESPONDENTS

Section	Description	Calculation	Total hours
371.3	Transaction records	60hr × 690	41,400
371.13	Second accounting system	8hr × 125	1,000
371.107	Web site/Ad Modification	20hr × 690	13,800
371.109	Create A List of Carriers	10hr × 690	6,900
371.111(a)	Pamphlet Provision (One-Time)	0.5hr × 690	345
371.111(c)	Confirming Required Information	0.5hr/month × 12 × 690	4,140
371.113	Explanation of Waiver-Agreement	(1/12)hr × 20,000	1,667
371.115	Negotiation of Agreements (One-Time)	4hr × 31 agreements × 690	85,560
	Additional Agreements Through Turnover	4 hrs × 5 agreements × 690	13,800
371.117	Disclosure and Records	10hr × 690	6,900
371.119	Removed Verification Requirement	Removed	0
	Total First Year Hours		175,512
	Total Recurring Annual Hours		89,607

We have rounded the estimates and have asked OMB for approval for first-year burden-hours of 175,500, and subsequent-year burden-hours of 89,600. We particularly request your comments on whether the collection of information is necessary for FMCSA to meet the goal of 49 CFR part 371 to protect consumers and household goods motor carriers, including: (1) Whether the information is useful to this goal; (2) the accuracy of the estimate of the burden of the information collection; (3)

ways to enhance the quality, utility and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

You must submit comments on the information collection burden addressed by this final rule to the Office of Management and Budget (OMB). The deadline for such submissions is December 29, 2010. Interested persons

are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the attention of the Desk Officer, Department of Transportation/Federal Motor Carrier Safety Administration, and sent via electronic mail to oir_submission@omb.eop.gov, or faxed to (202) 395-6974, or mailed to the Office of Information and Regulatory

Affairs, Office of Management and Budget, Docket Library, Room 10102, 725 17th Street, NW., Washington, DC 20503.

Executive Order 12988 (Civil Justice Reform)

This rulemaking meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, entitled "Civil Justice Reform," to minimize litigation, eliminate ambiguity, and reduce burden.

Executive Order 12630 (Taking of Private Property)

This rule will not effect a taking of private property or otherwise have taking implications under Executive Order 12630, entitled "Governmental Actions and Interference with Constitutionally Protected Property Rights."

Executive Order 13132 (Federalism)

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132. The FMCSA has determined that this rulemaking would not have a substantial direct effect on States, nor would it limit the policy-making discretion of the States.

Executive Order 13211 (Energy Effects)

FMCSA has analyzed this action under Executive Order 13211, entitled "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use." The Agency has determined that it is not a "significant energy action" under that order because it does not appear to be economically significant (*i.e.*, imposing a cost of more than \$100 million in a single year) based upon analyses performed at this stage of the rulemaking process, and is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

Executive Order 12372 (Intergovernmental Review)

The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this program.

List of Subjects

49 CFR Part 371

Brokers, Motor carriers, Reporting and recordkeeping requirements.

49 CFR Part 375

Advertising, Arbitration, Consumer protection, Freight, Highways and roads, Insurance, Motor carriers, Moving

of household goods, Reporting and recordkeeping requirements.

49 CFR Part 386

Administrative practice and procedure, Brokers, Freight forwarders, Hazardous materials transportation, Highway safety, Motor carriers, Motor vehicle safety, Penalties.

49 CFR Part 387

Buses, Freight, Freight forwarders, Hazardous materials transportation, Highway safety, Insurance, Intergovernmental relations, Motor carriers, Motor vehicle safety, Moving of household goods, Penalties, Reporting and recordkeeping requirements, Surety bonds.

■ For the reasons discussed above, FMCSA is amending title 49, Code of Federal Regulations, chapter III, subchapter B, as set forth below:

PART 371—BROKERS OF PROPERTY

■ 1. Revise the authority citation for part 371 to read as follows:

Authority: 49 U.S.C. 13301, 13501, and 14122; subtitle B, title IV of Pub. L. 109–59; and 49 CFR 1.73.

Subpart A—General Requirements

■ 2. Add a heading for subpart A to read as set forth above, and designate §§ 371.1 through 371.13 under subpart A.

■ 3. Add a new subpart B to read as follows:

Subpart B—Special Rules for Household Goods Brokers

Sec.

371.101 If I operate as a household goods broker in interstate or foreign commerce, must I comply with subpart B of this part?

371.103 What are the definitions of terms used in this subpart?

371.105 Must I use a motor carrier that has a valid U.S. DOT number and valid operating authority issued by FMCSA to transport household goods in interstate or foreign commerce?

371.107 What information must I display in my advertisements and Internet Web homepage?

371.109 Must I inform individual shippers which motor carriers I use?

371.111 Must I provide individual shippers with Federal consumer protection information?

371.113 May I provide individual shippers with a written estimate?

371.115 Must I maintain agreements with motor carriers before providing written estimates on behalf of these carriers?

371.117 Must I provide individual shippers with my policies concerning cancellation, deposits, and refunds?

371.121 What penalties may FMCSA impose for violations of this part?

Subpart B—Special Rules for Household Goods Brokers

§ 371.101 If I operate as a household goods broker in interstate or foreign commerce, must I comply with subpart B of this part?

Yes, you must comply with all regulations in this subpart when you operate as a household goods broker offering services to individual shippers in interstate or foreign commerce. The regulations in this subpart do not apply to a household goods broker when providing services to commercial or government shippers in interstate or foreign commerce.

§ 371.103 What are the definitions of terms used in this subpart?

FMCSA means the Federal Motor Carrier Safety Administration within the U.S. Department of Transportation.

Household goods has the same meaning as the term is defined in § 375.103 of this subchapter.

Household goods broker means a person, other than a motor carrier or an employee or bona fide agent of a motor carrier, that as a principal or agent sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation of household goods by motor carrier for compensation.

Individual shipper has the same meaning as the term is defined in § 375.103 of this subchapter.

§ 371.105 Must I use a motor carrier that has a valid U.S. DOT number and valid operating authority issued by FMCSA to transport household goods in interstate or foreign commerce?

You may only act as a household goods broker for a motor carrier that has a valid, active U.S. DOT number and valid operating authority issued by FMCSA to transport household goods in interstate or foreign commerce.

§ 371.107 What information must I display in my advertisements and Internet Web homepage?

(a) You must prominently display in your advertisements and Internet Web homepage(s) the physical location(s) (street or highway address, city, and State) where you conduct business.

(b) You must prominently display your U.S. DOT registration number(s) and MC license number issued by the FMCSA in your advertisements and Internet Web homepage(s).

(c) You must prominently display in your advertisements and Internet Web site(s) your status as a household goods broker and the statement that you will not transport an individual shipper's

household goods, but that you will arrange for the transportation of the household goods by an FMCSA-authorized household goods motor carrier, whose charges will be determined by its published tariff.

(d) If you provide estimates on any carrier's behalf pursuant to § 371.113(b), you must prominently display in your Internet Web site(s) that the estimate must be based on the carrier's tariff and that the carrier is required to make its tariff available for public inspection upon a reasonable request.

(e) You may only include in your advertisements or Internet Web site(s) the names or logos of FMCSA-authorized household goods motor carriers with whom you have a written agreement as specified in § 371.115 of this part.

§ 371.109 Must I inform individual shippers which motor carriers I use?

(a) You must provide to each potential individual shipper who contacts you a list of all authorized household goods motor carriers you use, including their U.S. DOT registration number(s) and MC license numbers. You may provide the list electronically or on paper.

(b) You must provide to each potential individual shipper who contacts you a statement indicating that you are not a motor carrier authorized by the Federal Government to transport the individual shipper's household goods, and you are only arranging for an authorized household goods motor carrier to perform the transportation services and, if applicable, additional services. You may provide the statement electronically or on paper.

§ 371.111 Must I provide individual shippers with Federal consumer protection information?

(a) You must provide potential individual shippers with Federal consumer protection information by one of the following three methods:

(1) Provide a hyperlink on your Internet Web site to the FMCSA Web site containing the information in FMCSA's publications "Ready to Move?—Tips for a Successful Interstate Move" and "Your Rights and Responsibilities When You Move."

(2) Distribute to each shipper and potential shipper at the time you provide an estimate, copies of FMCSA's publications "Ready to Move?—Tips for a Successful Interstate Move" and "Your Rights and Responsibilities When You Move."

(3) Distribute to each shipper and potential shipper at the time you provide an estimate, copies of "Ready to Move?—Tips for a Successful Interstate

Move" and "Your Rights and Responsibilities When You Move" as modified and produced by the authorized, lawful motor carrier to which you intend to provide the shipment under your written agreement required by § 371.115.

(b) If an individual shipper elects to waive physical receipt of the Federal consumer protection information by one of the methods described in paragraphs (a)(2) and (a)(3) of this section, and elects to access the same information via the hyperlink on the Internet as provided in paragraph (a)(1) of this section, you must include a clear and concise statement on the written estimate described in § 371.113 that the individual shipper expressly agreed to access the Federal consumer protection information on the Internet.

(c) You must obtain a signed, dated, electronic or paper receipt showing the individual shipper has received both booklets that includes, if applicable, verification of the shipper's agreement to access the Federal consumer protection information on the Internet.

(d) You must maintain the signed receipt required by paragraph (c) of this section for three years from the date the individual shipper signs the receipt.

§ 371.113 May I provide individual shippers with a written estimate?

(a) You may provide each individual shipper with an estimate of transportation and accessorial charges. If you provide an estimate, it must be in writing and must be based on a physical survey of the household goods conducted by the authorized motor carrier on whose behalf the estimate is provided if the goods are located within a 50-mile radius of the motor carrier's or its agent's location, whichever is closer. The estimate must be prepared in accordance with a signed, written agreement, as specified in § 371.115 of this subpart.

(b) You must base your estimate upon the published tariffs of the authorized motor carrier who will transport the shipper's household goods.

(c)(1) A shipper may elect to waive the physical survey required in paragraph (a) of this section by written agreement signed by the shipper before the shipment is loaded.

(2) The household goods broker must explain the physical survey waiver agreement to the individual shipper in plain English. The physical survey waiver agreement must be printed on the written estimate and must be printed at no less than 7-point font size and with the font typeface Universe.

(3) A copy of the waiver agreement must be retained as an addendum to the

bill of lading and is subject to the same record inspection and preservation requirements as are applicable to bills of lading.

(d) You must keep the records required by this section for three years following the date you provide the written estimate for an individual shipper who accepts the estimate and has you procure the transportation.

§ 371.115 Must I maintain agreements with motor carriers before providing written estimates on behalf of these carriers?

(a) In order to provide estimates of charges for the transportation of household goods, you must do so in accordance with the written agreement required by § 375.409 of this subchapter. Your written agreement with the motor carrier(s) must include the following items:

(1) Your broker name as shown on your FMCSA registration, your physical address, and your U.S. DOT registration number and MC license number;

(2) The authorized motor carrier's name as shown on its FMCSA registration, its physical address, and its U.S. DOT registration number and MC license number;

(3) A concise, easy to understand statement that your written estimate to the individual shipper:

(i) Will be exclusively on behalf of the authorized household goods motor carrier;

(ii) Will be based on the authorized household goods motor carrier's published tariff; and

(iii) Will serve as the authorized household goods motor carrier's estimate for purposes of complying with the requirements of part 375 of this chapter, including the requirement that the authorized household goods motor carrier relinquishes possession of the shipment upon payment of no more than 110 percent of a non-binding estimate at the time of delivery;

(4) Your owner's, corporate officer's, or corporate director's signature lawfully representing your household goods broker operation and the date;

(5) The signature of the authorized household goods motor carrier's owner, corporate officer, or corporate director lawfully representing the household goods motor carrier's operation and the date; and

(b) The signed written agreement required by this section is public information and you must produce it for review upon reasonable request by a member of the public.

(c) You must keep copies of the agreements required by this section for as long as you provide estimates on behalf of the authorized household

goods motor carrier and for three years thereafter.

§ 371.117 Must I provide individual shippers with my policies concerning cancellation, deposits, and refunds?

(a) You must disclose prominently on your Internet Web site and in your agreements with prospective shippers your cancellation policy, deposit policy, and policy for refunding deposited funds in the event the shipper cancels an order for service before the date an authorized household goods motor carrier has been scheduled to pick up the shipper's property.

(b) You must maintain records showing each individual shipper's request to cancel a shipment and the disposition of each request for a period of three years after the date of a shipper's cancellation request. If you refunded a deposit, your records must include:

(1) Proof that the individual shipper cashed or deposited the check or money order, if the financial institution provides documentary evidence; or

(2) Proof that you delivered the refund check or money order to the individual shipper.

§ 371.121 What penalties may FMCSA impose for violations of this part?

The penalty provisions of 49 U.S.C. chapter 149, *Civil and Criminal Penalties* apply to this subpart. These penalties do not overlap. Notwithstanding these civil penalties, nothing in this section deprives an individual shipper of any remedy or right of action under existing law.

PART 375—TRANSPORTATION OF HOUSEHOLD GOODS IN INTERSTATE COMMERCE; CONSUMER PROTECTION REGULATIONS

■ 4. Revise the authority citation for part 375 to read as follows:

Authority: 5 U.S.C. 553; 49 U.S.C. 13102, 13301, 13704, 13707, 14104, 14706, 14708; subtitle B, title IV of Pub. L. 109–59; and 49 CFR 1.73.

■ 5. Amend § 375.213 by revising paragraphs (a), (b)(1), and (d), and adding paragraph (e) to read as follows:

§ 375.213 What information must I provide to a prospective individual shipper?

(a) When you provide the written estimate to a prospective individual shipper, you must also provide the individual shipper with a copy of Department of Transportation publication FMCSA–ESA–03–005 (or its successor publication) entitled “Ready to Move?—Tips for a Successful Interstate Move.” You may provide the

individual shipper with a paper copy or you may provide a hyperlink on your Internet Web site to the FMCSA Web site containing the information in FMCSA's publication “Ready to Move?—Tips for a Successful Interstate Move.”

(b) * * *

(1) The contents of appendix A of this part, entitled “Your Rights and Responsibilities When You Move” (Department of Transportation publication FMCSA–ESA–03–006, or its successor publication). You may provide the individual shipper with a paper copy or you may provide a hyperlink on your Internet Web site to the FMCSA Web site containing the information in FMCSA's publication “Your Rights and Responsibilities When You Move.”

* * * * *

(d) Paragraphs (c)(2) and (c)(3) of this section do not apply to exact copies of appendix A published in the **Federal Register**, the Code of Federal Regulations, or on FMCSA's Web site.

(e) If an individual shipper elects to waive physical receipt of the Federal consumer protection information by one of the methods described in paragraphs (a) and (b)(1) of this section, and elects to access the same information via the hyperlink on the Internet as provided in paragraphs (a) and (b)(1) of this section:

(1) You must include a clear and concise statement on the written estimate described in § 375.401 that the individual shipper expressly agreed to access the Federal consumer protection information on the Internet.

(2) You must obtain a signed, dated, electronic or paper receipt showing the individual shipper has received both booklets that includes, if applicable, verification of the shipper's agreement to access the Federal consumer protection information on the Internet.

(3) You must maintain the signed receipt required by paragraph (e)(2) of this section for three years from the date the individual shipper signs the receipt.

■ 5. Revise § 375.409 to read as follows:

§ 375.409 May household goods brokers provide estimates?

(a) Subject to the limitations in § 371.113(a) of this subchapter, household goods brokers may provide estimates to individual shippers provided there is a written agreement between the broker and you, the motor carrier, adopting the broker's estimate as your own estimate. If you, the motor carrier, make such an agreement with a household goods broker, you must ensure compliance with all requirements of this part pertaining to estimates, including the requirement

that you must relinquish possession of the shipment if the shipper pays you no more than 110 percent of a non-binding estimate at the time of delivery.

(b) Your written agreement with the household goods broker(s) must include the items required in § 371.115(a) of this subchapter.

PART 386—RULES OF PRACTICE FOR MOTOR CARRIER, BROKER, FREIGHT FORWARDER, AND HAZARDOUS MATERIALS PROCEEDINGS

■ 6. Revise the authority citation for part 386 to read as follows:

Authority: 49 U.S.C. 113, chapters 5, 51, 59, 131–141, 145–149, 311, 313, and 315; Sec. 204, Pub. L. 104–88, 109 Stat. 803, 941 (49 U.S.C. 701 note); Sec. 217, Pub. L. 105–159, 113 Stat. 1748, 1767; Sec. 206, Pub. L. 106–159, 113 Stat. 1763; subtitle B, title IV of Pub. L. 109–59; and 49 CFR 1.45 and 1.73.

■ 7. Amend appendix B to part 386 by revising the heading and by adding paragraphs (g)(22) and (23) to read as follows:

Appendix B to Part 386—Penalty Schedule; Violations and Monetary Penalties

* * * * *

(g) * * *

(22) A broker for transportation of household goods who makes an estimate of the cost of transporting any such goods before entering into an agreement with a motor carrier to provide transportation of household goods subject to FMCSA jurisdiction is liable to the United States for a civil penalty of not less than \$10,000 for each violation.

(23) A person who provides transportation of household goods subject to jurisdiction under 49 U.S.C. chapter 135, subchapter I, or provides broker services for such transportation, without being registered under 49 U.S.C. chapter 139 to provide such transportation or services as a motor carrier or broker, as the case may be, is liable to the United States for a civil penalty of not less than \$25,000 for each violation.

* * * * *

PART 387—MINIMUM LEVELS OF FINANCIAL RESPONSIBILITY FOR MOTOR CARRIERS

■ 8. The authority citation for part 387 continues to read as follows:

Authority: 49 U.S.C. 13101, 13301, 13906, 14701, 31138, 31139, and 31144; and 49 CFR 1.73.

■ 9. Amend § 387.307 by redesignating paragraph (a) as paragraph (a)(1) and adding new paragraph (a)(2) to read as follows:

§ 387.307 Property broker surety bond or trust fund.

(a) *Security.* (1) * * *

(2) A household goods broker must have a surety bond or trust fund in effect for \$25,000 on and after January 1, 2012. The FMCSA will not issue a household goods broker license until a surety bond or trust fund for the full limits of liability prescribed herein is in effect. The household goods broker

license remains valid or effective only as long as a surety bond or trust fund remains in effect and ensures the financial responsibility of the household goods broker. The compliance date for paragraph (a)(2) is January 1, 2012.

* * * * *

Issued on: November 19, 2010.

Anne S. Ferro,
Administrator.

[FR Doc. 2010-29813 Filed 11-26-10; 8:45 am]

BILLING CODE 4910-EX-P

DEPARTMENT OF TRANSPORTATION**Federal Motor Carrier Safety Administration****49 CFR Parts 383, 384, 390, 391, and 392**

[Docket No. FMCSA–2010–0096]

RIN 2126–AB29

Drivers of CMVs: Restricting the Use of Cellular Phones**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.**ACTION:** Notice of proposed rulemaking; request for comments.

SUMMARY: The Federal Motor Carrier Safety Administration (FMCSA) proposes to restrict the use of hand-held mobile telephones, including hand-held cell phones, by drivers of commercial motor vehicles (CMVs) while operating in interstate commerce. The Agency proposes new driver disqualification sanctions for interstate drivers of CMVs who fail to comply with this Federal restriction and new driver disqualification sanctions for commercial driver's license (CDL) holders who have multiple convictions for violating a State or local law or ordinance on motor vehicle traffic control that restricts the use of hand-held mobile telephones. Additionally, interstate motor carriers would be prohibited from requiring or allowing drivers of CMVs to engage in the use of a hand-held mobile telephone while operating in interstate commerce. This rulemaking would improve safety on the Nation's highways by reducing the prevalence of distracted driving-related crashes, fatalities, and injuries involving drivers of CMVs.

DATES: FMCSA will be accepting both initial comments and reply comments in response to this Notice of Proposed Rulemaking (NPRM). Send your initial comments on or before February 22, 2011 and reply comments on or before March 21, 2011. Initial comments may address any issue raised in the NPRM and the background documents in the docket (*e.g.*, regulatory evaluation, studies, environmental assessment, etc.). Initial comments will be made available promptly electronically, online on <http://www.regulations.gov>, or for public inspection in room W12–140, DOT Building, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays. In order to allow sufficient opportunity for interested parties to prepare and submit any reply comments, late-filed initial

comments will not be considered. Reply comments must address only matters raised in initial comments and must not be used to present new arguments, contentions, or factual material that is not responsive to the initial comments.

ADDRESSES: You may submit comments and reply comments identified by docket number FMCSA–2010–0096 using any one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>.
- *Fax:* 202–493–2251.
- *Mail:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

• *Hand delivery:* Same as mail address above, between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

To avoid duplication, please use only one of these four methods. See the “Public Participation and Request for Comments” portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions about this proposed rule, contact Mr. Brian Routhier, Transportation Specialist, Federal Motor Carrier Safety Administration, Vehicle and Roadside Operation Division, at 202–366–4325 or FMCSA_MCPSV@dot.gov.

SUPPLEMENTARY INFORMATION:**Table of Contents for Preamble**

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I. Public Participation and Request for Comments

FMCSA encourages you to participate in this rulemaking by submitting comments, reply comments, and related materials. All comments received will be posted without change to <http://www.regulations.gov> and will include any personal information you provide.

A. Submitting Comments

If you submit a comment or a reply comment, please include the docket number for this rulemaking (FMCSA–2010–0096), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an e-mail address, or a phone number in the body of your document so that FMCSA can contact you if there are questions regarding your submission.

To submit your comment or reply comments online, go to <http://www.regulations.gov> and click on the “submit a comment” box, which will then become highlighted in blue. In the “Document Type” drop down menu, select “Proposed Rules,” insert “FMCSA–2010–0096” in the “Keyword” box, and click “Search.” When the new screen appears, click on “Submit a Comment” in the “Actions” column. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½; by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope.

We will consider all comments and material received during the comment period and may change this proposed rule based on your comments.

B. Viewing Comments and Documents

To view comments or reply comments, as well as any documents mentioned in this preamble, go to <http://www.regulations.gov> and click on the “read comments” box in the upper right hand side of the screen. Then, in the “Keyword” box insert “FMCSA–2010–0096” and click “Search.” Next, click the “Open Docket Folder” in the “Actions” column. Finally, in the “Title” column, click on the document you would like to review. If you do not have access to the Internet, you may view the docket online by visiting the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays.

C. Privacy Act

Anyone is able to search the electronic form of all comments

received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's Privacy Act Statement for the Federal Docket Management System published in the **Federal Register** on January 17, 2008 (73 FR 3316).

II. Abbreviations

AAMVA	American Association of Motor Vehicle Administrators
ABA	American Bus Association
Advocates	Advocates for Highway and Auto Safety
ATA	American Trucking Associations, Inc.
APTA	American Public Transportation Association
CDL	Commercial Driver's License
CMV	Commercial Motor Vehicle
CTA	Chicago Transit Authority
DOT	United States Department of Transportation
EA	Environmental Assessment
EIS	Environmental Impact Statement
FCC	Federal Communications Commission
FMCSA	Federal Motor Carrier Safety Administration
FMCSRs	Federal Motor Carrier Safety Regulations
FONSI	Finding of No Significant Impact
FR	Federal Register
FRA	Federal Railroad Administration
GCRTA	Greater Cleveland Regional Transit Authority
MBTA	Massachusetts Bay Transportation Authority
MCSAC	Motor Carrier Safety Advisory Committee
MCSAP	Motor Carrier Safety Assistance Program
NAICS	North American Industry Classification System
NCSL	National Conference of State Legislatures
NGA	National Governors Association
NPRM	Notice of Proposed Rulemaking
NSC	National Safety Council
NTSB	National Transportation Safety Board
OOIDA	Owner-Operator Independent Drivers Association
OMB	Office of Management and Budget
PAR	Population Attributable Risk
PDA	Personal Digital Assistant
TCA	Truckload Carriers Association
VTTI	Virginia Tech Transportation Institute

III. Background

A. Rationale for the Scope of the Proposed Rule

Driver distraction can be defined as the voluntary or involuntary diversion of attention from the primary driving tasks due to an object, event, or person. Researchers classify distraction into several categories: Visual (taking one's eyes off the road), manual (taking one's

hands off the wheel), cognitive (thinking about something other than the road/driving), and auditory (listening to someone talking). Research shows that using a hand-held mobile telephone while driving may pose a higher safety risk than other activities (e.g. eating and writing on a pad) because it involves all four types of driver distraction. For example, reaching for and dialing a mobile telephone are both visual and manual distractions. Using a hand-held mobile telephone may reduce a driver's situational awareness, decision making, or performance; and it may result in a crash, near-crash, unintended lane departure by the driver, or other unsafe driving action. This rulemaking proposes to restrict the use of hand-held mobile telephones because our research indicates that they are a source of driver distraction that could pose a safety risk. Specifically it would prohibit a CMV driver from reaching for, holding, or dialing a mobile telephone in order to conduct a voice communication while driving. Essentially, the CMV driver must be ready to conduct a voice communication in compliance with the proposed rule the moment he begins driving the vehicle.

In an effort to understand and mitigate crashes associated with driver distraction, the U.S. Department of Transportation (DOT) conducted research concerning behavioral and vehicle safety countermeasures to driver distraction. Data from studies¹ indicate that both reaching for and dialing a mobile telephone increase the odds of involvement in a safety-critical event such as a crash, near crash, or unintended lane departure.² Both reaching for and dialing a hand-held mobile telephone are manual distractions (i.e., hands-off wheel) and require substantial visual distraction

¹ Olson, R. L., Hanowski, R.J., Hickman, J.S., & Bocanegra, J. (2009) Driver distraction in commercial vehicle operations. (Document No. FMCSA-RRR-09-042) Washington, DC: Federal Motor Carrier Safety Administration, July 2009. Retrieved October 20, 2009, from <http://www.fmcsa.dot.gov/facts-research/art-public-reports.aspx>? Hickman, J., Hanowski, R. & Bocanegra, J. (2010). Distraction in Commercial Trucks and Buses: Assessing Prevalence and Risk in Conjunction with Crashes and Near-Crashes. Washington, DC: Federal Motor Carrier Safety Administration.

² In popular usage, mobile telephones are often referred to as "cell phones." As explained later in the NPRM, a variety of different technologies are licensed by the Federal Communications Commission (FCC) (47 CFR 20.3) to provide mobile telephone services; thus, the proposed rules here would apply to the range of technologies used to provide wireless telephone communications and the rule uses the broader term "mobile telephones." However, some of the materials discussed in this preamble use the popular term "cell phone," and the discussion continues that usage in such cases.

(i.e., eyes off forward roadway) to complete the task; therefore the driver may not be capable of safely operating the vehicle.

According to a VTTI study, the odds of being involved in a safety-critical event are three times greater when the driver is reaching for an object than when the driver is not reaching for an object. The odds of being involved in a safety-critical event are six times greater while the driver is dialing a cell phone than when the driver is not dialing a cell phone. These increases in risk are primarily attributable to the driver's eyes being off the forward roadway. Additionally, these activities have high population attributable risk (PAR) percentages (i.e., an activity, which if not undertaken, would increase safety most).³ The PAR percentage for reaching for an object was the highest in the study at 7.6 percent. Because of the physical, manual, and visual distractions and the data indicating a safety risk associated with the use of hand-held mobile telephones, FMCSA believes it is in the interest of public safety to propose, at a minimum, a restriction on hand-held mobile telephone use while driving a CMV.

Other governmental entities have made recommendations on mobile telephone use that go beyond our proposed rule. The National Transportation Safety Board (NTSB) determined that one probable cause of a November 2004 bus crash was the use of a hands-free cell phone. This crash was the impetus for an NTSB investigation (NTSB/HAR-06/04 PB2007-916201) and a subsequent recommendation to FMCSA that the Agency prohibit cell phone use by all passenger-carrying CMVs.⁴ FMCSA also received recommendations on cell phone use from its Motor Carrier Safety Advisory Committee (MCSAC). One of MCSAC's recommendations for the National Agenda for Motor Carrier Safety was that FMCSA initiate a rulemaking to ban the use of hand-held and hands-free mobile telephones while driving.

However, it is not clear if simply talking on a mobile telephone presents a significant risk. For example, the same VTTI study that detailed the risks of reaching and dialing found that "talking

³ See Section D. Studies of Mobile Telephone Use While Driving for a full discussion.

⁴ National Transportation Safety Board (2006) *Motorcoach Collision with the Alexandria Avenue Bridge Overpass, George Washington Memorial Parkway, Alexandria, Virginia, November 14, 2004* (Highway Accident Report NTSB/HAR-06/04; NTIS report number PB2007-916201). Retrieved July 22, 2010, from: <http://www.nts.gov/Publictn/2006/HAR0604.pdf>.

or listening to a hands-free phone” and “talking or listening to a hand-held phone” were relatively low risk activities and had only brief periods of eyes off forward roadway. It is the action of taking one’s eyes off the forward roadway to reach for and dial the mobile telephone that is highly risky. Therefore, our proposal does not go as far as the NTSB and MCSAC recommendations.

While some States have gone further than this proposed restriction on hand-held mobile telephones, no State has completely banned mobile telephone use. Nine States and the District of Columbia have traffic laws prohibiting all motor vehicle drivers from using a hand-held mobile telephone while driving. Some States have gone further for certain categories of drivers. Nineteen States and the District of Columbia prohibit the use of all mobile telephones while driving a school bus. Transit bus and motorcoach drivers are the focus of stricter mobile telephone rules in some States and local jurisdictions.⁵ This NPRM, which proposes to restrict hand-held mobile telephone use by all CMV drivers, is in line with existing regulations that hold CMV drivers to higher standards.

This rulemaking would improve safety on the Nation’s highways by reducing the prevalence of, or preventing, certain truck- and bus-related crashes, injuries, and fatalities associated with distracted driving. Our proposal would restrict hand-held mobile telephone use, but the Agency requests comment on whether we should implement in full the NTSB and MCSAC recommendations. The Agency requests public comment on the feasibility, operational impact, and safety benefits of prohibiting hands-free mobile telephone technology by drivers of CMVs as well. Because the Agency does not intend that this rulemaking preclude the use of innovative technologies that could be safely used by CMV drivers to facilitate mobile telephone use, the Agency will consider, through this rulemaking process, all information from interested parties, as it assesses the risks, feasibility, and safety of adopting an approach in the final rule. Public comment on these issues should also recognize our responsibility to ensure that CMV drivers are held to the highest degree of safety.

B. Legal Authority

The authority for this proposed rule derives from the Motor Carrier Safety

Act of 1984 (1984 Act), 49 U.S.C. chapter 311, and the Commercial Motor Vehicle Safety Act of 1986 (1986 Act), 49 U.S.C. chapter 313. The 1984 Act (Pub. L. 98–554, Title II, 98 Stat. 2832, Oct. 30, 1984) provides authority to regulate the safety of operations of CMV drivers and motor carriers and vehicle equipment. It requires the Secretary of Transportation (Secretary) to “prescribe regulations on commercial motor vehicle safety. The regulations shall prescribe minimum safety standards for commercial motor vehicles.” Although this authority is very broad, the 1984 Act also includes specific requirements in 49 U.S.C. 31136(a):

At a minimum, the regulations shall ensure that—(1) commercial motor vehicles are maintained, equipped, loaded, and operated safely; (2) the responsibilities imposed on operators of commercial motor vehicles do not impair their ability to operate the vehicles safely; (3) the physical condition of operators of commercial motor vehicles is adequate to enable them to operate the vehicles safely; and (4) the operation of commercial motor vehicles does not have a deleterious effect on the physical condition of the operators.

This proposed rule is based primarily on 49 U.S.C. 31136(a)(1), which requires regulations that ensure that CMVs are operated safely, and secondarily on section 31136(a)(2), to the extent that drivers’ use of mobile telephones might impact their ability to operate CMVs safely. This NPRM does not address the physical condition of drivers (49 U.S.C. 31136(a)(3)), nor does it impact possible physical effects caused by driving CMVs (49 U.S.C. 31136(a)(4)).

The relevant provisions of the Federal Motor Carrier Safety Regulations (FMCSRs) (49 CFR subtitle B, chapter III, subchapter B) apply to CMV drivers and employers operating a CMV included in the statutory authority of the 1984 Act. The 1984 Act defines a CMV as a self-propelled or towed vehicle used on the highways to transport persons or property in interstate commerce; and that either: (1) Has a gross vehicle weight/gross vehicle weight rating of 10,001 pounds or greater; (2) is designed or used to transport more than 8 passengers (including the driver) for compensation; (3) is designed or used to transport more than 15 passengers, not for compensation; or (4) is transporting any quantity of hazardous materials requiring placards to be displayed on the vehicle (49 U.S.C. 31132(1)). All drivers operating CMVs are subject to the FMCSRs, except those who are employed by Federal, State, or local governments (49 U.S.C. 31132(2)). The proposed rule would also require

employers to ensure their drivers comply with the restrictions on use of hand-held mobile telephones while driving CMVs.

In addition to the statutory exemption for government employees, there are several regulatory exemptions in the FMCSRs that are authorized under the 1984 Act, including, among others, one for school bus operations and one for CMVs designed or used to transport between 9 and 15 passengers (including the driver) not for direct compensation (49 CFR 390.3(f)(1) and (6)). The school bus operations exemption only applies to interstate transportation of school children and/or school personnel between home and school. This particular exemption is not based on any statutory provisions, but is instead a discretionary rule promulgated by the Agency. Therefore, FMCSA has authority to modify the exemption. Modification of the school bus operations exemption requires the Agency to find that such action “is necessary for public safety, considering all laws of the United States and States applicable to school buses” (former 49 U.S.C. 31136(e)(1)).⁶ Likewise, FMCSA has authority to modify the non-statutory exemption for small, passenger-carrying vehicles not for direct compensation, but is not required to comply with former 49 U.S.C. 31136(e).⁷ FMCSA is proposing to apply restrictions on hand-held mobile telephone use to both school bus operations by private operators in interstate commerce and small passenger-carrying vehicles not for direct compensation, although they would continue to be exempt from the rest of the FMCSRs. Other than transportation covered by statutory

⁶ Former section 31136(e)(1) was amended by section 4007(c) of the Transportation Equity Act for the 21st Century, Public Law 105–178, 112 Stat. 107, 403 (June 9, 1998) (TEA–21). However, TEA–21 also provides that the amendments made by section 4007(c) “shall not apply to or otherwise affect a waiver, exemption, or pilot program in effect on the day before the date of enactment of [TEA–21] under * * * section 31136(e) of title 49, United States Code.” (Section 4007(d), TEA–21, 112 Stat. 404 (set out as a note under 49 U.S.C. 31136).) The exemption for school bus operations in 49 CFR 390.3(f)(1) became effective on November 15, 1988, and was adopted pursuant to section 206(f) of the 1984 Act, later codified as section 31136(e) (*Federal Motor Carrier Safety Regulations; General*, 53 FR 18042–18043, 18053 (May 19, 1988) and section 1(e), Public Law 103–272, 108 Stat 1003 (July 5, 1994)). Therefore, any action by FMCSA affecting the school bus operations exemption would require the Agency to comply with former section 31136(e)(1).

⁷ The exemption in 49 CFR 390.3(f)(6) was not adopted until 2003, after the enactment of TEA–21, in a final rule titled, “*Safety Requirements for Operators of Small Passenger-Carrying Commercial Motor Vehicles Used In Interstate Commerce*” (68 FR 47860, August 12, 2003).

⁵ IIHS list of cellphone laws. <http://www.iihs.org/laws/cellphonelaws.aspx>

exemptions, FMCSA has authority to restrict the use of mobile telephones by drivers operating CMVs.

For any violation, such a restriction may be subject to civil penalties imposed on drivers, in an amount up to \$2,750, and on employers, in an amount up to \$11,000 (49 U.S.C. 521(b)(2)(A), 49 CFR 386.81 and Appendix B, paragraphs (a)(3) and (4)). Disqualification of a CMV driver for violations of the Act and its regulations is also within the scope of the Agency's authority under the 1984 Act. Such disqualifications are specified by regulation for other violations (49 CFR 391.15), and were recently adopted by the Agency in its final rule prohibiting texting by CMV drivers while operating in interstate commerce (49 CFR 391.15(e); 75 FR 59118, September 27, 2010). In summary, both a restriction on the use of hand-held mobile telephones and associated sanctions, including civil penalties and disqualifications, are authorized by statute and regulation for operators of CMVs, as defined above, in interstate commerce, with limited exceptions. But before prescribing any regulations under the 1984 Act, FMCSA must consider their costs and benefits (49 U.S.C. 31136(c)(2)(A)).

The 1986 Act (Title XII of Pub. L. 99-570, 100 Stat. 3207-170, Oct. 27, 1986), which authorized creation of the CDL program, is the primary basis for licensing programs for certain large CMVs. There are several key distinctions between the authority conferred under the 1984 Act and that under the 1986 Act. First, the CMV for which a CDL is required is defined under the 1986 Act, in part, as a motor vehicle operating "in commerce," a term separately defined to cover broadly both interstate commerce and operations that "affect" interstate commerce (49 U.S.C. 31301(2) and (4)). Also under the 1986 Act, a CMV means a motor vehicle used in commerce to transport passengers or property that: (1) Has a gross vehicle weight/gross vehicle weight rating of 26,001 pounds or greater; (2) is designed to transport 16 or more passengers including the driver; or (3) is used to transport certain quantities of "hazardous materials," as defined in 49 CFR 383.5 (49 U.S.C. 31301(4)). In addition, a provision in the FMCSRs implementing the 1986 Act recognizes that all school bus drivers (whether government employees or not) and other government employees operating vehicles requiring a CDL (i.e., vehicles above 26,000 pounds, in most States, or designed to transport 16 or more passengers) are subject to the CDL standards set forth in 49 CFR 383.3(b).

There are several statutory and regulatory exceptions from the CDL requirements, which include the following individuals: Military service members who operate a CMV for military purposes (a mandatory exemption for the States to follow) (49 CFR 383.3(c)); farmers; firefighters; CMV drivers employed by a unit of local government for the purpose of snow/ice removal; and persons operating a CMV for emergency response activities (all of which are permissive exemptions for the States to implement at their discretion) (49 CFR 383.3(d)). States may also issue certain restricted CDLs to other categories of drivers under 49 CFR 383.3(e)-(g). Drivers with such restricted CDLs may still be covered by a disqualification under the 1986 Act arising from the use of hand-held mobile telephones while driving CMVs.

The 1986 Act does not expressly authorize the Agency to adopt regulations governing the safety of CMVs operated by drivers required to obtain a CDL. Most of these drivers (those involved in interstate trade, traffic, or transportation) are subject to safety regulations under the 1984 Act, as described above. The 1986 Act, however, does authorize disqualification of CDL drivers by the Secretary. It contains specific authority to disqualify CDL drivers for various types of offenses, whether those offenses occur in interstate or intrastate commerce. This authority exists even if drivers are operating a CMV illegally because they did not obtain a CDL.

In general, the 1986 Act explicitly identifies several "serious traffic violations" as grounds for disqualification (49 U.S.C. 31301(12) and 31310). In addition to the specifically enumerated "serious traffic violations," the 1986 Act provides related authority that allows FMCSA to designate additional serious traffic violations by rulemaking if the underlying offense is based on the CDL driver committing a violation of a "State or local law on motor vehicle traffic control" (49 U.S.C. 31301(12)(G)). The FMCSRs state, however, that unless and until a CDL driver is convicted of the requisite number of specified offenses within a certain time frame (described below), the required disqualification may not be applied (49 CFR 383.5 (defining "conviction" and "serious traffic violation") and 383.51(c)).

Under the statute, a driver who commits two serious traffic violations in a 3-year period while operating a CMV must be disqualified from operating a CMV that requires a CDL for at least 60 days (49 U.S.C. 31310(e)(1)). A driver who commits three or more serious

traffic violations in a 3-year period while operating a CMV must be disqualified from operating a CMV that requires a CDL for at least 120 days (49 U.S.C. 31310(e)(2)). Because use of hand-held mobile telephones results in distracted driving and increases the risk of CMV crashes, fatalities, and injuries, FMCSA is now proposing that violations by a CDL driver of State or local law or ordinance on motor vehicle traffic control that restricts the use of such mobile telephones while driving CMVs should result in a disqualification under this provision.

FMCSA is authorized to carry out these statutory provisions by delegation from the Secretary as provided in 49 CFR 1.73(e) and (g).

C. Support for a Restriction on Mobile Telephones

There is an overwhelming amount of public support for reducing distracted driving, including hand-held mobile telephone use, while operating a CMV. It is likely that most motorists either have first-hand experience with or know someone who had a motor vehicle crash or near-crash event involving a distracted driver. There appears to be a steady increase in the use of electronic devices. Moreover, as outlined in the examples below, there is some evidence that CMV crashes and other incidents have been caused by the use of electronic devices.

FMCSA is aware of several recent CMV crashes in which the use of a mobile telephone may have contributed to the crash. In one case, according to media reports, a truck driver from Arkansas told police she was talking on her cell phone when she became involved in a crash that killed two boys on May 9, 2010. In another media report, on March 26, 2010, a tractor trailer crossed the median strip of Interstate 65 in central Kentucky and collided with a van transporting 9 adults, two children, and an infant. All the adults and the infant in the van and the truck driver were killed. The NTSB is conducting an investigation into the crash, including attempting to determine if a mobile telephone was a factor in the crash.⁸ According to media reports, in February 2010, a Montgomery County, Pennsylvania, school bus driver was allegedly talking on his cell phone before a deadly crash.⁹ In light of these incidents and the potential for more crashes due to

⁸ <http://www.nts.gov/Pressrel/2010/100514.html>.

⁹ *Driver To Stand Trial In Fatal School Bus Crash*. (April 20, 2010) Philadelphia, PA: KYW-TV. Retrieved from the CBS3 Web site, July 21, 2010, from: <http://cbs3.com/local/montgomery.county.school.2.1645628.html>.

distracted driving, FMCSA proposes restrictions on the use of hand-held mobile telephones. We are requesting comments on whether to propose a complete prohibition on mobile telephone use by drivers of CMVs. We have included in this NPRM information on research studies as well as the positions of safety organizations and industry on the use of mobile telephones by CMV drivers.

National Transportation Safety Board Recommendation

On November 14, 2004, a motorcoach crashed into a bridge overpass on the George Washington Memorial Parkway in Alexandria, Virginia. The National Transportation Safety Board (NTSB) determined that one probable cause of the crash was the use of a hands-free cell phone, resulting in cognitive distraction; therefore, the driver did not “see” the low bridge warning signs. This crash was the impetus for an NTSB investigation (NTSB/HAR-06/04 PB2007-916201) and a subsequent recommendation to FMCSA regarding cell phone use by passenger-carrying CMVs.¹⁰ This rulemaking addresses part of this outstanding recommendation.

In a letter to NTSB, dated March 5, 2007, the Agency agreed to initiate a study to assess:

- The potential safety benefits of restricting cell phone use by drivers of passenger-carrying CMVs,
- The applicability of an NTSB recommendation to property-carrying CMV drivers,
- Whether adequate data existed to warrant a rulemaking, and
- The availability of statistically meaningful data regarding cell phone distraction. Subsequently, the report “Driver Distraction in Commercial Vehicle Operations” (VTTI Study (2009)) was published on October 1, 2009. This report is summarized in section D.

Also in 2004, the NTSB investigated a truck-tractor median crossover crash in Sherman, Texas, that resulted in a collision and fire. The NTSB’s report cited one probable cause as the driver’s attempted or imminent use of a wireless device as a distraction from his driving duties.

The Agency will post in the rulemaking docket any additional information it obtains about these

¹⁰ National Transportation Safety Board (2006) *Motorcoach Collision with the Alexandria Avenue Bridge Overpass, George Washington Memorial Parkway, Alexandria, Virginia, November 14, 2004* (Highway Accident Report NTSB/HAR-06/04; NTIS report number PB2007-916201). Retrieved July 22, 2010, from: <http://www.nts.gov/PublicIn/2006/HAR0604.pdf>.

investigations that might not be generally available to the public.

FMCSA’s Motor Carrier Safety Advisory Committee’s Recommendation

Section 4144 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Public Law 109-59, 119 Stat. 1144, 1748 (Aug. 10, 2005), required the Secretary to establish a Motor Carrier Safety Advisory Committee (MCSAC). The committee provides advice and recommendations to the FMCSA Administrator on motor carrier safety programs and regulations and operates in accordance with the Federal Advisory Committee Act (5 U.S.C. App. 2).

In MCSAC’s March 27, 2009, report to FMCSA titled “Developing a National Agenda for Motor Carrier Safety,” MCSAC recommended that FMCSA adopt new Federal rules concerning distracted driving.¹¹ MCSAC reported, “Documented research shows that there are cognitive distractions and increases in crashes from cellular phone use and text messaging.” Therefore, one of MCSAC’s recommendations for the National Agenda for Motor Carrier Safety was that FMCSA initiate a rulemaking to ban the use of hand-held and hands-free mobile telephones while driving.

Motorcoach Safety Action Plan

In the November 2009 DOT Motorcoach Safety Action Plan, DOT identified seven priority action items that will have the greatest impact in reducing motorcoach crashes, injuries, and fatalities. One of these is a recommendation to initiate rulemaking to propose prohibiting texting and limiting the use of mobile telephones and other devices by motorcoach drivers.¹²

Distracted Driving Summit

The information and feedback DOT received during its Distracted Driving Summit, held September 30–October 1, 2009, in Washington, DC, demonstrated both the need and widespread support for a ban against texting and mobile telephone use while driving. Attendees

¹¹ Parker, David R., Chair, Motor Carrier Safety Advisory Committee (March 27, 2009). Letter to Rose A. McMurray, Acting Deputy Administrator, FMCSA, on MCSAC National Agenda for Motor Vehicle Safety. Retrieved July 23, 2010, from: <http://mcsac.fmcsa.dot.gov/documents/MCSACTask09-01FinalReportandLettertoAdministrator090428.pdf>.

¹² U.S. Department of Transportation (November 2009). *Motorcoach Safety Action Plan. (DOT HS 811 177)*. Retrieved July 23, 2010, from: http://www.fmcsa.dot.gov/documents/safety-security/MotorcoachSafetyActionPlan_finalreport-508.pdf.

included safety experts; researchers; elected officials, including four U.S. Senators and several State legislators; safety advocacy groups; senior law enforcement officials; and representatives of the telecommunications and transportation industries. Summit participants shared their expertise, experiences, and ideas for reducing distracted driving behaviors. They addressed the safety risk posed by this growing problem across all modes of surface transportation.

U.S. Transportation Secretary Ray LaHood stated: “Keeping Americans safe is without question the Federal government’s highest priority—and that includes safety on the road, as well as on mass transit and rail.” In addition, the Secretary pledged to work with Congress to ensure that the issue of distracted driving is appropriately addressed.¹³ At the conclusion of the Summit, the Secretary announced a series of concrete actions that the Obama Administration and DOT are taking to address distracted driving, including immediately starting rulemakings that would ban texting and restrict, to the extent possible, the use of mobile telephones by truck and interstate bus operators, as well as to initiate rulemaking by the Federal Railroad Administration (FRA) to codify provisions of the FRA’s Emergency Order No. 26 regarding restricting distracting electronic devices (see discussion below in Part E).

As a follow-up to the Summit, and based on data from studies on distracted driving, FMCSA initiated a number of actions to combat distracted driving by CMV drivers. Specifically, FMCSA issued Regulatory Guidance (75 FR 4305, January 27, 2010) that addressed texting by CMV drivers and issued a final rule (75 FR 59118, September 27, 2010) that prohibits texting by CMV drivers. Finally, DOT held a second Distracted Driving Summit on September 21, 2010,

Safety Advocacy Organizations

Numerous safety advocacy groups voiced support for a prohibition on mobile telephone use while driving. In January 2009, the National Safety Council (NSC) called for a nationwide prohibition on all cell phone use while driving.¹⁴ The NSC is focused on

¹³ U.S. Department of Transportation (October 1, 2009). *U.S. Transportation Secretary Ray LaHood Announces Administration-Wide Effort to Combat Distracted Driving* (DOT 156-09). Retrieved July 23, 2010, from: <http://www.dot.gov/affairs/2009/dot15609.htm>.

¹⁴ National Safety Council, (n.d.). *Distracted Driving*. Retrieved July 21, 2010, from: <http://>

alerting the American public to the fact that different distractions have different levels of crash risk. Additionally, Advocates for Highway and Auto Safety (Advocates) applauded DOT's effort to consider banning texting and restricting cell phone use by operators of CMVs. Advocates recently filed a petition for rulemaking requesting consideration of such action on the use of a wide array of electronic devices used by commercial drivers.¹⁵

Transportation Industry Associations Trucking Industry

The American Trucking Associations, Inc. (ATA) adopted a policy supporting the safe use of technologies and encourages drivers and/or motor carriers to consider a range of policies and safeguards intended to reduce, minimize, and/or eliminate driver distractions that may be caused by the increased use of electronic technologies. ATA's policy recommends that manufacturers and others adopt awareness, training, and safety policies on the use of such technologies—unless they are already regulated—while operating a motor vehicle. ATA believes that the use of hand-held electronic devices and the act of texting with such devices while a motor vehicle is in motion should be prohibited.¹⁶ Another one of the initiatives on ATA's safety agenda is their policy on the use of non-integrated technologies while the vehicle is in motion.¹⁷

In fact, many ATA member fleets have already adopted company policies designed to reduce distractions while operating CMVs. Many of these fleets do not allow drivers to operate any electronic devices at all, including dispatching equipment, while the vehicle is moving. ATA conducted an opinion survey of its safety committees

www.nsc.org/safety_road/Distracted_Driving/Pages/distracted_driving.aspx.

¹⁵ Gillan, J.S. (October 1, 2009). *Safety Advocates Respond to U.S. DOT Secretary's Announcement on Measures to Reduce Distracted Driving by Commercial Operators*. Retrieved July 21, 2010, from the Advocates for Highway and Auto Safety Web site: <http://www.saferoads.org/files/file/Distracted%20Driving%20Statement%20by%20Judith%20Stone%20October%201,%202009.pdf>.

¹⁶ American Trucking Associations (October 29, 2009). *Addressing the Problem of Distracted Driving*. Written testimony to the Subcommittee on Highways and Transit, U.S. House of Representatives' Transportation and Infrastructure Committee. Retrieved July 21, 2010, from: <http://www.truckline.com/Newsroom/Testimony1/Randy%20Mullett%20-%20Distracted%20Driving%20testimony.pdf>.

¹⁷ Boyce, C. (June 9, 2009) *ATA Unveils Progressive New Highway Safety Agenda*. Retrieved July 21, 2010, from: <http://www.truckline.com/pages/article.aspx?id=541%2F%7b8E1C7279-ED27-4C03-B189-CEEE26BBB12%7d>

on the use of "non-integrated electronic devices." From the responses of these industry leaders, ATA found that 67 percent of respondents had a policy restricting or limiting the use of portable electronic devices while driving. United Parcel Service, Inc. has an existing policy of no distractions while behind the wheel (e.g., two hands on the wheel and no two-way communication); and FedEx does not allow drivers to use any electronic device while operating FedEx vehicles.¹⁸ Additionally, ExxonMobil and Shell are examples of large companies that prohibit employees' use of any type of cell phone while driving during work hours.¹⁹ Because numerous large commercial trucking operations already have policies that prohibit the use of portable electronic devices while driving, a restriction on hand-held mobile telephone use is not expected to have a significant adverse impact on trucking fleets.

The Owner-Operators Independent Drivers Association (OOIDA) called upon government entities to aggressively pursue opportunities to educate the motoring public on safe driving practices and encourages law enforcement agencies to fully enforce existing laws pertaining to inattentive or negligent driving.²⁰ The Truckload Carriers Association (TCA) supports the safe use of technologies and encourages drivers and/or motor carriers to consider a range of policies and safeguards intended to reduce, minimize, and/or eliminate driver distractions caused by the increased use of electronic technologies (e.g., global positioning systems, cellular phones, etc.) during the operation of all types of motor vehicles.²¹

Motorcoach Operators

A spokesman for the United Motorcoach Association, which represents tour bus operators, stated that motorcoach operators should not tolerate drivers using mobile telephones unless there is an emergency. The American Bus Association (ABA) supports safety initiatives, and the

¹⁸ Halsey, A. (October 2, 2009). *Obama to Federal Employees: Don't Text and Drive*. *Washingtonpost.com*. Retrieved July 21, 2010, from: http://www.washingtonpost.com/wp-dyn/content/article/2009/10/01/AR2009100103447_pf.html.

¹⁹ Insurance Information Institute (December 2009). *Cellphones and Driving*. Retrieved July 21, 2010, from: <http://www.iii.org/IU/Cellphone-and-driving/>.

²⁰ OOIDA (n.d.). *Distracted Driving*. Retrieved from the OOIDA Web site, July 22, 2010, from: <http://ooida.com/Issues&Actions/Issues/DistractedDriving/distracted-driving.htm>.

²¹ Truckload Carriers Association (March 8, 2009). *Safe Use of Technology*. Retrieved July 21, 2010, from: <http://www.truckload.org/Safe-Use-of-Technology>.

safety culture of ABA and its member operators support such bans. ABA's pre-trip passenger safety messaging video instructs passengers, not drivers, to dial 911 in case of emergency. Only in extreme emergencies should drivers ever use a cell phone while operating motorcoaches. Furthermore, ABA asserted that hands-free use of cell phones is no better than hand-held cell phone use, as cognitive distraction is the safety issue in question.²² The ABA also drafted a model policy for members that states in part: "Cell phones and regulated electronic devices (REDs) are not to be used while the vehicle is in motion. Incoming calls or transmissions received on company-provided or authorized cell phones or REDs should go into voicemail and may be checked only when the bus is parked in a safe location."²³ Numerous large motorcoach and bus operations have already adopted policies that restrict the use of portable electronic devices while driving (many of them are more restrictive than the ABA model policy).

School Bus Operations

School bus operations are the focus of many States and local governments that have implemented distracted driving policies and laws; currently, 19 States and the District of Columbia²⁴ ban school bus drivers from using a mobile telephone while driving. Many cities, towns, and counties prohibit mobile telephone use or texting by school bus operators. The American School Bus Council, whose membership includes: National Association for Pupil Transportation, National Association of State Directors of Pupil Transportation Services, National School Transportation Association, Blue Bird Corporation, IC Corporation, and Thomas Built Buses, recommends prohibiting the use of cell phones or other portable electronic devices—even those equipped with hands-free features—while driving and banning the use of cell phones while supervising the loading and unloading of students.²⁵

²² Pantuso, P. (October 6, 2009). *Government Seeks Tougher Laws on Distracted Driving*. Retrieved July 21, 2010, from the American Bus Association Web site: [http://www.buses.org/files/MemberAlertTextingCellPhones100509\[1\].pdf](http://www.buses.org/files/MemberAlertTextingCellPhones100509[1].pdf).

²³ ABA Strategic Safety Committee (2010). *Recommended Model Company Policy: Cell Phones and Electronic Devices (REDs)*. Available in the docket for this rulemaking.

²⁴ Vermette, E. (2010). *Curbing Distracted Driving 2010 Survey of State Safety Programs*. Retrieved July 21, 2010, from: http://www.distraction.gov/files/research/GHSA-2010_distraction.pdf.

²⁵ American School Bus Council (February 14, 2007). *American School Bus Council Exceeds NTSB's Recommendation on Cell Phone Use by School Bus Drivers*. Retrieved July 23, 2010, from:

Continued

American Public Transportation Association (APTA)

On December 31, 2009, the APTA Bus Safety Working Group published a Recommended Practice regarding employee-controlled distractions while operating a vehicle on agency time. The intent of the voluntary standard is to provide transit agencies with a guideline to develop policies and standard operating procedures regarding operator controlled distractions.²⁶

FMCSA solicits comments about companies' or organizations' policies on drivers' use of mobile telephones and other portable electronic devices while driving CMVs on our Nation's highways.

D. Studies of Mobile Telephone Use While Driving

There are a number of studies from both government and private sources

http://www.americanschoolbuscouncil.org/uploads/pdf/Guidelines_Release.pdf.

²⁶ APTA Bus Safety Working Group (December 31, 2009). *Reducing Driver-Controlled Distractions While Operating a Vehicle on Agency Time*. Retrieved from the American Public Transportation Association Web site, July 23, 2010, from: http://www.aptastandards.com/Portals/0/Bus_Published/APTA-BTS-BS-RP-005-09_employee_controlled_distractions.pdf.

related to distracted driving. However, there are few studies of distracted driving that focus on the CMV driver. The following peer-reviewed studies were considered while developing this NPRM. These studies use different methodologies to analyze driver distraction. There are advantages and disadvantages to each methodology as follows:

- *Simulator studies*, and to some extent test-track studies, allow for experimental control over and measurement of the cognitive distractions, such as the type of phone conversation. These studies may have unrealistic driving and cell phone use conditions because they are not conducted on public roadways and therefore lack many of the risks associated with real world driving;
- *Naturalistic driving studies* use cameras and instrumentation in participants' vehicles to provide a clear picture of driver distraction under real-world driving conditions. However, these studies may have a small sample size of some of the individual distractions.

Overall, it is important to keep these differences in mind while comparing the results from different research

methods. Regardless, these studies illustrate degradations in driver performance due to the effects of driver distraction.

*Driver Distraction in Commercial Vehicle Operations*²⁷

Under contract with FMCSA, the Virginia Tech Transportation Institute (VTTI) completed the study titled, "Driver Distraction in Commercial Vehicle Operations," and released the final report on October 1, 2009. The purpose of the VTTI Study (2009) was to investigate the prevalence of driver distraction in CMV safety-critical events recorded in a naturalistic data set that included over 200 truck drivers and data from 3 million miles of operations. Of the 4,452 safety-critical events noted in the combined data, 60 percent had some type of non-driving related task listed as a potential contributing factor. Safety-critical events are crashes, near-crashes, crash-relevant conflicts, and unintentional lane deviations.

²⁷ Olson, R.L., Hanowski, R.J., Hickman, J.S., & Bocanegra, J. (2009). *Driver Distraction in Commercial Vehicle Operations*. (Document No. FMCSA-RRR-09-042) Washington, DC: FMCSA, July 2009. Retrieved July 26, 2010, from: <http://www.fmcsa.dot.gov/facts-research/research-technology/report/FMCSA-RRR-09-042.pdf>.

Table 1

Odds Ratio, Population Attributable Risk Percentage, and Eyes Off Forward Roadway by Selected Task

Task	Odds Ratio	Population Attributable Risk Percentage*	Eyes Off Forward Roadway**
Complex Non-Driving Related Task			
Text message on cell phone	23.2	0.7	4.6
Other – Complex (e.g., clean side mirror)	10.1	0.2	4.4
Interact with/look at dispatching device	9.9	3.1	4.1
Write on pad, notebook, etc.	9.0	0.6	4.2
Use calculator	8.2	0.2	4.4
Look at map	7.0	1.1	3.9
Dial cell phone	5.9	2.5	3.8
Read book, newspaper, paperwork, etc.	4.0	1.7	4.3
Moderate Non-Driving Related Task			
Use/reach for other electronic device	6.7	0.2	4.1
Other – Moderate (e.g., open medicine bottle)	5.9	0.3	3.3
Personal grooming	4.5	0.2	3.7
Reach for object in vehicle	3.1	7.6	2.9
Look back in sleeper berth	2.3	0.2	3.4
Talk or listen to hand-held phone	1.0	0.2	1.3
Eating	1.0	0	2.4
Talk or listen to CB radio	0.6	*	1.3
Talk or listen to hands-free phone	0.4	*	1.6

* Calculated for tasks where the odds ratio is greater than one.

** Number of seconds out of a 6 second interval.

The VTTI Study (2009) separately examined the different sub-tasks associated with cell phone use. Although talking on the cell phone did not show an increased risk, as seen in Table 1, a driver must take several risk-increasing steps in order to use the electronic device for conversation. In particular, as also shown in Table 1, the use of a cell phone involves a variety of sub-tasks, including reaching for and holding the phone, performing the visually complex process of manually dialing the phone, and then carrying out the conversation. In FMCSA's view, the risk associated with cell phone use should be viewed as a series of related sub-tasks, not all having equal risk. The odds of being involved in a safety-critical event are three times greater while the driver is reaching for an object than when the driver is not reaching for an object. The odds of being involved in

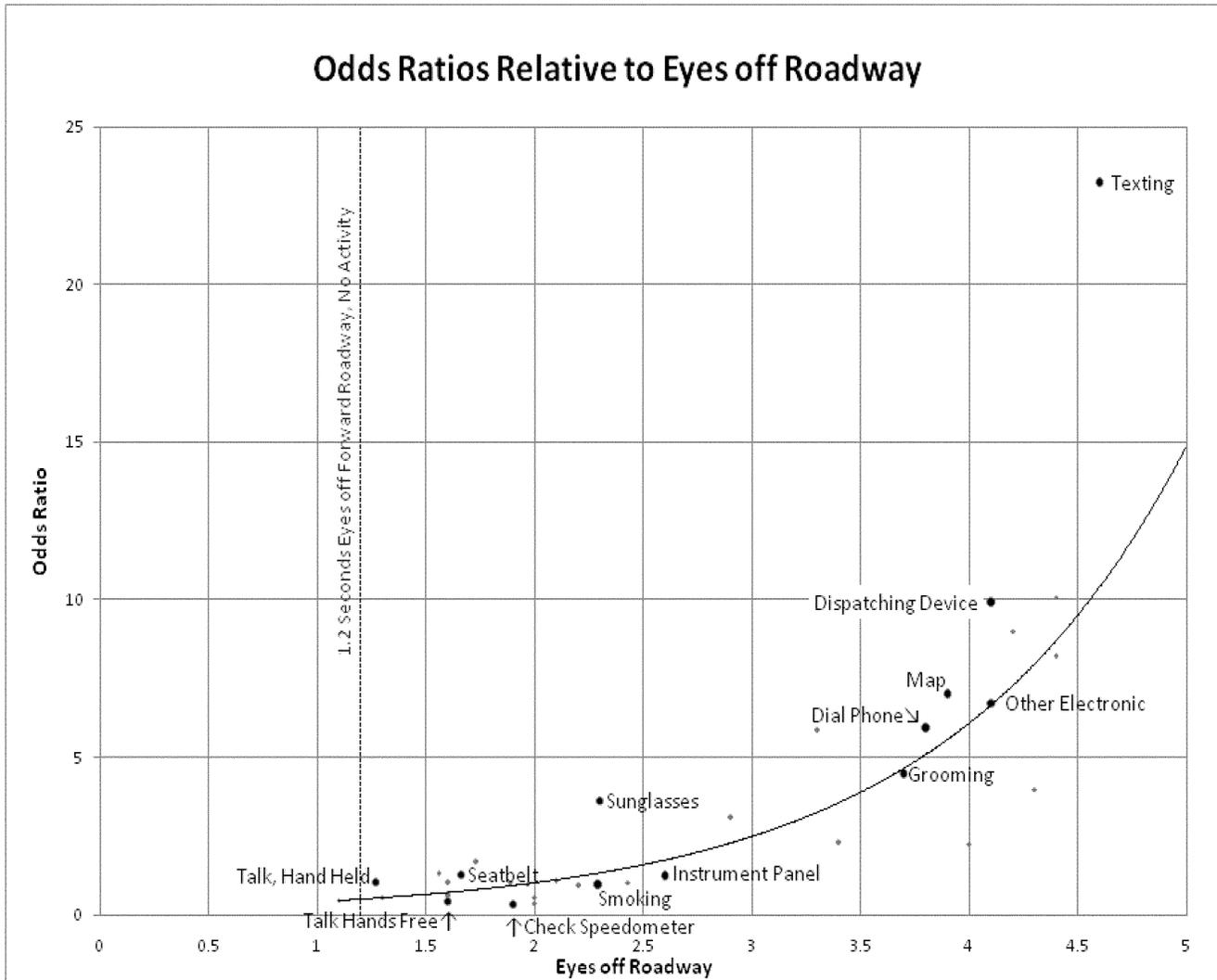
a safety-critical event are six times greater while the driver is dialing a cell phone than when the driver is not dialing a cell phone. But, according to the VTTI study, the odds of being involved in a safety critical event while talking or listening to a hand-held or hands-free phone do not show an increased risk.

In addition, the population attributable risk (PAR) incorporates the frequency of engaging in a non-driving related task by the population of drivers. If a task is done more frequently by a large population of drivers, it will have a greater PAR percentage. High PAR percentages occurred for commonly performed tasks (*i.e.*, a task, which if removed, would increase safety most). The PAR percentage for reaching for an object was the highest in the study at 7.6 percent. In other words, there would be 7.6 percent fewer safety-critical events, if reaching for an object while driving

never occurred. The risk of being involved in a safety-critical event was greater for other distracting activities, but the prevalence of the distractions was greatest for reaching for an object. In contrast, the PAR for talking on a hand-held phone was relatively low, at 0.2 percent, and the PAR was not calculated for talking on a hands-free cell phone.

FMCSA constructed a diagram that shows the relationship between the odds ratios of various activities conducted while driving and their associated eyes-off-roadway times. As seen in Diagram 1 (constructed from data in the VTTI study), those tasks that drew the driver's eyes away from the forward road led to a significant increase in risk. For example, texting, dialing, using other electronic devices, reading a map or grooming stand out as risky tasks.

Diagram 1- Odds Ratios Relative to Eyes off Roadway



Source: FMCSA-constructed. Based on VTTI Study (2009).

During the 3.8 seconds the driver has his eyes off the forward roadway while dialing his mobile telephone, at 55 miles per hour, the CMV travels about the length of a football field, 306 feet.

A complete copy of the final report for the VTTI Study (2009) is included in the docket referenced in the beginning of this rulemaking notice.

Distraction in Commercial Trucks and Buses: Assessing Prevalence and Risk in Conjunction With Crashes and Near-Crashes²⁸

The purpose of this research was to conduct an analysis of naturalistic data collected by DriveCam®. The

²⁸Hickman, J., Hanowski, R., & Bocanegra, J. (2010). *Distraction in Commercial Trucks and Buses: Assessing Prevalence and Risk in Conjunction With Crashes and Near-Crashes*. Washington, DC: FMCSA.

introduction of naturalistic driving studies that record drivers (through video and kinematic²⁹ vehicle sensors) in actual driving situations created a scientific method to study driver behavior under the daily pressures of real-world driving conditions.

The research documented the prevalence of distractions while driving a CMV, including both trucks and buses, using an existing naturalistic data set. This data set came from 183 truck and bus fleets comprising a total of 13,306 vehicles captured during a 90-day period. There were 8,509 buses and 4,797 trucks. The data sets in the current study did not include continuous data; they only included

²⁹Kinematics is a branch of physics that deals with the motion of a body or system without reference to force and mass.

recorded events that met or exceeded a kinematic threshold (a minimum g-force setting that triggers the event recorder). These recorded events included safety-critical events (e.g., hard braking in response to another vehicle) and baseline events (i.e., an event that was not related to a safety-critical event, such as a vehicle that traveled over train tracks and exceeded the kinematic threshold). A total of 1,085 crashes, 8,375 near-crashes, 30,661 crash-relevant conflicts, and 211,171 baselines were captured in the data set.

Odds ratios were calculated to show a measure of association between involvement in a safety-critical event, which includes crashes, and performing a non-driving related task. The odds ratios show the odds of being involved in a safety critical event when a non-driving related task is present compared

to when there is no non-driving related task. The non-driving related task, "any cell phone usage," includes all the specific cell phone sub-tasks, such as reaching for, dialing, talking or listening to a hand-held or hands-free cell phone.

Drivers increased their odds of involvement in a safety-critical event by 1.14 times for "any cell phone usage" while driving. However, when the cell phone task was disaggregated into sub-tasks, the study results show that the sub-tasks involved with using a cell phone have different risks, some increasing and some decreasing the odds of involvement in a safety-critical event. The odds of involvement in a safety critical event increased significantly when truck and bus drivers performed certain non-driving related tasks:

- Reaching for a cell phone while driving increased the odds by 3.7 times;
- Dialing a cell phone while driving increased the odds by 3.5 times;
- Reaching for a headset/earpiece increased the odds by 3.4 times.

Drivers decreased the odds of being involved in a safety-critical event by .65 times while talking or listening on a hands-free cell phone. However, the odds ratio for talking/listening should not ignore the fact that a person usually has to reach for and dial a cell phone in order to talk or listen. Both consuming food/drink and talking/listening on a hand-held cell phone (odds ratios = 1.11 and 0.89, respectively) had non-significant odds ratios (*i.e.*, no increase or decrease in risk).

The Impact of Cognitive Distraction on Driver Visual Behavior and Vehicle Control

While conclusive evidence is still lacking, several studies focused on cognitive distraction and its influence on driver performance. Harbluk, Noy, and Eizenman (2002) examined the impact of cognitive distraction on drivers' visual behavior and vehicle control.³⁰ This instrumented-vehicle study examined changes in drivers' visual scanning driving patterns under three tasks varying in cognitive complexity: no distraction, an easy cognitive task (*i.e.*, simple addition), and a difficult cognitive task (*i.e.*, difficult addition). As predicted, drivers had significantly increased hard-braking events under distracted driving conditions. Interestingly, under

distracted driving conditions, drivers made fewer eye movements, spent more time focusing on the central visual field, and spent less time scanning the right periphery. This suggests that visual scanning collapses to a minimal level under distracted driving conditions, increasing the risk that a driver will miss a critical event.

A Decrease in Brain Activation Associated With Driving When Listening to Someone Speak

Just, Keller, and Cynkar (2008) used functional magnetic resonance imaging (MRI) to investigate the impact of concurrent auditory language comprehension on the brain activity associated with a simulated driving task.³¹ Participants steered a vehicle along a curving virtual road, either undisturbed or while listening to spoken sentences that they judged as true or false. The study was designed to assess the neural effect of listening while driving, similar to listening to a cell phone while driving. The central findings were that the sentence listening task reliably degraded driving performance. The behavioral measures indicated reliably more road-maintenance errors and larger deviation from an ideal path in the driving with listening condition. The findings show that language comprehension performed concurrently with driving draws mental resources away from the driving and produces deterioration in driving performance, even when it is not accompanied by holding or dialing a phone.

The Distraction Effects of Phone Use During a Crucial Driving Maneuver

A study by Hancock, Lesch, and Simmons (2003)³² examined the effect of drivers on a test track responding to an in-vehicle phone at the same time they were faced with making a crucial stopping decision. The most crucial finding was the variation in stopping accuracy in the presence of the phone distraction task, from 95 percent accuracy without distraction to 80

³¹ Just, M.A., Keller, T.A., & Cynkar, J. (2008). A Decrease in Brain Activation Associated With Driving When Listening to Someone Speak. *Brain Research*. Retrieved July 26, 2010, from: <http://www.distraction.gov/files/research/carnegie-mellon.pdf>.

³² Hancock, P. A., Lesch, M., & Simmons, L. (2003). The Distraction Effects of Phone Use During a Crucial Driving Maneuver. *Accident Analysis and Prevention*, 35(4), 501–514. Retrieved July 26, 2010, from: http://www.sciencedirect.com/science?_ob=MIimg&imagekey=B6V5S-45SH77V-1-20&cdi=5794&user=3928936&pii=S0001457502000283&orig=search&coverDate=07%2F31%2F2003&sk=999649995&view=c&wchp=dGLzVtb-zSkWb&md5=b40e15505a9c7b04bd3c6aa3c42a5777&ie=/sdarticle.pdf.

percent with distraction, a significant 15 percentage point reduction. The study shows there is a detrimental impact of a coincident in-vehicle phone task on a critical driving maneuver.

Passenger and Cell Phone Conversations in Simulated Driving

Drews, Pasupathi, and Strayer (2008) examined in a simulator study how conversing with passengers in a vehicle differs from conversing on a cell phone while driving.³³ The results show that the number of driving errors was highest when the driver was conversing on a cell phone while driving. Passenger conversations made more references to traffic. In addition, drivers' speech production rate (measured in syllables per second) and the drivers' and passengers' speech complexity rate (measured in syllables per word of speech) dropped in response to an increase in the demand of the traffic. Overall, the study found that cell phone use negatively impacts lane keeping, increases the following distance, and leads to impairment of a navigation task, while passenger conversations have little effect on all of the three measures.

Request for Additional Research or Data

Overall, these studies illustrate degradations in driver performance due to the effects of driver distraction. The studies do not necessarily break down the individual components of mobile telephone use like the VTTI study does. However, they suggest certain risks when using a mobile telephone. Commenters are encouraged to provide other research or data that would enable the Agency to better assess the risk associated with mobile telephone use by CMV drivers while operating their vehicles.

E. Existing Mobile Telephone Bans by Federal, State, and Local Governments

Federal

On October 7, 2008, FRA published Emergency Order 26 (73 FR 58702). Pursuant to FRA's authority under 49 U.S.C. 20102 and 20103, the order, which took effect on October 27, 2008, restricts railroad operating employees from using distracting electronic and electrical devices while on duty. Among other things, the order prohibits both the use of mobile telephones and texting by railroad operating employees. FRA cited numerous examples of the adverse impact that electronic devices can have

³³ Drews, F.A., Pasupathi, M., & Strayer, D.L. (2008). Passenger and Cell Phone Conversations in Simulated Driving. *Journal of Experimental Psychology: Applied*, 14(4). Retrieved July 26, 2010, from: <http://www.psych.utah.edu/lab/appliedcognition/publications/passenger.pdf>.

³⁰ Harbluk, J. L., Noy, Y. I., & Eizenman, M. (2002). *The Impact of Cognitive Distraction on Driver Visual Behavior and Vehicle Control* (Report No. TP 13889E). Ottawa: Transport Canada. Retrieved July 26, 2010, from: <http://people.usd.edu/~schieber/materials/trans-canada-13889.pdf>.

on safe operations. These examples included fatal crashes that involved operators who were distracted while texting or talking on a mobile telephone. In light of these incidents, FRA proposed to amend its railroad communications regulations by restricting use of mobile telephones and other distracting electronic devices by railroad operating employees. FRA published its final rule in the **Federal Register** on September 27, 2010 (75 FR 59580).

On September 27, 2010, FMCSA also published a final rule (75 FR 59118) that prohibits texting on electronic devices, including mobile telephones, while driving a CMV. This rulemaking action addressed one of the riskiest distracted driving behaviors. Furthermore, on September 27, 2010, the Pipeline and Hazardous Materials Safety Administration published a notice of proposed rulemaking (75 FR 59197) that addressed distracted activities by drivers under its authority.

States

Nine States and the District of Columbia have traffic laws prohibiting all motor vehicle drivers from using a hand-held mobile telephone while driving. School bus drivers are currently prohibited from any mobile telephone use in 19 States and the District of Columbia. A list of these States can be found at the following Web site: <http://www.iihs.org/laws/cellphonelaws.aspx>. Generally, the State traffic laws are applicable to all drivers operating motor vehicles within those jurisdictions, including CMV operators. Some States are already tracking enforcement. For example, since March of 2008, when New Jersey's wireless hand-held telephone and electronic communication device ban became effective, more than 224,000 citations—an average of almost 10,000 a month—were issued to motorists violating this cell phone law.

Additionally, as part of its continuing effort to combat distracted driving, DOT kicked off pilot programs in Hartford, Connecticut, and Syracuse, New York, to test whether increased law enforcement efforts can get distracted drivers to put down their mobile telephones and focus on the road. During 1 week of the pilot program in Hartford, police cited more than 2,000 drivers for talking on mobile telephones and 200 more for texting while driving.

Public Transportation Agencies

The severity of the problem of distracted driving led public transportation agencies to ban the use of

mobile telephones/electronic devices while an operator is driving a vehicle in passenger service. In the period from May 2008 to May 2009, after the Massachusetts Bay Transportation Authority (MBTA) issued its cell phone ban, 12 bus drivers employed by the MBTA were suspended and one bus driver was fired for using a cell phone while on duty.

Most transit agencies allow operators to carry cell phones or other electronic devices in backpacks, purses, or bags, and to use them outside the vehicle during breaks and layovers and during emergencies. However, many large transit agencies prohibit operators from carrying cell phones or other electronic devices in the cab. Examples of policies at public transportation agencies include the following:

- *MBTA*. The MBTA banned cell phone use by drivers while on the job, with penalties escalating from a 3-day suspension after one offense, to a 10-day suspension after two, and dismissal for the third offense. Engineers on commuter-rail trains operated by a private contractor are also prohibited from having a cell phone or other device on their person.³⁴

- *Chicago Transit Authority (CTA)*. The CTA's zero tolerance policy prohibits employee use of electronic devices while operating buses and trains. This policy prohibits the use of cell phones, smart phones, personal digital assistants (PDAs), MP3/music players, wireless headsets, or any other appliance or device. Having possession of an electronic device results in probation and a 3-day suspension. Use of the device while on duty may lead to discharge.³⁵

- *Greater Cleveland Regional Transit Authority (GCRTA)*. All employees are prohibited from having a cell phone on their person while operating a bus or train at the GCRTA. The prohibition includes: Cell phones; smart phones; PDAs, electronic music devices; wireless headsets; or any other electronic communication or listening devices. While on duty, operators must keep cell phones and other devices separate from their person. They may be stored on-board in personal bags or purses. Cell phones may only be used when the operator is on layover, the vehicle is stopped, the parking brake is set, and he/she has left the driver's seat. Employees will be terminated for a first offense.³⁶

³⁴ Massachusetts Bay Transportation Authority (June 7, 2009). Cell Phone Ban Expanded. Retrieved July 26, 2010, from the MBTA Web site: http://www.mbta.com/about_the_mbta/news_events/?id=17461&month=&year=

³⁵ Chicago Transit Authority (August 5, 2009). CTA Adopts Zero Tolerance Policy on Employee Use of Electronic Devices While On-Duty. Retrieved July 26, 2010, from the CTA Web site: <http://www.transitchicago.com/news/default.aspx?Archive=y&ArticleId=2427>.

³⁶ Greater Cleveland Regional Transit Authority (September 18, 2009) RTA Strengthens Cell Phone Policy. Retrieved July 26, 2010, from the GCRTA Web site: http://www.riderta.com/nu_newsroom_releases.asp?listingid=1345.

While FMCSA is aware that many organizations have policies on mobile telephone use, FMCSA solicits further comments on mobile telephone use policy and enforcement and on the applicability of State laws and local ordinances to school bus drivers and transit employees.

IV. Discussion of Proposed Rule

Federal Restriction of Mobile Telephone Use by Interstate CMV Drivers

In light of the available studies, and to partially address the NTSB and MCSAC recommendations, the Agency proposes a restriction on the use of hand-held mobile telephones by CMV drivers operating in interstate commerce. This rulemaking would prohibit a CMV driver from reaching for, holding, and dialing a mobile telephone in order to conduct a voice communication while driving. Essentially, the CMV driver must be ready to conduct a voice communication in compliance with the proposed rule the moment he begins driving the vehicle. The proposed rule would include definitions related to the restriction. It also would add a driver disqualification provision for interstate CMV drivers. A driver disqualification provision would also be included for CDL holders convicted of two or more violations of State or local traffic laws or ordinances on motor vehicle traffic control concerning hand-held mobile telephone use.

This NPRM would amend regulations in 49 CFR parts 383 and 384 concerning the Agency's CDL regulations, part 390 concerning general applicability of the FMCSRs, part 391 concerning driver qualifications and disqualifications, and part 392 concerning driving rules. In general, the proposed requirements are intended to reduce the risks of distracted driving by restricting hand-held mobile telephone use by a driver who is operating a CMV in interstate commerce.

For CMV drivers operating in interstate commerce, the proposed rule would: (1) Restrict the use of hand-held mobile telephones; and (2) provide sanctions for those drivers convicted of using a hand-held mobile telephone while operating a CMV in interstate commerce, including civil penalties and/or disqualification from driving a CMV for a specified period of time. In addition, the proposed rule would provide sanctions for CDL holders convicted of violating a State or local law or ordinance on motor vehicle traffic control restricting the use of a hand-held mobile telephone while operating any CMV—specifically, a

disqualification for a specified period of time from operating any CMV requiring a CDL.

The proposed rule would also require interstate motor carriers to ensure compliance by their drivers with the restrictions on use of a hand-held mobile telephone while driving a CMV. Motor carriers would be prohibited from requiring or allowing drivers of CMVs to use a hand-held mobile telephone while operating in interstate commerce.

As indicated above, FMCSA proposes that any CDL holder operating a CMV (as defined in § 383.5) who is convicted of violating a State or local traffic law or ordinance on motor vehicle traffic control restricting or prohibiting hand-held mobile telephone use while driving a CMV would be disqualified for 60 days after a second conviction and 120 days after a third or subsequent conviction within a 3-year period.³⁷ State or local laws or ordinances restricting or prohibiting hand-held mobile telephone use would be added to the list of “serious” traffic offenses under § 383.51(c). The disqualifying serious traffic offense would be applicable to all persons who are required to possess a CDL, in accordance with the requirements of 49 CFR part 383, and who are subject to a State or local law or ordinance restricting or prohibiting hand-held mobile telephone use while driving. Therefore, the amendment to the CDL rules would be applicable to CMV drivers employed by Federal, State, or local government agencies, transit authorities, and school districts.

Other Technologies

It is not FMCSA’s intention to limit current or future innovative technologies that could allow safe and effective, completely hands-free, voice communication. Because of the lack of information about the availability of completely hands-free technology for CMV drivers’ work environment, FMCSA is unable to analyze their safety and economic or environmental impacts. The Agency is proposing to allow hands-free mobile telephone use as long as it does not require the driver to reach for, dial, or hold a mobile telephone, taking the driver’s eyes off the forward roadway and a hand off the wheel. We request comments on this rationale as well as whether true hands-free mobile telephones exist for use in the CMV operating environment, whether they are safe to use while driving a CMV, or whether they should

³⁷ Although the statute (in 49 U.S.C. 31310(e)) authorizes disqualifications of “at least” 60 or 120 days, the proposed rule follows the existing structure in the FMCSRs and provides for disqualifications of exactly 60 or 120 days.

be banned as well. The Agency is also interested in receiving public comments and acquiring further knowledge about innovative technologies, either those that exist today or that are under development, including the practicability of their application and use in CMVs and their safety and economic or environmental impact. FMCSA notes that the use of Citizens Band (CB) radios is not restricted in this proposed rule. CB radios are not included in this proposed rule because they do not fall under the definition of “commercial mobile radio services” as defined by the FCC. The NPRM should not be construed as a proposal to restrict the use of mobile telephones by drivers when they are not driving.

With significant national awareness now focused on the issue of distracted driving, the Agency hopes that important safety gains can be achieved as a result of this increased attention on the use of mobile telephones by drivers operating CMVs. Although fleet management systems and electronic dispatching tools are used by many of the Nation’s largest CMV fleets, the Agency believes safety-conscious fleet managers would neither allow nor require their drivers operating CMVs to use these devices or hand-held mobile telephones while driving.

Applicability to Federal, State, or Local Government Employees

FMCSA’s proposed explicit restriction on using a hand-held mobile telephone while driving a CMV would apply to CMV drivers covered under 49 CFR Part 392, but the requirements of Part 392 would not be applicable to Federal, State, or local government-employed drivers of CMVs in interstate commerce. Those drivers are statutorily exempt from nearly all of FMCSA’s safety regulations. However, the Agency proposes to make amendments to its disqualifying offenses for such CDL drivers if they are convicted, while driving a CMV, of violating a State or local law or ordinance on motor vehicle traffic control that restricts or prohibits the use of hand-held mobile telephones while driving. The Agency’s amendments to the CDL regulations would be applicable to Federal, State, or local government-employed drivers of CMVs who are required to possess a CDL.

The proposed rule would also be applicable to transit employees employed by Federal, State, and local governments who are required to possess a CDL.

Section-by-Section Analysis

Section 390.3³⁸

The Agency proposes to modify several discretionary regulatory exemptions concerning the applicability of the existing FMCSRs, including one for school bus operations and one for CMVs designed or used to transport between 9 and 15 passengers (including the driver), not for direct compensation (49 CFR 390.3(f)(1) and (6)). The Agency finds that this action is necessary for public safety regarding school bus transportation by interstate motor carriers, a finding required by the applicable statutory provisions, as explained above in the legal authority section. In addition, the Agency determined that in order to enhance public safety to the greatest extent possible, the rule should apply to the operation by drivers of small-passenger carrying vehicles (designed to transport 9–15 passengers) who are not receiving direct compensation, which are otherwise exempt from most of the FMCSRs under 49 CFR 390.3(f)(6).

Section 390.5

The Agency proposes to amend 49 CFR 390.5 by adding new definitions for the terms “mobile telephone” and “using a hand-held mobile telephone,” for general application. A broad definition of the term mobile telephone is proposed because of the wide variety of radio telephone services, in addition to cell phone services, that are licensed by the Federal Communications Commission (FCC) and might be available for use in a CMV. “Mobile telephone” could include, for example, a satellite telephone service, a broadband radio service, or a personal communications system. Using such wireless communication services is just as distracting to a CMV driver as using a cell phone. The FCC classifies these services as “commercial mobile radio services,” which are incorporated into the definition of mobile telephone. It does not include two-way or Citizens Band radio.

In this rulemaking, FMCSA proposes to define “using a hand-held mobile telephone” to clarify that certain uses of a hand-held mobile telephone are restricted, including reaching for,

³⁸ The proposed rules in this NPRM are numbered and placed in relation to the rules currently in effect and published in the Code of Federal Regulations (CFR). The Agency has issued an NPRM addressing texting while driving a CMV, which proposes similar definitions, and analogous prohibitions and disqualifications (75 FR 16391, April 1, 2010). The numbering and placement of any final regulations that result from this rulemaking will be adjusted appropriately to reflect any final rules adopted in other rulemakings.

dialing, and holding the mobile telephone to conduct voice communication. The Agency recognizes that mobile telephones often have multi-functional capability and is not prohibiting the use of mobile telephones for other uses. Of course, other types of activities using a mobile telephone might be covered by other rules proposed by FMCSA, such as those addressing texting while driving a CMV. To be consistent with these new definitions, FMCSA proposes removing exception (2)(i) from the existing definition of “texting” in this section.

Section 391.2

FMCSA proposes to amend 49 CFR 391.2, which provides certain exceptions to the requirements of part 391 for custom farm operations, apiarian industries, and specific farm vehicle drivers, to enable the Agency to make violations of the Federal mobile telephone restriction a disqualifying offense for such drivers. While the proposed explicit Federal restriction against hand-held mobile telephone use applies directly to these drivers, the disqualification provision in proposed § 391.15(f) below would not apply without this amendment to the current exceptions under 49 CFR 391.2.

Section 391.15

FMCSA proposes to add a new paragraph (f) to 49 CFR 391.15 entitled “Disqualification for violation of restriction on using a hand-held mobile telephone while driving a commercial motor vehicle.”³⁹ This provision would provide for the disqualification from operating a CMV in interstate commerce of any driver convicted of two or more violations within a 3-year period of the new hand-held mobile telephone use restriction while operating a CMV as set forth in proposed § 392.82. For the driver’s first hand-held mobile telephone use conviction, the Agency could assess a civil penalty against the driver. If a driver is convicted of committing a second hand-held mobile telephone use violation within 3 years, he or she would be disqualified for 60 days, in addition to being subject to the applicable civil penalty. For three or more hand-held mobile telephone use convictions for violations committed within 3 years, a driver would be disqualified for 120 days, in addition to being subject to the applicable civil penalty. This proposed change to the disqualifying offenses for interstate

drivers would mirror the Agency’s corresponding proposed new provisions governing the disqualification offenses for CDL drivers in § 383.51(c). The required number of convictions to cause a disqualification by FMCSA and the period of disqualification would be the same: 60 days for the second offense within 3 years and 120 days for three or more offenses within 3 years. In addition, the first and each subsequent violation of such a restriction or prohibition by a driver would be subject to civil penalties imposed on such drivers, in an amount up to \$2,750 (49 U.S.C. 521(b)(2)(A), 49 CFR 386.81 and Appendix B, A(4)).

Section 392.82

In this section, the Agency proposes a new restriction on using a hand-held mobile telephone while driving a CMV. Furthermore, this proposed section states that motor carriers must not allow or require CMV drivers to use a hand-held mobile telephone while driving. The Agency would also include a provision in this proposed section to apply this new hand-held mobile telephone restriction to “school bus operations notwithstanding the general exception in 49 CFR 390.3(f)(1).” Thus, school bus drivers who are employed by non-government entities and who transport school children and/or school personnel between home and school in interstate commerce would be subject to this proposed section. The Agency determined that this proposed section is necessary for public safety regarding school bus transportation by interstate motor carriers. In addition, the proposed rule would apply to the operation of CMVs designed or used to transport between 9 and 15 passengers (including the driver), not for direct compensation, notwithstanding the exception in 49 CFR 390.3(f)(6). The proposed section would also require employers to ensure compliance by their drivers with the restrictions on use of a hand-held mobile telephone while driving a CMV. Any violation by an employer would be subject to civil penalties in an amount up to \$11,000 (49 U.S.C. 521(b)(2)(A), 49 CFR 386.81 and part 386 Appendix B, paragraph (a)(3)).

A definition of “driving a commercial motor vehicle” would be incorporated into the restriction on using a hand-held mobile telephone while driving, in the proposed new § 392.82, in order to confine the use of that term to the restriction and the related disqualification and to avoid limiting the scope of the same term as used in other provisions of the FMCSRs.

The Agency proposes to add a limited exception to the hand-held mobile

telephone restriction to allow CMV drivers to use their hand-held mobile telephones if necessary to communicate with law enforcement officials or other emergency services.

Federal Disqualification Standard for CDL Drivers

Any CDL driver operating a CMV (as defined in § 383.5) who is convicted of violating a State or local motor vehicle law or ordinance that prohibits or restricts the use of a hand-held mobile telephone while driving a CMV would be disqualified after his or her second conviction for the hand-held mobile telephone offense or any other serious traffic violation (as defined by § 383.51(c)). The CDL disqualifying offense would be applicable to all persons who are required to possess a CDL, in accordance with the requirements of 49 CFR part 383, and who are subject to a State or local law or ordinance prohibiting or restricting the use of a hand-held mobile telephone while driving, when the offense occurs during the operation of a CMV. Therefore, the amendment to the CDL rules is applicable to drivers employed by Federal, State, or local government agencies, transit authorities, and school districts. To assist in the application of the provisions for disqualification, the regulations include definitions of the words “mobile telephone” and “using a hand-held mobile telephone.”

Section 383.5

The Agency proposes to add new definitions for the terms “mobile telephone” and “using a hand-held mobile telephone.” The Agency proposes a broad definition of mobile telephones based on the FCC regulations to cover the multitude of devices that allow users to send or receive voice communication while driving. The definitions of “mobile telephone” and “using a hand-held mobile telephone” would identify the type of activity that would be restricted by this proposed rule. To be consistent with these new definitions, FMCSA proposes removing exception (2)(i) from the definition of “texting” in this section.

Section 383.51

In Table 2 of 49 CFR 383.51(c), FMCSA would add a new serious traffic violation that would result in a CDL driver being disqualified. This serious traffic violation would be a conviction for violating a State or local law or ordinance restricting hand-held mobile telephone use while driving a CMV. For the purpose of this disqualification, the Agency proposes to use the same description of “driving” that is already

³⁹The texting NPRM, cited above, proposed to add a new paragraph (e) to this section. Therefore, paragraph (e); is reserved in this NPRM for possible use by this Agency for another rulemaking.

in the table for the texting disqualification (§ 383.51(c)(9)). FMCSA notes that the conviction must involve “using a hand-held mobile telephone” while operating a CMV and excludes convictions for hand-held mobile telephone use by a CDL driver while operating a vehicle for which such a CDL is not required. The Agency’s decision is consistent with the provisions of 49 U.S.C. 31310(e), which indicates the serious traffic violation must occur while the driver is operating a CMV that requires a CDL; the operative provisions in the revised table would limit the types of violations that could result in a disqualification accordingly.

As proposed, every State that issues CDLs would be required to impose this disqualification on a driver required to have a CDL issued by that State whenever that CDL driver was convicted of the necessary number of violations while operating in States where such conduct is restricted or prohibited by a State or local traffic law.

Section 384.301

A new paragraph (f) is proposed to be added to § 384.301. It would require all States that issue CDLs to implement the new provisions proposed in part 383 that relate to disqualifying CDL drivers for violating the new serious traffic violation of using a hand-held mobile telephone while driving a CMV as soon as practical, but not later than 3 years after this proposed rule is implemented.

Impact on States

Motor Carrier Safety Assistance Program (MCSAP)

Under MCSAP, States that receive grant funds would be required, as a condition of receiving the grants, to adopt regulations on the hand-held mobile telephone restriction that are compatible with final Federal regulations issued as a result of this rulemaking (49 U.S.C. 31102(a) and 49 CFR 350.201(a)). If a restriction of hand-held mobile telephone use (such as proposed in § 392.82) and the related disqualification (such as proposed in § 391.15(f)) are adopted by FMCSA, States under MCSAP would need to adopt compatible regulations applicable to both interstate and intrastate transportation as soon as practicable, but not later than 3 years thereafter (49 CFR 350.331(d)). If States do not adopt compatible regulations restricting hand-held mobile telephone use while driving a CMV and related disqualifications, they may not receive full MCSAP grant funding.

CDL Program

States that issue CDLs to CMV drivers would be required to adopt and implement the proposed CDL disqualification provisions that require disqualification for two or more convictions of violating a State or local law or ordinance restricting or prohibiting hand-held mobile telephone use while driving a CMV. States should be in compliance with this hand-held mobile telephone disqualification as soon as practicable, but not later than 3 years after the Agency adopts the disqualification provisions. If they do not comply with this provision, they may be subject to the loss of up to 5 percent in the first year of substantial non-compliance and up to 10 percent in subsequent years of certain Federal-aid highway amounts apportioned to the State (49 U.S.C. 31311(a) and 31314).

Impact on Other State Laws— Preemption

At present, only nine States and the District of Columbia restrict or prohibit hand-held mobile telephone use while driving a motor vehicle within their jurisdictions. FMCSA believes that there is a need for a Federal regulation to address the safety risks associated with hand-held mobile telephone use by CMV drivers nation-wide. The Federal restriction would provide uniform language applicable to CMV drivers engaged in interstate commerce, regardless of the presence or absence of a State law or regulation. State laws and regulations that are compatible with the Federal requirements we are proposing today, or that have a safety benefit or do not create an undue burden upon interstate commerce in conformity with 49 U.S.C. 31141 and 49 CFR 350.333, would remain in effect and could continue to be enforced with regard to CMV drivers. Future actions by the States to institute new restrictions or prohibitions on any form of mobile telephone use while driving CMVs in interstate commerce would be governed by the same principles. For more information see the Federalism section later in this document.

The States receiving MCSAP grants would be required, as a condition of receiving the grants, to adopt, at a minimum, regulations compatible with any adopted Federal restriction on use of a hand-held mobile telephone while driving CMVs in interstate commerce, in accordance with the requirements of 49 CFR 350.333.

Questions and Request for Comments

In order to make an informed decision on all of these issues related to mobile

telephone use, the Agency requests review and comment on some specific questions:

1. Should the Agency completely restrict all mobile telephone use, both hand-held and hands-free, by CMV drivers while driving in interstate commerce?
2. Should some CMV drivers, for example, drivers of passenger-carrying vehicles or of vehicles carrying hazardous materials, be more restricted than other CMV drivers?
3. Some motor vehicle design guidelines suggest limiting the time that a visual or a visual-manual task takes the driver’s eyes off of the forward roadway when designing vehicle controls. Should the Agency define a time limit for CMV drivers’ interaction with mobile telephones (either hand-held, hands-free, or both)?
4. Should the Agency propose limiting the number of keystrokes or button pushes that a CMV driver is allowed within a certain time frame when using a mobile telephone (either hand-held, hands-free, or both)? Should dialing be defined as a specific number of keystrokes or button pushes such as at least seven keystrokes or button pushes?
5. Are there technologies available or soon to be available that would allow completely hands-free mobile telephone operation by CMV drivers? Please provide any information on the availability and costs of such technologies. The Agency also requests comments regarding the amount of time and steps that are required by the driver to initiate and then conduct a hands-free mobile telephone conversation with such devices.
6. The Agency has proposed a definition for “use of a hand-held mobile telephone” in the regulatory text. The Agency requests comments on this definition as well as the public’s views on whether to include a description of allowable alternatives to “use of a hand-held mobile telephone,” such as hands-free technologies.
7. FMCSA seeks comment on its assumptions on States’ costs, any increase in enforcement costs to the States, or any other costs or increases borne by the States.

V. Regulatory Analyses

FMCSA proposes to restrict the use of hand-held mobile telephones by drivers of CMVs while operating in interstate commerce.⁴⁰ The Agency proposes new

⁴⁰ In popular usage, mobile telephones are often referred to as “cell phones.” As explained in the NPRM, however, a variety of different technologies

driver disqualification sanctions for interstate drivers of CMVs who fail to comply with this Federal restriction and new driver disqualification sanctions for CDL holders who have multiple convictions for violating a State or local law or ordinance on motor vehicle traffic control that restricts the use of hand-held mobile telephones. Additionally, motor carriers operating CMVs would be prohibited from requiring or allowing drivers of CMVs to engage in the use of a hand-held mobile telephone while operating in interstate commerce. This rulemaking would improve health and safety on the Nation's highways by reducing the prevalence of distracted driving-related crashes, fatalities, and injuries involving drivers of CMVs. In addition, the proposed rulemaking would reduce the financial and environmental burden associated with these crashes and promote the efficient movement of traffic and commerce on the Nation's highways.

Distraction-related crashes impose a substantial cost on society. Two studies estimate that mobile telephone related

crashes are responsible for \$43 billion in costs each year in the United States.⁴¹ Other studies, including two commissioned by the FMCSA, show that research findings are inconsistent regarding the risks associated with talking. But reaching for and dialing the device while driving is a risky activity.⁴² In the regulatory evaluation (in the docket for this proposed rule), FMCSA estimates the benefits and costs of implementing a restriction on the use of hand-held mobile telephones while driving a CMV.

The Agency considered four regulatory options: (1) No action, (2) a restriction on the use of all mobile telephones while operating a CMV for all interstate CMV drivers, (3) a restriction on the use of all mobile telephones while operating a passenger-carrying CMV for all interstate drivers, and (4) a restriction on the use of hand-held mobile telephones by all interstate CMV drivers, which is the preferred option in this proposed rule. The first option serves as a baseline for this analysis. For the second option, the Agency conducted a cost-benefit

analysis and estimates that this option would potentially lead to an annual net benefit of \$4 million (Table 2(b)).

Because specific data that would allow the Agency to quantify benefits are unavailable, for the third and fourth options the Agency conducted threshold analyses. Analysis predicts that the third option would lead to an estimated annual cost of approximately \$6.4 million. Current guidance from DOT's Office of the Secretary places the value of a statistical life at \$6.0 million (Table 2(c)). Consequently, this option would have to eliminate any combination of crash types equivalent in cost to approximately one fatality in order for the benefits of this proposed rule to equal the costs. The analysis further predicts that the preferred fourth option would lead to an estimated 1-year cost of \$12.1 million (Table 2(a)). Consequently, this option would have to eliminate any combination of crash types equivalent to two fatalities per year in order for the benefits of this proposed rule to equal the costs. These results are summarized below in Table 2.

TABLE 2(A)—THRESHOLD ANALYSIS RESULTS—OPTION FOUR (PREFERRED OPTION)

	Total estimated annual costs *	Annual break-even number of fatalities prevented**
Option Four—Restriction on Use of Hand-Held Mobile Telephones—All CMV Drivers.	\$12.1 Million ***	Approximately 2 Fatalities.

TABLE 2(B)—COST-BENEFIT ANALYSIS RESULTS—OPTION TWO (RESTRICTION ON USE OF ALL MOBILE TELEPHONES—ALL CMV DRIVERS)

Estimated annual benefit	Estimated annual cost	Estimated annual net benefit
\$84 Million	\$80 Million	\$4 Million.

TABLE 2(C)—THRESHOLD ANALYSIS RESULTS—OPTION THREE

	Total estimated annual costs *	Annual break-even number of fatalities prevented**
Option Three—Restriction on Use of All Mobile Telephones—All Passenger-Carrying CMV Drivers.	\$6.4 Million	Approximately 1 Fatality.

* This cost estimate does not include a one-time cost to the States of \$2.2 million.

** A statistical life is valued at \$6 million.

*** This is a worst case annual cost as it would apply only if 100% of CMV drivers were theoretically replaced every year.

Because FMCSA is addressing two of the risky activities cited in the VTTI study, the Agency expects the proposed

rule would prevent more than two fatalities and that the benefits justify the cost.

The regulatory evaluation also finds the potential costs to the States and private entities do not require further

are licensed by the Federal Communications Commission (FCC) (47 CFR 20.3) to provide mobile telephone services; thus, these proposed rules would apply to the range of technologies used to provide wireless telephone communications. But some of the materials and research studies discussed in this evaluation use the popular term "cell phone," and the discussion continues that usage in such cases.

⁴¹ Cohen, J.T. and Graham, J.D., A revised economic analysis of restrictions on the use of cell phones while driving, *Risk Analysis* 23(1) 1–14, 2003.

⁴² Olson, R. L., Hanowski, R.J., Hickman, J.S., & Bocanegra, J. (2009) Driver distraction in commercial vehicle operations. (Document No. FMCSA–RRR–09–042) Washington, DC: Federal Motor Carrier Safety Administration, July 2009.

Retrieved October 20, 2009, from <http://www.fmcsa.dot.gov/facts-research/art-public-reports.aspx?> Hickman, J., Hanowski, R. & Bocanegra, J. (2010). *Distraction in Commercial Trucks and Buses: Assessing Prevalence and Risk in Conjunction with Crashes and Near-Crashes*. Washington, DC: Federal Motor Carrier Safety Administration.

analysis pursuant to the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) because they are less than \$140.8 million per year. I also certify, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), that the proposed rule will not have a significant economic impact on a substantial number of small entities because the average cost to carriers subject to the preferred option would be approximately \$24.50.

Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

The FMCSA has determined that this rulemaking action is a significant regulatory action under Executive Order 12866, Regulatory Planning and Review, and that it is significant under DOT regulatory policies and procedures because of the substantial Congressional and public interest concerning the crash risks associated with distracted driving. However, the estimated economic costs of the preferred option of the proposed rule do not exceed the \$100 million annual threshold.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601–612) requires Federal agencies to consider the effects of the regulatory action on small business and other small entities and to minimize any significant economic impact. The term “small entities” comprises small businesses and not-for-profit organizations that are independently owned and operated and are not dominant in their fields and governmental jurisdictions with populations of less than 50,000. Accordingly, DOT policy requires an analysis of the impact of all regulations on small entities, and mandates that agencies strive to lessen any adverse effects on these businesses.

Carriers are not required to report revenue to the Agency, but are required to provide the Agency with the number of power units (PU) they operate, when they register with the Agency, and to update this figure biennially. Because FMCSA does not have direct revenue figures, PUs serve as a proxy to determine the carrier size that would qualify as a small business given the SBA’s revenue threshold. In order to produce this estimate, it is necessary to determine the average revenue generated by a PU.

With regard to truck PUs, the Agency determined in the 2003 Hours of Service Rulemaking RIA⁴³ that a PU produces

about \$172,000 in revenue annually (adjusted for inflation).⁴⁴ According to the SBA, motor carriers with annual revenue of \$25.5 million are considered small businesses.⁴⁵ This equates to 148 PUs (25,500,000/172,000). Thus, FMCSA considers motor carriers of property with 148 PUs or fewer to be small businesses for purposes of this analysis. The Agency then looked at the number and percentage of property carriers with recent activity that would fall under that definition (of having 148 PUs or fewer). The results show that at least 99 percent of all interstate property carriers with recent activity have 148 PUs or fewer.⁴⁶ This amounts to 481,788 carriers. Therefore, the overwhelming majority of interstate carriers of property would be considered small entities.

With regard to passenger carriers, the Agency conducted a preliminary analysis to estimate the average number of PUs for a small entity earning \$7 million annually, based on an assumption that a passenger-carrying PU generates annual revenues of \$150,000. This estimate compares reasonably to the estimated average annual revenue per PU for the trucking industry (\$172,000). The Agency used a lower estimate because passenger carriers generally do not accumulate as many VMT per PU as carriers of property;⁴⁷ and it is assumed, therefore, that they would generate less revenue on average. The analysis concluded that passenger carriers with 47 PUs or fewer (\$7,000,000 divided by \$150,000/PU = 46.7 PU) would be considered small entities. The Agency then looked at the number and percentage of passenger carriers registered with FMCSA that would fall under that definition (of having 47 PUs or fewer). The results show that at least 96 percent of all interstate passenger carriers with recent activity have 47 PUs or fewer.⁴⁸ This amounts to 11,338 carriers. Therefore, the overwhelming majority of interstate passenger carriers would be considered small entities.

In order to estimate the economic impact of the proposed rule on small entities, FMCSA computed a total

Operations,” Final Rule (68 FR 22456, April 23, 2003).

⁴⁴ The 2000 TTS Blue Book of Trucking Companies, number adjusted to 2008 dollars for inflation.

⁴⁵ U.S. Small Business Administration Table of Small Business Size Standards matched to North American Industry Classification (NAIC) System codes, effective August 22, 2008. See NAIC subsector 484, Truck Transportation.

⁴⁶ MCMIS, as of June 17, 2010.

⁴⁷ FMCSA Large Truck and Bus Crash Facts 2008, Tables 1 and 20; <http://fmcsa.dot.gov/facts-research/LTBCF2008/Index-2008>.

⁴⁸ MCMIS, as of June 17, 2010.

annual cost per carrier for each industry segment. First, FMCSA allocated the total cost⁴⁹ of the proposed rule in the first year among property and passenger carriers according to their respective shares of total carrier population.⁵⁰ Interstate property carriers constitute 98 percent of the total of interstate carriers, whereas interstate passenger carriers constitute 2 percent. The total annual cost of the proposed rule’s preferred option (\$12,095,948)⁵¹ was thus weighted by 98 percent for property carriers leading to a total cost of \$11,854,036, and by 2 percent for passenger carriers, leading to a total cost of \$241,919. Next, FMCSA divided the two weighted costs by their respective number of small carriers, as described above, arriving at a cost-per-carrier for each segment: \$11,854,029/481,788 = \$24.60 for property carriers; and \$241,919/11,338 = \$21.33 for passenger carriers, for a weighted average of \$24.50 per small entity.

While the preferred option of this proposed rule would clearly impact a substantial number of small entities, the Agency does not consider a weighted average cost of approximately \$24.50 per entity per year to be economically significant in light of the estimated average annual revenue of \$172,000.^{52 53} Accordingly, I certify that a regulatory flexibility analysis is not necessary.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), FMCSA wants to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking initiative. If the proposed rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please consult the FMCSA personnel listed in the **FOR FURTHER INFORMATION CONTACT** section of the proposed rule. FMCSA will not retaliate against small entities that question or complain about

⁴⁹ The total cost in this section does not include costs to the States.

⁵⁰ The actual cost burden may not necessarily be proportionate to the carrier segment’s share in the industry. Absent information on this distribution, FMCSA applied the above assumption.

⁵¹ Excluding costs to the States.

⁵² Regulatory Analysis for: Hours of Service of Drivers; Driver Rest and Sleep for Safe Operations, Final Rule—Federal Motor Carrier Safety Administration. 68 FR 22456—Published April 23, 2003.

⁵³ The 2000 TTS Blue Book of Trucking Companies, number adjusted to 2008 dollars for inflation.

⁴³ FMCSA Regulatory Analysis, “Hours of Service of Drivers; Driver Rest and Sleep for Safe

this proposed rule or any policy or action of the Agency.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of FMCSA, call 1-888-REG-FAIR (1-888-734-3247).

Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of \$140.8 million (which is the value of \$100 million in 2009 after adjusting for inflation) or more in any 1 year. Though this proposed rule would not result in such expenditure, FMCSA discusses the effects of this rule elsewhere in this preamble.

Paperwork Reduction Act

This proposed rule would call for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520).

Privacy Impact Assessment

FMCSA conducted a Privacy Threshold Analysis for the proposed rule on restricting the use of hand-held mobile telephones by drivers of passenger-carrying CMVs and determined that it is not a privacy-sensitive rulemaking because the rule would not require any collection, maintenance, or dissemination of Personally Identifiable Information from or about members of the public.

Executive Order 13132 (Federalism)

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments, on the relationship between the national government and the States, or on the distribution of powers and responsibilities among the various levels of government.

FMCSA recognizes that, as a practical matter, this proposed rule may have some impact on the States. Accordingly, the Agency sought advice from the National Governors Association (NGA), National Conference of State

Legislatures (NCSL), and the American Association of Motor Vehicle Administrators (AAMVA) on the topic of mobile telephone use, by letters to each organization, dated April 6, 2010. (Copies of these letters are available in the docket for this rulemaking.) FMCSA offered NGA, NCSL, and AAMVA officials the opportunity to meet and discuss issues of concern to the States. As a result of these consultation efforts with State and local governments, they would also be able to raise Federalism issues during the comment period for this NPRM. For a further discussion, see the previous section in this NPRM entitled "Impact on other State Laws—Preemption."

Executive Order 12630 (Taking of Private Property)

This proposed rule would not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Executive Order 12988 (Civil Justice Reform)

This proposed rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Executive Order 13045 (Protection of Children)

FMCSA analyzed this proposed rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This proposed rule is not an economically significant rule and would not create an environmental risk to health or risk to safety that might disproportionately affect children.

Executive Order 13211 (Energy Supply, Distribution, or Use)

FMCSA analyzed this proposed rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. FMCSA preliminarily determined that it is not a "significant energy action" under that order. Though it is nonetheless a potentially "significant regulatory action" under Executive Order 12866, it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), has not designated it as a

significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

The National Technology Transfer and Advancement Act (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through OMB, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

The Agency is not aware of any technical standards used to address mobile telephone use and therefore did not consider any such standards.

National Environmental Policy Act

The Agency analyzed this NPRM for the purpose of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*), determined under our environmental procedures Order 5610.1, published March 1, 2004, in the **Federal Register** (69 FR 9680), and preliminarily assessed that this proposed action requires an Environmental Assessment (EA) to determine if a more extensive Environmental Impact Statement (EIS) is required. In the event that FMCSA finds the environmental impacts do not warrant an EIS, FMCSA will issue a Finding of No Significant Impact (FONSI). The findings in the draft EA indicate there are no *significant* positive or negative impacts to the environment expected from the various options in the proposed rule. There could be minor impacts on emissions, hazardous materials spills, solid waste, socioeconomic, and public health and safety. FMCSA requests comments on the draft EA.

FMCSA also analyzed this proposed rule under the Clean Air Act, as amended (CAA), section 176(c), (42 U.S.C. 7401 *et seq.*) and implementing regulations promulgated by the Environmental Protection Agency. Approval of this proposed action is exempt from the CAA's general conformity requirement since it would not result in any potential increase in emissions that are above the general conformity rule's *de minimis* emission threshold levels (40 CFR 93.153(c)(2)). Moreover, based on our analysis, it is reasonably foreseeable that the proposed

rule would not significantly increase total CMV mileage, nor would it significantly change the routing of CMVs, how CMVs operate, or the CMV fleet-mix of motor carriers. The proposed action merely would establish requirements to restrict hand-held mobile telephone use while driving CMVs.

FMCSA seeks comment on these preliminary determinations.

List of Subjects

49 CFR Part 383

Administrative practice and procedure, Alcohol abuse, Drug abuse, Highway safety, Motor carriers.

49 CFR Part 384

Administrative practice and procedure, Alcohol abuse, Drug abuse, Highway safety, Motor carriers.

49 CFR Part 390

Highway safety, Intermodal transportation, Motor carriers, Motor vehicle safety, Reporting and recordkeeping requirements.

49 CFR Part 391

Alcohol abuse, Drug abuse, Drug testing, Highway safety, Motor carriers, Reporting and recordkeeping requirements, Safety, Transportation.

49 CFR Part 392

Alcohol abuse, Drug abuse, Highway safety, Motor carriers.

For the reasons discussed in the preamble, FMCSA proposes to amend 49 CFR parts 383, 384, 390, 391, and 392 as follows:

PART 383—COMMERCIAL DRIVER'S LICENSE STANDARDS; REQUIREMENTS AND PENALTIES

1. The authority citation for part 383 continues to read as follows:

Authority: 49 U.S.C. 521, 31136, 31301 *et seq.*, and 31502; secs. 214 and 215 of Pub. L. 106–159, 113 Stat. 1766, 1767; sec. 1012(b) of Pub. L. 107–56; 115 Stat. 397; sec. 4140 of Pub. L. 109–59, 119 Stat. 1144, 1726; and 49 CFR 1.73.

2. Amend § 383.5 by adding the definitions "mobile telephone" and "using a hand-held mobile telephone" in alphabetical order and revising the definition of "texting" to read as follows:

§ 383.5 Definitions.

* * * * *

Mobile telephone means a mobile communication device that falls under or uses any commercial mobile radio service, as defined in regulations of the Federal Communications Commission, 47 CFR 20.3. It does not include two-way or Citizens Band Radio services.

* * * * *

Texting means manually entering alphanumeric text into, or reading text from, an electronic device.

(1) This action includes, but is not limited to, short message service, e-mailing, instant messaging, a command or request to access a World Wide Web page, or engaging in any other form of electronic text retrieval or entry, for present or future communication.

(2) Texting does not include:

- (i) Inputting, selecting, or reading information on a global positioning system or navigation system; or
- (ii) Using a device capable of performing multiple functions (*e.g.*, fleet management systems, dispatching devices, smart phones, citizens band radios, music players, etc.) for a purpose that is not otherwise prohibited in this part.

* * * * *

Using a hand-held mobile telephone means using at least one hand to hold a mobile telephone to conduct a voice communication or to reach for or dial a mobile telephone.

* * * * *

3. Amend § 383.51 by adding a new paragraph (c)(10) to Table 2 to read as follows:

§ 383.51 Disqualifications of drivers.

* * * * *

(c)* * *

TABLE 2 TO § 383.51

	For a second conviction of any combination of offenses in this Table in a separate incident within a 3-year period while operating a CMV, a person required to have a CDL and a CDL holder must be disqualified from operating a CMV for . . .	For a second conviction of any combination of offenses in this Table in a separate incident within a 3-year period while operating a non-CMV, a CDL holder must be disqualified from operating a CMV, if the conviction results in the revocation, cancellation, or suspension of the CDL holder's license or non-CMV driving privileges, for . . .	For a third or subsequent conviction of any combination of offenses in this Table in a separate incident within a 3-year period while operating a CMV, a person required to have a CDL and a CDL holder must be disqualified from operating a CMV for . . .	For a third or subsequent conviction of any combination of offenses in this Table in a separate incident within a 3-year period while operating a non-CMV, a CDL holder must be disqualified from operating a CMV, if the conviction results in the revocation, cancellation, or suspension of the CDL holder's license or non-CMV driving privileges, for . . .
(10) Violating a State or local law or ordinance on motor vehicle traffic control restricting or prohibiting the use of a hand-held mobile telephone while driving a CMV. ²	60 days	Not applicable	120 days	Not applicable.

²Driving, for the purpose of this disqualification, means operating a commercial motor vehicle, with the motor running, including while temporarily stationary because of traffic, a traffic control device,

or other momentary delays. Driving does not include operating a commercial motor vehicle with or without the motor running when the driver has moved the vehicle to the side of, or off, a highway,

as defined in 49 CFR 390.5, and has halted in a location where the vehicle can safely remain stationary.

* * * * *

PART 384—STATE COMPLIANCE WITH COMMERCIAL DRIVER'S LICENSE PROGRAM

4. The authority citation for part 384 continues to read as follows:

Authority: 49 U.S.C. 31136, 31301 *et seq.*, and 31502; secs. 103 and 215 of Pub. L. 106–159, 113 Stat. 1753, 1767; and 49 CFR 1.73.

5. Amend § 384.301 by adding a new paragraph (f) to read as follows:

§ 384.301 Substantial compliance—general requirements.

* * * * *

(f) A State must come into substantial compliance with the requirements of subpart B of this part in effect as of [INSERT EFFECTIVE DATE] as soon as practical, but not later than [INSERT DATE 3 YEARS AFTER THE EFFECTIVE DATE].

PART 390—FEDERAL MOTOR CARRIER SAFETY REGULATIONS; GENERAL

6. The authority citation for part 390 continues to read as follows:

Authority: 49 U.S.C. 508, 13301, 13902, 31133, 31136, 31144, 31151, 31502, 31504; sec. 204, Pub. L. 104–88, 109 Stat. 803, 941 (49 U.S.C. 701 note); sec. 114, Pub. L. 103–311, 108 Stat. 1673, 1677; sec. 217, 229, Pub. L. 106–159, 113 Stat. 1748, 1767, 1773; and 49 CFR 1.73.

7. Amend § 390.3 by revising paragraphs (f)(1) and (f)(6) to read as follows: § 390.3 General applicability.

* * * * *

(f) * * *

(1) All school bus operations as defined in § 390.5, except for the provisions of §§ 391.15(f), 392.80 and 392.82 of this chapter.

* * * * *

(6) The operation of commercial motor vehicles designed or used to transport between 9 and 15 passengers (including the driver), not for direct compensation, provided the vehicle does not otherwise meet the definition of a commercial motor vehicle, except that motor carriers and drivers operating such vehicles are required to comply with §§ 390.15, 390.19, 390.21(a) and (b)(2), 391.15(f), 392.80 and 392.82.

* * * * *

8. Amend § 390.5 by adding the definitions "mobile telephone" and "using a hand-held mobile telephone" in alphabetical order and revising the definition of "texting" to read as follows:.

§ 390.5 Definitions.

* * * * *

Mobile telephone means a mobile communication device that falls under or uses any commercial mobile radio service, as defined in regulations of the Federal Communications Commission, 47 CFR 20.3. It does not include two-way or Citizens Band Radio services.

* * * * *

Texting means manually entering alphanumeric text into, or reading text from, an electronic device.

(1) This action includes, but is not limited to, short message service, e-mailing, instant messaging, a command or request to access a World Wide Web page, or engaging in any other form of electronic text retrieval or entry, for present or future communication.

(2) Texting does not include:

(i) Inputting, selecting, or reading information on a global positioning system or navigation system; or

(ii) Using a device capable of performing multiple functions (*e.g.*, fleet management systems, dispatching devices, smart phones, citizens band radios, music players, etc.) for a purpose that is not otherwise prohibited in this part.

* * * * *

Using a hand-held mobile telephone means using at least one hand to hold a mobile telephone to conduct a voice communication or to reach for or dial a mobile telephone.

PART 391—QUALIFICATION OF DRIVERS AND LONGER COMBINATION VEHICLE (LCV) DRIVER INSTRUCTIONS

9. The authority citation for part 391 continues to read as follows:

Authority: 49 U.S.C. 322, 504, 508, 31133, 31136, and 31502; sec. 4007(b) of Pub. L. 102–240, 105 Stat. 2152; sec. 114 of Pub. L. 103–311, 108 Stat. 1673, 1677; sec. 215 of Pub. L. 106–159, 113 Stat. 1767; and 49 CFR 1.73.

10. Revise § 391.2 to read as follows:

§ 391.2 General exceptions.

(a) *Farm custom operation.* The rules in this part, except for § 391.15 (e) and (f), do not apply to a driver who drives a commercial motor vehicle controlled and operated by a person engaged in custom-harvesting operations, if the commercial motor vehicle is used to—

(1) Transport farm machinery, supplies, or both, to or from a farm for custom-harvesting operations on a farm; or

(2) Transport custom-harvested crops to storage or market.

(b) *Apiarian industries.* The rules in this part, except for § 391.15 (e) and (f), do not apply to a driver who is operating a commercial motor vehicle

controlled and operated by a beekeeper engaged in the seasonal transportation of bees.

(c) *Certain farm vehicle drivers.* The rules in this part, except for § 391.15 (e) and (f), do not apply to a farm vehicle driver except a farm vehicle driver who drives an articulated (combination) commercial motor vehicle, as defined in § 390.5. For limited exemptions for farm vehicle drivers of articulated commercial motor vehicles, see § 391.67.

11. Amend § 391.15 by adding a new paragraph (f) to read as follows:

§ 391.15 Disqualification of drivers.

* * * * *

(f) Disqualification for violation of a restriction on using a hand-held mobile telephone while driving a commercial motor vehicle—

(1) *General rule.* A driver who is convicted of violating the restriction on using a hand-held mobile telephone in § 392.82(a) of this chapter is disqualified from driving a commercial motor vehicle for the period of time specified in paragraph (f)(2) of this section.

(2) *Duration.* Disqualification for violation of a restriction on using a hand-held mobile telephone while driving a commercial motor vehicle—

(i) *Second violation.* A driver is disqualified for 60 days if the driver is convicted of two violations of § 392.82(a) of this chapter in separate incidents committed during any 3-year period.

(ii) *Third or subsequent violation.* A driver is disqualified for 120 days if the driver is convicted of three or more violations of § 392.82(a) of this chapter in separate incidents committed during any 3-year period.

PART 392—DRIVING OF COMMERCIAL MOTOR VEHICLES

12. The authority citation for part 392 continues to read as follows:

Authority: 49 U.S.C. 13902, 31136, 31151, 31502; and 49 CFR 1.73.

13. Add a new § 392.82 to subpart H to read as follows:

§ 392.82 Restriction on using a hand-held mobile telephone.

(a) *Restriction.* (1) *Drivers.* No driver shall use a hand-held mobile telephone while driving a CMV.

(2) *Motor Carriers.* No motor carrier shall allow or require its drivers to use a hand-held mobile telephone while driving a CMV.

(b) *Definitions.* For the purpose of this section only, *driving* means operating a commercial motor vehicle, with the motor running, including while

temporarily stationary because of traffic, a traffic control device, or other momentary delays. Driving does not include operating a commercial motor vehicle with or without the motor running when the driver has moved the vehicle to the side of, or off, a highway and has halted in a location where the vehicle can safely remain stationary.

(c) *Exceptions.* (1) *School bus operations and vehicles designed or used to transport 9 to 15 passengers, including the driver, not for direct compensation.* The provisions of § 390.3(f)(1) and (6) of this chapter are not applicable to this section.

(2) *Emergencies.* Using a hand-held mobile telephone is permissible by

drivers of a CMV when necessary to communicate with law enforcement officials or other emergency services.

Issued on: December 13, 2010.

Anne S. Ferro,
Administrator.

[FR Doc. 2010-31736 Filed 12-20-10; 8:45 am]

BILLING CODE 4910-EX-P



Federal Register

**Monday,
April 5, 2010**

Part II

Department of Transportation

**Federal Motor Carrier Safety
Administration**

**49 CFR Parts 350, 385, 395, et al.
Electronic On-Board Recorders for Hours-
of-Service Compliance; Final Rule**

DEPARTMENT OF TRANSPORTATION**Federal Motor Carrier Safety Administration****49 CFR Parts 350, 385, 395, and 396**

[Docket No. FMCSA-2004-18940]

RIN 2126-AA89

Electronic On-Board Recorders for Hours-of-Service Compliance**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.**ACTION:** Final rule.

SUMMARY: The Federal Motor Carrier Safety Administration (FMCSA) amends the Federal Motor Carrier Safety Regulations (FMCSRs) to incorporate new performance standards for electronic on-board recorders (EOBRs) installed in commercial motor vehicles (CMVs) manufactured on or after June 4, 2012. On-board hours-of-service (HOS) recording devices meeting FMCSA's current requirements and installed in CMVs manufactured before June 4, 2012 may continue to be used for the remainder of the service life of those CMVs.

Motor carriers that have demonstrated serious noncompliance with the HOS rules will be subject to mandatory installation of EOBRs meeting the new performance standards. If FMCSA determines, based on HOS records reviewed during a compliance review, that a motor carrier has a 10 percent or greater violation rate ("threshold rate violation") for any HOS regulation listed in the new Appendix C to part 385, FMCSA will issue the carrier an EOBR remedial directive. The motor carrier will then be required to install EOBRs in all of its CMVs regardless of their date of manufacture and use the devices for HOS recordkeeping for a period of 2 years, unless the carrier (i) already equipped its vehicles with automatic on-board recording devices (AOBRDs) meeting the Agency's current requirements under 49 CFR 395.15 prior to the finding, and (ii) demonstrates to FMCSA that its drivers understand how to use the devices.

The FMCSA also changes the safety fitness standard to take into account a remedial directive when determining fitness. Additionally, to encourage industry-wide use of EOBRs, FMCSA revises its compliance review procedures to permit examination of a random sample of drivers' records of duty status after the initial sampling, and provides partial relief from HOS supporting documents requirements, if certain conditions are satisfied, for

motor carriers that voluntarily use compliant EOBRs.

Finally, because FMCSA recognizes that the potential safety risks associated with some motor carrier categories, such as passenger carriers, hazardous materials transporters, and new motor carriers seeking authority to conduct interstate operations in the United States, are such that mandatory EOBR use for such operations might be appropriate, the Agency will initiate a new rulemaking to consider expanding the scope of mandatory EOBR use beyond the "1 x 10" carriers that would be subject to a remedial directive as a result of today's rule.

DATES: *Effective Date:* This final rule is effective on June 4, 2010.

Compliance Date: Motor carriers must comply with this final rule by June 4, 2012. The incorporation by reference of certain publications listed in the rule is approved by the Director of the Federal Register as of June 4, 2010.

ADDRESSES:

Docket: For access to the docket to read background documents including those referenced in this document, or to read comments received, go to <http://www.regulations.gov> at any time or to the ground floor, room W12-140, DOT Building, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m. e.t., Monday through Friday, except Federal holidays.

Privacy Act: Anyone is able to search the electronic form for all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review U.S. Department of Transportation's (DOT) complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19476) or you may visit <http://dms.dot.gov>.

FOR FURTHER INFORMATION CONTACT: Ms. Deborah M. Freund, Vehicle and Roadside Operations Division, Office of Bus and Truck Standards and Operations, (202) 366-5370, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590-0001.

SUPPLEMENTARY INFORMATION: This rulemaking notice is organized as follows:

Table of Contents

- I. Table of Abbreviations
- II. Legal Basis for the Rulemaking
- III. Executive Summary
- IV. Discussion of Comments to the Notice of Proposed Rulemaking
- V. Rulemaking Analyses and Notices

I. Table of Abbreviations

Following is a list of abbreviations used in this document.

Advocates Advocates for Highway and Auto Safety
 AMSA American Moving and Storage Association
 ANPRM Advance Notice of Proposed Rulemaking
 ANSI American National Standards Institute
 AOBDRS Automatic On-Board Recording Devices
 ASCII American Standard Code for Information Interchange
 ATA American Trucking Associations
 ATRI American Transportation Research Institute
 Boyle Boyle Transportation
 CFR Code of Federal Regulations
 CMV Commercial Motor Vehicle
 CR Compliance Review
 CSA 2010 Comprehensive Safety Analysis 2010
 CVSA Commercial Vehicle Safety Alliance
 D Driving
 DOE U.S. Department of Energy
 DOT U.S. Department of Transportation
 EA Environmental Assessment
 ECM Electronic Control Module
 E.O. Executive Order
 EOBR Electronic On-Board Recorder
 EU European Union
 FedEx FedEx Corporation
 FHWA Federal Highway Administration
 FIPS Publications Federal Information Processing Standards Publications
 FMCSA Federal Motor Carrier Safety Administration
 FMCSR Federal Motor Carrier Safety Regulations
 FMI Food Marketing Institute
 FOIA Freedom of Information Act
 FONSI Finding of No Significant Impact
 FR **Federal Register**
 GAO Government Accountability Office
 GNIS Geographic Names Information System
 GPS Global Positioning System
 Hazmat Hazardous Materials
 HMTAA Hazardous Materials Transportation Authorization Act of 1994
 HOS Hours of Service
 IBT International Brotherhood of Teamsters
 ICC Interstate Commerce Commission
 ICCTA ICC Termination Act of 1995
 ICR Information Collection Request
 IEEE Institute of Electrical and Electronic Engineers
 IIHS Insurance Institute for Highway Safety
 IRFA Initial Regulatory Flexibility Analysis
 ITEC International Truck and Engine Corporation
 J.B. Hunt J.B. Hunt Transport, Inc.
 KonaWare KonaWare Transportation and Logistics
 LH Long Haul
 Maryland SHA Maryland State Highway Administration
 Maverick Maverick Transportation, LLC
 MCMIS Motor Carrier Management Information System
 MCSAP Motor Carrier Safety Assistance Program
 MCSIA Motor Carrier Safety Improvement Act of 1999

MTA Minnesota Trucking Association
 NEPA National Environmental Policy Act
 NHTSA National Highway Traffic Safety Administration
 1984 Act Motor Carrier Safety Act of 1984
 1935 Act Motor Carrier Act of 1935
 NPGA National Propane Gas Association
 NPRDA Notice of Potential Remedial Directive Applicability
 NPRM Notice of Proposed Rulemaking
 NPTC National Private Truck Council, Incorporated
 NTSB National Transportation Safety Board
 NRMCA National Ready Mixed Concrete Association
 OBD On-Board Diagnostic
 ODND On Duty Not Driving
 OFF Off Duty
 Ohio PUC Public Utilities Commission of Ohio
 OIG Office of the Inspector General
 OMB Office of Management and Budget
 ON On Duty
 OOIDA Owner-Operator Independent Drivers Association, Inc.
 PDA Personal Digital Assistant
 PII Personally Identifiable Information
 PIA Privacy Impact Assessment
 PMAA Petroleum Marketers Association of America
 PRA Paperwork Reduction Act of 1995
 Pub. L. Public Law
 Qualcomm Qualcomm Wireless Business Solutions
 RapidLog RapidLog Corporation
 RF Radio Frequency
 RIA Regulatory Impact Analysis
 RITA Research and Innovative Technology Administration
 RODS Records of Duty Status
 RP Recommended Practice
 SafeStat Motor Carrier Safety Status Measuring System
 SAFETEA-LU Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users
 SB Sleeper Berth
 SBA Small Business Association
 SC&RA Specialized Carriers & Rigging Association
 SEA Safety Evaluation Area
 SEISNOSE Significant Economic Impact on a Substantial Number of Small Entities
 SFRM Safety Fitness Rating Methodology
 SH Short Haul
 Siemens Siemens AG
 SNPRM Supplemental Notice of Proposed Rulemaking
 Stat. Statutes
 TCA Truckload Carriers Association
 TEA-21 Transportation Equity Act for the 21st Century
 TMC TPA Technology and Maintenance Council's Technical Policy Advisory Tripmaster Corporation
 UMTRI University of Michigan Transportation Institute
 U.S.C. United States Code
 UTC Coordinated Universal Time
 Verigo Verigo Incorporated
 VSL Value of a Statistical Life
 Werner Werner Enterprises, Incorporated
 XATA XATA Corporation
 Xora Xora, Incorporated

II. Legal Basis for the Rulemaking

The Motor Carrier Act of 1935 (Pub. L. 74-255, 49 Stat. 543, August 9, 1935, now codified at 49 U.S.C. 31502(b)) (the 1935 Act) provides “the Secretary of Transportation may prescribe requirements for (1) qualifications and maximum hours of service of employees of, and safety of operation and equipment of, a motor carrier; and (2) qualifications and maximum hours of service of employees of, and standards of equipment of, a motor private carrier, when needed to promote safety of operation.” This final rule addresses “safety of operation and equipment” of motor carriers and “standards of equipment” of motor private carriers and, as such, is well within the authority of the 1935 Act. Today’s final rule allows motor carriers to use Electronic On-Board Recorders (EOBRs) in their commercial motor vehicles (CMVs) to document drivers’ compliance with the HOS requirements; requires some noncompliant carriers to install, use, and maintain EOBRs for this purpose; and updates existing performance standards for on-board recording devices.

The Motor Carrier Safety Act of 1984 (Pub. L. 98-554, Title II, 98 Stat. 2832, October 30, 1984) (the 1984 Act) provides concurrent authority to regulate drivers, motor carriers, and vehicle equipment. It requires the Secretary to “prescribe regulations on commercial motor vehicle safety. The regulations shall prescribe minimum safety standards for commercial motor vehicles. At a minimum, the regulations shall ensure that—(1) Commercial motor vehicles are maintained, equipped, loaded, and operated safely; (2) the responsibilities imposed on operators of commercial motor vehicles do not impair their ability to operate the vehicles safely; (3) the physical condition of operators of commercial motor vehicles is adequate to enable them to operate the vehicles safely * * *; and (4) the operation of commercial motor vehicles does not have a deleterious effect on the physical condition of the operators” (49 U.S.C. 31136(a)).

Section 211(b) of the 1984 Act also grants the Secretary broad power, in carrying out motor carrier safety statutes and regulations, to “prescribe recordkeeping and reporting requirements” and to “perform other acts the Secretary considers appropriate” (49 U.S.C. 31133(a)(8) and (10)).

The HOS regulations are designed to ensure that driving time—one of the principal “responsibilities imposed on

operators of commercial motor vehicles”—does “not impair their ability to operate the vehicles safely.” (49 U.S.C. 31136(a)(2)). EOBRs that are properly designed, used, and maintained will enable motor carriers to track their drivers’ on-duty driving hours accurately, thus minimizing regulatory violations or excessive driving, and schedule vehicle and driver operations more efficiently. Driver compliance with the HOS rules helps ensure “the physical condition of operators of commercial motor vehicles is adequate to enable them to operate the vehicles safely” (49 U.S.C. 31136(a)(3)). To assist in the enforcement of the HOS regulations generally, FMCSA is requiring EOBR use by motor carriers with the most serious HOS compliance deficiencies (“threshold rate violations”), as described elsewhere in this final rule. The Agency considered whether this final rule would impact driver health under 49 U.S.C. 31136(a)(3) and (a)(4). To the extent the final rule has any effect on the physical condition of drivers, because the rule is expected to increase compliance with the HOS regulations the effect is unlikely to be deleterious. (See the discussion regarding health impacts at section 8.4. and Appendix A in the Environmental Assessment (EA).)

The requirements in 49 U.S.C. 31136(a)(1) concerning safe motor vehicle maintenance, equipment, and loading are not germane to this final rule, as EOBRs influence driver operational safety rather than vehicular and mechanical safety. Consequently, the Agency has not explicitly assessed the final rule against that requirement. However, to the limited extent 49 U.S.C. 31136(a)(1) pertains specifically to driver safety and safe operation of commercial vehicles, the Agency has taken this statutory requirement into account throughout the final rule. Also, before prescribing any regulations, FMCSA must also consider their “costs and benefits.” (49 U.S.C. 31136 (c)(2)(A) and 31502(d)). The Agency has taken these statutory requirements into account throughout the final rule.

In addition, section 408 of the ICC Termination Act of 1995 (Pub. L. 104-88, 109 Stat. 803, 958, December 29, 1995) (ICCTA) requires the Agency to issue an advance notice of proposed rulemaking (ANPRM) “dealing with a variety of fatigue-related issues pertaining to commercial motor vehicle safety (including * * * automated and tamper-proof recording devices * * *) not later than March 1, 1996.” The original ANPRM under section 408 of ICCTA was published on November 5,

1996 (61 FR 57252), the notice of proposed rulemaking (NPRM) on May 2, 2000 (65 FR 25540), and the final rule on April 28, 2003 (68 FR 22456). For a number of reasons, including lack of adequate cost and benefit data, FMCSA decided not to adopt EOBR regulations in 2003. FMCSA noted, however, that it planned “to continue research on EOBRs and other technologies, seeking to stimulate innovation in this promising area” (68 FR 22456, 22488, April 28, 2003).

Section 113(a) of the Hazardous Materials Transportation Authorization Act of 1994 (Pub. L. 103–311, 108 Stat. 1673, 1676, August 26, 1994) (HMTAA) required the Secretary to prescribe regulations to improve (A) compliance by commercial motor vehicle drivers and motor carriers with HOS requirements; and (B) the effectiveness and efficiency of Federal and State enforcement officers reviewing such compliance. HMTAA section 113(b)(1) states that such regulations must allow for a written or electronic document “* * * to be used by a motor carrier or by an enforcement officer as a supporting document to verify the accuracy of a driver’s record of duty status.” Today’s rule sets forth performance standards, incentives measures, and remedial requirements for use of devices that generate electronic documents, and addresses the HMTAA mandate.

Section 9104 of the Truck and Bus Safety and Regulatory Reform Act (Pub. L. 100–690, title IX, subtitle B, 102 Stat. 4181, 4529, November 18, 1988) also anticipates the Secretary prescribing “a regulation about the use of monitoring devices on commercial motor vehicles to increase compliance by operators of the vehicles with HOS regulations,” and requires the Agency to ensure any such device is not used to “harass vehicle operators” (49 U.S.C. 31137(a)). Section 4012 of the Transportation Equity Act for the 21st Century (Pub. L. 105–178), 112 Stat. 107, 408–409, June 9, 1998) (TEA–21) makes inapplicable to drivers of utility service vehicles, during an emergency period of not more than 30 days, regulations issued under 49 U.S.C. 31502 or 31136 regarding “the installation of automatic recording devices associated with establishing the maximum driving and on-duty times” (49 U.S.C. 31502(e)(1)(C)). The Agency has taken these statutory requirements into account throughout the final rule.

Based on the legislative framework reviewed previously, FMCSA has statutory authority to adopt an industry-wide requirement that all motor carriers subject to HOS requirements under 49 CFR part 395 install and use EOBR-

based systems. The Agency has adopted a more targeted approach in this final rule, consistent with the scope of the NPRM which limits the current rulemaking proceeding to compliance-based regulatory approaches implemented through a remedial directive. However, the Agency will publish a separate notice initiating a new rulemaking in the near future to consider expanding the scope of mandatory EOBR use beyond the standard set in this rule, consistent with its full authority and based upon new data and analyses.

In this final rule, the Agency establishes criteria for identifying carriers with threshold rates of HOS violations. We also establish changes to the safety fitness standard to ensure imposition of a remedial directive to install, use and maintain EOBRs is taken into account when determining a carrier’s safety fitness.

The determination of a carrier’s safety fitness is well within the Secretary’s authority. Section 215 of the 1984 Act requires the Secretary to “determine whether an owner or operator is fit to operate safely commercial motor vehicles,” (49 U.S.C. 31144(a)(1)) and to “maintain by regulation a procedure for determining the safety fitness of an owner or operator” (49 U.S.C. 31144(b)). The procedure must include “specific initial and continuing requirements with which an owner or operator must comply to demonstrate safety fitness” (49 U.S.C. 31144(b)(1)).

Section 4009 of TEA–21 prohibits motor carriers found to be unfit, according to a safety fitness determination, from operating commercial motor vehicles in interstate commerce. With limited exceptions, owners and operators determined to be unfit may not operate commercial motor vehicles in interstate commerce beginning on the 61st day after the date of such fitness determination, or the 46th day after such determination in the case of carriers transporting passengers or hazardous materials, “and until the Secretary determines such owner or operator is fit” (49 U.S.C. 31144(c)).

Section 4104 of the Safe, Accountable, Flexible, Efficient Transportation Act: A Legacy for Users (Pub. L. 109–59, 119 Stat. 1144, August 10, 2005) (SAFETEA–LU) directs FMCSA to revoke the registration of a motor carrier that has been prohibited from operating in interstate commerce for failure to comply with the safety fitness requirements of 49 U.S.C. 31144. Section 4114(b) of SAFETEA–LU expands FMCSA jurisdiction into intrastate operations by amending 49 U.S.C. 31144(c) to further prohibit

owners or operators of CMVs prohibited from operating in interstate commerce because FMCSA has determined they do not meet the safety fitness requirement, from operating any CMV that affects interstate commerce until the Secretary determines that such owner or operator is fit.

III. Executive Summary

In its January 18, 2007 NPRM (72 FR 2340), FMCSA proposed three related elements to address on-board electronic devices for recording HOS information: (1) An updated equipment standard in light of technological advances; (2) mandated use of EOBRs for motor carriers that demonstrated a history of severe noncompliance with the HOS regulations; and (3) certain incentives to encourage EOBR use by all motor carriers. The second element, concerning the mandated use of EOBRs, was of greatest concern to commenters.

The FMCSA acknowledges the safety concerns of Congress, the National Transportation Safety Board (NTSB), and the many organizations and individuals that submitted comments to the NPRM in support of a broader EOBR mandate. The Agency has begun work to evaluate regulatory options for significantly expanding the population of carriers covered by an EOBR mandate.

However, the Agency cannot extend the EOBR mandate beyond those covered by this final rule because the scope of the current rulemaking proceeding is limited to compliance-based regulatory approaches, implemented through a remedial directive. Therefore, FMCSA will examine the issue of a broader mandate under a new rulemaking proceeding in response to the safety concerns raised by Congress, the NTSB, and commenters to the docket.

As part of this activity, FMCSA also intends to gather more information on the voluntary use of EOBRs and to assess how increases in the number of units installed are influencing the costs of purchase and operation.

In the meantime, focusing on motor carriers with significant HOS compliance problems is likely to improve the safety of the motoring public on the highways in the near term. Consistent with the scope of the NPRM, we are therefore adopting procedures for issuance of remedial directives requiring EOBR installation, maintenance, and use by those motor carriers with serious HOS noncompliance.

As discussed in the EOBR Remedial Directives section of this preamble, FMCSA examined a variety of

parameters that might be used to establish subpopulations of motor carriers with poor HOS compliance to which an EOBR mandate might apply. In focusing on the most severe violations and the most chronic violators, we are adopting a mandatory-installation “trigger” designed to single out motor carriers that have a demonstrated record of poor compliance with HOS regulations. In today’s rule, as proposed in the NPRM, we adopt an EOBR mandatory-use requirement with a compliance-based trigger. It applies to motor carriers across all sectors that have demonstrated poor compliance with the HOS regulations. The NPRM details the history of this rulemaking and the alternatives considered (72 FR 2343).

Previously, an Agency proposal to mandate EOBRs for CMVs used in long-haul and regional operations was withdrawn (68 FR 22456, Apr. 28, 2003). The 2004 ANPRM (69 FR 53386) invited comment on a sector-based mandate (e.g., long-haul carriers only). FMCSA considered such broader mandates and discussed them again in the NPRM, although they were not ultimately pursued as regulatory options. Instead, the NPRM focused on which remedial directive option to adopt (72 FR 2372–2374).

The Agency proposed mandating EOBR installation, maintenance, and use for a relatively small population of companies and drivers with a recurrent HOS compliance problem. EOBRs would be required for those carriers determined—based on HOS records reviewed during each of two compliance reviews conducted within a 2-year period—to have had a 10 percent or greater violation rate (“pattern violation”) for any regulation in the proposed Appendix C to 49 CFR part 385 (“2 x 10” Remedial Directive Carriers). As described in more detail in this preamble, in the final rule the Agency has chosen the more stringent 1 x 10 remedial approach—whereby motor carriers with a 10 percent violation rate of any Appendix C HOS regulation in any single compliance review would be subject to a remedial directive (“1 x 10” Remedial Directive Carriers)—instead of the 2 x 10 approach proposed in the NPRM.

In the development of this final rule, the Agency found the overall crash rates of 1 x 10 and 2 x 10 motor carriers are considerably higher than the crash rates of the general motor carrier population. Using data from the FMCSA Motor Carrier Management Information System (MCMIS) database and compliance review databases, crash rates were computed by dividing total crashes by

each carrier’s number of power units. Crash rates were compared between the 1 x 10 and 2 x 10 motor carrier population and motor carriers in the general population. The 1 x 10 motor carriers were found to have a 40 percent higher crash rate than the general motor carrier population, and 2 x 10 motor carriers a 90 percent higher crash rate than the general motor carrier population. Many elements of the analyses of benefits and costs of this rule use estimates that were derived from FMCSA’s 2003 estimates concerning the effects of HOS rules. This was done to provide analytical continuity through the 2004–2010 timeframe of the EOBR rulemaking actions.¹ Also, due to data limitation, FMCSA used outdated studies in the analysis for this rule. For future HOS rulemakings, FMCSA will use updated studies and reports to analyze impacts.

Numerous commenters to the NPRM stated that the proposal still would not require EOBR use by enough carriers to make a meaningful difference in highway safety, relative to the total carrier population. The FMCSA acknowledges the safety concerns of the commenters. In response to those concerns, the Agency will explore the safety benefits of a broader EOBR mandate in a new rulemaking proceeding that will begin in the near future. In the meantime, the final rule’s application of a remedial directive to the 1 x 10 motor carriers makes the best immediate use of Agency resources and provides immediate safety benefits to society.

The number of motor carriers that will be required to install, use and maintain EOBRs is significantly greater under this final rule than was proposed in the NPRM. If FMCSA determines, based on HOS records reviewed during a single compliance review, that a motor carrier had a 10 percent or greater violation rate for any regulation in the new Appendix C to Part 385 (“threshold rate violation”), FMCSA will issue the carrier an EOBR remedial directive. The motor carrier will be required to install EOBRs meeting the performance requirements of this final rule in all of the carrier’s CMVs, regardless of their date of manufacture, and to use the devices for HOS recordkeeping purposes for a period of 2 years. An exception is provided for carriers that, prior to the compliance review determination, already equipped their vehicles with automatic on-board recording devices (AOBRDs) meeting

the Agency’s current requirements under 49 CFR 395.15 and can demonstrate to FMCSA that their drivers understand how to use the devices.

FMCSA amends the FMCSRs to provide new performance requirements for EOBRs used to monitor drivers’ HOS recording devices. EOBRs will be required to automatically record the CMV’s location at each change of duty status and at intervals while the CMV is in motion. Current on-board recorders are not required to do this. EOBRs must also conform to specific information processing standards to ensure the security and integrity of the data that is recorded. Drivers will be able to add information to the EOBR record (“annotate”) while the EOBR maintains the original recorded information and tracks these annotations. The EOBR support system must be able to provide a digital file in a specified format for use by motor carrier safety enforcement officials.

FMCSA requires on-board recording devices be integrally synchronized to the engine. Although the January 2007 NPRM proposed allowing non-synchronized devices, the Agency decided to continue requiring that on-board recording devices be integrally synchronized to ensure the accuracy of electronic records of duty status.

The Agency also adopts other performance specifications, in response to comments that differ from specifications proposed. These include, but are not limited to: Increasing the time interval for recording the geographic location of a CMV in motion from 1 minute to 60 minutes; making the recording of State-line-crossing information optional; removing the requirement to record a driver’s acknowledgement of advisory messages; reducing the amount of time a CMV is stationary before the EOBR defaults to on-duty not driving duty status; removing the daily ceiling on EOBR accumulated time inaccuracy or “time drift”; revising the requirements to allow a driver to enter annotations to denote use of a CMV as a personal conveyance and for yard movement; removing the requirement for an EOBR to display HOS data in a graph-grid format; specifying information technology security and integrity requirements; and adding and strengthening provisions concerning driver and motor carrier responsibilities relating to accurate EOBR records and support system performance. The details of the changes are discussed later in this document.

To ensure a smooth transition from AOBRDs to EOBRs, the final rule requires that for CMVs manufactured

¹ Estimates of benefits and costs that will be developed for future HOS-related rulemaking actions will use more recent baseline data.

after June 4, 2012, devices installed by a manufacturer or motor carrier to record HOS must meet the requirements of § 395.16. Commercial motor vehicles manufactured prior to June 4, 2012 may be equipped with an HOS recording device that meets the requirements of either § 395.15 (AOBRD) or § 395.16 (EOBR).

Finally, the final rule provides incentives for motor carriers to voluntarily use EOBRs. These include elimination of the requirement to retain and maintain supporting documents related to driving time as this information will be maintained and accessible from the EOBR. Additionally, compliance reviews that reveal a proposed 10 percent or higher violation rate based on the initial focused sample would be expanded to assess a random sampling of the motor carrier's overall HOS records.

Summary of FMCSA's January 2007 Proposal

On January 18, 2007, FMCSA proposed amending the FMCSRs to incorporate new performance standards for EOBRs installed in commercial motor vehicles manufactured on or after the date 2 years following the effective date of a final rule. On-board HOS recording devices meeting FMCSA's current requirements and voluntarily installed in CMVs manufactured before the implementation date of a final rule will be permitted for use for the remainder of the service life of those CMVs.

Under the proposal, motor carriers that demonstrated a pattern of serious noncompliance with FMCSA's HOS rules would be subject to mandatory installation of EOBRs meeting the new performance standards. If FMCSA determined, based on HOS records reviewed during each of two compliance reviews conducted within a 2-year period, that a motor carrier had a 10 percent or greater violation rate ("pattern violation") for any regulation in proposed Appendix C to part 385 of Title 49, CFR, FMCSA would issue the carrier an EOBR remedial directive. The motor carrier would be required to install EOBRs in all of its CMVs regardless of their date of manufacture and to use the devices for HOS recordkeeping for a period of 2 years, unless the carrier already had equipped its vehicles with AOBRDs meeting the Agency's current requirements under 49 CFR 395.15 and could demonstrate to FMCSA that its drivers understand how to use the devices.

We also proposed changes to the safety fitness standard to ensure imposition of a remedial directive to

install, use and maintain EOBRs as taken into account when determining a carrier's safety fitness. Finally, FMCSA proposed the same incentives for motor carriers to voluntarily use EOBRs in their CMVs as are adopted in today's final rule: (1) Random sampling of drivers' records of duty status; and (2) partial relief from HOS supporting documents requirements.

IV. Discussion of Comments to the NPRM

Overview of Comments

The Agency received 752 comments on the proposed rule. Of these, 609 expressed opinions without additional supporting material.

Organizations that provided comments included the following.

Safety advocacy groups: Advocates for Highway and Auto Safety (Advocates); Public Citizen; and Insurance Institute for Highway Safety (IIHS).

Drivers' organizations: International Brotherhood of Teamsters (IBT) and Owner-Operator Independent Drivers Association, Inc. (OOIDA).

National trucking industry associations: Canadian Trucking Alliance; Truckload Carriers Association (TCA); American Trucking Associations (ATA); National Private Truck Council, Inc. (NPTC); the Specialized Carriers & Rigging Association (SC&RA), and the American Moving and Storage Association (AMSA). Additionally, although several commenters referenced a Technical Policy Advisory (TPA) developed by the ATA Technology and Maintenance Council (TMC), TMC did not comment independently to the docket.

State trucking associations: Minnesota Trucking Association (MTA).

EOBR, software, and system providers: RapidLog Corp. (RapidLog); PeopleNet; Siemens AG (Siemens); Tripmaster Corp. (Tripmaster); Xora, Inc. (Xora); First Advantage; Verigo Inc. (Verigo); XATA Corp. (XATA); Qualcomm Wireless Business Solutions (Qualcomm); KonaWare Transportation and Logistics (KonaWare), and Report on Board.

U.S. Government agencies: National Transportation Safety Board (NTSB) and the U.S. Department of Energy (DOE).

CMV safety officials' organization: Commercial Vehicle Safety Alliance (CVSA).

State government agencies: Maryland State Police, Maryland State Highway Administration (Maryland SHA), and Public Utilities Commission of Ohio (Ohio PUC).

Motor carriers: J.B. Hunt Transport, Inc. (J.B. Hunt); FedEx Corp. (FedEx);

Werner Enterprises, Inc. (Werner); Calvary Mountain Express Inc.; River Transport, Inc.; Boyle Transportation (Boyle); OTR Transportation; Maverick Transportation, LLC (Maverick); Metro Express Inc.; Brenny Specialized, Inc.; Foreman Transport; Horizontal Boring & Tunneling Co.; and N&M Transfer Co., Inc.

National associations with transportation interests: International Foodservice Distributors Association; National Propane Gas Association (NPGA); National Ready Mixed Concrete Association (NRMCA); Petroleum Transportation and Storage Association; Petroleum Marketers Association of America (PMAA); and, the Food Marketing Institute (FMI).

State association with transportation interests: Colorado Ready Mixed Concrete Association.

CMV manufacturer: International Truck and Engine Corp.

1 Industry-Wide Mandate for EOBRs

FMCSA received 57 comments, mainly from drivers or individuals, who believe the Agency should require the use of EOBRs. Thirty-nine commenters supported a broader mandate than was proposed in the NPRM, though not an industry-wide mandate. Nineteen commenters supported mandating EOBRs for all carriers.

Advocates commented, "enforcement efficiencies would soar with universal use of accurate, tamper-proof EOBRs," and argued that the increased productivity of roadside inspection officials could significantly improve motor carrier safety. Several commenters, including CVSA, NTSB, and Public Citizen, asserted European Union nations, Japan, and other countries that require EOBRs have seen positive safety results.

Ohio PUC stated a mandate would greatly increase compliance with the HOS rules, increase safety, and reduce the potential for fraud.

Public Citizen, Advocates, and two vendors stated the proposed rule did not meet the statutory mandate or individual guidance concerning an evaluation of EOBRs, and that the administrative record of FMCSA's own rulemakings contradicted the proposal. They noted the Agency was required to consider safety as its highest priority and to further the highest degree of safety in motor carrier transportation.

IIHS stated the proposed rule was "completely at odds with the data on truck driver fatigue." IIHS cited its research that found that one in five drivers fell asleep at the wheel in the previous month.

DOE supported the NPRM, but preferred an industry-wide mandate for EOBR use to enhance the safety, security and cost effectiveness of the transportation of hazardous materials. DOE believes installation of EOBRs on all CMVs would enhance highway safety and HOS compliance of all motor carriers, including those that DOE uses to transport shipments of radioactive materials and waste.

Numerous commenters argued that EOBRs are needed to improve safety, but motor carriers will not voluntarily choose to use EOBRs. In a related vein, CVSA, NTSB, Siemens, and Report on Board believed a mandate for all motor carriers to use EOBRs would be necessary to obtain the customer base and economies of scale for vendors to offer lower-cost EOBRs.

An individual who identified himself as a safety consultant argued that motor carriers would not see sufficient advantages—either through reduced instances of noncompliance or reductions in paperwork burdens—to encourage them to use EOBRs voluntarily, especially since their chance of being subjected to a compliance review is low. He stated many progressive motor carriers have installed onboard systems with Global Positioning System (GPS) tracking capabilities but do not use them for HOS recording because drivers object to it. The consultant contended that by not mandating universal EOBR use, the DOT is, in effect, rewarding those who are unwilling to invest in safety.

IIHS stated that although AOBDRs have been allowed since 1988 and a substantial number of motor carriers use various types of on-board systems, only a small proportion of carriers use them to collect HOS data. As evidence that many motor carriers find EOBRs affordable and provide many operational benefits, IIHS cited surveys of truck drivers indicating about 45 percent of the long-distance drivers in 2005 said there were EOBRs or other on-board computers in their trucks, up from about 18 percent in 2003 and about 38 percent in 2004.

Some of the commenters believed a universal EOBR mandate would create a “level playing field” in the motor carrier business environment. They also stated it would protect drivers from adverse actions by their employers in retaliation for refusing to violate HOS regulations. Some of the commenters also mentioned improved readability and simplified recordkeeping associated with EOBRs when compared to handwritten records, as well as assisting motor carrier safety enforcement personnel in performing

their roadside reviews more efficiently and effectively.

Advocates stated FMCSA had ignored potential health impacts of using EOBRs and improving HOS compliance. It said FMCSA’s concern about the stress on drivers from using EOBRs distorted the research results of several studies. Furthermore, Advocates held, by not proposing to mandate EOBR use, the Agency was not helping “to ameliorate the adverse health impacts of exceptionally long working and driving hours triggered by the Agency’s final rules in 2003 and in 2005.”

Response: We understand the concerns of ATA and J.B. Hunt, among others, who believe the proposal did not cover enough carriers. While FMCSA acknowledges the safety concerns of those that support an industry-wide EOBR mandate, the Agency cannot extend the EOBR mandate in that manner in this final rule because the scope of the current rulemaking proceeding is limited to a compliance-based regulatory approach, implemented through a remedial directive. However, the number of motor carriers that will be required to install, use and maintain EOBRs is significantly greater under this final rule—using the 1 x 10 trigger—than under the 2 x 10 trigger that was proposed in the NPRM.

FMCSA recognizes that the potential safety risks associated with some motor carrier categories, including passenger carriers, hazardous materials transporters, and new entrants, are such that mandatory EOBR use for such populations might be appropriate. However, as noted above, in today’s rule, we adopt a compliance-based trigger that focuses on all HOS-violating motor carriers across all sectors as proposed in the NPRM. In addition, as some commenters to the 2007 NPRM docket indicated, a regulation that promotes voluntary use of EOBRs, but that does not mandate it for the majority of carriers, will not persuade many carriers to adopt the devices, even though the devices may generate improvements in operational productivity. And, as other commenters noted, a more universal approach to EOBR use may create a more level playing field in the industry.

As stated earlier in this document, the Agency will initiate a new rulemaking to consider expanding the scope of mandatory EOBR use beyond the “1 x 10” carriers that will be subject to a remedial directive as a result of today’s rule.

FMCSA acknowledges that some foreign countries have an industry-wide mandate for HOS recording devices.

However, the Agency is not aware of any published information that demonstrates that the specific mandate imposed by those countries has contributed to any discernible benefits in safety. Still, the absence of published information by those governments should not preclude consideration of that regulatory option for the U.S. What is clear is certain motor carriers with threshold rates of serious HOS violations have much higher than average crash rates, and the mandatory use of EOBRs via a remedial directive for these high-risk carriers provides a means to compel such carriers to achieve compliance with the HOS rules.

In terms of the benefits to motor carriers arising from EOBR use, FMCSA agrees that the savings in collecting, reviewing, and storing paper-based information alone can make EOBRs (and AOBDRs) attractive to many motor carriers. Furthermore, advances in information technology (particularly Web-based applications) and wireless telecommunications are making HOS monitoring applications—either in stand-alone form or as part of fleet management systems—far less costly on a per-power-unit basis than they were in the past.

Until several years ago, many on-board recording systems suppliers did not serve the small-fleet market, which, according to FMCSA’s motor carrier census, makes up most of the population of motor carriers: approximately 90 percent of motor carriers operate fewer than 20 power units. The picture is vastly different today. It is not only more economical for motor carriers to use on-board recording and monitoring systems, but there are far more suppliers of these systems to choose from. Vendors anticipate that customers have a substantial demand that they can meet, and they are meeting that demand without an FMCSA mandate. The revised EOBR systems cost estimates discussed in the Rulemaking Analyses and Notices section of this document and the RIA reflect these advancements.

In response to Advocates’ comments on potential health impacts of EOBR use, the Agency has addressed both positive and negative health impacts in Appendix A of the EA for this rule, which has been placed in the docket. The Agency carefully reviewed research on the potentially negative impacts of electronic monitoring and concluded that use of EOBRs required in today’s final rule will not result in negative impacts on driver health for two reasons: First, because monitoring of HOS compliance is an existing, not a new, requirement; and second, because

the Agency is requiring EOBRs to monitor safety, not workplace productivity. The underlying HOS regulations are the subject of a separate rulemaking action. Cost and benefit estimates of the HOS regulations are included in the analysis for that separate rulemaking (72 FR 71247, December 17, 2007).

2 General Opposition to Mandated Use of EOBRs

One hundred thirty-six commenters, the majority of whom were drivers or individuals, generally opposed any mandated use of EOBRs. The SC&RA, TCA, IBT, AMSA, and a driver claimed that FMCSA had not demonstrated EOBR use would improve highway safety. SC&RA questioned FMCSA's estimates in the RIA, concerning relationships between improvements in HOS compliance and improvements in safety outcomes resulting from use of EOBRs.

Several commenters criticized the Agency for failing to produce any definitive studies demonstrating the safety benefits of EOBRs. Some of these commenters cited the University of Michigan Transportation Institute (UMTRI) or American Transportation Research Institute (ATRI) studies which concluded that safety benefits were difficult to assess due to lack of empirical data. SC&RA stated that a 2006 study by ATRI did not identify safety benefits. OOIDA likewise criticized the RIA for assuming EOBRs would improve compliance rather than demonstrating that improvement would, in fact, occur. It also quoted a 1998 UMTRI study concluding EOBRs would have little or no effect on safety.

Forty of the 136 commenters stated FMCSA failed to prove that using EOBRs reduced driver fatigue, prevented or reduced the severity of accidents, or lowered operational costs. IBT expressed concern that employers would use EOBR data to pressure drivers to improve their operational productivity by driving faster and making shorter stops.

Gantec Trucking stated FMCSA has not shown that strict compliance with HOS limits improves safety, considering that accidents in which the CMV driver is at fault and fatigue-related accidents make up a very small percentage of CMV-involved accidents. Gantec criticized FMCSA for citing a lack of evidence to support strengthening driver training regulations but not holding itself to the same standard for proposing EOBR use. Some drivers believe EOBRs could make drivers less safe because they believe the accuracy of an EOBR's record would force them

to continue driving when they would prefer to take a break: With paper Records of Duty Status (RODS), drivers can take breaks as needed but not necessarily record them. Others questioned how EOBRs could improve safety because they cannot automatically detect or record non-driving activity. IBT stated because drivers would still need to enter non-driving time, they would still falsify their electronic records, because it is to their benefit to do so.

Response: FMCSA disagrees with commenters that believe there are no circumstances under which the use of EOBRs should be mandated. The Agency believes the safety records of carriers found to have certain threshold rates of violations of the HOS rules are a strong indicator of the need to do more than issue civil penalties. The final rule requires such carriers to install, use and maintain EOBRs to better ensure their drivers comply with the applicable HOS requirements and provides a means for prohibiting these motor carriers from continuing to operate CMVs in interstate commerce if they fail to comply with the remedial directive. This action is a significant first step toward strengthening the enforcement of the HOS rules for carriers with threshold rates of noncompliance.

The use of electronic records allows deviations from safety and operational norms to be made more visible because they can be detected far more rapidly than with paper records. Also, the electronic records will enable motor carriers to develop safety or operational countermeasures to address these deviations more efficiently and effectively. However, the Agency does not accept the assertion that drivers would not take breaks from driving because those breaks would be recorded.

3 EOBR Remedial Directive

3.1. Applicability of the Remedial Directive

The Minnesota Trucking Association, AMSA, and one individual supported requiring EOBRs only for motor carriers with a demonstrated history of serious noncompliance with the HOS rules.

In contrast, J.B. Hunt and many other commenters stated the proposed threshold would not capture enough carriers to serve as a meaningful deterrent to noncompliance or to positively influence highway safety outcomes. ATA stated that the method described in the NPRM for determining whether a remedial directive should be issued is not likely to dissuade the bulk of the egregious or defiant HOS

offenders. ATA recommended focusing on at least the top 10 percent most egregious HOS violators. This population could be determined by use of valid compliance review data and, potentially, driver out-of-service rates for HOS violations from roadside inspection data. ATA further recommended, prior to taking remedial action, FMCSA provide motor carriers an adequate warning period to give them an opportunity to institute improved safety management controls. If improvement benchmarks were not adequately attained, then more severe enforcement action would be warranted.

OIDA stated the proposed rule would punish only those carriers that keep accurate records of their noncompliance and would not punish the worst offenders who do not comply and who disguise their violations.

Numerous commenters including Maverick and Werner stated the requirement should apply to the driver rather than to the carrier. Such commenters argued that if most of a carrier's drivers are not in violation, mandating an EOBR for the carrier penalizes compliant drivers, which increases the cost. Also, if the remedial directive is applied to a carrier, the non-compliant drivers will simply go to another carrier to avoid using the EOBR, which effectively nullifies the potential benefits from mandating EOBR use.

Werner stated carriers are limited to taking after-the-fact compliance and enforcement actions against their drivers. The carrier should not be penalized for the actions of non-compliant drivers whom it no longer employs if the carrier has made an effort to deal with the drivers' HOS issues during their employment. ATA stated a record of HOS noncompliance should follow the driver and should only be considered in assessing the compliance status of the motor carrier where the driver is currently employed. ATA argued, "Penalties for EOBR violations should be proportional for all responsible parties, with special attention for tampering with the devices and the data."

The National Propane Gas Association (NPGA) asserted motor carriers transporting placardable quantities of hazardous materials, taken as a whole, do not represent a risk greater than non-hazmat carriers and should not be required to use EOBRs. Conversely, Advocates believes the inherently higher safety and security risks posed by hazardous materials transportation and the special safety concerns related to passenger motorcoach transportation, justify mandatory EOBR use for both categories of motor carriers.

OOIDA and three individuals objected to the trigger for imposition of a remedial directive because they believe the directives would disproportionately affect smaller companies. The individuals noted a company with very few trucks could be required to install EOBRs if only one driver is put out-of-service, while a large company could have many such drivers and not be targeted. Moreover, where a minority of drivers is out of compliance, the innocent majority of the carrier's drivers would be punished by a company-wide mandate. OOIDA asked if new entrant safety audits would be included in the compliance reviews (CRs) considered for the trigger; if so, it argued, small businesses would be severely affected because most new entrants are small operations. J.B. Hunt suggested FMCSA consider requiring new entrants to use EOBRs for a minimum period.

NTSB stated encouraging carriers to view EOBRs as a means of punishment would undermine the goal of industry-wide acceptance; such broad acceptance would result in greater safety for all motorists. Boyle Transportation agreed the punitive nature of the remedy would be a disincentive for carriers to install them.

Some commenters focused on the perceived underlying problem—the need for stronger HOS enforcement. According to Public Citizen, the onus is still on the Agency to commit to improving enforcement of HOS compliance. Advocates stated the rule would not address the pervasive nature of HOS violations. It stated RoadCheck 2006 found there was an upward trend in the number of HOS violations even though the new HOS rules adopted in 2003 allowed drivers to work longer hours. CVSA agreed that a more effective option for dealing with the habitual HOS offenders is stronger enforcement. They also noted HOS noncompliance is indicative of a systemic management problem within the carrier's operation, and the mere installation of EOBRs will not correct this problem. Finally, CVSA noted that government resources needed to monitor carriers subject to mandatory EOBR use will be substantial, and the benefits will not outweigh the costs.

Response: In its September 2004 ANPRM (69 FR 53386), the Agency requested commenters to address the scope of the EOBR requirement. Specifically, the Agency requested comment on whether it should: "Propose requiring that motor carriers in general, or only certain types of motor carrier operations, use EOBRs." 69 FR 53395. The Agency received numerous comments on this issue. In the 2007

NPRM the Agency noted it had the legal authority to adopt an industry-wide standard that all motor carriers subject to the HOS requirements use EOBRs. The Agency announced it would not exercise "the full extent of its authority at this time, however, and [would] instead propose a more targeted approach of mandating EOBR use for only those carriers with deficient safety management controls, as demonstrated by repeated patterns of hours-of-service violations." 72 FR 2341. The final rule, similarly, does not require all carriers to install and use EOBRs, but, consistent with the NPRM, targets only those carriers with substantial HOS noncompliance and associated deficient safety management controls. This final rule makes one significant change to the remedial directive provisions in the proposed rule, concerning the HOS noncompliance threshold triggering a remedial directive for a motor carrier. The NPRM proposed a so-called "2 x 10" approach as the "trigger" for a remedial directive. That approach would have required a final determination of one or more "pattern violations" of any regulation in proposed new Appendix C to part 385 ("Appendix C regulations") during a CR, followed by the discovery of one or more pattern violations of any Appendix C regulation during a CR completed within 2 years after the closing date of the CR that produced the first determination. We explained in the NPRM that a pattern violation would be "a violation rate equal to or greater than 10 percent of the number of records reviewed. For example, 25 violations out of 100 records reviewed would be a 25 percent violation rate and therefore a pattern violation. This trigger, if adopted, would result in the issuance of approximately 465 remedial directives to install EOBRs annually." 72 FR 2364. The Agency justified mandating EOBRs on this subpopulation of carriers, given that these carriers' "severe" HOS compliance deficiencies "pose a disproportionate risk to public safety." *Id.*

After reconsidering the alternatives discussed in the NPRM (72 FR 2374) including the proposed "2 x 10" remedial directives trigger, and based on comments received, the Agency adopts the considerably more stringent "1 x 10" requirement. As discussed in more detail below, we agree with the numerous commenters, including government agencies, carriers, industry associations, and safety groups, that the proposed 2 x 10 trigger would not mandate EOBR use by enough carriers, given the total population. Under the requirement adopted today, carriers

with a 10 percent violation rate of any HOS Appendix C regulations in any *single* CR will be subject to a remedial directive. Approximately 5,419 carriers and 104,428 power units on average will be subject to this directive per year. This represents a substantial increase in the number of remediated carriers compared to the 2 x 10 proposal, as further explained in the RIA and section 8, below. The crash rate for such carriers is more than double the industry average, (although the crash rate is slightly lower for the entire 1 x 10 group than it was for the 2 x 10 group because of the larger pool of carriers subject to the remedial directive). However, FMCSA anticipates the 1 x 10 approach finalized today will result in greatly increased HOS compliance, and therefore safety, in a cost-effective manner.

The Agency is revising the new 49 CFR 385.803 definitions and acronyms section and other affected rule text to replace the term "pattern" violation with the term "threshold rate" violation. Concern was raised that use of the term "pattern violation" in the final rule might lead to confusion with other "patterns" of violations in the FMCSRs and the Agency's enforcement structure. In addition, the Agency believes the term "pattern" is more aptly applied to the proposed 2 x 10 trigger, which required a finding of serious HOS violations in multiple CRs. Under the final rule, the finding of a 10 percent violation rate for an Appendix C regulation in a single CR will serve as the trigger for issuance of a remedial directive.

Two factors that were not operative in the NPRM analysis influenced the final rule. First, section 4114 of SAFETEA-LU was codified in the FMCSRs on July 5, 2007, approximately 6 months after the EOBR NPRM was published (72 FR 36762 (preamble) and 36788 (regulatory text) amending 49 CFR 385.7(c), (d), (f), and (g)). Prior to the enactment of section 4114, although motor carriers were required under 49 CFR 390.15 to record intrastate accidents on their accident registers, FMCSA did not take intrastate accidents or safety violations into account when determining motor carriers' safety ratings. Under section 4114, FMCSA must now utilize interstate motor carriers' accident and safety inspection data from intrastate operations (and from operations in Mexico or Canada if the carrier also has U.S. operations) in determining carriers' safety fitness under 49 U.S.C. 31144. This includes safety inspection data on HOS violations while operating in intrastate commerce. As a result of this larger universe of violations under

consideration in the safety fitness determination process, the number of carriers subject to the 1 x 10 remedial directive is now slightly higher than it would have been prior to enactment of section 4114.

Second, after issuance of the NPRM, DOT made an important change to its evaluation of safety benefits for all safety rules. This policy has caused the Agency to revisit the cost benefit analyses for all rules being developed, including the EOBR rule. Specifically, on February 5, 2008, DOT issued a memorandum to its modal agencies instructing them to estimate the economic value of preventing a human fatality at \$5.8 million. See "Economic Value of a Statistical Life in Departmental Analyses" (available at <http://ostpxweb.dot.gov/policy/reports/080205.htm>). FMCSA also published a notice in the **Federal Register** describing this policy change (73 FR 35194, June 20, 2008). The previous value of a statistical life (VSL), which was used in the RIA for the EOBR NPRM, was \$3.0 million. Given that the VSL nearly doubled, the net benefits of this rule, as well as those of other FMCSA rules under development, were recalculated using the new figures. This recalculation resulted in a reappraisal of all appropriate alternatives by the Agency, taking into account Agency analyses concerning safety impacts, enforcement resources, and data and comments received.

We fundamentally disagree with OOIDA's comment that this rule mandates EOBRs merely for those carriers who keep records. In addition to other HOS violations, failure to maintain and preserve records of duty status in accordance with part 395 and falsification of records are among the 24 separate violations in new Appendix C that will trigger a remedial directive if violated at the threshold rate of 10 percent or greater. Other issues related to supporting documents are discussed under the heading "Incentives," section 7, below. Also, the revised trigger applies to the same carriers as proposed in the NPRM, namely those that fail to meet their part 395 compliance obligations. But we anticipate the final rule will result in the issuance of a significantly larger number of remedial directives because directives can be triggered after a single compliance review in which the motor carrier is found to meet or exceed the violation rate threshold, rather than after a second CR that would take place as much as 24 months after the initial set of threshold violations are found.

As previously mentioned, some carriers objected to having EOBRs

imposed based on the actions of HOS-noncompliant drivers who might no longer be employed at the motor carrier affected. FMCSA disagrees with this position. A key to addressing the issue of non-compliant drivers is for motor carriers to exercise proper management controls. These controls should include, for example, a process for conducting adequate background checks prior to employing a new driver and ensuring that new drivers are adequately trained. Likewise, if a carrier has adequate management controls over driving operations, HOS violations at a rate greater than 10 percent should not occur in the first place. To ensure consistent oversight, FMCSA and its State enforcement partners must conduct compliance reviews based on the drivers employed during the review period in question. Subsequent adjustments in a non-compliant driver's employment status or a motor carrier's pool of employees should not influence the remedial directive determination.

At this time, the Agency elects not to require EOBRs for all new entrants or hazardous material (hazmat) carriers because these regulatory options are beyond the compliance-based scope of the current rulemaking proceeding. The Agency acknowledges the concerns of commenters, and plans to consider these options in preparation for a new rulemaking examining the expansion the EOBR mandate.

The remedial directive element of this final rule treats hazmat carriers, along with passenger carriers, differently from other carriers, consistent with our authority to determine safety fitness of carriers under 49 U.S.C. 31144 (c)(2)-(3) and 49 CFR part 385. As discussed in our NPRM (72 FR 2376) and set forth in this final rule, passenger and hazmat carriers will have only 45 days to install EOBRs after receiving a remedial directive under § 385.807(b)(1). As with the current regulations under part 385, the shorter period reflects the relatively higher risk to the traveling public (passenger carriers) and to safety and security (hazmat) of these carriers' operations. Non-hazmat property carriers will have 60 days to comply under § 385.807(b)(2). Both provisions are adopted as proposed.

As to applicability of the rule to new entrant carriers, CRs are not normally conducted on new entrant carriers, which are subject to a safety audit within the 18-month duration of the new entrant program. However, enforcement personnel have the discretion to follow up on a poor safety audit by conducting a separate CR. Therefore, new entrants, like other carriers that must comply with part 395,

can be subject to a remedial directive under a scenario where the audit leads to a CR.

We disagree with the characterization of a remedial directive to install EOBRs company-wide as a "punishment" for the innocent drivers who had no violations. The directive is intended to correct a demonstrated deficiency in the motor carrier's safety management controls and is therefore remedial, not punitive, in nature. This rule does not revise or impose any new civil penalties, including penalties for HOS violations. Moreover, drivers required to use EOBRs will actually benefit from a technology that allows for automation of a manual task that would otherwise burden the driver. As noted elsewhere, this rule also does not "target" any specific industry sector or particular size of motor carrier operation; instead, it focuses on carriers with substantial HOS compliance issues.

We respectfully disagree that this final rule on EOBRs will have no impact on HOS enforcement, since the rule improves the means of detecting HOS violations within a problem motor carrier population and thus enhances HOS enforcement.

3.2 Trigger for Remedial Directive

J.B. Hunt stated that, although the idea of mandating the least compliant and least safe carriers to use an EOBR appears to be a logical approach, there are problems with this method. It relies on the premise that all of the "least compliant" carriers have undergone, or soon will undergo, a CR. They disagreed with this premise, noted many carriers are unrated, and asserted the NPRM approach assumes the Agency is uncovering the least safe carriers through its log book sampling. However, according to J.B. Hunt, the Agency is merely selecting from a group of drivers, not carriers, who have had past compliance problems.

NTSB objected to using CRs to trigger remedial directives because so few CRs are done relative to the number of carriers and because carriers may be rated Satisfactory despite long and consistent histories of violations. Advocates and Public Citizen also cited the limited number of CRs conducted each year, which they said meant that the "pattern of violations" cannot be meaningful. Siemens agreed with this position.

Advocates added that carriers are selected for CRs using data from SafeStat, which is deficient in several ways, as noted by the DOT Office of the Inspector General (OIG) and the Government Accountability Office (GAO). Advocates contend that relying

on CR data results in severe underestimation of HOS violations. Advocates cite OIG's 2006 conclusion that without the critical data, FMCSA cannot accurately identify the high-risk motor carriers for CRs and enforcement actions (see "Significant Improvements in Motor Carrier Safety Program Since 1999 Act But Loopholes For Repeat Violators Need Closing," FMCSA Report Number MH-2006-046, issued April 21, 2006). They also noted small carriers are not included in SafeStat, yet may be at high risk of safety violations. Advocates also assert that the 2 x 10 criterion further reduces the pool of potential carriers subject to mandatory use of EOBRs.

A safety consultant stated CRs are an inadequate basis for identifying non-compliant carriers. Most carriers are not rated. Safety inspectors miss violations because of the volume of CRs they need to conduct. He also objected to the distinction between intentional and non-intentional errors in logs. He noted "DOT's own HOS study in 2004" suggested as many as 70 percent of long-haul carriers may have utilized false logs; his experience as auditor indicates that the figure may be accurate.

J.B. Hunt argued the methodology for selecting drivers in a CR does not reflect the overall compliance of the carrier. Rather, it indicates noncompliance among the particular drivers selected (from a population previously identified as having problems): It does not ensure that the least safe and compliant companies are required to install EOBR units. The NPRM states, "The overall safety posture of the motor carrier is not being measured during the CR." J.B. Hunt is concerned this means the desired safety impact of EOBR installations will not be maximized.

Maryland SHA asked that roadside inspection data be used to augment data obtained through a CR. If a carrier fails a CR, a second CR should not be needed before the remedial directive is imposed. Advocates supported this position. An individual supported using inspection data, suggesting FMCSA should set a threshold ratio for HOS violations found during inspections as the trigger. One individual recommended applying the requirement to carriers that are over 75 percent on SafeStat. J.B. Hunt recommended targeting at least carriers in categories A and B in SafeStat or some other reasonable measure that would impact a larger population.

OOIDA also stated until FMCSA completes its revision of SafeStat and issues a supporting document final rule, it will be nearly impossible for OOIDA to comment on the impact. OOIDA

believes the public should have another chance to comment on the trigger when the new scoring system is in place. In OOIDA's view, the Initial Regulatory Flexibility Analysis (IRFA) must also be revised at that time.

Response: Consistent with our NPRM, the Agency will use CR results to determine whether to issue remedial directives to carriers, requiring them to utilize EOBRs. The CR, typically conducted at the carrier's place of business, focuses on carrier management control as a metric for determining carrier safety fitness under 49 U.S.C. 31144. 72 FR 2373. As stated in part 385, noncompliance with critical regulations, which include all 24 HOS violations in the new Appendix C to part 385, "are quantitatively linked to inadequate safety management controls and usually higher than average accident rates. FMCSA has used noncompliance with acute regulations and patterns of noncompliance with critical regulations since 1989 to determine motor carriers' adherence to the Safety fitness standard in § 385.5" Part 385, App. B II(e). The rationale for using HOS violations under new Appendix C is consistent with the current safety fitness determination process and logically related to current part 385.

FMCSA believes the CR is the best assessment method to determine which carriers should be required to install EOBRs, since, rather than focusing on single violations, FMCSA is looking for threshold rates of noncompliance. The new definition of *threshold rate violation* at § 385.803, applicable to remedial directives, is entirely consistent with our current rules governing safety fitness determinations in part 385. The current regulations also require "more than one violation" for a "pattern of noncompliance," and, where a number of documents are reviewed, a finding of violations in 10 percent or more documents reviewed. Part 385 App. B II(g). Obtaining this large sampling of records can be best accomplished during a CR at the carrier's place of business. Such an overview of carrier management and operational safety oversight is not possible during a roadside inspection, as the review is confined to a single CMV and its driver (or team of drivers), at a single point in time. Indeed, CRs are designed to provide a sweeping assessment of carrier operations and safety management controls, and the assessments conducted, based on the Safety Fitness Rating Methodology (SFRM), form the basis for carrier safety ratings. Given the serious nature of the remedial directive and its potential to

place a financial burden on the carrier, we believe such a directive should be issued only after a broad operational examination and extensive record review inherent to the CR process. 72 FR 2373.

A number of commenters criticized the use of CR results as the trigger for a remedial directive. Many contended the use of the CR was inappropriate because the SafeStat algorithm used as part of the process of selecting carriers for CRs does not reliably predict high-risk carriers. These commenters believe other data, such as that received from roadside inspections, should be more fully utilized to determine which carriers receive CRs at the outset. In fact, SafeStat does incorporate motor carriers' roadside inspection outcomes, accident involvement, CR results, and enforcement history.

We cannot agree with J.B. Hunt's assertion that our basic methodology for selecting carriers for CRs is flawed. The SafeStat program continues to be upgraded to address issues raised by the GAO and the OIG. According to OIG, "FMCSA has made improvements in the data relied upon in SafeStat." (See letter from Calvin L. Scovel III, Inspector General, Department of Transportation, to the Honorable Thomas E. Petri, U.S. House of Representatives, June 19, 2007. <http://www.oig.dot.gov/item.jsp?id=2072>.) Moreover, a 2007 report from GAO, while suggesting improvements, nonetheless noted that SafeStat does a better job of identifying motor carriers that pose high crash risks than does a random selection. (See "Motor Carrier Safety: A Statistical Approach Will Better Identify Commercial Carriers That Pose High Crash Risks Than Does the Current Federal Approach, U.S. Government Accountability Office," June 2007, <http://www.gao.gov/new.items/d07585.pdf>.) FMCSA likewise disagrees with the Advocates' comment that SafeStat does not include small motor carriers. To the contrary, SafeStat does not exclude carriers based on size, and the system currently reflects data on even 1- and 2-truck operators.

As noted in our NPRM, we considered and rejected using only roadside inspection data for the remedial directives trigger because roadside inspections fail to measure carrier operations as comprehensively as CRs. Nevertheless, we acknowledge that far more roadside inspections are conducted compared to CRs, and they are a key and voluminous source of HOS compliance data. We will continue to use this valuable roadside data indirectly in the remedial directives selection process to inform SafeStat

selection rankings (72 FR at 2373 n. 5). Some commenters urged the Agency to use the Driver Safety Evaluation Area (SEA) component of SafeStat, which is based on roadside data, for a remedial directives trigger. The Driver SEA, however, combines both HOS and non-HOS violations, rendering its current use infeasible for a remedial directives trigger based exclusively on HOS violations. The Agency is actively exploring additional ways to tap into the enormous wealth of roadside data through its Comprehensive Safety Analysis (CSA) 2010 initiative.² In summary, CR findings will be the only direct basis to trigger a remedial directive under today's final rule. However, the follow-on rulemaking, discussed earlier, will explore this and other methodologies for determining whether a motor carrier would be required to install and use EOBRs.

3.3 Implementation of Remedial Directives

Maryland State Police commented the remedial directives concept will work only if there are follow-up actions for failure to comply with a directive. Report on Board stated the remedial directive would have no impact on problem drivers because police would not know which carriers are required to use an EOBR.

Others described the challenges of measuring impacts. For instance, Boyle Transportation contended, any benefits gained could not be extrapolated to the population at large because only bad carriers would be included. Public Citizen declared the number of carriers affected by the EOBR requirement is too small a sample to make statistically significant statements about the effectiveness of the number of devices installed. Maryland SHA stated imposing the requirement should affect the carrier's safety fitness determination. They noted carriers' ratings are affected by crashes for which they are not at fault.

J.B. Hunt, AMSA, and two individuals supported the two-year period for which a remedial directive would be required. These commenters generally did not provide detailed rationales for their support; however, generally, they deemed the two-year period adequate to

enable carriers to come into compliance. AMSA also added that this period would allow for carriers to adopt management controls and corrective action. Advocates opposed the two-year period, since once the period expired carriers could remove the devices; consequently, carriers will view EOBR not as an asset, but as a punishment.

Maryland SHA and Advocates stated the 60-day period (with a possible 60-day extension) to require EOBR installation once a remedial directive has been issued is too long. Carriers could continue unsafe practices during this period. Werner and an individual commenter thought the 60-day period was too short. Werner stated for all but the smallest carriers, the 60-day period would be used to locate a vendor, negotiate contracts, obtain delivery, route all trucks to the terminal for installation, and train the drivers. Some of these factors are beyond the carrier's control. Flexibility is needed to give more than 60 days if the carrier is making a good faith effort to comply.

Response: In response to the Maryland State Police's assertion that follow-up action is needed to enforce remedial directives, proof of compliance will be required (e.g., receipts), and FMCSA will disseminate information to enforcement personnel nationwide identifying which carriers are required to use EOBRs. Carriers who do not comply with a remedial directive will be ordered out of service. We believe the prospect of such an order will ensure compliance for carriers subject to a remedial directive.

We appreciate that issuance of a remedial directive requiring installation of EOBRs for an entire fleet of CMVs within 60 days may place a serious burden on certain carriers. Consequently, we appreciate Werner's concern that some factors, such as picking a vendor, are sometimes beyond a carrier's control, and, therefore, flexibility is needed where a carrier is making a good faith effort to comply. We note that, as proposed, today's rule allows FMCSA to extend the period during which carriers subject to a remedial directive may operate without EOBRs for up to an additional 60 days where the Agency determines a carrier is making a good faith effort to comply with a remedial directive. As a result, while the Agency expects compliance within 60 days, some carriers may have up to 120 days, at the Agency's discretion. Passenger and hazmat carriers, however, are limited to a single, non-extendable 45-day period.

We disagree with ATA's suggestion to provide a warning opportunity to allow for compliance improvements prior to

issuing a remedial directive. Such improvements, in practice, are difficult to assess. For instance, would simply hiring a new safety officer be sufficient? Or would merely hiring a consultant for a short time period to conduct a "quick fix" assessment of the situation be adequate? And how quickly would improvement need to be initiated and implemented, and for how long would it need to be sustained? These questions illustrate some of the challenges to the Agency of verifying if such mitigation measures are adopted and, if so, measuring their effectiveness at addressing the underlying safety concerns. Discovery of HOS threshold rate violations indicates a carrier has serious management control issues which need to be addressed promptly and decisively. If the Agency has made an erroneous finding, that finding can be challenged under the administrative review process proposed in the NPRM and finalized today.

Because the 1 x 10 approach requires the finding of an HOS Appendix C threshold rate violation in only a single CR, the proposed notice of potential remedial directive applicability (NPRDA) is no longer necessary and thus is not included in this final rule. The administrative review procedures apply only upon issuance of a remedial directive. Otherwise, the administrative review process proposed in the NPRM is adopted without change in today's final rule.

If a motor carrier believes the Agency committed an error in issuing a notice of remedial directive and proposed unfitness determination, the carrier may request administrative review under § 385.817. Challenges to the notice of remedial directive and proposed unfitness determination should be brought within 15 days of the date of the notice of remedial directive. This timeframe will allow FMCSA to issue a written decision before the prohibitions in § 385.819 go into effect. The filing of a request for administrative review under § 385.817 within 15 days of the notice of remedial directive will stay the finality of the proposed unfitness determination until the Agency rules on the request. Failure to petition the Agency within the 15-day period may prevent FMCSA from ruling on the request before the prohibitions go into effect. The carrier may still file a request for administrative review within 90 days of the date of issuance of the notice of remedial directive and proposed unfitness determination, although if such request is not filed within the first 15 days, the Agency may not necessarily issue a final determination before the prohibitions go into effect. Challenges to

² The goal of CSA 2010 is to develop and implement more effective and efficient ways for FMCSA, its State partners and industry to reduce commercial motor vehicle crashes, fatalities, and injuries. CSA 2010 will help FMCSA and its State partners contact more carriers and drivers, use improved data to better identify high risk carriers and drivers and apply a wider range of interventions to correct high risk behavior. See <http://www.fmcsa.dot.gov/safety-security/csa2010/home.htm>.

issuance of the remedial directive and proposed unfitness determination are limited to findings of error relating to the CR immediately preceding the notice of remedial directive.

The final rule does not affect current procedures under § 385.15 for administrative review of proposed and final safety ratings issued in accordance with § 385.11. The Agency is adopting non-substantive revisions to § 385.15(a), however, solely to correct two typographical errors.

A motor carrier subject to a remedial directive will not be permitted to request a change to the remedial directive or proposed determination of unfitness based upon corrective actions. In contrast to § 385.17, under which the Agency considers corrective actions taken in reviewing a carrier's request for a safety rating change, the only "corrective action" the Agency will take into account in conditionally rescinding a proposed unfitness determination under subpart J will be the carrier's installation of § 395.16-compliant EOBRs and satisfaction of the other conditions of the remedial directive. The Agency takes this position due to the severity of the violations upon which the remedial directive is based, the need for certainty in remediation of the motor carrier's proven safety management deficiencies, the challenges of ongoing monitoring of corrective action, the likely added deterrent effect, and the Agency's desire to promote use of EOBRs in the motor carrier industry generally.

The Agency may, nevertheless, consider a carrier's installation and use of EOBRs as relevant information that could, under certain circumstances, contribute to an improvement of a carrier's safety rating under § 385.17(d). An upgraded safety rating based upon corrective action under § 385.17 will have no effect, however, on an otherwise applicable remedial directive or proposed unfitness determination. As noted above, a carrier may be found unfit based on either failing to meet the safety rating component of the safety fitness standard under §§ 385.5(a) and 385.9, or under § 385.5(b), by failing to install, use or maintain an EOBR, when subject to a remedial directive under § 385.807.

Appeal rights and administrative review, and the relationship between the modified fitness determination rule in § 385.5 and the existing SFRM in Appendix B to part 385, were discussed at length in the NPRM. See 72 FR 2376–2378. Except for the elimination of the notice of potential remedial directive applicability, caused by the shift from a 2 x 10 to 1 x 10 trigger, the

administrative review procedures in the final rule are unchanged from those in the proposed rule. The relationship between the safety fitness determination and the SFRM likewise is not modified by any changes made between the proposed and final rules.

The Agency adds a new paragraph (e) to § 385.13 to clarify that motor carriers receiving a final determination of unfit or a final unsatisfactory safety rating will receive notice that their motor carrier registration under 49 U.S.C. 13902 is being revoked.

4 Transition From an AOBRD to EOBR System

Several commenters, including a motor carrier and two system providers, addressed potential challenges for motor carriers currently using AOBRDs and other automated HOS monitoring systems. They were concerned with how the compliance dates would affect their use of current AOBRD systems and expressed concern that the proposed EOBR regulation would prevent transferring proprietary systems to new trucks manufactured after the proposed compliance date.

Commenters predicted the period of transitioning could adversely affect fleets' adoption of the new devices. For this reason, a provider suggested the phase-in period should be fleet-based rather than vehicle-based, and that "breaks" should be offered to early adopters of EOBRs.

Response: It is not the Agency's intention to make AOBRDs obsolete or to require compliant motor carriers to replace their current systems of maintaining RODS. Only motor carriers that are subject to a remedial directive will be required to install, use, and maintain EOBRs—and those EOBRs will need to comply with the new performance requirements. Any carrier that voluntarily installs an EOBR after the compliance date must use a device that meets FMCSA's new requirements. Therefore, the Agency does not consider it appropriate or practical to institute a "fleet based" compliance schedule for motor carriers that currently use AOBRDs and are not subject to a remedial directive. The Agency does not wish to penalize HOS-compliant motor carriers by setting an arbitrary phase-out date for AOBRDs.

FMCSA is aware of many current systems with capabilities and features that exceed those required for AOBRDs and likely meet most if not all of the new EOBR requirements. Additionally, AOBRDs and EOBRs record the same key information and use the same duty-status codes, so FMCSA does not believe drivers or motor carriers will

require a long transition period. In any event, FMCSA will monitor developments related to EOBR system availability associated with the implementation of this rule.

5 Privacy

Numerous commenters expressed concerns about non-HOS uses of the data being collected by EOBRs. Some commenters suggested the rule have more restrictions on access to and use of the data. Some of these commenters (primarily carriers or carrier associations) said the rule should prohibit law enforcement from using the data for any purposes other than enforcing HOS rules, such as issuing speeding tickets. They also said agencies not involved in enforcing HOS should be denied access to EOBR data unless they obtain the consent of the carrier or driver. Werner Enterprises said the rule should clarify how long law enforcement agencies may retain EOBR data and whether the agencies may disclose the data to other parties. ATA, the Canadian Trucking Alliance, and AMSA suggested carriers are unlikely to voluntarily adopt EOBRs unless there are restrictions on the use of data for purposes other than enforcing HOS rules. ATA recommended statutory protections be provided to carriers pertaining to the control, ownership, and admissibility/discoverability of data generated and derived from EOBRs, and to assure the privacy rights of drivers.

Some commenters expressed concern competitors would gain access to data recorded by EOBRs. One of them was also concerned shippers or receivers would start demanding real-time monitoring of shipments as part of any contract. Another commenter was concerned employers would use the data recorded by EOBRs to push drivers to drive when it may not be safe to do so.

Some parties raised the concern that data recorded by an EOBR could be used in post-accident litigation. One commenter favored using EOBR data to investigate accidents involving tractor-trailers, including vehicle speed, braking, and steering for the last 30–60 seconds of vehicle travel. The Maryland SHA said only the following entities should have access to EOBR data for investigating tractor-trailer accidents: The Secretary of the U.S. Department of Transportation, FMCSA, the enforcement agency that investigates the crash, the carrier, and the driver or the driver's personal representative.

Several commenters contended EOBRs would violate the privacy of drivers. Some of these commenters said

the proposed EOBR requirement would be unconstitutional in that use of EOBRs would violate the Fourth Amendment's prohibition against searches absent a warrant or probable cause. Company drivers employed by carriers with high HOS violation rates would find themselves subject to EOBR monitoring because of the actions of others, which would not satisfy a requirement of probable cause.

OOIDA provided extensive comments asserting that required use of EOBRs would constitute an unconstitutional invasion of privacy as drivers have a legitimate expectation of privacy when they sleep, eat, and conduct personal business in their truck while not driving. OOIDA said despite FMCSA's assurances to the contrary, EOBRs would capture, store, and make available a variety of personal and proprietary information on drivers and carriers (*e.g.*, routes, customer locations, *etc.*) not captured or not accessible through paper logs. The proposed rule would require EOBRs to capture the location and time of a truck in motion every minute. This information would be electronically transferable and capable of being stored for later retrieval. Because a driver can operate a truck for personal conveyance, the EOBR would record where the driver spends his private time. OOIDA asserted the contemplated use of EOBRs fails to meet the legal requirements for a warrantless search. Such constant electronic surveillance would amount to a search of the driver as defined by the Fourth Amendment. Therefore, the use of EOBRs implicates core privacy interests, including the right to privacy in personal information and in associations. OOIDA further asserted it is impossible to understand the full impact of the proposed EOBR rule on privacy without knowing more about the pending rulemaking on HOS supporting documents.

OOIDA said the data captured by EOBRs is at far greater risk for dissemination and misuse than data recorded by log books. It said any data created by an EOBR that are collected by the government for investigation or enforcement or any other reason would be subject to requests under the Freedom of Information Act (FOIA) and could be available by request to anyone, including the general public. OOIDA said the U.S. Department of Transportation's Research and Innovative Technology Administration (RITA) Volpe Center's report ("Recommendations Regarding the Use of Electronic On-Board Recorders (EOBRs) for Reporting Hours of Service," September 26, 2005, available

at <http://www.regulations.gov>, ID FMCSA-2004-18940-0351) agreed with this conclusion. A commenter said because data collected by Federal agencies are subject to FOIA, carriers should not have to report GPS location data. ATA asked FMCSA to work with the trucking industry to seek enactment of Federal statutory protections of EOBR data. ATA said Federal law should support and clarify that motor carriers are the owners of the data recorded by EOBRs and thus they should have exclusive control over the data.

Response: This final rule does not change the Agency's treatment of HOS records concerning access, use and retention. FMCSA's predecessor agencies have had the authority to review drivers' and motor carriers' documents since 1937, when the first HOS regulations were promulgated (3 MCC 665, Dec. 29, 1937; 3 FR 7, Jan. 4, 1938). From the Motor Carrier Act of 1935 onward, Congress has recognized the Federal Government's interest in providing a higher level of safety oversight to CMV drivers. CMV driver licensing, driver's physical qualifications, training, and performance of driving and other safety sensitive duties are subject to Federal regulation. The Federal Government also requires records to document the results of various types of assessments (such as assessment of physical qualifications and controlled substances and alcohol testing) and compliance with regulations concerning CMV operations (such as RODS to document HOS).

The HOS information recorded on EOBRs will be examined by Federal and State enforcement personnel when they conduct compliance reviews or roadside inspections. Motor carriers will not be required to upload this HOS information into Federal or State information system accessible to the public. Furthermore, enforcement agencies will request and retain copies of HOS information to document violations and will not disclose private personal or proprietary information.

The final rule maintains current uses of HOS data to determine compliance with the HOS regulations. While we recognize the important privacy concerns raised by carriers and drivers, we believe this final rule carefully fulfills the Agency's need for accurate compliance data without creating any undue intrusion upon a CMV driver's privacy. The only information FMCSA is requiring EOBRs to collect is that information necessary to determine driver and motor carrier compliance with the HOS regulations.

Consequently, FMCSA did not propose

in the NPRM, nor will it require in the final rule, that EOBRs record data on vehicle speed, braking action, steering function, or other vehicle performance parameters necessary for accident reconstruction. Regarding the concern over potential use of EOBR data in post-crash litigation, this rule does not affect the rights of private litigants to seek discovery. Similarly, existing provisions governing FMCSA disclosure of motor carrier and driver information under FOIA are not affected by this rulemaking.

The Agency understands some drivers view their off-duty time and related information pertaining to their CMV's location as being sensitive information. Although the Agency does not find a legitimate expectation of privacy in the public location of a commercial motor vehicle, it will require automatic recording of CMV location information only to the level of precision (State, county, and Populated Place) shown in the Geographic Names Information System (GNIS) maintained by the United States Geological Survey. FMCSA is also declining to require locational tracking more frequently than once every 60 minutes while the truck is in motion. The main reason enforcement personnel would need to determine a history of a CMV's location would be to verify the driver's HOS compliance. This can normally be accomplished by reference to the name of the nearest city, town, or village, without the precise geographic coordinates necessary to identify, for example, a particular restaurant where a driver stopped for a meal. This is the requirement today with AOBDRs, and it also will be required under new § 395.16(f)(4). Except in the context of an investigation of a crash or a complaint of alleged FMCSR violations (when the Agency might inquire into off-duty time to learn if a driver was working for another motor carrier or performing other work during an alleged off-duty period), FMCSA generally does not inquire into a driver's off-duty activities. The Agency's interest in records of duty status that identify the date, time, and location at each change of duty status is based on its need to reconstruct the sequence of events for trips to determine compliance with the HOS regulations, including whether the driver was provided an off-duty period that could be used to obtain restorative sleep. If during this enforcement process FMCSA found evidence of vehicle activity during a claimed off-duty period, we would inquire further to establish the veracity of the RODS.

Briefly described are new provisions previously proposed in the January 2007

NPRM regarding default status for EOBRs and audit trails. FMCSA will require the “default” status for an EOBR be on-duty not driving (ODND) when the vehicle is stationary (not moving and the engine is off) for 5 minutes or more. When the CMV is stationary and the driver is in a duty status other than the ODND default setting, the driver would need to enter the duty status manually on the EOBR. The performance requirements of § 395.16 add a provision for automatically recording the location of the CMV. The Agency believes this requirement strikes an appropriate balance between improving the accuracy and reliability of ODND status information and off-duty information without intruding unnecessarily upon the privacy of the driver. Drivers would still be required to record the location of each change of duty status, as currently required under §§ 395.8 and 395.15. Finally, as stated in the NPRM (72 FR 2352), the Agency recognizes the need for a verifiable EOBR audit trail—a detailed set of records to verify time and physical location data for a particular CMV—must be counterbalanced by privacy considerations. *See also* the discussion on FMCSA’s Privacy Impact Assessment under preamble section V. Rulemaking Analyses and Notices.

We disagree with two assertions made by OOIDA based on the premise that “any EOBR data collected by the Federal Government is subject to FOIA and may be available to any entity or the general public.” OOIDA’s statement is an overly simplistic interpretation of our responsibilities under FOIA and DOT regulations. *See* 49 CFR part 7. The Volpe Center statement relied upon by OOIDA is not the official legal opinion of FMCSA. The Agency rejects OOIDA’s interpretation based on the two scenarios raised.

First, FMCSA rejects the OOIDA argument that EOBRs will allow a competitor to obtain access to information that would be deemed proprietary, such as carrier routes. If the information was indeed proprietary, the information would be exempt from FOIA disclosure under 5 U.S.C. 552(b)(4). Given that the Agency is only requiring EOBRs to collect locational data at each change of duty status and at intervals of no greater than 60 minutes while the CMV is in motion, and given that the locational data need only identify the nearest city, town, or village, the information gathered is not likely to be precise enough to allow routes or customers to be determined. It is also likely that competitors could, to some extent, discern motor carriers’ routes by other means. No commenter

has provided information demonstrating competitive harm—a showing mandated by FOIA—would occur from disclosure of EOBR data as proposed in the NPRM. In the absence of such a showing, the Agency has determined today’s final rule, in conjunction with existing legal authorities, properly balances the need to safeguard proprietary information against the need to enforce safety statutes and regulations.

Second, OOIDA alleges that FOIA could be used to obtain personal information, including truck location. As a preliminary matter, the Agency does not agree that the location of a CMV in a public place qualifies as “personal information.” Moreover, with respect to genuinely personal identifying information, FOIA’s exception for personnel, medical and similar information at 5 U.S.C. 552(b)(6) severely restricts the Agency from disclosing such information. In response to past FOIA requests for driver RODS from a carrier, the Agency has redacted all information that would reveal the identity of an individual driver. The Agency need not, and will not, disclose the name of a driver when the sec. 552(b)(6) exemption allows the Agency to disclose the HOS records in a redacted form. The Agency has also denied FOIA requests seeking individual driving records in the Agency’s possession. OOIDA’s characterization does not accurately reflect applicable judicial standards for the disclosure or withholding of private personal information.

We also disagree with OOIDA’s claim that required use of EOBRs amounts to an illegal search under the Fourth Amendment. It is well-established that the collection and inspection of documents and information pursuant to regulatory guidelines do not violate the Fourth Amendment. The data that compliant EOBRs will gather are comparable in most respects to the data already required on RODS. Further, there is no reasonable expectation of privacy in the location of a CMV, which can be monitored by the naked eye. The installation and use of the EOBR will also be known to the driver, and thus any expectation of privacy that might exist in the location of the CMV is significantly diminished.

6 Performance-Oriented Standards for EOBR Technology

6.1 Use of Detailed Design Specifications

A number of commenters disagreed with FMCSA’s approach of using performance oriented standards in the NPRM, and advocated using detailed

design specifications instead. Three asked for prescriptive guidance on how EOBRs must record HOS for drivers who work for multiple carriers or who drive multiple CMVs. CMV manufacturer ITEC stressed the need for interoperability between EOBRs and the equipment used by law enforcement officials, including both hardware connections and software compatibility. Siemens criticized the proposed performance-based approach, advocating instead a “single technical solution” to account for HOS for drivers who operate more than one CMV during any given day. Siemens believes, based upon its experience with international requirements for HOS monitoring, that an EOBR system’s technical concept should be “tailored for the specific needs and goals of the region in which they are being considered.”

Several other commenters, including XATA, SC&RA, and ATA expressed concerns with FMCSA’s approach. They seek specific, uniform, and consistent EOBR requirements related to EOBR utility, reliability, tamper-resistance, accuracy, durability, and effectiveness. Because electronic equipment technologies and industry consensus standards and recommended practices evolve over time, they questioned whether FMCSA’s regulation would provide sufficiently clear direction to suppliers and users of EOBR systems. ATA asserted motor carriers would not adopt EOBRs until their “compliance” was assured. Until that point, ATA believed motor carriers would not be able to accurately assess potential benefits and costs of EOBRs, and the potential for improving EOBR technology would be constrained. ATA recommended FMCSA publish an SNRPM to revise its proposed performance specifications.

Siemens and PeopleNet expressed concern about a need for design specifications to promote implementation of EOBR data integrity requirements. Siemens focused on EOBR data integrity through operational and legal chains of custody. Although it did not elaborate on its reasoning, Siemens contended neither AOBDRs nor the proposed EOBRs would protect data from falsification and called on FMCSA to standardize file formats, download protocols, and user interfaces. Siemens also recommended FMCSA reference a “defined” [published] security standard such as the *Common Criteria* to define the level of tamper resistance.

Response: As the commenters point out, information technology standards evolve over time; performance standards allow EOBR suppliers to implement

solutions that will improve users' ability to enter, review, and use data efficiently and effectively without constraining innovation or improvements.

Responding to comments concerning prescriptive requirements to ensure data integrity during transfers, Appendix A to part 395 addresses requirements for hardware, software, and communications related to transfer of data from an EOBR to a safety official's portable computer. As will be discussed later in this section, FMCSA has substantially revised these requirements in response to the comments on the NPRM.

Responding to Siemens' comments about the necessity for a "single technical solution" for all EOBR applications, FMCSA disagrees. A full set of design specifications for hardware, software, and communications methods would impose unnecessary restrictions on the design of EOBRs and support systems, limit the ability to adopt emerging technologies, and constrain motor carriers with different operational characteristics from implementing EOBR applications. However, the data element dictionary will serve as a guide to developers of EOBR and support systems to foster the use of compatible data structures for the benefit of both motor carriers and safety oversight agencies.

Responding to comments concerning cross-referencing European Union (EU) standards, FMCSA notes that the EU Council regulation No. 2135/98 requires a "driver card" for recording and transferring HOS data. It does not include provisions for wireless data transfer. In contrast, many North American suppliers of AOBDR systems currently provide wireless data transfer capabilities between a CMV and the motor carrier's information management systems via satellite or cellular transmission. FMCSA does not agree that data transfer methods requiring the use of physically removable media should be mandated, because wireless data transfer (1) provides motor carriers considerably more flexibility to implement HOS and other motor carrier operational oversight systems, and (2) does not have an adverse effect on the quality and integrity of the HOS data.

With respect to data integrity, although FMCSA is not requiring specific information technology structures, the Agency expects motor carriers and their EOBR system providers to use appropriate methods and procedures in the development, testing, and operation of HOS information systems to ensure data and information integrity. However, after

reviewing the "Common Criteria" cited by Siemens, "Common Criteria for Information Technology Security Evaluation," the Agency understands that these requirements were developed primarily for use with national security and defense communities and would go far beyond what is necessary for monitoring HOS compliance.

6.2 Information and Display Requirements

6.2.1 Information Content Requirements

Several commenters objected to the proposed requirement for EOBRs to record information currently required by the HOS regulations, including shipping information, motor carrier name and USDOT Number, and a time and location entry at each change of duty status. One supplier contended an EOBR would need a "full keyboard" to enter this information. Seven commenters objected to the proposed requirement to include State line crossing information, questioning its relevance to HOS compliance assurance.

Werner asked for clarification of the "24-hour start time," because it believes the 24-hour period of the underlying HOS regulation is affected by the "split break" and would vary. Although it noted the ATA Technology and Maintenance Council's (TMC) Technical Policy Advisory (TPA) (collectively, TMC TPA) recommended the use of the four codes (*i.e.*, OFF, SB, D, and ON), Werner asked for flexibility to allow use of other duty status codes. Conversely, Siemens held the four codes should be unique to avoid inconsistencies. ITEC asked if there was a potential inconsistency between the diagnostic event codes and the code words in Table 3, EOBR Diagnostic Event Codes.

ITEC and a motor carrier asked for flexibility in coding of latitude and longitude values to allow software users to operate outside of North America. Werner stated its system calculates the name of the nearest city or town from latitude/longitude coordinates.

Response: As noted earlier, this rulemaking updates and revises the requirements for use of technological methods to record HOS. It does not change the underlying HOS regulations. With the exception of the requirement to record CMV location hourly while the CMV is in motion, it does not change the basic requirements for documenting HOS-related information (such as motor carrier identification).

FMCSA disagrees that an EOBR would need a "full"—presumably a full-sized—keyboard. Some of the earliest AOBDRs did not have full keyboards,

leading to the requirement in § 395.15(d)(2) for a listing of location codes. Many contemporary devices have full keyboards (although the dimensions are considerably smaller than those used with desktop computers). Others use partial keypads or touch-sensitive screens. Information such as the carrier name, USDOT Number, and shipping document references can also be entered automatically through centralized or administrative applications. These entries continue to be necessary to identify the motor carrier, CMV, and other information related to the transportation. EOBRs must accommodate recordkeeping for drivers who operate multiple CMVs, as AOBDRs are required to do.

FMCSA agrees that display of State line crossing information is not necessary for HOS compliance assurance purposes and has removed the requirement from the rule. Collection of State line crossing information for fuel tax reporting purposes will continue to be optional, as in the current AOBDR rule.

Responding to Werner's question about the start time for a 24-hour period, this regulation has not changed. Both §§ 395.8(d) and 395.15(c)(10) of the current rules allow the motor carrier to select the 24-hour period starting time.

Responding to comments on duty status coding, the identifiers will remain "driving" or "D," "on-duty, not driving" or "ON," "off-duty" or "OFF," and "sleeper berth" or "SB." This maintains consistency with current regulation and for the transition from AOBDRs to EOBRs. Also, a driver could enter explanations concerning duty status activities (such as a period of ON time spent loading a trailer or performing maintenance on a power unit) in the Remarks section.

In response to ITEC's question about event codes, the labels for the event codes are 6 characters, but the codes themselves would be 2 characters (bytes) in length.

In response to the questions about latitude and longitude codes, the proposed rule was written with North American users in mind. FMCSA recognizes some CMVs may travel outside North America, and other nations might want to adapt the FMCSR requirement. In the interests of international harmonization, the final rule makes a nominal revision to the data dictionary to accommodate a field for east/west latitude ("E/W") and north/south longitude ("N/S"). EOBR and system suppliers may set these fields to default to "N" and "E" entries.

As to the use of an algorithm to identify the nearest city, town, or

village, Question 3 of the Regulatory Guidance to § 395.15 allows this. FMCSA intends to allow EOBR systems to use this method as well. The Regulatory Guidance is added as § 395.16 (f)(4). However, the Agency has not accepted and will not accept *only* latitude-longitude codes as location records because they do not provide a safety official with a way to quickly determine a geographic location on a standard map or road atlas. (See §§ 395.15(d) and 395.16(f)(2).) Although the provision for location codes in § 395.16(f)(5) is specific to the United States, EOBR and system suppliers may augment their location-tracking capabilities to include locations outside the United States.

6.2.2 Driver Acknowledgement of HOS Limits Alerts § 395.16(o)(4)

Qualcomm and the TMC TPA oppose the proposal to require a driver to acknowledge warnings of HOS limits. The TMC TPA recommends the EOBR include configurable alert capabilities so a driver could receive several alerts before reaching the regulatory limits of HOS. Qualcomm stated it was unclear what would be required if the driver failed to acknowledge warnings. Werner was concerned about a conflict between the reporting time for position histories and the ability to record a 30-minute warning. In contrast, Maryland SHA stated the warning should be recorded in the EOBR and made part of the driver's record.

Response: The proposed "response" provision would have required the driver to interact with the EOBR while the CMV is in motion, and it is not part of the final rule. FMCSA does not believe it is appropriate to require the driver to interact with the EOBR while the vehicle is in motion. However, the requirement for the minimum, 30-minute alert remains in the final rule.

6.3 Duty Status Category When Vehicle Is Not Moving (§ 395.16(d))

6.3.1 EOBR Must Default to On-Duty/Not-Driving When Vehicle Is Stationary for 15 Minutes or More

Werner and the Maryland State Police agreed with the proposed 15-minute default to on-duty/not-driving (ODND). In contrast, Qualcomm and Siemens asserted the 15-minute period was too long and that the determination of driving/non-driving time should be more flexible and should also reflect motor carriers' operational practices in recording driving time. Siemens recommended switching to ODND whenever a CMV stops, contending that the interpretation of stops should be

part of the compliance software, rather than the data record.

Commenters suggested two distance thresholds for an EOBR to record a CMV in motion as "D." Werner suggested a 2-mile threshold, while Qualcomm and the TMC TPA recommended a 1-mile threshold. For changing a default status from D to ODND, Werner recommended if a vehicle moves less than 1 mile, a 5-minute stop would reset the movement threshold. The "driving stop" situation should alert the driver of duty status change and allow the driver to override the default. For example, the duty status would remain D if the CMV were stopped in traffic or when the driver operated auxiliary vehicle functions while seated at the driving controls.

Response: FMCSA agrees that a 15-minute period is too long. Section 395.16(d) has been revised to require that an EOBR automatically record driving time, and the EOBR's entry must change to on-duty not driving when the CMV is stationary for 5 minutes or more. The driver must then enter the proper duty status. If the CMV is being used as a personal conveyance, the driver must affirmatively enter an annotation before the CMV begins to move.

FMCSA agrees with the TMC TPA's interpretation concerning the entry of the time of a duty status change: it must be done when the change takes place.

6.3.2 Recording and Confirmation of On-Duty Not Driving and Driving Status

Several commenters, including Werner, Qualcomm, ATA, the MTA, and the authors of the TMC TPA asked FMCSA to clarify how to record duty status information when the CMV is in motion, but the driver is not in a "driving" status. These situations include a maintenance technician repositioning a CMV in a motor carrier's yard and a driver using a CMV as a personal conveyance. Commenters also cited the draft TMC TPA's treatment of situations where a driver fails to log on to the EOBR, prompting the driver and continuing to record driving time if the driver ignores the prompt, and allowing a driver to confirm previous driving time, and generating a system error if a driver ignores prompts.

Response: As is the case with AOBDRs, the driver would need to select and enter the proper duty status and make the appropriate entry in the "Remarks" section of the record. This rule does not change the way FMCSA defines ODND activities. In response to the questions concerning use of a CMV as a personal conveyance, FMCSA has revised §§ 395.16(d)(1) and 395.16(h)(3). If a CMV is being used as a personal

conveyance, the driver must affirmatively enter an annotation before the CMV begins to move.

6.3.3 Other Comments on Duty Status Defaults

IBT, OOIDA, TCA and 23 other commenters stated that the need for manual entry of non-driving status creates the same potential for violations of the HOS rules as the present system. For many drivers, ODND time may account for a substantial proportion of their work schedules. Because drivers may receive less pay for hours ODND than for driving time—or no pay at all—they have an economic incentive to under-report the number of those hours. OOIDA contends if drivers were compensated for this time most deficiencies in drivers' recording their ODND time would disappear.

Response: FMCSA is not aware of any devices currently available that would enable automatic recording of all categories of duty status, nor did any commenters suggest that such devices are available. Given concerns about personal privacy in general, we do not believe proposing the use of personal activity monitors for HOS compliance purposes would be appropriate. Despite the need to require the driver to manually enter some kinds of information, FMCSA believes the automatic recording of CMV location information will assist the Agency in investigating potential violations of part 395.

As to drivers' compensation for ODND time, driver compensation is not within FMCSA's jurisdiction.

6.4 Malfunction Alert System

Several commenters opposed the proposed requirement for an EOBR to provide an audible and visual signal when it ceases to function properly (§ 395.16(o)(6)). KonaWare, Qualcomm, TMC, Werner, and FedEx believe the requirement for a failure-alert system would add to the costs of an EOBR. Qualcomm expressed concern that driver alerts for minor interruptions in device operation, such as loss of mobile communications network coverage for very short periods of time should not be required while the CMV is being driven. Instead, Qualcomm believes they should be indicated only when the vehicle is stopped or if they affect required data capture, requiring the driver to enter remarks or amend a record.

The TMC TPA and Qualcomm recommended FMCSA allow the driver to fill in missing data for non-critical sensor failure. The data would be "annotated" as driver-added information, and a record of the sensor

failure would be included in the log data. ATA said more specificity was needed on driver reporting, carrier correction, and sensor failures.

Response: FMCSA continues to believe it is necessary to require the malfunction alert system required for EOBRs in § 395.16 remain essentially the same as that currently required for AOBDRs in § 395.15(i)(4). FMCSA agrees with the commenters that certain types of brief interruptions in operation should not be considered an “EOBR device failure.” In particular, the Agency acknowledges location information can be momentarily lost due to signal blockages, such as from bridges or geographic features. The Agency revises § 395.16(o) to clarify subsystem and sensor failure alert.

6.5 Synchronization of EOBR to Vehicle (§ 395.16(e) and (g))

Most commenters strongly disagreed with the proposal to allow EOBRs without integral synchronization with the vehicle. Vendor commenters XATA, Qualcomm, Tripmaster, Siemens, and PeopleNet, motor carriers Boyle Transportation, Fil-Mor Express, and J.B. Hunt, safety advocacy groups IIHS and Advocates, and CVSA and TMC provided extensive comments opposing the Agency’s proposal to allow the use of EOBRs that are not synchronized with the CMV. Various commenters addressed both the need for integral synchronization and the inability of GPS technologies to provide driving time and CMV travel-distance information with sufficient accuracy.

XATA commented that a duty status other than D is difficult to automate, so the D status must be as accurate as possible. A connection to the engine makes it possible to automatically enter the vehicle identification, so only the driver’s identification must be entered manually. XATA suggested entering both items of identification manually increases opportunities for falsification and difficulty of auditing.

Tripmaster was concerned non-synchronized EOBRs could not be designed to prevent tampering and manipulation. Tripmaster recommended synchronization include obtaining power from the vehicle, obtaining distance from vehicle-based sensors or networks, and ensuring the device could not be deactivated without visible signs of tampering. Tripmaster also believed FMCSA could generate more realistic performance standards for synchronized than for non-synchronized EOBRs. Tripmaster and the TMC TPA noted the inherent inaccuracies of GPS-based distance measurement (citing a University of Oregon study that found

GPS-based distance accuracy to range from 75 percent to 94 percent of actual distance traveled). Tripmaster added that non-synchronized devices could provide location data from the driver carrying the device on his/her person, well beyond what is required to verify the accuracy of the RODS and that auditing the electronic RODS records for non-synchronized EOBRs would be problematic, particularly if there would be no supporting documents to verify driving time.

IIHS and Advocates stated FMCSA failed to provide evidence the non-synchronized EOBRs can provide secure and accurate records, be made tamper-resistant, or ensure records will be related to a unique truck, driver, and carrier. Advocates was particularly concerned FMCSA’s proposed approach would eliminate the Agency’s ability to assess the design and operational integrity of EOBRs.

With respect to use of GPS technologies substituting for integral synchronization, Qualcomm, ITEC, and other commenters cited problems associated with losing the GPS signal. GPS technology suffers from “canyon effect” in urban areas, where tall buildings and tunnels can block the communications pathways to the GPS satellites, and even relying on GPS signals for distance traveled on a minute-by-minute basis may not achieve the accuracy FMCSA desired in the NPRM. Furthermore, the straight line point-to-point distances computed between recording intervals is less than actual travel distances over curved segments of highway. For this reason, Boyle Transportation favored a requirement for EOBRs to have GPS capability *and* to be synchronized to the engine, to improve both tamper-resistance and the ability to calibrate the device.

A number of commenters stated non-synchronized systems would be vulnerable to tampering and manipulation. Tripmaster, J.B. Hunt, and PeopleNet noted non-tethered devices can be turned on and off or removed from the vehicle and left behind, leading to falsification of travel distance and duty status information. J.B. Hunt, Tripmaster, PeopleNet and the TMC TPA noted physically blocking a GPS receiver’s antenna (such as by covering it with aluminum foil) was completely effective in blocking the signal, and the signal could be corrupted by a noisy radio frequency (RF) transmitter. Siemens added that unsynchronized EOBRs would be useless for enforcement if used by drivers willing to cheat because their data integrity would be no better than

with manual RODS. Additionally, safety officials would not have an enhanced tool to detect falsification; and, if EOBRs were to be mandated only in the context of a remedial action, this flaw would be magnified. Siemens added that there is no way to prevent interruption of signal availability (for example, in tunnels or when the driver turns it off purposefully).

Only a few commenters supported the proposal to allow non-integrally-synchronized EOBRs. Verigo described its PDA-based electronic logbook and questioned the justification for a more complex system. Xora supported non-integrally synchronized EOBRs on the basis of their lower costs and potential wider adoption. ATA stated it would support unsynchronized EOBRs only if: (1) Effective controls could be developed to prevent or minimize system weakness, especially deliberate blockage or loss of data; or (2) sufficiently severe penalties could deter these violations. CVSA believed untethered EOBRs might be possible in the future.

Response: After considering the comments on this issue, FMCSA decided to require EOBRs to be integrally synchronized with the CMV in which it is installed. This parallels the current requirement for AOBDRs in § 395.15. The definition of an “integrally synchronized” device in the final rule is as proposed in the January 2007 NPRM. The current definition of AOBDR in § 395.2 calls for the device to be “integrally synchronized with specific operations of the commercial motor vehicle in which it is installed.” It implicitly defines synchronization through a performance-based requirement: “At a minimum, the device must record engine use, road speed, miles driven, the date, and time of day.” The final rule is explicit in its definition: an integrally-synchronized AOBDR or EOBR must receive and record the engine use status for the purpose of deriving on-duty driving status from a source or sources internal to the CMV.

The NPRM based the proposed use of non-synchronized devices upon the assumed accuracy of those devices to measure the distance traveled by a CMV. After reviewing the comments that questioned those assumptions, FMCSA decided it would be prudent to conduct a limited field test of several of these devices. The Agency entered into an interagency agreement with the Volpe Center to perform this work. The results of this effort are documented in the report, “Evaluation of the Accuracy and Reliability of GPS-Based Methods for Measuring Vehicle Driving

Distance,” which has been placed in the docket for this rulemaking.

The study assessed the performance of commercial off-the-shelf GPS receivers using various types of antennas and antenna mount configurations and waypoint time intervals (that is, time intervals during the trips) of 10, 30, 60, and 120 seconds. The vehicles’ odometers were calibrated on a certified course and the GPS-derived measurements were compared to those corrected odometer readings. The accuracy for vehicle driving distance measurements made within this study ranged from 1.9 percent to 10.6 percent less than actual baseline driving distance. In light of this significant level of inaccuracy, FMCSA concluded that the integral synchronization requirement should remain.

6.6 Accuracy and Frequency of Data Recorded by EOBRs

6.6.1 Rounding

ATA and Werner stated the rule should not place a motor carrier that elects to use EOBRs at a disadvantage over those that do not. One specific issue was that of “rounding” information recorded on paper RODS to the nearest 15 minutes. ATA offered an example of a driver beginning to drive at 6:55 a.m. after a 10-hour off-duty period. If the driver used a paper RODS the time would be entered as “7:00 a.m.,” and the driver would be in compliance with the HOS regulations. However, if “6:55 a.m.” appeared on the RODS the driver would be in violation.

Response: In the situation these commenters describe, there is an inherent advantage for the use of handwritten RODS. The 15-minute grid on the RODS allows for flexibility in estimating start and stop times (*i.e.*, changes in duty status). Question 1 of the Regulatory Guidance for § 395.8 [available through <http://www.fmcsa.dot.gov>] states that short periods of time (less than 15 minutes) are to be noted in the Remarks section of the RODS. By contrast, a driver using an EOBR (or an AOBRD) could be cited for any time period over or under the prescribed requirements. However, FMCSA believes such small differences are not likely under most circumstances to warrant enforcement action, particularly when they are few and isolated.

6.6.2 Location Information, General

Two commenters addressed the precision of location information. KonaWare recommended a location precision only to the level of the nearest

city, with latitude-longitude data included in the detailed record to complement it. Qualcomm questioned the meaning of the phrase, “correspond to Census Bureau 2000 Gazetteer County Subdivision data,” and whether that referenced source is the most current.

FedEx stated the Census Bureau 2000 Gazetteer “County Subdivision” data did not correspond to actual city names that would make sense to a person viewing the location. FedEx held the requirements in § 395.15(d)(1) give a person enough information to determine the location of status changes (*i.e.*, city, town, or village, with State abbreviation).

Response: FMCSA proposed to include latitude and longitude in the Data Elements Dictionary. The Agency proposed “nearest populated place” per Federal Information Processing Standard Publication 55 (FIPS 55) because “city” has a specific meaning under some States’ laws: in some jurisdictions, there are many populated places in FIPS 55 that are not “cities.” In response to Qualcomm’s question, the County Subdivision information is contained in FIPS 55. The FIPS 55 data set has been integrated into the U.S. Geological Survey’s Geographic Names Information System (GNIS), and all references to that source in the final rule will reflect this change.

6.6.3 Frequency of Recording Location Information (§ 395.16(f))

Many commenters believed the proposed 1 minute update interval was excessive and unwarranted. PeopleNet, XATA, Boyle Transportation, FedEx, and several others were concerned the size of the resulting dataset would lead to significantly higher onboard data storage and data transfer costs. Qualcomm, ATA, and others indicated such a frequent recording interval should not be required when the CMV’s motion and mileage are determined through a synchronized, tamper-resistant interface with vehicle sensors.

The TMC TPA stated minute-by-minute location history should be required only for purposes of auditing GPS-based mileage accuracy of a non-synchronized EOBR. Also, XATA contended that the requirement for location recording frequency should take into consideration whether or not EOBR synchronization would be required.

ITEC recommended a recording interval of no less than every 5 minutes, citing reduced onboard storage, as well as data transmission and costs, both from CMV office and CMV roadside inspector’s computers. PeopleNet suggested a 5- or 15-minute interval

might be sufficient so long as accurate mileage information were recorded from the CMV’s electronic control module (ECM). FedEx recommended a 75-minute interval for sending data to the host (back office) and a 15-minute location record. CVSA supported the 1-minute interval and plus or minus 1 percent accuracy. DriverTech also supported the 1-minute interval.

Some commenters, including ATA, Tripmaster, and J.B. Hunt, recommended FMCSA retain the current requirement to record the CMV location only at each change of duty status. Werner cited its practice of receiving hourly updates of CMV position.

Response: FMCSA acknowledges the commenters’ concerns about the proposed 1-minute recording interval. The final rule requires location and time to be recorded at an interval of no greater than 60 minutes while the vehicle is in motion. The reason for selecting an appropriate location-recording interval is to ensure travel distance and the associated driving time are recorded and reported at a level of accuracy appropriate to ensure HOS compliance. Based on the information provided by commenters and the Agency’s decision to continue to require that on-board recorders be integrally synchronized, the Agency believes the new requirement achieves an appropriate balance between accuracy and affordability.

As discussed in the NPRM and in the preamble of this final rule, the Agency expects the addition of the requirement to automatically record location information will significantly improve the accuracy of driving time information.

6.6.4 Clock Drift

Qualcomm recommended several revisions to the proposed requirements, including a requirement for the clock drift tolerance for systems with or without mobile communications to not exceed 3 minutes at any time. These systems should be calibrated at least every 3 months. For systems *without* mobile communications, vehicle system clocks should be calibrated at least 3 times per year against an external trusted source. Motor carriers should maintain records of all clock recalibrations, including the degree of adjustment.

ATA stated the clock accuracy requirement should be realistic and the regulation needs to address how clock accuracy is managed. ATA cited the TMC TPA and its discussion of the Technology and Maintenance Council’s Recommended Practice 1219(T) (TMC

RP 1219(T)). TMC RP 1219(T) recommends that clock drift be checked periodically. EOBRs with mobile communications and/or GPS may recalibrate, or use calibrated network or GPS time, on a continuous basis. Clock resets and recalibration adjustments should be made only by a trained technician. Adjustments that exceed the allowable threshold should be entered into the EOBR's maintenance record.

Werner asserted a requirement for clock accuracy would provide no significant benefit to the system. Werner cited questions raised in the TMC TPA, particularly the proposed 2 second per day time drift. Siemens stated the clock requirement is achievable, but will require a periodic synchronization with a trusted time reference. Tripmaster recommended FMCSA consider a requirement for clock time drift of less than 1 minute per month and that it be checked every 3 months.

The TMC TPA also provided specific recommendations for recalibration of EOBR clocks: (1) Clock drift should not exceed 1 minute with calibration required at least every 3 months; (2) clocks determined to drift more than an average of 1 minute per month must be repaired or replaced; (3) EOBRs with mobile communications and/or GPS should recalibrate or use calibrated network or GPS time on a continuous basis; (4) clock resets and recalibration adjustments (exceeding the allowable threshold) should be maintained with carrier records and should be made only by a trained technician.

Response: Section 395.16(e)(2) of the proposed rule addressed date and time information that could not be altered by a motor carrier or a driver. FMCSA is not specifying a maximum daily time drift in the final rule. However, § 395.16(e)(4) provides that the time deviation must not exceed 10 minutes from Coordinated Universal Time (UTC) at any time.

6.6.5 Distance-Traveled Accuracy (§ 395.16(g))

Several commenters expressed concern with the NPRM's proposal for accuracy of CMV distance travel: non-synchronized EOBRs, which obtain distance-traveled information from a source external to the CMV, must be accurate within 1 percent of actual distance traveled over a 24-hour period. Most comments centered on the difference between the proposed requirement in the NPRM for EOBRs and industry consensus standards for odometers. Qualcomm, ITEC, Xora, Tripmaster, and Siemens expressed concern that the NPRM's provisions did not align with the state-of-the-practice.

They cited SAE J1226, "Surface Vehicle Recommended Practice: Electronic Speedometer Specification—On Road." Section 5.1 of that document, Overall Design Variation, states the overall odometer accuracy "shall be within minus 4 percent to plus 4 percent for each actual unit of distance of travel over the operating range of the instrument. The design limits should not, however, be construed as absolute under all operating conditions." Thus, according to Qualcomm, the best-case scenario for a non-synchronized EOBR would be a plus or minus 5 percent error in the mileage calculation. In short, for systems capturing mileage from the vehicle ECM odometer, Qualcomm recommended the odometer should be maintained consistent with the vehicle manufacturer's specification for odometer recalibration.

Qualcomm and other commenters recommended FMCSA reference SAE J1708 ("Serial Data Communications Between Microcomputer Systems in Heavy-Duty Vehicle Applications") for communications with the vehicle data bus. Qualcomm also stated the requirements of § 395.16 should address conditions where location history data are incomplete due to limitations in obtaining satellite fixes and should specify when a driver should record HOS information in a paper RODS. ATA and Werner offered similar concerns. ATA stated odometer accuracy is outside the control of the EOBR supplier and excessive calibration requirements would be operationally problematic and costly.

ITEC and several other commenters noted, although recording to within 1 percent of the odometer is reasonable, the overall accuracy for distance data should be 5 percent because an absolute accuracy of plus or minus 1 percent of the actual distance may not always be achievable. A key reason is that the rolling radius of the vehicle's drive axle tires changes with ambient temperature, inflation pressure, load, and tire wear, and these changes can exceed 1 percent. An odometer is calibrated using the tire manufacturer's recommended revolutions per mile, and the vehicle owner must maintain this rolling radius when the vehicle's tires change from replacement, recapping, or regrooving.

Response: In § 395.16(g)(3), the Agency requires the distance-traveled information recorded by the EOBR should not be less accurate than the information obtained from the CMV's odometer.

Because FMCSA will allow only integrally synchronized EOBRs, the proposed rule text concerning distance-traveled information from a source

external to the CMV, is not included in the final rule.

Responding to the request to formally reference SAE J1708, we do not believe this is necessary because it is one of several engineering consensus standards that address on-vehicle communications networks that can provide engine use status. The Agency does not wish to preclude the use of other standards, existing or in development.

Concerning commenters' references to SAE J1226, FMCSA notes that this Recommended Practice also refers users to SAE J862, "Factors Affecting Accuracy of Mechanically Driven Automotive Speedometer-Odometers." Among other things, this document describes nine factors that can affect odometer readings, four of which relate to tires.

6.7 Review and Amendment of Records by Drivers (§ 395.16(h))

6.7.1 Driver Amendments of EOBR RODS.

Qualcomm recommended the regulations be more flexible to allow driver annotations of the records, to the same degree it is possible with paper RODS, to include annotating yard moves to reposition CMVs, as well as noting driving time in stop-and-go traffic. Qualcomm also asserted that driving status information automatically generated should not be subject to alteration, but a driver should be able to "claim" driving time if he or she neglected to log-on. Qualcomm recommended drivers should also be allowed to review and accept or reject any administrative amendments, and administrative staff be required to reconcile and assign all driving (vehicle movement) periods with drivers. Both drivers and administrative personnel should be able to annotate and reconcile manual data entries such as tractor and trailer numbers.

Werner sought clarification of the term "annotation," arguing the driver should be able to amend non-driving status periods at any time and should be able to request authorized administrative personnel to amend driving time entries, but disagreed that correction of typographical errors should generate an audit trail. The system should keep a digital record or other evidence showing any amendments made after the driving records were approved by the driver and identifying the amendments by time, date, personnel involved, and the reason for the amendment. Werner objected to limiting the driver to making corrections to the RODS only before the first driving period of the day or following the last

period of the day, because it would place an unnecessary burden on the driver and force a driver who has made an error to drive the rest of the day with incorrect records. According to Werner, driver acceptance of the technology is critical to its use in the industry, and every reasonable effort should be made to keep the systems forgiving and driver friendly. DriverTech stated allowances need to be made for legitimate truck moves.

DriverTech stated there needs to be a reasonableness factor to correct honest mistakes and suggested a limit of one duty status correction per 24 hours. The TMC TPA stated that the data capture and data integrity requirements proposed in the NPRM needed better definition and improved usability. For example, they recommended that for the most common cases, the driver and administrative records amendment process needs to be more thoroughly defined and practical to ensure drivers submit complete and accurate electronic logs. The process of making and reviewing amendments made by administrative personnel needs to address more specific situations. TMC RP 1219(T)), currently under development by the ATA Technology and Maintenance Council S. 12 Onboard Vehicle Electronics Study Group, outlines a recommended process that it believes better ensures data accuracy and accountability. Automated recording of duty status changes and effective recording of overrides need more specificity to address yard moves and stopped-in-traffic scenarios. RP 1219(T) recommended amendments be limited to eight specific items.

Response: In § 395.16(h)(3), FMCSA selected the term “annotate” rather than “amend.” Annotating a record implies adding information, generally for the purpose of clarifying it. Amending a record implies changing it. An EOBR must automatically record driving time (§ 395.16(d)(1)) so there should be no need for a driver to request designated administrative personnel to amend a driving record. Section 395.16(h)(3) has been revised to include use of a CMV as a personal conveyance. It requires the driver to annotate the corresponding driving time entry to reflect such use.

As discussed earlier, § 395.16(d)(1) requires the EOBR to automatically record driving time. Altering driving time records is prohibited. However, remarks may be added to annotate the record. Section 395.16(h)(3) has been revised to address this.

6.7.2 Other Comments on Driver Interaction With EOBRs

Several commenters offered recommendations about driver interaction with EOBRs. Several commenters offered recommendations about driver interaction with EOBRs. For example, when team drivers use a CMV equipped with an EOBR, they suggested the non-driving team member be allowed to make entries in the EOBR while the CMV is moving. Others suggested a method for the driver to override pre-programmed duty status change thresholds (such as between driving and on duty). Still others recommended FMCSA consider adding distance and time thresholds for “yard moves” and for “non-allocated driving time.”

Werner stated there had been little consideration or analysis of driver acceptance. The ideal system should take into account the need for driver training and the differing levels of technical sophistication.

Response: This rule does not alter the treatment of the duty status of team drivers. The final rule allows annotations of the EOBR’s electronic RODS. Whether an annotation is characterized as an “override” or by another term, the annotation must add information to the HOS record—it must not overwrite or delete information. Because of the enormous variations in motor carriers’ individual policies and practices, FMCSA does not believe it would be appropriate to establish a single uniform threshold for non-allocated driving time.

Today’s rule, like the 1988 AOBDR rule, is performance-based and anticipates developers of EOBRs will work with their motor carrier clients to ensure the devices are appropriately designed and configured. Motor carriers must ensure drivers are trained to use the new EOBRs properly.

6.8 Safety Officials’ Access to HOS Information

6.8.1 EOBR Must Be Capable of Producing Duty Status Records for the Current Day and the Previous 7 Days (§ 395.16(k))

Werner asked if an EOBR needed to retain 7 days of RODS in the device itself, or if the information could be stored on a server. Werner also asked for clarification on provisions for safeguarding and retention of transferred data to portable computers used by roadside inspection officials.

Response: RODS data need not be stored on the EOBR. Section 395.16(k)(1) allows use of “information stored in and retrievable from the EOBR

or motor carrier support system records.” As is the case in the current AOBDR rule, § 395.15(b)(4), HOS data must consist of information “stored in and retrievable from” the device. As for enforcement officials’ duties regarding safeguarding and retention of information is concerned, the HOS information they obtain from (or via) EOBRs must be handled and safeguarded in the same way as other records obtained during the conduct of enforcement activities. (See preamble section IV. Discussion of Comments to the NPRM; 5. Privacy, Agency response.)

6.8.2 EOBR Must Be Able To Produce, Upon Demand, a Driver’s HOS Chart Using a Graph-Grid Format in Either Electronic or Printed Form (§ 395.16(i) and (n))

CVSA supported the use of a graph-grid format. However, numerous commenters, including Qualcomm, Tripmaster, the TMC TPA, Werner, and ATA questioned the need for the EOBR device itself to produce the graph-grid format.

Qualcomm, Tripmaster, and ATA believed the display requirements should be limited to specific information (such as driver information and the sequence of changes of duty status) in the vehicle, and other data should be made available by electronic data transfer or reports from a motor carrier’s office system. Werner, XATA, and the TMC TPA suggested, other than placing HOS information in a familiar format, there is no real reason for an EOBR to display data in a graph-grid format they believe computers used by roadside safety personnel should be able to handle this task. The Maryland SHA offered a similar comment. Conversely, ITEC stated it did not believe the data format provided in Appendix A, Table 1, could be used to produce a graph-grid.

Qualcomm and ATA noted many legacy systems and devices could potentially meet proposed EOBR requirements, save two: the proposed display requirements and the viewable-outside-the-cab requirement. The latter is a concern because many new devices are dashboard-mounted. Because the format specification does not address requirements for display size, character resolution, scrolling, and navigation, they question how usable the display would be.

A motor carrier questioned whether EOBRs could produce the required HOS information, and another contended FMCSA did not offer a standardized method for retrieving EOBR recorded data because not all agencies will have

the proper equipment to access a driver's logs.

A few commenters offered alternatives, such as using an integrated printer with the EOBR rather than a mobile display. One asked how an alternative display format would be approved.

The Maryland SHA stated the requirement that the data be displayed in "either electronic or printed form" presents problems. If the EOBR provides the HOS information in electronic format only, the officer will have no substantive evidence or paper copy for court purposes, which will hamper adjudication processes. Maryland SHA urged FMCSA to assess how these changes will impact roadside enforcement activities, as not all enforcement officers have laptop computers from which to receive or review HOS data retrieved from an EOBR.

Response: The provision at § 395.16(i)(2) would allow electronic transmission of an EOBR-generated RODS for display on another device, such as a PDA or portable computer used by a safety official at a roadside inspection. FMCSA amends paragraph (i)(2) and subsection (n) to clarify the requirement for the EOBR to enable RODS data to be transferred to an enforcement official's PDA or portable computer. The Agency also revises the rule text to remove the proposed design requirement to display the graph-grid on the EOBR device.

The Agency also clarifies that data transfer methods discussed in the NPRM and adopted in this final rule are meant to facilitate a one-way transfer of data from the EOBR to the enforcement official's computer and not the reverse. Several commenters appeared to interpret this provision as a requirement for EOBRs to be able to interact with each other, and for any EOBRs to be able to interact with any office support systems. FMCSA leaves the decisions on whether to provide this level of interoperability to EOBR system providers. Rather, the proposed specifications were developed based on the assumption the Agency would provide the software capable of: (1) Initiating the data transfer, (2) transforming the EOBR-generated standard flat file into the desired graphical output on enforcement officials' electronic equipment (*i.e.*, computer, PDA, *etc.*), and (3) determining whether the RODS information was in compliance with 49 CFR part 395.

EOBR system suppliers and motor carriers would not need to determine how to achieve interoperability with

enforcement officials' various types of equipment and software. Under the Motor Carrier Safety Assistance Program (MCSAP), enforcement officials operate FMCSA-approved hardware with inspection software compatible with FMCSA systems to conduct roadside inspections. The proposed data format and transmission protocols have been tested to work with enforcement officials' tools. This was the rationale for proposing the EOBR make data available in a flat file format, the simplest of formats (as opposed to requiring a specific hierarchical or relational database form), and for setting forth specific communications protocols.

The same would apply to information generated by the motor carrier's office systems. The safety investigator uses FMCSA-approved equipment and FMCSA-issued software to conduct the compliance review at the motor carrier's place of business. Systems capable of producing the flat file delineated in Appendix A to part 395, Table 2, would be fully compatible with the compliance review software, and they would meet Agency requirements under the new § 395.16(i).

Responding to the SHA, FMCSA will require EOBRs display the driver's duty status sequence, as is currently required for AOBRDs. The Agency will also require drivers' HOS records be made available in digital form to inspection officials.

6.8.3 EOBR Must Be Able To Produce Upon Demand a Digital File of the Driver's HOS (§ 395.16(i)(2))

The TMC TPA stated security of digital EOBR data needs to be considered, citing security threats external to the EOBR in the data transfer process. Xora supported an EOBR that could obtain HOS information from a centralized server, and one that could be physically handed to roadside inspection officials. Werner asked FMCSA to define "immediately" in the context of an inspection. It noted a driver will need the opportunity to verify the recently created logs for accuracy. If the system maintains the log data off the truck for some or all of the period being checked, a reasonable delay may be incurred in sending the data to the truck in some form.

Response: Motor carriers and their EOBR system providers must use appropriate methods and procedures in the development, testing, and operation of HOS information systems to ensure data and information integrity. Rather than specifying testing and assessment procedures, the Agency again focuses on performance requirements for the EOBR

user. Under new § 395.16(o)(2), the EOBR and associated support systems must not permit alteration or erasure of the original information collected concerning the driver's hours of service, or alteration of the source data streams used to provide that information, and under § 395.16(p)(1), the motor carrier must not permit or require alteration or erasure of the original information collected concerning the driver's hours of service, the source data streams used to provide that information, or information contained in its EOBR support systems that use the original information and source data streams.

As to defining "immediately," FMCSA requires CMV drivers to maintain their EOBR records current to the last change in duty status and encourages safety officials to exercise reasonable discretion in allowing the drivers sufficient time to access the HOS records from the EOBR, or from the motor carrier's support system.

6.8.4 Information Must Be Accessible to Safety Assurance Officials Without Requiring Them To Enter In or Upon the CMV (§ 395.16(i)(4))

CVSA supported the requirement that information displayed on the EOBR be accessible to safety assurance officials without requiring the officials to enter in or upon the CMV. However, one driver stated moving the EOBR in and out of the truck would lead to electronic problems. He suggested using a cable to connect it to a computer.

Response: FMCSA agrees with CVSA. The final rule will retain the proposed requirement that information displayed on the EOBR be made accessible to safety assurance officials without requiring them to enter in or upon the CMV. It will not be necessary to physically remove an EOBR from its mounting in a CMV cab. The enforcement official will provide a cable to the driver to plug into the EOBR, or request the driver initiate a wireless transfer of the RODS data to the officer's portable computer.

6.8.5 Electronic Records Must Be Transferable to Portable Computers in the Specified Format (§ 395.16(i)(6))

A number of commenters provided comments related to the need for safety officials to obtain digital records from EOBRs to conduct roadside inspections. CVSA held EOBRs should use standardized data formats and have a standardized interface for law enforcement so that training, compliance evaluation, and monitoring are effective and simplified. CVSA stated it would be better to equip

inspectors to print the record, which they will need as evidence.

Regarding security encryption, data security, and how these interact with enforcement roadside computers, the SHA commented that not all MCSAP agencies' safety inspection officials have laptop computers in their patrol vehicles and or wireless platform capabilities from the patrol vehicle.

Ohio PUC stressed the need for technological solutions to improve inspection officials' ability to read and interpret electronic HOS records. The MTA and OOIDA also stressed the need for training these officials in the use of EOBRs and interpretation of HOS data.

CVSA stated electronic records must adhere to common, uniform, and strict standards so inspection officials can read the data on laptops or handheld computers. However, CVSA had concerns with the possibility of these files introducing a virus or otherwise damaging the inspection official's operating system or software.

Qualcomm stated the use of XML or other file formats should be considered for Internet file transfers. It is also recommended the specifications be deferred to an industry standards approach to address any ongoing changes in security, technology, or data requirements, rather than by including them in a regulation. The TMC TPA offered a similar comment related to insulating a regulation from technological change. The document advocated a hardwired connection between the EOBR and the vehicle data bus and a network neutral wireless connection to obtain data via the Internet from a secure server. ITEC stated it assumed that, because it was not discussed, FMCSA did not intend to require that EOBR data be downloaded onto portable media. Werner questioned the cost of being able to download data.

Ohio PUC stated the rule must have verifiable provisions to ensure EOBRs are standardized with a uniform format that all carriers must use to display information. These must be easily read by roadside inspection personnel and designed to include a standard means of allowing enforcement personnel to download information from the devices.

Response: FMCSA agrees with commenters that it will be critical for roadside inspection officials to be prepared to interact with the new EOBRs. The Agency has set the compliance date to provide sufficient time for this transition. As discussed above, the final rule specifies the use of standardized file formats and communications interfaces to support the needs of safety officials operating in the field.

6.8.6 Communications information interchange methods (§ 395.16(i))

Qualcomm, TMC, ITEC, Tripmaster, and ATA opposed the wireless information interchange standards cited in the proposed rule because they would be likely to become outdated. The TMC TPA stated the wireless methods are prone to connection management, interoperability, and security issues, as well as changes in technical standards.

Qualcomm recommended FMCSA use TMC RP 1219(T) for technical requirements. In addition, they recommended citing SAE J1708, "Serial Data Communications Between Microcomputer Systems in Heavy-Duty Vehicle Applications," in reference to wired communications links using the vehicle data bus. They also recommended FMCSA consider referencing SAE J1939, "Recommended Practice for a Serial Control and Communications Vehicle Network." Qualcomm also asked FMCSA to consider submitting a standards request to the Society of Automotive Engineers subcommittees for J1939 and J1708 to address tamper-resistance technical specifications for capturing information from electronic control modules transmitting over the vehicle data bus.

Qualcomm and the TMC TPA recommended two methods for information reporting they believed would be technology neutral for EOBR devices and are expected to have significant longevity in availability. They recommended use of the vehicle data bus for a wired data transfer from the EOBR to a roadside inspection device (because this approach is similar to that used for on-board diagnostic (OBD) emissions inspections); and use of the Internet for wireless data transfers from the EOBR (device and/or support system) with the roadside inspection system (device and/or host support system). Although they noted additional security standards would be required to ensure proper authentication between devices and data transfer security, they recommended these be addressed through industry standards rather than by regulation.

Qualcomm and the TMC TPA both believe use of Universal Serial Bus (USB) or a serial port would not be appropriate for a wired data transfer. They cited problems with pin configurations and software driver requirements, as well as the long-term viability of wired USB, because wireless USB standards are under development. On the other hand, they appear to favor use of the Internet for wireless data transfers from the EOBR (and/or its

support system) to the roadside inspection system (device and/or host support system). Many EOBR systems maintain near real-time communications with secure centralized support systems, and they believe virtually all safety officials conducting roadside inspections can use network connectivity to retrieve this information from a support system (or directly) with Internet file transfers. Qualcomm believed the Internet file data transfer approach will be able to accommodate changes in wireless communications standards and has high probability of still working flawlessly over a 10-year or longer time frame.

Qualcomm held use of Wireless Local Area Network (WLAN) and Wireless Personal Area Network (WPAN) technologies for peer-to-peer wireless connections are not appropriate in EOBRs and law enforcement systems because they have significant security vulnerabilities and are prone to connection management issues.

Qualcomm also supported wired transfer via the CMV's data bus. Qualcomm, Tripmaster, and ATA referenced TMC RP 1210(B) (Serial Communications Application Program Interface). For wireless, they referenced RP 1216 (the vehicle-to-office data communications standard). Qualcomm stated the latter standard brings efficiencies to the industry because it puts aside any proprietary communications protocols and allows for wireless communications (via radio frequency, infrared, satellite, cellular, or WLAN) between a trucking company's office and its fleet.

ITEC recommended dropping the Bluetooth wireless standard, which is not interoperable with IEEE 802.11 and RS-232 (which is out-of-date), and adding IEEE 802.11p. ITEC-supported USB 2.0.

CVSA suggested that, while FMCSA may not want to specify the communications technologies because they change so rapidly, the more important aspects related to the data are security, content, and timeliness of the information availability. Werner stated any wireless access should be adequately protected.

KonaWare stated FMCSA should not specify data transfer technology. If data transfer is needed, submission of data to law enforcement within 48 to 72 hours should be acceptable.

Siemens expressed concern about costs for wireless data extraction. Although they noted FMCSA included these costs in its estimate of operating costs as a necessary item for mobile phone solutions and fleet management systems, they were concerned these

costs were not addressed for minimally compliant, tethered EOBR solutions that could use other methods to transfer data for backup purposes. Siemens was concerned owner-operators, small carriers, and carriers operating within limited geographic areas would not benefit from wireless data extraction of HOS data.

PeopleNet stated the records should be available in wireless or wired format, but not both. FedEx stated the protocols and application interfaces needed to perform the data download are not defined. A great deal of definition would be required to successfully implement a roadside exchange as suggested in the NPRM, and changing technology could make several of the suggested physical transport layers obsolete. FedEx suggested wireless as a transport layer (802.11g and Bluetooth), but stated the pairing methodology between EOBR and roadside device must be defined. It also stressed the need for the Agency to define a method for authentication between the EOBR and roadside device, an especially important concern if the Agency contemplated using wireless technology.

Response: The final rule requires the use of wired (direct physical connection) and wireless communications (WiFi and cellular, as described in more detail below) of the electronic RODS data record. For a wired transfer, the roadside enforcement official will provide a cable to the driver to be inserted into the EOBR's USB data port.

FMCSA is revising the requirements for the content of the data file that would be downloaded from an EOBR to an enforcement official's portable computer to remove the name of the driver and co-driver in the records downloaded at roadside. The driver and co-driver will be identified by employee identification number(s) in that downloaded record. Enforcement officials may verify the identity of the driver (and co-driver) from documents such as a driver's license and would enter that information into their portable computers to generate inspection reports and violation documents. This change is being made because the combination of a name and other information in a transmitted record places the record in the category of personally identifiable information (PII). PII must be encrypted, and encryption adds considerably to the complexity of software design, implementation, and maintenance. These factors would increase the costs to EOBR suppliers, motor carriers, and FMCSA. FMCSA stresses this change

affects only those records downloaded at roadside. All other records maintained in EOBRs and support systems must include the driver's and co-driver's names. This includes records requested by safety assurance officials at a motor carrier's place of business.

The primary goal of the EOBR device itself is to collect and safeguard data. There are numerous industry consensus standards and recommended practices in this field, and FMCSA believes developers of EOBRs and EOBR support systems are in the best position to select and use those standards and practices to ensure their motor carrier customers are able to maintain the confidentiality, integrity, and availability of HOS data and information.

To ensure a reliable means of data exchange between each EOBR device and a roadside safety official's portable computer, the following hardware interface specifications are required:

1. Each EOBR device must implement a single USB compliant interface featuring a Type-B connector.

2. USB interface must comply with USB V1.1 and V2.0 USB signaling standards.

3. The USB interface must implement the Mass Storage class (08h) for [software] driverless operation.

FMCSA will not allow the use of portable storage devices, e.g., thumb drives, for the transfer of the electronic RODS because they are not capable of meeting the necessary authentication requirements.

6.9 Identification of the Driver (§ 395.16(j))

6.9.1 FMCSA's Approach of Not Specifying Identification Method

CVSA supported the idea of providing flexibility regarding how drivers are identified. However, CVSA said FMCSA should specify a minimum performance requirement including standardized and explicit test procedures and expectations. ITEC approved of the decision to allow motor carriers to choose among competing technologies for driver identification. The company said driver identification technologies would be a key cost factor in the implementation of EOBRs.

Several commenters, including IBT, OOIDA, and AMSA, disagreed with FMCSA's approach, contending the rule should be more specific regarding the identification of drivers. IBT was concerned unscrupulous drivers' use of false identification could undermine efforts to improve HOS compliance. Qualcomm, Siemens, and the TMC TPA said the rule should have security requirements that address detailed

policies and procedures for driver identity management. They also requested the requirements cover the use of third parties for EOBR security administration and audit.

One commenter recommended using employee ID numbers to identify drivers, while another proposed using an identification code made up of the driver's license number and the abbreviation of the issuing State.

Response: FMCSA agrees the identification of the driver of a CMV is key to implementation of this rule. However, imposing a set of standards to assign and manage driver and employee identification numbers is unnecessary to effectuate this rulemaking and is more appropriately addressed through motor carriers' internal processes.

This final rule requires the driver's name as part of the EOBR's record maintained by the motor carrier. However, it will not require the driver's name to be part of the information transmitted from the EOBR or a support system during the course of a roadside inspection because the combination of a name and the other information is considered personally identifiable information and is subject to stringent and complex encryption requirements. As discussed earlier, enforcement officials will verify the identity of the driver (and co-driver) from documents such as a driver's license.

FMCSA's interest is that each driver used by a motor carrier is uniquely identified for purposes of recordkeeping and the motor carrier ensures that drivers enter duty status information accurately. How individual drivers are identified—by name, by employee number, or by another code—is left to a motor carrier's discretion. However, we very strongly discourage a motor carrier from using a Social Security number or driver's license number because of the potential for persons to obtain access to information that is not relevant to HOS compliance assurance. It is a motor carrier's responsibility to select and implement information security policies—including issuing and updating identification and information system access codes—appropriate to its own operations.

Responding to Qualcomm's question concerning recording the hours of drivers who use more than one vehicle, an EOBR support system must account for this, as today's AOBDRs are required to do. Although not explicitly required in the regulation, error-checking procedures in the support system also should flag a driver who is shown as operating multiple CMVs on the same day, during the same period of time. AOBDRs have been required to identify

which driver of a team is operating the CMV at any given time—and EOBRs must do the same. Each driver must be assigned a unique identifier.

6.10 Maintenance and Repair (§ 395.16(p))

6.10.1 Motor Carrier Must Ensure EOBRs Are Calibrated, Maintained, and Recalibrated

Werner said the requirement for motor carriers to ensure EOBRs are calibrated, maintained, and recalibrated should not be imposed without serious cost/benefit analysis. The carrier said this requirement could be a substantial burden for many carriers who have trucks that are not home-based at a terminal.

Qualcomm and TMC said the requirements for motor carriers should also address security management and administration of EOBR systems. They also said the rule should provide criteria for when third-party services must be used if carriers do not have appropriate resources for security management.

Maverick Transportation asked FMCSA to clarify how often EOBRs would need to be recalibrated and how long a carrier would need to retain calibration, maintenance, and recalibration records.

Response: Section 395.15(i)(8) of the current regulations requires that AOBRDs be maintained and recalibrated in accordance with the manufacturer's recommendations. Considering the range of approaches (now and in the future), it would not be realistic for FMCSA to specify maintenance intervals for EOBRs. The text of the rule adopted here parallels the proposed regulation but adds a requirement for calibration. This initial calibration would be done at the time of initial installation, if the characteristics of the device require it. Concerning security management and administration, those are information technology matters, and any third-party performing this work for a motor carrier would do so as the carrier's agent and under the carrier's direction. Retention of EOBR maintenance and calibration records is addressed in the general inspection, repair, and maintenance requirements of current § 396.3, because an EOBR, like an AOBRD, is an "additional part or accessory which may affect safety of operations." These records must be maintained for 1 year or 6 months after a CMV leaves the motor carrier's control.

6.11 Testing and Certification Procedures

6.11.1 Manufacturer Self-Certification (§ 395.16(q))

Qualcomm expressed support for the provision allowing EOBR manufacturers to self-certify their products. The company said the self-certification approach is consistent with the requirements in § 395.15 and should be continued. Maverick Transportation agreed with manufacturer self-certification, but asserted EOBR manufacturers should face penalties if their products are later found to be non-compliant.

Conversely, several motor carrier and EOBR manufacturer commenters believed FMCSA's proposed requirement for AOBRD and EOBR manufacturers to self-certify their devices did not provide a sufficient level of assurance to convince carriers to voluntarily use EOBRs. These commenters indicated carriers would be more willing to invest in EOBRs if FMCSA or an independent testing entity evaluated and certified devices as conforming products. J.B. Hunt stated that, because most of today's EOBR manufacturers are small businesses, they probably would not have the financial resources to properly indemnify the carrier if FMCSA were to find the devices non-compliant. Werner made similar comments, noting the contracts offered by EOBR vendors would likely restrict a carrier's right to recover from the vendor if the system were found to be non-compliant.

CVSA recommended FMCSA and the National Highway Traffic Safety Administration create a more rigorous, third-party certification program for EOBRs. It also recommended the establishment of an advisory board to create and maintain a list of approved EOBRs. This advisory board could operate similarly to those groups that are involved with speed-measuring instruments and breath alcohol testing devices.

Qualcomm and ATA offered the alternative of "strong self-certification." An international standard, ISO/IEC 17050, would be used as a basis for requiring manufacturers to document their conformance with a standard. An EOBR manufacturer's declaration of conformity would be subject to standardized documentation requirements and audits. They noted this approach would require a government or industry entity to audit supporting materials for conformity declarations and to maintain a registry of conforming products. ATA stated such an authority does not currently

exist. Tempering its support of third-party certification, ATA cautioned that FMCSA should balance the potential benefits of third-party certification against the potential for increased cost of EOBR devices and possible delays in the introduction of new devices and technology due to the need to satisfactorily complete a certification process.

Response: The Agency is aware that a working group of the ATA's Technology and Maintenance Council S. 12 Onboard Vehicle Electronics Study Group is currently preparing a draft recommended engineering practice, TMC RP 1219(T), "Guidelines for Electronic On-Board Recorders." Several commenters included this document as an attachment to their comments. Although the final rule does not establish a formal FMCSA oversight process for EOBR testing and certification, it is possible that more widespread use of EOBRs may bring compliance concerns to light. Therefore, FMCSA will monitor motor carriers' compliance with EOBR and support system requirements as part of its safety oversight programs.

6.11.2 Other Comments on Testing and Certification Procedures

The Ohio PUC asked that the rule provide for periodic certification of the reliability and integrity of EOBRs, with specific penalties for failure to comply; and it maintained widespread violations could occur without such provisions. The MTA suggested the rule require EOBR manufacturers to warranty performance of their products for at least 5 years.

Response: FMCSA takes seriously penalties related to false records but does not believe it would be appropriate to set a prescriptive requirement for "recertifying" EOBRs according to a fixed schedule. The self-certification process will remain part of the FMCSRs. FMCSA does not have the authority to impose a requirement for a warranty period or warranty terms.

6.12 Other Comments on Proposed EOBR Standards

Several commenters believe the NPRM did not adequately address a requirement to make EOBRs "tamper-proof." Siemens said FMCSA should require EOBRs to be tested and certified against a defined security standard by independent laboratories. Advocates criticized FMCSA for proposing no specific controls for ensuring that EOBRs are tamper-proof, contending the Agency "must set minimum requirements for what constitutes tamper-proof or tamper-resistant EOBRs

and their key components.” Advocates called upon FMCSA to ensure that EOBRs are both tamper-proof and designed to indicate any attempts at tampering. CVSA suggested FMCSA review the EU Information Technology Security Evaluation process with regard to EOBRs. A team driver who had used an EOBR said her motor carrier had altered the hours recorded by the device, and FMCSA must ensure against improper alteration of data by drivers, carriers, or law enforcement personnel. Two commenters said the burden of making EOBRs tamper-proof should rest on the shoulders of the manufacturers and FMCSA, and that all aspects of tampering should be resolved before installation.

Response: The September 2005 report prepared by the Volpe Center: “Recommendations Regarding the Use of Electronic On-Board Recorders (EOBRs) for Reporting Hours of Service,” addresses a range of methods to prevent, to the greatest extent practicable, tampering with the physical EOBR device, as well as the electronic records it holds. The revised text of § 395.16(p)(1) prohibits the motor carrier from permitting or requiring alteration or erasure of original information or the source data streams used to provide it. This covers both physical and electronic alterations and erasures.

FMCSA reviewed the EU type-specification for electronic tachographs early in this rulemaking process. The type-specification is highly design-prescriptive for both the hardware and software elements of the electronic tachograph and support systems. By contrast, FMCSA regulatory policy expresses a strong preference for performance-based regulations. Furthermore, because the EU directive for the electronic tachograph is based upon a compliance-assurance model that is dramatically different from that of FMCSA, FMCSA continues to believe adopting it would be inappropriate. And, as discussed above, the final rule will continue to require manufacturer self-certification of EOBRs and their support systems.

6.12.1 Environmental Specifications

For operating temperature, Qualcomm and ITEC said the typical industry standards for device functionality while installed in commercial vehicles (–40 to 85 °C) exceed the rule’s requirements for the temperature range at which EOBRs must be able to operate (–20 to 120 °F (–29 to 49 °C)). Both commenters suggested the rule defer to industry standards for environmental performance, specifically SAE standard

J1455, “Recommended Environmental Practices for Electronic Equipment Design in Heavy-Duty Vehicle Applications.” TMC offered a similar comment.

NTSB stated the NPRM failed to address damage-resistance and data-survivability, and asked for performance standards for these issues.

Response: FMCSA agrees with Qualcomm, ITEC, and TMC and in the final rule revises the environmental operating ranges (temperature, *etc.*) for EOBRs. In response to NTSB, FMCSA considers it appropriate to require EOBRs to comply with the same generally-accepted industry consensus standards for durability and reliability as other electronic components used in trucks and buses, but not to go beyond these standards in terms of crash- or fire- survivability.

6.12.2 Reconstruction of RODS After EOBR Failure

Werner and the Maryland State Police questioned the requirement that a driver reconstruct RODS for the past 7 days in the event of an EOBR failure. The two commenters doubted that drivers would be able to do this unless the data had been printed out, transmitted to the carrier, or backed up in some other way.

Response: Records must be available for the current day and the past 7 days so safety officials can review them during roadside inspections. This is not a new requirement; it currently applies to both paper RODS and AOBDRs (§§ 395.8(k), 395.15(b)(2)). The 7 days’ worth of records can include those records already transmitted to the motor carrier.

6.12.3 Requirement To Carry EOBR Instructions and Blank RODS (§ 395.16(l))

ITEC said the rule should be clarified to allow a motor carrier to maintain the EOBR instruction sheet and blank RODS forms either separately or together. Qualcomm expressed support for the requirement that CMVs carry instructional material. TMC TPA suggested FMCSA be more specific about the content of the instruction sheet to assure greater consistency and usability.

Response: The requirement in the final rule is identical to the current one for AOBDRS (§ 395.15). It does not specify that the instructions and blank RODS forms be bound in a single document, only that the driver have both of them on board the CMV.

7. Incentives To Promote EOBR Use

FMCSA is adopting as proposed two incentives for motor carriers that

voluntarily install and use EOBRs compliant with section 395.16. First, after the traditional targeted review of their drivers’ HOS compliance, FMCSA will conduct random reviews of such carriers’ drivers for purposes of determining these carriers’ safety ratings. Second, such carriers will be granted relief from the supporting documents requirements for purposes of recording on-duty driving time. FMCSA requested comment on these two incentives, as well as on possible additional incentives, including granting flexibility in the HOS rules themselves.

7.1 Random Review for Motor Carriers Voluntarily Using EOBRs

Numerous commenters, including Report on Board, Werner, Maverick, SCRA, and IIHS, said random review of a motor carriers HOS compliance, as opposed to a focused review, would not provide enough incentive to make voluntary installation of EOBRs attractive. Both IIHS and Report on Board held only a mandate requiring EOBRs will work. Report on Board commented that carriers believe they are competitively disadvantaged by using EOBRs. Because focused sampling would continue, with violations imposed based on that sampling, it felt that there would be little reason for carriers to voluntarily adopt EOBRs.

SCRA stated there were no statistical data provided on safety enhancement or cost benefits to support this element of the proposed rule, arguing that application of technology should provide tangible cost benefits and easily recognizable advantages for all required to comply.

Several commenters objected to the incentive because they believed it would place some carriers at an unfair disadvantage. OOIDA stated FMCSA is proposing to lessen scrutiny of carriers that adopt EOBRs while increasing scrutiny of other carriers, most of whom will be small. OOIDA also stated the proposal is inconsistent with CSA 2010 since that initiative relies heavily on focused review of problem drivers based on roadside data. “Without any proof that EOBRs improve HOS compliance or the safe operation of commercial motor vehicles, FMCSA cannot justify the creation of such a dichotomous enforcement strategy.” One carrier was also concerned the proposal places small carriers at a disadvantage because they cannot afford EOBRs, and they will be given the same scrutiny as those mandated to use EOBRs.

While Maverick supported the random sampling incentive, Advocates stated the implication is that the

outcome of EOBR use is not improved oversight and enforcement of safety management controls. Advocates asserted the proposal would lead to "more extensive HOS violations and lack of enforcement."

Response: One objective of CSA 2010 is to leverage the capabilities of existing technologies to make compliance and enforcement efforts more effective and efficient. FMCSA believes policies that encourage the adoption of EOBRs are consistent with CSA 2010. (See the earlier discussion of CSA 2010 and roadside data in preamble section IV. Discussion of Comments to the NPRM; 3.2 *Trigger for remedial directive*. The motor carrier industry previously expressed concern that FMCSA's current HOS sampling techniques during compliance reviews are not random across all areas of a carrier's operation. Rather, the compliance review procedures direct the safety investigators to focus on known problem areas and drivers first. If the number of violations discovered using the existing policy of focused sampling exceeds 10 percent of the records reviewed, a less than satisfactory safety fitness rating is proposed. Thus, industry members argue, a motor carrier's overall safety fitness rating can be adversely affected based only on a focused review of known problem drivers or areas of a motor carrier's operation without consideration of a motor carrier's overall HOS compliance status or violation rate.

FMCSA does not agree that motor carriers under the proposed incentive will be subject to less-thorough reviews. Under the incentive proposed and adopted today, all motor carriers taking advantage of this incentive, and all owner-operators leased to such carriers, will be subject to the same level of initial review as under current procedures, which focus first on drivers involved in crashes and those with known HOS violations. Violations resulting from this initial focused sample will continue to be considered for compliance improvement and enforcement purposes. However, under the incentive, a CR that revealed a proposed 10 percent or higher violation rate based on the *initial* focused sample will be expanded through *random* sampling to look at a broader segment of the motor carrier's overall operation. Only the HOS violations resulting from this expanded review will be used to determine a carrier's safety rating.

This incentive is justified on several grounds. The HOS portion of CRs on motor carriers using EOBRs can be done far more efficiently than traditional reviews of logbooks and supporting

documents, thus allowing motor carriers—as well as FMCSA reviewers—to do more thorough and comprehensive checks of HOS records for accuracy and possible falsification. The Agency expects EOBR use to lower voluntary-adopter-carriers' rates of serious HOS violations, which, as noted above, are related to higher than average crash rates. As a result, safety will be promoted. Because civil penalties will still be imposed and SafeStat scores will still be affected if violations are discovered during the targeted review, carriers will continue to be motivated to correct HOS compliance problems. See 72 FR 2378–2379. FMCSA emphasizes that the Agency will continue to bring civil penalty enforcement cases against both drivers and carriers for HOS violations discovered during the initial focused HOS review, even though that analysis will not be used for purposes of determining the carrier's safety rating.

7.2 Partial Relief From Supporting Documentation (§ 395.11)

Several commenters, including Maverick, SC&RA, TCA, J.B. Hunt, and AMSA, generally supported the incentive providing relief from the requirement to maintain supporting documents relating to driving time. Commenters, including Maverick and SC&RA, stated EOBRs will capture much of the same information as supporting documents. Continuing to require supporting documents becomes a disincentive for using EOBRs.

AMSA stated retaining and reconciling such corroborating documents is a financial, storage, and organizational burden on carriers, and relief from these burdens might provide the desired incentive for a carrier to consider adopting EOBRs. ATA stated that managing supporting documents takes 258 million hours a year; the potential costs could be billions of dollars. FedEx noted the NPRM claimed the EOBRs would reduce compliance costs and increase productivity, but if the supporting document requirements are not dropped, those claims were overstated or wrong. If regulators require or allow technology to replace paperwork for HOS, FedEx commented the Agency should replace all paperwork for that requirement. Otherwise, it is an indication that either the technology is not ready for implementation or the technical specifications should be revisited.

MTA, Boyle, NPTC, ATA, and FedEx sought elimination of the supporting documents requirement for those with EOBRs. NPTC stated companies that use EOBRs to supervise driver operations and have effective management systems

should not be required to undertake the additional administrative task of collecting and maintaining supporting documents to verify the non-driving portion of a driver's hours. If a company is found to be significantly non-compliant in its HOS management, NPTC asserts FMCSA could use its enforcement authority to impose additional and more stringent supporting document requirements on that carrier and its drivers.

In contrast, J.B. Hunt said supporting documents cannot be eliminated, but carriers should not have to retain documents that show only time and location. If the document does not have any objective information that discloses the driver's non-driving activities, it would not be of value in an EOBR world. Additionally J.B. Hunt states that, in most over-the-road operations, driving time is the most important contributor to driver fatigue. For example, loading and unloading times can be significant, but supporting documents are of little value in determining the duration of on-duty activity. Siemens stated law enforcement is unlikely to accept reduced supporting documents over the long term, and inadequate performance standards lead States and law enforcement to ignore EOBRs.

One owner/operator said this proposed relief was an unfair advantage to motor carriers who could afford EOBRs.

Response: FMCSA agrees compliant EOBRs produce regular time and CMV location position histories sufficient to adequately verify a driver's on-duty driving activities. Under this final rule, motor carriers voluntarily maintaining the time and location data produced by EOBRs would need to maintain only those additional supporting documents that are necessary to verify ODND activities and off-duty status.

It is not in the best interest of public safety to provide relief from supporting document requirements necessary to verify ODND status. Providing such relief could make verification and enforcement of ODND activities extremely difficult, if not impossible in some cases. For privacy reasons, the requirements for compliant EOBRs stop short of the electronic, video or other driver monitoring measures that would be necessary to verify individuals' on-duty not driving time and activities through use of automated recorders.

FMCSA disagrees with FedEx that failure to eliminate all supporting document requirements is an indication that EOBR technology is not yet ready for implementation. FMCSA considers the ability to relieve supporting

document requirements related to on-duty and driving time significant in itself. Blanket relief from all supporting document requirements was not proposed in the NPRM and is not included as part of this final rule.

7.2.1 EOBRs and the Supporting Documents Rule

Several commenters raised the relationship of this rule with the supporting documents rule. ATA stated FMCSA should complete the supporting document rule as soon as possible. FedEx said the rule should be coordinated with the EOBR rule, OOIDA and CVSA asserted until the supporting document rule is complete, the public does not have enough information to evaluate the incentives.

FMCSA published the supporting documents Supplemental Notice of Proposed Rulemaking on November 3, 2004 (69 FR 63997), and proposed requirements for the collection and use of documents to verify the accuracy of driver records of duty status. It proposed language to clarify the duties of motor carriers and drivers with respect to supporting documents and requested further comments on the issue. FMCSA withdrew this rulemaking action on October 25, 2007 (72 FR 60614) based on issues with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) analysis supporting this action. After the paperwork analysis that accurately identifies the information collection burden associated with the existing supporting documents requirements is complete, the Agency intends to initiate a new rulemaking action. This will ensure the new rulemaking proposal is based on an accurate and comprehensive understanding of the existing information collection inventory.

FMCSA does not wish to delay the benefits of this rulemaking pending completion of the supporting documents rule. Therefore, this rulemaking provides for relief from the existing supporting document requirements related to on-duty driving activities for motor carriers that voluntarily install EOBRs.

7.3 Suggestions for Other Incentives

MTA recommended any violations occurring when the truck is being used as a personal conveyance should be assigned only to the driver, not the carrier. It suggested carriers should not be subject to violations for speeding based on GPS data, and also that RODS violations should be weighted as other categories are, not at twice the value.

ATA suggested including positive credits or points for carriers in the

SafeStat selection criteria as applied to the safety management and Driver SEAs. ATA also suggested FMCSA offer relief from the 2-point assessment in the safety rating methodology for a pattern of HOS violations. It also recommended the use of random sampling in conducting compliance reviews. In the event these incentives cannot be achieved through provisions in regulations, FMCSA should provide motor carriers the ability to test and apply these incentives through pilot programs and an expedited exemption process.

ATA, TCA, J.B. Hunt, Fil-Mor Express, AMSA, and two individuals recommended tax incentives. Two individuals also recommended tax breaks. TCA stated log auditing for EOBR logs should be done only at roadside inspections, not by the carriers. DriverTech stated the fleets and EOBR manufacturers should be exempt from lawsuits on product and usage liability.

CTA recommended FMCSA consider allowing minor variances in driving, on-duty and off-duty time, up to a specified limit. CTA did not see this as an incentive to encourage EOBR use by compliant carriers; rather, it considered it to be a reasonable enforcement approach to avoid unwarranted penalties. Other commenters made similar suggestions.

J.B. Hunt suggested a number of incentives. It recommended providing EOBR carriers with a credit on their Inspection Selection System score to allow their drivers to more frequently bypass inspection stations. J.B. Hunt said this may help gain much needed driver acceptance. Only carriers with a good history of well maintained equipment (Equipment Safety Evaluation Area (SEA) value or Out-of-Service rates less than a certain score) should qualify for this incentive.

J.B. Hunt said the Agency should make a commitment in the final rule to work cooperatively with other agencies and governmental entities in an effort to exempt EOBR units from the Federal Excise Tax (FET) for original equipment manufacturer installations and equipment retrofitting and to provide for an accelerated depreciation or expensing option for tax purposes. It recommended ensuring EOBR carriers are able to gain the benefit of the "Intra-City Multiple Stop" rule by permitting the driver to show very short movements (totaling less than 1 percent of daily miles traveled) combined with other driving in the same city. This should also apply to consolidating ODN time as currently permitted when logging on paper.

AMSA stated, without sufficient incentives, HHG carriers would find it too expensive to install EOBRs and implement the supporting systems.

An individual suggested original equipment manufacturer-installed EOBRs should come with the option to switch providers.

Response: FMCSA believes the majority of other incentive ideas offered, including tax incentives, are outside the scope of this rulemaking. FMCSA does not believe it is in the best interest of public safety to count threshold rates of HOS violations the same as other violations in our safety fitness rating methodology, as suggested by the Minnesota Trucking Association and the ATA. To do so would effectively allow motor carriers to continue in operation with a Satisfactory safety fitness rating and 100 percent HOS noncompliance as long as deficiencies were not documented in other areas of the motor carrier's operation. Also, FMCSA did not propose, and will not require, EOBRs to collect vehicle speed data.

8. Economic Analysis and Other Rulemaking Analyses and Notices

8.1 Economic Costs

8.1.1 Viability of EOBR Market Without a Broad Mandate

Three commenters, Report on Board, Siemens, and CVSA, stated a broader mandate would lead to lower device costs. Report on Board claims it did not see a viable market for its own product without an industry-wide mandate. Siemens reported its device would cost 20 percent more under a long-haul mandate compared to what it would cost under an industry-wide mandate and mentioned that component costs should fall over time. However, IIHS pointed out there is already a market for these devices, and questions of unit-cost and availability are no longer relevant.

Response: FMCSA assumes that the price of EOBRs under an industry-wide mandate should be considered from a long-run equilibrium perspective—*i.e.*, assuming manufacturers have had enough time to enter the industry and expand capacity to meet demand. Under those conditions, prices should be driven to where they allow efficient manufacturers to cover their production costs and provide an adequate profit.

The production of more units may allow manufacturers to take advantage of economies of scale (whereby fixed costs are spread over more units) and produce EOBRs at lower per-unit cost. The degree to which economies of scale would reduce costs is uncertain, however. Current and would-be EOBR manufacturers would, for the most part,

already be able to take advantage of considerable economies of scope³ because they (1) Currently produce similar products, (2) already possess the necessary technical expertise, organizational infrastructure, distribution networks, and some of the necessary manufacturing equipment, and (3) have access to variable inputs (materials and labor). Independent of the number of EOBRs produced, firms would not necessarily need to make outlays for many of these fixed inputs. Similarly, though manufacturers might be expected to achieve manufacturing cost savings through “learning by doing” (that is, finding more efficient manufacturing methods as cumulative output increases), it is not clear to what extent learning effects have already been exhausted in the course of manufacturing very similar devices. Finally, uncertainty about the number of new manufacturers entering the expanded market makes it impossible to estimate the number of units per manufacturer, which is a key variable in determining both scale and learning effects.

FMCSA agrees that the cost of EOBRs’ electronic components—EOBRs generally borrow components from existing technology—should trend down, assuming that plentiful supplies of electronic parts continue. However, and given the circumstances noted above, FMCSA does not have sufficient data at this time that would allow it to estimate the effects of greater production volumes on EOBR costs, and hence on EOBR prices. In the face of substantial uncertainty over the extent of any reduction in EOBR prices as a result of greater sales volumes, FMCSA has assumed that the market price for EOBRs would remain unchanged regardless of the breadth of the mandate, for the purposes of this rule. The data and price projections will be explored further in the follow-on rulemaking, discussed earlier.

The Agency agrees with IIHS that availability should not be a consideration and that EOBR prices are not prohibitive. Report on Board’s claim that it did not see a viable market without FMCSA’s delivering captive customers is not supported by current market conditions: Not only are numerous manufacturers already engaged in this business, but the market for these devices could extend beyond U.S. borders. In both the NPRM and this final rule, the Agency examined a variety of devices, including the lowest

cost device submitted for consideration. The analysis for the final rule is premised on the use of only a low cost device.

8.1.2 Alternative Device Cost Estimates

Report on Board, Siemens, NPGA, and TCA offered estimates of EOBR device costs ranging from \$300 to \$3,000. Siemens stated the low cost device considered in the NPRM would not be practicable due to its low operational life, and offered a \$300 price estimate for its own minimally compliant device, which it claims has a ten-year operational life with periodic maintenance and upgrades; the annualized cost of this device would be \$69.

Response: Since the NPRM was published, FMCSA has actively monitored EOBR technology (both devices with and without extra fleet management applications) currently being sold in North America. It conducted its analysis in that NPRM using a range of devices priced from \$100 to \$2000, a range into which most of the devices subsequently described by commenters fall. The Agency categorically rejects the assertion motor carriers will need to spend \$3000 for a device that meets the performance standards of this rule. FMCSA agrees the cost-savings of the low cost device originally considered was severely curtailed by its assumed short operational life. Since publishing the NPRM, the Agency has become aware of other compliant low cost EOBRs, and has focused its analysis on one of them, while carefully considering all of the costs particular to this device.

8.1.3 Comments on Associated Costs

Eight commenters mentioned costs associated with EOBRs in addition to the individual device costs. AMSA, SC&RA, Werner, the Maryland State Police, TCA, and ATA stated driver and other employee training expenses would be significant. Werner, AMSA, the Maryland State Police, and ATA mentioned installation costs. FedEx, SC&RA, ATA, TCA, and NPGA stated the Agency should consider administrative costs for such expenditures as computer software and hardware, data extraction, and administrative staff; NPGA further stated computing equipment to process EOBR data could cost as much as \$15,000 per carrier, and such expense would be disproportionately large for its members, who, on average, have 9 or fewer trucks. AMSA, SC&RA, Maryland State Police, and ATA commented inspection, maintenance, and repair

costs should be factored in. AMSA, SC&RA, and ATA stated airtime costs for data extraction should be accounted for, while Siemens stated a single annual operating cost figure it has estimated for its low-cost device includes all airtime costs.

Werner and ATA pointed to device calibration as possibly resulting in significant cost. Werner stated calibration requirements may impose significant costs on the carrier if calibration cannot be easily done by existing staff and asked how often calibration will or should be required. This could represent a substantial burden for many carriers that have trucks that are not based at a terminal. ATA also listed driver technical demands, external report generation, and the costs for some fleets of moving from existing systems to new systems as potentially adding costs.

Response: With the exception of calibration costs, which FMCSA does not believe to be significant, the Agency included all of the costs referenced by commenters. In any event, commenters for the most part did not offer any alternative cost figures for the Agency to consider. Regarding repair, maintenance, and upgrade costs, the Agency currently bases its estimates on a device that is leased from its manufacturer and does not have these costs associated with it. Cost and benefit estimates now explicitly account for current use of AOBRDs, devices that would meet the requirements of this rule, and fleet management systems that can be upgraded to EOBR functionality.

The Agency does not believe NPGA’s assertion that office computer equipment for processing EOBR data “could be as much as \$15,000” is reasonable, particularly for its members, who, on average, have nine or fewer trucks. The Agency has made every attempt not to understate any costs, although all cost estimates are constrained by the criterion that EOBR systems meet the minimum requirements of this rule. In addition, hypothetically large cost figures are not germane, because carriers incur excessive costs at their own choosing, not because the rule requires them to do so. Costs of office equipment have been eliminated in this analysis because the EOBR provider hosts all records on a secure Web site and includes the price of this service in its monthly fee.

Every device is configured differently, and not all devices share the same costs. The complexity and cost of installation, for example, can vary widely by device, and the costs of even similarly configured devices can differ greatly. FMCSA presented the costs particular to

³Economies of scope: Per-unit or average total cost of production decreases as a result of increasing the number of different goods produced.

the three devices it considered; it could not present costs as if these had been any other devices. Likewise, the current analysis focuses on the actual costs of implementing the low cost device presented. As in the NPRM, costs particular to that device are explicitly accounted for. The goal of the cost analysis is to demonstrate how the performance standards of this rule may be met with minimal cost, not to estimate the costs of every possible device.

8.1.4 Costs of Training Law Enforcement

The Maryland SHA and ATA stated the cost of training enforcement officers to review electronic logs should be included. The Maryland SHA added State enforcement officials would also be asked to provide "inspection services for verification of electronic-on-board-recorder installation and operation," although enforcement personnel are neither trained electronics installers nor mechanics. The Maryland SHA also stated not all enforcement personnel have laptop computers in their patrol vehicles, and those that do may not have wireless connectivity; it would be impossible to check electronic logs under these circumstances. Additionally enforcement personnel should not be asked to perform this function as staffing reserves are already strained with more important duties—*e.g.*, roadside inspections, homeland security activities, *etc.* Maryland SHA stated FMCSA should fully assess the effects on enforcement. No funding is being provided to enforce the new provisions.

Response: The Agency has carefully considered the costs to State enforcement staff. The Agency has already increased its cost estimates after recognizing that training in reviewing electronic records will always represent an additional cost, and will never simply replace the current training in paper RODS. In response to the Maryland SHA's concerns, the Agency has estimated costs of inspecting EOBR devices, and the costs of equipment purchases and upgrades for accessing and reviewing electronic records.

8.2 Paperwork Savings

Six entities commented on paperwork benefits and driver's time use. PMAA stated the time saved from not filling out logs is not significant. However, the Maryland SHA agrees that EOBRs will save time, and SC&RA stated automation should reduce administrative burden. Report on Board estimated annual per truck paperwork burden costs \$2,029. Public Citizen commented electronic records are more

easily collected and analyzed, and such information could be used to more accurately track and monetize time wasted at loading docks, which would benefit drivers paid by the mile or trip. Verigo, a manufacturer of manual electronic logs that lack the automatic recording features required of AOBDRs and EOBRs, stated FMCSA is relatively silent on the issue of HOS auditing and management reporting.

Response: Paperwork savings figure prominently into this rule's analysis, and have been carefully considered. The paperwork burden associated with RODS includes the time spent filling them out, reviewing them, and filing them. FMCSA's estimate of the paperwork burden of filling out RODS is 6.5 minutes per day per driver, and 3 minutes per day per driver for review and filing. Trucking companies may not recognize all the benefits of paperwork savings if they pay drivers by the mile or trip and do not compensate drivers for time spent filling out logs. Costs directly borne by drivers are as important as costs borne by motor carriers, and, as other commenters have pointed out and the RIA shows, the time saving to drivers can be significant. The Agency also agrees with Public Citizen that insofar as EOBRs accurately capture total on-duty time, drivers may benefit when wasted time, such as excessive time spent at loading docks, is documented. Nevertheless, this potential benefit is not included in the RIA because the Agency cannot predict if this added recording of on duty time will translate into driver compensation, and if so, whether this would be a transfer from motor carriers or paid for via higher prices charged to shippers.

8.3 Regulatory Flexibility Act Analysis (Small Entities)

Forty commenters, including 15 carriers and 13 drivers, expressed opinions on the impact on small entities. PMAA stated the cost would be a heavy burden for small companies. TCA stated with high fuel costs and expected tighter emission controls increasing the costs of new trucks, the cost of EOBRs is one more burden the majority of these carriers cannot afford. The Maryland State Police said mandating EOBRs could be economically disastrous for some carriers. OOIDA said the burden would be disproportionately borne by small entities, which do not have the purchasing power of larger carriers or the large number of revenue producing drivers across whom to spread EOBR costs; non-safety economic advantages of EOBRs also come at a cost and typically are only useful to those

managing large fleets. OOIDA also stated small carriers are more likely to be selected for reviews, although until SafeStat is revised, it is difficult to be certain on that point; larger carriers are more sophisticated about disguising noncompliance.

OOIDA also commented the most burdensome cost to small-business carriers will be the loss of drivers who are unwilling to drive for an EOBR-mandated motor carrier. As posited by OOIDA, for example, the cost of the initial installation of an EOBR into an existing truck has been estimated to be between \$1,000 and \$3,000. Either the motor carriers will face that cost for each truck, or the owner-operator will bear that cost. That cost may be prohibitive for a small-business, and owner-operators who face such a cost will quickly look for work for another carrier. Under either scenario, a motor carrier facing the mandate will go out of business.

Response: All carriers are harmed, but especially small carriers, by companies that gain a competitive advantage by violating safety regulations. Although the majority of carriers are small businesses, most will not be subject to the remedial directive. Any competitive advantage gained by a small carrier by violating HOS will likely come at the expense of carriers with similar characteristics—size, geography, market share.

Regarding comments concerning costs, costs for the most part are proportional to the number of power units a carrier would need to outfit. Carriers would incur an annual net expense of less than \$100 per power unit, less than 0.1 percent of annual revenue per power unit. Furthermore, even these modest costs are avoidable as long as carriers comply with the HOS rules.

8.4 Comments on Driver Health Considerations

Three commenters criticized the Agency for failing to adequately consider driver health impacts in this rule. IBT stated carriers will use EOBRs to pressure drivers to increase productivity, which would increase their stress levels and adversely impact their health, and OOIDA stated the stress of being monitored alone is enough to harm driver health. Advocates, however, stated FMCSA's concern about the stress of using EOBRs distorted the research results of several studies, and the Agency had ignored potential health impacts of using EOBRs and improving compliance. Advocates contended the Agency's regulatory analysis ignored "evidence of adverse

health impacts from the very long working hours associated with HOS violations.” Furthermore, by not proposing to mandate EOBR use, Advocates held the Agency was not helping “to ameliorate the adverse health impacts of exceptionally long working and driving hours triggered by the Agency’s final rules in 2003 and in 2005.”

Response: The Agency has addressed both positive and negative health impacts in Appendix A to the EA for this rule, which has been placed in the docket. The Agency carefully reviewed research on the potentially negative impacts of electronic monitoring and concluded that the use of EOBRs required in today’s final rule will not result in negative impacts on driver health for two reasons: First, because monitoring of HOS compliance is an existing, not a new, requirement; and second, because the Agency is requiring EOBRs to monitor safety, not workplace productivity.

The Agency has also not been able to statistically quantify significant health benefits from improved HOS compliance, although at least some benefits are anticipated to result, for at least some drivers. Cost and benefit estimates of the HOS regulations are included in the analysis for that separate rulemaking 72 FR 71247 (Dec. 17, 2007). In addition, the underlying HOS regulations are the subject of a separate rulemaking action 72 FR 71247 (Dec. 17, 2007).

V. Rulemaking Analyses and Notices

Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

Under Executive Order 12866 (58 FR 51735, October 4, 1993) and DOT policies and procedures, FMCSA must determine whether a regulatory action is “significant,” and therefore subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Order defines “significant regulatory action” as one likely to result in a rule that may:

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the

environment, public health or safety, or State, local, or Tribal government or communities.

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency.

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof.

(4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order.

FMCSA has determined this rule will have an annual effect of \$100 million or more, and is, therefore, an economically significant regulatory action within the meaning of the Executive Order and under the regulatory policies and procedures of DOT because of the level of public interest in rulemakings related to hours-of-service (HOS) compliance. The Agency has therefore conducted an RIA of the costs and benefits of this rule. The RIA is summarized below. The full analysis is available in the docket.

After reconsidering the discussion in the NPRM, and based on comments received, FMCSA examined two regulatory options for the final rule—the 2 x 10 remedial directive proposed in the NPRM, and the considerably broader and more stringent 1 x 10 remedial directive. We understand the concerns of ATA and J.B. Hunt, among others, who believe the proposal did not cover enough carriers. While FMCSA acknowledges the safety concerns of those that support an industry-wide EOBR mandate, the Agency cannot extend the EOBR mandate in that manner in this final rule because the scope of the current rulemaking proceeding is limited to a compliance-based regulatory approach, implemented through a remedial directive. However, the number of motor carriers that will be required to install, use and maintain EOBRs is significantly greater under this final rule—using the 1 x 10 trigger—than under the 2 x 10 trigger that was proposed in the NPRM. The RIA examines the costs and benefits of two regulatory options, the 2 x 10 and the 1 x 10 remedial directives.

Cost information was gathered from publicly available marketing materials and contact with EOBR vendors. The

RIA focuses on the least expensive device determined to be compliant with the rule.⁴ We do not expect all carriers to use this specific device, only that it represents a device at the low end of the cost range of an EOBR that the Agency believes would be compliant with the provisions of the final rule.

For many carriers, this rule would not require new equipment. Some carriers already use AOBDRs, AOBDRs with enhanced functionality, or onboard systems with EOBR functionality, which the rule will allow them to continue using provided certain conditions are met. These carriers are excluded from cost and benefit calculations when appropriate. Other carriers employ Fleet Management Systems (FMS) that are capable of fulfilling this rule’s requirements with the activation of available hardware or software functions. Estimates of costs are lower for carriers that already have partial or complete EOBR functionality.

Costs were estimated on an annualized basis over a ten-year horizon. Costs and benefits that accrue throughout the year are presented at their present value at the beginning of the year. Training time costs for drivers, administrative staff, and State enforcement personnel were estimated. The analysis estimates the cost to carriers of coming into compliance with HOS and corresponding safety benefits as induced through EOBR use. Cost savings on paper log purchase, use, and processing are also assessed.

Safety benefits of EOBR use are assessed by estimating reductions in HOS violations and resulting reductions in fatigue-related crashes. Other non-safety health effects (positive and negative) for drivers, as a result of the potential decreased driving time based on increased pressure on drivers to comply with the HOS regulations, are considered but not quantified in this analysis.

The estimates of the total net benefits are presented below: Of the two regulatory options, the 1 x 10 remedial directive yields higher total net benefit.

⁴ The least expensive device that satisfies the requirements of the rule was found to be the RouteTracker sold by Turnpike Global. Cost data are based on the use of this device with the Sprint network.

TOTAL ANNUAL NET BENEFITS
[Millions]

	Regulatory option 1: 1 x 10 remedial directive	Regulatory option 2: 2 x 10 remedial directive
Total Costs	(\$139)	(\$14)
Total Benefits	182	22
Net Benefits	43	8

Additionally, the overall crash rates of both the 1 x 10 remedial directive motor carriers and the 2 x 10 remedial directive motor carriers are considerably higher than the crash rates of the general motor carrier population. Using data from MCMIS and compliance review databases, crash rates were computed by dividing total crashes by each carrier's number of power units. The Agency compared crash rates between the general motor carrier population and 1 x 10 remedial directive motor carriers as well as between the general motor carrier population and 2 x 10 remedial directive motor carriers. The 1 x 10 remedial directive motor carriers were found to have a 40 percent higher crash rate than that of other carriers that have undergone compliance reviews, and 2 x 10 remedial directive motor carriers had a 90 percent higher crash rate than that of other carriers that have undergone compliance reviews. The final rule's application of a remedial directive to the 1 x 10 remedial directive motor carriers makes the best use of Agency resources and provides considerably higher net benefits to society.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (Pub. L. 96-354, 5 U.S.C. 601 *et seq.*), requires agencies to consider the impact of regulations on small businesses, small non-profit organizations, and small governmental jurisdictions, unless the Agency determines that a rule is not expected to have a significant economic impact on a substantial number of small entities (SEISNOSE). The remedial directive aspect of this rule will be applicable to about 2,800 motor carriers in the first year and 5,700 motor carriers each year thereafter. The Agency estimates that the total net cost of this rule will be less than \$100 per power unit per year, compared to revenues of over \$100,000 per power unit per year. Based on the number of carriers affected and the overall cost impact to these carriers, the Agency does not expect this rule to have a SEISNOSE. The Agency has prepared a small business impact analysis for this rule that discusses its estimates of small business impacts.

This analysis has been placed in the docket.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*), Federal agencies must obtain approval from OMB for each collection of information they conduct, sponsor, or require through regulations. The FMCSA determined that this rule will affect the OMB Control Number 2126-0001, "Hours of Service of Drivers Regulation, Supporting Documents," information collection request (ICR), approved at 184,380,000 burden hours through December 31, 2011. The PRA requires agencies to provide a specific, objectively supported estimate of burden hours that will be imposed by the information collection. *See* 5 CFR 1320.8. The requirement triggering the paperwork burden imposed by FMCSA's records of duty status requirement is set forth at 49 CFR 395.8.

The FMCSA estimated that the remedial provisions of this final rule, requiring the installation, use, and maintenance of EOBRs by motor carriers with a threshold rate of serious HOS violations, would affect approximately 5,700 motor carriers that employ 129,000 drivers annually. The use of EOBRs will reduce the annual burden hours for FMCSA's information collection OMB Control Number 2126-0001 by 3,110,000 hours. The FMCSA's revised estimate of the annual burden of the IC is 181,270,000 hours (184,380,000 - 3,110,000).

A supporting statement reflecting this assessment will be submitted to OMB together with this final rule.

Privacy Impact Assessment

Section 522(a)(5) of the Transportation, Treasury, Independent Agencies, and General Government Appropriations Act, 2005, (Pub. L. 108-447, div. H, 118 Stat. 2809, 3268) requires the Department of Transportation and certain other Federal agencies to conduct a privacy impact assessment (PIA) of each proposed rule that will affect the privacy of individuals. The Agency conducted a

PIA for the NPRM, and we have augmented the PIA for this final rule and placed the revised version in the docket. Although the Agency determined that the same personally identifiable information (PII) for CMV drivers currently collected as part of the RODS and supporting documents requirements would continue to be collected under this rulemaking, it recognized the significance of the decision to require, even in limited circumstances, that PII previously kept in paper copy now be kept electronically. Privacy was a significant consideration in FMCSA's development of this proposal. As stated earlier, we recognize that the need for a verifiable EOBR audit trail—a detailed set of records to verify time and physical location data for a particular CMV—must be counterbalanced by privacy considerations. The Agency considered, but rejected, certain alternative technologies to monitor drivers' HOS (including in-cab video cameras and bio-monitors) as too invasive of personal privacy. All CMV drivers subject to 49 CFR part 395 must have their HOS accounted for to ensure they have adequate opportunities for rest. This final rule would not change the Agency's policies, practices, or regulations regarding its own collection and storage of HOS records of individual drivers whose RODS are reviewed. The expanded review procedures under the random review incentive, however, would enlarge the population of drivers whose RODS are reviewed for those carriers. It would also change the technology by which compliance is to be documented, in a way that facilitates both the sharing of information and its capacity to be data processed.

As before, the HOS information recorded on EOBRs would be accessible to Federal and State enforcement personnel only when compliance assurance activities are conducted at the facilities of motor carriers subject to the RODS requirement or when the CMVs of those carriers are inspected at roadside. Motor carriers would not be required to upload this information into Federal or

State information systems accessible to the public. This would aid data security and ensure that general EOBR data collection does not result in a new or revised Privacy Act System of Records for FMCSA. (Evidence of violation of any FMCSA requirements uncovered during either of these activities is transferred to a DOT/FMCSA Privacy Act record system.) Data accuracy concerning drivers' RODS should improve as a result of the new performance standards for EOBRs, allowing drivers to make EOBR entries to identify any errors or inconsistencies in the data, and mandating EOBR use by motor carriers with a history of serious HOS noncompliance.

What would change, and change significantly, is the capacity of this data to be processed and converted to more usable information for the purpose of determining drivers' and motor carriers' compliance with the HOS regulations. Although no CMV operator would be required to upload this data to a Federal or State database accessible to the public, the electronic formulation of the data would make it easier for a CMV operator to keep track of the activities of its drivers. Similarly, Federal and State law enforcement and safety authorities, including FMCSA, would be better able to do the same. As shown in other contexts, the increased accessibility, accuracy, and reliability of geospatial location information has made electronically generated and preserved data attractive to a variety of audiences. On balance, we must compel use of these devices in those situations described in this rule. The entire privacy impact assessment is available in the docket for this rule.

Unfunded Mandates Reform Act

This rule would not result in the net expenditure by State, local and Tribal governments, in the aggregate, or by the private sector, of \$141,300,000 or more in any one year, nor would it affect small governments. Therefore, no actions are deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Executive Order 13132 (Federalism)

This rulemaking would not preempt or modify any provision of State law, impose substantial direct unreimbursed compliance costs on any State, or diminish the power of any State to enforce its own laws. Accordingly, this rulemaking does not have Federalism implications warranting the application of Executive Order 13132.

Executive Order 12372 (Intergovernmental Review)

The regulations implementing E.O. 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this rule.

National Environmental Policy Act

The National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*, as amended) requires Federal agencies to consider the consequences of, and prepare a detailed statement on, all major Federal actions significantly affecting the quality of the human environment. In accordance with its procedures for implementing NEPA (FMCSA Order 5610.1, Chapter 2.D.4(c) and Appendix 3), FMCSA prepared an EA to review the potential impacts of this rulemaking. The EA findings are summarized below. The full EA is in the docket.

Implementation of this action would alter to some extent the operation of CMVs. However, the rule will not require any new construction or change significantly the number of CMVs in operation. FMCSA found, therefore, that noise, hazardous materials, endangered species, cultural resources protected under the National Historic Preservation Act, wetlands, and resources protected under Section 4(f) of the Department of Transportation Act would not be impacted by the rule.

The EA also examined impacts on air quality and public safety. We anticipate that drivers of CMVs operated by carriers that have been issued an EOBR remedial directive will now take the full off-duty periods required by the HOS rules. During off-duty periods, drivers frequently leave the CMV parked in "idle," which increases engine emissions on a per-mile basis. Hence, drivers for remediated carriers will cause a modest overall increase in engine emissions by virtue of additional drivers coming into compliance with the HOS regulations. Because the number of trucks likely to be required to install EOBRs is relatively small (139,000 out of 4.2 million total CMVs), FMCSA determined that the increase in air toxics would be negligible. Moreover, because drivers for carriers brought into HOS compliance will experience less fatigue and be less likely to have fatigue-related crashes, there will be a counterbalancing increase in public safety.

FMCSA concludes that the rule changes will have a negligible impact on the environment. The provisions under the action do not, individually or collectively, pose any significant environmental impact. Therefore, this

rule change will not require an environmental impact statement. Consequently, FMCSA issues a Finding of No Significant Impact (FONSI) in the EA for this final rule.

Executive Order 13211 (Energy Supply, Distribution or Use)

FMCSA determined that the rule will not significantly affect energy supply, distribution, or use. No Statement of Energy Effects is therefore required.

Executive Order 12898 (Environmental Justice)

FMCSA considered the effects of this final rule in accordance with Executive Order 12898 and DOT Order 5610.2 on addressing Environmental Justice for Minority Populations and Low-Income Populations, published April 15, 1997 (62 FR 18377) and determined that there are no environmental justice issues associated with this rule or any collective environmental impact resulting from its promulgation. Environmental justice issues would be raised if there were "disproportionate" and "high and adverse impact" on minority or low-income populations. None of the regulatory options considered in this rulemaking will result in high and adverse environmental impacts.

Executive Order 13045 (Protection of Children)

Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, Apr. 23, 1997), requires agencies issuing "economically significant" rules, if the regulation also concerns an environmental health or safety risk that an agency has reason to believe may disproportionately affect children, to include an evaluation of the regulation's environmental health and safety effects on children. Although the rule is economically significant, it will improve safety; the rule also would not have a disproportionate affect on children. Therefore, FMCSA has determined that an analysis of the impacts on children is not required.

Executive Order 12988 (Civil Justice Reform)

This action meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Executive Order 12630 (Taking of Private Property)

This rule will not effect a taking of private property or otherwise have

taking implications under E. O. 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

National Technology Transfer and Advancement Act

The National Technology Transfer and Advancement Act (15 U.S.C. 272 note) requires Federal agencies proposing to adopt Government technical standards to consider whether voluntary consensus standards are available. If the Agency chooses to adopt its own standards in place of existing voluntary consensus standards, it must explain its decision in a separate statement to OMB.

FMCSA determined there are no voluntary national consensus standards for the design of EOBRs as complete units. However, there are many voluntary consensus standards concerning communications and information interchange methods that could be referenced as part of comprehensive performance-based requirements for EOBRs to ensure their reliable and consistent utilization by motor carriers and motor carrier safety compliance assurance officials. For example, the digital character set would reference the ASCII (American Standard Code for Information Interchange) character set specifications, the most widely used form of which is ANSI X3.4-1986. This is described in the "American National Standard for Information Systems—Coded Character Sets—7—Bit American National Standard Code for Information Interchange (7—Bit ASCII) (ANSI document # ANSI INCITS 4-1986 (R2007)) published by the American National Standards Institute (ANSI). The standard is available by contacting the American National Standards Institute, 11 West 42nd Street, New York, New York 10036, or by visiting the ANSI Web site at <http://webstore.ansi.org>. In another example, the Agency would reference the 802.11g-2003 standard as defined in the 802.11-2007 base standard for wireless communication published by IEEE (Institute of Electrical and Electronics Engineers).

We did review and evaluate the European Commission Council Regulations 3821/85 (analog tachograph) and 2135/98 (digital tachograph). These are not voluntary standards, but rather are design-specific type-certification programs. We concluded these standards lack several features and functions (such as CMV location tracking and the ability for the driver to enter remarks) that FMCSA has included in its performance-based final

rule, and require other features (such as an integrated license document on the driver's data card) that are not appropriate for U.S. operational practices.

List of Subjects

49 CFR Part 350

Grant programs—transportation, Highway safety, Motor carriers, Motor vehicle safety, Reporting and recordkeeping requirements.

49 CFR Part 385

Administrative practice and procedure, Highway safety, Motor carriers, Motor vehicle safety, Reporting and recordkeeping.

49 CFR Part 395

Highway safety, Incorporation by reference, Motor carriers, Reporting and recordkeeping.

49 CFR Part 396

Highways and roads, Motor carriers, Motor vehicle equipment, Motor vehicle safety.

■ For the reasons stated in the preamble, FMCSA amends 49 CFR chapter III as set forth below:

PART 350—COMMERCIAL MOTOR CARRIER SAFETY ASSISTANCE PROGRAM

■ 1. The authority citation for part 350 is revised to read as follows:

Authority: 49 U.S.C. 13902, 31101-31104, 31108, 31136, 31140-31141, 31161, 31310-31311, 31502; and 49 CFR 1.73.

■ 2. Amend § 350.201 by revising the introductory text and adding a new paragraph (z) to read as follows:

§ 350.201 What conditions must a State meet to qualify for Basic Program Funds?

Each State must meet the following 26 conditions:

* * * * *

(z) Enforce requirements relating to FMCSA remedial directives issued in accordance with 49 CFR part 385, subpart J, including providing inspection services for verification of electronic on-board recorder installation and operation as provided in § 385.811(b).

PART 385—SAFETY FITNESS PROCEDURES

■ 3. Revise the authority citation for part 385 to read as follows:

Authority: 49 U.S.C. 113, 504, 521(b), 5105(e), 5109, 13901-13905, 31133, 31135, 31136, 31137(a), 31144, 31148, and 31502; Sec. 113(a), Pub. L. 103-311; Sec. 408, Pub. L. 104-88; Sec. 350, Pub. L. 107-87; and 49 CFR 1.73.

■ 4. Amend § 385.1 by revising paragraph (a) to read as follows:

§ 385.1 Purpose and scope.

(a) This part establishes FMCSA's procedures to determine the safety fitness of motor carriers, to assign safety ratings, to direct motor carriers to take remedial action when required, and to prohibit motor carriers determined to be unfit from operating a CMV.

* * * * *

■ 5. Amend § 385.3 by adding a definition for the term "safety fitness determination" in alphabetical order, by removing the existing definition for the term "safety ratings," and by adding a new definition for the term "safety rating or rating" to read as follows:

§ 385.3 Definitions and acronyms.

* * * * *

Safety fitness determination means the final determination by FMCSA that a motor carrier meets the safety fitness standard under § 385.5.

Safety rating or *rating* means a rating of "Satisfactory," "Conditional" or "Unsatisfactory," which the FMCSA assigns to a motor carrier using the factors prescribed in § 385.7, as computed under the Safety Fitness Rating Methodology (SFRM) set forth in Appendix B to this part and based on the carrier's demonstration of adequate safety management controls under § 385.5(a). A safety rating of "Satisfactory" or "Conditional" is necessary, but not sufficient, to meet the overall safety fitness standard under § 385.5.

(1) *Satisfactory safety rating* means that a motor carrier has in place and functioning safety management controls adequate to meet that portion of the safety fitness standard prescribed in § 385.5(a). Safety management controls are adequate for this purpose if they are appropriate for the size and type of operation of the particular motor carrier.

(2) *Conditional safety rating* means a motor carrier does not have adequate safety management controls in place to ensure compliance with that portion of the safety fitness standard prescribed in § 385.5(a), which could result in occurrences listed in § 385.5(a)(1) through (a)(11).

(3) *Unsatisfactory safety rating* means a motor carrier does not have adequate safety management controls in place to ensure compliance with that portion of the safety fitness standard prescribed in § 385.5(a), and this has resulted in occurrences listed in § 385.5(a)(1) through (a)(11).

(4) *Unrated carrier* means that the FMCSA has not assigned a safety rating to the motor carrier.

- 6. Revise § 385.5 to read as follows:

§ 385.5 Safety fitness standard.

A motor carrier must meet the safety fitness standard set forth in this section. Intrastate motor carriers subject to the hazardous materials safety permit requirements of subpart E of this part must meet the equivalent State requirements. To meet the safety fitness standard, the motor carrier must demonstrate the following:

(a) It has adequate safety management controls in place, which function effectively to ensure acceptable compliance with applicable safety requirements to reduce the risk associated with:

(1) Commercial driver's license standard violations (part 383 of this chapter),

(2) Inadequate levels of financial responsibility (part 387 of this chapter),

(3) The use of unqualified drivers (part 391 of this chapter),

(4) Improper use and driving of motor vehicles (part 392 of this chapter),

(5) Unsafe vehicles operating on the highways (part 393 of this chapter),

(6) Failure to maintain accident registers and copies of accident reports (part 390 of this chapter),

(7) The use of fatigued drivers (part 395 of this chapter),

(8) Inadequate inspection, repair, and maintenance of vehicles (part 396 of this chapter),

(9) Transportation of hazardous materials, driving and parking rule violations (part 397 of this chapter),

(10) Violation of hazardous materials regulations (parts 170 through 177 of this title), and

(11) Motor vehicle accidents, as defined in § 390.5 of this chapter, and hazardous materials incidents.

(b) The motor carrier has complied with all requirements contained in any remedial directive issued under subpart J of this part.

- 7. Amend § 385.9 by revising paragraph (a) to read as follows:

§ 385.9 Determination of a safety rating.

(a) Following a compliance review of a motor carrier operation, FMCSA, using the factors prescribed in § 385.7 as computed under the Safety Fitness Rating Methodology set forth in Appendix B to this part, shall determine whether the present operations of the motor carrier are consistent with that portion of the safety fitness standard set forth in § 385.5(a), and assign a safety rating accordingly.

* * * * *

- 8. Amend § 385.11 by revising the section heading and adding paragraph (g) to read as follows:

§ 385.11 Notification of safety rating and safety fitness determination.

* * * * *

(g) If a motor carrier is subject to a remedial directive and proposed determination of unfitness under subpart J of this part, the notice of remedial directive will constitute the notice of safety fitness determination. If FMCSA has not issued a notice of remedial directive and proposed determination of unfitness under subpart J of this part, a notice of a proposed or final safety rating will constitute the notice of safety fitness determination.

- 9. Amend § 385.13 by adding paragraph (e) as follows:

§ 385.13 Unsatisfactory rated motor carriers; prohibition on transportation; ineligibility for Federal contracts.

* * * * *

(e) *Revocation of operating authority.* If a proposed "unsatisfactory" safety rating or a proposed determination of unfitness becomes final, the FMCSA will, following notice, issue an order revoking the operating authority of the owner or operator. For purposes of this section, the term "operating authority" means the registration required under 49 U.S.C. 13902 and § 392.9a of this subchapter. Any motor carrier that operates CMVs after revocation of its operating authority will be subject to the penalty provisions listed in 49 U.S.C. 14901.

- 10. Amend § 385.15 by revising paragraph (a) to read as follows:

§ 385.15 Administrative review.

(a) A motor carrier may request the FMCSA to conduct an administrative review if it believes FMCSA has committed an error in assigning its proposed safety rating in accordance with § 385.11(c) or its final safety rating in accordance with § 385.11(b).

* * * * *

- 11. Amend § 385.17 by adding paragraphs (k) and (l) to read as follows:

§ 385.17 Change to safety rating based upon corrective actions.

* * * * *

(k) An upgraded safety rating based upon corrective action under this section will have no effect on an otherwise applicable notice of remedial directive, or proposed determination of unfitness issued in accordance with subpart J of this part.

(l) A motor carrier may not request a rescission of a determination of unfitness issued under subpart J of this part based on corrective action.

- 12. Amend § 385.19 by revising paragraphs (a) and (b) to read as follows:

§ 385.19 Safety fitness information.

(a) Final safety ratings, remedial directives, and safety fitness determinations will be made available to other Federal and State agencies in writing, telephonically, or by remote computer access.

(b) The final safety rating, any applicable remedial directive(s), and the safety fitness determination pertaining to a motor carrier will be made available to the public upon request. Any person requesting information under this paragraph must provide FMCSA with the motor carrier's name, principal office address, and, if known, the USDOT Number or the Interstate Commerce Commission MC (ICCMC) docket number if any.

* * * * *

- 13. Amend § 385.407 by revising paragraph (a) to read as follows:

§ 385.407 What conditions must a motor carrier satisfy for FMCSA to issue a safety permit?

(a) *Motor carrier safety performance.*

(1) The motor carrier:

(i) Must be in compliance with any remedial directive issued under subpart J of this part, and

(ii) Must have a "Satisfactory" safety rating assigned by either FMCSA, under the Safety Fitness Procedures of this part, or the State in which the motor carrier has its principal place of business, if the State has adopted and implemented safety fitness procedures that are equivalent to the procedures in subpart A of this part.

(2) FMCSA will not issue a safety permit to a motor carrier that:

(i) Does not certify that it has a satisfactory security program as required in § 385.407(b);

(ii) Has a crash rate in the top 30 percent of the national average as indicated in FMCSA Motor Carrier Management Information System (MCMIS); or

(iii) Has a driver, vehicle, hazardous materials, or total out-of-service rate in the top 30 percent of the national average as indicated in the MCMIS.

* * * * *

- 14. Amend part 385 by adding a new subpart J consisting of new §§ 385.801 through 385.819 to read as follows:

Subpart J—Remedial Directives

Sec.

385.801 Purpose and scope.

385.803 Definitions and acronyms.

385.805 Events triggering issuance of remedial directive and proposed determination of unfitness.

385.807 Notice and issuance of remedial directive.

385.809 [Reserved]

- 385.811 Proof of compliance with remedial directive.
- 385.813 Issuance and conditional rescission of proposed unfitness determination.
- 385.815 Exemption for AOBDR users.
- 385.817 Administrative review.
- 385.819 Effective of failure to comply with remedial directive.

Subpart J—Remedial Directives

§ 385.801 Purpose and scope.

(a) This subpart establishes procedures for FMCSA's issuance of notices of remedial directives and proposed determinations of unfitness.

(b) This subpart establishes the circumstances under which FMCSA will direct motor carriers (including owner-operators leased to motor carriers, regardless of whether the owner-operator has separate operating authority under part 365), in accordance with § 385.1(a), to install electronic on-board recorders (EOBRs) in their commercial motor vehicles as a remedy for threshold rate violations, as defined by § 385.803, of the part 395 hours-of-service regulations listed in Appendix C to this part.

(c) This subpart establishes the procedures by which motor carriers may challenge FMCSA's issuance of proposed determinations of unfitness and remedial directives.

(d) The provisions of this subpart apply to all motor carriers subject to the requirements of part 395 of this chapter.

§ 385.803 Definitions and acronyms.

(a) The definitions in subpart A of this part and part 390 of this chapter apply to this subpart, except where otherwise specifically noted.

(b) As used in this subpart, the following terms have the meaning specified:

Appendix C regulation means any of the regulations listed in Appendix C to Part 385 of this chapter.

Appendix C violation means a violation of any of the regulations listed in Appendix C to part 385 of this chapter.

Electronic on-board recording device (EOBR) means an electronic device that is capable of recording a driver's duty hours of service and duty status accurately and automatically and that meets the requirements of § 395.16 of this chapter.

Final determination for purposes of part 385, subpart J means:

(1) An adjudication under this subpart upholding a notice of remedial directive and proposed unfitness determination;

(2) The expiration of the period for filing a request for administrative review of remedial directive and

proposed unfitness determination under this subpart; or

(3) The entry of a settlement agreement stipulating that the carrier is subject to mandatory EOBR installation, use, and maintenance requirements.

Motor carrier includes owner-operators leased to carriers subject to a remedial directive, regardless of whether the owner-operator has separate operating authority under part 365 of this chapter.

Proposed determination of unfitness or proposed unfitness determination means a determination by FMCSA that a motor carrier will not meet the safety fitness standard under § 385.5 on a specified future date unless the carrier takes the actions necessary to comply with the terms of a remedial directive issued under this subpart.

Remedial directive means a mandatory instruction from FMCSA to take one or more specified action(s) as a condition of demonstrating safety fitness under 49 U.S.C. 31144(b).

Threshold rate violation for the purposes of this subpart means a violation rate for any Appendix C regulation equal to or greater than 10 percent of the number of records reviewed.

§ 385.805 Events triggering issuance of remedial directive and proposed determination of unfitness.

A motor carrier subject to 49 CFR part 395 will be subject to a remedial directive and proposed unfitness determination in accordance with this subpart for threshold rate violations of any Appendix C regulation or regulations that have been documented during a compliance review. A remedial directive and proposed unfitness determination will be issued if a compliance review conducted on the motor carrier resulted in a final determination of one or more threshold rate violations of any Appendix C regulation are discovered.

§ 385.807 Notice and issuance of remedial directive.

(a) Following the close of the compliance review described in § 385.805(a), FMCSA will issue the motor carrier a written notice of remedial directive and proposed determination of unfitness. FMCSA will issue the notice and proposed determination as soon as practicable, but not later than 30 days after the close of the review.

(b) The remedial directive will state that the motor carrier is required to install and maintain EOBRs compliant with § 395.16 of this chapter in all of the motor carrier's CMVs and to use the

EOBRs to record its drivers' hours of service pursuant to § 395.16. The motor carrier shall provide proof of the installation to FMCSA in accordance with § 385.811 within the following time periods:

(1) Motor carriers transporting hazardous materials in quantities requiring placarding, and motor carriers transporting passengers in a CMV, must install EOBRs and provide proof of the installation by the 45th day after the date of the notice of remedial directive.

(2) All other motor carriers must install EOBRs and provide proof of installation by the 60th day after the date of FMCSA's notice of remedial directive. If FMCSA determines the motor carrier is making a good-faith effort to comply with the terms of the remedial directive, FMCSA may allow the motor carrier to operate for up to 60 additional days.

(3) A motor carrier may challenge the notice of remedial directive and proposed determination of unfitness in accordance with § 385.817.

§ 385.809 [Reserved]

§ 385.811 Proof of compliance with remedial directive.

(a) Motor carriers subject to a remedial directive to install EOBRs under this section must provide proof of EOBR installation by one of the following:

(1) Submitting all of the carrier's CMVs for visual and functional inspection by FMCSA or qualified State enforcement personnel.

(2) Transmitting to the FMCSA service center for the geographic area where the carrier maintains its principal place of business all of the following documentation:

(i) Receipts for all necessary EOBR purchases.

(ii) Receipts for the installation work.

(iii) Digital or other photographic evidence depicting the installed devices in the carrier's CMVs.

(iv) Documentation of the EOBR serial number for the specific device corresponding to each CMV in which the device has been installed.

(3) If no receipt is submitted for an installed device or the installation work in accordance with paragraph (a)(2) of this section, the carrier must submit a written statement explaining who installed the devices, how many devices were installed, the manufacturer and model numbers of the devices installed, and the vehicle identification numbers of the CMVs in which the devices were installed.

(b) Visual and functional EOBR inspections may be performed at any

FMCSA roadside inspection station or at the roadside inspection or weigh station facility of any State that receives Motor Carrier Safety Assistance Program funds under 49 U.S.C. 31102 and that provides such inspection services. The carrier may also request such inspections be performed at its principal place of business.

(c) Motor carriers issued remedial directives pursuant to this section must install in all of their CMVs EOBRs meeting the standards set forth in 49 CFR 395.16. Such motor carriers must maintain and use the EOBRs to verify compliance with part 395 for a period of 2 years following the issuance of the remedial directive. In addition to any other requirements imposed by the FMCSRs, during the period of time the carrier is subject to a remedial directive the carrier must maintain all records and reports generated by the EOBRs and, upon demand, produce those records to FMCSA personnel.

(d) *Malfunctioning devices.* Motor carriers subject to remedial directives shall maintain EOBRs installed in their CMVs in good working order. Such carriers must cause any malfunctioning EOBR to be repaired or replaced within 14 days from the date the carrier becomes aware of the malfunction. During this repair or replacement period, carriers subject to a remedial directive under this part must prepare a paper record of duty status pursuant to § 395.8 of this chapter as a temporary replacement for the non-functioning EOBR unit. All other provisions of the remedial directive will continue to apply during the repair and replacement period. Failure to comply with the terms of this paragraph may subject the affected CMV and/or driver to an out-of-service order pursuant to § 396.9(c) and § 395.13 of this chapter, respectively. Repeated violations of this paragraph may subject the motor carrier to the provisions of § 385.819.

§ 385.813 Issuance and conditional rescission of proposed unfitness determination.

(a) Simultaneously with the notice of remedial directive, FMCSA will issue a proposed unfitness determination. The proposed unfitness determination will explain that, if the motor carrier fails to comply with the terms of the remedial directive, the carrier will be unfit under the fitness standard in § 385.5, prohibited from engaging in interstate operations and intrastate operations affecting interstate commerce, and, in the case of a carrier registered under 49 U.S.C. 13902, have its registration revoked.

(b) FMCSA will conditionally rescind the proposed determination of unfitness upon the motor carrier's submission of sufficient proof of EOBR installation in accordance with § 385.811.

(c) During the period the remedial directive is in effect, FMCSA may reinstate the proposed unfitness determination and immediately prohibit the motor carrier from operating in interstate commerce and intrastate operations affecting interstate commerce if the motor carrier violates the provisions of the remedial directive.

§ 385.815 Exemption for AOBRD users.

(a) Upon written request by the motor carrier, FMCSA will grant an exception from the requirements of remedial directives under this section to motor carriers that already had installed in all commercial motor vehicles, at the time of the compliance review immediately preceding the issuance of the notice of remedial directive, AOBRDs compliant with 49 CFR 395.15 of this chapter.

(b) The carrier will be permitted to continue using the previously installed devices if the carrier can satisfactorily demonstrate to FMCSA that the carrier and its employees understand how to use the AOBRDs and the information derived from them.

(c) The carrier must either use and maintain the AOBRDs currently in its CMVs or install new devices compliance with § 395.16 of this chapter.

(d) Although FMCSA may suspend enforcement for noncompliance with the remedial directive, the directive will remain in effect; and the hours-of-service compliance of any motor carrier so exempted, will be subject to ongoing FMCSA oversight.

(e) The exemption granted under this section shall not apply to CMVs manufactured on or after the date 2 years from the effective date of this rule.

§ 385.817 Administrative review.

(a) A motor carrier may request FMCSA to conduct an administrative review if the carrier believes FMCSA has committed an error in issuing a notice of remedial directive under § 385.807 and proposed unfitness determination under § 385.813. Administrative reviews of notices of remedial directive and proposed unfitness determinations are limited to findings in the compliance review immediately preceding the notice.

(b) The motor carrier's request must explain the error it believes FMCSA committed in issuing the notice of remedial directive and proposed unfitness determination. The motor carrier must include a list of all factual

and procedural issues in dispute and any information or documents that support its argument.

(c) The motor carrier must submit its request in writing to the Assistant Administrator, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590. The motor carrier must submit on the same day a copy of the request to FMCSA counsel in the FMCSA service center for the geographic area where the carrier maintains its principal place of business.

(1) If a motor carrier has received a notice of remedial directive and proposed unfitness determination, the carrier should submit its request in writing within 15 days from the date of the notice. This timeframe will allow FMCSA to issue a written decision before the prohibitions outlined in § 385.819(a) take effect. If the carrier submits its request for administrative review within 15 days of the issuance of the notice of remedial directive and proposed unfitness determination, FMCSA will stay the finality of the proposed unfitness determination until the Agency has ruled on the carrier's request. Failure to submit the request within this 15-day period may prevent FMCSA from ruling on the request before the prohibitions take effect.

(2) A motor carrier must make a request for an administrative review within 90 days after the date of the notice of remedial directive and proposed determination of unfitness under § 385.807.

(d) FMCSA may request the motor carrier to submit additional data or attend a conference to discuss the request for review. If the motor carrier does not provide the information requested, or does not attend the conference, FMCSA may dismiss its request for review.

(e) FMCSA will notify the motor carrier in writing of its decision following the administrative review. FMCSA will complete its review:

(1) Within 30 days after receiving a request from a hazardous materials or passenger motor carrier that has received a proposed unfitness determination;

(2) Within 45 days after receiving a request from any other motor carrier that has received a proposed unfitness determination;

(3) With respect to requests for administrative review of notices of remedial directive, as soon as practicable but not later than 60 days after receiving the request.

(f) The decision regarding a proposed unfitness determination constitutes final Agency action.

(g) The provisions of this section will not affect procedures for administrative review of proposed or final safety ratings in accordance with § 385.15 or for requests for changes to safety ratings based upon corrective action in accordance with § 385.17.

§ 385.819 Effect of failure to comply with remedial directive.

(a) A motor carrier that fails or refuses to comply with the terms of a remedial directive issued under this subpart, including a failure or refusal to provide proof of EOBR installation in accordance with § 385.811, does not meet the safety fitness standard set forth in § 385.5(b). With respect to such carriers, the proposed determination of unfitness issued in accordance with § 385.813 becomes final, and the motor carrier is prohibited from operating, as follows:

(1) Motor carriers transporting hazardous materials in quantities requiring placarding and motor carriers transporting passengers in a CMV are prohibited from operating CMVs in interstate commerce and in operations that affect interstate commerce beginning on the 46th day after the date of FMCSA's notice of remedial directive and proposed unfitness determination. A motor carrier subject to the registration requirements of 49 U.S.C. 13901 will have its registration revoked on the 46th day after the date of FMCSA's notice of remedial directive and proposed unfitness determination.

(2) All other motor carriers are prohibited from operating a CMV in interstate commerce and in operations that affect interstate commerce beginning on the 61st day after the date of FMCSA's notice of remedial directive and proposed unfitness determination. A motor carrier subject to the registration requirements of 49 U.S.C. 13901 will have its registration revoked on the 61st day after the date of FMCSA's notice of remedial directive and proposed unfitness determination. If FMCSA determines the motor carrier is making a good-faith effort to satisfy the terms of the remedial directive, FMCSA may allow the motor carrier to operate for up to 60 additional days.

(b) If a proposed unfitness determination becomes a final determination, FMCSA will issue an order prohibiting the motor carrier from operating in interstate commerce. If the motor carrier is required to register under 49 U.S.C. 13901, FMCSA will revoke the motor carrier's registration on the dates specified in § 385.819(a)(1) and (a)(2).

(c) If FMCSA has prohibited a motor carrier from operating in interstate

commerce under paragraph (a) of this section and, if applicable, revoked the carrier's registration, and the motor carrier subsequently complies with the terms and conditions of the remedial directive and provides proof of EOBR installation under § 385.811, the carrier may request FMCSA to lift the prohibition on operations at any time after the prohibition becomes effective. The request should be submitted in writing in accordance with § 385.817(c).

(d) A Federal Agency must not use for CMV transportation a motor carrier that FMCSA has determined is unfit.

(e) *Penalties.* If a proposed unfitness determination becomes a final determination, FMCSA will issue an order prohibiting the motor carrier from operating in interstate commerce and any intrastate operations that affect interstate commerce and, if applicable, revoking its registration. Any motor carrier that operates a CMV in violation of this section will be subject to the penalty provisions listed in 49 U.S.C. 521(b).

■ 15. Amend Appendix B to part 385 by revising paragraphs (b), (c), and (d) and section VI, paragraph (a), to read as follows:

Appendix B to Part 385—Explanation of Safety Rating Process

* * * * *

(b) As directed, FMCSA promulgated a safety fitness regulation, entitled "Safety Fitness Procedures," which established a procedure to determine the safety fitness of motor carriers through the assignment of safety ratings and established a "safety fitness standard" that a motor carrier must meet to obtain a "Satisfactory" safety rating. FMCSA later amended the safety fitness standard to add a distinct requirement that motor carriers also be in compliance with applicable remedial directives.

(c) To meet the safety fitness standard, a motor carrier must meet two requirements. First, the carrier must demonstrate to FMCSA it has adequate safety management controls in place that function effectively to ensure acceptable compliance with the applicable safety requirements. (See § 385.5(a)). A "safety fitness rating methodology" (SFRM) developed by FMCSA uses data from compliance reviews (CRs) and roadside inspections to rate motor carriers. Second, a motor carrier must also be in compliance with any applicable remedial directives issued in accordance with subpart J. This second requirement is set forth in § 385.5(b).

(d) The safety rating process developed by FMCSA is used to:

1. Evaluate the first component of the safety fitness standard, under § 385.5(a), and assign one of three safety ratings (Satisfactory, Conditional, or Unsatisfactory) to motor carriers operating in interstate commerce. This process conforms to § 385.5(a), Safety fitness standard, and § 385.7, Factors to be considered in determining a safety rating.

2. Identify motor carriers needing improvement in their compliance with the Federal Motor Carrier Safety Regulations (FMCSRs) and applicable Hazardous Materials Regulations (HMRs). These are carriers rated Unsatisfactory or Conditional.

* * * * *

VI. Conclusion

(a) FMCSA believes this "safety fitness rating methodology" is a reasonable approach to assignment of a safety rating, as required by the safety fitness regulations (§ 385.9), that most closely reflects the motor carrier's current level of compliance with the safety fitness standard in § 385.5(a). This methodology has the capability to incorporate regulatory changes as they occur.

* * * * *

■ 16. Add Appendix C to part 385 to read as follows:

Appendix C to Part 385—Regulations Pertaining to Remedial Directives in Part 385, Subpart J

§ 395.1(h)(1)(i) Requiring or permitting a property-carrying commercial motor vehicle driver to drive more than 15 hours (Driving in Alaska).

§ 395.1(h)(1)(ii) Requiring or permitting a property-carrying commercial motor vehicle driver to drive after having been on duty 20 hours (Driving in Alaska).

§ 395.1(h)(1)(iii) Requiring or permitting a property-carrying commercial motor vehicle driver to drive after having been on duty more than 70 hours in 7 consecutive days (Driving in Alaska).

§ 395.1(h)(1)(iv) Requiring or permitting a property-carrying commercial motor vehicle driver to drive after having been on duty more than 80 hours in 8 consecutive days (Driving in Alaska).

§ 395.1(h)(2)(i) Requiring or permitting a passenger-carrying commercial motor vehicle driver to drive more than 15 hours (Driving in Alaska).

§ 395.1(h)(2)(ii) Requiring or permitting a passenger-carrying commercial motor vehicle driver to drive after having been on duty 20 hours (Driving in Alaska).

§ 395.1(h)(2)(iii) Requiring or permitting a passenger-carrying commercial motor vehicle driver to drive after having been on duty more than 70 hours in 7 consecutive days (Driving in Alaska).

§ 395.1(h)(2)(iv) Requiring or permitting a passenger-carrying commercial motor vehicle driver to drive after having been on duty more than 80 hours in 8 consecutive days (Driving in Alaska).

§ 395.1(o) Requiring or permitting a property-carrying commercial motor vehicle driver to drive after having been on duty 16 consecutive hours.

§ 395.3(a)(1) Requiring or permitting a property-carrying commercial motor vehicle driver to drive more than 11 hours.

§ 395.3(a)(2) Requiring or permitting a property-carrying commercial motor vehicle driver to drive after the end of the 14th hour after coming on duty.

§ 395.3(b)(1) Requiring or permitting a property-carrying commercial motor vehicle

driver to drive after having been on duty more than 60 hours in 7 consecutive days.

§ 395.3(b)(2) Requiring or permitting a property-carrying commercial motor vehicle driver to drive after having been on duty more than 70 hours in 8 consecutive days.

§ 395.3(c)(1) Requiring or permitting a property-carrying commercial motor vehicle driver to restart a period of 7 consecutive days without taking an off-duty period of 34 or more consecutive hours.

§ 395.3(c)(2) Requiring or permitting a property-carrying commercial motor vehicle driver to restart a period of 8 consecutive days without taking an off-duty period of 34 or more consecutive hours.

§ 395.5(a)(1) Requiring or permitting a passenger-carrying commercial motor vehicle driver to drive more than 10 hours.

§ 395.5(a)(2) Requiring or permitting a passenger-carrying commercial motor vehicle driver to drive after having been on duty 15 hours.

§ 395.5(b)(1) Requiring or permitting a passenger-carrying commercial motor vehicle driver to drive after having been on duty more than 60 hours in 7 consecutive days.

§ 395.5(b)(2) Requiring or permitting a passenger-carrying commercial motor vehicle driver to drive after having been on duty more than 70 hours in 8 consecutive days.

§ 395.8(a) Failing to require driver to make a record of duty status.

§ 395.8(e) False reports of records of duty status.

§ 395.8(i) Failing to require driver to forward within 13 days of completion, the original of the record of duty status.

§ 395.8(k)(1) Failing to preserve driver's record of duty status for 6 months.

§ 395.8(k)(1) Failing to preserve driver's records of duty status supporting documents for 6 months.

PART 395—HOURS OF SERVICE OF DRIVERS

■ 17. The authority citation for part 395 is revised to read as follows:

Authority: 49 U.S.C. 508, 13301, 13902, 31133, 31136, 31502, 31504, and § 204, Pub. L. 104–88, 109 Stat. 803, 941 (49 U.S.C. 701 note); Sec. 114, Pub. L. 103–311, 108 Stat. 1673, 1677; Sec. 217, Pub. L. 106–159, 113 Stat. 1748, 1767; and 49 CFR 1.73.

■ 18. Amend § 395.2 by adding the following definitions in alphabetical order:

§ 395.2 Definitions.

CD–RW (Compact Disc—Re-Writable) means an optical disc digital storage format that allows digital data to be erased and rewritten many times. The technical and physical specifications for CD–RW are described in the document Orange Book Part III: CD–RW, published by Royal Philips Electronics.

CMRS (Commercial Mobile Radio Services) An FCC designation for any carrier or licensee whose wireless

network is connected to the public switched telephone network and/or is operated for profit. Another common term for these entities is cellular telephony providers.

* * * * *

802.11 is a set of communications and product compatibility standards for wireless local area networks (WLAN). The 802.11 standards are also known as WiFi by marketing convention.

Electronic on-board recording device (EOBR) means an electronic device that is capable of recording a driver's hours of service and duty status accurately and automatically and that meets the requirements of § 395.16. The device must be integrally synchronized with specific operations of the commercial motor vehicle in which it is installed. The EOBR must record, at minimum, the information listed in § 395.16(b).

* * * * *

Integrally synchronized refers to an AOBDR or EOBR that receives and records the engine use status and distance traveled for the purpose of deriving on-duty driving status from a source or sources internal to the CMV.

* * * * *

USB (Universal Serial Bus) is a serial bus interface standard for connecting electronic devices.

UTC (Coordinated Universal Time) is the international civil time standard, determined by using highly precise atomic clocks. It is the basis for civil standard time in the United States and its territories. UTC time refers to time kept on the Greenwich meridian (longitude zero), which is 5 hours ahead of Eastern Standard Time. UTC times are expressed in terms of a 24-hour clock. Standard time within any U.S. time zone is offset from UTC by a given number of hours determined by the time zone's distance from the Greenwich meridian.

* * * * *

■ 19. Amend § 395.8 by revising paragraphs (a)(2) and (e) to read as follows:

§ 395.8 Driver's record of duty status.

(a) * * *

(2) Every driver operating a commercial motor vehicle equipped with either an automatic on-board recording device meeting the requirements of § 395.15 or an electronic on-board recorder meeting the requirements of § 395.16 must record his or her duty status using the device installed in the vehicle. The requirements of this section shall not apply, except for paragraphs (e) and (k)(1) and (2) of this section.

* * * * *

(e) Failure to complete the record of duty activities of either this section, § 395.15 or § 395.16, failure to preserve a record of such duty activities, or making false reports in connection with such duty activities shall make the driver and/or the carrier liable to prosecution.

* * * * *

■ 20. Add § 395.11 to read as follows:

§ 395.11 Supporting documents for drivers using EOBRs.

(a) Motor carriers maintaining date, time and location data produced by a § 395.16-compliant EOBR need only maintain additional supporting documents (e.g., driver payroll records, fuel receipts) that provide the ability to verify on-duty not driving activities and off-duty status according to the requirements of § 395.8(k).

(b) This section does not apply to motor carriers and owner-operators that have been issued a remedial directive to install, use, and maintain EOBRs.

■ 21. Amend § 395.13 by revising paragraph (b)(2) and by adding paragraph (b)(4) to read as follows:

§ 395.13 Drivers declared out of service.

* * * * *

(b) * * *

(2) Every driver required to maintain a record of duty status under § 395.8 must have a record of duty status current on the day of examination and for the prior 7 consecutive days.

* * * * *

(4) No driver shall drive a CMV in violation of § 385.811(d) of this chapter.

* * * * *

■ 22. Amend § 395.15 by adding introductory text to paragraph (a), and revising paragraph (a)(1) to read as follows:

§ 395.15 Automatic on-board recording devices.

(a) *Applicability and authority to use.* This section applies to automatic on-board recording devices (AOBRDs) used to record drivers' hours of service as specified by part 395.

(1) A motor carrier may require a driver to use an AOBDR to record the driver's hours of service in lieu of complying with the requirements of § 395.8 of this part. For commercial motor vehicles manufactured prior to June 4, 2012, manufacturers or motor carriers may install an electronic device to record hours of service if the device meets the requirements of either this section or § 395.16.

* * * * *

■ 23. Add § 395.16 to read as follows:

§ 395.16 Electronic on-board recording devices.

(a) *Applicability and authority to use.* This section applies to electronic on-board recording devices (EOBRs) used to record the driver's hours of service as specified by part 395. Motor carriers subject to a remedial directive to install, use and maintain EOBRs, issued in accordance with 49 CFR part 385, subpart J, must comply with this section.

(1) A motor carrier may require a driver to use an EOBR to record the driver's hours of service in lieu of complying with the requirements of § 395.8 of this part. For commercial motor vehicles manufactured after June 4, 2012, any electronic device installed in a CMV by a manufacturer or motor carrier to record hours of service must meet the requirements of this section.

(2) Every driver required by a motor carrier to use an EOBR shall use such device to record the driver's hours of service.

(b) *Information to be recorded.* An EOBR must record the following information:

(1) Name of driver and any co-driver(s), and corresponding driver identification information (such as a user ID and password). However, the name of the driver and any co-driver is not required to be transmitted as part of the downloaded file during a roadside inspection.

(2) Duty status.

(3) Date and time.

(4) Location of CMV.

(5) Distance traveled.

(6) Name and USDOT Number of motor carrier.

(7) 24-hour period starting time (e.g., midnight, 9 a.m., noon, 3 p.m.).

(8) The multiday basis (7 or 8 days) used by the motor carrier to compute cumulative duty hours and driving time.

(9) Hours in each duty status for the 24-hour period, and total hours.

(10) Truck or tractor and trailer number.

(11) Shipping document number(s), or name of shipper and commodity.

(c) *Duty status categories.* An EOBR must use the following duty statuses:

(1) "Off duty" or "OFF"

(2) "Sleeper berth" or "SB", to be used only if sleeper berth is used.

(3) "Driving" or "D".

(4) "On-duty not driving" or "ON".

(d) *Duty status defaults.*

(1) An EOBR must automatically record driving time. If the CMV is being used as a personal conveyance, the driver must affirmatively enter an annotation before the CMV begins to move.

(2) When the CMV is stationary for 5 minutes or more, the EOBR must default

to on-duty not driving, and the driver must enter the proper duty status.

(3) An EOBR must record the results of power-on self-tests and diagnostic error codes.

(e) *Date and time.*

(1) The date and time must be recorded on the EOBR output record as specified under paragraph (i) of this section at each change of duty status, and at intervals of no greater than 60 minutes when the CMV is in motion. The date and time must be displayed on the EOBR's visual output device.

(2) The date and time must be obtained, transmitted, and recorded in such a way that it cannot be altered by a motor carrier, driver, or third party.

(3) The driver's duty status record must be prepared, maintained, and submitted using the time standard in effect at the driver's home terminal, for a 24-hour period beginning with the time specified by the motor carrier for that driver's home terminal.

(4) The time must be coordinated to UTC and the absolute deviation shall not exceed 10 minutes at any time.

(f) *Location.*

(1) Information used to determine the location of the CMV must be derived from a source not subject to alteration by the motor carrier or driver.

(2) The location description for the duty status change, and for intervening intervals while the CMV is in motion, must be sufficiently precise to enable Federal, State, and local enforcement personnel to quickly determine the vehicle's geographic location on a standard map or road atlas. The term "sufficiently precise," for purposes of this paragraph means the nearest city, town or village.

(3) When the CMV is in motion, location and time must be recorded at intervals no greater than 60 minutes. This recorded information must be capable of being made available in an output file format as specified in Appendix A to this part, but does not need to be displayed on the EOBR's visual output device.

(4) For each change of duty status (e.g., the place and time of reporting for work, starting to drive, on-duty not driving, and where released from work), the name of the nearest city, town, or village, with State abbreviation, must be recorded.

(5) The EOBR must record location names using codes derived from satellite or terrestrial sources, or a combination of these. The location codes must correspond, at a minimum, to ANSI INCITS 446-2008, "American National Standard for Information Technology—Identifying Attributes for Named Physical and Cultural

Geographic Features (Except Roads and Highways) of the United States, Its Territories, Outlying Areas, and Freely Associated Areas and the Waters of the Same to the Limit of the Twelve-Mile Statutory Zone (10/28/2008)," where "GNIS Feature Class" = "Populated Place" (incorporated by reference, see § 395.18). (For further information, see also the Geographic Names Information System (GNIS) at <http://geonames.usgs.gov/domestic/index.html>).

(g) *Distance traveled.*

(1) Distance traveled must use units of miles or kilometers driving during each on-duty driving period and total for each 24-hour period for each driver operating the CMV.

(2) If the EOBR records units of distance in kilometers, it must provide a means to display the equivalent distance in miles.

(3) Distance traveled information obtained from a source internal to the CMV must be accurate to the distance traveled as measured by the CMV's odometer.

(h) *Review of information by driver.*

(1) The EOBR must allow for the driver's review of each day's record before the driver submits the record to the motor carrier.

(2) The driver must review the information contained in the EOBR record and affirmatively note the review before submitting the record to the motor carrier.

(3) The driver may annotate only non-driving-status periods and the use of a CMV as a personal conveyance as described in paragraph (d)(1) of this section. The driver must electronically confirm his or her intention to make any annotations. The annotation must not overwrite the original record.

(4) If the driver makes a written entry on a hardcopy output of an EOBR relating to his or her duty status, the entries must be legible and in the driver's own handwriting.

(i) *Information reporting requirements.*

(1) An EOBR must make it possible for authorized Federal, State, or local officials to immediately check the status of a driver's hours of service.

(2) An EOBR must produce, upon demand, a driver's hours-of-service record in either electronic or printed form. It must also produce a digital file in the format described in Appendix A to this part. The record must show the time and sequence of duty status changes including the driver's starting time at the beginning of each day. As an alternative, the EOBR must be able to provide a driver's hours-of-service

record as described in paragraph (i)(6) of this section.

(3) This information may be used in conjunction with handwritten or printed records of duty status for the previous 7 days.

(4) Hours-of-service information must be made accessible to authorized Federal, State, or local safety assurance officials for their review without requiring the official to enter in or upon the CMV. The output record must conform to the file format specified in Appendix A to this part.

(5) The driver must have in his or her possession records of duty status for the previous 7 consecutive days available for inspection while on duty. These records must consist of information stored in and retrievable from the EOBR, handwritten records, records available from motor carriers' support systems, other printed records, or any combination of these. Electronic records must be capable of one-way transfer through wired and wireless methods to portable computers used by roadside safety assurance officials and must provide files in the format specified in Appendix A to this part. Wired communication information interchange methods must comply with the "Universal Serial Bus Specification (Revision 2.0) incorporated by reference, see § 395.18) and additional specifications in Appendix A, paragraph 2.2 to this part. Wireless communication information interchange methods must comply with the requirements of the 802.11g-2003 standard as defined in the 802.11-2007 base standard "IEEE Standard for Information Technology—Telecommunications and information exchange between systems—Local and metropolitan area networks—Specific requirements: Part 11: Wireless LAN Medium Access Control (MAC) and Physical Layer (PHY) Specifications" (IEEE Std. 802.11-2007) (incorporated by reference, see § 395.18), or CMRS.

(6) Support systems used in conjunction with EOBRs at a driver's home terminal or the motor carrier's principal place of business must be capable of providing authorized Federal, State, or local officials with summaries of an individual driver's hours of service records, including the information specified in § 395.8(d). The support systems must also provide information concerning on-board system sensor failures and identification of amended and edited data. Support systems must provide a file in the format specified in Appendix A to this part. The system must also be able to produce a copy of files on portable storage media (CD-RW, USB 2.0 drive) upon request of authorized safety

assurance officials. The support system may be maintained by a third-party service provider on behalf of the motor carrier.

(j) *Driver identification.* For the driver to log into the EOBR, the EOBR must require the driver to enter information (such as a user ID and password) that identifies the driver or to provide other information (such as smart cards, biometrics) that identifies the driver.

(k) *Availability of records of duty status.*

(1) An EOBR must be capable of producing duty status records for the current day and the previous 7 days from either the information stored in and retrievable from the EOBR or motor carrier support system records, or any combination of these.

(2) If an EOBR fails, the driver must do the following:

(i) Note the failure of the EOBR and inform the motor carrier within 2 days.

(ii) Reconstruct the record of duty status for the current day and the previous 7 days, less any days for which the driver has records.

(iii) Continue to prepare a handwritten record of all subsequent duty status until the device is again operational.

(iv) A brief (less than 5 minute) loss of connectivity between the EOBR and a location-tracking system or the motor carriers' support system is not considered an EOBR failure for the purpose of this section.

(l) *On-board information.* Each commercial motor vehicle must have onboard the commercial motor vehicle an information packet containing the following items:

(1) An instruction sheet describing how data may be stored and retrieved from the EOBR.

(2) A supply of blank driver's records of duty status graph-grids sufficient to record the driver's duty status and other related information for the duration of the current trip.

(m) *Submission of driver's record of duty status.*

(1) The driver must submit electronically, to the employing motor carrier, each record of the driver's duty status.

(2) For motor carriers not subject to the remedies provisions of part 385 subpart J of this chapter, each record must be submitted within 13 days of its completion.

(3) For motor carriers subject to the remedies provisions of part 385 subpart J of this chapter, each record must be submitted within 3 days of its completion.

(4) The driver must review and verify that all entries are accurate prior to

submission to the employing motor carrier.

(5) The submission of the record of duty status certifies that all entries made by the driver are true and correct.

(n) *EOBR display requirements.* An EOBR must have the capability of displaying all of the following information:

(1) The driver's name and EOBR login ID number on all EOBR records associated with that driver, including records in which the driver serves as a co-driver.

(2) The driver's total hours of driving during each driving period and the current duty day.

(3) The total hours on duty for the current duty day.

(4) Total miles or kilometers of driving during each driving period and the current duty day.

(5) Total hours on duty and driving time for the prior 7-consecutive-day period, including the current duty day.

(6) Total hours on duty and driving time for the prior 8-consecutive-day period, including the current duty day.

(7) The sequence of duty status for each day, and the time of day and location for each change of duty status, for each driver using the device.

(8) EOBR serial number or other identification, and identification number(s) of vehicle(s) operated that day.

(9) Remarks, including fueling, waypoints, loading and unloading times, unusual situations, or violations.

(10) Driver's override of an automated duty status change to driving if using the vehicle for personal conveyance or for yard movement.

(11) The EOBR may record other data as the motor carrier deems appropriate, including the date and time of crossing a State line for purposes of fuel-tax reporting.

(o) *Performance of recorders.* A motor carrier that uses an EOBR for recording a driver's records of duty status instead of the handwritten record must ensure the EOBR meets the following requirements:

(1) The EOBR must permit the driver to enter information into the EOBR only when the commercial motor vehicle is at rest.

(2) The EOBR and associated support systems must not permit alteration or erasure of the original information collected concerning the driver's hours of service, or alteration of the source data streams used to provide that information.

(3) The EOBR must be able to perform a power-on self-test, as well as a self-test at any point upon request of an authorized safety assurance official. The

EOBR must provide an audible and visible signal as to its functional status. It must record the outcome of the self-test and its functional status as a diagnostic event record in conformance with Appendix A to this part.

(4) The EOBR must provide an audible and visible signal to the driver at least 30 minutes in advance of reaching the driving time limit and the on-duty limit for the 24-hour period.

(5) The EOBR must be able to track total weekly on-duty and driving hours over a 7- or 8-day consecutive period. The EOBR must be able to warn a driver at least 30 minutes in advance of reaching the weekly duty-/driving-hour limitation.

(6) The EOBR must warn the driver via an audible and visible signal that the device has ceased to function. "Ceasing to function" for the purpose of this paragraph does not include brief losses of communications signals during such time as, but not limited to, when the vehicle is traveling through a tunnel.

(7) The EOBR must record a code corresponding to the reason it has ceased to function and the date and time of that event.

(8) The audible signal must be capable of being heard and discerned by the driver when seated in the normal driving position, whether the CMV is in motion or parked with the engine operating. The visual signal must be visible to the driver when the driver is seated in the normal driving position.

(9) The EOBR must be capable of recording separately each driver's duty status when there is a multiple-driver operation.

(10) The EOBR device/system must identify sensor failures and edited and annotated data when downloaded or reproduced in printed form.

(11) The EOBR device/system must identify annotations made to all records, the date and time the annotations were made, and the identity of the person making them.

(12) If a driver or any other person annotates a record in an EOBR or an EOBR support system, the annotation must not overwrite the original contents of the record.

(p) *Motor Carrier Requirements.*

(1) The motor carrier must not alter or erase, or permit or require alteration or erasure of, the original information collected concerning the driver's hours of service, the source data streams used to provide that information, or information contained in its EOBR support systems that use the original information and source data streams.

(2) The motor carrier must ensure the EOBR is calibrated, maintained, and recalibrated in accordance with the

manufacturer's specifications; the motor carrier must retain records of these activities.

(3) The motor carrier's drivers and other personnel reviewing and using EOBRs and the information derived from them must be adequately trained regarding the proper operation of the device.

(4) The motor carrier must maintain a second copy (back-up copy) of the electronic hours-of-service files, by month, on a physical device different from that on which the original data are stored.

(5) The motor carrier must review the EOBR records of its drivers for compliance with part 395.

(6) If the motor carrier receives or discovers information concerning the failure of an EOBR, the carrier must document the failure in the hours-of-service record for that driver.

(q) *Manufacturer's self-certification.*

(1) The EOBR and EOBR support systems must be certified by the manufacturer as evidence that they have been sufficiently tested to meet the requirements of § 395.16 and Appendix A to this part under the conditions in which they would be used.

(2) The exterior faceplate of the EOBR must be marked by the manufacturer with the text "USDOT-EOBR" as evidence that the device has been tested and certified as meeting the performance requirements of § 395.16 and Appendix A to this part.

■ 24. Add § 395.18 to read as follows:

§ 395.18 Matter incorporated by reference.

(a) *Incorporation by reference.* Certain materials are incorporated by reference in part 395, with the approval of the Director of the Federal Register under 5 U.S.C. 552(a), and 1 CFR part 51. For materials subject to change, only the specific version approved by the Director of the Office of the Federal Register and specified in the regulation is incorporated. To enforce any edition other than that specified in this section, the Federal Motor Carrier Safety Administration must publish notice of change in the **Federal Register** and the material must be available to the public. All of the approved material is available for inspection at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202-741-6030 or go to <http://www.archives.gov/federal-register/cfr/ibr-locations.html>. Also, it is available for inspection at the Federal Motor Carrier Safety Administration, Office of Bus and Truck Standards and Operations (MC-PS), 1200 New Jersey Ave., SE., Washington, DC 20590-0001, (202) 366-4325, and

is available from the sources listed in paragraphs (b) and (c) of this section.

(b) *Institute of Electrical and Electronic Engineers (IEEE).* 3 Park Avenue, New York, New York 10016-5997. Web page is <http://www.ieee.org/web/publications/home>; telephone is (800) 678-4333.

(1) "IEEE Standard for Information Technology—Telecommunications and information exchange between systems—Local and metropolitan area networks—Specific requirements: Part 11: Wireless LAN Medium Access Control (MAC) and Physical Layer (PHY) Specifications," IEEE Computer Society, Sponsored by the LAN/MAN Standards Committee: June 12, 2007 (IEEE Std. 802.11-2007). Incorporation by reference approved for § 395.16(i); and Appendix A to part 395, paragraph 2.3.

(2) [Reserved]

(c) *Universal Serial Bus Implementers Forum (USBIF).* 3855 SW. 153rd Drive, Beaverton, Oregon 97006. Web page is <http://www.usb.org>; telephone is (503) 619-0426.

(1) "Universal Serial Bus Specification," Compaq, Hewlett-Packard, Intel, Lucent, Microsoft, NEC, Philips; April 27, 2000 (Revision 2.0). Incorporation by reference approved for § 395.16(i) and Appendix A to part 395, paragraph 2.2.

(2) [Reserved]

(d) *American National Standards Institute (ANSI).* 11 West 42nd Street, New York, New York 10036. Web page is <http://webstore.ansi.org>; telephone is (212) 642-4900.

(1) "ANSI INCITS 446-2008, American National Standard for Information Technology—Identifying Attributes for Named Physical and Cultural Geographic Features (Except Roads and Highways) of the United States, Its Territories, Outlying Areas, and Freely Associated Areas and the Waters of the Same to the Limit of the Twelve-Mile Statutory Zone (10/28/2008)," (ANSI INCITS 446-2008). Incorporation by reference approved for § 395.16(f); Appendix A to part 395, paragraph 1.3, Table 2; and Appendix A to part 395, paragraph 3.1.1.3. (For further information, see also the Geographic Names Information System (GNIS) at <http://geonames.usgs.gov/domestic/index.html>).

(2) [Reserved]

■ 25. Add Appendix A to 49 CFR part 395 to read as follows:

Appendix A to Part 395—Electronic On-Board Recorder Performance Specifications

1. Data Elements Dictionary for Electronic On-Board Recorders (EOBRs)

1.1 To facilitate the electronic transfer of records to roadside inspection personnel and compliance review personnel, and provide the ability of various third-party and proprietary EOBR devices to be

interoperable, a consistent electronic file format and record layout for the electronic RODS data to be recorded are necessary. This EOBR data elements dictionary provides a standardized and consistent format for EOBR output data.

EOBR Data File Format

1.2 Regardless of the particular electronic file type (such as ASCII or XML) ultimately used for recording the electronic RODS produced by an EOBR, RODS data must be

recorded according to a “flat file” database model format. A flat file is a simple database in which all information is stored in a plain text format with one database “record” per line. Each of these data records is divided into “fields” using delimiters (as in a comma-separated-values data file) or based on fixed column positions. Table 1 below presents the general concept of a flat data file consisting of data “fields” (columns) and data “records” (rows).

Table 1: Flat Data File Database Model

FIELDS →

	Person First Name	Person Last Name	Driver PIN	Event Date	Event Time	Status Code
RECORDS ↓	William	Smith	978354	20050718	12:11	D
	William	Smith	978354	20050718	15:17	SB
	William	Smith	978354	20050718	18:53	D
	William	Smith	978354	20050718	21:43	ON
	William	Smith	978354	20050718	22:14	OFF
	William	Smith	978354	20050719	06:25	ON
	William	Smith	978354	20050719	06:47	D
	William	Smith	978354	20050719	13:32	SB
	William	Smith	978354	20050719	15:27	D
	William	Smith	978354	20050719	20:04	SB

1.3 The data elements dictionary describes the data fields component of the above framework. Individual data records must be generated and recorded whenever there is a change in driver duty status, an EOBR diagnostic event (such as power-on/

off, self test, etc.), or when one or more data fields of an existing data record are later amended. In the last case, the corrected record must be recorded and noted as “current” in the “Event Status Code” data field, with the original record maintained in

its unedited form and noted as “historical” in the “Event Status Code” data field. The EOBR Data Elements Dictionary is described in Table 2. The event codes are listed in Table 3.

TABLE 2—EOBR DATA ELEMENTS DICTIONARY

Data element	Data element definition	Type	Length	Valid values and notes
Driver Identification Data				
Driver First Name	First name of the driver	A	35	See Note 1.
Driver Last Name	Last name, family name, or surname of the driver	A	35	See Note 1.
Driver PIN/ID	Numeric identification number assigned to a driver by the motor carrier.	A	40	
Vehicle Identification Data				
Tractor Number	Motor carrier assigned identification number for tractor unit.	A	10	
Trailer Number	Motor carrier assigned identification number for trailer	A	10	
Tractor VIN Number ..	Unique vehicle ID number assigned by manufacturer according to US DOT regulations.	A	17	
Co-Driver Data				
Co-Driver First Name	First name of the co-driver	A	35	See Note 1.
Co-Driver Last Name	Last name, family name or surname of the co-driver	A	35	See Note 1.
Co-Driver ID	Numeric identification number assigned to a driver by the motor carrier.	A	40	
Company Identification Data				
Carrier USDOT Number.	USDOT Number of the motor carrier assigned by FMCSA.	N	8	

TABLE 2—EOBR DATA ELEMENTS DICTIONARY—Continued

Data element	Data element definition	Type	Length	Valid values and notes
Carrier Name	Name or trade name of the motor carrier company appearing on the Form MCS-150.	A	120	
Shipment Data				
Shipping Document Number.	Shipping document number	A	40	
Event Data				
Event Sequence ID ...	A serial identifier for an event that is unique to a particular vehicle and a particular day.	N	4	0001 through 9999.
Event Status Code ...	Character codes for the four driver duty status change events, State border crossing event, and diagnostic events.	A	3	OFF = Off Duty SB = Sleeper Berth D = On Duty Driving ON = On Duty Not Driving DG = Diagnostic.
Event Date	The date when an event occurred	N (Date)	8	UTC (universal time) recommended. Format: YYYYMMDD.
Event Time	The time when an event occurred	N (Time)	6	UTC (universal time) recommended. Format: HHMMSS (hours, minutes, seconds).
Event Latitude	Latitude of a location where an event occurred	N	2,6	Decimal format: XX.XXXXXX.
Event Longitude	Longitude of a location where an event occurred	N	3,6	Decimal format: XXX.XXXXXX.
Place Name	The location codes must correspond, at a minimum, to ANSI INCITS 446-2008, "American National Standard for Information Technology—Identifying Attributes for Named Physical and Cultural Geographic Features (Except Roads and Highways) of the United States, Its Territories, Outlying Areas, and Freely Associated Areas and the Waters of the Same to the Limit of the Twelve-Mile Statutory Zone (10/28/2008)," where "GNIS Feature Class" = "Populated Place" (incorporated by reference, see § 395.18). (For further information, see also the Geographic Names Information System (GNIS) at http://geonames.usgs.gov/domestic/index.html .	N	5	Unique within a FIPS state code. Lookup list derived from GNIS.
Place Distance Miles	Distance in miles to nearest populated place from the location where an event occurred.	N	4	
Total Vehicle Miles ...	Total vehicle miles (as noted on vehicle odometer or as measured by any other compliant means such as vehicle location system, etc.).	N	7	With total vehicle mileage recorded at the time of each event, vehicle miles traveled while driving, etc., can be computed.
Event Update Status Code.	A status of an event, either Current (the most up-to-date update or edit) or Historical (the original record if the record has subsequently been updated or edited).	A	1	C = Current, H = Historical.
Diagnostic Event Code.	For diagnostic events (events where the "Event Status Code" is noted as "DG"), records the type of diagnostic performed (e.g., power-on, self test, power-off, etc.).	A	2	(See Table 3).
Event Error Code	Error code associated with an event	A	2	(See Table 3).
Event Update Date ...	The date when an event record was last updated or edited.	N (Date)	8	UTC (universal time) recommended. Format: YYYYMMDD.
Event Update Time ...	Then time when an event record was last updated or edited.	N (Time)	6	UTC (universal time) recommended. Format: HHMMSS (hours, minutes, seconds).
Event Update Person ID.	An identifier of the person who last updated or edited a record.	A	40	
Event Update Text ...	A textual note related to the most recent record update or edit.	A	60	Brief narrative regarding reason for record update or edit.

Note 1: This element must not be included in the records downloaded from an EOBR or support system at roadside.

TABLE 3—EOBR DIAGNOSTIC EVENT CODES

Code class	Code	Brief description	Full description
General System Diagnostic	PWR ON	Power on	EOBR initial power-on.
General System Diagnostic	PWROFF	Power off	EOBR power-off.
General System Diagnostic	TESTOK	test okay	EOBR self test successful.
General System Diagnostic	SERVIC	Service	EOBR Malfunction (return unit to factory for servicing).
General System Diagnostic	MEMERR	memory error	System memory error.
General System Diagnostic	LOWVLT	Low voltage	Low system supply voltage.
General System Diagnostic	BATLOW	battery low	Internal system battery backup low.
General System Diagnostic	CLKERR	clock error	EOBR system clock error (clock not set or defective).
General System Diagnostic	BYPASS	Bypass	EOBR system bypassed (RODS data not collected).
Data Storage Diagnostic	INTFUL	internal memory full	Internal storage memory full (requires download or transfer to external storage).
Data Storage Diagnostic	DATAACC	Data accepted	System accepted driver data entry.
Data Storage Diagnostic	EXTFUL	external memory full	External memory full (smartcard or other external data storage device full).
Data Storage Diagnostic	EXTERR	external data access error.	Access external storage device failed.
Data Storage Diagnostic	DLOADY	download yes	EOBR data download successful.
Data Storage Diagnostic	DLOADN	download no	Data download rejected (unauthorized request/wrong Password).
Driver Identification Issue	NODRID	no driver ID	No driver information in system and vehicle is in motion.
Driver Identification Issue	PINERR	PIN error	Driver PIN/identification number invalid.
Driver Identification Issue	DRIDRD	Driver ID read	Driver information successfully read from external storage device (transferred to EOBR).
Peripheral Device Issue	DPYERR	display error	EOBR display malfunction.
Peripheral Device Issue	KEYERR	keyboard error	EOBR keyboard/input device malfunction.
External Sensor Issue	NOLTLN	no latitude longitude	No latitude and longitude from positioning sensor.
External Sensor Issue	NOTSYC	no time synchronization	Unable to synchronize with external time reference input.
External Sensor Issue	COMERR	communications error	Unable to communicate with external data link (to home office or wireless service provider).
External Sensor Issue	NO_ECM	no ECM data	No sensory information received from vehicle's Engine Control Module (ECM).
External Sensor Issue	ECM_ID	ECM ID number mismatch.	ECM identification/serial number mismatch (with preprogrammed information).

2. Communications Standards for the Transmittal of Data Files From Electronic On-Board Recorders (EOBRs)

2.1 EOBRs must produce and store RODS in accordance with the file format specified in this Appendix and must be capable of a one-way transfer of these records through wired and wireless methods to authorized safety officials upon request.

2.2 *Wired.* EOBRs must be capable of transferring RODS using the "Universal Serial Bus Specification (Revision 2.0) (incorporated by reference, see § 395.18). Each EOBR device must implement a single USB compliant interface featuring a Type B connector. The USB interface must implement the Mass Storage class (08h) for driverless operation.

2.3 *Wireless.* EOBRs must be capable of transferring RODS using one of the following wireless standards:

2.3.1 802.11g–2003 standard as defined in the 802.11–2007 base standard for wireless communication "IEEE Standard for Information Technology—Telecommunications and information exchange between systems—Local and metropolitan area networks—Specific requirements: Part 11: Wireless LAN Medium

Access Control (MAC) and Physical Layer (PHY) Specifications" (IEEE Std. 802.11–2007) (incorporated by reference, see § 395.18).

2.3.2 Commercial Mobile Radio Services (e.g., cellular).

3. Certification of EOBRs To Assess Conformity With FMCSA Standards

3.1 The following outcome-based performance requirements must be included in the self-certification testing conducted by EOBR manufacturers:

3.1.1 Location

3.1.1.1 The location description for the duty status change must be sufficiently precise to enable enforcement personnel to quickly determine the vehicle's geographic location at each change of duty status on a standard map or road atlas.

3.1.1.2 When the CMV is in motion, location and time must be recorded at intervals of no greater than 60 minutes. This recorded information must be available for an audit of EOBR data, but is not required to be displayed on the EOBR's visual output device.

3.1.1.3 Location codes derived from satellite or terrestrial sources, or a

combination thereof must be used. The location codes must correspond, at minimum, to the GNIS maintained by the United States Geological Survey.

3.1.2 Distance traveled

3.1.2.1 Distance traveled may use units of miles or kilometers driving during each on-duty driving period and total for each 24-hour period for each driver operating the CMV.

3.1.2.2 If the EOBR records units of distance in kilometers, it must provide a means to display the equivalent distance in English units.

3.1.2.3 If the EOBR obtains distance-traveled information from a source internal to the CMV, the information must be accurate to the CMV's odometer.

3.1.3 Date and time

3.1.3.1 The date and time must be reported on the EOBR output record and display for each change of duty status and at such additional entries as specified under "Location."

3.1.3.2 The date and time must be obtained, transmitted, and recorded in such a way that it cannot be altered by a motor carrier or driver.

3.1.3.3 The time must be coordinated to the Universal Time Clock (UTC) and must not drift more than 60 seconds per month.

3.1.4 File format and communication protocols: The EOBR must produce and transfer a RODS file in the format and communication methods specified in sections 1.0 and 2.0 of this Appendix.

3.1.5 Environment

3.1.5.1 Temperature—The EOBR must be able to operate in temperatures ranging from –40 degrees C to 85 degrees C.

3.1.5.2 Vibration and shock—The EOBR must meet industry standards for vibration stability and for preventing electrical shocks to device operators.

3.2 The EOBR and EOBR support systems must be certified by the manufacturer as evidence that their design has been sufficiently tested to meet the requirements of § 395.16 under the conditions in which they would be used.

3.3 The exterior faceplate of EOBRs must be marked by the manufacturer with the text ‘USDOT–EOBR’ as evidence that the device has been tested and certified as meeting the performance requirements of § 395.16.

PART 396—INSPECTION, REPAIR AND MAINTENANCE

■ 26. The authority citation for part 396 continues to read as follows:

Authority: 49 U.S.C. 31133, 31136, and 31502; and 49 CFR 1.73.

■ 27. Amend § 396.9 by revising the section heading, the heading of paragraph (c), and paragraph (c)(1) to read as follows:

§ 396.9 Inspection of motor vehicles in operation.

* * * * *

(c) *Motor vehicles declared “out of service.”* (1) Authorized personnel shall declare and mark “out of service” any motor vehicle which by reason of its mechanical condition or loading would likely cause an accident or a breakdown. Authorized personnel may declare and mark “out of service” any motor vehicle not in compliance with § 385.811(d). An “Out of Service Vehicle” sticker shall be used to mark vehicles “out of service.”

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Issued on: March 19, 2010.

Anne S. Ferro,
Administrator.

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FMCSA HOURS OF SERVICE RULEMAKING, RIN 2126-AB-26
Primary Changes Proposed for Property-Carrying Drivers

PROVISION	CURRENT RULE	PROPOSED RULE	NOTES
“DAILY” DUTY PERIOD			
Off-duty period	10 consecutive hrs.	No change	
“Driving Window”	<p>For most drivers, 14 consecutive hrs. (may continue on-duty/not driving after 14 hrs.);</p> <p>“Regional” allowed one 16-hr. period “weekly” but release from duty required after 16 hrs;</p> <p>Non-CDL w/i 150 miles allowed two 16-hr. periods “weekly” (may continue on-duty/not driving after 16 hrs.).</p>	<p><i>For all property-carrying CMV drivers(unless excepted):</i></p> <p>14 consecutive hrs. with release from duty required at end of driving window;</p> <p>16 consecutive hrs. no more than twice “weekly” with release from duty required at end of driving window.</p>	<u>Any on-duty time</u> after 14th hour constitutes use of a 16-hr. period.
Maximum on-duty within driving window	Normally 14 hrs; 16 hrs. once per week for “regional” drivers; 16 hrs. twice per week for non-CDL w/i 150 miles.	13 hrs.	Proposal not applicable to non-CDL 150 mile short-haul drivers. 13 hrs. during 14- or 16-hour driving windows for others.
Maximum driving within driving window	11 hrs.	10 or 11 hrs. (Both being considered)	
Limit on consecutive hours of driving	None	May drive only if it has been 7 hours or less since last off-duty period of at least 30 minutes.	Proposal not applicable to non-CDL 150 mile short-haul drivers.

PROVISION	CURRENT RULE	PROPOSED RULE	NOTES
“WEEKLY” DUTY PERIOD			
Maximum on-duty hours	60 hrs. in 7 days/ 70 hrs. in 8 days	No change	
“Restart”	34 consecutive hrs.	See “limits on restarts” below.	
Limits on Restarts	None	(1) Must include two periods between Midnight-6 a.m.; (2) May only be used once per week.	Driver must designate the period being used as a restart.
SLEEPER BERTH			
When used as substitute for 10 consecutive hrs. off duty	Two periods: One at least 8 consecutive hrs. in SB; other at least 2 hrs. SB or off-duty. The shorter period does NOT extend the driving window.	Continue 8/2 hr. periods, but apply same new driving, on-duty, and duty-period limits as proposed for non-SB drivers.	
DEFINITION OF ON-DUTY TIME			
On-duty time	Includes any time in CMV except sleeper-berth.	Does not include any time resting in a parked CMV. In moving CMV, does not include up to 2 hrs. in passenger seat immediately before or after 8 consecutive hrs. in sleeper-berth.	Also applies to passenger-carrying drivers.
OILFIELD EXEMPTION			
Oilfield exemption	“Waiting time” for certain drivers at oilfields (which is off-duty but does extend 14-hr duty period) must be recorded and available to FMCSA, but no method or details are specified for the recordkeeping.	“Waiting time” for certain drivers at oilfields must be shown on RODS or electronic equivalent as off duty and identified by annotations in “remarks” or a separate line added to “grid.”	“Waiting time” is not included in on-duty time or the calculation of the 14 or 16-hr. driving window.