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# THE GEORGE WASHINGTON UNIVERSITY

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WASHINGTON, DC

Public Interest Comment<sup>1</sup> on

Department of Transportation Federal Motor Carrier Safety Administration's Proposed Rule  
Electronic Logging Devices and Hours of Service Supporting Documents

Docket No. FMCSA–2010–0167  
RIN 2126–AB20

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Retrospective Review Comment Project

The George Washington University Regulatory Studies Center strives to improve regulatory policy through research, education, and outreach. As part of its mission, the Center conducts careful and independent analyses to assess rulemaking proposals from the perspective of the public interest. This comment on the Department of Transportation Federal Motor Carrier Safety Administration's (FMCSA) supplemental notice of proposed rulemaking (SNPRM) establishing standards for electronic logging devices (ELDs) and their use, as well as supporting documentation does not represent the views of any particular affected party or special interest, but is designed to evaluate whether FMCSA's proposal incorporates plans for retrospective review, pursuant to Executive Orders 13563.

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<sup>1</sup> This comment reflects the views of the author, and does not represent an official position of the GW Regulatory Studies Center or the George Washington University. The Center's policy on research integrity is available at <http://regulatorystudies.columbian.gwu.edu/policy-research-integrity>.

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## Introduction

FMCSA has established federal hours of service (HOS) regulations that limit on-duty driving time of drivers of commercial motor vehicles (CMVs) in order to ensure they have adequate time for rest. This proposal would supplement and reinforce those requirements in several ways. According to FMCSA,

This SNPRM would improve CMV safety and reduce the overall paperwork burden for both motor carriers and drivers by increasing the use of ELDs within the motor carrier industry, which would in turn improve compliance with the applicable HOS rules. Specifically, this SNPRM proposes: (1) Requiring new technical specifications for ELDs that address statutory requirements; (2) mandating ELDs for drivers currently using RODS [records of duty status]; (3) clarifying supporting document requirements so that motor carriers and drivers can comply efficiently with HOS regulations, and so that motor carriers can make the best use of ELDs and related support systems as their primary means of recording HOS information and ensuring HOS compliance; and (4) proposing both procedural and technical provisions aimed at ensuring that ELDs are not used to harass vehicle operators.<sup>3</sup>

As a part of its ongoing Retrospective Review Comment Project, the Regulatory Studies Center examines significant proposed regulations to assess whether agencies propose retrospective review as a part of their regulations, and submits comments to provide suggestions on how best to incorporate plans for retrospective review into their proposals. To facilitate meaningful retrospective review after the promulgation of a final rule, multiple government guidelines instruct agencies to incorporate retrospective review plans into their proposals during the rulemaking process.

### Incorporating Retrospective Review into NPRMs

Through a series of Executive Orders, President Obama has encouraged federal regulatory agencies to review existing regulations “that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.” On January 18, 2011, President Obama signed Executive Order 13563, Improving Regulation and Regulatory Review, which reaffirmed the regulatory principles and structures outlined in EO 12866. In addition to the regulatory philosophy laid out in EO 12866, EO 13563 instructs agencies to

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<sup>3</sup> FMCSA, “Electronic Logging Devices and Hours of Service Supporting Documents; Proposed Rule,” 79 FR 17656. March 28, 2014.

consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned. Such retrospective analyses, including supporting data, should be released online whenever possible.<sup>4</sup>

This ex-post review makes it possible for regulatory agencies and the public to measure whether a particular rule has had its intended effect. In his implementing memo on retrospective review, former Administrator of the Office of Information and Regulatory Affairs, Cass Sunstein, emphasized the importance of designing regulations to facilitate their evaluation:

With its emphasis on “periodic review of existing significant regulations,” Executive Order 13563 recognizes the importance of maintaining a consistent culture of retrospective review and analysis throughout the executive branch. To promote that culture, *future regulations should be designed and written in ways that facilitate evaluation of their consequences* and thus promote retrospective analyses and measurement of “actual results.” To the extent permitted by law, agencies should therefore give careful consideration to how best to promote empirical testing of the effects of rules both in advance and retrospectively.<sup>5</sup>  
[Emphasis added]

This emphasis is repeated in Sunstein’s June 14, 2011 memo, “Final Plans for Retrospective Analysis of Existing Rules.” In its Draft 2013 Report to Congress on the Benefits and Costs of Federal Regulations, the Office of Management and Budget (OMB) states that such retrospective analysis can serve as an important corrective mechanism to the flaws of ex ante analyses. According to that report, the result of systematic retrospective review of regulations:

should be a greatly improved understanding of the accuracy of prospective analyses, as well as corrections to rules as a result of ex post evaluations. A large priority is the development of methods (perhaps including not merely before-and-after accounts but also randomized trials, to the extent feasible and consistent with law) to obtain a clear sense of the effects of rules. In addition, and

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<sup>4</sup> Exec. Order No. 13563, *Improving Regulation and Regulatory Review*, 76 FR 3821 (2011).

<sup>5</sup> United States. Office of Management and Budget. Office of Information and Regulatory Affairs. *MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES: Retrospective Analysis of Existing Significant Regulations*. By Cass Sunstein. April 25, 2011.

importantly, *rules should be written and designed, in advance, so as to facilitate retrospective analysis of their effects.*<sup>6</sup>

## Retrospective Review Requirements

To evaluate whether FMCSA’s proposal was “designed and written in ways that facilitate evaluation of [its] consequences,” we measure it against five criteria:

- Did FMCSA clearly identify the problem that its proposed rule is intended to solve?
- Did FMCSA provide clear, measurable metrics that reviewers can use to evaluate whether the regulation achieves its policy goals?
- Did FMCSA commit to collecting information to assess whether its measurable metrics are being reached?
- Did FMCSA provide a clear timeframe for the accomplishment of its stated metrics and the collection of information to support its findings?
- Did FMCSA write its proposal to allow measurement of both outputs and outcomes to enable review of whether the standards directly result in the outcomes that FMCSA intends?

### Identifying the Problem

The first of the “Principles of Regulation” outlined by President Clinton in EO 12866 makes it clear that, as a first step, agencies must be able to identify the problem that justifies government action through regulation:

Each agency shall identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem.

This step is crucial to the formulation of any policy. Without knowledge of the problem that the agency is trying to address, the public cannot assess whether the policy or regulation at hand has had the intended effect, which is key in retrospectively evaluating regulation.

FMCSA points to the problem of “significant violations” of existing HOS rules, which can lead to increased CMV driver fatigue and pose an unacceptable risk to the public. The agency’s stated objective in issuing the SNPRM is to reduce the number of driver-fatigue related crashes that could have been avoided had the driver complied with the agency’s rules limiting hours of

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<sup>6</sup> United States. Office of Management and Budget. Office of Information and Regulatory Affairs. *MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES: Final Plans for Retrospective Analysis of Existing Rules*. By Cass Sunstein. June 14, 2011.

service. The agency also cites as justification for the proposal legislation<sup>7</sup> requiring CMVs engaged in interstate commerce who must keep RODS to be equipped with ELDs, which automatically record driving time and facilitate electronic recording of other categories of duty status.

## **Measurement Criteria**

The main desired outcome of the regulation is a reduction in injuries and deaths associated with accidents involving CMV drivers who have violated the HOS requirements providing for adequate rest.

### **Measuring changes in compliance with HOS regulations**

According to the Regulatory Impact Analysis prepared for the proposal, “use of ELD technology would significantly reduce or eliminate false or erroneous driving time records, and is also expected to reduce false and erroneous on-duty, off-duty, and sleeper-berth entries.”<sup>8</sup> The agency expects the technology will reduce violations of its HOS regulations by:

- helping carriers “prevent drivers from exceeding driving time and related on-duty time limits as well as by preserving off-duty time for drivers to recover,” and
- assisting “roadside inspectors and safety investigators in more rapidly detecting HOS violations that do occur so that they can cite non-compliant carriers and drivers and hopefully change their behavior by doing so.”

FMCSA currently conducts regular checks at the roadside, and should be able to use these roadside inspections to measure changes in compliance with the HOS limits. These inspections should provide information as to whether 1) ELDs reduce or eliminate false or erroneous driving time records, and 2) whether installation of ELDs is associated with fewer violations of HOS regulations.

### **Measuring changes in driver fatigue-related accidents**

FMCSA expects fewer violations of its HOS regulations brought about by the ELDs will reduce the risk of CMV driver fatigue-related accidents. It estimates that the proposed option will avoid 1,425 crashes, 434 injuries, and 20 deaths per year.

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<sup>7</sup> The 2012 transportation reauthorization bill, Moving Ahead for Progress in the 21st Century Act (“MAP-21”; P.L. 112-141). MAP-21 §32301

<sup>8</sup> FMCSA, Preliminary Regulatory Evaluation of Electronic Logging Devices and Hours of Service Supporting Documents Supplemental Notice of Proposed Rulemaking, February 2014. (“RIA”)

The agency bases this estimated reduction in accidents on its “Roadside Intervention Model” that relies on data from roadside inspections and traffic enforcements. To corroborate these estimates once the regulation is in place, the agency should be able to rely on its “Trucks Involved in Fatal Accidents” (TIFA) data, which is coded to indicate whether a CMV driver involved in a crash was exceeding drive time limits and/or was drowsy, sleepy, asleep, or fatigued.

## Information Collection

FMCSA expects that “the use of ELDs can significantly reduce drivers’ time spent logging their hours and handling and transmitting these logs, and carriers’ time spent handling these logs,” and that “the monetary value of these time savings may exceed the costs of the devices.”<sup>9</sup> Of course, if that is true, then it calls into question the need for a rule.

According to the information collection request submitted to OMB, the transition from paper RODS to ELDs will reduce the time spent complying with the HOS regulations by 68.33 million hours per year.<sup>10</sup> FMCSA estimates that annual costs associated with collecting and storing the required information (beyond the cost of the time spent on the tasks) will rise to \$940.1 million per year once ELDs are required, from \$123.68 million per year for paper RODS.

If it does decide to proceed with a regulatory requirement for ELDs, FMCSA should commit to gathering data to evaluate whether these predicted time savings materialize, either through a representative survey of drivers and carriers, or by encouraging feedback pursuant to the Paperwork Reduction Act (PRA), not only when the regulation is issued and when the information collection is renewed at 3-year intervals, but during implementation.

OMB’s PRA regulations require agencies to “ensure that each collection of information ...informs and provides reasonable notice to the potential persons to whom the collection of information is addressed of ... an estimate, to the extent practicable, of the average burden of the collection (together with a request that the public direct to the agency any comments concerning the accuracy of this burden estimate and any suggestions for reducing this burden).”<sup>11</sup>

## Timeframe

According to the logic of the proposal, installation of the ELDs should bring about immediate behavioral changes on the part of carriers and drives, with associated improvements in

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<sup>9</sup> FMCSA RIA.

<sup>10</sup> FMCSA’s request for an extension of the information collection, “Hours of Service (HOS) of Drivers Regulations” (OMB Control Number of 2126-0001), compliance with paper RODS involve an estimated 113.72 million hours per year nationally, while installation of ELDs on all CMVs will reduce that burden to 45.39 million hours per year. Available at: <http://www.regulations.gov/#!documentDetail;D=FMCSA-2010-0167-0484>

<sup>11</sup> 5 CFR Part 1320.8(b)(3)(iii)

compliance with HOS regulations and accident reductions. Thus, FMCSA should commit to evaluating the success of the requirements as it evaluates accident data in the years immediately following the effective date of the rule.

As drivers and carriers transition from RODS to ELDs, NHTSA should evaluate whether the estimated time savings ensue. At a minimum, NHTSA should evaluate the validity of its assumptions every three years when it seeks renewal of OMB approval of the information collection under the PRA.

## Measure Linkages

The linkages FMCSA assumes to estimate safety benefits of the proposal are:

- installation of ELDs will reduce the falsification of driving records,
- more accurate driving records will lead to greater compliance with HOS regulations,
- compliance with HOS regulations will lead to less driver fatigue,
- driver fatigue from violating HOS rules are a significant cause of CMV accidents, and
- greater compliance with HOS regulations will reduce fatigue-related crashes that injure and kill parties involved.

FMCSA gathers information that can evaluate each of these linkages. It should explicitly commit to doing so on an annual basis in the final rule.

The agency should also explore other potential consequences of the regulation. This proposal considers the possibility of driver harassment. FMCSA may also consider the effect of the requirements on driver compensation, the viability of smaller carriers, etc.

## Recommendations

Executive orders and OMB guidance direct that “future regulations should be designed and written in ways that facilitate evaluation of their consequences and thus promote retrospective analyses and measurement of ‘actual results.’”<sup>12</sup> While some of the linkages cannot be directly measured (e.g., will compliance with HOS regulations actually reduce driver fatigue), the extent to which the safety benefits that FMCSA predicts transpire should be measurable with data that the agency collects regularly through roadside inspections and accident reports. Consistent with Executive Order 13563, in the preamble of its final rule, FMCSA should commit to measuring the actual results of this regulation, and specify the data and measurement tools it plans to use.

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<sup>12</sup> United States. Office of Management and Budget. Office of Information and Regulatory Affairs. *MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES: Retrospective Analysis of Existing Significant Regulations*. By Cass Sunstein. April 25, 2011.

While more difficult to measure, FMCSA should also commit to evaluate whether the paperwork burden reductions are achieved, and whether the rule results in unintended consequences.