BEFORE THE

FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

UNITED STATES DEPARTMENT OF TRANSPORTATION

AND THE

OFFICE OF MANAGEMENT AND BUDGET

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COMMENTS OF THE

OWNER OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC.

IN RESPONSE TO THE SUPPLEMENTAL NOTICE OF

PROPOSED RULEMAKING AND REQUEST FOR PUBLIC COMMENTS

ELECTRIC LOGGING DEVICES AND HOURS-OF-SERVICE

SUPPORTING DOCUMENTS

Docket No. FMCSA-2010-0167

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President
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June 26, 2014
I. **INTRODUCTION**

A. Statement of Interest

These comments are submitted on behalf of Owner-Operator Independent Drivers Association, Inc. (“OOIDA” or “Association”) in response to the Supplemental Notice of Proposed Rulemaking and Request for Comments published by the Federal Motor Carrier Safety Administration, (“FMCSA” or “Agency”), Docket No. FMCSA-2010-0167, 79 Fed. Reg. 17656 (March 28, 2014). (Hereinafter “SNPRM” or “the Notice”). The Notice requests comments on (1) the mandatory use of hours-of-service (HOS) electronic logging devices (ELDs) by drivers currently required to prepare HOS records of duty status (RODS); (2) requirements concerning HOS supporting documents; and (3) measures to address concerns about harassment resulting from the mandatory use of ELDs.

OOIDA, is a not-for-profit corporation incorporated in 1973 under the laws of the State of Missouri, with its principal place of business in Grain Valley, Missouri. OOIDA is the largest international trade association representing the interests of independent owner-operators, small-business motor carriers, and professional drivers. The approximately 150,000 members of OOIDA are professional drivers and small-business men and women located in all 50 states and Canada who collectively own and operate more than 200,000 individual heavy-duty trucks. Single-truck motor carriers represent nearly half of the total of active motor carriers operated in the United States. The mailing address of the Association is:

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The Association actively promotes the views of professional drivers and small-business truckers through its interaction with state and federal government agencies, legislatures, courts, other trade associations, and private businesses to advance an equitable and safe environment for commercial drivers. OOIDA is active in all aspects of highway safety and transportation policy, and represents the positions of professional drivers and small-business truckers in numerous committees and various forums on the local, state, national, and international levels. OOIDA’s mission includes the promotion and protection of the interests of independent truckers on any issue which might touch on their economic well-being, their working conditions, or the safe operation of their motor vehicles on the nation’s highways.

OOIDA files these comments because of its serious concern that the use of ELDs for monitoring driver compliance with HOS regulations would have wide-ranging and negative implications for the health, privacy, safety and economic interests of all U.S.–domiciled truck drivers and motor carriers including members of OOIDA. OOIDA’s standing and qualifications to offer views on these subjects were recognized by the U.S. Court of Appeals for the Seventh Circuit in *Owner-Operator Independent Drivers Association, Inc. v. Federal Motor Carrier Safety Administration*, 656 F.3d 580, 585-86 (7th Cir. 2011) when that court set aside as arbitrary and capricious a previous attempt to mandate the use of ELD’s, a.k.a. Electronic On Board Recorders (“EOBRs”), or Electronic Hours of Service Recorders (“EHSRs”).

**B. Summary of Comments**

The words of the statute here are straight forward and unambiguous. The Secretary is directed to require that commercial motor vehicles operated by drivers subject to HOS regulations be equipped with an “electronic logging device to improve compliance by an operator of a vehicle with hours of service regulations…” 49 U.S.C. § 31137(a)(1). An
“electronic logging device means an electronic device that – (A) is capable of recording a driver’s hours of service and duty status accurately and automatically…” *Id.* at (f)(1)(A). The statute also provides that the “Secretary of Transportation shall prescribe regulations - - * * * *(2) ensuring than an electronic logging device is not used to harass a vehicle operator.” The Seventh Circuit had no problem recognizing that the directive of Section 31137(a) is mandatory. *Owner-Operator*, 656 F.3d at 588.

The agency has not proposed a device capable of recording a driver’s hours of service and duty status “automatically.” Further, there is a growing body of evidence that state enforcement officials have neither the training nor the equipment to conduct proper inspections of vehicles equipped with ELDs. Today, such vehicles are often waived through the inspection process by officers who are unable to deal with electronic RODS and/or who make the unwarranted assumption that drivers operating vehicles with ELD’s must be in compliance with the HOS regulations. Such an assumption, as we demonstrate below, is demonstrably wrong.

FMCSA embarks on this ill-advised program without any evidence that currently available ELDs, which require the manual input of changes in duty status, will provide the slightest improvement over paper logbooks which also depend upon manual input of such information. While it is true that ELDs can measure an individual’s driving time, those devices cannot determine compliance with the HOS rules any better than paper logbooks. Nor can they determine whether a driver has had an opportunity to obtain restorative sleep in order to eliminate fatigue. Even if ELDs can detect when a person actually operates a truck for more than eleven hours in one day, empirical data demonstrate that accidents are far more likely to occur during a driver’s first hour behind the wheel and that the rate of accidents after eleven hours is,
by comparison, minuscule. The incremental benefits from the proposed rule cannot possibly justify the costs of this program.

FMCSA agrees that miscoding of changes in duty status is a serious problem. However, it fails to dispute the proposition that ELDs as outlined under this Notice can, and will, do little to address this problem which has at its roots the manual entry of information by the driver on both paper logbooks and ELDs. OOIDA has provided significant evidence that pressure and harassment by motor carriers, who require drivers to maximize driving time to meet unrealistic delivery schedules, is a significant factor contributing to miscoding of changes in duty status. This rulemaking proceeding creates an important opportunity to address two significant contributors to HOS violations – harassment and coercion of drivers. 49 U.S.C. §§ 31136(a)(2) and 31137(a)(2). FMCSA’s proposal on harassment is not carefully conceived and provides no effective tools to ensure against harassment. OOIDA is incredulous that FMCSA has put off for another day specific regulations dealing with coercion. The concepts of harassment and coercion are closely intertwined. The pressure put on motor carriers by shippers and receivers to follow unrealistic delivery schedules favors addressing the problems of harassment and coercion comprehensively in a single proceeding.

FMCSA completely ignores the constitutional implications of mandating that electronic devices be used to monitor the conduct of upwards of 2.84 million drivers in order to promote enforcement of the HOS regulations. In the first EOBR case, OOIDA took the position that monitoring driver behavior for law enforcement purposes is not covered by the pervasively regulated industry exception to the Fourth Amendment’s warrant requirement. That exception applies only to the inspection of business premises. Nor does such a program, which is specifically designed to promote law enforcement, fall within the “special needs” exception to
the warrant requirement. This issue was raised in OOIDA’s appeal to the Seventh Circuit. The Seventh Circuit found it unnecessary to reach this issue – there were other ample grounds to set aside the rule. But this issue has not gone away. FMCSA should have made its position known in the current SNPRM so that all interested parties could provide useful comments. An agency that proposes to use electronic monitoring devices on several million drivers should not dodge such an important issue. It should put its views on the record and permit interested parties an opportunity to review and comment on those views.

Congress’ mandate and FMCSA’s proposed rule requires the electronic monitoring of a class of individuals that restricts those individuals’ right to freedom of movement without honoring the individual’s due process rights. The most analogous statute requiring the government to perform electronic monitoring of a class of individuals was the sex-offender focused Adam Walsh Act. That law provides that all persons accused of violating the Act would be required to wear an electronic monitoring device as a condition of bail. Acknowledging the government’s legitimate interest in protecting the public, a series of federal courts nonetheless struck down, as unconstitutional, that Act’s blanket imposition of electronic monitoring of all such individuals. They found that the Act denied individuals their right to due process before the government restricted their freedom of movement with an electronic monitoring device. Due process meant holding a hearing to evaluate the individual’s threat to public safety and to determine whether the electronic monitoring and curfew restrictions sought by the government were a necessary restriction to abate the threat. Without providing for the due process rights of truck drivers, the proposed rule’s imposition of electronic monitoring is an unconstitutional deprivation of a driver’s freedom of movement. If adopted, the proposed rule would afford truck
drivers fewer constitutional protections than the courts currently afford accused sex-offenders under federal law.

Finally, FMCSA’s cost-benefit analysis is seriously deficient and does not support such an ambitious undertaking. The Seventh Circuit expressed skepticism on FMCSA’s cost benefit analysis for EOBRs. The SNPRM does nothing to clear up previously noted deficiencies. *Owner-Operator*, 656 F.3d at 589. The statute does not assign financial responsibility for the cost of such devices to either motor carriers or drivers. The SNPRM does nothing to fill this statutory void. The impact of the cost of these devices may fall on a single driver, a small carrier with fewer than 5 to 10 trucks, or a giant carrier with several thousand trucks. A final rule that fails to address this circumstance in its cost-benefit analysis cannot be seen as the product of reasoned decision making. Further, FMCSA has no credible data on the relationship between the use of ELDs and actual HOS compliance, and even less data on the relationship between HOS compliance and highway safety. There is virtually nothing in the record that would allow one to defend FMCSA’s cost-benefit analysis as support for reasoned decision making.

II. THE PROPOSED RULE DOES NOT SATISFY THE STATUTORY MANDATE

A. The Proposed Rule Does Not Mandate Deployment of ELDs that Automatically Record Changes in Duty Status.

By statute the Secretary is directed to prescribe regulations:

(1) requiring a commercial motor vehicle involved in interstate commerce and operated by a driver subject to the hours of service and the record of duty status requirements under part 395 of title 49, Code of Federal Regulations, be equipped with an electronic logging device to improve compliance by an operator of a vehicle with hours of service regulations prescribed by the Secretary.

49 U.S.C. § 31137(a)(1). An electronic logging device is defined in the statute as follows:

(f) Definitions.--In this section:
(1) *Electronic logging device.*--The term “electronic logging device” means an electronic device that--
(A) is capable of recording a driver’s hours of service and duty status accurately and automatically . . . .

49 U.S.C. § 31137(f)(1)(A) (emphasis added.). The SNPRM does not propose to mandate the installation of devices that satisfy this definition. This course of action is arbitrary, capricious and reason enough for any court to overturn the proposed rule if adopted.

In Public Citizen v. Federal Motor Carrier Safety Administration, 374 F.3d 1209 (D.C. Cir. 2004) the D.C. Circuit ruled on language governing Congressional direction to adopt regulations “dealing with” fatigue-related issues pertaining to commercial motor vehicle safety. The D.C. Circuit explained that the Congressional directive to “deal with” regulatory details related to fatigue required FMCSA “to take action with regard to someone or something” to ensure that agency responsibility as to these issues was fulfilled. Id. at 1221.

Here, Congress used even stronger language directing that FMCSA mandate the installation of devices that automatically record the duty status of drivers. Congress directed FMCSA to take specific regulatory action. In response to this unambiguous directive, FMCSA claims that “there is no current technology that can automatically differentiate between a drivers ODND [on duty not driving] status versus off duty or sleeper berth status.” 79 Fed. Reg. at 17666-1. Undaunted, the SNPRM proposes to do something else. It proposes to mandate installation of expensive electronic devices that cannot record changes in duty status automatically - devices that are not capable of automatically recording the status of a driver’s compliance with the HOS regulations. Such devices are more likely to make HOS compliance worse than would otherwise be the case if nothing were done at all.

The proposal to mandate deployment of devices that FMCSA concedes do not meet statutory standards is in excess of FMCSA’s legal authority. Issuing a final rule that fails to heed the specific statutory mandate in 49 U.S.C. §31137(a) would be arbitrary and capricious.

Adherence to this rule is essential because it goes directly to the scope of the authority delegated to an agency by Congress; when an agency ignores a mandatory factor it defies a “statutory limitation on [its] authority.” United Mine Workers v. Dole, 870 F.2d 662, 673 (D.C. Cir. 1989). Such an act is necessarily arbitrary and capricious.

656 F.3d at 587. The inability to automatically record changes in duty status is a fatal flaw in the proposed rule. The rule as proposed should be withdrawn until this flaw is corrected.

The statute’s mandate that an ELD automatically record each of a driver’s change of duty status is neither a mistake by Congress nor a triviality that can be ignored by FMCSA. It is the only definition of a device that, technically, has any potential to improve compliance with the HOS rules. Any device that does not automatically record each change of duty status of a driver provides no more reliable a record of a driver’s HOS compliance than paper logbooks. As OOIDA has described to the agency time and again, the majority of HOS violations derive not from exceeding 11 hour or 14 hour time limits on driving, but by the miscoding of non-driving duty status. As long as drivers continue to have such discretion, then they will be under pressure from motor carriers, shippers, receivers, and brokers to use their log books or ELDs in that manner.

Such practices will continue, even with the proposed ELD’s, until each change of duty status is recorded automatically – outside of the discretion of drivers, motor carriers, and any other parties with an economic interest in the driver’s time. OOIDA describes in these comments below how current electronic logging devices mask non-driving HOS violations.
OOIDA members also report their observations of the many instances in which drivers for motor carrier who have adopted electronic logging devices will be waived through inspection areas – receiving less scrutiny than paper log book users. That is a significant part of the reason motor carriers who have adopted ELDs appear to have better HOS compliance. But it is a false sense of security that will only grow if ELDs that fall short of the statutory mandate are adopted under this rule. Therefore, the proposed rule is really no rule. It completely fails to meet the statutory mandate and completely fails to achieve the statute’s purpose.

Significantly, this is the first notice and request for comment since Congress mandated an ELD that automatically records each change of a driver’s duty status. FMCSA’s proclamation of the lack of availability of a device that meets the statutory mandate before even requesting comments upon it is arbitrary and capricious and not otherwise in accordance with law.

B. The Proposed Rule Does Not Satisfy the Statutory Mandate On Harassment

49 U.S.C. § 31137(a) has two separate provisions. Subsection (a)(1) requires the Secretary to prescribe regulations mandating deployment of ELDs that automatically record a driver’s duty status. Subsection (a)(2) requires the Secretary to prescribe regulations “ensuring that an electronic logging device is not used to harass a vehicle operator.” This second requirement requires action by the Secretary on all “electronic logging devices” irrespective of whether such devices are mandated under subsection (a)(1). For a variety of reasons set forth in these comments, the Secretary should withdraw its current proposal on ELDs under subsection (a)(1). Withdrawing this proposal will not, however, relieve the Secretary from promulgating regulations to ensure that the thousands of electronic logging devices currently deployed by motor carriers are not used to harass vehicle operators. That portion of the SNPRM should proceed with all deliberate speed to satisfy the Secretary’s obligations under subsection (a)(2).
III. **ELDS PROVIDE NO HOS COMPLIANCE ADVANTAGES OVER PAPER LOGBOOKS**

A. **ELDs Are Inherently Incapable of Improving HOS Compliance**

FMCSA asserts that, because ELDs are capable of accurately measuring on-duty driving time, they should be accepted as a significant first step in strengthening HOS enforcement. But as the Agency must know better than anyone, knowing how long a driver has operated a truck rarely helps identify whether the driver is in compliance with the HOS rules. Only an accurate record of both a driver’s driving and *non-driving* activities will allow one to determine whether the driver is complying with the rules. And because the driver must manually enter his non-driving duty status into the ELD, just as he does with paper logbooks, ELDs are not an automatic, “tamper-proof” device for accurately recording compliance with the HOS rules.

OOIDA demonstrated in comments filed previously in this docket, that if an individual’s non-driving time is entered into the ELD incorrectly, such an individual can operate a truck in violation of the HOS rules for up to 11 hours before the ELD records an HOS violation. Without an accurate manual entry of changes in duty status, an ELD cannot disclose whether the driver actually began violating the rules from the very moment he began to drive, after 11 hours of driving, or at some time in between. For practical enforcement purposes, ELDs will permit up to 11 hours of unlawful driving a day – without showing any violation. The SNPRM attempts no explanation for how a device with such a large margin of error “addresses a significant aspect of the problem” or justifies its cost and intrusion into privacy. When several public interest groups sued FMCSA over the current HOS rules, they argued that FMCSA could not justify permitting a driver to operate a truck one hour longer than they believed was acceptable (11 hours versus 10 hours). With the proposed ELD rule, however, FMCSA has advocated the use of a device that
will, in most instances, allow up to 11 hours of driving in excess of what is permitted under the HOS rules. See OOIDA comments filed on May 23, 2011 in response to the original NPRM.

According to FMCSA statistics, driving past the 11th hour accounted for only 0.9 percent of HOS violations in 2009. Preliminary Regulatory Evaluation, Table 31, p. 52, Docket Number FMCSA 20010-0167-0003. If the automatic detection of the 11 hour violation is an ELDs’ only compliance and enforcement advantage over paper logbooks, this should be the starting point for any benefit calculation of ELDs. Instead, FMCSA assumes, without explanation or support, a far greater level of benefits for HOS compliance through ELDs. FMCSA should, for the first time, acknowledge the limited capability of ELDs and measure the safety benefits to be derived from that limited capacity. If the Agency performed such an analysis, it would be clear that the costs of ELDs in economic, privacy, and safety terms far outweigh whatever marginal benefits are identified.

OOIDA believes that ELDs will give persons interested in highway safety, and the inspectors who will rely upon them, a false sense of safety and driver compliance. Because these hours are recorded on a computer with the assistance of a GPS device, and are tied functionally to the engine of a truck, ELDs create a dangerous illusion that the data must be accurate. In fact, the conclusion that an individual who drives only 11 hours per day with an ELD must be in compliance with the HOS regulations is simply wrong. Those who draw such a conclusion, including numerous state enforcement officers who regularly wave ELD equipped trucks through the inspection process, take a giant step backwards in addressing the problem of driver fatigue. OOIDA submitted a hypothetical set of logbooks illustrating this flaw in the Agency’s ELDs safety analysis. See OOIDA’s May 23, 2011 comments submitted in the original NPRM.
OOIDA has updated the analysis to reflect recent changes in the HOS regulations. The conclusions drawn from the original analysis, however, remain unchanged.

B. ELDs Accommodate False Entry of Driver Duty Status.

There are four duty statuses comprising a driver’s time when he or she is operating a commercial motor vehicle (CMV) in interstate commerce. Those four duty statuses are defined in Title 49 Part 395 of the Federal Code of Regulations (FMCSRs). The driver of a CMV is subject to those regulations and has a responsibility to record the time he or she spent in each of those duty statuses. The four duty statuses are:

**On-duty time**—is defined as the time from when a driver begins to work, or is required to be in readiness to work, until the time the driver is relieved from work and all responsibilities for performing work. This division has two subparts defined as:

1. **Driving time**—all time spent at the controls of a CMV in operation. A driver may not drive without first taking 10 consecutive hours of off-duty. A driver may drive only during a period of 14 consecutive hours after coming on-duty following 10 consecutive hours off-duty. In addition, driving time is not permitted if more than 8 hours have elapsed since the end of the driver’s last off-duty or sleeper berth period of at least 30 minutes (rest breaks). Driving time is limited to 11 hours of driving, which must be completed within the 14-hour period of on-duty time. Once the driver starts his workday he must stop driving after 14 consecutive hours.

2. **On-Duty not-driving time**—all time spent working on job related duties. Contrary to statements from FMCSA there is no regulatory limitation on the amount of time the driver may be on-duty, the regulations only restrict the on-duty period when the driver may drive.
3. **Off-duty** – is not defined specifically in the Federal Regulations except by default. Instead, off-duty is simply defined as the time the driver is relieved from work and all responsibility for performing work.

4. **Sleeper-berth time**—all CMV drivers subject to the hours of service regulations must have 10 hours of sleeper berth time where they must be in a sleeper berth, or equivalent, for at least 8 consecutive hours before they can drive. Two hours may be spent in the passenger’s seat of a property-carrying vehicle immediately before, or after, a period of at least 8 consecutive hours in the sleeper berth.

All CMV drivers subject to the HOS regulations are required to keep a record of duty status (RODS) for each day, detailing their preceding 24 hours. The RODS must be in the drivers’ possession for the preceding 8 days. In addition, if the driver is operating 7 days a week, he or she is only permitted to work 70 hours in an 8 consecutive day period. However, the 34-hour restart provision within the FMCSRs allows a driver to start a duty cycle showing 0 hours. In order to utilize the restart provision, a driver is required to take 34 consecutive hours or more off-duty that includes two periods between 1 a.m. and 5 a.m.

The primary criticism of the paper logbook that is required under the present regulations is the ease with which a driver can “falsify” time, which can lead to fatigue and unsafe driving. The premise behind FMCSA’s SNPRM is that ELDs will be able to detect this “falsification” and thus drivers will be less fatigued and safer drivers.

The following is an example of how HOS are recorded on a logbook grid as defined by the FMCSA and as proposed for an ELD graph. For this illustration, the driver is to pick up a load of produce from a wholesale distributor and deliver that load 450 miles away to a grocery outlet facility. The example below will show the driver’s RODS kept by the ELD as the first
Day One graph, and the “actual time” will be shown as the bottom Day One graph (Same for Day Two graph). The shaded areas of the Day One and Day Two graphs are the violations of the HOS regulations. The ELD will not indicate any of these violations and in fact will indicate the driver is in complete compliance with the regulations.

**Day One**

**ELD Time:** In this example, the driver is just completing his 34-hour restart and according to the ELD, has completed his second period in the sleeper-berth between 1 and 5 a.m. The **driver manually inputs** the start of his day at 6:00 a.m. as **on-duty not driving**. The driver has started his 14-hour window, and he officially has until 8:00 p.m. to complete his 11 hours of driving.

**“Actual time”:** The driver actually left the sleeper berth at 4:00 a.m. and started the reefer unit in order to cool the trailer to the temperature that is required on the Bill of Lading for shipping, **but does not manually input this duty status**. Instead, the driver started the cooling unit, did a pre-trip inspection, and grabbed some breakfast. **At 6:00 a.m., he manually inputted the on-duty not driving status** so the ELD will show an on-duty record of 6:00 a.m. In actual time, the driver has only until 6:00 p.m. to complete the 11 hours of driving for the 14-hour window.

Incidentally, because the driver did not take a second period of off-duty and/or sleeper-berth time that included a period between 1 and 5 a.m., every minute of on-duty time, whether on-duty not driving or driving, is in violation of the hours of service.

**ELD and “Actual Time”:** At 7:00 a.m., the driver begins to drive and both the ELD and the real time graph lines parallel each other. The driver must take a 30 minute rest break before 8 hours have elapsed since the driver’s last off-duty or sleeper berth period.

**ELD Time:** According to the ELD, the driver has until 1:00 p.m. to take his break and manually input it into the ELD, which he does in full compliance with the regulations.
“Actual time”: The driver should have taken a rest break by 12:00 noon to comply with the regulations, but instead, he waited until 1:00 p.m. to take his break. The driver is in violation of the 30-minute rest break regulation at 12:00 noon.

**ELD and “Actual time”:** At 2:00 p.m., the driver manually inputs the change in duty status from off-duty to on-duty not driving to fuel his tanks.

**ELD Time:** The driver begins to drive again at 2:30 p.m. and continues to drive until 7:00 p.m., where he arrives at his destination. The driver parks the truck and waits to unload, but the dock is closed so he shuts down for the evening and inputs a change of duty status to off-duty from 7:00 p.m. until 9:00 p.m. when the driver manually changes the duty status to sleeper-berth. The driving time was parallel to the ELD, but the driver is in violation of the 11 hours of driving in the 14 hours of on-duty time. The 14-hour clock actually ended at 6:00 p.m., but the driver continued to drive for another hour. The driver inputted that he went off-duty at 7:00, but actually, the driver went on-duty not driving by doing paperwork, checking the truck, and pulping the load while parked at the receiver. After which, he went to the sleeper at 9:00 p.m.

The ELD graph will show complete compliance with all HOS regulations for Day One. Actual time should have indicated that the driver was in violation for all hours he was in operation because he violated the 34-hour restart provision, regardless of the three other hours of service violations the driver incurred.
**Day Two**

**ELD:** According to the ELD, the driver stayed in the sleeper berth until 7:00 a.m., and completed the 10 hours of sleeper berth time required by the regulations. At 10:00 a.m., the driver manually inputs on-duty not driving while his trailer is unloaded during the next half hour.

**“Actual time”:** The driver got out of the sleeper at 5:00 a.m., and reported to the dock supervisor and received an unloading dock assignment and number to unload, which places the driver in the on-duty not driving status. Furthermore, the driver is out of compliance with the HOS because he did not stay in the sleeper-berth for 10 hours. By 7:00 a.m., the driver is still in the check-in area waiting for his number to be called, but the ELD shows that he is off-duty. At 7:30 a.m., the driver bumps the dock and begins to unload with a pallet jack, which takes two
and half-hours. **The driver manually enters on-duty not driving at 10:00 a.m. into the ELD, and lists the next half hour for unloading between 10:00 and 10:30 a.m.**

**ELD and “Actual time”**: At 10:30, the ELD inputs that the driver is driving, and the ELD and actual time are parallel the rest of the day. The ELD shows the driver took a 30-minute break at 3:00 p.m., which is within the regulations.

**“Actual time”**: The driver should have taken the 30-minute break by 1:00 p.m., but he did not take a break until 3:00 p.m., which is in violation of the regulations. In the actual time, the driver should have stopped driving after 7:00 p.m., as his 14-hour clock ended at that time, but instead, he continued driving for another 4 hours until he inputted off-duty at 11:00 p.m., followed by sleeper berth at 12:00 midnight.

The ELD recorded graph will show a compliant graph meeting all hours of service regulations for Day Two.

![Graph showing ELD Time and Actual Time for Day Two](image)

The shaded areas in the graph below show periods where the driver is actually in violation of the HOS regulations.
The inability of an ELD to provide any appreciable improvement to the accuracy of a driver’s RODS and compliance with the HOS rule over paper logbooks is dramatic. ELDs may be able to automatically record the length of time a truck has been driven, but that capability is of no appreciable value over paper logs if the driver can continue to enter an incorrect duty status when not driving. Therefore, the ELD can help mask the fact that much of the actual driving time is improper under the regulations. The proposed ELD provides no more accurate record of driver’s duty status than paper logs.
Comparison of Day One and Two between ELD recorded and Actual Time.

C. ELDs Place Undue Pressure on Drivers to Violate Other Rules, Including Safety Regulations.

The changing nature of how ELDs record a driver’s record of duty status will place pressure on drivers to take actions that will at the very least put them at risk of violating local ordinances and other rules about where a truck can be parked, up to and including placing undue pressure on the driver to speed or violate other safety rules so as to not be recorded as violating the HOS rules. Unfortunately, the impact of a “second-by-second” recording of a driver’s driving time was not evaluated as part of the Agency’s regulatory or safety analysis for this rulemaking. Three situations provide examples to illustrate this point:

Example One: A driver has set his schedule to allow for him to leave the facility where he is loading and drive off facility property to an area where he may legally park his truck and take his daily rest break. However, due to an unexpected delay at the dock, the driver’s duty window has closed before he is able to move his truck off the facility property. The facility management has a long-standing policy not permitting for-hire drivers to park their truck and
take a rest break on the property. Further, the facility will not allow the driver to drop his trailer on their facility and move the vehicle under the “personal conveyance” rule. If he stays, the facility is going to have him charged with trespassing. While the driver will only be moving the truck a few hundred feet, the automatic nature of the ELD, combined with the “second-by-second” recording of driving time mean that if he moves his vehicle to avoid the trespass charge, he will be in violation of the HOS rules. As such, the driver is in a “Catch-22” situation that is not addressed under the SNPRM.

**Example Two:** A driver has set her schedule to allow for just enough time to park her truck and loaded trailer at home before taking a 34-hour restart. However, due to a slow vehicle on a one-lane road, the 11-hour driving window expires for the driver just down the road from her home. Not wanting to risk an HOS violation and the negative impact on her CSA score, the driver parks her truck on the shoulder of the highway and goes off-duty for her restart. Not only is the driver’s truck at risk of being ticketed by law enforcement for being illegally parked, but the truck is potentially a hazard for other motorists. Yet, again, the driver is in a “Catch-22” situation caused by the ELDs recording of driving time down to the second.

**Example Three:** Due to an already tight delivery schedule provided by his carrier, a driver is literally operating with only a few minutes to spare before his last delivery and the time when he is able to go off duty due to the expiration of his driving and duty windows. The driver comes upon a construction site on the Interstate where the available lanes are reduced. The driver knows that any delay here will cause him to exceed his driving limits. While it is possible that he could contact his dispatcher and ask him what to do, he knows that the response is going to be to keep pushing and make the delivery, and the potential negative impacts of a failed delivery on his record are significant. As such, he decides to race ahead of the slowing traffic,
It is easy to dismiss these three examples by saying they are not realistic or that they could simply be addressed through better scheduling by the driver. Unfortunately, they are realistic scenarios, and the FMCSA Administrator noted before Congress just how little control that drivers have over their schedules. Finally, an individual law enforcement officer may state that the driver could address these issues through comments in their log. This is true, but in the grid-graph record any time over the driving or duty limits will still be recorded as an HOS violation. Then it becomes a subjective scenario for the driver and law enforcement over whether or not to charge the driver with a violation.

IV. THE PROPOSED REGULATIONS DO LITTLE TO ADDRESS HARASSMENT

49 U.S.C. § 31137(a)(2) directs the Secretary to prescribe regulations “ensuring that an electronic logging device is not used to harass a vehicle operator.” This language is plain and unequivocal. It is not qualified or limited in any way. The SNPRM starts off on the wrong foot by asking for comments or measures “to address concerns about harassment.” 79 Fed. Reg. at 17656-1. Congress did not express some vague “concerns about harassment.” It flat out told the Secretary to ensure that ELDs are not used to harass. The SNPRM informs us that “the Agency notes that it cannot adopt a regulation guaranteeing that every instance and form of harassment, whether real or perceived, is eliminated.” 49 Fed. Reg. at 17675-2. OOIDA and professional
truck drivers do not look for a guarantee. The expectation is for the Secretary to do everything within reason to ensure “that an electronic logging device is not used to harass a vehicle operator.” 49 U.S.C. § 31137(a)(2). The SNPRM falls far short of implementing this mandated task.

Next, notwithstanding the clear directive from Congress to get on with it, the SNPRM proceeds to identify contrived obstacles to the implementation of Congressional will:

Nor does the Agency believe that Congress intended that the Agency interfere with labor/management agreements or disputes not directly related to the required use of ELDs, or duplicate the role Congress has assigned to the U.S. Department of Labor under 49 U.S.C. 31105.

79 Fed. Reg. at 17675-2. The SNPRM offers no textual support in the statute for this “belief.” Congress did not instruct the Secretary to take a back seat to anyone when it comes to “ensuring that an electronic logging device is not used to harass a vehicle operator.” The quoted language from the SNPRM is a classic example of bureaucratic “buck-passing.” The Secretary should rethink carefully the wisdom of any effort to shirk his responsibilities under the statute by shifting those responsibilities to others.

Next, the SNPRM proposes an approach that significantly scales back the Agency’s view of what an ELD is in order to set the stage for a further constriction of its proposed effort to deal with harassment:

As explained in Part VI of this SNPRM, FMCSA would refine the requirements of an ELD to include only recording functions; anything beyond basic recording of the required data elements would not be required by an ELD. However, the SNPRM would not prohibit motor carriers from employing communication, FMS, and other functions beyond mere recording. Many current systems, which have been on the market for years, go beyond the recording abilities proposed in this SNPRM; and the Agency does not infer from the anti-harassment provision in section 31137(a)(2) a congressional intent that FMCSA ban or impose significant new restrictions on those functionalities in this rulemaking. Therefore, to the extent necessary to address harassment, FMCSA would address use of technology
beyond the minimally compliant ELD only if that technology encompassed an ELD function.  

*Id.* (emphasis added). The SNPRM thus takes the very narrow view that an ELD is nothing more than a device that performs a recording function. The proposed rule then skews the Agency’s efforts to ensure against harassment “only if that technology encompassed an ELD function,” i.e. recording. The SNPRM offers no textual support or analysis to support this approach. Nor is there ambiguity in the statutory language that would open the door to such an approach. This approach fails to satisfy the standards imposed in the recent Seventh Circuit case: “The Agency must articulate a reason for its action that demonstrates a rational connection between the facts found and the choice made.” 656 F.3d at 588.

After squeezing down the concept of what an ELD is so as to narrow its responsibility to ensure against harassment, FMCSA tries to resurrect the goal of motor carrier productivity that was eliminated by Congress from the current law. Prior to its amendment in 2012, Section 31137 provided:

(a) Use of monitoring devices.--If the Secretary of Transportation prescribes a regulation about the use of monitoring devices on commercial motor vehicles to increase compliance by operators of the vehicles with hours of service regulations of the Secretary, the regulation shall ensure that the devices are not used to harass vehicle operators. However, the devices may be used to monitor productivity of the operators. (Emphasis added).

The 2012 amendment dropped the “if…then” format of the earlier version in favor of mandatory “shall” language. The earlier language affirmatively sanctioned a carrier’s use of these electronic devices to monitor productivity, but that language was dropped in the 2012 version. FMCSA, showing its pro-carrier/anti driver instincts, tells us that it “would not penalize motor carrier actions aimed at productivity, provided that the action did not constitute harassment as
defined in today’s proposal.” 79 Fed. Reg. at 17675-3. Although encouraged to do so by the
Seventh Circuit (656 F.3d. at 588 - 589), FMCSA makes no effort either to define harassment or
to establish its boundaries with productivity. The proposed rule springs to the defense of carrier
productivity (Section 390.36(b)(2)) – a priority eliminated by Congress in the current version of
the statute – while assigning a back seat to its primary responsibility of ensuring against
harassment. The SNPRM pays little heed to the admonition of the Seventh Circuit on this
point:

To provide an adequate explanation under section 31137(a), the Agency
should have revealed how it drew the line between legitimate measures
designed to assure productivity and forbidden measures that harass. These
terms are undefined in the statute and thus require some amplification.**

* * *

[A]n adequate explanation that addresses the distinction between
productivity and harassment must also describe what precisely it is that will
prevent harassment from occurring. The Agency needs to consider what
types of harassment already exist, how frequently and to what extent
harassment happens, and how an electronic device capable of
contemporaneous transmission of information to a motor carrier will guard
against (or fail to guard against) harassment. A study of these problems with
EOBRs already in use, and a comparison with carriers that do not use these
devices, might be one obvious way to measure any effect that requiring
EOBRs might have on driver harassment.

656 F.3d at 588-589. Assuming that, after the 2012 amendment of the statute, the agency is still
free to consider motor carrier productivity at all, it is not free to ignore the admonition of the
Seventh Circuit in achieving a proper balance.

The SNPRM then limits its harassment proposal to the use by a carrier of information
recorded by the ELD that results in a regulatory violation by the driver:

FMCSA proposes to add a new § 390.36 to prohibit a motor carrier from
engaging in harassment of a driver. As defined, “harass or harassment”
would mean “an action by a motor carrier towards a driver employed by the
motor carrier (including an independent contractor while in the course of
operating a CMV on behalf of the motor carrier) involving the use of
information available through an ELD . . . or through other technology used
in combination with and not separate from the ELD, that the motor carrier knew, or should have known, would result in the driver violating § 392.3 or part 395 [of 49 CFR]."


Proposed Section 390.36 requires that harassment complaints (filed under Section 386.12a) be based upon violations of § 392.3 or Part 395 of the FMCSRs. *Id.* The statutory provision on harassment is not so limited and the SNPRM does not explain or defend this limitation.

The approach of tying harassment problems to driver violations of Part 395 or § 392.3 is seriously flawed. Requiring that driver harassment complaints be based upon regulatory violations creates a giant loophole through which acts of harassment will pass. Suppose a driver has several hours of driving time available to him under the HOS rules. His carrier is well aware of this because it monitors driver activity with the ELDs. The driver is ill or too tired to drive, but the carrier harasses (or coerces) him to drive on anyway. Under the rule as proposed, the driver’s continued driving would not result in a Part 395 violation unless or until he ran out of hours. The driver would have no ability to complain under the proposed rule because there is no violation of Part 395 by the driver. The motor carrier’s violation of § 392.3 is irrelevant under proposed § 390.36.

Suppose a carrier harasses a driver to continue to drive and use up available driving time under the HOS regulations. The driver believes that bad weather conditions or serious traffic problems make driving inadvisable. Because yielding to the carrier’s demands will not result in a violation of Part 395, the rule as proposed affords no protection to the driver.

Consider another example. Suppose a motor carrier is harassing a driver to do something but the driver resists. There is no violation of the regulations because the driver does not cave in
to the harassment. Why is the driver who refuses to violate a regulation not protected from harassment under Section 31137(a)(2)?

Another example. Suppose the harassment took the form of a carrier insisting on preparation of a false entry of duty status, a very common situation. The driver caves under the request, but there would be no detectable (recorded) violation upon which to base a complaint because of the false entry of duty status. Would the driver have to turn himself in for violating Part 395 before filing his complaint? A driver under these circumstances is then burdened with a requirement of proving actual knowledge on the part of the carrier – a requirement that a well-represented carrier will hide behind even when the facts are otherwise clear. Such complaints would result in a fight between the driver and an army of lawyers representing the motor carrier in a “he said, she said” contest. In the meantime, FMCSA has assigned itself a completely passive role with no duty to investigate or take any action on its own. These proposed procedures are totally ineffective in dealing with harassment. The proposal is a sad joke unworthy of an agency charged with responsibility of ensuring against driver harassment.

One significant reason why the SNPRM’s attention to harassment is so inadequate is that FMCSA has not even completed gathering data for its own study of the issue. As the SNPRM describes, FMCSA has initiated a survey of drivers and motor carriers regarding the use of e-logging devices to harass drivers. 79 Fed. Reg. at 17663. FMCSA’s website, updated June 10, 2014, reports that the survey is now underway and that a report would be due in September 2014, more than two months after the close of the comment period in this SNPRM.

http://www.fmcsa.dot.gov/safety/research-and-analysis/survey-electronic-logging-devices-and-driver-harassment. This order of events, proposing a rule before developing a full record of information about the issue of driver harassment, demonstrates a lack of seriousness by FMCSA
respecting its obligation to comply with the statutory mandate on harassment. FMCSA is currently flying blind. This is probably the primary reason why the proposed rule’s remedy for harassment discussed above demonstrates such a poor comprehension of the problem.

Not only is the record deficient because of its lack of information and analysis concerning this survey, it is deficient because the public has had no opportunity to react and comment upon it. The public will not have access to the data collected by the survey, or have notice of the agency’s decisions based upon that data, before this comment period expires. The public will not have an opportunity to review or comment on how that data affects FMCSA’s decisions on the content of this rule. This is the type of defect in a rulemaking process that caused the U.S. Court of Appeals for the District of Columbia to overturn the Hours of Service rules in July of 2007.

Finally, OOIDA is concerned that because FMCSA has already proposed an electronic logging rule, and is accepting comments without completion of the regulatory record, it has effectively closed off whole sections of the rulemaking from future amendment in this proceeding - no matter what it learns in its study. OOIDA has consistently urged FMCSA to be open to the amendment of any e-logging rule (technical, procedural, or substantive) to address driver harassment.

To remedy this problem and comply with the Administrative Procedure Act, FMCSA must be prepared to publish the data collected by the survey, publish its analysis of that data, and welcome another round of comments so that interested parties may properly address the driver harassment issue.
V. BENEFITS OF ELDS ARE NOT SUBSTANTIATED

Similar to FMCSA’s past attempts to mandate Electronic On-Board Recorders (EOBRs)/Electronic Hours of Service Recorders (EHSRs), the SNPRM declares that the premise of requiring electronic recordation of on and off duty driving time is to “improve compliance with hours of service (HOS) rules and improve safety by decreasing the risk of fatigue-related crashes attributable to violations of the applicable HOS regulations.” Regulatory Impact Analysis February 2014 (2014 RIA). But like the previous attempts, the fundamental underlying premise for requiring an electronic device is unproved, and defeats the agency’s conclusions regarding the safety benefits. The Seventh Circuit expressed skepticism on the ability to establish benefits from the use of electronic monitoring devices. Owner-Operator, 656 F.3d at 589. FMCSA has not introduced any new evidence that electronic rather than manual recording provides any increased compliance with HOS rules. FMCSA’s analysis can be reduced to one meaningless comparison based upon the limited data reviewed -- those trucks with EHSRs (Electronic Hours of Service Recorders) had a lower HOS violation and crash rate than those without. However, FMCSA concedes that the small sample size, the skew in the data to large carriers and the inability to control for variations in record keeping among carriers evaluated, skews even the limited data analyzed. FMCSA Safety Benefit Evaluation April 2014 (2014 Safety Study) at xiii-ix. “Small sample sizes limited the power to detect a significant difference between the EHSR cohort and non-EHSR cohort for U.S. Department of Transportation (USDOT) recordable and fatigue related crashes. This result is primarily attributed to the lack of sufficient data (in terms of the number of these types of crashes) to be able to detect safety benefits with statistical significance at the observable level.” Nevertheless, FMCSA concluded in its EHSR study that there are clear safety benefits. Id. The study concluded that EHSR
equipped trucks had an 11.7 percent lower crash rate and a 53 percent lower driving-related HOS violation risk than non-EHSR equipped trucks.

The 2014 Safety Study lacks reliability for numerous reasons, some evident in the detail reported and some never even considered in the analysis. As an initial matter, FMCSA’s analysis is completely undermined by its reliance on a number for CMV drivers that is currently in question. FMCSA bases its analysis on an estimate of 4.3 million drivers in FMCSA-regulated operations. RIA at 21. However, FMCSA has just published revised numbers cutting that estimate by 38 percent. In “Agency Information Collection Activities: Revision of an Approved Information Collection: Hours of Service (HOS) of Drivers Regulation” 79 Fed. Reg. 35843-44 (June 24, 2014), the agency published a revision of the paperwork burden approved by OMB for drivers RODS. The agency requests to lower the burden of estimated hours based on the decreased number of CMV drivers subject to the HOS rules and burden reduction due to voluntary use of electronic HOS technology. FMCSA lowers the number of drivers covered under the HOS rules from 4.6 million to 2.84 million -- a reduction of 38 percent -- and estimates that 10% of those drivers currently use electronic HOS technology. The disparity in the numbers used in the cost/benefit analysis justifying the proposed rule compared to the most recent estimate on the number of drivers in the ICR filing, seriously undermines the analysis contained in the 2014 RIA.

Another glaring deficiency in the 2014 Safety Study is the effect that the mere installation of the equipment might have on the inspection process itself. In fact, the 2014 Safety Study nowhere takes into account the process for selecting trucks for roadside inspection – a factor that has profound impact on the end result for (1) quantifying HOS violations and (2) inferring the impact of HOS violations on crash statistics. If there is a bias in the selection of trucks for
inspection based upon whether the truck is monitored by an EHSR, then the results will be biased based upon the selection process. If fewer trucks monitored by an EHSR are inspected, then the results counting HOS violations will be biased in favor of trucks with EHSRs. The statistical analysis of the Safety Study is inherently unreliable because it imposed no controls for this bias.

**ELD Enforcement Practices – OOIDA’s Survey**

In the previous section we showed that the inability of state-of-the art ELD’s to automatically record duty status made them no more reliable at recording HOS violations than paper logbooks. We cautioned that the use of electronic recording devices would provide the illusion of accuracy rather than real accuracy. Observations made by OOIDA members in the field confirm the seriousness of this problem.

OOIDA conducted a survey regarding the frequency with which state roadside inspections passed trucks monitored with EOBRs/ELDs (or stated that the truck had such equipment) through the inspection process without checking the trucker’s logs. OOIDA received 2,687 responses. Of those responding, 69 percent (2,069) reported that many trucks carry a sticker stating that it has an EOBR/ELD installed on the truck. Of those trucks carrying such a sticker, 88 percent reported that the company for which the truck was in service, rather than the driver, was responsible for issuing the sticker announcing the installation of the EHSR equipment. The survey found that 33 percent of 2,069 responders reported that a law enforcement official declined to inspect the driver’s logs because he saw that the truck had a sticker stating that it was equipped with and EOBR/ELD. The survey found that out of 2,347 responders 39 percent stated that they had seen a law enforcement official passing on inspecting another driver’s logs because the truck was equipped with an EOBR/ELD. Further, numerous
responders reported that in addition to just passing on inspection, officers did not know how to operate the EOBRs/ELDs, and so regardless of the need to inspect, the officer could not read the electronic log to complete the inspection. Responders to the survey reported the practice of passing on inspection of trucks equipment with EOBRs/ELDs was evident throughout the country, with no particular area singled out.

Nor was it necessary to display a sticker to be passed through without inspection. Many drivers reported that as soon as they told an inspector that the truck was equipped with an EOBRs/ELDs, they were passed through without inspection of the logs. A survey responder stated: “When the trooper asked to see my logbook, I pushed my Qualcomm over in the passenger footwell and she said oh you’re on electronic logs? I don’t need to see you then.” Another stated, “when [the inspector] asked for my logbook and I showed him the Qualcomm, he said never mind.” And: “I am E-log and soon as they (officers) realize it they just say to move on. I was at the scale on I-12 eastbound outside Hammond, LA and while standing at the scale they asked drivers for their logbook. They were only checking paper logs, everyone that had an EOBR or ELD was told they were good to go.” Drivers reported that the EOBRs/ELDs inspection pass was routine, not a one-off situation: “I was a company driver for NFI for 5 years. I had gone through several DOT inspections, and never once did they look at my logs.” Another driver stated, “I have been running electronic logs for years and no state has ever asked to see them; they know the big companies I have been leased to are electronic. They just say oh you are electronic.” Another commented, “I drove for a company for 6 years that had mandatory ELD. During that 6 years I recall only being asked to see my electronic log two times and both times it was handed back with no questions asked, and with a look that said they didn’t know what they were looking at.”
Survey results show that field inspectors frequently assume large carriers require EOBRs/ELDs. A responder who did not have a sticker or an electronic log, was allowed to pass on inspection without looking at the logbook because the officer assumed the driver had an EOBR since he was leased to a large package delivery company. The officer stated “you have eLogs so I’m not going to ask for your logs.” Similarly, another responder said: “I work for Knight Transportation. We are always allowed to bypass scales. I have been told by officers at weight stations that it is because Knight has an excellent safety records, and also its because Knight uses E-Logs and they cannot be cheated, so why check them anyways.”

Given the ease with which ELDs can be used to mask HOS violations through false record of duty status entries as shown above, FMCSA should be quite alarmed at the inability or unwillingness of state enforcement officers to examine electronic records in the field.

**2014 Safety Study**

The 2014 Safety Study concedes that it was “skewed toward large, for-hire carriers and may not represent the overall U.S. trucking population.” (2014 Safety Study at 25-26). Out of the eleven participating carriers, nine possessed over 1,000 trucks while the remaining two operated between 100 and 500 trucks. *Id.* These eleven carriers do not represent small or even medium sized motor carriers, as 97% of all fleets are twenty trucks or less, and 90% of all fleets are six trucks or less. (Unified Carrier Registration Plan of FMCSA at 23). As the OOIDA survey demonstrates, the skew toward large carriers reinforces the self-selecting bias to favor large carriers by passing on inspections. Fewer inspections stack the deck for fewer HOS violations rendering the 2014 survey suspect from its inception.
The 2014 Safety Study took crash data directly from carrier records instead of relying on FMCSA data. The Study acknowledges that carrier records relating to crashes vary considerably. *Id.* at 17. “One issue the research team experienced was that the criteria for recording crashes varied considerably among carriers. Some carriers recorded minor crashes (e.g., scratching the truck body in a parking lot) that were often omitted by other carriers.” *Id.* The Study concedes that this inconsistency opens the possibility of “severe bias in EHSR evaluation” compounded by the fact that “EHSR market penetration rate differed among truck fleets with different crash recording standards.” *Id.* To compensate for this admitted flaw in the analysis, the Study attempts to unify crash standards, listing factors considered, but nowhere defines what criteria was included, nor how this “unification” overcomes the variations in the standards for recording crashes among the included carriers. *Id.* The Study coded crashes by utilizing the first impact or harmful event. For an example, a vehicle that encroached on a truck’s lane, thereby causing the truck driver to make an avoidance maneuver that resulted in the truck rear-ending another vehicle, would be coded as a rear-end collision. Thus, even though the driver correctly responded to try to avoid a head-on crash, it was counted against the driver. More significantly, how could an EHSR have helped prevent the action of the encroaching vehicle or prevented the crash?

The Safety Study concluded that trucks equipped with EHSRs had a total crash and preventable crash rates that were significantly lower than the rates for trucks not equipped with EHSRs, 11.7 percent lower for total crash rate and 5.1 percent lower for preventable crash rate. Nonetheless, the Study did not find any safety benefit between EHSR and non-EHSR carriers for US DOT-recordable and fatigue-related crashes. Yet, the justification for mandatory EHSR use, and the premise behind the safety of EHSR use is the belief that it increases HOS compliance,
which in turn FMCSA believes reduces driver fatigue, resulting in increased on-road safety.

However, if the results of the Study detect no safety benefit for DOT-recordable crashes and fatigue-related crashes, then the entire house of cards -- the justification for EHSRs -- comes crashing down.

Below is a list of operational definitions for crashes utilized in the Study. *Id.* at 23.

According to the Study, EHSRs do not demonstrate any safety benefits by reducing fatigue, how would utilizing an EHSR prevent any of the following crashes?

**Table 2: Operational definition for the uniform crash types (*Id.* at 23)**

<table>
<thead>
<tr>
<th>Crash Type</th>
<th>Operational Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Run Off Road</td>
<td>The truck ran off the road, and the road and/or surface caused the first damage to the truck.</td>
</tr>
<tr>
<td>Head-on</td>
<td>The truck had a front-end collision with another vehicle on the roadway.</td>
</tr>
<tr>
<td>Rear-end</td>
<td>The truck rear-ended another vehicle on the roadway.</td>
</tr>
<tr>
<td><strong>Rear-ended</strong></td>
<td><strong>The truck was rear-ended by another vehicle on the roadway.</strong></td>
</tr>
<tr>
<td>Sideswipe</td>
<td>The truck struck another vehicle/object traveling in the same direction on its side.</td>
</tr>
<tr>
<td>Opposite Sideswipe</td>
<td>The truck struck another vehicle traveling in the opposite direction on its side.</td>
</tr>
<tr>
<td>Backing</td>
<td>The truck backed up and struck another vehicle or object.</td>
</tr>
<tr>
<td>Parking Lot</td>
<td>The truck struck a fixed object or vehicle while maneuvering in a parking lot, dock, or truck stop.</td>
</tr>
<tr>
<td>Hit Object in Road</td>
<td>The truck hit an object in the roadway while driving.</td>
</tr>
<tr>
<td>Hit Animal</td>
<td>The truck struck an animal in the roadway.</td>
</tr>
<tr>
<td>Rollover</td>
<td>The truck rolled over, and the rollover was the first impact.</td>
</tr>
<tr>
<td>Jackknife</td>
<td>The truck jackknifed, and the jackknife was the first impact (loss of control of the trailer).</td>
</tr>
<tr>
<td><strong>Parked</strong></td>
<td><strong>Another vehicle, person, or object damaged the truck while it was parked</strong></td>
</tr>
<tr>
<td>Roll back</td>
<td>The truck rolled back into another vehicle or object after releasing the brake.</td>
</tr>
<tr>
<td>Roll Away</td>
<td>The truck rolled forward into another vehicle or object after releasing the brake.</td>
</tr>
<tr>
<td>Hit Fixed Object</td>
<td>The truck struck a fixed object not on the roadway.</td>
</tr>
<tr>
<td>Hit Pedestrian</td>
<td>The truck struck a person</td>
</tr>
<tr>
<td>Overhead</td>
<td>The truck struck an overhead object (e.g., an overpass).</td>
</tr>
<tr>
<td><strong>Mechanical</strong></td>
<td><strong>The truck experienced some sort of mechanical failure.</strong></td>
</tr>
<tr>
<td><strong>Hit by Other Vehicle (OV)</strong></td>
<td><strong>Another vehicle struck the truck, but there was not enough information to classify a specific crash type.</strong></td>
</tr>
<tr>
<td><strong>Truck Hit OV</strong></td>
<td><strong>The truck struck another vehicle, but there was not enough information to classify a specific crash type.</strong></td>
</tr>
<tr>
<td><strong>Broadside</strong></td>
<td>The truck had a driver/passenger side impact with another vehicle, or the OV had a driver/passenger side impact with the truck.</td>
</tr>
<tr>
<td>Other</td>
<td>Miscellaneous crash circumstances that did not fit into other categories</td>
</tr>
<tr>
<td><strong>Non-contact</strong></td>
<td><strong>Any instance where there was not contact with another vehicle, object, or pedestrian (e.g., tire blowout)</strong></td>
</tr>
</tbody>
</table>

35
The Safety Study collected HOS violation data from each of the participating carriers. However, some carriers collected internal HOS data, whereas others did not, similar to the manner in which carriers collected crash data. Nonetheless, instead of attempting to unify the HOS data as the Study did with the crash data, it instead turned to FMCSA’s Safety Management System (SMS) online web page. Unfortunately, the SMS web page only provides data for two years prior to the retrieval date. Thus, HOS violation data was only collected from a small portion of 2010, all of 2011, and 2012. Id. at 22. Nonetheless, the study claimed that final datasets included 970 HOS violations over a 5-year period, which appears objectively low considering a single carrier such as Swift Transportation (US DOT 54283) had 841 HOS violations in only a two-year period. The following definitions were utilized in the study to determine non-driving-related HOS violations; notice that there is no inclusion of on-board recording device violations:

- Driver’s RODS not current,
- Log violation (general/form and manner),
- Driver failing to retain previous 7 days of logs,
- False report of driver’s RODS,
- No driver’s RODS, and
- No logbook.

Comparing Swift’s CSA scores, 51% of their HOS violations are on-board recording violations. It seems evident that the HOS violations included in the Study used to reach only 970 HOS violations are very different from the violations included in the SMS system. Furthermore, as discussed above the OOIDA survey found that many law enforcement officials pass on conducting level 3 inspections -- logbook inspections -- on trucks that have an EOBRs/ELDs installed. The OOIDA survey found that 34% of responders equipped with EOBR/ELDs had personally experienced a law enforcement official passing on inspecting their RODS, while another 40% stated that they saw this same event occur with other truck drivers. Therefore, it is
unlikely that the 2014 Safety Study accurately analyzed the HOS violations or the potential effect EHSRs have in improving HOS compliance.

OOIDA has conducted another survey which contradicts the findings of the 2014 Safety Study. The OOIDA survey is not a direct comparison, but certain of its findings are telling with respect to the effectiveness of electronic devices in controlling for safety violations of drivers. The OOIDA survey analyzed information available on the FMCSA/CSA site, where carrier’s BASIC percentiles/scores are reported and posted for public access. In addition, MCS-150 information was used as another source of data. OOIDA examined the CSA scores of a select number of large carriers that have speed limiters and EOBRs installed. The Foundation reviewed the following data in an attempt identify a correlation between speed limited and EOBR equipped fleets with improved safety on speeding violations and crashes when compared to non-speed limited non-EOBR fleets. The following carriers require speed limiters and EOBRs: Werner, Schneider, J.B. Hunt, Swift, C.R. England, US Express, Knight, and Maverick. The following carriers do not require electronic monitoring equipment: Dart, Bennett, Landstar Inway, and Landstar Ranger. The examined data included:

- Percentages of Crashes per # of power units (PU)
- Percentage of Crashes per # of drivers
- Average Vehicle Miles Traveled before a crash

Among the findings useful for comparison to the 2014 Safety Study, demonstrated that the non-electronically monitored carriers had a better crash ratio than the monitored carriers. All but one of the speed limited/EOBR carriers had fewer miles driven before recording a crash, while three of the four large carriers without such technology had the highest vehicle miles traveled before recording a crash.
<table>
<thead>
<tr>
<th>Name of carrier</th>
<th>Average number of miles per crash</th>
</tr>
</thead>
<tbody>
<tr>
<td>Landstar Ranger</td>
<td>1,865,945</td>
</tr>
<tr>
<td>Landstar Inway</td>
<td>1,825,806</td>
</tr>
<tr>
<td>Dart</td>
<td>1,709,459</td>
</tr>
<tr>
<td>Maverick</td>
<td>1,658,537</td>
</tr>
<tr>
<td>Knight</td>
<td>1,595,745</td>
</tr>
<tr>
<td>Bennett</td>
<td>1,512,821</td>
</tr>
<tr>
<td>Schneider</td>
<td>1,358,816</td>
</tr>
<tr>
<td>US Xpress</td>
<td>1,142,857</td>
</tr>
<tr>
<td>J.B. Hunt</td>
<td>1,138,187</td>
</tr>
<tr>
<td>Swift</td>
<td>1,121,704</td>
</tr>
<tr>
<td>C.R. England</td>
<td>989,916</td>
</tr>
<tr>
<td>Werner</td>
<td>910,543</td>
</tr>
</tbody>
</table>

At a minimum, these findings seriously undermine the wildly optimistic findings of the Safety Study. It begs credulity that the study’s finding that EHSR equipped trucks had an 11.7 percent lower crash rate compared to non-equipped trucks, where FMCSA’s own safety data shows otherwise.

**VI. COST OF THE PROPOSED RULE**

FMCSA’s analysis of the costs of mandatory of ELDs use is based upon its analyses included in prior proposed rulemakings. RIA 37-38. FMCSA acknowledges that prices have not significantly declined in recent years. RIA at ii. FMCSA bases it price analysis on Qualcomm products, and certain of its price information was “acquired through a conversation Qualcomm sales representative, Angelo Matero, and FMCSA during a meeting on May 12, 2010.” RIA at 38 n. 31. OOIDA incorporates here its detailed comments from its May 23, 2011 submission, Docket No. FMCSA-2010-0167.

Significantly, FMCSA’s conclusions regarding the relative benefits in light of the costs is consistent with prior rulemakings. FMCSA recognizes that the costs far outweigh the benefits:

Safety benefits are higher when all regulated CMV operations are included in the ELD mandate . . . but the marginal costs (ELD costs plus compliance costs) of including these operations are more than 5 1/2 times higher than
the marginal benefits. These options would add SH drivers who do not use RODS, have better HOS compliance, and much lower crash risk from HOS non-compliance. For the SH non-RODS subgroup, FMCSA’s analysis indicates that ELDs are not a cost effective solution to their HOS non-compliance problem. This result is consistent with past ELD analyses.

RIA at iv-v.

**OOIDA further comments:**

1. **The Cost of EOBRs on Driver and Equipment Turnover** -- The Agency greatly underestimates the cost of the regulations taking into account driver and equipment turnover. If a driver buys a new truck, he will have to pay to buy a new EHSR or pay to transfer his existing unit. If he moves to another carrier, he will have to conform his equipment to the requirements of a new carrier.

   The statute is silent regarding who will bear the burden of paying for mandatory ELD use – the driver or the motor carrier. FMCSA nowhere makes any proposal in this regard, nor otherwise addresses who will be responsible for purchasing the equipment, and paying for its installation and its repair and other maintenance. Regardless of how “reasonable” the Agency may characterize these costs, if the burden is placed on owner-operator drivers or small fleet owners, the cost poses a very heavy burden. Owner-operators in particular often exist financially week to week. Any additional financial burden may be the final straw making their continuation in the trucking business impossible. A cost-benefit analysis that does not address the crucial question of what type of organizations will shoulder the burden of these costs cannot support a reasoned regulatory judgment.

2. **Costs of Repair and Financing** -- FMCSA assumptions regarding the life of the equipment are contrary to previous commenters. Further, even FMCSA recognizes that the impact on small carriers is of great concern, and concedes that it has “no information about the
typical small carriers’ cash flow.” RIA at 38. FMCSA states without support and unrealistically that financing will be available “if the carrier has good credit.” Id. FMCSA’s financial analysis of likely costs in this regard are in light of its admitted lack of evidence and unsupported “assumptions.” Id.

3. Cost Savings — FMCSA also estimates that there will be a potential reduction in personnel costs from the reduced need to check and store paper RODS. What possible importance could this have if the cost of the ELD is passed onto the driver? If any event, motor carriers will face new responsibilities for storing, maintaining, and reviewing EOBR records:

   a. Logs will still need to be checked
   b. Logs will still need to be stored
   c. More personnel may have to be added to interpret new information from the ECM and GPS synchronization
   d. If there is to be a benefit from the ECM readings, more personnel may have to be hired to interpret technical data

Additional personnel will be needed to maintain the equipment and software — perform repairs and software updates.

VII. THE PROPOSED RULE VIOLATES THE DUE PROCESS RIGHTS OF DRIVERS

The electronic logging statute and proposed rule requires electronic monitoring that restricts the freedom of movement of all persons subject to the HOS rules. The proposed rule provides for electronic monitoring combined with, effectively, a curfew. Neither Congress nor FMCSA made any record to support the proposition that all drivers subject to the proposed rule are likely to violate the HOS regulations or are a confirmed threat to public safety. Neither the statute nor the proposed rule provides for any separate determination of an individual’s risk to public safety before requiring electronic monitoring. The Agency makes no explicit demonstration of how the proposed electronic monitoring/intrusion into drivers’ freedom of
movement is necessary to address a governmental interest (risk to public safety). The proposed rule does not specifically identify any fact pattern that is a risk to public safety that is ameliorated by electronic monitoring.

Without providing for any of these conditions to be met, the statute and rules’ imposition of electronic monitoring constitutes an unconstitutional deprivation of a driver’s freedom of movement. It is a simple fact that the statute and the proposed rule treats the class of truck drivers as worthy of fewer constitutional protections than the courts afford alleged child pornographers under the Adam Walsh Child Protection and Safety Act of 2006, Pub.L.No. 109-248, 120 Stat. 587 (codified at 18 U.S.C. § 3142 (c)(1)(B)).

Title II of the Adam Walsh Child Protection and Safety Act of 2006, 18 U.S.C. § 3142(c)(1)(B) is analogous to the electronic logging provisions of 49 U.S.C. § 31137. A series of federal court decisions have struck down, as unconstitutional, the Adam Walsh Act’s blanket imposition of electronic monitoring of all persons accused of violating the Act as a condition of bail. In those cases, the courts agreed that the personal right at issue was the freedom of movement; that the statute’s restriction on that freedom of movement was electronic monitoring combined with a curfew; that Congress has made no finding to support the assertion that all persons accused of violating the Adam Walsh act can be presumed to be a flight risk or threat to public safety; that under this scheme it was all but certain that the rights of those who pose no such risk or threat would be unreasonably impinged; that, instead, the Constitution affords each individual a hearing to evaluate that person’s alleged risk or threat and to determine whether the proposed monitoring and curfew restrictions are a necessary restriction to abate the risk or threat. U.S. v. Polouizzi, 697 F. Supp. 2d 381, 390-394 (E.D.N.Y. 2010). See also U.S. v. Arzberger 592 F. Supp. 2d at 600 (S.D.N.Y. 2008); U.S. v. Smedley, 611 F. Supp. 2d 971, 975 (E.D. Mo.
Thus, even in the criminal justice arena, the government has never required or permitted electronic monitoring of individuals unless the individual’s due process rights have been protected. In some cases, electronic monitoring may be used as a substitute for incarceration for individuals who have been convicted of a crime. Clearly the fact of a conviction bespeaks the due process afforded such an individual – a factor that is completely missing from the electronic logging statutory mandate and proposed rule covering most of the population of truck drivers.

In more limited circumstances, a court may approve electronic monitoring as a component of setting pretrial-bail for persons accused of committing a crime. The courts hold consistently, however, that the Constitutional right to procedural due process requires an individual hearing for each person to determine whether electronic monitoring plus a curfew (restricting the accuser’s right to freedom of movement) was reasonable and necessary to meet the government’s interest. Those individual determinations and due process protections are nowhere found in the statute or the rule proposed here.

VIII. THE PROPOSED RULE FAILS TO PROTECT DRIVERS’ FOURTH AMENDMENT RIGHTS

A. The Use of ELDs Constitutes a Search Within the Meaning of the Fourth Amendment

The Fourth Amendment to the United States Constitution applies to both criminal and civil cases, proscribing unreasonable searches and seizures.1 Except in certain well-defined cases:

The right of the people to secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause,
circumstances, a search is not considered reasonable unless executed pursuant to a judicial warrant issued upon probable cause. See Skinner v. Railway Labor Executives Ass’n, 489 U.S. 602, 619 (1989).

In United States v. Knotts, 460 U.S. 276 (1983) the Supreme Court held that short term use of a simple beeper device to track the movement by truck of a five gallon drum of chloroform used in drug manufacturing from its place of purchase to its place of use was not a search. Police officers supplemented their visual observations of the truck’s movement with tracking signals from the beeper device. 460 U.S. at 278-79. The record did not disclose any use of the beeper after the truck reached its final destination. Id. at 284-85. The Court’s holding, relying on the “limited use which the government made of the signals,” was appropriately narrow:

Nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case.

Id. at 284. The Knotts case presents a very narrow ruling under facts that are easily distinguished from the use of ELDs proposed here. Other courts have declined to apply the Knotts ruling beyond the narrow confines of the facts presented in that case. Kyllo v. United States, 533 U.S. 27 (2001); United States v. Maynard, 615 F.3d 544, 556-58 (D.C. Cir. 2010) (aff’d on other grounds Sub. nom. United States v. Jones, 132 S. Ct. 945 (2012)); United States v. Butts, 729 F.3d 1514, 1518 n. 4 (5th Cir. 1984); People v. Weaver, 12 N.Y.3d 433, 440-44, 882 N.Y.S.2d 357 (N.Y. 2009). These post-Knotts decisions support the conclusion that prolonged and systematic tracking of driver using ELDs constitutes a search under the Fourth Amendment.

supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
In *Kyllo v. United States*, *supra*, the Court examined the use of a sensing device that was used to detect heat from electric lamps used to promote the indoor cultivation of marijuana in a residence to determine “what limits there are upon this power of technology to shrink the realm of guaranteed privacy.” 533 U.S. at 34. The Court distinguished technology that merely supplemented sensory observations of the kind implicated in *Knotts* (visual observation of a vehicle) with technology that provided information regarding the interior of a home that could not otherwise have been obtained without physical “intrusion into a constitutionally protected area …” *Id.* at 34. “Technology that does more than merely supplement sensory observations constitutes a search at least where … the technology in question is not in a general public use.” *Id.* Such a search is presumptively unreasonable without a warrant. *Id.* at 40. The analysis in *Kyllo* confirms the narrow application that should be accorded the so-called “sensory-enhancement” exception in *Knotts*.

The *Knotts* Court further narrowed its holding by specifically reserving prolonged, 24 hour per day surveillance for a later case. The Court observed that, “if such dragnet type law enforcement practices…should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable.” 460 U.S. at 284.

ELDs present a very different situation from that in *Knotts*. First, the beeper used in *Knotts* was a simple tool that was approved because it provided only a modest sensory-enhancement to real-time visual surveillance. *Id.* at 277. Beepers could neither determine location nor store location data. By contrast, a GPS device does not enhance human senses, it replaces them with remote collection and storage of data reflecting time, location, movement and speed.
Further, the use of GPS tracking equipment operating 24 hours a day, seven days a week over prolonged periods of time and covering 4 million drivers (RIA at 46) presents precisely the “dragnet type law enforcement practices” that the Supreme Court reserved for a later day in *Knotts*. 460 U.S. at 284. Under the proposed rule here, drivers are caught in FMCSA’s dragnet.

The *Knotts* opinion did not address the question of whether continuous and/or prolonged surveillance using a sophisticated GPS device constitutes an unreasonable search. A truck traveling over public highways can easily be observed by others and, under many circumstances, the driver would have no reasonable expectation of privacy. But circumstances change when a vehicle is exposed to continuous surveillance over a long period of time. The D.C. Circuit’s analysis of the privacy implications of prolonged GPS tracking in *Maynard* is both thoughtful and persuasive.

Applying the foregoing analysis to the present facts, we hold the whole of a person's movements over the course of a month is not actually exposed to the public because the likelihood a stranger would observe all those movements is not just remote, it is essentially nil. It is one thing for a passerby to observe or even to follow someone during a single journey as he goes to the market or returns home from work. It is another thing entirely for that stranger to pick up the scent again the next day and the day after that, week in and week out, dogging his prey until he has identified all the places, people, amusements, and chores that make up that person's hitherto private routine.

615 F.3d at 560. The D.C. Circuit went on to recognize a reasonable expectation of privacy that is defeated by monitoring by a GPS device over a prolonged period:

Society recognizes Jones's expectation of privacy in his movements over the course of a month as reasonable, and the use of the GPS device to monitor those movements defeated that reasonable expectation. As we have discussed, prolonged GPS monitoring reveals an intimate picture of the subject's life that he expects no one to have—short perhaps of his spouse. The intrusion such monitoring makes into the subject's private affairs stands in stark contrast to the relatively brief intrusion at issue in *Knotts*; indeed it
exceeds the intrusions occasioned by every police practice the Supreme Court has deemed a search under [Katz v. United States, 389 U.S. 347 (1967)].

Maynard, 615 F.3d at 563 (citations omitted). The Maynard decision was affirmed by the Supreme Court on other grounds. United States v. Jones, 132 S. Ct. 945 (2012). In Jones, the Court held that the installation of the tracking device was an unlawful seizure under the Fourth Amendment. So too, the mandatory installation of ELDs by regulation also constitutes a seizure here. Further, the proposition that drivers of commercial motor vehicles have no reasonable expectation of privacy because they operate their equipment on public roads cannot withstand serious analysis. The recent decision of the Supreme Court in Riley v. California, ___U.S.___, ____ S. Ct.___, ___WL____( June 25, 2014) emphasizes the important privacy interest a person has in his daily movements that may be invaded by electronic location tracking equipment. Slip Op. at 19-20. This is precisely the problem that drivers confront when dealing with ELDs which track their whereabouts 24/7.

B. Monitoring Driver Behavior With ELDs Does Not Fall Within the Pervasively Regulated Industry Exception to the Fourth Amendment’s Warrant Requirement.

1. Overview of the Pervasively Regulated Industry Exception

In Donovan v. Dewey, 452 U.S. 594 (1981) the Supreme Court held that where an individual elects to participate in a pervasively regulated business his “justifiable expectations of privacy” are necessarily diminished. Id. at 600. In such cases, reasonably defined inspection schemes accompanied by appropriate standards for implementation pose only limited threats to those limited expectations of privacy. Id.

In New York v. Burger, 482 U.S. 691, 702-703 (1987) the Court reaffirmed the principles articulated in Donovan, noting that the privacy expectations of individuals are lower in
“commercial premises” than in a home or other location. The Court concluded that where (1) the business in question is closely regulated, and (2) the warrantless inspections are necessary to further the regulatory scheme, (3) compliance with the Fourth Amendment turns on whether the inspection program, in terms of the certainty and regularity of its application, provides a constitutionally adequate substitute for a warrant.

2. The Use of ELDs to Monitor Driver Behavior is Not Covered By the Pervasively Regulated Industry Exception

There is no doubt that the holding in Burger was limited to the administrative inspection of commercial premises. The Burger Court specifically noted that the statute authorizing the inspection “must be ‘sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes.’”  Id. at 703 quoting Donovan v. Dewey, 452 U.S. at 600. (emphasis added). The foundation for the Court’s holding in Burger rests on a long series of Supreme Court cases dealing exclusively with administrative inspections of commercial premises: Colonnade Corp. v. United States, 397 U.S. 72 (1970) (warrantless inspection of premises on which liquor was sold-disapproved); United States v. Biswell, 406 U.S. 311, 315 (1972) (warrantless inspection of premises on which fire arms were sold-approved); Donovan v. Dewey, 452 U.S. at 606 (warrantless inspection of stone-quarry under Federal Mine Safety and Health Act, 30 U.S.C. § 801-approved); Marshall v. Barlow’s, Inc., 436 U.S. 307 (1978) (warrantless inspection of factory under OSHA-disapproved).

In Whren v. United States, 517 U.S. 806 (1996) Justice Scalia, writing for a unanimous court, observed that Burger upheld the constitutionality of a warrantless administrative inspection which he defined as “the inspection of business premises conducted by authorities
responsible for enforcing a pervasive regulatory scheme ....” 517 U.S. at 811, n2. (Emphasis added).

The proposed use of ELDs here does not involve the inspection of “commercial premises.” Rather, it involves the systematic tracking of the movement of individual drivers over extended periods of time by the use of sophisticated electronic devices in order to enforce compliance with HOS regulations applicable to individual driver conduct. Neither Burger nor any of the cases implementing the pervasively regulated industry exception stand for the proposition that individuals working in a pervasively regulated industry may be personally subjected to continuous surveillance by sophisticated monitoring devices over long periods of time without a warrant.

3. The Proposed Use of ELDs Is Not Necessary to Meet Regulatory Goals

There is a second reason why the proposed use of ELDs does not fall within the pervasively regulated industry exception. The proposed use of ELDs does not satisfy the second prong of the test set out in New York v. Burger - - that the search must be necessary to accomplish regulatory goals.

FMCSA states that the government interest at issue is to improve compliance with the various HOS rules, make the operation of commercial motor vehicles safer, and improve drivers’ opportunity for rest. The record presented thus far does not support the conclusion that this regulatory goal is furthered by the mandatory use of ELDs. As demonstrated above, the fact that drivers must manually enter changes in duty status into an ELD makes the device no better than paper logs in meeting the regulatory goal of reducing HOS violations. The proposed rule does little more than substitute one method of recording duty status for another – manual ELD entries of changes in duty status for manual logbook entries.
FMCSA has no basis on which to establish that ELDs are necessary to further the regulatory scheme thereby justifying a warrantless search of truck drivers. As fully demonstrated above, FMCSA is completely unable to support its safety claims with current, reliable data. There is absolutely no data to support the proposition that ELDs are necessary (or capable of) supporting the regulatory objectives. Accordingly, use of ELDs is not within the pervasively regulated industry exception to the Fourth Amendment’s warrant requirement.

C. The Use of ELDs to Support the Ordinary Needs of Law Enforcement is Not Permitted Under the Fourth Amendment.

The proposed rule does not encompass a regulatory scheme for the use of ELDs that satisfies the exception to the Fourth Amendment warrant requirement applicable to situations involving “special needs beyond the needs of ordinary law enforcement.” The Supreme Court has consistently held that searches conducted pursuant to administrative regulations are constitutional absent a search warrant, probable cause, or individualized suspicion if there is a “special need” for such a search and if the search is for a purpose distinguishable from ordinary enforcement purposes. New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring); See also Skinner v. Railway Labor Executives, 489 U.S. 602 (1989), and National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).

The “special needs” exception is based upon a balance between the governmental interest and the expectation of privacy and nature of the intrusion. Green v. Berge, 354 F.3d 675, 677-78 (7th Cir. 2004), citing, Skinner v. Railway Labor Executives, 489 U.S. 602. The Supreme Court has refused to allow the identification of “special needs” as a pretext for warrantless searches for law enforcement purposes. City of Indianapolis v. Edmond, 531 U.S. 32 (2000). The government must identify some generalized purpose which justifies dispensing with the “individualized suspicion” usually required for a search. Id. at 41. That interest cannot be
simply “crime control.”  \textit{Id.} at 42. Thus, the Supreme Court has found such “special need” in the public school context – such as random drug testing of student athletes -- because a warrant requirement would unduly interfere with the “swift and informal disciplinary procedures” necessary for teachers and administrators to maintain order in schools. \textit{T.L.O.}, 469 U.S. 340, 341; \textit{Vernonia v. Sch. Dist. v. Acton}, 515 U.S. 646, 653 (1995); \textit{Joy v. Penn-Harrison-Madison School Corporation}, 212 F.3d 1052, 1059 (7th Cir. 2000). But the Supreme Court declined to recognize a “special need” in controlling a severe and intractable drug problem to justify a city’s drug interdiction checkpoint program. “The gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose.” \textit{Edmond}, 531 U.S. at 42. Nor does some vague “public safety” purpose qualify as a “special need.” \textit{Id.} at 43. The detection of almost any criminal offense broadly serves the safety of the community. By contrast, with respect to a smaller class of offenses, where society may be confronted with an immediate threat, is there a “special need” to dispense with the individualized suspicion requirement of the Fourth Amendment. \textit{Id.} In \textit{Edmond}, the Court refused to find a special need where the police sought to employ checkpoints primarily for the “ordinary enterprise of investigating crimes.” \textit{Id.} at 44. The Court concluded stating “we decline to approve a program whose primary purpose is ultimately indistinguishable from the general interest in crime control.” \textit{Id.}

The Seventh Circuit highlighted the proper application of the special needs exception in distinguishing between testing for drug and alcohol use as opposed to testing for nicotine. \textit{Joy}, 212 F.3d 1052. The Court found a “legitimate and pressing” need for random testing for drugs and alcohol for students driving on school property because of the potential to seriously injure another student but no such need for the use of tobacco. Thus the Court concluded that the
school had a “special need” beyond law enforcement (immediate school safety) with respect to the student driving population to detect drug and alcohol use, but not tobacco.

Here, the proposed rule cannot qualify for the special needs exception for two reasons. First, the government interest goes too far. The mandated use of ELDs subjects perfectly legal, private activity to public scrutiny, and potential sanction. Second, FMCSA has not established any purpose beyond law enforcement. The only stated purpose of the mandated use of ELDs is to “increase compliance” with HOS requirements. The corollary to that purpose is to enforce compliance by sanctioning violations. The proposed rule mandates that ELDs have specific technical features so that local, state, and federal law enforcement officials may access and use ELD data to impose civil and criminal sanctions directly against drivers who violate the hours-of-service regulations.\(^2\) As the ANPRM stated, “...FMCSA is attempting to evaluate the suitability of [ELDs] to demonstrate compliance with and enforcement of the hours-of-service regulations....” 69 Fed. Reg. at 53387. That agenda is clearly carried forward in the proposed rule. As in Edmond, the primary purpose for mandatory ELD implementation is “indistinguishable” from FMCSA’s general interest in compliance with the HOS regulations.

Whatever the secondary purposes of ELDs might be (to improve motor carrier attention to the HOS rules, give drivers more opportunity to rest, to improve highway safety) and no matter how beneficial those purposes, no Supreme Court cases have ever extended to the warrantless search of individuals to support the ordinary needs of law enforcement. Approving such a regulatory scheme would tear down the protective walls built by the Fourth Amendment

\(^2\) State enforcement officers operating under MCSAP grants typically have the authority to issue criminal citations for violations of motor carrier safety regulations including hours-of-service regulations. For example, see Tenn. Code Ann. § 65-15-122 (a) [E]very officer, agent or employee of any corporation, or any other person who knowingly violates or fails to comply with . . . any provision of this part, commits a Class B misdemeanor . . . .
and open the door to government intrusion into the liberty and privacy interests of virtually any worker.

IX. CONCLUSION

The Secretary has not proposed a regulation mandating the deployment of e-logging devices that automatically record a driver’s duty status as required by 49 U.S.C. § 31137 (a)(1) and (f)(1)(A). That portion of the proposed rule should be withdrawn until the Secretary is in a position to mandate deployment of a compliant device. There are presently thousands of e-logging devices deployed and in use. There is an urgent need for the Secretary to publish regulations addressing harassment under Section 31137 (a)(2). The current proposal is seriously flawed. Harassment of drivers to encourage false entries of duty status on logbooks or e-logging devices or to otherwise encourage violation of the HOS regulations presents a serious safety challenge. The Secretary’s duty to ensure against such harassment should be fulfilled by a proactive regulatory regime that makes FMCSA an active participant in this process. OOIDA’s comments dated May 23, 2011 at page 14-15 provided a useful starting point for evaluating such an approach.

Respectfully submitted,

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The Federal Motor Carrier Safety Administration (FMCSA) Proposed Rule: Electronic Logging Devices; Hours of Service Supporting Documents

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