**DEPARTMENT OF TRANSPORTATION**

**FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

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# PETITION OF THE

# OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC.;

# FOR EXEMPTION FROM ELECTRONIC LOGGING DEVICE REQUIREMENTS

# IN 49 CFR PART 395, SUBPART B

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**November 21, 2017**

The Owner-Operator Independent Drivers Association (OOIDA) is the largest association representing the views of small-business motor carriers. OOIDA has approximately 160,000 members located in all fifty states and Canada who collectively own and operate more than 240,000 individual heavy-duty trucks. OOIDA remains fundamentally opposed to the Electronic Logging Device (ELD) mandate and believes the Federal Motor Carrier Safety Administration (FMCSA) has failed to address a number of issues regarding its implementation.

Pursuant to 49 C.F.R. § 381.300 et seq., OOIDA hereby petitions the FMCSA for an exemption from the Electronic Logging Device requirements in 49 C.F.R. Part 395, Subpart B (Docket No. FMCSA-2010-0167; 80 Fed. Reg. 78292, 783 85-78416 (December 16th, 2015) scheduled to become effective December 18, 2017, for motor carriers that are considered to be a small transportation trucking business as defined by 13 CFR § 121.201[1], who do not have a Carrier Safety Rating of "Unsatisfactory", and can document a proven history of safety performance with no attributable at-fault crashes.

The exemption would not have any adverse impacts on operational safety, as motor carriers and drivers would remain subject to the HOS regulations in 49 C.F.R. § 395.3, as well as the requirements to maintain a paper record of duty status under 49 C.F.R. § 395.8. The exemption would also allow small-business motor carriers to maintain their current practices that have resulted in a proven safety record. The term of the requested exemption is no less than five years. If a five year exemption is granted, it should also be subject to renewal upon application. 49 C.F.R. § 381.300.

[1] The Small Business Administration size standard for truck transportation and local delivery services is currently $27.5 million. https://www.sba.gov/sites/default/files/files/Size_Standards_Table_2017.pdf

**Safety**

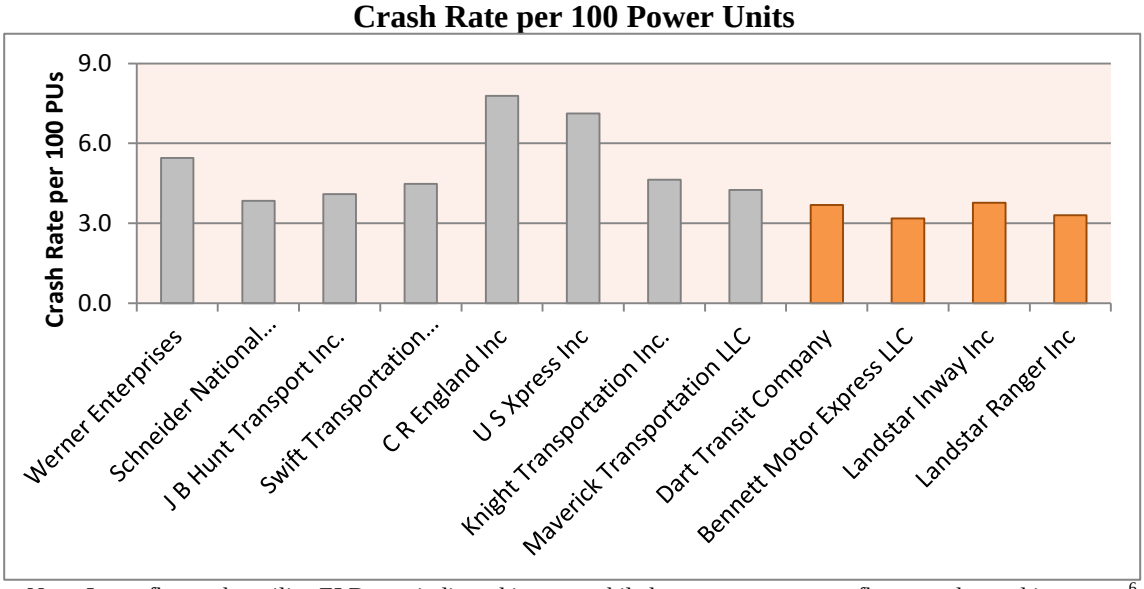
According to FMCSA, "The ELD final rule is intended to improve Commercial Motor Vehicle (CMV) safety and reduce the paperwork burden by increasing the use of ELDs within the motor carrier industry, which FMCSA believes will improve HOS compliance, and thereby reduce the number of crashes related to CMV driver fatigue associated with violations of the HOS rules *(emphasis added)*."[2] However, the Regulatory Impact Analysis (RIA) accompanying the ELD final rule relies on assumptions which are not based on sound science to substantiate these supposed safety improvements. The rulemaking was approved based upon the false premise that ELD's will increase compliance with the HOS regulations and thereby reduce the risk of fatigue-related crashes. However, a 2016 National Academy of Sciences report found, "Fatigue is very difficult to define and therefore to measure objectively. If fatigue is loosely defined as the inability to sustain performance over time, under such a vague definition, it is not directly measurable. Therefore, it is somewhat difficult to assess fatigue, and thus to regulate how to avoid driving while fatigued." The study went on to say, "HOS regulations can only limit hours spent driving and working; they cannot mandate rest, so they inherently cannot ensure, by themselves, that drivers will be well rested and alert. Therefore, it is not straightforward to determine how additional modifications of the current HOS regulations would result in more or less fatigue in CMV drivers that might, respectively, raise or lower crash risk."[3] These findings expose the flawed basis for the ELD rulemaking.

FMCSA estimated that 26 fatalities, 562 injuries, and 1,844 crashes will be prevented each year with the installation of ELDs.[4] In this analysis, the Agency *assumes* that compliance with the HOS regulations will decrease crashes and therefore show a benefit that outweighs the costs

[2] Brian Preslopsky et al., *Regulatory Evaluation of Electronic Logging Devices and Hours of Service Supporting Documents Final Rule*, FMCSA (2015), pg. 3-4.
[3] National Academies of Sciences, Engineering, and Medicine, *Commercial Motor Vehicle Driver Fatigue, Long-Term Health, and Highway Safety: Research Needs.* (2016), pg. 3.
[4] Brian Preslopsky et al., *Regulatory Evaluation of Electronic Logging Devices and Hours of Service Supporting Documents Final Rule*, FMCSA (2015), pg. vi.

associated with purchasing and installing ELDs. FMCSA attempted to validate these benefits through a convoluted mathematical analysis founded upon assumptions, while also utilizing an extremely small and outdated data set. In an attempt to address the problem statement in the RIA, FMCSA determined that there are HOS violations which can lead to CMV driver fatigue. Thereby the Agency stated, "Using technology to improve recording of CMV driver activity can reduce fatigue by helping carriers to prevent drivers from exceeding driving time and related on-duty time limits as well as preserving off-duty time for drivers to recover."[5] However, there is no limit to on-duty time and ELDs still require on-duty status to be entered manually rather than automatically.

Furthermore, if the safety records of large fleets with ELDs are examined, it is clear that merely installing ELDs does not achieve safety benefits.




Note: Large fleets who utilize ELDs are indicated in gray, while large owner-operator fleets are denoted in orange.[6]

In 2011, FMCSA's own analysis, entitled *Electronic On-Board Recorders and Hours-of-Service Supporting Documents Preliminary Regulatory Analysis*, concluded, "There is little

[5] Ibid, pg. 7.

[6] In order to examine the safety outcomes of ELDs, large motor carriers that have been actively pursuing a mandate were compared to the largest non-asset carriers of like size. These non-asset carriers predominately utilize owner-operators and do not have ELDs installed across their whole fleet.

research on the effectiveness of EOBRs in reducing crashes and HOS Violations."[7] Additionally, Cambridge Systematics, at the request of FMCSA in studying the effects of EOBRs on safety concluded, (1) There have been no documented improvements in compliance or safety in carriers that use ELDs, and (2) Even the most effective on-board technology will not enable regulators to determine how drivers have conducted themselves while they are off duty and/or on duty, not driving.[8]

**Exemption Request**

OOIDA requests that motor carriers that are considered to be a small transportation trucking business as defined by 13 CFR § 121.201, who do not have a Carrier Safety Rating of "Unsatisfactory", and can document a proven history of safety performance with no attributable at-fault crashes should be exempted from the ELD requirements in 49 C.F.R. Part 395, Subpart B.

The Small Business Administration defines a small transportation trucking business as earning $27.5 million or less in average annual receipts.[9] For the majority of owner-operators and independent drivers, that figure is significantly less. The profit margin for owner-operators is razor thin and to incur another regulatory cost will undoubtedly have a negative effect for these types of trucking businesses. FMCSA estimated, "the typical carrier will likely be required to spend about $584 per CMV to purchase and install ELDs. In addition to purchase costs, carriers will also likely spend about $20 per month per CMV for monthly service fees. We have estimated that the replacement of the original ELD will cost an additional $42 to uninstall the first device above the $584 to purchase and install the replacement, for a total of $626, occurring in both Year 5 and Year

[7] FMCSA Analysis Division, Electronic On-Board Recorders and Hours-of-Service Supporting Documents Preliminary Regulatory Evaluation, Federal Motor Carrier Safety Administration (2011), pg. 55.
[8] E. Fogel and B. Wright, *On-Board Recorders: Literature and Technology Review*, Cambridge Systematics for Federal Motor Carrier Safety Administration (July 2002).
[9] https://www.sba.gov/sites/default/files/files/Size_Standards_Table_2017.pdf

10."[10] Spending extra capital on ELDs will likely result in less investment for driver pay and benefits, maintenance, equipment, and other safety upgrades.

At present, none of the 193 ELD solutions listed on the FMCSA web site have been validated by the Agency or any unbiased third party testing program; yet carriers are required to purchase and use these devices or risk violation. Most small-business motor carriers can ill afford to buy a self-certified ELD only to learn later that the ELD is non-compliant. FMCSA has continually stated that they do not know if the self-certified ELD's fulfill the regulatory requirements but yet motor carriers and/or drivers are still responsible for purchasing a compliant ELD. Many small-business carriers do not have the resources or expertise to investigate whether or not an ELD will fulfill the requirements and do not have excess capital to buy a piece of equipment that may later have to be replaced because it fails to comply with the regulation. Carriers with small fleets will have additional expenses for ELD training as well as developing and implementing an administrative process to fulfill the statutory requirements. Many of these extra costs were not addressed in the cost-benefit analysis of the rulemaking even though the Agency factored in cost savings for tasks drivers do not get paid for, such as completing paper logs. Again, extra costs associated with ELDs will result in less investment for driver pay and benefits, maintenance, equipment, and other safety upgrades. OOIDA would also note that FMCSA is not a covered agency as defined in section 609(d)(2) of the Regulatory Flexibility Act, and has taken no steps to minimize the additional cost of credit for small entities.

Since the inception of the ELD mandate, FMCSA has failed to properly notify small-business motor carriers of the rulemaking. FMCSA has failed to provide outreach through small-business trade publications, law enforcement periodicals or through mailings, a relatively easy task since FMCSA has the address of every motor carrier that falls within the scope of the ELD

[10] Brian Preslopsky et al., *Regulatory Evaluation of Electronic Logging Devices and Hours of Service Supporting Documents Final Rule*, FMCSA (2015), pg. 61.

mandate. FMCSA only started outreach in June of 2017 and that was through very limited trade shows. FMCSA should have sent notification via United States mail to every motor carrier affected by this rule and advise them of where they could find additional information on what the requirements would be and how they differ from previous requirements.

OOIDA maintains that implementation of the mandate will force small businesses to bear all of the $2 billion in costs associated with the installation of these devices, imposing wholly unnecessary financial and compliance burdens on American businesses of all sizes. However, we acknowledge that 99 percent of the motor carriers that FMCSA regulates are considered small entities under SBA's definition. Accordingly, FMCSA has stated that the Agency will not allow any motor carriers to be exempt from coverage of the final rule based solely on a status as a small entity.[11] Thus, we request that small-business motor carriers that are considered to be a small transportation trucking business must also provide a track record of safety performance in order to qualify for an exemption from the ELD requirements in 49 C.F.R. Part 395, Subpart B.

A motor carrier must document a driving history with no attributable at-fault crashes, an above average rate of accident-free miles per 100 million vehicle miles traveled (VMT), and must not have received an "Unsatisfactory" rating from the FMCSA. Motor Carriers who meet the exemption criteria would achieve a level of safety that is equivalent to, or greater than, the level of safety that would be obtained by installing an ELD. The exemption would allow small-business motor carriers with exemplary safety records to maintain their current practices. The exemption would not have any adverse impacts on operational safety, as motor carriers and drivers would remain subject to the HOS regulations in 49 C.F.R. § 395.3, as well as the requirements to maintain a paper record of duty status under 49 C.F.R. § 395.8.

**Cybersecurity**

[11] Ibid

The ELD mandate approved by Congress in the Moving Ahead for Progress in the 21st Century (MAP-21) stipulates that devices must be "tamper resistant."[12] The legislation calls for a secure process for "standardized and unique vehicle operator identification, data access, data transfer for vehicle operators between motor vehicles, data storage for a motor carrier, and data transfer and transportability for law enforcement officials."[13] Currently, the Agency does not have a sufficient way to determine if devices listed on the FMCSA website can safely and efficiently perform such transfers. Additionally, there are cybersecurity concerns with self-certified devices. Because ELDs will be connected to a truck engine, they could be a target for hackers to take control of the vehicle. ELDs could also be vulnerable to data manipulation – both professional and personal. Owner-operators exempted from the mandate will not have to worry about losing control of their vehicle or the loss of their personal data via an ELD and will operate at an equal or greater level of safety than complying with the mandate.

At two recent cybersecurity conferences, Blackhat USA 2017 and DEF CON 25, IOActive[14], a leading cybersecurity research firm released a summary of their findings analyzing three entry-level ELD providers currently listed as self-certified on the FMCSA website. Their general conclusion was that all three devices did very little to nothing at all to follow best practices and were open to compromise. They noted the following specific shortcomings in their report: devices shipped with debug enabled; firmware easily accessible for analysis; development strings

[12] Moving Ahead for Progress in the 21st Century Act of 2012. Pub. L. 112-141. 126 Stat. 787-788.
[13] Ibid
[14] Headquartered in Seattle, Washington, IOActive is the only security consultancy with a global presence and deep expertise in hardware, software, and wetware assessments. IOActive serves as a trusted security advisor to the Global 500 and other progressive enterprises, helping to safeguard their most important assets and improve their overall security posture. IOActive maintains operations and clients on six continents and in more than 30 countries worldwide.

present, use of banned functions; lack of secure boot; lack of encryption for communications; and a basically general failure to follow cybersecurity best practices.[15]

Due to a lack of validation for ELDs in the marketplace that are in compliance with the regulation, we believe that a five year exemption would provide necessary time for ELD manufacturers to be fully vetted by Federal Regulators, which would alleviate small-business motor carriers from learning that they purchased an ELD that could damage their vehicles electronic control module or be hacked. This would also allow small-business carriers the opportunity to investigate these instruments and see which device best fits their operation. Law enforcement would also have additional time to analyze which devices fulfill the regulatory obligations, especially considering that FMCSA did not release training for law enforcement until just two months before the implementation date.

**Conclusion**

Many OOIDA members with millions of accident-free miles driving during their career have notified us that they will be retiring as a result of this mandate. These drivers are subject matter experts who have driven an array of trucks in severe weather, traffic and other conditions. If these drivers will remain in the trucking industry as result of an exemption, then that will achieve a level of safety equal to, or greater than, the level of safety that would be obtained by complying with the ELD mandate. If the mandates forces these skilled drivers out of the industry, they will be replaced with new, inexperienced drivers that are far more likely to crash which will not achieve an equal or higher level of safety.

Pursuant to 49 C.F.R. § 381.300 et seq., OOIDA petitions the FMCSA for an exemption from the ELD requirements in 49 C.F.R. Part 395, Subpart B (Docket No. FMCSA-2010-0167; 80

[15] National Motor Freight Traffic Association, "Heavy Vehicle Cyber Security Update." https://babin.house.gov/uploadedfiles/eld-execaction-full_final.pdf

Fed. Reg. 78292, 783 85-78416 (December 16th, 2015) scheduled to become effective December 18, 2017 for motor carriers that are considered to be a small transportation trucking business as defined by 13 CFR § 121.201, who do not have a Carrier Safety Rating of "Unsatisfactory", and can document a proven history of safety performance with no attributable at-fault crashes. Motor carriers that meet the specified exemption criteria would be permitted to maintain their current practices which have resulted in exemplary highway safety records. Small-business motor carriers who meet the exemption criteria would achieve a level of safety that is equivalent to, or greater than, the level of safety that would be obtained by installing an ELD.