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DEPARTMENT OF TRANSPORTATION

[4910-EX-P]

Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2012-0309]

Agency Information Collection Activities; Approval of a New Information Collection Request: Driver and Carrier Surveys Related to Electronic Onboard Recorders (EOBRs), and Potential Harassment Deriving from EOBR Use

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), USDOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FMCSA announces its plan to submit the Information Collection Request (ICR) described below to the Office of Management and Budget (OMB) for review and approval. The purpose of this new ICR is to broadly examine, by the collection of survey data, the issue of driver harassment and determine the extent to which Electronic Onboard Recorders (EOBRs) used to document drivers' hours of service (HOS) could be used by motor carriers or enforcement personnel to harass drivers or monitor driver productivity. The survey will collect information on the extent to which respondents believe that the use of EOBRs may result in coercion of drivers by motor carriers, shippers, receivers, and transportation intermediaries. The proposed surveys for drivers and carriers collect information related to issues of EOBR harassment of drivers by carriers. FMCSA plans to publish a supplemental notice of proposed rulemaking on EOBRs. Prior to the issuance of a final rule, FMCSA will consider the survey results.

DATES: Please send your comments by **[Insert date 30 days after the date of publication of this notice in the Federal Register]**. OMB must receive your comments by this date in order to act on the ICR.

ADDRESSES: All comments should reference Federal Docket Management System (FDMS) Docket Number FMCSA-2012-0309. Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the attention of the Desk Officer, Department of Transportation/Federal Motor Carrier Safety Administration, and sent via electronic mail to oir_submission@omb.eop.gov, faxed to (202) 395-6974, or mailed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Docket Library, Room 10102, 725 17th Street, N.W., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Mr. Albert Alvarez, Research Division, Office of Analysis, Research and Technology, Federal Motor Carrier Safety Administration, 1200 New Jersey Ave., SE, Washington, DC 20590. Telephone: (202) 385-2387; e-mail albert.alvarez@dot.gov. Requests for additional information or copies of the information collection instrument and instructions should be directed to Gene Bergoffen, Principal, MaineWay Services, PO Box 166, Fryeburg, ME 04037. Telephone: 207 935-7948; e-mail bergoffen@roadrunner.com.

SUPPLEMENTARY INFORMATION:

Title: Driver and Carrier Surveys Related to Electronic Onboard Recorders (EOBRs), and Potential Harassment Deriving from EOBR Use

OMB Control Number: 2126-XXXX.

Type of Request: New ICR.

Respondents: Commercial motor vehicle (CMV) drivers and carriers.

Estimated Number of Respondents: 1,039 [(2 carrier in-depth interviews + 20 carrier pre-test Web interviews + 400 carrier main survey Web interviews + 100 carrier non-response telephone followup interviews) + [7 driver in-depth interviews + 510 driver intercept interviews) = 1,039].

Estimated Time per Response: The estimated average time per responses are as follows: 30 minutes for Form 5877, “In-Depth Interview With Carriers,” Form 5878, “In-Depth Interview With Carriers Recruitment Questionnaire,” and Form MCSA-5881, “In-Depth Interview With Drivers Recruitment Questionnaire;” 20 minutes for Form 5879, “Web Survey With Carriers,” Form MCSA-5880, “In Depth Interview With Drivers Main Questionnaire,” and Form MCSA-5881, “In Depth Interview With Drivers Recruitment Questionnaire;” and 10 minutes for Form MCSA-5885, “Intercept Survey With Carriers.”

Expiration Date: N/A.

Frequency of Response: Once.

Estimated Total Annual Burden: 110.5 hours [(2 carrier in-depth interviews x 30 minutes/60 minutes) + (20 carrier pre-test Web interviews x 20 minutes/60 minutes) + (400 carrier main survey Web interviews x 20 minutes/60 minutes) + (100 carrier non-response telephone followup interviews x 10 minutes/60 minutes) + (7 driver in-depth interviews x 30 minutes/60 minutes) + (510 driver intercept interviews x 20 minutes/60 minutes) /3 year approval = 110.5].

BACKGROUND:

Motor carrier management and oversight of drivers' HOS is one of FMCSA's fundamental concerns. Motor carriers began to look to automated methods of recording drivers' record of duty status (RODS) in the mid-1980s as a way to save drivers' time and improve the efficiency of their compliance assurance procedures. In April 1985, the Federal Highway Administration (FHWA), the predecessor agency to FMCSA within the U.S. Department of Transportation (USDOT), granted the first of 10 waivers to allow use of onboard computers in lieu of requiring drivers to complete handwritten RODS.

After conducting notice-and-comment on the rulemaking regarding automated methods of recording RODS, the Agency issued a final rule on September 30, 1988. The rule revised part 395 of the Federal Motor Carrier Safety Regulations (FMCSRs) by allowing motor carriers the flexibility to equip CMVs with an automatic onboard recording device (AOBRD) in lieu of requiring drivers to complete handwritten RODS. The term "automatic onboard recording device" was defined under §395.2 as follows:

"an electric, electronic, electromechanical, or mechanical device capable of recording driver's duty status information accurately and automatically as required by §395.15. The device must be integrally synchronized with specific operations of the commercial motor vehicle in which it is installed. At a minimum, the device must record engine use, road speed, miles driven, the date, and time of day."

On April 5, 2010, FMCSA published a final rule to incorporate new performance standards for electronic onboard recorders (EOBRs) installed in CMVs manufactured on or after June 4, 2012 (75 FR 17208). The new rule required installation of EOBRs meeting the new performance standards in CMVs operated by motor carriers found by the Agency to have serious HOS noncompliance. EOBRs would have been required to record the CMVs location automatically at each change of duty status and at intervals

while the CMV is in motion. Currently, onboard recorders are not required to do this. To ensure a smooth transition from AOBRDs to EOBRs, the final rule would have required that for CMVs manufactured on or after June 4, 2012, devices installed by a manufacturer or motor carrier would need to have met the requirements of §395.16. CMVs manufactured prior to June 4, 2012, could be equipped with an HOS recording device that met the requirements of either §395.15 (AOBRD) or §395.16.

The 2010 EOBR rule was challenged in court based in part on concerns that EOBRs could be used to harass drivers. *Owner-Operators Independent Drivers Association v. U.S. Department of Transportation*, 656 F.3d 580 (7th Cir. 2011). At the time, a new rulemaking by FMCSA had been started that proposed to require certain motor carriers operating CMVs in interstate commerce to use EOBRs to document their drivers' HOS (76 FR 5537, February 1, 2011). Based on issues raised in the litigation on the April 2010 final rule, FMCSA published a notice requesting public comment on the harassment issue on April 13, 2011 (76 FR 20611). The Agency sought and received comments on the following items:

- Experiences drivers have had regarding harassment, including coercion by carriers to evade the HOS regulations;
- Whether such carrier activity would be permitted as productivity monitoring or would be barred by other statutory or regulatory provisions;
- Whether use of EOBRs would impact the ability of carriers, shippers, and other parties to harass or coerce drivers to violate HOS requirements;
- The effectiveness of mechanisms currently available under 49 CFR 392.3, 49 CFR part 395 and 49 U.S.C. 31105(a) to protect against carrier coercion; and

- Whether additional regulations or guidance from FMCSA are necessary to ensure that EOBR devices are not used to harass vehicle operators.

On August 26, 2011, the U.S. Court of Appeals for the Seventh Circuit vacated the Agency's April 2010 final rule on the use of EOBRs. The court stated that contrary to statutory requirements, the Agency failed to address the issue of driver harassment, including how EOBRs could potentially be used to harass drivers and ways to ensure that EOBRs were not used to harass drivers. The basis for the court's decision was FMCSA's failure to directly address a requirement in 49 U.S.C. §31137(a).

As a result of the court's ruling, carriers relying on electronic devices to monitor HOS compliance are currently governed by the rules that address the use of AOBRDs as in effect immediately before the court's ruling (49 CFR 395.15). On May 14, 2012, FMCSA rescinded the April 5, 2010, final rule, as amended September 13, 2010, in response to the court's decision to vacate the rulemaking. FMCSA had previously announced its intent to move forward with a proposal on EOBRs with a supplemental notice of proposed rulemaking (SNPRM) [77 FR 7562 (February 13, 2012)]. Congress subsequently mandated that the Secretary of Transportation adopt regulations requiring that CMVs involved in interstate commerce and operated by drivers who are required to keep records of duty status (RODS) be equipped with "electronic logging devices" (MAP-21, Pub. L. 112-141, §32301(b), 126 Stat. 405, 786-788 [July 6, 2012], amending 49 U.S.C. 31137). MAP-21 retained the requirement that regulations ensure such devices not be used to harass drivers of CMVs and also required that certain regulations governing CMV safety ensure that drivers of CMVs are not coerced into operating in

violation of regulations to be promulgated [Pub. L. 112-141, §32911. 126 Stat. at 818 (amending 49 U.S.C. 31136(a))].

The objectives of the proposed driver and carrier surveys through this ICR are to broadly examine the issue of driver harassment and coercion and determine the extent to which EOBRs could be used to either harass and/or monitor driver productivity. These surveys will explore the relevant issues from the point of view of both drivers and carriers toward the use of EOBRs. The survey results will inform FMCSA in its ongoing rulemaking on EOBRs, including potential countermeasures or best practices that could ensure that EOBRs are not used to harass or coerce CMV drivers. The purpose of these surveys is, in part, to respond to the court's suggestion that the Agency research the issue of driver harassment based on use of the device.

COMMENTS FROM THE PUBLIC

General Summary

The FMCSA received 36 comments to the 60-day Federal Register notice published December 13, 2012 (77 FR 74267), regarding the Agency's Information Collection Activities; Approval of a New Information Collection Request: Driver and Carrier Surveys Related to Electronic Onboard Recorders (EOBRs), and Potential Harassment Deriving from EOBR Use. There were no requests from commenters to receive copies of the survey and the documents associated with the survey that were available upon request as stated in the Federal Register notice. Of the 36 comments received three directly related to the survey. The remaining comments focused directly or indirectly on the effects of EOBRs in-truck operations.

Commenters included industry associations, motor carriers, and individual CMV drivers. The three commenters directly referencing the survey notice were the American Trucking Association (ATA), Owner-Operator Independent Drivers Association (OOIDA), and Trans Products & Tran Services.

Five comments from trucking companies addressed the use of EOBRs in their operations. One company had a neutral comment, one had a negative comment, and three had positive comments.

Twenty-six separate comments from CMV drivers generally opposed the use of EOBRs in truck operations according to the following four categories:

- One opposed the use of EOBRs and their intrusion into driver's rest and personal time;
- Twenty-one objected to the impact of EOBRs on driver fatigue/HOS given the unreasonable demands of carriers to exceed their legal driving time;
- Two opposed the excessive costs for small carriers in the purchase and maintenance of EOBRs; and
- Two said the use of EOBRs would be an invasion of privacy.

Four individual commenters supported EOBRs. Their reasoning was that EOBRs will enable CMV drivers to be accountable for ensuring they do not run over the legal HOS limits and, by the use of EOBRs, carriers will not be able to force drivers to drive beyond their HOS.

None of these commenters provided substantive information resulting in changes to the proposed survey or its associated documents. However, FMCSA does appreciate

all these comments and will consider them when reviewing the findings of the survey project.

ATA wrote a supportive letter for the use of EOBRs and the survey project goals. It stated “ATA supports laws and regulations mandating the use of electronic logging devices (ELDs)—often called electronic onboard recorders or EOBRs—for recording drivers’ compliance with Federal hours-of-service regulations. ATA also supports the FMCSA plan to survey drivers and carriers on how ELDs can be used to monitor productivity and their potential use as a tool to harass drivers.”

OOIDA commented that it “support[s] the goals of the proposed survey.” It further stated “OOIDA submits these comments to encourage the Agency to design this effort in a way that collects information on the wide range of pertinent driver experiences.”

Trans Products & Tran Services, which offers trucking regulation support and education, opposed the plan survey stating:

“We feel this survey will be inadequate and will not fairly represent the entire industry that will be potentially affected by a final rule requiring all commercial motor carriers to have EOBRs as a way to record driver hours of service. Furthermore we do not feel that the data retrieved and recorded will significantly reduce crashes.”

FMCSA Response:

ATA

FMCSA agrees with ATA on the need for the survey, the findings, and the survey’s potential importance to the trucking industry.

TRANS PRODUCTS & TRAN SERVICES

The commenter raised two concerns related to the survey process. First, the commenter stated that the survey will not represent the proper pool of affected drivers. FMCSA plans to randomly survey drivers at truck stops and will sample an adequate sample of drivers who actually use EOBRs. But the first questions being asked will be tested with a random sample of drivers contacted through a telephone survey. FMCSA believes that this sample strategy will be generally representative of the universe of drivers that currently use and will be potentially required to use EOBRs.

Second, this commenter raised a concern that drivers will not feel free to comment because of the fear of intimidation by their superiors. In response, no surveys conducted at truck stops will identify the driver or the company for which he/she works for, and the data will be aggregated and not associated with any individual or fleet.

OOIDA

FMCSA understands that OOIDA supports the goals of the proposed survey but raises questions as to whether the survey process will reflect concerns of drivers. The OOIDA comments also suggest some content for the surveys.

OOIDA raised concerns about the composition of the research team and question whether drivers are adequately represented at this stage. In response, given the contentious nature of this issue, FMCSA selected a team of consultants and academic researchers with expertise in the motor carrier industry and survey design. Nonetheless, we look forward to working with OOIDA, as well as other parties from the driver and carrier community, to optimize the effectiveness of this survey.

The following table notes FMCSA's reply to OOIDA's suggestions in response to four questions in the notice of December 13, 2012. Additionally, it is important to note

that the surveys were developed after intensive review of OOIDA’s earlier submissions including comments relating to potential EOBR regulations. The FMCSA also reviewed the complete docket of comments, which includes driver input from public listening sessions held in 2012. In addition, FMCSA considered public input provided at a subcommittee meeting of FMCSA’s Motor Carrier Safety Advisory Committee, of which an OOIDA official is a member.

As part of the survey development there will be interviews of randomly selected drivers and fleets on the survey instruments. The purpose is to test the survey before it is provided to drivers and fleet carriers.

Responses to OOIDA’s concerns are provided in regular text in the chart below.

Page/reference of OOIDA comment	
6; III-A-2	<p><u>OOIDA commented: Without knowing the number of questions and the scope of the discussions that FMCSA interviewers intend to conduct, it is difficult to judge whether the estimated time burden in the notice is accurate.</u></p> <p>Reply: The truck drivers’ intercept survey is estimated to have a burden of 20 minutes per interview. A series of questions focuses on 14 different interactions between drivers and their supervisors. Drivers are asked the following about them: the frequency with which they occur; which, if any, they consider harassment; which, if any, they see as coming from the existence of an EOBR (if their truck has one); and which, if any, are rooted in other truck functionality. In addition, information is gathered about coercion and management reactions to driver’s reluctance to obey management’s instructions. The draft list of interactions is as follows:</p> <p>Schedules:</p> <p>A. Ask you to meet a customer load schedule you viewed as unrealistic.</p> <p>B. Ask a customer to adjust a load schedule so it was realistic for you.</p> <p>Fatigue:</p>

	<p>C. Ask you to operate when you judged you were fatigued.</p> <p>D. Ask that you shut down if you felt fatigued.</p> <p>Logging and breaks:</p> <p>E. Ask you to log inaccurately to get more work time or delay a break.</p> <p>F. Ask you to log accurately when you could have had more work time or delayed a break by being inaccurate.</p> <p>G. Change your log record after it was made to give you more work time or delay a break.</p> <p>H. Ask you to take sufficient time off duty to recover from fatigue.</p> <p>Communications:</p> <p>I. Interrupt your off-duty time with a message that woke you up.</p> <p>J. Contact you promptly about a new job task so you didn't have to wait without pay.</p> <p>Paid and Unpaid Time:</p> <p>K. Pay you for customer delays in picking up or delivering freight.</p> <p>L. Require you to wait for customer delays for more than 2 hours without pay.</p> <p>M. Arrange your loads so you had little delay time between loads.</p> <p>N. Require you to wait between loads for more than 2 hours without pay.</p> <p>Other situations that might be identified through the qualitative survey phase</p>
6; III-A-3-a	<p><u>OOIDA commented: FMCSA would enhance the quality, usefulness, and clarity of the information collected if it: a) collected sufficient data from drivers who operated an EOBR rather than just a random sample.</u></p> <p>Reply: We are aware that a minority of truck drivers use EOBRs. The plan for intercepts is designed to limit the number of truck drivers without EOBRs in order to oversample truck drivers with EOBRs. Quotas will be established throughout day-parts in order to ensure that drivers with and without EOBRs will be interviewed</p>

	through the course of the day, limiting day-part bias.
6; III-A-3-b	<p><u>OOIDA commented: FMCSA would enhance the quality usefulness, and clarity of the information collected if it: b) asked drivers whether they had experienced each of the examples of the type of harassment outlined in these comments.</u></p> <p>Reply: As noted above, drivers will be handed a list of interactions with their carriers, asked whether they have experienced them, and asked whether or not they consider them harassment.</p>
6; III-A-3-c	<p><u>OOIDA commented: FMCSA would enhance the quality, usefulness, and clarity of the information collected if it: c) guaranteed drivers' confidentiality to ensure candor without fear of retaliation or enforcement actions.</u></p> <p>Reply: Promises of confidentiality are made at the beginning of the survey. The language currently reads as follows: "All responses to this collection of information are voluntary and confidentiality will be provided to the extent allowed by law."</p>
7; III-A-3-d	<p><u>OOIDA commented: FMCSA would enhance the quality, usefulness, and clarity of the information collected if it: d) ensured the survey was broad enough to inquire to the types of harassment described in these comments.</u></p> <p>Reply: Please see the list of interactions listed above.</p>
7; III-A-4	<p><u>OOIDA commented: The burden of the survey would be reduced if drivers were asked whether they had specifically been harassed, rather than asking driver broad, nonspecific questions.</u></p> <p>Reply: We agree and believe the list of interactions is specific.</p>
14	<p><u>OOIDA commented: Include law enforcement use or non-use of EOBRs.</u></p> <p>Reply: Regarding law enforcement use (or non-use) of EOBRs, members of law enforcement are currently not included in the survey plan as respondents, but drivers' experiences with them are. Drivers with EOBRs are asked the following two questions:</p> <p style="padding-left: 40px;">Have you ever had a problem producing your electronic hours-of-service records for a law enforcement officer?</p> <p style="padding-left: 40px;">If so, was this problem big enough that you felt harassed by the request to see your records?</p> <p>Carriers are not asked this pair of questions.</p>

OOIDA also expressed a concern regarding measures to prevent carriers from harassing drivers through the use of EOBRs. The qualitative questionnaires for both carriers and drivers ask participants what could be done to prevent this, either through the technology itself or in processes surrounding EOBR usage. Additionally, the issue is

addressed in the quantitative surveys. Carriers and drivers are asked to identify (from a list) actions which they think are “good ideas” to prevent carriers from harassing their drivers. In addition, carriers and drivers are asked what FMCSA actions would be appropriate in response to carrier harassment. For specific examples of relevant questions regarding mitigation see: Qualitative, Carriers: 18b, 19; Qualitative, Drivers: 18; Quantitative, Carriers: 26, 27; and Quantitative, Drivers: 32, 33.

No party requested a copy of the survey instruments and associated documents before their submission. These documents were, however, available upon request as stated in the 60-day notice (77 FR 74267, Dec. 13, 2012). Should FMCSA receive a request for these instruments or documents, FMCSA will post them in the docket for this ICR to ensure broad public access.

FMCSA will publish a SNPRM on EOBRs and will consider survey results concerning the EOBR use by motor carriers to ensure that EOBRs are not used by carriers to harass or coerce drivers prior to the issuance of a final rule.

PUBLIC COMMENTS INVITED: You are asked to comment on any aspect of this

information collection, including the following: 1) whether the proposed collection is necessary for FMCSA to perform its functions; 2) the accuracy of the estimated burden; 3) ways for FMCSA to enhance the quality, usefulness, and clarity of the collected information; and 4) ways that the burden could be minimized without reducing the quality of the collected information.

Issued on: May 20, 2013

Dr. G. Kelly Leone
Associate Administrator, Office of
Research and Information Technology
and Chief Information Officer

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