

By the Commission.

Bryant L. VanBrakle,
Secretary.

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DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Parts 379, 381, 385, 390, and 395

[Docket No. FMCSA-1998-3706]

RIN 2126-AA76

Hours of Service of Drivers; Supporting Documents

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

ACTION: Supplemental notice of proposed rulemaking (SNPRM); request for comments.

SUMMARY: The FMCSA intends to clarify that each motor carrier has the duty under the current regulations to: Verify the accuracy of drivers' hours of service (HOS) and records of duty status (RODS), and this obligation extends to the HOS and RODS of independent drivers or owner-operators while driving for the motor carrier; ensure each driver collects and submits to the employing motor carrier all supporting documents with the RODS; and ensure all motor carriers know of the requirement to maintain supporting documents in a method that allows cross reference to the RODS. This notice also proposes a supporting document based self-monitoring system that would be the carrier's primary method for ensuring compliance with the HOS regulations. In recognition of developing technologies, the FMCSA proposes to permit the use of electronic documents as a supplement to, and, in certain circumstances, in lieu of, paper supporting documents. The intended effect of this proposal is to provide clearer and more detailed definitions of "supporting documents", "employee", "driver", and a requirement for each motor carrier to use a self-monitoring system to verify accuracy of HOS and RODS.

DATES: We must receive your comments by January 3, 2005.

ADDRESSES: You may submit comments identified by DOT DMS Docket Number FMCSA-1998-3706 by any of the following methods:

- *Web site:* <http://dms.dot.gov>.

Follow the instructions for submitting

comments on the DOT electronic docket site.

- *Fax:* 1-202-493-2251.

• *Mail:* Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL-401, Washington, DC 20590-0001.

• *Hand Delivery:* Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

• *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.

Instructions: All submissions must include the agency name and docket number or Regulatory Identification Number (RIN) for this rulemaking. Note that all comments received will be posted without change to <http://dms.dot.gov>, including any personal information provided. Please see the Privacy Act heading for further information.

Docket: For access to the docket to read background documents or comments received, go to <http://dms.dot.gov> at any time or to Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Privacy Act: Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477) or you may visit <http://dms.dot.gov>.

Comments received after the comment closing date will be included in the docket and we will consider late comments to the extent practicable. The FMCSA may, however, issue a final rule at any time after the close of the comment period.

FOR FURTHER INFORMATION CONTACT: Mr. Jerry Fulnecky, Office of Enforcement and Compliance, (202) 366-4553, FMCSA, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

SUPPLEMENTARY INFORMATION:

Legal Basis for the Rulemaking

This rulemaking is required by, and based on, section 113 (Driver's Record of Duty Status) of the Hazardous

Materials Transportation Authorization Act of 1994, Pub. L. 103-311, August 26, 1994, 108 Stat. 1673, at 1676 (hereinafter the HMTAA). Section 113, however, assumes the existence of FMCSA's more general authority to regulate the HOS of commercial motor vehicle (CMV) drivers and related matters. That authority is conferred by the Motor Carrier Act of 1935,¹ now codified at 49 U.S.C. 31502(b), and the Motor Carrier Safety Act of 1984,² 49 U.S.C. 31136(a).

Section 113(a) requires FMCSA to amend 49 CFR part 395 to improve both driver and carrier compliance with the HOS regulations and the effectiveness and efficiency of HOS enforcement, at a cost reasonable to the motor carrier industry. As described in detail later in the preamble, this proposal would close the loopholes that made it possible for some operators to obscure their violations of the HOS rules by failing to collect, retain, or properly to index, documents that could be used to check the accuracy of drivers' RODS. Drivers—both employees and owner-operators—would be required to collect all documents that could be used to evaluate RODS data, put their name or the vehicle number on those documents and forward them to the employing motor carrier. The carrier would have to maintain these records and collect related documents from other sources that could be used to check each driver's RODS. All of these records would have to be available to special agents in the same manner as RODS themselves. The enforceability of the HOS regulations would be substantially improved. As for the cost of the proposal, there would be none if motor carriers and drivers were in full compliance with the current supporting documents regulation, as interpreted by a series of administrative and Federal appellate court decisions.³ Because that is not the case, the costs will be borne by motor carriers not now collecting, retaining, and/or indexing supporting documents. FMCSA estimates the annual cost of the rule would be \$14.2 million,⁴ a modest sum given the very large carrier and driver population that would be covered by it. The

¹ Public Law 74-255, 49 Stat. 543, August 9, 1935.

² Public Law 98-554, Title II, 98 Stat. 2832, October 30, 1984.

³ See the section below headed Motor Carrier Responsibilities for a discussion of the Federal appellate court decisions and the section headed Collection and Retention of Supporting Documents for a discussion of the administrative decisions.

⁴ See the section headed Regulatory Impact Analysis for the discussion of how the agency estimated the \$14.2 million costs.

requirements of Section 113(a) would therefore be satisfied.

More specifically, section 113(b)(1) provides that the new rules must require written or electronic documents used by a motor carrier in connection with a specific trip to include at least the driver's name or the vehicle's number, thus ensuring that the document can be tied to a particular driver and used as a supporting document to verify the accuracy of his/her RODS. This requirement would be met by proposed § 395.10(e) and (f).⁵ The former would require both the driver and the motor carrier to identify each supporting document and to add the driver's name, the date and the vehicle number, if that data does not already appear on the document. The latter would require the motor carrier to identify supporting documents, including those received from sources other than the driver, and to maintain them in a manner that permits them to be matched to a particular driver's RODS on a particular day.

Section 113(b)(2) requires a regulatory provision specifying the number and kind of supporting documents that must be retained by a motor carrier. The new regulatory definition of "supporting document" in § 395.2 would cover any document generated or received by a carrier or driver during the normal course of business that could be used to verify a driver's RODS. We are proposing and requesting comments on a long, but not exclusive, list of examples.

Section 113(b)(3) requires a regulatory provision specifying how long a motor carrier must maintain HOS records; that period must be at least 6 months from the date of receipt. This SNPRM would require carriers to maintain RODS and all associated supporting documents for 6 months from the date of receipt (§ 395.8(k)(1)).

Section 113(b)(4) requires a provision authorizing motor carriers (individually or in groups), on a case-by-case basis, to use "self-compliance systems" that ensure driver compliance with the HOS rules and allow enforcement officers to audit those systems to validate compliance. As explained below in the section entitled "Supplemental Proposal," FMCSA believes the exemptions authorized in 1998 by section 4007 of the Transportation Equity Act for the 21st Century⁶ (TEA-21)—now codified at 49 U.S.C. 31315(b)

and 31136(e) and 49 CFR part 381, subpart C—dovetail perfectly with the "self-compliance systems" mandated here. The agency will therefore entertain requests for HOS self-compliance systems that meet the statutory standard for an exemption, *i.e.*, maintenance of the same level of safety under the exemption as would be achieved by complying with the Federal Motor Carrier Safety Regulations (FMCSRs).

Section 113(b)(5) requires a regulatory provision allowing case-by-case waivers of the RODS requirements of part 395 for motor carriers (either individually or in groups) when sufficient supporting documentation is provided to enforcement personnel by an intelligent vehicle-highway system, as defined in section 6059 of the Intelligent Vehicle-Highway Systems Act of 1991. FMCSA has determined that, contrary to Congressional expectations, Intelligent Transportation (IT) systems have not yet advanced to the point where electronic monitoring of supporting documents by enforcement officers is a feasible substitute for RODS. The motor carrier industry has been quite reluctant to integrate its data systems with those of the enforcement community in a way that would allow real-time access to supporting documents. FMCSA is therefore unable to carry out this mandate quite the way Congress intended. Nonetheless, the agency will entertain exemption requests under part 381 if motor carriers believe they can demonstrate compliance with the HOS requirement without the use of RODS.

Section 113(c) defines "supporting document" for purposes of that section. The agency's new definition of the term in § 395.2 would meet the statutory requirement.

With one exception, all of the requirements of section 113 would therefore be met. That exception reflects the agency's inability to carry out section 113(b)(5), given the current state of IT systems.

As indicated above, section 113 assumes the existence of FMCSA's general rulemaking authority. The Motor Carrier Act of 1935 provides that "[t]he Secretary of Transportation may prescribe requirements for—(1) Qualifications and maximum hours of service of employees of, and safety of operation and equipment of, a motor carrier; and (2) qualifications and maximum hours of service of employees of, and standards of equipment of, a motor private carrier, when needed to promote safety of operation" (49 U.S.C. 31502(b)). This SNPRM is based on the agency's authority to regulate "maximum hours of service of employees." Although the proposal

would not change the substantive HOS regulations, it would make them easier to enforce and thus more effective, an objective implied by the grant of authority.

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

This SNPRM is based primarily on the mandates to ensure that CMVs are "operated safely" and that the responsibilities imposed on drivers "do not impair their ability to operate the vehicles safely" (49 U.S.C. 31136(a)(1) and (2), respectively). Enhanced compliance with the HOS regulations will help to improve the operational safety of CMVs. This proposal would also make it easier for FMCSA to document, penalize, and deter cases where motor carriers permit, urge, or require drivers to exceed the HOS limits, thereby impairing their ability to drive safely.

Background on Hours of Service, RODS, and the Verification of RODS

The FMCSA requires that the number of hours a driver may operate a CMV be limited on a daily and weekly basis. These HOS requirements, found in part 395 of Title 49 of the Code of Federal Regulations (49 CFR part 395), are intended to provide drivers with opportunities to obtain sleep, and thereby reduce the risk of drivers operating CMVs while drowsy, tired, or fatigued. There is evidence that the majority of CMV crashes occur as a result of human error, that human error is often the result of inattention or diminished vigilance, and that inattention or diminished vigilance can often be the result of fatigue. Fatigue relates often to poor sleep quality and/or quantity, and poor sleep quality or quantity relates often to working schedules of CMV drivers. To facilitate enforcement of the HOS requirements,

⁵ See the section headed Section-By-Section Analysis for the discussion about proposed paragraphs § 395.10(e) and (f).

⁶ Public Law 105-178, 112 Stat. 107, at 401, June 9, 1998.

the FMCSA requires that motor carriers collect and maintain paper RODS (daily logs) prepared by the drivers. Motor carriers have the option of requiring that their drivers use automatic on-board recording devices in lieu of paper daily logs. The driver and/or the motor carrier are subject to administrative civil penalties for failure to make or preserve RODS, or for making any false report in connection with RODS. They are also subject to criminal penalties for such violations.

The HOS rules were first issued in the late 1930's (Ex Parte No. MC-2, 3 M.C.C. 665). Since that time, drivers have had the responsibility to prepare RODS. The original pocket rulebook from 1939 states that carriers and drivers would be liable for the accuracy of entries made by drivers on the RODS. The Interstate Commerce Commission (ICC) explained the original two purposes of the RODS as follows:

"[to allow for] a standardized type of record to be maintained of the daily driving time and the weekly hours on duty which would be in the possession of each driver and which would enable a highway patrolman or other enforcement officer to determine immediately upon the stopping of the vehicle whether the driver had been on duty or was driving in violation of our regulations. * * * [and] to provide a record from which our field representatives could readily determine whether or not the carriers are complying with the regulations" (24 M.C.C. 413).

In order to determine whether carriers are complying with the HOS regulations, the FMCSA is authorized, by 49 U.S.C. 504(c), to inspect and copy any record of a carrier, lessor, or association and to inspect the equipment of a carrier, or lessor, or other person controlling, controlled by, or under common control with a carrier, as long as these actions were made in furtherance of an investigation and regardless of whether or not the records were required to be maintained by the FMCSA regulations or orders.

A third purpose of the RODS is that they enable motor carriers, at the time of dispatch, to ensure their drivers have sufficient time to safely complete trips within the HOS regulations. The FMCSA believes many motor carriers began to realize this purpose in the early years of the regulation.

Over the last 60 years, many motor carriers have regularly audited or inspected drivers' RODS for accuracy to ensure their drivers are complying with the HOS regulations. This enables the motor carriers to verify, through their own self-monitoring system, that drivers are accurately reporting their HOS. It also allows drivers to calculate their available hours before being dispatched.

This provides the motor carrier with a valuable management tool to efficiently dispatch trips within the HOS limitations.

The FMCSA has learned from experience that in order for the motor carriers to ensure that drivers are alert and not fatigued, motor carriers must maintain self-monitoring systems that compare RODS to supporting documents. The Federal Highway Administration (FHWA) decided to adopt this practice of maintaining "RODS supporting documents" as a part of its regulatory oversight to assist motor carriers in operating safely. The FHWA published a final rule on November 26, 1982 (47 FR 53383) which, in part, required motor carriers operating in interstate commerce to retain supporting documents, along with drivers' records of duty status, for at least six months from the date of receipt (49 CFR 395.8(k)). The FHWA did not define the term "supporting document" in that final rule.

In general, motor carriers use many different types of business records to document various business transactions, such as bills of lading, carrier pro forma invoices or waybills, credit and debit card receipts, customs declarations, delivery receipts, dispatch and assignment records, expense vouchers, freight bills, fuel billing statements, toll receipts, weight scale tickets, etc. These records, among others, are generated by motor carriers, drivers, and independent contractors (including independent owner-operators) for their own business purposes, or they are received from third parties which include consignors, consignees, vendors, toll highway authorities and operators, and other business, regulatory, or law enforcement agencies for a variety of motor carrier purposes.

Motor carriers have been using these records not only to document various business transactions, but also to verify the accuracy of their drivers' RODS. Many motor carriers regularly maintain these records for their own internal management purposes. This practice, over the years, has become a standard motor carrier operating procedure among safe motor carriers. While a paper based supporting documents system continues as the primary method for testing the accuracy of drivers' records of duty status, there is a growing use of electronic systems and records by motor carriers that add to a motor carrier's ability to verify drivers' compliance with HOS rules. However, the FMCSA has encountered situations where the carrier often fails to maintain these electronic records for the 6-month

period currently required for paper supporting documents.

The FHWA published regulatory guidance in the *Federal Register* on November 17, 1993 (58 FR 60734, 60761), and published revised guidance on April 4, 1997 (62 FR 16370, 16425), that provided examples of the types of supporting documents that should be retained. Both of these publications outlined our position that supporting documents are the records of the motor carrier maintained in the ordinary course of business that are used or could have been used by the motor carrier to verify the information recorded on a driver's record of duty status, such as the examples provided above. An extensive, but not a complete, list of the various types of records considered to be supporting documents is provided in this guidance, and it is available on the FMCSA Web site at <http://www.fmcsa.dot.gov/rulesregs/fmcsr/regs/395reg.htm>. (Scroll to Question 10 in the guidance for § 395.8.)

Motor Carrier Responsibilities

Regardless of the type of supporting document system used by the motor carrier, the motor carrier's responsibility for compliance with the FMCSRs remains clear. It is well settled that the motor carrier is responsible for, and must police the actions of, its employees. This obligation under the FMCSRs was affirmed by the Associate Administrator for what was then the Office of Motor Carriers (of the Federal Highway Administration) in *In the Matter of Horizon Transportation, Inc.*, 55 FR 43292 (October 26, 1990) (Final Order February 12, 1990). A motor carrier's responsibility for the actions of independent contractors and owner operators it uses was outlined in *In re R.W. Bozel Transfers, Inc.*, 58 FR 16918 (March 31, 1993) (Final Order August 6, 1992); and more recently in *In the Matter of Commodity Carriers, Inc.*, Docket No. FHWA-97-2393 (Order Appointing Administrative Law Judge March 25, 1997) (adopted by the Associate Administrator on Review, May 27, 1999). Likewise, each motor carrier must have a system in place that allows it to effectively monitor compliance with the FMCSRs, especially those aimed at driver fatigue, a major safety concern (See *In re National Retail Transportation, Inc.*, Docket No. FHWA-96-6390, document 4 (Final Order: Decision on Review September 12, 1996)).

The United States Court of Appeals for the Sixth Circuit affirmed in *A.D. Transport Express Inc. v. Federal Motor Carrier Safety Administration*, 290 F.3d 761 (6th Cir. 2002) that supporting

documents must be maintained in a common sense manner so that FMCSA special agents can “verify dates, times, and locations of drivers recorded on the RODS.” The United States Court of Appeals for the District of Columbia Circuit, in *Darrell Andrews Trucking, Inc. v. Federal Motor Carrier Safety Administration*, 296 F.3d 1120 (D.C. Cir. 2002), approved FMCSA’s position that the term “supporting document” encompasses any document that could be used to support the RODS. The D.C. Circuit, in its decision, agreed with the Sixth Circuit that the FMCSA requirement for supporting documents to be maintained in a fashion that permits the matching of those records to the original drivers’ RODS is a reasonable interpretation of 49 CFR 395.8(k)(1). In fact, the D.C. Circuit Court concluded that all the FMCSA is asking is that carriers refrain from destroying the agency’s ability to match records with their associated drivers.

Previous NPRMs on Hours of Service Supporting Documents

1. 1998 Notice of Proposed Rulemaking

On April 20, 1998, in response to section 113 of the HMTAA, the FHWA published an NPRM (63 FR 19457, RIN 2125-AD52, Docket No. FHWA-98-3706) requesting comments on a proposed definition of “supporting documents” for the HOS regulations. The FHWA proposed that motor carriers develop and maintain effective auditing systems that would not have required the retention of supporting documents to monitor the accuracy of the drivers’ RODS. The NPRM proposed that, if a motor carrier fails to have such a system, the motor carrier would be required to retain various types of business documents. The use of electronic recordkeeping methods was also proposed as a preferred alternative to paper records.

Comments to the April 20, 1998 NPRM

We received 41 comments in response to the 1998 Supporting Documents NPRM. Two organizations each submitted two comments that were counted as separate comments. The respondents represented three advocacy groups, two consultants to the industry, one labor union, 17 motor carriers, 13 trade associations including one motorcoach association, two on-board recorder manufacturers, and one State government agency.

Three comments fully supported the NPRM. They were from Bestway Express, Inc., Insurance Institute for Highway Safety (IIHS), and the National Propane Gas Association (NPGA).

Bestway Express had two suggestions, in addition to its approval of the FMCSA’s efforts. One was to develop:

a process that allows self-assessment in program design for safety management. As an industry, and partner with Government, we need these kinds of initiatives as we go forward with performance-based standards. The approach that you have developed where a carrier can design a self-monitoring system, get pre-determined FMCSA assessment of that program, and then can implement their program is commendable.

Bestway’s other suggestion was that, “A self-monitoring system, if SafeStat is the performance standards, is the only model to use as a long-range implementation plan.”

The NPGA considered the proposal “a significant step in implementation of electronic document technology into the operations of motor carriers generally.”

In supporting the proposal, the IIHS noted:

Although the proposal is less stringent than authorized by the Act [HMTAA], it is an important first step in improving truck driver and motor carrier compliance with HOS rules. Any weakening of the proposed rule would contravene the intent of the Act [HMTAA].

Twenty-three (23) of the comments expressed their belief that the supporting documents NPRM should have been deferred until it could be considered in the context of the overall HOS rules. They believed the current HOS rule needs repair before the supporting documents rule is amended.

The National Association of Small Trucking Companies (NASTC) commented that carriers generally recognize their obligation “not only to ‘trust but to verify’ the [drivers’] logs as submitted.” It noted that the proposal squarely aimed at “placing the burden on the carrier to catch drivers who make fraudulent log entries,” and that “the DOT cites over 30 different extrinsic documents which typically cross a trucking company’s desk and suggests that some, part, or all of these documents can be used as an external check to stop log falsifications.”

Many commenters believed the proposal would impose significant burdens upon industry by requiring records to be kept that are not now required. Many believed few if any documents are produced for each beginning, intermediate, and end of a trip and that those documents that are produced do not have the information required by the statute, such as driver’s name and the vehicle number.

Yellow Corporation’s (Yellow) comments are indicative of LTL carriers generally. Yellow operates between fixed terminals, and manages HOS

compliance through the payroll system, which, Yellow notes, is also used by investigative personnel during compliance reviews. Like many others, Yellow sees the proposal as expanding the burden of collecting many unnecessary records, when its present systems are adequate to do the job.

A few commenters were very concerned that the FMCSA had misinterpreted and misapplied the definition of “burden” in 5 CFR 1320.3(b)(2). They believed that collecting many receipts and keeping them for four months as proposed in the 1998 NPRM is not usual and customary in the motor carrier industry.

The NASTC also believed that the supporting documents rule should provide examples of acceptable carrier programs that would meet the NPRM’s requirements. The writer of the comments described an intricate system of log verification employed by “one of our larger, more sophisticated members.”

Their dispatcher only dispatches drivers on loads which their hours of service show they can deliver legally. This carrier receives its driver’s trip package containing the driver prepared record of duty status, toll receipts, bills of lading, and many of the other 30+ items named in the proposed regulation. All of the driver logs are reviewed for completeness and compliance with the 10, 15, and 70 hour rules. Approximately one third of the logs, selected randomly, are compared to supporting documents to determine if there has been any falsification. All log violations are noted and the offending drivers are notified by letter. Repeated violations result in warnings, out of service letters and ultimately termination.

He notes, however, that although the system could be reduced to writing for auditing purposes, the special agent conducting a compliance review would not be able to verify all the checking done by the record clerk, because the external documents used for that purpose are not retained centrally, or maybe not at all. Without reasonable guidelines, perhaps in the form of models or examples of acceptable systems or programs, the motor carrier can never know whether its system would pass muster. He also observed that the proposal fails to deal with distinctions between system design and system implementation, so that a carrier with an effectively designed system may be required to start over from scratch because a special agent found shortcomings in the way it was implemented.

In addition, a few comments provided specific responses to the nine questions the agency asked primarily related to internal self-compliance systems. The nine questions asked in the 1998 NPRM

are reprinted below, along with the paraphrased comments of several commenters.

Question (1). What types of self-monitoring systems should be considered in addition to the type proposed in this document?

Yellow contended that any software application that verified RODS through comparison with internal documents should be acceptable, and that the FMCSA should not limit a carrier's choice of a self-monitoring system to any specific application(s). Alabama Power agreed with Yellow so long as the self-monitoring scheme would provide a reasonable assurance of compliance. ROCOR Transportation was satisfied with the present system with the possible addition of the existing interpretive guidance.

Question (2). Whether and what conditions should be imposed upon motor carriers (such as accident or out of service prevention performance history) before the FMCSA would authorize a different self-monitoring system as an alternative to compliance with this proposed rule?

Yellow Corporation stated: "The only conditions that should be considered in determining if the motor carrier must change its self monitoring system should be those directly related to errors/violations in the RODS or repeated violations of HOS." Alabama Power, on the other hand, believed the FMCSA should consider relative accident and out-of-service rates. Accident and out-of-service rates should be established for determining when additional monitoring is necessary. ROCOR Transportation was satisfied with the current system.

Question (3). Whether motor carriers seeking additional authorization should have some established safety record with the FMCSA or other State or local enforcement agencies?

This question apparently caused some confusion as Yellow Corporation answered as though the agency were asking about expanded operating authority, and believed the FMCSA should conduct a compliance audit of any carrier seeking to expand its operation by more than 20 percent. Alabama Power believed that carriers or industries with established good safety records should be exempted from all or part of the HOS regulations.

Question (4). What must happen before the FMCSA should disallow the use of a self-monitoring system or an alternative system?

As noted above, Yellow believed that the system should not be blamed for failure of individuals to comply, and that the FMCSA should establish

standards for any such system. Alabama Power leaned toward a performance test, which demonstrates the value of the system by performance on the highway, *i.e.*, high accident and out-of-service rates. ROCOR Transportation believed the FMCSA special agent ought to be able to determine whether a carrier is effectively using a system, and make recommendations accordingly.

Question (5). Are there any other advanced technology systems currently in use or under development that the motor carrier industry may use to validate HOS or support the RODS?

Alabama Power believed most advanced systems are cost prohibitive, especially for utility companies where driving is a very minor part of their business. ROCOR Transportation acknowledged the industry has started using satellite technology.

Question (6). Should waivers be considered on a case-by-case basis for other systems that do not quite meet these requirements, but may have other compensating features that produce equivalent safety results?

Yellow's position was that the standards must recognize that differences in operations and practices will mean differences in monitoring programs. Therefore, variances must be considered on a case-by-case basis. Alabama Power advocates a more open system that suits each carrier's needs.

Question (7). Under what circumstances should the use of such alternative systems also operate as a substitute for the requirement to prepare and maintain RODS? Demonstration of the effective use of a system, in whole or in part, for verification should obviate any necessity to further examine the information produced by the system by enforcement personnel.

Yellow preferred criteria that would accurately capture the hours and be verifiable to a particular driver through a failsafe means, *e.g.*, a code or electronic signature. However, the company believed "(o)nly when all parties requiring HOS information have the most advanced technology can alternative systems fully replace the current requirement." Alabama Power would permit any normal timekeeping system when "the nature of a carrier's or industry's business limits the exposure to public safety," and the carrier or industry has an adequate commercial motor vehicle safety record.

Question (8). What impact would a six-month or longer record retention requirement have on the Federal government, State governments, and motor carriers?

Yellow was firmly opposed to any expansion of the present six-month

retention requirement, which, it believed, is more than adequate for purposes of evaluating compliance. Assuming the retention requirement includes all supporting records, the company contends a carrier's administrative costs would increase significantly. Alabama Power agreed that, as written, the proposal would significantly increase the administrative burden of carriers. ROCOR Transportation notes the irony of suggesting increased burdens at a time when the pressure is on to reduce administrative workload. ROCOR would have preferred reducing the retention period to four months, which would be enough to enable FMCSA special agents to assess a carrier's safety posture.

The Georgia Public Service Commission (GPSC) believes the idea of reducing the retention time of RODS from six months to four months is unnecessary. It argued that in the current downsizing climate of government, six months is barely enough time to conduct compliance reviews where complaints have been received and to follow-up on serious crashes. It believed reducing the retention period to four months would result in time restraints that would not work for the governments because the workload of State and Federal compliance review personnel is increasing—not decreasing. They concluded that this would allow many serious complaints and crash investigations to go unfinished, as the evidence for substantiating the potential violations would have been discarded by the motor carriers. They suggested this issue is best left alone since most carriers and Congress are comfortable with the six-month time frame.

Question (9). Would we enhance enforcement and prosecution efforts with the longer retention requirement (*e.g.*, the ability to adequately enforce the rules, collect evidence for a criminal case, prepare the case, and successfully prosecute drivers or motor carriers for deliberately or recklessly violating HOS restrictions)?

Neither Yellow nor Alabama Power sees any benefit in longer retention requirements.

FMCSA's Response to the Comments on the 1998 Supporting Documents Proposal

The FMCSA agreed with those commenters who wanted to merge the supporting documents proposal into the HOS rule. The agency was under a legislative mandate to issue the NPRM on supporting documents, and used the opportunity to gather useful opinions

about a more systematic approach to monitoring HOS.

The FMCSA was attentive to the comments concerning the administrative burdens resulting from what some thought was a prescriptive alternative. The FMCSA believes the NPRM may not have been clear. Many commenters seem to have either misunderstood the options in the original proposal, or, more likely, feared too much discretion on the part of special agents, in determining the effectiveness of any alternate system. This was particularly evident in the extensive comments of the NASTC. NASTC's comments described a carrier program that would definitely have satisfied a requirement for an effective system, but the writer was apprehensive about the possibility that such a model program (although it was entirely a paper system) could be thwarted by a finding by a special agent that some element was lacking.

The actual intent of the proposal was captured much more accurately in the comments of Bestway, the NPGA and the IIHS. The FMCSA attempted to convert what, to some, appeared to be a very prescriptive statutory requirement into a rule that could provide an alternative to reliance on paperwork. There still appears to be a pervasive reluctance on the part of industry to employ technology to verify compliance with HOS rules. The agency understands that certain segments of the for-hire motor carrier industry do not favor the FHWA's and FMCSA's IT system joint program encouraging the installation and use of such satellite technologies for IT purposes, and at the same time, permitting FMCSA special agents the use of the same technology devices to assist in discovering violations of HOS regulations. On the other hand, there is a great deal of anxiety about increasing administrative burdens by requiring more verifying records to be kept and maintained.

With respect to the retention period, the GPSC has persuaded the FMCSA that six months worth of records is needed for proper reviewing by Federal and State officials of a driver's and carrier's compliance with the rules and for crash investigations. The FMCSA has decided to retain the six-month requirement in this SNPRM.

2.2000 Notice of Proposed Rulemaking

The April 20, 1998, NPRM was superseded by the May 2, 2000, Hours of Service NPRM (65 FR 25540, RIN 2126-AA23) [Docket No. FMCSA-97-2350; formerly FHWA-97-2350 and MC-96-28]. The supporting documents proposal was incorporated into the 2000

rulemaking based on comments to the 1998 NPRM recommending that the supporting documents rule be considered in the broader context of a complete revision of the Hours of Service rules. In the May 2000 NPRM, the FMCSA attempted to go further than the 1998 supporting documents NPRM by proposing basic changes to both the HOS and the means to verify compliance. The 2000 proposal addressed the issues raised by those commenters who believed the 1998 supporting documents proposal invited a "one size fits all" approach. The May 2000 proposal focused on those operations involving long or regional trips away from a home base with little carrier supervision of, contact with, or control over the driver. The FMCSA proposed to minimize the paperwork burden for all other operations and, whenever possible, to accept records that are required by other Federal agencies, notably the Department of Labor's Wage and Hour Division. The FMCSA stated that this approach would be consistent with the requirements of section 113 of the HMTAA.

Comments to the May 2, 2000 NPRM

Because of the new approach taken in the May 2000 NPRM, there were very few comments that specifically addressed supporting documents. Instead commenters focused on the overall approach, stating that they found it confusing and that it would be hard to enforce.

Supplemental Proposal

Today's SNPRM incorporates and supercedes both the April 20, 1998, supporting document NPRM and the supporting documents portion of the May 2, 2000, Hours of Service NPRM. Because of the original delay in issuing an HOS Final Rule based on the May 2000 NPRM and FMCSA's responsibility to issue regulations based on section 113 of the HMTAA, the FMCSA is issuing an SNPRM that is based on the proposed rules from the April 1998 NPRM but also adds entirely new language. Today's proposal addresses self-monitoring systems, records of duty status, and supporting documents for use in monitoring and enforcing the HOS (including minimum hours off duty, rest, and work) of CMV drivers.

Agency case law, as noted above under Motor Carrier Responsibilities, interprets the FMCSRs to require motor carriers to establish commonsense self-monitoring systems to verify the accuracy of drivers' HOS and RODS. This rule would explicitly require the motor carrier to have a systematic

inspection, verification, and maintenance system to verify the accuracy of the times and locations of each driver for every working day on each trip, as well as mileage for each trip. The self-monitoring system proposed by this rule is not a self-compliance system as proposed in the 1998 NPRM. Rather, the FMCSA clarifies and strengthens in regulatory language the Agency's implied intent that all carriers must establish a RODS and supporting document self-monitoring system to verify accuracy of HOS and RODS.

FMCSA has decided to address the self-compliance systems referred to in section 113(b)(4) and (b)(5) of the HMTAA by allowing motor carriers to apply for exemptions under 49 CFR part 381, subpart C (§§ 381.300 through 381.330). Although the HMTAA uses the term "waiver," FMCSA believes the section 113(b)(5) provision allowing a waiver is equivalent to the exemption provision under section 4007 of the Transportation Equity Act for the 21st Century (TEA-21) (codified at 49 U.S.C. 31315(b)), as distinct from the TEA-21 waiver provision codified at 49 U.S.C. 31315(a)(1). This is because section 31315(a)(1) limits the duration of waivers to a period "not in excess of three months." Thus, FMCSA believes that allowing a carrier to apply for regulatory relief in the form of an exemption, rather than a waiver, would best serve the industry's interests and comport with Congress' intent.

The FMCSA is currently studying and developing standards required for an electronic on-board recorders (EOBR) system. See the September 1, 2004, advance notice of proposed rulemaking (69 FR 53386) requesting public comments about EOBRs by November 30, 2004. It continues to define the minimum set of data elements necessary to allow safety enforcement personnel to determine compliance with the hours of service requirements in part 395 of the Federal Motor Carrier Safety Regulations. The FMCSA will continue to study the feasibility, and cost and benefits of internal self-compliance systems and currently has several workgroups studying and reviewing electronic systems and their capabilities.

In this SNPRM, the FMCSA adopts the position that the use of electronic-based record keeping methods in a supporting documents system is preferred over traditional paper records. The FMCSA proposes to allow motor carriers to use electronic, laser or automated technology, (e.g. global positioning systems (GPS), automatic vehicle identifier transponders,

electronic bills of lading used by customs officials in the United States (U.S.) and other countries, and state driver-vehicle inspection reports using pen-based computer systems) in conjunction with *paper* supporting documents as long as the electronic supporting documents are retained for the same period as applies to paper supporting documents, are equally accessible and reviewable by special agents as are their paper counterparts, and can be produced, within 48 hours of demand, in hard copy. This position is in keeping with the requirements of the Paperwork Reduction Act of 1995 that the FMCSA eliminate duplication in record keeping and reduce the information collection burden on motor carriers. However, this SNPRM does not lose sight of the preeminent duty placed upon the Department of Transportation and the FMCSA by Congress to reduce crashes and fatalities, and to make the highways a safer method of travel.

Discussion of Specific Requirements

To satisfy the legislative mandate, the FMCSA is proposing to (1) add definitions for the terms "supporting document", "employee", and "driver" to § 395.2; (2) add a section entitled, "§ 395.10 Systematic verification and record retention"; (3) modify the record retention requirements in §§ 390.29 and 390.31; and (4) clarify the motor carrier's responsibility to monitor drivers' compliance with the HOS and verify the accuracy of the drivers' RODS.

Definition of Supporting Documents

The FMCSA is proposing in § 395.2 to add the statutory definition of supporting documents as provided by Congress in the HMTAA, with the addition of clarifying language and a list of examples. The proposed list is only a sampling of the types of documents that the FMCSA believes could support the HOS and be used to verify the accuracy of RODS, when used either by themselves or with other documents. The FMCSA is also proposing to clarify that for the purpose of part 395 definitions of "employee" and "driver" are the same as defined in § 390.5. Thus all commercial motor vehicle drivers (including independent contractors) are considered to be employees of the motor carrier for the purposes of receiving, accepting, and submitting to the motor carrier any document defined as a supporting document while performing a transportation function. The FMCSA reaffirms in this notice that the term "independent contractor" includes an owner-operator.

The general rule as to what *type of document* falls into the category of "supporting documents" was outlined by the Administrative Law Judge Burton S. Kolko in *National Retail Transportation* in 1993 (*In re National Retail Transportation, Inc.*, FHWA-96-6390, document 3 (July 20, 1993)). In 1996, the Associate Administrator for Motor Carriers subsequently affirmed and adopted Judge Kolko's holding that "supporting documents" are those documents which pass through the carrier's hands in the normal course of business and which could be used to verify the information recorded on a driver's RODS (*In re National Retail Transportation, Inc.*, FHWA-96-6390, document 4 (September 12, 1996)). A similar definition is found within the HMTAA (Pub. L. 103-311, 108 Stat. 1673 (August 26, 1994)).

In order to achieve the FMCSA's goal of carrier compliance with the FMCSRs by effectively monitoring HOS, the motor carrier must be able to accurately determine, for each trip and for each day of the driver's trip, the location of the driver and the corresponding times that the driver was at those locations. To do so, a supporting document (whether it is paper or electronic based) must be verifiable.

Motor Carrier Self-Monitoring Systems

Considering the Congressional mandate in section 113(b)(4) of the HMTAA and current state-of-the-art electronic technology, the FMCSA continues to study, evaluate, and develop standards for design and use of electronic data in establishing self-compliance systems. The current technology permits motor carriers to maintain a dual system of electronic tracking and paper supporting documents.

This rule would explicitly require the motor carrier to have a self-monitoring system to verify the accuracy of the driver's times and locations for each working day on each trip, as well as mileage for each trip. Under § 395.8(d) and (f)(4), drivers already are required to record their total miles driving each workday. The "self-monitoring system" in this rulemaking differs from the "self-compliance system" mentioned in the HMTAA and the 1998 NPRM. This rule strengthens and clarifies the FMCSA's long-standing position that motor carriers must actively monitor and verify drivers' HOS and RODS.

The FMCSA requires motor carriers to be responsible for establishing and using a system to verify the accuracy of RODS and drivers' HOS. Regardless of the type of system used by the motor carrier (whether a "supporting

document" system using traditional paper or one using electronic-based supporting documents), the motor carrier must be able to verify drivers' HOS and the accuracy of the duty report categories (on duty, driving, sleeper berth, off duty, time reporting for duty each day, time released from duty each day, and the total number of hours on duty each day) recorded by drivers on their RODS. The FMCSA believes that most carriers already produce, or could produce with relative ease, a document to verify the time and place of the driver and, as required by regulation, the vehicle mileage at the beginning and end of each workday. Various other supporting documents may be obtained during the trip, such as dispatch records, bills of lading, daily call-in records, shipping and receiving invoices, toll receipts, automatic vehicle identifier transponder records, and a variety of other receipts containing verifiable dates, times, and locations that can be identified with a specific driver. FMCSA considers it the motor carrier's responsibility to determine what supporting documents are available to the driver and motor carrier that could be used to verify the accuracy of RODS and HOS and to ensure that any electronic or mechanical means to reference date, time and location in the production of these documents is activated. The motor carrier must then collect, use, and maintain those documents.

Collection and Retention of Supporting Documents

The FMCSA believes all drivers, whether on the company payroll or an owner-operator, have a current regulatory obligation to comply with the HOS and RODS requirements, and to cooperate with their motor carrier employers by collecting and submitting the supporting documents needed to verify compliance with the rules. The FMCSA is clarifying in § 395.10(d)(2) that drivers must submit supporting documents to the motor carrier at the time the corresponding record of duty status is submitted.

The FMCSA would also clarify that motor carriers are currently required to retain all "supporting documents" that all drivers (including independent contractors) receive during a trip. This retention requirement applies no matter how the carrier pays drivers for these trips. The FMCSA imposes this requirement on the motor carrier under whose authority the driver is performing transportation services. Documents passing through the hands of leased drivers would be passing through the hands of the motor carrier because

drivers are the employees and representatives of the motor carrier for purposes of the FMCSRs during the course of the transportation service provided. This conclusion is consistent with the decisions in the National Retail Transportation cases discussed above and the FMCSRs, and would resolve the confusion created by two separate administrative cases: (1) *In re Ace Doran Hauling & Rigging Co.*, Final Order Under 49 CFR 385.15, February 24, 2000 (see FMCSA-2000-6997, document 4); and *In the Matter of Ace Doran Hauling & Rigging Co.*, FMCSA-2000-6997 (Order, July 11, 2000) (see also Order on Reconsideration and Final Order with Regard to Civil Penalties (February 8, 2001) and Order Vacating Order on Reconsideration and Final Order With Regard to Civil Penalties (May 10, 2001)). In *In the Matter of Spears Transfer & Expediting, Inc.*, FMCSA-2001-9110, document 5 (Decision On Petition For Safety Rating Review, April 26, 2002), FMCSA held that toll receipts and other supporting documents passing through the hands of a motor carrier's drivers are considered to be in the possession of a carrier, even if not forwarded to carrier management. FMCSA expressly stated that it was overruling any finding in the *Ace Doran* safety rating appeal inconsistent with the *Spears* decision. However, the *Spears* decision did not overrule *Ace Doran* in its entirety, because the *Spears* case involved company drivers rather than leased operators. This rule, when adopted, would complete the process of overruling the February 24, 2000, Order in *Ace Doran* by clarifying that the obligation to retain supporting documents extends to both independent contractors and company drivers. In doing so, the rule incorporates the long-standing definition of employee in 49 CFR 390.5, which states that an employee "includes a driver of a commercial motor vehicle (including an independent contractor while in the course of operating a commercial motor vehicle) * * *

The Senate report accompanying the HMTAA discussed those situations where a motor carrier leases the service of drivers, such as independent contractors, owner-operators, or fleet-broker drivers employed by other motor carriers. S. Rep. No. 217, 103d Cong., 1st Sess. 1640 (1994). The report noted that documentation of a leased driver's duty status was frequently not obtained and retained by the motor carrier using the driver. This report also stated that it was the intent of the HMTAA to ensure that supporting documents, generated by such business arrangements, be retained

by the motor carriers that perform the transportation service. Additionally, it is clear that it was Congress' intent to facilitate Federal and State enforcement efforts to document violations of the HOS regulations.

The FMCSA's enforcement personnel have experienced difficulties in obtaining supporting documents for trip lease arrangements between motor carriers and owner-operators. Senator Exon, the legislation's sponsor, discussed the need for this provision during the floor debate preceding final passage of the HMTAA. He explained that "reports that auditors have been forced to retrieve documents from garbage dumpsters or play hide-and-seek with firms that have a history of habitual HOS violations give rise to the need for this provision." Further, Senator Exon stated that "the object of this provision is to help make the roads safer by giving enforcement personnel the ability to catch flagrant abusers. It is not designed to create a trap for drivers who receive, for example, a pre-stamped toll receipt or to unfairly punish drivers for a de minimus deviation from the current rules." See 140 Cong. Rec. S11323 (daily ed. August 11, 1994).

The legislation sets a record retention period of at least six months. The FMCSA believes that this requirement was based upon Congress' intent to have supporting documents maintained for an identical period as the time required for duty status record retention, which is also six months. The FMCSA has received a few telephone inquiries regarding the retention period for "Supporting Data for Reports and Statistics; Supporting data for periodical reports of * * * hours of service, * * *, etc." identified in 49 CFR part 379, Appendix A, Item K.2.

This retention period relates to an old FHWA monthly report acquired from the ICC in 1966. The FHWA required the report until December 15, 1967. The FHWA had required every motor carrier, other than a private carrier of property, to report on a Form BMC 60 "every instance during the calendar month covered thereby in which a driver employed or used by it has been required or permitted to be on duty, or to drive or operate a motor vehicle in excess of the hours * * *." Class I motor carriers of passengers and Classes I and II motor carriers of property also had to file the same Form BMC 60 report "for every calendar month in which no driver employed or used by it has been required or permitted to be on duty, or to drive or operate a motor vehicle in excess of the hours * * *." See 32 FR 7128, May 11, 1967.

The FHWA had a retention period of three years. The FHWA removed the reporting requirement on December 15, 1967 (32 FR 17941). The ICC and the Surface Transportation Board never removed the retention period from its preservation of records list. Based upon the savings clause in the ICC Termination Act of 1995, the FHWA transferred the former ICC's preservation of records lists to the FHWA regulations on June 21, 1997 (62 FR 32040). This action provided the initial appearance of a conflict between parts 379 and 395 with respect to HOS supporting data and HOS supporting documents.

The proposal in this document in no way involves "reporting" data similar to the former report Form BMC 60. This proposal only relates to motor carrier recordkeeping requirements and a motor carrier's comparison of its own records to the driver's records of duty status. The Office of Management and Budget's (OMB) regulations in 5 CFR 1320.3(m) identifying the definitions of a "recordkeeping requirement" explain that a report is different than the retention of a record, notification of the existence of records, and disclosure of records. The FMCSA believes a report is a document submitted directly to the FMCSA, as was Form BMC 60 until December 15, 1967. In part 379, Appendix A, item K.2.'s reference to hours of service data, therefore, does not have any actual effect upon this proposal and therefore, the FMCSA proposes to delete item K.2. from Appendix A for these reasons.

Ability To Transfer Paper Supporting Documents That Contain a Signature to Automated, Electronic, or Laser Technology Formats

The FMCSA proposes to allow motor carriers to transfer supporting documents to electronic or laser technology systems. Currently, § 390.31(d) allows all records to be maintained in computer technology format, except those documents containing signatures.

Under this proposal, all supporting documents, including those requiring a signature, would be eligible for retention in electronic, laser or other automated format, so long as the motor carrier can produce an accurate, legible, and unaltered printed copy of the original supporting document within 48 hours of demand. The FMCSA is therefore proposing a conforming amendment to § 390.31(d). Automated, electronic, or laser technology systems that transmit information or a report directly to the driver or the motor carrier would also be acceptable.

However, the FMCSA is also proposing a requirement that automatic, electronic, or laser technology systems must be capable of reproducing the information stored in such systems for inspection at the motor carrier's place of business.

Motor Carrier's Discretion To Use Technology With Paper Supporting Documents

The FMCSA is also proposing to allow motor carriers to use electronic, laser or automated technology, (e.g., GPS, automatic vehicle identifier transponders, electronic bills of lading used by customs officials in the U.S. and other countries, and State driver-vehicle inspection reports prepared by using pen-based computer systems) with paper supporting documents to allow the motor carrier to reduce the retention of some paper documents. However, the electronic data that can be used for verification of RODS must be maintained for 6 months.

The FMCSA would accept the data supplied by these technologies as alternatives to supporting documents, if the motor carrier can produce a legible, unaltered, printed copy of the required information at its principal place of business or other location. In the latter case, production would be required within 48 hours after a request has been made. The FMCSA would allow motor carriers to use any intelligent transportation system, developed now or in the future, in the manner and to the extent it is effective, for HOS and RODS verification.

The FMCSA's use of supporting document information obtained from electronic, laser, or automated technologies would be limited to the specific purpose of compliance with hours of service limits. The FMCSA believes the only information it would need from these systems would be date, time, location, driver, and vehicle specific information. The FMCSA would not use the information for any other purpose. The FMCSA proposes that all confidential, proprietary, and private information would be redacted by the agency before the agency would place the hours of service supporting information in publicly accessible locations. This means that the agency would redact such things as consignees and consignor names, routes, rates, and other proprietary information from any records it has acquired for enforcement purposes before placing the information in public dockets or other places that the public may have general access.

The FMCSA may allow a motor carrier to refrain from keeping all supporting documents when the agency finds a carrier's HOS compliance and its

system demonstrate it effectively complies with the HOS rules. The FMCSA will consider a motor carrier's request to be exempt from the supporting document requirements under 49 CFR part 381. The FMCSA will base its decision on the carrier's HOS compliance as shown by the compliance review and the specific request the carrier submits.

The FMCSA also is interested in comments from suppliers and technology developers concerning the possibility of integrating various existing electronic data systems, such as NorPass and PrePass, to assist motor carriers interested in developing supporting-document information systems in lieu of paper documents. If technologically feasible, such alternative systems could reduce burden by allowing carriers, FMCSA, and State and local enforcement agencies to check HOS compliance remotely. The clearinghouse model may be relevant to this concept. The International Registration Plan, for example, uses a clearinghouse to apportion motor carrier registration fees (paid to the base State) among States in which registered vehicles have been driven.

The FMCSA would be particularly interested in supporting-document information systems that could cull out dates, times, locations, drivers, and vehicle-specific information. The latter technology could enable motor carriers and FMCSA to redact confidential, proprietary, and private information (such as consignee and consignor names, routes, and rates) that may be reviewed or audited by law enforcement officials but should not enter the public domain.

Location of Records

Under the proposed changes to § 390.29, motor carriers could retain their time records, RODS and supporting documents at a location of their choice. However, the location would have to be suitable for preserving the records so that they would not be damaged or lost. In addition, a motor carrier must be able to produce such records at its principal place of business within 48 hours of a request by an authorized enforcement official if those records are kept at a location other than the principal place of business. Otherwise, records kept at the principal place of business must be produced upon demand and without unreasonable delay. This request for documents can be made by telephone, fax, mail, or by other means. Saturdays, Sundays and holidays would be excluded from the computation of the 48-hour period of time. This 48-hour period would

provide a reasonable amount of time for documents to be sent via overnight mail. Furthermore, most business operations with electronic transfer capabilities could probably produce information in a shorter period.

Retention Period

The FMCSA is proposing that *all* supporting documents, whether in electronic or paper format, be retained for the entire retention period. In this proposal, the term "all supporting documents" means all documents, whether electronic or paper, that can be used to verify the driver's RODS and time record entries for any particular trip. These documents must be capable of being matched by a special agent of the FMCSA or other authorized representative or a Federal, State, local, or tribal government to the original drivers' RODS. In addition, supporting documents may be required to be kept for longer periods based upon other Federal, State, or local laws, rules, or orders (e.g., Internal Revenue Service rules). The FMCSA is proposing that these supporting documents must be kept for six months after receipt by the motor carrier, unless a longer period of time is required by another authority (see proposed §§ 395.8(k) and 395.10(h)).

Appendix B to Part 385, Explanation of Safety Rating Process

Section VII of Appendix B to part 385 lists critical and acute regulations, which play an important role in assigning a safety rating. The descriptions of section 395.8(i) in this section of the appendix would be updated to conform to the requirements of the SNPRM. New descriptions for the clarifications provided at § 395.10 would also be added, to allow the agency to accurately update the safety rating process on the effective date of the final rule. The FMCSA asks the public to comment on whether these regulatory citations are appropriate or different citations should be used, and whether the citations should be "critical" or "acute" violations.

Regulatory Impact Analysis

This SNPRM imposes no new regulations and therefore imposes no new costs or benefits. The purpose of this SNPRM is to bring existing rules into conformity with directions given by Congress and to remove any potential for misunderstanding of the rules by motor carriers or enforcement personnel.

As a result of past misunderstandings, some motor carriers and drivers do not believe the November 26, 1982, final

rule applies to them. They would now incur costs which they should have incurred with the promulgation of the 1982 rule. The FMCSA has estimated those costs and puts them in the context of the benefits necessary to make this proposal cost-effective.

Cost-effectiveness occurs when the benefits from a proposal equal or exceed the costs. In this case, that is the cost-effectiveness of clarifying the rule versus ignoring the misinterpretations. Given Congressional direction and an internal desire for clarity, consistency, and fairness, ignoring the misinterpretations is not an option. A meaningful reality check and perspective will be obtained by going through the calculations. For this analysis, FMCSA assumes that 25 percent of drivers and owner-operators are not in compliance with the existing regulation. The cost to bring them into

compliance would be \$14.2 million per year. As explained in the Regulatory Evaluation in the docket, in order for this proposal to be cost-effective, it would have to deter an estimated 228 crashes, including 2.3 fatal crashes. FMCSA seeks comment and data whether its 25 percent estimate is correct.

Benefits

The direct benefits of this rule are better conformity with the instructions of Congress, better clarity, and more even and thorough enforcement of HOS regulations. Enforcement is only a shadow benefit of the real benefit sought, which is safer roadways. Conformity and clarity are desirable, intangible qualities that do not lend themselves to straightforward quantification; therefore we do not estimate a tangible value for these benefits.

It would be most desirable if the FMCSA could directly compute the decrease in highway accidents and fatalities as a function of easier enforcement of HOS rules. Certainly, such a function exists in a probabilistic sense, but knowing or estimating that function would require experimentation in the real world, costing real lives. Therefore, the agency presents the reduction in accidents necessary to make this rule cost-effective.

The FMCSA knows from previous studies that accidents occur roughly in proportion, with fatalities being the rarest and property-damage-only (PDO) being the most common. The agency has not found anything in this SNPRM to suggest that it would affect one severity category differently from any other, so the agency assumes that those proportions would be unaltered.

TABLE 1.—NUMBER OF CRASHES AND COSTS IN 2000, BY SEVERITY

| | PDO | Injury | Fatal | Total |
|-----------------------------------|---------|-----------|-------------|---------|
| Crashes ⁷ | 338,000 | 96,000 | 4,917 | 438,917 |
| Percentage | 77% | 22% | 1% | 100% |
| Cost per Crash ⁸ | \$5,026 | \$100,382 | \$3,650,810 | |

⁷ FMCSA, "Large Truck Crash Facts 2000," Tables 13 through 18. 2002.

⁸ Zaloshnja, Eduard, Ted Miller, and Rebecca Spicer (National Technical Information Service, Springfield, VA) *Costs of Large Truck- and Bus-Involved Crashes*, October 2000. (Inflated to 2002 dollars.)

Keeping the ratio constant, averting one accident involving a fatality also averts 22 accidents with injuries and 77 accidents with PDO. Therefore, a measure that averts one fatal accident results in total savings of approximately \$6,246,216 from the 100 total accidents avoided. Even if these costs were considered new costs, the rule would only have to avert 228 accidents annually to be cost-beneficial, of which about 2.3 would involve a fatality, 50.2 would involve an injury, and 175.5 would involve PDO. Multiplying these values by the corresponding values from Table 1 yields \$14.3 million in savings from reducing the accident rate.

Costs

While the FMCSA does not believe this SNPRM would impose any costs because all of its requirements are already required, the FMCSA has prepared the following analysis to show the effects on those not complying with the current rule. Their costs should be attributed to existing rules, even if, due to misunderstanding, they only begin assuming those costs after this clarification.

Drivers whose records have not been retained would have to place identifying information on all supporting

documents that could be used to verify their RODS. Recognizing that no two trips are the same regarding the amount of documentation produced, the FMCSA used standard figures to approximate the central tendency of costs. The FMCSA assumes that ten pieces of information would need to be kept from each full day of travel. The agency estimates that it would take approximately 15 seconds to write the necessary information on each document. Assuming 250 full workdays in a year, this totals 625 minutes, or 10.42 hours, per driver per year. Using Bureau of Labor Statistics (BLS) data on "Median Weekly Earnings" from the Occupational Employment and Wages Estimates data for 1999 and 2000, the agency estimates average truck driver's wages of \$15.82 per hour (including a 20 percent increase to account for employee fringe benefits). Annualized, this is \$165 per driver affected.

The FMCSA assumes that this cost is imposed only on owner-operators not complying correctly with the current rule. According to Professor Francine LaFontaine of the University of Michigan, there are approximately

300,000 owner-operators.⁹ The FMCSA believes that most of these owner-operators are complying with these provisions. If only 75 percent of owner-operators are currently collecting and retaining the required supporting documents, 75,000 (0.25 times 300,000) are not. This translates into an annual compliance cost of \$12.4 million (75,000 times \$165).

Owner-operators would also have to perform the administrative tasks of filing, maintaining, periodically deleting, and, if inspected, retrieving the supporting documents. This whole process would take between 1 and 2 hours annually, depending on many factors. The agency uses a proxy of one and a half hours and the same wage rate (since this calculation would come out of driving for owner-operators). This amounts to just under another \$1.8 million, for a total of \$14.2 million.

Motor carriers must have a self-monitoring system in place. This system should explain how they use supporting documents (and other means) to ensure

⁹ Francine LaFontaine, Incentive Contracting in Practice: A Detailed Look at Owner Operator Leases in the U.S. Truckload Trucking Industry, Working Paper, June 2000, available at <http://webuser.bus.umich.edu/Departments/BusEcon/research/wp.lafontaine.2000.06.06.html>.

that their drivers comply with the HOS regulations. Since this is not a new requirement, it would not impose any additional costs to motor carriers.

Section-by-Section Analysis

Part 379, Appendix A, Row K.2

As discussed above in the section headed "Collection and Retention of Supporting Documents," the FMCSA proposes to amend appendix A to 49 CFR part 379 to remove the phrase "hours of service," from item K.2. This would remove an obsolete reference to a report that has not been required since December 15, 1967.

Part 385, Appendix B, Section VII

As discussed above in the section headed "Appendix B to Part 385 Explanation of Safety Rating Process," the FMCSA proposes to revise the citation for § 395.8(i) and to add citations for § 395.10(a), (e), and (f) to the section VII list of acute and critical regulations. These citations play an important role in assigning a safety rating. The description for § 395.8(i) is being updated to conform to the requirements of this SNPRM. New descriptions for paragraphs § 395.10(a), (e), and (f) are also being added to allow the agency to accurately update the safety rating process on the effective date of a subsequent final rule.

Section 390.5 Definitions

The FMCSA proposes to amend the definition of the term "employee" originally adopted from the Motor Carrier Safety Act of 1984, Pub. L. 98-554, Oct. 30, 1984, Sec. 204(2), 98 Stat. 2829, 2833 (MCSA) (now codified at 49 U.S.C. 31132(2)). "The Committee emphasize[d] that its inclusion of independent contractors under the definition of employee is for the purpose of [the MCSA] only; the Committee [did] not intend that this definition be construed as affecting the interpretation of the Internal Revenue Service as to the status of independent contractors under the tax laws."

"Independent owner-operators" employment status posed a unique problem to the [Congressional] drafters' of the MCSA. "An independent owner-operator owns his own truck and drives it. He also may own several other trucks and have several drivers working for him. There is no question that the commercial motor vehicles he drives and his driving should be subject to the same safety rules as other commercial motor vehicles on the highway. All commercial motor vehicles if improperly maintained or operated pose

a significant threat to the public safety." S. Rpt. 98-424, page 7.

Independent owner-operators' employment status and inclusion in the MCSA has continually posed unique problems for owner-operators to understand their responsibilities and unique problems for FMCSA's enforcement of the regulations. Based on these continuing problems, the FMCSA proposes to add the phrase "and an owner-operator" after the phrase "independent contractor." The Congressional intent was that term "independent contractor" would substitute for the term owner-operators, however, many owner-operators and motor carriers may have forgotten this history. Adding the phrase after the phrase "independent contractor" should ensure motor carriers and drivers understand that the MCSA's generic term "employee" used by the FMCSA includes owner-operators. The FMCSA also wants to restate that using the term "employee" continues the FMCSA's and Congressional intent that the term does not affect the interpretation of the Internal Revenue Service as to the status of independent contractors under the tax laws.

Section 390.29 Location of Records and Documents

The FMCSA proposes to amend paragraph (b) by requiring the immediate production of records and documents that a motor carrier maintains at each principal place of business. The current requirement is silent as to when a motor carrier must produce records and documents that a motor carrier maintains at each principal place of business. Motor carriers have attempted to stall FMCSA special agents from conducting unannounced or short notice on-site investigations at the principal place of business generally providing the reason that § 390.29(b) allows them to produce records for up to 48 hours after a demand is made. The FMCSA never intended to allow such practices. The proposal would make clear that all records and documents which are maintained at the principal place of business where an investigation is occurring must be produced upon demand by a special agent of the FMCSA or other authorized representative of a Federal, State, local, or tribal government.

Paragraph (b)(2) would continue to allow records and documents that motor carriers maintain at their regional offices or driver work-reporting locations to be made available for inspection within 48 hours after a demand is made. The FMCSA would continue to exclude

Saturdays, Sundays, and Federal holidays from the computation of the 48-hour period of time.

Section 390.31 Copies of Records or Documents

The FMCSA proposes to revise paragraph (d) to incorporate guidance that was published allowing automated, electronic, or laser technology systems to store copies of records or documents provided the motor carrier can produce an accurate, legible, and unaltered printed copy of the required data and provided that alternate means for signature verification are available. If the FMCSA adopts this proposed paragraph, the two interpretations published on April 4, 1997 (62 FR 16730) on page 16408, column three for § 390.31 would become obsolete and unnecessary.

Section 395.1 Scope of the Rules in This Part

The FMCSA proposes to move the introductory phrase of § 395.8(a) to § 395.1(p). The FHWA moved the three exceptions and exemptions contained in the CFR before August 31, 1992 at §§ 395.8(k)(2) *Retention of driver's record of duty status*, 395.8(l)(1) *100 air-mile radius*, and 395.8(l)(2) *Hawaiian driver's records of duty status* to § 395.1 on July 30, 1992 (57 FR 33638, at 33645). The FMCSA intends to move the exception for private motor carrier of passengers (nonbusiness) and its drivers to § 395.1 to list the various exceptions and exemptions in one convenient location at the front of part 395.

Section 395.2 Definitions

The FMCSA proposes to revise the introductory phrase of § 395.2 to ensure that the public knows that all definitions used in Part 395 that are not separately defined in this section are defined in § 390.5.

Section 395.8 Records of Duty Status

As discussed above under the section-by-section subheading "§ 395.1 Scope of the rules in this part," the FMCSA proposes to revise the introductory phrase of paragraph (a) to move the exception for private motor carriers of passengers (nonbusiness) and their drivers to § 395.1(p).

The FMCSA proposes to revise paragraph (d)(3) to include coach and bus vehicle numbers to be included on the record of duty status.

Paragraph (i) would revise the current requirement to include that motor carriers and drivers must collect supporting documents along with the records of duty status. The FMCSA

intends that the use of the term “systematically” in this section and subsequent sections would have the ordinary common-sense definition to mean a methodical procedure that is marked by thoroughness and regularity.

The FMCSA proposes paragraph (k) would revise the current requirement to include that motor carriers and drivers must retain systematically supporting documents and the records of duty status.

Section 395.10 Systematic Verification and Record Retention

This proposed new section would clarify existing requirements that have been implied by the FMCSA and its predecessors and upheld by the D.C. and Sixth Circuit Courts.

First, the FMCSA would clarify that every motor carrier must systematically and effectively monitor its drivers' hours of service and the accuracy of the information contained on drivers' records of duty status by comparing paper records of duty status, automatic on-board recording device records, or GPS records with information contained in supporting documents. Supporting documents could include third-party records, including State weight or toll receipts or transponder records maintained on behalf of States by providers such as PrePass or NorPass. The motor carrier's required monitoring procedure would be methodical, thorough, and regular. The procedure must allow an FMCSA special agent to verify drivers' records using the supporting documents.

In addition to the system employed by one of NASTC's larger, more sophisticated members that was described above in the discussion of comments to the NPRM, the FMCSA believes the following example would also be a best practice for what the agency is seeking to attain by this proposal to require systematic and effective monitoring to ensure drivers comply with the Federal HOS.

An Indiana-based motor carrier uses a system that combines electronic technology and paper supporting documents for determining driver compliance with HOS requirements. This carrier's system consists of a three (3) level false RODS checking system.

Level One: The first level of the analysis uses an electronic interface with the fuel billing system automatically comparing all fuel purchases and cash advances—by date and time—with each driver's daily RODS. The system looks for “on duty not driving” time which coincides with the particular fuel purchase or cash advance. A non-match may indicate an

inaccurate log. However, whether or not there is a match, the carrier passes the RODS on to Level Two.

Level Two: The carrier compares RODS with any and all receipts that are in the driver's trip envelope for that trip. This includes purchase receipts, tolls, scales, and any other dated supporting documents.

Level Three: The carrier audits the RODS by using “point-to-point” mileage software to check the miles and hours driven for accuracy.

In addition to the three-level approach above, the carrier also uses information from all moving violations, accident reports, roadside inspections, and motorist complaints to check the accuracy of driver's RODS.

Using this three-level approach, the carrier approaches a 100 percent check of all RODS for falsification. In other words, their goal is 100 percent with the rare instance where there is not enough supporting documents for one trip to accurately verify the RODS.

Paragraph (b) would clarify that the FMCSA would measure the motor carrier's compliance against a certain level to determine its effectiveness. The level where FMCSA currently determines whether too many false records and non-compliance exists is whether an FMCSA special agent finds 10 percent or greater drivers' records to be false or in violation. The FMCSA may use any supporting documents or other evidence, whether or not in the motor carrier's possession, to determine the validity of the drivers' paper or automatic records of duty status and the effectiveness of the motor carrier's supporting document monitoring system. The FMCSA, however, may limit its special agents' use of records that the motor carrier does not possess or could not have possessed, at the FMCSA's discretion.

The FMCSA proposes in paragraph (c) that it would clarify that the motor carrier would be required to begin to systematically use effective supporting documents that FMCSA believes to be more effective to verify the accuracy of the hours of service and paper or automatic records of duty status, if the agency determines the motor carrier's monitoring is ineffective in verifying the drivers' compliance with the hours of service and the accuracy of the paper or automatic records of duty status. In addition, the FMCSA believes it is important to note that the phrase “verifying the drivers' compliance with the hours of service” as is currently interpreted would include that the agency would determine that a carrier's system is ineffective if the carrier has a

significant number of HOS violations or false RODS.

Paragraph (d) proposes to clarify that the motor carrier's drivers must retain all supporting documents that come into the possession of the driver in the ordinary course of the driving operation. This would include all independent contractors and owner operators as discussed above. In addition, the FMCSA would clarify that the driver must provide the supporting documents and the paper or automatic records of duty status to authorized enforcement officials of Federal, State or local government upon request or demand as well as to the motor carrier.

The FMCSA proposes in paragraph (e) to clarify the motor carrier's and driver's responsibilities to identify supporting documents and the paper or automatic record of duty status they support. In addition, the regulation would include clarifying the responsibility that motor carriers and drivers must not obscure or deface other information contained in the supporting document. The responsibility that motor carriers and drivers must not obscure or deface other information contained in the supporting document comes from 49 U.S.C. 521.

The FMCSA proposes that the identification system may include legibly adding the driver's full name, date, and vehicle number, if those items do not already appear on the document. The FMCSA, however, is not requiring the carrier or driver add such information to cross-reference the documents. The current implication in the rules is only that a means to cross-reference the documents is necessary. Thus, a carrier may use a different system to cross reference supporting documents to RODS.

Paragraph (f) also proposes to clarify the motor carrier's responsibility to identify additional supporting documents that it receives from any source, but that the driver probably does not receive. This would include documents generated by the carrier and documents from both carrier and third-party electronic systems (e.g., GPS reports, on-board computer records, transponder reports, and scanned or electronically mailed documents). Various toll authorities are allowing carriers to pay tolls using transponders for which the carrier may get periodic reports of use or charges that the FMCSA would consider to be supporting documents. In addition, electronic-mail messages have become widely used between drivers and motor carriers. These messages have references to dates, times, or locations, which must remain activated, and must be kept in a manner that permits matching of

records to the driver's RODS. Motor carriers should recognize, however, that such records are not in the public domain, and exert appropriate privacy controls.

The FMCSA proposes in paragraph (g) to restate the current requirement that motor carriers must provide RODS and supporting documents to any duly authorized Federal, State or local government enforcement official upon request or demand as is required currently, and would continue to be required, under §§ 390.29, 390.31, and 395.8(k).

Finally, the FMCSA proposes in paragraph (h) to clarify that the violations of these clarified rules would be considered failures of the motor carrier's and driver's responsibilities to verify and maintain records of duty status and supporting documents. The FMCSA proposes such violations would include civil and criminal penalties under 49 U.S.C. 521 for such violations as:

- (1) Failure to prevent a driver from falsifying his records of duty status;
- (2) Failure to prevent alteration of supporting documents;
- (3) Alteration of supporting documents which changes their accuracy;
- (4) Failure to prevent a driver from exceeding the hours-of-service; and
- (5) Failure to have an effective system to verify and maintain records of duty status and supporting documents.

Rulemaking Analyses and Notices

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

The FMCSA has determined that this document does not contain an economically significant regulatory action under Executive Order 12866. The FMCSA has estimated that this rulemaking would have an annual economic impact on the motor carrier industry of less than \$100 million. The proposal is significant under Executive Order 12866 because of substantial public interest. The proposal has been reviewed by OMB.

The FMCSA has determined this regulatory action is significant under the regulatory policies and procedures of the DOT because of the high level of interest concerning motor carrier safety issues expressed by Congress, motor carriers, their drivers and other employees, State governments, safety advocates, and members of the traveling public.

As discussed below, current FMCSA regulations have required the retention of all supporting documents since

January 1, 1983, the effective date of the November 26, 1982, final rule, and responsible motor carriers have collected and retained all such documents both in the ordinary course of business and for purposes of regulatory compliance. This rule would explicitly require motor carriers to have systematic means to inspect, verify, and maintain drivers' HOS and RODS; more clearly would define who must collect and retain supporting documents; and would explain how supporting documents are to be collected, where they must be kept, and for how long. This rulemaking action would not create a serious inconsistency with any other agency's action or materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs. The FMCSA discussed the regulatory impact analysis earlier in this document under the heading Regulatory Impact Analysis. Evaluation of the information collection costs of this proposed rule is described fully below in the Paperwork Reduction Act section.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (5 U.S.C. 601–612), the agency has evaluated the effects of this rulemaking on small entities. The Regulatory Flexibility Act requires Federal agencies to analyze the impact of rulemakings on small entities, unless the Agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. This proposal does not impose any costs on the public and therefore does not impose any costs upon small entities. FMCSA, however, has prepared an Initial Regulatory Flexibility Analysis because of the considerable public interest in this proposal to show the negligible potential economic impact it would have on small entities domiciled in the United States. We performed the analysis in the broadest possible terms by counting all the costs that small entities might begin to bear as a result of this clarification, even if those costs should have been borne by them all along.

This Initial Regulatory Flexibility Analysis must include the following elements:

1. A description of reasons why action is being considered;
2. The objectives of, and legal basis for, the rule;
3. A description and estimated number of small entities regulated and domiciled in the United States;
4. A description and estimate of compliance requirements including differences in cost, if any, for different groups of small entities;

5. Identification of duplication, overlap, and conflict with other rules and regulations; and

6. A description of significant alternatives to the rule.

Initial Regulatory Flexibility Analysis

1. Description of Reasons Action Is Being Taken

The purpose of the proposal is to bring existing rules into conformity with directions given by Congress and to remove any potential for misunderstanding of the rules by motor carriers or enforcement personnel. As a result of past misunderstanding, some motor carriers and drivers did not believe the rule applied to them. They would now incur costs which they should have incurred with the passage of the rule on November 26, 1982 (47 FR 53383).

This SNPRM would clarify existing requirements that have been implied by the FMCSA and its predecessors and upheld by the D.C. and Sixth Circuit Courts as discussed above. The SNPRM would clarify decisions in the National Retail Transportation cases discussed above, and would resolve the confusion created by two separate administrative cases: (1) *In re Ace Doran Hauling & Rigging Co.*, Final Order Under 49 CFR 385.15, February 24, 2000 (see FMCSA–2000–6997, document 4); and *In the Matter of Ace Doran Hauling & Rigging Co.*, FMCSA–2000–6997 (Order, July 11, 2000) (see also Order on Reconsideration and Final Order with Regard to Civil Penalties (February 8, 2001) and Order Vacating Order on Reconsideration and Final Order With Regard to Civil Penalties (May 10, 2001)). *In the Matter of Spears Transfer & Expediting, Inc.*, FMCSA–2001–9110, document 5 (Decision On Petition For Safety Rating Review, April 26, 2002), FMCSA held that toll receipts and other supporting documents passing through the hands of a motor carrier's drivers are considered to be in the possession of a carrier, even if not forwarded to carrier management. FMCSA expressly stated that it was overruling any finding in the *Ace Doran* safety rating appeal inconsistent with the *Spears* decision. However, the *Spears* decision did not overrule *Ace Doran* in its entirety, because the *Spears* case involved company drivers rather than leased operators. This proposal, when adopted, would complete the process of overruling the February 24, 2000, Order in *Ace Doran* by clarifying that the obligation to retain supporting documents extends to both independent contractors and company drivers. In doing so, the proposal incorporates the

long-standing definition of employee in 49 CFR 390.5, which states that an employee “includes a driver of a commercial motor vehicle (including an independent contractor while in the course of operating a commercial motor vehicle) * * *”

2. Objectives and Legal Basis

The objective for this action is to improve both (A) compliance by commercial motor vehicle (CMV) drivers and motor carriers with the HOS requirements, and (B) the effectiveness and efficiency of Federal and State enforcement officers reviewing such compliance. As noted above, the legal basis for this rule is section 113 of the Hazardous Materials Transportation Authorization Act of 1994, Pub. L. 103-311, 108 Stat. 1673 (August 26, 1994).

3. Description and Estimated Number of Small Entities Regulated and Domiciled in the United States

The main cost generating element of this proposal is to bring all owner-operators into compliance with the record keeping requirements of the hours-of-service regulations. We assume 25 percent of approximately 300,000 existing owner-operators are not in compliance with the existing regulations for cost estimation purposes. Owner-operators are acting as either drivers or motor carriers.

4. Description and Estimate of Compliance Requirements

This proposal would apply to those small entities regulated by the FMCSA

that use CMV drivers. It is difficult to determine exactly how many small entities would be affected by this proposal, partly because it is unknown how many motor carriers were unaware that the existing rule applies to them and partly because it is not known year-to-year how many small entities on average would use CMV drivers. However, as of June 2004, there were 650,000 U.S.-domiciled motor carriers on the FMCSA’s Motor Carrier Management Information System (MCMIS) census file. This includes both for-hire and private motor carriers domiciled in the United States. The Small Business Administration (SBA) defines small businesses in the motor carrier industry based on thresholds for average annual revenues, below which SBA considers a motor carrier small. For trucking companies, the threshold is \$21.5 million in annual sales, while for motorcoach and related industries the threshold is \$6 million in annual sales. Data from the 1997 Economic Census (U.S. Census Bureau), North American Industrial Classification System (NAICS) Code 4841, “General Freight Trucking,” indicates that 99 percent of “general freight” trucking firms had less than \$25 million in annual sales in 1997 (which most closely corresponds to the SBA threshold of \$21.5 million for motor carriers). In the case of passenger (or motorcoach) carriers, the 1997 Economic Census, NAICS Code 4855, “Charter Bus Industry,” indicates that 94 percent of charter bus firms had less than \$5 million in annual sales in 1997 (which most closely corresponds to the

SBA threshold of \$6 million for passenger carriers).

Because the FMCSA does not have annual sales data on private carriers, it assumes the revenue and operational characteristics of private motor carriers are generally similar to those of for-hire motor carriers. Regardless of which of the above percentages is used (99, 94, or 96 percent), FMCSA estimates that over 600,000 of the approximately 650,000 total motor carriers in the MCMIS Census File meet the definition of small businesses.

Although these small entities would have to keep records verifying all of their employees’ status regarding the HOS, there is no additional administrative cost borne by most of them because they already have to maintain those records under the current system. Of the three hundred thousand (300,000) owner-operators, some unknown number are not in compliance due to misinterpretation of the rule. Now they would incur the recordkeeping costs they should have incurred since January 1, 1983, which are the same as the costs that other motor carriers have been bearing.

The FMCSA believes that all the costs of this proposal would be borne by owner-operators who were required to bear them all along but were unaware of that fact.

Data from the 1997 Economic Census, NAICS Code 4841 (General Freight Trucking) and NAICS Code 4855 (Charter Bus Industry) are contained in the tables 2 and 3.

TABLE 2.—AVERAGE ANNUAL REVENUES OF SMALL TRUCKING FIRMS [NAICS Code 4841, General Freight Trucking]

| Revenue size | Number of firms (percent of segment total) | Average annual revenues per firm (Millions) | Compliance costs per driver (\$165 per driver), as percent of annual revenues per firm |
|------------------------------|--|---|--|
| Less than \$25 million | *27,609 | 1.33 | 0.0124 |

*99 percent of segment total.

TABLE 3.—AVERAGE ANNUAL REVENUES OF SMALL PASSENGER CARRIERS [NAICS Code 4855, Charter Bus Industry]

| Revenue size | Number of firms (percent of segment total) | Average annual revenues per firm (Millions) | Compliance costs per driver (\$165 per driver), as percent of annual revenues per firm |
|-----------------------------|--|---|--|
| Less than \$5 million | *1,022 | 0.98 | 0.0168 |

*94 percent of segment total.

Since we do not have sufficient information to estimate the distribution of the number of drivers per small firm,

we provide reasonable bounds of one employee per firm to 30 employees per firm. Between these boundaries, the

costs range from 0.0124 percent and 0.372 percent of annual revenues. These bounds overestimate the effect on the

larger motor carriers because they generally have more than the average revenue for firms in this size category. Even at 0.372 percent of annual revenues (*i.e.* \$4,950 for a firm with 30 drivers), this rule is clearly not imposing a cost burden that would alter

the market or force firms from the industry.

There are other potentially affected industries, listed in Table 4. They are less directly affected than the two listed above, but still may include some firms employing owner-operators who

wrongly assumed that their employers were the ones required to maintain the supporting documents for six months. These are listed for completeness only, as we do not expect many affected small entities in any of these industries.

TABLE 4.—OTHER POTENTIALLY AFFECTED INDUSTRIES

| NAICS code | Alphabetic keywords | 2002 NAICS short title |
|------------|--|--|
| 1112 | “Truck farming, field, bedding plant and seed production” ... | Other Vegetable (except Potato) and Melon Farming. |
| 2389 | “Aerial or picker truck, construction, rental with operator” ... | Site Preparation Contractors. |
| 4251 | Fuel oil truck jobbers | Wholesale Trade Agents and Brokers. |
| 4842 | “Trucking used household, office, or institutional furniture and equipment”. | Used Household and Office Goods Moving. |
| 4852 | “Bus line operation, intercity” | Interurban and Rural Bus Transportation. |
| 4854 | “Bus operation, school and employee” | School and Employee Bus Transportation. |
| 4871 | “Buses, scenic and sightseeing operation” | “Scenic and Sightseeing Transportation, Land”. |
| 5621 | Dump trucking of rubble or brush with collection or disposal | Other Waste Collection. |
| 7223 | Ice cream truck vendors | Mobile Food Services. |

5. Compliance Requirements of the Rule

Although these small entities would have to keep records verifying all of their employees’ hours-of-service status, there is no additional administrative cost borne by most of them because they already have to maintain those records under the current system. Some portion of the 300,000 owner-operators would now have to incur some additional cost related to providing motor carriers supporting documents that the owner-operators previously maintained for tax reporting and other business expense purposes.

The FMCSA believes that all the costs of this proposal would be borne by owner-operators who failed to comply with our current regulations. These owner-operators would require no special technical or professional skills beyond what they already possess.

6. A Description of Significant Alternatives to the Rule

As explained above, this rule would have minimal impact on small businesses. Any alternatives would be likely to increase the costs rather than decrease them since ignoring the misunderstanding is not a permissible option. For example, changing the reporting system so that records are kept electronically would be likely to impose high initial costs and small maintenance and power costs. Reducing the length of records retention would reduce costs, but only slightly. Short retention periods would restrict the special agent’s ability to identify patterns that indicate unsafe practices.

FMCSA welcomes comments on these or other possible alternatives and their impacts on small entities.

Unfunded Mandates Reform Act of 1995

This proposed rule would not impose a Federal mandate resulting in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$120.7 million or more in any one year (in 2003 dollars) (2 U.S.C. 1531 *et seq.*). The FMCSA believes the total projected cost of this proposal is \$14.2 million per year and that the cost would be borne solely by owner-operators. State and local governments may see a reduction in enforcement costs, but FMCSA has not quantified this because it is not clear whether they would seek the same enforcement level at a lower cost or more enforcement at the same cost. For the purposes of this analysis, the agency assumed the latter. The FMCSA requests additional comments whether this should be considered a Federal mandate resulting in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$120.7 million or more in any one year.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*), Federal agencies must obtain approval from the OMB for each collection of information they conduct, sponsor, or require through regulations. An analysis of this Supplemental Notice of Proposed Rulemaking has been made by the FMCSA, and it has been determined

that it relates to the currently-approved information collection covered by OMB Control No. 2126–0001, entitled “Hours-of-Service of Drivers Regulations.” Information Collection 2126–0001, with an annual burden of 160,376,492 hours, expires on April 30, 2006.

This SNPRM intends to clarify each motor carrier’s hour-of-service and records of duty status responsibilities under the current regulations. The FMCSA has preliminarily determined that this proposal would not result in an increase in the existing information collection burden. However, the agency requests public comment on this determination. The OMB currently approves this information collection as follows:

- OMB Control Number: 2126–0001.
- Title: Hours of Service of Drivers Regulations.
- Respondents: 1,538,503,200 (motor carriers, CMV drivers).
- Estimated Annual Hour Burden for the Information Collection: 160,376,492.
- Estimated Annual Cost to Respondents: \$63,306,510 (4,220,434 drivers employing logbooks × \$15 per year per driver).

Interested parties are invited to send comments regarding any aspect of these information collection requirements, including, but not limited to:

- (1) Whether the collection of information is necessary for the performance of the functions of the FMCSA, including whether the information has practical utility,
- (2) the accuracy of the estimated burden,
- (3) ways to enhance the quality, utility, and clarity of the collected information, and

(4) ways to minimize the collection burden without reducing the quality of the information collected.

If you submit copies of your comments to the Office of Management and Budget concerning the information collection requirements of this document, your comments to OMB will be most useful if received at OMB by December 3, 2004. You should mail, hand deliver, or fax a copy of your comments to: Attention: Desk Officer for the Department of Transportation, Docket Library, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, 725 17th Street, NW., Washington, DC 20503, fax: (202) 395-6566.

National Environmental Policy Act

The agency analyzed this supplemental proposed rule for the purpose of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*) and determined under our environmental procedures Order 5610.1, published March 1, 2004 (69 FR 9680), that this action is categorically excluded (CE) under Appendix 2, paragraph 6.y.(7) of the Order from further environmental documentation. That CE relates to establishing regulations and actions taken pursuant to the regulations concerning prohibitions on motor carriers, agents, officers, representatives, and employees from making fraudulent or intentionally false statements on any application, certificate, report, or record. In addition, the agency believes that the action includes no extraordinary circumstances that would have any effect on the quality of the environment. Thus, the action does not require an environmental assessment or an environmental impact statement.

We have also analyzed this proposed rule under the Clean Air Act, as amended (CAA) section 176(c), (42 U.S.C. 7401 *et seq.*) and implementing regulations promulgated by the Environmental Protection Agency. Approval of this action is exempt from the CAA's General conformity requirement since it involves policy development and civil enforcement activities, such as, investigations, inspections, examinations, and the training of law enforcement personnel. See 40 CFR 93.153(c)(2). It would not result in any emissions increase nor would it have any potential to result in emissions that are above the general conformity rule's *de minimis* emission threshold levels. Moreover, it is reasonably foreseeable that the rule would not increase total CMV mileage, change the routing of CMVs, how CMVs operate, or the CMV fleet-mix of motor

carriers. This action merely establishes standards for hours-of-service supporting document entries on records of duty status for motor carriers, agents, officers, representatives, and CMV drivers.

We seek comment on these determinations.

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

We have analyzed this proposed action under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. The agency has determined preliminarily that this proposed action would not significantly affect the supply, distribution, or use of energy.

Executive Order 13045 (Protection of Children)

We have analyzed this proposed action under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This proposed rule is not an economically significant rule and does not concern an environmental risk to health or safety that may disproportionately affect children.

Executive Order 12898 (Federal Actions To Address Environmental Justice in Minority Populations and Low Income Populations)

The FMCSA evaluated the environmental effects of the proposed action and alternatives in accordance with Executive Order 12898 and determined that there were no environmental justice issues associated with revising the supporting documents for records of duty status for the hours-of-service regulations. Environmental justice issues would be raised if there were "disproportionate" and "high and adverse impact" on minority or low-income populations. FMCSA analyzed the demographic makeup of the trucking industry potentially affected by the proposal and determined that there was no disproportionate impact on minority or low-income populations.

Executive Order 12988 (Civil Justice Reform)

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

Executive Order 12630 (Taking of Private Property)

This proposed rule would not affect a taking of private property or otherwise

have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Executive Order 13132 (Federalism)

This proposed action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, dated August 4, 1999, and it has been determined that it would not have significant Federalism implications or limit the policymaking discretion of the States.

Executive Order 12372 (Intergovernmental Review)

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

List of Subjects

49 CFR Part 379

Freight forwarders, Maritime carriers, Motor carriers, Moving of household goods, Reporting and recordkeeping requirements.

49 CFR Part 381

Motor carriers.

49 CFR Part 385

Administrative practice and procedure, Highway safety, Mexico, Motor carriers, Motor vehicle safety, Reporting and recordkeeping requirements.

49 CFR Part 390

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

49 CFR Part 395

Highway safety, Motor carriers, Reporting and recordkeeping requirements.

In consideration of the foregoing, the FMCSA proposes to amend 49 CFR parts 379, 381, 385, 390, and 395, as set forth below:

PART 379—PRESERVATION OF RECORDS

1. The authority citation for part 379 continues to read as follows:

Authority: 49 U.S.C. 13301, 14122 and 14123; and 49 CFR 1.73.

Appendix A to Part 379—[Amended]

2. Amend Appendix A to 49 CFR part 379 by removing the phrase "hours of service," from item K.2.

* * * * *

PART 381—WAIVERS, EXEMPTIONS, AND PILOT PROGRAMS

3. The authority citation for part 381 is revised to read as follows:

Authority: 49 U.S.C. 31136(e) and 31135; sec. 113(b)(4) and (5) of Pub. L. 103–311, 108 Stat. 1677; and 49 CFR 1.73.

PART 385—SAFETY FITNESS PROCEDURES

4. The authority citation for part 385 continues to read as follows:

Authority: 49 U.S.C. 113, 504, 521(b), 5105(e), 5109, 5113, 13901–13905, 31136, 31144, 31148, and 31502; Sec. 350 of Pub. L. 107–87; and 49 CFR 1.73.

5. Amend section VII in Appendix B to part 385 by revising the citation and text for § 395.8(i) and adding citations and text for § 395.10(a), (e), and (f), in alphanumerical order, to read as follows:

Appendix B to Part 385—Explanation of Safety Rating Process

* * * * *

VII. List of Acute and Critical Regulations

* * * * *

§ 395.8(i) Failing to require driver to forward within 13 days of completion, the original of the record of duty status and all supporting documents (critical).

* * * * *

§ 395.10(a) Failing to verify the accuracy of paper records of duty status or automatic on-board recording device records by comparing their information with the information contained within each supporting document (critical).

§ 395.10(e) Failing to systematically identify each supporting document and the paper or automatic record of duty status it supports (critical).

§ 395.10(f) Failing to maintain each supporting document in a manner that permits the matching of the record to the original driver's record of duty status (critical).

* * * * *

PART 390—FEDERAL MOTOR CARRIER SAFETY REGULATIONS; GENERAL

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

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

7. Amend § 390.5 by revising the definition of the term “employee” to read as follows:

§ 390.5 Definitions.

* * * * *

Employee means any individual, other than an employer, who is employed by an employer and who in the course of his or her employment directly affects commercial motor vehicle safety. Such term includes a driver of a commercial motor vehicle (including an independent contractor and an owner-operator while in the course of operating a commercial motor vehicle), a mechanic, and a freight handler. Such term does not include an employee of the United States, any State, any political subdivision of a State, or any agency established under a compact between States and approved by the Congress of the United States who is acting within the course of such employment. This definition does not affect the status of a driver as an independent contractor or employee under United States Department of the Treasury, Internal Revenue Service interpretations of the tax laws or in any other context beyond this subchapter.

8. Revise § 390.29(b) to read as follows:

§ 390.29 Location of records and documents.

* * * * *

(b)(1) All records and documents required by this subchapter which are maintained at the principal place of business must be produced upon demand by a special agent of the Federal Motor Carrier Safety Administration or other authorized representative of a Federal, State, local, or tribal government.

(2) All records and documents required by this subchapter which are maintained at a regional office or driver work-reporting location must be made available for inspection, upon demand by a special agent of the Federal Motor Carrier Safety Administration or other authorized representative of a Federal, State, local, or tribal government at the motor carrier's principal place of business or other location specified by the special agent or other authorized representative within 48 hours after a demand is made. Saturdays, Sundays, and Federal holidays are excluded from the computation of the 48-hour period of time.

9. Revise § 390.31(d) to read as follows:

§ 390.31 Copies of records or documents.

* * * * *

(d) *Exception.* All records may be maintained through the use of automated, electronic, or laser technology systems provided the motor

carrier can produce an accurate, legible, and unaltered printed copy of the required data; and provided that alternate means for signature verification are available.

PART 395—HOURS OF SERVICE OF DRIVERS

10. The authority citation for part 395 continues to read as follows:

Authority: 49 U.S.C. 504, 14122, 31133, 31136, and 31502; sec. 113, Pub. L. 103–311, 108 Stat. 1673, 1676; and 49 CFR 1.73.

11. Amend § 395.1 by revising paragraph (a)(1) and adding a new paragraph (p) to read as follows:

§ 395.1 Scope of rules in this part.

(a) *General.* (1) The rules in this part apply to all motor carriers and drivers, except as provided in paragraphs (b) through (p) of this section.

* * * * *

(p) *Private motor carriers of passengers (nonbusiness).* The provisions of § 395.8 do not apply to a private motor carrier of passengers (nonbusiness) or its drivers.

12. Amend § 395.2 by revising the introductory text and adding the definition of “Supporting document,” alphabetically, to read as follows:

§ 395.2 Definitions.

Words or phrases used in this part are defined in § 390.5 of this subchapter, except as provided in this section—

* * * * *

Supporting document means any document that is generated or received by a motor carrier or commercial motor vehicle driver in the normal course of business that could be used, as produced or with additional identifying information, to verify the accuracy of a driver's record of duty status. For the purposes of this definition, any *document* includes, but is not limited to any record or document, either written or electronic, that is available individually or in combination with other records or documents, to provide a date, time, or location to verify the accuracy of a driver's record of duty status. Examples of supporting documents include: accident/incident reports, bills of lading, border crossing reports, carrier pro forma invoices (pros or waybills), cash advance receipts, credit card receipts and statements, customs declarations, delivery receipts, dispatch/assignment records, driver reports (facsimile or call-in logs), expense vouchers, freight bills, fuel billing statements, fuel receipts, gate receipts, global positioning reports, inspection reports, invoices, interchange reports, International Registration Plan

receipts, International Fuel Tax Agreement receipts, lessor settlement sheets, lodging receipts, lumper receipts, on-board computer reports, over/short and damage reports, overweight/oversize reports and citations, port of entry receipts, telephone billing statements, toll receipts, traffic citations, transponder reports, trip permits, trip reports, waybills, weight/scale tickets, and other transportation and payroll-related documents.

* * * * *

13. Amend § 395.8 by adding introductory text and revising paragraphs (a), (d)(3), (i), and (k) to read as follows:

§ 395.8 Driver's record of duty status.

Subject to the exceptions and exemptions in § 395.1:

(a) Every motor carrier must require every driver used by the motor carrier to systematically and effectively record, inspect, verify, and maintain, records of all hours of service by duty status for each 24-hour period using the methods prescribed in either paragraph (a)(1) or (2) of this section:

(1) Every driver who operates a commercial motor vehicle must record his/her duty status on paper, in duplicate, for each 24-hour period. The duty status time must be recorded on a specified paper grid, as shown in paragraph (g) of this section. The grid and the requirements of paragraph (d) of this section may be combined with any company forms. The previously approved format of the Daily Log, Form MCS-59 or the Multi-day Log, MCS-139 and 139A, which meets the requirements of this section, may continue to be used; or

(2) Every driver who operates a commercial motor vehicle must record his/her duty status by using an automatic on-board recording device that meets the requirements of § 395.15 of this part. The requirements of § 395.8 paragraphs (e) and (k)(1) and (2) of this section also apply.

* * * * *

(d) * * *

(3) Vehicle number(s) (Coach, bus, truck, tractor, and trailer number(s));

* * * * *

(i) *Collecting and filing driver's paper records of duty status and supporting documents.* Each motor carrier must systematically collect drivers' records of duty status and associated supporting documents for each driver it uses. The driver must systematically collect and submit or forward by mail the original driver's record of duty status and all associated supporting documents to the

regular employing motor carrier within 13 days following the completion of the form.

* * * * *

(k) *Retention of driver's record of duty status.* (1) Each motor carrier must systematically maintain records of duty status and all associated supporting documents for each driver it uses for a period of six months from the date of receipt.

(2) The driver must systematically retain a copy of each record of duty status and all associated supporting documents for the previous seven consecutive days in his or her possession and make it available for inspection while on duty.

* * * * *

14. Add § 395.10 to read as follows:

§ 395.10 Systematic verification and record retention.

(a) Every motor carrier must systematically and effectively monitor its driver's hours of service and the accuracy of the information contained on the driver's record of duty status by comparing paper records of duty status, as required by § 395.8, or automatic on-board recording device records, as required by § 395.15, with information contained within supporting documents. Each system must enable a special agent of the Federal Motor Carrier Safety Administration or other authorized representative of a Federal, State, local, or tribal government to verify the drivers' paper records of duty status or automatic on-board recording device records using the supporting documents.

(b) A special agent of the Federal Motor Carrier Safety Administration or other authorized representative of a Federal, State, local, or tribal government may deem a motor carrier's system to be effective only when the special agent or other authorized representative finds fewer than 10 percent of the drivers' paper records of duty status or automatic on-board recording device records are false. A special agent of the Federal Motor Carrier Safety Administration or other authorized representative of a Federal, State, local, or tribal government may use any supporting documents or other evidence, whether or not in the motor carrier's possession, to determine the validity of the drivers' paper or automatic records of duty status and the effectiveness of the motor carrier's supporting document based monitoring system.

(c) If a special agent of the Federal Motor Carrier Safety Administration or other authorized representative of a Federal, State, local, or tribal

government determines a motor carrier's systematic monitoring is ineffective in verifying the drivers' compliance with the hours of service and the accuracy of the paper or automatic records of duty status, the FMCSA may require the carrier to begin to systematically use supporting documents that FMCSA believes are effective to verify the accuracy of the hours of service and paper or automatic records of duty status.

(d) Every motor carrier must require every driver to retain, and every driver must retain, all supporting documents containing references to date, time, or location, that come into the possession of the driver in the ordinary course of the driving operation. The driver must provide the supporting documents and the paper or automatic records of duty status:

(1) To any duly authorized enforcement official of Federal, State or local government upon request or demand; and

(2) To the motor carrier at the time the driver submits the corresponding record of duty status to the motor carrier as required by the motor carrier or § 395.8(i) of this part.

(e) The motor carrier and the driver must identify each supporting document and the paper or automatic record of duty status it supports. A motor carrier and a driver must not obscure or deface other information contained in the supporting document. An identification system may include legibly adding the driver's full name, date, and vehicle number, if those items do not already appear on the document.

(f) The motor carrier must identify each supporting document whether received from the driver or from any other source including carrier-generated documents and electronic systems (*i.e.*, global positioning reports, on-board computer, transponder reports, scanned, or electronically-mailed documents), ensure that any electronic or mechanical means to reference date, time and location in the production of these documents is activated, and maintain those documents in a manner that permits the matching of those records to the original driver's record of duty status.

(g) Supporting documents must be provided to any duly authorized enforcement official of Federal, State or local government upon request or demand along with the corresponding records of duty status as required in §§ 390.29, 390.31, and 395.8(k) of this subchapter.

(h) A motor carrier and a driver may be subject to civil or criminal penalties under 49 U.S.C. 521 for:

(1) A failure by the motor carrier to prevent a driver from falsifying his records of duty status; failure to prevent alteration of supporting documents; alteration of supporting documents which changes their accuracy; or the

failure to prevent a driver from exceeding the hours-of-service;

(2) A driver's falsification of a record of duty status or alteration of supporting documents which changes their accuracy; and

(3) A failure by the motor carrier to have an effective system to verify and

maintain records of duty status and supporting documents.

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Annette M. Sandberg,
Administrator.

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