

### *Proposed Change 5: Renewal of Certifications*

The Department solicits comments on a proposal to specify that a certification under chapter 154 is effective for a specified term of years. This proposal is responsive to many comments pointing out that changed circumstances may affect whether a once-certified mechanism continues to be adequate for purposes of ensuring the availability for appointment of competent counsel. At the time a State applies for certification, for example, its provisions authorizing compensation at a specified hourly rate may be sufficient to achieve this objective. But after the passage of years, that may no longer be the case in light of inflation or other changed economic circumstances. *Cf. Durable Mfg. Co. v. United States Dep't of Labor*, 578 F.3d 497, 501–02 (7th Cir. 2009) (upholding time limitation of validity of labor certificates in light of possible subsequent changes in economic circumstances affecting consistency with statutory requirements and objectives). Similarly, changes in various State policies that may affect the mechanism's operation, or new statutory provisions or legal precedent relating to attorney competence, compensation, or reasonable litigation expenses, may bear on the continued adequacy of the mechanism. Providing some limitation on the lifespan of certifications and requiring renewal of certifications would allow questions regarding continued compliance with chapter 154 to be reexamined at regular intervals, each time with increased information about a State's actual experience with its mechanism, rather than assuming that a once-compliant State system is compliant indefinitely.

At the same time, it is possible that overly stringent limitations on the duration of certifications could unduly burden States and disserve chapter 154's objectives by discouraging States from undertaking the effort to establish compliant mechanisms and seek their certification. Balancing the need for examination of continued compliance with the need to provide States with a substantial period of certainty, the Department is considering a term of five years for certifications, which would begin to run only after completion of both the certification process by the Attorney General and any related judicial review. *See* 28 U.S.C. 2265(c) (providing for DC Circuit review of certification decisions). The final rule could also provide that if a State requests renewal of the certification at or before the end of the five-year period, the initial certification would remain

effective until completion of the renewal process and any related judicial review. Thus, a State that achieves certification of its mechanism would enjoy the uninterrupted benefits of chapter 154 for the full term of five years. The Department seeks comment on the merits and substance of a renewal requirement, including whether five years is an appropriate term of years during which a certification should be effective, or whether that term of years should be longer or shorter.

### **Regulatory Certifications**

#### *Executive Orders 12866 and 13563—Regulatory Review*

This regulation has been drafted and reviewed in accordance with Executive Order 12866, "Regulatory Planning and Review," section 1(b), Principles of Regulation, and in accordance with Executive Order 13563, "Improving Regulation and Regulatory Review," section 1(b), General Principles of Regulation.

The Department of Justice has determined that this rule is a "significant regulatory action" under Executive Order 12866, section 3(f), and accordingly this rule has been reviewed by the Office of Management and Budget.

#### *Executive Order 13132—Federalism*

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. It only requests public comment on possible changes in a previously published proposed rule regarding the certification procedure under chapter 154 of title 28, United States Code. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism assessment.

#### *Executive Order 12988—Civil Justice Reform*

This regulation meets the applicable standards set forth in section 3(a) and (b)(2) of Executive Order 12988.

#### *Regulatory Flexibility Act*

The Attorney General, in accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), has reviewed this regulation and by approving it certifies that this regulation will not have a significant economic impact on a substantial number of small entities. It only requests public comment on possible changes in a previously

published proposed rule regarding the certification procedure under chapter 154 of title 28, United States Code.

#### *Unfunded Mandates Reform Act of 1995*

This rule will not result in aggregate expenditures by State, local, and tribal governments or by the private sector of \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

#### *Small Business Regulatory Enforcement Fairness Act of 1996*

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804. This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Dated: February 6, 2012.

**Eric H. Holder, Jr.,**

*Attorney General.*

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## **DEPARTMENT OF TRANSPORTATION**

### **Federal Motor Carrier Safety Administration**

#### **49 CFR Parts 385, 390, and 395**

[Docket No. FMCSA–2010–0167]

RIN 2126–AB20

#### **Electronic On-Board Recorders and Hours of Service Supporting Documents**

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

**ACTION:** Notice of intent.

**SUMMARY:** FMCSA announces its intent to move forward with the Electronic On-Board Recorders and Hours of Service Supporting Documents rulemaking (EOBR 2) by preparing a Supplemental Notice of Proposed Rulemaking (SNPRM). To augment the Agency's efforts to obtain comprehensive data to support this SNPRM, FMCSA plans to do the following: hold listening sessions on the issue of driver harassment; task the Motor Carrier Safety Advisory Committee (MCSAC) to assist in developing material to support this

rulemaking, including technical specifications for EOBRs and their potential to be used to harass drivers; and conduct research by surveying drivers, carriers, and vendors regarding harassment issues.

**ADDRESSES:** Comments and material received from the public as well as documents mentioned in this notice are available for inspection or copying in the docket, Docket No. FMCSA–2010–0167, and at the Docket Management Facility, U.S. Department of Transportation, Ground floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Ms. Deborah M. Freund, Vehicle and Roadside Operations Division, Office of Bus and Truck Standards and Operations, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE., Washington, DC 20590–0001 or by telephone at (202) 366–5370.

**SUPPLEMENTARY INFORMATION:**

**Regulatory Background**

The following discussion summarizes the recent regulatory history of the agency's EOBR initiatives.<sup>1</sup>

*EOBR 1*

On April 5, 2010, the Agency issued a final rule (75 FR 17208) that provided new technical requirements for EOBRs. The EOBR final rule also required the limited, remedial use of EOBRs by any motor carrier found, during a single compliance review, to have a 10 percent violation rate for any hours-of-service (HOS) regulation listed in a new Appendix C of 49 CFR part 385. The final rule required EOBRs on all of the motor carrier's commercial motor vehicles (CMVs) for a period of 2 years. The compliance date for the final rule was June 4, 2012.

The Owner-Operator Independent Drivers Association (OOIDA) challenged the final rule in the United States Court of Appeals for the Seventh Circuit. OOIDA raised several concerns relating to EOBRs and their potential use for driver harassment. On August 26, 2011, the Court vacated the entire final rule. *Owner-Operator Indep. Drivers Ass'n et al. v. Fed. Motor Carrier Safety Admin.*, 656 F.3d. 580 (7th Cir. 2011). The Court held that, contrary to statutory requirements, the Agency failed to address the issue of driver harassment, including how EOBRs could potentially

be used to harass drivers and ways to ensure that EOBRs were not used to harass drivers. The basis for the decision was FMCSA's failure to directly address a requirement in 49 U.S.C. 31137(a) which reads as follows:

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

The court's expectation about how the Agency should address harassment and productivity under the statutory directive included the following:

"In addition, an adequate explanation that addresses the distinction between productivity and harassment must also describe what precisely it is that will prevent harassment from occurring. The Agency needs to consider what types of harassment already exist, how frequently and to what extent harassment happens, and how an electronic device capable of contemporaneous transmission of information to a motor carrier will guard against (or fail to guard against) harassment. A study of these problems with EOBRs already in use, and a comparison with carriers that do not use these devices, might be one obvious way to measure any effect that requiring EOBRs might have on driver harassment" (Id. at 588–89).

The Court also noted that the Agency had not estimated the safety benefits of EOBRs currently in use and how much EOBRs increased compliance.

As a result of the vacatur, carriers relying on electronic devices to monitor HOS compliance are currently governed by the Agency's previous rules regarding the use of automatic on-board recording devices (49 CFR 395.15). The requirements set forth in 49 CFR 395.15, were not affected by the Seventh Circuit's decision regarding the technical specifications set out in 49 CFR 395.16 in the EOBR 1 Final Rule.

*EOBR 2*

On February 1, 2011, the Agency published a notice of proposed rulemaking (NPRM) that proposed to expand the scope of EOBR use to a broader population of motor carriers (EOBR 2) (76 FR 5537). The EOBR 2 NPRM proposed that, within 3 years of the effective date of the final rule, all motor carriers currently required to maintain records of duty status (RODS) for HOS recordkeeping would be required to use EOBRs.

Due to the pending EOBR 1 litigation, the Agency extended the EOBR 2 public

comment period and, in recognition of issues raised in oral argument before the Seventh Circuit, expressly invited comment on the issue of driver harassment. A notice published on March 10, 2011 (76 FR 13121) extended the public comment period for the EOBR 2 NPRM to May 23, 2011. On April 13, 2011, the Agency published a notice specifically inviting comments on the EOBR2 rulemaking to address harassment (76 FR 20611). In light of the litigation challenging the Agency's treatment of driver harassment in EOBR 1, FMCSA wished to ensure that interested parties had a full opportunity to consider the harassment issue in the active EOBR 2 rulemaking.

**Planned Activities**

*EOBR 2 SNPRM*

Because the EOBR 2 rule relied on the technical specifications provided in EOBR 1, where this final rule was vacated, the Agency must again propose and seek comment on new technical standards into the CFR before any final rule concerning use of an EOBR device is issued. These proposed technical standards would take into account the official MCSAC recommendations, as well as public comments.

FMCSA takes this opportunity to declare its intention to proceed with the EOBR 2 rulemaking. The Agency is preparing an SNPRM to propose technical standards for an EOBR, address driver harassment issues, propose requirements for retaining HOS supporting documents, and provide clarification and request further comments on several of the proposals. Additionally, the Agency will hold public listening sessions; work with its Motor Carrier Safety Advisory Committee (MCSAC); and use driver, carrier, and vendor surveys to obtain all the stakeholder information needed to discuss issues involving driver harassment.

*Public Listening Sessions*

FMCSA will hold public listening sessions to discuss issues involving the driver harassment issue. The public will have an opportunity to speak about this issue and provide the Agency with information on how to address harassment. All public comments will be placed in the docket of this rulemaking. Details concerning the schedule and locations for the listening sessions, as well as procedural information for participants, will follow in a subsequent **Federal Register** notice.

<sup>1</sup> For a more detailed history of the program containing the initial regulatory actions by the agency see EOBR 1, discussed below in this section (75 FR 17208).

*Motor Carrier Safety Advisory  
Committee Task*

MCSAC is an advisory committee to FMCSA.

In June 2011, a MCSAC subcommittee began work on Task 11-04 (Electronic On-Board Recorders (EOBR) Communications Protocols, Security, Interfaces, and Display of Hours-of-Service Data During Driver/Vehicle Inspections and Safety Investigations). The subcommittee examined technical issues relating to the electronic transfer of HOS information from CMVs to law enforcement personnel at the roadside raised by the EOBR 1 final rule. The subcommittee met several times and made its final report to the full committee on December 5 and 6, 2011.

On December 16, 2011, the full committee made an official recommendation to FMCSA.

FMCSA will task MCSAC to make recommendations related to the EOBR2 rulemaking. Details will follow in a subsequent **Federal Register** notice.

More information about these MCSAC meetings, recommendations, and task orders can be found at <http://mcsac.fmcsa.dot.gov/meeting.htm>.

*Research*

Subject to Office of Management and Budget approval, FMCSA will initiate OMB-approved survey of drivers regarding harassment experiences and concerns and OMB-approved surveys for carriers and vendors regarding

harassment. Details will follow in subsequent **Federal Register** notices.

*EOBR 1 Final Rule Withdrawal*

Based on the Seventh Circuit's decision, the Agency plans to publish a final rule in the **Federal Register** announcing the removal of the regulatory text in 49 CFR parts 350, 385, 395, 396 adopted in EOBR 1 and subsequently vacated by the Seventh Circuit decision. This will complete the actions required by the Court.

Issued on: February 7, 2012.

**Anne S. Ferro,**  
*Administrator.*

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