



September 18, 2022

Via DOTExecSec@dot.gov
& electronic filing to the docket.

The Honorable Pete Buttigieg
Secretary of Transportation
1200 New Jersey Avenue SE
Washington, DC 20590

Re: Docket No. FMCSA-2022-0078

Dear Secretary Buttigieg:

This is in response to a request for comments issued by the Federal Motor Carrier Safety Administration (FMCSA) under the above-referenced docket related to Electronic Logging Devices (ELDs).

On December 13, 2019, before the release of this “best practices” document entitled “*Cybersecurity Best Practices for Integration/Retrofit of Telematics and Aftermarket Electronic Systems into Heavy Vehicles (bts.gov)*”...

<https://rosap.ntl.bts.gov/view/dot/49248>

...the SBTC filed with then-Secretary Elaine Chao a PETITION FOR MOTOR VEHICLE SAFETY STANDARDS AND ENFORCEMENT PURSUANT TO 49 U.S. Code § 30162.

That petition is referenced at <https://www.regulations.gov/document/FMCSA-2019-0239-0358>.

NHTSA initially ignored this petition --as the USDOT OIG found after audit on November 9, 2021 NHTSA does often (“For example, the Agency did not respond within the required 120-day timeline to 87.5 percent of FMVSS petitions submitted between March 2016 and December 2020.”).

After multiple inquiries, filings, and debate over whether our petition was actually a bona fide “petition” that was required by law to be processed within 120 days or mere “correspondence,” NHTSA finally processed a subsequent revised iteration of this petition dated September 27, 2021, after we indicated we would seek judicial review if the agency did not comply with the 120-day processing provision of the law, which we have had to do twice now as you know with delayed FMCSA matters. NHTSA then accepted the “petition” as such, and agreed in writing it was indeed a completely submitted petition...

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<https://www.regulations.gov/document/NHTSA-2022-0019-0002>

By then, this petition entailed a request that NHTSA: (1) conduct a defect investigation based on scholarly research that suggested there is probable cause to believe ELDs can be remotely hacked and that further research should be conducted; and (2) issue new and revised motor vehicle safety standards related to ELDs.

We went to NHTSA because FMCSA had refused for years to address the issue of possible telematics hacking. We had noted multiple times to both agencies that the FBI has indicated they have similar concerns about the possibilities of ELD hacking (*“The ELD mandate does not contain any cybersecurity or quality assurance requirements for suppliers of ELDs. As a result, no third-party validation or testing is required before vendors can self-certify their ELDs”*).

<https://www.thetruckersreport.com/wordpress/wp-content/uploads/FBIPIN.pdf>

With respect to our repeatedly expressed concern over the lack of a bona fide ELD certification process that was mandated by MAP-21, we also noted that one NTSB Board member has gone on record as saying FMCSA’s self-certification of ELDs is not very “robust.”

<https://www.freightwaves.com/news/investigative-keeptruckin-fights-ntsb-bid-to-remove-its-eld-technology-in-wake-of-crash>

However, NHTSA denied the request for new and revised motor vehicle safety-related standards here:

<https://www.federalregister.gov/documents/2022/03/07/2022-04729/federal-motor-vehicle-safety-standards-denial-of-petitions-for-rulemaking>

Disappointingly, NHTSA also denied the request for a defect investigation here:

<https://www.federalregister.gov/documents/2022/03/30/2022-06683/denial-of-motor-vehicle-defect-petition-dp21-005>

The SBTC’s August 13, 2022 response to these denials is published here:

<https://www.regulations.gov/comment/NHTSA-2022-0019-0003>

Notwithstanding an SBTC application for exemption from ELDs and a subsequent petition for reconsideration, which were both denied by FMCSA...

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<https://www.federalregister.gov/documents/2019/07/17/2019-15206/hours-of-service-of-drivers-application-for-exemption-small-business-in-transportation-coalition>

<https://www.fmcsa.dot.gov/regulations/federal-register-documents/2020-07730>

...SBTC also filed a "Petition for Retrospective Regulatory Review" of ELDs with USDOT on September 9, 2021 (attached) and filed via the FMCSA General Petitions docket:

<https://www.regulations.gov/comment/FMCSA-2021-0054-0021>

... which was also denied by your Department on January 14, 2022 (attached).

Although our original request was tracked by FMCSA on their FAST Act Petitions page at:

<https://www.regulations.gov/document/NHTSA-2022-0019-0002><https://www.fmcsa.dot.gov/regulations/petitions-0>

...our attached petition for reconsideration in that matter has **not** been tracked, despite repeated requests to FMCSA for same, and has been left hanging in limbo.

We are therefore glad to see the present notice and request for comments that suggests perhaps an ELD 'retrospective review' of sorts may now actually be in progress, one that finally considers our suggestion that FMCSA should develop an actual, bona fide ELD certification program as directed by Congress.

We also suggest that FMCSA please now consider, along those lines, our previous assertions to both FMCSA and NHTSA, incorporated here, by reference, regarding the potential for remote telematics hacking as it now reviews technical considerations. We think USDOT should look at ELD installation both in terms of factory and post factory ELD installation, in which case both USDOT agencies should be involved. A copy of this comment will therefore be submitted to the applicable NHTSA dockets in the hopes NHTSA will now consider new and revised motor vehicle safety standards since FMCSA is now looking more closely at this matter.

In moving forward with the current docket, in response to its request for comments, we ask FMCSA to please consider the specific language within MAP-21 regarding "ELECTRONIC LOGGING DEVICE REQUIREMENTS," "PERFORMANCE AND DESIGN STANDARDS," "CERTIFICATION STANDARDS," and "TAMPER RESISTANT(CE):"

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“(b) ELECTRONIC LOGGING DEVICE REQUIREMENTS.— “(1) IN GENERAL.—The regulations prescribed under subsection (a) shall—

“(A) require an electronic logging device—

“(i) to accurately record commercial driver hours of service;

“(ii) to record the location of a commercial motor vehicle;

“(iii) to be tamper resistant; and

“(iv) to be synchronized to the operation of the vehicle engine or be capable of recognizing when the vehicle is being operated;

“(B) allow law enforcement to access the data contained in the device during a roadside inspection; and

“(C) apply to a commercial motor vehicle beginning on the date that is 2 years after the date that the regulations are published as a final rule.

“(2) PERFORMANCE AND DESIGN STANDARDS.—The regulations prescribed under subsection (a) shall establish performance standards—

“(A) defining a standardized user interface to aid vehicle operator compliance and law enforcement review;

“(B) establishing a secure process for standardized—

“(i) and unique vehicle operator identification;

“(ii) data access;

“(iii) data transfer for vehicle operators between motor vehicles;

“(iv) data storage for a motor carrier; and

“(v) data transfer and transportability for law enforcement officials;

“(C) establishing a standard security level for an electronic logging device and related components to be tamper

resistant by using a methodology endorsed by a nationally recognized standards organization; and

“(D) identifying each driver subject to the hours of service and record of duty status requirements under part 395 of title 49, Code of Federal Regulations.

“(c) CERTIFICATION CRITERIA.— “(1) IN GENERAL.—The regulations prescribed by the Secretary under this section shall establish the criteria and a process for the certification of electronic logging devices to ensure that the device meets the performance requirements under this section.

“(2) EFFECT OF NONCERTIFICATION.—Electronic logging devices that are not certified in accordance with the certification process referred to in paragraph (1) shall not be acceptable

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evidence of hours of service and record of duty status requirements under part 395 of title 49, Code of Federal Regulations.

H. R. 4348—384

“(d) ADDITIONAL CONSIDERATIONS.—The Secretary, in prescribing the regulations described in subsection (a), shall consider how such regulations may—

“(1) reduce or eliminate requirements for drivers and motor carriers to retain supporting documentation associated with paper-based records of duty status if—

“(A) data contained in an electronic logging device sup plants such documentation; and

“(B) using such data without paper-based records does not diminish the Secretary’s ability to audit and review compliance with the Secretary’s hours of service regulations; and

“(2) include such measures as the Secretary determines are necessary to protect the privacy of each individual whose personal data is contained in an electronic logging device.

“(e) USE OF DATA.—“(1) IN GENERAL.—The Secretary may utilize information contained in an electronic logging device only to enforce the Secretary’s motor carrier safety and related regulations, including record-of-duty status regulations.

“(2) MEASURES TO PRESERVE CONFIDENTIALITY OF PERSONAL DATA.—The Secretary shall institute appropriate measures to preserve the confidentiality of any personal data contained in an electronic logging device and disclosed in the course of an action taken by the Secretary or by law enforcement officials to enforce the regulations referred to in paragraph (1).

“(3) ENFORCEMENT.—The Secretary shall institute appropriate measures to ensure any information collected by electronic logging devices is used by enforcement personnel only for the purpose of determining compliance with hours of service requirements.

“(f) DEFINITIONS.—In this section:

“(1) ELECTRONIC LOGGING DEVICE.—The term ‘electronic logging device’ means an electronic device that—

“(A) is capable of recording a driver’s hours of service and duty status accurately and automatically; and

“(B) meets the requirements established by the Secretary through regulation.

“(2) TAMPER RESISTANT.—The term ‘tamper resistant’ means resistant to allowing any individual to cause an electronic device to record the incorrect date, time, and location for changes to on-duty driving status of a commercial motor

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vehicle operator under part 395 of title 49, Code of Federal Regulations, or to subsequently alter the record created by that device.”

Lastly, we ask that FMCSA please note here our recent correspondence with CVSA and FMCSA regarding the results of the past two annual Roadchecks (2022 and 2021).

In terms of CVSA's releases for the past two years on the results of the two annual Roadchecks, the applicable Top 5 USA Driver OOS Violation tables they are showing the public are attached here (see Appendix A: Table 4 for 2021 & Table 6 for 2022).

HOS was, according to their 2021 release, the **number one** USA driver OOS violation in 2021 as per table 4. This table shows there were 1,203 HOS violations representing 41.5% of all violations. There was a secondary separate category for false logs (427 violations, representing 14.7% of all violations).

But there is no equivalent stand-alone HOS category for the same data in 2022 as per table 6. This table shows 1,901 false log violations, constituting 45% of all violations, purportedly up, as a percentage, from last year's mere 14.7% of the total.

So, CVSA is now apparently saying that in 2022, almost one out of every two USA driver OOS violations was for "false logs." That is a very significant representation. It appears because HOS is no longer a top 5 stand-alone category in 2022, that CVSA is saying HOS violations (notwithstanding false logs) now accounts for less than 4.9%, as HOS violations could in 2022 only fall under the category of "other."

Our experience in motor carrier regulation (in my own case thirty-years' experience) tells us that it cannot be simultaneously true that HOS violations significantly decreased from being 41.5% of the whole last year while under the ELD paradigm, and suddenly dropped to less than 5% while under ELDs again this year, on the one hand... and, on the other, falsification of logs while during the ELD era shot up from 14.7% last year to an incredible 45% this year.

If these data are indeed correct, then this shows that ELDs have **not stopped the problem of falsification of logs as FMCSA and Congress lead the public to believe would be the result of a switch to ELDs**; that the problem of driver log falsification has instead gotten significantly worse than last year while still under the ELD paradigm and that the trend here is that ELDs are resulting in **more falsification**, which was not supposed to be able to happen under ELDs. That would mean we are going in the completely wrong direction under ELDs in terms of promoting motor carrier safety and protecting the motoring public. That is something for USDOT to really think about.

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If the data are **not** correct in terms of pulling and interpreting source data from FMCSA, then CVSA needs to issue a corrected 2022 report that show the correct top 5 USA Driver OOS Violations for 2022, one that reflect actual HOS OOS violations.

If the data are inaccurate because law enforcement erroneously reported HOS violations (that should have been reported under the HOS category) under the 'false log' category, then remedial training for motor carrier enforcement personnel is in order to ensure that in the future, they properly classify the HOS violations as truly HOS violations, and not false logs.

There is, of course, also an inherent question, here, of whether law enforcement might currently be failing to put drivers OOS for HOS violations in 2022 like they did last year. Perhaps, this is the advent of the new 2022 work trend called "quiet quitting" plaguing the enforcement community.

Something is just not right here. SBTC recommends that FMCSA & CVSA please work together to figure out what went wrong here as the two annual reports do not appear to be consistent and both do not seem accurate.

The Department will recall that, in protesting one of our exemption applications in this November 22, 2019 letter...

<https://www.regulations.gov/comment/FMCSA-2019-0239-0265>

...the CVSA stated:

*"In the denial of the original exemption request, FMCSA made the correct determination that the exemption request does not outline an adequate method for maintaining an equivalent level of safety. In their original request, SBTC argues that the ELD requirement is not a 'safety regulation' and therefore has no safety benefit and that the continued use of paper logs by their members will maintain a level of safety equivalent to the use of ELDs. However, FMCSA's own research has determined that the use of ELDs will provide an improved level of safety, which is the basis for the requirement in the first place. ELDs provide the enforcement community with a more effective tool for identifying hours-of-service violations and abuse, helping to remove unsafe drivers and carriers from the roadways. **It is a well-recognized fact that drivers can falsify their paper logs. ELDs make that falsification more difficult. Therefore, simply continuing the use of paper logs with no additional safety measures or oversight activities cannot result in a level of safety equivalent to the use of ELDs.** In their request for reconsideration, SBTC reiterates the same claims about paper logs and does not provide any additional method of ensuring an equivalent level of safety (emphasis added)."*

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We have asked CVSA to explain this and although they did reply, it does not appear they can adequately explain the lack of HOS OOS stats in 2022 and the drastic increase in “false logs” in 2022 replacing HOS as the top OOS category at this time.

It would therefore appear-- nearly three years later, that CVSA’s 2019 crystal ball was wrong, and that mandated use of ELDs, instead of paper logs as SBTC had proposed for the small business portion of the industry through its exemption application, in 2022 has, in reality, taken us in the **wrong direction, contrary to public safety and FMCSA’s mission to ensure motor carrier safety.**

FMCSA should now consider reporting back to Congress on these latest Roadcheck 2022 statistical developments, which lead us to believe that ELDs have not fixed the falsification of logs problem as Congress, FMCSA and CVSA anticipated they would, so that Congress might consider whether to at last relieve industry of this unnecessary and unsafe burden and make the industry simple and safe again.

Thank you.

Sincerely,

/s/JAMES LAMB
SBTC Executive Director

APPENDIX A

2021 CVSA ROADCHECK TOP 5 USA DRIVER OOS STATS

The second focus area, hours of service, was the most cited driver out-of-service violation, accounting for 41.5% of all driver out-of-service violations. That's 1,203 violations. Hours-of-service rules limit the number of hours that drivers of commercial property- and passenger-carrying vehicles are permitted to spend driving and working and regulate the minimum amount of time drivers must rest between driving shifts. Canada, Mexico and the U.S. all have strict hours-of-service regulations in place to help reduce the occurrence of driver fatigue.

Of the 2,898 out-of-service driver violations issued, the top five violations were for:

Table 4: Top Five OOS Driver Violations

| | Category | Number | Percentage |
|---|---------------------|--------|------------|
| 1 | Hours of Service | 1,203 | 41.5% |
| 2 | Wrong Class License | 565 | 19.5% |
| 3 | *Other | 482 | 16.6% |
| 4 | False Logs | 427 | 14.7% |
| 5 | Suspended License | 132 | 4.6% |

**Examples of "Other" driver violations include operating without the required operating authority, expired or no medical certificate, operating a commercial motor vehicle while ill or fatigued, driving while prohibited in the Drug and Alcohol Clearinghouse, etc.*

2022 CVSA ROADCHECK TOP 5 USA DRIVER OOS STATS

Table 6: Top Five Driver OOS Violations – U.S.

| Violation Category | # of OOS Driver Violations | % of OOS Driver Violations |
|---------------------|----------------------------|----------------------------|
| False Logs | 1,901 | 45.0% |
| Wrong Class License | 1,045 | 24.7% |
| Suspended License | 251 | 5.9% |
| No Medical Card | 222 | 5.3% |
| Other | 205 | 4.9% |