

BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION
DEPARTMENT OF TRANSPORTATION

COMMENTS OF THE
OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC.

IN RESPONSE TO NOTICE AND REQUEST FOR COMMENTS

DOCKET NO. FMCSA-2011-0074

Agency Information Collection Activities; Request for Comments on a New Information
Collection: Evaluating the Safety Benefits of an On-Board Monitoring System in Commercial
Vehicle Operations; Independent Evaluation and Data Analysis

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BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION
DEPARTMENT OF TRANSPORTATION

The Owner-Operator Independent Drivers Association, Inc. (“OOIDA”) hereby submits its comments in response to the March 29, 2011, notice and request for comments (“Notice”) published at 76 Fed. Reg. 17474 by the Federal Motor Carrier Safety Administration (“FMCSA” or “Agency”), Docket No. FMCSA-2011-0074, advising the public of its intent to request approval from the Office of Management and Budget for a new information collection request (“ICR”) in the form of a series of questionnaires that are part of a Field Operational Test (“Field Test”) designed to assess commercial motor vehicle (“CMV”) drivers’ expectations, attitudes and acceptance of a prototype on-board monitoring system (“OBMS”). FMCSA seeks comments on the need for the proposed questionnaires and ways they can be enhanced, as well as comments on the accuracy of and ways to minimize the estimated burden imposed by those questionnaires. 76 Fed. Reg. at 17475.

OOIDA is a not-for-profit corporation incorporated in 1973 in Missouri with its principal place of business located at 1 NW OOIDA Drive, Grain Valley, Missouri 64029. The more than 152,000 members of OOIDA are independent owner-operators, small-business motor carriers, and professional truck drivers (“small-business truckers”) located in all 50 states and Canada. These groups have a significant presence in the trucking industry: One-truck motor carriers represent nearly half the total number of active motor carriers operating in the United States while approximately 93 percent of active motor carriers operate 20 or fewer trucks.

OOIDA is the largest international trade association representing small-business truckers. The Association actively promotes their views through its interaction with state, provincial and

federal government agencies; legislatures; courts; other trade associations; and private businesses. OOIDA also actively represents the positions of this group on all aspects of highway safety and transportation policy in numerous committees and various forums on the local, state, national, and international level.

Many of OOIDA's members might be required to use any OBMS developed and/or approved by FMCSA as a result of the Field Test, whether use is mandatory or voluntary. Accordingly, OOIDA would like to provide FMCSA with its members' thoughts and concerns about the questionnaires. However, as discussed below, the Notice does not contain draft questionnaires or any specifics about the questions that will be asked. Nor does it provide any information whatsoever about the Field Test the questionnaires will be a part of, the type of OBMS being tested, or a potential OBMS regulatory scheme that is envisioned by FMCSA should the Agency ultimately decide the technology merits a regulatory mandate. Finally, no other documents that might provide such information have been referenced in the Notice or placed in the docket and, so far as OOIDA is aware, FMCSA has never published any other notice that would give the public the missing information. In this void, it is difficult for any commenter, OOIDA included, to address the questionnaires in any meaningful way.

OOIDA also believes that FMCSA has jumped the gun by asking the public about the questionnaires without first or at the same time soliciting comments on the use of OBMS systems generally, the particular OMBS involved here, and the planned Field Test. Had FMCSA done so, OOIDA (and perhaps others) could point out the negative aspects of this type of driver monitoring. For example, an OBMS sometimes penalizes drivers for what are essentially defensive driving maneuvers. An OBMS is distracting and increases the stress level of many drivers who feel that

such data gathering could affect their job security. An OBMS in the truck cab that is a long-haul driver's home away from home invades the driver's privacy rights, possibly in a manner that violates constitutional protections. Finally, the OBMS hardware and software is costly for motor carriers and drivers already strapped for cash. OOIDA would also have identified less intrusive methods for encouraging more safety-conscious behavior by drivers, which do not have all of these pitfalls.

DISCUSSION

I. FMCSA has not provided sufficient background information to allow the public to offer meaningful comments.

FMCSA's request for comments on the questionnaires is not part of a rulemaking proceeding under the Administrative Procedures Act. Rather, as stated in the Notice, FMCSA is seeking public comments regarding an Information Collection Request ("ICR") in accordance with the Paperwork Reduction Act of 1995 ("PRA"). *See* 76 Fed. Reg. at 17474. The PRA was enacted to minimize the burdens placed on individuals, small businesses, and local governments by information requests from the federal government while at the same time maximizing the public benefit from the information collected through better government decisionmaking. *See generally* 44 U.S.C. § 3501. This is done by limiting information requests to those that are "necessary" for the performance of a government agency's functions, that have a "practical utility," and that "improve the quality" of information being collected by agencies. *Id.* at § 3504.5.A.iv. To ensure that a new collection request meets these criteria, the PRA requires an agency to seek public comments before any request is implemented and, after reviewing and fairly evaluating those comments, to submit the request to OMB for approval. *Id.* at § 3506.4.B.c.1.i. It is assumed that the agency will refine the information request based upon the comments received to ensure maximum quality, utility, and clarity. OMB

too seeks public comments before making its own independent determination regarding the need for and utility of the information. *Id.* at § 3507.B & 3508.

An ICR notice not only advises the public of the proposed information collection, but also contains a background section that explains the purpose, scope, expected benefits, and estimated burden of the collection. Although there is no statutory directive dictating the precise amount of information that must be provided in an ICR notice, it is clear that the PRA's goals will not be accomplished unless the notice contains sufficient details to give the public a "meaningful" opportunity to participate in the process. *See* Administrative Procedures Act cases, *e.g.*, *Louis v. Dept. of Labor*, 419 F.3d 970, 976 (9th Cir. 2005); *Gerber v. Norton*, 294 F.3d 173, 179 (D.C. Cir. 2002); *Hall v. EPA*, 263 F.3d 926, 940-41 (9th Cir. 2001); *Mobil Oil Corp v. Dept of Energy*, 728 F.2d 1477, 1490 (Temp. Emer. Ct. App. 1983). The publication of a notice without adequate information, although technically compliant, is fundamentally unfair as it does not give commenters a fair opportunity to offer informed criticism and affect the results. *Id.*

Only a bare-bones, single-paragraph, background statement has been provided by FMCSA in the present proceeding. *See* 76 Fed. Reg. at 17475. It is totally lacking in the type of detail that would allow for meaningful comments. While it states that the questionnaires will be designed to "assess CMV drivers' acceptance on the OBMS being evaluated in the FOT," and "will address the CMV drivers' expectations, experiences, and attitudes toward the OBMS" as they change over time, no draft questionnaires, sample questions, or even categories or types of questions contemplated are provided. Moreover, the little information that is provided is unintelligible. The public is told that there will be pre-study, during the study, and post-study questionnaires; that questionnaires will be used during Baseline, Intervention, and Withdrawal periods; and that the number of estimated

responses varies between 250 and 1,250 depending which questionnaire is involved. *See id.* However, the Notice does not describe the various periods, nor does it explain why 500 participants will provide either 250 or 1,250 responses at various times. Further, the Notice is inconsistent about the number of questionnaires to be used, referring at one point to “four unique questionnaires” and at another point on the same page to a “total of six questionnaires.” 76 Fed. Reg. at 17475.

Given the limited and confusing nature of the information provided, it is impossible for commenters to determine and advise FMCSA, as required by the PRA, whether the questionnaires are necessary for the functioning of FMCSA or whether they have practical utility. Nor can commenters determine and advise the agency whether the requests are written using plain, coherent, and unambiguous terminology, understandable to the CMV drivers who must respond, or provide suggestions about how even essential questionnaires might be improved to achieve maximum practical utility. 44 U.S.C. §3506.B.I.d.D. This concern should not be taken lightly. Improperly constructed questionnaires could generate inaccurate statistical data that could then be used to justify an unwarranted OBMS mandate.

This Notice also contains an estimate of the annual burden imposed by the questionnaires and asks for comments on the accuracy of that estimate and ways it could be minimized without compromising the quality of the collected information. 76 Fed. Reg. at 17475. Here again, absent draft questionnaires or a comprehensive explanation of the content of the questionnaires, there is no possible way for a commenter to either evaluate the accuracy of FMCSA’s estimates or suggest ways to minimize the burden.

Equally problematic is the fact that the Notice treats the questionnaires as a stand-alone

information request,¹ notwithstanding the fact that the questionnaires are an integral component in the FMCSA's Field Test of an OBMS. Virtually no information is provided about either the Field Test or the OBMS being tested. The entire description of the test and the system is as follows:

The goal of the OBMS and safety research study (FOT) is to determine whether on-board monitoring and feedback will reduce at-risk behavior among CMV drivers and improve driver safety performance. The purpose of the questionnaire portion is to assess CMV drivers' acceptance on the OBMS being evaluated in the FOT.

76 Fed. Reg. at 17475. There are no details regarding the type of OBMS being tested, how the OBMS was developed, why FMCSA has focused on this particular method for improving driver behavior, or what research findings or studies FMCSA relied upon to support its apparent belief that an OBMS will improve driver safety performance. Similarly, there are no details regarding the nature or scope of the Field Test and the limited information provided again seems inconsistent. Specifically, while FMCSA estimates 500 CMV driver participants, it inexplicably estimates only 250 responses to the pre-study and exit questionnaires and 1,250 responses to the other questionnaires. 76 Fed. Reg. at 17475. Thus, here too, given the dearth of information, a commenter has no way to place the questionnaires in their proper context to advise whether they are or are not a necessary or useful part of the Field Test, and whether they are or are not necessary for the functioning of the agency.

Accordingly, if FMCSA wants to proceed with the questionnaires as part of the proposed Field Test, it should first issue a supplemental notice providing commenters with the background information that will allow them to fairly evaluate and address the need for and practical utility of

¹ An example of a stand-alone ICR would be the annual and quarterly motor carrier financial and operating statistics collected by DOT (Forms M and QFR), which are not tied to any particular agency project or rulemaking.

the questionnaires. That notice should also include draft questionnaires or, if those aren't yet available, detailed descriptions of the types of questions that will be asked. The additional information is essential if the public comment process is to help improve the quality and clarity of the questions asked.

II. FMCSA should seek comments on the merits of on-board monitoring systems.

As noted above, the ICR here is not a stand-alone request for information. Rather, the questionnaires are one small component in a project aimed at the development of an OBMS to be installed in the cabs of trucks used by CMV drivers. FMCSA has not indicated its ultimate goal here – i.e., whether it simply intends to encourage the use of the OBMS by motor carriers and drivers, whether it intends to propose regulations that would require a limited population of motor carriers with poor safety records to install and use such systems, or whether it intends to make their use mandatory for all motor carriers. It is reasonable, however, to assume that FMCSA is studying and testing on-board monitoring systems (OBMS) because it is considering some regulatory mandate. As a practical matter, if regulation has never been contemplated, then the development of such systems could be left entirely to private industry.

A review of FMCSA's historical treatment of electronic on-board recorders ("EOBR") suggests that, even if regulation is not being contemplated at the present time, FMCSA would over time progress through the other various options to that stage. FMCSA's predecessor agency, the Federal Highway Administration, allowed the usage of EOBRs to record drivers' duty status as an alternative to handwritten paper logbooks to demonstrate compliance with hours-of-service requirements, but their usage was entirely voluntary. *See* 50 Fed. Reg. 15269 (April 17, 1985). Then, in January of 2007, in a rulemaking now being challenged in the courts by OOIDA and several

of its members, FMCSA proposed mandatory EOBR usage for motor carriers with a history of serious hours-of-service rule violations, and provided incentives for use by other motor carriers. 72 Fed. Reg. 2340 (Jan. 18, 2007). Finally, in February of 2011, before the fate of that limited-application rule was fully resolved, FMCSA proposed a much broader, universally applicable EOBR rule that would require the majority of interstate carriers that currently use paper logbooks to document drivers' hours-of-service to use EOBRs instead. 76 Fed. Reg. at 5537 (Feb. 1, 2011).

Given the realistic possibility that FMCSA's treatment of OBMSs will evolve in a similar fashion, whatever FMCSA's present intent, the agency should seek public input at this juncture regarding the overall need for and practical utility of such systems, instead of limiting public participation to the much narrower issue of the propriety of the use of questionnaires during a Field Test of an OBMS. It simply does not make sense to evaluate the merits of and need for the questionnaires when no comparable determination has been made that the OBMS being tested is itself worthy of FMCSA's time and resources.

Indeed, a rulemaking to evaluate the possible regulation of an OBMS seems to be the procedure contemplated by the PRA. That statute specifically provides that, where a new information collection is related to a proposed rule, the ICR notice should be included in the notice of proposed rulemaking. 44 U.S.C. § 3506.4.B.i.c.2. This is the procedure most commonly followed by FMCSA. Two recent examples include the Certified Medical Examiner (CME) and Electronic On-board Recorder (EOBR) rulemakings, both of which included ICR components. *See, e.g.*, 76 Fed. Reg. 5537, 5551 (Feb. 1, 2011); 73 Fed. Reg. 73129, 73140-73142 (Dec. 1, 2008).

Unless FMCSA has absolutely no intention of regulating OBMSs in any manner, OOIDA would therefore recommend that the Agency issue an advance notice of proposed rulemaking

detailing the various regulatory options being considered in connection with the OBMS project. Taking this optional step now to obtain and consider public input on key issues pertaining to treatment of OBMS usage once a prototype is fully developed could avoid implementation problems later. Indeed, early public input would allow FMCSA to better evaluate the need for such systems and related regulations, and to also determine whether it should devote more resources to this or to other methods for enhancing driver safety.

III. On-board monitoring systems are problematic in a number of ways.

FMCSA has not asked for comments on the OBMS system being tested. Moreover, it would be impossible for OOIDA to offer a critique of the specific OBMS being tested because, as noted above, FMCSA has not provided any information whatsoever about that system or even indicated where such relevant information might be found. Nevertheless, OOIDA thinks it important, given the contemplated Field Test of an OBMS, to at least briefly note the many problems inherent in any such system.

Through independent research we found two documents from December of 2007 on the FMCSA website pertaining to an OBMS project: a Tech Brief and a Final Report (“2007 Final Report”), both captioned “Onboard Monitoring and Reporting for Commercial Motor Vehicle Safety” that discuss a two-phase research project for the investigation and development of a prototype OBMS with a “hardware and software suite that allowed for online measurement of a set of driving characteristics that are indicators of unsafe driving behavior.” See www.fmcsa.dot.gov/facts-research/research-technology/tech/Onboard-Monitoring-and-Reporting-for-CMV-Safety-Tech-Brief-Dec2007.pdf and www.fmcsa.dot.gov/facts-research/research-technology/report/Onboard-Monitoring-and-Reporting-for-CMV-Safety-Final-Report-Dec2007.pdf. The prototype seems, at

a minimum, to monitor driving speed, following behavior, fatigue, and possibly attention/intention through the use of sensors - including video cameras inside and outside of the truck cab- and provides both visual and auditory warnings and alerts to drivers. Feedback would be supplied to drivers in both real-time and via carrier management at a later time, with an emphasis on real-time online feedback wherever permitted by the OBMS technology.

Since those documents were issued more than three years ago, we don't know whether the present Field Test is the one referenced in those documents. Nor do we know whether the OBMS now being tested uses the same equipment or monitors the same behaviors as presented in those documents. Nevertheless, the features of the system described in those documents help to pinpoint some of the real-world concerns raised by any such monitoring system. These include:

- The monitored behaviors that the OBMS is designed to eliminate, such as increased speeds, lane departures, and sudden applications of the brakes, often reflect defensive driving maneuvers required to avoid obstructions in the roadway (e.g., a deer, other car, poor road conditions, etc.). Because an automated system cannot detect the reason for monitored behaviors, observant drivers could be penalized for responding to dangerous situations created by other drivers.
- An OBMS adds to the instrumentation on a CMV dashboard that must already be monitored by the driver. The real-time online feedback includes distracting bells, whistles, and warnings that divert a driver's attention away from the primary driving task at hand to what he is being told to do or not do by the system. Reliance upon the system could take the place of independent judgment, based upon years of driving experience.
- The "big brother is watching" situation created by the presence of an OBMS, especially video equipment that measures eye closures and movements supposedly indicating fatigue or inattention, adds an unprecedented level of driver monitoring and stress in the truck cab. Drivers are rightfully concerned that delayed feedback available to carrier management creates the

opportunity for harassment by carriers and even job loss.²

- In the event of agency enforcement action against a driver or a lawsuit growing out of an accident or other incident, information collected by the OBMS could be used by insurance companies and courts to establish liability on the part of the driver.
- An OBMS in the truck cab that serves as the long-haul driver's home while on the road might violate the right of privacy protected by the U.S. Constitution. Even though pervasive trucking regulation diminishes a truck driver's expectation of privacy, the government's right to invade the sanctuary of the truck must be structured to ensure the actions are necessary to achieve regulatory safety goals and are limited in a way that provides a constitutionally-adequate substitute for the warrant required by the Fourth Amendment. *New York v. Burger*, 482 U.S. 691, 702-03 (1987); *Donovan v. Dewy*, 452 U.S. 594, 600 (1981).
- An OBMS requires the purchase, installation, and continuous monitoring of costly high-tech equipment by motor carriers and drivers. These costs may well outweigh the safety benefits produced depending on motor carrier size.

IV. The desired safety improvement may be more effectively obtained through less costly and more efficient means.

The 2007 Final Report located by OOIDA shows that FMCSA was aware of some of the negatives discussed above associated with an OBMS system. However, there is no indication in either the Notice or the 2007 documents that FMCSA performed any type of cost-benefit analysis to determine whether an OBMS would still be justified in light of those negatives. Indeed, there is no mention of the significant costs to motor carriers or drivers for purchasing, installing, and continuously monitoring the information provided by the system. Nor do any of the available documents indicate that the Agency has calculated or assigned a value to the behaviors being addressed, to the likely reduction of those behaviors, or to the costs associated with the stress and

² To the extent that this OBMS is measuring fatigue and compliance with hours-of-service regulations, it is incumbent upon FMCSA to ensure that the system is not being used to harass vehicle operators. 49 U.S.C. § 31137(a).

other adverse consequences associated with the use of such systems. OOIDA believes that a proper cost-benefit analysis would show that FMCSA's research of OBMS for CMV drivers is very likely misplaced.

There are already a plethora of state laws on the books, applicable to CMV drivers, aimed at specific unsafe behaviors such as speeding and following too close, and at unacceptable behaviors falling under the rubric of inattentive or negligent driving practices. Thus, Agency resources may be better devoted to something other than development of safety technologies with limited appeal for many in the industry. Second, there are other more efficient, less intrusive, and less costly ways to encourage safe driving habits and reduce the number of truck-involved crashes.

One alternative strongly and consistently supported by OOIDA is more stringent entry-level CMV driver training and licensing requirements that include the use of mandatory commercial learners permits (CLP) and a graduated commercial drivers license (CDL) program to ensure better trained, more safety-conscious drivers. *See* OOIDA Comments filed in FMCSA Docket No. 2007-27748 (May 23, 2008) and Docket No. 2007-27659 (July 9, 2008). In contrast to an OBMS program that could potentially monitor most CMV drivers, these programs would focus primarily on entry-level drivers, a group that represents "more than 3 times the risk of crashes than their more experienced counterparts." ATA Whitepaper, *Issue: Truck Driver Hours of Service Rules (HOS)* (Nov. 2010), p.2. Training and licensing of relatively new CMV drivers could be designed to emphasize avoidance of the very behaviors being addressed by the prototype OBMS. The need for carriers to invest in high-tech equipment and monitoring programs would be eliminated. At the same time, the programs are more likely to yield positive safety benefits because they are focused on the groups most in need of additional attention.

OOIDA has also pointed out on a number of occasions that drivers are less likely to continue driving when fatigued if the condition that most commonly leads to these behaviors are eliminated. Drivers often continue driving when they need a break because they must meet delivery schedules set by shippers and carriers that are unrealistic given the excessive time (2 to 8 hours) frequently spent waiting to load/unload. As confirmed in a recent GAO study, drivers who use all allowed hours of daily on-duty time often do so because of delays in loading or unloading that are beyond their control. GAO Report, *COMMERCIAL MOTOR CARRIERS: More Could Be Done to Determine Impact of Excessive Loading and Unloading Wait Times on Hours of Service Violations*, GAO-11-198 (Jan. 26, 2011), pp. 12, 14, at www.gao.gov/products/GAO-11-198. Indeed, the causes of detention – facility limitations, product not being ready for shipment, poor service, and scheduling practices – are all within the shipper or receiver’s control. *Id.* at 14. If those delays can be eliminated or at least significantly reduced, the pressure to continue driving even when tired would be minimized.

V. Participants must fairly represent the majority of CMV drivers who have not been subjected to electronic monitoring.

In the Notice, FMCSA has indicated that the Field Test will have 500 participating drivers, a minuscule fraction of the millions of CMV truck drivers estimated to be on the roads today. Thus, error rates can be significant unless those participants fairly and accurately represent the overall population that could potentially be required to use an OBMS. Since this population is composed overwhelmingly of drivers who have never before been subjected to any type of electronic monitoring, it is critical that most participants come from that group. A group already accustomed to other types of electronic monitoring is likely to have very different attitudes and expectations

regarding such systems.

OOIDA cannot emphasize this point strongly enough. It appears from the 2007 Final Report that only six drivers were consulted at the conceptual design stage about their opinions about the use of OBMS and these six were not at all representative of most drivers. 2007 Final Report, at 57. To the contrary, the drivers questioned were all employee drivers working for the same mid-sized carrier, all operated within a several hundred mile range, and they never or rarely slept in their cabs. *Id.* Even more important for present purposes, these drivers were already driving trucks equipped with speed governors and the XATA monitoring system, a system that is promoted as an electronic fleet management and fleet intelligence system, which not only optimizes fleet utilization but addresses safety and security concerns. 2007 Final Report, at 32, 59-60. Consequently, it is quite likely that their opinions about the additional on-board monitoring system being discussed, including their general acceptance of most aspects of the system, are not representative of the views of other drivers, including the majority of OOIDA's owner-operator members who operate in a very different milieu.

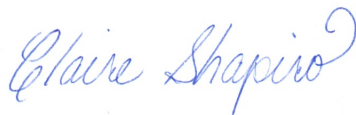
Accordingly, the results of a Field Test cannot and should not be relied upon by FMCSA to determine whether or how to encourage/regulate the use of an OBMS unless the Agency takes care to assemble a more diverse sample of drivers that not only reflect the various segments of the motor carrier industry, but who have for the most part not been subjected to electronic monitoring by their motor carriers.

CONCLUSION

OOIDA supports FMCSA's efforts to foster safer driving habits among CMV drivers. However, for all the reasons discussed above, OOIDA believe that FMCSA would accomplish more

at less cost to industry if it redirected its resources and efforts aimed at development of OBMS to better training for entry-level drivers and efforts to reduce the detention situation that contributes to driver fatigue. These alternatives would be a more productive and less costly method of achieving improvements to CMV safety. To the extent that FMCSA nevertheless decides to go ahead with the proposed Field Test, it is critical that the Agency select participants that fairly represent the majority of drivers who have never before been subjected to electronic monitoring.

Respectfully submitted,



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