I. INTRODUCTION

The American Trucking Associations, Inc. (ATA) submits the following comments to the Federal Motor Carrier Safety Administration’s (FMCSA) Notice of Public Proposed Rulemaking on Electronic Logging Devices and Hours of Service Supporting Documents.¹

ATA is the national trade association representing the American trucking industry.² ATA is vitally interested in matters affecting the nation’s trucking fleet, including supporting documents requirements and the adoption of devices to record drivers’ hours of service.

II. SUMMARY OF ATA’S POSITION

ATA supports laws and regulations mandating the installation and use of Electronic Logging Devices (ELD) for recording drivers’ hours of service. To this end, ATA advocated for the MAP-21 provision mandating a rulemaking to require ELDs. ATA is confident that such devices will improve compliance with the hours of service regulations. Also, FMCSA data generated in 2010 demonstrated a strong correlation between compliance with the hours of service regulations (in place at that time) and lower

¹ 79 Federal Register at 17656
² ATA is a united federation of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interests of the trucking industry. Its membership includes more than 2,000 trucking companies and industry suppliers of equipment and services. Directly and indirectly through its affiliated organizations, ATA encompasses over 34,000 companies and every type and class of motor carrier operation.
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ATA urges FMCSA to move swiftly to issue a final rule mandating ELD use, but not so swiftly as to make the rule vulnerable to inevitable legal challenges. ATA recognizes that the agency must conduct research and analysis to ensure that a final rule is judicious and defensible.

Though ATA supports this proposal we have a number of suggestions for how it can be improved that will be discussed in this document, as follows:

- The grandfather period for existing devices is too short, will penalize early adopters, and have a chilling effect on voluntary adoption.
- The proposed location provision standards are acceptable for enforcement purposes, but employers must be assured that they can be allowed to monitor vehicle location more precisely in the interest of security, safety, and efficiency.
- The proposed use of CDL identifiers is an improvement over the agency’s prior proposal, carrier-assigned driver identification numbers, but other mechanisms should be explored.
- ATA disagrees with FMCSA’s suggestion that employers should not be permitted to make ELD edits of any kind without driver approval. In some cases it’s appropriate, especially when correcting for errors that don’t impact compliance with driving or on-duty time rules.
- FMCSA’s proposed supporting documents requirements are excessive and unnecessary. ELDs will help ensure a much higher degree of compliance and will all but completely eliminate the need for supporting documents.
- FMCSA should consider ways to minimize the challenges the rules will prevent for providers of rented and leased vehicles, and their customers.

In addition to mandating ELDs, FMCSA should consider ways to actively promote voluntary adoption of the devices. This is necessary given the known benefits of ELD use and the fact that a final deadline for mandatory device adoption is a few years away. Realistically, it will probably take the agency at least one full year to issue a final rule and the subsequent deadline for device adoption will likely be two years thereafter. In other words, fleets will not be required to install these devices for at least three years. In fact, delays in the regulatory process and potential litigation over the rule could delay an adoption deadline even further.

In the interim, fleets that voluntarily adopted ELDs find they are sometimes placed at a competitive disadvantage as a result. Non ELD-equipped fleets simply aren’t held to the same standard of compliance with the hours of service rules as ELD-equipped fleets. For instance, an ELD-equipped motor carrier may decide not to accept a contract for a run that would require its drivers to come close to the legal driving time limit. Though a competitor using paper logs may choose to accept the contract knowing that — on days when the drivers might exceed the limit (albeit only by a few minutes) - they can take advantage of the 15 minute increments of paper logs (e.g., record the trip as though it were in compliance). Also, ELD equipped fleets find they are more likely to be cited for minor violations during
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roadside inspections because the devices are so precise and since the violations are more apparent than they would be on a paper log.

These inequities ultimately penalize early adopters and will discourage other fleets from installing ELDs before the final deadline to do so, especially under the new, more restrictive, hours of service rules. Since FMCSA is proposing to mandate ELDs, presumably the agency would favor early, voluntary adoption. To address a chilling impact on voluntary adoption, FMCSA should consider providing the following incentives:

- Extend the period for grandfathering of devices meeting existing standards for automatic on-board recording devices (AOBRDs);
- Reduce the violation weight in the Compliance, Safety Accountability (CSA) Safety Measurement System (SMS) assigned to minor hourly and false log violations committed by ELD users;
- Adjust the “measure” (ratio of violations per inspection) in the SMS hours of service measurement category by providing additional credit for each inspection;
- Provide relief from enforcement of the new HOS rest break requirement given that compliance with this requirement is more heavily scrutinized when an ELD is used (e.g., grace period for breaks beginning just minutes after the 8th hour of on-duty time);
- Change FMCSA’s processes to require that during compliance reviews and reviews of safety management plans, records sampled to measure compliance mirror the percentage of the fleet that is equipped with ELDs.

III. THE PROPOSED GRANDFATHER PERIOD FOR EXISTING DEVICES SHOULD BE MODIFIED

ATA is concerned that the grandfather period for existing devices, two years after the industry-wide ELD deadline, is too short. Fleets that have voluntarily adopted devices to electronically monitor drivers’ hours of service compliance under the existing automatic on-board recording device standards have little assurance that their devices will not become obsolete in as little as five years. In the subject notice, FMCSA contends that many of the devices in use today, especially those manufactured in the last few years, will be capable of being brought into compliance with the new standards with a relatively simple and inexpensive software upgrade. In other words, according to the agency, much of the hardware sold recently will not automatically become obsolete. However, fleets have their doubts and will not know if this will be possible until after the final rule is published.

To come into compliance with new ELD specifications, existing equipment must be made capable of sophisticated data transfer methods. If the ELD has a port to transfer data to a printer, the carrier using the device could choose to purchase ruggedized external printers and corresponding consumables (e.g.,

3 As discussed above, a final rule is anticipated in no less than one year, with the final adoption deadline two-years later. The grandfather period would close two years after that, for a total of five years.
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paper and ink). Even then, the ELD software would need to be made capable of printing a Quick Response (QR) code.

ELDs that don’t have printing capabilities would need to be made capable of the alternative electronic data transfer methods which may be beyond the devices’ hardware capabilities. For instance, some devices don’t have the proper display capabilities to properly show a QR code. Others don’t have the internal electronics to provide Bluetooth transfer. Finally, since the vast majority (perhaps all) lack internal Transfer Jet technology, to be capable of this type of transfer will require external (e.g., tethered) hardware. This hardware will come at an additional expense and can only be used if the ELD has the means to connect to it (e.g., a port).

Moreover, neither FMCSA nor the industry suppliers can say with any confidence the total number or types of devices in use today, or being marketed today, which will be capable of meeting the new requirements. In fact, they will be unable to so until the final rule is published. Even for those that will be capable of being upgraded, FMCSA cannot properly estimate the cost of having to do so. Given the uncertainty that their hardware may become obsolete or that a mandatory system upgrade will be costly, fleets will undoubtedly have second thoughts about making an early investment in ELDs. Further, safe, responsible carriers - proud early adopters – will be left to wonder if they are ultimately being penalized for their progressive investment.

To remedy this problem, FMCSA should revert to the grandfather provision suggested in the agency’s 2007 Notice of Proposed Rulemaking (NPRM) on ELDs\(^4\) that preceded the subject SNPRM. In that NPRM, the agency proposed that carriers be permitted to use devices meeting the existing requirements for automatic on-board recording devices (AOBRDs) for the remainder of the service life of the vehicles in which they are installed.

This suggestion was reasonable on a number of fronts. First, it would continue to encourage voluntary adoption and not penalize early adopters. Also, it would ensure that the grandfathered devices could only be used for a finite period, the life of the vehicle.

IV. THE PROPOSED LOCATION PRECISION REQUIREMENTS ARE REASONABLE, WITH CAVEATS

The proposed precision requirements for monitoring vehicle location, no closer than one mile while on-duty and ten miles while off-duty, are quite reasonable. These requirements should stave off any concern by drivers that records available to law enforcement during roadside inspections will present an intrusion on their privacy. This is especially true since this level of near (but not precise) location monitoring will prevent law enforcement from knowing the exact location a driver has recently visited. In some circumstances respecting this confidentiality may be important, such as when a driver visits a

\(^4\) 72 Federal Register at 2340
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specialist for a medical condition. Provided that law enforcement can still reasonably verify hours of
service compliance, the needs of both parties will be met.

However, for a number of important reasons it is necessary to retain the employer’s capability to
monitor vehicle location more precisely, if they so choose. It is important that FMCSA clarify that it does
not contemplate restricting motor carriers from monitoring location more precisely. Motor carriers rely
on such precision for safe and efficient operations. For instance, fleets use such monitoring to guide
drivers around congested areas, manage delivery and pick-up times, to avoid non-truck routes (e.g., low
over passes) and the like.

Such precision is also critical for ensuring the security of the vehicle and its cargo - which the fleet often
owns or, at a minimum, is responsible for protecting. Removing a carrier’s ability to closely monitor the
location of equipment and its load would be akin to laying out a welcome mat for cargo thieves. This is
especially true for high value cargo such as electronics, pharmaceuticals, and tobacco products. The
street value for a load of this nature can run in the millions of dollars, especially with respect to
pharmaceuticals and tobacco products.

Moreover, it is a motor carrier’s logical right to know where its equipment is located at all times. In
addition to addressing security concerns, vehicle location monitoring is necessary to facilitate other
important functions. For instance, fleets use real-time location monitoring to route trucks around areas
of growing congestions (e.g., due to crashes or roadwork). Also, precise tracking and routing is
necessary to avoid the hazards of non-truck routes such as low overpasses. Finally, motor carriers must
verify if drivers’ personal conveyance movements, while off-duty, meet the terms under which they are
authorized by the carrier. For instance, some carriers will authorize personal conveyance but only to
specific locations (e.g., a restaurant or hotel) or only for certain distances (e.g., no more than 50 miles).

Precise location tracking, and especially mileage in each state, is a requirement for International
Registration Plan and International Fuel Tax Agreement compliance. To participate in these mandatory
programs, fleets must keep a record of and report the mileage they have operated in each state. Less
precise monitoring, (e.g., no closer than 10 miles) would result in erroneous reporting of the mileage
that was covered in each jurisdiction. This is especially true for fleets that frequently operate near state
borders (e.g., Washington, D.C. metropolitan area, Kansas City).

These needs undoubtedly outweigh the impact to driver privacy. Accordingly, in the interests of safety,
security and efficiency, the rights of motor carriers to monitor their equipment and cargoes precisely
must be protected and retained.
V. ATA SUPPORTS THE PROPOSED RECORDING OF PERSONAL CONVEYANCE AND YARD MOVES

ATA welcomes and supports FMCSA’s proposed treatment and recording of personal conveyance and movements within closed facilities (i.e., yards). For many years, FMCSA has acknowledged that trips from home to work (and vice versa) and to restaurants in the vicinity of en route lodgings may be considered off-duty time. However, the NPRM that preceded the subject SNPRM called for ELDs to record this time as driving time, with an annotation noting the time was actually spent in an off-duty status.

Similarly, under the process offered in the NPRM, movements within a yard would have to be annotated as on-duty/not driving time. Because ELDs automatically track vehicle movement, recording of these inconsequential repositionings would be captured but erroneously reflected as on-duty/driving status. FMCSA has long held that movements by a worker exclusively within a closed facility should not be considered on-duty/driving time. 5 However, under the previously proposed process, if a mechanic, dock worker, or fueling agent were to move a truck a short distance within a closed facility, the ELD would track such movement as driving time and likely attribute it to the driver who is usually assigned to that vehicle. In some cases a short movement of this sort could mistakenly suggest that the driver had violated the 11 or 14 hour rules.

FMCSA’s previously proposed approach would have been extremely problematic. First, it would have resulted in erroneously system notifications of drivers exceeding driving time (11 hour) or driving window limits, due to yard and personal conveyance movements. Motor carriers would have then had to reconcile each one of these events in their systems against drivers’ annotations to identify true violations. This approach would have also unnecessarily complicated enforcement efforts, both during roadside inspections and compliance reviews.

FMCSA’s modified proposal in the subject SNPRM is reasonable and appropriate. Under it, carriers will have a record of all vehicle movements but will be able to distinguish those that should be legitimately recorded as driving time from those should not. Further, it will help law enforcement identify true driving time violations, while at the same time providing visibility to yard and personal conveyance movements in the event they are unreasonable or excessive. Such visibility will help alert law enforcement to potential abuses of these provisions for additional investigation, when warranted. In short, FMCSA’s modified proposal represents a reasonable middle ground between ensuring that such events are recorded but not unnecessarily complicating efforts to verify legitimate driving time compliance.

5 Guidance to 395.2 Question 9 available at http://www.fmcsa.dot.gov
VI. THE PROPOSED USE OF CDL NUMBERS FOR DRIVER IDENTIFICATION IS AN IMPROVEMENT

ATA welcomes FMCSA’s proposal to require the use of commercial driver’s license (CDL) numbers to create unique driver ELD identifiers. This suggestion represents a dramatic improvement over the process FMCSA proposed in the 2011 NPRM - to have employers create and assign driver identification numbers. That proposed process presented enormous potential for fraud. For example, there would be nothing to prevent a driver who had reached his weekly on-duty time limit from simply “borrowing” an identifier from another driver, especially one who was on vacation or other long-term leave (e.g., workers’ compensation). Similarly, an employer could create identifiers for fictional drivers and allow real drivers to use them.

The process proposed is better, especially from an enforcement standpoint. For example, under the previous proposal a roadside inspector would have no viable means of ensure that a driver was using his employer-assigned identifier and not another one. However, the newly proposed process would allow inspectors to validate the identifier by comparing it against the CDL in the driver’s possession. Similarly, a safety investigator validating identifiers during a compliance review could compare them against license numbers recorded in active driver qualification files to verify that they are unique and assigned only to active drivers.

While the use of CDL numbers is an improvement over the previous proposal, FMCSA should consider alternatives that accomplish the same objectives and include the same protections against fraud. For instance, some employers assign driver identification codes which, when entered into the ELD, cause the ELD to display the driver’s name. During a roadside inspection, an enforcement officer can simply verify the driver’s name as shown on the display by comparing it to the driver’s license. An alternative process of this sort would prevent motor carriers and suppliers from having to implement new systems to assign identifiers based on CDL numbers as proposed. Doing so would present an inconvenience and a burden, without any real benefit.

VII. FMCSA’S PROPOSED CERTIFICATION PROCESS IS REASONABLE

In the subject SNPRM, FMCSA has proposed that manufacturers test and self-certify that their devices meet certain technical standards. Also, the agency has committed to conducting periodic verification testing to validate manufacturers’ claims. Though this proposed process might not be as robust as requiring third party or government certification of each device on the market, it represents a very reasonable and preferable alternative, for a host of reasons.

Ultimately, verification of each device by the government or a third party would be ideal. In fact, it may be an option in the long term. To require such a process in the short term, however, would risk delaying certification of devices, adoption of them, and potentially, an industry-wide mandate. As the mandate
deadline draws nearer, a host of manufacturers offering a variety of different devices will likely surface to serve the new need. At the same time, fleets will rush to install ELDs in advance of the deadline. This rush will be made worse by the fact that many ELD providers will need several months after publication of the final rule to develop, manufacture, and test devices to meet the new specifications. The delayed availability of compliant devices will create a time crunch, leaving suppliers just a few remaining months before the deadline to market, sell and distribute them. Requiring a government or third party certification process, from the outset, would simply make matters worse and would likely delay industry-wide ELD adoption.

This set of circumstances presents a public policy dilemma. Would it be better to delay the mandate to more carefully verify that devices being offered are robust and compliant? Or to accelerate the mandate by implementing a process that would provide reasonable assurances that the devices are acceptable? ATA believes the latter is the correct approach.

Self-certification and testing by manufacturers and some level of verification by FMCSA will provide both the industry and the agency with reasonable assurance that devices being offered are compliant. In fact, knowing that FMCSA may verify their certification claims will have a powerful impact on manufacturers. After all, who would want to offer a non-compliant device under the potential threat of being called-out by the agency, losing market credibility, and having to make a potentially huge financial investment to reengineer their device? For this reason, and in the interest of accelerating industry-wide devices adoption, ATA supports self-certification, which presents the proper balance between device verification and speedy device adoption.

VIII. EMPLOYERS SHOULD BE PERMITTED TO MAKE ELD RECORD EDITS

In the subject notice, FMCSA proposes that edits to a driver’s ELD records only be made by the driver or, if initiated by the motor carrier, later approved by the driver. While the agency’s reasoning for this process is understandable in some respects, it will complicate compliance and enforcement, especially with respect to minor, inconsequential corrections. Also, it could raise the potential for fraud.

In the majority of cases when edits do need to be made, they are non-substantive. For instance, if a driver begins his shift at 6 a.m. and punches a time clock but fails to log into his ELD at that same time, the device’s record will erroneously reflect that the driver’s on-duty period did not begin until 7:00 a.m. when the driver began his trip and the device first detected vehicle movement. In such a case it would be reasonable for the employer to adjust the ELD record to match the time clock records. This is especially the case since it would ultimately help prevent the driver from trying to claim the availability of additional driving time (e.g., after his “true” 14 hour driving window closes at 8 p.m.). Further, it would clear up a potential log falsification episode that could otherwise be identified by an internal auditor routinely verifying hours of service recordkeeping compliance or an FMCSA safety investigator.
To require the driver in this scenario to approve the edit, as FMCSA has proposed, would be illogical. The employer has a record of the true start of the driver’s on-duty time, is trying to better ensure compliance with hours of service recordkeeping requirements, and is seeking to limit driving time, not increase it. Logically, FMCSA should want motor carriers to be able to make such corrections, unencumbered by the need to obtain driver approval.

Requiring driver acceptance of such edits presents a number of problems. FMCSA must consider what an employer in such circumstances should do if a driver refuses to accept the changes. Should they let the record stand? Similarly, what if the erroneous record is identified during an internal review weeks or months after the fact and the driver cannot be contacted for approval because he has since left the company?

For these reasons, and because the motor carrier is ultimately responsible for maintaining accurate records of duty status, FMCSA should permit motor carriers to make edits to drivers’ records of duty status. At a minimum, the agency should allow changes that would not disguise driving time violations or otherwise make such violations possible. Minor recordkeeping errors that don’t reflect driving time violations comprise the vast majority of hours of service violations. To allow motor carriers to correct them, unhindered by the need to seek driver approval, would more efficiently help both motor carriers and enforcement officials focus on those comparatively few discrepancies that reflect material fraud (i.e., false logs) and driving time violations.

IX. THE PROPOSED DATA TRANSFER OPTIONS ARE REASONABLE

In the subject SNPRM, FMCSA proposed several options for transferring ELD data to law enforcement officers during roadside inspections, more than were suggested in the NPRM. These options are welcome since they provide flexibility to accommodate a marketplace comprised of diverse devices. Further, such flexibility will give equipment manufacturers latitude to develop innovative new products that may better help monitor, record, and report hours of service compliance.

The set of data transfer options proposed represents a balance between the need to facilitate law enforcement access to, and verification of, records of duty status and the need to avoid overly prescriptive requirements for devices. Such an overreach would prevent motor carriers from using other devices with ELD capabilities that possess additional functionality. These additional functions, such as speed monitoring, serve FMCSA’s and the trucking industry’s overarching goal of improving highway safety and, as such, their use should not be discouraged.

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Some groups have urged FMCSA to require that all ELDs be capable of producing printed (hard copy) records of duty status. However, doing so would be illogical, costly, and unnecessary. As the agency is aware, our society is growing increasingly paperless. Boarding passes, currency transfers, and even retail store receipts are provided electronically. By the time the final deadline for device adoption arrives, paper records will be even rarer. To require them of ELDs would not only run counter to this trend, but would cast FMCSA and state enforcement agencies as being out of touch and behind the times.

In addition to being unprogressive, a requirement that ELDs be capable of producing printed records would add expense and affect device reliability. On top of the manufacturing cost to add printing capabilities to the devices, fleets would have to ensure that each truck had, at all times, an ample supply of paper and ink (if applicable). Also, the addition of a printing mechanism will inevitably increase the potential for device malfunction.

Though at least one manufacturer markets a device with internal printing capability, the vast majority do not. For them to offer internal printing capability would require completely redesigning their devices (hardware). As an alternative they could offer external printers, but doing so would present a far different value proposition. To survive the environment of a truck cab (e.g., temperature, shock), an external printer would need to be “ruggedized” at substantial additional cost.

In addition to adding cost, requiring paper printers would put a chilling effect on voluntary ELD adoption in advance of an industry-wide mandate. As discussed above, to justify a short grandfather period (i.e., two years) for ELD-like devices in use today, FMCSA contended in the SNPRM that the majority of devices manufactured in the last few years will not automatically become obsolete. Instead, the agency said, they will be capable of being brought into compliance with a relatively inexpensive software upgrade. However, if FMCSA were to require all devices to be capable of producing paper printouts, the “software upgrade” claim would no longer be true. For all but one device on the market today, fleets would have to purchase ruggedized external printers that could be tethered to their ELD-like devices. Those using devices that don’t have the means to communicate with a printer (e.g., a port) would simply be out-of-luck and would find themselves holding a collection of obsolete hardware.

ATA recognizes and appreciates law enforcement’s interest in facilitating roadside verification of hours of service compliance. No reasonable stakeholder seeks to deliberately limit or constrain such review. However, adding cost, hindering voluntary early adoption, and otherwise embracing a dying medium is the wrong approach. Instead, the industry, law enforcement, and the government must work together to find other ways to facilitate the overarching goal. In doing so, all parties must answer a broader question: Does it make more sense to impose a prescriptive data transfer requirement on close to 3,000,000 trucks and drivers, or to require that approximately 13,000 certified commercial motor vehicle enforcement officials have the means to accept records electronically by one of several required options?
X. FMCSA’S PROPOSED SUPPORTING DOCUMENTS REQUIREMENTS ARE UNREASONABLE

ATA supports FMCSA’s efforts to more clearly define the “number, type and frequency” of documents needed to verify hours of service compliance as required by Section 113 of the Hazardous Materials Transportation Act of 1994 (HMTA). Furthermore, ATA appreciates the importance of streamlining this overly burdensome process, especially given the advent and adoption of technological innovations that offer more efficient solutions. It is ATA’s opinion however, that the proposed supporting documents requirements in the subject notice are still excessive and unnecessary and do not completely fulfill the Congressional mandate found in the HMTA which stipulates that regulations addressing the collection and retention of these documents come at a “reasonable cost” to motor carriers.

ATA offers the following thoughts, suggestions, and explications regarding the supporting documents portion of the SNPRM:
- Relief from retention of documents used to verify driving time is necessary and appropriate;
- The elimination the previously proposed Hours of Service Management System requirement is welcome;
- The elimination of the previously proposed requirement that motor carriers certify the absence of supporting documents is good public policy;
- The “Self-Compliance Systems” process for exempting carriers from the supporting documents requirements is a helpful alternative for safe and compliant motor carriers;
- The SNPRM does not conform to the HMTA statute which requires a “provision specifying a number, type, and frequency of supporting documents at a reasonable cost to the driver and motor carrier.” Adjustments are necessary;
- The burden of proof for holding a carrier responsible for a driver’s hours of service violations should reside with the government;
- FMCSA should harmonize the timeline within which drivers must submit their supporting documents to the motor carrier with the 13 days within which drivers currently must submit their records of duty status (RODS) to their motor carrier employers;
- Motor carriers should not be required to alter their current hours of service supporting documents retention practices to satisfy an ambiguously defined “manner that permits the effective matching of the documents to the driver’s record of duty status,” as suggested by FMCSA.”

XI. RELIEF FROM RETENTION OF DOCUMENTS USED TO VERIFY DRIVING TIME IS NECESSARY AND PROPER.

8 79 Fed. Reg. No 60 at 17686
ATA supports FMCSA’s proposal to relieve motor carriers of the requirement to retain supporting documents to verify on-duty/driving time. This element of the proposal makes good sense. Because the devices are integrally synchronized with the vehicle, they consistently, reliably and automatically capture vehicle movement. Hence, the potential for underreporting of driving time is minimal, if not non-existent.

XII. THE ELIMINATION OF THE PREVIOUSLY PROPOSED HOURS OF SERVICE MANAGEMENT SYSTEM REQUIREMENT IS WELCOME.

ATA agrees with FMCSA’s decision to eliminate the Hours of Service Management System requirement that was previously proposed. While it had some merit, the previous plan posed numerous limitations and potential inequities. ATA acknowledges that motor carriers are responsible for detecting and preventing hours of service violations. However, a focus on the presence of such an oversight system by law enforcement, in the absence of actual hours of service violations, would be illogical. Moreover, it would represent a waste of limited enforcement resources. At base, the existence or absence of an Hours of Service Management System does not indicate the presence of hours of service violations. Accordingly, the absence of such a system alone should not constitute a violation.

XIII. THE ELIMINATION OF THE PREVIOUSLY PROPOSED REQUIREMENT THAT THE MOTOR CARRIER CERTIFY THE ABSENCE OF SUPPORTING DOCUMENTS IS GOOD PUBLIC POLICY.

ATA appreciates FMCSA’s elimination of the proposed certification provision. As noted in our comments to the 2011 Notice of Proposed Rulemaking (NPRM), the ambiguities of the proposal were of great concern to the industry. The complexities of the industry, its operations, and the many documents exchanged would render such a requirement unworkable.

XIV. THE “SELF-COMPLIANCE SYSTEMS” PROCESS FOR EXEMPTING THE SUPPORTING DOCUMENTS REQUIREMENTS IS A HELPFUL ALTERNATIVE FOR SAFE AND COMPLIANT MOTOR CARRIERS.

ATA supports the Self-Compliance Systems exemption process and feels the procedures described in 49 CFR §381, subpart C provide an appropriate avenue for application. Given that these systems are likely to vary widely in form and function, ATA appreciates the non-prescriptive approach to this section and the flexibility it provides. ATA believes it will encourage further innovation in hours of service compliance processes.

XV. THE SNPRM DOES NOT CONFORM TO THE HMTA STATUTE WHICH REQUIRES A “PROVISION SPECIFYING A NUMBER, TYPE, AND FREQUENCY OF SUPPORTING DOCUMENTS AT A REASONABLE COST TO THE DRIVER AND MOTOR CARRIER.” ADJUSTMENTS ARE NECESSARY.

The SNPRM does not fulfill the Congressional directive to allow for compliance at a reasonable cost to motor carriers. Throughout the history of the supporting documents rulemakings and published guidance, the number and type of required records that would constitute supporting documents has consistently increased. A “supporting document” is now defined statutorily as “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.” FMCSA has expansively interpreted this to mean motor carriers must retain all documents produced in the normal course of business that may be used to verify hours of service compliance.

More recently, the supporting documents rulemaking has been appropriately added to the Electronic Logging Devices (previously Electronic On-Board Recorders) docket. Relief from some supporting document requirements is logical because ELDs automatically and reliably record on-duty/driving time, thereby eliminating the necessity of supporting documents to verify such time. The two are certainly linked.

Unfortunately, the SNPRM maintains burdensome requirements to verify on-duty/not driving time. Since ELDs automatically record compliance with 49 CFR §395.3(a)(3) – 11 hours of total drive time within a 14 hour on duty window – the remaining concern is compliance with 49 CFR §395.3(a)(2) – which states that a driver may not drive following the 14th consecutive hour after coming on duty. However, requiring drivers and motor carriers to verify each time a driver’s duty status changes to on-duty/not driving is unnecessary. For instance, mid-shift changes of duty status are of little, if any, consequence since they have no bearing on compliance with the 14 hour rule. All that is necessary is two supporting documents: the one nearest the beginning of a driver’s work day and the one nearest the end. Compliance with 49 CFR §395.3(a)(2), the 14 hour rule, can be reasonably verified (to the degree possible) with these two documents. Changes of duty status within this time are of little significance to hours of service compliance, particularly the 14 hour rule.

Admittedly, there is a need to verify compliance with 49 CFR §395(3)(b)(1-2) – the 60/70 hour limits – which may vary slightly given the existence of occasional off-duty periods (e.g. mandatory rest breaks) within the 14 hour work window. However, cases in which is a driver nears the 60/70 hour limit are rare.

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10 The 1993 regulatory guidance defined supporting documents as records that are “or could be used” to verify log information and included a list of 34 categories of documents to be used. (58 Fed. Reg. No 220 at 60761). The 1998 NPRM expanded this to 45 categories (63 Fed. Reg. No. 75 at 19458). The 2004 NPRM (49 Fed. Reg. No 212 at 63997) proposed retention of “all documents that could be used to evaluate RODS data.” The 2010 revised guidance removed some documents from the list of those necessary but warns motor carriers this list is only examples and that other documents may be necessary. (75 Fed. Reg. No 111 at 32984)


12 Docket # FMCSA-2010-0167
According to prior FMCSA hours of service rulemakings, drivers typically average 52 hours a week in on-duty time and only a small percentage operate near the cumulative duty time limit. These facts certainly don’t justify the need for motor carriers to retain supporting documents for all mid-shift duty changes, as proposed.

The SNPRM attempts to lessen the record keeping burden by limiting the total number of required supporting documents in any duty day to a maximum of 10. In order for documents to be counted toward the maximum however, they must contain four mandatory elements: driver identification, date, time, and location. As ATA succinctly pointed out in its comments to the 2011 NPRM, it is rare for any document to reflect all of the required elements, let alone several in each category.13 As such, it is a challenge to indisputably verify on-duty/not driving status with a qualifying document. Alternately, the SNPRM suggests that documents containing all the required elements, except time, may be substituted if a qualifying document is not available. These documents, however, are unfortunately not subject to the 10 document limitation. ATA suggests this is the more likely scenario and can therefore conclude that the 10 document daily cap is a benefit in theory only and provides no actual relief from the hours of service supporting documents requirements.

As a result of the illusory document cap and the unnecessary burdens of proving mid-shift on-duty not driving time, it is not surprising that FMCSA does not expect this rulemaking to produce a reduction in the overall document collection and retention burden.14 This is clearly at odds with the intent of the HMTA that authorizes this portion of the SNPRM. In fact, since the passage of HMTA in 1994, FMCSA has maintained a broad view of what constitutes a supporting document and thus continued to impose an unusual and uncustomary burden on the trucking industry.15

XVI. THE BURDEN OF PROOF FOR HOLDING A CARRIER RESPONSIBLE FOR A DRIVER’S HOURS OF SERVICE VIOLATIONS SHOULD RESIDE WITH THE GOVERNMENT;

Compliance with the hours of service regulations is a shared responsibility. The expansive and highly disparate scope of operations within the trucking industry assumes varying levels of control between drivers and their motor carrier employers. In the end, it’s the driver who, on his or her own volition, has the power to physically turn the key and operate a commercial motor vehicle, regardless of employer controls or agency rules. While motor carriers have a stake in ensuring their drivers operate within the regulations, it can be challenging, if not impossible, for many trucking companies to control the actions of their drivers – especially those operating independently at a great distance from the motor carrier.

As written, the SNPRM provides that a motor carrier could only be held harmless if a driver was acting entirely outside the scope of the motor carrier’s operations. As a practical matter, drivers have a great

14 79 Fed. Reg. No 60 at 17658
15 75 Fed. Reg. No 111 at 32984
deal of autonomy, making it impossible for a carrier to prevent every hours of service violation. For example, drivers may willfully ignore hours of service regulations without the knowledge of the carrier in order to fulfill a personal agenda (e.g., to make more money or return home sooner). Carriers should not be penalized for failing to achieve the impossible.

Most motor carriers provide substantial training to drivers to prepare them for hours of service compliance. The presence of such a program should shift the burden of proof to the government, as the driver has been clearly informed of his or her responsibilities under the law. In such cases, the carrier should only be held liable for encouraging a driver to violate the hours of service regulations, or for undetected actions of an employee, if the government can prove the motor carrier did not perform due diligence in providing instruction and training to the driver in hours of service compliance.

**XVII. FMCSA SHOULD HARMONIZE THE TIMELINE WITHIN WHICH DRIVERS MUST SUBMIT THEIR SUPPORTING DOCUMENTS TO THE MOTOR CARRIER WITH THE 13 DAYS CURRENTLY ALLOWED FOR DRIVERS TO SUBMIT THEIR RECORDS OF DUTY STATUS.**

The SNPRM requires drivers to submit supporting documents they’ve collected to their employing motor carrier within 8 days. While this represents an improvement over previously proposed guidelines, it creates an imbalance between existing regulations. Currently, drivers who maintain paper logs are required to submit those logs, and any documentation that accompanies it, to their employing motor carrier within 13 days.\(^{16}\) This is obviously inconsistent and confusing. Hence, drivers should only be required to submit supporting documents within 13 days of receipt.

**XVIII. MOTOR CARRIERS SHOULD NOT BE REQUIRED TO ALTER THEIR CURRENT HOURS OF SERVICE SUPPORTING DOCUMENT RETENTION PRACTICES TO SATISFY THE AMBIGUOUSLY DEFINED “MANNER THAT PERMITS THE EFFECTIVE MATCHING OF THE DOCUMENTS TO THE DUTY STATUS.”**

ATA strenuously objects to the proposed requirement that carriers maintain supporting documents in a manner that they may be effectively matched to the corresponding driver’s records of duty status. It is reasonable to expect that carriers not deliberately keep records in a manner that would make matching difficult or to purposefully frustrate investigators. However, to require that carriers go beyond “retaining” records (keeping them in the manner in which they receive them) to “maintaining” them (by ensuring that they can easily be matched by an investigator) goes a step too far.

ATA respects and supports the need for enforcement agents to verify hours of service compliance. Further, we support efforts to hold rogue motor carriers accountable for deliberately impeding investigators’ efforts to match supporting documents to drivers’ logs. However, to burden all motor carriers with the responsibility of manipulating the manner in which their supporting documents are

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\(^{16}\) 49 CFR §395.8(i)
Comments of The American Trucking Associations on
Electronic On-Board Recorders and Hours of Service Supporting Documents

retained, so that FMCSA can better hold the small number of non-compliant fleets accountable, is simply wrong. Moreover, it would be wholly inappropriate, in ATA’s view, to hold a carrier accountable for failing to facilitate such matching, particularly if the carrier has not otherwise violated the hours of service regulations. Doing so would amount to citing a carrier for a paperwork violation, a practice the agency strives to abandon as it increases its focus on performance-based measurements.

XIX. SEVERAL OF THE PROPOSED ELD TECHNICAL SPECIFICATIONS NEED IMPROVEMENT

ATA, with the assistance of its Technology and Maintenance Council’s ELD Task Force comprised of ELD suppliers, has identified a number of technical concerns with the subject SNPRM. It is important that FMCSA address these concerns in order to ensure that the industry wide deadline for device adoption can be met, that the devices meet the intended purpose (i.e., improved hours of service compliance), and so that the majority existing equipment recently installed by early adopters won’t quickly become obsolete. Similarly, as discussed above, the impact of these specifications on suppliers’ ability to bring existing hardware in line with new requirements could have a chilling effect on voluntary adoption.

For instance, once the final device specifications are known, suppliers are concerned that it could take them between 12 and 24 months to make the modifications necessary to market compliant devices. This delay is caused by the need to develop file structures to accommodate new requirements with respect to driver editing, incorporation of new data transfer capabilities, and other such functions. Since the two year adoption deadline is required by statute, FMCSA must take steps to ensure that an adequate number of devices will be available to meet the demand in that time-frame. Accordingly, the agency must take steps to minimize the challenges suppliers will face in developing compliant devices.

ATA is also concerned about FMCSA’s claim that devices manufactured in the last few years will be able to comply new requirements with a relatively inexpensive software upgrade. This claim is questionable and cannot be verified until after the final specifications are published. Suppliers contend that, based on the proposed specifications, the cost to upgrade existing devices would be high. For example, they would need to redesign systems to accommodate new driver record editing rules and to meet the harassment protection provisions. Suppliers would also need to verify that their existing hardware (e.g. display screens), could support the density necessary for providing functional Q.R. codes.

Manufacturers also point to some concerns with the limited window provided for the repair of malfunctioning ELDs. As a contingency for such circumstances, fleets will need to have spare devices readily available. While this may be practical for larger motor carriers, it is unrealistic to expect smaller motor carriers will do so. Naturally, this begs the question, what should fleets do if their devices cannot be quickly repaired? This provision is also of concern to fleets that don’t operate their own repair facilities or have home terminals to which drivers routinely return. Coordinating delivery of new units to these vehicles and the installation of them will present challenges. Hence, FMCSA should consider expanding the time allowed for replacement or repair of malfunctioning units.
ELD providers also raised concerns about the requirement to periodically synchronize devices to Coordinated Universal Time (UCT) and that a device’s deviation from UCT must not exceed 10 minutes at any point in time. To ensure such synchronization will require cell or satellite service (depending on the device) and such service is not always available. Considering such obstacles, FMCSA must decide if such frequent synchronization and precision (i.e., no more than 10 minutes difference) is truly necessary.

ATA also questions the necessity of requiring that the devices be able to produce the volume of data that FMCSA proposes (e.g., last six months’ records, all drivers who previously used the device). Such requirements will cause devices to need large memory capacity that will add to cost, reduce design flexibility, and ultimately impact the ability of some existing hardware to be upgraded to meet new specifications. Instead, FMCSA should require that the devices be able produce the same level of detail that drivers currently must provide during roadside inspections - the record of duty status for the current day and each of the last six days.

XX. FMCSA MUST CONSIDER HOW THE MANDATE WILL IMPACT RENTED AND LEASED VEHICLES

FMCSA should also consider the real-world challenges an ELD mandate would create for fleets using rented and leased vehicles. In the event of a breakdown, a motor carrier will call on its truck rental and leasing company to provide a replacement truck. However, it is not reasonable to expect that, as a contingency for such circumstances, the provider will have one available with an ELD that matches the carrier’s hours of service management system (e.g. the same make). Hence, the carrier will be unable to populate the device in the replacement vehicle with the driver’s records of duty status for the prior seven days. Even if the driver then manually populates the device, the motor carrier will not have the means to communicate and read data from it.

Similarly, rental and leasing providers will have to determine what percentage of their fleets they will equip with ELDs, and with which makes and models. A provider who supplies mostly fleets engaged in short-haul operations will not likely install ELDs in all of its trucks, since doing so would be unnecessary and wasteful. However, to accommodate other customers and drivers who occasionally (i.e. more than 8 days per month) need to use an ELD, the provider must ensure that some of its trucks are so equipped. FMCSA should consider ways to address this dilemma. For instance the agency should explore means to offer better interoperability between devices so that motor carriers could be assured that data from one system could be reliably imported by another. Also, perhaps, additional latitude should be given to fleets using short term replacement vehicles (e.g. permitted to use paper records of duty status for more than 8 days).

XXI. CONCLUSION
ATA supports FMCSA’s proposal to require the adoption and use of ELDs to monitor hours of service compliance. ATA is confident that such devices will improve compliance with the hours of service regulations and be beneficial in other ways. Accordingly, FMCSA should not linger in issuing a final rule mandating ELD use, but at the same time exercise the caution necessary to ensure that the rule can withstand inevitable legal challenges.

Though FMCSA’s proposal is a good one, ATA suggests a number of ways it can be improved, including:

- Lengthening the grandfather period for existing devices to allow their use for the lives of the vehicles in which they are installed;
- Clarifying that the agency does not contemplate prohibiting employers from precisely monitoring vehicle location;
- Considering other driver identification mechanisms that will meet the intent of the proposed use of CDL numbers for this purpose;
- Allowing employers to make edits to correct logs, when such corrections would not have an impact on compliance with driving or on-duty time limits;
- Further reducing the supporting documents requirements to mandate that carriers keep two documents per driver each day - the one nearest the beginning of a driver’s work day and the one nearest the end.
- Considering ways to minimize the challenges the rules will present for providers of rented and leased vehicles, and their customers.
- Promoting voluntary ELD use by offering incentives to early adopters.

Adoption of these recommendations will help FMCSA ensure that the forthcoming ELD mandate is more broadly accepted and meets the greater objectives.