

## **The Long and Lonely Road: the Saga of the Recent Amendments to the Hours of Service Regulations**

### **Note**

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<b>I. Introduction .....</b>	<b>45</b>
<b>II. Hours of Service Regulations: 1935-2006.....</b>	<b>46</b>
<b>A. May 2000 Proposed Regulations.....</b>	<b>48</b>
<b>B. April 2003 Regulations .....</b>	<b>49</b>
<b>C. Public Citizen v. FMCSA .....</b>	<b>50</b>
<b>D. November 2004 Supporting Documents Rule .....</b>	<b>53</b>
<b>E. January 2005 Proposed Regulations.....</b>	<b>54</b>
<b>III. The Reintroduction of EOBRs.....</b>	<b>56</b>
<b>A. January 2007 Proposed Regulations on Eobrs .....</b>	<b>56</b>
<b>B. Reactions to the Eobr Proposal.....</b>	<b>57</b>
<b>C. Potential Legal Issues with Eobr Proposal.....</b>	<b>57</b>
<b>i. Compelling Government Interest.....</b>	<b>58</b>
<b>ii. Searches Under the Fourth Amendment .....</b>	<b>60</b>
<b>iii. Privileged Work Product .....</b>	<b>61</b>
<b>VI. Conclusion .....</b>	<b>62</b>

### **I. INTRODUCTION**

Hours of service (the “HOS”) regulations have been in existence for more than seventy years.<sup>1</sup> These rules are the primary regulations governing the number of hours a truck driver may work in a certain time period. For many years, the regulations were minimally revised, but recently, Congress focused on ensuring safer roads for the public. Numerous federal agencies have tried

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1. Electronic On-Board Recorders for Hours-of-Service Compliance, 72 Fed. Reg. 2340, 2340-41 (proposed Jan. 18, 2007) (to be codified at 49 C.F.R. pts. 350, 385, 395, 396).

to revise the regulations, but it is the most recent agency, the Federal Motor Carrier Safety Administration (“FMCSA”), that has run into legal problems each time new regulations are proposed. The agency lost a court decision in 2004 and litigated related regulations in December of 2006.<sup>2</sup> In each proposal, FMCSA did not follow the Administrative Procedures Act (the “APA”).<sup>3</sup> In addition, the newest proposal disclosed in January 2007 has brought up numerous privacy questions that FMCSA might face in the future.<sup>4</sup>

This article offers a background into the HOS regulations and revisions, including the legal problems FMCSA faced with each proposal. In addition, the new proposal for Electronic On-Board Recorders (“EOBRs”) is discussed along with the possible privacy issues raised.

## II. HOURS OF SERVICE REGULATIONS: 1935-2006

The Interstate Commerce Commission (“ICC”) was established on February 4, 1887.<sup>5</sup> ICC had authority over the business of all common carriers engaged in the transportation of passengers or property.<sup>6</sup> Although ICC recommended regulations for motor carriers in 1928, HOS regulations were not introduced until 1935, with the Motor Carrier Act.<sup>7</sup> The Act provided for the Secretary of Transportation to establish requirements for the qualifications and maximum hours of service for drivers of a motor carrier.<sup>8</sup> Over a period of four years, ICC conducted studies and held hearings on the number of hours worked by motor carrier drivers and adopted regulations establishing maximum hours on March 1, 1939.<sup>9</sup>

The 1939 HOS rules limited drivers to ten hours of driving within a twenty-four hour period, unless the driver was off duty for at least eight consecutive hours following the on-duty driving time.<sup>10</sup> In a seven day period, drivers were limited to sixty hours of on-duty time unless the company ran vehicles every day of the week; then the limit was seventy hours within an eight day period.<sup>11</sup> A driver could obtain rest and restore available hours by

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2. Pub. Citizen v. FMCSA, 374 F.3d 1209, 1211 (D.C. Cir. 2004).

3. Jami Jones, *Appeals Court Hears OOIDA's Hours-of-Service Arguments*, LAND LINE MAGAZINE, Dec. 5, 2006, available at [http://www.landlinemag.com/Special\\_Reports/2006/Dec06/120506\\_hos\\_argument.htm](http://www.landlinemag.com/Special_Reports/2006/Dec06/120506_hos_argument.htm).

4. Electronic On-Board Recorders for Hours-of-Service Compliance, 72 Fed. Reg. at 2370.

5. Interstate Commerce Act, Pub. L. No. 49-104; § 11, 24 Stat. 379, 383 (1887).

6. Interstate Commerce Act, § 12.

7. Hours of Service of Drivers, 61 Fed. Reg. 57,252, 57,253 (proposed Nov. 5, 1996) (to be codified at 49 C.F.R. pt. 395).

8. Motor Carrier Act of 1935, Pub. L. No. 74-255, § 204, 49 Stat. 543, 546 (1935)

9. Hours of Service of Drivers, 61 Fed. Reg. at 57,254.

10. *Id.*

11. *Id.*

**2008]            *Recent Amendments to Hours of Service Regulations*            47**

using a sleeper berth in the truck.<sup>12</sup> One year later, ICC mandated the use of Daily Logs for drivers to track their hours and other relevant information.<sup>13</sup> These Daily Logs are generally referred to as Record of Duty Status (“RODS”).<sup>14</sup> ICC explained that RODS allowed for

a standardized type of record to be maintained of the daily driving time and the weekly hours on duty which would be in the possession of each driver and which would enable a highway patrolman or other enforcement officer to determine immediately upon the stopping of the vehicle whether the driver had been on duty or was driving in violation of [the ICC] regulations . . . and to provide a record from which [the ICC] field representatives could readily determine whether or not the carriers are complying with the regulations.<sup>15</sup>

In 1962 and 1963 the HOS rules were revised slightly.<sup>16</sup> The ten hour limit on drive time was reserved, as was the sixty/seventy hour limit on on-duty time, but the “fifteen hour rule” was also established.<sup>17</sup> The fifteen hour rule required those who had been on duty for thirteen hours after eight consecutive hours off duty, to stop driving after an additional two hours.<sup>18</sup> Soon after, Congress passed the Department of Transportation Act which created the Department of Transportation (“DOT”) in 1967.<sup>19</sup> All responsibility for motor carrier safety issues was transferred from ICC to DOT, which then assigned these responsibilities to the Federal Highway Administration (“FHWA”).<sup>20</sup>

Enforcement of the HOS regulations was spotty before the 1990s.<sup>21</sup> In 1994, Congress enacted the Hazardous Materials Transportation Authorization Act of 1994 in order to enforce the HOS regulations.<sup>22</sup> Section 113 mandated that the Secretary of Transportation propose regulations to better ensure

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12. Hours of Service of Drivers, 70 Fed. Reg. 3339, 3349 (proposed Jan. 24, 2005) (to be codified at 49 C.F.R. pt. 395).

13. Electronic On-Board Recorders for Hours-of-Service Compliance, 72 Fed. Reg. 2340, 2342 (proposed Jan. 18, 2007) (to be codified at 49 C.F.R. pts. 350, 385, 395, 396). *See generally* Driver’s record of duty status, 49 C.F.R. § 395.8 (1982).

14. Electronic On-Board Recorders for Hours-of-Service Compliance, 72 Fed. Reg. at 2342.

15. Hours of Service of Drivers; Supporting Documents, 69 Fed. Reg. 63,997, 63,999 (proposed Nov. 3, 2004) (to be codified at 49 C.F.R. pts. 379, 381, 385, 390, 395).

16. Hours of Service of Drivers, 61 Fed. Reg. at 57,254.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. Jim Johnston, *HOS: Here we go again!*, LAND LINE MAGAZINE, Nov. 2004, available at [http://www.landlinemag.com/Achives/2004/Nov2004/news/issues\\_positions.htm](http://www.landlinemag.com/Achives/2004/Nov2004/news/issues_positions.htm).

22. Hazardous Materials Transportation Authorization Act of 1994, Pub. L. No. 103-311, § 113, 108 Stat. 1673, 1676 (1994).

compliance with the HOS rules.<sup>23</sup> Over a year passed and no rules were promulgated; Congress then mandated that FHWA issue an advance notice of proposed rulemaking regarding the HOS regulations.<sup>24</sup> Less than a year later, FHWA published the advance notice.<sup>25</sup>

Before FHWA is able to publish the proposed changes to the HOS regulations, authority over motor carrier safety issues is handed over to a new agency, FMCSA.<sup>26</sup> The purpose behind the establishment of FMCSA was due to findings by Congress that the high number and severity of crashes involving motor carriers were intolerable; the number of inspections both on a federal level and state level were insufficient; and an additional agency was necessary in order to reduce the number of crashes involving large trucks.<sup>27</sup> Congress clearly states that the agency, in carrying out its duties, “shall consider the assignment and maintenance of safety as the highest priority.”<sup>28</sup>

#### A. MAY 2000 PROPOSED REGULATIONS

On May 2, 2000, FMCSA issued a notice of proposed rulemaking regarding the hours of service of drivers.<sup>29</sup> The new HOS regulations were necessary as transportation systems had changed drastically.<sup>30</sup> Motor carriers and other vehicles on the road could travel at higher speeds, more vehicles were using high-speed roads, and trucking was now a more prevalent way to transport goods since the HOS regulations were first introduced.<sup>31</sup> The agency estimated that 755 fatalities and 18,705 injuries occurred each year due to fatigued motor carrier drivers.<sup>32</sup>

The proposal dealt with five main issues.<sup>33</sup> First, research showed there should be a more regular work day and that drivers are more alert when they work on a regular twenty-four hour cycle.<sup>34</sup>

The proposal next dealt with the issue of drivers needing more

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23. Hazardous Materials Transportation Authorization Act of 1994 § 113.

24. ICC Termination Act of 1995, Pub. L. No. 104-88, § 101, 109 Stat. 804, 804 (1995).

25. Hours of Service of Drivers, 61 Fed. Reg. at 57,252.

26. Motor Carrier Safety Improvement Act of 1999, Pub. L. No. 106-159, § 101, 113 Stat. 1748, 1750 (1999).

27. Motor Carrier Safety Improvement Act of 1999 § 3-4

28. 49 U.S.C. § 113 (1999).

29. Hours of Service of Drivers; Driver Rest and Sleep for Safe Operations, 65 Fed. Reg. 25,540, 25,540 (proposed May 2, 2000) (to be codified at 49 C.F.R. pts. 350, 390, 394, 395, 398).

30. Hours of Service of Drivers; Driver Rest and Sleep for Safe Operations, 65 Fed. Reg. at 25,541.

31. *Id.*

32. *Id.* at 25,546.

33. *Id.* at 25,553-54.

34. *Id.* at 25,554.

**2008]            *Recent Amendments to Hours of Service Regulations*            49**

opportunities for daily and weekly sleep.<sup>35</sup> The rules at the time only allowed for eight hours of off duty time; however, the rules did not factor in daily life activities such as eating meals or commuting.<sup>36</sup> In order for the driver to obtain eight hours of sleep or more, the proposal would require “10 consecutive hours off duty within each 24-hour cycle, and two hours of additional time off in each 14-hour work period within each 24-hour cycle.”<sup>37</sup>

The next suggestion was that any shift could not exceed twelve hours because research showed that performance decreases strikingly after more than twelve hours of work.<sup>38</sup> FMCSA also considered the time of day a driver is on the road. The research conducted showed that there is a higher risk of accidents at night, so the proposal required drivers to work no more than five consecutive night shifts.<sup>39</sup> Finally, FMCSA found that the potential for safety issues increased when drivers did not comply with HOS regulations.<sup>40</sup> Therefore, FMCSA proposed that EOBRs be installed to track HOS, rather than relying on the paper log books that had been used since the 1940s.<sup>41</sup>

FMCSA received more than 53,000 comments on the proposed changes to the HOS regulations; most of the comments were unfavorable.<sup>42</sup> After almost ten years of research and hearings about revising the regulations, critics felt that the revisions were “restrictive, cumbersome and impractical.”<sup>43</sup> The large amount of criticism on the May 2000 Proposal resulted in Congress passing two consecutive DOT Appropriations Acts that prohibited the agency from promulgating a final rule.<sup>44</sup>

**B. APRIL 2003 REGULATIONS**

As a result of the DOT Appropriations Acts, FMCSA hired an independent consultant to review alternatives to the HOS regulations before issuing a new proposal.<sup>45</sup> Despite its diligent efforts, proposed regulations from FMCSA were not issued quickly enough for Public Citizen, a public interest group that had been publicly pushing for changes to the HOS regulations. To push the agency to promulgate new HOS regulations faster,

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35. *Id.* at 25,553.

36. *Id.* at 25,554.

37. *Id.* at 25,540.

38. *Id.* at 25,556.

39. *Id.* at 25,557-58.

40. *Id.* at 25,546.

41. *Id.* at 25,563.

42. Hours of Service of Drivers; Driver Rest and Sleep for Safe Operations, 68 Fed. Reg. 22,456, 22,459 (Apr. 28, 2003) (to be codified at 49 C.F.R. pts. 385, 390, 395).

43. Johnston, *supra* note 21.

44. Hours of Service of Drivers; Driver Rest and Sleep for Safe Operations, 68 Fed. Reg. at 22,459.

45. *Id.* at 22,459.

the group sued the Department of Transportation. In November 2002, Public Citizen and a number of other safety groups joined together to file a lawsuit, forcing FMCSA to issue new HOS rules.<sup>46</sup>

FMCSA settled the lawsuit with Public Citizen in February 2003 and agreed to issue a final HOS rule.<sup>47</sup> On April 28, 2003, FMCSA promulgated the new rule. The new rule included provisions that required drivers to take off duty time after ten consecutive hours of work or after a fourteen hour shift.<sup>48</sup> The provisions also increased driving time from ten to eleven hours, and permitted drivers to restart the driving clock after thirty-four hours of off duty time.<sup>49</sup> FMCSA reserved the sleeper berth exception because the practice was so prevalent in the industry.<sup>50</sup> The issue of installing EOBRs in motor carriers was not discussed in the new rule, even though it was included in the 2000 proposed rule.<sup>51</sup>

### C. PUBLIC CITIZEN V. FMCSA

After an agency promulgates a rule, often times a public interest group or affected company will sue under the “arbitrary and capricious” standard found in the APA.<sup>52</sup> This Act is the governing instrument for federal agency actions. The reviewing court must determine whether the action by the agency was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>53</sup> In order to do so, the court must find that there was a “rational connection” between the evidence the agency possessed and the decision made regarding the evidence.<sup>54</sup>

The court must conduct a “thorough, probing, in-depth review” of the agency action.<sup>55</sup> In order to do so, the court asks four questions:

- (1) if the agency acted within the scope of its authority;
- (2) if the agency can explain its decision;
- (3) if the facts the agency relies on are in the record; and

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46. *In re Citizens for Reliable and Safe Highways*, No. 02-1363 (D.C. Cir. 2003).

47. Public Citizen, <http://www.citizen.org/documents/TruckSafety%20RulesAgreement0224.pdf> (last visited Feb. 22, 2007).

48. Hours of Service of Drivers; Driver Rest and Sleep for Safe Operations, 68 Fed. Reg. at 22,457.

49. *Id.*

50. *Id.* at 22,465-66.

51. *Id.* at 22,502.

52. Administrative Procedure Act § 2, 5 U.S.C. § 706 (1966). The Act is the governing instrument for federal agencies.

53. Administrative Procedure Act § 2.

54. *Motor Vehicle Mfr. Ass'n v. State Farm Mut. Automobile Ins.*, 463 U.S. 29, 43 (1983).

55. *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 415 (1971).

**2008]            *Recent Amendments to Hours of Service Regulations*            51**

(4) whether the agency considered the evidence in the record.<sup>56</sup>

Although standard is narrow, one of the ways a court can find against the agency is if the agency “entirely failed to consider an important aspect of the problem.”<sup>57</sup>

In *Public Citizen v. FMCSA*, plaintiffs Public Citizen, Citizens for Reliable and Safe Highways (CRASH), and Parents Against Tired Truckers (PATT) argued that the 2003 HOS regulations “failed to consider the impact of the rules on the health of drivers, a factor the agency must consider under its organic statute.”<sup>58</sup> Therefore, the plaintiffs argued FMCSA’s promulgation of the regulations was arbitrary and capricious.<sup>59</sup> The court agreed, holding that the agency likely departed from congressional intent and ruled in favor of Public Citizen.<sup>60</sup>

Under 49 U.S.C. § 31136(a)(4), FMCSA is required to set minimum safety standards to ensure that “the operation of commercial motor vehicles does not have a deleterious effect on the physical condition of the operators.”<sup>61</sup> Not mentioned in the 2003 regulations was the impact of the new rules on a driver’s health.<sup>62</sup> Although FMCSA argued that the health of the driver “permeated the entire rulemaking process,” the court found that the agency needed to speak directly to the issue of the health of drivers and explain why it proposed the rules it did.<sup>63</sup>

In addition to the court holding that the 2003 rule was arbitrary and capricious, the court also had other concerns with the rule.<sup>64</sup> Even though research showed that driver performance “begins to degrade after the 8th hour on duty and increases geometrically during the 10th and 11th hours,” FMCSA increased the allowable driving time from ten hours to eleven hours.<sup>65</sup> The court also questioned the sleeper-berth exception, as research in the proposal found that sleep in a berth is less restorative than in a bed and that solo drivers did not use the sleeper berth as effectively as team drivers.<sup>66</sup> If this was true, the court reasoned, then these facts support eliminating the sleeper-berth

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56. *Fund for Animals v. Babbitt*, 903 F. Supp. 96, 105 (D.C. Cir. 1995).

57. *Motor Vehicle Mfr. Ass’n*, 463 U.S. at 43.

58. *Hours of Service of Drivers*, 70 Fed. Reg. 3339, 3341 (proposed Jan. 24, 2005) (to be codified at 49 C.F.R. pt. 395); *Public Citizen v. FMCSA*, 374 F.3d 1209, 1216 (D.C. Cir. 2004).

59. *Id.*

60. *Pub. Citizen*, 374 F.3d at 1216.

61. 49 U.S.C. § 31136 (1994).

62. *Pub. Citizen*, 374 F.3d at 1216.

63. *Id.* at 1217.

64. *Id.*

65. *Id.* at 1218.

66. *Id.* at 1219.

exception, especially for solo drivers.<sup>67</sup>

The court also discussed the lack of a requirement for motor carriers to install EOBRs.<sup>68</sup> The agency left out the requirement of EOBRs because it felt that it could not adequately estimate the costs and benefits of installing the systems, it did not want to test out the existing devices, and was concerned with privacy issues regarding drivers.<sup>69</sup> The court chastised the agency, stating that Congress directed FMCSA to collect and analyze data on automated and tamper-proof recording devices.<sup>70</sup> The court reasoned that part of the agency's job is to use its experience in the area to estimate costs and benefits of the systems.<sup>71</sup> Also, because the agency recognizes that non-compliance with HOS regulations is prevalent in the industry and admitted this to the court, the agency should have at least attempted to analyze EOBRs for possible benefits.<sup>72</sup>

The last issue the court discussed in the opinion was the thirty-four hour restart provision.<sup>73</sup> The new provision would increase the maximum number of hours a driver could work each week.<sup>74</sup> The fact that FMCSA did not address the increase in the hours of driving time each week made the court question the rule's rationality.<sup>75</sup>

The U.S. Court of Appeals vacated the HOS rules on July 16, 2004.<sup>76</sup> The court remanded the case back to FMCSA for the agency to specifically consider the effect the new rules would have on a driver's health.<sup>77</sup> In addition, FMCSA was ordered to revisit the change in the number of allowable driving time hours, the availability of sleeper berths, the thirty-four hour restart time, and research the costs of EOBRs.<sup>78</sup>

One month later, FMCSA contracted with the Transportation Research Board of the National Academy of Sciences to review literature regarding the health effects on drivers from the HOS regulations - including fatigue.<sup>79</sup> Although the U.S. Court of Appeals ruled against FMCSA, two months after the ruling, Congress passed the Surface Transportation Extension Act of

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67. *Id.*

68. *Id.* at 1220.

69. *Id.*

70. *Id.* at 1221.

71. *Id.*

72. *Id.* at 1221-22.

73. *Id.* at 1222-23.

74. *Id.* at 1222.

75. *Id.*

76. *Id.* at 1211.

77. *Id.* at 1216.

78. *Id.* at 1217.

79. Hours of Service of Drivers, 70 Fed. Reg. 3339, 3341 (proposed Jan. 24, 2005) (to be codified at 49 C.F.R. pt. 395).

**2008]            *Recent Amendments to Hours of Service Regulations*            53**

2004.<sup>80</sup> This Act extended the April 2003 HOS final rule until September 30, 2005, or until FMCSA issued a new rule; whichever came first.<sup>81</sup>

**D. NOVEMBER 2004 SUPPORTING DOCUMENTS RULE**

Before FMCSA issued new HOS regulations, the agency needed to clarify the documents a driver kept to verify the accuracy of the Driver Log.<sup>82</sup> In 1982, a final rule regarding supporting documents and RODS was issued by FHWA.<sup>83</sup> The rule required motor carriers to retain documents that verify the accuracy of the RODS for a period of six months.<sup>84</sup> However, there was a loophole in the rule as the agency did not define the term “supporting document.”<sup>85</sup> Compliance with HOS rules was therefore difficult to ensure as drivers would throw away or not collect the documents to support the RODS.<sup>86</sup> In order to stop that practice FMCSA promulgated the supporting documents rule in 2004.<sup>87</sup> The rule required that any written or electronic trip document must include the driver’s name or the vehicle number in order for the document to be connected with the individual driver.<sup>88</sup>

There were numerous critics of the supporting documents proposal. The American Trucking Association argued that the rule conflicted with the requirements of the Hazardous Materials Transportation Authorization Act of 1994;<sup>89</sup> did not meet the requirements of the Regulatory Flexibility Act<sup>90</sup> and Paperwork Reduction Acts;<sup>91</sup> lacked information needed by the Office of

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80. Surface Transportation Extension Act of 2004, Pub. L. No. 108-310, § 7, 118 Stat. 1144, 1154 (2004).

81. *Id.*

82. Hours of Service of Drivers; Supporting Documents, 69 Fed. Reg. 63,997, 63,997 (proposed Nov. 3, 2004) (to be codified at 49 C.F.R. 379, 381, 385, 390, 395).

83. *Id.* at 63,999.

84. *Id.*

85. *Id.*

86. *Id.* at 63,997.

87. *Id.* The initial supporting documents proposal was issued with the May 2000 proposed changes to the HOS rules, however the agency did not receive enough comments and decided to issue this as a separate proposal. *Id.* at 64,002.

88. *Id.* at 64,008. Examples of supporting documents include accident reports, bills of lading, delivery receipts, fuel receipts, toll receipts or weight/scale tickets. *Id.* at 64,013-14. This proposal also allowed for electronic-based methods of record keeping. *Id.* at 63,999.

89. Hazardous Materials Transportation Authorization Act of 1994, Pub. L. No. 103-311, § 113, 108 Stat. 1673, 1676 (1994).

90. Regulatory Flexibility Act, 5 U.S.C. § 601-612 (requiring government agencies to assess the impact of the regulation on small businesses, small nonprofit organizations, and small governmental bodies when promulgating a rule and to use less burdensome alternative whenever possible).

91. Paperwork Reduction Act of 1995, 44 U.S.C. § 3501. This statute was enacted to “minimize the paperwork burden for individuals, small businesses, educational and nonprofit institutions, Federal contractors, State, local and tribal governments, and other persons resulting from the collection of information by or for the Federal Government.” *Id.* at § 3501(a).

Management and Budget for regulatory analysis and cost evaluation; and subjected motor carriers to more record-keeping responsibilities.<sup>92</sup> Nonetheless, the Office of Management and Budget conducted a review of the proposal and cleared the rule for final publication on September 14, 2006.<sup>93</sup> However, FMCSA did not publish the final rule because errors in the paperwork analysis portion of the proposal were found.<sup>94</sup> On October 25, 2007, this proposed rule was withdrawn with FMCSA intending to publish new proposed rules sometime in the future.<sup>95</sup>

#### E. JANUARY 2005 PROPOSED REGULATIONS

FMCSA issued the new HOS rules on January 24, 2005.<sup>96</sup> The rules were identical to the April 2003 regulations vacated by the U.S. Court of Appeals.<sup>97</sup> Despite the prior court opinion, a legislative proposal was announced a month later that, if passed, adopted the April 2003 regulations as if they had been adopted by a prior act of Congress.<sup>98</sup> A separate legislative proposal was also put forth by the Bush administration proposing that FMCSA retain the authority to modify HOS rules through normal rulemaking, but limit its ability to consider the health of the driver.<sup>99</sup> Under the Bush Administration's proposal, FMCSA's jurisdiction would be limited to ensuring that the operators of commercial motor vehicles were free from death or serious physical harm.<sup>100</sup> If passed, the proposals would have circumvented the U.S. Court of Appeal's ruling on the April 2003 proposed HOS regulation changes and changed the focus of the agency.

DOT fully endorsed the legislative proposal as the agency believed that under the April 2003 regulations drivers would be able to rest more, and, that the proposal offered "better use of driver time, more efficient handling of freight by shippers and receivers, and increased productivity."<sup>101</sup> In addition, DOT argued that continuing to work on the changes to HOS regulations was

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92. *The FMCSA drafts supporting documents rule: regulation sent to White House for final review*, 163 COMMERCIAL CARRIER JOURNAL 14, 14-15 (2006).

93. OIRA Conclusion of EO 12866 Regulatory Review, available at <http://www.reginfo.gov/public/do/eoDetails?rrid=113347>.

94. Avery Vise, *The FMCSA would mandate recorders for serious offenders*, COMMERCIAL CARRIER JOURNAL MAGAZINE, <http://www.etrucker.com/apps/news/article.asp?id=57573>.

95. Hours of Service of Drivers; Supporting Documents SNPRM; Withdrawal, 72 Fed. Reg. 60,614, 60, 614 (Oct. 25, 2007).

96. Hours of Service of Drivers, 70 Fed. Reg. 3339, 3339 (proposed Jan. 24, 2005) (to be codified at 49 C.F.R. pt. 395).

97. *Id.*

98. *The FMCSA tries to shield hours rules: proposal would write regulations into statutory law*, 162 COMMERCIAL CARRIER JOURNAL 14, 14 (2005).

99. *Id.*

100. *Id.*

101. *Id.*

**2008]            *Recent Amendments to Hours of Service Regulations*            55**

time-consuming and a large number of agency resources were participating in the project, taking time away from other duties.<sup>102</sup> The highway bill that proposed to change the scope of FMCSA eventually died at the end of the 108<sup>th</sup> Congress; FMCSA decided to continue with the regulatory process using the January 2005 proposed regulations.<sup>103</sup>

On August 25, 2005, the HOS rules were published as final rules.<sup>104</sup> In the publication, FMCSA was vigilant in discussing driver health. The agency researched health and fatigue studies, consulted with safety and health experts, and contracted out literature reviews to ensure that all of the court's issues with the April 2003 rule were covered.<sup>105</sup> The report also cited data from the Fatality Analysis Reporting System (FARS), which is maintained by the National Highway Traffic Safety Administration.<sup>106</sup> According to FARS, the total number of fatal crashes involving large trucks "decreased by 166, from 3,120 in 2003 to 2,954 in 2004."<sup>107</sup> The number of fatigue-related truck driver crashes dropped by 20.4 percent.<sup>108</sup> While FMCSA admits the data sample is small, the study was cited in the final rule to suggest that the number of fatigue-related crashes is decreasing due to the new HOS regulations.<sup>109</sup>

Four days after the 2005 HOS regulations were published, OOIDA filed a petition to challenge the new rules.<sup>110</sup> Soon after, the California Trucking Association and the International Brotherhood of Teamsters joined the lawsuit.<sup>111</sup> Public Citizen also filed a lawsuit in February 2006 against FMCSA over the 2005 HOS regulations.<sup>112</sup>

One of the arguments made by the coalition was that the final rule was too different from the proposed rule because the agency offered too many suggestions regarding the sleeper berth exception; as such, there was no way to know which arrangement the agency was going to use in the final rule.<sup>113</sup> An agency may make substantial changes from a proposed regulation; however, the final changes must be "in character with the original scheme" and "a

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102. *Id.*

103. *Id.*

104. Hours of Service of Drivers, 49 C.F.R. §§ 385, 390, 395.

105. 49 C.F.R. §§ 385, 390, 395 at 49,981-96.

106. *Id.* at 49,998. FARS is a national census of fatal crashes involving all motor vehicles, including large trucks. *Id.* at §§ 385, 390, 395 at 49,999.

107. *Id.*

108. *Id.*

109. *Id.*

110. OOIDA, *DC Appeals Court to Hear Arguments in HOS Challenge*, Oct. 26, 2006, [http://www.oida.com/Documents/Press\\_Releases/HOS\\_arguments\\_appeal.html](http://www.oida.com/Documents/Press_Releases/HOS_arguments_appeal.html).

111. *Id.*

112. Public Citizen, *Trucker Hours-of-Service Rule Creates Hazard*, Feb. 27, 2006, <http://www.citizen.org/pressroom/release.cfm?ID=2143>.

113. Bulk Transporter, <http://www.bulktransporter.com/news/HOS0276/index.html> (last visited Feb. 22, 2008).

logical outgrowth” of the proposed regulation.<sup>114</sup> The court will determine if the final rule was a logical outgrowth of the proposed regulation; otherwise, the regulation will be sent back to the agency to re-open for comments.<sup>115</sup>

### III. THE REINTRODUCTION OF EOBRs

After publishing the final rule on HOS regulations, FMCSA turned to the question of EOBRs. EOBRs were originally in the May 2000 proposed regulations, but the agency dropped the issue in the 2003 proposed regulations due to the controversy.<sup>116</sup> In the seven years between EOBR proposals, the agency nonetheless continued to study the technology in hopes of reintroducing the idea in the future.<sup>117</sup>

#### A. JANUARY 2007 PROPOSED REGULATIONS ON EOBRs

On September 1, 2004, FMCSA published an advance notice of proposed rulemaking and requested comments on EOBRs.<sup>118</sup> At the same time, FMCSA conducted its own research into the feasibility of incorporating EOBRs into the trucking industry and sponsored numerous outside studies.<sup>119</sup> The proposed rulemaking was published in the Federal Register on January 18, 2007.<sup>120</sup>

The EOBR technology standards FMCSA proposed include: (1) the ability to identify the individual driver; (2) the resistance of the system to tampering and providing inaccurate information; (3) the machine’s ability to provide a record of the work day for auditing purposes; (4) the ease and speed of enforcement personnel to access the information; (5) the protection given to personal or proprietary information stored in the EOBR; (6) the basic cost of the system; and (7) acceptability of the systems by drivers.<sup>121</sup> In order to track where the truck is located, Global Positioning Satellite (GPS) technology or another location tracking system would be required.<sup>122</sup>

As a surprise to many, FMCSA’s proposal did not make EOBRs mandatory for all motor carrier companies. To ease companies into the idea of

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114. *Natural Res. Def. Council v. EPA*, 824 F.2d 1258, 1283 (1st Cir. 1987) (quoting *S. Terminal Corp. v. EPA*, 504 F.2d 646, 658-59 (1st Cir. 1974)).

115. *Id.*

116. *Electronic On-Board Recorders for Hours-of-Service Compliance*, 72 Fed. Reg. 2340, 2343 (proposed Jan. 18, 2007) (to be codified at 49 C.F.R. pts. 350, 385, 395, 396).

117. *Id.* at 2343.

118. *Electronic On-Board Recorders for Hours-of-Service Compliance*, 69 Fed. Reg. 53,386, 53,386 (proposed Sept. 1, 2004) (to be codified at 49 C.F.R. pt. 395).

119. *Electronic On-Board Recorders for Hours-of-Service Compliance*, 72 Fed. Reg. at 2343.

120. *Id.* at 2340.

121. *Id.* at 2343.

122. *Id.*

**2008]            *Recent Amendments to Hours of Service Regulations*            57**

EOBRs in the future, the agency recommended only those motor carriers with a “pattern violation” would be required to install and use an EOBR for two years.<sup>123</sup> A “pattern violation” is defined as “a 10 percent or greater violation rate” of HOS regulations.<sup>124</sup> FMCSA estimated that within the first two years of enforcement, EOBRs would be mandatory for 930 carriers with a total of 17,500 drivers.<sup>125</sup>

FMCSA encouraged voluntary adoption of EOBRs in the industry.<sup>126</sup> In the proposal, the agency offered incentives for those companies that adopted the new technology, such as relaxing the HOS supporting document requirements.<sup>127</sup>

**B. REACTIONS TO THE EOBR PROPOSAL**

Trucking industry groups reacted differently to the EOBR proposal. For example, despite the application of HOS regulations to its motor carriers entering the United States, the Canadian Trucking Alliance supported the proposal; noting the impact of the proposal to be minor.<sup>128</sup> The American Trucking Association found EOBRs to be a sensible approach as well.<sup>129</sup> The Owner-Operator Independent Drivers Association (“OOIDA”), on the other hand, considered the rule to be “a flawed attempt to deal” with HOS rule violations.<sup>130</sup> OOIDA argued that EOBRs would not ensure HOS compliance.<sup>131</sup> Finally, Public Citizen concluded that the 2007 proposed rules did not go far enough to provide safety on public roads, encouraging FMCSA adopt a rule which would require all commercial trucks to install EOBRs.<sup>132</sup>

**C. POTENTIAL LEGAL ISSUES WITH EOBR PROPOSAL**

The 2007 proposed regulations on EOBRs raised a number of potential legal issues, including the issue on privacy. Although the agency briefly mentioned privacy in the 2007 regulations, the final rule will have to include

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123. *Id.* at 2340.

124. *Id.*

125. *Id.* at 2380.

126. *Id.* at 2340.

127. *Id.* at 2344.

128. *CTA Supports Truck Electronic On-Board Recorders*, BULK TRANSPORTER ONLINE EXCLUSIVE, Jan. 26, 2007, [http://bulktransporter.com/Topnews/cta\\_supports\\_electronic\\_recorders/index.html](http://bulktransporter.com/Topnews/cta_supports_electronic_recorders/index.html).

129. *ATA Officials Applaud EOBR Effort*, LAND LINE MAGAZINE, Jan. 24, 2007, [http://www.landlinemag.com/todays\\_news/Daily/2007/Jan07/012207/012407\\_01.htm](http://www.landlinemag.com/todays_news/Daily/2007/Jan07/012207/012407_01.htm).

130. *The FMCSA Proposes EOBR Rule for HOS Serious Offenders*, 28 HAZMAT TRANSPORT NEWS 4, 4 (2007).

131. *Id.*

132. *Id.*

more information in order to assuage the privacy concerns of drivers.<sup>133</sup>

*i. Compelling Government Interest*

The first instructive case on whether EOBRs infringe on a driver's privacy is *Skinner v. Railway Labor*.<sup>134</sup> In *Skinner*, the Supreme Court addressed the Federal Railroad Administration's rule that mandated drug tests for employees involved in train accidents.<sup>135</sup> Under the Federal Railroad Safety Act of 1970, the agency may prescribe "appropriate rules, regulations, orders, and standards for all areas of railroad safety."<sup>136</sup> The Supreme Court balanced the compelling government interest – railroad safety – against the privacy concerns of the railroad employees.<sup>137</sup> The Court found that alcohol and drug abuse by railroad employees posed a safety risk to the public that outweighed the privacy interests of the employees.<sup>138</sup>

In the case of EOBRs, FMCSA has a compelling government interest that driver fatigue is a threat to other persons (as well as the driver) on the road. Compared to *Skinner*, FMCSA's compelling government interest is high, perhaps even more so than in *Skinner* because more people are injured or killed by fatigued motor carrier drivers than impaired railroad engineers.<sup>139</sup>

The fact that EOBRs do not infringe on a driver's privacy is further supported by the Supreme Court's decision in *National Treasury Employees Union v. Von Raab*.<sup>140</sup> In that case, the Court held that the U.S. Customs Service properly implemented a drug-screening program for certain employees within the agency.<sup>141</sup> In limited circumstances, the Court reasoned, the Government's need to conduct suspicionless searches outweighs the privacy interests of the employee.<sup>142</sup> If employees are subject to "background investigations, medical examinations, or other intrusions," those employees, such as the employees of the U.S. Customs Service, should have a diminished expectation of privacy.<sup>143</sup> Applying the Court's rationale to the implementation of EOBRs, FMCSA may argue that a motor carrier driver's expectation of privacy should be lower than that of a non-regulated person, as

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133. Electronic On-Board Recorders for Hours-of-Service Compliance, 72 Fed. Reg. 2340, 2369-70, 2382 (proposed Jan. 18, 2007) (to be codified at 49 C.F.R. pts. 350, 385, 395, 396).

134. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 602 (1989).

135. *Id.* at 606.

136. *Id.*

137. *Id.* at 633.

138. *Id.*

139. See Public Citizen, *supra* note 111 (citing some 5,000 deaths and 110,000 injuries each year attributable to driver fatigue).

140. *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 656 (1989).

141. *Id.* at 677.

142. *Id.*

143. *Id.*

**2008]            *Recent Amendments to Hours of Service Regulations*            59**

the motor carrier driver is also subject to medical exams, drug and alcohol tests, and extensive record-keeping rules.<sup>144</sup>

The Court of Appeals for the Ninth Circuit also dealt with regulations requiring random drug testing in *Bluestein v. Skinner*.<sup>145</sup> *Bluestein* involved private sector employees who would be required to partake in random drug testing through a Federal Aviation Administration regulation.<sup>146</sup> The court conceded that the random testing of employees is a factor to consider when weighing privacy issues against the government interest; however, the court chose safety over privacy,<sup>147</sup> and concluded that testing random employees without notice would be a greater deterrent against drug use.<sup>148</sup> Applying the *Bluestein* court's rationale to the implementation of EOBRs, FMCSA may argue that the intrusion into the information in EOBRs would similarly be a deterrent against HOS violations.

Perhaps the best case in support of EOBRs is *International Brotherhood of Teamsters v. Department of Transportation*.<sup>149</sup> The Court of Appeals for the Ninth Circuit essentially followed the previous cases regarding drug testing of employees. There, FHWA issued a rule requiring four different drug tests for commercial drivers: (1) random; (2) pre-employment; (3) post-accident; and (4) biennial.<sup>150</sup> Following *National Treasury*, the court held that the expectation of privacy for commercial truck drivers should be less than the public, in general, due to the highly regulated environment and the numerous federal regulations regarding a driver's qualifications.<sup>151</sup> "The intrusiveness of these drug-testing regulations, on their face, must be measured against the impositions on drivers' privacy already worked by the nature of their job and its attendant regulations."<sup>152</sup> The government interest for FHWA was to avoid accidents, deter drug use, and make roads safer.<sup>153</sup>

If the 2007 EOBR regulations are challenged on the issue of privacy, FMCSA has a strong argument that the collection of data from the EOBRs is less intrusive than drug testing. Though information concerning when a driver is sleeping and where the driver is located may have some bearing on his or her privacy, drivers are already subject to numerous requirements and regulations, not to mention that the current paper RODS provide the same information as the EOBRs would convey.

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144. See 49 C.F.R. § 391.1 (1995); 49 C.F.R. § 382.101 (2001); 49 C.F.R. § 395.8 (1998).

145. *Bluestein v. Skinner*, 908 F.2d 451, 453 (9th Cir. 1990).

146. *Id.*

147. *Id.* at, 456-457 (quoting *Harmon v. Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989)).

148. *Id.* at 457.

149. *Int'l Bhd. of Teamsters v. Dep't of Transp.*, 932 F.2d 1292, 1292 (9th Cir. 1991).

150. *Id.* at 1294.

151. *Id.* at 1300.

152. *Id.* at 1302.

153. *Id.* at 1303-04.

*ii. Searches Under the Fourth Amendment*

Another aspect of privacy that FMCSA may confront is a person's privacy protection under the Fourth Amendment.<sup>154</sup> First, in the context of government action, drug testing is a search under the Fourth Amendment.<sup>155</sup> Furthermore, the Fourth Amendment mandates that all searches and seizures be reasonable.<sup>156</sup> However, there is an exception for special needs that make the "warrant and probable-cause requirement impracticable."<sup>157</sup> To start, the business must be a pervasively regulated business, such as an alcohol distributor or a gun dealer.<sup>158</sup> A pervasively regulated business is one that has a "long tradition of close government supervision."<sup>159</sup> Because of that government supervision, someone in a closely regulated industry should have a diminished expectation of privacy.<sup>160</sup>

There are three questions a court must ask when determining if a warrantless inspection on a closely regulated business is reasonable.<sup>161</sup> First, there must be a substantial government interest in the regulatory scheme and that regulation must reasonably serve the substantial interest.<sup>162</sup> Next, the warrantless inspections must further the regulatory scheme.<sup>163</sup> Finally, the statute's inspection program must advise the owner of a potential search, and the search must be limited in time, place, and scope.<sup>164</sup>

The EOBRs pose no Fourth Amendment problem. The motor carrier industry is a pervasively regulated business as both drivers and motor carrier companies are subject to regulations. FMCSA has a substantial government interest in acquiring the information from the EOBRs. FMCSA's goal is to ensure safety on the roads and compliance with HOS regulations. The EOBRs tell the agency official if the HOS regulations have been followed. Though an officer or agency official would not give notice to the truck driver before an inspection of the EOBR, for fear of the driver tampering with the device and the stored information, FMCSA agency statute would provide notice to drivers that they could be subject to a search. Otherwise, if the information is tampered with before the official can view the information, there is no way to ensure that the HOS regulations are being followed.

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154. U.S. CONST. amend. IV.

155. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 614 (1989).

156. U.S. CONST. amend. IV.

157. *Skinner*, 489 U.S. at 619.

158. *N.Y. v. Burger*, 482 U.S. 691, 700-701 (1987).

159. *Id.* at 700.

160. *Id.* at 702.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* at 703.

**2008]            *Recent Amendments to Hours of Service Regulations*            61**

Despite the strong application of the *Burger* case to EOBRs, some distinctions may exist. The *Burger* test applied to closely regulated *businesses*;<sup>165</sup> a truck could be considered a driver's home, as well as his business, and as such, may increase the driver's expectation of privacy while he is sleeping or otherwise undertaking activities in his "home."<sup>166</sup>

***iii. Privileged Work Product***

Another privacy issue that worries truck drivers is whether the information stored in the EOBR may be used against them in accident litigation. *In re Air Crash* gives some insight into the potential privacy problems a driver might encounter.<sup>167</sup> On December 20, 1995, an American Airlines flight crashed in Colombia; tragically, 159 people died.<sup>168</sup> The plaintiffs served a request on the airline for documents which were part of the ASAP program; the program was a "voluntary pilot self-reporting program designed to encourage pilots to report incidents and violations."<sup>169</sup> Data such as speed, navigational problems, and altitude were included in the documents; pilots who reported these incidents were given incentives, such as a reduced enforcement action by the Federal Aviation Administration.<sup>170</sup>

American Airlines wanted to protect the information and argued two privileges: (1) the "self-critical analysis privilege"; or (2) a new common law privilege for the documents in the ASAP program.<sup>171</sup> The court held that the self-critical analysis privilege could not be applied in this case.<sup>172</sup> First, the privilege does not extend to objective facts, just to impressions and opinions; second, the privilege is only necessary if the flow of protected information would stop if discovery was allowed; and third, the privilege only extends to reports that were prepared with the expectation that the information would be kept confidential.<sup>173</sup> However, the court held there was a limited common law privilege.<sup>174</sup> In doing so, the court looked at three factors:<sup>175</sup> (1) the private interests and public interests; (2) if there is an evidentiary benefit from denying the privilege; and (3) if the privilege is recognized by state courts and legislatures.<sup>176</sup>

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165. *Id.*

166. *Id.* at 700.

167. *In re Air Crash Near Cali, Colombia*, 959 F. Supp. 1529, 1529 (S.D. Fla. 1997).

168. *Id.* at 1530.

169. *Id.* at 1531.

170. *Id.*

171. *Id.* at 1532.

172. *Id.*

173. *Id.*

174. *Id.* at 1533.

175. *Id.*

176. *Id.* at 1533-1535.

Truck drivers have a right to worry about the information stored on the EOBR. It could indicate if they speeding or if they were driving in violation of HOS rules. The burden would be on the party opposing discovery to prove why the information should be protected.<sup>177</sup> Currently, there is no privilege that precludes discovery of recorded data in accidents.<sup>178</sup> The self-critical analysis privilege would not be available to the information stored on the EOBR because the information would be facts, not opinions; the information flow would not be hindered by discovery because the information would already be required by FMCSA; and there is no expectation that the information would be kept confidential as agency officials and law enforcement would have access to the information. Nonetheless, a driver could argue for a limited common law privilege, which arguably, would permit them to be more forthcoming in the details of the incident. FMCSA could then use the information (provided either by the driver or EOBR) to increase safety on the roads.

## VI. CONCLUSION

FMCSA has made numerous missteps while trying to change the HOS rules. Congress has pushed for revisions for a great number of years, along with many public interest groups. Trucking companies and industry groups would like to increase safety, but worry about costs and privacy issues. There is a lack of agreement between all of the parties as to the rules and technology needed to best accomplish the safety goals of the agency. The agency has not conformed to APA procedures and has lost in court because of it.

In July 2007, the Court of Appeals for the D.C. Circuit ruled on the challenges made to the 2005 HOS regulations.<sup>179</sup> The court held that FMCSA violated provisions of the APA by failing to allow parties to comment on the proposed rules and that FMCSA did not explain the reasons and methodology behind the changes.<sup>180</sup> FMCSA believed that the court found against the agency for procedural problems with the announced changes to the HOS regulations, but not with the substantive changes to the regulations.<sup>181</sup> Therefore, in December 2007, FMCSA issued an interim final rule to adopt the 2005 HOS Regulations.<sup>182</sup> FMCSA requested comments from interested parties until February 15, 2008, and announced that a final rule will finally be

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177. *Id.* at 1531.

178. Donald C. Massey, *Proposed On-Board Recorders for Motor Carriers: Fostering Safer Highways or Unfairly Tilting the Litigation Playing Field?*, 24 S. ILL. U. L. J. 453, 467 (2000).

179. *OOIDA v. FMCSA*, 494 F.3d 188, 188 (D.C. Cir. 2007).

180. *Id.* at 193.

181. Hours of Service of Drivers, 72 Fed. Reg. 71,247, 71,248 (proposed Dec. 17, 2007) (to be codified at 49 C.F.R. pts. 385, 395).

182. *Id.* at 71,247.

**2008]      *Recent Amendments to Hours of Service Regulations*      63**

issued sometime later in 2008.<sup>183</sup>

Changes to HOS regulations may finalize in 2008, but if the 2007 proposed regulations for EOBRs become final rules, the agency can expect more litigation in its future.

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183. Hours of Service of Drivers, 72 Fed. Reg. at 71,247.