



September 9, 2021 (sic; actually September 10, 2021)

Full Packet via US Mail

Mava Lewis
Office of the General Counsel
United States Department of Transportation
1200 New Jersey Avenue, SE.
Washington, DC 20590

Re: Retrospective Review of 49 CFR 395 Subpart B--Electronic Logging Devices (ELDs) & Issuance of OST Guidance on ELD vetting and certification pursuant to 49 CFR 5.13(c)(4)(i).

Dear Ms. Lewis:

On August 1, 2021, the Small Business in Transportation Coalition (SBTC) submitted a Petition for 'Retrospective Review' of 49 CFR 371 & Issuance of OST Guidance on Broker Transparency to you. We received the attached acknowledgement of receipt of this petition from Larry Minor of FMCSA on behalf of the USDOT Office of the General Counsel on September 2, 2021 (Exhibit A).

Comes now, the SBTC to petition you once again for Retrospective Review of 49 CFR 395 Subpart B--Electronic Logging Devices (ELDs) & Issuance of OST Guidance on ELD vetting and certification pursuant to 49 CFR 5.13(c)(4)(i).

At the onset of this new petition, SBTC wishes to note that it filed a comment on the DOT-OST-2017-0069-2437 docket back in 2017 that relates to this matter. It appears the Department did not ever finalize this regulatory review. Accordingly, we wrote to John Putnam on August 31, 2021 via email (Exhibit B) asking for the status of this regulatory review. We have received no reply to date.

As you know, the Moving Ahead for Progress in the 21st Century Act ("MAP-21) directed the Secretary to take certain actions with respect to electronic logging devices ("ELDs"), including, but not limited, to promulgating regulations:

“...requiring a commercial motor vehicle involved in interstate commerce and operated by a driver subject to the hours of service and the record of duty status requirements under part 395 of title 49, Code of Federal Regulations, be equipped with an electronic logging device to improve compliance by an operator of a vehicle with hours of service regulations prescribed by the Secretary;”

MAP-21 further required that the Secretary’s regulations:

“...require an electronic logging device— “(i) to accurately record commercial driver hours of service; “(ii) to record the location of a commercial motor vehicle; “(iii) to be tamper resistant; and “(iv) to be synchronized to the operation of the vehicle engine or be capable of recognizing when the vehicle is being operated; “(B) allow law enforcement to access the data contained in the device during a roadside inspection; and “(C) apply to a commercial motor vehicle beginning on the date that is 2 years after the date that the regulations are published as a final rule.”

MAP-21 also directed “Performance and Design” standards:

“The regulations prescribed under subsection (a) shall establish performance standards— “(A) defining a standardized user interface to aid vehicle operator compliance and law enforcement review; “(B) establishing a secure process for standardized— “(i) and unique vehicle operator identification; “(ii) data access; “(iii) data transfer for vehicle operators between motor vehicles; “(iv) data storage for a motor carrier; and “(v) data transfer and transportability for law enforcement officials; “(C) establishing a standard security level for an electronic logging device and related components to be tamper resistant by using a methodology endorsed by a nationally recognized standards organization; and “(D) identifying each driver subject to the hours of service and record of duty status requirements under part 395 of title 49, Code of Federal Regulations.”

Finally, in terms of the enforcement of these standards, MAP-21 imposed an affirmative duty on the Secretary to promulgate certification criteria and a process for certification:

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

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We believe an ELD falls under the definition of “motor vehicle safety standard” insofar as an ELD is commercial “motor vehicle equipment” mandated by law. We therefore petitioned the Secretary twice from 2019 to 2021 asking USDOT to adopt a new motor vehicle standard. Yesterday, we finally received the attached letter from NHTSA on those matters but only after we filed a motion for leave to amend our current Federal complaint against the Department on August 20, 2021 (see Exhibits C & D, respectively).

Our previous requests to the Federal Government to suspend the ELD rule due to then-new data showing a 30 year high in large truck fatality rates and delay the December 16th 2019 transition to ELDs fell upon deaf ears. Instead, the Secretary Chao Department and the Commercial Vehicle Safety Alliance (“CVSA”) implemented hard ELD enforcement. We are now at a 31 year high awaiting NHSTA’s latest data. Accordingly, and on behalf of its membership and the small carrier industry in general, the Small Business in Transportation Coalition (“SBTC”) now repeats its 2019 request for an **order** by the Office of the Secretary to be issued which: (1) enforces MAP-21 and directs that all ELD products must actually be certified by the Federal Motor Carrier Safety Administration (“FMCSA”) in accordance with the Congressional directive and standards set forth in MAP-21; and (2) declares a nationwide **moratorium** on ELD enforcement until a bona fide certification process is in place that allows carriers to properly vet ELD products as intended by the people’s representatives in Congress.

We again ask for this process as a replacement of FMCSA’s current “self-certification” procedure, which, we contend, (1) skirts the United States Department of Transportation’s (“USDOT”) responsibility under MAP-21 to develop a bona fide certification process; and (2) recklessly allows non-tamper-proof, unencrypted, and otherwise deficient ELD products to be used in Commercial Motor Vehicles due to the self-certification scheme, which is contrary to the intent of Congress.

We would also like to unequivocally state again, here, that the ELD mandate was never properly mandated by FMCSA. In 2018, we wrote to FMCSA regarding their failure to adhere to 49 CFR Appendix A to Subpart B of Part 395, Functional Specifications for All Electronic Logging Devices (ELDs).

That is, we reminded them that FMCSA committed during rulemaking to making certain ELD-related information would be readily available to the industry and public online at the onset of implementation without the need for filing Freedom of Information Act or

other data requests. We pointed to 49 CFR Appendix A to Subpart B of Part 395, Functional Specifications for All Electronic Logging Devices (ELDs) as follows:

5.3. Publicly Available Information

*Except for the information listed under paragraphs 5.1.1(b)(2), (4), and (5) and 5.2.1(b)(9) of this appendix, **FMCSA will make the information in sections 5.1 .1 and 5.2.1 for each certified ELD publicly available on a Web site to allow motor carriers to determine which products have been properly registered and certified as ELDs compliant with this appendix** (emphasis added).*

We noted that 5.1.1. states:

5.1.1. Registering Online

(a) An ELD provider developing an ELD technology must register online at a secure FMCSA Web site where the ELD provider can securely certify that its ELD is compliant with this appendix.

(b) Provider's registration must include the following information:

(1) Company name of the technology provider/manufacturer.

(2) Name of an individual authorized by the provider to verify that the ELD is compliant with this appendix and to certify it under section 5.2 of this appendix.

(3) Address of the registrant.

(4) Email address of the registrant.

(5) Telephone number of the registrant.

And we pointed out that 5.2.1 states:

5.2.1. Online Certification

(a) An ELD provider registered online as described in section 5.1 .1 of this appendix must disclose the information in paragraph (b) of this section about each ELD model and version and certify that the particular ELD is compliant with the requirements of this appendix.

(b) The online process will only allow a provider to complete certification if the provider successfully discloses all of the following required information:

(1) Name of the product.

(2) Model number of the product.

(3) Software version of the product.

(4) An ELD identifier, uniquely identifying the certified model and version of the ELD, assigned by the ELD provider in accordance with section 7.1 5 of this appendix.

(5) Picture and/or screen shot of the product.

(6) User's manual describing how to operate the ELD.

- (7) Description of the supported and certified data transfer mechanisms and step-by-step instructions for a driver to produce and transfer the ELD records to an authorized safety official.*
- (8) Summary description of ELD malfunctions.*
- (9) Procedure to validate an ELD authentication value as described in section 7.1 4 of this appendix.*
- (10) Certifying statement describing how the product was tested to comply with FMCSA regulations.*

We further noted that FMCSA had --as of a 2018 --published in furtherance thereof a page at <https://csa.fmcsa.dot.gov/ELD/List>, which only covered the following items:

- (1) Name of the product.*
- (2) Model number of the product.*
- (3) Software version of the product.*
- (4) An ELD identifier, uniquely identifying the certified model and version of the ELD, assigned by the ELD provider in accordance with section 7.1 5 of this appendix.*
- (5) Picture and/or screen shot of the product.*

and:

- (1) Company name of the technology provider/manufacturer.*
- (4) Email address of the registrant.*
- (5) Telephone number of the registrant.*

We alerted FMCSA to the fact that the following seven data columns that are required to be published on the website appeared to have been omitted by FMCSA:

Name of an individual authorized by the provider to verify that the ELD is compliant with this appendix and to certify it under section 5.2 of this appendix.

Address of the registrant.

User's manual describing how to operate the ELD.

Description of the supported and certified data transfer mechanisms and step-by-step instructions for a driver to produce and transfer the ELD records to an authorized safety official.

Summary description of ELD malfunctions.

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Procedure to validate an ELD authentication value as described in section 7.1 4 of this appendix.

Certifying statement describing how the product was tested to comply with FMCSA regulations.

Also in 2018, we advised FMCSA that certain ELD manufacturers were misleading the industry to believe that their ELD products were "FMCSA-Certified" when the SBTC & FMCSA both knew this not to be true because of FMCSA's "self-certification" policy, which again we contend shirked their responsibility under the Congressional directive. FMCSA did not address this with us and ignored this problem.

We still contend that FMCSA failed to adhere to its promise to publish the missing information referenced above for at least eight months after the ELD rule took effect in 2017, and that FMCSA thereby neglected to enable the industry to properly vet ELD products made available by ELD manufacturers, **including being aware of very important information like a "summary description of malfunctions."** Without this due notice, FMCSA therefore **failed** to properly implement the ELD rule.

FMCSA never acknowledged or responded to our concern that the ELD mandate was not properly implemented and that FMCSA failed to provide industry with the information it needed to make good choices when selecting ELD equipment at the onset of the ELD implementation compliance period.

In our comment to the FMCSA a while back in furtherance of Hours of Service reform rulemaking, we pointed to the **national security** risks inherent in self-certification:

"SBTC was the only trucking association to tell to Congress that the trucking industry knows very well that there is the potential for criminals and others including terrorists to hack into trucks' telematic devices and breach drivers' bluetooth and wi-fi connections to take over the controls of trucks' accelerators remotely. They know this because the FMCSA's parent agency USDOT and the FBI issued a warning to this effect in 2016. And University of Michigan researchers reported they had accomplished this for real not too long ago. They actually hacked in and made a truck accelerate on a highway to the amazement -and sheer terror-- of its driver.

We ask FMCSA to imagine a HAZMAT truck being forced remotely into accelerating into a school bus filled with kids, or a hospital or nursing home, or a major city's water supply.

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By opting to allow ELD manufacturers to “self-certify” we believe FMCSA skirted their obligations under MAP-21, jeopardized national security, and you have allowed the market to be flooded with unsecured devices that are not encrypted. Quite frankly, some of them malfunction and some don’t work at all. We remind FMCSA here of our request to immediately suspend ELDs due to this national security concern and of our pending class exemption application.

And while some ELD manufacturers are out inappropriately peddling their products as being “FMCSA-certified,” in reality... FMCSA has not certified any of them. Not a one. FMCSA merely requires these manufacturers register their products and “self-certify.”

We find this ironic, when we think about how these are tracking devices that are intended to prevent truck drivers from, “self-certifying” their hours of service compliance on paper logs.”

We continue to believe FMCSA’s failure to develop a certification program to protect the industry and public from telematic devices susceptible to hacking... is reason enough to temporarily press the pause button on ELD enforcement until the Office of the Secretary has had time to (1) conduct this retrospective review, direct FMCSA to thoroughly research and report back to the Secretary and Congress on telematic vulnerabilities, and develop a bona fide telematic certification program as originally directed by Congress; and/or (2) issue guidance on how motor carriers are supposed to determine if the properly vetted ELDs when they were deprived important safety information which FMCSA promised through rulemaking to give them, and how new entrants should currently be vetting ELD products when they are not actually certified by the FMCSA.

We would also like to note here that FMCSA’s self-certification of ELD products has drawn the criticism of the **Federal Bureau of Investigation** in addition to the SBTC insofar as hacking is concerned. Indeed, in its July 21, 2020 bulletin, the Bureau stated:

“Cyber criminals could exploit vulnerabilities in electronic logging devices (ELDs), which became required equipment in most commercial trucking operations as of 16 December 2019 due to a federal regulatory mandate. Although the mandate seeks to provide safety and efficiency benefits, it does not contain cybersecurity requirements for manufacturers or suppliers of ELDs, and there is no requirement for third-party validation or testing prior to the ELD self-certification process. This poses a risk to businesses because ELDs create a bridge between previously unconnected systems critical to trucking operations. Companies choosing an ELD can mitigate their cyber risk by following best practices tailored

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to ELDs. This includes asking the ELD's supplier specific questions, some of which are identified in this PIN."

And most recently, it was reported on March 1, 2021 by Freight Waves (<https://www.freightwaves.com/news/investigative:-keeptruckin-fights-ntsb-bid-to-remove-its-eld-technology-in-wake-of-crash>) that one National Transportation Safety Board member had this to say about FMCSA's "self-certification:

Michael Graham, NTSB board member, said during the Westfield Transport hearing that FMCSA's review process for ELDs was "perilously close to very little or no certification" at all.

"It works, and it works because I say it works," Graham said. "That's not a very robust system."

Lastly, because of USDOT's past pattern and practice to the contrary, with respect to both of SBTC's petitions for retrospective review and guidance filed now over the past 6 weeks, the SBTC wishes to remind the Department that the **Administrative Procedure Act** requires the Department to address these matters "**within a reasonable time**" and afford SBTC "**prompt notice**" of your decisions.

Please note 5 U.S. Code § 555 - Ancillary matters states:

(b)...With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it (emphasis added)... and

(e) Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

While we request that you please process this petition in accordance with law, given the COVID-19 pandemic and the unique once-in-a-century challenges faced by truckers over the past year, the Omnitracs failure in 2019, and the concerns expressed by the FBI and NTSB, which clearly show there is a need for USDOT oversight and certification of ELD products, we again request an **Office of the USDOT Inspector General Audit** into FMCSA's implementation of the MAP-21 requirement as part of your

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retrospective review and that the Secretary develop a bona fide ELD certification program in accordance with Congress' mandate.

We also believe an **immediate nationwide emergency moratorium on ELD enforcement for all carriers** is in order until such time as a bona fide risk-free ELD certification program is properly developed and implemented by FMCSA in the interests of public safety and national security and that a return to paper logs, albeit temporary, be authorized as a result of your retrospective review. Given the agricultural exemption already granted by Congress, we believe Congress has already established firm public policy that paper logs are safe and sufficient for these carriers and --all things considered-- are in the public interest.

Thank you.

Sincerely,

/s/ JAMES LAMB
SBTC Executive Director