

**DEPARTMENT OF TRANSPORTATION**

**Federal Motor Carrier Safety Administration**

**Docket No. FMCSA-2010-0168**

**Policy on the Retention of Supporting Documents and the Use of Electronic Mobile Communication/Tracking Technology in Assessing Motor Carriers' and Commercial Motor Vehicle Drivers' Compliance with the Hours of Service Regulations**

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.

**ACTION:** Notice of Regulatory Guidance and Policy Change.

**SUMMARY:** The Federal Motor Carrier Safety Administration (FMCSA) provides notice to the motor carrier industry and the public of regulatory guidance and policy changes regarding the retention of supporting documents and the use of electronic mobile communication/tracking technology in assessing motor carriers' and commercial motor vehicle drivers' compliance with the hours of service regulations.

**DATES:** Effective Date: This change in policy is effective [**Insert date 30 days after the date of publication in the Federal Register**]. Comments should be submitted on or before July 9, 2010. Late-filed comments will be considered to the extent practicable.

**ADDRESSES:** You may submit comments (identified by Docket Number FMCSA-2010-0168) using any of the following methods:

- **Federal eRulemaking Portal:** <http://www.regulations.gov>. Follow the online instructions for submitting comments.

- Mail: Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, S.E., West Building, Ground Floor, Room W12-140, Washington, DC 20590-0001.
- Hand Delivery or Courier: West Building, Ground Floor, Room W12-140, 1200 New Jersey Avenue, S.E., between 9 a.m. and 5 p.m. E.T., Monday through Friday, except Federal holidays.
- Fax: 202-493-2251.

Privacy Act: Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's Privacy Act Statement for the Federal Docket Management System published in the Federal Register on January 17, 2008 (73 FR 3316), or you may visit <http://edocket.access.gpo.gov/2008/pdf/E8-785.pdf>.

**FOR FURTHER INFORMATION CONTACT:** Mr. David Mancl, Team Leader, Enforcement and Compliance Division, MC-ECE, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue, S.E., Washington, DC 20590. Telephone: 202-493-0442. Web site address: <http://www.fmcsa.dot.gov>.

## **SUPPLEMENTARY INFORMATION**

### **Background**

In 1997, the Federal Highway Administration (FHWA), FMCSA's predecessor agency, issued a policy memorandum recognizing that advanced technologies, which were emerging and being implemented within the industry, offered an opportunity to improve operational and safety performance. To promote and encourage the use of these

new technologies in the industry's operations and overall safety management, the Agency limited the use of the data and records generated by advanced technologies for checking hours of service compliance during reviews and regulatory enforcement actions.

After more than a decade, the Agency's policy achieved its purpose; the once emerging technologies are today a widely accepted and essential component of the industry's logistics, operations and safety management systems. FMCSA therefore rescinded the 1997 policy on November 19, 2008, effective December 19, 2008. (73 FR 69717)

On December 24, 2008, the Associate Administrator for Enforcement and Program Delivery issued an internal Agency policy memorandum titled: "Use of Advanced Information Technology Policy." This memorandum informed FMCSA and State enforcement personnel that FMCSA would exercise its full statutory authority under 49 U.S.C. 504(c) to inspect and copy records of a motor carrier. If a motor carrier uses Global Positioning Systems (GPS) or other electronic mobile communication/tracking technology during the ordinary course of its business, FMCSA has the authority to request these records and use them during the course of an investigation. FMCSA considers electronic mobile communication/tracking records to be supporting documents, as they record the time, date, and/or location of motor vehicles and/or drivers.

Since December 2008, there has been some confusion concerning FMCSA's use of these technologies for enforcement purposes and the requirements for motor carriers to retain and produce related records upon demand. The Agency has identified the need for further guidance regarding the use of electronic mobile communication/tracking records

to verify compliance with 49 CFR Part 395, Hours of Service Drivers. Today's Policy, therefore, supersedes the December 2008 Policy.

Following up its commitment as stated in the April 2010 final rule, Electronic On-Board Recorders (EOBRs) for Hours-of-Service (HOS) Compliance, 75 FR 17208, FMCSA is drafting a notice of proposed rulemaking (NPRM) to further advance motor carrier safety through improved HOS compliance. This NPRM will have three components: (1) proposing that EOBRs be required for considerably more motor carriers and drivers, (2) proposing that motor carriers be required to develop and maintain systematic and effective HOS oversight for their drivers, and (3) proposing, pursuant to Sec. 113 of the Hazardous Materials Transportation Authorization Act of 1994, title I of Pub. L. 103-311, 108 Stat. 1673 (Aug. 26, 1994) (HMTAA), requirements for motor carriers to retain HOS supporting documents. The Agency anticipates publishing the NPRM by the end of 2010 and publishing a final rule within 24 months. In clarifying current enforcement practices, today's guidance moves toward the anticipated NPRM.

### **Policy**

This Policy is intended to be used by enforcement personnel as guidance in making enforcement decisions. Nothing in this Policy is intended to alter a motor carrier's duty to ensure that its employees and agents are complying with all applicable regulations. A motor carrier is responsible for the acts and omissions of its employees and agents with respect to regulatory compliance.

Previous policy statements have used the terms "GPS" and "Advanced Information Technology" to describe electronic mobile communication/tracking technology. FMCSA recognizes that these terms are no longer adequate to describe

electronic mobile communication/tracking technology. Such technologies can no longer be considered “advanced” as they are now widely accepted and used in the industry. Likewise, electronic mobile communication/tracking systems may rely on technology other than GPS to determine the time, date, and/or location of motor vehicles and/or drivers. For ease of discussion in this Policy, the use of the phrases “electronic mobile communication/tracking technology,” “electronic mobile communication/tracking systems,” and “electronic mobile communication/tracking records” shall be deemed to include those technologies and records that allow a motor carrier to identify the location of a motor vehicle or driver, or that allow a motor carrier to send or receive messages to or from its drivers. The application of this Policy to a technology or record does not depend on the method of communication or the technology used to obtain the time and/or position location information.

#### Supporting Documents Requirements for Motor Carriers without Qualifying Electronic Mobile Communication/Tracking Technology

Supporting documents are motor carriers’ records that are maintained in the ordinary course of business and may be used by the motor carrier to verify information recorded on the driver’s RODS. On April 4, 1997, as part of a set of guidance and policy statements, FHWA, FMCSA’s predecessor agency, published a list of more than thirty examples of supporting documents that motor carriers needed to retain pursuant to 49 CFR § 395.8(k)(1) (62 FR 16370, 16425) (Guidance Question 10). Based on its enforcement experience since 1997, FMCSA recognizes that certain documents in that list are not regularly used by enforcement staff to verify the accuracy of records of duty status (RODS) and that requiring motor carriers to retain these documents is no longer

necessary. FMCSA will therefore no longer consider the following to be “supporting documents” and will not require motor carriers to maintain and produce such documents pursuant to 49 CFR § 395.8(k)(1):

- driver call-in records;
- international registration plan receipts;
- international fuel tax agreement receipts;
- trip permits;
- cash advance receipts; and
- driver fax reports (cover sheets).

The Agency rescinds the list of examples of supporting documents in the April 4, 1997, Guidance Question 10 and provides the following updated, shorter list: bills of lading, carrier pros, freight bills, dispatch records, electronic mobile communication/tracking records (as explained below), gate record receipts, weigh/scale tickets, fuel receipts, fuel billing statements, toll receipts, toll billing statements, port of entry receipts, delivery receipts, lumper receipts, interchange and inspection reports, lessor settlement sheets, over/short and damage reports, agricultural inspection reports, driver and vehicle examination reports, crash reports, telephone billing statements, credit card receipts, border crossing reports, customs declarations, traffic citations and overweight/oversize permits and traffic citations.

Motor carriers without qualifying electronic mobile communication/tracking technology must continue to retain other supporting documents that may be used to verify information on the driver’s RODS. If the motor carrier has multiple offices or terminals and these records are maintained at motor carrier locations other than the motor carrier’s

principal place of business, see Regulatory Guidance on the Definition of “Principal Place of Business,” July 29, 2009 (74 FR 37653), they must be forwarded to the principal place of business, or other location specified, upon a request by an authorized FMCSA representative or State official in accordance with 49 CFR § 390.29.

Supporting Documents Requirements for Motor Carriers that Use Qualifying Electronic Mobile Communication/Tracking Technology

If a motor carrier uses a paper RODS system and also uses electronic mobile communication/tracking technology on specific vehicles and can produce electronic mobile communication/tracking records acceptable to the Agency under this Policy, FMCSA will permit the motor carrier to maintain and submit fewer paper supporting documents.

Whether the electronic mobile communication/tracking records are acceptable to the Agency under this Policy or not, the investigator has the authority to demand those records, and he or she may accept them in either printed or electronic form from the motor carrier. These records will be used to assess motor carrier and commercial motor vehicle driver compliance with the HOS regulations and for other evaluations into the safety performance or regulatory compliance of the motor carrier. Electronic mobile communication/tracking records may also be used by the Agency as evidence in any proceeding to enforce Federal motor carrier statutes and regulations.

For each vehicle a motor carrier uses for which the motor carrier can produce electronic mobile communication/tracking records acceptable under this Policy, the motor carrier is no longer required to maintain or produce the following supporting documents pursuant to 49 CFR § 395.8(k)(1) for the driver of that vehicle:

- Gate record receipts;
- Weigh/scale tickets;
- Port of entry receipts;
- Delivery receipts;
- Toll receipts;
- Agricultural inspection reports;
- Over/short and damage reports;
- Driver and vehicle examination reports;<sup>1</sup>
- Traffic citations;
- Overweight/oversize reports and citations;
- Carrier pros;
- Credit card receipts;
- Border Crossing Reports;
- Customs declarations; and
- Telephone billing statements.

Motor carriers that seek to take advantage of the less burdensome supporting documents retention requirements available under this Policy are precluded in HOS enforcement proceedings from challenging the accuracy of their own electronic mobile communication/tracking records.

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<sup>1</sup> This notice does not affect motor carriers' duty to maintain driver and vehicle examination reports in accordance with the retention requirements of 49 CFR part 396. See 49 CFR 396.11(c)(2) and 396.9(d)(3)(ii).

### Qualifying Electronic Mobile Communication/Tracking Technology

For each vehicle for which a motor carrier seeks to take advantage of the less burdensome supporting documents retention requirements available under this Policy, the motor carrier must show that the electronic mobile communication/tracking records have the characteristics below:

**Positioning Frequency:** The system must be set up to communicate position location at a rate of at least one time per hour, per vehicle, while the vehicle is in motion.

**Vehicle Integration:** The system must be integrally synchronized with the vehicle.

**Report Functionality:** The system must be capable of generating upon demand a document/record, either printed (paper) or electronically rendered (spreadsheet, portable document format, tagged image file format or other commonly available software format), showing the required Report Content.

**Report Content:** The position history report must include, at a minimum, vehicle identification information, date, time, proximity location (reference points), and latitude and longitude for each position communication.

**Retention:** Motor carriers must maintain position history reports for a period of six months in accordance with 49 CFR § 395.8(k)(1).

If the motor carrier's electronic mobile communication/tracking records for a particular vehicle do not qualify under this Policy, the motor carrier must maintain all supporting documents that may be used to assess motor carrier and commercial motor vehicle driver compliance with the HOS regulations, pursuant to 49 CFR § 395.8(k)(1). A motor carrier that uses electronic mobile communication/tracking technology in the

ordinary course of business for any purpose is expected to include the use of records and information generated by that technology in its HOS oversight activities.

#### Related Information

A motor carrier's responsibility to ensure the accuracy of its drivers' RODS is not limited by the list of examples of supporting documents in this Policy. A motor carrier is liable for false RODS submitted by its drivers and other HOS violations if the motor carrier had or should have had the means by which to detect the violations, regardless of whether the means to detect the violations is included in the list of examples of supporting documents.

All motor carriers that use electronic mobile communications/tracking technology, whether or not such technology is qualifying technology under this Policy, must continue to retain data generated by that system in the ordinary course of business. The motor carrier is not required, for purposes of responding to investigations by FMCSA or State enforcement personnel, to convert the data from the format in which it is ordinarily retained. However, if the motor carrier receives in the ordinary course of business electronic or printed reports or other communications in which the data is converted to a more readable or usable format, the motor carrier must retain such reports or communications and provide them to investigators upon demand.

If a motor carrier denies the Agency access to its supporting documents, including, without limitation, electronic mobile communication/tracking records, the motor carrier's action shall be considered a denial of access under 49 U.S.C. § 521(b)(2)(E). As with all supporting documents, a failure to maintain electronic mobile communication/tracking records may be cited under 49 C.F.R. § 395.8(k)(1).

FMCSA recognizes that motor carriers may use electronic mobile communication/tracking technologies for applications other than recording the time, date and/or location of a motor vehicle and/or driver. An electronic record of vehicle performance trends and events such as speeding or hard-braking, or vehicle performance measures such as fuel consumption (MPG) or engine speed (RPM), which may be captured through on-board sensors and transmitted via electronic mobile communication/tracking technology, is not required to be maintained as a supporting document under 49 CFR Part 395. However, if a triggering event or performance measure creates a record of the time, date, and/or location of a motor vehicle and/or driver, then the time, date and/or location of that event or measure must be retained.

Other statutes and/or regulations may require the retention of certain listed documents. This Policy does not affect a motor carrier's responsibility to comply with these other statutes and/or regulations.

This Policy is not intended to address motor carriers that use EOBRs under the terms of a remedial directive and EOBRs or Automatic On-Board Recording Devices (AOBRDs) under the terms of a settlement agreement. Carriers subject to a remedial directive or settlement agreement must comply with the terms of that directive or agreement, including requirements to retain particular documents.

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