



February 11, 2013

National Highway Traffic Safety Administration
Office of the Administrator
1200 New Jersey Avenue, SE
West Building
Washington, DC 20590

Re: Docket No. NHTSA–2012–0177
Federal Motor Vehicle Safety Standards; Event Data Recorders

Dear Administrator:

The Electronic Frontier Foundation (EFF) submits the following comments to the National Highway Traffic Safety Administration (NHTSA) in response to the Notice of Proposed Rulemaking (NPRM) on Event Data Recorders (EDRs), Docket No. NHTSA–2012–0177, dated December 13 2012.¹ In addition to these comments, EFF joins in full the comments of the Electronic Privacy Information Center, *et al.*, also submitted to the NHTSA on February 11, 2013 (EPIC Comments), and signed by EFF along with a coalition of privacy, consumer rights, and civil rights organizations.

I. **ABOUT EFF**

EFF is a nonprofit, member-supported civil liberties organization working to protect privacy and free expression in technology, law, policy, and standards in the information society. EFF actively encourages and challenges the executive and judiciary to support privacy and safeguard individual rights as emerging technologies become more prevalent in society. With over 21,000 dues-paying members and over 179,000 mailing-list subscribers, EFF is a leading

¹ 77 Fed. Reg. 74144 (proposed Dec. 13, 2012) (to be codified at 49 C.F.R. pt. 571).

voice in the global and national effort to ensure that fundamental liberties are respected in the digital environment.

II. SPECIFIC PRIVACY CONCERNS WITH THE NRMP

Although the NHTSA has acknowledged² the significant privacy implications in the collection and use of EDR data, the NPRM does not sufficiently address these concerns. The NHTSA's proposed privacy measures are inadequate to ensure that individuals' privacy is safeguarded in the collection and use of EDR data. In order that the proposed regulations adequately protect driver and vehicle-owner privacy, EFF respectfully urges NHTSA to review and revise its proposed rules to adopt the amendments proposed by the EPIC Comments, as well as to address the concerns set forth below.

- a. **The regulations should mandate a clear statement in the owners manual that EDR data is the sole property of the vehicle owner and that the owner has an expectation of privacy in that data.**

The NHTSA should exercise its statutory authority to establish clear rules regarding EDR data ownership. The EPIC Comments present a regulatory framework based on a review of state law whereby the NHTSA might codify its existing policy to treat EDR data as the sole property of the vehicle owner in the regulation. The amended regulations as proposed in the EPIC Comments will provide vehicle owners and operators protection against the very privacy harms identified by the NHTSA.

EFF additionally proposes that the NHTSA's current requirements for information in the owner's manual in 49 C.F.R. § 563.11 should be amended to include clear statements that:

- 1) All data recorded by the EDR is, and will remain, the property of the owner;

² 77 Fed. Reg. 74144, 74146.

- 2) Any person or entity must obtain the owner's consent before accessing any data collected or stored by the EDR; and
- 3) The owner has an expectation that all data collected or stored by the EDR will remain private, except with the explicit consent of the owner.

In addition, Part 563.11 should be amended to require that all data collection by the EDR beyond the minimum data elements or duration required by the NHTSA, be disclosed with specificity.

Clear notice of how EDR data will be protected will give vehicle owners confidence that their privacy interests will be protected.

b. The NHTSA should explicitly prohibit the collection of audio, video, or location data by EDRs.

The possibility that an EDR might collect audio, video, or location data presents a clear threat to the privacy of owners, drivers, and passengers. The NPRM states that the regulation will not require the collection of such data.³ However, the NHTSA's assurance ignores the possibility that without an explicit prohibition, such data may nonetheless be collected. Thus, the NHTSA should amend the proposed rules to explicitly prohibit the collection of audio, video, or location data in EDRs.

The U.S. Supreme Court's decision in *United States v. Jones* illustrates one privacy concern regarding collection of location data by EDRs.⁴ In *Jones*, the Court held that GPS tracking of a vehicle by law enforcement constitutes a search for the purposes the Fourth

³ *Id.*

⁴ *United States v. Jones*, 565 US ___, 132 S. Ct. 945 (2012).

Amendment and thus requires a warrant.⁵ However, the majority based its holding on the view that the government's attachment of a GPS device onto a vehicle constitutes a physical trespass on private property.⁶ If a vehicle contains an EDR that records location data, there would be no need for the government to install a separate GPS device, and thus no trespass. Thus, if EDRs were permitted to record location data, important Fourth Amendment protections against the warrantless tracking of vehicles could potentially be easily sidestepped. The regulations should ensure this does not occur by requiring that EDRs not collect data beyond the type of crash recovery data required in the NPRM.

c. **The regulations should provide a cap on the amount of EDR data that may be recorded.**

The NPRM will *require* EDR data recording for short durations: a minimum of 5 seconds prior to a crash for the recording of 15 required and 28 optional "data elements."⁷ However, by setting only a minimum duration, the NHTSA permits a manufacturer to enable an EDR to record data over a greater, and perhaps much greater, duration. Because no maximum duration is specified, and because modern automotive electronics packages include large amounts of digital storage, there is nothing to prevent the long-term collection of data.

EFF urges the NHTSA to amend its proposed rules to specify that 5 seconds is also the maximum data recording duration for each required or optional data element. On this record, EFF sees no reason to permit longer recording; the NHTSA has already made a reasoned decision that public safety does not require greater than 5 seconds of data recording.

⁵ *Id.* at 949.

⁶ *Id.*

⁷ NPRM, 77 Fed. Reg. at 74147-51.

Without a cap on the timeframe of EDR data collection, long-term collection of data would allow an EDR to generate a record of a vehicle's operation over a long period of time. This type of long-term monitoring of drivers' habits could compromise vehicle owners' privacy rights. Long-term monitoring is also not necessary to generate the crash data NHTSA proposes to study in order to improve vehicle safety.

- d. **The regulations should limit EDR data collection, retention, and use by third parties, and should prohibit the disclosure of EDR data for purposes other than crash recovery.**

Some of the most significant privacy concerns surrounding the collection of EDR data involve the potential collection, retention, and use of that data by third parties and for purposes other than the recovery of information regarding vehicle crashes. Modern vehicles contain extensive computer equipment, which often features telecommunications technology that can monitor various aspects of vehicle performance and broadcast data to the vehicle manufacturer or other third parties.⁸ The data collected by EDRs should be kept separate from the data these vehicle services depend on, in order to ensure that EDR data is not broadcast to any third party.

To address this concern, the NHTSA should adopt the amendments to the rules as proposed by the EPIC Comments. Such amendments will ensure that EDR data not be disclosed to any third party or used for any inappropriate purposes.

⁸ See, e.g., BMW TeleServices: Introduction, http://www.bmw.com/com/en/owners/service/bmw_teleservices.html (last visited Feb. 7, 2013).

- e. **The regulations should require that EDR data be accessible via a public standard in order to ensure that vehicle owners have access to their own data.**

The NHTSA currently requires that EDR data be accessible via commercial imaging tool.⁹ However, a requirement that manufacturers sell or license a tool that may be closed, proprietary, and potentially cost-prohibitive, places the key to consumers' private EDR data in the hands of a third party. The NHTSA should instead require that the data recorded by EDRs be accessible via a published, free, and public standard. A public standard would ensure that consumers' access to data they own and purportedly control is not dependent on cost or on the design of a particular manufacturer's proprietary system. At a bare minimum, the NHTSA should require that manufacturers license an imaging tool on terms that are free for personal, non-commercial use.

- f. **The NHTSA should require the EDR's connector be protected with a physical connector lockout apparatus.**

The NHTSA accepts that the vehicle owner has a privacy interest¹⁰ in the data collected by the EDR. The NHTSA's proposed rules, however, do nothing to ensure the security of the data collected. In order to ensure that the owner's privacy interests are protected, the NHTSA should require that manufacturers implement a physical measure, such as a connector lockout apparatus, to restrict access to EDR data. The NHTSA should at least require the ability to allow the owner to lock and unlock the connector at the owner's sole option. Doing so would allow the

⁹ 49 C.F.R. § 563.12.

¹⁰ NPRM, 77 Fed. Reg. at 74151 (“NHTSA’s longstanding policy has been to treat EDR data as the property of the vehicle owner For this reason, before we attempt to obtain EDR data in a crash investigation, our first step is always to obtain the vehicle owner’s consent.”).

owner control over access to the EDR, and thereby codify the existing NHTSA policy that EDR data is property of the vehicle owner.

III. CONCLUSION

EFF respectfully urges the NHTSA to adopt the recommendations of the Electronic Privacy Information Center, *et al.*, also submitted today. In addition, EFF urges the NHTSA to revise its proposed rules to (1) mandate clear statements in the owner's manual that EDR data is the property of the owner and will remain private, (2) explicitly prohibit the collection of audio, video, and location data by the EDR, (3) place a maximum duration on EDR data recording, (4) require that data recorded by the EDR be accessible via a published, free, and public standard, or at minimum, a tool licensed free for personal use, and (5) require the inclusion of a connector lockout apparatus that would give the vehicle owner control over physical access to the EDR.

Sincerely,



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cc: Office of Information and Regulatory Affairs
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