

**OVERSIGHT OF THE FEDERAL TRUCK DRIVER
HOURS-OF-SERVICE RULES AND TRUCK SAFETY**

HEARING

BEFORE THE

SUBCOMMITTEE ON SURFACE TRANSPORTATION
AND MERCHANT MARINE INFRASTRUCTURE,
SAFETY, AND SECURITY

OF THE

COMMITTEE ON COMMERCE,
SCIENCE, AND TRANSPORTATION
UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

DECEMBER 19, 2007

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OVERSIGHT OF THE FEDERAL TRUCK DRIVER HOURS-OF-SERVICE RULES AND TRUCK SAFETY

WEDNESDAY, DECEMBER 19, 2007

U.S. SENATE,
SUBCOMMITTEE ON SURFACE TRANSPORTATION AND
MERCHANT MARINE INFRASTRUCTURE, SAFETY, AND SECURITY,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:07 a.m. in room SR-253, Russell Senate Office Building, Hon. Frank R. Lautenberg, Chairman of the Subcommittee, presiding.

OPENING STATEMENT OF HON. FRANK R. LAUTENBERG, U.S. SENATOR FROM NEW JERSEY

Senator LAUTENBERG. The hearing will come to order, please.

This hearing is focused on safety—truck safety, in particular—but it's also a reminder about what happens when we get careless, casual, in enforcement of the laws that we've got on the books. We're going to hear from witnesses who've directly experienced what happened within their families when a tired trucker came barreling down the highway.

The Bush Administration has gone to extraordinary lengths to allow truckers to stay behind the wheel and on our roads for longer periods of time than they should. Today, we're going to examine those misguided steps. Despite two unanimous Federal court decisions that ruled against the Administration's proposals, the Federal Motor Carrier Safety Administration is going forward as if the court said nothing at all.

The Administration's plan allows truckers to drive for 30 percent longer each week, putting families at higher risk of an accident involving a tired truck driver. It's unacceptable, especially when you consider the volume of trucks on our roadways. One out of every 30 vehicles along our roads—is a large truck. Last year, one out of nine fatal crashes involved one of these trucks. Just think about the relationship with these numbers. One out of 30 vehicles is a large truck, but, when it comes to fatal crashes, one out of nine is a truck.

When our loved ones are on the roadways going to work, going to school, we hope and expect the professional truck drivers that are on the same highways, the same roadways, are alert and well rested. But, too often—a driver has been on the road too many hours, and we find out way too late through inspection or a post-

crash investigation. We know that fatigue is a cause of many of these crashes, but drivers rarely admit that they were too tired to drive.

The biggest problem is that truck driving time limits, called hours-of-service rules, are seldom enforced. In effect, drivers can drive as long as they well—please, putting their safety, and the safety of others on the road, at risk.

We have technology that enforces hours-of-service rules and keeps people safe, but the Federal Motor Carrier Safety Administration, the Nation's top truck-safety agency, has failed to require it, and, instead, continues to allow truckers to drive for longer and longer periods of time.

The Bush Administration's indifference to enforcing truck driving limits for truckers is bad enough, but, even more shameful than not enforcing the laws on the books, is the Administration's efforts to make the current law less safe for motorists. I say this advisedly, "to make it less safe." The FMCSA wants to allow truck drivers to be on the road for up to 11 hours straight, and to work up to 77 hours per week. Not only is it patently unsafe to increase these hours, but we understand the agency ignored the science behind fatigue and selected studies that they liked in order to support their positions.

I understand that the safety data that DOT used to demonstrate that driving in the 11th hour is safe, when 10 hours was the legal limit. I have a chart here, and it's probably not too clear from a distance, but it shows that, after 10 hours of work the number of crashes has declined. Work 10 hours, and, in your 11th hour, you're at the peak of safe driving and it declines. How would you like your child or your loved one or a member of your family walk into an operating room where a doctor has already worked 15 hours, and say, "Oh, well, he'll be as good as he is in the first hour"? Heaven forbid that that kind of a thing take place. And this picture is outrageous. It's a deliberate misstatement of reality.

Now, I understand that there is a mission to this, and I'm trying to figure out what the mission is. The idea that operating an 80,000-pound truck at 65 miles an hour for 11 hours at a time is safe simply defies common sense. Using that logic, maybe we could get to zero accidents if we drove 15 hours. This endeavor may benefit trucking companies, but it hurts everyone else on the road. I believe that the Administration's proposed rule is a sham, and so do our courts, and they've said so, twice. Since the Administration has refused to listen, giving us reason to question their priorities and their commitment to safety, it's time for Congress to get involved.

Over the past decade, 5,000 men, women, and children have died in truck-related crashes each year. In 2006, 805 of those victims were truck drivers themselves. And it's time for us to make our roads safer for families and for the drivers themselves.

I look forward to hearing testimony today from the FMCSA, as well as from industry representatives and members of the trucking safety community.

We're not able to be joined by some of our colleagues. The Senate was in session until quite late last night, and people had made

travel plans to leave after that, all the members of this Subcommittee are very interested in the outcome of today's hearing.

So, I welcome our panel of witnesses. We have Mr. Walter Krupski, Owner-Operator Independent Drivers Association. We have Mr. David Osiecki, the Vice President of Safety, Security, and Operations for the American Trucking Associations; John Hill, the Administrator of the Federal Motor Carrier Safety Administration; Joan Claybrook, the President of Public Citizen; Daphne Izer, who represents Parents Against Tired Truckers; LaMont Byrd, the Director of Safety and Health for the International Brotherhood of Teamsters.

Before we call on you, my colleague Senator Pryor is here, and he'd like to make a statement.

And we welcome Senator Pryor.

**STATEMENT OF HON. MARK PRYOR,
U.S. SENATOR FROM ARKANSAS**

Senator PRYOR. Thank you, Mr. Chairman.

I just wanted to thank you for having this hearing. It's obviously a very important issue for public safety and truck safety on our highways. And I'd just thank you for your leadership on this, and look forward to hearing from the panel.

Thank you.

Senator LAUTENBERG. Thank you.

We're pleased to have the different views represented, maybe not as pleased to hear some as others, but we'll try to be balanced in our views, and ask you to respond honestly, as you see it. Of course, we don't have to talk that way to Ms. Izer.

I'm especially glad to have a fellow New Jerseyan here. Mr. Krupski is based in Stewartsville, New Jersey, and he can tell you, many trucks carrying goods along the East Coast pass through our state.

I thank all of you for being here to share your experiences. We observe a 5-minute limit for your testimony, so please be mindful of that. We'll start off with Mr. Krupski, please.

**STATEMENT OF WALTER J. KRUPSKI JR., OWNER, W. KRUP
TRUCKING, INC.; ON BEHALF OF OWNER-OPERATOR
INDEPENDENT DRIVERS ASSOCIATION**

Mr. KRUPSKI. Good morning, Chairman Lautenberg, distinguished Members of the Subcommittee. It's my privilege to be here today on behalf of the members of—

OK.

Thank you for inviting me to testify on the subject that has great significance to the—to them, the rest of the men and women who make a living behind the wheel of commercial motor vehicles.

My name is Walter Krupski. I'm the Owner of W. Krup Trucking in the town of Stewartsville, New Jersey—in the great State of New Jersey. I've been involved in the trucking industry for more than 30 years. I've been a driver. I've been an owner-operator. I've been a small-fleet motor carrier. I'm proud to say that I logged well over 3 million miles without a chargeable accident.

First of all, we support the FMCSA in keeping both the 11-hour driving option and the 34-hour restart. However, the hours-of-serv-

ice rules should be more flexible to allow drivers to sleep when they are tired, to work when they are rested. The rules must encourage drivers to get off the road when they are tired, and must not penalize them for doing so.

With that said, we strongly encourage the FMCSA and this Committee to examine the underlying causes of violations and driver fatigue. Significant reductions in driver fatigue will not be achieved until drivers are paid for all the work the drivers face and they're paid for all the work and driver's face no economic downside for complying with the rules.

We fully understand the driver's, from the standpoint of the hours-of-service regulations, it is necessary to acknowledge that the majority of drivers in the trucking industry are compensated—how they're compensated. Most drivers are paid by how many miles they drive. Simply put, the fewer miles, the less money they make. Once a driver's daily 14-hour clock begins, it keeps running even if the driver pulls over to sleep for any amount of time less than 8 hours—8 consecutive hours. Under the current hours-of-service rule, drivers must give up work and compensation if they pull off the road to take a nap when they need to rest during the workday.

While drivers are compensated only for driving, they're expected to perform uncompensated nondriving tasks that consume a significant and unpredictable amount of time of their driving time. Drivers must keep driving even when tired, because they don't know how much time will be available for them to drive during the day. For a vast majority of drivers, the time spent on duty not driving is often uncompensated. There are general administrative functions that require drivers—such as completing paperwork, fueling, performing—undergoing safety inspections, requiring the daily on-duty time that counts against the 14-hour clock.

To some extent, drivers can predict and control the functions, but there are many other activities which occur regularly that are highly unpredictable and out of the driver's control. Again, this is time that is against—the drivers aren't getting paid for. Wait to load/unload, physically loading and unloading a truck, manually sorting and stacking freight, and taking care of mechanical breakdowns are just a few examples of the unpredictable uncompensated activities that count against the driver's time.

In addition, there are delays for congestion, work zones, bad weather, highway accidents, which reduce the potential—which reduce earning potential, because drivers are paid by the mile, and this time must count against their 14-hour clock.

Significantly, on time spent loading and unloading, shippers and receivers routinely make truckers wait for hours, even days, before they load or unload their trucks. No one in the industry pays for detention time—most shippers and receivers do not pay this time and work, and have little incentive to treat drivers differently. Some even require drivers to unload their trucks and perform warehouse work, such as restacking pallets. Not only is this work unpaid, but it is essentially stealing the time that the driver has, under the hours-of-service rules, to do the work that they are paid for; that's driving the truck.

I'd like to emphasize that the time that a driver must spend on activities other than driving is often completely outside the con-

trol—outside their control. Until they arrive at the shipper and receiver site, and sometimes even later, drivers have absolutely no idea how much time the shipper or receiver will demand on them, or how much loading or unloading work will be demanded of them. Again, they are not paid for this time or work; this leaves them with no ability to plan their schedule or manage their time under the hours-of-service rules. Unfortunately, some motor carriers allow these procedures to persist by instructing their drivers to log only 15 minutes for loading and unloading to preserve driving time, regardless of how long the delays; thus, masking the actual on-duty time spent.

Congress has previously asked the DOT to examine whether it should be—should have the authority of the—authority over shippers and receivers to effectively enforce the safety regulations. To my knowledge, the DOT has never submitted to Congress or otherwise published any examination of this issue.

Senator LAUTENBERG. Thank you, Mr. Krupski. If you have anything else to say, please try to do it in summary form.

Mr. KRUPSKI. OK.

If all the stakeholders—

Senator LAUTENBERG. By the way, your full statement is in the record.

Mr. KRUPSKI. OK. Thank you.

[The prepared statement of Mr. Krupski follows:]

PREPARED STATEMENT OF WALTER J. KRUPSKI JR., OWNER, W. KRUP TRUCKING, INC.; ON BEHALF OF OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION

Good morning, Chairman Lautenberg, Senator Smith and distinguished members of the Subcommittee. It is my privilege to be here today on behalf of the Owner-Operator Independent Drivers Association (OOIDA). Thank you for inviting me to testify on a subject that is of great significance to the men and women who make a living behind the wheel of commercial motor vehicles. It is by no means a stretch to say that the hours-of-service regulations (HOS) that are being discussed today steer the daily lives of owner-operators and professional truck drivers whether they are engaged in activities related to their livelihood or at home with their families.

My name is Walter Krupski Jr. I am the Owner of W. Krup Trucking in Stewartsville, New Jersey. I have been involved with the trucking industry for more than 30 years. Over the past 30 years I have driven truck as a company employee and as an independent owner-operator, have worked as a solo driver as well as in a team driving operation and have logged well over 3 million miles without a chargeable accident. I have also owned and managed a small fleet of trucks and trailers as well as contracted the services of up to 25 owner-operators. I currently own 3 trucks and 6 trailers, driving one of the units myself and hiring out the others.

OOIDA is the national trade association representing the interests of small business trucking professionals and professional drivers on matters that affect their industry. The Association actively promotes the views of small business truckers through its interaction with state and Federal regulatory agencies, legislatures, the courts, other trade associations and private entities to advance an equitable business environment, and safe and secure working conditions for commercial drivers. OOIDA currently has more than 159,000 members who collectively own and operate more than 250,000 individual heavy-duty trucks.

On December 17, 2007, the Federal Motor Carrier Safety Administration (FMCSA) published in the *Federal Register* an Interim Final Rule (IFR) amending the Federal Motor Carrier Safety Regulations to allow commercial motor vehicle (CMV) drivers up to 11 hours of driving time within a 14-hour, non-extendable window from the start of the workday, following 10 consecutive hours off-duty (11-hour limit). In addition the interim rule allows drivers to restart calculations of the weekly on-duty time limits after the driver has at least 34 consecutive hours off-duty (34 hour restart). We applaud the response of FMCSA in keeping both the 11-hour option and allowing the more widely used 34-hour restart. This IFR and the hearing today offer an unique opportunity to address not only the courts concerns on the

regulations but the more pervasive underlying causes of hours-of-service violations. We cannot continue to treat the symptoms and expect healing; we must examine the causes that permeate the industry. It is not a time for band aids but major surgery to heal the years of neglect from FMCSA and DOT.

Under the current hours-of-service rule, drivers must give up work and compensation if they pull off the road to rest during the work day. Once a driver's daily 14 hour on-duty clock begins, it keeps running, even if the driver pulls over to sleep for any amount of time less than 8 consecutive hours. Drivers are compensated only for driving. They are expected, however, to perform non-driving, uncompensated work that can consume unpredictable and significant amounts of their on-duty time. Drivers must keep driving, therefore, even when tired, because they do not know how much of their on-duty time will be available to them for driving during the day, and they must drive enough miles to maintain a minimal level of compensation.

The hours-of-service rule must be more flexible to allow drivers to sleep when tired and to work when rested. The rules must *encourage* truck drivers to get off the road when they are tired and must not penalize them for doing so.

Professional Truck Driver's Perspective

To fully comprehend a truck driver's standpoint on the hours-of-service regulations it is necessary to acknowledge how the majority of drivers in the trucking industry are compensated. Drivers are normally paid by how many miles they drive, therefore, the fewer miles driven the lower their compensation.

Under the HOS regulations the 14-hour running clock begins whenever a driver performs any on-duty activity after taking a compliant minimum rest period. The remaining 10 hours of a 24-hour day is supposed to be reserved for resting. For the vast majority of drivers the time spent on-duty, not driving is often, or sometimes always, uncompensated. There are general and administrative functions that are required of drivers such as completing paperwork, fueling, performing or undergoing safety inspections, and general maintenance that require daily on-duty uncompensated time that counts against their 14-hour on-duty clock. To some extent drivers can predict and control those administrative duties, but there are many other activities that occur regularly that are also uncompensated yet highly unpredictable.

Waiting to load or unload, physically loading or unloading, manually sorting and stacking freight and taking care of mechanical breakdowns are a few examples of these unpredictable, uncompensated activities that count against the 14-hour clock. In addition there are the delays from congestion, work zones, detours and inclement weather which reduce earnings potential because drivers paid by the mile must count this time against their 14-hour running clock. The 14-hour clock can only be stopped by spending either a minimum of 10 consecutive hours off-duty, or 8 consecutive hours in the sleeper berth of the vehicle and at least 2 more hours off later in the day. Even though the driver must take the additional 2 hours off-duty, those hours do not stop the 14-hour clock.

In light of the forgoing realities it is easy to understand that drivers want to get in as much compensated driving time as possible each day. In a survey done by OOIDA of its members, 66 percent reported that they forego short rest breaks, naps and meals under the 14-hour rule in order to perform as much compensated driving time as they can. In fact most drivers report that they seldom drive more than 10 hours per day, but still feel compelled to continue driving when they would like to take a break to compensate for either planned duties or unpredictable delays.

Congress directed the FMCSA to find a way to deal with the problem of shippers and receivers who often consider the vehicle as a rolling warehouse to store their materials until needed. There is no prescribed penalty for receivers who make a driver wait for hours or even days before unloading their trucks. By law receivers must allow drivers the option to unload, but may then require them to sort and stack or re-palletize the freight, and at times even stock the shelves of the warehouse. Many receivers coerce or require drivers to hire "lumpers" to unload their trailers, further compromising drivers' income. If drivers chose not to pay for someone else to unload they may be required to unload the shipment by hand or wait an extended amount of time to be allowed to unload. These are some of the time consuming, uncompensated on-duty activities that complicate a driver's ability to comply with HOS. Unfortunately, some motor carriers allow these procedures to persist by instructing their drivers to log only fifteen minutes for loading and unloading to preserve driving time regardless of how long the delay, thus masking actual on-duty time spent.

Many of these same shippers and receivers are now penalizing drivers for showing up late for prearranged appointments. The charges are often significant and place undue pressure and stress on a driver trying to comply with the HOS. These charges are assessed regardless of whether a driver has operated legally or was de-

layed because of an event beyond their control such as weather related road closures, highway accidents or delays at a previous appointment.

In 1995 Congress asked DOT to examine whether it should have authority over shippers and receivers to effectively enforce the safety regulations. DOT never submitted to Congress or otherwise published an examination of this issue. Motor carriers have historically been unwilling to remedy the problems associated with loading and unloading abuses, and drivers are powerless to resolve them. Government oversight may be the only solution.

The costs for small motor carriers have increased tremendously in the last two years. The steep and fluctuating cost of fuel, maintenance, equipment, parts and supplies, equipment to comply with idling restrictions, and the rising cost of engines to meet emissions standards has caused a vicious circle of potential and real small carrier bankruptcies. Drivers strive to be safe to provide for their family's future, so when they state that they feel the rules are not flexible enough to allow for rest breaks when they are tired or to avoid congestion etc., they are the ones who know and should be listened to.

Sleeper Berth Exceptions

Certain specialized segments of the trucking industry have been especially hard hit by the regulations since they were modified to do away with sleeper berth exceptions. Team drivers who have traditionally operated on a 5 or 6 hour on-duty driving cycle followed by 5 or 6 hours in the sleeper berth now find themselves driving many more consecutive hours than previously. Many of these teams are husband-wife teams where the wife, coming into the driving part of the industry as a late career choice, drives when the husband gets tired and allows him to get a couple hours or more of rest. Now under the new HOS regulations the wife is often compelled to drive 8 consecutive hours or more.

Drivers who haul hazardous materials or loads contracted by the Department of Defense (DOD) also face obstacles to HOS compliance. Under the regulations certain hazardous materials must be under constant supervision and direct control at all times. This is also contractually imposed by the DOD on drivers hauling certain loads. For example, it is impossible to park a truck the required distance from inhabited areas and not have the other team driver be awake to supervise or control the load while the other team driver takes breaks for any number of personal reasons. This effectively "breaks" the 10 hour rest period for the team driver in the sleeper and essentially places them in a regulatory "Catch-22"—comply with constant supervision and control requirements of the shipment and then be unable to properly account for the required off-duty/sleeper berth requirements. This conundrum could be solved by allowing flexibility in the rules for team drivers to extend the 14-hour clock by taking short rest breaks without penalizing the drivers or by reinstating the sleeper berth exceptions that were once a part of the HOS rules.

Conclusion

If FMCSA and Congress truly wish to reduce fatigue among drivers, several issues need to be addressed that are integral to truck drivers work schedules, but ignored by the HOS rules:

1. That most drivers are not paid for the long hours spent waiting at the loading docks. They are paid by the mile or as a percentage of the freight bill.
2. When drivers must wait for many uncompensated hours, they have less time under HOS rules to drive their truck and produce an income. This puts them between a rock and a hard place: between potential heavy fines for violations of HOS rules and losing their job.
3. Shippers and receivers have no incentive to use truckers' time efficiently. Most of the time they pay no more or less for using any amount of the drivers' time.
4. Shippers and receivers have the greatest control of anyone in the transportation chain over a driver's schedule and yet bear no responsibility for requiring that drivers work longer than the HOS rules allow as a condition for receiving work from them.
5. Drivers are pushed financially and physically, increasing their fatigue and negatively impacting their safety.

Significant reductions in driver fatigue will not be achieved until drivers are paid for all of their work and drivers face no economic downside for complying with the rules. If drivers were compensated for both their driving and non-driving on-duty work, they would have much less incentive to drive while fatigued. Additionally,

they would have every incentive to record all of their on-duty time, and problems with the accuracy of logbooks would disappear.

Additionally, truck drivers should not be required to unload their truck or to pay others to unload it. Drivers would be better able to manage their fatigue if they were prohibited from performing the physical loading or unloading their own truck. The high unloading fees drivers are charged by receivers to unload their own freight must be eliminated so that drivers are not coerced to perform the unloading.

The demands and expectations of shippers, receivers, brokers and motor carriers on truck drivers for each load they take are far more pervasive than any inspection scheme and schedule of fines that either Congress or FMCSA could devise. Unless these economic issues are addressed, drivers who become disqualified from driving for violating the hours-of-service rules will simply be replaced by a new driver facing the same economic pressures. Only by addressing these issues is there the potential for making significant reductions in driver fatigue.

Chairman Lautenberg, Senator Smith and distinguished Members of the Subcommittee, thank you for your consideration of this testimony. I would be pleased to answer any questions that you may have.

Senator LAUTENBERG. Mr. Osiecki?

**STATEMENT OF DAVE OSIECKI, VICE PRESIDENT,
SAFETY, SECURITY, AND OPERATIONS,
AMERICAN TRUCKING ASSOCIATIONS**

Mr. OSIECKI. Good morning.

Mr. Chairman, Committee Member Pryor, thank you for the opportunity to express the American Trucking Association's views on the hours-of-service issue and truck safety.

I am Dave Osiecki, ATA's Vice President of Safety, Security, and Operations. Our testimony will address three points. Number one, the balanced approach and mutually dependent nature of the hours-of-service provisions. Number two, the improved safety experience of the trucking industry while operating under the hours-of-service rules. And, number three, driver fatigue in relationship to other causes of truck-involved crashes.

First, ATA supports the new rules, because their provisions work together in a mutually dependent manner. They were developed as a balanced set of rules that promote better driver alertness by providing a greater opportunity for daily rest through an increase in the minimal amount of off-duty time between shifts, by reducing the maximum daily on-duty time limit by 1 hour and eliminating the provision allowing it to be extended by breaks, and by promoting work-rest schedules that come closer to a 24-hour circadian cycle. This balanced set of rules also increases the maximum driving time limit by 1 hour within the shortened workday, and provides a rest-and-restart period which some, but not all, drivers use for increased operational flexibility.

Moving to our second point, ATA supports the rules, because, simply put, they are working. Since becoming effective in January of 2004, the number of crash-related injuries has decreased by 14,000, and the injury crash rate is at its lowest point ever. The number of truck-involved fatalities has also decreased. Between 2005 and 2006, fatalities dropped by 4.7 percent, the largest percentage drop since 1992, and the projected fatal crash rate for 2006 is 1.94 fatal crashes per 100 million miles of travel—by far, the lowest rate since DOT began keeping records.

Our written testimony includes a substantial amount of additional safety data demonstrating similar positive safety trends.

And to the third point, the role of driver fatigue in crashes, all causes of crashes are important; however, any objective evaluation of crash causation—and this includes the government’s own studies—would not highlight driver fatigue as the paramount safety issue that it’s often portrayed to be. These studies find that other more mainstream traffic safety problems are far greater concerns.

DOT’s annual analysis of its Fatality Analysis Reporting System, or FARS data, shows that the fatigue-related fatal crashes involving trucks are a small portion of the total. For the 17 years from 1991 to 2006, on average, just 1.7 percent of truck drivers in a fatal crash were identified as fatigued.

It’s commonly argued that fatigue is under-reported and, therefore, this percentage is likely to be understated. For this reason, it’s important to look at FMCSA’s Large Truck Crash Causation Study, the most comprehensive causation study ever done. The majority of crashes studied were caused by driver operating or performance errors, not driver fatigue. Inadequate surveillance, non-fatigue-related driver inattention, and excessive speed are the ubiquitous causes far exceeding fatigue, vehicle-related problems, and roadway or environmental causes.

A truck-safety paradigm shift must occur, in our view, to confront the mainstream traffic safety issues that affect truck safety. For this reason, ATA offers three important recommendations:

First, reinstate a national maximum speed limit, with the maximum limit being 65 miles per hour for all vehicles, including large trucks. This will save many lives, as it did in the 1970s, when the 55-mile-per-hour limit was imposed.

Second, support a Federal requirement for all new large trucks to be electronically speed-governed at a setting not to exceed 68 miles per hour. This will reduce the number and severity of truck crashes.

And, third, provide incentives for trucking companies to adopt active safety technologies to assist driver decisionmaking and improve driver performance.

ATA also supports primary safety-belt laws in all 50 states to save lives and reduce the severity of injuries.

In summary, Mr. Chairman, ATA supports the new hours-of-service rules; again, simply put, because they are working. We also believe that a paradigm shift must occur for resources to be better aligned to address the mainstream traffic safety issues affecting trucks.

Thank you, again. And, at the appropriate time, I will be happy to field any questions you may have.

Thank you.

[The prepared statement of Mr. Osiecki follows:]

PREPARED STATEMENT OF DAVE OSIECKI, VICE PRESIDENT, SAFETY, SECURITY AND OPERATIONS, AMERICAN TRUCKING ASSOCIATIONS

Introduction

Chairman Lautenberg, Ranking Member Smith, and other members of the Subcommittee, thank you for the opportunity to express the American Trucking Associa-

tions' (ATA)¹ perspectives on "Federal Truck Driver Hours of Service (HOS) Rules and Truck Safety."

My name is Dave Osiecki, Vice President of Safety, Security and Operations for the American Trucking Associations (ATA). I am responsible for directing and overseeing the policy development and regulatory affairs activities for ATA in numerous public policy areas, including truck driver safety and motor carrier safety. My involvement has included more than 10 years of work on issues associated with HOS rules, which has allowed me to develop knowledge and expertise on driver fatigue and alertness issues, and on how different HOS rules impact various segments of the trucking industry. It is my pleasure to appear before the Subcommittee today on behalf of ATA.

ATA's testimony is directed primarily at the effectiveness of the current HOS rules promulgated by the Federal Motor Carrier Safety Administration (FMCSA). ATA's testimony will:

- I. Emphasize the mutually dependent nature of the HOS rules' provisions;
- II. Illustrate the improved industry safety experience under the new HOS rules;
- III. Provide ideas to improve the HOS rules;
- IV. Evaluate driver fatigue in terms of crash causation; and
- V. Urge action on two safety initiatives that will have a real impact on truck safety.

I. The HOS Rules Are a Package With Mutually Dependent Provisions

The new HOS regulations provide improved tools in promoting safety, alertness and driver performance in the trucking industry by addressing basic physiological factors known to create fatigue. FMCSA provided in the rules an effective and balanced approach to promoting driver alertness and made significant improvements to enhance highway safety by:

- Increasing from 8 to 10 hours the minimum amount of time that drivers must be off-duty between shifts and, by doing so, providing a greater opportunity for drivers to obtain 7–8 consecutive hours of sleep;
- Reducing the maximum daily on-duty time limit by 1 hour from 15 to 14 and eliminating the provision allowing this time be extended by breaks;
- Providing a maximum 11-hour driving time per shift to complete runs safely;
- Adopting a rule that promotes schedules nearer to a 24-hour circadian cycle; and
- Allowing for a minimum of 34 consecutive off-duty hours of rest, recovery and restart for drivers to address any potential sleep debt.

On December 17, 2007, FMCSA published an Interim Final Rule (IFR) that retains the 11-hour maximum driving limit and the 34-hour rest and restart provision, along with the rest of the HOS rules that have been in place since January 2004. The IFR will become effective on December 27, 2007. ATA supports FMCSA in taking this action. The IFR addresses the D.C. Circuit Court of Appeals' procedural concerns expressed in its July 2007 decision, and provides a wealth of safety data which supports retention of the rule.

II. The Trucking Industry's Safety Experience Has Improved While Operating Under the New HOS Rules

Government-collected safety data and metrics, as well as data collected from the industry, clearly indicate that the current HOS rules are an improvement over the old rules in terms of driver health, truck safety and overall highway safety. With the exception of a more restrictive off-duty sleeper berth provision, the current rules—including the maximum 11-hour driving limit and the 34-hour, rest, recovery, and restart provision—have been in effect since January 2004. In other words, the rules have been in force for 4 years and industry safety has improved over this time period.

Recently released government-collected data demonstrates that the trucking industry is operating more safely under the current HOS rules. For example:

¹ATA is a united federation of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interests of the trucking industry. Its membership includes more than 2,000 trucking companies and industry suppliers of equipment and services. Directly and indirectly through its affiliated organizations, ATA encompasses over 34,000 companies and every type and class of motor carrier operation.

- The number of truck-involved fatalities decreased 4.7 percent in 2006—from 5,240 in 2005 to 4,995 in 2006—the largest percentage drop in truck-involved fatalities since 1992.
- The projected truck-involved fatal crash rate for 2006 is 1.94 fatal crashes per 100 million vehicle miles of travel (VMT). This projected rate is at its lowest point since the U.S. Department of Transportation (DOT) began keeping these records in 1975.
- The number of injuries resulting from truck-involved crashes decreased by almost 2,000 in 2005 and dropped another 8,000 in 2006.
- The injury crash rate, another accepted metric, is also at its lowest point since DOT recordkeeping began.

The positive trend in truck-involved injury crashes and related injuries is illustrated in the following table.²

Table 1.—Large Truck Injury Crash Statistics, 2002–2006³

Year	Injury Crashes	Vehicles Involved	Persons Injured	Million Vehicle Miles Traveled	Injury Crashes per 100 Million Vehicle Miles Traveled	Vehicles Involved in Injury Crashes per 100 Million Vehicle Miles Traveled	Persons Injured per 100 Million Vehicle Miles Traveled	Large Trucks Registered
2002	90,000	94,000	130,000	214,603	41.9	43.9	60.4	7,927,280
2003	85,000	89,000	122,000	217,917	38.8	40.7	56.0	7,756,888
2004	83,000	87,000	116,000	220,811	37.5	39.3	52.6	8,171,364
2005	78,000	82,000	114,000	222,836	34.8	37.0	51.1	8,481,999
2006	***	***	106,000 ⁴	223,282 ^{**}	***	***	***	***

^{**} 2006 Large Truck Vehicle Miles Traveled (VMT) projection based on 2006 FHWA Total VMT projection.
^{***} Not Yet Available.

In addition to the DOT data, the Department of Labor's Bureau of Labor Statistics collects and tracks occupational injury and illness data for various industries.⁵ Below are truck driver non-fatal incidence rates of occupational injuries and illnesses for 2002 through 2006, per 100 full-time employees. The 2004–2006 rates reflect a decrease of nearly 15 percent.

2002–2003	(the 2 years prior to current HOS rules)	6.8
2004–2005	(the first 2 years operating under current HOS rules)	6.1
2006	(the last year of operating under current HOS rules)	5.8

An additional study conducted by the American Transportation Research Institute (ATRI), a research organization affiliated with ATA, supports the government's safety findings. ATRI's study—"Safety and Health Impacts of the New Hours-of-Service Rules"—collected fleet data representing approximately 100,000 truck drivers and 10 billion annual VMT. Safety and health statistics for 2003 (under the old HOS rules) were compared to those for 2004 (under the current HOS rules) to identify changes in outcomes. The analysis found that there were significant decreases in the collision rate per million VMT (–3.7 percent), preventable collision rate (–4.8 percent), and non-preventable collision rate (–0.8 percent). Even larger reductions were found in the driver injury rate (a reduction of 2.6 percent), collision-related injury rate (a reduction of 7.6 percent), and non-collision injury rate (a reduction of 13.7 percent) per million VMT. These aggregated fleet statistics indicate clearly that 2004 was a safer year for participating fleets.⁶

To further determine the safety experience of the industry, in August 2007, ATA initiated a survey effort to collect motor carrier data for the month of June 2007. More than 769 motor carriers using 233,742 trucks and employing 214,987 professional drivers responded to the survey and provided both 11 hour driving time and 34 hour restart use data, along with data on the number of DOT recordable crashes by driving hour.

The table that follows, based on ATA's finalized review of the survey data, shows the number and percentage of crashes in each of the driving hours. In considering the following numbers, it should be remembered that the majority of serious truck

² See National Center for Statistics and Analysis link at www.nhtsa.dot.gov.

³ See <http://www.fmcsa.dot.gov/facts-research/research-technology/report/Large-Truck-Crash-Facts-2005/Large-Truck-Crash-Facts-2005.pdf>, February 2007, page 10.

⁴ See <http://www.fmcsa.dot.gov/facts-research/facts-figures/analysis-statistics/MCSPR-06-30-07.htm>.

⁵ See <http://www.bls.gov/iif/oshsum.htm>.

⁶ See <http://www.atrionline.org/research/results/Hours-of-Service%20one-pager.pdf>.

accidents (about 67 percent according to FMCSA's 2005 HOS Regulatory Impact Analysis) are not the fault of the truck driver, and only a small percentage of those that are the truck driver's fault are fatigue-related. This issue will be addressed in detail later in this document under Section IV.

Table 2.—ATA Survey Results on the Number and Percentage of Crashes per Driving Hour

Driving Hour	Number of Crashes	Percentage of Total Crashes
0–1	158	15.90
1–2	143	14.39
2–3	138	13.88
3–4	98	9.86
4–5	92	9.26
5–6	93	9.36
6–7	72	7.24
7–8	82	8.25
8–9	46	4.63
9–10	37	3.72
10–11	35	3.52

As Table 2 indicates, the 11th hour of driving time has both the fewest number and the lowest percentage of accidents. Even assuming significantly less driving time in the 11th hour, the accident frequency in that time-frame is still apparently well below prior hours. While this data does not address the difference in risk in the driving hours, this is discussed immediately below.

In November 2007, the Virginia Tech Transportation Institute (VTTI) released a significant follow-up report⁷ to its previous study⁸ that addressed the research question:

Is crash risk, as measured by the frequency of critical incident occurrence, measurably different between the 10th and 11th hours of driving? The study was a naturalistic data collection approach through which data was collected as participants drove company trucks on their normal revenue-producing runs. This research produced a significant finding relevant to the assessment of the 2003 and 2005 HOS regulations. Specifically, the VTTI analysis on frequency of critical incident occurrence showed no statistical difference between the 10th and 11th hour of driving.

III. What Else Can Be Done to Improve the HOS Rules?

Effective HOS rules are only part of a solution aimed at keeping commercial operators alert and safe when working and driving. Managing operator alertness and fatigue in a trucking setting is a complex issue that calls for a comprehensive approach. ATA is hopeful that the national dialogue on this issue moves beyond simple on-duty, driving and off-duty limits toward a more comprehensive programmatic approach to managing alertness. This will take years, but movement toward this goal needs to begin.

Reconsider How the Sleeper Berth Provisions Benefit Driver Alertness

Reinstating aspects of the sleeper berth provision that was available and used by drivers for decades would be a great first step. ATA supports greater flexibility in the provision governing use of the sleeper berth. Greater flexibility, consistent with the provision in effect until 2005, would:

- *Encourage naps* because drivers would not lose work hours because of time spent in the sleeper berth. Naps are one of the most important fatigue countermeasures for drivers.
- *Encourage shorter continuous driving periods* by allowing drivers to take sleeper berth naps “off the clock” during their tour of duty. Drivers could split their daily driving periods (up to 11 hours) into shorter periods.
- *Encourage a “circadian friendly” approach.* Many driver duty tours begin in the morning and continue through the afternoon and into the evening. Under such a schedule, drivers are likely to work and drive during the morning hours, but take breaks for naps during the afternoon. For most people, the afternoon is the

⁷Hanowski, Olson, Bocanegra, Hickman, Dingus, Sudweeks, “Critical Incidents that Occur in the 10th and 11th Hour of Driving in Commercial Vehicle Operations: “Does Risk Increase in the 11th Hour?”, Virginia Tech Transportation Institute, November 7, 2007.

⁸Hanowski, Dingus, Sudweeks, Olson and Fumero, “Assessment of the Revised Hours-of-Service Regulations: Comparison of the 10th and 11th Hour of Driving Using Critical Incident Data and Measuring Sleep Quantity Using Actigraphy Data”, June 2005.

daytime period when it is most difficult to stay awake, and when most naps are taken.⁹ The evening hours are times of greater alertness. Compared to drivers working continuously, drivers taking advantage of a more flexible sleeper berth provision would tend to be rest and sleep during their afternoon circadian low periods, and drive during morning and evening hours when their alertness is high.

- *Aid congestion relief.* On many freight corridors, drivers must operate through or around major metropolitan areas (e.g., the I-95 corridor that includes Washington, Baltimore and Philadelphia), which are becoming increasingly congested for longer periods of time each day. A return to a more flexible provision would allow drivers to use their sleeper berth at these times to rest, which would also help reduce congestion at peak commuting and travel times.

To encourage sleep, rest, and naps and to also promote the efficient movement of freight, the sleeper berth provision should be reconsidered.

Electronic On-Board Recorders May Help in Gaining Better Compliance With the HOS Rules

ATA foresees a future state where certain trucking operations are required to use Electronic On-Board Recorders (EOBRs) for HOS recordkeeping. However, FMCSA must assure that the regulatory ground work for this technology is properly completed. ATA's membership established in October 2005 a comprehensive policy regarding EOBRs that is aimed at achieving prudent utilization of this technology.

Two prime points within ATA's policy, which were shared with this Senate Subcommittee in May 2007 are:

1. *"There should be sound, consensus-based evidence that EOBR use leads to enhanced fleet safety performance by such means as accident rate reduction and improved compliance, therefore, increasing the credibility of EOBR systems as a cost-effective technology for motor carriers."*

ATA is concerned that supporting research showing that EOBR use reduces fatigue, improves safety, prevents accidents and lowers costs does not exist. Such information is necessary not only to justify a regulation and its benefits, but also to provide motor carriers meaningful information in deciding whether to deploy such systems in their fleets. Given that FMCSA does not have benefit and cost data sufficient to support an overall mandate, ATA generally supports the agency's approach to provide incentives to drive voluntary adoption of EOBRs, with mandates limited to targeted enforcement against non-compliant carriers and drivers.

2. *"EOBR systems should be based on the minimal, functional and performance specifications necessary to accurately record and report hours-of-service compliance and assure reliability and utility of operation."*

The industry has asked for uniform, minimum performance criteria for EOBR devices and systems, which provides for flexibility in the design and delivery to the market. There needs to be design and operational requirements that will dependably, reliably, and comprehensively replace manual logbooks. Without consistent and recognizable specifications for EOBR devices and systems, there will continue to be questions related to utility, reliability, tamper-resistance, accuracy, durability and effectiveness.

IV. Evaluating Driver Fatigue In Terms of Crash Causation

Truck driver fatigue is an important issue. However, any objective evaluation of crash causation—and this would include the government's own studies—would not highlight driver fatigue as the paramount safety issue that it is often portrayed to be. In fact, those same government studies, along with other reports, indicate that other, more mainstream, traffic safety problems are greater problems/concerns.

FMCSA annually analyzes the Fatality Analysis Reporting System (FARS) data maintained by the National Highway Traffic Safety Administration for fatigue factors. The analysis of the FARS data shows that fatigue-related fatal crashes involving trucks are a small portion of the total as indicated in the table below.

⁹Dinges, D.F., Broughton, R.J. and Eds., "Sleepiness and Alertness: Chronological, Behavioral, and Medical Aspects of Napping," New York, Raven Press, 1989.

Table 3.—Fatal Motor Vehicle Traffic Crashes Involving Large Trucks¹⁰

Year	Total	Fatigue-Related	Fatigue-Related LT Fatal Crashes, Percent of Total
2003	4,335	74	1.7
2004	4,478	66	1.5
2005	4,551	82	1.8
2006	4,321	69	1.6

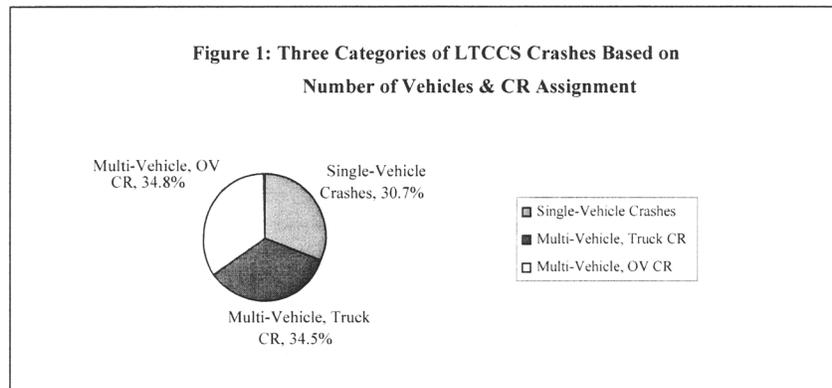
Going back even further, for the 17 years from 1991 to 2006, just *1.7 percent* of large truck drivers in a fatal crash were identified as fatigued, based on FARS coding.

It is commonly argued that fatigue is underreported and, therefore, this percentage is likely to be understated to some degree. In addition, a fatigue coding in FARS does not mean that driver fatigue caused the crash, only that it was a contributing factor. For this reason, it is important to analyze the findings of FMCSA's 2006 Large Truck Crash Causation Study (LTCCS).

The LTCCS determined the "Critical Reasons" for a sample of 963 serious (fatal and injury) large truck crashes. Critical Reasons (CRs) are the proximal causes of the crashes examined in the study. LTCCS crashes, and truck crashes in general, fall into three broad categories:

- Multi-vehicle crashes with the CR assigned to the other vehicle. In practice, this means the other vehicle is at-fault.
- Multi-vehicle crashes with the CR assigned to the truck (*i.e.*, truck at-fault).
- Single-vehicle truck crashes (where the CR is almost always assigned to the truck).

Figure 1 below is a pie chart of LTCCS truck crash involvements per the three categories mentioned.¹¹ The largest block was multi-vehicle crashes in which the other vehicle (OV) was assigned the CR. The other two pieces of the pie were multi-vehicle crashes in which the truck had the CR and truck single-vehicle crashes.¹²

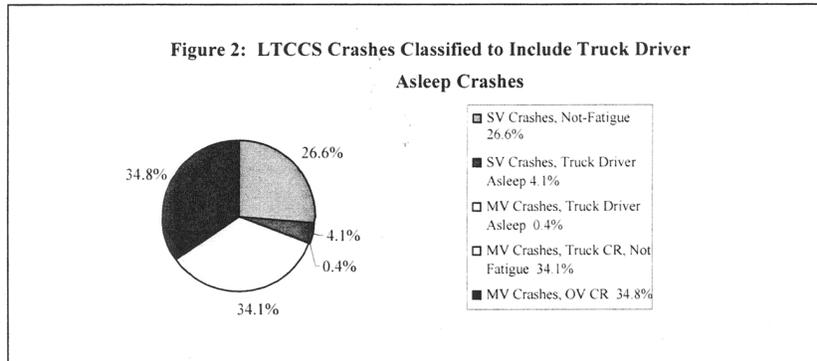


¹⁰Source: FMCSA Analysis of Fatality Reporting System (FARS) NHTSA, Declaration of Thomas Keane to the U.S. Circuit Court of Appeals for the D.C. Circuit, September 21, 2007.

¹¹The two primary Federal databases for estimating crash problem size and crash characteristics are the General Estimates System (GES) and FARS. In 2005, per GES and FARS, 87 percent of large truck injury (including fatal) crashes were multi-vehicle, and 13 percent were single-vehicle. The corresponding LTCCS percentages were 69 percent and 31 percent. This means that the LTCCS over-sampled single-vehicle truck crashes. This discrepancy between the LTCCS multi- vs. single-vehicle crash breakout and national percentages (based on GES and FARS) may well have skewed LTCCS statistics toward an overrepresentation of asleep-at-the-wheel crashes and other crash causes seen primarily in single-vehicle crashes. Nevertheless, the LTCCS findings provide important insight into the level of fatigue involved in serious truck crashes.

¹²Note that the denominator in these figures is all LTCCS crashes in which a critical event and CR were coded. For one truck, one light vehicle crashes, trucks were assigned the CR in 44 percent, OVs in 56 percent. For all truck involvements in multi-vehicle (2+ vehicles) LTCCS crashes, trucks were assigned the CR in 40 percent.

Figure 2 expands the categories further by adding “truck driver asleep” as a sub-category of both truck multi-vehicle and single-vehicle crashes. When all large truck crashes are considered, a total of 4.5 percent are primarily related to truck driver asleep-at-the-wheel. This includes asleep-at-the-wheel multi-vehicle crash involvements (0.4 percent of LTCCS crashes) and single-vehicle involvements (4.1 percent of LTCCS crashes).



Looking at single-vehicle and multi-vehicle crashes separately, ‘truck driver asleep’ was the CR in 13.2 percent of truck single-vehicle crash involvements, but only 1.1 percent of their multi-vehicle crashes in which they were assigned the CR. This is a 12-fold difference. In all multi-vehicle crashes (truck driver CR + other vehicle CR), truck drivers were asleep in only 0.55 percent.

Below Table 4 shows percentages for top CRs for those LTCCS multi-vehicle crashes in which the truck was assigned the CR. In other words, when trucks were at-fault in multi-vehicle crashes, these were the proximal causes. Keep in mind that multi-vehicle crashes represent the largest crash type. As seen in the table, asleep-at-the-wheel is not a major cause. The overwhelming majority of these crashes are caused by driver error (e.g., too fast for conditions, following too closely, etc.), not driver fatigue.

Table 4.—Most Common Truck CRs for Multi-Vehicle Crashes in Which the Truck Was Assigned the CR

Critical Reasons (includes some aggregations)	Percentage
Inadequate surveillance (didn't look or looked but did not see)	19
Inattention (e.g., distraction, daydreaming)*	19
Too fast for conditions or curve/turn**	13
Illegal maneuver	8
Following too closely	8
Vehicle factor (e.g., brakes, tires, cargo shift)	7
Misjudgment of gap or other's speed	5
Driver error, type unknown	4
False assumption of other driver's actions	3
Performance errors (e.g., overcompensation)	3
Heart attack or other physical impairment	2
Asleep-at-the-wheel	1
Other CRs not shown	8

*Aggregations: * Internal distraction, + external distraction, + other inattention (daydreaming), + unknown recognition error.
 **Too fast for conditions to be able to respond to unexpected actions of other road users, + too fast for curve/turn.
 Percentages based on all trucks.

We are not providing a table for multi-vehicle crashes in which the other vehicle is assigned the CR (i.e., the other vehicle is at-fault). It is notable, however, that in 9 percent of these crashes, the *other driver* was coded as asleep-at-the-wheel. This means that in the LTCCS multi-vehicle crash data, the car driver was *nine times more likely* to be asleep at the wheel than the truck driver.¹³

For all vehicle types (trucks, other vehicles, etc.), driver fatigue is a larger factor in single-vehicle crashes. But for all vehicle types there is a much bigger factor than fatigue: excessive speed. Driver performance problems/errors—i.e., excessive speed

¹³ A similar huge discrepancy was found by the AAA Foundation for Traffic Safety in a review of 10,732 fatal car-truck crashes occurring between 1995–98 (Kostyniuk *et al.*, 2002). Only 44 of these 10,732 crashes (0.4 percent) involved a truck driver drowsy or asleep. In contrast, 300 of them (2.8 percent) involved a car driver impaired by fatigue. This is a seven-fold difference.

and non fatigue-related driver inattention—are the ubiquitous causes of crashes, far exceeding fatigue, other driver factors, vehicle-related causes, and roadway/environmental causes.

The overemphasis on truck driver fatigue as the paramount safety issue, however, has resulted in resources being allocated to that issue that could otherwise be directed toward more critical safety concerns. The biggest block of crashes involving large trucks is those precipitated by the errors of other drivers. To be certain, truck driver errors also cause crashes but the vast majority of these performance errors are not fatigue-related. Instead, they are the same errors that cause most serious car crashes: driver distraction, other non-fatigue related driver inattention, and excessive speed.

The countermeasures to address these problems include driver education, but they must also emphasize more stringent and effective traffic enforcement (including automated enforcement) and enlightened applications of active safety technologies on trucks and other vehicles to assist drivers.

ATA believes a truck safety paradigm shift must occur to directly confront the dominating and mainstream traffic safety issues that affect truck safety. For this reason, we offer these important recommendations immediately below.

V. Truck Safety Resources Need To Address Primary Crash Causes

To improve truck safety in a meaningful way, government policies, programs and countermeasures need to address the primary causes of truck crashes. After all, Congress funded the LTCCS for 5 years in order for government and industry to better understand the causes. Unfortunately, too much of the Federal truck safety budget continues to focus on ensuring the safe condition of the truck, on driver fatigue issues, and on prevention of impaired driving. However, it is clear from the LTCCS and other causation research, that speeding is a more significant cause and contributing factor in crashes involving trucks, than any of the factors that currently receive the largest proportion of DOT's attention and resources. A lack of focus on speed as a causal or significant contributing factor in truck crashes represents a significant gap in the Federal Government's truck safety strategy.

To address the speed issue, ATA urges Congressional support for two initiatives. First, ATA supports reinstatement of a national maximum speed limit. ATA further supports that the maximum speed limit be 65 mph applicable to all vehicles, including large trucks.

Second, ATA supports a requirement for all new large trucks to be electronically speed governed at a setting not to exceed 68 mph.

In fact, in October 2006, ATA petitioned the National Highway Traffic Safety Administration (NHTSA) to initiate a rulemaking to amend the Federal Motor Vehicle Safety Standards to require vehicle manufacturers to install a device limiting the speed of large trucks (defined as those with a Gross Vehicle Weight Rating of greater than 26,000 pounds) to no more than 68 mph. At the same time, ATA also petitioned FMCSA to initiate a concurrent rulemaking with NHTSA to prohibit owners and operators from adjusting the electronic control module in affected trucks in a way that enables the vehicles to exceed 68 mph. Now, more than a year later, it is unfortunate that DOT has not accepted and acted on ATA's petition.

Reducing speed-related crashes involving large trucks is critical to NHTSA's and FMCSA's safety missions. These new requirements are necessary in order to reduce the number and severity of crashes involving large trucks and other vehicles.

Summary

Based on government and industry safety data collected over the last 3–4 years since the new HOS rules have been in effect, it is becoming increasingly clear that the new HOS rules are more effective than the prior rules in helping to improve safety on the Nation's highways, and provide for the safety and health of drivers. ATA supports their retention.

Additionally, an objective evaluation of driver fatigue in context with other crash causes indicates that other, more mainstream, traffic safety problems are far greater concerns. ATA supports a substantial realignment of DOT programs and resources to focus on critical truck-related crash causes.

Thank you for the opportunity for ATA to offer its views on truck driver HOS rules and truck safety. We look forward to working with this Subcommittee, Congress, DOT, FMCSA, and other reasoned stakeholders to improve the safety and productivity of our Nation's highway transportation system.

Senator LAUTENBERG. Welcome, Mr. Hill. Your presentation, please.

**STATEMENT OF HON. JOHN H. HILL, ADMINISTRATOR,
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

Mr. HILL. Thank you, Mr. Chairman.

Chairman Lautenberg and Senator Pryor, thank you for inviting me today to discuss the Federal Motor Carrier Safety Administration's approach for regulating truck drivers' hours-of-service.

FMCSA's hours-of-service rules reduce the risk of fatigue-related crashes involving truck drivers and provide flexibility for the trucking industry to meet the transportation needs of the Nation, while ensuring highway safety.

Safety is our top priority at the Department of Transportation, and our efforts have produced results. The heavy-truck fatality rate per hundred-million vehicle miles traveled is currently at the lowest rate since the Department began keeping these figures 30 years ago. We are committed to reducing the fatality rate even further.

Mr. Chairman, before I review the history of the hours-of-service rulemaking actions to provide a basis for today, I would like to address the Agency's issuance of the interim final rule, or IFR, on hours-of-service, and assure that an IFR is a temporary measure to prevent significant confusion with hours-of-service enforcement and compliance while we accept and review comments and prepare a final rule.

Faced with a December 27 deadline for the rulemaking action established by the recent court ruling, an interim regulation provides a familiar and uniform set of national laws to govern motor carrier transportation while FMCSA gathers public comments on all aspects of this interim final rule, conducts peer analysis and review, and considers the appropriate final rule that addresses the issues identified by the court. FMCSA is fully committed to issuing a final rule in 2008.

Prior to implementing the 2003 rule, FMCSA allowed drivers to complete their 10 hours of driving within a 15-hour window. It was an extendable workday. In practice, the 15-hour window was substantially longer, because miscellaneous off-duty periods were not counted as part of the 15 hours. Drivers were only required to be off-duty for 8 hours before returning to duty. Drivers could split their time in the sleeper berth into two separate periods, provided neither period was less than 2 hours. This meant that drivers could operate their vehicles for extended periods of time without having the opportunity for a single uninterrupted rest period long enough to obtain 7 to 8 hours of sleep.

In addition, the rules provided for weekly limits of on-duty time which resulted in drivers who were on certain schedules running out of available on-duty time within a few days. They were then required to go off-duty for approximately 3 full days before being allowed to drive again.

As a result of the 2003 rule, driving time was limited to 11 hours within a 14-hour nonextendable window after coming on duty, following 2 additional hours, and requiring a total of 10 consecutive hours off-duty.

Also, drivers were allowed to restart the calculation of the weekly limit after they took 34 consecutive hours off. And drivers using sleeper berths were allowed to continue to split the mandatory off-duty period, with a 2-hour minimum period in the sleeper berth.

In April 2004, the United States Court of Appeals for the District of Columbia Circuit overturned the 2003 rules on the grounds that the FMCSA did not address the issue of driver health. Congress enacted legislation to provide continuity through this time until the court allowed us to finalize a rule that would be published within 1 year or September 30, 2005, whichever occurred first.

In 2005, the rule the agency adopted strengthened the previous hours-of-service rule by requiring drivers using sleeper berths to spend at least 8 hours but less than 10 in the sleeper berth, and take an additional 2 hours either off-duty or in the sleeper berth.

Following publication of the 2005 rule, and despite the Agency's efforts to provide a rule based on best available scientific information concerning driver fatigue, the August 2005 rule was challenged on several grounds. On July 24 of this year, the court issued a decision vacating the 11-hour driving limit and the 34-hour restart, on procedural grounds. In an order filed on September 28 of this year, the court granted a 90-day stay of the effective date until December 27.

On December 12, we made available to the public an IFR on hours-of-service. On December 17, the IFR was published in the *Federal Register*. The IFR addresses the procedural issues identified by the court in vacating parts of the 2005 rule.

And, as I mentioned earlier, the IFR is a temporary measure, but, by adopting this rule—on an interim basis, the agency is seeking to avoid significant and costly disruption to existing industry compliance and State enforcement practice while addressing the procedural limits identified by the court, and providing an opportunity for public comment on the actions and underlying safety analysis from all interested parties. This will ensure that an uninterrupted safety regime remains in place with State law enforcement officials and practices and policies.

We will soon begin the process of reviewing the public comments to the docket to determine the most appropriate steps to complete the final rule.

Thank you, Mr. Chairman, for the opportunity to appear before you today. And I will look forward to working with this Committee in the future to address highway safety.

[The prepared statement of Mr. Hill follows:]

PREPARED STATEMENT OF HON. JOHN H. HILL, ADMINISTRATOR,
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

Introduction

Chairman Lautenberg, Ranking Member Smith, and Members of the Subcommittee, thank you for inviting me today to discuss the Federal Motor Carrier Safety Administration's (FMCSA's) approach for regulating truck drivers' hours-of-service (HOS). I am pleased to describe FMCSA's efforts to establish and enforce HOS rules, which are supported by scientific studies of fatigue and effectively reduce the risks of fatigue-related crashes involving truck drivers, while providing flexibility for the industry to meet our Nation's freight transportation needs and ensure highway safety.

On May 1, 2007, at a hearing before this Subcommittee, I discussed FMCSA's notice of proposed rulemaking (NPRM) to improve safety in the truck and bus industries by requiring motor carriers with severe patterns of HOS violations to equip their vehicles with Electronic On-Board Recorders (EOBRs). Since that hearing, FMCSA has completed its review and additional analyses necessary to respond to the public comments. We have completed additional research in response to com-

ments about the proposed performance specifications for EOBRs. We are now drafting a Final Rule to follow-up on our January 2007 NPRM on EOBRs.

Mr. Chairman, I would like to take a moment to assure you that our recent issuance of an Interim Final Rule (or IFR) on hours-of-service is a temporary measure needed to prevent significant disruption to hours of service enforcement and compliance while we prepare a final rule. Faced with the December 27 deadline for rulemaking established by a recent Court ruling, an interim regulation provides a familiar and uniform set of national rules to govern motor carrier transportation while FMCSA gathers public comments on all aspects of this interim final rule, conducts peer review of our analysis, and considers the appropriate final rule that addresses the issues identified by the Court. Our safety data indicate that the IFR will maintain highway safety outcomes. FMCSA is fully committed to issuing a final rule in 2008.

The transportation community faces many important challenges. Even as priorities change and our Nation's transportation needs evolve, safety on our roads must remain paramount to all priorities. Safety is the Department of Transportation's top priority and our efforts have produced results. The large truck fatal crash rate for 2006 is at its lowest point, 1.94 fatal crashes per 100 million large truck vehicle miles traveled (VMT), since the Department began tracking these figures 30 years ago. From calendar year 2005 to 2006, large truck fatalities decreased from 5,240 to 4,995, representing a 4.7 percent reduction in large truck fatalities. We are committed to reducing the fatality rate even further.

FMCSA has focused on fighting driver fatigue as one way to help make our roads safer. In April 2003 and August 2005, we took important steps toward reducing the number of fatigue-related crashes by modifying the hours-of-service rules to ensure that truck drivers are provided with adequate opportunities to rest at the end of each work day and during the work week. While the litigation that followed our rulemaking actions has created an atmosphere of uncertainty, FMCSA remains committed to providing an hours-of-service regulatory regime that does not compromise safety.

While some may offer unsubstantiated claims about the impact of the 2003 and 2005 HOS rules on safety and drivers' work hours, FMCSA is required to consider empirical data and offer factual evidence when promulgating its regulations. The Motor Carrier Safety Act of 1984 requires that "Before prescribing regulations under this section, the Secretary shall consider, to the extent practicable and consistent with the purposes of this chapter . . . costs and benefits."

Preventing fatigue-related large truck crashes is important to the Agency, as is evidenced by the resources we have expended on the HOS issue over the past 7 years. However, it must be noted that FMCSA is responsible for reducing all types of large truck crashes, not just those involving fatigue. In its 2005 rulemaking, FMCSA estimated that 93 percent of all large truck crashes were *not* fatigue-related.

Additionally, some commenters have challenged the basis for FMCSA allowing drivers to drive 1 hour longer per shift, when combined with the longer rest periods required in the 2003 and 2005 HOS rules. The Trucks Involved in Fatal Accidents (TIFA) dataset, the only comprehensive data source that tracks fatal large truck crashes by hour of driving, confirms, however, that between 1991 and 2002 only 9 large trucks were involved in fatigue-related fatal crashes in the 11th hour of driving. More recent TIFA data reveal that there was one such involvement in 2003, none in 2004, and only one in 2005. As Administrator of the agency responsible for CMV safety, I must determine where to best place our efforts and allocate the resources provided by this Subcommittee. Where can we save the most lives in dealing with unsafe and illegal drivers? The following major factors examined in the Large Truck Crash Causation Study have a higher relative crash risk than fatigue: illegal lane maneuver; traveling too fast for conditions; inattention; inadequate surveillance; and following too closely. Fatigue is an important safety factor to address, and may be underreported; however it is less significant a contributor to fatalities and injuries than these other driver related factors.

Wise stewardship requires us to use our resources most effectively to reduce crashes and fatalities. We continually assess how to best reduce roadway deaths. One of the most important ways is to increase safety belt usage of drivers of CMVs. Specifically, of the 805 large truck occupants killed in crashes in 2006, 393 (49 percent) were not wearing their safety belt. Of these 393, 134 were ejected completely from their vehicle. We believe that many of these 393 fatalities could have been avoided had the large truck occupants been wearing their safety belts. Through focused efforts in the last 2 years, we have seen safety belt use increase from 48 percent to 59 percent. I want to see the safety belt rate at 90 percent, a figure several states have achieved for passenger vehicles. Another area that needs greater effort

is the use of technologies such as electronic and roll stability control systems, lane departure warning systems, and forward collision warning systems. The industry is starting to adopt these technologies at a faster pace. FMCSA continues to promote and evaluate these technologies. We intend to make the adoption of these technologies a part of our enforcement regime through settlement agreements when carriers have failed to demonstrate safety performance in their operations.

FMCSA's 2003 Final Rule

Regulating the number of hours commercial drivers may work has been a Federal Government responsibility for 70 years, beginning with the Interstate Commerce Commission (ICC). Through the years, there have been three reforms of the rules, the most notable of which was the 2003 rule, when FMCSA made significant revisions to improve highway safety. The 2003 rule limited driving to 11 hours within a 14-hour, non-extendable window after coming on duty following 10 consecutive hours off-duty (known as the 11-hour rule). Although the rules concerning weekly limits for on-duty time were unchanged, drivers were allowed to restart the weekly limit calculation after they took 34 consecutive hours off-duty (known as the 34-hour restart provision). Drivers using sleeper berths were allowed to continue to split the mandatory off-duty period, with the minimum period in the sleeper berth being 2 hours.

The 2003 rule contained several provisions that improved the opportunity for drivers to obtain restorative sleep. For example, among the most significant provisions, the rule established a 14-hour, non-extendable window within which a driver could drive up to 11 hours following a 10 consecutive hour off-duty period. As a result of the 14-hour rule, drivers were prohibited from driving after the 14th hour since the beginning of the work day, regardless of whether they used the maximum 11 hours driving time. Unlike the previous rule, miscellaneous off-duty periods could not be used to extend the workday. The increase in the minimum off-duty period from 8 to 10 consecutive hours ensured that drivers had the opportunity for restorative sleep to fully recover from the work day. This provision moved drivers toward a work-rest schedule that more closely matched the natural 24-hour circadian cycle and gave drivers the opportunity to obtain the 7 to 8 hours of uninterrupted sleep per day that most adults need. The 34-hour restart provision gave drivers the opportunity for two 8-hour sleep periods, which research has shown can overcome cumulative fatigue associated with sleep deprivation. Survey results and analysis verified that most drivers take substantially more than the minimum 34 hours when re-starting the weekly clock.

Because the duty period within which an operator could drive was more limited than under the pre-2003 rule and because the rest period was long enough to provide an opportunity for 7 to 8 hours of uninterrupted sleep time, FMCSA concluded it was safe and reasonable to extend the number of hours an operator could drive within the 14-hour window from 10 hours to 11 hours. The 34-hour restart provision also provided drivers and carriers with operational flexibility and an improved quality of life, particularly for long haul operations, where the 60- and 70-hour rules may limit flexibility by forcing drivers to go off-duty for periods longer than necessary to fully recover from a typical work week. FMCSA concluded that the limited 14-hour rule and the mandatory 10-hour off-duty period improved safety while the 11 hours of driving time and the 34-hour restart provide operational flexibility.

The Court's 2004 Decision

In April 2004, the United States Court of Appeals for the District of Columbia Circuit (the Court or D.C. Circuit) overturned the 2003 rule on the grounds that FMCSA did not address adequately the issue of driver health, as required by 49 U.S.C. 31136(a)(4) [*Public Citizen v. FMCSA*, 374 F.3d 1209, D.C. Cir. 2004]. However, to avoid industry disruption and burden on the states, Congress enacted section 7(f) of the Surface Transportation Extension Act of 2004, which provided that the 2003 rule would remain in effect until a new final rule addressed the Court's issues or until September 30, 2005, whichever occurred first.

FMCSA Response to the Court's 2004 Decision

After reviewing the decision and considering the concerns raised by the Court, FMCSA stood behind the evidence and analysis that supported the 2003 rule and decided to repropose the rule as originally published in 2003 and to seek public comments. On August 25, 2005, FMCSA published a final HOS rule that retained many provisions of the 2003 rule ("the 2005 rule").

The Agency strengthened the 2003 rule significantly by requiring drivers using sleeper berths to spend at least 8 but less than 10 consecutive hours in the sleeper berth and to take an additional 2 hours either off-duty or in the sleeper berth. The new requirement followed the science by upholding the benefits of 7–8 hours of un-

interrupted sleep each day. The Agency required further that the shorter sleeper berth period be counted against the 14-hour on-duty limit, thereby decreasing the extent to which the workday could be extended. The 2005 rule also provided relief to some short-haul operations using lighter trucks.

In preparing the 2005 rule, FMCSA researched both U.S. and international health and fatigue studies and consulted with Federal safety and health experts. For example, we evaluated the much longer work day, including 13 hours of driving, allowed by Canadian drivers. In fact, we are currently conducting joint HOS research with Canada to understand better the impact of driving on the driver. The Agency considered scientific evidence about the relationship between the hours a commercial motor vehicle driver works, drives, and the structure of the work schedule (on-duty/off-duty cycles, time-on-task, especially time in continuous driving, sleep time, etc.), and the impact on the driver's health.

Litigation Concerning the 2005 Rule

Despite these efforts to provide a rule based on careful consideration of the best available scientific information, Public Citizen and others challenged the August 2005 rule on several grounds, as did the Owner-Operator Independent Drivers Association (OOIDA). On July 24, 2007, the Court rejected OOIDA's arguments, which challenged the sleeper berth provision, but accepted part of Public Citizen's arguments, vacating both the 11-hour driving limit and the 34-hour restart provisions [*Owner-Operator Independent Drivers Association, Inc. v. Federal Motor Carrier Safety Administration*, 494 F.3d 188 (D.C. Cir. 2007)].

The Court concluded that FMCSA did not satisfy the Administrative Procedure Act's (APA) requirements because the Agency failed to provide an opportunity for public comment on the methodology of the Agency's operator-fatigue model, which FMCSA used to assess the benefits of alternate changes to the HOS rules. The Court then listed several elements of the process by which the Agency calculated the impact of time-on-task that it held the public could not have anticipated and that were not disclosed in time to allow for public comment.

The Court also vacated the one-hour increase in the daily driving limit because FMCSA did not provide an adequate explanation for certain critical elements in the model's methodology, in particular the manner of plotting crash risk as a function of time-on-task/hours of driving. In vacating the 34-hour restart provision, the Court held that FMCSA provided no explanation for the failure of its operator-fatigue model to account for cumulative fatigue due to the increased weekly driving and working hours permitted by the 34-hour restart provision. The Court rejected three additional challenges to the 2005 Rule raised by OOIDA, and in so doing, agreed that FMCSA had made the sleeper berth provision safer.

In an order filed on September 28, 2007, the Court granted a 90-day stay of the mandate. The Court directed that issuance of the mandate be withheld until December 27, 2007.

FMCSA's Response to the Court's 2007 Decision

On December 17, FMCSA published an IFR to reinstate the hours-of-service provisions vacated by the D.C. Circuit Court of Appeals. As a result of the IFR, truck drivers will continue to be limited to driving only 11 hours within a 14-hour duty period, after which they must go off-duty for at least 10 hours. The interim final rule was developed after new data showed that safety levels have been maintained since the 11-hour driving limit was first implemented in 2003. As required by the Court, the Agency seeks comment on its methodology of the operator-fatigue model, which is central to the justification for this IFR. The IFR is based on the Agency's evaluation of new safety and operational data, additional analysis and modeling of the relationship between hours of driving and fatigue-related large truck crashes, discussion of the concept of cumulative fatigue in the context of driving activity, and the collection and evaluation of new data on the benefits and costs of the 11-hour driving limit and the 34-hour restart provisions.

By re-adopting the 11-hour limit and the 34-hour restart, the Agency intends to allow motor carriers and drivers to combine work-rest schedules that follow the optimal 24-hour circadian cycle (10 hours off-duty and 14 hours on-duty) while maintaining highway safety with operational flexibility. This action serves to stabilize workers' hours and establish certainty for enforcement personnel.

The overwhelming majority of roadside enforcement actions are conducted by State and local enforcement personnel who have been trained and are certified to conduct roadside inspections in accordance with the North American Standard inspection procedures. The number of officers conducting these inspections is approximately 10,000. Any change in the hours of service regulations would require a mas-

sive retraining effort of our state and local partners, which would result in an even longer disruption in the ability to enforce the new regulations.

In addition to the training requirements, each State would have to adopt the new regulations into their respective State laws before their personnel could enforce the regulations. In 23 states, this occurs via automatic adoption but the remaining 27 states adopt the regulations through varying processes, some of which require 2 years before complete adoption occurs. By adopting these interim rules, the Agency seeks to avoid significant and costly disruption of existing industry compliance and State enforcement practices while ensuring that the actions and underlying safety analysis that underpin our policies are available for comment from all interested parties before issuing a final rule. This will ensure that an uninterrupted safety regime remains in place with State enforcement laws, policies, and personnel.

The two provisions we reinstated on an interim basis are part of a broader, critical set of five HOS provisions included in this IFR. The three other critical provisions of the 2005 rule are the following: (1) the increase in the minimum off-duty period from 8 consecutive hours to 10 consecutive hours to ensure drivers have an opportunity to obtain restorative sleep; (2) the establishment of a 14-hour non-extendable window from the start of the workday within which all work must be completed; and (3) the modification of the sleeper-berth rule to require an 8-hour sleeper berth period, thereby ensuring that drivers have an opportunity to obtain uninterrupted sleep. These provisions function with the 11-hour limit and the 34-hour restart provision to protect against degradation of a driver's cognitive or psychomotor skills due to fatigue.

The IFR describes additional analysis conducted since 2005 that validates the modeling relied upon by the Agency to examine the relationship between the risk of a fatigue-related large truck crash and driving during the 11th hour. It also addresses cumulative fatigue as it relates to the driving and restart provisions. In its analysis of the 34-hour restart provisions being re-adopted in this IFR, the Agency further examined the research pertaining to work hours and sought additional research completed after the issuance of the 2005 rule. The Agency found no new research that addressed the relationship of work hours to commercial motor vehicle safety.

However, safety data collected and analyzed since the 2003 and 2005 HOS rules became effective address the impact of the 11-hour driving limit and the 34-hour restart provision and validate the Agency's belief that safety has been maintained under these provisions. The Agency has collected new operational data that indicate that its conclusions with regard to the cost-benefit analysis of the 11-hour driving limit and the 34-hour restart provision remain accurate. These data also suggest that reverting to the pre-2003 rule's 10-hour driving limit and eliminating the 34-hour restart provision would be significantly disruptive to drivers, carriers, and to the States where most of the enforcement of HOS violations occurs. It would also be disruptive to the safe and efficient movement of freight and might delay the delivery of essential goods and services to the American people.

Conclusion

The Department of Transportation is committed to putting into place an hours-of-service regime that improves highway safety by ensuring that drivers have adequate opportunities for rest at the end of each work day and during the work week. The Agency has considered the scientific evidence concerning driver fatigue and real-world operational data on how motor carriers and drivers are working under the 2005 rule.

The rule's opponents have argued consistently in favor of reducing the allowable driving time from 11 hours to 10 hours and eliminating the 34-hour restart. However, the information available at the time we published our 2005 rule and the subsequent IFR did not support that position.

We will examine comments to our recently published IFR and will pursue any evidence that suggests that the 11-hour allowable driving time and 34-hour restart is resulting in any increase of CMV fatalities. Our responsibility to the traveling public demands that we promote safety.

Thank you for the opportunity to appear before you today. I am committed to working with this Committee to ensure a safe and efficient transportation system for our citizens.

Senator LAUTENBERG. Thank you.
Ms. Claybrook, we invite you to give your testimony.

**STATEMENT OF JOAN CLAYBROOK, PRESIDENT,
PUBLIC CITIZEN; ON BEHALF OF ADVOCATES FOR HIGHWAY
AND AUTO SAFETY**

Ms. CLAYBROOK. Thank you very much, Mr. Chairman. I appreciate the opportunity to be here.

The clear Congressional command, and now two court rulings, tell us that the Department of Transportation has failed to do its job of making us safe on the Nation's highways by setting effective standards for truck driver working hours. Truck driving is a difficult, dangerous, and deadly profession. These vehicles are very labor intensive to operate. Driving one of these trucks—is not like driving a car; it's a very physically draining job. Most drivers are not paid by the hour, as you have heard, but by the mile, and this encourages them to drive as fast and as far as they can, and not to keep good records.

Under the Bush rules, trucking companies would be empowered to force their drivers to work, not 8 hours, not 9 hours, not 10 hours, but 11 hours in a demanding job that most of us couldn't do and have never done, and to do that for 7 days in a row, all while taking a mere 34 hours off for a so-called "weekend."

Every year, 5,000 people are killed in crashes with large trucks. It's equivalent to a major airline crash every single week. And if that were happening in this country, I think the Congress would be, on the dime, working on this every single day to try and reduce the numbers. Over 110,000 are seriously injured and some of the victims of truck crashes involving driver fatigue are here in this room today. I'd like to at least acknowledge who they are, hold up the pictures of their loved ones, including Ron Wood, who lost his sister, his mother, and three nephews under the age of 5 who were killed on a trip coming home from a toy store. An additional five others were killed in that same crash that took ten lives when the truck driver fell asleep at the wheel in Dallas. The human cost of truck crashes is incalculable.

Truck driving is also one of the most dangerous occupations in the United States. There's tremendous turnover in this industry, which means that these drivers are often not adequately trained, and, because of the excessively long hours, grueling schedules, difficult working conditions, and unsafe government rules, truck driving is often referred to as a sweatshop on wheels. And it is getting more dangerous every year. According to the Department of Transportation, fatalities for occupants of trucks have been going up, from 726 in 2003 to 805 in 2006.

The public urgently needs Congress to act, so that the Federal Motor Carrier Safety Administration will do its job of protecting the public. This agency was created in 1999 with safety as its highest priority, written into the statute. The agency, however, has contributed to the problem by ignoring Congressional mandates, missing every single safety goal established by Congress in the last 7 years, issuing rules that actually roll back safety and then are overturned by the courts, and promoting industry productivity at the expense of safety, despite its statutory mission.

It took Congress stepping in to stop them from opening up the border to trucks from Mexico because of the clear and obvious safe-

ty problems that still exist, even though it's been partially opened now with a pilot project.

The U.S. Court of Appeals has twice overturned the hours-of-service rule, but the agency has just reissued the same exact problematic rule. Ben Franklin said that the definition of "insanity" is doing the same thing over and over, and expecting different results. Well, uh, this is insanity.

The courts have twice told FMCSA that the 11-hour driving day and the inadequate weekend of 34 hours to restart the work week are inadequate. They have no new or creditable data or information to support this rule. The agency uses information that it's already admitted is unreliable. Claims in the interim final rule say that we will see a reduction in fatalities caused by driver fatigue when we compare the first 9 months of 2003 to the first 9 months of 2004, but this information is based on police accident reports, which the agency explained at length in the 2000 NPRM are not reliable, because of extensive problems with collecting accurate, verifiable data about whether or not a crash is fatigue-related.

And in 2005, the agency again repudiated this data and described it as mostly preliminary, self-reported and without statistical controls drawn from small sample sizes. All of which, once again, leads to inconsistent findings.

And, meanwhile, the Insurance Institute for Highway Safety has reported, in an October 2006 survey, that truck driver fatigue is not decreasing, that one of every five truckers reports falling asleep behind the wheel.

Drastic action is needed in this case. Not only is the agency ignoring Congressional mandates, but it is also flouting the courts, ignoring clear deficiencies in the rule. Accordingly, Public Citizen today, with some other highway safety groups, has filed an order with the U.S. Court of Appeals to vacate the interim final rule, because it is inadequate and it merely reiterates the rule that has been twice overruled by the Court of Appeals. We're asking them to vacate this and to direct the agency to forthwith issue a revised interim final rule or guidance to bring the maximum consecutive driving time back down to 10 hours with a work week of 60 or 70 hours. Today it can be as much as 88 hours, without the inadequate 34-hour restart.

We also recommend that the agency rescind this interim final rule and comply with the court decision.

Senator LAUTENBERG. You're running over time.

Ms. CLAYBROOK. I'm sorry? Oh, I thought I had 42 seconds left. Oh, no, I don't. I'm 42 seconds over. Sorry. I apologize, Mr. Chairman.

Well, I think that you get the gist of our concerns about this rule. Thank you very much.

[The prepared statement of Ms. Claybrook follows:]

PREPARED STATEMENT OF JOAN CLAYBROOK, PRESIDENT, PUBLIC CITIZEN;
ON BEHALF OF ADVOCATES FOR HIGHWAY AND AUTO SAFETY

Good morning, and thank you Chairman Lautenberg, Ranking Member Smith, and members of the Subcommittee on Surface Transportation and Merchant Marine Infrastructure, Safety, and Security for the invitation to testify before you today on behalf of Public Citizen and Advocates for Highway and Auto Safety on truck driver hours of service. I also very much appreciate the long-term commitment to safety

that members of the Subcommittee and the full Committee have shown over the years on a variety of safety issues. This committee has a long history of bipartisan legislation to advance motor carrier safety and to stop special interest efforts to degrade and rollback bus and truck safety rules. Your priority on motor carrier safety was exemplified by the May 1, 2007, subcommittee hearing on Electronic On-Board Recorders and truck driver fatigue reduction, issues that are directly related to the hours-of-service (HOS) regulation that is the subject of today's hearing.

The history of the HOS rule is a textbook example of how the three branches of government interact to shape policy. But, as I will point out, this interaction does not always result in the best or safest policy. More than that, it is a classic case of the many ways that very technical policies—hours, restarts, sleeper berths, Electronic On-Board Recorders—are, ultimately, about people, whose lives continue to be at risk every day that we spend waiting for the Bush Administration to do its job of protecting the public.

I. Inadequate Hours-of-Service Standards Put the Public at Risk

Before I launch into the technical details of the laws Congress passed and the rules the Bush Administration has so inadequately issued, I want to remind you of a few basic facts.

Truck driving is difficult, dangerous and deadly. These vehicles are very labor-intensive to operate. Driving ones of these trucks is not like driving a car; it is a physically draining job. Because truck driving is exempt from the Fair Labor Standards Act (FLSA) most drivers are not paid by the hour but by the mile, and thus get no overtime pay after 40 hours of driving a week. The incentive is to drive as far and as fast as you can. The trucking companies have enormous power to pressure drivers to work at this very intense job for very long periods of time, and the Bush hours of service rules would have increased that pressure. Under the Bush rules, trucking companies would be empowered to force their drivers to drive not 8 hours, not 9 hours, not 10 hours, but *eleven hours* at a demanding job. Drivers could also be required to work a total of 14 hours a day—three additional hours loading, unloading and preparing to drive, for 7 days in a row.

I challenge any of you to work under those conditions and not come out at the end of it exhausted.

When these tired truckers fall asleep at the wheel, they are not at just any wheel: they're in incredibly big trucks that are suddenly like missiles on the road, and everyone in their path is at risk. These risks are not hypothetical: they are very real. Roughly 5,000 people die every year in collisions with big trucks, while another 100,000 are injured. For drivers it is one of the most dangerous occupations in America, killing over 800 drivers a year.

Mike Martin knows these risks all too well. Late on a cloudy afternoon in September of 2004, an 18-wheeler crossed a state highway median near Dallas, Texas and struck two oncoming vehicles. The crash killed a total of 10 people, including Mike Martin's entire family: his mother in-law, wife and three children—all of whom were under the age of 5—all perished in the crash, on the way home from a toy store. In one careless instant his life was changed forever. All evidence and witness accounts indicate that the brakes of the 18-wheeler were never applied, even as the trailer careened across a bumpy median into oncoming traffic. When investigators arrived on scene, the federally mandated logbook in which the driver was required to document his on-duty and driving hours was inexplicably missing. Evidence later compiled during the investigation indicates that in the 2-weeks prior to the life-ruining crash, the driver illegally falsified his records *at least four times* to allow him more time on the road.¹

At the time of this terrible crash the 2003 hours-of-service rule allowed truck drivers to legally log a staggering 98 on-duty hours in just an eight-day period.² That averages to 12.25 hours of on-duty time every day, for 8 days straight. During these floating work-weeks, truckers were allowed to spend an astonishingly dangerous 11 hours daily just driving, independent of other duties. On top of that, truckers could log an additional three non-driving but on-duty hours each day, so long as the exhausting 14-hour day was followed by a ten-hour rest period.³ This limited rest period was supposed to allow time for truckers to eat, spend personal time alone or with family, and, of course, sleep—even though the rules allowed the driver to be interrupted during the rest period. After a driver reached his maximum allowable on-duty and driving hours for a week, he need only take a 34-hour break—not even

¹Greg Jones & Doug Swanson, *10 Lives Paid for Trucker's Mistakes*, DALLAS MORNING NEWS, Feb. 28, 2006.

²See 68 Fed. Reg. 22456 (April, 28 2003).

³*Id.*

a full day and a half—before starting the cycle all over again.⁴ And even with this rigorous on-duty schedule allowing for more than double the traditional 40-hour work-week, drivers still operated under intense time restraints, as evidenced by the shocking patterns of willingness to falsify logbook entries to allow for more on-duty time.

More on-duty time can mean more freight deliveries by truck, which proponents herald as improving the economy. But as the wreckage of the September 2004 accident near Dallas demonstrates, it does so at a huge price. The ability to make a delivery on time or schedule in an additional delivery during an already packed week should never be placed before the safety of individuals on U.S. highways, no matter what the potential productivity gains of the trucking industry may be. Hours-of-service rules must promote safety, not industry profits. Financial gain in the trucking industry will not prevent countless highway injuries, whereas adequate safety measures can. Increased deliveries cannot adequately remedy even one family who has lost a loved one in a fatigued driving crash, whereas adequate safety measures can act to prevent the crash from ever occurring.

Nearly all stakeholders believed the HOS rule that had governed driver hours from 1962 until 2003 needed to be revised. That rule,⁵ which limited truck drivers to 10 consecutive hours of driving after 8 hours off-duty and capped weekly hours at a maximum of 60 or 70 hours, depending on the work schedule of the motor carrier, promoted driver fatigue and needed to be made safer. Unfortunately, the Federal Motor Carrier Safety Administration's (FMCSA) twin 2003 and 2005 final rules, which contained the provisions described above, chose to improperly emphasize economic efficiency over safety by permitting truck drivers to both drive and work even more hours than the previous rule had allowed. Although Congress in 1995 by statute required the U.S. Department of Transportation (DOT) to reform the rules to make them safer, DOT and FMCSA had their own agenda.

We are here today in part because the U.S. Court of Appeals came to the rescue and, in each instance, struck down the longer maximum-hours provisions of the 2003 and 2005 FMCSA HOS rules. Just last July 24, 2007, the court held that FMCSA had not justified allowing 11 consecutive hours of driving, instead of 10 hours, and had not adequately explained the basis for allowing drivers to replenish their weekly driving and work hours after only a short, 34-hour off-duty layover.⁶ The court gave the agency until December 27, 2007, just over a week from today, to change the HOS rule in compliance with the court's decision and to notify drivers and enforcement officers as to how to proceed until a new HOS rule is issued.⁷ Last week on December 10, 2007, FMCSA in response to the Court issued a new interim final rule which once again mimics the 2003 and 2005 rules the court struck down. We are here today to discuss the new interim final rule, which is FMCSA's inadequate response to its Congressionally-mandated duties and to the court decisions. We are here because we cannot allow history to once again repeat itself. There are too many lives at stake.

II. The History of Hours-of-Service Regulation is One of Congressional Concern and Agency Failure

The serious consequences of driver fatigue and large truck crashes led Congress to require limits on driver hours in 1935 and to demand improvements in truck safety and the HOS rule in 1995. Unfortunately for everyone, the agency charged with providing those needed improvements has failed every step of the way to deliver.

A. The First Hours-of-Service Standards Failed To Protect the Public Sufficiently

Limits on truck driver hours were first adopted in the Motor Carrier Act of 1935⁸ and placed under the aegis of the Interstate Commerce Commission. Soon after, Congress exempted truckers who could be subject to the HOS rule from the maximum hours protection of the Fair Labor Standards Act of 1938.⁹ Coupled with the fact that most truckers are paid by the mile of travel, this economic reality places a heavy premium on driving time and the need to maximize the use of driving hours for both the motor carrier and the driver.

⁴ *Id.*

⁵ 27 Fed. Reg. 3553 (1962).

⁶ *Owner-Operator Indep. Drivers' Ass'n v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188 (D.C. Cir. 2007).

⁷ *Owner-Operator Indep. Drivers' Ass'n v. Fed. Motor Carrier Safety Admin.*, Docket No. 06-1078 (D.C. Cir. Sept. 28, 2007) (order granting 90-day stay of issuance of mandate).

⁸ Pub. L. No. 74-225 (1935).

⁹ Codified at 29 U.S.C. § 213(b)(1).

In 1962, the HOS rule was revised to allow more driving hours per day. Previously, while truck drivers were allowed to drive for 10 consecutive hours and then take 8 consecutive hours off-duty, they were limited to a maximum of 10 hours of driving in each 24-hour period. While drivers could perform non-driving duties after completing 10 hours of driving, they could not drive again until 14 *non-driving hours*, including the 8-hour off-duty period, had elapsed. The 1962 amendment changed this schedule dramatically by decoupling the 10 hours of driving and the 8 hours off-duty schedule from the 24-hour circadian clock.¹⁰ Motor carriers could permit drivers to keep close to a 24-hour circadian schedule by using the 10 hours of driving as part of a 15-hour work day (that could be extended even further by taking off-duty breaks that tolled the on-duty work time), followed by the mandatory 8 hours off-duty, for a 23-hour schedule. However, the rule change allowed motor carriers and drivers who wanted to maximize driving time, to alternate 10 hours of driving with 8 hours off-duty continuously, in 18-hour blocks, day after day, until they reached their maximum weekly on-duty limit of 60 or 70 hours. This change offered economic benefits in the form of greater efficiency for motor carriers and higher income for drivers and thus became a common and regular schedule for many long-haul drivers.

This 18-hour schedule, however, was widely acknowledged as unsafe and as promoting driver fatigue. For example, let's say a driver on a 7-day weekly schedule, with a limit of 60 on-duty hours, began driving at 6 a.m. on a Monday morning. By maximizing the use of the driving hours this driver could "burn" through the 60 driving and work hours by 10 a.m. the following Friday morning, just 100 hours after starting. Driving such a schedule, which many long-haul drivers needed to do to satisfy motor carrier delivery schedules and also to maximize their mileage and their earnings, also resulted in the driver starting each subsequent 10-hour driving shift at an earlier time on each successive day. This rearward rotating schedule compounded fatigue by defying the driver's internal biological clock (circadian rhythm). Because working such schedules builds up accumulated fatigue or sleep "debt," drivers were limited to a total maximum of either 60- or 70-hour work weeks, *i.e.*, on-duty hours, depending on whether they worked for a motor carrier that operated on a 7-day or 8-day schedule. After using the maximum on-duty hours, drivers were then required to be off-duty for the remainder of the 7- or 8-day period, a "weekend" that for drivers who maximized the use of their on-duty hours could be as long as 68 hours for drivers on a 7-day work schedule or 74 hours for drivers on an 8-day schedule. Going back to the example, once the driver who started on Monday morning finished using the 60 hours on Friday morning, the driver would be off-duty from 10 a.m. Friday morning until 6 a.m. the following Monday morning, a total of 68 straight hours off-duty to ensure rest and recovery from the intense, fatigue laden 4-day driving and on-duty schedule. This rule governed HOS for four decades, from 1962 until 2003.

B. Congress Demanded Improvements—Which the 2003 HOS Rule Failed To Deliver

Jurisdiction over the HOS rule was transferred to U.S. DOT when it was created in 1966. DOT officials acknowledged that driver fatigue was a recognized factor in truck crashes. At a 1988 symposium, DOT officials emphasized the contribution of driver fatigue to truck crashes and suggested the problem was largely attributable to violations of the HOS limits. In 1990, the National Transportation Safety Board (NTSB), an independent safety investigating agency, recommended that DOT require the use of automated, tamper-proof recording devices, called Electronic On-Board Recorders (EOBRs), in order to effectively enforce the HOS rule and reduce driver fatigue. In the same year, DOT officials conceded that there is a cumulative fatigue effect after several days of driving.¹¹ In 1995, another DOT sponsored expert meeting, the Truck and Bus Safety Summit, which included over 200 drivers, motor carrier representatives, government officials, and safety advocates, concluded that driver fatigue was the preeminent motor carrier safety problem.¹²

Studies have attempted to quantify the incidence of fatigue in truck crashes. The NTSB research suggested that 30–40 percent of heavy truck crashes may involve fatigue as a factor.¹³ Subsequent estimates by FMCSA during the HOS rulemaking have ranged from 15 percent¹⁴ as part of the 2000 proposed rule, to a markedly

¹⁰ 27 Fed. Reg. 3553.

¹¹ *HOS Study: Report to Congress*, at 6, Federal Highway Administration (1990) (FHWA HOS Study).

¹² 65 Fed. Reg. 25540, 25541 (May 2, 2000).

¹³ *Factors That Affect Fatigue in Heavy Truck Accidents*, NTSB (1995).

¹⁴ 65 Fed. Reg. at 25546.

lower estimate of just over 8 percent¹⁵ that was whittled down to help the agency justify its initial 2003 final rule increasing the maximum number of allowed driving hours. These lower estimates are highly questionable because even DOT's agencies have admitted that their fatality and crash databases significantly understate the problem of driver fatigue.¹⁶

Against this backdrop, Congress expressed its concern about the increasing number of truck crashes and sought to improve safety and reduce driver fatigue by revising the exhausting driving limits of the HOS rule. Congress required DOT to "issue an advanced notice of proposed rulemaking dealing with a variety of fatigue-related issues . . . (including 8 hours of continuous sleep after 10 hours of driving, loading and unloading operations, automated and tamper-proof recording devices [EOBRs], rest and recovery cycles, fatigue and stress in longer combination vehicles, fitness for duty, and other appropriate regulatory and enforcement countermeasures for reducing fatigue-related incidents and increasing driver alertness)."¹⁷ But DOT's motor carrier agency at the time, FHWA, took no action even as the annual number of crashes continued to rise through the 1990s.

Frustrated by agency inaction, Congress responded by passing the Motor Carrier Safety Improvement Act of 1999,¹⁸ which created the FMCSA as an agency for the first time reporting directly to the Secretary of Transportation and dedicated to motor carrier safety specifically charged with the mission to make safety its "highest priority."¹⁹

In its first year of operation, FMCSA released a notice of proposed rulemaking (NPRM) in 2000²⁰ that called for a 24-hour mandatory work/rest cycle that would have allowed 12 hours of driving or other work daily and 12 hours off-duty (10 hours to be taken in a single block). Although the proposed 12-hour driving limit was unsafe, the NPRM had potentially beneficial features. Since it imposed a 24-hour daily schedule, it offered a circadian rhythm compatible driving routine that could have been a major step forward in reducing fatigue and improving working conditions of drivers. To provide recovery time from the weekly accumulation of fatigue, the NPRM proposed a rest and recovery "weekend" of at least two consecutive nights and the intervening day off-duty each week. The NPRM also required the installation of EOBRs to replace driver logbooks, with its accompanying practice of keeping fraudulent logbooks (known as "comic books"), to improve compliance and enforcement of the HOS rule. Finally, however, the NPRM included an unworkable plan to divide the industry into 5 categories based on distinct type of motor carrier operations.

The industry strongly objected to the NPRM, and Congress, not for the last time, intervened to prohibit FMCSA from moving forward to issue a rule based on the NPRM until 2001,²¹ throwing out the progressive and safer HOS initiatives contained in the proposal along with the bad.

FMCSA issued a distinctly different final rule in 2003.²² First, the 2003 rule extended the consecutive tour of driving from 10 to 11 hours. Demanding that a truck driver put in up to 11 consecutive hours of driving—long enough to drive from Washington, D.C. to Jacksonville, Florida—is just too much. It is unreasonable, it is unsafe, and it must be reduced. FMCSA's own findings in the 2000 proposed rule, drawn from a significant body of scientific research, show that once a truck driver moves past the eighth hour of consecutive driving, the relative risk of a crash begins to dramatically increase at a geometric or logarithmic rate until, at the end of the 11th hour of driving, the risk is several times higher than at the end of the eighth hour. Eleven consecutive hours of driving is far too much to perform safely and reliably on a consistent basis, and no scientific research supports it.

And those long hours of driving repeated day after day takes a toll on truck driver health. The Transportation Research Board's study for FMCSA's nearly identical 2005 HOS rule clearly demonstrates the extraordinary, dangerous health effects on truck drivers of very long working and driving hours.²³

¹⁵ FMCSA Regulatory Impact Analysis, 8–14 to 8–15 (2002).

¹⁶ 65 Fed. Reg. at 25545; FHWA HOS Study at 5.

¹⁷ Interstate Commerce Commission Termination Act (ICCTA) of 1995, § 408, Pub. L. 104–88 (Dec. 29, 1995) (codified at 49 U.S.C. § 31136 note).

¹⁸ Pub. L. No. 106–159 (Dec. 9, 1999).

¹⁹ *Id.*, Title I, § 101(a), codified at 49 U.S.C. § 113(b).

²⁰ 65 Fed. Reg. 25540.

²¹ Department of Transportation and Related Agencies Appropriations Act of 2001, § 335, Pub. L. 106–346 (Oct. 23, 2000).

²² 68 Fed. Reg. 22456 (Apr. 28, 2003).

²³ *Commercial Truck and Bus Safety, Synthesis 9, Literature Review on Health and Fatigue Issues Associated with Commercial Motor Vehicle Driver Hours of Work, A Synthesis of Safety Practice*, Transportation Research Board, National Academies of Science (Aug. 9, 2005).

Second, FMCSA replaced the longer “weekend” rest time proposed in the NPRM with an option to take just a minimal 34-hour off-duty interval—the required 10 hours off-duty time coupled with only an additional 24-hour rest period, which would reset drivers’ weekly tally of hours. Not only does the 34-hour “restart” allow drivers to reset their 60- and 70-hour weekly on-duty time after far too short a lay-over to get adequate rest, but it also dramatically increases, by between 25 and 40 percent, the total number of driving and working hours a driver can cram into the work week compared to the previous HOS rule.

In the example mentioned earlier, under the old HOS rule the long-haul driver who maximized driving hours started work at 6 a.m. Monday morning and finished at 10 a.m. Friday morning and was then off-duty for 68 hours. Under the 2003 rule, however, the same driver would complete using the 60 hours on-duty at 8 p.m. Friday night and, after only 34 hours off-duty, could start driving again at 6 a.m. Sunday morning and be permitted to drive an additional 14 hours before Monday morning at 6 a.m. A more likely scenario would have the driver “restart” the weekly time clock after completing 5 full 11-hour driving shifts, for a total of 55 hours, at 5 a.m. Friday morning. Then, by taking the minimum 34-hours off-duty, that driver could start driving again at 3 p.m. on Saturday afternoon, and drive an additional two full shifts, 22 hours, by 6 a.m. on Monday morning, the driver’s original start time. Even taking into account that the driver stopped after 55 hours for the short 34-hour restart, the trucker ends up driving an extra 17 hours in the same weekly time span compared to the hours of driving allowed under the 1962 HOS rule. For drivers on an 8-day schedule, up to 88 hours of driving and an incredible 98 hours of on-duty work time are permissible as a result of the short “restart” provision.

While the calculations to figure this out may be complex, the result of the 34-hour restart is simple. No matter when it is taken during the workweek, the restart provision allows drivers to take significantly less time off-duty for rest than was required under the 1962 rule, and it converts that previously required off-duty rest time into driving time. While this may make motor carriers more “efficient” in scheduling just-in-time deliveries, it encourages longer hours and promotes more, not less, driver fatigue. Not only does this incredible schedule produce for a truck driver accumulated fatigue and exhaustion that studies have shown reduce alertness and increase crash risk, but the minimal 34-hour “restart” does not provide a sufficient opportunity for a driver to eliminate that fatigue and restore safe performance behind the wheel. Further, no research supports the safety of a 34-hour minimum layover before restarting a driver’s working and driving clock for another tour of duty. Although some drivers may want to take advantage of these additional hours to earn a better living, the restart exacts an unacceptable cost from drivers in terms of stress and the toll on their health, while inflicting societal costs in additional highway deaths and injuries.²⁴

Finally, FMCSA in the 2003 final rule did an about-face on EOBRs and dropped this technology requirement from the rule altogether, claiming further study was needed, even though EOBRs and global positioning systems (GPS) were already in common use in the U.S. and worldwide, and even though all European Union nations and many countries throughout the rest of the world require commercial vehicles transporting freight to be equipped with digital, tamper-proof tachographs, one form of EOBR technology.

C. The Court Rejected the 2003 Rule—but FMCSA Just Reissued it in the 2005 Rule With Minor Changes

In response, Public Citizen’s litigation group, representing Public Citizen, Parents Against Tired Truckers (P.A.T.T.) and Citizens for Reliable and Safe Highways (CRASH), sued FMCSA because the agency rule, by increasing rather than decreasing driving hours, posed a great threat to public safety and because the agency failed to meet its statutory obligations on driver health and to “deal with” EOBRs. Advocates for Highway and Auto Safety also filed an amicus, or friend of the court, brief on the issue of the detrimental impact that shift-work and prolonged driving and work schedules have on truck driver health. On July 16, 2004, the court of appeals struck down the 2003 rule in its entirety and issued a unanimous, scathing opinion that pointed out the numerous flaws in the agency’s positions and reasoning.²⁵

The court’s decision held that the 2003 rule was arbitrary and capricious because FMCSA had failed to consider the impact of the rule’s longer driving and working

²⁴Moreover, not only did FMCSA fail to mention in the 2003 rule that longer driving and work hours could be the result, but the agency entirely failed to consider the impact that these longer driving and work hours would have on the health of drivers who took advantage of them.

²⁵*Public Citizen v. FMCSA*, 374 F.3d 1209 (D.C. Cir. 2004).

hours on the health of truck drivers—a consideration required by Federal law. However, the court pointed out “the troubling nature of . . . other facets of the rule-making,”²⁶ including concerns about the dubious reasons for the increase from 10 to 11 consecutive hours of driving, failure to acknowledge or justify the 34-hour restart, and an apparent “willful” lack of knowledge regarding EOBRs technology. The court’s opinion clearly signaled that the underlying basis for the 2003 rule was of questionable legality.²⁷ The court vacated the rule in its entirety, requiring FMCSA to go back to the drawing board.

Rather than comply, FMCSA sought a reprieve from the court’s order, requesting Congress to allow the agency to retain the invalidated 2003 rule while it drafted a new one. Congress granted FMCSA a one-year reprieve to allow the agency to produce a revised rule.²⁸ While it was unwise of Congress to protect the agency in this manner, Congress wisely declined requests from DOT to codify the 2003 rule into law.

But FMCSA’s response in 2004 was not to reexamine its underlying premises or rethink the rule but simply to forge ahead by reintroducing the same 2003 rule the court had just struck down as its new proposed rule.²⁹ About 1 year later, FMCSA issued the 2005 final rule that was nearly identical to the 2003 rule.³⁰ Despite the severe criticism from the court, the agency had changed little of substance, seeking only to improve the packaging and window-dressing accompanying the rule in an attempt to justify what the court of appeals had already rejected.

Needless to say, given this action by FMCSA—issuance of another unsafe regulation that would continue to promote fatigue in drivers—Public Citizen and the other safety groups, now joined by Advocates for Highway Safety and the International Brotherhood of Teamsters, again sued FMCSA in the D.C. Circuit Court of Appeals. That lawsuit resulted in the court of appeals’ second unanimous decision against FMCSA and its 2005 edition of the HOS rule. Although three different judges heard the second case, the court once again held that the rule was legally deficient. While the court’s decision this time around turned on the agency’s failure to provide fair notice of its statistical analysis and to properly and fully explain its methodology in the model used to support the 2005 rule, the court nevertheless repeated the recitation of fundamental flaws that were cited in its first decision. It is evident that the Federal court was not taken in by FMCSA’s attempts to make a silk purse from a sow’s ear.

D. FMCSA Abandons Electronic On-Board Recorders (EOBRs) for Trucks

The adoption and use of new and emerging technology was prevalent throughout the second half of the 20th century, and the shift to high-tech solutions to problems is clearly a hallmark of this new, 21st century. Individuals, private industry, non-governmental organizations and even many government agencies have made the adoption and use of technology to improve operational efficiency as well as advance public health and safety. Nonetheless, FMCSA in both its 2003 and 2005 HOS rules did precisely the opposite. Not only did these rules increase the amount of driving and work time that motor carriers and drivers could avail themselves of, but the agency entirely abandoned the concept of EOBR technology to ensure compliance and reduce paperwork. The disregard for EOBRs exhibited by FMCSA in its 2003 rule was so blatant that the court of appeals could not “fathom [] why the agency had not even taken the seemingly obvious step of testing EOBRs on the road,”³¹ and referred to the agency’s failure to evaluate the effectiveness of the technology as a willful “lack of knowledge[.]”³² This shabby treatment of EOBRs by FMCSA, however, was only the beginning.

In January of this year, FMCSA proposed an EOBR rule that, at best, can only be described as ludicrous.³³ In the face of widespread, chronic violations of hours of service, which even the agency admits presents a difficult enforcement problem, FMCSA has proposed a rule that would result in about 465 motor carriers installing EOBRs on their trucks each year. Mr. Chairman, there are approximately 725,000, *nearly three-quarters of a million*, registered motor carriers in the U.S. The agency’s

²⁶ *Id.* at 1217.

²⁷ *Id.* at 1217–23.

²⁸ Surface Transportation Extension Act of 2004, Part V, § 7(f), Pub. L. 108–310 (Sept. 30, 2004).

²⁹ 70 Fed. Reg. 3339 (Jan. 24, 2005).

³⁰ 70 Fed. Reg. 49978 (Aug. 25, 2005). The only change affecting long-haul drivers was a modification of the sleeper berth rule to require at least one rest period of 8 consecutive hours in the sleeper berth.

³¹ *Public Citizen*, 374 F.3d at 1222.

³² *Id.*

³³ 72 Fed. Reg. 2340 (Jan. 18, 2007).

proposal would require less than *one-tenth of 1 percent* of commercial trucking and motorcoach companies to install technology that would reduce HOS violations, make the job of enforcement easier, and create a safer highway environment. This absurd proposal, if adopted, will result in making EOBRs on trucks for hours of service monitoring even harder to find than the proverbial needle in a haystack.

The reason such a small number of motor carriers would be required to use EOBRs is that the agency intends to wield this modern technology as a punishment, rather than as an important safety enforcement tool. Only those carriers who fail to get passing marks on two successive safety reviews would be required to install EOBRs, turning them into a technological “Scarlet Letter.” What’s more, although these poor safety risk compromises would be required to install EOBRs, the technology itself would not be required to be integrated into the vehicle and linked with engine functions through the vehicle electronic control module (ECM). Even for such poor safety risks, FMCSA would rely on stand-alone Global Positioning Systems (GPS) to record hours, allowing location-only tracking systems as EOBRs. In effect, FMCSA would allow drivers for these unsafe carriers to use cell-phones with GPS features as EOBRs, a prospect that will lead to fraud and abuse because handheld phones not only are rife with serious security problems but they can readily be passed from driver to driver.

Other significant deficiencies plague this rule as well. FMCSA has proposed no performance criteria to ensure that the EOBRs that are used are tamper-proof. In addition, the agency proposes to set no certification criteria for the installation, calibration, or repair of EOBRs, leaving those performance standards entirely to EOBR vendors. Finally, FMCSA has proposed eliminating recordkeeping requirements for many supporting documents that enforcement authorities use to corroborate HOS compliance, either as entries in a written logbook or as data captured by an EOBR. Given that the agency would require only a minuscule fraction of motor carriers to install potentially weak EOBR systems that are not even integrated with the vehicle ECM, there is no excuse for permitting the elimination of crucially important records that law enforcement personnel rely on to document HOS violations. The agency proposal, Mr. Chairman, is nothing short of a total travesty that may have to be corrected by legislation.

Mr. Chairman, FMCSA’s track record and actions throughout the recent history of the HOS rulemakings speak volumes. One cannot ignore that FMCSA has acted with impunity, disregarding Congressional mandates, ignoring Court decisions, and now even the court’s mandate, and the agency has turned a deaf ear to the public outcry over truck safety and a blind eye to the death and injury toll due to truck crashes. Even as the agency has been repeatedly shown to be derelict in its duty to make safety its highest priority, FMCSA has just recently tried to pull a statistical “fast one” on Congress and the public by watering down its crash data and manipulating statistics in the FY 2008 budget presented to the Appropriations Committees of both the House and Senate earlier this year.³⁴

III. FMCSA’s Interim Final Rule Fails To Meet the Agency’s Mandate To Make Safety the Highest Priority

Mr. Chairman, last week, in response to the court of appeal’s decision striking the two portions of the HOS rule that permit 11 consecutive hours of driving and the 34-hour “restart,” a new chapter in the saga of the HOS rule was written. In a momentous breach of agency authority, the U.S. Department of Transportation (DOT) and the Office of Management and Budget (OMB) decided that the FMCSA would defy the court’s decision and issue an Interim Final Rule (IFR) to reinstate the two increases in maximum driver hours of service that the court nullified last July. Not only is this decision an inappropriate and cynical maneuver to cling to a fatally flawed policy, but it is also entirely illegal and a willful violation of the rule of law. In its so-called statement of the legal basis for reinstating the two provisions, FMCSA cites no statute, no case law, and no other precedent that gives the agency

³⁴In its FY 2008 budget, FMCSA abandoned using the traditional, direct, valid exposure measure of the number of annual truck fatalities matched with the number of annual 100 Million Truck Miles Traveled (MTMT). Instead, the agency merged bus and motorcoach fatality figures with large truck fatalities and is now measuring all commercial motor vehicle crash fatalities against *all motor vehicle miles traveled*, including not just truck mileage, but also bus, motorcoach, passenger vehicle, and even motorcycle mileage. As a result, the large truck fatality rate, which formerly was over 2.3 deaths per 100 MTMT, has been manipulated to appear as if it is *lower by more than an order of magnitude*. Suddenly, the rate is now less than one death per 100 Million *Total Vehicle Miles Traveled*, or 0.184 for commercial motor vehicle (truck, bus, motorcoach) fatalities per in 2005. This manipulation can easily mislead Congress and the public about the true state of large truck crash fatalities. *Budget Estimates*, Fiscal Year 2008, FMCSA at 4A-14, Submitted for the Use of the Committees on Appropriations (U.S. DOT).

the legal right or justification to require adherence to regulations that were struck down by the second highest court in our land.

A. FMCSA Is Putting Industry Interests Above the Public Interest and Defying the Courts

Although FMCSA has tried in the Interim Final Rule to portray this action as a reasonable approach under difficult circumstances, Congress should be aware that this agency has gone radically off course. Instead of obeying its mission statement, written by Congress, to make safety its highest priority, it is now abundantly clear that FMCSA serves a master other than the people of the United States of America. The Interim Final Rule justifies its defiance of the law by insisting that provisions of the two rules nullified by the court of appeals provide an estimated \$2 billion in benefits to the trucking industry, because they allow truck drivers to drive and work longer hours. When the agency claims that these rules provide the industry with greater “flexibility,” it really means that they allow motor carriers to work drivers longer and harder. FMCSA deems this “flexibility” essential to continued productivity because the industry has trouble attracting new drivers, driver turnover is more than 100 percent annually, and working conditions are so difficult one expert has referred to modern trucking as “sweatshops on wheels.”³⁵ As a result, and in order to accommodate the need to keep trucks moving, the agency decided in the two rejected rules and now, a third time, in the IFR to allow motor carriers to squeeze more driving hours and work time out of the same workforce.

At the same time, however, these rules imperil highway safety every day they are in effect. In 2000, the FMCSA came to the conclusion that driver performance decreases and crashes increase in each hour of driving after the first eight (8) consecutive hours of driving. FMCSA’s predecessor agency, the Federal Highway Administration (FHWA), came to the same conclusion during more than 40 years of stewardship over American trucking. These findings of fact were based on research and data analysis that have never been refuted. In addition, prior to 2003, both agencies had concluded that truckers who drive 60 or 70 hours over several days need an extended period of time off for rest and recovery. FMCSA concluded that drivers need at least a two-night “weekend,” two consecutive nights and the intervening day off, and FHWA provided even longer periods for rest at the end of the work-week. Again, these findings were based on data, evidence, and facts that have not been refuted.

In the effort to overcome the prior objective determinations and findings of fact made by FHWA and FMCSA itself based on decades of research and study, the agency has, since 2003, sponsored new but inconclusive studies, attempted to reinterpret data, selectively cited sources, relied on abstracts instead of complete studies, and cherry-picked evidence. In the Interim Final Rule the agency continues this approach, dusting off old studies that even the agency has rejected and relying on the self-serving information eagerly supplied by motor carriers. FMCSA has completely undermined its credibility in a misguided effort to give the false impression that longer driving and work hours do not degrade driving performance or highway safety.

Mr. Chairman, the fact is that the research and data are clear that driving longer hours with less rest and insufficient sleep promotes fatigue. For this very reason, the court raised so many questions about different portions of the FMCSA rule in 2004 and reiterated these issues in the decision this past July. But one does not have to be an expert or data analyst to understand that truck drivers are tired after driving for ten straight hours and need more than a short “restart” to be rested and to perform safely. This is simple common sense and logic, which have been borne out by the research and data, and no amount of obfuscation and conveniently supplied “information” can alter these facts.

In the Interim Final Rule, FMCSA makes exactly the same arguments it made to the court when the agency asked for a one-year stay of the court’s order vacating the two provisions. The court, knowing that the agency could not complete a new rulemaking in less than a year, refused FMCSA’s request and gave the agency a stay of only 90 days, until December 27, 2007. This 90-day stay was based on the agency’s assertion to the court that it would need about that much time to allow motor carriers and drivers to change their schedules and to start the process of getting states to adopt a revised HOS rule without the two vacated provisions. While the court granted the agency the time it said it needed to carry out a transition that complied with the court’s ruling, the agency instead wasted the 90-day period while developing its strategy of defiance. This is astounding because FMCSA would not have been barred from proceeding to issue a new proposed rule at the same time

³⁵ Belzer, M.H., *Sweatshops On Wheels*, Oxford University Press (2000).

it was submitting to the lawful authority of the U.S. Court of Appeals. Mr. Chairman, FMCSA has become a rogue agency that thinks it is a law unto itself.

B. FMCSA Has No New or Credible Data To Support the HOS Rule

In its latest attempt to salvage a dangerously unsafe rule, FMCSA has trotted out the same old evidence that has already been rejected by researchers, safety groups, and the court of appeals—misinformation that misses the point and proves nothing, and “junk” science that is biased and contains the subjective submissions of interested parties. While I cannot go through all the bad information that the agency has only recently cooked up or is rehashing, I will mention a sample of the agency’s so-called “evidence.”

1. There is no evidence that declining truck fatalities are attributable to the weak hours-of-service rules.

One of the most ludicrous claims about FMCSA’s HOS regulation is that general crash figures are evidence that the 2005 HOS rule has lowered large truck crash rates, deaths, and injuries. FMCSA points to a decline in the number of truck-involved fatalities in 2006 from 2005, a lower truck crash fatality rate for 2005 compared to 1975, and a reduced number of truck crash injuries in 2005 and again in 2006.

The argument that these declines are attributable to the weak hours-of-service rules is false and highly misleading. First, overall trends in national transportation crashes, deaths, and injuries are the result of numerous causes, not any single factor. No one involved in scientific research would even contemplate assigning changes in national death and injury figures to just one cause. Even the agency admitted in 2004 with respect to fatigue-related crashes that “[i]t is impossible to definitively link a specific provision of the 2003 rule with the improved safety performance during 2004.”³⁶ Any claim that the change in truck fatalities from 2005 to 2006 proves anything about the safety of the HOS rule is wishful thinking, not sound science.

Second, FMCSA’s claim that there was an improvement in 2006 is undermined by the fact that truck deaths declined every year from 1999 through 2002 while the old HOS rule was in effect, and the number of deaths in 2002 was lower than the figure for 2006. In fact, the number of truck crash deaths *increased* in 2004, the first year under the initial revision of the HOS rule, compared to the number of deaths that occurred in 2003, the last year under the old HOS rule. According to FMCSA, these facts should prove that the previous HOS rule was safer than the rules adopted in 2003 and 2005. But this is not valid evidence. To claim that national changes in truck crash rates are due to near-term changes in the HOS regulation is utterly impossible and has no scientific support of any kind.

In addition, FMCSA claims that the fatality rate for large truck crashes fell in 2005 from 2004. We do not yet have 2006 vehicle-miles-traveled figures, but it needs to be pointed out, first, that the fatality rate actually *increased* from 2003 to 2004, the year the HOS rule went into effect—a fact that FMCSA has conveniently ignored—and, second, that the calculation of the annual fatality rate for truck crashes is a complicated process with a wide margin for error. Vehicle miles traveled, as a means of expressing fatality rates, is notoriously unreliable. This is stated in many publications, including by FMCSA itself: “Exposure data on large truck travel are crude. Registration data are of little use, because the spread of annual miles traveled by different trucks is very large. The available data on vehicle miles of travel (VMT) are not especially accurate, and they make only gross distinctions among truck and road types.”³⁷ Similarly, another Analysis Brief published by the agency stated that “[t]he most common measure of exposure is vehicle miles traveled. . . . Exposure data, however, can be difficult and expensive to collect—often much more so than the crash data with which they are used.”³⁸ Claiming that small changes in annual truck vehicle miles traveled are due solely to changes in HOS regulation are utterly absurd and without merit.

2. The agency relies on data that it has previously repudiated as unreliable.

Next, FMCSA is trying to revive arguments about the safety effects of the 2003 and 2005 HOS rules that the agency itself has explicitly repudiated as having no credibility. An example of this is FMCSA’s reliance in the Interim Final Rule on a supposed modest reduction in the number of fatigue-related crashes that occurred

³⁶ 70 Fed. Reg. 50013.

³⁷ *Using LTCCS Data for Statistical Analyses of Crash Risk*, Large Truck Crash Causation Study (LTCCS) Analysis Series: Office of Information Management, Federal Motor Carrier Safety Administration, Publication FMCSA–RI–05–037.

³⁸ *Methodology of the Large Truck Crash Causation Study*, Office of Information Management Publication FMCSA–RI–05–035, February 2005.

in the first 9 months of 2003 compared to the same time period in 2004, the first year of the 2003 HOS rule. This type of data is captured by the Fatality Analysis Reporting System (FARS) based on fatigue-coded crashes taken from Police Accident Reports (PARS). The attempt to invoke fatigue-related truck crashes in the year of initial implementation of the 2003 final rule or because of the 2005 final rule is clearly inappropriate and cannot be relied on by the agency because FMCSA itself has pointed out that fatigue-related crash reporting by police as entered in the FARS data system is unreliable. In the 2000 HOS notice of proposed rulemaking,³⁹ the agency discussed at length the problems in collecting accurate, verifiable documentation as to whether a crash is fatigue-related. It pointed out that for a number of reasons it is often difficult for police officers at the scene to get direct evidence of fatigue after a crash and thus the actual number of fatigue-related crashes documented in FARS is underreported. FMCSA had to augment its estimate of fatigue-related crashes by the use of other methods to reach a much greater quantified fatigue contribution to fatal fatigue-related crashes in its rulemaking proposal. The agency concluded that “in-depth studies of crashes have found that inattention and other mental lapses contribute up to 50 percent of all crashes. While fatigue *may* not be involved in all these crashes, it clearly contributes to some of them. *We estimate that 15 percent of all truck involved fatal crashes are ‘fatigue-relevant’, that is, fatigue is either a primary or secondary factor.*”⁴⁰ Thus, FMCSA in 2000 already rejected reliance on invoking the very type of data that it now claims as evidence.

But even more directly, FMCSA has also repudiated the use of these specific data as evidence. In the 2005 HOS rule FMCSA stated, regarding the 2003 and 2004 9-month comparison discussed above of fatigue-related crashes, “Although this data suggests that fatigue-related crashes have fallen since the 2003 rule became effective, *this newer data is mostly preliminary, self-reported without statistical controls, and also reflects small sample sizes, all of which—once again—sometimes leads to inconsistent findings.*”⁴¹ It is clear that the FMCSA cannot invoke a comparison of fatigue-related crashes based on FARS. Moreover, the initial use of this information was based on an interim assessment of the FARS data. Subsequent statistics from the FARS final reports for both 2003 and 2004 showed that the number of fatigue-related crashes in both years was higher than first reported and, therefore, the claimed “improvement” in safety all but disappeared. In any event, FMCSA’s new reliance on any figures on fatigue among truck drivers based on FARS is essentially worthless.

3. The facts about driver fatigue belie FMCSA’s manipulations.

Finally, it should be stressed here that, over the years, FMCSA has tried repeatedly to manipulate reductions in the effects of truck driver fatigue on large truck crashes, with a descent from 15 percent in the 2000 proposed rule, to just over 8 percent in the 2003 HOS rule, and now to reliance on the 1.5 percent and 1.7 percent figures of recent FARS data. Countervailing figures, however, are not so much dismissed as ignored as if they didn’t exist, including figures drawn from the National Transportation Safety Board (NTSB) and from Australia, among many other sources, which peg the contribution of truck driver fatigue in fatal truck crashes at levels as high as 30 to 40 percent. FMCSA also ignores even the research findings of NHTSA, its own companion modal administration in the U.S. DOT. In a comprehensive study released by NHTSA in 2003, *An Analysis of Fatal Large Truck Crashes*,⁴² the agency found for the analysis years of 1996 through 2000 that, in two-vehicle crashes involving a large truck, truck drivers were either drowsy or asleep in 20 percent of the crashes. This finding was derived from an evaluation of Traffic Safety Facts crash data gathered by NHTSA’s National Center for Statistics and Analysis and through the Trucks Involved in Fatal Accidents (TIFA) Codebook.⁴³ However, FMCSA has completely failed to acknowledge this analysis and is instead denying that fatigued truck drivers are a major contributor to severe truck crashes.

At the same time that FMCSA is having trouble “connecting the dots” on fatigue, independent research conducted by the Insurance Institute for Highway Safety (IIHS) shows that driver fatigue is on the rise. According to a study conducted in 2005, “Eighty percent of the surveyed truckers said they’re using [the 34-hour re-

³⁹ See *Preliminary Regulatory Evaluation and Regulatory Flexibility Act Analysis*, p. 21, Hours-of-Service; Notice of Proposed Rulemaking, 65 Fed. Reg. 25540 (May 2, 2000).

⁴⁰ PRE at 30 (emphasis supplied).

⁴¹ 70 Fed. Reg. 49981 (emphasis added).

⁴² *An Analysis of Fatal Large Truck Crashes*, National Center for Statistics and Analysis, National Highway Traffic Safety Administration, DOT HS 809 569, June 2003.

⁴³ D. Blower and L. Pettis, *Trucks Involved in Fatal Accidents Codebook*, Center for National Truck Statistics, The University of Michigan Transportation Research Institute, 1996–1999.

start] provision to squeeze up to 25 percent more driving into a calendar week.”⁴⁴ The research also found that in 2003, before the new rule went into effect, 13 percent of truck drivers reported falling asleep at the wheel at least once in the previous week, but by 2005, 21 percent of drivers interviewed reported the same thing,⁴⁵ a 66 percent increase in the number of drivers admitting to falling asleep at the wheel.

I must also point out, as is discussed later in this testimony, that FMCSA is now trying to pull the wool over Congress’s eyes by combining the traditional fatality rate for large trucks with other commercial vehicles that have lower fatality rates, in order to give the false appearance that progress toward improved safety is being achieved. This shell game, along with FMCSA’s new assault on logic and the science that shows that working and driving more hours over a week increases both the absolute and the relative risk of truck crashes, should be rejected. As far as I am concerned, it is D.O.A.—dead on arrival. I know the traveling public does not believe a word of it. I am convinced that it will be rejected again by the court of appeals. Congress should not buy into this ruse.

IV. There Is Too Much at Stake To Allow This Pattern of Failure To Continue

There is no question that professional trucking is a difficult occupation. According to the Fatality Analysis Reporting System (FARS) database maintained by the National Highway Traffic Safety Administration (NHTSA) over 800 large truck occupants were killed in crashes in both 2005 and 2006.⁴⁶ Another Federal agency has stated that “[c]haracteristics of a truck driver’s job, including long hours of driving, loading and unloading cargo, irregular schedules, a sedentary lifestyle, and the nature of drivers’ food choices on the road, are associated with work-related injury and poor health status.”⁴⁷ Medical research also documents that trucking takes its toll on driver health because truckers, as a group, have very high rates of major illnesses and health disorders, including cardiovascular disease, back disorders, and noise-induced hearing loss among other serious ailments.⁴⁸

In addition, large trucks pose inherent dangers to other highway users. According to the FARS database, 4,995 people died and 106,000 were injured in crashes involving large trucks in 2006. These statistics have changed little in the decade since 1995 when 4,918 people were killed and 117,000 were injured in such crashes. Even though large trucks represent only 3 percent of registered vehicles, they consistently account for 8 percent of all vehicles involved in fatal crashes and 12 percent of all traffic fatalities, according to figures from the IIHS. Most fatality victims, however, are not truck drivers. In fact, even though truckers have a high number of on-the-job fatalities, in fatal crashes involving one large truck and one passenger vehicle, 97 percent of the people killed are occupants of the passenger vehicles.⁴⁹

V. FMCSA Must Do a Better Job To Protect the Public

Mr. Chairman, the driving limits and work hours adopted by FMCSA in the 2005 rule, which the agency has just reinstated despite the court of appeals ruling, are simply too long to ensure a reasonable level of highway safety. All of the research literature of the past 30 years and more has shown over and over again that very long working hours and limited opportunities for rest and family life severely undermine the safety and damage the health of these workers. This reality has been shown in many studies addressing commercial aviation, rail transportation, and maritime work, as well as for trucking. Yet, truck drivers under FMCSA’s HOS regulation can be required to work more than double the hours of an average American worker.

FMCSA should come to its senses about HOS and do what is right for the public, for drivers and for the industry. I recommend the agency take the following four actions:

1. First, the agency must rescind the Interim Final Rule and comply with the court of appeals decision that the 11-hour maximum for consecutive driving and

⁴⁴ IIHS *Status Report*, vol. 40, no. 6 (July 16, 2005).

⁴⁵ IIHS *Status Report*, vol. 41, no. 8 (Oct. 7, 2006).

⁴⁶ Fatality Analysis Reporting system (FARS), 2006 Annual Assessment of Motor Vehicle Crashes, p. 122, DOT HS 810 837, NHTSA (Sept. 2007).

⁴⁷ NIOSH *Update: NIOSH Seeks Input on Study Examining Truck Driver Safety and Health*, Centers for Disease Control and Prevention, National Institute for Occupational Safety and Health (Nov. 1, 2007) available at <http://www.cdc.gov/niosh/updates/upd-11-01-07.html>.

⁴⁸ Transportation Research Board, National Academies of Science, *Literature Review on Health and Fatigue Issues Associated with Commercial Motor Vehicle Driver Hours of Work*, NAS (2005).

⁴⁹ IIHS Fatality Facts 2005.

the 34-hour restart were promulgated in violation of law and must be vacated. Compounding the prior violation of law by illegally clinging to these rules while the agency moves through a third round of rulemaking is not just a reflection of the agency's loss of perspective: it represents a breach of faith with the American public as well as law, and it violates the separation of powers and undermines the FMCSA's ever diminishing credibility. When it comes to safety, FMCSA no less than the Food and Drug Administration or the Centers for Disease Control and Prevention owe a duty to the public to protect its safety and to carry out the agency's obligation to make safety its "highest priority."

2. Second, it is unarguable that consecutive driving hours must be scaled back from the 11 hours that can be demanded from a truck driver in the regulation that has now been twice overturned by the appellate court. The scientific evidence shows that driver performance decreases and crashes increase above 8 hours of continuous driving. Eleven hours is far too much and no scientific research supports it. The agency should scale back from 11 the maximum number of consecutive driving hours permitted under the HOS rule.

3. Third, the length of a truck driver's tour of duty must be substantially reduced from the unconscionable surge in total hours of work and driving that can be accumulated over 7 or 8 consecutive days under the 2005 HOS rules. In 2000, FMCSA proposed an end of tour of duty layover that approximated a real "weekend" by requiring at least 2 consecutive nights and the intervening day off-duty. The agency was at least on the right track—drivers must have some kind of "weekend" like most other American workers to recover from the exhaustion of driving long hours, to spend time with family, and to enjoy some quality of life outside of the truck cab.

4. Finally, the agency must change its approach with respect to EOBRs. The agency's proposed rule issued earlier this year is not viable. In this day and age, Mr. Chairman, we cannot relegate the use of such important safety technology only to a small portion of enlightened companies that voluntarily adopt it, and we certainly cannot reserve it as a means of punishment for a minute percentage of motor carriers that are bad actors. The potential benefits for safety and the proven advantages for law enforcement are too great not to require universal installation of EOBRs on all commercial motor vehicles that carry freight and passengers in the United States.

Thank you, Mr. Chairman, for the opportunity to testify today, and I am prepared to answer any questions that you or Members of the Committee may have.

Senator LAUTENBERG. Ms. Izer, we had a chance to meet before, and I congratulate you for the work that you've done to make everybody aware of what happens when the rules go awry and when a tired trucker is at the wheel of a large truck and mistakes are made and accidents that are terrible are a result. And, Ms. Izer, thank you for coming, and we invite you to give your statement.

**STATEMENT OF DAPHNE IZER, FOUNDER,
PARENTS AGAINST TIRED TRUCKERS (P.A.T.T.)**

Ms. IZER. Thank you, Senator Lautenberg. And I'd like to thank, also, Senator Pryor and other members of this Subcommittee for inviting me.

I'm founder of Parents Against Tired Truckers. On October 10, 1993, my life was changed forever. A Wal-Mart truck driver fell asleep at the wheel of his 80,000-pound rig and crashed into my son and his friends. As a result of this horrific, but preventable, crash, four beautiful teenagers—Jeff, Dawn Marie, Angie, and Katie—were killed. Linda survived. Five families suffered incomparable personal loss as a result of a single tired trucker, yet there are thousands of us who will be without a loved one this holiday season because a trucker fell asleep at the wheel. And you can be sure there are numerous fatigued truckers on the roads right now during this hearing due to the unsafe and illegal hours-of-service

rules issued by FMCSA. This is unacceptable and totally unnecessary.

My testimony reflects the views of the Truck Safety Coalition, which P.A.T.T. and CRASH are with.

It's difficult to comprehend, as a mother who lost a son, why the Federal agency Congress created to protect the traveling public—the FMCSA—has shown so little safety leadership and made so little effort to address more than 5,000 fatalities and 110,000 injuries every single year as a result of truck crashes. The lack of positive action by our Federal Government on the issue of tired truckers lies in sharp contrast to actions taken to stop drunk driving.

Historically, the reaction of Congress and the USDOT to the epidemic of drunk driving on our highways was to pass stronger Federal laws, like the National Minimum 21 drinking age, and the national .08 BAC law. We are especially grateful for your long-standing leadership on this issue, Senator Lautenberg.

The responses of the Administration to the epidemic of truck driver fatigue have actually undermined truck safety. Any action taken to address the problem of truck driver fatigue contributed to making a dire situation even worse. After 17 to 19 hours without sleep, responses slow as much as 50 percent, equivalent to having .05 BAC. Moreover, FMCSA's last two hours-of-service rules actually increase driver fatigue and sleep deprivation, and that, correspondingly, increases crash risk.

In 1995, I participated in the summit organized by the Federal Highway Administration that involved participation by some 200 experts from across the country, and they ranked driver fatigue as the number-one issue that needed to be addressed. I had hoped that this recognition would finally result in effective solutions, yet 12 years—12 years later and after thousands of deaths and millions of injuries, truck driving still remains one of the most dangerous occupations, and innocent lives continue to be wiped out.

It would be preposterous for the USDOT to allow drivers to consume more alcohol by increasing the Federal BAC level for drivers as a solution to reduce impaired driving, yet the FMCSA has twice issued a blatantly dangerous rule on hours-of-service, and that dramatically increases the working and driving hours of truck drivers. They twice have been legally challenged by safety groups, including P.A.T.T., and twice has had its final rule unanimously overturned in courts. Yet, in an amazing display of bureaucratic arrogance, FMCSA, just last week, took special measures to reinstate the same two illegal rules as it once again tries to figure out a way to justify them as legal.

The agency's course of action makes it quite clear that they are intent on putting the truck industry's profits ahead of public safety, and nothing, not even two court opinions overturning the rule, will stand in their way. So, the agency will continue to force these longer hours on drivers, and jeopardize safety. But, we will continue to fight this killer rule.

Groups like P.A.T.T. and the Truck Safety Coalition urge you to do something to rein in this agency. When FMCSA was created, Congress specifically included language stating that "safety" was the highest priority of this agency, and not "industry profits." FMCSA is clearly—has already proven how little regard it has for

the safety of American citizens, and now it has shown how much contempt it has for our legal system. Enough is enough. Too many people are dying, and too little is being done to stop the carnage on our highways.

In conclusion, thank you, again, for allowing me to participate in today's hearing on an issue that has deeply affected my family and thousands upon thousands of other families. It truly is time to stop truck drivers from being turned into abused and exploited workers in rolling sweatshops. We need your leadership to put the brakes on longer workdays for truck drivers and to advance highway safety for everyone.

Thank you. I'm ready to answer any questions you may have.
[The prepared statement of Ms. Izer follows:]

PREPARED STATEMENT OF DAPHNE IZER, FOUNDER,
PARENTS AGAINST TIRED TRUCKERS (P.A.T.T.)

Good morning, my name is Daphne Izer and I am the Founder of Parents Against Tired Truckers (P.A.T.T.). P.A.T.T. is a member of the Truck Safety Coalition and my testimony reflects the views and position of our coalition. I would like to begin by thanking Senator Lautenberg, Ranking Member Smith and the other members of the Subcommittee on Surface Transportation and Merchant Marine Infrastructure, Safety, and Security for inviting me to participate in this critical hearing on the issue of truck driver fatigue and the Hours-of-Service (HOS) rule.

On October 10, 1993, my life was forever changed. A truck driver fell asleep at the wheel of his 80,000 pound rig, killing four innocent teenagers. One of them was my son Jeff. He and four of his friends were on their way to a hayride and had just pulled into the breakdown lane on the Maine Turnpike when a Wal-Mart truck driver fell asleep at the wheel of his big rig and crashed into my son and his friends. As a result of this horrific, preventable crash, four beautiful teenagers: Jeff—age 17, Angie—age 16, Dawn Marie—age 15, and Katie—age 14 were killed. One friend, Linda, survived but was seriously injured and she is mentally scarred for life. Five families suffered incomparable personal loss as a result of a single tired trucker. Yet, there are hundreds of thousands of us—parents, brothers and sisters, grandparents, aunts and uncles, neighbors, co-workers and friends—who will be without a loved one during the holidays because a trucker fell asleep at the wheel. I shudder to think about how many fatigued truckers are on the roads right now, during this hearing, due to the unsafe and illegal HOS rule issued by the Federal Motor Carrier Safety Administration (FMCSA). This danger that threatens all motorists is unacceptable and unnecessary.

I formed P.A.T.T. in May 1994 to try to make a difference and protect other families from what I have gone through. P.A.T.T. has grown from a Maine grassroots group to a nationally recognized organization. In 2002, we combined efforts with Citizens for Reliable and Safe Highways (CRASH) and formed the Truck Safety Coalition. Together, we are dedicated to reducing the number of preventable deaths and injuries caused by truck-related crashes, providing compassionate support to truck crash survivors and families of truck crash victims, and educating the public, policy-makers and media about truck safety issues.

There are hundreds of victims throughout the country who volunteer time to work with the Truck Safety Coalition to achieve our mission. Their hard work and dedication are astounding. Like others who have been affected by motor vehicle deaths and injuries, they have taken their sorrow and turned it into strength. Conversely, it is difficult to comprehend, as a mother who lost her son, why the Federal agency Congress created to protect the traveling public, the FMCSA, has shown so little safety leadership and made so little effort to address more than 5,000 fatalities and over 110,000 injuries annually as a result of truck crashes. In fatal crashes involving a truck and a passenger vehicle, 97 percent of the deaths are the car occupants. The ineffective and incompetent changes to truck safety regulations, especially on the issue of HOS, is a clear and convincing example of the wrong direction this agency repeatedly takes on so many issues affecting public health and safety.

This lack of positive action by our Federal Government on the issue of tired truckers lies in sharp contrast to actions taken to stop drunk driving. Historically, the reaction of Congress and the U.S. Department of Transportation (U.S. DOT) to the epidemic of drunk driving on our highways was to pass stronger Federal laws like

the National Minimum 21 drinking age and the national .08 percent BAC law, as well as implement tougher enforcement programs like sobriety checkpoints and "use it or lose it" initiatives. We are especially grateful for your long-standing leadership on this issue, Senator Lautenberg.

Unfortunately, even though the issues are quite similar, compared to Legislative and Executive Branch resolve to combat impaired driving, the responses of the Administration to the epidemic of truck driver fatigue have actually undermined truck safety. Any action taken to address the problem of truck driver fatigue contributed to making a dire situation even worse. After 17 to 19 hours without sleep, a person's response speeds are as much as 50 percent slower and equivalent to having a .05 percent blood alcohol level. Moreover, FMCSA's hours of service rules issued in 2003 and 2005 actually increase truck driver fatigue and sleep deprivation that correspondingly increases crash risk.

Numerous studies have shown that fatigue is a major factor in big truck crashes. Research, including studies conducted by the National Transportation Safety Board (NTSB) and the Australian Federal Office of Road Safety, has found that 30 percent to 40 percent of big truck crashes are due to fatigue. Even the U.S. DOT has repeatedly cited fatigue as a major factor in truck crash causation. In its 2000 proposed rule on hours of service, FMCSA claimed that fatigue is involved in as many as 15 percent of truck crashes. Decades of studies on many other types of work have repeatedly shown that very long working hours, erratic schedules, and working mostly at night while trying to sleep during the day are consistently related to high injury rates and performance errors that can directly impact the safety and lives of many people.

Yet, FMCSA has engaged in persistent denial of these scientific findings and refuses to acknowledge that it is, in fact, making motor carrier and highway safety more dangerous. Its hours of service regulations are designed to push truck drivers to work and drive to the point where the chance of a crash is dramatically increased. Furthermore, trucking interests have, at times, found a sympathetic ear in Congress to allow requests for dangerous and deadly special interest exemptions to the hours of service rule to get out from under any regulation. Exemptions for utility workers, agricultural workers, and others have no justification in science. Industry productivity should not come at the expense of the safety and health of the truck drivers who have no protection from exploitation. It is time to stop the squeaky wheel, or perhaps more aptly, the well-greased wheel of the trucking industry from steering public policy in Congress and the Executive Branch that jeopardizes everyone's safety.

In 1995, a summit organized by the Federal Highway Administration that involved participation by safety groups, law enforcement, government officials and trucking industry representatives ranked "driver fatigue" as the number one issue that needed to be addressed. I participated in that forum soon after P.A.T.T. was formed and hoped that this recognition would finally result in effective solutions. Yet, 12 years later and after more than 60,000 truck crash deaths and a million more injuries, truck driving, according to the Centers for Disease Control and the Bureau of Labor Statistics, still remains one of the most dangerous occupations and thousands of innocent people are needlessly killed annually on our roads and highways.

Meanwhile, no real progress has been made by the FMCSA to substantially reduce the truck crash death and injury toll. The agency has missed every single safety goal it has adopted. Deaths continue to mount, dangerous trucks and unsafe drivers remain on the road because of weak enforcement, and safety rules are routinely issued that promote the trucking industry bottom line rather than protecting the personal safety and improving the health of truck drivers and the motoring public.

It would be preposterous for the U.S. DOT to allow drivers to consume more alcohol by increasing the Federal BAC level for drivers as a solution to reduce impaired driving. Yet, this irrational action is comparable to the Federal response to the epidemic of fatigued truck drivers. FMCSA has twice issued a blatantly dangerous rule on hours of service that dramatically increases the working and driving hours of truck drivers, twice been legally challenged by safety groups including P.A.T.T., and twice has had its final rule unanimously overturned in the courts.

In the first unanimous decision, FMCSA sought to avoid the Court's ruling and requested that Congress grant the agency time to rewrite the rule. Congress enacted a special provision giving the agency a one-year reprieve to issue a new rule while the dangerous and illegal 2003 rule remained in effect, threatening the safety of truck drivers and the public more than ever. The agency responded by issuing the same rule that the Court, in a stinging rebuke, had declared illegal. Ultimately, in a betrayal of its assurance to Congress to draft a revised HOS rule, FMCSA re-issued in 2005 a nearly identical rule that the Court overturned. The rule, once

again, allowed the same excessively long working and driving hours that permitted truck drivers to drive more than 25 percent more hours and work up to 40 percent more hours in the same number of days as under the pre-2003 regulation. Incredibly, the agency claimed that the “new” rule addressed the issues identified by the Court.

In the second Court case, a separate panel of three different judges unanimously held that FMCSA had ignored the dangerous impact on safety that the extended driving time allowed by the rule would have, and that the agency manipulated its data to support its view while failing to disclose crucially important information to the public. As a result, the Court vacated the increase in the daily shift driving limit from 10 to 11 hours, as well as the 34-hour restart provision that allows drivers to accumulate dramatically more driving hours each week than were previously permitted.

In both cases, the Court opinions pointed out that the conclusions on which the agency based elements of the HOS rule raised “very real concerns,” “assume[d] dubious[]” propositions and relied on “problematic” justifications. In effect, six different judges in two separate cases agreed that the FMCSA has failed to justify the dramatic increases in daily and weekly driving and working hours that both the 2003 and 2005 final rules allowed. What is even more incredible about these rules is that they directly contradict the U.S. DOT’s own statements about the dangers of exceptionally long driving and working hours made in earlier rulemaking actions on truck driver hours of service. In a complete reversal, hours that the U.S. DOT formerly held to be unacceptable and dangerous were now deemed acceptable in the 2003 and 2005 final rules.

Current Federal hours of service regulations allow truck drivers to drive up to 11 hours in each shift after 10 hours off-duty. The hours off-duty can be split into two portions for drivers using sleeper berths. This means that a truck driver can now drive up to 77 hours over 7 consecutive calendar days and up to 88 hours over 8 consecutive calendar days because the driver’s work week now “floats” by using a minimum 34-hour “restart.” A driver can restart another tour of duty during days when, under the pre-2003 regulation, that driver had layover and rest time. This is equivalent to driving from Washington, D.C. to Atlanta, Georgia without stopping and driving this long distance every day for a week. I cannot imagine driving for that long in my car day after day, much less behind the wheel of an 80,000 pound big rig.

This anti-safety rule, which was first issued in 2003, dramatically increased truck drivers’ workdays by 40 percent more hours over 8 consecutive calendar days and allowed them to drive 28 percent more hours over the same time period. This amounts to truck drivers working double the amount of hours in a calendar week compared to the typical 40-hour work week of most workers in the United States. And, these incredibly long working hours are mostly used in driving, often for hours on end at high speeds, all through the night, and sometimes in horrendous weather conditions.

These new hours of service are not just taking a toll on the safety of truck drivers and everyone who shares the roads with big rigs, but have severe, adverse impacts on the health of truck drivers. Truck drivers are being pushed beyond the limits of human endurance. The current regulation is not protecting these drivers. Truck drivers should be afforded the same respect as other workers, work reasonable hours, and be permitted to have sleep patterns that are in accord with normal human needs.

As I mentioned, the Federal Court of Appeals in Washington, D.C., struck down as illegal the two parts of the HOS rule that increase driving and work hours, the 11 consecutive hour driving shift and the 34-hour restart. Yet, in an amazing display of bureaucratic arrogance, FMCSA last week took special measures to reinstate the same two illegal rules while it once again tries to figure out a way to justify them as legal. That will not happen if I have anything to say about it.

While I am not a lawyer, it strikes me as a total violation of our law and system of government for an agency to so blatantly defy a court’s order. Truck crash victims, like me, who depend on the Federal Government to protect our families and friends, cannot believe that the agency’s action is legal and that FMCSA can thumb its nose at a Federal court. The agency’s course of action makes it quite clear that they are intent on putting the trucking industry’s profits ahead of public safety and nothing, not even two court opinions overturning the rule, will stand in their way. So the agency will continue to force these longer hours on drivers and jeopardize safety but I will continue to fight against this killer rule.

Mr. Chairman and Members of the Subcommittee, this is the second hearing you have held this year on rules issued by FMCSA that are setbacks for safety. Groups like P.A.T.T. and the Truck Safety Coalition, urge you to do something to rein in

this agency. When FMCSA was created in 1999, Congress specifically included language stating that “safety” was the highest priority of this agency and not “industry profits”. FMCSA has already proven how little regard it has for the safety of American citizens, and now it has shown how much contempt it has for our legal system. Enough is enough. Too many people are dying and too little is being done to stop the carnage on our highways.

Let me conclude by thanking you again for allowing me to participate in today’s hearing on an issue that has deeply affected my family. The importance of this issue is the reason I flew down from my home State of Maine to be here today. It truly is time to stop truck drivers from being turned into abused and exploited workers in rolling sweatshops. We need to put the brakes on longer workdays for truck drivers. We need your leadership to step in and stop this 19th century abuse of American workers and protect the traveling public.

Thank you. I am ready to answer any questions you may have.

Senator LAUTENBERG. Thank you very much. And we encourage you to continue your hard work on making sure that people understand what happens if we permit this condition to continue to exist.

Mr. Byrd, welcome.

STATEMENT OF LAMONT BYRD, DIRECTOR, SAFETY AND HEALTH, INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Mr. BYRD. Chairman Lautenberg, Senator Pryor, members of the Subcommittee, my name is LaMont Byrd, and I’m Director of Safety and Health for the International Brotherhood of Teamsters. Thank you for the invitation to testify here today on the critical issues of hours-of-service for truck drivers.

Approximately one-third of our 1.4 million workers are commercial drivers who are covered by the hours-of-service regulation. These drivers work in various trucking industry sectors, including long haul and short haul, automobile transport, tank haul, construction, parcel delivery, and waste transport. The IBT uses the collective bargaining process to create safe, healthy working conditions for our membership, building off of the minimal protections provided by safety and health regulations. We routinely negotiate how rules are implemented and enforced in the workplace. Many of our contracts contain provisions that make noncompliance with safety and health regulations a violation of the collective bargaining agreement that is subject to the grievance procedure.

Further, Teamster contracts provide our driver members with good wages, health benefits, and pension plans, eliminating the economic incentive that many nonunion drivers may have to violate the hours-of-service regulation.

The Teamsters union has been a party to the legal actions challenging the 2003 and the 2005 hours-of-service regulations. The union believes the court was correct in vacating the final rule the first time, because the agency failed to comply with its statutory requirement to protect the health of drivers, and, the second time, because the agency’s analysis was flawed.

With respect to the current interim final rule, the IFR, our review of the information provided by the Federal Motor Carrier Safety Administration has not convinced us to change our position. We continue to oppose increasing daily driving time and the use of a 34-hour restart provision.

The union questions the agency’s rationale of increasing the daily driving time from 10 hours to 11 hours. In a previous rulemaking, the agency justified the increase, in part, by arguing that the roads

are better and trucks are more comfortable than they were when the rule was first promulgated, back in the 1930s. Now the agency simply states that there is no evidence that increasing driving time increases the risk of having a fatigued-related crash.

We feel that the agency chose to cherry-pick from studies that support its position on this matter, even though the researchers who conducted the studies advised the reader to use caution in applying these results across the entire trucking industry.

Further, in our opinion, these cherry-picked studies do nothing to invalidate the other studies, cited in the hours-of-service docket, that conclude that there is an increased risk of crash associated with hours driving. The studies cited are included in our written testimony.

Regarding the 34-hour restart provision, Teamster members in the LTL sector are prohibited from using the provision, due to negotiated language in our freight agreement. Consequently, our members are afforded the opportunity to obtain nearly two times the hours off per week, as compared to drivers who use restart. The union opposes the use of restart, because we feel that it has a negative affect on the driver's ability to get restorative rest.

The union clearly understands the difficulty of developing an hours-of-service rule that must establish a balance between the health and safety of drivers and the driving public with the needs of a very diverse pool of motor carriers. The union feels that it is equally important that the rule be constructed in a manner that allows a driver to achieve a reasonable balance between work life and personal life. Drivers obviously are not machines, they are husbands, wives, sisters, and brothers who have the same types of responsibilities and aspirations that you and I have, and they should be afforded the opportunity to do more than simply work and rest. This consideration can be easily overlooked in a complex rule-making process such as the one used to develop an hours-of-service rule.

It is our opinion that the IFR, like previous versions of the rule, falls short of the agency's stated mission, which is to reduce crashes, injuries, and fatalities involving large trucks. Rather than attempting to promulgate a rule which favors increasing the productivity of drivers and increasing the profits of motor carriers, the agency should seriously consider all of the relevant scientific evidence, along with informed opinions of the stakeholders, who are also dedicated to improving highway and driver safety, to promulgate a rule that fulfills the agency's stated mission.

In the interim, the Teamsters union will continue to rely heavily on our collective bargaining agreements to ensure the safety of our membership.

Thank you.

[The prepared statement of Mr. Byrd follows:]

PREPARED STATEMENT OF LAMONT BYRD, DIRECTOR, SAFETY AND HEALTH,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Chairman Lautenberg, Ranking Member Smith and members of the Subcommittee My name is LaMont Byrd, Director of Safety and Health, for the International Brotherhood of Teamsters. Thank you for the invitation to testify here today on this critical issue of hours of service for truck drivers.

Introduction

The International Brotherhood of Teamsters (IBT) is a labor organization whose members include hundreds of thousands of persons, mostly drivers, employed by motor carriers. Because of the large number of its members that are involved in motor transportation, the IBT has a strong interest in ensuring that any changes to the hours of service regulations do not adversely affect the health, safety, or economic well-being of its members or the safety of the driving public.

The IBT has been an active participant in the Department of Transportation's attempts to revise the hours of service regulations, first under the Federal Highway Administration and then under the Federal Motor Carrier Safety Administration (FMCSA, the Agency) and will remain so. Since the membership of the IBT is protected by collective bargaining agreements that provide them with excellent compensation and benefits packages, it is logical that the IBT should be considered the "voice of reason" in this rulemaking procedure. Its members are not willing to sacrifice their health or safety for the opportunity to make more money. Teamster members have no incentive to violate the law. The collective bargaining agreements provide sufficient protections from employer coercion to violate safety regulations by making such actions a violation of the contract and subject to the grievance process. This is why the IBT has asserted in all previous comments on this matter, that better enforcement is a critical component in any revision to the hours of service.

The Court Decisions

The IBT has been a party to the legal actions embarked upon by Public Citizen and other stakeholders with respect to the 2003 and 2005 Hours of Service Regulations promulgated by the Federal Motor Carrier Safety Administration. Twice now the U.S. Court of Appeals for the District of Columbia has vacated those rulemakings. The July 2004 ruling cited the FMCSA's failure to consider the health of the driver and characterized the rule as "arbitrary and capricious". (*Public Citizen et al., v. Federal Motor Carrier Safety Administration*, 374 F.3d 1209) The Court was correct in vacating the rule because the FMCSA is statutorily required to "ensure that . . . the operation of commercial motor vehicles does not have a deleterious effect on the physical condition of the operators." 49 U.S.C. Section 31136(a)(4). Based on the court's decision, it is clear that the FMCSA failed to comply with this requirement. This did not stop the agency, however, from issuing a nearly identical rule in 2005.

The July 2005 Court of Appeals decision vacated the 2005 rule, based on the fact that the FMCSA failed to disclose critical information the agency used in its cost-benefit analysis for public comment. The agency did not explain how its operator-fatigue model failed to account for cumulative fatigue due to increased weekly driving hours permitted by the 34-hour restart. The FMCSA did not provide any opportunity for notice and comment on its new model or explain the methodology and assumptions from which it was derived. While the FMCSA claims that the court ruled on procedural grounds, the fact is that the court stated that the agency's analysis was flawed. The court expressed concerns about the increase in the daily driving limit to 11 hours, while the agency conceded that studies showed that performance began to degrade after the 8th hour on duty and increased geometrically during the 10th and 11th hour. This is hardly a procedural issue. We continue to support the motions filed by Public Citizen relative to the Interim Final Rule.

The Interim Final Rule (IFR)

The IBT conducted a brief review of the IFR and several of the supporting documents in preparation for the hearing. However, it should be noted that due to the limited interval between the time from which the IFR was released and the hearing, our review and analysis is incomplete. It is anticipated that the IBT will provide a more comprehensive review of these materials in preparation of our comments that will be submitted to FMCSA's Rulemaking Docket.

11-Hour Driving Issue

In response to the Court's ruling, the agency goes into some detail regarding the rationale used in developing the model used to justify increasing the maximum daily driving time from 10 hours to 11 hours. FMCSA states that new safety data that the agency reviewed suggests that the 11-hour driving limit has not resulted in any "upward trend in the number of fatal crashes as a whole or fatigue-related crashes in particular." In our review of the information provided by FMCSA in the IFR, we have found no such data to support the Agency's conclusion.

The Agency takes this position after taking a contrary position during previous HOS rulemaking where the FMCSA acknowledged that the relative risk of a crash dramatically increases after about 8 hours of driving, as driving continues through

the 9th, 10th, 11th, and 12th hours. The Agency used its expertise and judgment based on the research literature to show that the relative risk of a crash effectively doubles from the 8th to the 9th hour of driving, and doubles again from the 10th to the 11th hour of driving, even before the twelfth hour of driving is completed.¹ It is our opinion that in the IFR, the Agency has chosen to “cherry pick” from studies that support their new position on this matter. In particular, the agency relies too heavily on a study conducted by the Virginia Tech Transportation Institute regarding Time-on-Task related fatigue and its contribution to crash risk. In our cursory review of the Virginia Tech Transportation Institute study, we have no reason to challenge the validity of the methodology used by the researchers, however, we agree with comments in their conclusion which concede that interpretation of the conclusions reached in the study must be used cautiously due to the small sample size of drivers in the study population. We would also conclude that the results may have limited relevance to certain sectors of the trucking industry that were not included in the study. Further, we are of the opinion that the VTTI study does nothing to invalidate other studies cited regarding this matter, *e.g.*, Mackie and Miller;² Jovanis, *et al.*;³ and Park, *et al.*;⁴ that conclude that there is an increased crash risk associated with hours driving.

In addition, according to Public Citizen,⁵ a 1996 study found a strong relationship between single-vehicle truck crashes and the length of consecutive hours spent driving.⁶ The risk of a crash actually doubled after 9 hours of continuous driving.⁷ Another study of truck driving found that “[a]ccident risk increases significantly after the fourth hour, by approximately 65 percent until the seventh hour, and approximately 80 percent and 150 percent in the eighth and ninth hours,” respectively [emphasis added].⁸

We are of the opinion that because of the diverging opinions of the researchers who investigated this matter, there is a need to conduct additional research regarding this issue prior to considering any driving time increases for commercial drivers.

34-Hour Restart Provision

In the 2003 NPRM, the FMCSA introduced the concept of weekly off-duty periods to provide drivers with the opportunity to compensate for sleep debt accumulated during the work week. This concept is similar to work rules that were negotiated into some of the union’s collective bargaining agreements to allow for minimum rest periods between work weeks, so of course, in theory, the union could agree with this concept. It seems as though this idea has since evolved into a restart provision of which, according to the language in the preamble of the 2005 final rule, “The only reason for a restart provision is to allow increased productive time, notwithstanding the general regulatory requirements.”⁹ The trucking industry has pushed for a restart provision dating back to 1992. The FMCSA admits that the 34-hour restart provision allows an extra 14 hour shift every 7 days. So in a revised rule that is supposed to reduce driver fatigue, reduce crashes and fatalities, and make roads safer for the motoring public, FMCSA decided to allow drivers to work for an additional 14 hours per week, bringing the total weekly hours worked to 84.

The IBT opposes the restart provision and we have taken the position that Teamster drivers in the LTL sector will not use this regulatory provision. We negotiated language into our collective bargaining agreements that prohibits the use of restart, except in rare situations, and those runs are negotiated with the employer on a

¹ 65 FR 25544 Relative Risk of Fatigue Crash by Hours Driving (Chart 5).

² Mackie, R.R. and Miller, J.C. 1978. Effects of hours of service, regularity of schedules, and cargo loading on truck and bus driver fatigue (DOT HS-803-799). Washington, D.C.: National Highway Traffic Safety Administration.

³ Jovanis, P., Park, S.W., Gross, F., and Chen, K. On the Relationship of Crash Risk and Driver Hours of Service, 2005 International Truck & Bus Safety Security Symposium, Alexandria, VA.

⁴ Park, S., Mukherjee, A., Gross, F., and Jovanis, P.P. “Safety implications of multi-day driving schedules for truck drivers: Comparison of field experiments and crash data analysis.” Transportation Research Board 2005 Annual Meeting.

⁵ Public Citizen, Comments on Notice of Proposed Rulemaking; Request for Comments; Hours-of-Service of Drivers; 70 FR 3339, Jan. 24, 2005; Docket No. FMCSA-2004-19608; formerly FMCSA-1997-2350. Page 19.

⁶ Saccomano, F., *et al.*, “Truck Safety: Perceptions and Reality,” (Ontario: Institute for Risk Reduction, 1996) at 157-174.

⁷ Saccomano, F., *et al.*, “Truck Safety: Perceptions and Reality,” (Ontario: Institute for Risk Reduction, 1996) at 157-174.

⁸ Lin, T., *et al.*, “Modeling the Safety of Truck Driver Service Hours Using Time-Dependent Logistic Regression,” *Transportation Research Record* 1467 (Washington, D.C.: Transportation Research Board, 1994), at 1-10.

⁹ 70 FR 50017.

case-by-case basis. By not using the restart provision, our members are afforded the opportunity to obtain nearly two times the hours off as compared to a driver who uses restart. Allowing drivers who already work extremely long hours to work even more is not a good decision for the safety and health of the driver or the safety of the motoring public. Again, this is an example of the FMCSA favoring the economic concerns of the industry.

The IBT opposes the use of the 34-hour restart because of the negative effect it has on a driver's ability to get restorative rest. Those companies affected by this language have not seen a negative economic impact resulting from the labor agreement. They have not lost a competitive advantage. The IBT contends that this voluntary provision has become mandatory to most drivers not protected by collective bargaining agreements. The FMCSA is naïve to think that a company would not push its drivers to drive the maximum allowed by law, by utilizing every provision, or special exception provided in the rules. This will be discussed in greater detail below.

The IBT understands that the FMCSA must carefully weigh the economic impact of any regulation and carefully balance that with the safety benefits to drivers and the public. However, the IBT believes that the Agency is more concerned about the economic viability of the industry than about the health and safety of the drivers in this rulemaking. This is evidenced by the obvious similarities between the industry proposal described in the April 2003 preamble to the final rule [68 Fed. Reg. 22491-22501], and the final rule published by the Agency in 2005, and now the IFR.

In the IFR, the Agency cites 5 studies in which it claims address cumulative fatigue caused by sleep debt, however, copies of the studies were not placed in the docket in time to be adequately reviewed and evaluated by the public in time to comment on them in preparation for this testimony. However, in reviewing the abstracts for these studies, none looked at the effect that the 34-hour restart provision, and the subsequent increase in cumulative driving hours, had on commercial drivers. The FMCSA admits that there is a lack of scientific evidence with respect to the cumulative fatigue caused by the implementation of the 34-hour restart provision. The Court concluded that FMCSA had not adequately considered the "cumulative fatigue" raised by Public Citizen in its final rule. On page 34 of the IFR, the Agency makes the following statement:

"The Agency found in 2005 that few studies address the effect of recovery periods between work periods spanning multiple days, such as a workweek. After reviewing the studies relevant to the 34-hour recovery period, as cited in the 2003 rule and those submitted by commenters to the 2005 NPRM, the Agency determined that current scientific evidence is limited with respect to the type of cumulative fatigue raised by Public Citizen and the Court."

The Rosekind study is one of the few studies cited by the Agency in its argument in the IFR regarding the lack of evidence of cumulative fatigue caused by sleep debt. According to comments submitted by Advocates in response to the 2005 NPRM, Rosekind argues that the 34 hour restart time is sufficient to permit recovery. In prior studies, Rosekind has argued that two successive nights of recovery sleep are needed to restore performance and expunge sleep debt.¹⁰ Advocates argued correctly that "the schedule of a high percentage of truck drivers is either irregular, with backward rotating shifts . . . or are non-diurnal even when circadian. It is well-known and amply documented that workers on inverted shift work schedules often get both less and poorer quality sleep when they attempt to work during the night and try to sleep during the day."¹¹ Drivers who use the 34-hour restart provision may encounter great difficulty obtaining two successive nights of 8 hours of sleep during the 34-hour period. In the IFR, the Agency has still not adequately addressed the need for two consecutive nights of at least 8 hours of sleep; a concept

¹⁰M. Rosekind, D. Neri, and D. Dinges, "From Laboratory to Flightdeck: Promoting Operational Alertness, *Fatigue and Duty Limitations—An International Review*, the Royal Aeronautical Society, London, 1997, pp. 7.1–7.14.

¹¹Advocates for Highway and Auto Safety, Hours-of-Service of Drivers, Notice of Proposed Rulemaking; Request for Comments 70 FR 3339, January 24, 2005.

supported by studies cited by the FMCSA in both the 2005 NPRM and the current IFR.^{12,13,14,15,16}

According to Public Citizen, scientific studies clearly show that as drivers log more hours on the road over multiple days, their performance declines. Public Citizen makes the following statement in their comments to the 2005 NPRM:

“A 1992 study found that driving patterns over the previous 7 days significantly increased crash risk on the eighth day of driving.¹⁷ And a 1999 study by the American Automobile Association found that working a 60-hour week, as opposed to a 40-hour or 50-hour week, markedly raises a driver’s crash risk: ‘Working the night shift increased the odds of a sleep-related (versus non-sleep-related) crash by nearly 6 times. Working more than 60 hours a week increased the odds by 40 percent.’¹⁸ FMCSA’s own analysis for the 2000 NPRM convincingly demonstrates that a 34-hour restart is unsafe, as it would only exacerbate drivers’ cumulative fatigue, while failing to guarantee even the bare minimum necessary for a truly recuperative weekly recovery period.”¹⁹

In the IFR, the Agency references the O’Neill, TR *et al.* Study when making the following statement: “The authors reported that a schedule of 14 hours on duty (with 12 hours of driving) and 10 hours off-duty for 5 consecutive day periods did not appear to produce significant cumulative fatigue over the 2-week testing period.”²⁰

The referenced study was an experiment using 10 truck drivers in simulated long-haul runs over a 15 day period. Limitations of this study included: small number of subjects (n=10); subjects studied in a simulated environment rather than a real-world scenario with scheduled meals, exercise, and other activities; only a straight day schedule was examined—conclusions drawn regarding cumulative fatigue and recovery are restricted to a straight schedule (a schedule of 14 hours on duty/10 hours off-duty for a 5-day week); subjects were directed to take breaks and get adequate rest—subjects were not as fatigued as real-world drivers are expected to be; quality and length of sleep was affected by the fact that subjects were staying in an apartment.

Also, the authors suggested that a full two nights and 1 day off would be a minimum safe restart period under the conditions tested. However, the study design considered the effects of a 58-hour off-duty period, not the 34-hour period provided by the restart rule, and the authors cautioned about generalizing the results to operations with different characteristics (for example those that are not day shifts).²¹ Furthermore, what the Agency fails to include in the IFR is that the authors concluded that “there was a gradual decline in driver response quality over time (hours at the wheel).”²²

The Wylie *et al.* Study²³ cited by the Agency in supporting their argument concluded that “There was some evidence of cumulative fatigue across days of driving. For example, performance on the Simple Response Vigilance Test declined during the last days of all four conditions.” Additionally, and perhaps most alarming, is the fact that the authors concluded that “the follow-up study found that based on a

¹² 70 FR 3347. See: O’Neill *et al.* (1999).

¹³ 70 FR 3347.

¹⁴ 70 FR 3347.

¹⁵ 70 FR 3347.

¹⁶ Smiley, A., R. Heslegrave, *A 36-Hour Recovery Period for Truck Drivers: Synopsis of Current Scientific Knowledge*, Prepared by Human Factors North for Transport Canada, Montreal: Transport Canada, Apr. 1997, at iii.

¹⁷ Kaneko, T., *et al.*, “Multiday Driving Patterns and Motor Carrier Accident Risk: A Disaggregate Analysis,” *Accident Analysis and Prevention*, 25:5, 1992, 437–456.

¹⁸ Stutts, J., *et al.*, *Why Do People Have Drowsy Driving Crashes?: Input from Drivers Who Just Did*, AAA Foundation for Traffic Safety, Washington, D.C., Nov. 1999.

¹⁹ 65 FR 25555, 25556.

²⁰ O’Neill, T.R., Krueger, G.P., Van Hemel, S.B., and McGowan, A.L. (1999). “Effects of operating practices on commercial driver alertness.” Rep. No. FHWA–MC–99–140, Office of Motor Carrier and Highway Safety, Federal Highway Administration, Washington, D.C.

²¹ Insurance Institute for Highway Safety, Comments on Hours of Service of Drivers, Notice of Proposed Rulemaking (NPRM), Docket No. FMCSA–2004–19608; formerly FMCSA–1997–2350, p. 4.

²² O’Neill, T.R., Krueger, G.P., Van Hemel, S.B., and McGowan, A.L. (1999). “Effects of operating practices on commercial driver alertness.” Rep. No. FHWA–MC–99–140, Office of Motor Carrier and Highway Safety, Federal Highway Administration, Washington, D.C.

²³ Wylie, C.D., Shultz, T., Miller, J.C., and Mitler, M.M. (1997). “Commercial motor vehicle driver rest periods and recovery of performance.”

small sample of drivers, 36 hr recovery was insufficient for day or night drivers, but especially for night drivers.”²⁴

A study by Park *et al.*²⁵ examined the “effect of multi-day driving and continuous driving (time on task) on crash risk. The study uses pre-existing crash data from the 1980s and measurements from the Driver Fatigue and Alertness Study (DFAS) conducted in the mid-1990s. The authors concluded that “there is some evidence, although it is far from persuasive, that there may be risk increases associated with significant off-duty time, in some cases in the range of 24 to 48 hours. The implication is that ‘restart’ programs should be approached with caution.”²⁶ There were also questions raised regarding “the efficacy of a “restart” period (Smiley and Heslegrave, 1997); there appears to be evidence from this analysis that 24 and perhaps 48 hours may be insufficient, particularly for night and early morning driving.”²⁷

A study performed by Jansen *et al.*²⁸ examined working hours, patterns, and work schedules of employees in terms of need for recovery from work. The authors concluded that in men, continuous “Need for Recovery” scores were significantly associated with working more than 40 hours per week compared with fewer hours per week (drivers work 60–70+ hours per week), working 9 to 10 hr per day (drivers work 12–14+ hours per day) compared with working fewer hours per day, and working overtime frequently. Need for Recovery (highest quartile vs. lowest quartile) results in men showed significant associations between high need for recovery and working 9 to 10 hr per day, working more than 40 hr per week, and working frequent overtime. The author concluded: “The study showed that high working hours a day and high working hours a week generally went together with a higher need for recovery, confirming our hypothesis that day workers with many working hours a week report more need for recovery from work compared to employees working less hours a week. Extension of the working day, in terms of overtime work, was particularly associated with more need for recovery in both men and women.”²⁹ An industry sector for the workers evaluated in the research was not provided. No information on occupation was a limiting factor in the study. Studies performed by Dingus *et al.*³⁰ and Klauer, *et al.*³¹ examined long-haul sleeper team truck drivers operating heavy trucks for a minimum of 6 continuous days, with the typical run being 7 to 10 working days, on their regularly assigned route. The authors concluded that it “appears that the combination of long driving times and multiple days provides the greatest concern, with several results pointing to the presence of cumulative fatigue.”³²

According to the Insurance Institute for Highway Safety, the 2005 commentary on the rule change by Rosekind points to a scientific basis for the 34-hour restart

²⁴ Wylie, C.D. “Driver drowsiness, length of prior principal sleep periods, and naps”. (1998). Transportation Development Centre. Report No. TP 13237E. (Direct quote taken from CTBSSP Literature Review on Health and Fatigue Issues Associated with Commercial Motor Vehicle Driver Hours of Work; Transportation Research Board).

²⁵ Park, S., Mukherjee, A., Gross, F., and Jovanis, P.P. “Safety implications of multi-day driving schedules for truck drivers: Comparison of field experiments and crash data analysis.” Transportation Research Board 2005 Annual Meeting.

²⁶ Park, S., Mukherjee, A., Gross, F., and Jovanis, P.P. “Safety implications of multi-day driving schedules for truck drivers: Comparison of field experiments and crash data analysis.” Transportation Research Board 2005 Annual Meeting.

²⁷ Park, S., Mukherjee, A., Gross, F., and Jovanis, P.P. “Safety implications of multi-day driving schedules for truck drivers: Comparison of field experiments and crash data analysis.” Transportation Research Board 2005 Annual Meeting.

²⁸ Jansen, N., Kant, I., van Amelsvoort, L., Nijhuis, F., and van den Brandt, P. “Need for recovery from work: evaluating short-term effects of working hours, patterns and schedules.” *Ergonomics*. 2003 Jun 10; 46(7):664–80.

²⁹ Jansen, N., Kant, I., van Amelsvoort, L., Nijhuis, F., and van den Brandt, P. “Need for recovery from work: evaluating short-term effects of working hours, patterns and schedules.” *Ergonomics*. 2003 Jun 10; 46(7):664–80.

³⁰ Dingus, T., Neale, V., Garness, S., Hanowski, R., Keisler, A., Lee, S., Perez, M., Robinson, G., Belz, S., Casali, J., Pace-Schott, E., Stickgold, R., and Hobson, J.A., The Impact of Sleeper Berth Usage on Driver Fatigue. FMCSA, FMCSA–RT–02–050, Washington, D.C., November 2001.

³¹ Klauer, S.G., Dingus, T.A., Neale, V.L. and Carroll, R.J. (2003) “The effects of fatigue on driver performance for single and team long-haul truck drivers”. Driving Assessment 2003—The Second International Driving Symposium on Human Factors in Driver Assessment, Training and Vehicle Design. Park City, Utah.

³² Klauer, S.G., Dingus, T.A., Neale, V.L. and Carroll, R.J. (2003) “The effects of fatigue on driver performance for single and team long-haul truck drivers.” Driving Assessment 2003—The Second International Driving Symposium on Human Factors in Driver Assessment Training and Vehicle Design. Park City, Utah. (Direct quote taken from CTBSSP Literature Review on Health and Fatigue Issues Associated with Commercial Motor Vehicle Driver Hours of Work; Transportation Research Board).

rule.³³ However, the studies referenced in the commentary are not based on commercial vehicle drivers. They mostly are experiments that primarily examine the effects on simulated performance of continuous hours of wakefulness, not time on task. The commentary does not consider the range of factors that may affect sleep debts among truck drivers (*e.g.*, split rest time in a sleeper berth) created by long daily work shifts and their ability to get adequate recovery sleep in the real world. For example, for many drivers the 34-hour recovery period occurs on the road rather than at home.³⁴

The Agency makes the following statement on pp. 35–36 of the IFR regarding cumulative fatigue: “Although some popular literature discusses ‘burnout’, the Agency does not consider these anecdotal narratives to be evidence that cumulative fatigue is a significant concern under normal driving conditions.” However, the Agency relies heavily on anecdotal information provided by the ATA to justify its IFR (Carrier Safety Data Filed with the ATA Motion, pp.56–57; ATA Operational Usage Survey of Members, pp. 62–64; Carrier Information Filed with ATA Motion, pp. 65–66).

Agency Assumptions

FMCSA believes the pre-2003 possibilities of “extreme” driving behavior are actually eliminated under the 2003 or 2005 rule. As stated above, the Agency is being naïve if it truly thinks that this is the case.

FMCSA argues that because the 2003 and 2005 rules prohibit driving after the 14th hour of coming on duty, drivers will not utilize “extreme” driving behavior. However, according to the Hours-of-Service Compliance Rates provided in Table 3 of the IFR, it was determined that HOS violations regarding the 15 or 14 hour rule increased 601 percent when comparing violations in 2003 with those in 2006. Our understanding of the rule suggests that this violation documents that drivers are operating commercial motor vehicles after the 14 hour period has expired. Further, our experience, based on reports from our driver membership, suggests that as the HOS regulation matures, motor carriers are actively seeking “loopholes” to exploit in an effort to maximize the hours worked by drivers for productivity gains. For example, according to the exemption cited in 395.1(o), a property-carrying driver is exempt from the requirements of section 395.3(a)(2) if:

1. The driver has returned to the driver’s normal work reporting location and the carrier released the driver from duty at that location for the previous five duty tours the driver has worked;
2. The driver has returned to the normal work reporting location and the carrier releases the driver from duty within 16 hours after coming on duty following 10 consecutive hours off-duty; and
3. The driver has not taken this exemption within the previous 6 consecutive days, except when the driver has begun a new 7- or 8-consecutive day period with the beginning of any off-duty period of 34 or more consecutive hours as allowed by section 395.3(c).

This 16 hour exemption permits a driver to operate after the 14th hour of coming on duty as long as the previous conditions are met. Therefore, the assumption is that in typical operating scenarios, some drivers who meet the above criteria will, at most, use the exemption one time per work week. The IBT has received numerous calls from our members who were seeking guidance on the legality of using the exemption more than one time per week. In these situations, the motor carriers are instructing drivers who have worked for two or 3 days and used the exemption on one of those days to use the 34 hour restart provision before expiring their available working hours. Upon their return to work, the motor carriers are instructing the drivers to use the 16-hour exemption for a second time that calendar week, and continue to work until they expire their hours for the remainder of the calendar week. In this scenario, a driver may work upwards of 88 hours in a 7 day period. Therefore, our experience suggests that if motor carriers can exploit the regulations to their advantage, they will do so. One must keep in mind that this is occurring among unionized carriers where the union and the collective bargaining agreements serve to dissuade motor carriers from violating the regulations. If this is happening in this situation, it begs the question of what is occurring in the nonunion sector.

³³ Insurance Institute for Highway Safety, Comments on Hours of Service of Drivers, Notice of Proposed Rulemaking (NPRM), Docket No. FMCSA–2004–19608; formerly FMCSA–1997–2350, p. 5.

³⁴ Insurance Institute for Highway Safety, Comments on Hours of Service of Drivers, Notice of Proposed Rulemaking (NPRM), Docket No. FMCSA–2004–19608; formerly FMCSA–1997–2350, p. 5.

Conclusion

The rulemaking process for this important regulation has been unnecessarily lengthy and arduous. The FMCSA could have avoided many of the challenges to promulgating a final rule if the agency had simply taken the time to objectively review the existing scientific literature, commissioned researchers to conduct studies to fill any identified knowledge gaps, and obtained and seriously considered input from all stakeholders. Instead, the agency chose to be the stalking horse for the trucking industry by attempting to circumvent the required rulemaking process and promulgate a final rule that focuses on the priorities of motor carriers, which oftentimes do not emphasize the health and safety of the drivers and the motoring public.

The IBT suggests that the FMCSA focus on its primary mission, which is to reduce crashes, injuries, and fatalities involving large trucks and buses. Increasing daily and weekly driving limits falls far short in attaining this goal. The FMCSA should discard the subjective preconceived notions that guided the creation of the current rule. The FMCSA must objectively re-examine the docket and based on sound science, revise the rule to address the health and safety of commercial motor vehicle drivers and the public. The burden is not the public's to prove that the current rule is inadequate. The court has already made that determination. The FMCSA must address the inadequacies that have been identified by the court.

Senator LAUTENBERG. Thank you very much, Mr. Byrd.

We look, with a degree of some significant surprise, at the suggestion that the longer you work, the more efficient you are.

Mr. Osiecki, do you get better in your 15th, 16th hour of work in a day, more efficient and more alert?

Mr. OSIECKI. Thank you for the question, Senator.

The honest answer is, no. The—what the scientific literature would say in response to—

Senator LAUTENBERG. I asked you a question about how you think you would feel in your 12th to 15th hour of work. Do you think that you're as good at your job, as efficient as you might be as when you first started?

Mr. OSIECKI. No, sir—

Senator LAUTENBERG. No?

Mr. OSIECKI.—you're not. The literature shows, at about—at the 16th hour is where, essentially, you drop off the table.

Senator LAUTENBERG. Yes.

Mr. OSIECKI. The length of the wakefulness period, from the time you wake up until the time you go to bed for your next sleep period, the literature says, is that—the problems come in at about the 16th hour, which is one of the reasons, we understand, that the agency limited the workday—a consecutive workday—to 14th hour—14 hours, to give that, sort of, 2-hour margin, if you—

Senator LAUTENBERG. So, do you think you're as good at the 11th hour of work as you are at the first hour of work?

Mr. OSIECKI. That, I don't know what the data seems to indicate at this point.

Senator LAUTENBERG. Well, how was the data generated? First of all, in order to do this testing, you obviously had to be talking to people who were driving illegally, because they were way past the number of hours that they should be working in a day. So, how do you account for the fact that they're violating the law, and here you're using them as an example of what the law can be? Should we just open it up and say, "Drive as many hours as you can, the heck with the rules"?

Mr. OSIECKI. I—no, sir. The—there is a study—there have been multiple studies done under the previous rules and looking at the risk of driving, hour by hour, when the driving limit was 10 and

the off-duty period was 8. There is a recent study, using naturalistic driving data, which is important, because it's data collected via video cameras both on the truck and viewing the environment in which the truck is operating, and that study and that data indicates that there's no statistical difference in the safety between the 10th hour and the 11th hour. And that's a—it's a very recent study.

Senator LAUTENBERG. So, then the idea that—your proposition develops here—is that you just keep going until at the end of a particular time, you stop driving, that's the safest thing you can do. It's very hard to understand that. And, frankly, it's impossible to believe it.

Mr. Hill, your agency's rationale for the new hours-of-service rule is that things have gotten no worse under this Administration. Now, 5,000 deaths a year is what's happening. And is the Administration going to continue to be content with that?

Mr. HILL. Mr. Chairman, thank you for the question.

Absolutely not. There's a whole group of people, back at FMCSA today, working very hard to get regulations out and to update our safety monitoring practices, and to improve oversight of motor carrier compliance.

One of the things that we are currently doing is trying to address all the fatalities, and not just focus on the fatigue. Now, I've talked to the people in the room today who have lost loved ones, such as Ms. Izer, and there is no good response to any of those tragic situations. I firmly agree that we need to address driver fatigue, to the degree that we can. I want to assure you that we, as an agency, are committed to addressing truck safety in this country, and—

Senator LAUTENBERG. Well, you've been committed for some time, because the Agency's goal of reducing truck fatalities, from the 1999 levels, by 50 percent within 9 years—are we now at that level? As it's roughly 8 years later, are you content with the fact that you're on track at this point?

Mr. HILL. No, Mr. Chairman, we are not content with any deaths involving large trucks. We are pleased that we are seeing a downward trend in the commercial vehicle fatality rate. It is at the lowest on record in 30 years, it's at 1.93. That's the official rate—

Senator LAUTENBERG. Do you want to comfort some of the people who are here who have lost some of their family that truck fatality rates are down?

Mr. HILL. There—no, I cannot comfort them with that, but I want to assure you, and them, that we are working to address it, even though they have lost loved ones.

Senator LAUTENBERG. And part of your proposal is that we increase the number of work hours that are allowed from 60 to 77 hours, and what does that do to help truck operations get safer?

Mr. HILL. Mr. Chairman, I think it's really important to keep in mind that, when we talk about increasing truck hours, we actually increased the amount of rest that truck drivers were required to take, from 8 hours off to 10 hours off, then we limited the workday to 14. Under the old rules, we could check their log books, and they could extend their workday almost in perpetuity, because they were allowed to use the sleeper berth for a fixed period of time to extend the workday. So, we have limited the workday, while increasing the driving time 1 hour.

Now, I would say to you that, in our recent assessment, we went out and did a survey to see how widely the 11th hour is being used, and about 27 percent of those carriers that we—or the drivers that we surveyed are using the 11th hour of driving. So, it's not being used to the maximum, as some would purport. And the 34-hour restart—

Senator LAUTENBERG. Well, do you want it to be used to the maximum? Is that what you're proposing?

Mr. HILL. Well, it's designed to be for operational flexibility to help with congestion and—

Senator LAUTENBERG. Yes.

Mr. HILL.—weather issues that come up.

Senator LAUTENBERG. We heard from Mr. Byrd that a 2-night rest is really essential for the physical well-being and alertness of truck drivers. Did I not remember your comment correctly, here?

Mr. BYRD. Yes, Senator, that's our position. And there are studies that support that position, also.

Senator LAUTENBERG. Ms. Claybrook, when an agency simply ignores its safety mandate on an important issue like this, what do you think the Congress ought to do? Should we legislate the appropriate hours-of-service for truck drivers, and maybe mandate all trucks be equipped with Electronic On-Board Recorders to ensure compliance with safety?

Ms. CLAYBROOK. Well, first of all, I think that the agency ought to be sanctioned. I think that an agency that ignores the courts ought to be sanctioned. And I've actually asked our attorneys to consider this. It's in the back of our minds at the moment. We haven't done it yet. But I believe that this agency should be sanctioned.

Second, I do believe that the on-board recorder should be mandated, because this has been an issue that's been floating around and being discussed now for over 20 years. Every industrialized nation of the world requires them on their trucks, and—just about—not every single one, but just about. They're in wide use. They're very available. Companies use them for their own recordkeeping for their products, so why not have them on their trucks for enforcement of these hours-of-service? Without them, as we all know, the drivers keep what's called "comic books," rather than having accurate records. And with Mexican trucks coming into the United States, there's no way that you can accurately enforce any U.S. hours-of-service rules without on-board recorders.

The on-board recorder portion of a rule that the agency proposed in 2000—has now been—been separated away, and there's a separate rulemaking going on, so that it's been separated from the hours-of-service rules. And what it covers is one-tenth of 1 percent of the trucks in the United States. And that rule hasn't been issued in final form yet, but it's in the proposal form. That is ludicrous, ridiculous. And so, I believe that it would be wonderful if Congress would mandate the use of these on-board recorders.

Thank you so much, Mr. Chairman.

Senator LAUTENBERG. Thank you.

Ms. CLAYBROOK. I also have some information that I could, maybe, submit for the record, or you could ask me more about the statistics that are being used. For example, I just would like to

point out that the number of deaths, as opposed to the rate, which is notoriously inaccurate—because it's based on the vehicle miles traveled, which is notoriously inaccurate—the number of deaths in 2004 went up by 200, and it was also—about that same number was in 2005. It went down in 2006, but the variability of these numbers are affected by many, many other factors besides one regulation. It's affected by the weather, conditions—and the hours of driving—nighttime or daytime driving, and many other things. So, I don't think there's any way you could associate the reduction in the rate with—

Senator LAUTENBERG. I agree.

Ms. CLAYBROOK.—or credit it to this rule that the agency has issued and has been overruled twice by the courts.

Senator LAUTENBERG. With reality.

Mr. Hill, last week the NTSB recommended that your agency require all interstate trucks to use Electronic On-Board Recorders to collect and maintain records of driver hours. Now, if you don't require this electronic supervision, how many additional Federal inspectors might be needed to achieve the same level of compliance with hours-of-service rules that we would get from using the on-board recorders?

Mr. HILL. Mr. Chairman, that's a very insightful question. It would be a sizable number of employees that would have to be added to properly bring about zero violation of the hours-of-service rules. I believe that the future of hours-of-service compliance is EOBRs, and I do agree with them, and we are working on a rule right now. And, contrary to what Ms. Claybrook said, even though, in our proposed rule, we had limited the number, I am looking to expand the population of carriers that would be covered by that significantly, and I plan to do that.

Senator LAUTENBERG. Mr. Byrd, what do you think about the use of Electronic On-Board Recorders? Is that a reasonable way to monitor the hours-of-service?

Mr. BYRD. We would think—Senator, thank you for the question—we would think that the use of EOBRs would be reasonable, but we, as a union, just have concerns about—that the data collected not be used, necessarily, to discipline drivers. You know, with these—this black-box technology, a lot more than just hours-of-service-related data can be collected, and our concerns would be more with the data collected that's outside the realm of hours-of-service. So, we—

Senator LAUTENBERG. That's not unreasonable. But the fact is that it seems to be a better way of understanding what's happening, to have it done electronically, mechanically, et cetera, and to make sure that there's no abuse of the use of these files, and that it can be protected if we note that as a requirement.

Is it common in the industry that the mileage be the measurement for salary—or compensation? Is that standard throughout the industry? Anybody.

Ms. CLAYBROOK. Yes, it is.

Mr. OSIECKI. In terms of the long-haul industry, Senator, mileage pay is the primary method of pay. But the trucking industry is far larger than just the long-haul industry; in fact, most trucking is regional or local, and most regional or local truck drivers are paid—

local are paid by—typically, by the hour. They're commonly referred to as "pickup and delivery drivers." Regional drivers are sometimes paid a combination of mileage and hour. In some cases, it's percentage of the load, or, some cases, it's just a flat contract. So, there are varying methods of pay.

Senator LAUTENBERG. Yes.

Mr. OSIECKI. And we're not aware of any empirical data indicating that truck driver pay has any relationship to safety. Now, there have been suggestions, and we're open to looking at that idea.

Senator LAUTENBERG. Well, the more home runs you hit, the higher your pay; the more miles you drive, I assume, the higher your pay; the faster you drive—there are a number of things that connect with that. And—I observe, myself—as I travel on the New Jersey Turnpike, one of the busier roads in the country, and I see driver behavior that is, at times, shocking. It's huge rigs going at 75, 80 miles an hour, cutting in traffic like a passenger car, and you can't control the erratic lawbreaker. I think there are a lot of things that have to be done to deal with this problem. We cannot stand by. We're looking at the terrible cost of life, at the—hundreds of thousands of injuries, did you say, Ms. Claybrook?

Ms. CLAYBROOK. It's over 100,000 injuries.

Senator LAUTENBERG. Over 100,000—

Ms. CLAYBROOK. And they're terrible injuries, they're not just small injuries, but the—

Senator LAUTENBERG. Yes.

Ms. CLAYBROOK. When there's a crash between a car and a large truck, the—

Senator LAUTENBERG. Yes.

Ms. CLAYBROOK.—the car occupants are the ones that are most seriously damaged. But—

Senator LAUTENBERG. Yes.

Ms. CLAYBROOK. And, even so, trucking is one of the most dangerous occupations in the world—

Senator LAUTENBERG. Yes.

Ms. CLAYBROOK.—for just the drivers.

Senator LAUTENBERG. And going beyond that—and there is nothing that does not have costs—financial cost matched up with the tragedy of human life lost, but the fact of the matter is that, in addition to the terrible pain and anguish that comes from losing an individual, the cost to society—the cost of the traffic that's backed up for hours, the cost of having rescue people out there on the job—is enormous.

Ms. IZER, you've been a tireless advocate for improving truck safety, and the reason is, unfortunately, very obvious. But what do you think is the number-one thing that we can do to stop the number of deaths that occur each year by tired truckers? What would you propose that we do?

Ms. IZER. Well, the EOBRs are certainly—you know, they need to be mandated. The industry is not going to do them on their own. And the driving hours should not be over ten. They shouldn't be over ten. And, until drivers are paid for their time, I don't know what'll make a difference.

Senator LAUTENBERG. I didn't mean to put you on the spot, but the hearing, whatever you have to say, matters an awful lot. I heard one of your friends yesterday in the meeting in which we had people who lost a child, or a mother, sister—say that cruise control was being used in one of these accidents. Mr. Byrd, does cruise control do something—in your judgment, to lull a driver into kind of a less alert condition?

Mr. BYRD. Well, Senator, there are—we've gotten no reports from our drivers that suggest that use of cruise control presents a problem on the road.

Senator LAUTENBERG. Because there is a human condition that, after a number of hours, there is an inclination toward sleep or complacency.

Mr. Hill, your agency was very concerned about having no clear hours-of-service standard among the 50 states, and it proposed what I consider a flawed rule quickly, rather than a good rule. But, after your 2003 proposal, only 22 states immediately adopted the rule, and others took years to comply. Why don't we just get it right and get it in place before asking the states to change our laws to follow along?

Mr. HILL. Well, Mr. Chairman, as you have indicated, there were states who were delayed in that process. Under our current setup, 23 of the states in the country adopt our regulations automatically by reference, 27 require some kind of legislative activity or administrative process to promulgate a rule to make it in force in their state. And we believe that we did address that issue in 2003, and the courts have found differently, and we've been working, since that time, to address those procedural differences.

And the problem with the States is that they have to go through the legislative process. And in some States, they don't have it every year; they may have it every 2 years. And so, it does create an incremental phased-in approach to the rule, nationally, which we're trying to avoid.

Senator LAUTENBERG. Mr. Osiecki, does this change in the hours-of-service rule, produce some economic benefits to the industry?

Mr. OSIECKI. The shorter answer is: in some cases, yes; in some cases, no. In reality—

Senator LAUTENBERG. Tell me why it wouldn't.

Mr. OSIECKI.—there has been a general decrease in productivity, overall, under these rules, in the range from the very low single-digit percentage—1 or 2 percent—up to as high as 9 percent. And in part, that's because of the—or, the consecutive or nonextendable nature of the workday, as the Administrator commented on earlier; in part, it's—in large part, it's due to the sleeper berth provision that Mr. Krupski talked about, the inflexibility in the sleeper berth. So, the—and I mentioned the balance, the fact that these rules are a balanced set of rules. In some cases, they increase flexibility; in other cases, they took some serious flexibility away from past rules. And, because of that, that reduction in flexibility, that's reduced productivity overall in the industry.

Now, there has been a minimum gain under the 11, but, as the administrator said, not all drivers use that, and certainly not all drivers use the 34-hour restart. In fact, when they use the restart, typically—and the average restart period is about 2 days, it's about

49 hours, if my memory serves—so, there—it's been a give-and-take, but, generally speaking, it's—

Senator LAUTENBERG. I think it's more "take."

Mr. Hill's testimony suggested that the benefit would be \$2 billion. Do you challenge that, Mr. Osiecki?

Mr. OSIECKI. Do I challenge that? No, sir.

Senator LAUTENBERG. No. So, that sounds like, overall, it would be an economic benefit to the industry.

Now, I'm just trying to understand whether or not dollars are gained by the risk of lowered safety rules. And since, to me—and—we'll do further study on this—it sure suggests that we are increasing the risk, despite the sharp, outrageous claim that a human can get better, after 10 hours of work, at doing their job than they did in the first 10 hours.

Mr. OSIECKI. If I may, Senator—

Senator LAUTENBERG. Sure.

Mr. OSIECKI.—one way to look at the question in a simple manner is to look at the overall miles that the industry has driven since the new rules were put in place. And the mileage has not increased substantially. In fact, the mileage is very incrementally increasing, from about 220 billion per year up to about 221 billion per year. And the latest estimate is about 222 billion per year. So—and that's not to mention the increase in registration of trucks. So, there are more trucks, there's only a slight number of mileage increase, and fatalities and injuries are coming down. So, again, I would emphasize—you know, you asked us to be honest—the honest data indicates that, in some way, the rules are working. And I can't sit here and honestly tell you how they're working, but safety is improving in the trucking industry, and that's the good news, at this point.

Senator LAUTENBERG. Mr. Byrd, you noted, that the government cherry-picked certain studies to build support for its rules. What are the basic principles you feel the agency ignored in its rule change?

Mr. BYRD. Well, I think that the agency selected studies that—this recent study, I think, that was referred to, it showed some indication that time on task had minimal impact on—I guess, on risk of fatigue-related crashes. But there are other studies that have had a differing conclusion. And we don't think that the agency just really gave equal weight to those studies. It seems as though they sought to identify some studies that supported their position, and they gave those studies heavier weight. That's basically, you know, what we found, or what we identified.

Senator LAUTENBERG. Ms. Claybrook, do you have a view on how these studies were developed?

Ms. CLAYBROOK. Well, I'll submit some material for the record—
[The information referred to is contained in the Appendix.]

Ms. CLAYBROOK.—but, just in general, let me just say, first of all, I do want to say, again, that the number of deaths went up, from 2004 to 2005, by 200, so that they went up from 5,036 to 5,235, so—and for 2005, it went up to 5,240. So, the number of deaths actually did go up in 2 of the years during which this rule was in place. They have come down for 2006 by—

Senator LAUTENBERG. You said that earlier.

Ms. CLAYBROOK. Yes, right. But—so, that’s one thing. But, in terms of the studies, first of all, it’s very difficult for the police, when a crash occurs with a big truck, to determine whether or not fatigue was a factor. Often, the driver of the car is killed, so, it’s very difficult to have any objective discussion of what happened in this crash. The only voice that’s heard is the truck driver. The truck driver is obviously wakened by the crash, if they were sleeping or near sleeping, so the police can’t really take any test to determine whether fatigue was, in fact, a factor. So, they’re notoriously inaccurate, when you just try to collect the data on the highway itself.

The studies that have been done—and there are many of them that are in the record from our lawsuit in 2003 and 2005—show that the driving capacity of a driver, after 8 hours, goes down, and it goes down dramatically between the 10th hour and the 11th hour. That research has been done by independent parties, it’s not industry research. And so, our view is that the longer the time on task—after 8 hours, particularly—the worse the driving capacity is, because the drivers are so tired. And if they take their eye off the road for a nanosecond, they can have a crash, because cars move much more quickly, they stop much more quickly, they get irritated with big trucks, and truckers also, if the driver’s not alert, they just can’t handle heavy traffic or bad weather and other things.

So, we believe that the hours-of-service should be reduced, and that the time should be reduced. No person in America works 14 hours a day and doesn’t get paid overtime. These truck drivers don’t get paid overtime for the hours from 8 to 11, so that’s why being paid by the mile is such an incentive to them to drive as far and as fast as possible, because they’re trying to make up, in fact, for the lack of that. And then, the hours from 11 to 14, that is available to work, as opposed to drive—they often don’t get paid at all. And then, they get only 10 hours off. No one else in America is treated this way. It’s an outrageous thing.

Senator LAUTENBERG. It does challenge reality—

Ms. CLAYBROOK. Right.

Senator LAUTENBERG.—reality—let me say “sensibility”—to post a claim that challenges all the rules of normal health. And so, we’ll look very—

Ms. CLAYBROOK. Could I just say, also, Mr. Chairman, with regard to the chart that you have—this is it, in graph form—

Senator LAUTENBERG. Yes.

Ms. CLAYBROOK.—and this is a paper* written by Kenneth Campbell, of the University of Michigan Transportation Research Institute, and it completely refutes that chart. What it says is that, “The majority of accidents happen after only a few hours.”—They claim that they occur after a few hours of driving. This chart, what it does is, it looks at the fact that—most people are driving in the first hour; fewer people are driving in the second hour; fewer yet are driving in the third hour, etc. So—the chart is really a reflection of the number of people who are driving—the full 11 hours. And so, it does not have anything to do, necessarily, with the ca-

*This paper is available at <http://deepblue.lib.umich.edu/bitstream/2027.42/1319/2/93357.0001.001.pdf>.

capacity of the drivers to drive. And so, we'll submit this for the record.

Senator LAUTENBERG. Thank you.

Mr. Hill, now, have you seriously considered any public comment to the—I can't get over the nomenclature here—"interim final rule" that was published last week? Was that reviewed? And what was the number of inquiries or witnesses or contributors you had?

Mr. HILL. Mr. Chairman, because we announced the interim final rule before it was published in the *Federal Register*, we are anticipating comments in the near future, but it was just in the *Federal Register*, published on December the 17. So, I think it is probably a little premature for us to have received those comments; it will take some time to do that. But I want to assure you and the members of this panel that we will give thoughtful consideration to the comments that are made, and that we will look at the data.

Senator LAUTENBERG. But will you stimulate the opportunity for more public comment on this rule before it's finally put into place?

Mr. HILL. We are open to listening to anyone who wants to comment on this rule.

Senator LAUTENBERG. Will you advertise that you'd like—

Mr. HILL. Sure, we can do that. When we put out that *Federal Register* already.

Senator LAUTENBERG. Well, we'd appreciate it if you'd—

Mr. HILL. And one thing that I would say, Mr. Chairman, is that since the publication of the 2005 rule, we now have empirical data that shows the crashes and the deaths that are involved, that we did not have when the rule was published in 2005. That's an important part of this interim final rule, because if you'll look at the numbers of crashes involving fatigue, fatal crashes from the Fatality Accident Reporting System, in 2004, there were 69; in 2005, there were 82; and in 2006, there were 69.

Senator LAUTENBERG. These are verifiable fatigue—

Mr. HILL. They come from NHTSA, yes. It's the database that we get from NHTSA.

Then, if you look at when the fatalities occurred in the hour of driving, that is coming from the truck-involved fatality accidents analysis. It is done by the University of Michigan. And they looked at the fatalities, and they found that in 2004, there were zero fatal crashes involving the 11th hour of driving, and there was one fatal crash in the 11th hour of driving in 2005. Now, that is data that I must look at. And I would encourage Ms. Claybrook, and any others who have data, to bring it to us and look at it, because, as you know, sir, I am required to look at safety, and I do that. Twenty-nine years of law enforcement, that's what I believe in: safety. But I am also required by this Congress to look at cost benefits. And cost benefits are an incredibly important part of the process that I have to give an account to this Committee, as well.

Ms. CLAYBROOK. Mr. Chairman, could I just comment that this has to do with exposure data. In other words, as I said before, this University of Michigan work, that the majority do occur in the first hour or second hour or third hour, because there are more drivers on the road in their first hour of driving or their second hour of driving. And so, it's all a matter of exposure. But when you break it down, then it does not prove the point that Mr. Hill was making.

Senator LAUTENBERG. Yes.

Ms. CLAYBROOK. And I would also say that, on the issue of the public comment, the reason that we have gone to court today to challenge the interim final rule, is because they put forth an interim final rule that is identical as to the hours of driving—to the 2003 and 2005 rules that were overruled by the court. It's been 5 months since the court overruled the last one, the 2005 rule was overruled in July of 2007. So, the agency's had 5 months to figure out what to do to comply with the court, and, instead of putting out a proposed rule right away that had a time for public comment and then making a decision, they waited until December, 5 months later, and then just issued it as a mandate. There's been no public comment on this mandate, and it's going to be in effect until they finish the final rulemaking.

Senator LAUTENBERG. I don't want to create a debate here, but I feel it's fair to give Mr. Hill a chance to respond to Ms. Claybrook's comments.

Mr. HILL. Thank you, Mr. Chairman. I appreciate your openness to this discussion.

I wish that I were an attorney. I wish I could argue as eloquently as Counsel Claybrook has just argued. But I am not an attorney, and it is inappropriate for me to get into the litigation aspects of this rule.

There will be litigation. And if we write the rule differently, somebody else will litigate us on it; I'm absolutely convinced. This rule is contentious. Everywhere you go in any direction, you're going to poke at somebody and you're going to take some kind of an area of their operation that they don't think that they ought to have governed. And so, it's going to be litigated.

And I just would say to you, sir, that we did not sit idly by for 7 months, or 5 months, waiting for this to be done. We have been working tirelessly to address this. We have a clearance process to make sure that things get done. And it has been an ongoing—

Senator LAUTENBERG. Well, obviously, this is going to be studied more closely in a court of law.

And so, I want to ask Mr. Krupski a question, here. In your comments, you highlight the economic reasons that you think push drivers to drive when they're too tired. Might this be fixed if truckers were required to be paid on an hourly basis for both driving and nondriving time?

Mr. KRUPSKI. An hourly basis for driving/nondriving, maybe a combination of—maybe mileage while they're driving and hourly pay while they're unloading their truck or doing other tasks other than driving. So, you—there could be a mix in there that you—for mileage, you get paid this way. You won't have the incentive to try to cheat a little bit on your logbook because you were unloading your truck longer and you're fatigued. You'll be compensated for those hours, and then you don't have to drive as much, because you could make—

Senator LAUTENBERG. Trying to make up for it by getting those extra miles.

Mr. KRUPSKI. Exactly.

Senator LAUTENBERG. Yes.

Senator Pryor, our colleague, very interested in trucking, and he asked that I ask you some questions. How do you feel about a speed limit for trucks—fixed? He suggests 68 miles an hour. But, how do each of you feel about a fixed speed limit for truck drivers? I would tell you, I would welcome it, based on what I see—in my time on the highway.

Ms. CLAYBROOK. If all the vehicles on a road were fixed at the same speed, it makes the flow of traffic go much easier. So, if you want to start fixing limits for trucks at 68 or 65, fix it for cars at 68 or 65, so there's not the congestion of cars going faster, when you're trying to pass another truck that's going up the hill 50 miles an hour.

Senator LAUTENBERG. Mr. Byrd, what do you think about that?

Mr. BYRD. I think we would share in that opinion. We wouldn't have any problems with a fixed speed limit, and we think that standardizing it would eliminate that problem with the congestion.

Senator LAUTENBERG. Can we control that with a Governor in the truck that accounts for hills and things of that nature?

Mr. KRUPSKI. Well, you can. The computers—you just—you could—the existing technology out there in trucks today, you could control your top speed of your truck. Absolutely, it's not a problem.

Senator LAUTENBERG. Yes. Mr. Osiecki?

Mr. OSIECKI. Yes, Senator. And I fully agree with that remark. Every large truck that's manufactured today has what's commonly referred to as an electronic control module in the engine. In fact, cars have them, as well. And that's the electronic setting that I've referred to in my prepared remarks. That setting can be set, for lack of a better word, at any number, and the number that we—

Senator LAUTENBERG. Conditions.

Mr. OSIECKI.—suggest is 68. Yes. And the speed differential issue is a real issue, and that's an enforcement—

Senator LAUTENBERG. Yes.

Mr. OSIECKI.—issue, as well.

Senator LAUTENBERG. And Senator Pryor asked the question that we've reviewed about on-board recorders to monitor the speed, drivers hours, and that looks like it's a no-brainer, to use the language.

And I thank each one of you—

Ms. CLAYBROOK. Mr. Chairman, could I just say that—

Senator LAUTENBERG. I hope not.

[Laughter.]

Senator LAUTENBERG. Go ahead.

Ms. CLAYBROOK.—just briefly, that we do favor trucks having a speed limit, but if you don't have the Electronic On-Board Recorders, the difficulty for the police in enforcing that law is enormous. And the proposal that Mr. Hill has issued, as I said, covers only one-tenth of 1 percent of the trucks with requirement for on-board recorders, even if you increase that to 10 percent of the trucks, it still is not going to do the job. It—

Senator LAUTENBERG. No, but—except—

Ms. CLAYBROOK. It needs to be every truck.

Senator LAUTENBERG.—at some point, you have to say that that would certainly be a step forward, and we can build on that. And—

Ms. CLAYBROOK. Well, it's a step forward, but—it doesn't mean that you can really have enforcement.

Senator LAUTENBERG. Thank you all for the Claybrook hearing. Ms. CLAYBROOK. Thank you.

[Laughter.]

Senator LAUTENBERG. Thanks.

Now, Ms. Claybrook has a lot of experience and a lot of knowledge, and we respect it. And, all of you, thank you, for your excellent participation. There will be agreement with some parts of it, and disagreement with lots of it.

And I want to enter a statement by Senator Snowe, from Maine, that she has for the record.

[The prepared statement of Senator Snowe follows:]

PREPARED STATEMENT OF HON. OLYMPIA J. SNOWE, U.S. SENATOR FROM MAINE

Thank you, Mr. Chairman, for holding this hearing.

A resolution to the Hours-of-Service issue has lingered for far too long, and it is my hope that we can start moving forward to finally forge a correct and lasting balance with regard to the latest rulemaking of the Federal Motor Carrier Safety Administration (FMCSA).

I have long advocated for a comprehensive safety regime for the commercial truck operators across the country. Tragically, it was in my home State of Maine in the mid-1990s that we lost four innocent teenagers to a truck driver who had fallen asleep at the wheel. Since that horrible accident, I have urged the implementation of new, more practical Hours-of-Service regulations for truck operators, often joined by many of my colleagues here in the Senate. In fact, I have been pressing for more responsible safety measures on our roadways since before the creation of the Federal Motor Carrier Safety Administration. When that organization was created in 2000, I was eagerly looking forward to the expeditious development of a new safety regime that treated all elements of the trucking industry fairly, and protected the passenger vehicles that shared the road with them.

However, I must confess my tremendous disappointment. These "revised" Hours-of-Service regulations have struggled through several iterations of the same proposal, while failing to achieve the goals expressed upon their introduction, and have been unable to withstand court challenges and Congressional mandates. In fact, it seems without question that the most recent Hours of Service rule will face a court decision much like its predecessors, and the forecast is not positive. Each one of the past two rulemakings was voided by the U.S. Court of Appeals. Despite the legal hurdles imposed upon them, the FMCSA boldly came to us 2 years ago requesting the Senate codify the flawed Hours-of-Service rule during the last highway bill. And now, rather than proposing new, innovative ideas to ensure truck safety, the so-called 'new' rulemaking is simply a restatement of the previous efforts.

I am eager to hear from our distinguished panelists to discern whether or not they envision this rulemaking surviving any sort of legal challenge, why they have not taken into account or commented on idling time and "detention time," when an operator is forced to remain in his vehicle, wasting precious and costly fuel—and why they have failed to require Electronic On-Board Recorders, or EBORs. I contend that the uncertainty surrounding the survivability of the newest version of Hours of Service, which will form the cornerstone of our Federal trucking safety regime, leaves a gaping hole in our ability to provide other tools that would contribute to more secure roads.

Lastly, I would like to take the time to recognize a very esteemed fellow Mainer—Ms. Daphne Izer, who is here representing the group she founded, Parents Against Tired Truckers. It was Mrs. Izer and her family who were forced to cope with the terrible tragedy I mentioned at the beginning of my statement, and due to her tremendous resolve and strength, she has formed an association that has provided both solace and a voice for families who have faced similar tragedies. I applaud her efforts, and thank her for being here.

I look forward to the excellent panelists and hope this hearing is the start of a dialogue that will lead to safer roadways for all Americans.

Senator LAUTENBERG. And we're going to keep this record open. So, if we can, we'll submit written questions to you for further elucidation.

And I want to say, to the families that are here, the people who are part of P.A.T.T., would you mind just standing for just a moment? These are members of a family who lost people they dearly love. Mr. Martin lost five members of his family in a truck-related crash. And if we can keep in mind your faces and the faces of those that you so carefully hold there, we all have to commit to doing a better job here.

Thank you all for your work.

This hearing is concluded.

[Whereupon, at 11:30 a.m., the hearing was adjourned.]

A P P E N D I X

PREPARED STATEMENT OF THE NATIONAL PRIVATE TRUCK COUNCIL, INC.

Mr. Chairman and Members of the Subcommittee:

The National Private Truck Council, Inc. ("NPTC") is a trade association representing the interests of over 400 companies that operate private truck fleets in furtherance of non-transportation primary businesses. NPTC members include both Fortune 500 companies and small local distribution companies. Our members are heavily represented in the food, retail, chemical and manufacturing industries, but encompass a broad cross-section of American business interests.

NPTC members provide both long-haul trucking and local distribution service, depending on the type of industry and distribution requirements. They operate both tractor-trailers and a variety of straight trucks in meeting the transportation needs of their companies and their customers. All NPTC member companies and their drivers are subject to the driver hours of service regulations in 49 CFR Part 395 that are the subject of this hearing and the related Federal Motor Carrier Safety Administration ("FMCSA") rulemaking. 72 *Federal Register* 71247 (December 17, 2007).

In short, NPTC supports the FMCSA's Interim Final Rule that reinstates the 11-hour daily driving limit and the 34-hour weekly reset provisions to the driver hours of service rules in 49 CFR Part 395. These two provisions have been accepted by both trucking management and drivers alike. Moreover, combined with the other changes made to the hours of service regulations in the FMCSA's 2005 rulemaking, they have helped to improve the safety record of the motor carrier industry since they were imposed by the FMCSA.

NPTC seeks to maintain continuity and uniformity of HOS rules in the workplace by retaining the current rules as incorporated in the IFR. This will allow carrier management, drivers and enforcement officials to operate in an environment of certainty and understanding rather than doubt and frequent fluctuations in the rules. This continuity itself will assist carriers and drivers in operating in a safe manner going forward.

Industry Safety Record

The 11-hour driving rule and 34-hour reset provisions were not implemented by themselves. In April 2003, FMCSA published a final rule that changed the requirements for drivers of property-carrying commercial motor vehicles. 68 *Federal Register* 22456 (April 28, 2003). Under this rule, driving was limited to 11 hours within a 14-hour (down from 15 hours), non-extendable window after coming on duty, following 10 consecutive hours off-duty (an increase from the prior requirement of 8 hours). Moreover, drivers were no longer able to extend the daily on-duty period beyond the 14-hour daily limit by taking off-duty breaks during the duty period. Thus, a driver knew that the daily on-duty period would not exceed a standard of 14 hours, regardless of whether the driver took breaks throughout the day, and the driver was required to have an additional two consecutive hours off-duty each day before beginning another duty period. The increase in the daily driving limit from 10 to 11 hours was more than offset by the reduction in the daily on duty limit from 15 to 14 hours, and the prohibition on extending the daily on duty limit beyond 14 hours.

Although the 60- and 70-hour weekly on-duty rules were unchanged, drivers could restart the calculation during any weekly time period after they took 34 consecutive hours off-duty. This was consistent with the FMCSA's analysis of the existing fatigue research that concluded that two consecutive "nights" of rests is sufficiently restorative to offset the effects of cumulative fatigue from prior activities. The 34-consecutive hour period acts as a surrogate for two consecutive nights of rest in this requirement.

These combined changes in the hours of service regulations have been in effect since January 4, 2004. On August 25, 2005 the HOS rules were further amended by requiring drivers using sleeper berths to spend at least 8 but less than 10 con-

secutive hours in the sleeper berth and take an additional 2 hours either off-duty or in the sleeper berth in order to begin a new duty period. 70 *Federal Register* 49978 (August 25, 2005).

Despite the claims of Public Citizen, these regulatory changes have had significantly diminished the safety performance of motor carriers since they went into effect in 2004. Looking at fatal crashes involving large trucks,¹ total fatalities from such crashes, and fatal crashes per 100 million miles traveled, the data all shows stable or downward trends from 2003 (the last year under the prior rules) through 2006 (the last year for which data is available).

Year	Fatal Crashes Involving Heavy Trucks	Total Fatalities	Fatalities Per 100 Million Vehicle Miles Traveled
2003	4,335	5,036	2.31
2004	4,478	5,235	2.37
2005	4,533	5,212	2.34
2006	4,321	4,995	xxx

The number of fatal crashes involving heavy trucks and the total fatalities resulting therefrom actually declined in 2006, despite an expected increase in the number of miles traveled by commercial motor vehicles. Under the new HOS rules, there are fewer fatal accidents involving large trucks than before, and fewer persons are dying in such accidents. Those data do not support the claims by purported safety groups that the 2003 changes to the HOS regulations have harmed public safety.

Furthermore, U.S. Department of Transportation data shows that “fatigue-related large truck crashes as a percentage of total large truck crashes varied little [from 2003 to 2006], decreasing from 1.7 percent in 2003 to 1.5 percent in 2004, increasing to 1.8 percent in 2005 and decreasing to 1.6 percent in 2006.” See Response of Federal Motor Carrier Safety Administration in Support of Motion to Stay the Mandate, *Owner-Operators Independent Drivers Assn., Inc. v. FMCSA*, D.C. Cir. No. 06–1035, filed September 21, 2007, at 5. These conclusions are supported by the experience of NPTC member companies. On March 10, 2005, NPTC filed comments with the FMCSA on the rulemaking proposal to adopt the current HOS rules as a new rule after the court of appeals had invalidated the rules in July 2004. Docket No. FMCSA–2004–19608; formerly FMCSA–1997–2350. NPTC’s comments supported the continuation of the “current” hours of service rules as originally set out in the final rule of April 28, 2003, 68 *Federal Register* 22456 and amended at 68 *Federal Register* 56208 (September 30, 2003).

Although NPTC did not have any scientific studies or data to *prove* that the current hours of service rules have improved, or at least have not harmed, driver health and motor carrier safety performance, NPTC offered self-reported data from 63 private fleets comparing their accident experience in 2003, the last year under the old rules, with 2004, the first year under the new rules.

The carriers collectively reported that they incurred 794 DOT-recordable accidents² while operating 1,613,465,000 miles in 2003, for a rate of .4921 accidents per million vehicle miles. In 2004 those same carriers reported incurring 673 DOT-recordable accidents while operating 1,584,031,000 miles, for a rate of .4248 accidents per million vehicle miles. These 63 NPTC companies experienced 15.2 percent fewer recordable accidents in the first year under the new HOS rules and a 13.7 percent reduction in accident frequency in that same year.

Furthermore, this accident experience for private fleets is some 45 percent better than the .763 average recordable crashes per million miles for large trucks as reported by the FMCSA for the year 2001, the last year for which data are available. See *FY 2001 Compliance Review Crash Frequency Report*, MCMIS, March 25, 2002.

NPTC does not argue that this 13.7 percent reduction in accident frequency from 2003 to 2004 was *caused* by the change to the new hours of service rules. But the comments to the FMCSA docket noted that the change in the hours of service requirements was the only variable that changed for the entire motor carrier industry from 2003 to 2004. And this significant reduction in accident rate in the first year under the new hours of service rules substantially undermines the core arguments made by the petitioners challenging the new rules in Federal court that the new

¹Source: National Highway Traffic Safety Administration, Fatal Analysis Reporting System.

²A “DOT-recordable accident” is defined in 49 CFR §390.5 as an occurrence involving a commercial motor vehicle on a highway in interstate or intrastate commerce in which there is a fatality, bodily injury resulting in immediate medical treatment away from the scene, or disabling damage to one or more vehicles requiring towing away from the scene.

rules would have the opposite effect and reduce the level of safety among motor carrier operations.

The court petitioners view the 11-hour daily driving limit and the 34-hour reset views in a vacuum, concluding only that these changes allow drivers to operate a commercial motor vehicle for more time on a daily or weekly basis. This view ignores the other regulatory changes made by FMCSA and the experience of carriers in operating under the combined new rules. For example, NPTC members report that drivers receive more and better quality rest with the requirement for 10 consecutive hours off-duty instead of 8, and therefore the drivers generally support that change. The 10-hour rule allows the drivers to return to home after a shift and take care of personal and family matters and still receive up to 8 hours of rest before reporting to work for the next trip.

Need for Continuity

NPTC seeks the ongoing application of the current HOS rules to continue the improvements in carrier safety records and to avoid any disruptions in service and safety caused by frequent and unpredictable changes to the HOS requirements. Each time the HOS rules change, carriers must retrain their drivers, dispatchers and managers, reconfigure their pickup and delivery schedules, and re-program their electronic on-board recording devices that account for driving time (in the form of electronic log books) and other operational data. These changes take time and require significant financial expenditures.

In addition, enforcement officials must also retrain their staffs each time there is a change in the regulations. The Commercial Vehicle Safety Alliance, the association of state, provincial, and Federal officials responsible for the administration and enforcement of motor carrier safety laws in the United States, Canada and Mexico, has suggested that a minimum of 6 to 8 months is necessary to retrain enforcement officers in changes to the HOS regulations. See Motion of CVSA for Leave to Participate as Amicus Curiae in Support of a Stay of the Court's Mandate, *Public Citizen v. FMCSA*, D.C. Cir. No. 06-1078, filed September 17, 2007, at 9. Thus, CVSA asked the court of appeals to stay the effect of its July 24, 2007 decision in order to avoid the disruption and uncertainty that would result from amendments to the HOS requirements.

Because the 11-hour daily driving limit and the 34-hour reset are well-received by drivers and motor carriers, and their implementation (along with other revisions to the HOS rules) have not harmed motor carrier safety, and the alternative of requiring the FMCSA to start over with yet another rulemaking on hours of service would be disruptive and unnecessary to promote safety, NPTC asks that this subcommittee keep apprised of the current court of appeals challenge and intervene if necessary to restore the existing HOS rules as a matter of statute. Should the court of appeals once again vacate the 11-hour daily driving limit and/or the 34-hour reset provision, or remand the rulemaking to FMCSA to reissue or revise the rulemaking, we ask that Congress step in to stop this procedural back and forth and allow the FMCSA to regulate the industry in an appropriate manner. This would preserve the benefits of the rules as presently implemented and preclude any further litigation challenges to such rules.

Respectfully submitted,

DR. GARY F. PETTY,
President and CEO,

National Private Truck Council, Inc.

PREPARED STATEMENT OF THE CANADIAN TRUCKING ALLIANCE

Introduction

The Canadian Trucking Alliance is pleased to submit to the Subcommittee these comments on the regulation of truck driver hours of service in the United States. The hours of service rule promulgated by the Federal Motor Carrier Safety Administration has a significant impact on the Canadian trucking industry. Canada is the United States' largest trading partner and over 85 percent of the goods traded between the two countries are transported by truck. In 2006, there were 12.9 million truck crossings, southbound and northbound, at the Canada-U.S. border. That means 6.45 million trucks—both Canadian and U.S.-based vehicles—entered the United States from Canada. Transport Canada (the Canadian counterpart of the U.S. Department of Transportation) estimates that approximately two-thirds of the trucks crossing the Canada-U.S. border are Canadian-based vehicles. In other words, there are about 4.3 million entries into the United States each year by Canadian trucks and drivers. Many of these vehicles and drivers, of course, make repeat

crossings and a conservative estimate is that cross-border traffic involves about 70,000 Canadian commercial vehicle drivers. All these drivers are subject to the U.S. Federal Motor Carrier Safety Regulations, including the hours of service rule, when they are operating in the United States.

About the Canadian Trucking Alliance

The Canadian Trucking Alliance (CTA) is a nonprofit federation of Canada's seven provincial and regional trucking associations. With its head office in Ottawa and provincial association offices from coast to coast, CTA represents a broad cross-section of the Canadian trucking industry—some 4,500 motor carriers, owner-operators and industry suppliers. CTA is the voice of the Canadian trucking industry on both domestic and international legislative, regulatory and policy issues.

CTA Supports the Interim Final Rule Issued by FMCSA

In October 2007, CTA petitioned FMCSA in support of a petition filed earlier by the American Trucking Associations (ATA), requesting that the agency issue an interim final rule to keep its current hours of service regulation in place. We agreed with ATA that the rule now in force represents a road safety improvement over its predecessor. In fact, FMCSA's own safety surveys and studies demonstrate favourable road safety results since the current rule was adopted—a point emphasized by the Administrator in his statement to the Subcommittee on December 19, 2007. The U.S. Circuit Court's decision of July 2007 to vacate a portion of the HOS rule found no substantive defect in the rule, only a failure of the agency to comply with certain procedures during the rulemaking process.

The Canadian cross-border trucking industry was concerned over the potential business turmoil resulting from the costs that carriers and drivers would have incurred if parts of the current rule had been vacated and replaced, even on a temporary basis, by the old rule or some other interim rule. In the event of a rule change, drivers and carrier operating personnel would need to be retrained, systems would need to be overhauled and many freight contracts would need to be renegotiated. CTA's safety and compliance concerns were heightened by the fact that the Canadian industry would have had no way of determining which hours of service rule was in effect in the individual U.S. states in which its drivers and vehicles operate.

Daily Driving Limits in Canada and the U.S.

Two major differences between the U.S. and Canadian hours of service rules are that Canada permits a commercial vehicle operator 13 hours driving time during a 14-hour maximum on-duty period and has a 36-hour restart rule, in comparison with an 11-hour driving limit and 34-hour restart in the U.S.¹ The 13-hour driving time rule has been in effect in Canada for several decades and the Canadian experience with these rules has been positive. We know of no evidence that the rate of fatigue-related accidents involving commercial motor vehicles is any higher in Canada than in the United States notwithstanding the longer driving period permitted in Canada.

In revising the Canadian hours of service rules in November 2005, Transport Canada stated in its Regulatory Impact Analysis² that:

“The main objective of the new Regulations is to reduce the risk of fatigue-related commercial vehicle collisions by providing drivers with the opportunity to obtain additional rest . . .

Under the new Regulations, the maximum driving time, per shift, will be maintained at 13 hours . . .”

The Scientific View of Driving Shift Length

Researchers and safety regulators around the world have long debated the degree to which shift length contributes to transport operator fatigue. While some studies over the years have reported degradation of operator performance toward the end of a work shift, there is ample evidence that fatigue onset can also occur very early in a shift—even after one or 2 hours on duty. The prevailing view is that the so called time-on-task effect as a fatigue contributor cannot be considered in isolation from other key “sleepiness” factors, all of which, to one degree or another, are a function of the quantity, quality and timing of restorative rest obtained by the operator.

¹The regulations now in place in Canada require a minimum of 10 hours of off-duty time per day, as is also the case in the United States.

²*Canada Gazette Part II*, November 16, 2005.

The Commercial Vehicle Driver Fatigue and Alertness Study (DFAS), published in November 1996 by the U.S. Department of Transportation and Transport Canada, found that “there was no difference in the amount of drowsiness observed in the video data during comparable . . . trip segments of the 10-hour and 13-hour trips.”³ The study also reported “evidence of significant driver fatigue within the current Federal 10-hour driving limitation after 8 hours off-duty. While sleeping behavior itself cannot be regulated, a key determinant of alertness is whether the driver obtains adequate amounts of sleep during off-duty time.”⁴

In February 2001, the National Road Transport Commission of Australia, the Australian Transport Safety Bureau and the New Zealand Land Transport Safety Authority jointly commissioned a report by an expert group of sleep scientists, who had been asked to consider regulatory approaches to the management of truck driver fatigue. The expert group expressed the now widely held view that opportunity for sleep should be a key determinant of maximum allowable working time. The scientists made the following comment in their report:

“. . . it is hard to set a definitive safe limit for the acceptable duration of work in terms of absolute safety standards. However, it is possible to consider the options for what constitutes an upper bound for the duration of work, beyond which it is normally unreasonable to work. That upper bound is determined by what constitutes an acceptable time off to achieve satisfactory sleep and all the other necessities of life including social activities. That upper bound will lie in the period between 12 and 14 hours of work.”⁵

When the commercial driver hours of service rules in both Canada and the United States were under review following the publication of the DFAS report, sleep scientists and regulators on both sides of the border were in overall agreement that one of the cornerstones of a modernized regulatory regime should be to provide increased opportunities for sleep. The revised regulations—the United States in 2003 and Canada in 2007—raised the minimum daily off-duty time by 25 percent, from 8 to 10 hours. While as mentioned in the DFAS report, it is not possible to mandate when and for how long a driver must sleep, the regulations in both countries now give drivers sufficient off-duty time to obtain what scientific experts consider to be an adequate “anchor” sleep of about 8 hours per day. In Canada, where it is permissible to split the 10 hour off-duty requirement, as long as one of the periods is at least 8 consecutive hours, drivers are afforded the additional opportunity to take rest breaks and naps during the shift without losing productive time.

Canadian and U.S. Restart Provisions

Both the U.S. and Canadian hours of service rules include provisions allowing for a restart in calculating a commercial driver’s weekly cumulative driving time. The restart provisions—34 hours in the U.S. and 36 hours in Canada—were included in each country’s new regulations for two main purposes:

- to reduce undue amounts of off-duty time a driver must spend away from home at the end of a cycle, and
- to provide drivers with sufficient off-duty time during the restart period to allow two principal sleep periods of at least 8 hours, which are generally considered sufficient to enable the driver to recover from cumulative fatigue.

Since the Canadian and U.S. restart provisions have been put in place, they have been widely used by Canadian drivers operating on both sides of the border. A survey conducted by CTA in September 2007 reported that the carriers’ safety experience with the restart provisions has been positive.

Concluding Comment

For the foregoing reasons, CTA supports the issuance of an interim final rule which will allow the current 11-hour driving limit and the 34-hour restart provision to remain in place pending a public comment period and publication of a final rule by FMCSA.

³ DFAS, page ES-14.

⁴ *Ibid*, page 2-64.

⁵ Fatigue Expert Group: Options for Regulatory Approach to Fatigue in Drivers of Heavy Vehicles in Australia and New Zealand, NRTC, ATSB & NZLSTA, February 2001, page 36.

SUPPLEMENTAL INFORMATION SUBMITTED BY JOAN CLAYBROOK,
PRESIDENT, PUBLIC CITIZEN

Petition for Reconsideration Filed with the Federal Motor Carrier Safety Administration Regarding the Order Issued on Hours of Service of Drivers; Final Rule 249 CFR Parts 385, 390, and 395 70 *Federal Register* 49977 et seq., August 25, 2005

This is a petition for reconsideration of the final rule promulgated by the Federal Motor Carrier Safety Administration (FMCSA) establishing the hours of service (HOS) for drivers of commercial motor vehicles (CMVs), published at 70 FR 49977 *et seq.* (Aug. 25, 2005) (“2005 final rule”). This petition is filed by Advocates for Highway and Auto Safety, Citizens for Reliable and Safe Highways (CRASH), the International Brotherhood of Teamsters (IBT), Parents Against Tired Truckers (P.A.T.T.), Public Citizen and Trauma Foundation, pursuant to 49 C.F.R. Part 389.35 (Oct. 1, 2004). Petitioners delineate below the numerous reasons why major aspects of the 2005 final rule are not practicable, are unreasonable, and are not in the public interest.

I. Introduction

The rulemaking proceeding to adopt a revised hours of service (HOS) regulation suffers from a number of major shortcomings in terms of the approach taken by the FMCSA to address serious health and safety concerns for truck drivers and the public. In establishing the FMCSA as a safety agency for motor carrier operations,¹ Congress made it the fundamental goal of this new agency that it shall “consider the assignment and maintenance of safety as the highest priority, recognizing the clear intent, encouragement, and dedication of Congress to the furtherance of the *highest degree of safety* in motor carrier transportation.” 49 U.S.C. § 113(b) (2004) (emphasis added). Safety is the paramount mission of the FMCSA. While the agency has inherited pre-existing requirements that obligate the agency also to consider the costs and benefits that its regulations may impose on the trucking industry and the public in the course of rulemaking, the touchstone of the agency mission remains and must be public safety and the safety of the truck drivers it regulates.

Nevertheless, throughout the preamble of the 2005 final rule, the agency repeatedly cites its general obligation to pursue benefit/cost analysis while submerging its specific mission to ensure public safety to second rank importance. Time and again the preamble to 2005 final rule cites the economic efficiencies that benefit the trucking industry as outweighing the safety costs that will be borne by the public. In every instance where safety and economic burdens are balanced, the agency has opted to choose economic productivity of the trucking industry instead of determining the issue in favor of public safety. The determinations made in the 2005 final rule are openly contrary to the agency’s mission and highest priority, and should be reconsidered.

In addition, the FMCSA’s approach to its evaluation of the relevant data and research amounts to a misuse of the scientific evidence in the administrative record. Admittedly, the agency has an onerous task of reviewing and assessing the validity of numerous research reports and studies from various fields of sleep science, medicine, and environmental health, as well as many types of other data. While no small task, the agency must accomplish this obligation fairly and evenhandedly. It is evident, however, that the only studies that the agency finds to be accurate and credible are those that reinforce the agency’s previous and preexisting view, embodied in the existing HOS regulation adopted April 28, 2003 (68 FR 22456) (“2003 final rule”).² Studies that disagree with the agency determinations in the 2003 final rule are faulted, distinguished, and otherwise found wanting in the 2005 final rule. Yet, studies with similar faults or shortcomings that support the agency’s previous position are nevertheless found to be credible and are relied on by the agency to justify the 2005 final rule. The agency has carefully cherry-picked the relevant research in order to find support. The body of scientific and medical research that does not support the agency determinations in this rule is substantial and cannot readily be dismissed. The agency should reconsider its selective use of the applicable studies and place more weight on the need for prudence and caution in regard to public safety. Even where the agency states that the research evidence is unclear, not conclusive, or divided, the agency discards any countervailing science and research findings and unerringly determines that its prior policy choices in the 2003 final rule should be sustained. In light of the massive amount of evidence that does not support the

¹ Motor Carrier Safety Improvement Act of 1999, Pub. L. 106–159, Title I, § 106 (Dec. 9, 1999).

² Except for regulatory modifications to the provisions governing short-haul drivers and sleeper berth use, the 2005 final rule is identical to the 2003 final rule.

agency's conclusions, and given the agency's mission to uphold safety as its highest priority, the results of FMCSA's review of the scientific evidence in the record is unfair and heavy-handed, and its final rule consistently places a thumb on the side of the scale for industry productivity in order to outweigh any safety benefits or to dismiss adverse safety impacts.

This petition for reconsideration demonstrates that the FMCSA has not justified the main features of the HOS regulation contained in the 2005 final rule in several major respects, including the failure to adequately explain and justify: the dangerous consequences of the dramatic increases in potential exposure to adverse health impacts commensurate with the much longer working and driving hours over 7 and 8 consecutive calendar days; the addition of an 11th hour of consecutive driving time in each shift; the adverse safety impacts of the much longer cumulative working and driving hours; adoption of only a 34-hour off-duty restart period; permitting a 21-hour rearward rotating shift schedule; the determination to allow a shift work limit of 16 hours for short-haul drivers for any two (2) days in a weekly tour of duty; and the deferral of rulemaking for time-certain action on the adoption of Electronic On-Board Recorders. A number of other issues including the assumptions used in the agency's regulatory impact analysis are also specifically addressed in this petition.

II. Misuse of Data

In its explanation of the 2005 final rule, FMCSA cites a number of sources for relevant information and data for the nearly identical rule that is, on an interim basis, already in effect as a result of the 2003 final rule. Much of this information is anecdotal, self-reported, unscientific, biased, or inapposite, and cannot be relied on by the agency as the basis for promulgating this final rule. The agency, nevertheless, invokes these sources in the preamble of the final rule in order to produce an avalanche of pseudo-factual information tending to support the determinations in the final rule.

Among these efforts, FMCSA attempts to foster acceptance of an improved safety record of drivers and motor carriers occurring in the first three-quarters of 2004 as compared with the first three-quarters of 2003 as somehow evidencing the positive influence of the January 2004 implementation of the 2003 final rule in reducing fatigue-related crashes. Although the FMCSA ultimately rejects reliance upon carrier-reported information that supposedly shows lower crash rates in 2004 following the January implementation of the final rule, *id.* At 50010, it nevertheless relies upon a comparison of allegedly favorable crash figures from the Fatality Analysis Reporting System (FARS) showing that over the first 9 months of 2004, fatigue-related crashes declined 11.8 percent from 1.7 percent to 1.5 percent in 2004.

The attempt to invoke fatigue-related truck crashes in the year of initial implementation of the 2003 final rule is clearly inappropriate and cannot be relied on by FMCSA for several reasons and, accordingly, can form no part of the agency's failed effort to justify the 2005 final rule.

First, the agency itself has provided a previous, extended discussion of why fatigue-related crash reporting by police as entered in the FARS data system is unreliable. In fact, the agency itself, because of the unreliability of police accident reports (PARs) that code the presence of fatigue, augmented its estimate of fatigue-related crashes by the use of other methods to reach a much greater quantified fatigue contribution to fatal fatigue-related crashes in the 2000 HOS Notice of Proposed Rulemaking (NPRM) and in its accompanying *Preliminary Regulatory Evaluation and Regulatory Flexibility Act Analysis (PRE)*³:

There are a number of difficulties police face in determining whether fatigue contributed to an accident. First, the responding officer's primary concern is assisting accident victims and restoring the flow of traffic. Investigating the causes of the accident is often a second (or lower) level concern. Second, few officers are trained in accident reconstruction, and they therefore do not have the training to conduct a detailed investigation of the physical and mechanical evidence. Therefore, many police officers must rely on eyewitness and other oral evidence.

This results in an additional problem. By the time an officer interviews surviving crash-involved drivers, any signs of fatigue are likely to have worn off. The stress of the crash produces an adrenaline surge, eliminating any traces of fatigue and in fact enhancing the drivers [*sic*] sense of alertness and awareness and acuity, at least for the short term.

³ *Preliminary Regulatory Evaluation and Regulatory Flexibility Act Analysis*, Notice of Proposed Rulemaking, 65 FR 25540 *et seq.*, May 2, 2000, Docket No. FMCSA-1997-2350.

PRE at 21.

The FMCSA points out that FARS data coders “must rely on the original police accident report[,]” but that “[f]atigue, of course, is particularly difficult to assess, even with in-depth investigations, since there is no physical evidence of fatigue. The assessment is usually based on statements of the involved parties or witnesses.” *Id.* at 25.

Furthermore, the agency argues that fatigue crashes are probably underestimated because it may often play a less direct role in triggering a crash given the fact that “a sizable literature demonstrates that fatigued individuals are prone to a variety of mental and physical errors[,]” including studies that show that cognitive functions of tired drivers are more compromised than their physical performance. *Id.* at 22. This indicates that other errors indicated on a PAR may be also due to fatigue because this impairment produces low vigilance or alertness. *Id.*

This evaluation led the agency to emphasize “the magnitude of the fatigue problem, and demonstrate the substantial differences in estimates of the size of the problem.” *Id.* at 25. The FMCSA then reviewed research literature and other data sources, which led the agency to regard the PARs-based annual fatigue-related crash data in FARS as an underestimation of its contribution to truck fatal crashes. *Id.* at 24–30.

Most analysts believe that the incidence of fatigue-related crashes is higher than the 2 percent figure from the PARs, and many put the true figure well above the 2.8 to 6.1 percent range presented in table 14. As noted above, fatigue increases the likelihood that drivers do not pay sufficient attention to driving or commit other mental errors. * * * [I]n-depth studies of crashes have found that inattention and other mental lapses contribute up to 50 percent of all crashes. While fatigue may not be involved in all these crashes, it clearly contributes to some of them. *We estimate that 15 percent of all truck involved fatal crashes are ‘fatigue-relevant’, that is, fatigue is either a primary or secondary factor.*”

Id. at 30 (emphasis supplied).

The agency essentially halved this figure in the 2003 final rule, primarily because the reduction in the percentage of fatigue-related fatal crashes aided its benefit-cost analysis, by enabling the industry’s productivity gains overwhelm the increase in both the relative and absolute risk of fatigue-related crashes that result from extending driving shift each day from 10 to 11 consecutive hours. *See, e.g., Regulatory Impact Analysis and Small Business Analysis for Hours of Service Options*, Federal Motor Carrier Safety Administration, December 2002, at 8–10 to 8–15. Nevertheless, this estimate still relied upon sustained agency doubts about the accuracy of PARs-based FARS fatigue-related crash figures (*id.* at 8–10) and, therefore, FMCSA augmented the low figures of FARS-reported fatigue crash data with the addition of crashes due to the influence of fatigue on driver attention, for example. *Id.* at 8–14. As a result, the agency reduced its estimate of fatigue-related fatal crashes from its figure in the 2000 NPRM by adding inattention/fatigue inattention crashes to FARS fatigue-only figures, modified by data from the Motor Carrier Management Information System, and arrived at an average of 8.15 percent of fatal truck crashes due to fatigue.⁴ *Id.*

⁴Petitioners repeat here their longstanding disagreement with the FMCSA’s efforts to reduce the impact of fatigue in its contribution to large truck crashes, including fatal crashes, by relying on manipulation of FARS coded information on fatigue. In the RIA, the FMCSA states that it used FARS, but that the database “was edited to eliminate records on individual crashes where key data were missing, and also where primary, fault appeared to lie with other vehicles (not trucks) involved in the crash, and with certain hazardous weather conditions.” RIA at 43. In combination with an addition of inattention crashes, whose representation in the final calculation of 8.15 percent of fatal large truck crashes of 20 percent also is not shown by other than conclusory statements, the agency arrived at the fatigue factor used as the platform for its calculation of safety costs and benefits.

The agency has previously rejected as a matter of record the assignment of fault to other drivers based on FARS codes. *See, Motor Carrier Safety Analysis, Facts, & Evaluation (MCSAFE)*, 2:I (October 1996), 2:II (November 1996). Moreover, even studies invoked and relied on by the agency make it clear that raw FARS coded data cannot be used to judge which vehicle initiated a maneuver leading to a two-vehicle crash between a large truck and a passenger vehicle. The Research Analysis Brief published by the Federal Highway Administration, *Driver-Related Factors in Crashes between Large Trucks and Passenger Vehicles*, FHWA-MCRT-99-011, April 1999, admits that the extent to which the drivers of the trucks and of the cars were both able to accurately describe events to investigating officers following the fatal crashes is unknown. Moreover, the agency admits that only one-half of the fatal crashes between one large truck and one passenger vehicle even has any physical evidence about each vehicle’s maneuver and physical position prior to the crash for supporting assignments of FARS driver codes. *Id.* at 4. As

Consequently, it is patent that the agency cannot claim an improvement in fatigue-related fatal crashes based only on a 9-month data change of 2003 to 2004 unadjusted FARS figures by assuming a far higher contribution to fatigue in its preamble to this final rule and in its accompanying RIA. In fact, the agency dismisses reliance on this early FARS data in the preamble of the instant final rule: “Although this data suggests that fatigue-related crashes have fallen since the 2003 rule became effective, *this newer data is mostly preliminary, self-reported without statistical controls, and also reflects small sample sizes, all of which—once again—sometimes leads to inconsistent findings.*” 70 FR 49981 (emphasis supplied). Moreover, the agency further negates its own case for this claimed improvement in fatigue-related crashes in 2004: “It is impossible to definitively link a specific provision of the 2003 rule with the improved safety performance during 2004.” *Id.* at 50013.

It therefore is clear that the FMCSA cannot invoke a comparison of unadjusted, preliminary FARS figures of part of 2004 with part of 2003, figures which the agency itself acknowledges constitute a chronically underreported incidence of fatigue-related crashes, to claim somehow that the final rule implemented in January 2004 has led to a reduction in fatal fatigue-related crashes.

III. FMCSA Should Reconsider the Determination That a Substantial Increase in Allowable Driving and Working Hours in the Final Rule Will Have No Adverse Health Impacts On Truck Drivers

Although this 2005 final rule, as was the case with the 2003 final rule that preceded it, allows drivers to accumulate far more working and driving hours than permitted under the pre-2003 regulation (49 CFR Pt. 395 (Oct. 1, 2002)), the agency nevertheless has concluded that the much greater potential exposure by drivers operating CMVs⁵ to a variety of health threats, including diesel emissions, “does not have a deleterious effect on the physical condition of drivers.” 70 FR 49981. The FMCSA reaches this conclusion on the basis of three major considerations, none of which withstands close scrutiny.

First, the agency claims that, although there are far longer working and driving hours permitted by the 2005 final rule,⁶ the potentially very large increase in exposure to health insults and pathologies such as diesel emissions, diabetes, cardiovascular disease, and whole body vibration will not be correlated with increased health risks in these areas because of a lack of definitive studies demonstrating conclusive, direct causal relationships between exposure (the dose) and the severity of the adverse health impact (the response),⁷ including those studies reviewed by the Transportation Research Board’s special committee empanelled to perform a health literature review (TRB Health Panel).⁸ Accordingly, FMCSA claims it cannot quantify health risks to drivers in connection with the larger number of driving and working hours permitted by the final rule, and therefore cannot conclude that fewer hours working or driving would reduce the health risk of exposure to diesel emissions, for example, which, in turn, would reduce the incidence of cancer in CMV drivers. *Id.* at 49986. In this connection, the agency also dismisses even credible epidemiological studies because “[e]pidemiological studies can never prove causation; that is, they cannot prove that a specific risk factor actually causes the disease being studied.” *Id.* at 49982. However, FMCSA later concedes that “[s]tudies show a causal relation-

a result, FARS coders are relying on PAR indications of the presence of fatigue that often are the product of a surviving party—usually the truck drivers—interviews that may not reveal the presence of fatigue, as the agency itself has acknowledged during this rulemaking. PRE at 21, 25.

⁵ Since the 2005 final rule includes, as in 2003, an exemption for motor coach drivers, who continue to operate under the pre-2003 HOS regulations, this petition applies only to HOS regulation of truck drivers.

⁶ The FMCSA describes these dramatic increases in driving and working hours under the new HOS regulation in only one section of the preamble, 70 FR 50021–50022, and again in the accompanying Regulatory Impact Analysis. In the 2005 NPRM, the Agency explained that the re-start provision:

provides an opportunity for increases in the total hours of permissible on-duty time in a 7-day period, after which a driver may not drive a CMV, from 60 hours to 84 hours. It also provides an opportunity for increases in the total hours of permissible on-duty time in an 8-day period, after which a driver may not drive a CMV, from 70 hours to 98 hours and, [sic] provides an opportunity for increases in the maximum driving time permitted in an 8-consecutive-day period (from 70 hours to 88 hours). 70 FR 50021.

⁷ See, *id.*, at 49988–49989 for this agency argument with respect to cardiovascular disease.

⁸ CTBSSP Synthesis 9: Literature Review on Health and Fatigue Issues Associated with Commercial Motor Vehicle Driver Hours of Work (TRB Health Panel), Transportation Research Board, National Academy of Sciences, August 9, 2005, FMCSA Docket No. 2004–19608–2084, filed August 10, 2005.

ship between exposure to diesel emissions and lung cancer,” *id.* at 49985, and that the National Institute for Occupational Safety and Health (NIOSH) “review [submitted to the docket] generally concluded that long work hours appear to be associated with poorer health, increased injury rates, more illnesses, or increased mortality.”⁹ *Id.* at 49989.

This stance by the agency—rejecting all relevant health-related literature whose weight overwhelmingly links increased exposure to specific health risks with increased numbers and percentages of workers suffering disease, injury, and death—is both imprudent and countermanded by the agency’s own contracted TRB Health Panel review of relevant health literature. Although that review radically reduced the number of research studies subjected to specific written evaluation in the previously cited TRB Health Panel review,¹⁰ even the 25 health-relevant studies that were summarized in the Synthesis provided the basis for the Health Panel to find that:

- Lung cancer is likely caused by exposure to diesel exhaust and *the longer that exposure lasts the more likely it is that a cancer will develop*. Though the evidence linking this exposure to bladder cancer is less robust than that to lung cancer, *it remains likely that there is such a relationship and that it is governed by a positive dose-response curve*.
- There is some evidence that cardiovascular disease is caused in part by truck driving and *its risk increases with the duration of this activity and the disruption of the sleep cycle*.
- Based on exposure assessments, *noise-induced hearing loss could well be a result of a working lifetime as a driver, * * **
- *There are several studies available . . . that contain objective evidence of vertebral pathology related to an occupation as a professional driver. In conclusion, the available data support the hypothesis that there is likely a causative relationship between professional driving and a variety of vertebral disorders as well as LBP [Low back pain] syndrome.*¹¹

It is clear, then, that, in the best judgment of the TRB Health Panel members charged by the FMCSA with reviewing health literature relevant to the health risks of CMV driving, the preponderance of the evidence in the research literature reviewed shows an association between the amount of exposure to certain specific health insults and the level of injury and disease incurred by commercial drivers. This finding is not directly engaged by the FMCSA anywhere in the final rule or in the Regulatory Impact Analysis (RIA).¹² In fact, the latter document takes no quantitative notice of the benefits and costs of raising the number of driving hours over 8 consecutive calendar days from 70 hours under the old rule to 88 hours under both the 2003 and 2005 final rule, and the amount of working hours over 8 consecutive calendar days from 70 under the old rule to 98 under both the 2003 and 2005 final rules. The increase in available driving hours over 8 consecutive days through the maximum use of the agency’s 34-hour “restart” provision is *28 percent more* than under the pre-2003 HOS regulation and, similarly, the increase in available total working hours over 8 consecutive days is *40 percent more* than under the pre-2003 regulation. This policy choice therefore subjects drivers to dramatically increased amounts of risk exposure to several serious and identified health threats.

⁹ However, the agency attempts to blunt this overall NIOSH finding by pointing out that the NIOSH review concluded that the relation between long working hours and health is uncertain from available studies. *Id.* at 49990.

¹⁰ The 6 members of the Health Panel assigned to evaluate health-related research publications found more than 1,850 articles, which were screened for actual review. Of that number, 55 articles were reviewed and, of that number, 25 articles were chosen for written summarization by one of the primary reviewers to be included in the synthesis “based on the validity of the methodology, the relevance of the studied population to truck driving, and the quality of the statistical analysis of health outcomes.” “CTBSSP Synthesis 9 . . . ,” *op. cit.*, at 8. Petitioners do not agree with the judgment of the Health Panel that many of the studies excluded from written review are not directly relevant to the issue of adverse health impacts on CMV drivers, particularly those studies that were excluded on the basis that the study population was not relevant to the health impacts of long working and driving hours on CMV drivers.

¹¹ *Id.* (Emphasis added). The TRB Health Panel found less strong relationships in the reviewed health research literature between commercial driving and other musculoskeletal disorders, gastrointestinal disorders as related to differing shift assignments and circadian rhythm disruptions, separate adverse health impacts due to circadian shifts alone in working and rest schedules, and reproductive health.

¹² *Regulatory Impact Analysis and Small Business Impact Analysis for Hours of Service Options*, prepared by FMCSA and ICE Consulting, Inc., August 15, 2005.

The FMCSA disregards both the enormous weight of the research literature, as well as the professional conclusions of its own empanelled group of prominent health researchers on the TRB Health Panel, that several major areas of commercial driver health were increasingly subject to adverse impacts as the hours of working and driving also are increased above levels permitted by the pre-2003 HOS regulation. It is difficult to imagine a more imprudent posture assumed by an agency explicitly charged with protecting the health of CMV drivers and ensuring that its regulations do not have a deleterious effect on the physical condition of CMV drivers.

The agency's disregard of an enormous wealth of health literature showing the dangerous health effects of increasing the frequency or amount of exposure to disease mechanisms¹³ as well as the findings of its own TRB Health Panel permits an increase of driving hours over the pre-2003 HOS regulation from 10 to 11 and the abbreviation of the tour of duty "restart" time to only a minimum of 34 hours. This disregard of adverse health effects on drivers permits the agency in its RIA to purportedly show that productivity benefits to industry from having an extra, 11th, hour of driving in each shift and fewer hours off-duty at the end of a tour of duty than often obtained under the pre-2003 HOS regulation trump health and safety benefits of shorter consecutive driving hours and longer off-duty layovers before beginning another multi-day tour of duty.

The second tactic of FMCSA in this final rule to minimize both the adverse health impacts, and the safety impacts, of the much longer driving and working hours that it has allowed is to rely upon a snapshot of the trucking industry that uses small samples in the agency's own industry survey¹⁴ and drawn from other motor carriers' information,¹⁵ 70 FR 49984, to claim that the use of the larger number of working and driving hours in the 2003 final rule has been limited: "There is no indication that drivers are averaging more hours of work, as opponents of the 2003 rule had feared." *Id.* at 49981. Yet the agency's survey shows that 22.9 percent of over-the-road drivers exceeded 10 hours of driving, so the agency's own limited review shows that the motor carrier industry since the 2003 rule was fully implemented and enforced beginning in January 2005, has begun to use the 11th consecutive hour of driving in each shift.¹⁶

The final rule establishes minimum and maximum requirements for CMV driver HOS. As compared to the pre-2003 HOS regulation, the final rule permits drivers to drive 11 consecutive hours instead of 10, to rest for as little as just 34 hours between driving tours instead of having as much as 3 days or more off-duty at the end of a driving tour (for drivers who maximized the use of their driving time under the pre-2003 rule), and allows drivers who maximize their driving time per shift and tour of duty under this final rule to drive 17 additional hours in a 7-day driving tour and 18 additional driving hours in an 8-day driving tour. Having established by regulation increased maximum driving and working limits, as well as a reduced minimum off-duty time for each tour of duty, the agency cannot hide from the probable effect of these more taxing HOS limits on drivers' health. The agency is required to consider alternative implementation schemes with most or all drivers driving and working these permitted maximum hours while only taking the minimum off-duty time.

Since the 2003 and 2005 final rules adopt these limits, the agency cannot ignore the impact on drivers who avail themselves of the legal HOS limits. It is wholly inappropriate for the agency, having asserted that the rule changes are necessary to provide "flexibility" to the industry, to claim that few drivers will work to the HOS limits in the final rule and, therefore, that the final rule will have little or no impact on drivers. This posture is even less supportable when the agency simultaneously asserts that there will be large economic benefits to the industry from the same rule changes. Moreover, agencies do not generally engage in idle regulatory action that will have no practical effect. The "flexibility" which the agency claims is needed, and

¹³Many of the studies showing these deleterious health effects of longer working and driving hours have been entered into Docket No. 2004-19608 by the agency itself over the last year and a half.

¹⁴*Special Report—FMCSA Field HOS Survey: Motor Carrier Industry implementation & Use of the April 2003 Hours of Service Regulations*, Federal Motor Carrier Safety Administration, June 2005. The survey only reviewed the hours of 542 commercial drivers from 269 motor carriers for 2 weeks over the span of July 2004 through January 2005 by reviewing the drivers' log books or time records.

¹⁵The company data on hours worked drawn from motor carriers such as Schneider and J.B. Hunt are not susceptible of independent validation of their accuracy.

¹⁶Also see, the RIA at 19 where the FMCSA states the findings of a survey conducted by the Owner-Operator Independent Drivers Association (OOIDA) that member drivers were already driving 10 or more hours in more than 25 percent of their work days during the first year of the new, 2003 HOS rule.

which will reap significant economic benefits to the industry, can only be of benefit if drivers are in fact driving and working the longer permissible hours, and taking fewer rest and off-duty hours. Indeed, regardless of the reliability of the information, FMCSA reports that in less than 1 year over one-fifth of drivers are already using the expanded HOS regime. This is precisely what the FMCSA intended in adopting the final rule. The agency must fairly confront and reasonably address the likely impacts to the health of drivers who avail themselves of its rule changing the HOS maximum driving and work hours and minimum off-duty time.

It is clear on its face that there is no reasonable basis to expect and believe that the enormous U.S. trucking industry has evolved to full use of the new 2003 HOS regulation in a single year. The agency's own citation of the driver survey conducted by Campbell and Belzer that drivers self-reported working on average 64.3 hours per week, a figure combining both 7-day (60 hours) and 8-day (70 hours) tours of duty permitted by the pre-2003 HOS regulatory regime. This survey, and many other comparable surveys, over the years have shown that long-haul, over-the-road drivers have made nearly maximum use of available driving hours and, because the pre-2003 HOS rule allowed an extension of working time beyond the 15 hours limit in each shift if the driver did not then resume driving,¹⁷ maximum use of the flexible working hours that were allowed.

Furthermore, there is a contradiction between the preamble statements that repeatedly play down the industry's likely use of the maximum available, increased number of both working and driving hours over 7 or 8 consecutive days, as well as the additional, 11th hour of driving provided by the 2003/2005 final rules and the agency's statements in its RIA. The FMCSA attempts to foster acceptance at multiple points in the preamble to this rule that the future of the trucking industry's use of the increased available driving and working hours will, for some unknown reason, reflect only the amounts used during 2004, that "[t]he theoretical availability of many more driving and on-duty hours under the 2003 rule is largely irrelevant[.]" *id.* at 50005, and that "[t]here is no reason to believe that a full 11 hours of driving will ever become the standard for the industry." *Id.* at 50010. However, the agency assumes in the RIA a very different view of the potential for increasingly intensive use of these dramatic leaps in the number of available driving and working hours.

In that RIA, the FMCSA relies on information drawn from Schneider, the Owner-Operator Independent Driver Association (OOIDA) survey, the agency's field survey of only 542 drivers, and the Prof. Burks survey to strike the positive note that "the 11th hour is definitely being used." RIA at 2-24. Similarly, the agency emphasizes that the industry is still evolving in its use of the 11th, additional hour of consecutive driving time and that "many of the responding companies . . . may be building the 11th hour into their schedules," and that "[s]ome of the information from the Edwards interviews tells us that LTL [less than truckload] managers are now planning some runs that use the 11th hour. This would occur, for example, when a company finds that use of the 11th hour would bring one or more additional terminals within the overnight reach of a given terminal." *Id.* In fact, the agency expresses its optimism that the use of the 11th, additional hour of consecutive driving will expand: "[A]s the 11th hour of driving becomes more incorporated into normal operations in the future, we believe its use much more likely to increase rather than decrease." *Id.* at 6-77. This position in the RIA contradicts the preamble of the final rule and acknowledges that carrier operations will evolve to utilize the additional hour of consecutive driving. In fact, the agency goes out of its way to show how much more strongly productivity benefits for industry trump the safety Option 1 with a reduction in consecutive driving hours from 11 to 10 if carrier operations eventually utilize the extra hour: "If the use of the 11th driving hour doubled, Option 2 with 10 hours would become even less cost-beneficial relative to the original Option 2. Also note that even if the use of the 11th hour dropped, because the use of the 11th hour is cost-beneficial *regardless of how often it is used*, variation of this single assumption could never make the restriction of the 11th hour of driving cost-beneficial."¹⁸ *Id.* (emphasis supplied).

It is evident that the agency would like to have it both ways in this final rule: it relies on the considerable productivity gains triggered by the use of the additional 11th hour of driving that FMCSA allows in the 2005 final rule and yet also downplays in the preamble the potential increase in crash risk due to adding more driving hours by claiming that industry is not using—and will not use—the extra consecutive hour of driving. It is apparent that the agency, in fact, expects the

¹⁷Title 49 CFR 395.3 (Oct. 1, 2002).

¹⁸A summary statement of the considered regulatory options considered for costs and benefits is found in the RIA at ES-1-2.

trucking industry to evolve to a fuller use of the 11th hour of driving in the relatively near future, an action that undermines any unsupported suggestion that a single year of carrier operations under the new, 2005 version of the HOS rule that supposedly shows working and driving hours as similar to the pre-2003 regulatory regime, somehow means that industry will never take full advantage of the expanded HOS permitted by the 2005 final rule.

Accordingly, the agency's effort to assert that the 2005 final rule is health-neutral fails. Not only has the agency dramatically increased the number of hours commercial drivers can be exposed to diesel emissions, noise, and driving and working demands that, with such increased exposure, commensurately increase the risk of cancer, cardiovascular disease, and vertebral disorders, but its futile effort to convince the public that the trucking industry will not modify or expand its operations to increasingly take advantage of the enormous number of additional hours of work and driving made available by the 2005 final rule is nothing more than an unsupported pronouncement.

IV. The Regulatory Impact Analysis (RIA) Is Flawed and Does Not Support the Determinations Made in the Final Rule

FMCSA attempts to justify some of the main features of the 2005 final rule by relying on the benefits-cost analysis in the RIA. The RIA contains fatal errors and it fails altogether to model key features of the new final HOS regulation that are not justified anywhere in either the preamble of the final rule or in the RIA itself.

A. The RIA Does Not Model the 14-Hour Work Shift

The RIA fails to model and monetize the safety costs and benefits of a 14-hour work day shift. Instead, FMCSA models and quantifies only the effects of the incremental increase in driving hours allowed in each shift from the prior maximum of 10 hours to the 11 hours allowed under both the April 2003 and August 2005 final rules. The agency does not believe that the effects of work demanded of drivers apart from the driving task have time-on-task effects on driver fatigue, alertness, and performance during the work day due to such activities as loading and unloading. However, the agency itself contracted for and reported on the fatiguing effects of the additional work required of drivers and how the additional work impacts the ability of drivers to perform safely when actually operating their commercial motor vehicles.¹⁹

FMCSA is on record as conceding that time-on-task fatigue effects accrue not just from driving, but from the adverse impact on alertness and performance from all the duties and work performed by a driver over the course of a daily shift.²⁰ Furthermore, it recognizes that the effects of total time on duty directly impact the amount of driver fatigue in the preamble of the final rule: "[C]ontinuous daily wakefulness is among the strongest predictors of fatigue, and the Agency's best judgment indicates *it outweighs driving time as a predictor of fatigue.*" 70 FR 50038. If total duty time is the yardstick for the measuring the production of fatigue among truck drivers, then the FMCSA was duty bound to model and quantize its effects on driver alertness and performance both when driving and performing other tasks during each shift. Yet the RIA contains no benefit-cost analysis of allowing 14 hours of work each day that includes both a maximum of 11 hours of consecutive driving and 3 hours of other duty time.

¹⁹ See, e.g., T. O'Neill, et al., *Effects of Operating Practices on Driver Alertness*, 1999.

²⁰ The rulemaking record is so heavy with citational support for the fatiguing effects of total shiftwork time-on-task, and not just accrued driving time in each shift, that one reference should suffice that was produced by the FMCSA itself with multiple research studies cited in support:

The research suggests that performance degrades and crash risk increases markedly after the 12th hour of *any duty time* during a work shift (Hamelin (1987); Brown (1994); Campbell (1988); Rosa and Bonnet (1993); Rosa (1991); Rosa et al. (1989); Harris and Mackie (1972); Mackie and Miller (1978); U.S. Army (1983); Transportation Research and Marketing (1985)). 65 FR 25540, 25556 (emphasis supplied).

Moreover, the effects of total time-on-task and their palpable effects on worker and driver alertness and performance were documented with extensive support in Advocates' 1997 docket submission dated June 30, 1997, to the agency's advance notice of proposed rulemaking Docket No. FMCSA-1997-2350 and in our 2000 docket submission dated December 15, 2000, to the agency's notice of proposed rulemaking in FMCSA Docket No. 1997-2350. Both sets of Advocates' docket comments are incorporated by reference in their entirety in this petition for reconsideration.

B. The RIA Does Not Take Into Account Cumulative Increases in Driving and Work Hours Permitted Under the Final Rule

FMCSA completely ignores a quantified assessment of the costs and benefits of dramatically increasing cumulative truck driver hours of service for both work and driving under both the 2003 and 2005 final rules. That increase in total cumulative working and driving hours is mentioned once in the RIA (but discarded for analysis)²¹ and mentioned with quantitative information in only one place in the preamble of the 2005 final rule where the agency states explicitly that the use of the restart provision:

Provides an opportunity for increases in the maximum driving time permitted in a 7-consecutive-day period (*from 60 to 77 hours*). Likewise, the restart provision provides an opportunity for increases in the total hours of permissible on-duty time in an 8-day period, after which a driver may not drive a CMV, *from 70 hours to 98 hours* and, [*sic*] provides an opportunity for increases in the maximum driving time permitted in an 8-consecutive-day period (*from 70 hours to 88 hours*).

70 FR 50021 (emphasis supplied). Also *see, id.*, at 50022.

FMCSA cannot argue that it was not reminded by its own contracted researchers about the importance of cumulative fatigue and the need to take it explicitly into account in its evaluation of the effects of longer driving and working hours in both the 2003 and 2005 final rules. On the very first page of the Trucks In Fatal Accidents study produced by Kenneth Campbell for the agency, the author asserts that, “[b]ased on the study of fatigue in other industrial settings, there are three factors that produce fatigue:

- Time on task
- Time of day (circadian component)
- Cumulative fatigue”²²

Similarly, the FMCSA itself acknowledges the findings of the preliminary reports of Jovanis *et al.* (2005) that, “[t]hrough time-dependent logistic regression modeling, the study found a pattern of increased crash risk associated with hours of driving, particularly in the 9th, 10th, and 11th hours, and *multi-day driving*.”²³ 70 FR 50021. Similarly, Dingus *et al.* found in their evaluation of the adverse effects of sleeper berth use that critical incidents of solo drivers began to mount after the second and third shift over a multi-day driving bout due to the evident impact of cumulative fatigue that was not being eliminated with sleeper berth use.²⁴

The FMCSA might be tempted to claim that it addressed cumulative fatigue in the RIA because of its consideration in the cost-benefit analysis of two other, longer restart periods (Option 3: 58 hours; Option 4: 44 hours, RIA at ES-1), but that effort would fail because the purpose of the exercise had nothing to do with modeling and quantifying the safety costs and benefits of the longer cumulative working and driving hours allowed by the 2005 final rule. Instead, the agency wanted to demonstrate lower productivity benefits for the trucking industry that would occur with a longer restart period. A longer restart interval would result in drivers accruing fewer working and driving hours over 7 or 8 consecutive days. FMCSA also wanted to show that longer restarts do not supposedly result in improved sleep for commercial drivers. This is made clear by the agency’s eagerness in Section 6 of the RIA to show that a shorter 34-hour restart period produces these larger number of working and driving hours over the same 7 or 8 consecutive calendar days, allegedly without any

²¹“Also the data do not include any information on the driver schedule over a longer period than the shift in which the crash took place. Thus, it is not possible to determine if cumulative fatigue may have been a factor.” RIA at 44. With a single reference to a lack of data collected by Kenneth Campbell and the University of Michigan Transportation Research Institute (UMTRI), FMCSA cannot evade its burden to model the much greater working and driving hours permitted by both the 2003 and 2005 final rules due to the application of the 34-hour restart provision that created a sea change in HOS regulation by ending the use of a fixed work week of either 7 or 8 days and, instead, installing a “floating” work week which permits commercial drivers and motor carriers to dramatically expand the number of both driving and working hours over 7 or 8 consecutive calendar days.

²²Kenneth Campbell, *Estimates of the Prevalence and Risk of Fatigue in Fatal Crashes Involving Medium/Heavy Trucks from the 1991–2002 TIFA Files*, Final Report, August 2005 (“TIFA Report”).

²³P. Jovanis, *et al.*, *Crash Risk and Hours Driving: Interim Report II*, Pennsylvania Transportation Institute, Penn State University, April 15, 2005 (hereafter Jovanis Report).

²⁴T. Dingus, *et al.*, *Impact of Sleeper Berth Usage on Driver Fatigue*, Final Report FMCSA-RT-02-070, 2002. Also *see*, <http://www.fmcsa.dot.gov/facts/-research/briefs/Sleeper-Berth-Technical-Briefing.htm>.

detrimental effect on drivers' ability to get sufficient sleep as compared with the longer minimum restart periods of Options 3 and 4.²⁵

C. The RIA Does Not Use the Pre-2003 Regulation as the Baseline for Assessing Costs and Benefits

Finally, the agency's entire effort to justify its 2005 version of the HOS final rule fails at the threshold because it has chosen the wrong regulation as the baseline for analysis of the four regulatory options premised in the RIA. Although it is true that the agency reviews portions of the 2003 final with regard to the 10-hour driving maximum, the agency essentially imposes the 2003 regulation as the analytic baseline for its benefit-cost analysis. For example, the FMCSA considers two variations of the 34-hour restart provision that will allow longer layover periods before starting a new tour of duty, but fails to directly model and quantitatively assess costs and benefits of the new rule with its much longer working and driving hours in comparison with the pre-2003 rule.

Instead, the FMCSA picks only two main features of the 2003/2005 final rules, the 11th consecutive driving hour and the 34-hour restart provision, and then constructs strawman arguments to show that no benefits analysis, no matter how extreme, can justify a return to only a maximum of 10 consecutive hours of driving and an expansion of the restart provision beyond 34 consecutive hours off-duty. As a result, the RIA of the 2005 final rule is a chimera—a strange hybrid of selected features of the 2003 final rule commingled with selected features of the pre-2003 final rule. Yet FMCSA fail to directly compare the August 2005 HOS final rule with the pre-2003 HOS regulation that includes, among other things, a fixed work week, no restart provision, and far lower total working and driving hours allowed over 7 and 8 consecutive calendar days. This bizarre exercise does not fulfill the agency's burdens to justify the 2005 final rule in comparison with the pre-2003 baseline regulatory regime.

The FMCSA, as already discussed above, attempts to dismiss the impact of this enormous increase in available total working and driving hours over 7 or 8 consecutive calendar days by appealing to information about carrier and driver practices during the first year of the implemented 2003 rule—information that cannot be independently corroborated.²⁶ This information purportedly shows that motor carriers and drivers are only partially availing themselves of these additional working and driving hours in the first year of the rule after full implementation in January 2004. However, a FMCSA snapshot of an evolving industry during its first year of operating under a dramatically different HOS regime cannot be used to predict what and how the trucking industry will change to accommodate the economic benefits of much longer working and driving hours in succeeding years. In fact, the agency has no support whatever in the rulemaking record for its pretense of being able to forecast the future operations of the trucking industry under the 2005 final rule. However, if the agency believes that the industry will not change under the greatly expanded hours of work and driving that it has permitted by the 2005 final rule, then it cannot rely on the claims and quantification of improved productivity benefits to industry that it makes repeatedly in the RIA by invoking exactly the increased use of these dramatically increased hours that it is at pains to deny in the preamble of the final rule will ever occur.

V. FMCSA Should Reconsider the Additional, Eleventh Hour of Consecutive Driving in Each Shift

In this final rule, the FMCSA attempts to show that the safety effects of the 11th hour of driving are relatively minor, and, moreover, those adverse safety impacts are outweighed by the productivity benefits of the extra hour of driving. 70 FR at, e.g., 50012; RIA, Secs. 5 and 6. Basically, the agency attempts to convince readers that drivers are still well-rested and therefore able to drive the longer consecutive hours in each shift. However, the record includes startling results from the Hanowski *et al.* (2005) study²⁷ that drivers were receiving only an average of 6.28

²⁵ And, again, the FMCSA tries to have it both ways by showing the productivity benefits that result when the 34-hour restart provision is reduced close to the minimum layover time, and yet also attempt to argue that drivers are often taking far more time off than just the minimum of 34 consecutive hours. See, 70 FR 50022.

²⁶ The actual data and methods of collection for the various contractor and motor carrier company data relied on by the agency are not in the rulemaking record for evaluation of their accuracy by the public.

²⁷ R. Hanowski, *et al.*, *Assessment of the Revised Hours-of-Service Regulation: Comparison of the 10th and 11th Hour of Driving Using Critical Incident Data and Measuring Sleep Quantity Using Actigraphy Data*, Virginia Polytechnic University, June 2, 2005, transmitted under cover

hours of sleep, the “approximately 6 hours of sleep” that the agency itself is forced to acknowledge from the research means that drivers under the 11 hours regime are chronically sleep deprived. This petition sets forth elsewhere (*see*, below, Section VII) the tortured—and self-contradictory—rationalizations that the FMCSA offers to lower the bar for the required amount of sleep from 8 hours, to 7 hours, to nearly 6 hours as adequate for ensuring driver health, expunging sleep debt, eliminating fatigue, and restoring performance.

Because the RIA contains a fuller explanation, the following discussion will analyze the RIA’s conclusion that productivity benefits trump any reduction of consecutive driving time from 11 to 10 hours. According to the RIA, this is true even if one assumes, for example, that the contribution of fatigue to fatal truck crashes was far higher than the 8.15 percent assumed in both the 2003 and the 2005 final rules, and the capital value of a life in calculating the number of additional lives saved from moving from an 11 to a 10 hour limit on consecutive driving is effectively tripled. RIA at 6–77–78.

Apparently, the agency believes that it has decisively shown that an extra hour of consecutive driving time trumps any claim to the superior safety benefits of reducing driving time by an hour. However, the agency repeatedly undermines its own argument for the central reliability it places on the TIFA Study that it contracted for with Kenneth Campbell of the Oak Ridge National Laboratory.²⁸

The TIFA Report claims to show that the relative risk of a fatigue-related fatal truck crash begins to increase at a rapid rate from the 6th hour of consecutive driving time until, at the 13th or greater number of hours of driving, the risk has effectively increased by 14 times in comparison with the relative risk at the completion of 6 hours of driving. TIFA Report, Figure 9 and accompanying narrative, at 12. At the 10th hour of driving, there is a 2.63 percent contribution of fatigue to fatal crashes, and a 4.71 percent fatigue contribution to the relative risk of fatal crashes after 11 hours of driving. This is a startling 79 percent jump in relative risk from increasing consecutive driving time by only 1 hour.

It is clear that the agency’s benefit-cost analysis stands or falls on the use of the TIFA data, as modified by preliminary data from the Large Truck Crash Causation Study (LTCCS). However, the sleep model, including the TIFA data, is not reliable on several counts in light of the agency’s own caveats about their uncertainty.

The agency uses the Walter Reed dose-response (sleep restriction) model to quantify the effects of fatigue.²⁹ RIA at 5–41. That model, however, does not rely on actual vehicle operational data but rather on driver performance in driving simulators as well as performance on a Psychomotor Vigilance Test (PVT).³⁰ Most importantly, the Walter Reed study has no time-on-task considerations. A small sample group (50 subjects) of commercial drivers were controlled and monitored simply for the different amounts of sleep they obtained and how different groups with different amounts of sleep performed on a PVT test and in a driving simulator, as well as how much sleep was needed by subjects in the different groups to recover from varying amounts of sleep restriction.³¹

To remedy the lack of a time on task (TOT) multiplier to account for increases in relative risk as the hours of consecutive driving mount for a CMV operator, the FMCSA uses the TIFA relative risk calculations of the Campbell 2005 study (TIFA Study) and considered the additional hour-by-hour relative risk calculations drawn from the uncompleted FMCSA-contracted study by Paul Jovanis.³² Jovanis’s study

letter dated July 11, 2005, to the FMCSA, entered into Docket No. FMCSA–2004–19608 on August 16, 2005, as Entry #2089.

²⁸Kenneth Campbell, “Estimates of the Prevalence and Risk of Fatigue in Fatal Crashes,” *op. cit.*

²⁹Balkin *et al.*, *Effects of Sleep Schedules on Commercial Motor Vehicle Driver Performance*, DOT–MC–00–133, May 2000. Also *see*, the FMCSA Tech Brief MCRT–00–014, September 2000. (The study is incorrectly cited in the bibliography of the RIA with a 2004 publication date. RIA at SB–1.)

³⁰Advocates is already on record in several docket filings with the FMCSA about the unreliability of studies involving fatigue and alertness for workers, including vehicle operators, that use driving simulators to show any changes in worker or driver vigilance and performance.

³¹*See*, the summary of findings in FMCSA Tech Brief MCRT–00–014, *op. cit.*, at 4.
³²P. Jovanis, *et al.*, *Crash Risk and Hours Driving: Interim Report*, Pennsylvania Transportation Institute, Penn State University, February 25, 2005; P. Jovanis, *et al.*, “Crash Risk and Hours Driving: Interim Report II,” *op. cit.* The agency also considered other, recent research that it contracted with investigators at Virginia Polytechnic University (Hanowski *et al.*, *op. cit.*), but decided not to rely on it because the study does not calculate relative risk increases over the gamut of consecutive hours of driving but only compares the 10th with the 11th hour for any changes in crash risk. RIA at 44. This was a wise decision by the agency on other grounds given the fact that this study has a very small sample size permitting no credible generalizability to

“data show an 11th hour risk factor of about 3.4, which would be substantially higher than the equivalent estimates derived from the Campbell-LTCCS [Large Truck Crash Causation Study] data discussed above.”³³ RIA at 47. However, for reasons that are not made clear in the RIA, the use of the Jovanis findings showing a much higher relative risk factor for the 11th hour of driving was eliminated from use in the benefits-cost analysis.³⁴

Accordingly, the agency has based its benefit-cost analysis on a model (called the Fatigue Avoidance Scheduling Tool or “FAST”) derived from the Balkin Study in an adaptation produced by Hursh *et al.*,³⁵ with the addition of a TOT multiplier based on the TIFA Study analysis.

Yet the agency acknowledges that these data are deeply flawed. FMCSA erodes its reliance on the TIFA relative risk calculation in the RIA itself and further undermines its credibility to the brink of discarding it in the preamble of the 2005 final rule. First, the agency points out a central shortcoming of the TIFA data themselves—they do not reflect driving in the 10th and 11th hours under the implementation period of the 2003 final rule HOS regime, but rather under the pre-2003 HOS regulation:

[B]ecause this data collection effort predates the 2003 rule change, the results reflect pre-2003 HOS regulations: driving time was limited to 10 hours, the minimum rest time between trips was only 8 hours, and there were no provisions for a restart of the cumulative 7/8 day duty period. Also, the data do not include any information on the driver schedule over a longer period than the shift in which the crash took place. Thus, it is not possible to determine if cumulative fatigue may have been a factor.

RIA at 44.

Further doubt is cast by the agency itself in its RIA on the reliability of the TIFA data from the Campbell analysis. Since the data claim on fatigue-related crashes in the 11th hour are few in the pre-2003 regulatory era, “[s]uch limited populations of fatigue-related crashes raises uncertainty with regard to the relative crash risk ratios associate later driving hours, since the misclassification of a single crash as

the trucking industry as a whole and fails to control for major confounders that would heavily influence relative crash risk from hour to hour. These and other shortcomings include:

- the use of only driving files—the researchers had no records of any non-driving work activities that would also impact driver alertness and performance;
- there was non-driving work even performed during breaks and, so, there is no way to separate non-driving work from rest breaks since there is only a record of driving time;
- an operating assumption of the study was to assume that any non-driving interlude of 34 or more hours meant that the driver had taken a restart layover before starting a new tour of duty, and there was no independent means of determining whether the driver worked during this period of 34 or more hours without driving;
- the investigators did not know whether data were not collected for any given shift;
- the investigators included partial 11th hours of driving, *i.e.*, less than a full, additional 11th hour, which can substantially alter the change in relative risk from the 10th to the 11th hour of driving;
- additional reductions of data involving the original 50 study subjects occurred.

Basically, the study has no value in demonstrating any changes in crash risk from the 10th to the 11th hour of driving because threshold research design principles were violated in conducting the study. Nevertheless, these manifold defects do not deter the FMCSA from repeatedly asserting that the Hanowski Study shows that there is no or a negligible adverse safety impact from drivers moving from a maximum of 10 to a maximum of 11 hours of consecutive driving time, much less averaging only 6.28 hours of sleep each day.

³³The agency, however, does not rely on the Campbell LTCCS data analysis: “[I]t is important to note that the LTCCS data are still preliminary and have not yet been published in final form.” Those data, however, are overwhelmingly based on post-crash representations of driving hours by the surviving truck drivers involved in crashes and through inspection of their log books which are notoriously manipulated by drivers to simulate compliance with HOS regulations. See, *Large Truck Crash Causation Study—Interim Report*, DOT HS 809 527, September 2002; K. Campbell and M. Belzer, *Hours of Service Regulatory Evaluation Analytical Support—Task 1: Baseline Risk Estimates and Carrier Experience*; D. Belman and K. Monaco, *University of Michigan Trucking Industry Program Driver Survey 1997, 1998, 1999*; M. Belzer, *Sweatshops on Wheels: Winners and Losers in Trucking Deregulation*, Oxford University Press, 2000.

³⁴Presumably, the rationale for the exclusion of the Jovanis Study findings in the RIA stem from the statement that “[t]he main limitation with this analysis is that it is representative of only one trucking industry segment (LTL carriers). Additionally, there are very few driver cases showing 11 hours of driving . . .” RIA at 47. However, this implied stance on the merits of the Jovanis Study is countered by the FMCSA’s assertion in the preamble of the final rule that the Jovanis Study methods appear to be valid. 70 FR 50012.

³⁵S. Hursh, *et al.*, “Fatigue Models for Applied Research in Warfighting,” *Aviation Space and Environmental Medicine* 75:3 Suppl. (2004).

fatigue-related can affect the resulting relative risk ratios quite substantially.” RIA at 46. Furthermore, there are other baseline concerns with the pre-2003 TIFA due to the limitation of consecutive driving time to 10 hours—driving during the 11th hour was illegal at the time the TIFA data were collected. *Id.* “As a result, the data on the frequency of driving 11 hours or more could be underreported. As such, it is unclear whether fatigue-related crashes are over- or under-represented in the TIFA data set, since it is not possible to determine whether any under-reporting involved all fatal crashes during the 11th hour of driving, or just those where the truck driver was determined to be fatigued.” *Id.* Accordingly, “the relative risk of the subpopulation of commercial drivers admitting to illegal driving during the 11th hour or later may not reflect the relative risk of drivers operating legally under the 2003 final rule. Unfortunately, TIFA data for calendar year 2004 (the first year when driving in the 11th hour was permissible) will not be available until late 2006.” *Id.*

This complete lack of relevant data to show the relative risk of driving during the 11th hour undermines FMCSA’s justification for adding another, 11th hour of consecutive driving time to the HOS regulation. The FMCSA’s entire benefit-cost analysis purportedly showing that industry productivity benefits trump safety benefits triggered by a return to a regime of 10 hours maximum driving time is based on a TOT multiplier for relative risk ratios using only pre-2003 data. Accordingly, the agency’s effort to rationalize this maneuver by conducting a “sensitivity analysis” is a house of cards.

Furthermore, FMCSA points out in the preamble of the 2005 final rule that the TIFA file “combines data from the FARS with additional data on the truck and carrier collected by the University of Michigan Transportation Research Institute (UMTRI) in a telephone survey with the truck driver, carrier, or investigating officer after the fatal crash.” 70 FR 49997. Because the TIFA file relies so strongly on interview information, “[d]espite its scope and complexity, however, TIFA data must be treated with caution.” *Id.* Because FARS data has no information about the amount of driving hours that were accumulated by a driver at the time of a crash:

TIFA researchers therefore contact the driver (or the employing carrier) after the fatal crash to collect such information. However, a good deal of time can elapse (more than a year in some cases) between the date of the crash and the date the TIFA researcher first contacts the driver (or the employing carrier). This delay raises the question whether the driver can accurately recall his/her driving time so long after the incident.

Id.

The use of totally non-representative data from time periods preceding the implemented 2003 final rule and these concerns about both the accuracy and the fundamentally uncorroborated reliability of TIFA data undermine any effort by the FMCSA to rely on its benefit-cost analysis to justify the extra hour of consecutive driving time in the 2003 and 2005 final rules.³⁶ FMCSA itself warns at the outset of the preamble to the 2005 final rule that “[a]ll in all, we must thus be careful in applying this data to the 2003 rule or today’s rule . . .” 70 FR 49981. Unfortunately, the agency is not careful—it uses the TIFA data as the basis for a failed effort to demonstrate, using pre-2003 data from an era governed by a different regulatory regime, that the safety downside from the additional hour of driving is both

³⁶Petitioners also point out the agency’s repeated effort especially in the preamble of the 2005 final rule to suggest, or to foster acceptance of the wholly unsupported belief, that the risk of driving more consecutive hours is somehow offset or neutralized by the additional time off provided for truck drivers in each shift.

- “Also, despite [TIFA] being the largest database available * * * we thus must be careful in applying this data to the 2003 rule or today’s rule, where the minimum off-duty time is 25 percent greater.” 70 FR at 49981.

- “The 2003 rule, which allows up to 11 hours of daily driving but requires 10 hours off-duty, may have reduced the risk of driver fatigue and thus the percent of large truck fatal crashes involving fatigue.” *Id.* at 49997 (emphasis supplied).

The agency is well aware that it cannot demonstrate any causal relationship between allowing longer consecutive driving hours and requiring a longer off-duty period in each shift. For one thing, the research literature cited not only by Advocates but the studies even reviewed and entered into the docket by the agency itself, including summaries of studies (e.g., *An Annotated Literature Review Relating to Proposed Revisions to the Hours-of-Service Regulation for Commercial Motor Vehicle Drivers*, DOT-MC-99-129, November 1999, FMCSA-1997-2350-956) have shown over many years of investigation that as workers are demanded to work longer and longer shifts, especially those in excess of about 9–10 hours, their ability to recover from the extraordinary demands placed on their protracted vigilance and performance cannot be countered by providing them longer daily off-duty periods.

minimal and overwhelmed by productivity benefits to industry. In fact, the FMCSA acknowledges that “[a]vailable information on the effect of allowing 11 hours of driving time is inconclusive.” *Id.* at 49999.

VI. FMCSA Should Reconsider the Determination To Adopt Only a Thirty-Four Hours Off-Duty “Restart” Provision

The whole purpose of the restart provision in both the 2003 and 2005 final rules is clearly the desire of motor carriers to get drivers back on the job in contrast to the pre-2003 fixed-length work week in which drivers were prohibited from working or driving if they had already exhausted their available, maximum duty hours over 7 or 8 consecutive days. The FMCSA asserts in the preamble of the instant final rule that it “has determined that the research on CMV drivers supports the assessment that a recovery period of 34 hours is sufficient for recovery from cumulative fatigue. The importance of two night (midnight to 6 a.m.) rest periods was highlighted in the 1998 HOS expert panel report.” 70 FR 50017. But the 34 hour restart provision does not require two midnight to 6 a.m. rest periods, but only that drivers take a minimum 34 hours off-duty before restarting their working and driving “clock” to accrue another tour of duty that can total up to 60 hours in 7 “floating” work days or 70 hours in 8 “floating” work days. Moreover, the agency itself has pointed out over the history of this rulemaking that LTL drivers often work entirely at night or that long-haul, over-the-road drivers can have changes in their shifts from one tour of duty to another, or even within the same tour of duty. RIA at 41. As a result, many drivers will be released from duty at a time when they can only manage a single sleeping period, not two, in a minimum 34-hour layover because their inverted or acircadian schedule undermines efforts to sleep more than once over a 34-hour “restart” period. The FMCSA implies as much in the preamble of the final rule: “The majority of driver (about 80 percent) are daytime drivers, who would likely start their recovery period between 6 p.m. and midnight, and therefore these drivers would have the opportunity for two full nights of sleep prior to the start of the next work week.” It follows that many drivers, especially those on rotating shifts or inverted (nighttime driving, daytime sleeping) schedules would be able to manage only a single sleep period.

The agency engages in an extensive discussion of some of the research showing that a 34 hours off-duty “restart” layover is insufficient for recuperative rest and sleep. The FMCSA instanced the research advanced by the Insurance Institute for Highway Safety, including “a 1997 observational study of over-the-road drivers³⁷ [that] found that a 36-hour recovery period was inadequate, and a 2005 analysis of data from a national LTL firm suggest[ing] that there may be increases in crash risk associated with off-duty periods as long as 48 hours.” 70 FR 50017–50018. The agency also cited the arguments and research findings advanced by Elisa Braver of the University of Maryland School of Medicine who:

asserted that there is an absence of scientific evidence that the cumulative sleep deficits and fatigue incurred by working 60 hours can be remedied by having 34 hours off-duty. She said that the scientific evidence cited by the Agency in support of the restart is marred by small numbers, inapplicability to the driving population, and failure to study the effects of having 34 hours off after working according to the schedule permitted by the rule. As an example, Braver said that the study cited by O’Neill [O’Neill, T.R., *et al.* (1999)] featured small numbers of volunteers in driving simulators following a schedule unlike that of typical drivers who had 58 hours off between five-day work shifts.³⁸

Id. at 50018.

The Insurance Institute for Highway Safety also cited the baseline research design defects of the O’Neill *et al.* (1999) study. However, the FMCSA response to these studies is essentially to ignore the need to respond and, instead, to take refuge

³⁷This study is not cited by the agency, but refers to A. McCartt *et al.*, *Study of Fatigue-Related Driving among Long-Distance Truck Drivers in New York State*, 1997, rev. 1998.

³⁸The FMCSA has already undermined its reliance on the O’Neill *et al.* Study nearly 6 years ago by characterizing it in its November 1999 literature review as a study design [that] provided a relatively benign schedule that provided 10 consecutive hours off-duty and also allowed the drivers to sleep at times most compatible with circadian rhythms. The end-of-week recovery periods allowed three sleep periods that allowed sleep during optimal times—between midnight and 6 a.m. The duty days also included three scheduled breaks. As the researchers note, the results of this study may not be generalizable to operations that are not day shifts, have shorter post-shift off-duty periods, have few or no breaks during the duty period, or vary from what the drivers is accustomed to in terms of circadian disruptions or longer-than-usual on-duty periods.

An Annotated Literature Review Relating to Proposed Revisions to the Hours of Service Regulation for Commercial Motor Vehicle Drivers, DOT–MC–99–129, November 1999, at 115–116.

in a generalization that “the research on adequate recovery periods is somewhat limited . . .” *Id.* at 50021. In addition, the agency selectively accepts some studies that support its decision and rebuts or rejects any that are unfavorable to its policy choice.

For example, the well-known and often-cited research survey performed by Smiley and Heslegrave (1997) is repeatedly glossed without any clear acknowledgement that the conclusion of the authors was that a 36-hour restart provision was not acceptable for driver recovery from the effects of cumulative fatigue.³⁹ *Id.* At 50024. Similarly, the Insurance Institute’s citation of the study by Wylie *et al.* (1997) showing that drivers could not recover from cumulative fatigue with even 48 hours off-duty is rejected out of hand because of its small sample size. *Id.* Yet, despite small sample size, the 50 subjects in the Balkin *et al.* (2000) Walter Reed study used as the basis for the fatigue model in the RIA and the nominal 82 subjects (of an incomplete study conducted by Hanowski *et al.* (2005)), does not deter the agency from relying on these research efforts because they provide some support for the agency’s foregone decisions. Moreover, under the cover of the agency’s claim that “the current scientific evidence is limited,” the FMCSA avoids taking the prudent course of requiring more time off at the end of a work week than is allowed under both the 2003 and 2005 final rules. Instead, the agency opts to be far more demanding on drivers than under the pre-2003 regulation and instead restricts off-duty “restart” time to a minimum of 34 hours. In addition, the agency cites the OOIDA survey of its member drivers that only 20 percent responded that they were getting more time at home as a result of the 2003 rule. This means that fully 80 percent of OOIDA drivers—the great majority—answered “No”—they are not getting home more often to rest and recover. *Id.* at 50025. The agency simply disregards the negative feedback from this survey on the claimed benefit of more home time under the 2003 regulation.

It is clear that the agency wants to justify the 34-hour restart provision because the economic benefits of cycling drivers back that much sooner into the longer working and driving hours allowed by the 2003 and 2005 final rules produce economic gains for the trucking industry. Additional time off-duty would spawn delays that are generated by a longer minimum restart provision that reduces driver productivity.⁴⁰ “[W]e can say that at least one-third of restarts are short enough to bring a productivity gain.” RIA at 2–22. However, that policy choice is not supported by the research that the agency advances, and it is countered by other research showing that the 34 hours allowed as a minimum layover before a new tour of duty is inadequate to eliminate commercial driver fatigue accumulated from long working and driving hours over previous days. The agency needs to reconsider its decision to discount or ignore countervailing research that does not support its position.

VII. The Adequacy of Rest and Sleep Time Allotted Under the Rule Should Be Reconsidered

In the final rule, FMCSA approaches the topic of the minimum rest time needed to ensure adequate sleep with ample sleight-of-hand. The agency attempts to foster the acceptance of a variety of off-duty sleep times as “normal” in this final rule, especially in the preamble, that vary between a low of 6 hours on average achieved by drivers to the 8.5 hours, when split rest time in sleeper berths is taken, recommended by Mark Rosekind and apparently endorsed by the FMCSA.⁴¹ The FMCSA should remember that it is already on record in more than one instance over the history of this rulemaking, beginning with the advance notice of proposed rulemaking in 1997, that drivers need a minimum of a full 8 hours of restorative sleep. For example, in the May 24, 2000, NPRM, the agency asserted that drivers should get “eight consecutive hours of uninterrupted sleep each day[,]” and that “to

³⁹ Even the agency’s mention of the Smiley and Heslegrave study in one location in the preamble of the 2005 final rule characterizes it as “their literature review regarding 36-hour recovery” without acknowledging that the authors concluded from their literature survey that a 36-hour recovery period was not adequate for commercial drivers to expunge sleep debt and recover performance. 70 FR 50024.

⁴⁰ “Because they limit driving hours and require longer restart periods, the relative productivity loss caused by Options 3 and 4 are substantially greater than that for Option 2 in almost all cases. Also, in almost all cases, the impact of Option 3 is greater than that of Option 4, due to the longer restart required under Option 3.” RIA at ES–3.

⁴¹ “Rosekind of Alertness Solutions concluded that translating these scientific results into operational practice would suggest that an ‘anchor sleep opportunity’ of 6.5 hours and another sleep opportunity of 2 hours would likely provide the minimum number of sleep hours needed to maintain a performance equivalent to one 8-hour sleep period.” 70 FR 50027–50028.

afford the driver an opportunity to obtain a minimum period of 8 hours to sleep, the research shows that the off-duty periods need to be increased.”⁴² 65 FR 25554.

In contrast, the agency picks and chooses various amounts of sleep throughout the preamble of this final rule, always defending each different number as being adequate for drivers to recover performance and expunge sleep debt. Here is a sampling of the agency’s shifting stance on the amount of daily sleep that truck drivers need:

- “The circadian friendliness of today’s rule is bolstered by the requirement for 10 consecutive hours off-duty. This is enough time to enable drivers to get the 7–8 hours of sleep most people need to maintain alertness and prevent the onset of cumulative fatigue.” 70 FR 49980.
- “While the Agency would like to see drivers obtain a sleep period between 7 to 8 hours per day to maximize driver alertness, the finding of 6.28 hours of sleep per night [in the Hanowski, *et al.* Study] is within normal ranges consistent with a healthy lifestyle and is a vast improvement over previous sleep findings.”⁴³ *Id.* at 49983.
- “Today’s rule provides for 10 hours of consecutive off-duty time, giving drivers the opportunity to obtain 7 to 8 hours of restorative sleep per day. Research on the implementation of the 2003 rule shows that drivers are sleeping 6.28 hours of verified sleep and this is within normal ranges consistent with a healthy lifestyle.” *Id.* at 49991, also *see, id.*, at 49993.
- “The 2003 rule and today’s final rule provide drivers an additional 2 hours off-duty creating a much improved opportunity for 7 or 8 hours of sleep.” *Id.* at 50011.
- “The research supports 6–8 hours of sleep on average, as having a positive impact upon a driver’s health.” Final Rule at 164. However, the FMCSA also asserts just prior to this statement that:

[T]he research overwhelmingly supports that on average humans require between 7 and 8 consecutive hours of sleep per day to restore performance.
* * * Establishing a rule requiring less than the average would result in sleep restriction over time that would lead to increased fatigue and reduced performance, thus elevating crash risk and compromising safety. *Id.*

- And on the preceding page, the FMCSA favorably quotes Rosekind (1997) who “concluded that ‘scientific data are clear regarding the human physiological requirement for 8 hours of sleep to maintain performance and alertness,’” *id.* At 50015. On the same page the agency again cites the conclusion reached by several studies that “even a relatively small reduction in average nighttime sleep duration (*i.e.*, approximately 6 hours of sleep) resulted in measurably decremented performance,” *id.*, as well as Mark Rosekind’s finding from other research that had been conducted, “that obtaining 2 hours less sleep than needed (for an average adult this equates to about 6 hours of sleep) produces a reduction in performance and alertness. The data showed that obtaining a total of 8 hours of sleep per 24-hour period is critical.” *Id.* at 50027.
- However, the agency lowers the bar even further: “Based on research that led to the 2003 rule, FMCSA knew that short sleep (sleep less than 6 hours) among drivers was a concern from both a safety and health perspective.” *Id.* at 50027.
- And on the same page there is a return to the position that “[T]o ensure that drivers are afforded the opportunity to obtain 7 to 8 hours of sleep, the rule must afford a period of time greater than the minimum required for sleep.” *Id.* Yet the agency in the immediately preceding pages has shown—and endorsed—the position that less than 7 hours of sleep *is* acceptable and that, indeed, even 6 hours of sleep is acceptable, despite its own rebuttal of that view at, *id.*, 50015.

It is clear from this review that the FMCSA has a shifting, contradictory view in the record of what is needed as the minimum amount of sleep for recovery from fatigue. That agency view varies from 8 hours of sleep, 7–8 hours of sleep, 6.28 hours of sleep, down to “6–8 hours of sleep,” *id.* at 50016, which the agency itself contradicts only one page earlier by emphasizing the findings of several studies that showed that 6 hours of sleep is insufficient for expunging sleep debt and restoring performance. *Id.* at 50015. If 6 hours of sleep are insufficient at one point in the

⁴² Also *see*, 68 FR 22456, 22469.

⁴³ As noted earlier, the Hanowski *et al.* Study had a very small sample size, and the authors point out several major variables that were uncontrolled in the research effort so that, in the end, they cannot account for the amounts of sleep taken in relation to fatigue and performance.

preamble of the final rule (*id.*), then the average amount of sleep of 6.28 hours which the agency found to be sufficient based on the Hanowski *et al.* Study—which is “approximately 6 hours of sleep,” *id.* at 50015—is clearly inadequate on its face.

VIII. The Agency Should Reconsider Its Decision to allow CMV Drivers To Drive and Rest on a Non-Circadian, 21-Hour Rearward Rotating Shift Schedule

In the 2000 NPRM, the FMCSA argued strongly in several places in the preamble that truck drivers would benefit in reduced fatigue, improved performance and alertness, and elimination of accumulated sleep debt if their working and driving cycle adhered to a fully circadian, 24-hour shift cycle of waking time and rest time. See, e.g., 65 FR 25548, 25554–25556. The agency attempted to ensure this by a schedule for long-haul drivers that provided 10 hours off-duty, 12 hours of work, and 2 hours of breaks. It even attempted to regularize the layover period for truck drivers following the end of a tour of duty by ensuring that drivers would be able to benefit from nighttime sleep and daytime activity before beginning a new tour of duty by essentially penalizing motor carriers that released drivers after 11 PM at the end of a tour of duty. *Id.* at, e.g., 25604. Overall, the FMCSA underpinned the entire HOS regime in the 2000 NPRM by attempting to ensure that drivers both during the work week and after its completion were aided in achieving alertness and eliminating accumulated sleep debt by a regulatory scheme that hewed closely to a circadian schedule. A circadian day for commercial drivers was, in fact, the centerpiece of the proposed rule.

However, this dedication to a circadian work day for truck drivers disappeared in the 2003 HOS final rule. That final rule markedly diverged from the NPRM in several major ways, but the most far-reaching change was the abandonment of a strict circadian schedule for drivers during a shift. The final rule, although it provided up to 3 hours of non-driving duty time in each shift, nevertheless did not require any non-driving shift hours to be taken and, instead, permitted drivers to use a backward rotating 21-hour shift schedule consisting of only 11 hours of consecutive driving followed by a minimum 10 hours of off-duty rest time. 68 FR 22456. The agency even went so far as to disagree with the American Trucking Associations’ (ATA) espousal of a circadian work day⁴⁴ to argue that “the strict 24-hour work/rest cycle would be ideal from a scientific viewpoint, but it is simply not practical and too inflexible to require of the industry. A strict 24-hour work/rest cycle would cause unavoidable impacts to motor carrier operations that the agency cannot justify from a safety or economic standpoint.” *Id.* at 22468. “Moving toward a 24-hour work/rest cycle without requiring a rigid starting time could achieve safety benefits while causing less productivity disruptions to motor carrier operations than adopting the strict 24-hour work/rest cycle the NPRM and P.A.T.T. proposed.” *Id.*

In fact, these quotations show clearly that the agency retreated from the scientific research findings cited in more than one place in the 2000 NPRM and substituted a rationalization that had no support in the rulemaking record. Nowhere did the agency establish that drivers would in fact not be less fatigued and less well rested if they used a 21-hour shift rotation rather than a fully circadian 24-hour work/rest schedule. The agency itself marshaled the research both in the preamble of the NPRM itself as well as in its accompanying Annotated Literature Review, *op. cit.*, to show that schedules with less than a full circadian alternation of work with rest produced workers who got less rest and lower quality sleep, and also performed more poorly. The agency’s argument that a 21-hour rotation was preferable to the 18-hour rotation was as gratuitous and unsupported as its conclusory blandishment, *supra*, that departing from a 24-hour work/rest schedule “could achieve safety benefits.” Nowhere in the administrative record of this rulemaking did the agency show that the well-known decrements in the length and quality of sleep, and in worker performance with respect to mistakes, deaths, and injuries would be abated by a 21-hour schedule and that such a schedule would achieve the same safety benefits as a fully circadian, 24-hour schedule. The FMCSA simply pronounced that this 21-hour drive/rest shift cycle was just as acceptable in safety results as a 24-hour schedule, and proceeded on the basis of this circular argument to adopt the shorter, non-circadian schedule. No additional justification for continuing this major feature of the 2003 HOS regulation was provided by the FMCSA in the final rule.

Accordingly, the agency has failed to justify imposition of a non-circadian, rearward rotating 21-hour drive/rest schedule in the 2005 HOS final rule, and that major aspect of the new regulation should be reconsidered by the FMCSA.

⁴⁴ Although it must be stressed that this ATA circadian schedule would be achieved by allowing drivers up to 14 hours of driving each day followed by a minimum 10 hours of off-duty rest time.

IX. FMCSA Should Reconsider the Determination To Allow Sixteen Hour Work Days for Short Haul Truck Drivers

This final rule adopts a second 16-hour work day for short haul drivers who operate commercial motor vehicles without commercial driver licenses (CDLs) between 10,001 and 26,000 pounds gross vehicle weight if they operate within a 150 air-mile radius⁴⁵ of their work reporting location to which they must return at the end of each work day. In addition, these short-haul drivers will not have to keep records of duty status, that is, logbooks entering time worked, driven, and off-duty over the course of both work days and a tour of duty. Employers will be required to maintain time records for 6 months. The agency provides no narrative explanation of what is entered on such time records. 70 FR 50033.

The agency attempts to justify the addition of a second 16-hour work day by appealing to a few studies supposedly evidencing driver tolerance of very long work days without any significant deterioration of performance or effects of fatigue. *Id.* at 49995, 50033–50035. The FMCSA also appeals to its analysis of short-haul operations within relatively circumscribed operating areas that shows such operations involve a relatively low proportion of driving in comparison with other work-related duties and tasks. *Id.* at 50033. The implication is that the amount of risk exposure per day and over a tour of duty has been considerably reduced and that this shows why short-haul drivers have relatively few fatigued-related fatal crashes.

Each of these arguments needs to be taken in turn. First, it must be emphasized that, although the agency is claiming that “longer workdays will not translate into longer driving times in the short-haul environment,” *id.* at 50033, and “short-haul drivers rarely, if ever, accumulate 11 hours of driving, regardless of work day length[.]” *id.*, these operations have not yet evolved to take advantage of the longer working hours provided by the final rule. The panoply of other permitted expanded working and driving hours are available to the short-haul trucking sector. *Id.* at 50032–50033. Petitioners have previously rebutted the agency’s unsupported belief that the 2004 snapshot of the trucking industry shows that the increased working and driving hours provided by the 2003 final rule will not be used. Similarly, the agency’s supposition that the future will be like the recent past for the short-haul sector, such as its package delivery operations, is an *ipse dixit*—an utterly conclusory presumption without support in the record. Just as the RIA analysis of the use of the new, additional working and driving hours shows that the use, for example, of the 11th hour of driving is expected to increase in order to raise productivity benefits for the trucking industry, there is every reason to expect that the short-haul industry sector will evolve to expand operations over the greater number of working and driving hours first provided by the 2003 final rule and now further increased by the 2005 final rule.

Those hours, as stated openly by the FMCSA in the final rule, *id.* at 50033, consist of the same working and driving hours per shift and per tour of duty as those provided to other trucking industry sectors, save for the new sleeper berth exception. The short-haul sector may use an 11th hour of consecutive driving, may use the 34-hour minimum restart provision, and may use the maximum tours of duty limits of 60 hours in 7 days or 70 hours in 8 days. Through the use of the new “floating” work week triggered by the application of the 34-hour restart provision, this means that short-haul drivers may accrue *88 hours of work in 7 days* and *102 hours of work in 8 days*. This means that over 7 consecutive days, short-haul drivers could work *47 percent more* than permitted under the pre-2003 HOS rule, and over 8 consecutive days, they could work *46 percent more* than under the prior rule.

The potential impact of this dramatic increase in available hours on the health and safety of these drivers, who could eventually be tasked with working over 100 hours in an 8-day tour of duty, is waved off by the agency with the unsupported proclamation that the second 16-hour day will not be used; therefore, the agency’s cost-benefit analysis assumes that “the risk impacts of the second 16-hour day would be essentially zero.” RIA at 6–72. It is not logical for the agency to enshrine in amended regulations dramatically increased working and driving hours that it nevertheless insists will never be used by drivers and motor carriers.

If the second 16-hour day is not expected to be used, then why does the agency provide it? The FMCSA response in the preamble of this final rule is that “the Agency want[s] to give this segment of the motor carrier industry as much flexibility as possible to structure their operations efficiently . . .” 70 FR 50033. The history of the industry clearly shows that if the additional time or increased flexibility is available, industry will make use of it to increase productivity. One has only to

⁴⁵An air mile is identical to a nautical mile, both equivalent to 1.15 statute miles. Therefore, an air mile is equal to 162.5 statute or land miles.

point to the sea change in HOS regulation adopted by the Federal Highway Administration in 1962 that no longer tied the maximum number of driving and off-duty hours to a circadian day of 24 hours, but rather allowed drivers to constantly alternate 10 of driving with 8 hours off-duty along with no requirement to use any non-driving working hours. See 61 FR 57252, 57254 col. 2 (Nov. 5, 1996). The result was predictable: industry, especially the long-haul, over-the-road sector, began increasing productivity by more rapid delivery schedules covering more miles in fewer days—a practice that was key to the development over the last quarter-century of Just In Time delivery practices, especially following deregulation of the trucking industry at the start of the 1980s.

The agency cannot have it both ways. It cannot provide a second 16-hour work day which, on its face, is being adopted to allow the short-haul industry sector to expand working times twice in a work week to 16 hours and yet also claim that the day will not be used and, therefore, that the second 16-hour work day is safety neutral.

The agency also tries to justify the addition of a second 16-hour work day by appealing to a few studies that supposedly show that driving and working 16 and even 17 hours does not produce significant changes in driver fatigue and performance. All of these studies are inadequate for demonstrating that short-haul drivers can operate vehicles and work extremely long days without adverse impacts on their health and safety. Even the agency admits that two studies of short-haul drivers showed high levels of stress because these drivers regarded their work loads even under the working and driving hours permitted under the pre-2003 regulatory regime to be unreasonable. 70 FR 50033. In another study conducted by Williamson *et al.* (2000) of drivers in New Zealand, the agency characterizes this study to have found that “drivers could maintain their performance until about the 17th hour of wakefulness, after which performance capacity was sufficiently impaired to be a safety concern.” *Id.* But this study used a break of at least 24 hours before the start of the study’s 16-hour working and driving day, and the study of a 16-hour work day was a simulation and was not conducted on-road at all. In fact, the “simulation” involved drivers playing computer games. Moreover, the agency fails to report that the investigators found that “performance deteriorated significantly by the middle of the second 16-hour period. In fact, performance levels at this time were considerably poorer than the 0.05 percent BAC alcohol equivalence standard.”⁴⁶ Moreover, the drivers “tested” by playing computer games for 16 hours had an immediately previous, full 24-hour break. *Id.* It is clear that the impromptu demands of the short-haul sector of the industry, such as regional package delivery services, will often find it advantageous to schedule not only one 16-hour work day without a prior 24 hour break, but that drivers can be compelled to work the available second 16-hour work day 2 days in row if, for example, accelerated holiday package delivery demands must be met. The Williamson *et al.* Study also shows that successive days of exceedingly long working hours dramatically increased fatigue and that recovery was not possible in the short term, a finding also ignored by the FMCSA.

As for the FMCSA’s reliance on the study by Massie *et al.* (1997) study, *Short-Haul Trucks and Driver Fatigue*, DTFH61-C-00038, Federal Highway Administration, Washington, D.C., 70 FR at 50034–50035, even the agency’s own review of this study in its literature review for the 2000 NPRM⁴⁷ points out that the authors reviewed local service trucks within a 50-mile operating radius and found that they had a fatal crash involvement rate 1.8 times higher than over-the-road trucks, a fact not mentioned by the FMCSA. Moreover, the authors analyzed crash data for driver fatigue involvement and found that fatigue was not coded often as a crash contributing factor, as is the case with all PARs used as the basis for FARS judgments on the presence of driver fatigue. As a result, the Massie *et al.* Study concluded that fatigue involvement was probably underreported. In any case, the control for trip distance for attempting to determine the presence of fatigue was 50 miles or less, not the 150 air miles adopted by the FMCSA in this final rule for allowing short-haul drivers to work two 16-hour days each week.

The agency has no justification for allowing short-haul drivers to work between 88 and 102 hours over the course of a tour of duty and work two 16-hour days a week—which may be required back-to-back—on the basis of the arguments and research advanced in the preamble of this new HOS regulation. In fact, the agency’s

⁴⁶ A. Williamson, *et al.*, “Demonstration Project for Fatigue Management Programs in the Road Transport Industry: Summary of Findings,” Road Safety Research Report CR 192, Australian Department of Transport and Regional Services, 2000.

⁴⁷ “An Annotated Literature Review Relating to Proposed Revisions to the Hours-of-Service Regulation for Commercial Motor Vehicle Drivers,” *op. cit.*, at 42–43.

judgment should be to withdraw the use of the first 16-hour day permitted by the 2003 final rule.

X. Omission of Electronic On-Board Recorders From the Final Rule

Finally, Petitioners regard the agency's explanation of why it will continue to defer the potential adoption of Electronic On-Board Recorders (EOBRs) to be another example of the FMCSA's long, well-documented history of dilatory action on this major safety topic.⁴⁸ 70 FR 50041. The 2003 and 2005 final rules permit truck drivers to work and drive far longer hours than allowed under the pre-2003 regulation, and the agency is well aware of the documented, widespread falsification of log books entries by commercial drivers seeking to conceal their practices of exceeding maximum permitted on-duty and driving hours in each shift and over multi-day tours of duty, as well as illegally reducing their off-duty rest time below the minimum required in HOS regulations.⁴⁹ Now that the agency has permitted even more hours of driving and working and less rest each week by allowing drivers to use only a minimum 34-hour restart layover that creates a more rapid cycling of work weeks than under the pre-2003 rule, it is more crucial than ever for the FMCSA to ensure that drivers do not become sleep-deprived and fatigued by violating these more extreme limits on driving, working, and off-duty hours that have been allowed by the instant final rule.

Accordingly, the FMCSA needs to accelerate the rulemaking process to adopt EOBRs to ensure that drivers do not exceed the new, higher driving hour limits. The FMCSA has already unconscionably delayed the rulemaking process by first issuing an advance notice of proposed rulemaking with no stated calendar of when the agency will actually issue a proposed rule. The agency's statement in this rulemaking is simply not an acceptable engagement of this need to propose adoption of EOBRs as soon as possible.

XI. Procedural Issues

During the course of the rulemaking that resulted in the 2005 final rule, FMCSA committed procedural errors that should be reconsidered by the agency.

A. FMCSA's Flawed Procedural Approach to This Rulemaking Proceeding

FMCSA chose to begin this rulemaking proceeding by proposing the same 2003 final rule that had been the subject of an adverse court decision and which was then vacated in its entirety. *Public Citizen et al., v. FMCSA*, 374 F.2d 1209 (2004). By proceeding in this manner, the agency deprived the public of any real opportunity to engage in and comment on the agency's intended rulemaking proposal and final rule.

Since the 2003 final rule had been legally rendered null and void by the Federal court, the public at the very least should have been presented with the pre-2003 HOS rule as the baseline for initial public comments. If any rule was to be used as the baseline for comment, the agency was legally bound to make its starting point from the pre-2003 regulation, the rule that was and is still in effect for motor coach operations.

FMCSA, however, stated that it was not actually proposing the vacated 2003 final rule, but that in order "[t]o facilitate discussion, the agency is putting forward the 2003 rule as the 'proposal' on which public comments are sought" 70 FR 3339 (Jan. 4, 2005). Clearly, this was not a proposed rule because the agency merely restated the contents of the vacated 2003 rule and sought information about how the 2003 rule might be altered or justified to meet the deficiencies pointed out in the court decision. Moreover, the agency was conducting ongoing research and analysis of the issues raised regarding that rule. In fact, the agency was gathering information and conducting analysis but, as yet, had made no determinations about what, if any, changes would be made. The public was given no indication whether the agency would consider making major or only *de minimis* changes from the 2003 final rule when that rule was re-invoked as the basis for the January 24, 2005, notice. In this

⁴⁸The rulemaking comments of Advocates for Highway and Auto Safety on the need for EOBRs (ANPRM, 69 FR 53386, September 1, 2004), sets forth this protracted rulemaking history of both the Federal Highway Administration and the Federal Motor Carrier Safety Administration repeatedly denying petitions for opening rulemaking and indulging delaying tactics in addressing this major area of need for motor carrier safety despite prompting by Congress, the National Transportation Safety Board, and the Inspector General of the U.S. Department of Transportation. Comments of Advocates for Highway and Auto Safety, Docket No. FMCSA-2004-18940-310 (Nov. 30, 2004). See also comments of Public Citizen, Docket No. FMCSA-2004-18940-317 (dated Nov. 30, 2004). Both sets of comments are incorporated by reference in this petition.

⁴⁹See, *supra*, footnote 30.

light, the January 2005 notice was more in the nature of an advance notice of proposed rulemaking rather than a specific proposed rule. The agency itself points out in the preamble to the final rule, “[a]s the quotation marks around the ‘proposal’ indicate, the 2003 rule was merely the starting point of a research and rulemaking program to determine whether that rule could be reconciled with the *Public Citizen* decision.” 70 FR 50043.

This “starting point” could not also turn out to be the ending point of the rule-making process. FMCSA was legally obligated to provide the public notice and an opportunity for comment on the rule it ultimately determined to proceed with, and to share its reasoning. Once the agency had sifted through information and made determinations regarding the shape the future HOS regulation should take, the agency was bound to present that proposal to the public and allow an opportunity for further comment. The agency in fact provided the public only one opportunity to comment on a “proposal” which even the agency acknowledges was merely a place-holder that was not intended to be the end result of the agency’s rulemaking process. The agency then proceeded to make determinations about what should be in the new HOS, but those determinations and the rationale for those determinations were first presented to the public in this final rule, without prior public notice or an opportunity for public comment. This procedure violates the fundamental protections afforded in the Administrative Procedure Act (APA), 5 U.S.C. § 553.

As it turned out, the 2005 final rule makes two major changes to the previous 2003 final rule by changing the regulation regarding short-haul drivers and sleeper berth usage. However, because these specific changes were never presented to the public until the issuance of the final rule, the public had no opportunity to comment on those specific changes. As can be seen in this petition, petitioners would have opposed both those changes had they been offered as adopted in the 2005 final rule for public comment prior to adoption. Equally important, the agency did not provide the public an opportunity for comment regarding its reasons and explanation for retaining critical aspects of the 2003 final rule in the 2005 final rule. Prior to the issuance of this final rule, the agency afforded no opportunity to evaluate or refute the agency’s basis for determining that major portions of the 2003 final rule, including the 11-hour limit on consecutive hours of driving per shift and the minimum 34-hour restart, should be retained. This truncated proceeding violates basic principles of fairness and due process under which the agency is required to permit the public to comment on regulatory proposals. Such violation is especially egregious where, as in the present circumstances, the rulemaking is highly controversial, the previous and nearly identical rule has been overturned in Federal court, and the agency has determined that the rulemaking is significant from an economic standpoint. 70 FR 3351 (“this rulemaking constitutes an economically significant regulatory action under Executive Order 12866”).

The agency asserts that this un-APA style procedure was necessary due to the one-year time limit for regulatory action set by Congressional action. Section 7(f) of the Surface Transportation Extension Act of 2004, Part V, Pub. L. 108–310 (Sept. 30, 2004). This position is belied by the fact that the agency took three (3) months, one fourth of the allotted year, to draft and issue the January 2005 place-holder notice. The preamble of that notice runs just 10 pages in the *Federal Register* and essentially reviews the 2003 final rule and poses generalized questions regarding that rule, requests information on HOS issues and asks for public comment. Nothing in that notice necessitated the use of so much time that a true notice of proposed rulemaking could not be included in the agency’s rulemaking schedule. Despite the fact that the 2003 final rule was maintained in place for 1 year, FMCSA was obligated at some point to afford the public an opportunity to comment on the actual proposal the agency intended to present for ultimate adoption in this final rule.

On reconsideration, FMCSA should undertake a new regulatory impact analysis that is published for public comment.

B. The Administrative Record

Petitioners also complain regarding FMCSA’s failure to provide a complete record for the public to review in two important respects.

First, the agency decided to place abstracts in lieu of complete copies of studies and research reports relied on by the agency in the electronic rulemaking docket. Despite FMCSA’s assertion that the “full versions of the reports were readily available in the Library of Congress, the National Library of Medicine in Bethesda, and other sources such as university libraries,” 70 FR 50044, many of those research reports are only available for a substantial fee through pay-for-use or subscription services and would require a large expenditure of funds to collect all the sources cited in the abstracts. This placed a significant burden on the public, including the public interest organizations in this petition, to search for and pay to obtain docu-

ments and materials that the agency relied on in its rulemaking proceeding. All such documents should be made reasonably available to the public at no cost as part of the rulemaking proceeding. In response to complaints that such a process deprived the public of an opportunity to participate on an equal footing with the FMCSA in the regulatory process, “FMCSA [] created a reading room where the copyrighted materials referred to in the NPRM may be examined.” *Id.* However, the public was not notified of the availability of this material at the agency until the publication of the 2005 final rule on August 25, 2005. No prior notice to the general public was given.

Counsel for Petitioner Advocates for Highway and Auto Safety contacted FMCSA’s HOS Team in February 2005, before the close of the public docket, regarding the agency’s use of abstracts but received no response from agency personnel until May 2005. Counsel for Petitioner Advocates for Highway and Auto Safety was later notified by letter that 23 studies for which abstracts appeared in the electronic docket were available in a public reading room. That notification, however, was provided in a letter received on May 1, 2005, more than 50 days after the closing date for public comment and more than 2 months after counsel for Petitioner Advocates for Highway and Auto Safety had originally contacted the agency with an inquiry regarding those documents. Letter dated April 29, 2005, from Thomas L. Yager, FMCSA HOS Team, to Henry M. Jasny, General Counsel, Advocates for Highway and Auto Safety.

Second, FMCSA did not place a number of important studies that the agency relies on in the final rule in the public docket until very late in the rulemaking process. For example, it was not until August 10, 2005, that the literature review conducted by the National Academy of Sciences Transportation Research Board (TRB), with which FMCSA had contracted in order to “review, first, the literature published between 1975 and the present concerning the health implications of the hours-of-service regulations for CMV drivers,” 68 FR 3341, was entered into the docket. Docket No. FMCSA–2004–19608–2084. In addition, the study by Hanowski, *et al.*, was not placed in the docket until August 16, 2005 (Docket No. FMCSA–2004–19608–2089). The final rule was formally signed by the FMCSA Administrator and issued on August 16, 2005 (70 FR 50073, Aug. 25, 2005). The agency did not provide the public with copies of other important studies the agency relied until after the 2005 final rule was issued, including the second interim report of the study by Jovanis, *et al.*, (Interim Report II) which was placed in the docket on August 18, 2005 (Docket No. FMCSA–2004–19608–2091), and the two versions of the study by Campbell, K.L., which were placed in the docket on August 25, 2005 (Docket No. FMCSA–2004–19608–2115 (Feb. 2005 Draft Report)) (Docket No. FMCSA–2004–19608–2116 (Aug. 2005 Final Report)). Finally, the agency’s rule relies on critical analysis included in the RIA, a document that is dated August 15, 2005, and which was not placed in the public docket until August 19, 2005 (Docket No. FMCSA–2004–19608–2094). As a result, the public was unaware of the existence of these documents, had no opportunity to review, evaluate, or comment on their contents in advance of issuance of the final rule.

Submitted By:

JUDITH L. STONE,
President,
Advocates for Highway and Auto Safety.

LAMONT BYRD,
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International Brotherhood of Teamsters.

JOAN CLAYBROOK,
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JOHN LANNEN,
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Citizens for Reliable and Safe Highways.

ANDREW MCGUIRE,
Executive Director,
Trauma Foundation.

DAPHNE IZER,
President and Founder,
Parents Against Tired Truckers.

OL' BLUE®, USA (UNITED SAFETY ALLIANCE, INC.™)
Van Nuys, CA, December 17, 2007

Hon. FRANK R. LAUTENBERG,
 Chair,
 Senate Subcommittee on Surface Transportation and Merchant Marine Infrastruc-
 ture, Safety, and Security,
 Washington, DC.

RE: HEARING ON FEDERAL TRUCK DRIVER HOURS-OF-SERVICE RULE

Dear Senator Lautenberg:

In light of rescheduling of the previous two hearing dates, which I had made arrangements to attend, I am communicating my concerns via this document.

The purpose of this letter is to provide you with some information regarding the lack of education by the FMCSA of commercial truck drivers concerning the various versions of the hours-of-service (HOS) regulation in effect since January 2004. This information was obtained through a survey conducted by the United Safety Alliance, Inc., d.b.a. Ol' Blue, USA, and an organization that is trusted by thousands of truckers throughout the Nation.

1. Background

United Safety Alliance, Inc. is a non-profit charitable organization transacting business under the name "Ol' Blue, USA." Ol' Blue, USA, was founded in 1986 and is dedicated toward educating the public on highway safety and improving relations between commercial drivers, law enforcement and the public. Ol' Blue, USA, conducts various educational programs including radio programs, Internet programs, a monthly magazine column, simulated truck inspections and logbook seminars at trucking trade shows. Our school program "Big Wheels, Little Kids" involves educating children about safety around large vehicles.

The affairs of Ol' Blue, USA, are managed by our volunteer Board of Directors. Our seven (7) directors are individuals from the trucking industry, retired law enforcement, trucking media and education. I serve as a president of the organization at the pleasure of our Board of Directors of which I am also a member.

2. Sources of Funds

Ol' Blue, USA, is funded through cash and in-kind donations from the public. Receiving no Federal, or state funding.

3. Survey Background

Beginning on August 15, 2006 and terminating on October 31, 2006, Ol' Blue, USA began conducting an on-line survey of 1,094 CDL drivers. This survey was designed by Crump and Associates as a public service for Ol' Blue, USA, who states that sampling of more than 1,000 drivers, provides a more than adequate sampling to quantify the survey as valid. The identities of the survey participants were anonymous. Ol' Blue, USA conducted the survey because of the feedback we were receiving from listeners on our radio program and from Internet correspondence indicating that there was widespread misunderstanding of the hours-of-service rule, not only among drivers, but also among management. We wanted to confirm this information through our survey and concentrate on what was lacking in the way of HOS education.

This survey was used as source material for many trucking publications, and was never challenged as to the results, not even by FMCSA, who responded to a publication that the data was being evaluated.

4. Summary of Survey Results

The results of the HOS survey conducted by Ol' Blue, USA indicated the following:

- 67.5 percent of participants said the Hours-of-Service regulations were difficult to understand and easy to violate accidentally.
- 48.7 percent of participants said that they needed more training about Hours of Service regulations in plain language.
- 54.9 percent of participants said they thought they understood the Hours-of-Service regulations, but still have some difficulties.
- 62.7 percent of participants said they needed to know where to find honest answers about Hours-of-Service regulations.
- 51.1 percent of participants said that the people they work for expect them to violate Hours-of-Service regulations as part of their job.

The Ol' Blue, USA 2006 HOS driver Survey can be found at <http://www.olblueusa.org/survey/>.

5. Commercial Vehicle Safety Association (CVSA) Roadcheck 2007

The CVSA is an organization consisting of representatives from commercial vehicle enforcement and the trucking industry. Law enforcement members of CVSA conduct an annual "Roadcheck" in June, the purpose of which is to inspect commercial vehicles and commercial vehicle operators to determine compliance with the Federal Motor Carrier Safety Regulations.

From June 5–7, 2007, Commercial Vehicle Safety Affiance (CVSA) found that for the second straight year, the number of drivers placed out of service increased from 5.6 percent in 2006 to 6.2 percent in 2007. *This is the highest Roadcheck driver out of service rate since 1999.* The bulk of the drivers placed out of service (65.9 percent of the total) were done so for hours-of-service violations. This compares with 57.1 percent in 2006. Falsification of records of duty status was second in line, comprising 11.4 percent of the total—12.4 percent was the 2006 number. *Hours-of-Service out of service violations continues its upward trend,* with 4.9 percent of all inspections resulting in a driver being placed out of service for hours-of-service, up from 4.5 percent last year, 3.5 percent in 2005 and 3.4 percent in 2004.

Roadcheck 2007 results can be found at http://www.cvsa.org/latestnews/cvsa_latestnews.cfm#jun29.

6. Oregon's DOT Inspections in July 2007 Put Nearly 300 Drivers Out of Service

In July 2007, ODOT inspectors checked driver's logbooks and qualifications to make sure they were complying with Federal and state regulations. Preliminary results indicated that more than 1,200 inspections were completed at seven sites. About one quarter (25 percent) of the inspections resulted in a driver being placed out of service. The national driver out-of-service rate is 7 percent. Final results will be posted on the agency's website, www.oregon.gov/ODOT/MCT/. See also the article in *The Trucker* that can be found at <http://www.thetrucker.com/News/Stories/2007/8/10/Julyinspectionputsnearly300Oregondriversoutofserviceforsafetyviolations.aspx>.

7. FMCSA's Hours-of-Service of Drivers Interim Final Rule

Ol' Blue, USA takes no position on what the interim or final hours-of-service regulation should be. However, it is our organization's position that education of drivers by the FMCSA and by the motor carrier industry is woefully lacking. This is evidenced by the results of our HOS survey. I urge you to support measures that would provide for greater education of truck drivers on the hours-of-service regulation. As the FMCSA noted in its decision promulgating of the Interim Final Rule "*Uncertainty is the enemy of enforcement and compliance; it can only impair highway safety.*" See page 8, Notice of Interim Final Rule.

Very truly yours,

R.J. TAYLOR,
President.

cc: Subcommittee Members

Democrats

FRANK R. LAUTENBERG (Chairman)
JOHN D. ROCKEFELLER IV
JOHN F. KERRY
BYRON L. DORGAN
MARIA CANTWELL
MARK PRYOR
THOMAS CARPER
CLAIRE McCASKILL
AMY KLOBUCHAR
DANIEL K. INOUE (Ex-Officio)

Republicans

GORDON H. SMITH (Ranking Member)
JOHN MCCAIN
TRENT LOTT
KAY BAILEY HUTCHISON
OLYMPIA SNOWE
JIM DEMINT
DAVID VITTER
JOHN THUNE
TED STEVENS (Ex-Officio)

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MARK PRYOR TO
WALTER J. KRUPSKI, JR.

Question 1. Would you share with the Subcommittee how the safety performance of motor carriers has changed since introduction of the new hours of service rules?

Answer. In terms of motor carrier safety performance data collection and analysis neither I nor OOIDA have any additional information beyond the results presented

by Administrator Hill that indicate in 2006 large truck crashes and crash rates were either nearly level or somewhat better than under the former hours-of-service regulations.

Question 2. What have drivers been saying about the 11 hour and 34 hour provisions?

Answer. Results of a driver survey conducted by the OOIDA Safety Foundation indicate that the “weekly” 34-hour restart option is used 4 times per month by 45 percent of respondents, never used by 10.5 percent, and average usage is 3.1 times per month. When asked how often the “daily” 11th hour of driving is used, 26 percent of respondents indicated they use it from 1 to 4 times per month, 18 percent never use it, and the average number of times the 11th hour is used per month is 8.2. The survey results appear to track fairly closely with what drivers are generally saying.

When talking to drivers, the long-haul drivers particularly like the 34-hour restart because it shortens the time they must remain idle while away from home. Under the 70 hours in 8 days maximum weekly on-duty limitation these drivers often run out of hours on the road, earning no income while spending money for food and other essentials for as much as 3 days waiting to regain income-producing driving time. Thirty-four hours is enough time to take two extended sleep periods to eliminate fatigue and otherwise rest or attend to personal matters without unnecessarily penalizing drivers. And since the restart is a minimum off-duty requirement, drivers may choose to take more time off at home or elsewhere if they so desire.

Also as is indicated from the survey results, many drivers say they do not regularly use the 11th hour of driving. They view it more as providing flexibility to use when needed to make up for driving time lost due to bad weather, traffic congestion or any number of other delays drivers may face.

Question 3. Are there improvements that can still be made in the hours of service rules?

Answer. The 14-hour maximum on-duty limitation is a serious issue with most drivers. The daily 14-hour “clock” starts as soon as a driver begins any on-duty activity subsequent to a required minimum rest period. Breaks of less than 10 hours in duration do not stop the clock unless the sleeper berth exception is used. Drivers complain that they feel pressured to keep driving when they would like, or need, to take a break in the event that an unforeseen delay would interfere with completing their driving duties within the 14-hour window.

The current sleeper berth exception is another major problem for team drivers and also adversely affects solo drivers. First, team drivers had become accustomed to operating in shorter rotating shifts, for example, 5 hours on-duty and 5 hours in the sleeper berth. Under the current exception that is no longer possible forcing each team driver to drive for longer periods at a time while the off-duty driver is confined to the sleeper berth. If the “off-duty” driver is forced to leave the sleeper berth for reasons that may include inspections, border crossings, or to be in attendance of a hazardous materials load that driver must “restart” the sleeper berth time in order to meet the minimum consecutive hours required.

Many solo drivers began to utilize the sleeper berth exception under the previous hours-of-service regulations that first incorporated the 14-hour on-duty clock. Under that exception drivers could take shorter breaks that suspended the 14-hour clock for needed rest, or for operational purposes such as waiting for peak traffic times in urban locations to pass. That is not possible under the current exception because only the minimum 8-consecutive-hour portion of the sleeper berth period will suspend the clock.

Question 4. What is your organization’s position regarding Electronic On-Board Recorders? Speed Limiters? Setting a maximum speed limit?

Answer. OOIDA opposes the mandated use of Electronic On-Board Records. EOBRs are no more a reliable or accurate record of a driver’s compliance with the hours-of-service rules than paper logs. The only event that the devices can automatically detect is whether the vehicle is moving or sitting still. All other duty status entries—off-duty, sleeper berth, on-duty not driving—must be entered manually by the driver. If a driver were so inclined he/she could manipulate the hours-of-service regulations by, for example, entering sleeper berth status when actually performing loading or unloading duties.

OOIDA also opposes a mandated speed limiter setting. The current regulatory proposal calls for a required maximum setting of 68 mph. There are 22 states that have speed limits greater than 68 mph on certain highways. Such a setting would create dangerous speed differentials between large trucks and other classes of vehicles in those states, on those highways. Several studies indicate that speed differen-

tials cause an increase in certain types of accidents, such as rear-end and side-swipe accidents. The vast majority of accidents occur on roadways and in areas with speed limits that are less than 68 mph, thus there would be little or no safety benefit to such a proposal. Also, while there are several academic studies that show the negative impact of speed differentials for cars and trucks on highways, there are no studies that demonstrate speed limiting commercial motor vehicles will have a positive effect on highway safety. There are also numerous other issues related to the mandating of speed limiters for trucks such as increased congestion, technical and enforcement problems that OOIDA would be happy to expand upon.

A national maximum speed limit can also create unintended problems. The state Departments of Transportation are much better equipped to determine what speeds are appropriate for their needs to safely improve traffic flow and efficiencies on highways within their borders.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MARK PRYOR TO
DAVE OSIECKI

Question 1. Would you share with the Subcommittee how the safety performance of motor carriers has changed since introduction of the new hours of service rules?

Answer. Government-collected safety data and metrics, as well as data collected from the industry, clearly indicate that the current HOS rules are an improvement over the pre-2004 rules. The rules have been in force for *four* years (2004–2007) and safety in the trucking industry has improved throughout this time period. The following data illustrates this improvement.

- The number of truck-involved fatalities decreased 4.7 percent in 2006—from 5,240 in 2005 to 4,995 in 2006—the largest percentage drop in truck-involved fatalities since 1992.
- The truck-involved fatal crash rate for 2006 was 1.93 fatal crashes per 100 million vehicle miles of travel (VMT). This rate is at its lowest point since the U.S. DOT began keeping these records in 1975.
- The number of injuries resulting from truck-involved crashes decreased by 6,000 in 2004, 2,000 in 2005 and dropped another 8,000 in 2006.
- The injury crash rate for 2006 is also at its lowest point since DOT record-keeping began.
- The Department of Labor’s Bureau of Labor Statistics tracks truck driver non-fatal incidence rates of occupational injuries and illnesses. For 2002 through 2006, per 100 full-time employees, the data is below. The 2004–2006 rates reflect a decrease of nearly 15 percent.

2002–2003	(the 2 years prior to current HOS rules)	6.8
2004–2005	(the first 2 years operating under current HOS rules)	6.1
2006	(the last year of available data operating under current HOS rules)	5.8

Question 2. What have drivers been saying about the 11-hour and 34-hour provisions?

Answer. Overwhelmingly, drivers like, appreciate, and support the 34 hour rest and restart provision. In fact, ATA has heard nothing but positive comments from drivers, safety directors and fleet executives about the 34 hour restart. Drivers also appreciate the flexibility and cushion that the 11 hour rule provides to make pickups and complete deliveries with a lesser chance of a regulatory violation.

ATA’s comments are not based on opinion, rather they are based on research conducted in 2005 and 2006 by the American Transportation Research Institute (ATRI). This research assessed the safety and health impacts of the new hours of service rules implemented in 2004, and included a comprehensive driver survey and industry focus groups. An interesting survey finding was that drivers liked the new “off-duty” provisions the best—the 34 hour rest and restart, and the 25 percent increase in the minimum off-duty time between shifts (*i.e.*, an increase from the previous minimum of 8 hours to the new minimum of at least 10 hours).

Upon request, ATA would be glad to provide ATRI’s full report on its HOS research results.

Question 3. Are there improvements that can still be made in the hours of service rules?

Answer. Yes. Changes to the sleeper berth split rest provision are needed. The current sleeper-berth rule is too restrictive by constraining drivers to only *one* option—sleeper-berth rest periods must be split into no more than two periods, one of which must be at least *eight consecutive hours*. While the government should re-

quire rest, the government should not require drivers to be in a sleeper berth for eight consecutive hours . . . that's simply unrealistic for most people.

A flexible and functional sleeper berth provision was available and used by truck drivers for *decades* prior to the change in the 2005 rules. A return to a rule with flexibility for both solo and team drivers who utilize sleeper berths is needed.

Question 4. Do you have any recommendations to share with the Committee for improving trucking/highway safety through additional means?

Answer. ATA recommends, and has been advocating the initiatives listed below. This is just a partial list from ATA's comprehensive safety agenda. ATA urges the Subcommittee to take appropriate action to encourage or require the implementation of these recommendations.

- Primary safety belt laws in all states.
- Reinstatement of a national maximum speed limit of 65 mph for all vehicles.
- A Federal regulation requiring that all new large trucks be electronically speed limited (or "governed") to no more than 68 mph at the time of manufacture.
- A new car-truck behavior improvement program that focuses on speed and traffic enforcement aimed at all vehicles, particularly those operating unsafely around large commercial vehicles.
- Creation of a national drug and alcohol test results clearinghouse to centrally capture positive test results of truck drivers to ensure drivers with a substance abuse problem are getting the needed help, consistent with Federal regulations, prior to operating a large truck in commerce.
- Creation of a national employer notification system to electronically link trucking employers, drivers they employ, and the state licensing agency that issued the driver his or her commercial driver's license. This would allow driver violation and conviction information to be received and acted upon by trucking employers more timely than the current driver self-reporting system.

Question 5. What is your organization's position on setting a maximum speed limit, requiring EOBRs, speed-limiters?

Answer. Please see the response to number 4 above for ATA's position on the speed limit and speed limiter issues. Regarding Electronic On-Board Recorders (EOBRs), in order for ATA to support a Federal regulation requiring the use of EOBRs for documenting compliance with hours-of-service rules, the following issues need to be satisfactorily addressed. However, prior to any regulation mandating EOBR use, ATA believes FMCSA should undertake a pilot program to determine the effectiveness of EOBRs in improving compliance and safety performance.

- There should be sound, consensus-based evidence that EOBR use leads to enhanced fleet safety performance by such means as accident rate reduction and improved compliance, therefore, increasing the credibility of EOBR systems as a cost-effective technology for motor carriers.
- EOBR systems should be based on the minimal, functional and performance specifications necessary to accurately record and report hours-of-service compliance and assure reliability and utility of operation.
- Statutory protections should be afforded to motor carriers pertaining to the control, ownership and admissibility/discoverability of data generated and derived from EOBRs, and to assure the privacy rights of drivers.
- Drivers shall be responsible for operating the EOBR in full compliance with all applicable regulations.
- Any EOBR regulation must address the operational diversity of the trucking industry, continue existing exceptions to the record of duty status, and consider additional exemptions that balance compliance and the evolving industry diversity.
- Motor carriers using compliant EOBRs should be relieved of the burden of retaining supporting documents for hours-of-service compliance and enforcement purposes.
- Any EOBR mandate, if instituted, should be made simultaneously applicable to all vehicles of the affected population of motor carriers, it should avoid any implementation inequities identified and take measures to eliminate them.
- Any EOBR regulation that takes an incentive-based approach should allow for reasonable and defensible flexibility in the hours of service rules for drivers and motor carriers.
- Tax incentives should be pursued as a means to facilitate adoption of EOBR systems.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MARK PRYOR TO
HON. JOHN H. HILL

Question 1. As you know, some trucking groups are pushing for government action on speed-related issues. Can you tell us what action FMCSA (and NHTSA if possible) has taken on the industry's petitions to set maximum speed limits and set truck electronic engine controls (speed limiters) at not more than 68 mph?

Answer. In late 2006, Road Safe America submitted to the Federal Motor Carrier Safety Administration (FMCSA) a petition for rulemaking requesting the Agency require speed limiting devices set at 68 miles per hour on new trucks with a gross vehicle weight rating greater than 26,000 pounds. The group also requested that FMCSA require motor carriers to retrofit trucks manufactured after 1990 with speed limiting devices and assess penalties against motor carriers for failing to maintain the speed limiting devices that would be required if a rule were issued.

The American Trucking Associations (ATA) petitioned the National Highway Traffic Safety Administration (NHTSA) to require vehicle manufacturers to install speed limiting devices on newly manufactured trucks to limit the maximum speed of trucks to 68 miles per hour.

As part of the Department of Transportation's effort to evaluate the petitions, FMCSA and NHTSA published a *Federal Register* notice on January 26, 2007, requesting public comment on the petitions. The comment period ended on March 27.

No decision has been made whether to grant the petitions at this time. If the petitions are granted, a notice-and-comment rulemaking proceeding will be initiated in accordance with applicable Departmental procedures. However, the decision whether to issue a final rule would be based on a review of all available data and information gathered in the course of the rulemaking proceeding, and an analysis of the public comments the agencies receive in response to any rulemaking notices.

In February 2008, Assistant Secretary for Transportation Policy Tyler Duvall, and FMCSA Administrator John Hill, met with representatives from Road Safe America and the American Trucking Associations to discuss the petition. We anticipate finalizing our decision in the next few months.

Question 2. What was FMCSA's rationale for recalculating the risk of driving 11 consecutive hours instead of 10 in the Interim Final Rule (IFR)? Do you believe this approach will increase safety and save more lives?

Answer. In preparing its economic impact analysis for the 2007 hours-of-service (HOS) IFR, FMCSA made several analytical adjustments in response to the D.C. Circuit Court of Appeals' July 2007 ruling that the Agency had failed to adequately explain the methodology supporting its 2005 HOS final rule.

One of those adjustments was in how FMCSA calculated the relative risk of a large truck being involved in a fatigue-related crash by hour of driving, if the 11th hour of daily driving were no longer available.

Specifically, to account for the impact of time on task (TOT) on the risk of a fatigue-related large truck crash, FMCSA calculated a TOT factor that was based on the relative risk of a fatigue crash in each individual driving hour divided by the average risk of a fatigue crash across the first 11 hours. FMCSA adjusted its analysis from the original regulatory impact analysis because it determined that the estimate of the average fatigue crash risk should have been based on hours one through 10 (not hours one through 11 as was used in the original analysis). However, in the end, the adjustment had no impact on the results of the analysis, mainly because of the way the results were scaled in the final analysis. As such, this analytical adjustment did not change the safety benefits of the rule, and therefore, had no impact on the final benefit-cost analysis results of the 2007 HOS IFR, which showed that eliminating the 11th hour of driving and the 34-hour restart would result in significantly more economic costs to society than benefits.

Question 3. Please discuss FMCSA's position on Electronic On-Board Recorders (EOBRs). What has FMCSA identified as the benefits and drawbacks of this technology? Can/Should a mandated requirement of EOBRs complement an HOS regulation?

Answer. On January 18, 2007, FMCSA published a notice of proposed rulemaking (NPRM) to amend its safety regulations to establish new performance standards for EOBRs. The NPRM included certain technical performance standards for this next generation of on-board recorders, including that the new devices be able to record date, time, location and distance traveled.

In addition, under the proposal motor carriers that have demonstrated a history of serious noncompliance with the hours-of-service (HOS) rules would be subject to mandatory installation of these EOBRs. The proposal provides that if FMCSA determined—based on HOS records reviewed during each of two compliance reviews conducted within a 2-year period—that a motor carrier had a 10 percent or greater vio-

lation rate (“pattern violation”) for certain regulations, the Agency would issue the carrier an EOBR remedial directive. The motor carrier would be required to install EOBRs in all of its commercial motor vehicles (CMVs) regardless of their date of manufacture and to use the devices for HOS recordkeeping for a period of 2 years, unless the carrier already had equipped its vehicles with recording devices that meet the Agency’s current requirements under 49 CFR 395.15 and could demonstrate to FMCSA that its drivers understand how to use the devices.

Finally, under the proposed rule, FMCSA would encourage industry-wide adoption of this technology by providing the following incentives for motor carriers to voluntarily use EOBRs in their CMVs: (1) revising the Agency’s compliance review procedures to permit examination of a random sample of drivers’ records of duty status; and (2) providing partial relief from HOS supporting documents requirements, if certain conditions are satisfied.

The FMCSA has completed its review of the comments received in response to the NPRM and is completing additional data analyses as a result of those comments to determine the content of a final rule. Although there are many complex technical issues involved, we plan to publish a final rule addressing EOBR use in 2008.

With regard to the benefits of EOBRs, the technology provides motor carriers with an effective tool to monitor and manage their drivers’ hours of service to better ensure compliance with the rules than the handwritten log books. EOBRs may also help to deter some drivers from violating the maximum driving time rules. However, because EOBRs are not capable of automatically capturing drivers’ duty status when the commercial motor vehicle is not in operation, motor carriers and enforcement officials must continue to rely on drivers’ self-reporting of their non-driving duty status, and any accompanying supporting documents to determine the total number of on-duty hours, and sleeper-berth time the driver has accumulated.

As to whether an EOBR mandate would complement an hours-of-service (HOS) rule, the Agency’s HOS rulemaking focuses on regulations to provide drivers with adequate opportunities for rest while the EOBR rulemaking focuses on the use of technology to monitor drivers’ compliance with the HOS rules. The FMCSA plans to publish a final rule addressing EOBRs use in 2008, and a separate final HOS rule following up on the December 17, 2007, Interim Final Rule (IFR).

Question 4. What is the Administration’s position on setting a maximum speed limit, requiring EOBRs, speed-limiters?

Answer. The National Highway Designation Act of 1995 (NHS Act) repealed the National Maximum Speed Limit Compliance Program which limited maximum speed in the United States to 55 mph. Therefore, the Department of Transportation cannot withhold Federal funds from States that set speed limits above 55 mph. Currently, 25 States have a maximum speed limit of 70 mph or above for trucks, while another 19 have a maximum speed limit of 65 mph for trucks.

With regard to petitions to require speed limiters, filed by Road Safe America and the American Trucking Associations, a decision has not been made. If the petitions are granted, a notice-and-comment rulemaking proceeding will be initiated in accordance with the applicable procedures. However, the decision whether to issue a final rule would be based on a review of all available data and information gathered in the course of the rulemaking proceeding, and an analysis of the public comments the agencies receive in response to any rulemaking notices.

As for EOBRs, FMCSA has completed its review of the comments received in response to the NPRM, and is completing additional data analyses as a result of those comments to determine the content of a final rule. FMCSA believes the best way to address hours-of-service compliance is by targeting high-risk carriers which have demonstrated a pattern of non-compliance. Our data show the carriers non-compliant with HOS regulations account for greater involvement in crashes than compliant carriers. Rather than imposing an economic burden on all motor carriers, we believe this approach is in keeping with empirically-based rulemakings. Although there are many complex technical issues involved, we plan to publish a final rule addressing EOBR use in 2008.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MARK PRYOR TO
HON. JOAN CLAYBROOK

Question 1. Would you briefly explain your views in opposition to these new rules and the rules that were on the books pre-2003? In your view, how have the new rules impacted truck and highway safety? What programs/policy/rules/regulations does Public Citizen currently support/oppose?

Public Citizen believes that it is the duty of the Federal Motor Carrier Safety Administration (FMCSA) to develop a new, responsible hours-of-service rule that maxi-

mizes highway safety and driver health. We believe that the current interim final rule (IFR) for hours-of-service, provisions of which have been twice struck down by a Federal appeals court, fails to maximize health and safety. In comparison to the pre-2003 rules, the IFR actually increases both the daily and weekly limits drivers can spend behind the wheel.

Public Citizen opposes these rules in that they allow for 11 hours of daily driving and that contain a 34-hour “restart” provision. These provisions combined allow for a dramatic increase in weekly time behind the wheel. FMCSA is quick to note that the large truck crash fatality rate has decreased since the 34-hour restart and 11-hour driving day provisions have been in effect. This assertion, however, ignores that the number of occupant fatalities has steadily increased in the years since these provisions have been in use. In 2006 there were 805 occupant fatalities, whereas in 2003 there were only 726 fatalities. The number increased every year. Drivers/operators are paying the price for longer driving hours with their health and safety.

The cumulative fatigue created by extending both the daily drivable hours and the number of hours that can be driven in a rolling week period creates significant safety issues. The current rules allow for 30 percent more driving hours and a 40 percent increase in on-duty time each week as compared to the pre-2003 rules, in addition to longer daily driving tours. Under the current rules, the 34-hour restart provision and 11-hour driving day allows for dramatic increases in total time behind the wheel and on-duty:

	Maximum Driving Hours	Maximum Total On-Duty Hours
7-day floating week	77	84
8-day floating week	88	98

Under the current rules, even if drivers obtained 8 hours of rest after on-duty periods, the dramatic increase in weekly driving hours permitted by the 34-hour “restart”—28 percent for weekly driving hours and 40 percent for on-duty hours—ensures that drives will be more, not less, fatigued. As the operator fatality statistics indicate, this takes a dangerous toll on driver and highway safety.

Public Citizen does not believe that the increase in allowable driving hours provides sufficient opportunity for drivers to obtain the rest necessary to safely operate. Given the economic motivation the pay-per-mile system creates to maximize on-duty driving hours, FMCSA is ignoring reality by assuming drivers will always be able to obtain eight uninterrupted hours of sleep, given that the 10-hour off-duty period must also be used for paperwork, fueling, loading, communications and other non-driving duties.

FMCSA also has failed to sufficiently demonstrate how the extra off-duty time, when compared to the pre-2003 rules, enhances a driver’s ability to drive an additional hour—this is especially true given the economic motivation to maximize driving time.

IFR also fails to allow for a reasonable circadian sleep cycle and adequate resting weekend. The rules, in application, allow for a schedule in which drivers maximizing their driving would be on a 21-hour, backward-rotating schedule. This is the likely schedule, because truckers have a strong economic motivation to maximize allowable driving time—in other words, to drive 11 hours and sleep the minimum of 10 hours. In reality, the IFR does not propose a 24-hour, circadian work/rest cycle. These rules have turned large trucks on our public highways into rolling time bombs.

Opposition to Pre-2003 Rules

The regulations in effect prior to 2003 had been in effect since 1939 and had not been substantially changed since 1962. Public Citizen believed these regulations were in desperate need of overhaul, to comport with modern scientific understanding of sleep cycles and driver fatigue. Public Citizen supported the development of a new set of rules consistent with the best available technology present.

Public Citizen supported revision of the pre-2003 rules specifically because the regulations did not accommodate a circadian cycle. Since 1962, the rules allowed work/rest cycles as short as 18 hours if drivers maximized or were required to maximize driving time. Such “18-hour days” run counter to human beings’ circadian rhythm of just over 24 hours. The old rules also did not require that drivers take their 8 off-duty hours in one block, meaning that drivers might not get the significant benefits associated with one long block of uninterrupted rest. Under the old regulations, drivers could accumulate required rest in a sleeper berth (if each period was at least 2 hours long), staggering shorter driving and resting sessions until they

reached weekly limits. Because sleep in short segments is less effective in restoring driving fitness than sleep in one long block, split-sleep patterns are among the strongest predictors of fatigue-related truck crashes. Public Citizen disagreed and continues to disagree with regulations creating such a dangerous driving pattern.

Public Citizen's Position

Motor carrier drivers deserve adequate health and safety protections as the law requires—protections that should be afforded to all American workers. Public Citizen supports the following guidelines for hours-of-service regulations:

- *Maximum Driving Time in Each Shift:* Drivers should accrue no more than 10 consecutive hours of driving in a shift. We prefer fewer consecutive hours, as the research literature and the agency itself has shown, would result in safer operations. New rules should strive for a maximum of 8 driving hours per shift.
- *Minimum Off-Duty Time in Each Shift:* Solo drivers should take at least 12 consecutive hours off-duty in a single block of time, regardless of whether the off-duty rest time occurs in a sleeper berth or elsewhere. Studies are unanimous that commercial drivers get both less sleep and lower quality sleep when it is taken in two, separate sleeper-berth or other rest periods.
- *Shift Cycle:* A shift schedule adhering fully to a circadian cycle is more desirable than the 21-hour shift rotation of drive/rest permitted under the current regulations.
- *Ceiling on Total Accrued Driving Time in Each Tour of Duty:* Drivers should not be able to accrue more than 48 hours of driving over 7 consecutive calendar days or more than 56 hours of driving over 8 consecutive calendar days. Fewer hours of driving would further improve safety.
- *“Restart” Provision:* Drivers should not be able to “restart” their driving hours by taking only 34 hours off-duty. Drivers work on either a 7 or 8 day work rotation. Under current rules, after reaching 66 hours of driving, a driver must take a minimum of 34 hours to rest—time to travel home, sleep, visit family and take care of any other personal business. Public Citizen believes after reaching the weekly hours cap, drivers should be afforded a weekly off-duty period that includes at least two to three full nights of rest and not an option to restart after only a 34-hour break.
- *Maximum Shift Working Time:* Drivers should work no more than 12 hours in each shift and should be paid overtime after 8 hours of work like the rest of workers in America.
- *Other Activities during the Work Shift:* Meals, fuel stops, and similar activities should be “on the clock”—that is, included in the maximum hours of on-duty time in each shift before a driver is able to drive again. Four hours of non-driving duty time in each shift would be available under a 8 driving hours/12 on-duty hours/12 off-duty hours schedule. Drivers need this time for meals, fueling, loading/unloading, and paperwork obligations.

Question 2. What is your organizations’ position regarding Electronic On-Board Recorders? Speed Limiters? Setting a maximum speed limit?

Electronic On-Board Readers

Public Citizen strongly advocates the mandated use of Electronic On-Board Recorders (EOBRs) in all commercial trucking applications. Compliance is critical to reaping the benefits of hours-of-service regulations. FMCSA currently relies upon manual logbooks known as driver records of duty status (RODS) for documenting driver hours of service. This is essentially no more than an honor code system. RODS create enormous potential for abuse and falsification. By FMCSA’s own admission, alteration and abuse of duty time is “widespread.” This method of documenting hours-of-service effectively undermines enforcement of any set of hours-of-service rules and denies truckers and the driving public the benefits of hours-of-service regulations. Drivers commonly refer to these record books as comic books.

Automated recorders capable of more accurately documenting duty status have been available for over 35 years, and can now be purchased off-the-shelf. In addition to safety benefits for truckers that accrue from compliance with hours-of-service rules, EOBRs offer economic benefits to the trucking industry. EOBRs would reduce costs to the industry that are the result of fatigue-related crashes, allow for better scheduling and routing of trucks, and eliminate the costly paperwork burden associated with RODS. Indeed, many trucking companies have electronic systems for scheduling trucks and tracking deliveries, making the additional HOS tracking function a relatively simple matter. Public Citizen believes it illogical, dangerous and irresponsible to fail to mandate installation of EOBRs, given that FMCSA ad-

mits that violations of hours-of-service regulations are widespread. EOBRs represent an important means by which to deter many of these violations. FMCSA must proffer a rule requiring the use of EOBRs without further unnecessary delay. The current proposal, issued as a Notice of Proposed Rulemaking in January 2007, would require EOBRs only for carriers with a “demonstrated history of non-compliance.” In reality this mandate would apply to only 1/10 of 1 percent of all trucks.

Speed Limiters for Commercial Trucks

Public Citizen supports the adoption of speed limiting devices for use on commercial trucking fleets. FMCSA in 2001 reported that excessive speed was a contributing factor in 21 percent of large truck crashes. When adopted in conjunction with a reasonable set of hours-of-service regulations, the use of speed limiting devices will provide assurance that truckers do not act on industry pressures to speed in order to achieve more deliveries. Public Citizen believes that a program integrating both speed limiting devices and an enforced, reasonable speed limit would greatly contribute to overall highway safety and reduce the number of truck crashes. As truck travel speeds increase, so does the crash risk. It follows that preventing a vehicle from exceeding the speed limit would eliminate the segment of higher-speed crashes, reducing both injuries and fatalities.

Ensuring that large trucks cannot operate in excessive speeds will also create environmental benefits. Increased fuel consumption is needed to operate at higher speeds, creating additional and unnecessary particulate and greenhouse gas emissions. Such pollutants place the general public at increased risk for asthma and other health conditions.

Finally, Public Citizen believes that the installation of speed limiters on large commercial trucks will provide long term benefits to the trucking industry. In addition to the potential occupant lives that will be saved by reducing operating speeds and the saved expenses of truck crashes, speed limiters will prevent much of the unnecessary wear and tear on diesel engines associated with higher-speed operations. This will ultimately mean trucks will require less maintenance and that an engine can accumulate more mileage before it needs replacement. Speed limiters would also help establish better fuel economy among trucking fleets, sparing truckers the added and increasing expense of diesel fuel that would be burned through higher-speed operation.

National Maximum Speed Limit

Public Citizen supports re-establishing a national speed limit for both commercial trucks and passenger vehicles traveling on the highway system as was in effect from 1974–1987. Public Citizen believes that in order for a national, maximum speed limit to be effective and have significant safety impacts that it must be enforced with the same speed limit for both commercial trucks and personal vehicles. Having a uniform speed limit for all vehicles on the road eases and steadies the flow of traffic, helping to avoid the congestion and vehicular spacing issues that occur when a passenger vehicle attempts to pass a much larger commercial truck.

Setting a national, maximum speed limit would provide both safety and environmental benefits. If readily enforced, a national maximum speed limit could help to significantly reduce highway crashes, fatalities and injury. The National Highway Traffic Safety Administration reported that in 2006 speed was a contributing factor in 31 percent of all fatal highway crashes. A maximum speed limit set at 55 or 60 miles per hour would also increase fuel economy in the vast majority of vehicles utilizing the highway system. In short, a uniform, national maximum speed limit supports the ideals of improved safety and reducing greenhouse gas emissions, both of which are longstanding Public Citizen goals.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MARK PRYOR TO DAPHNE IZER

Question 1. Would you briefly explain your views on these new FMCSA rules and the rules that were on the books pre-2003? In your view, how have the new rules impacted truck and highway safety? What programs/policy/rules/regulations does your organization currently support/oppose?

Answer. The pre-2003 hours of service rules had a number of unsafe features that caused driver fatigue and led to many crashes by tired truckers. First, the 10-hour consecutive driving shift was very long and grueling, and studies showed that truck crash risk increases after 8 hours of driving and is much higher by the 10th consecutive hour of driving. This is understandable and the reason why most employees, in far less demanding jobs than truck driving and where public safety is not on the line every moment, generally only have to work 8 hour days. Second, the 8-

hour off-duty time was not long enough to allow drivers to get the rest and sleep they needed to be fresh for their next driving shift. Studies show that most workers, but especially truck drivers, need 8 hours of sleep, not just rest, to be able to perform their jobs well. But with only 8 hours off-duty, drivers had to travel home, complete errands, and take care of other household and life tasks, and sleep, all within 8 hours. As a result, getting 8 consecutive and continual hours of sleep was not possible. For drivers stopping for 8 hours while on the road, not only was it physically difficult, if not impossible to get 8 hours of sleep, but the sleeper berth rule gave drivers permission to take only 5 hours off-duty at a time.

As unsafe as the hours of service requirement was under the pre-2003 HOS rule, the current rule that has been in place since 2004 makes things even worse. By letting truckers drive for 11 consecutive hours instead of 10 hours, the rule gives already exhausted truckers permission to continue driving and thus to become even more tired and less safe and to have more exposure time on the road while fatigued. The extra hour is not just a 10 percent increase in driving time, it adds another hour of driving a fully loaded, 80,000 pound rig down the highway at speeds of 60 miles an hour or more at the end of the driver's shift when the driver is at his most fatigued and least safe condition.

The rule added 2 hours to the off-duty time, extending it from 8 to 10 hours between driving shifts. However, surveys show that drivers still do not get 8 hours of sleep but only about 6 hours. The 10-hour off-duty time, while it might help a little, does not even provide the full amount of nightly sleep that drivers needed when they were limited to only 10 consecutive hours of driving. There is no evidence that the extra rest time provides any benefit to prevent fatigue or to offset the workload imposed by an additional consecutive hour of driving. Substantial research shows that you cannot offset the exhaustion of extremely long working and driving hours and that, in fact, both the length and the quality of sleep is impaired by very long working hours.

Another dangerous and unsafe provision in the new HOS rule is to allow the 34-hour "restart" which permits drivers to "restart" their weekly driving and working clock after taking only 34 hours total off-duty. This provision permits truckers to drive far more hours than under the pre-2003 rule. It really lets the most tired, long-haul truckers who are using their driving hours as fast as possible to convert what used to be off-duty rest time under the pre-2003 rule into more driving hours. FMCSA has admitted that the 34-hour restart allows up to 17 more hours each week of driving time for drivers on a 7-day work schedule (77 hours instead of 60), and up to 18 more hours each week of driving time for drivers on an 8-day work schedule (88 hours instead of 70). Under the pre-2003 rule those 17 or 18 hours were available as off-duty rest time.

The reason this poses a grave threat to safety is that it encourages the most tired drivers to drive the most hours. Under the pre-2003 rule, drivers with relatively relaxed driving schedules already got at least 34-hours off-duty between work weeks, but truckers driving aggressive schedules and trying to maximize their use of driving hours early in the week got far more off-duty rest time to recover toward the end of their week. For example, truckers who worked a regular schedule driving just one 10-hour driving shift a day for 6 days (Monday through Saturday), were the most rested and least pressured drivers during the week and they were required to be off-duty for at least 34 hours at the end of the work week, from Saturday night until Monday morning. Typically, these drivers had 36 hours off-duty, from 6 p.m. Saturday to 6 a.m. Monday, or longer depending on when they stopped driving on Saturday and began driving on Monday. But for drivers that maximized their driving hours by alternating the 10-hour driving shift with the 8-hour off-duty period until they reached their 60 or 70 hour weekly maximum driving hours, which was the case for many long-haul drivers, these truckers were required to be off-duty for the remainder of the week which could amount to as much as 52 or 56 hours off-duty.

Under the current rule, however, the drivers that maximize their use of driving hours, and who are comparatively more tired, only need to take 34 hours off-duty, the same off-duty time that used to be required for the *least* exhausted drivers. As a result, this allows these tired drivers to convert what used to be mandatory off-duty time into more hours behind the wheel.

While we support the longer 10-hour off-duty requirement, we oppose the increase in permitted driving hours from 10 to 11 hours per shift and we oppose the 34-hour restart provision. Both of these driving hour increases are counterproductive and encourage more tired and fatigued drivers. The 11 hours of consecutive driving should be reduced, even 10 hours of consecutive driving is too much, and the 34-hour restart should be eliminated. Also, we support keeping the 14-hour workday maximum limit that cannot be extended by intervening off-duty time.

Question 2. What is your organization's position regarding Electronic On-Board Recorders? Speed Limiters? Setting a maximum speed limit?

Answer. We strongly support the need to require effective Electronic On-Board Recorder (EOBR) systems on all trucks. One of the difficulties with any hours of service rule is the widespread violation by truckers who want to earn more money and know that they will not get caught because enforcement is spotty. EOBRs will not only eliminate cheating and multiple logbooks ("comic books") but it will make it much easier for law enforcement officials and for Federal and state motor carrier inspectors to determine whether the driver was operating illegally. EOBRs are an essential part of any comprehensive solution to truck safety.

Studies and surveys have shown that between 30 percent and 56 percent of truck drivers regularly exceed HOS limits and falsify their paper logbooks recording their duty status. HOS violations and logbook falsification have been at epidemic levels for decades.

Mandatory On-Board Recorders in big trucks to measure the driving time of commercial drivers are currently required in all European Union countries, Morocco, Argentina, Brazil, Peru, Uruguay, Venezuela, Israel, Turkey, Japan, South Korea, Singapore, and are under consideration in Australia because of the very high rate of fatigued truck driver crashes.

We also support the use of speed limiters or governors to prevent trucks from exceeding speed limits. Furthermore, we support a reasonable maximum speed limit for trucks in order to prevent large trucks from being driven at excessive speeds.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MARK PRYOR TO
LAMONT BYRD

Question 1. Would you briefly explain your views on these new FMCSA rules and the rules that were on the books pre-2003? In your view, how have the new rules impacted truck and highway safety? What programs/policy/rules/regulations does your organization currently support/oppose?

Answer. IBT did not have a problem with the pre-2003 regulation as our driver membership is covered by Collective Bargaining Agreements (CBA) that define the workday and workweek, therefore, ensuring that drivers had sufficient rest time on a daily and weekly basis. In addition, the CBAs typically include language that requires the signatory parties to comply with all Federal, state, and local safety and health regulations. Consequently, any violations of the HOS regulation (by the motor carrier or by the driver) may result in a grievance being filed that must be resolved through the grievance machinery included in the CBA. However, we acknowledge that for non-union drivers, the pre-2003 HOS regulation was problematic. For example, the "old" rule only required drivers to have eight (8) hours of off-duty time between work shifts. There was abundant scientific evidence suggesting that a person needs roughly 7.5 hours of sleep to avoid experiencing cumulative fatigue. It was virtually impossible for a driver to attend to his/her personal or family needs and get 7.5 hours of sleep in an 8-hour time period. Further, the "old" rule allowed drivers to extend their workday by declaring themselves to be "off-duty". In effect, a driver could begin his/her work shift, work for several hours, go "off-duty", and resume driving many hours after beginning the workday. The problem with this practice is that the "off-duty" period was not of sufficient duration to allow the driver to obtain restorative rest. Further, the "off-duty" period was oftentimes spent waiting in break rooms or on freight docks where no accommodations for rest were present (beds, quiet areas, etc.) Therefore, it was our opinion that under the previous regulatory system, combined with a "Just In Time" economy, many drivers were at risk of experiencing fatigue.

The new Hours-of-Service Regulation provides somewhat more protection for drivers, but continues to fall short of what is needed to enable drivers to avoid experiencing cumulative fatigue. As indicated above, Teamster drivers are protected by CBAs that have been modified to address what we perceive as weaknesses in the new regulation and, therefore, does not have a significant impact on our membership. With respect to our position on the "new rule", we are of the opinion that requiring drivers to have a minimum of ten (10) hours of off-duty time between work shifts is a positive revision. The ten-hour rest period should provide drivers with sufficient time to address personal and family responsibilities and obtain the necessary 7.5 hours of rest to avoid experiencing cumulative fatigue. The 14 hour work day is also a positive revision to the regulation as it, combined with the 10 hour rest period places drivers in a work / rest cycle that more closely approaches the 24 hour circadian cycle that is essential for humans. However, the regulation still has weaknesses. For example, the 34-hour restart provision allows drivers to work

the normal 60 or 70-hour workweek, rest for 34 hours, and resume working with a “fresh set” of hours. In effect, as was discussed by several stakeholders who participated in the hearing, the restart provision allows drivers to drive upwards of 88 hours per 8-day workweek, as compared to 70 hours for the “old rule”. The IBT is of the opinion that it is very difficult to obtain two consecutive nighttime rest periods in 34 hours. Additionally, allowing drivers to drive additional hours during the workweek does not reduce driver fatigue; it stands to reason that it only contributes to fatigue. For these reasons, the IBT negotiated with our LTL carriers to develop contract language that prohibits drivers from using the restart provision.

Overall, in our opinion, the new HOS regulation has not improved transportation safety because of provisions such as the 34-hour restart and the 16-hour workday extension. If such provisions were eliminated from the rule, we feel that the 10-hour rest period between shifts and the continuous 14-hour workday would significantly improve a driver’s ability to obtain restorative rest.

Question 2. What is your organization’s position regarding Electronic On-Board Recorders? Speed Limiters? Setting a maximum speed limit?

Answer. With respect to Electronic On-Board Recorders (EOBR), the IBT is of the opinion that the technology may have utility in ensuring compliance with the Hours-of-Service regulation. However, in our view, the use of the technology is not a panacea relative to compliance with the regulation. EOBRs are designed to automatically capture information regarding the time during which a commercial motor vehicle is operating, however, recording devices will not automatically capture data concerning “on duty, not driving” time. The driver will have to manually input this information, thus allowing an unscrupulous individual the opportunity to input erroneous information. Further, we have concerns about how drivers will be identified as actually being the operator of the EOBR-equipped CMV. There has been discussion about methods that could be employed to identify drivers, but it is possible that some of these methods could easily be defeated, thus allowing a driver who has no available driving hours to operate while using another driver’s identity. In addition, we have serious concerns about other information that can be collected by the “black box” technology. It has been our experience that carriers that utilize this type of technology tend to want to combine it with Global Positioning Satellite (GPS) technology and collect information on the “real-time” position of the vehicle, information on various operational criteria (engine speed, braking operations, etc.) Some carriers have attempted to use this information to critique the driving patterns of drivers, including pressuring the drivers to maintain the posted speed limit in a particular area, although there may be weather or traffic conditions that preclude the driver from doing so. In extreme situations, motor carriers have attempted to use the information to implement disciplinary actions against drivers for failure to follow a management directive. We feel that this practice has contributed to job stress (which may contribute to driver fatigue), overall job dissatisfaction, and in some instances has an adverse impact on safety. We would strongly recommend that the Federal Motor Carrier Safety Administration (FMCSA) and any motor carriers that use EOBR and other electronic technologies limit how the technology is implemented.

Speed Limiters

Many commercial motor vehicles operated by Teamster members are currently equipped with speed limiting devices and our drivers report no significant problems or safety hazards associated with the use of such equipment. However, in some instances the union and motor carriers negotiated contract language that requires the vehicles to be able to reach an agreed to speed to ensure that the vehicles can be safely operated on highways and throughways, *e.g.*, 62 mph for LTL trucks. The union is particularly concerned that the vehicles be able to attain sufficient speeds to safely pass other vehicles, if necessary. Further, CMVs should also be able to maintain safe speeds while traveling up hills.

Maximum Speed Limit

The union agrees that large commercial motor vehicles should not be operated at extreme speeds. As indicated above, a large percentage of CMVs operated by Teamster members are equipped with speed limiting devices that preclude the heavy trucks from operating at the maximum posted speed limit in many states. However, it is the opinion of the union that heavy trucks are able to maintain sufficient speeds to enable them to operate safely when driving among smaller, faster personal vehicles. Otherwise, the union has no issue with the current speed limit laws.