

**STATEMENT OF
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**BEFORE THE HOUSE COMMITTEE ON OVERSIGHT AND GOVERNMENT
REFORM, SUBCOMMITTEE ON REGULATORY AFFAIRS, STIMULUS
OVERSIGHT AND GOVERNMENT SPENDING**

***THE PRICE OF UNCERTAINTY: HOW MUCH COULD DOT'S PROPOSED
BILLION DOLLAR SERVICE RULE COST CONSUMERS THIS HOLIDAY SEASON***

November 30, 2011

INTRODUCTION

Chairman Jordan, Ranking Member Kucinich, and Members of the Subcommittee, thank you for inviting me today to discuss the Federal Motor Carrier Safety Administration's (FMCSA's) efforts to reduce the risk and prevalence of fatigue-related truck crashes through improvements in the hours of service (HOS) regulations. I am pleased to describe to you today FMCSA's rulemaking to amend the HOS rules, based on a thorough review of fatigue-related scientific literature, crash data, driver health and mortality information, and the feedback we received from public meetings of the Agency's Motor Carrier Safety Advisory Committee (MCSAC) and listening sessions around the country. FMCSA's HOS rules are essential to reducing the risks of fatigue-related crashes involving truck drivers, and provide flexibility for the industry to meet the transportation needs of the Nation while ensuring highway safety.

The Department of Transportation (the Department) has focused on fighting driver fatigue as one way to help make our roads safer since the enactment of the ICC Termination Act of 1995. The Act included a provision requiring the Department to initiate rulemaking to revise the HOS requirements. The Department issued an Advance Notice of Proposed Rulemaking in 1996, followed by a Notice of Proposed Rulemaking (NPRM) in 2000. In 2003 and 2005, we took important steps toward reducing the number of fatigue-related fatal crashes by modifying the hours-of-service rules to ensure that truck drivers are provided better opportunities to rest at the end of each work day, and during the work week. In 2010 we took further steps by proposing important changes to the current HOS rules. While the cycle of rulemaking and litigation has created an atmosphere of uncertainty, FMCSA remains committed to working with its safety partners and stakeholders to provide an hours-of-service regulatory approach that raises the safety bar for the industry.

BACKGROUND

Crash Rates for Trucks

Crash rates for trucks and passenger vehicles have been falling since the late 1970s. The reasons for the decline are complex and cannot be attributed to any single factor.

Improved vehicle and highway design have contributed to the reduction, and injuries and fatalities have also decreased with greater use of seat belts by car and truck drivers. The rates have been declining steadily over a long period, well before FMCSA initiated the latest HOS rulemaking in 2010. We agree that some elements of recent declines can be attributed to the improved rest drivers receive by the limits to a 14-hour work day and mandatory 10 hours off-duty time.

Economic conditions also play a part in the number of crashes. The large decrease in truck-related fatality rates from 2007 to 2009 is not unprecedented; similar year-to-year percentage decreases in fatal crash rates occurred in 1980, 1982, 1991, 1992, and other periods of recession.

In opposing changes to the current HOS regulations, the motor carrier industry assumes that fatigue-related crashes, which are the target of the HOS rules, have declined sharply, along with crashes as a whole. The data from the Trucks Involved in Fatal Accident (TIFA) reports, however, indicate that the trend in fatigue-coded fatal crashes has not been as consistent as the decline in crashes. The highest percentage of fatigue-coded fatal crashes occurred before the 2003 HOS final rule in 1999 and 2000 (both 2.1 percent) followed by 2 percent in 1994 and 2007, i.e., before and after the rule. The lowest rate occurred before the rule (1.4 percent in 2001) followed by 1.5 percent in 2002, 2004, and 2006, spanning the period before and after the rule.

While the decline in crashes is welcome, it is not sufficient, and as long as FMCSA's primary mission is to place safety as the highest priority in its regulation of bus and truck safety, it will continue to identify strategies and rules to reduce serious and fatal crashes involving trucks and buses without imposing unreasonable costs on business and economy as a whole.

In 2009, 3,380 people died in truck crashes and 74,000 were injured. These numbers represent the loss of people – husbands, wives, children, family members, cherished friends, and colleagues. The initial 2010 data on fatal truck crashes indicate that the downward trend reversed in the second half of the year as the economy improved. Recent crash reports provide a painful reminder of the need to continue doing everything we can to improve truck safety.

Hours of Service History

When the first HOS rules were implemented by the ICC in 1938, the requirements provided an on-duty limit of 60 hours in a week, and 15 hours in a day (15-hour rule). In 1939, the ICC revised its rules to limit drivers to a total of 10 hours of driving time in any

period of 24 consecutive hours unless the driver was off duty for 8 consecutive hours immediately following the 10 hours of driving. In addition, the ICC revised the weekly restrictions for drivers. Drivers were limited to 60 hours of on-duty time in any period of 168 consecutive hours (60-hour rule). For motor carriers that operated commercial vehicles every day of the week, the limit was set at 70 hours in any period of 192 consecutive hours (70-hour rule).

In 1962, the ICC amended the HOS rules to remove the prohibition against driving more than 10 hours in any 24-hour period. In 1963, the 15-hour rule was amended to prohibit drivers from driving after being on duty for more than 15 hours, following 8 consecutive hours off duty. In addition, the ICC modified the procedure for calculating the 60-hour and 70-hour rules. Through these actions, the ICC established the HOS regime that would remain in place until 2003, when FMCSA made significant revisions to increase the minimum off-duty period from 8 to 10 hours, and to provide a 14-hour, non-extendable window within which all driving must be completed.

Prior to 2003, drivers were allowed to complete up to 10 hours of driving within a 15-hour, extendable workday or window. In practice, the 15-hour window could be substantially longer than 15 hours because miscellaneous off-duty periods were not counted as part of the 15 hours. Also, drivers using a sleeper berth could split their time in the sleeper berth into two separate periods to accumulate the equivalent of 8 consecutive hours off duty, provided neither period was less than 2 hours. This meant that drivers could be required to 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 consecutive hours of sleep which most individuals need each day.

The way the weekly limits for on-duty time were prescribed, drivers on certain schedules could “run out” of available on-duty time within a few days and be forced to go off duty for approximately 3 full days before being allowed to drive again. This was the case regardless of whether the driver may have fully recovered from the work demands in a shorter period of time. In this context, it could be said that the absence of a “restart” provision had the effect of making the rule unnecessarily burdensome by limiting the availability of drivers beyond what was needed to ensure safety.

FMCSA’s 2003 Final Rule

In April 2003, FMCSA published a final rule that changed the requirements for drivers of property-carrying CMVs (“the 2003 Rule”). The rule extended the driving time to 11 hours (known as the 11-hour rule) within a 14-hour, non-extendable window after coming on duty, following 10 consecutive hours off duty. Although the rules concerning weekly limits for on-duty time remained unchanged, drivers were allowed to restart the weekly limit calculation at any time after taking 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, taken together, improved the opportunity for drivers to obtain restorative sleep, thus decreasing the likelihood of driver fatigue. 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. This provision moved drivers toward a work-rest schedule that more closely matched the natural circadian cycle of 24 hours 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 of the 2003 rule gave daytime drivers the opportunity for two 8-hour sleep periods.

As 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 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 provided drivers and carriers' 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 safety benefits of the limited 14-hour rule and the mandatory 10-hour off-duty period improved safety while providing operational flexibility with the 11 hours of driving time and the 34-hour restart.

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 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). The Court also indicated in dicta that it had concerns about the rationale for other provisions in the rule. Shortly after the Court ruled, Congress enacted section 7(f) of the Surface Transportation Extension Act of 2004. This section 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 decided to re-propose the rule as originally published in 2003 and to seek public comments. On August 25, 2005, FMCSA published a final HOS rule that addressed driver health in detail but otherwise retained most of the 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 take an additional 2 hours either off duty or in the sleeper berth. The new requirement provided drivers the opportunity to obtain 7 to 8 hours of uninterrupted sleep each day. Also, the Agency required that the shorter off-duty or 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 additional 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. The Agency considered scientific literature about the relationship among 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

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 focused on the sleeper berth provision, but accepted part of Public Citizen's arguments and vacated the 11-hour driving time and 34-hour restart provisions (Owner-Operator Indep. Drivers Ass'n, Inc. v. Federal Motor Carrier Safety Admin., 494 F.3d 188 (D.C. Cir. 2007)).

Public Citizen challenged the provisions on four grounds. First, it contended that FMCSA's actions were inconsistent with the Administrative Procedure Act (APA) requirement for notice and comment rulemaking because the Agency did not disclose in time for comment the methodology of a model central to the Agency's justification for the rule. Second, it asserted that when the methodology was disclosed, FMCSA did not provide an explanation for some of its critical elements, thus rendering the rule arbitrary and capricious. Third, Public Citizen alleged that FMCSA's treatment of a number of other safety considerations was also arbitrary and capricious. Finally, Public Citizen argued that the rule failed to protect driver health. The Court vacated the rule provisions based on the first two arguments and did not address the last two.

The Court concluded that FMCSA did not satisfy the APA's 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 costs and benefits of alternative changes to the HOS rules.

The Court also found that FMCSA did not provide an adequate explanation for certain critical elements in the model's methodology. As its basis for vacating the increase in the daily driving limit from 10 to 11 hours, the Court found arbitrary and capricious what it described as FMCSA's "complete lack of explanation for an important step in the Agency's analysis," i.e., the manner in which it had plotted crash risk as a function of time-on-task/hours of driving. The Court also found that FMCSA failed to provide an explanation for its method for calculating risk relative to average driving hours in determining its estimate of the increased risk of driving in the 11th hour. As its basis for vacating the 34-hour restart provision, the Court found that FMCSA also 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.

Based on these two findings, the Court determined that it was not necessary to reach Public Citizen's other two arguments. In addition, the Court rejected three more challenges to the 2005 Rule raised by OOIDA.

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

In December 2007, FMCSA issued an interim final rule to correct the procedural issues that were identified by the Court in overturning two provisions of the 2005 rule, while retaining the 11- and 34-hour provisions. The rulemaking notice sought comment on the methodology of the model central to the justification for certain provisions of the HOS rules. It was 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.

The Agency published a final rule in November 2008, making permanent the provisions of the interim final rule, effective January 19, 2009. In December 2008, several petitions for reconsideration of the final rule were filed with the Agency. Two of the petitions were especially complex in terms of the issues raised. The first was from Advocates for Highway and Auto Safety (Advocates), the International Brotherhood of Teamsters, Public Citizen, and the Truck Safety Coalition. The second was from the Insurance Institute for Highway Safety. The FMCSA denied both petitions in written responses dated January 16, 2009.

2009 Petition for Judicial Review and Settlement Agreement

On March 9, 2009, Public Citizen, Advocates, the Teamsters, and the Truck Safety Coalition (the Petitioners) petitioned the D.C. Circuit to review the final rule. The American Trucking Associations filed a motion to intervene on March 12. As part of its effort to end the cycle of rulemaking and litigation, on October 26, 2009, FMCSA and the Petitioners entered into a settlement agreement under which the petition for judicial review of the November 19, 2008, final rule would be held in abeyance pending the publication of an NPRM. The settlement agreement stated that FMCSA would publish a final rule within 21 months of the date of the agreement.

The settlement agreement did not include any guidance, directions, or restrictions on the scope and content of the NPRM that was published on December 29, 2010, or make any commitments on the outcome of the notice-and-comment rulemaking process. Therefore, FMCSA had full discretion to reconsider the November 19, 2008, final rule, which

provided a maximum of 11-hours driving time following 10 consecutive hours off duty and a restart of the 60- and 70-hour on-duty limits following 34 consecutive hours off duty, as well as other provisions of the current HOS regulations. In fact, the Agency committed to taking an entirely fresh look at the HOS regulations with the goal of promoting the safe operation of commercial motor vehicles while taking into account both driver health and the vital role that trucks play in the delivery of goods and services to the American people.

Public Engagement – Path to the December 2010 NPRM

In December 2009 FMCSA tasked its MCSAC to identify ideas and information the Agency might consider as it developed options for the hours-of-service rulemaking. The MCSAC submitted its report to the FMCSA Administrator on February 2, 2010.

While the MCSAC was completing its work, the Agency held a series of five listening sessions across the Nation to provide interested parties with the opportunity to provide ideas and information the Agency might consider in developing the NPRM. Four of the listening sessions were held in January 2010 while a fifth listening session was held in March 2010.

FMCSA published the HOS NPRM on December 29, 2010. The NPRM proposed seven changes from current requirements. First, the proposed rule would limit drivers to either 10 or 11 hours of driving time following a period of at least 10 consecutive hours off duty. On the basis of all relevant considerations, FMCSA favored a 10-hour limit, but stated that its ultimate decision would include a careful consideration of comments and any additional data received. Second, the rule would limit the standard “driving window” to 14 hours, while allowing that number to be extended to 16 hours twice a week. Third, actual duty time within the driving window would be limited to 13 hours. Fourth, drivers would be permitted to drive only if 7 hours or less had passed since their last off-duty or sleeper-berth period of at least 30 minutes; in other words, certain drivers were required to take a 30-minute break but with flexibility as to when that break would occur. Fifth, the 34-hour restart for calculations of the maximum weekly on-duty time would be retained, subject to certain limits: the restart would have to include two periods between midnight and 6 a.m. and could be started no sooner than 168 hours (7 days) after the beginning of the previously designated restart. Sixth, the definition of “on-duty” would be revised to allow some time spent in or on the CMV to be logged as off duty. Seventh, the oilfield operations exception would be revised to clarify the language on waiting time and to state that waiting time would not be included in the calculation of the driving window.

With regard to the economic impact of the proposed rule, FMCSA estimated that the regulatory option that included a 10-hour limit on driving time during the work day would impose costs of approximately \$1 billion per year with annual safety and economic benefits of approximately \$1.4 billion. The net benefits would be \$380 million per year. The regulatory option that included an 11-hour limit on driving time during the work day would impose costs of approximately \$520 million per year with annual safety and economic benefits slightly greater than \$1 billion. The net benefits for this option would be \$560 million per year. FMCSA acknowledged that the 10-hour driving time component

of the rulemaking contributed more than \$500 million to the estimated cost of the rule while providing only \$330 million in safety and economic benefits. However, taken as a whole, the regulatory option that included a 10-hour driving time limit was cost-beneficial, based on the Agency's analysis of the crash data and research.

On February 17, 2011, FMCSA held a Public Listening Session to solicit comments regarding the HOS NPRM. FMCSA webcast the session for internet participants, and provided telephone call-in opportunities. On the same day, FMCSA conducted an on-line Question and Answer Forum to receive additional on-line comments.

On May 9, 2011, FMCSA published a notice of availability of four additional research reports concerning fatigue and commercial vehicle drivers. These studies had not been completed at the time the NPRM was published in 2010. The Agency requested public comment on the research reports with a deadline of June 8 for the submission of comments. Acknowledging that the time required to provide the public with an opportunity to review the additional research would make meeting the July 2011 deadline for a final rule difficult, if not impossible, FMCSA and the Petitioners agreed on May 11, 2011, to a new deadline of October 28, 2011, for the publication of the HOS final rule. The parties agreed to extend that deadline in late October and on November 28, asked the Court to continue to hold the petition for review in abeyance pending publication of the final rule. The draft final rule is currently under review at the Office of Management and Budget.

CONCLUSION

The goal of this rulemaking is to reduce excessively long work hours that increase both the risk of fatigue-related crashes and long-term health problems for drivers. A rule cannot ensure that drivers will be rested, but it can ensure that they have enough time off to obtain adequate rest on a daily and weekly basis. FMCSA has considered the available crash data and scientific literature concerning driver fatigue, as well as feedback from the Agency's public MCSAC meetings, and the listening sessions held around the country. We look forward to issuing the final rule and will work with stakeholders and state partners to provide a smooth transition from the current regulations to full compliance with the new requirements.

Thank you for the opportunity to appear before you today. I look forward to working with this Committee and our stakeholders to ensure a safe and efficient transportation system for the citizens of the United States.