

**STATEMENT OF
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**BEFORE THE SENATE COMMERCE, SCIENCE, AND TRANSPORTATION
SUBCOMMITTEE ON SURFACE TRANSPORTATION AND MERCHANT
MARINE SAFETY, SECURITY AND INFRASTRUCTURE**

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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 comments 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 27th 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 seven 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% of all large truck crashes were not fatigue-related.

Additionally, some commenters have challenged the basis for FMCSA allowing drivers to drive one 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%) 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 two years, we have seen safety belt use increase from 48% to 59%. I want to see the safety belt rate at 90%, 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 restarting 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 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 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 uninterrupted 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 is 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 massive 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.