Testimony of
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on

Federal Hours of Service for Truck Drivers

before the
Surface Transportation and Merchant Marine Infrastructure,
Safety, and Security Subcommittee,
Senate Committee on Commerce,
Science & Transportation

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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 bi-partisan 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 eight hours, not nine hours, not ten 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 seven 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 two 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 eight 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 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

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[1] Greg Jones & Doug Swanson, *10 lives paid for trucker's mistakes*, DALLAS MORNING NEWS, Feb. 28, 2006.

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

[3] *Id.*

[4] *Id.*

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.

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[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).

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 1935[8] 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.

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.

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[8] Pub. L. No. 74-225 (1935).

[9] Codified at 29 U.S.C. § 213(b)(1).

[10] 27 Fed. Reg. 3553.

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 percent[14] as part of the 2000 proposed rule, to a markedly lower estimate of just over 8 percent[15] 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 off 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

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[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.

[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).

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 2000[20] 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]

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

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[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).

layover 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.

[24] Moreover, 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.

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 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 rulemaking,"[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 one 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.

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

[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.

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 proposal would require less than *one tenth of one 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 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 miniscule 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

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

[32] *Id.*

[33] 72 Fed. Reg. 2340 (Jan. 18, 20007).

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 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 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

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[34] In 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).

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 work force.

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 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.

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

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

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[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.

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 in the first nine 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% of all crashes. While fatigue many 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.

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

[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).

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 restart] 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

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[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.

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

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

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 of 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 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

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[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*, Center 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.

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 it "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.