September 6, 2000

THE CRE REPORT CARD
ON
DOT'S PROPOSED RULE ON HOURS OF SERVICE FOR THE MOTOR CARRIER INDUSTRY

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A. Goals, Methodology, Conclusions and Recommendations.

1. Goals.

The goals of this Report Card are:

-- To delineate systematically the requirements imposed by Congress and the Administration on the Department of Transportation's rulemaking proceeding to promulgate a new hours of service regulation for the trucking industry;

-- To assess the extent to which DOT has complied with these requirements; and

-- To the extent that infirmities are identified, to suggest what DOT could do to correct the infirmities.

2. Methodology.

CRE reviewed ten statutes and executive orders, as well as Vice President Gore's "Reinventing Government" initiative, and developed a roster of 62 requirements designed by Congress and the Clinton Administration to ensure that Federal agencies address the following broad concerns:

-- Clarity of the result to be achieved by the regulation, taking into account the agency's delegated authorities and seriousness of the problem addressed by the regulation;

-- Openness and inclusion of all stakeholders, including meaningful consideration of concerns addressed by stakeholders;

-- Practical effectiveness of the approach selected by the agency, taking into account alternative approaches to achieve the same result; and

-- Appropriateness of costs stemming from the regulation, taking into account demonstrated need.

These four broad concerns pervade the 62 specific requirements addressed in the pages that follow.

For each of the 62 requirements, CRE reviewed the administrative record, and in particular the NPRM, the "Preliminary Economic Analysis" ("PRE") prepared by DOT in support of the NPRM, and the "Supporting Statements" submitted by DOT to OMB pursuant to the Paperwork Reduction Act. CRE also took into consideration the testimony of the approximately 70 witnesses who gave testimony at the hearing held by DOT in Washington, DC on May 31-June 1, 2000 ("the hearing").

3. Conclusions.

CRE's conclusions are summarized in the chart on pages 4-7, and are detailed in the "COMPLIANCE/NONCOMPLIANCE" and "SUGGESTED REMEDIAL ACTION" rubrics for each of the 62 rulemaking requirements.

4. Recommendations.

-- The proposed rule needs to be rewritten to correct the substantive issues identified in this Report Card.

-- DOT needs to revisit the basic premises of its regulatory strategy.

-- Before it can regulate, DOT must demonstrate the following: (i) whether fatigue-related accidents present a statistically significant problem; (ii) whether accidents alleged to have resulted from fatigue were in fact caused by fatigue; (iii) whether truck drivers were at fault in those accidents actually caused by fatigue; and, most importantly, (iv) the relative role in causing fatigue of such factors as hours of service, loading/ unloading, failure to optimize available rest time or other factors.

-- In developing a new regulatory strategy, DOT must work with *all* stakeholder groups, including individual truck drivers and carriers identified in consultation with trucking industry and other groups, public utilities, shippers, manufacturers and suppliers.

-- In developing a new regulatory strategy, DOT must consult with State, local and tribal governments.

-- In developing a new regulatory strategy, DOT must consult with DOL, EPA, OSHA and other Federal agencies.

-- OMB has not provided effective oversight of DOT compliance with the legal requirements delineated in this Report Card. OMB needs to provide more effective management and oversight of the activities of rulemaking agencies.

CRE notes that the legal requirements described in this Report Card were imposed by Congress, the Clinton Administration, and oversight agencies such as OMB to ensure that regulations, such as DOT's proposed Hours of Service regulation, would be procedurally and substantively fair to all affected parties (*e.g.*, regulated drivers, businesses and consumers who depend on the trucking industry, and the public at large, whose safety is implicated). These requirements are designed to ensure that every conceivable issue (*i.e.*, safety, environmental, economic, social) is adequately addressed by the promulgating agency *and* that any and all concerned members of the public have and opportunity to know and understand the issues and to have their voices meaningfully considered before the agency makes its final decision.

CRE's Findings

Requirement			
		Basis Established/Issue Adequacy Addressed	Basis Not Established/Issue Not Adequately Addressed
1.	Compelling Public Need		×
2.	Consistency with Statutory Mandate; Promotion of President's Priorities		×
3.	Assessment of Quantifiable Costs/Benefits		×
4.	Assessment of Adverse/Beneficial Effects on the Natural Economy		×
5.	Assessment of Adverse/Beneficial Effects on Health, Safety and the Environment		×
6.	Assessment of Qualitative Impacts		×
7.	Alternatives to Adopting a Regulation		×
8.	Alternative Regulatory Approaches		×
9.	Netting to Select of Most Beneficial Alternative		×
10.	Identification of Problem Necessitating Regulation		×
11.	Role of Existing Legal Requirements in Creating the Problem	×	
12.	Assessment of Relative Risk		×
13.	Design of Regulation in Most Cost Effective Manner		×
14.	Data Supporting Selected Regulatory Approach		×

15.	Adoption of Performance-Based, Rather Than Command-and-Control Regulatory Solutions		×
16.	Consultation with State, Local, and Tribal Officials		×
17.	Compatibility with Regulations of Other Federal Agencies		×
18.	Narrowly-Tailored Requirement		×
19.	Easy-to-Understand Requirement		×
20.	Characterization as "Significant Regulatory Action"	(unclear)	(unclear)
21.	Maximization of Involvement of Affected Parties		×
22.	Consideration of Consensual Mechanisms Such as Negotiated Rulemaking		×
23.	OIRA Review of Significant Regulatory Actions	(unclear)	(unclear)
24.	Adequacy of Opportunity for Notice and Comment	×	
25.	Adequacy of Agency's Response to Issues Raised	(pending)	(pending)
26.	Determination of "Significant Economic Impact" on "Substantial Number of Small Entities"		×
27.	Inclusion of the Planned Regulation in the *Unified Federal Regulatory Agenda*	×	
28.	Initial Regulatory Flexibility Analysis		×
29.	Review of Initial Regulatory Flexibility Analysis by Small Business Administration	(unclear)	(unclear)
30.	Final Regulatory Flexibility Analysis	(pending)	(pending)
31.	Special Notice and Consultation Requirements for Small Businesses		×

32.	Section 202 Statement with Respect to State Local, and Tribal Government Costs		×
33.	"Section 202 Statement" with Respect to Private-Sector and National-Economic Costs		×
34.	"Section 202 Statement" with Respect to Environmental Impacts		×
35.	Preparation of "Small Government Agency Plan"		×
36.	Development of Effective State, Local, and Tribal Government Input Process		×
37.	Identification of "Least Burdensome Option" or Explanation Why Other Option Was Selected		×
38.	Involvement of OMB and CBO	(unclear)	(unclear)
39.	Adequacy of Notice and Opportunity to Submit Comments to OMB		×
40.	Purpose, Need and "Practical Utility" Requirements		×
41.	Accuracy of Burden Estimates		×
42.	Preparedness of Designated Agency Office to Process the Information to Be Collected; Plan for Effective and Efficient Management of the Information		×
43.	Testing of Proposed Information Collection		×
44.	Duplicativeness with Information Otherwise Available to the Agency		×
45.	Understandability of Paperwork Requirements	×	
46.	Implementation Consistent and Compatible with Existing Requirements		×
47.	Duration of Record Retention Period	×	
48.	Allowance of Reduced or Alternate Requirements for Small Businesses		×

49.	Use of Information Technology to Reduce Burden		×
50.	Consideration of, and Certification Regarding, Public Comments on Items 40-49		×
51.	Duty to Promulgate Regulations That Discourage Litigation		×
52.	Consultation with Elected State and Local Officials		×
53.	Establishment of "Accountable Process" and Designation of Agency Official to Conduct State and Local Government Consultations		×
54.	Identification of Family Impacts of Proposed Regulations		×
55.	Preparation of Environmental Impact Statement ("EIS")		×
56.	Public Notice and Opportunity to Comment on Environmental Impacts and EIS		×
57.	Characterization as "Major Rule"		×
58.	Transmission of Report and Supplementary Materials to Congress and GAO	(pending)	(pending)
59.	"Cut Obsolete Regulations"	×	
60.	"Reward Results, Not Red Tape"		×
61.	"Get out of Washington--Create Grass Roots Partnerships"		×
62.	"Negotiate, Don't Dictate"		×

B. Executive Order 12866 on Regulatory Planning and Review.

1. Compelling Public Need.

REQUIREMENT: A federal agency should not promulgate a regulation unless there is a "compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people." (Exec. Order 12866 § 1(a).) Compelling public need should take into account costs and benefits. Id. Alternatively, the agency can regulate if the regulation is "required by law" or "necessary to interpret the law." (Id.)

COMPLIANCE/NONCOMPLIANCE: At the outset, CRE notes that, according to DOT, "[t]he objective of this proposal is to reduce the number of fatigue-related truck and motorcoach crashes." (NPRM at 25,545.) Yet DOT's present proposal fails both the "private market failure" and "required by law" tests set forth above.

(a) "Private-market-failure" test. With respect to the *"private-market-failure"* test, DOT has failed to establish that fatigue is a significant enough contributor to accidents -- vis-à-vis other factors, such as fault of the other vehicle involved in the accident -- to justify promulgation of a regulation addressing only this factor. The study described by DOT as being the most comprehensive (Treat, *et al.*) found fatigue to be a "certain or probable" factor in only 2% of the cases studied. Similarly, in study by Najm *et al.*, only 3.7% of cases could be clearly attributed to fatigue.

-- Moreover, to the extent that fatigue is a factor in accidents, DOT has not established that such fatigue is caused by hours of service, as opposed to additional work duties of drivers, most importantly loading/unloading, moonlighting and misuse/ineffective use of available rest time. In fact, the evidence adduced at the hearing indicates that these latter factors are the primary fatigue factors. DOT needs to establish within reason the extent to which each of these three (and other) factors cause fatigue. To date, DOT has made no attempt to do so.

-- In addition, DOT has not even determined the extent to which truck drivers, as opposed to other involved drivers, are at fault for the

accidents that do occur.

(b) "Required-by-law" test. With respect to the *"required-by-law"* test, DOT cites a total of seven statutes as providing legal authority for the regulation of fatigue.[1] When these statutes are read in conjunction with each other, it becomes clear that DOT's proposed rule does not meet the standards set by the following congressional pronouncements:

(1) The number of motor carriers undergoing compliance reviews is grossly inadequate. DOT must enhance its ability to target inspection and enforcement resources. DOT's efforts must be directed "toward the most serious safety problems and to improve States' ability to keep dangerous drivers off the road." (MCSIA § 3(4).)

- - The proposed rule fails this requirement, because it does nothing to enhance compliance monitoring and enforcement over the motor carrier industry as a whole. In particular, the proposed rule does not target problem drivers and carriers, so that valuable taxpayer dollars would be wasted on compliance efforts aimed at drivers and carriers with excellent safety records.

(2) Three key measures are required "to reduce the number and severity of large-truck involved crashes": (i) "more commercial motor vehicle and operator inspections and motor carrier compliance reviews"; (ii) "stronger enforcement measures against violators"; and (iii) "scientifically sound research." (MCSIA § 4(2).)

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[1] (1) Motor Carrier Safety Improvement Act of 1999 ("MCSIA"), Pub. L. 106-159, 113 Stat. 1748; (2) ICC Termination Act of 1995("ICC Term. Act"), Pub. L. 104-88, 109 Stat. 803; (3) Motor Carrier Act of 1935, codified at 49 U.S.C. § 31502(a); (4) Migrant Farm Workers - Regulation of Interstate Transportation Act of 1956, codified at 49 U.S.C. § 31502(b); (5) Motor Carrier Safety Act of 1984, codified at 49 U.S.C. § 31136; (6) Hazardous Materials Transportation Authorization Act of 1994 ("HMTAA"), Pub. L. 103-311, 108 Stat. 1673; and (7) National Highway System Designation Act of 1995 ("NHSDA"), Pub. L. 104-59, 109 Stat. 568.

- - As is demonstrated at pages 23-24 below, the proposed rule would increase, rather than decrease, the number of fatal accidents.

(3) Safety is the "highest priority." (MCSIA § 101(b).)

- - As is set forth at pages 23-24, the proposed rule would create new safety hazards, rather than remedy existing ones.

(4) In conducting its regulatory obligations, DOT must "identif[y] and target[] enforcement efforts at high-risk commercial motor vehicles, operators, and carriers. (MCSIA § 104(a)(3), (b).)

- - The proposed rule does not comply with this congressional mandate.

(5) The Federal Highway Administration was to have issued a final rule by March 1, 1999 on "a variety of fatigue-related issues pertaining to commercial motor vehicle motor vehicle safety (including 8 hours of continuous sleep after 10 hours of driving, loading and unloading operations, automated and tamper-proof recording devices, 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)..." (ICC Term. Act § 408.)

- - Congress clearly intended that DOT address a number of fatigue-related issues in crafting its regulation, *e.g.*, loading and unloading practices and the role played by enforcement. Yet DOT has completely ignore key factors identified by Congress, as well as by witnesses at the hearing, as having a significant impact on fatigue and safety. (See pages 23-24 below.)

(6) DOT has the general authority to prescribe qualifications and maximum hours of service for motor carriers, private motor carriers, and motor carriers transporting migrant workers. (49 U.S.C. § 31502(b), (c).)

(7) In conjunction with regulating fatigue, DOT is obligated to regulate: (i) safety issues in connection with vehicle maintenance, equipping, loading and operating; (ii) responsibilities imposed on drivers which may impair their ability to operate vehicles safely; (iii) ensuring that the physical condition of drivers is adequate to enable them to operate vehicles safely; and (iv) preventing long-term deleterious effects on the physical conditions of drivers. (49 U.S.C. § 31136(a).)

-- DOT has ignored the loading/unloading issue. In addition, a number of witnesses at the hearing testified that the proposed rule would impair their long-term physical condition.

(8) DOT was to have promulgated in 1995 regulations to enhance carrier compliance existing hours of service regulations. HMTAA, § 113.

-- This congressional mandate suggests that, prior to establishing a new hours-of-service regime, DOT was to have improved compliance and enforcement under the existing regulation, so as to determine whether any safety problem is attributable to DOT's lax enforcement, rather than the contents of the existing regulation.

(9) DOT has the authority to conduct a rulemaking proceeding to determine whether it should grant an exemption from hours-of-service requirements for agricultural commodities and farm supplies transporters. NHSDA § 345.

In sum, DOT has not complied with the "Compelling Public Need" requirement, because:

-- DOT wrongly assumes that fatigue results solely from hours of service, and has failed to consider other causative factors, such as loading and unloading practices. Moreover, DOT has not reasonably established the role that fatigue plays in existing accidents. indicates that fatigue is not the decisive factor;

-- DOT has not reasonably established that fatigue is caused by the number of hours driven in a given time period;

-- Congress has directed DOT to improve "safety." DOT incorrectly assumes that: (i) fatigue is the sole safety issue; and (ii) any fatigue problem found to exist can be corrected through a command-and-control hours regime. In fact, as evidenced by testimony at the May 31-June 1 hearing: (i) Congress has indicated that the safety problem would be best addressed by intensifying enforcement efforts against proven violators; and (ii) DOT's present proposal would aggravate fatigue as a problem due to the proposed rule's lack of flexibility.

-- Congress has directed DOT to focus its regulatory efforts on compliance and enforcement against proven violators. Yet the NPRM is directed at the 95% of carriers with good records. DOT's present approach violates Congress' mandate and constitutes a grossly inefficient allocation of taxpayer dollars.

SUGGESTED REMEDIAL ACTION: DOT must revise its proposal in the following ways:

(a) The regulation must provide sufficient flexibility to enable drivers and carriers to determine when to fit rest periods into their on- and off- duty schedules.

(b) DOT is obligated to establish a regulatory regime that focuses on drivers and carriers with demonstrable safety problems, and does not penalize the large majority of drivers and carriers with excellent safety records.

(c) DOT should not be regulating "fatigue"; rather, DOT should be regulating "safety."

2. Consistency with Statutory Mandate; Promotion of President's Priorities.

REQUIREMENT: Sections 3(1) and 4(2) of the Federal Motor Carrier Safety Improvement Act of 1999 call for DOT to: (a) reduce crashes involving large trucks through intensified inspections and compliance reviews; (b) increase civil penalties for violators; (c) improve the quality of compliance data available to the agency so as to enhance enforcement; (d) expedite the completion of rulemakings; and (e) utilize scientifically sound research. (See P.L. 106-159 §§ 3(2), (3), (4), (6), (7); 4(2).)

COMPLIANCE/NONCOMPLIANCE: The present proposal does not address any of these congressional directives. Instead, the NPRM uses "fatigue" as a proxy for addressing a panoply of safety-related issues, such as the roles played by loading requirements and safety problems stemming from the proposed rule's lack of scheduling flexibility.

SUGGESTED REMEDIAL ACTION: Given the five congressional concerns listed immediately above, DOT must address the following questions before it can be in a position to proceed with a final rule:

(a) To what extent are truck drivers at fault for the accidents that occur?

(b) To what extent is "fatigue," as opposed to other safety-related factors, a contributor to the accidents in which truck drivers are at fault?

(c) To the extent that fatigue is demonstrated to be a problem, to what extent is fatigue caused by hours driven, loading/unloading requirements imposed by shippers, ineffective use of available rest time, upset of natural body rhythm due to inflexibility of command-and-control regulatory requirements, and/or other factors?

(d) What is DOT doing to comply with Congress' directive to enhance compliance monitoring and enforcement efforts?

(e) Why is DOT placing "good corporate citizens" with excellent safety records in the same regulatory category as proven violators?

Until adequate answers are provided, it would be inappropriate for DOT to proceed on the basis of its present proposal.

With respect to Congress' directive that DOT complete its rulemakings with greater expedition, CRE notes that this goal cannot be achieved at the expense of DOT compliance with the procedural requirements governing rulemaking proceedings, as outlined in this Report Card. Given the fact that DOT's ANPRM on hours of service was issued in November of 1996, it would be reasonable for Congress, the regulated community and other stakeholders to expect that DOT would have fully complied with the legal requirements outlined in this Report

Card during the ensuing three-and-one-half year period.

3. **Assessment of Quantifiable (Economic) Costs/Benefits.**

REQUIREMENT: "[A]gencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully measured) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider." (Exec. Order 12866 § 1(a).)

"Each agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs." (Id. § 1(b)(6).)

COMPLIANCE/NONCOMPLIANCE:

(a) DOT's Failure to Address Economic Impact on Numerous Industries. DOT has failed to acknowledge any of the severe economic impacts that its proposal would have on entire sectors of the US economy, including but not limited to: (i) manufacturers; (ii) suppliers and distributors; (iii) shippers; (iv) tourism; (v) bus industry; (vi) limousine industry; (vii) domestic petroleum supply industry; (viii) food industry; and (ix) agriculture. To the extent that DOT has failed to address the economic impacts on these industries, OMB would be in derogation of its legal and oversight duties under the Executive Order if it fails to require DOT to correct such noncompliance and allows the rulemaking to proceed.

(b) Inadequacy of DOT's Trucking Industry Analysis. Even with respect to the trucking industry, DOT's economic cost estimates are grossly under-inclusive and inaccurate. DOT recognizes only the following economic impacts: (i) reduction in wages for individual drivers due to decreases in miles driven; (ii) increase in wage costs to carriers due to need to hire additional drivers and national shortage of drivers; and (iii) cost of purchasing electronic on-board recorders ("EOBRs"). See NPRM at 25,572-75; PRE at 49-60. As indicated in the pages immediately following, a number of witnesses at the

hearing testified that DOT has underestimated the economic costs of these three categories, and that DOT has completely ignored the approximately 40 additional categories of economic costs identified below.

Quantifiable Economic Costs Imposed on Carriers:

[1] Lower Trucking Company Earnings Due to Decreased Productivity. A number of witnesses presented calculations of the aggregate economic impacts that the DOT proposal would have on their businesses, and testified that, given the low profit margins of most carriers, the adverse economic impacts of the proposed rule would cause many small carriers to go out of business. These estimates vary significantly from DOT's estimates (based on the limited range of economic impacts recognized by DOT). For example, losses in the construction industry could average 40% per day. (See Harrell testimony.)

Witnesses at the hearing testified that increased costs to carriers could not be passed on to customers for two reasons. First, in many instances the carrier has long-term, binding contractual commitments to provide an existing service level at a set price. (See Eyre testimony.) Second, in many instances the customers would find the price increases unacceptable or unaffordable, so that the customer response would be not to purchase the service. (See Palmer testimony ("marginal families" would be unable to afford school trips).)

Unlike DOT's cost estimates, which are based on theoretical assumptions, the estimates of these companies are based on the companies' use of actual cost data and practical experience. DOT should work with these and other companies to develop realistic and accurate estimates based on "real-life" data.

[2] Hiring Costs for Replacement Drivers. Carriers in virtually all categories would be required to hire replacement drivers to relieve originating drivers forced to stop work in the middle of runs due to the inflexible and mechanistic nature of the DOT proposal. Paradise Tours calculates that it would have to expand its number of drivers by 56%-86% if the DOT proposal is promulgated in its present form. (See

LeBron testimony.)

Evidence adduced at the hearing indicates that DOT's estimate of 49,000 new driver hires per year is grossly underestimated, and that 80,000 would be a more realistic, though possibly still underestimated, figure. (See Rothstein testimony.)

[3] Additional Vehicles for Replacement Runs. DOT did not estimate the costs to carriers of purchasing (or renting) additional vehicles for use by the additional drivers. Yet one small bus company calculated that ten mini-vans would have to be purchased for replacement shuttle purposes. (See Eyre testimony.)

[4] Costs of Lodging in Connection with "Replacement Runs." DOT did not estimate the costs to carriers of lodging associated with shuttling both originating and replacement drivers. Yet the hearing brought to light evidence that such costs will occur. (See Eyre testimony.)

[5] Costs of Fuel for "Replacement Runs." DOT did not estimate the cost to carriers of additional fuel in connection with the shuttling of originating and replacement drivers. (See LeBron testimony.)

[6] Costs of Tires for "Replacement Runs." DOT did not estimate this cost.

[7] Costs of Repairs Associated with "Replacement Runs." DOT did not estimate this cost. (See LeBron testimony.)

[8] Increased Insurance Costs Due to Increase in Accident Rate. DOT did not estimate this cost. Yet the evidence adduced at the hearing demonstrates that the DOT proposal, in its present form, would increase accidents and accompanying fatalities nationwide, which in turn would result in higher insurance rates. (See discussion at pages 23-24 below.)

[9] Increased Costs Stemming from Accidents, Including Legal Liability and Litigation Costs. DOT did not estimate the litigation and judgment liability costs to carriers resulting from the increase in the number of accidents that would be occasioned by the DOT's proposal. These costs

would flow naturally from the increased safety hazards described at pages 23-24 below.

[10] Recruitment and Hiring of New Drivers. DOT addresses new driver *wages*, but does not acknowledge recruitment/hiring as a separate cost category. Testimony at the hearing indicates that such costs would be substantial. One small bus company estimates that the present driver turnover rate of 20% would increase to 40% as a result of wage decreases under the DOT proposal. (See Eyre testimony.) This estimate is based on the company's years of experience with driver-employees.

[11] Licensing of New Drivers. DOT did not address the cost of licensing new drivers. As with recruitment and hiring, the hearing testimony indicates that licensing costs would be significant. (See Eyre testimony.)

[12] Training of New and Inexperienced Drivers. DOT did not address the training of new hires. Training would be imperative in light of the younger age and inexperience of such drivers. Once again, the hearing testimony indicates that training costs would be significant. (See Eyre testimony.)

[13] Higher Wages Associated with New Hiring Due to Shortage of Drivers. DOT acknowledges that driver hourly rates would increase due to market pressures resulting from the DOT proposal. However, DOT underestimates the number of drivers involved. DOT also suggests that carriers could reduce their need for additional drivers by increasing the efficiency of existing drivers, an absurd suggestion that demonstrates DOT's lack of familiarity with the day-to-day realities of the industry it regulates.

[14] Work Loss Resulting from "Empowerment" Provision. DOT takes no account of the incentive the "empowerment" provision would provide to drivers to evade work duties on grounds of alleged fatigue. DOT has drafted the provision in a broad and sweeping manner: any driver would have absolute discretion to announce at any time, and on repeated occasions, that he or she is too fatigued to drive. A carrier would have

no legal authority to challenge a driver who abuses this new, absolute right. Accordingly, carriers would experience decreased productivity, including missed deliveries, due to sudden, unannounced work stoppages. DOT has not recognized, or attempted to calculate the monetary value of, this significant economic impact.

[15] Litigation and Liability Costs in Connection with "Empowerment" Provision. DOT takes no account of the incentive that the empowerment provision would create for drivers to sue carriers. Any attempt by a carrier to take any reasonable action against a driver who abuses the new right would be subject to legal sanction. The new legal standard DOT seeks to create would result in litigation costs and money judgments against carriers.

[16] Union Renegotiation Costs. As DOT acknowledged at the hearing, DOT is attempting to regulate the workplace, which raises issues regarding conflicts between union contracts and DOL regulations, as well as the need to consult and coordinate with unions and DOL. All motor carriers whose employees are unionized would be required to renegotiate their labor arrangements to take into account adjustments to employee hours and wages, as well as to determine the extent and implementation of employees' new rights against carriers under the empowerment provision. The economic costs of this process would include attorneys fees and the time resources of carrier managerial staff.

[17] Work Disruption Costs Stemming from Loss of Existing, Experienced Drivers. A number of witnesses testified that implementation of the DOT proposal would result in significant driver turnover. DOT also acknowledges that loss of existing drivers would occur. Moreover, both industry witnesses and DOT acknowledge that there is a nationwide shortage of drivers to serve as replacements. Nevertheless, DOT did not account for the economic costs of disruptions that would result from driver loss.

[18] Disruptions Stemming from "Empowerment" Provision. Invocation of the empowerment provision, and the inability of carriers to place reasonable limits on abuses, would result in disruptions to service. DOT

has not addressed this economic cost.

[19] Costs of Fines for State Highway and Local Stopping Violations. The DOT proposal would require drivers to stop on road shoulders and at rest stops for extended periods of time. A number of witnesses testified that drivers are routinely fined by State and local highway enforcement officers whenever drivers stop in one place for more than two hours. Fines for violations of State and local two-hour limitations constitute an additional economic burden that would be incurred on a daily basis if the DOT proposal is promulgated in its present form.

[20] Costs of Purchasing EOBRs. DOT estimated that the cost of purchasing EOBRs would be in the range of $2,0000-$2,400, but that the actual per-unit costs might actually be double those amounts. (NPRM at 25,574.) DOT then went on to apply a $1,000 per-unit estimate, based on DOT's assumption that prices would come down. DOT's unsupported EOBR cost estimate must be revisited, taking into account input from carriers.

[21] Costs of Training in Use of EOBRs. DOT provides an estimate for training in the use of EOBRs. However, the basis for DOT's estimate is not adequately validated.

[22] Disruptions Resulting from Malfunctioning EOBRs. Under the DOT proposal, a driver would have to interrupt a run if and when the EOBR breaks down, *e.g.*, due to mechanical failure. This would result in disruptions, including scheduling mishaps and missed deliveries. (See Mortimer testimony.)

[23] Costs of Planning and Developing New Recordkeeping Programs Based on Use of Black Boxes. This is a significant administrative cost that would be borne by each carrier. Adjusting to an EOBR-based recordkeeping and reporting system would require that the carrier revisit virtually every aspect of its present informational system. Electronic data would have to be integrated into existing electronic-based and paper-based information processes. Yet DOT dismisses such administrative costs as being too minor to merit consideration. (See PRE at 49.)

[24] Costs of Repair and Replacement of EOBRs. DOT's economic analysis assumes that repair and replacement problems would not arise. The economic analysis must be adjusted to address such costs.

[25] Costs of Purchase and Activation of Individual User Cards. DOT estimates that each driver "smart card" would cost only $1-$2. This estimate was contested at the hearing.

[26] Computerization Coordination Costs. Establishment of an EOBR system would require installation of a computer software system to collect and process the data. DOT has not addressed this cost, which could be prohibitive for small carriers.

[27] Costs of Monitoring and Repair of Computerized System. DOT has not considered the costs to carriers of maintenance of sophisticated computer systems capable of gathering and processing data from individual EOBRs.

Quantifiable Economic Costs Imposed on Drivers:

[28] Decreases in Earnings. DOT claims that "[f]or the majority of drivers in compliance with the existing HOS regulations, the cost of most of the options would be minimal. These drivers would not face any significant reduction in the number of hours they could drive, either on a daily or a weekly basis." (PRE at 52.) DOT provides no evidence for this claim. In fact, a number of companies applied DOT's proposal to their existing scheduling patterns, and arrived at reality-based estimates showing significant driver income loss. For example, Eyre Bus Service estimates that its drivers would suffer a 30% wage decrease, which would be significant enough for the company, in turn, to suffer a loss in qualified, experienced drivers. (See Eyre testimony.)

[29] Out-of-Pocket Costs at Rest Stops. Drivers would be forced to purchase food items at rest stops out-of-pocket in order to be able to remain at the rest stop facility during DOT-mandated "rests." (See Mortimer testimony.)

Quantifiable Economic Costs Imposed on Shippers:

[30] Costs Associated with Delays Due to Inability of Drivers to Meet Scheduling Deadlines. A number of witnesses testified that the inflexibility of the DOT proposal would prevent drivers from meeting shipping deadlines on a regular basis. This would result in significant costs to the shipping industry. At least one carrier documented missed deliveries upon undertaking a test run under the proposed rule.

[31] Costs Resulting from Inability of Drivers to Perform Loading/Unloading Responsibilities. Given the strictness of the DOT proposal, there would be numerous instances in which drivers would be prohibited legally from performing loading and unloading functions. This would occur, for example, where the driver has exceeded his or her daily hour limitation due to delays in arriving at the shipper's site. DOT has not addressed this cost.

Quantifiable Economic Costs Imposed on Manufacturers and Suppliers of Goods:

[32] Lower Manufacturer and Supplier Earnings Due to Delivery Problems and Other Inefficiencies. DOT has not attempted to estimate the costs to manufacturers and suppliers stemming from shipping delays.

[33] Costs to Manufacturers, Suppliers, Shippers, and Trucking Companies Associated with Developing New Scheduling and Dispatching Mechanisms. DOT has not attempted to estimate the costs to manufacturers, supplier, shippers and trucking companies of developing new distribution mechanisms for the entire US economy.

Quantifiable Economic Costs Imposed on Consumers of Goods:

[34] Increase in Cost of Goods and Services for Consumers. In many instances the increased distribution costs described above would be passed on to consumers in the form of higher prices for products. (See Tusing testimony.) DOT has not addressed this nationwide economic impact.

Quantifiable Economic Costs Imposed on State and Local Governments:

[35] Costs of Highway Repair. DOT's proposed rule would increase the aggregate number of miles driven by truck drivers on the nation's highways, due to the need for "replacement drivers" to meet originating drivers mid-route. Increased highway use by heavy vehicles will increase the need for highway repairs.

[36] Costs of Increased Accidents Due to Increased Congestion. This would impose significant economic burdens on State and local governments, including enforcement and emergency-response costs.

[37] Obligation to Promulgate Conforming Regulations. Each State would be required to rewrite its regulations governing motor carrier operations in the State to conform with the new DOT regulation in order to remain qualified for Federal matching highway funds. (See Weeks testimony.)

[38] Retraining of State and Local Enforcement Officers. Each State would be required to train its police and highway patrol officers in the mechanics of the new regulatory regime.

SUGGESTED REMEDIAL ACTION: DOT's "PRE" is grossly inadequate for purposes of Executive Order 12866 compliance. The present "PRE" does not provide OMB with an adequate or verifiable basis for approving the present regulatory proposal. DOT must develop reasonably complete and accurate estimates of the economic costs of the 38 impact categories set forth immediately above (as well as for the two additional categories set forth at Requirement No. 4 immediately below). In preparing these estimates, DOT must work with, and obtain economic data from, existing stakeholders (such as large and small carriers, shippers, large and small manufacturers and suppliers, and State and local governments) to ensure that the corrected estimates address all cost elements and are otherwise accurate.

4. Assessment of Adverse/Beneficial Effects on the National Economy.

REQUIREMENT: The cost-benefit analysis must address "any adverse effects on the efficient functioning of the economy, private markets (including productivity, employment, and competitiveness)." (Exec. Order 12866 § 6(a)(3)(C)(ii).)

COMPLIANCE/NONCOMPLIANCE: DOT did not address the following adverse impacts on the national economy:

[39] Costs to Petroleum Industry Stemming from Distribution Limitations. A witness at the hearing testified that the DOT proposal would impose significant economic costs to the domestic petroleum industry which were not addressed by DOT.

[40] Loss of Distribution Efficiencies and Accompanying Impact on Competitiveness. The DOT proposal would upset the entire system of product distribution in the US. In a very real sense, it is the nation's truck drivers that connect all of the elements that enable the nation's economy to operate smoothly. Disruptions in the nationwide distribution system would have serious implications for US competitiveness in the global marketplace.

SUGGESTED REMEDIAL ACTION: DOT must analyze separately each of the 40 economic impacts identified above.

5. Assessment of Adverse/Beneficial Effects on Health, Safety and the Environment.

REQUIREMENT: The cost-benefit analysis must address "any adverse effects on... health, safety, and the natural environment." (Exec. Order 12866 § 6(a)(3)(C)(ii).)

COMPLIANCE/NONCOMPLIANCE: The DOT proposal would create the following six new categories of safety hazards:

[1] Increase in Road Congestion Due to Shift in Driving Patterns to Morning Rush Hours. Increased congestion may be a stronger crash causation factor than fatigue. Yet the DOT proposal would require nighttime runs to be redirected to morning rush hours in already congested urban areas.

[2] Increase in Daytime Highway Construction. The DOT proposal would result in the redirection of nighttime construction work to daytime hours, which would increase the number of vehicles exposed to such construction work, thereby increasing the number of accidents at highway construction sites.

[3] Increase in Number of Trucks on Road Shoulders. The DOT proposal would force truck drivers to take mandatory rests on road shoulders, due to inadequate parking space at rest stops, thus increasing the rate of road-shoulder accidents.

[4] Increase in Number of Young and Inexperienced Drivers; Loss of Experienced Drivers. A number of witnesses testified vociferously about the differential in safety records between older, experienced and younger, inexperienced drivers. Yet the DOT proposal would force older, experienced drivers into other professions, and require carriers to hire younger, inexperienced replacement drivers.

[5] Increase in Driver Fatigue Due to Moonlighting. A number of witnesses testified that drivers losing 30% of their present income would be forced to take second jobs, despite the fact that such additional worktime would be prohibited in many instances under the DOT proposal. Carriers would be unable, as a practical matter, to detect and police moonlighting by drivers. Such moonlighting would increase the fatigue experienced by drivers; yet this fatigue-increasing factor would be beyond the oversight capabilities of either carriers or DOT. A considerable proportion of the DOT-mandated "rest" time could be dedicated to moonlighting in violation of the regulation.

[6] Increase in Accidents Resulting from Need to Meet Shipping/Delivery Deadlines in Reduced Time Framework. A number of witnesses testified that, in order to meet shipping deadlines, drivers would be forced to compress more miles into shorter DOT-authorized time allotments. In consequence, drivers might feel compelled to engage in unsafe driving practices, such as speeding, in order to meet such tightened deadlines.

[7] Environmental Impact of Increase in Releases of Exhaust from Trucks. (See discussion at Requirement Nos. 34 and 55 below.)

SUGGESTED REMEDIAL ACTION: DOT cannot promulgate the proposal in its present form unless and until DOT demonstrates that these new safety hazards do not outweigh the fatigue hazard alleged to result from the present hours of service regime. In light of the fact that DOT has not yet established that the present fatigue hazard is caused by sleep deprivation (as opposed to other factors), and in

light of the fact that DOT has not established that the aggregate fatigue problem is statistically significant, it is likely that these six unaddressed safety hazards vitiate any qualitative benefits the proposed rule is supposed to provide.

6. Assessment of Qualitative Impacts.

REQUIREMENT: The cost-benefit analysis must incorporate an analysis of "qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider." (Exec. Order 12866 § 1(a).)

COMPLIANCE/NONCOMPLIANCE: DOT's cost-benefit analysis does not address the following qualitative considerations:

(a) Unworkability of the Proposed Rule; Impossibility of Implementation.

[1] Inability to Determine "Type" Status. A number of witnesses testified that the DOT proposal is simply not workable as a practical matter. For example, a witness from the coach industry testified that, under the DOT proposal a driver's "Type" status could change within one trip. Thus, it would be impossible for the driver and/or carrier to determine with which set of requirements the driver must comply. (See LeBron testimony.)

[2] Inability to Stop at Rest Stops or Road Shoulders. Another "workability" or "feasibility" issue stems from the lack of rest stops on the nation's highways. A fundamental premise of the DOT proposal is that drivers must stop, almost mechanically, when the on-duty time limits are reached. Yet a number of witnesses testified (and DOT acknowledges) that there is a shortage of rest stop space. Moreover, taking rests on the shoulder of the road is not a feasible or, in many instances, legal option, because State and local police regularly ticket drivers after two hours in one spot. (See Spenser testimony.) In addition, one witness testified that State highway police regularly chase truck drivers out of rest stops, even when the driver would clearly be in violation of the hours-of-service rules. (See Perfetti, Jr. testimony.)

[3] Inability to Calibrate Schedules in Advance. A number of witnesses from a number of industries testified that it is impossible to plan a week in advance the specific number of hours that a given driver will need to meet his or her scheduled deliveries. This is the case, with respect to the long-haul and local delivery industrial sectors, for a number of reasons, including: (i) weather conditions; (ii) unanticipated road conditions, such as detours or congestion; or (iii) changes in shippers' requirements, especially in light of the prevalence of "just-in-time" distribution practices.

With respect to the public utility industry, an additional scheduling inability stems from the inherently emergency nature of electric utility repair work. With respect to the tour bus industry, in many instances the bus driver or tour operator is unable to calculate with precision the timing and location of rest stops required by passengers, or the duration of visits at specific sights (*e.g.*, passengers require restroom stops; visits at specific sites may take more or less time than anticipated in the schedule). (See LeBron testimony.)

[4] Shortage of Drivers to Enable Carrier Compliance with Replacement-Driver Obligations. DOT, carriers and drivers are in agreement that there is a nationwide shortage of experienced drivers available to fill today's need, much less the need that would be created by promulgation of the DOT proposal.

[5] Unworkability of the "Empowerment" Provision. Because the empowerment provision does not contain any form of reasonable limitations to control abuses, that provision has the potential to disrupt carrier operations and employer-employee relations on a massive basis. As the provision is now drafted, a driver could spend his or her mandatory rest-period in a manner not consistent with "restorative sleep" (*e.g.*, moonlighting or recreational activities), and then avoid performance of driving duties on grounds of "fatigue." The carrier would be prohibited from challenging the driver's refusal to work. Similarly, a driver who is not fatigued could nevertheless claim fatigue as a justification for not working on any given day. The DOT provision is inflexible and absolute in disallowing any challenge by the carrier to

the driver's fatigue claim; in fact, the carrier would be subject to enforcement penalties for challenging drivers who abuse the provision.

[6] Inability to Enforce Prohibition Against Driver "Moonlighting." The DOT proposal is premised on the assumption that all driver work, both for the carrier and for other employers, constitutes "on-duty" time that must be taken into account in determining the need for rest. Yet DOT is simultaneously decreasing driver wages by roughly 30%. This creates an incentive for drivers to do one of two things: (i) leave the driving profession (which would aggravate the existing driver shortage nationwide); or (ii) find additional, "moonlighting" employment. (See Eyre testimony.) Although the latter option would not be permissible under the DOT proposal, the economic incentive for drivers to violate the regulation would be compelling. Nor would either carriers or DOT have adequate resources to police such unlawful secondary employment.

(b) Creation of New Safety Hazards Outweighing (Supposed) Safety Gains. As is set forth at pages 23-24 above, the six new safety hazards raise qualitative issues that DOT did not address in its cost-benefit analysis.

(c) Privacy Concerns. DOT's assertion that the EOBR requirement would not raise any privacy concerns was contested at the hearing. DOT must address this question in consultation with carriers and individual truck drivers.

(d) Impact on Driver Morale and Family Life. As is set forth at Requirement No. 55 (page 72) below, the DOT proposal would have two key adverse impacts on the family life of drivers. First, the number of weekends that drivers are compelled to spend away from their families would be significantly increased. Second, decreases in driver salaries would compel either the driver and/or his or her spouse to seek additional employment, thereby detracting from family life.

In addition to these family impacts, a number of witnesses at the hearing testified that the rule would have a significant impact on driver morale. These driver's characterized the DOT proposal as treating drivers like "children" and "robots," and pointed out that DOT's basic premise is that drivers cannot be trusted to abide by legal rules and are incapable of making

adult decisions concerning when and where to rest.

(e) DOT's Prejudice Against Truck Drivers. The correctness of these drivers' assessments of DOT's subjective attitude toward their profession is borne out by a number of DOT pronouncements:

[1] "Road drivers are unconcerned about leisure consumed away from home, and therefore do not face a standard labor-leisure tradeoff." (PRE at 51.) In plain English, DOT's position is that truck drivers do not have the normal needs (*e.g.*, for leisure and family life) that other human beings have.

[2] "Ex-drivers in other occupations probably have a more desirable bundle of human capital characteristics than current drivers, which may be why they discontinued driving. This bundle of characteristics may be correlated with safety, further reducing any offsetting crashes by new drivers." (PRE at 44.) In plain English, DOT is saying in essence that serving as a truck driver is evidence that one is inherently less safe than others.

[3] "[T]he benefits of this NPRM can be achieved only by forcing motor carriers and Type 1 and 2 drivers to make a dramatic change in their present attitude toward compliance in long-haul and regional operations." (NPRM at 25,596.) This statement is revealing in two key respects. *First,* it reflects DOT's subjective belief that the trucking industry is predisposed to violate Federal regulations in some moral sense. Yet DOT has not provided any evidence of such an *attitudinal* problem on the part of the industry. *Second,* if DOT really believes that the problem is one of compliance and enforcement, then the implication of such a conclusion is that DOT should follow Congress' directive, and focus its regulatory efforts on enforcement against proven violators.

These statements reflect a significant bias against truck drivers as a class on the part of the agency that is tasked with regulation of truck driver welfare. DOT's patronizing attitude may explain why no trucking industry representatives were included in the Expert Panel convened by DOT to consider regulatory options and strategies. (See NPRM at 25,561.)

SUGGESTED REMEDIAL ACTION: DOT must revisit its entire regulatory strategy, and plan and develop a workable, feasible regulation that is capable of being implemented and enforced.

7. **Alternatives to Adopting a Regulation.**

REQUIREMENT: "Each agency shall identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public." (Exec. Order 12866 § 1(b)(3).)

COMPLIANCE/NONCOMPLIANCE: DOT has not seriously considered whether self-regulation or safety *incentives* would be effective alternatives to regulation, especially in light of the facts that: (i) the overwhelming majority of carriers have excellent safety records; (ii) carriers have built-in economic incentives to avoid accidents, due to liability costs and adverse publicity (see Mackie testimony); and (iii) DOT has failed to establish whether *hour-related* fatigue is the cause of the accidents that do occur.

One key alternative to hours-of-service regulation that DOT is aware of would be to regulate shipping practices (*e.g.*, allocation of loading and unloading responsibilities) which have a significant impact on fatigue and which truck drivers and carriers are not able to control under the present regulatory regime.

In addition, DOT has not considered whether the net cast by any regulation should broadly cover carriers with excellent safety records, or rather whether, in keeping with Congress' directives, DOT should target carriers with proven violations.

SUGGESTED REMEDIAL ACTION: DOT should consider the options set forth immediately above, taking into account comments from the regulated community. DOT should then document for the public its rationale for the alternative or alternatives selected.

8. **Alternative Regulatory Approaches.**

REQUIREMENT: Once it is determined that there is a valid need to adopt a regulation, the agency must develop a roster of regulatory alternatives. (See Exec. Order 12866 § 1(b)(8).)

COMPLIANCE/NONCOMPLIANCE: DOT considered five variations of one regulatory alternative, but did not in reality consider alternatives that are materially different from each another. The five "options" considered by DOT are all variations on one command-and-control theme, *i.e.*, mandatory and inflexible hour requirements. Regulatory alternatives not considered by DOT include: (i) establishing general daily and weekly hour requirements, but allowing sufficient flexibility to carriers and drivers to enable them to develop scheduling patterns tailored to the unique needs of individual companies and drivers (*i.e.*, taking a performance-based approach); (ii) limiting the full brunt of regulation to carriers with proven safety problems; and (iii) identification of the full range of factors that cause fatigue so that the real causative factors are actually and fully addressed in the final rule.

SUGGESTED REMEDIAL ACTION: DOT should seriously consider the alternative regulatory options described above, including through notice and comment. DOT should then draft an alternative regulatory proposal.

9. **Netting to Select the Most Beneficial Alternative.**

REQUIREMENT: "[I]n choosing among alternative regulatory alternatives, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach." (Exec. Order 12866 § 1(a); see also id. § 1(b)(6) (the agency may impose a given regulatory alternative "only upon a reasoned determination that the benefits...justify its costs").)

COMPLIANCE/NONCOMPLIANCE: Because DOT did not consider all of the economic, environmental and safety impacts of its proposal, and because DOT did not consider a full range of alternatives, DOT has also not complied with this requirement. Moreover, from an "equity" perspective DOT's proposal would

place severe economic burdens on drivers and carriers with excellent safety records.

SUGGESTED REMEDIAL ACTION: After complying with Requirement Nos. 7 and 8, DOT should comply with this requirement.

10. **Identification of Problem Necessitating Regulation.**

REQUIREMENT: "Each agency shall identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as the significance of the problem." (Exec. Order 12866 § 1(b)(1).)

COMPLIANCE/NONCOMPLIANCE: As is set forth at pages 8-12 above, DOT has not properly identified the safety issue that needs to be regulated.

SUGGESTED REMEDIAL ACTION: Before it can regulate DOT must establish: (i) whether fatigue-related accidents present a statistically significant problem; (ii) whether accidents alleged to have resulted from fatigue were in fact caused by fatigue; (iii) whether truck drivers were at fault in those accidents actually caused by fatigue; and, most importantly, (iv) whether fatigue is caused by hours of service, loading/unloading practices, failure to optimize available rest time or other factors.

11. **Role of Existing Legal Requirements in Creating the Problem.**

REQUIREMENT: "Each agency shall examine whether existing regulations (or other law) have created, or contributed to, the problem that a new regulation is intended to correct and whether those regulations (or other law) should be modified to achieve the intended goal of regulation more effectively." (Exec. Order 12866 § 1(b)(2).)

COMPLIANCE/NONCOMPLIANCE: Although a number of witnesses at the hearing stated that the present regulations should remain in place, a number of other witnesses opined that the "Depression-era" regime is in need of modernization to reflect developments in the transportation industry during the past 50 years. Nevertheless, DOT failed to establish a causal connection among accidents,

fatigue and hours on duty (as opposed to activities during hours off duty and loading/unloading). *DOT also failed to address whether the regulations in greatest need of change are DOT's weak enforcement policies and practices.*

SUGGESTED REMEDIAL ACTION: DOT must establish whether the regulatory problem identified by the agency (*i.e.*, fatigue) is caused by hours of service or other factors.

12. Assessment of Relative Risk.

REQUIREMENT: "In setting regulatory priorities, each agency shall consider, to the extent reasonable, the degree and nature of the risks posed by various substances or activities within its jurisdiction." (Exec. Order 12866 § 1(b)(4).)

COMPLIANCE/NONCOMPLIANCE: DOT did not assess the relative risks posed by the following: (i) off-duty-hours-induced fatigue; (ii) loading/unloading; (iii) increased road congestion; (iv) increased number of inexperienced truck drivers; and (v) DOT's failure to take adequate enforcement actions against drivers and carriers with bad safety records.

SUGGESTED REMEDIAL ACTION: DOT must comply with this requirement after the agency prepares the required assessment of the causes of accidents involving trucks.

13. Design of Regulation in Most Cost Effective Manner.

REQUIREMENT: "When an agency determines that a regulation is the best available method of achieving the regulatory objective, it shall design its regulations in the most cost-effective manner to achieve the regulatory objective. In doing so, each agency shall consider incentives for innovation, consistency, predictability, the costs of enforcement and compliance (to the government, regulated entities, and the public), flexibility, distributive impacts, and equity." (Exec. Order 12866 § 1(b)(5).)

COMPLIANCE/NONCOMPLIANCE: DOT's proposal fails this requirement for a number of reasons. First, the proposed rule would create unpredictable economic and safety results for virtually all stakeholders. Second, tight compliance and

enforcement resources, funded by the taxpayers, would be expended regulating drivers and carriers with excellent safety records, instead of focusing those resources on problem drivers and carriers. Third, the DOT proposal fails the flexibility test, as is discussed elsewhere in this Report Card. Fourth, the DOT proposal punishes carriers who have engaged in innovation by investing in electronic on-board information systems, because these carriers would have to replace their existing systems with the EOBRs specified pursuant to DOT's inflexible, command-and-control language.

SUGGESTED REMEDIAL ACTION: DOT must work with stakeholder groups, possibly on a consensus basis, to develop a rule that does not cause serious disruptions in the day-to-day operation of the American economy or threaten the solvency of a substantial number of small businesses.

14. Data Supporting Selected Regulatory Approach.

REQUIREMENT: "Each agency shall base its decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation." (Exec. Order 12866 § 1(b)(7).)

COMPLIANCE/NONCOMPLIANCE: As is set forth at pages 14-23 above, DOT failed to address significant scientific and economic issues. In addition, DOT failed to provide adequate documentation in support of its cost estimates and assumptions.

SUGGESTED REMEDIAL ACTION: DOT must correct its analyses of the economic and scientific issues. DOT must provide more adequate documentation for the cost and other economic assumptions upon which the agency's estimates are premised.

15. Adoption of Performance-Based, Rather Than Command-and-Control Regulatory Solutions.

REQUIREMENT: "Each agency shall...to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt." (Exec. Order 12866 § 1(b)(8).)

COMPLIANCE/NONCOMPLIANCE: DOT's proposed rule is a classic command-and-control regulation. It would impose a set of unbending and inflexible rules, in many occasions leading to patently absurd results. One such absurd result raised by a number of witnesses is that, due to the inflexible and mechanistic application of the hour limitations, if a long-haul driver is within one hour of his or her home on a Friday evening, and his or her driving time limit has been reached, he or she would have to stay at a rest stop for the entire weekend, and would be prohibited from making the one-hour journey home. (See Owen testimony.) This kind of absurdity, as well as the fact that the proposed rule deprives individual drivers of any discretion as to when they need rest and where to take it provoked heated reactions from a number of drivers upon whose compliance the ultimate workability of the rule will depend.

SUGGESTED REMEDIAL ACTION: DOT's failure to consider a performance-based regulatory strategy is a major failing of the present rulemaking proceeding. This failing flies in the face of the Administration's aspirations (reflected in Executive Order 12866 and Vice President Gore's "Reinventing Government" initiative) to promote performance-based regulation.

16. Consultation with State, Local, and Tribal Officials.

REQUIREMENT: "Wherever feasible, agencies shall seek views of appropriate State, local, and tribal officials before imposing regulatory requirements that might significantly or uniquely affect those governmental entities. Each agency shall assess the effects of Federal regulations on State, local, and tribal governments, including specifically the availability of resources to carry out those mandates, and seek to minimize those burdens that uniquely or significantly affect such governmental entities, consistent with achieving regulatory objectives. In addition, as appropriate, agencies shall seek to harmonize Federal regulatory actions with related State, local, and tribal regulatory and other governmental functions." (Exec. Order 12866 § 1(b)(9).)

COMPLIANCE/NONCOMPLIANCE: According to DOT, "[t]his rule does not require action by State, local, or tribal governments. Therefore, no prior consultations with elected representatives of these governments were initiated." (Regulatory Accountability and Reform Analysis at 2 (attachment to PRE).) This statement ignores the following significant State and local government impacts that

necessitate consultation with State and local government officials:

(a) States would be required to promulgate regulations conforming to DOT's final rule in order to remain eligible for matching Federal highway funds.

(b) States would have to increase enforcement and emergency expenditures due to increased use of highway shoulder areas and increased accident rates.

(c) Federal limitations would be placed on State and local regulations requiring nighttime construction.

(d) The new Federal requirements would conflict with State and local electrical utility emergency response regulations.

SUGGESTED REMEDIAL ACTION: DOT must comply with the various statutory and Executive Order provisions delineated in this Report Card which collectively require DOT habitually, systematically and meaningfully to consult with State, local and tribal governmental officials on virtually all significant regulatory projects.

17. Compatibility with Regulations of Other Federal Agencies.

REQUIREMENT: "Each agency shall avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies." (Exec. Order 12866 § 1(b)(10).)

COMPLIANCE/NONCOMPLIANCE: DOT's proposed hours of service regulation conflicts with Federal regulations governing electric utility emergency response. [Stanley Wells testimony, May 31, 2000] The DOT proposal may also conflict with DOL requirements governing employer-employee relations and EPA's NAAQS standards.

SUGGESTED REMEDIAL ACTION: DOT must initiate a process of consultation with DOL, OSHA, EPA and OMB aimed at identifying all potential sources of statutory or regulatory conflicts, taking into account the conflicts and adverse quantitative and qualitative impacts identified in this Report Card.

18. Narrowly-Tailored Requirement.

REQUIREMENT: "Each agency shall tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations." (Exec. Order 12866 § 1(b)(11).)

COMPLIANCE/NONCOMPLIANCE: The DOT proposal does not make any distinction between large and small carriers, despite DOT's acknowledgment that the majority of motor carriers have fleets of 20 or fewer vehicles. The burdens placed on individual drivers and small carriers are out of proportion to the minimal (if any) safety benefits that would result from the proposal in its present form.

SUGGESTED REMEDIAL ACTION: DOT must tailor its regulation: (i) to focus the expenditure of taxpayer resources on proven violators, not good corporate citizens; and (ii) to provide less burdensome alternatives to small carriers.

19. Easy-to-Understand Requirement.

REQUIREMENT: "Each agency shall draft its regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty." (Exec. Order 12866 § 1(b)(12).)

COMPLIANCE/NONCOMPLIANCE: As is set forth at page 25 above, it would be impossible in many instances for drivers and/or carriers to determine a driver's status during the course of one week, or even one run. In light of the fact that carriers, drivers, and enforcement personnel would be unable to determine exactly what set of requirements applies, the DOT proposal does not pass the easy-to-understand test.

SUGGESTED REMEDIAL ACTION: A number of witnesses, including an enforcement officer, called for elimination of the "Type" distinctions as they appear in the present DOT proposal. In addition, the "empowerment" provision must be rewritten to provide reasonable limits on the exercise of unbridled "empowerment" by unscrupulous employees, and to provide a mechanism for

objectively determining when an employee has abused the provision beyond reasonable limits, thereby justifying action by the employer.

20. Characterization as "Significant Regulatory Action."

REQUIREMENT: The agency and/or OMB must determine whether its proposal constitutes a "significant regulatory action." The proposal is "significant" if the regulation is likely to do any one or more of the following:

-- Have an annual effect on the economy of $100 million or more;

-- Adversely affect in a material way the economy or a sector of the economy;

-- Adversely affect in a material way productivity, competition, or jobs;

-- Adversely affect in a material way the environment, or public health or safety;

-- Adversely affect in a material way State, local, or tribal governments or communities;

-- Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

-- Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereunder; or,

-- Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth elsewhere in Executive Order 12866.

(See Exec. Order 12866 § 3(f).)

COMPLIANCE/NONCOMPLIANCE: DOT acknowledges that its proposal constitutes a "significant regulatory action."

SUGGESTED REMEDIAL ACTION: (Not applicable.)

21. Maximization of Involvement of Affected Parties.

REQUIREMENT: "[B]efore issuing a notice of proposed rulemaking, each agency should, where appropriate, seek the involvement of those who are intended to benefit from and those expected to be burdened by any regulation (including, specifically, State, local, and tribal officials). In addition, each agency should afford the public a *meaningful* opportunity to comment on any proposed rulemaking, which in most cases should include a comment period of not less than 60 days." (Exec. Order 12866 § 6(a)(1) (emphasis added).)

This requirement suggests that 60 days is not an adequate comment period in all instances. Rather, 60 days is the low-end threshold for adequacy and meaningfulness.

COMPLIANCE/NONCOMPLIANCE: On a superficial level DOT complied with this requirement, in that the agency allowed for public comment at the ANPRM stage. In a deeper sense, however, DOT has not made any qualitative or meaningful attempt to listen to or address the concerns of the following key stakeholder groups:

-- Truck drivers;

-- Motor carriers;

-- Industries dependent on performance of the trucking industry (*e.g.*, shippers, manufacturers, suppliers);

-- Public- and quasi-public-sector sectors dependent on feasibility of the proposed rule (*e.g.*, hospitals, public utilities, public enforcement authorities);

-- State and local governments.

It is one thing to mechanically establish a docket for the receipt of comments. It is quite another to address the issues raised by the comments in a serious and meaningful way, and to respond to legitimate concerns by modifying the agency's initial concept to resolve serious problems raised by the comments. In addition, section 6(a)(1) anticipates that the rulemaking agency will seek out key