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

The Center for Regulatory Effectiveness
11 Dupont Circle, N.W.
Washington, DC 20036
(202) 265-2383

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		X
2. Consistency with Statutory Mandate; Promotion of President's Priorities		X
3. Assessment of Quantifiable Costs/Benefits		X
4. Assessment of Adverse/Beneficial Effects on the Natural Economy		X
5. Assessment of Adverse/Beneficial Effects on Health, Safety and the Environment		X
6. Assessment of Qualitative Impacts		X
7. Alternatives to Adopting a Regulation		X
8. Alternative Regulatory Approaches		X
9. Netting to Select of Most Beneficial Alternative		X
10. Identification of Problem Necessitating Regulation		X
11. Role of Existing Legal Requirements in Creating the Problem	X	
12. Assessment of Relative Risk		X
13. Design of Regulation in Most Cost Effective Manner		X
14. Data Supporting Selected Regulatory Approach		X

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. (<u>See</u> 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. <u>Narrowly-Tailored Requirement.</u>

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. <u>Easy-to-Understand Requirement.</u>

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. <u>Maximization of Involvement of Affected Parties.</u>

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 <u>*meaningful*</u> 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

stakeholder groups in an affirmative manner. Both the text of the NPRM and the reactions of DOT officials to testimony at the hearing suggest a lack of understanding by those officials of the fundamental nature and operations of the trucking industry (and of the serious impacts the present proposal would have on that industry). Moreover, the NPRM does not suggest that DOT has engaged in any form of outreach to truck drivers as the key targets of the regulation; nor have State and local government officials been contacted; nor does DOT recognize the impact its actions will have on virtually all industrial sectors dependent on the trucking industry. Accordingly, it cannot be said that DOT complied with section 6(a)(1) of the Executive Order in a meaningful or substantive way.

SUGGESTED REMEDIAL ACTION: DOT must develop a formal plan for the inclusion of stakeholder groups that have been excluded, or less than meaningfully included, to date. These groups must have a significant say in how DOT addresses each of the legal requirements delineated in this Report Card.

22. Consideration of Consensual Mechanisms Such as Negotiated Rulemaking.

REQUIREMENT: "Each agency is also directed to explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking." (Exec. Order 12866 § 6(a)(1).)

COMPLIANCE/NONCOMPLIANCE: The language of the Executive Order reflects the Clinton Administration's view that negotiated rulemaking should be favored. Moreover, Congress has established within the Administrative Procedure Act ("APA") a framework for the conduct of consensus-based rulemaking when such an approach is in the public interest. See 5 U.S.C. §§ 561-568. A number of witnesses called on DOT to undertake negotiated rulemaking to arrive at a workable solution to the question of how to ensure adequate rest for truck drivers. (See Lynch testimony.) A consensual approach is particularly appropriate in the present context, because whether or not any final rule will be workable or enforceable will be highly dependent on the practical ability of individual truck drivers to comply (not to mention their willingness to stay in the profession). Given the unusually high degree, and the emotional tenor, of opposition provoked by DOT's present proposal, it is imperative that DOT come up with an alternative that the individuals charged with compliance can live with.

SUGGESTED REMEDIAL ACTION: The APA provisions cited above provide a flexible framework which DOT can use to develop, on a consensual basis, a set of specific hours of service rules that would resolve the rest issue without creating qualitative and economic havoc to truck drivers as individuals and to the industry as a whole.

23. OIRA Review of Significant Regulatory Actions.

REQUIREMENT: If the planned regulatory action is characterized as "significant," the Office of Information and Regulatory Affairs ("OIRA") within OMB is required to review the cost-benefit assessment. (Exec. Order 12866 § 6(a)(2)(B).) However, OIRA does not review non-significant actions. (Id. § 6(b)(1).) Moreover, when the planned regulatory action is characterized as "significant," OMB is required to make available to the public "all documents exchanged between OIRA and the agency during the review by OIRA and the agency under this section." (Id. § 6(b)(4)(D).)

COMPLIANCE/NONCOMPLIANCE: The NPRM states that OMB reviewed the proposed rule, apparently without addressing any of the issues set forth at Requirement Nos. 1 through 22 above (and without addressing any of the Paperwork Reduction Act issues at Requirement Nos. 39 through 50 below). (See NPRM at 25,594.)

DOT erroneously concludes that its present proposal: (i) would not materially affect the economy, specific economic sectors, jobs, competitiveness, the environment or State/local governments; (ii) would not be inconsistent or interfere with the activities of other Federal agencies; and (iii) would not impact Federal grant programs. (Id. at 25,595.) These conclusions are dismissive of virtually all of the serious issues raised in this Report Card, including:

-- The economic impacts, as set forth at pages 15-23;

-- The qualitative impacts, as set forth at pages 25-28;

-- The job impacts, as set forth at pages 15-16, 17-18 and 20;

-- The competitiveness impacts, as set forth at page 23;

-- The environmental impacts, as set forth at pages 52 and 72;

-- Inconsistency with the regulatory requirements of other Federal agencies, as set forth at page 35; and

-- Impact on Federal highway program matching fund conditions, as set forth at pages 22 and 54.

SUGGESTED REMEDIAL ACTION: DOT and OMB should disclose the extent of OMB's review of each of the legal requirements set forth in this Report Card, as well as the substance of OMB's comments and suggestions to DOT.

C. Administrative Procedure Act.

24. Adequacy of Opportunity for Notice and Comment.

REQUIREMENT: "[T]he agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation." (5 U.S.C. § 553(c).) The comment period is not adequate if it does not provide a "meaningful" or "fair" or "reasonable" opportunity to be heard. In particular, the agency's action is subject to invalidation under the APA to the extent that numerous parties have called for an extension on the ground that additional time is needed to respond adequately, yet the agency denies the extension. (See Estate of Smith v. Bowen, 656 F. Supp. 1093, 1097-98, 1099 (D. Colo. 1987) (invalidating HHS regulation due to HHS' refusal to grant an extension of the comment period).)

COMPLIANCE/NONCOMPLIANCE: DOT rejected requests made in early May, 2000 for an extension of the comment period. At the hearing, however, at least eight witnesses called for an extension, due to the amount and complexity of the data that the associations' members are being asked to compile and evaluate in order to document the impacts of the proposed rule. (See Am. Trucking Ass'n, Owen, Williams, Smith Road, Nat'l Small Shipping Conf., Snack Food Ass'n, Render and Noble testimony.) One speaker pointed out that it was inconsistent for DOT to deny an extension at the NPRM stage in light of the fact that DOT had allowed an extension at the ANPRM stage. (See Am. Trucking Ass'n testimony.) In response to the number of calls for an extension and the publicity generated by the hearing, DOT changed its position and granted to an extension.

SUGGESTED REMEDIAL ACTION: DOT is now in compliance with this requirement.

25. Adequacy of Agency's Response to Issues Raised.

REQUIREMENT: The agency must respond in a reasoned manner to those comments that raise significant problems. (See, e.g., Reytblatt v. U.S. Nuclear Regulatory Comm'n, 105 F.3d 715 (D.C. Cir. 1997).)

COMPLIANCE/NONCOMPLIANCE: (Pending.)

SUGGESTED REMEDIAL ACTION: In accordance with the principle of "transparency" in rulemaking proceedings, it is imperative that DOT respond to each of the issues raised in this Report Card and in the other comments, and that the agency memorialize in writing its final position with respect to each significant issue under separate headings when the final rule is published. Only by addressing each issue separately and distinctly and under separate headings can it be clear that the agency has responded to each of the significant issues raised in this Report Card and in the other filed comments.

D. Regulatory Flexibility Act.

26. Determination of "Significant Economic Impact" on "Substantial Number of Small Entities."

REQUIREMENT: The Regulatory Flexibility Act is drafted in a manner that creates a presumption that a proposed rule would have a "significant economic impact" on a "substantial number of small entities," unless the agency officially "certifies" otherwise. (See 5 U.S.C. § 605(b).) If the proposed rule would *not* significantly impact a substantial number of small entities, then the agency is exempted from the requirement of preparing initial and final regulatory flexibility analyses. (Id. § 605(b).) The language of section 605 indicates that an agency's failure to certify affirmatively that a proposed rule would *not* significantly affect small entities triggers the applicability of sections 603 and 604, requiring the initial and final regulatory flexibility analyses. This is significant in light of the Regulatory Flexibility Act's judicial review provisions. (See id. § 611.)

COMPLIANCE/NONCOMPLIANCE: DOT originally opined that the proposed rule would "affect a substantial number of small entities, but would not have a significant impact on these entities." (NPRM at 25,596.) DOT then partially reversed itself by withdrawing this negative certification, but declined to affirmatively acknowledge that the proposed rule would in fact have a "significant economic impact" on a substantial number of small entities. (See 65 Fed. Reg. 34,904 (May 31, 2000).) In other words, DOT has refused clearly to acknowledge that the Regulatory Flexibility Act applies to the present rulemaking proceeding.

DOT appears to be taking the position that it cannot determine whether or not the Regulatory Flexibility Act applies to its proposed rule due to the agency's inability to assess the "*full* economic impact of the proposal." In light of the number of significant economic impacts identified at the hearing (and summarized in this Report Card), and in light of the high proportion of small carriers in the trucking industry, DOT's equivocation is not justified.

To suggest, as DOT appears to be doing, that the regulatory flexibility analysis requirements can be avoided simply because the agency does not know, at the outset, what "full economic impacts" the analysis will reveal turns the statutory requirement on its head.

SUGGESTED REMEDIAL ACTION: DOT must make an affirmative certification that its proposal would have a significant economic impact on a substantial number of small entities.

27. Inclusion of the Planned Regulation in the *Unified Federal Regulatory Agenda.*

REQUIREMENT: "[E]ach agency shall publish in the Federal Register a regulatory flexibility agenda which shall contain...(1) a brief description of the subject area of any rule which is likely to have a significant economic impact on a substantial number of small entities..." (5 U.S.C. § 602(a)(1).)

COMPLIANCE/NONCOMPLIANCE: DOT complied with this requirement. (See 65 Fed. Reg. 23,202 (Apr. 24, 2000).)

SUGGESTED REMEDIAL ACTION: (Agency is in compliance.)

28. Initial Regulatory Flexibility Analysis.

REQUIREMENT: Whenever a proposed rule would have a significant economic impact on a substantial number of small entities, the agency must prepare, and make available for public comment, an initial regulatory flexibility analysis. (5 U.S.C. § 603(a).) The initial analysis must identify "any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities." Specific alternatives that must be addressed include:

-- Establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;

-- Clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities;

-- Use of performance rather than design standards; and

-- Exemption from coverage of all or part of the rule for such small entities.

Id. § 603(c).

Compliance/Noncompliance: DOT's initial regulatory flexibility analysis (at pages 25,595-25,596 of the NPRM, and at pages RFA-1 through RFA-11 of the docket) is inadequate for the following broad reasons. *First,* the analysis fails to acknowledge the existence of whole industries in which a substantial number of small businesses would be significantly adversely affected by the proposed rule. As is stated elsewhere in this Report Card, these industries include shippers, manufacturers and suppliers, as well as distinct sectors within the motor carrier industry, such as tourist coach services, commuter bus services and limousine services. *Second,* as is demonstrated elsewhere in this Report Card, DOT's analysis excludes entire categories of economic impacts on the motor carrier industry. *Third,* DOT has not fully considered the viability of exempting small businesses from the EOBR requirement, despite the unnecessary expense and duplicativeness of that requirement. *Fourth,* DOT has not considered alternatives, such as taking a performance-based approach to addressing the regulatory problem identified by the agency. (See pages 33-34.)

Suggested Remedial Action: DOT's initial regulatory flexibility "analysis" is grossly inadequate and must be redone and republished. In preparing a revised initial analysis, DOT must consider all of the economic impacts delineated in this Report Card as they would apply to all affected industries. DOT must also make a reasonable effort to develop less burdensome alternative requirements for carriers with fleets of 20 of fewer vehicles.

29. Review of Initial Regulatory Flexibility Analysis by Small Business Administration.

Requirement: "The agency shall transmit a copy of the initial regulatory flexibility analysis to the Chief Counsel for Advocacy of the Small Business Administration." (5 U.S.C. § 603(a).) If the agency determines that the proposed rule would not have a significant economic impact on a substantial number of small entities, "[t]he agency shall provide such certification and statement to the Chief Counsel for Advocacy of the Small Business Administration." (Id. § 605(b).)

Compliance/Noncompliance: The NPRM does not indicate whether SBA's Chief Counsel for Advocacy has passed on the adequacy of the initial regulatory flexibility analysis.

Suggested Remedial Action: DOT should disclose the extent to which SBA reviewed the initial flexibility analysis, as well as the substance of any issues raised by SBA (and how they were resolved).

30. Final Regulatory Flexibility Analysis.

Requirement: "When an agency promulgates a final rule under section 553 [of the Administrative Procedure Act]...the agency shall prepare a final regulatory flexibility analysis. Each final regulatory flexibility analysis shall contain... (5) a description of the steps the agency has taken to minimize the significant economic impact on small entities..." (5 U.S.C. § 604(a)(5).)

Compliance/Noncompliance: (Pending promulgation of final rule.)

Suggested Remedial Action: (Compliance to be assessed upon issuance of final rule.)

31. Special Notice and Consultation Requirements for Small Businesses.

Requirement: "When any rule is promulgated which will have a significant economic impact on a substantial number of small entities, the head of the agency promulgating the rule or the official of the agency with statutory responsibility for the promulgation of the rule shall assure that small entities have been given an opportunity to participate in the rulemaking for the rule through the reasonable use of techniques such as... (3) direct notification of interested small entities; and... (5) the adoption or modification of agency procedural rules to reduce the cost or complexity of participation in the rulemaking by small entities." (5 U.S.C. § 609(a).)

Compliance/Noncompliance: It does not appear that DOT has undertaken any outreach efforts to obtain the views of the small business community, especially in light of DOT's nonrecognition of significant impacts on small businesses. This is especially disturbing in light of testimony at the hearing regarding the low profit margins of the majority of US trucking businesses and the fact that a substantial majority of US trucking businesses have fleets of 20 or fewer trucks.

SUGGESTED REMEDIAL ACTION: DOT must undertake a serious, credible effort to work with the small business community to address ways in which the proposed rule should be modified to protect the viability of small businesses.

E. Unfunded Mandates Reform Act.

32. Preparation of Section 202 Statement with Respect to State, Local, and Tribal Government Costs.

REQUIREMENT: "[B]efore promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes *any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate,* or by the private sector, *of $100,000,000 or more (adjusted annually for inflation) in any 1 year,* and before promulgating any final rule for which a general notice of proposed rulemaking was published," the rulemaking agency must prepare a written statement addressing the specific costs and benefits to State, local and tribal governments. (UMRA § 202(a), at 2 U.S.C. § 1532(a).) In other words, if the costs to State and local governments identified by CRE at page 22 above would impose costs of $2 million or more per State, then DOT is required to prepare a Section 202 Statement.

The Section 202 Statement must address the following issues with respect to State, local and tribal government impacts:

-- The qualitative and quantitative assessment of the anticipated costs and benefits of the Federal mandate, including the costs and benefits to State, local, and tribal governments or the private sector;

-- Analysis of the extent to which such costs to State, local, and tribal governments may be paid with Federal financial assistance (or otherwise paid for by the Federal government);

-- Extent to which there are available Federal resources to carry out the intergovernmental mandate;

-- Estimates by the agency, if and to the extent that the agency determines that accurate estimates are reasonably feasible, of (A) the future compliance costs of the Federal mandate; and (B) any disproportionate budgetary effects of the Federal mandate upon any particular regions of the nation or particular State, local, or tribal governments, urban or rural or other types of communities, or particular segments of the private sector;

-- Description of the extent of the agency's prior consultation with elected representatives (under UMRA section 204 (see Requirement No. 36 below)) of the affected State, local, and tribal governments;

-- Summary of the comments and concerns that were presented by State, local, or tribal governments either orally or in writing to the agency; and

-- Summary of the agency's evaluation of those comments and concerns.

(Id.) Significantly, the language quoted above indicates that this requirement applies regardless of whether the Federal mandate that triggers the State, local and/or tribal government expenditures is a "private-sector" or "intergovernmental" Federal mandate. (See language emphasized above.)

COMPLIANCE/NONCOMPLIANCE: CRE has identified four types of expenditures to State, local and tribal governments that are likely to result if DOT promulgates its present proposal as a final rule:

(a) Increased costs of highway repair;

(b) Increased costs related to accidents due caused by increased truck congestion during rush hours;

(c) Obligation to rewrite conforming State regulations; and

(d) Retraining of State and local enforcement and highway patrol officers regarding new Federal and State requirements.

It is likely that these four categories of expenditures combined will cost each State more than $2 million, on average. Therefore, DOT should have prepared a Section 202 Statement prior to publishing its NPRM. Yet, 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).)[2]

SUGGESTED REMEDIAL ACTION: DOT must prepare a Section 202 Statement addressing State, local and tribal governmental impacts of its proposal. The Statement must address the impacts identified by CRE at page 22 above, as well as any additional issues identified by State, local and tribal governmental officials to be consulted by DOT.

33. Preparation of "Section 202 Statement" with Respect to Private-Sector and Nationwide Economic Costs.

REQUIREMENT: The Section 202 Statement must contain "estimates by the agency of the effect on the national economy, such as the effect on productivity, economic growth, full employment, creation of productive jobs, and international competitiveness of United States goods and services, if and to the extent that the agency in its sole discretion determines that accurate estimates are reasonably feasible and that such effect is relevant and material." (UMRA § 202(a)(4), at 2 U.S.C. § 1532(a)(4).)

COMPLIANCE/NONCOMPLIANCE: As is set forth at pages 15, 17-18, 20 and 23 above, DOT did not adequately address a number on adverse impacts its proposal would have on productivity, employment and international competitiveness. DOT's conclusion that its proposal "would not have a significant impact on full employment or the creation of productive jobs....[or] on international competitiveness" is contradicted by testimony at the hearing regarding the proposal's effect on: (i) the job market for truck drivers (*i.e.*, the proposal would make it impossible for a significant percentage of truck drivers to maintain their existing jobs and would put pressure on other job markets due to increased truck driver moonlighting); (ii) productivity in a number of industries; and (iii) international competitiveness (*i.e.*, stemming from disruption in ability of US business to respond to global market demand).

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[2] The reference in the quoted language to "elected representatives" suggests that DOT may have confused the Section 202 Statement requirement with the Section 204 State, Local and Tribal Government Input Process requirement. (<u>See</u> Requirement No. 36 below).

SUGGESTED REMEDIAL ACTION: DOT must prepare a corrected Section 202 Statement with respect to both private and public sector impacts.

34. Preparation of "Section 202 Statement" with Respect to Environmental Impacts.

REQUIREMENT: The Section 202 Statement must contain "a qualitative and quantitative assessment of the anticipated costs and benefits of the Federal mandate, including...the effect of the Federal mandate on health, safety, and the natural environment...." (UMRA § 202(a)(2), at 2 U.S.C. § 1532(a)(2).)

COMPLIANCE/NONCOMPLIANCE: DOT states that it "does not believe that this proposal would have any impact on the natural environment." At the hearing, however, a number of witnesses pointed out that vehicle use by all of the five "Types" of drivers could increase by roughly 30%, and that a significant portion of nighttime driving would be shifted to morning rush hours. This raises two environmental impacts that must be considered by DOT. First, the cumulative increase in releases of diesel exhaust into the environment could be measurable and significant; such increases could complicate or defeat attempts by major urban areas to comply with requirements under the Clean Air Act. Second, DOT's proposal would increase the use of a non-renewable resource (*i.e.*, petroleum) without producing any corresponding benefit (such as an in productivity). These two impacts should have been addressed in the Section 202 Statement.

SUGGESTED REMEDIAL ACTION: *First,* DOT must consult with motor carriers to arrive at a reasonable estimate of increases in exhaust released into the environment as a result of promulgation of the DOT proposal. *Second,* DOT must then consult with State and local governmental officials responsible for administration of Federal Clean Air Act requirements to determine the impacts that such additional exhaust would have on attainment/nonattainment under the Clean Air Act. *Third,* DOT must address the issue of increased depletion of non-renewable resources. *Fourth,* DOT must memorialize its findings in a Section 202 Statement, summarize its findings in a revised notice of proposed rulemaking, and transmit a copy of the original Statement to Congress (pursuant to the Small Business Regulatory Enforcement Fairness Act, see Requirement No. 58 below).

35. Preparation of "Small Government Agency Plan."

REQUIREMENT: "Before establishing any regulatory requirements that might significantly or uniquely affect small governments, agencies shall have developed a plan under which the agency shall-- (1) provide notice of the requirements to potentially affected small governments, if any; (2) enable officials of affected small governments to provide meaningful and timely input in the development of regulatory proposals containing significant Federal intergovernmental mandates; and (3) inform, educate, and advise small governments on compliance with the requirements." (UMRA § 203(a), at 2 U.S.C. § 1533(a).)

The term "small government" refers to cities, counties, towns, townships, villages, school districts or special districts with populations of less than 50,000. (UMRA § 421(11), at 2 U.S.C. § 658(11) (incorporating by reference 5 U.S.C. § 601(5)).)

COMPLIANCE/NONCOMPLIANCE: Applicability of this requirement to the DOT proposal depends upon the extent to which expenditures for enforcement or increased accident levels would be borne by "small governments." DOT's "Regulatory Accountability and Reform Analysis" did not address this issue.

SUGGESTED REMEDIAL ACTION: DOT must undertake some degree of reasonable effort to determine how its proposal would affect "small governments," as well a reasonable quantitative (*i.e.*, dollar) and qualitative (*i.e.*, environmental) assessment of such effects.

36. Development of Effective State, Local, and Tribal Government Input Process.

REQUIREMENT: "Each agency shall, to the extent permitted in law, develop an effective process to permit elected officers of State, local, and tribal governments (or their designated employees with authority to act on their behalf) to provide meaningful and timely input in the development of regulatory proposals containing significant Federal intergovernmental mandates." (UMRA § 204(a), at 2 U.S.C. § 1534(a).)

The term "intergovernmental mandate" includes regulatory provisions that "would increase the stringency of conditions of assistance to State, local, or tribal governments" under "Federal programs under which $500,000,000 or more is

provided annually to State, local, and tribal governments under entitlement authority." (UMRA § 421(5)(B)(i).)

Compliance/Noncompliance: Unlike the Section 202 Statement requirement (which is triggered when any type of Federal regulatory requirement (*i.e.*, private-sector *or* intergovernmental) would result in consequential expenditures by State, local and tribal governments), the Section 204 Input Process requirement is not triggered unless the regulation contains "significant Federal *intergovernmental* mandates." Accordingly, it must be determined whether DOT's proposed rule would increase the stringency of conditions with which State and local governments would have to comply in order to remain eligible for Federal matching highway funding. As is indicated at page 22 above, it appears that the DOT proposal would significantly increase the burdens on States desiring to maintain eligibility for such funds. Therefore, DOT should have complied with the Section 204 Input Process requirement.

Suggested Remedial Action: DOT must institute a process whereby DOT will consult with State, local and tribal governments to obtain their input regarding the affect the proposed rule would have at the State, local and tribal level, and to identify alternatives to eliminate or minimize any adverse effects so identified.

37. Identification of "Least Burdensome Option" or Explanation Why Other Option Was Selected.

Requirement: "[B]efore promulgating any rule for which a written statement is required under section 202, the agency shall identify and consider a reasonable number of regulatory alternatives and from those alternatives select the one that achieves the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule, for -- (1) State, local, and tribal governments...; and (2) the private sector..." (UMRA § 205(a), at 2 U.S.C. § 1535(a).) However, the agency head may alternatively "publish[] with the final rule an explanation of why the least costly, most cost-effective or least burdensome method of achieving the objectives of the rule was not adopted." (UMRA § 205(b), at 2 U.S.C. § 1535(b).)

Compliance/Noncompliance: As is set forth at pages 30-31 above, DOT did not adequately consider alternatives to the regulatory strategy embodied in the

proposed rule as a general matter. In particular, DOT failed to consider the question of alternative regulatory mechanisms to alleviate adverse impacts on State, local and tribal governments.

SUGGESTED REMEDIAL ACTION: DOT must engage in more effective consultation with the principal stakeholder groups in both the public and private sectors, and develop for public notice and comment an appropriate range of regulatory options.

38. Involvement of OMB and CBO.

REQUIREMENT: The agency is to ensure that the Section 202 and Section 203 Statements are transmitted to OMB and CBO. (UMRA § 206, at 2 U.S.C. § 1536.)

COMPLIANCE/NONCOMPLIANCE: The extent of compliance is unclear from the NPRM.

SUGGESTED REMEDIAL ACTION: DOT should disclose in the NPRM the extent to which DOT consulted with OMB and CBO, and should summarize the substance of OMB's and CBO's reactions to the Section 202 and 203 Statements.

F. Paperwork Reduction Act.

39. Adequacy of Notice and Opportunity to Submit Comments to OMB.

REQUIREMENT: Under the Paperwork Reduction Act, 44 U.S.C. §§ 3501, *et seq.*, an agency must obtain OMB's approval before imposing recordkeeping or reporting requirements (referred to as "information collection requirements") on the public. The notice must provide the public with a minimum of 60 days within which to submit comments to the appropriate "desk officer" at OMB. (See 44 U.S.C. § 3507 (a)(1)(D); 5 C.F.R. §§ 1320.8(d)(1), 1320.11(a).)

COMPLIANCE/NONCOMPLIANCE: The NPRM fails this requirement for a number of reasons:

(a) Notice Unclear Regarding Deadline for Comments. The first page of the NPRM contains a notice that comments on the proposed rule must be submitted to DOT at a specific address (complete with room number and zip code) by a date certain (July 31 (now extended)). (See NPRM at 25,540.) 58 pages later, buried toward the end of the NPRM, DOT makes the following unclear statement:

> The collections of information contained in this NPRM relating to OMB Control Number 2126-0001 have been submitted to OMB for review under section 3507(d) of the PRA. Please direct all comments to the Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for the Department of Transportation. Comments may be received *within 30 days of publication [of what?] up to the close of the rule's comment period, but comments to OMB will be most useful if received by OMB within 30 days of publication.*

(NPRM at 25,598 (emphasis added).) This language is unclear as regards the comment deadline for the following reasons: (i) no calendar date is provided, even though a calendar date for non-Paperwork Reduction Act comments was provided on the first page of the NPRM; (ii) the term "within 30 days of publication up to the close of the rule's comment period" just does not make

any sense as a matter of plain English, so that it is unclear whether the deadline is the same as the page one deadline (*i.e.*, July 31, now extended), or rather is 30 days earlier than the page one deadline (?)[3]; and (iii) the "most useful" language suggests that OMB may have already made its decision by June 2, 2000, so that any public comments would not be considered by the OMB desk officer.

(b) Notice Unclear Regarding Recipient/Destination of Comments. The above-quoted notice does not provide an address for the submission of the public comments. Members of the public who have concerns about the proposed rule's information collection requirements -- and many such concerns were raised by individual truck drivers and small businesspeople at the hearing -- cannot be expected to do research to determine OMB's mailing address and where in the OMB labyrinth their comments should be directed in order to be considered by OMB as required by law.

(c) Failure to Make Supporting Statement Available for Public Inspection. CRE attempted to obtain copies of the "Support Statement" that DOT is supposed to file with OMB explaining how the "information collections" contained in the proposed rule (*e.g.*, the EOBR requirement) meets the various substantive standards required by the Paperwork Reduction Act. (See Requirement Nos. 40 through 50 below.) It is only from the Supporting Statement that a member of the public can assess for himself or herself whether the "sponsoring agency" has justified the appropriateness of the proposed information collection. The OMB docket office provided CRE with four sets of documents dating from May, 26, 1995 through April 19, 2000, all of which pertained to versions of the hours-of-service paperwork requirements that

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[3] CRE attempted, during the week of June 12, 2000, to obtain a definitive answer on this question from three high-level DOT officials involved in drafting the NPRM. The first did not know the answer, and directed the question to a DOT press officer. The second, the press officer, stated that the Paperwork Reduction Act comment deadline was the same as the general comment deadline, although this official was not an attorney. The third, a DOT attorney, stated that the provision is unclear. If high-level DOT officials intimately involved in drafting the proposed rule are unclear about the requirements for filing comments under the Paperwork Reduction Act, then how are members of the public supposed to determine what they must do in order to exercise their congressionally-conferred right to participate in the OMB review process through the submission of public comments?

pre-date the NPRM. Whatever Supporting Statement DOT may have provided to OMB has not been made available for public inspection. Moreover, when CRE reported this problem to a high-level DOT official, DOT declined to assist CRE in obtaining the Supporting Statement filed in connection with the NPRM on or about May 2, 2000.

(d) Notice Indicates That Filing of Comments May Be Futile If Not Filed Prior to the (Unclear) Deadline. Under the Paperwork Reduction Act, OMB has the authority to makes its decision to approve or disapprove of an agency's proposed information collection 30 days after OMB receives the "clearance package" containing the Supporting Statement from the sponsoring agency. (See 44 U.S.C. § 3507(b).) Yet OMB regularly refrains from making its decision until the end of the applicable public comment period. Accordingly, the language in the NPRM could suggest to those commenters familiar with OMB procedures under the Paperwork Reduction Act (*e.g.*, trade associations or public interest groups) that the submission of comments after June 1, 2000 would be futile.

SUGGESTED REMEDIAL ACTION: The notice must be republished, and must: (i) clarify where comments are to be sent (*i.e.*, mailing address, fax number, and e-mail address); (ii) clarify one *calendar-date* deadline for comments; (iii) clarify that OMB will not make its decision until OMB has considered all of the comments received by close of business on the deadline date; and (iv) conform to the main deadline for the filing of comments with DOT on non-Paperwork Reduction Act issues. In addition: (v) DOT should undertake to transmit Paperwork Reduction Act-related comments received by DOT to the appropriate OMB desk officer; and (vi) OMB does not at the present time have the legal right to approve or disapprove DOT's proposed information collections under the NPRM in light of the procedural irregularities set forth above.

40. Purpose, Need and "Practical Utility" Requirements.

REQUIREMENT: Before imposing a paperwork requirement on the public, the sponsoring agency must demonstrate that "the proposed collection is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility." (44 U.S.C. § 3506(c)(2)(A)(i), (c)(3)A).) "Practical utility" is defined as "the actual, not merely the theoretical or potential,

usefulness of information to or for an agency, taking into account its accuracy, validity, adequacy, and reliability, and the agency's ability to process the information it collects...in a useful and timely fashion." (5 C.F.R. §1320.4(*l*).) Moreover, a proposed information collection should be approved only if it would "enhance the quality, utility, and clarity of the information to be collected." (44 U.S.C. § 3506(c)(2)(A)(iii).)

COMPLIANCE/NONCOMPLIANCE: Under the DOT proposal all motor carriers would have to purchase: (i) an EOBR for each vehicle in the carrier's fleet; (ii) accompanying software systems to process the information recorded by the EOBRs; and (iii) "smart cards" for each driver. These new requirements fail the "need" and "practical utility" tests, because: (i) DOT has not established that present reporting practices are inefficient or inaccurate; (ii) DOT has not established any failure on the part of truck drivers or motor carriers to prepare drivers' records of duty status in good faith; and (iii) given the systemic and technological adjustments that would have to be made on a nationwide basis, DOT has not established that DOT's compliance and enforcement staff are presently prepared to process EOBR data in a "useful and timely fashion."

SUGGESTED REMEDIAL ACTION: DOT should withdraw the requirement that virtually every commercial vehicle in the United States purchase a prohibitively expensive computer system in the absence of need and practical utility.

41. Accuracy of Burden Estimates.

REQUIREMENT: The "sponsoring agency" (*i.e.*, DOT) is required to "evaluate the accuracy of the agency's estimate of the burden of the proposed information to be collected." (44 U.S.C. § 3506(c)(2)(A)(ii).) OMB's ongoing and consistent practice is to require sponsoring agencies to submit ***accurate*** estimates of burden. When a sponsoring agency's burden estimate is demonstrably and materially inaccurate, *e.g.*, due to the failure to assess whole categories of burden, OMB's practice is to return the "clearance package" containing the proposed paperwork requirements to the sponsoring agency, and to require the agency to resubmit the clearance package with corrected burden estimates. The reason for this practice is that OMB cannot make key determinations without possessing accurate burden data. For example, without accurate data, OMB cannot determine whether the paperwork burdens to be imposed on respondents are justified based on the

benefits to be provided by the information to be collected by the agency.

COMPLIANCE/NONCOMPLIANCE: It is impossible to reconstruct the exact manner by which DOT arrived at its final burden estimates due to the fact that DOT and OMB have not made DOT's Supporting Statement available to the public. (See pages 57-58 above.) Nevertheless, witnesses at the hearing provided important testimony identifying the following sources of inaccuracy in DOT's estimates: (i) DOT's estimate of the costs of EOBRs is inaccurate; (ii) DOT does not appear to have factored in the costs of purchasing new computer software systems to process data recorded on individual EOBRs; (iii) DOT's estimates of training costs do not appear to have been tested with carriers, so that these estimates, too, are probably inaccurate; (iv) DOT has not estimated burdens associated with the transition from existing paper-based or electronic/computer-based systems to the DOT-prescribed technology; and (v) DOT has completely ignored costs associated with the transition to the five-Type-based, 24-hour-based reporting system that would be instituted by the proposed rule.

An additional potential problem stems from the unclear status of existing electronic on-board recording systems already purchased and installed by many carriers. Although one DOT official has stated that existing electronic systems would be "grandfathered" into the new rule, and therefore deemed in compliance, it is not clear that all existing systems would in fact be approved. With respect to any existing electronic systems that are not ultimately included within a "grandfather" exemption, DOT must estimate the following additional categories of burden: (vi) lost value of capital investment in existing electronic hour recording systems; and (vii) loss of investment in associated costs, such as training.

SUGGESTED REMEDIAL ACTION: It would be unlawful for OMB to take any action on the new or modified information collections contained in the NPRM unless and until the infirmities in DOT's burden estimates are corrected.

42. Preparedness of Designated Agency Office to Process the Information to Be Collected; Plan for Effective and Efficient Management of the Information.

REQUIREMENT: The agency must certify to OMB that the proposed information collection requirement "has been developed by an office that has planned and

allocated resources for the efficient and effective management and use of the information to be collected, including the processing of information in a manner which shall enhance, where appropriate, the utility of the information to agencies and the public." (44 U.S.C. § 3506(c)(3)(H).) Moreover, prior to submitting the proposed information collection to OMB, the agency is required to have established "a plan for the efficient and effective management and use of the information to be collected, including necessary resources." (Id. § 3506(c)(1)(A)(vi).)

COMPLIANCE/NONCOMPLIANCE: There is no evidence that DOT has complied with this requirement.

SUGGESTED REMEDIAL ACTION: DOT should disclose to OMB and the public DOT's written plan for the effective use of EOBR data to be collected.

43. Testing of Proposed Information Collection.

REQUIREMENT: The agency must "review each collection of information before submission to the Director [*i.e.*, of OMB] for review under this chapter, including... (v) a test of the collection of information through a pilot program, if appropriate." (44 U.S.C. § 3506(c)(1)(A)(v).)

COMPLIANCE/NONCOMPLIANCE: It does not appear that DOT has complied with this requirement.

SUGGESTED REMEDIAL ACTION: DOT must test the new requirements with existing carriers to determine the accuracy, cost-effectiveness and feasibility of implementation on a nationwide scale. DOT should work with associations representing the motor carrier industry to identify carriers which would serve as test cases.

44. Duplicativeness with Information Otherwise Available to the Agency.

REQUIREMENT: The agency must certify to OMB that, based on public comments received, the proposed information collection "is not unnecessarily duplicative of information otherwise reasonably accessible to the agency." (44 U.S.C. § 3506(c)(3)(B).)

COMPLIANCE/NONCOMPLIANCE: Use of a specific type of DOT-mandated EOBR would duplicate existing paper- and electronic-based systems already in place nationwide.

SUGGESTED REMEDIAL ACTION: Any EOBR system identified by DOT should be recommended as an alternative, not mandated, especially as regards small carriers.

45. Understandability.

REQUIREMENT: The agency must certify to OMB that, based on the public comments received, the proposed information collection "is written using plain, coherent, and unambiguous terminology *and* is understandable to those who are to respond." (44 U.S.C. § 3506(c)(3)(D) (emphasis added).)

COMPLIANCE/NONCOMPLIANCE: The NPRM fails this test, because information collection "respondents" (*i.e.*, drivers and carriers) would not be able to assess which of the five hour-reporting regimes would apply to a given driver or a given trip, on any given day or week. A number of witnesses provided specific examples demonstrating that drivers and carriers would be unable to ascertain what substantive requirements they would be subject to, and hence what information they would be required to report.

SUGGESTED REMEDIAL ACTION: DOT must produce a regulation that gives regulated individuals and companies reasonable notice of what they must do to comply. This may require modifying or eliminating the five "Types" or categories of drivers contained in the present version of the proposal.

46. Implementation Consistent and Compatible with Existing Requirements.

REQUIREMENT: The agency must certify to OMB that, based on the public comments received, the proposed information collection "is to be implemented in ways consistent and compatible, to the maximum extent practicable, with the existing reporting and recordkeeping practices of those who are to respond." (44 U.S.C. § 3506(c)(3)(E).)

COMPLIANCE/NONCOMPLIANCE: It is clear that this requirement has not been met for the reasons stated at Requirement Nos. 48-50 (pages 63-65 below).

Suggested Remedial Action: (<u>See</u> suggested remedial actions at pages 63-65 below.)

47. **<u>Duration of Record Retention Period.</u>**

Requirement: The agency must indicate "for each recordkeeping requirement the length of time persons are required to maintain the records specified." (44 U.S.C. § 3506(c)(3)(F).)

Compliance/Noncompliance: DOT has complied with this requirement.

Suggested Remedial Action: (Not applicable.)

48. **<u>Allowance of Reduced or Alternate Requirements for Small Businesses.</u>**

Requirement: The agency must sign a certification to OMB stating that the proposed paperwork requirements "reduce[] to the extent practicable and appropriate the burden on persons who shall provide information to or for the agency, including with respect to small entities...(i) establishing differing compliance or reporting requirements or timetables that take into account the resources available to those who are to respond;...and (iii) an exemption from coverage of the collection of information, or any part thereof." (44 U.S.C. § 3506(c)(2)(C).)

Compliance/Noncompliance: This requirement has not been complied with, for the reasons stated at pages 29-30 above.

Suggested Remedial Action: The final rule should provide greater flexibility for small carriers.

49. **<u>Use of Information Technology to *Reduce* Burden.</u>**

Requirement: The agency must certify to OMB that, based on the public comments received, the proposed information collection "to the maximum extent practicable, uses information technology to *<u>reduce</u>* *<u>burden</u>* and improve data quality, agency efficiency and responsiveness to the public." (44 U.S.C. § 3506(c)(2)(I) (emphasis added).)

COMPLIANCE/NONCOMPLIANCE: The statutory language indicates that computer technologies are supposed to be used to *reduce* burdens, not to *increase* them. The DOT proposal would impose a computer technology requirement in a manner that is unnecessarily burdensome.

SUGGESTED REMEDIAL ACTION: Use of EOBRs should be permissive, not mandatory. Alternatively, the following categories of carriers should be exempt from any mandatory EOBR requirement: (i) carriers which have already implemented or invested in other computerized reporting systems as of the effective date of the final rule; and (ii) carriers with fleets of 20 or fewer vehicles.

50. Consideration of, and Certification Regarding, Public Comments on Requirement Nos. 40-49 .

REQUIREMENT: The agency is required to "certify (and provide a record supporting such certification, including public comments received by the agency) that each collection of information submitted to the Director" of OMB complies with the ten specified standards set forth at section 3506(c)(3). (44 U.S.C. § 3506(c)(3).) (These ten standards correspond roughly to the issues delineated at Requirement Nos. 40 through 49 immediately above.)

COMPLIANCE/NONCOMPLIANCE: OMB has essentially diluted this requirement by issuing a form containing boxes which are checked off and signed by an agency official. This encourages the agency official to check the boxes without seriously considering the merits of each certification. Significantly, OMB's form does not mention the public-comment-based documentation that is required by Congress to serve as the basis of the certifications. By bureaucratizing the certification process, which was intended as a means by which sponsoring agencies such as DOT could engage in internal 'due diligence' before submitting clearance packages to OMB, OMB has deprived this process of any real meaning.

In the present instance: (i) it is unclear whether DOT even signed the form, because the relevant Supporting Statement is unavailable from either DOT or OMB (see pages 57-58 above); and (ii) DOT has not complied with the public-comment-based-documentation requirement, because DOT has neither obtained nor reviewed any public comments under the Paperwork Reduction Act.

SUGGESTED REMEDIAL ACTION: DOT should retract the clearance package. Alternatively, OMB should reject the clearance package, and require DOT to resubmit a corrected package (in accordance with OMB's standard practice). DOT should resubmit a corrected clearance package with the required certifications and supporting documentation from the public comments. In other words, DOT should not seek OMB clearance until DOT has itself reviewed comments from the public on Paperwork Reduction Act-related issues.

G. Executive Order 12988 on Civil Justice Reform.

51. <u>Duty to Promulgate Regulations That Discourage Litigation.</u>

REQUIREMENT: "[E]ach agency promulgating new regulations...shall adhere to the following requirements:...(2) [t]he agency's proposed...regulations shall be written to minimize litigation; and (3) [t]he agency's proposed...regulations shall provide a clear legal standard for affected conduct rather than a general standard, and shall promote simplification and burden reduction." (Exec. Order 12988 § 3(a).)

More specifically, a proposed regulation must: (i) "specif[y] in clear language the effect on existing Federal law or regulation, if any, including all provisions repealed, circumscribed, displaced, impaired, or modified"; (ii) "provide[] a clear legal standard for affected conduct rather than a general standard, while promoting simplification and burden reduction"; and (iii) "specif[y] whether administrative proceedings are to be required before parties may file suit in court and, if so, describe[] those proceedings and require[] the exhaustion of administrative remedies." (<u>Id.</u> § 3(b)(2).)

COMPLIANCE/NONCOMPLIANCE: DOT has not complied with the Civil Justice Executive Order for the following reasons:

(a) The "empowerment" provision would encourage litigation by drivers against carriers in circumstances in which the carrier has provided the driver with adequate opportunity for restorative sleep. The language drafted by DOT would give unscrupulous drivers (*i.e.*, the small minority of drivers who would abuse the provision by invoking it when not fatigued or when fatigue was caused by the driver's misuse of rest time) significant but unwarranted legal leverage against carriers.

(b) The lack of clarity regarding applicable categorization of drivers and trips on particular days and weeks would result in litigation between drivers and carriers when they disagree about which set of rules should apply in specific instances.

(c) The regulation would create a de facto legal standard that would be judicially noticed in litigation to determine liability for accidents. A court could

determine that the carrier complied with the wrong set of the five possible sets of requirements, and that in doing so, the carrier failed to conform to the applicable "standard of care" under general principles of negligence law. (See Noble testimony; see also RESTATEMENT (SECOND) OF TORTS § 286 ("[t]he court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation..."); Resolution Trust Corp. v. Heiserman, 839 F. Supp. 1457, 1465 (D. Colo. 1993) (on a claim of negligence *per se*, the standard of care is determined by statute, regulation, or ordinance, and violation of that standard of care conclusively establishes negligence).)

(d) By increasing the safety hazards on the nations highways, DOT's proposal would increase the number of fatal accidents, and hence the number of lawsuits that would follow such accidents.

SUGGESTED REMEDIAL ACTION: DOT must rewrite its proposed rule to correct these unwarranted litigation impacts.

H. Executive Order 13132 on Federalism.

PRELIMINARY NOTE: DOT's Federal Register notice references Executive Order 12875 (Enhancing the Intergovernmental Partnership). (See NPRM at p. 25596.) DOT seems unaware that Executive Order 12875 was revoked on August 4, 1999 by Executive Order 13132. Therefore, the present analysis is based solely on Executive Order 13132.

52. Consultation with Elected State and Local Officials.

REQUIREMENT: A proposed regulation has "federalism implications" when it would impose "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." (Exec. Order 13132 § 1(a).) "When undertaking to formulate and implement policies that have federalism implications, agencies shall...(4) where national standards are required by Federal statutes, consult with appropriate State and local officials in developing those standards." (Id. § 3(d)(4).)

COMPLIANCE/NONCOMPLIANCE: DOT's proposal would require States to promulgate DOT's "national standards." (See Weeks testimony.) Therefore, DOT should have consulted with State and local officials. As is stated at pages 34-35, DOT did not engage in such consultation.

SUGGESTED REMEDIAL ACTION: (See remedial action suggested at Requirement No. 36 (page 54) above.

53. Establishment of "Accountable Process" and Designation of Agency Official to Conduct State and Local Government Consultations.

REQUIREMENT: "Each agency shall have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications....[T]he head of each agency shall designate an official with principal responsibility for the agency's implementation of this order and that designated official shall submit to the Office of Management and Budget a description of the agency's consultation process." (Exec. Order 13132 § 6(a).)

Compliance/Noncompliance: DOT does not appear to have performed this requirement.

Suggested Remedial Action: In undertaking the remedial action suggested at Requirement No. 52 immediately above, DOT should disclose the elements of and apply its "accountable process" established pursuant to the Federalism Executive Order.

I. Executive Order 12606 on Family Considerations in Policy Formulation and Implementation.

54. Identification of Family Impacts of Proposed Regulations.

REQUIREMENT: "Executive departments and agencies shall identify proposed regulatory and statutory provisions that may have a significant potential negative impact on the family well-being and provide adequate rationale on why such proposal should be submitted. The head of the department or agency shall certify in writing that, to the extent permitted by law, such measure has been assessed in light of the criteria in Section 1 of this Order and how such measures will enhance family well-being. Such certification shall be transmitted to the Office of Management and Budget. Departments and agencies shall give careful consideration to family-related concerns and their impact in notices of proposed rulemaking and messages transmitting legislative proposals to the Congress." (Exec. Order 12606 § 2(a).)

Section 1 criteria include whether the proposal would: (i) "help the family perform its functions"; or (ii) "increase or decrease family earnings." (See id. § 1(c), (d).)

COMPLIANCE/NONCOMPLIANCE: DOT failed to address and resolve the following adverse impacts its proposal would have on the ability of truck drivers to maintain a normal family life:

(a) Evidence adduced at the hearing demonstrates that the DOT proposal would significantly impinge on the ability of truck drivers to spend extended periods of off-duty time with their families.

(b) The significant driver salary decreases that would result from the DOT proposal would make it harder for drivers to support their families, putting strains on the family as an institution, as well as on the individuals within the family. Moreover, any attempt by the driver to compensate for lost income through moonlighting (which would in some instances not be permissible under the DOT proposal) would cause the driver to spend even more time away from his or her family.

Unfortunately, it must be noted at this juncture that DOT is on record as having taken the position that truck drivers do not value the opportunity to spend time with their families as do other Americans. (See page 28 above.)

In addition to these adverse impacts on the family life of drivers, one witness at the hearing testified that the DOT proposal would prevent children in economically "marginal" families from being able to participate in school trips.

SUGGESTED REMEDIAL ACTION: DOT must develop a regulation that does not impair the family life of drivers. DOT should also reconsider its negative stereotypes about truck drivers as a class.

J. National Environmental Policy Act.

55. Preparation of Environmental Impact Statement ("EIS").

REQUIREMENT: "[A]ll agencies of the Federal Government shall -- (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on...(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. (NEPA § 102(C), at 42 U.S.C. § 4332(C).)

COMPLIANCE/NONCOMPLIANCE: As is stated at page 52 above, the use of replacement trips to relieve drivers who have reached their hours-of-service limitations mid-route would add significantly to the number of engine idling hours, and hence to the aggregate amount exhaust released into the environment. DOT made no attempt to calculate this, nor to consult with State and local governments regarding the impact on their Clean Air Act (NAAQS) compliance obligations to EPA.

SUGGESTED REMEDIAL ACTION: FMCSA should consult with officials at OMB, EPA and other agencies within DOT to assess the need for NEPA compliance. (See also remedial action suggested at Requirement No. 34 above.)

56. Public Notice and Opportunity to Comment on Environmental Impacts and EIS.

REQUIREMENT: Whenever preparation of an environmental impact statement is required, the agency should request public comments before any final decision is made. (40 C.F.R. §1503.1(a)(4).)

COMPLIANCE/NONCOMPLIANCE: DOT has not seriously explored the environmental impacts of its proposed rule.

Suggested Remedial Action: (See remedial action suggested at Requirement No. 55 above.)

K. Small Business Regulatory Enforcement Fairness Act ("SBREFA") - - Congressional Review Provisions.

57. Characterization as "Major Rule."

REQUIREMENT: The determination of whether a rule is "major" is made by OMB. However, the promulgating agency's (*i.e.*, DOT's) determination that a rule is or is not "significant" under Executive Order 12866 and the Regulatory Flexibility Act (see Requirement Nos. 20 and 26 above) will have an impact on the position to be taken by OMB. For purposes of SBREFA, a "major rule" is one that "has resulted in or is likely to result in -- (A) an annual effect on the economy of $100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets." (5 U.S.C. § 804(2).)

COMPLIANCE/NONCOMPLIANCE: (Compliance deadline pending.) (Were DOT's proposal to be promulgated in its present form, it would clearly constitute a "major rule," in light of the rule's economic impacts, attendant price increases, impacts on distinct industrial sectors, impacts on State and local government agencies, impacts on competition, impacts on productivity, and impacts on international competitiveness. Although the NPRM does not mention SBREFA, this may simply reflect the fact that the time for compliance with SBREFA has not yet arrived.)

SUGGESTED REMEDIAL ACTION: (Not applicable.)

58. Transmission of Report and Supplementary Materials to Congress and GAO.

REQUIREMENT: Upon promulgating a final rule, the agency must transmit to each House of Congress and to the Comptroller General: (i) a copy of the rule; (ii) a concise general statement relating to the rule, including whether it is a "major rule"; (iii) the proposed effective date; (iv) a complete copy of the cost-benefit analysis of the rule; (v) a copy of the agency's analyses under the Regulatory Flexibility Act; (vi) a copy of the agency's statements under the Unfunded

Mandates Reform Act; and (vii) copies of any other statements or analyses prepared under any other applicable statutes or executive orders. (5 U.S.C. § 801(a)(1)(A), (B).)

The purpose of this requirement is to enable Congress to determine whether the final rule should be invalidated (pursuant to a congressional "joint resolution of disapproval") due to the agency's failure to comply with the statutes and executive orders described in this Report Card.

COMPLIANCE/NONCOMPLIANCE: (Compliance deadline pending.) (It is noteworthy that, to the extent that the infirmities set forth in this Report Card are not corrected, Congress may have substantial grounds for enacting a joint resolution of disapproval invalidating DOT's final rule.)

SUGGESTED REMEDIAL ACTION: DOT's hours of service proposal should be reformulated, in conformity with all of the procedural and substantive requirements described in this Report Card. In particular, DOT should comply with both the letter and the spirit of the stakeholder input requirements described herein. Unlike DOT's present proposal, the reformulated proposal should:

(1) Be drafted in a manner that does not increase the public safety hazard the rule purports to remedy;

(2) Provide *adequate* notice and *meaningful* public comment;

(3) Reflect that the agency *meaningfully* and *seriously* considered the impacts that DOT's promulgation will have on working people in this country; and

(4) Be drafted in a manner that does not harm the following stakeholder groups: (i) truck drivers; (ii) other users of the nation's highways; (iii) small businesses.

(5) Be drafted in a manner that does not have a significant negative impact on: (i) jobs; (ii) productivity; (iii) international competitiveness of U.S. businesses; (iv) manufacturing; and (v) distribution.

L. Vice President Gore's "Reinventing Government" Initiative and National Performance Review.

59. "Cut Obsolete Regulations."

REQUIREMENT: Regulatory agencies are supposed to "cut obsolete regulations."

COMPLIANCE/NONCOMPLIANCE: On the one hand, a number of witnesses at the hearing commended DOT for recognizing that the "Depression-era" hours of service regulations were in need of change. On the other hand: (i) Congress has raised as an issue DOT's lack of expeditiousness in modernizing its regulations; and (ii) DOT's present proposal does more harm than good.

SUGGESTED REMEDIAL ACTION: (See remedial actions suggested at Requirement No. 58 immediately above and throughout this Report Card.)

60. "Reward Results, Not Red Tape"; Selection of Performance-Based, as Opposed to Command-and-Control, Regulatory Solutions.

REQUIREMENT: Agency regulations should "reward results, not red tape." This is, in effect, a call to promulgate performance-based, as opposed to command-and-control, regulations.

COMPLIANCE/NONCOMPLIANCE: As is set forth at pages 33-34 above, DOT's proposal fails this test.

SUGGESTED REMEDIAL ACTION: (See remedial action suggested at page 34 above.)

61. "Get out of Washington--Create Grass Roots Partnerships."

REQUIREMENT: In planning and developing regulations, agencies should work with the parties who will bear the brunt of complying with those regulations.

COMPLIANCE/NONCOMPLIANCE: As is set forth at page 47-48 above, DOT fails this test.

SUGGESTED REMEDIAL ACTION: (See remedial action suggested at page 48 above.)

62. "Negotiate, Don't Dictate."

REQUIREMENT: In planning and developing regulations, agencies should, to the extent reasonable and practicable, strive for consensus-based solutions.

COMPLIANCE/NONCOMPLIANCE: DOT has made no attempt to develop any form of consensus among the stakeholders. (See discussion at pages 38 and 39 above.)

SUGGESTED REMEDIAL ACTION: (See remedial action suggested at pages 39 and 40 above.)