

Statement of Stephen H. Kaplan
General Counsel of Department of Transportation
Before the Committee on Small Business of the
United States House of Representatives
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My name is Stephen H. Kaplan, and I am the General Counsel of the Department of Transportation (DOT). I am pleased to have the opportunity today to tell you about the special efforts we have made to respond to the concerns and needs of small businesses and other small entities affected by our rulemaking.

First, I should note that DOT has, by some measures, the largest rulemaking responsibility in the federal government. Our nine operating administrations and the Office of the Secretary have a tremendous responsibility for a broad range of matters that include safety and the environment.

We take very seriously our responsibilities under the Regulatory Flexibility Act and believe that we have done a very good job in developing rules that minimize, to the extent possible, the burdens those rules impose on small businesses. Indeed, we often do more than the Act requires. For example, we generally apply its requirements earlier than required, using it at such stages as the advance notice of proposed rulemaking (ANPRM). It is also important to note that, in implementing our rules, we stress compliance rather than penalties. We would rather deter than detect. Moreover, because we are primarily regulating safety, it is important to the economic

viability of those we regulate that they act in a safe manner. I have attached to my statement a description, including many specific examples, of a wide range of things we have done in response to concerns of small entities. (Attachment 1)

We recognize that small businesses may be concerned with some of the rules that we issue, but, in this regard, there are four points that must be stressed: (1) We make every effort to hear and understand their concerns. (2) We seriously consider and try to address those concerns in developing our rules. (3) Our legal responsibilities often do not permit us to grant all the relief small businesses may desire. (4) The rulemaking action we take is often compelled by statutory mandates.

An excellent example of our efforts involves DOT's alcohol and drug testing rulemakings that were mandated by Congress and were issued in February 1994. Although the rulemaking itself is not necessarily typical of DOT rulemakings because of the magnitude and complexity of the effort involved, we believe it is quite illustrative of the concern we have for small business impacts. We issued an ANPRM with a number of options and held numerous public meetings and hearings. The final rule contained a number of actions to alleviate the burdens on small businesses, including:

- exempting some small businesses;
- phasing in the rule for others;
- requiring only surveys of most small businesses rather than reports from all;
- permitting the use of easy, short forms.

A more detailed description of our many actions is attached. (Attachment 2)

There are many other examples of our accomplishments. For example, we phase in some of our requirements, such as the NHTSA requirement for automatic occupant protection. To implement the private motor carrier passenger rule, FHWA allowed a one-year educational period to inform a segment of the bus industry never before regulated; these rules applied some of the requirements covering commercial motor vehicle operators to private persons carrying passengers for their own purposes (e.g., church groups or scouting organizations). The FAA used a phased compliance schedule for Stage 2 aircraft noise rules that made it easier for small business to comply with the phase-out of noisier aircraft.

We also try to "tier" our rules, where appropriate. For example, a number of Coast Guard regulations are keyed to vessel size or number of passengers carried. USCG's requirements for overfill devices to prevent oil spills is an illustration of this; after hearing public comment, USCG did not cover vessels below a certain size, eliminating 21 tankships and 391 tank barges owned and operated by small companies. In the private motor carrier passenger rule, FHWA tailored the requirements for the private carriers compared to the commercial operators; for example, they imposed fewer paperwork requirements.

In addition, we use simplified forms or reporting where possible. For example, FHWA recently issued a rule that eliminated the requirement for all motor carriers to submit an accident report within 30 days after they learned or should have learned of a reportable accident. Instead of the reports, carriers are now simply required to maintain an accident

register for one year after the accident. We also recently proposed to ease requirements imposed on small businesses applying for disadvantaged business certification; the proposal would permit the submission of one application per state for certification even when multiple recipients of DOT financial assistance are involved.

Despite efforts like these, we recognize there is always room for further improvement. In 1994, that is why we were active participants in the Small Business Forum on Regulatory Reform. That is also why we continue to take steps that should lead to even better rulemaking. For example, we are currently making a dramatic change to our public rulemaking (and adjudicatory) dockets. We are creating an electronic docket that will store all of our rulemaking dockets electronically, using imaging techniques that will store even handwritten postcards.

Ultimately, we will permit electronic submission of comments as well as electronic retrieval. This system will provide small businesses with a tremendous advantage over the current system: For example, a small business in California will be able to more effectively participate in our rulemaking by being able to read our docket at its office or other computer.

In January, I also sent a memorandum to senior officials throughout the Department asking them to continue our efforts to address the concerns of small business "and find areas where we can do even more." In that regard, I provided them with seventeen "suggestions on how we can make our rules (and their enforcement) even more responsive to the concerns of small businesses. Many of these approaches are already being used in

some parts of the Department." Those suggestions include such things as using more weekend and evening hearings and improving inspectors' understanding of small businesses and their problems. The list is at Attachment 3.

I have also asked that the operating Administrations examine the benefits of developing a seminar for us to conduct for small businesses that would explain the rulemaking process and how they can make better use of it (e.g., how to obtain a change to or exemption from an existing rule).

I hope you agree that we at DOT are making special efforts to address the concerns of small businesses and, where possible, to alleviate the burdens they might often face. We believe these cooperative efforts, these attempts to more effectively involve small businesses in our rulemaking process, are more likely to achieve success than the adversarial approach of increasing litigation.

Thank you for the opportunity to express the Department's views on this important subject.

**Department of Transportation
Small Business/Entity
Success Stories**

1. Early and Continuous Stakeholder Involvement

The Department of Transportation (DOT) already has taken extensive action in this area. It makes wide use of such things as advance notices of proposed rulemaking (ANPRM), requests for information, public meetings, advisory committees, and routine meetings with industry.

One excellent example of this is the FAA's use of the Aviation Rulemaking Advisory Committee (ARAC), which provides the FAA with extensive technical and economic information on numerous issues of importance to small aviation entities. ARAC has over 60 association members covering the complete spectrum of aviation interests. The committee is responsible for reviewing a wide range of aviation issues and making recommendations to the FAA before it makes a decision on a proposed rule. The Aviation Rulemaking Advisory Committee makes its recommendations to the FAA, when appropriate, in the form of fully developed draft regulatory documents, with industry and FAA participation from day one. The FAA has assigned over 50 important regulatory and policy issues to ARAC for its consideration.

2. More Effective Communications

We are increasing the opportunity for better participation. For example, the Department is in the process of creating an electronic docket. We are also exploring the possibility of increased use of telecommunications to provide easier and better access for people who cannot make it to our public hearing or meetings. We are also increasing our use of informal public meetings where there will be more two-way discussion rather than testimony.

3. Informal Public Meetings

We try to have more informal meetings with the public to permit an easier exchange of information. For example, in implementing statutory mandates for airline passenger facility charges and for alcohol testing of transportation employees, the Department held public meetings very early in the process (prior to issuing NPRMs) to discuss with interested members of the public specific issues raised by the legislation. The Office of the Secretary (OST) just held a public meeting with those interested in commercial space transportation matters to discuss potential issues involved in licensing and insurance rulemakings before issuing NPRMs.

We also make special efforts to make our hearings more accessible to small business. For example, we have held evening hearings; one example is the FAA hearings on current proposals concerning its "high density" rule. We

also have made Departmental employees available an hour before hearings began so that members of the public can ask questions of them about the proposal before giving their testimony.

The Coast Guard often holds regional hearings in locations convenient to concentrations of affected entities. For example, seven public meetings were held following publication of proposed revisions to the small passenger vessel regulations. Meetings were held in New England, the Mid-Atlantic, the Gulf Coast, the Northwest, the California, the Great Lakes, and the Inland Mississippi areas.

Coast Guard Auxiliary training courses, which include information on compliance with recreational boating regulations, are often held on weekends and at night. The Chicago hearing on the Small Passenger Vessel rulemaking was held on a Saturday.

NHTSA has demonstrated a willingness to meet at times outside of regular business hours. The agency frequently meets on weekends with national organizations, especially those affiliated with law enforcement agencies. The law enforcement meetings usually cover a broad range of traffic-related topics, including seat belt and helmet use, driving under the influence of alcohol, and speeding. NHTSA takes these opportunities to participate in workshops relating to programmatic issues and also to present current issues and updates.

4. Teleconferences

We are trying to use teleconferencing more to improve access to DOT. For example, Coast Guard held closed circuit video/telephone hearings on a Tug Escort rulemaking. Live hearings were held in Anchorage and Valdez with remote sites in Cordova, Seldovia, Homer, Kenai, Seward, Kodiak, Whittier, and Ninilchik.

As another example, after we issued our drug testing rules in 1988, we held a teleconference in which the audience could call in questions. The Coast Guard used closed circuit video and telephone conferences at a number of locations in Alaska during the Tug Escort rulemaking.

In September 1994, the NHTSA Child Passenger Safety Interactive Satellite Seminar linked 42 local interactive classroom locations, thereby allowing the active participation of 1,200 attendees. Using advanced satellite and computer technology, participants could interact with the presenters and other locations. Participants were able to respond to questions and provide immediate feedback and evaluation by using the keypads provided at their seats. Several thousand additional people were able to watch the proceedings from non-interactive sites.

5. Q& A Format

The Department makes active and effective use of the question and answer format in its regulatory documents. For example, USCG used this approach in its Tug Escort rulemaking, Towing Vessel Safety Initiative, and Oil Spill Response Vessel rulemaking. RSPA used it for its Emergency Flow Restricting Devices and Safeguarding Food rulemakings. NHTSA has done this recently for rulemakings involving CNG-Power Heavy Trucks and Buses, Uniform Tire Quality Grading Standards, and Permitting Replaceable Lens Headlamps. In the preambles to its NPRM's, the FAA often asks specific questions to elicit information to support its economic evaluation of the proposed rule. In a recent NPRM proposing duty time rules for flight attendants, the agency asked whether flight attendants should be given the option of following the pilot rules.

6. Negotiated Rulemaking

DOT was the first Federal agency to use negotiated rulemaking, has used it a number of times since, and has just started another one on an FRA rulemaking on worker safety. We are currently considering using it to develop a USCG operating schedule for drawbridges within the city of Chicago, a NHTSA rulemaking on headlamp aiming procedures, and an FHWA rule on incorporating physical fitness determinations as part of the Commercial Drivers Licensing process. It is also worth noting, with respect to earlier public participation, that NHTSA first issued a notice requesting public suggestions of suitable topics for negotiated rulemaking before making its selection. While not formally negotiated rulemaking, the FAA Aviation Rulemaking Advisory Committee has used a consensus process to develop recommended regulations that will be widely accepted in the aviation community.

7. Electronic Docket and Bulletin Boards

The Department is in the process of setting up an electronic docket for its rulemaking and adjudicatory files. Hard copies of information submitted to the docket will be passed through a scanning machine and stored electronically. The public will be able to review the docket through their own computers or in a DOT electronic reading room. Eventually, the public will also be able to submit documents to the docket electronically. As a result, when the Department issues a proposed rule it will immediately be placed in the docket and be available to the public electronically and the public will be able to submit comments, electronically if they desire.

In addition, in a number of instances throughout the Department we have conducted individual rulemakings with the aid of electronic bulletin boards. For example, the Department just used this approach for a proposal concerning procedural rules for airport rates and charges decisions. Coast Guard regulatory information is currently posted on the Society of Naval and

Marine Engineers (SNAME) bulletin board and on the MARAD bulletin board. Coast Guard will establish its own bulletin board in the near future, and will include regulatory information. FHWA places copies of laws and regulations applicable to its programs on the Federal Highway Electronic Bulletin Board System (FEBBS). RSPA has established a bulletin board called the Hazardous Materials Information Exchange (HMLX) that provides regulatory information on its hazardous materials program.

8. Public Comment on Agency Regulatory Procedures

The Department sought public comment on this subject in the past when it adopted its "Regulatory Policies and Procedures." We are also seeking public comment on specific actions we are considering in response to the executive order and the National Performance Review. For example, the Federal Aviation Administration (FAA) recently asked for public comment on and held a public hearing on its approach to cost-benefit analyses. The FAA is also requesting public comment on the use of direct final rulemaking. The Coast Guard held a public meeting and solicited comment as part of a Total Quality Management review of its regulatory process. It has implemented a number of procedural changes as a result of the review.

9. Electronically Available Newsletters.

As an example of this, USCG publishes an Oil Pollution Act of 1990 Newsletter. It is currently available on the Society of Naval and Marine Engineers (SNAME) and MARAD Bulletin Boards, and will be available on a Coast Guard Bulletin Board to be established in early 1995.

10. Toll-Free Hotlines

To the extent that resources permit and we believe they would be helpful, the Department has already developed and publicized a large number of toll-free hotlines. For example, FHWA provides and publicizes a toll-free 800 number to handle inquiries of all types 24 hours per day. FHWA recently published and widely circulated a booklet containing a list of telephone numbers (including SBA) of particular usefulness to truck and bus drivers. This included the numbers for all our division offices, which serve as local sources to answer questions and/or direct calls to appropriate agencies.

11. Guidance Material

DOT publishes a large amount of guidance materials. For example, DOT publishes information on hazardous materials that includes lists of toll-free numbers, contacts, laws, and regulations. The FAA has an extensive system of Advisory Circulars that inform the public of acceptable means of complying with FAA regulations.

As another example, FHWA and its State partners make available to all motor carrier operators educational and technical assistance packages that explain the motor carrier safety and hazardous materials regulatory requirements and how to comply. These packages are distributed during face to face contact with the carrier official by a field safety specialist.

An excellent example of the kind of material FHWA puts out for small businesses, which was extremely effective (over 300,000 copies were distributed), is the overview prepared for its alcohol and drug rules that were issued in February 1994. FRA has a similar program designed to inform small railroads of regulatory requirements and assist them in their compliance efforts.

We also provide a lot of guidance in easy-to-use Q&A formats. One example involves the FHWA, which began using the question and answer format in 1992, and uses it exclusively to address incoming interpretation requests from the motor carrier industry. In November 1993, the FHWA published more than 500 Q&As in the Federal Register to assist the industry in understanding the rules. The FHWA intends to periodically update this rule in the Federal Register and make such a publication in the Federal Register annually. The FAA is now publishing its interpretations of its noise rules in Q & A format in the Federal Register.

After issuing our initial drug testing rules in 1988, the Department developed and presented a series of conferences held throughout the country. We gave two days worth of presentations on how to comply with our rules and answered many questions from the audience. We took all of the frequently asked questions and prepared a publication that contains those questions along with the answers. The FAA used the "Dear Abby" format to develop its guide, "Most Frequently Asked Questions About Drug Testing." FAA's magazine, "FAA Aviation News," uses a Q & A format to respond to questions from the public on FAA regulations.

12. Dissemination of Information

We make special efforts to disseminate information widely, especially to small businesses. For example, when applicable, FHWA supplies plainly written news releases and/or personalized communications to small business trade organizations for their own distribution and sends them to the many specialized trade magazines and newsletters aimed at those audiences. In addition, FHWA supplies radio "actualities" for general broadcast and tapes and interviews to approximately 20 radio stations throughout the country known as late-night "trucker talk shows" when it has news of particular import. The Coast Guard maintains a number of mailing lists that include trade and other specialized publications and organizations. Extended comment periods are used when it may take more time to disseminate information to fragmented groups, such as recreational boaters or the fishing industry. The FAA disseminates airworthiness

directives on the "Fed World" bulletin board of the Department of Commerce.

13. Briefings

We often brief stakeholders and trade associations upon promulgation of significant final regulations. Again, a good example are the recently issued drug and alcohol rulemakings where we not only held briefings for stakeholders and trade associations on the day the rules were announced but also held a series of four public conferences throughout the country to discuss the rules in more detail. Agency representatives have also spoken at hundreds of conferences held by private organizations.

14. Staff Understanding of Small Businesses

Through training courses, circulation of various documents (e.g., the reports developed by the committees set up by the Small Business Forum on Regulatory Reform and other steps) we improve the understanding of relevant agency staff about small businesses. An excellent example of our efforts in this area is the action taken by FHWA. Its field staff is particularly close to small operators, visiting their facilities and conversing with them by telephone on a regular basis. Headquarters staff, some of whom came from the industry, also visit carrier offices, truck stops, driver and industry meetings, truck shows, and the like to meet and talk with small operators. Small operators are represented on FHWA's National Motor Carrier Advisory Committee and are always among those invited to serve on various ad hoc committees and working groups when special occasions arise.

Because of the nature of our rulemaking, which is generally quite industry specific, our inspectors generally have a very good understanding of the companies with which they deal. For example, the FAA's aviation safety inspectors receive training in the differences between the smaller operations and the larger. Further, many of the inspectors were either employees or owners of small aviation businesses before being hired by the FAA, and therefore have personal knowledge about them.

15. Alternative Enforcement Mechanisms

Our general approach to compliance is to first take steps to help industry understand and comply with our rules. However, our primary responsibility involves safety regulations, and there comes a time when we must go beyond "encouraging" and take enforcement action to deter noncompliance and help ensure safety. An example of our efforts to be non-punitive involves FHWA compliance reviews. During these reviews, investigators review records and also educate the carrier in areas of deficiencies. For several years, FHWA has distributed folders of information designed to help carriers obtain satisfactory safety ratings. These folders are currently being updated and will be available to all motor carriers. They are particularly

helpful to smaller businesses that do not have the resources to retain a professional consultant.

In addition, FHWA staff ranging from regional personnel to safety investigators regularly attend industry and trade association safety meetings. Many division offices sponsor safety meetings that specifically target small motor carriers. Where FHWA personnel sponsor or attend the meetings, they distribute handouts with information about the regulations and they answer audience questions.

The Coast Guard is considering initiatives to place increased emphasis on self-inspection, with Coast Guard oversight and spot checks. Additionally, unless there is evidence of a pattern of noncompliance, penalties are rarely imposed for minor violations that are quickly corrected.

The FAA's enforcement policies call for using counseling warning letters, and corrective actions to the extent that safety does not require resort to civil penalties or certificate actions. For minor violations that are quickly corrected, penalties are rarely used. Further, the FAA has programs that encourage self-evaluation, disclosure, and correction of any deficiencies found. The FAA's Reporting and Correction Policy provides that, under most circumstances, if a company self-discloses a violation, corrects the condition immediately, and takes steps to prevent it from recurring, a reduced penalty or no penalty will be imposed. FRA also exercises discretion in deciding whether to use its enforcement tools, and tries to direct its enforcement actions toward the more serious violations. RSPA is using mediation in its hazardous material enforcement cases.

In some instances, we also provide reasonable grace periods, where appropriate. As noted above, for example, when the FAA discovers a non-compliant condition, it frequently will accept a corrective action plan in lieu of a penalty. In each case, the FAA inspector considers how much time should reasonably be given to correct the condition. However, if our inspectors observe a violation they generally must report it, and action must be taken promptly to avoid endangering the public. If it is not too serious, we may only send a warning letter rather than assess a penalty. Also, some safety discrepancies may require immediate correction, and the vessel/vehicle/airplane may be prohibited from operating. This is different from a "penalty" for the violation.

16. Phase-ins

When appropriate, we gradually phase-in new regulatory requirements in an effort to promote greater fairness in the enforcement rules. For example, when the National Highway Traffic Safety Administration required airbags or automatic belts in automobiles, it phased in the requirement over three years, requiring an increase in the percentage of new cars that had to have the equipment each year. When we issued the alcohol and drug testing rules for the Department, we provided small businesses with an extra year

before they had to begin implementing the testing requirements. When we issued the initial drug-testing rules, we phased in the random testing rate, allowing industry to start with a lower rate while they gained experience implementing the rule. To accommodate the private motor carrier passenger final rule, FHWA allowed for a one-year educational period to educate and inform a segment of the bus industry never before regulated. This consisted of a mass mailing of brochures to the bus population informing them of the new regulations. In implementing the Stage 2 aircraft noise legislation, the FAA adopted a phased compliance schedule that offers two methods of compliance at each of three compliance dates, and has a separate phased schedule for new entrant air carriers. The FAA also amended the flight data recorder rules to eliminate a single compliance date and granted an exemption to allow a phased compliance schedule for operators eliminating older airplanes that are costly to upgrade.

17. Tiering

Where appropriate, we use tiered structures. For example, in our alcohol and drug regulations, we generally require reports from all large companies but only do surveys of the small companies. A number of Coast Guard regulations are keyed to vessel size or numbers of passengers carried. Certain of FRA's reporting requirements exclude railroads with fewer than 400,000 employer hours. FRA's event recorder rule applies only to trains operated above 30 miles per hour, which excludes most small railroads. FRA's engineer certification requirements contain staggered dates for implementation based on railroad size.

18. Uniform Enforcement

We endeavor to insure uniform enforcement activity, including enforcement activity delegated to the states. For example, RSPA works through the Cooperative Hazardous Materials Enforcement Development (COHMED) Program, a State/Federal organization devoted to the consistent enforcement of hazardous materials laws and regulations.

NHTSA attempts to ensure uniform enforcement activities in the traffic law arena. The agency has developed model enforcement programs in many areas, including seat belt enforcement, standardized field sobriety testing, detection of impaired drivers, the drug recognition and evaluation program, and speed limit enforcement.

Consistency in enforcement actions is an important element of the FAA's compliance and enforcement program. Actions by field offices are reviewed by the regions to this end. The FAA has a sanction table that provides the normal range of penalties for various violations, as well as guidance on circumstances where warning letters and corrective action should be used instead of penalties. In the most significant cases, the action must be

coordinated with headquarters, largely to ensure consistency with national policy.

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19. Interagency Coordination

We have an extensive amount of interagency coordination. For example, our drug and alcohol rulemakings were coordinated with HHS, DOE, NRC, and FDA. Our automobile fuel economy regulations are coordinated with DOE. Our regulations requiring accessibility for the disabled are coordinated with the DOJ and the Architectural and Transportation Barriers and Compliance Board. Our infectious substance rulemakings are coordinated with agencies like the Center for Disease Control and OHSA. Before issuing regulations concerning the carriage of preference cargoes, MARAD always advises other Federal agencies impacted by the rulemaking, namely, USDA, USAD and DOD. We worked with EPA in developing the hazardous waste manifest rule.

20. Electronic Data Interchange

We allow quite a bit of electronic data interchange. For example, RSPA allows the electronic filling of certain airline tariff information. The FHWA has recently awarded a contract to investigate and develop methods for updating carrier information in the Motor Carrier Management Information System (MCMIS). One of the methods being explored is allowing carriers electronic access to the MCMIS to update their information. This will only be possible and feasible if the carrier has the proper software and hardware required. This action, if implemented, would also reduce the paperwork burden on the motor carrier industry. A current Coast Guard rulemaking will permit electronic submission of merchant vessel personnel information. FTA has begun a Grants Management Information System that is available to a limited number of grantees and will be made available to all other grantees in the future. FTA is also moving to electronic grant making.

21. Simplified Forms and Reporting

To the extent possible, we use simplified forms and reporting requirements for small businesses. For example, for our drug and alcohol testing reporting requirements we have a short "EZ" form. Another example involves FHWA which, effective March 4, 1993, issued a Final Rule that eliminated the requirement for all motor carriers to submit an accident report within 30 days after they learned or should have learned that a reportable accident occurred. The motor carrier was required to file the original and two copies of Form MCS 50-T (property) or Form MCS 50-B (passengers) with the Director of the Regional Motor Carrier Office of the Federal Highway Administration region in which the carrier's principal place of business was located. Instead of submitting reports, carriers are now required to maintain an accident register of accidents meeting the definition of an accident for a period of one year after an accident occurs. This action has reduced the paperwork burden on the motor carrier industry.

22. Work with State Agencies

One excellent example of our efforts to work with states involves FHWA's work with the Commercial Vehicle Safety Alliance (CVSA), which is an organization of State and Provincial Government Agencies and representatives from private industry in the United States and Canada dedicated to improvement of commercial vehicle safety. In addition to jointly establishing the uniform driver/vehicle inspection standards and out-of-service criteria used by States in conducting roadside and terminal inspections in the Motor Carrier Safety Assistance Program (MCSAP), the CVSA and FHWA together produce "The Guardian." "The Guardian" is a newsletter whose articles concentrate on regulations, policies, procedures, and personalities involved in the MCSAP. The newsletter is distributed to, among others, FHWA personnel nationwide and to all State agencies participating in the MCSAP. The FHWA is also directly linked by the LAN e-mail system to the CVSA and many State agencies.

The FHWA is committed to continue working with the States to further enhance the level of coordination and uniformity. For example, FHWA is working with the States in the implementation of a national uniform commercial vehicle accident reporting program through the adoption of the National Governors Association accident data elements. Concurrently, it is assisting States to develop the appropriate communication and coordination networks with all interested groups to make certain that the information that is collected and reported is accurate and complete. Many of its program initiatives designed to improve uniformity and coordination, as well as meet its primary goal to reduce the number and severity of commercial motor vehicle accidents, are conducted in partnership with CVSA, the American Association of Motor Vehicle Administrators (AAMVA), industry groups and other Federal agencies. These initiatives include automation of accident collection and reporting procedures, creation of program evaluation procedures, development of multi-year State Enforcement Plans (SEPs), creation of "Peer Groups" to develop recommendations on how to improve coordination and facilitate the exchange of ideas on how to better administer the MCSAP, and creation of a uniform compliance and enforcement program along the U.S.-Mexico border consistent with the NAFTA provisions.

RSPA works with COHMED, as noted above. RSPA also works closely with state agencies both directly and through the National Association of Pipeline Safety Representatives. In addition, RSPA is designating an employee in each region as a state liaison.

We believe that we already have very good relationships with the federal, state, and local agencies affected by our regulations. For example, the agency within DOT that has the greatest relationship with state and local governments is the Federal Highway Administration (FHWA). FHWA is an active participant in meetings of the American Association of State Highway Transportation Officials. The Coast Guard works closely with the National

Association of State Boating Law Administrators (NASBLA) to review and develop recreational boating regulations. FTA also works closely with States and localities; two organizations it works closely with that represent transit providers (which in most instances are local public bodies) are the American Public Transit Association and the Community Transportation Association of America.

DOT Drug and Alcohol Rulemakings

In 1988, because of its concern about the potential impact of drug use in the transportation industry, the Department issued drug testing requirements affecting six different transportation modes. In response to requests that DOT should explore additional steps with respect to alcohol also, in 1989, we also published an advance notice of proposed rulemaking to obtain public comment on whether we should take additional action with regard to alcohol. The ANPRM set forth a number of options and raised a large number of questions. Before we could take further action in this rulemaking, Congress passed the Omnibus Transportation Employee Testing Act of 1991, which mandated drug and alcohol testing for four transportation modes.

After enactment of the Act, to enable better evaluation and comparison of the capabilities of different alcohol testing methods, the Department conducted a public hearing in November 1991 to obtain specific information from the manufacturers of breath test devices. In December 1992 the Department published a number of proposed rulemaking documents primarily aimed at implementing the statutory mandate. In addition to requesting written comments, the Department held four public hearings in Washington, DC; Chicago; San Francisco; and Dallas. We also held a public meeting in Washington, DC, to facilitate presentation and discussion of relevant information on one of the issues raised in the rulemaking, work place random testing and its impact on drug use

deterrence. At that meeting over 20 participants presented papers and sparked discussions on a variety of issues.

All of this action took place before we issued the final rules in February of last year. It illustrates the numerous steps we take to ensure effective public participation in our rulemaking process. The substantive action we took in the rules also illustrates our consideration of small business concerns. The following list of steps that we took show that we tried to provide as much flexibility as possible to small business covered by our statutorily mandated alcohol testing requirements:

1. Small companies can comply in a variety of ways - testing can be conducted by the employer, an outside contractor or program administrator, a consortium, a union, or any other entity.
2. Small businesses will have an extra year to implement the alcohol testing requirements. The extra year will enable small businesses to join established consortia or large employer testing programs, rather than have to establish their own programs. The use of consortia is the predominant method of compliance with the DOT drug testing rules in some industries, particularly among smaller employers.
3. We have eased the requirements to join consortia. A small employer may better achieve the benefits of a lower random rate (if industry achieves this lower rate under the performance standard) if it joins a consortium.

4. In some transportation industries, a significant percentage of employees are subject to the testing rules of more than one modal administration. This is one reason we have tried to make the modal administration rules as uniform as possible. Where it does not compromise the effectiveness of the testing program, one mode will defer to another. This should ease compliance for small employers.

5. Pre-employment testing is a statutory requirement from which we could not exempt small employers. However, allowing the use of recent test results from previous employers in lieu of new pre-employment tests should also ease compliance for small employers.

6. The Research and Special Programs Administration is exempting master meter operators and liquefied petroleum gas operators; these are generally small businesses.

7. All but one of the operating administrations are limiting the reporting requirements for small businesses. They will survey the small companies, not require them all to report.

8. The Federal Railroad Administration (FRA) is retaining the exemption in its existing drug and alcohol rules for railroads with 15 or fewer employees that do not engage in joint operations. (These entities are not considered sufficiently safety-sensitive to be subject to testing because they tend to operate on private track at slow speeds.) FRA, which requires covered employers to submit plans for their alcohol misuse programs, imposes significantly reduced plan requirements on smaller employers.

9. The testing procedures final rule provides flexibility to use different testing technologies for screening tests. This flexibility should assist small employers in keeping down their costs of equipment purchases.

10. If there are no positive test results, the employer may use an easy, short form to record the results.

In addition, when we issued our new alcohol and drug testing requirements, we prepared and distributed a special pamphlet providing a plain English overview of the requirements that were especially directed at small entities. Hundreds of thousands of copies of the document have been distributed. Upon announcing the rule, we also held briefings for industry and employee representatives and Congressional members and staff. Then we held a series of four conferences throughout the United States to provide assistance and guidance to those who must comply with the regulations. Approximately two thousand people attended the four conferences. The Department has also put together a tremendous amount of guidance material for regulated entities on such issues as model training courses for the breath alcohol technicians who will have to conduct testing.

DOT Suggestions

on

How to be More Responsive to Small Business Concerns

1. **Make more use of advance notices of proposed rulemaking, requests for information, public meetings, advisory committees, and routine meetings with industry to gather information before making specific rulemaking proposals.**

2. **Hold more evening and weekend hearings or meetings.**

3. **Use teleconferencing more frequently to make public hearings and meetings more accessible.**

4. **Use question formats more frequently to obtain needed information; use question and answer formats more frequently to provide information.**

5. **Make Departmental employees more readily available to answer questions about rulemaking matters; e.g. have employees available an hour before the start of a hearing to answer questions.**

6. **Make more use of electronic communications and toll-free hotlines to make information available to the public or provide responses to inquiries.**

7. Increase efforts to ensure that staff is fully aware of the special problems faced by small businesses.

8. Reexamine our communications strategies for advising small businesses of important action or information, including our list of organizations and individuals to be contacted.

9. Consider additional use of briefings, seminars, and workshops for stakeholders, trade associations, etc. after issuing significant final rules.

10. Continue to ensure that all important notices and information directives affecting small business are published in the Federal Register.

11. Increase efforts to make the public aware of the information that we make available to them (e.g., guidance material and training courses).

12. Improve inspectors' understanding about the small businesses they are inspecting and the particular problems small businesses face.

13. When appropriate, consider use of grace periods and phase-ins, or the use of tiered regulations, to ease the burden imposed on small businesses.

14. Increase our efforts to lessen paperwork burdens by considering such options as short forms, surveys rather than reports from an entire industry, and the use of electronic filing.

15. When appropriate, increase efforts to develop non-punitive methods of ensuring regulatory compliance.

16. Provide the regulated community with a list of the kinds of violations and common errors encountered by the agency; e.g., DOT publishes an annual report on hazardous materials civil penalty cases, which provides information on the types of violations found and the civil penalties assessed; we also issue letters to industries advising of typical violations that are observed during hazardous materials inspections and publish penalty schedules and guidelines.

17. Recognize that, despite our best efforts, our actions in response to small business concerns are not always fully appreciated; increase your efforts to change this perception.