

STATEMENT OF NANCY McFADDEN
GENERAL COUNSEL
DEPARTMENT OF TRANSPORTATION

BEFORE THE SUBCOMMITTEE ON COMMERCIAL AND
ADMINISTRATIVE LAW
COMMITTEE ON THE JUDICIARY
U. S. HOUSE OF REPRESENTATIVES
ON CONGRESSIONAL REVIEW OF RULES

March 6, 1997

INTRODUCTION

Mr. Chairman and members of the committee, my name is Nancy McFadden. I am the General Counsel at the Department of Transportation (DOT), and it is a pleasure to be here today to testify on the Congressional review of agency rulemaking provisions in Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996.

Although these provisions have not yet been in place a full year, we are pleased to see that this committee decided to hold a hearing to find out how they are working. We do not disagree with the notion that the Congress should play a significant role in overseeing the implementation of the regulatory responsibilities that it grants to the executive branch, but it is also important that you ensure that whatever processes are set up are efficient as well as effective, especially at a time when we are downsizing the federal government.

BACKGROUND

Before I get into what we are doing to comply with the Congressional review provisions, it might be helpful if I mention a few important points about the Department of Transportation and its regulatory responsibilities. We are made of nine operating administrations, the Bureau of Transportation Statistics and the Office of the Secretary. (For the purposes of today's hearing, it is important to note that we do not oversee the regulatory responsibilities of the Surface Transportation Board and the information I will provide does not cover any of the Board's responsibilities for

compliance with the Congressional review provisions.) Our statutory responsibilities are quite broad and cover the need to issue regulations across a broad range of activities from aircraft certification to hazardous materials transportation, from fuel economy standards for motor vehicles to oil spill response plans, from transportation for the disabled to changing communities from one time zone to another. Although some of our rules are quite significant, many simply establish rules of the road that are necessary so that one operator knows what to expect from another.

In that regard, it is worth noting that we divide our rules into two basic categories for purposes of review within both the department as well as at the Office of Management and Budget: significant and nonsignificant. Our nonsignificant rules have a large subcategory called routine and frequent. This subcategory includes rules that do such things as adjust the approach path for landing on an airport runway or change the times for opening a drawbridge over a particular river. We issue about three to four thousand of these routine and frequent rules each year; they are so numerous that, as they are gathered together for publication, many of them may be included in one document. (For example, during the last nine months of 1996, we published 46 documents containing a total of 1,376 different standard instrument approach rules for different airports.)

COMPLIANCE WITH THE CONGRESSIONAL REVIEW PROVISIONS

All of these rules, as well as the other nonsignificant and significant rules, are required to be submitted under the Congressional review provisions; we submitted 977 rules during the first 11 months under the statute or an average of about 20 documents per week. Of these, over 75 percent fit into our routine and frequent category. Because of the large number of documents, we need a well-controlled program to ensure not only that they are all submitted but also that we can track any action that might be taken in the Congress.

As a result, we created a computer data base to track each rule and generate a standard form that contains the information that we are required to submit along with a copy of the rule and its supporting documents under section 801 (a) (1). A copy of the standard form that we are using is attached to my statement. A separate form is completed for each rule document. In addition, a separate cover letter signed by the General Counsel

is used for each group of rules delivered to each addressee each day. To ensure that there are no mistakes made about when a particular document is delivered to each of the addressees, we decided to have the documents delivered by messenger twice a week; because the statute prohibits a rule from taking effect before it is delivered to the Congress and GAO, and because we may have a need to put a rule into effect quickly for safety or other reasons, we need to know with certainty when the rule is received. We also require that the messenger return to us a copy of the standard report form date stamped by the General Accounting Office to verify delivery. Although not a major expenditure compared to some programs, because the documents have to be delivered to three addresses, we estimate that the messenger service will cost us over \$3,000 per year. In addition, because some parts of the department are located in buildings a good distance away from the headquarters building, there is some time and expense involved in having their documents delivered to the headquarters building for pickup. There is also some time and expense involved in making the copies for each of the houses of Congress and the GAO; we are providing about 1,000 pages per week in total.

Although we had some technical problems initially over such things as whether separate cover letters were required for each rule, the process is working relatively smoothly now. At the same time, as a large rulemaking department, with responsibilities spread over many offices and throughout the country, we have to continuously monitor our efforts to ensure that we properly comply with the statute. Although we would not describe the statutory mandate as a difficult one to comply with, it involves a large number of documents and leaves little room for error; the process that has been established to handle it is imposing a cost on us.

GOVERNMENT-WIDE STANDARD FORM

In this regard, it is worth noting our discussions with GAO staff about their efforts to develop a standard form for the submission of rules to them and the Congress to enable GAO to keep the information in a computer data base. DOT was part of an informal interagency group that worked with GAO on this issue. We not only appreciated the opportunity that GAO provided to us to work with them on this form but the many hours GAO staff spent with us discussing the potential problems or concerns that were presented to us by some of the options. While we understand GAO's need to develop a

good data base because of the large number of rules that it is receiving, we would have serious concerns about having to provide anything beyond the type of factual information that we are providing in our current form. We would be especially concerned if the form were to require information that entailed legal judgments necessitating review of all these forms by attorneys. Considering the large number of documents that we are submitting, the extra time involved in filling in extra information on a form or, more importantly, in having to have the form reviewed by others could substantially increase the cost imposed on us.

REVIEW OF RULES

Our experience with GAO was also positive with respect to the one major rule that we issued during the first eleven months under the Congressional review provisions. This rule involved corporate average fuel economy standards for light trucks. During GAO's preparation of its report for the Congress, GAO staff talked to DOT staff on a number of occasions in an effort to make sure they fully understood why we wrote the rule the way we did. We were pleased with the opportunity that we were provided by GAO and, although we did not agree with everything they said in their report, overall we thought they made every effort to be fair and objective. Nothing further happened after the GAO report was submitted, and no joint resolution was introduced concerning this rule. We should get more experience with respect to these provisions in the near future, since we have six rulemakings pending that are potentially major actions.

With respect to our non-major rules, to the best of our knowledge, no joint resolutions have been introduced or any other action taken with respect to any of those that we have submitted.

CONCLUSION

I appreciate the opportunity to testify today on this important legislation. It provides Congress with a valuable opportunity to ensure that the objectives it intended when it

adopted authorizing legislation are being met. I welcome any questions that you may have.

Congressional Review of Department of Transportation Rulemakings

FROM:

TO: COMPTROLLER
SENATE
HOUSE

RIN:

Concise, General Statement Relating to the Rule: See summary on first page of enclosed rule.

Proposed Effective Date:

Major Rule: Yes No

Date Submitted/Received: 00/00/00

Enclosures:

Number of Pages
(each document)

The Rule 0

Submitted to Comptroller General Only

Cost-Benefit analysis	0
<input type="checkbox"/> Included in rule.	
Agency's actions relevant to Sections 603, 604, 605, 607, and 609 (Regulatory Flexibility Act)	0
<input type="checkbox"/> Included in rule or cost-benefit analysis.	
Agency's actions relevant to Sections 202, 203, 204, and 205 of the Unfunded Mandates Act	0
<input type="checkbox"/> Included in rule or cost-benefit analysis.	
Other relevant information or requirements under any other Act and any relevant executive order*	0
<input type="checkbox"/> Included in rule or cost-benefit analysis.	
<input type="checkbox"/> Included in rule or cost-benefit analysis.	0

*Any statements required by 44 USC Sections 3501-3520 (Paperwork Reduction Act), 19 USC Sections 2531-2533 (Trade Agreements Act), 42 USC Sections 4321-4347 (National Environmental Policy Act) and other environmental requirements, EO 12866 (Regulatory Planning and Review), EO 12612 (Federalism), EO 12372 (Intergovernmental Review) and other specific executive orders are included in the enclosed rule. Information and analysis in response to these requirements may also be contained in the cost-benefit analysis, if one was prepared. If separate documents were prepared in response to these requirements (e.g., an environmental impact statement), they will be separately noted on this form and enclosed.